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**WELFARE AND MARKET:  
A SOCIAL, ECONOMIC  
AND LEGAL ANALYSIS**

# WELFARE AND MARKET: A SOCIAL, ECONOMIC AND LEGAL ANALYSIS

Ida D'Ambrosio  
Paolo Palumbo

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名誉

*Meiyo*  
*Honor*

良心

*Ryoushin*  
*Conscience*

高貴

*Kouki*  
*Nobility*



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# CONTENTS

Acocella, G. <i>Preface: Europe in the XXI century and the welfare crisis</i> .....	5
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## ABSTRACTS LEGAL SECTION

Arcopinto, A. <i>Social citizenship: The protection of religious diversity as an engine of economic development</i> .....	7
Balsamo, F. <i>Creative cities and religion: The potential contribution of religion to the development of culture in urban and suburban spaces</i> .....	9
Berrettini, A. <i>The entrusting of the social services in the Third sector code in the light of the principle of free competition</i> .....	11
Bruno, G. C. <i>The role of local authorities in the integration and welfare policies for migrants</i> .....	13
Chiola, G. <i>New guidelines for social inclusion policies relevant to mental illnesses inside the prison context</i> .....	15
D'Ambrosio, I. <i>The security of real estate transfers: The guarantee function of the recording for the consumer</i> .....	17
De Marco, S. <i>Welfare and Third sector</i> .....	18
De Petris, A. <i>Public duties and private management in the integrated water services in Italy: Still looking for balance</i> .....	19
Fusco, G. <i>The welfare and the church</i> .....	20
Gagliardi, C. <i>The “Catholic” impact investing</i> .....	22
Guasco, A. <i>Frumentationes in the republican period of ancient rome: Between public welfare and demagogy</i> .....	23
Helzel, P. B. <i>Globalization and transformation of rights</i> .....	24
La Regina, K. <i>New technologies and individual guarantees: The “Trojan horse”</i> .....	25
Marchisio, E. <i>Civil liability and defensive medicine</i> .....	26
Martini, G. <i>The Diciotti case: A useful starting point to (re-)think about the notion of political act</i> .....	27
Palumbo, D. <i>Organisation and tortious liability</i> .....	28
Parma, A. <i>Private munificence and management of municipal states in the cities of roman Italy: Some epigraphic examples</i> .....	29
Santoro, R., Gravino, F. <i>The Internet, cultures and religions towards an intercultural web</i> .....	30
Sorvillo, F. <i>Religious freedom and CSR: International standards and the accountability on human rights in Italian ETS</i> .....	32
Sosa Gómez, C. <i>A conceptual conflict between the people and the citizen</i> .....	34
Staiano, F. <i>Discrimination against women migrant workers in the Italian agricultural sector: Main issues and possible normative solutions</i> .....	35
Tarantino, G. <i>At the roots of welfare: Citizenship, human dignity and fundamental rights</i> .....	36
Tarantino, M. L. <i>Conceptions of human nature and rights</i> .....	37
Tropea, G., Giannelli, A. <i>Public security and crisis of welfare state</i> .....	38
Valletta, A. <i>Family and multicultural society</i> .....	39

## ABSTRACTS SOCIAL AND ECONOMIC SECTION

Carioni, M., de Andreis, F., Verrillo, A. M. <i>The landscape of water conflicts: Actions for a fair management</i> ...	40
Ceka, N. <i>Archeology in Albania between culture, politics and economy</i> .....	42
Comite, U. <i>Care safety, clinical risk management and patient well-being: An economic-business approach</i> .....	43
D'Acunto, S., Schettino, F., Suppa, D. <i>The phenomenon of migration: Theories and empirical evidences</i> .....	44
De Andreis, F., Iarrusso, G., Petruzzo, S. <i>New challenges of the global economy: Human trafficking and civil aviation organizations</i> .....	45
Favia, F., Cekani, I. <i>Social tourism and welfare</i> .....	47
García Chamizo, F. <i>Social policies of Castilla-La Mancha: A case study</i> .....	48
Iaquinta, P., Sassone, F. <i>Territorial gaps in welfare spending in Italy</i> .....	49
Licaj, B. <i>Tourism employee welfare measures in tourism and young emigration: The case of Albania</i> .....	50
Mebane, M. E., Benedetti, M. <i>Promoting the wellbeing of unemployed: A pilot study</i> .....	51
Misale, F. <i>Atypical work and safety at work</i> .....	53
Oliva, N. <i>From corporate social responsibility to sustainability: A new corporate development model</i> .....	55
Pompò, M. <i>Economic and social policies for women: A gender analysis</i> .....	56

## PAPERS LEGAL SECTION

Arcopinto, A. <i>Social citizenship: The protection of religious diversity as an engine of economic development</i> ...	57
Balsamo, F. <i>Creative cities and religion: The potential contribution of religion to the development of culture in urban and suburban spaces</i> .....	65
Chiola, G. <i>New guidelines for social inclusion policies relevant to mental illnesses inside the prison context</i> .....	73
D'Ambrosio, I. <i>The security of real estate transfers: The guarantee function of the recording for the consumer</i> .....	83

De Marco, S. <i>Welfare and Third sector</i> .....	89
De Petris, A. <i>Public duties and private management in the integrated water services in Italy: Still looking for balance</i> .....	95
Decimo, L., Sessa, V. <i>Inclusion policies and intercultural dialogue: The role of religious organizations</i> .....	105
Gagliardi, C. <i>The “Catholic” impact investing</i> .....	113
La Regina, K. <i>New technologies and individual guarantees: The “Trojan horse”</i> .....	121
Marchisio, E. <i>Civil liability and defensive medicine</i> .....	132
Palumbo, D. <i>Organisation and tortious liability</i> .....	142
Palumbo, P. <i>Welfare and intercultural education: The role of the teaching of catholic religion</i> .....	146
Santoro, R., Gravino, F. <i>The Internet, cultures and religions towards an intercultural web</i> .....	158
Sorvillo, F. <i>Religious freedom and CSR: International standards and the accountability on human rights in Italian ETS</i> .....	166
Staiano, F. <i>Discrimination against women migrant workers in the Italian agricultural sector: Main issues and possible normative solutions</i> .....	175
Tarantino, M. L. <i>Conceptions of human nature and rights</i> .....	187
Valletta, A. <i>Family and multicultural society</i> .....	194

#### PAPERS SOCIAL AND ECONOMIC SECTION

Carioni, M., de Andreis, F., Verrillo, A. M. <i>The landscape of water conflicts: Actions for a fair management</i> .....	203
Comite, U. <i>Care safety, clinical risk management and patient well-being: An economic-business approach</i> .....	210
De Andreis, F., Iarrusso, G., Petruzzo, S. <i>New challenges of the global economy: Human trafficking and civil aviation organizations</i> .....	221
García Chamizo, F. <i>Social policies of Castilla-La Mancha: A case study</i> .....	229
Mebane, M. E., Benedetti, M. <i>Promoting the wellbeing of unemployed: A pilot study</i> .....	243
Oliva, N. <i>From corporate social responsibility to sustainability: A new corporate development model</i> .....	253
Pompò, M. <i>Economic and social policies for women: A gender analysis</i> .....	261

## PREFACE: Europe in the XXI century and the welfare crisis

*Giuseppe Acocella \**

If we intend, as this collection does, to summarize the legal, economic and social destiny of the welfare in our times, we need to understand what is it that has deeply affected our social protection system, starting from the European continent, in the last thirty years. As the world, indeed, was set to celebrate the two hundredth anniversary of the French Revolution, history made it so that the event had to be celebrated aside from all formalities that were preparing themselves, celebrating the first one with a new great revolution, that is, the fall of the Berlin Wall, in 1989, which ended the Cold War and lead the world toward a new era of global balance and international relations.

A Cold War historian, John Lewis Gaddis, professor at Yale, discovered the fine similarity, underlining that, “sometimes revolutions take us by surprise. It had happened in France in 1789, it has happened again 200 years after in Eastern Europe” and, as the prudent historian he was, he highlighted the conditions that prepare and determine revolutions, with the famous theory that history behaves “like a sand pile that keeps growing, and no one knows which is the grain that will make it slide down at some point”. As it is known, the Storming of the Bastille, a decisive event that represents that “grain of sand” in 1789, was, in truth, a minor thing per se, but it constituted the last straw in a country that was weary of the monarchy of King Louis, just as Reagan’s attack to the Evil empire in 1989, as Gaddis himself remembers, or John Paul II pontificate and the arrival in power of Gorbaciov in URSS represented the mix that enhanced the crisis in East Germany, that had to endure the renunciation to forbid the citizens the passage to West Berlin and the demolition of the Wall.

Unified Germany, with great sacrifices and under the guidance of Kohl, following the event, gained an undisputed and consolidated European leadership. The German model, based on the balance between state centralism and Länder’s federalism, with some analogies with the EU mechanism, after the unification underwent significant repercussions, and the regional particularism, with the newcomers, threatened the unity of the federal state. In particular, the social legislation (which was a source of pride since Bismark), and precisely the same welfare state model, were based, in the Bonn Constitution of 1949, on the uniform protection of the rights of the citizens on the entire National territory, thanks to centralized laws enforced by the consolidated cooperation activity between the German Federation and the single Länders. The federal laws become, de facto and de jure, inefficient when deprived of the action of the Länders (there is no offset management of the state), even though the latter might not be able to ensure those rights without federal resolutions.

With the entrance of the Länders of East Germany, the situation got complicated, making it more difficult to ensure the same living conditions for all citizens. In order to solve this, the federal unitary structure enhanced its intervention and, consequently, reduced the cooperation and the autonomy of the Länders, which had no power to ensure the same treatment to both East and West Germany. Therefore, the higher differentiation between the Länders brought to a crisis of the model enhanced between 1966 and 1969 (*la Grosse Koalition*). In 1995 – with the end of the derogatory and distributive tax system to the advantage of the Eastern Länders, the supportive federal system plunged into a crisis, and the competition between Länders increased enormously, so much as to no longer justify the transfer of resources to the poorer territories. Indeed, in 1999 the richer Länders (Bayern, Baden-Wüttemberg, and Hessen) refused the financial equalization law, which obligated the three Länders to transfer resources to the Eastern Länders, by recurring to the Federal Constitutional Court, which, in November 1999, ruled the illegitimacy of the equalization law, despite reiterating the solidarity principles adopted by the Constitution and by the Federal Republic of Germany.

Afterwards, the great migrations started, and, from Eastern Europe and Africa, as well as the lacerated Middle East (from Syria and bordering countries), just as it had happened in the United States with immigrants coming from Central and Latin America, they started to push toward the European Southern borders, and the welfare and the social balance were, therefore, critically and further undermined, introducing conflicts that shook both the European Union itself and the already

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weak layouts of the single countries. The strong transition of the European countries toward individualistic fruition of the social support (and aid) system had already generated and, therefore, increased, later, a crisis that invested directly the recipients of social intervention and poverty alleviation measures.

Recognizing, cynically, that the State will not be able to fully conduct the traditional functions, also due to the intolerable increase of the health and social public expense, in wider sectors of both the political class and the population, it will be inevitable to wonder which points are indispensable to the organization of a different welfare, especially in the direction of the realization of an integrated network of services actively involving efficient networks created by the organized civil society.

The welfare community, today, presents itself as a system that modifies the same model of social policy traditionally established between institutions and citizens' society, and that requires qualified collaborations of the citizens organized in associations. The enhancement of the social relations might lead to consider that the public spirit, strongly compromised and penalized in the contemporary individualized and corporatized societies, which devalue social bonds, might be recreated and cultivated by free aggregations of social forces, trusting in the social pluralism for a future of support, to the purpose of social and democratic restoration.

The discussion on the topic has been dangerously reduced to goodwill propositions regarding general reception or income support as a remedy to face new social imbalances (ending up, this way, dismissing the relation between rights and duties, which was essential to the balance of the constitutions of the Twentieth century), giving up the ethical value and the democratic synthesis of the search for conditions that favor efficient social mobility. Without any counterpoints, it is inevitable to separate society between "active" and "passive" subjects, which entails an increased compression of the welfare and solidarity systems.

This book offers a valuable interdisciplinary contribution to the reflection, examining and deepening many aspects related to law, social sciences, and economics, presenting a general overview of the issues and pinpointing the lively scientific debate still in place. With this publication, enhanced by the contribution of several scholars from all over the world, the Giustino Fortunato University aims at implementing international research activities. I want to therefore express my gratitude to Professor Ida D'Ambrosio and Professor Paolo Palumbo for the total dedication to the activity of curatorship of this book.

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# ABSTRACTS

## LEGAL SECTION

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### **SOCIAL CITIZENSHIP: THE PROTECTION OF RELIGIOUS DIVERSITY AS AN ENGINE OF ECONOMIC DEVELOPMENT**

*Antonella Arcopinto* \*

The “classic” definition of citizenship – what determines the set of reciprocal rights and duties of individuals within the national state – appears to be insufficient today, since it mainly highlights the aspect of the relationship between the citizen and the national state. In reality, current citizenship is profoundly transformed, in a world where multi-ethnic pluralism derives from the coexistence of cultural and religious diversity.

In the landing place, having a confessional mark and legal system, the main problem is to protect religious differences or, as we could name, “minorities”, which have continuous difficulties in expressing and demonstrating their own being “different”. The constituent elements of citizenship are the rights that belong to the individual as a member of a community. The extension of citizenship, in terms of civil, political, social, and now also cultural rights, presents itself as a central topic of the conflict of modernity.

The social element is represented by being able to live according to the canons in force within a territory, guaranteeing social well-being and economic security, guaranteeing the possibility of the individual to be able to express himself and self-determine himself in every field of social life. “Social citizenship” means, therefore, the active participation of subjects in the process of implementing social rights. Based on their own uses, needs, and needs, they must address the social offer of the territory. In this work, I intend to look at the responses concretely provided to the “Other”, belonging to a cultural minority, within a new space, characterized by a well-defined majority, which essentially influences the juridical, community, and of the market.

In modern globalized societies, it is necessary to find some reference points and to have confidence in one’s subjectivity that is at the basis of human life, so that the behavior can be more influential from the point of social and institutional view.

The “social citizen” is one who can exercise his rights simply as a “human being”, and not just as a “citizen of a state”; social citizenship goes beyond the bond of state belonging, but invests respect for the belongings and beliefs of individuals.

In the passage from a simple society to a pluralist society, the individuals belonging to minority cultures and religions make requests for identity preservation finding the fundamentals of their own faith; they express their subjectivity thanks to signs, uses, behaviors understandable only on the basis of their faith, their way of being as individuals and acting in the social background. The highest levels of satisfaction in social life, in fact, are achieved in countries where religious freedom is protected, falling within the fundamental freedoms of the individual. The individual national systems should find a way to regulate the multiple rights/duties of individuals as “citizens” of the globalized community, since it is indisputable that the confessional and cultural belonging conditions the action of people in every field of everyday life, from that personal to legal, as well as economic. Religion plays a central role in the dynamics of social development and it can therefore act as an engine also for the economic. In fact, in the territories where the subjects are protected in the exercise of their religious affiliation, not only diminish the social discord, but there is an increase of the economic activity, in how much it is possible to give life to market investments - both internal and external – in order to respond to the economic and personal needs of the subject.

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Religion and economy constitute the widest religious marketing system. Everyday the believer influenced by his/her religion, makes choices respecting the fideistic precepts in which he/she reflects himself/herself. Thus, companies, for many years, produce goods and services which are religious-oriented. This happens because the believer-consumer gets a reply to his/her questions and fideistic needs. Companies trade products and set up services that meet the needs of minorities on a social level, giving them the opportunity to find concrete answers to their market needs, which turn into personal and, therefore, social well-being.

**Keywords:** Social Citizenship, Religious Influences, Religiously Oriented Economy, Social Well-Being, Intercultural Marketing

# CREATIVE CITIES AND RELIGION: THE POTENTIAL CONTRIBUTION OF RELIGION TO THE DEVELOPMENT OF CULTURE IN URBAN AND SUBURBAN SPACES

*Fabio Balsamo* \*

The post-industrial contemporary societies make it even more necessary to re-evaluate the role of culture as a new engine for economic and social development. The rediscovery of the cultural heritage as an important growth factor also passes through the adequate enhancement of the intangible cultural heritage of Humanity, understood under the *Convention for the Safeguarding of Intangible Cultural Heritage of UNESCO* (2003)<sup>1</sup> as that set of living traditions transmitted by our ancestors such as oral expressions, including language, performing arts, traditional craftsmanship, social practices, rituals and parties, knowledge and practices concerning nature and the universe.

In addition to the immediate relationship that links religions to material cultural heritage – think, above all, of the themes of sacred art, places of worship of historical-cultural nature, the significant archival and religious museum heritage – it seems evident that religions share an extraordinary cultural heritage, even of an intangible kind, thanks to the wide wisdom of values, languages, traditions and rituals they have been carrying for centuries. Hence the importance of involving religions within those programs aimed at promoting culture and creativity. Among the numerous initiatives, in particular, it is worth mentioning the *Creative City Project* launched by UNESCO, by 2004, which currently sees the participation of 180 cities (of which 9 Italian cities) of 5 different continents, distinguished by having elected creativity and culture as the engine of its economic development.

In these experiences, the network of relationships that derives from the collaboration between the different cities participating in the Project is able to solicit the adoption of further paths of cultural and religious integration. Also, for this reason, the participation of religious confessions is to be considered crucial, being able to generate initiatives suitable to favour social cohesion and better integration of the different ethnic and religious groups within the society, also providing the opportunity to their better inclusion in the socio-economic context of the destination countries.

Culture can represent a decisive factor of the socio-economic revitalization of degraded urban areas, open to the active presence of religious confessions. In particular, the contribution that can be offered by religious organizations in the re-use of degraded urban spaces, particularly in the suburbs, or in the creation of a solid urban environment through the elaboration of specific education courses on legality and reception is relevant. Think again of the practice of sharing decommissioned buildings of worship, so far mainly limited to the collaboration between Orthodox and Catholics, which, indeed, deserves to be extended even to the benefit of other religious groups. In fact, this good practice can represent an important tool for promoting interreligious dialogue.

With specific regard to the theme of the suburbs – a subject of particular attention also in the Magisterium of Pope Francis – the “Periferie creative” initiative, promoted in Italy by MIUR, should be mentioned. In these experiences specific attention was given to interreligious dialogue and to the knowledge of cultural and religious specificities of individual pupils, issues also seen as opportunities, especially in secondary schools, for economic revitalization of the most depressed areas. This aim was also pursued through the provision of a technical-financial support service for the development of entrepreneurial projects, with a specific focus on non-profit entities, and on the planning of education initiatives for entrepreneurship, creativity and innovation.

It is therefore the non-profit world, frequently of religious inspiration, that constitutes the terrain for generating new business and aggregation models thanks to which the current deterioration that

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<sup>1</sup> UNESCO. (2003). *Convention for the safeguarding of the intangible cultural heritage 2003*. Retrieved from [http://portal.unesco.org/en/ev.php-URL\\_ID=17716&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html)

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characterizes the most peripheral metropolitan areas can be overcome.

With this chapter, therefore, I intend to highlight the forms and methods with which the collaboration between religious confessions and civil authorities is implemented in the promotion of culture and creativity, as a tool for building an inclusive society.

**Keywords:** Creative Cities, Religion and Art, Religion and Creativity, Urban Religion, Religion and Culture

# THE ENTRUSTING OF THE SOCIAL SERVICES IN THE THIRD SECTOR CODE IN THE LIGHT OF THE PRINCIPLE OF FREE COMPETITION

*Alessandro Berrettini \**

This chapter intends to investigate how the Third sector code, Legislative Decree No. 117/2017, is in contrast with the principle of free competition protected at the national and EU level. This interest stems from the analysis of a recent opinion of the Council of State, issued with a view to updating the ANAC guidelines on the assignment of social services to non-profit organizations. The opinion just indicated, in fact, fears the disapplication of the Art. 56 of the Third sector code which provides for a different method of entrusting social services of economic importance (and not) to voluntary organizations and social promotion associations, with respect to the provisions of articles 142 and 143, Legislative Decree No. 50/2016.

Article 56, Legislative Decree No. 117/2017, as just mentioned, provides for the possibility of entrusting a social service to voluntary organizations and social promotion associations, without resorting to the public procurement regulated by Art. 143 Legislative Decree No. 50/2016 which reserves to non-profit organizations “the right to participate in the procedures for the award of public contracts exclusively for health, social and cultural services as per Annex IX”.

The problem that arises in relation to the possible contrast between the principle of free competition, ensured by compliance with Legislative Decree No. 50/2016, and the agreements under analysis does not concern either the nature of the activity carried out in foster care, or the nature of the subjects to whom the p.a. entrusts a public service but their economic importance<sup>1</sup>. In fact, according to the law of the European Union, it is necessary to prevent “acts capable of producing an imbalance in a given market, without the structure of the subject that puts them in place assuming particular importance” (Cerbo, 2011)<sup>2</sup>.

In light of what has just been said, only if the social service to be entrusted to voluntary organizations or social promotion associations should concern the performance of activities that consist in “offering goods or services in a given market”<sup>3</sup> that is of economic importance, a disharmony could arise between the code of public procurement and the Third sector code.

In order to avoid the conflict just indicated between Legislative Decree No. 50/2016 and Legislative Decree No. 117/2017, the Council of State with the opinion No. 2052/2018 defines the limits of use of the agreements pursuant to Art. 56 Legislative Decree No. 50/2016. The judges of Palazzo Spada, in fact, affirm that the conventions find their reason only if the service that the institution of the Third sector must perform is characterized by gratuitousness, remembering that “European procurement law is only concerned with onerous assignments”. This gratuitousness consists in the “performance of a service in the absence of remuneration” (Salerno, 2010)<sup>4</sup> resolving “in a non-economic phenomenon, that is, structurally outside the logic of the market”, since managed under a profile of comparing costs and benefits necessarily at a loss for the lender. The criterion, therefore, that seems to emerge from the jurisprudence to qualify the social service as onerous, with a consequent application of the rules on public procurement, seems to be that relating to the presence in the agreement of any emolument intended “to cover all or part of the cost of production”.

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<sup>1</sup> According to the Court of Justice CE, 25 October 2001, C-475/99; Corte Giust. CE, 26 marzo 2009, C-113/07, economic activity is “the activity which consists in offering goods or services on a given market and which could, at least in principle, be exercised by a private individual for profit”.

<sup>2</sup> Cerbo, P. (2011). Appalti pubblici e associazioni di volontariato: La concorrenza fra soggetti “disomogenei”. *Urbanistica e Appalti*, 3, 335-345. Retrieved from [https://fissuu.com/egiudice/docs/cerbo\\_urbanistica\\_e\\_appalti\\_3\\_2011](https://fissuu.com/egiudice/docs/cerbo_urbanistica_e_appalti_3_2011)

<sup>3</sup> Figorilli, F. (2017). *I servizi pubblici*. In *Diritto amministrativo*, AA.VV., Torino, p. 644; CE, 12 September, 2000, C-180 e 184/98.

<sup>4</sup> Of the same notice, Salerno, G. C. (2010). *Servizi di interesse generale e sussidiarietà orizzontale tra ordinamento costituzionale e ordinamento dell'unione europea*. Turin, Italy: Giappichelli.

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Given these premises, this work, through the analysis of the “Spezzino”<sup>5</sup> and “Casta”<sup>6</sup> judgments of the European Court of Justice, will investigate possible exceptions to the principle of free competition in the field of assignment of social services that do not seem to be taken into consideration by the judges of Palazzo Spada.

**Keywords:** Public Procurement, Third Sector, Legislative Decree No. 1117/2017, Social Services, Free Competition

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<sup>5</sup> C-113/13, EU:C:2014:2440

<sup>6</sup> C-50/14, EU:C:2016:56

# THE ROLE OF LOCAL AUTHORITIES IN THE INTEGRATION AND WELFARE POLICIES FOR MIGRANTS

*Giovanni Carlo Bruno* \*

Local and regional authorities have mainly been seen, in the processes of reception and integration of migrants (forced and economic), as actors involved in the final stages of these processes, after admission and possible relocation of the persons concerned on the national territory.

Although the exclusive role of the state as regards the legal status of non-EU citizens and on immigration is undisputed (Art. 117, paragraph 2, of the Constitution of Italy), it is also recognized the possibility of legislative interventions of the regions with regard to the phenomenon of immigration, in the areas of regional competence.

Without disputing the power of the state to admit (and expel) persons from the territory under its jurisdiction, through legislation which also complies with international standards, the aim of the intervention is to offer some considerations on the possibilities of enhancing the role of local governments in the governance of migration.

The ‘Immigration Single Text’ – “*Testo Unico sull’immigrazione*”<sup>1</sup> – identifies areas of responsibility of the regions in the field of immigration. The provisions of the Single Text (see Art. 1, paragraph 4) can be considered as fundamental principles on the matters for which the regions can adopt detailed rules, such as education and health protection.

On issues concerning the competence of regions, e.g. social services, Art. 3 paragraph 5 of the Single Text states that “[w]ithin the ambit of the respective budget attributions and endowments, the regions, provinces, municipalities and other local bodies adopt the measures concurring to the pursuit of the aim to remove hindrances that in actual fact impede the full recognition of the rights and interests recognised to aliens present on the State’s territory, with particular reference to those concerning lodging, language, social integration, in compliance with the human being’s fundamental rights”<sup>2</sup>.

The local authorities are called upon to confront the communities of their own territory, carrying interests and needs to be met with rational use of available resources. Since they are closer to those people present in local areas, the same authorities are responsible for maintaining a high level of information on the implementation of development projects for the territories, taking into account the presence of new citizens who must nevertheless be guaranteed full access to basic welfare benefits, in application of the general principle of non-discrimination.

The Congress of Local and Regional Authorities of the Council of Europe, a body set up by the Organisation to promote and strengthen democracy at the local and regional level in the 47 member states, adopted in March 2017 two *soft law* and non-binding acts concerning the role of local and regional authorities in the management of migration policies, with particular regard to reception and integration issues, including welfare<sup>3</sup>.

Attention to the migratory phenomenon is not new in the activities of the Congress. Several previous acts had touched upon migration issues, with an approach based on the rights of individuals and oriented towards social cohesion. Local and regional authorities are recognized as “the cornerstone of efforts to effectively tackle the current challenges linked to migration” (Res. No. 411, paragraph 10) and they are called upon to carry out actions based on the principles of inclusion, non-discrimination and the fight against the negative representation of migrants.

The ultimate objective of all these non-binding acts is to reaffirm that integration policies should

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<sup>1</sup> Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero, Decreto Legislativo No. 286 (1998, July 25). Retrieved from [https://www.esteri.it/mae/normative/normativa\\_consolare/visi/d\\_lgs\\_25\\_luglio\\_1998\\_n\\_286.pdf](https://www.esteri.it/mae/normative/normativa_consolare/visi/d_lgs_25_luglio_1998_n_286.pdf)

<sup>2</sup> Unofficial translation.

<sup>3</sup> Council of Europe. (2017). *From reception to integration: the role of local and regional authorities facing migration, Resolution No. 411*. Retrieved from [https://search.coe.int/congress/Pages/result\\_details.aspx?ObjectId=0900001680703e5e](https://search.coe.int/congress/Pages/result_details.aspx?ObjectId=0900001680703e5e); Council of Europe. (2017). *From reception to integration: the role of local and regional authorities facing migration, Recommendation No. 394*. Retrieved from [https://search.coe.int/congress/Pages/result\\_details.aspx?ObjectId=0900001680703ef3](https://search.coe.int/congress/Pages/result_details.aspx?ObjectId=0900001680703ef3)

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be planned according to a 'holistic' approach, which includes the linguistic, cultural, economic and social dimensions.

In addition, the intervention will examine the contribution, in the Campania Region, of the Regional Law No. 6 of February 8, 2010 "*Norms for the social, economic and cultural inclusion of foreign persons present in Campania*" ("*Norme per l'inclusione sociale, economica e culturale delle persone straniere presenti in Campania*") for the inclusion of and against any discrimination toward 'new' citizens.

**Keywords:** Migration, Development, Governance, Integration, Welfare

# NEW GUIDELINES FOR SOCIAL INCLUSION POLICIES RELEVANT TO MENTAL ILLNESSES INSIDE THE PRISON CONTEXT

*Giovanni Chiola \**

Social inclusion is a human right for all people, and it should take into consideration also people that manifest a severe psychiatric illness while incarcerated (*rei folli*).

The United Nations Human Rights Committee has sustained the “positive obligation” of states to protect the rights of those whose vulnerability arises from their status, as prisoners deprived of their liberty. The recent constitutional court ruling No. 99 in 2019 goes in this direction. The recent court ruling maintains that some inmates with mental problems may best serve their court ruling outside the prison (e.g., mandatory postponement, optional deferment, home detention, assistance or residential facilities). Prison, for some inmates, can be a cause of severe pathologies and is now recognized as a possible detriment to mental health.

The overcoming of the prejudicial wave that stigmatizes the recluse has taken place thanks to the Italian Constitutional Court through a process that has involved the NBC (National Bioethics Council), but above all the CEDU (European Court of Human Rights) that has focused and fined Italy, on the issue of prisons.

The new penitentiary European system promotes the extramural execution of penalties. The European penitentiary policies are inspired partially by the Italian penitentiary, which has been modified thanks to two significant legislative changes, taken as a model by the WHO: the 1978 Basaglia reform (opening of asylums) and the Law No. 81 of 2014 (closing of the Forensic Psychiatric Hospitals (OPG)).

With the Basaglia reform mental patients were freed from the mental hospitals and after Law No. 81, no citizen, male or female, has been sent in custody as a security measure to the OPG but in residences meant for the execution of security measures (REMS).

To this path of inclusion of the mentally weaker, we must add the recent Constitutional Court Ruling No. 99 in 2019, the focus of this article, which has recognized the prison as a pathogen factor and allowed some inmates, with severe mental problems to serve their court ruling outside the prison and not inside the health units in the same prison.

Thus, with this critical ruling, the judge has equated the physical pathology of prisoners with the mental pathology of prisoners. The sentence has effects not only for the insane offenders but also for having thrown light on the penitentiary institution until now considered a “*Sancta Sanctorum*” of the Italian penal system.

The ruling is essential for the same recognition of health issues and mental illnesses. Mental issues of inmates were once neglected by the judiciary or used to reinforce security measures and contain social danger. This ruling is innovative also for having conceived the prison as an inappropriate place for inmates who have been diagnosed with a severe mental illness during detention. Imprisoning people with serious mental issues violates not only Art. 27 of the Constitution, but also the supreme and fundamental Art. 3 of the Convention on Human Rights.

This last constitutional ruling confirms that the Constitutional Court has taken into consideration the previous decisions of the European Court of Human Rights (ECHR) on the respect of the absolute prohibition of torture or inhuman or degrading treatment (ECHR, second section, sentence 17 November 2015, *Bamouhammad against Belgium*, paragraph 119; ECHR, Grand Chamber, the judgment of April 26, 2016, *Murray v. Netherlands*, paragraph 105; ECHR, the judgment of July 16, 2009, Ric. No. 22635/03, *Sulejmanovic v. Italy*; ECHR, the judgment of January 8, 2013, Ric. No. 43517/09, *Torreggiani and Others v. Italy*).

The recent Constitutional Court Ruling No. 99 in 2019 affirms that in the event of a violation, it is mandatory for “the jurisdictional authority to provide for the interruption of imprisonment”,

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remembering that the scope of the prohibition according to art. Three of the Convention on Human Rights must be extended to the entire prison system, including the prison psychiatric department because even in this place “*degrading treatment could be practiced when the therapies are not appropriate, and the detention is prolonged for a significant period of time*”.

The long wave against prejudice also affects the Italian prison system, including the automatism (absence of collaboration) that were deemed unacceptable because they precluded access to benefits (Art. 85, paragraph e) of the Law No. 103 of 2017 (Changes to the Criminal Code, the Criminal Procedure Code, and the Penitentiary System).

The ruling of the EDU Court in the case of *Marcello Viola v. Italy* (No. 2), Ric. No. 77633/16, the sentence of June 13, 2019, condemned Italy for violating the Art. 3 Human Rights Convention, or the right of the prisoner to life imprisonment to not be subjected to inhuman and degrading treatment, and therefore, to enjoy discounts of penalty or benefit.

Thanks to this last ECHR decision, the Italian legislator must modify the prison regulations accordingly and align several penitentiary institutions (e.g., the special detention regime) to the international human rights standards. The ECHR maintains that inmates should enjoy all the rights internationally recognized as fundamental, from the Universal Declaration of Human Rights (1948) and subsequently from the two international covenants, on civil and political rights, and economic, social and cultural rights (implemented in 1976). European penitentiary policies, however, are modifying the rigid system of security measures – at the moment without affecting the granite Criminal Code Rocco – with rapidity and effectiveness.

However, in Italy, the path to the recognition of human, political and civil rights to inmates is still long and tortuous since it can only be reached through the revision of “double track” of the Criminal Code of 1930 (the articles of the Rocco Code are still in force).

The recent Italian Constitutional Court Ruling No. 99 was a big step in the direction of recognition of human rights of prisoners; however, Italy in this period is going through the rising tide of penal populism that strongly affects the legislator. Concrete examples of the recent change in the cultural climate on security can be found in the decree-law on the subject of public order and security (Decree-Law No. 53 of June 2019); starting from the changes to the penal code and other provisions on the matter of legitimate defense (Law No. 36 of April 26, 2019); the decree on international protection and immigration, public safety (Decree-Law No. 113 of October 4, 2018, converted with modifications with Law No. 132 of December 1, 2018); finally, the urban security decree (Decree-Law No. 14 of February 20, 2017).

Therefore, though the Court Ruling No. 99 was jurisprudentially very progressive, the path of inclusion of the mentally weaker inmates has to face a rise of penal populism in Italy – the public generally tends to prefer punitive policies in the field of criminal justice. Italian society is changing sharply towards a position of closure to foreigners, but also towards social policies, strongly compressed in favor of other more perceptible and politically palatable initiatives.

**Keywords:** Folli Rei, Rei Folli, Psychiatric Illness While Incarcerated, Forensic Psychiatric Hospitals, Alternative Penalties to Prison, Dignity, Rights of Detainees

# THE SECURITY OF REAL ESTATE TRANSFERS: THE GUARANTEE FUNCTION OF THE RECORDING FOR THE CONSUMER

*Ida D'Ambrosio \**

Property registration is the most relevant and articulate system of public disclosure, that is, a type of disclosure that, having as a basis the pursuit of the objective of any other type of disclosure, is loaded with a further specific function that, generally, consists of making the effects of the deed produced between the parties from the very moment of its execution enforceable against third parties. The following work, despite starting from traditional literature, which defines registration as a special institution, analyzes its gradual placement in a completely different regulatory framework, oriented toward the safety and protection of trade. This regulatory framework, essentially, prevents obligations, rights and burdens that are hidden or non-acknowledgeable, to be applied against third parties. The importance of these intervened regulatory modifications and of the procedure, are such as to legitimate a real overturning of values, in light of which, what really is exceptional is no longer the set of laws related to registration, but rather those that solve conflicts among subjective rights basing themselves on acts that are hidden and non-acknowledgeable from third parties. The Italian system is oriented, by now, toward the direction of the dynamic safety of trades. This research, therefore, aims at pinpointing the particular cases that can be registered, and to what extent the will of the parties can make enforceable against third parties the negotiation restriction they produced, analyzing the extent to which the legislator has intended to protect the safety of the circulation of property in relation to the safeguard of subjective rights. In the in-depth analysis of this topic, however, one cannot disregard the circumstance that the rule regarding property circulation, save a few exceptions, is that of a resolution via registration of circulation conflicts and, consequently, the enforceability against third parties of judicial situations that are not merely obligatory or personal whenever there is no knowledgeability through public disclosure. Only exceptionally, the “superior” nature of the interests in conflict determines its enforceability even in presence of disclosure failure.

**Keywords:** Safety, Real Estate Transfers, Consumer’s Protection, Guarantee Function, Recording

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## WELFARE AND THIRD SECTOR

*Silvia de Marco* \*

In our country and many European states, the extraordinary achievement of non-profit organizations in the last decades of the latest century is undoubtedly due to the gradual decline of the welfare state in the assumed role of “assistance support”, and also to the serious economic crisis that in the 90s of the same century has affected modern democratic states.

However, the economic-juridical doctrine has underlined how the reasons for this event are caused by the failure of the state and the market in the sector of services of social interest (health, education, etc.), where, in fact, the bureaucratic mediation and the contractual composition turned out to be ineffective in contrast to the trend of effectiveness and efficiency of private non-profit organizations with the ideal goals that the users considered most reliable due to their peculiar functional characterization. And this also occurs when overcoming the political prejudices, it is recognised the suitability to carry out an economic and occupational function that has been recognized.

From the point of view of domestic law, on the other hand, all this corresponds to an evolution of the normative system in the direction of the full affirmation of the constitutional principles of protection of the person and pluralism, with the consequent reinterpretation in a personalistic key of the “bare and essential” general discipline contained in the civil code of 1942, the progressive expulsion from the direct system of provisions and technique that directed obstruct the delineation of a pluralistic oriented social structure, with the emanation of a variegated and complex special legislation that the new pluralist instances wanted to accept.

In effect, even so, the validity of law from the code that it has been chosen not to ignore, differently that it happened in the past with codes of liberal inspiration, the existence of non-profit organizations, only with the fall of the fascist regime become law the fundamental Charter that has created the conditions for the affirmation of a pluralistic society and for the adoption of many special legislative interventions that, even so, they are episodic and sectorial which, they have first of all dismantled the original design of the 1942 code, purifying it, in particular, of those provisions that most reflected the political thought of the time of its emission.

However, the special legislation, which has actually incorporated the results of the statutory evolution also with regard to the profiles of the full compatibility of these organizational structures with the business activity, has also been characterized as “supporting legislation”, providing benefits and supports due to the general natural interest for the aims pursued, and it allowed the implementation of the privatization and outsourcing processes deemed necessary to face the aforementioned economic crisis of the last decade of the latest century.

But of decisive importance for the development of the sector, in many states that, like our, have joined the European Union, is also the penetration into the regulatory systems of the principle of community derivation of horizontal subsidiarity, which has, in fact, subverted the approach of the relationship between public welfare and private welfare in a particular historical moment of contraction of public expenditure due to budgetary constraints set by EU institutions.

In this social, economic, and legal mutate context, the Italian Legislator intervened in 2017, dictating a long-awaited regulation of the “reform” of the Third Sector. It is an articulated discipline that, in a renewed climate of the public-private collaboration, intends in various ways to encourage the establishment of non-profit organizations that pursue “civic, solidarity and social utility goals”, also assuming an important economic role, and employment. Relevant is the clear tendency of the new legislation to configure public intervention no longer as a limit to private autonomy, but as a guarantee that it will be carried out in full compliance with the rules.

**Keywords:** Welfare, Third Sector, No Profit, General Interest Purposes, Asset Destination

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## PUBLIC DUTIES AND PRIVATE MANAGEMENT IN THE INTEGRATED WATER SERVICES IN ITALY: STILL LOOKING FOR BALANCE

*Andrea De Petris* \*

The regulation of water services in recent years in Italy has gone through different stages and moments, in an attempt to find the right balance between the guarantees of generalized access to a universal good like water, and the interest in encouraging the entry of private investments in the sector. Starting with the recall of the regulation concerning integrated water service in the Italian legal order, the article describes the complex and varied process recently implemented in Italy. The provisions on the topic followed very different approaches over the years, resulting in legislation that did not manage to clear the limits between public and private influence on the management of water services in Italy. The 2011 referendum proved that a clear majority of the Italian citizens wanted water services to remain public. Thus, the following legislation maintained a “mixed” solution, when public and private intervenes are still possible. As a matter of fact, jurisprudence, legislator, and legal scholars were not able to provide a definitive and accepted solution so far. The article, which analyses in detail a sector where the social approach must necessarily be granted also in case of openings to private entrepreneurial interventions, concludes with a description of the problems and risks that a mixture of public and private elements, unable to guarantee the welfare character of the water services, could produce in the Italian socio-economic structure in the near future.

**Keywords:** Public Management, Water Services, Privatization, Regulation, Competition

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## THE WELFARE AND THE CHURCH

Gennaro Fusco \*

The concept of *welfare*, even if similar themes are already present especially when social security and the tasks of the State are compared, is present in the social doctrine of the Church only in the most recent encyclicals.

From the beginning, the documents of the social doctrine of the Church have the concern to describe and define the role of the State and its relationship with other subjects regarding the management of social risks. The encyclical *Rerum novarum*, promulgated on May 15, 1891, by Pope Leo XIII, at No. 11, goes in this direction, emphasizing that the State intervenes only when the family finds itself in a severe closeness that it is not at all possible for it to get out of it.

Forty years later, the encyclical *Quadragesimo anno*, promulgated by Pope Pius XI on May 15, 1931, taking up the indications present in *Rerum novarum*, puts the accent above all on the need for a reform of the institutions and above all of the State. The principle of the supplementary function of the State with regard to protection and social security is stated, a principle that anticipates the classical principle in the social doctrine of the Church of subsidiarity.

The encyclical *Mater et magistra*, promulgated by Pope John XXIII on May 15, 1961, at No. 104, stresses the importance of the principle of subsidiarity. So the State and other bodies of public law must not extend their property unless there are reasons for an obvious and real need for the common good, and not for the purpose of reducing and even less of eliminating private property.

Also in the pastoral constitution *Gaudium et spes*, promulgated by Pope Paul VI on December 7, 1965, the task of the State is connected above all to the pursuit of the universal destination of goods.

The explicit reference to *welfare* can be found in the encyclical *Centesimus annus*, promulgated by Pope John Paul II on May 1, 1991. It recognizes that the intervention of the State, to protect social security, has resulted in a model that has been consolidated as Welfare State.

Pope John Paul II, in his speech “*The model of a modern social state as a manifestation of authentic civilization and an instrument for the defense of the poorest*”, given to the members of the Pontifical Academy of Social Sciences in 1997, states that this model, when it is not unbalanced on excessive assistance, it is a manifestation of authentic civilization, it is an indispensable tool for the defense of the most disadvantaged social classes, often crushed by the exorbitant power of the global market.

The theme of *welfare* is therefore used in the most recent documents of the social doctrine of the Church, underlining the connection between peace, social security and a guarantee for a balanced economy, and between the diffusion of a social security system and protection, in particular, of work. And the essential key, of the whole social question, becomes work, as its main purpose is to make life more human, placing human dignity at the center of attention.

Within contemporary society, however, both post-industrial and post-modern, it is precisely on the subject of work and social security, as indicated by the social sciences, that the lack of promises of the *welfare* are condensed and its triple crisis is manifested: tax, rationality and legitimacy. The encyclical *Centesimus annus*, in fact, at No. 48, recalled the excesses that led to the degenerations towards the so-called Welfare State, deriving from an inadequate understanding of the proper tasks of the State, from which the phenomena of de-responsibility for society, of disproportionate growth of public apparatus dominated by bureaucratic logic and of fell neglect of major social issues.

From here, in order to counteract the above, the need arose to promote social policies that have as their primary objective the support of social actors who are indispensable in the process of building solidarity networks: that is, the family and the other intermediate subjects, to whom the person refers to and that can contribute to the growth of the subjectivity of society.

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The Magisterium of the Church, in general, highlights the strong interdependence between the political tasks of the State and the international problems that come to assume ever newer values of the course of time, and between the State and the intermediate social actors in the light of the principle of subsidiarity.

**Keywords:** Welfare, Church, Principle of Subsidiarity, Family

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## THE “CATHOLIC” IMPACT INVESTING

Caterina Gagliardi \*

The article aims to highlight the effects of the new impact investing strategies put in place by the Catholic Church, according to the guidelines drawn by Pope Francis.

Of ancient origins in the Christian tradition, ethical investments, or better called „impact“ investments, significantly connote Pope Francis’ pontificate.

For the Pope, it is essential “to emphasize the importance that the various political and economic sectors have in promoting an inclusive approach which takes into consideration the dignity of every human person and the common good. I am referring to a concern that ought to shape every political and economic decision, but which at times seems to be little more than an afterthought”.

The promotion of “sustainable” finance that contributes to the fight against poverty was the central theme of the first Vatican Conference (VIIC), on “*Investing for the poor: How impact investing can serve the common good in the light of Evangelii Gaudium*”, organized in 2014 by the Pontifical Council for Justice and Peace (new Dicastery for Promoting Integral Human Development) and by Catholic Relief Services. This event was followed, in 2016 and 2018, by two other Vatican Conferences, entitled: “*Making the year of mercy a year of impact for the poor*” and “*Scaling investment in service of integral human development*”.

The objective of these meetings, between impact investment experts and Catholic leaders from different countries, was to evaluate and share financial models that conform to the vision of an economy at the service of the people, strongly supported by Pope Francis. Purpose, in 2014 the *Catholic Impact Investing Collaborative* (CIIC) was established with the mission to connect Catholic impact investors. In fact, the distinct values and heritage of the Catholic community have a strong influence on how CIIC participants think about and approach their investment portfolios. The principal perspective is based on the desire to model God’s economy, intentionally pursuing benefit for all affected by a transaction.

In this contest, what is the role of the Church in the construction of a necessary connection between profit and gift? How the “renewed” work of the Catholic impact funds is characterized? How these institutions interact with new partnerships to sustain their social mission? Can the Church’s involvement in impact investing to influence other religious organizations to pursue similar strategies? This contribution attempts to answer these questions.

**Keywords:** Catholic Church, Finance, Solidarity, Impact Investors, Social and Economic Inclusion

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## FRUMENTATIONES IN THE REPUBLICAN PERIOD OF ANCIENT ROME: BETWEEN PUBLIC WELFARE AND DEMAGOGY

*Alessio Guasco* \*

Since the 5th century B.C. public distributions of wheat at a favorable price (*frumentationes*) have been attested during the Roman Republic because of the famines or exceptional events. However, between the 2nd and 1st century B.C. *frumentationes* arranged with *leges publicae* obtained the character of the ordinariness. The chapter deals with the analysis of the normative interventions starting from the tribuneship of Caius Gracchus and up to the dictatorship of Cesar gathered in the economic, social and political framework of those turbulent decades in the history of Rome. The object of this study is to highlight whether these *leges* were mere demagogic interventions promoted by the *populares*, in order to gratify their own electorate, as pointed out by Cicero, or public welfare provisions aimed at rebalancing, although only partially, the significant income gap between the wealthier classes and the poorest ones.

**Keywords:** Roman Law, Frumentationes, Legespublicae, Wheat, Populares

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## GLOBALIZATION AND TRANSFORMATION OF RIGHTS

*Paola B. Helzel* \*

The process of globalization, which in the last twenty years has been the absolute protagonist of the world scene, has led to the extension and strengthening of the culture of rights on the one hand, while on the other hand a growing conflict between groups belonging to cultures, religions and peoples different. A battle, for and against the rights, in which the latter were exploited to strengthen, justify and impose a point of view, compared to the others. The consequence of all this was the generation of a strange structural correlation between economic globalization and juridical universalism, whose actor is always the individual in its singularity without ties. This state of affairs has produced the 'ennoblement' of simple subjective claims to rights, the uncontrollable tendency to reformulate any claim, even the most idiosyncratic, in terms of 'rights', without, however, considering that the alleged right disjointed from responsibility, often it becomes a reason for disintegration and a weapon aimed at the other. Such a transformation of a human right into a claim leads to a weakening of the role of the rights themselves.

**Keywords:** Rights, Law, Globalization

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# NEW TECHNOLOGIES AND INDIVIDUAL GUARANTEES: THE “TROJAN HORSE”

*Katia La Regina \**

There is no doubt that the arrival, on the investigation scenario, of the so-called “*Trojan horse*” may ensure a remarkable contribution in overcoming the limits that, in time, have been highlighted with regard to the “traditional”, so to speak, wiretapping. Preliminarily, we see the evolution of the technology used by the communication and messaging tools, such as *Whatsapp*, *Telegram*, *Snapchat*, *Skype*, which, in order to guarantee the users privacy and safety, use encryption systems that make the communication impossible to intercept. The *Trojan horse*, instead, overcomes these barriers, opening unprecedented prospects in the field of investigation. However, it is a type of evidence research that has been recently disciplined through a technique that, renouncing to precise regulation of the potential uses of this tool, is inexorably destined to feed deep uncertainties on the troubled enough subject of wiretapping.

The issue concerns the ways in which the safeguarding of individual rights should have been guaranteed towards an investigative tool that could potentially destroy the right to privacy, the domicile inviolability, the inviolability and secrecy of correspondence and of any other form of communication; an investigative tool, therefore, able to limit constitutionally and conventionally guaranteed rights (Articles 2, 14, 15, 8 of the European Convention on Human Rights (ECHR)).

In front of functionalities that, from the point of view of the legal framework, range from wiretapping to inspection, to search until seizure, the legislator could, indeed, had to say a lot. And, instead, inspired by a delegation that has perhaps settled on self-restraint registered on the application ground, the Legislative Decree of December 29, 2017, No. 216 considers the Trojan as a mere executive method of wiretapping, with the consequence that, from a legislative point of view, the virus electronically represents what under the physical aspect is the ordinary transmitting device.

**Keywords:** Wiretapping, Intruding Agent, Investigations; Individual Guarantees, Remote-Control System

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## CIVIL LIABILITY AND DEFENSIVE MEDICINE

*Emiliano Marchisio* \*

Civil liability is used as indirect market regulation since the risk to incur liability for damages provides an incentive to invest in safety. Such a *paradigm* of civil liability requires identification of a “culpable” person liable for redress.

This approach based on fault and deterrence works in several cases (e.g., damages for defective products), but is inappropriate in others, such as health-care, where increases in liability drove to “defensive medicine” strategies (i.e., practices, not in the interest of patients, aimed at protecting doctors against potential plaintiffs) which showed harmful also for patients themselves.

A rich and valuable literature shows, in fact, that, in some sectors such as health-care, the current paradigm of civil liability turns unreliable, since increases of civil liability *beyond certain limits* do not procure any further gain in safety and, to the contrary and paradoxically, conduce to a reduction of market efficiency and overall safety of patients, which were supposed to receive benefit by the increase of liability itself.

It seems, therefore, necessary to somehow unwind the increase of civil liability against doctors and hospitals in order to guarantee that the health-care system may develop in an efficient and safe way.

It is important to note that defensive medicine cannot be resolved, in health-care, by a trend reversal, simply by reducing civil liability and corresponding patients’ rights to redress in case of damages. On the patients’ side, claims to redress for health damages are recognised, in most jurisdictions, as deriving from constitutional rights to health. The “solidarity” approach inspiring current civil liability would not allow preventing damaged patients from being recognised a redress which, therefore, is rather difficult to be repealed.

This complex situation does not allow simple solutions but requires a well-designed action to allow public health-care to remain in place the way we know it.

**Keywords:** Civil Liability, Medical Malpractice, Defensive Medicine, No-Fault Scheme, Strict Liability

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# THE DICIOTTI CASE: A USEFUL STARTING POINT TO (RE-)THINK ABOUT THE NOTION OF POLITICAL ACT

*Giovanni Martini* \*

The case of the military ship U. Diciotti is very well known: in August 2018 more than two hundred migrants were being held aboard, for about 10 days, preventing them from landing. This decision taken by the Italian authorities, and in particular by the former Interior Minister, was censored by the Public Prosecutor at the Court of Catania who hypothesized, with regard to the conduct of the latter, the existence of the crime of aggravating abduction.

The described story, as is evident, stimulates the juridical reflection on the ‘definition’ of a political act, the notion of which has been used by several academics (as well as politics) to justify the unquestionability, also by the criminal courts, of the decisions taken by the Minister of Interior designed to prevent the landings on the mainland (in fact, the Diciotti military ship is itself Italian territory) of the migrants rescued at sea by the Italian coast guard military, intervening to supply for the inertia of the Maltese authorities.

Starting from the examination of the Art. 31 of the Consolidating Law of Council of State, which historically constituted the normative paradigm on which it was founded, and from which it took its first steps, the academic reflection on the political act, it will try reason on the following problematic profiles:

a) The new boundaries of the ‘political act’ category – being evident that behind this ‘label’ one can include a typological multiplicity of acts and decisions sent by the highest level organs of the state – within the republican legal system, in particular in the light of what set out by the last line of the Art. 7 of the Code of the administrative process that, unequivocally, more than was previously in the Art. 31 of the T.U.C. St., excludes the jurisdiction of the administrative judge with regard to “the acts or provisions issued by the Government in the exercise of political power”.

b) The form of the political act. Also in this regard, the case of the Diciotti ship is paradigmatic, as the intervention of the Minister of the Interior, aimed at preventing the landing, was not reflected into the formal emanation of an act or a provision.

c) Finally, the relationship between the political act and public interest, a subject that is more complex than ever in the light of the consideration that the definition of such interests is increasingly the result of supranational choices on which the various states, and therefore not only Italy, only to a limited extent are able to affect, as well as for the presence of opposing subjective rights, even of supranational derivation, which cannot be ‘weakened’ by national provisional acts.

**Keywords:** Political Act, Migrants, Landings on the Mainland

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# ORGANISATION AND TORTIOUS LIABILITY

*Domenico Palumbo* \*

The issue of corporate social and criminal responsibility must be compared with that of the adoption of an adequate organizational model, in order to verify whether, from a conceptual point of view, the provisions of special laws comply with the rules contained in the Civil Code system or if there is an autonomous concept of adequacy of the organizational model (for example with respect to that provided by the legislation of the D. Lgs. 231/2001).

Certainly, the D. Lgs. 231/01 introduced a great novelty: thanks to this discipline, the concept of criminal responsibility (and social responsibility) of the companies finds space in our system for the first time.

In reality, it is a responsibility connected to both the commission of crimes by subjects that occupy top positions in the companies themselves and to the advantage that the juridical person derives from the commission of those crimes.

In this context, the D. Lgs. 231/01 calls for the adoption of organizational models aimed at providing internal rules for the company, compliance with which should avoid the commission of crimes. These organizational models serve as a justification for criminal liability, as they demonstrate that the company, as such, has taken all possible precautions so that no criminal acts are committed.

In reality, already before the introduction of the D. Lgs. 231/01 the doctrine emphasized the need to find a balance between setting some limits for the management and at the same time leaving some freedom to the entrepreneurial intuitions of the directors of corporations.

The balance between these two needs is found in the introduction of the D. Lgs. 231/2001 and then in the field of company law with the Art. 2403-2381 c.c.

In fact, these two standards refer to the concept of adequacy of the organizational model. The first, the Art. 2403 of the Civil Code, imposes the burden of supervision on the adequacy of the organizational model on the board of statutory auditors, while Art. 2381 c.c. provides the option of appointing managing directors, with respect to which the board is given the power/duty to act informed and, in relation to the information acquired, the burden of assessing the adoption of a suitable organizational model appropriate to the structure of society.

Given the above, we must try to understand if the concept of adequacy of the organizational structure (which is described by the possible organizational model) referred to in Art. 2381 c.c. and 2403 c.c. is the same with respect to that provided for by D. Lgs. 231/01 and, if its autonomy is identified, if this concept has been sufficiently enhanced.

In fact, if correctly identified, the principle of adequacy of the organizational model, besides being a justification with respect to the criminal hypothesis, could be elevated to a requirement that favors the economic development of the companies themselves and of the entire economic sector, preventing in practice not only the commission of crimes but also favoring a correct operation of the company with respect to the social context in which it carries out its activity.

**Keywords:** Company, Organisation, Liability, Adequacy

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## PRIVATE MUNIFICENCE AND MANAGEMENT OF MUNICIPAL STATES IN THE CITIES OF ROMAN ITALY: SOME EPIGRAPHIC EXAMPLES

*Aniello Parma* \*

The chapter presents some results of my broader research, now nearing completion, on the complex organizational and management skills of the *ordo decurionum* in the administration of the Roman cities in the centuries from the I to the IV A.D. of the empire. The research, through the direct testimony of this administrative activity, focuses on the determination of the sectors and methods of intervention of the agreement both in the local, political and social life, both above all in the management of the real estate assets of the city, both in the revenues deriving from their location or sale. I present some inscriptions from Italian cities that show examples of private munificence intended for the maintenance and restoration of public buildings for community purposes.

**Keywords:** Roman Social Life, Private Munificence, Municipal Administration, Ordo Decurionum, Decreta Decurionum, Latin Epigraphy

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# THE INTERNET, CULTURES AND RELIGIONS TOWARDS AN INTERCULTURAL WEB

Raffaele Santoro \*

Federico Gravino \*\*

The relationship between society and technology is osmotic. Technological innovations foster social interactions. These find, in the first one, instrumentals to respond to intercultural society's new needs. In particular Internet, a virtual territory represents a platform of diversity: the web allows the crossing of languages, cultures, and different social backgrounds. Digital language favored the network's birth because it's taken as a universal language. Therefore, the Internet represents a valid opportunity for growth and cultural mediation. Also confessional laws reserved privileged observatory for the impact of technological change on the development of society. Catholic Church, for example, pointed out that the Internet is an instrument to concretely realize the characteristic of "communion" of the Church and it showed a favorable attitude for "those wonderful technical inventions ... that most directly concern the man's spiritual faculties and offered new possibilities to communicate, with extreme ease, all sorts of news, ideas, teachings" (Barbour, 1993)<sup>1</sup>.

Also, the "new" needs of intercultural society call for institutions to promote tools that foster the development of diversity in the interaction. An active role in this regard is played by the United Nations Alliance of Civilizations (UNAOC). Since its foundation, it wanted to realize the goal of exploring the roots of actual polarization between society and cultures and promoting a practical action program to address this problem.

Moreover, the impact of technological fosters growth and development perspective to encouraging respect for spiritual and ethical values, for conscience and religious ones. It has been observed that "intercultural exchanges without religion ... don't improve understanding of one another" (Ventura, 2017)<sup>2</sup>. It's believed that religion plays a central role in the dynamics of social development, because the greater protection of this freedom corresponds to a decrease in social tensions and a growth in social and economic welfare. The protection of religious freedom must not be exhausted in theoretic declarations but it must be translated through concrete instruments of implementation.

An example is offered by intercultural applications. Apps designed to promote intercultural dialogue are different to avoid conflicts and global tensions. Proposalsweredifferent (Ibn Battuta, Earth Touchable, Sanskar), aimed at promoting specific issues such as gender equality, youth development, migrants integration, and facilitating dialogue between different cultures and civilizations. Specific dissemination was given to religious apps (ilRosario, Sindr, Asoriba, iSalam, Obo san-bin, Sanskar, Follow JC Go).

However, the development of these apps causes different security problems. Among these, particular attention is reserved to the protection of the user's privacy. The download allows the provider to access phone data (phonebook, contacts, photos, videos, locations) and personal data, among these religious ones. No problem if a social network allows the user to declare its own confessional membership among personal data that the user voluntarily chooses to publicate on own profile (as Facebook): it favors the conscious circulation of personal data and itallowsotherusers to knowalsoconfessionalmembership.

Instead, the use of a religious app can allow the provider of that to access different data which can know-users membership (or not). These data are subjects to processing by the app that often transfers them to other societies to realize goal unknown by the user. Italian Data Protection Authority orders apps provider giving essential information about processing data, its purpose, holder's identity, and controller of processing data: in this perspective transparency and free and informed consent

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<sup>1</sup> Barbour, I. (1993). *Ethics in an age of technology*. San Francisco, CA: Harper, San Francisco.

<sup>2</sup> Ventura, M. (2017). Preghiera a più voci. Non c'è silenzio nelle religioni (ma ci sono incomprensioni). *Corriere della Sera*. Retrieved from <https://www.intercultura.it/download/id:4747/>

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at processing data is offered to users.

The digital world causes significant problems with a concrete possibility to control personal data by users: it seems more appropriate to ensure transparency for personal data processing that takes action on control mode. The user, in fact, aware of the risks, can decide, step by step, if and which apps to download and if and for what purposes to allow the provider to use his data, also religious ones. From an intercultural perspective, the web is an available interactive tool suitable for promote society's welfare and development and also to promote the transition from multicultural integration to intercultural interaction.

**Keywords:** Social Media, Religious Denominations, App, Privacy Protection, Social Security



# RELIGIOUS FREEDOM AND CSR: INTERNATIONAL STANDARDS AND THE ACCOUNTABILITY ON HUMAN RIGHTS IN ITALIAN ETS

*Francesco Sorvillo* \*

International standards on business and human rights and on corporate social responsibility (CSR) define a system of rules currently in use to combat human rights abuses in modern industrial society.

On the basis of these rules, governments adopt the so-called National Action Plans (NAPs), which also Italy has recently adopted by approving the 2012-2014 Action Plan on Corporate Social Responsibility and the 2016-2021 Action Plan on Business and Human Rights.

In line with what is foreseen by these international sources, the NAPs require companies to report on human rights (accountability) in their social communications (social disclosure).

In this context, the protection of religious freedom plays a fundamental role as part of the range of needs that characterize modern intercultural societies.

As we have known, these themes are part of the bigger discussion concerning the relationship between economics, law and religion, which has been attracting the interest of scholars for some years now.

In fact, from a scientific point of view macroeconomic models have been developed by connecting freedom of religion and belief with economic performance.

Grimm, Clark, and Snyder (2014)<sup>1</sup>, for example, identify a positive link between freedom of religion and belief and competitiveness, estimating that in countries that promote these freedoms there is a reduction in social hostility which contributes to economic development.

These studies have stimulated reflection on human rights (and therefore on religious freedom), extending it to the field of corporate relations.

Lin (2013)<sup>2</sup> highlights the link between religions and corporate social responsibility, while Cui, Jo, and Na (2017)<sup>3</sup> confirm that managers of companies based in communities with a strong religious character are more committed to CSR, and show greater capacity to prevent and/or reduce the risks associated with business activities.

Among the common characteristics of these theories is the attention paid to human rights, which is considered an essential (pre-)condition for progress.

In this regard, it should be noted that the regulatory framework is constantly updated by initiatives such as the “UN Forum on Business and Human Rights” set up to develop the multi-level debate on business and human rights.

The reflections coming from the Forum are placed in an evolutionary context focused on the strengthening of corporate social responsibility and corporate accountability, which translates into the adoption of Codes of Ethics or Social Accountability.

This orientation influences the external communication of companies which, through reporting tools, are invited to clarify the possible impact of their actions on human rights, both internally and externally, mainly because of their impact on both territories and local communities.

This research in this respect is divided into two parts. The first part investigates the role of religious freedom in international standards on business and human rights and in the NAPs, with particular attention to the Italian National Action Plans. The second part, on the other hand, deals with the theme of accountability on human rights in the Italian non-profit area, a sector recently affected by the reorganization of the Legislative Decree No. 117/2017.

In this context, the processes of accountability provided by Article 14 of Decree No. 117 also involves entities who operate like association structures subjects with an associative structure (Third

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<sup>1</sup> Grimm, B. J., Clark, G., & Snyder, R. E. (2014). Is religious freedom good for business? A conceptual and empirical analysis. *Interdisciplinary Journal of Research on Religion*, 10, 1-19. Retrieved from <https://www.religjournal.com/pdf/ijrr10004.pdf>

<sup>2</sup> Lin, C. (2013). *Religions & corporate social responsibility*. Retrieved from <http://www.cliffordlin.com/religion-and-corporate-social-responsibility>

<sup>3</sup> Cui, J., Jo, H., & Na, H. (2017). Corporate social responsibility, religion, and firm risk. *Asia-Pacific Journal of Financial Studies*, 46(2), 305-340. <https://doi.org/10.1111/ajfs.12171>

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sector entities, and from now only ETS) who operate by expressing a certain tendency or pursue “different activities” with social religious and or cultural aims.

These instances, in particular, can have a specific interest in the accountability on human rights because the adherence to the so-called systems of non-financial reporting (NFR) clearly reaffirm values and cultures of which they are the direct expression.

From this point of view, the research clarifies the system of social accountability of these entities, providing food for thought for a strategic sector for economic development, both national and international.

**Keywords:** Religious Freedom, Corporate Social Responsibility (CSR), Accountability, Human Rights, Third Sector Entities

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# A CONCEPTUAL CONFLICT BETWEEN THE PEOPLE AND THE CITIZEN

*Cecilia Sosa Gómez \**

The people and the citizen, today, in a constitutional democratic state, wage a fight for space driven by the political power they contain, poorly understood by the representatives they elect.

When we speak of the people, democratic constitutions immediately associate the term to sovereignty and acknowledge the people as depositaries of that sovereignty; as in “we, the people ...”, “national sovereignty lies with the people”, “we, the people's representatives”, or “it is the will of the people to ...”; thus, public authorities are temporary depositaries of sovereignty when they are elected by the people in whose name they are to exercise such sovereignty; and it has also been used to put illegitimate governors in power, legitimized by the manipulation of the people's support.

The truth is that the concept of ‘the people’ has been elastic throughout the political spectrum, used by all political colors.

What do the two concepts have in common? Which is stronger and predominant? Has their content changed?

The history of the two concepts in face of the evolution of society, public life and life in the media that is inseparable from advertising and propaganda and particularly from the development of interpersonal communications, has begun to affect its classic conceptualization and demands greater precision in its application and use. More so when the concept of ‘citizen’ goes from a sense of belonging to a country to being the holder of rights and obligations, evolving from a civil citizen to a political citizen, to a social citizen.

Thus, a citizen goes from being a member of an organized society to being the vitally important axis of a country and its decisions on general development, which implies a change that demands the formation of citizenship, since this is currently a space between authority and private life and constitutes a counterweight to government, which brings us to teaching it at school.

**Keywords:** People, Citizenship, Sovereignty, Representation, People's Power, Rights, Public Authority, Education in Citizenship

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# DISCRIMINATION AGAINST WOMEN MIGRANT WORKERS IN THE ITALIAN AGRICULTURAL SECTOR: MAIN ISSUES AND POSSIBLE NORMATIVE SOLUTIONS

*Fulvia Staiano* \*

In Europe and Italy, female migrant workers are not predominant in the agricultural sector. According to the latest data published by Eurostat, within EU Member States women make up on average 35.1% of the labour force in the agricultural sector<sup>1</sup>. This is also observable, more broadly, with reference to the presence of foreign workers in the European and Italian labour market. In Italy, although the incidence of foreign workers in the agricultural sector has tripled between 2007 and 2017 – from 5.3% to 16.6% of total workers – this phenomenon mainly concerns male workers. Foreign workers are in fact more (and disproportionately) present in the sector of services and care for families, with particular reference to children and the elderly<sup>2</sup>. Nonetheless, the presence of female foreign workers in the agricultural sector is by no means negligible from a qualitative point of view. In a sector of the labour market already characterized by difficult working conditions, a high risk of exploitation and few legal and practical protections, foreign agricultural workers encounter specific problems due to their sex, their migratory status, and their nationality. Such problems are worthy of attention and specific analysis beyond the numerical data concerning their presence in the Italian and European agricultural sector.

In light of these observations, this research aims to carry out an analytical reflection on the main issues affecting women migrant workers in the agricultural sector. The starting point of this reflection will consist of the data on the experiences of discrimination of agricultural workers in the region of Campania gathered by Project *Net.Work – Rete Antidiscriminazione* between June and December 2017 in the Provinces of Naples, Salerno and Caserta. In this context, special attention will be devoted to the phenomenon of the sectorialization of the Italian labour market and to the issue of effective access to the protections established by Italian law and jurisprudence in the matter of maternity protection and more generally of work-family balance. The research will also analyse the main forms of discrimination (and coercion) experienced by women migrant workers, also with reference to the lack of legal recognition of multiple and intersectional discrimination. In this context, the link between the lack of access to socio-economic rights and the existence of phenomena of abuse and violence on the part of employers will be discussed to highlight the inadequacy of regulatory interventions exclusively focused on criminal repression. The research will then end with a reflection on the most effective legal and normative approaches to tackle the discussed issues.

**Keywords:** Discrimination, Agriculture, Women Migrant Workers, European Union Law, Italian Law, Human Rights

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<sup>1</sup> Eurostat. (2017). *Agriculture, forestry and fishery statistics*. Retrieved from <https://ec.europa.eu/eurostat/documents/3217494/8538823/KS-FK-17-001-EN-N.pdf/c7957b31-be5c-4260-8f61-988b9c7f2316>

<sup>2</sup> IOM Italy. (2017). *Online the briefing on migrants' contributions to Italy's welfare*. Retrieved from <https://italy.iom.int/en/news/online-briefing-migrants%E2%80%99-contributions-italy%E2%80%99s-welfare>; IDOS Study and Research Centre. (2018). *Statistical dossier on immigration*. Retrieved from <http://www.fes-italia.org/media/15751.pdf>

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## AT THE ROOTS OF WELFARE: CITIZENSHIP, HUMAN DIGNITY AND FUNDAMENTAL RIGHTS

Giovanni Tarantino \*

As is known, the welfare state is the most evolved form of Social state. Citizenship, as Catania recalls, “è quel complesso di diritti che vengono riconosciuti a chi ha lo status di cittadino. Sia il Welfare State sia la cittadinanza, lo ripetiamo, presuppongono e in qualche modo non possono concepirsi se non sul presupposto del concetto dello Stato nella sua forma più evoluta: in quanto Stato costituzionale. [...] Per un costituzionalismo come quello del secondo dopoguerra, in cui l'unica forma di legittimazione ammissibile è fondata sul rispetto dei diritti fondamentali dell'uomo (così come li enuncia la Dichiarazione del 1948), la cittadinanza non può più essere concepita come riconoscimento dell'appartenenza ad uno Stato-nazione, ma diventa la condivisione di uno status di diritti civili, politici e sociali e di valori universali, la cui caratteristica astratta e concettuale è esattamente quella di non essere circoscrivibili ad etnie specifiche, ma di far riferimento ed essere logicamente estensibili a tutti gli uomini, prescindendo dalla appartenenza etnico-culturale, dalla lingua, dalla religione, e dalle peculiarità originarie o politiche specifiche” (Catania, 2015, p. 216<sup>1</sup>). This set of rights, on reflection, makes concrete a very strong normative principle: that of human dignity. And in fact, there are numerous normative texts, both international and national, following the Second World War, in which there is a duty to respect dignity as an essential constituent of the concept of human nature. Dignity was therefore considered as the source of the fundamental rights of individuals. The deepening of the concept of dignity, carried forward to have a broad vision of the concept of human nature, better than the different concepts of human nature, led to its distinction in natural moment and relational-moral moment. The first was the foundation of the theory of “dignity as a dowry”, the second the foundation of the theory of “dignity as a performance”. The variety of proposed models of human nature, considering that fundamental rights are the constituents of human nature, has recently led to an uncertain and difficult definition of the same.

**Keywords:** Welfare, Citizenship, Human Dignity, Fundamental Rights

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<sup>1</sup> Catania, A. (2015). *Filosofia del diritto. Introduzione critica ai concetti giuridici*. Turin, Italy: Giappichelli.

## CONCEPTIONS OF HUMAN NATURE AND RIGHTS

*Maria Lucia Tarantino \**

Human nature is biologically and culturally oriented towards respect for life, freedom and the environment. Therefore it does not possess a tendency towards the globalisation of the technocratic paradigm of the society of the present time.

In the human being's nature, both universal and individual principles are present. These have been known since the Greek-Roman era (Aristotle-Cicero), they place themselves as a classical distinction which returns in the Middle Ages (St. Thomas), it has become part of everyday culture, undergoing insignificant variations in time due to the different extent of man's nature and privileged by the author who reintroduced it.

In the end, however, in the affluent society, which would have brought the biological evolution of man to a final point, the evolution of humanity could only have been cultural, so we have arrived at placing at the base of the nature of man only culture and not nature and culture together, so undermining the basis of the classical distinction between universal principles and individuating ones. Principles that exist in the nature of every man even if the individuating ones in a different way.

One of the consequences of the distinction between universal and individuating principles of human nature is the distinction between basic or natural rights and individual rights; these initially should characterize the single person but also reinforce the practice of fundamental rights. The first are rights of the species and as such have a universal value. Accordingly, UNESCO published the *Universal Declaration of Human Genome and the Rights of Man* (1997). Its message is that individuating rights must never be set against fundamental rights. If this happens humanity is living in a decadent phase of its history. Today we are trying to go beyond the anthropological traditional-natural paradigm and to open the way to the anthropological transhuman or posthuman paradigm. These two anthropological paradigms gradually bring us to the return of *homo praedatorius*, which historically is materialised in various forms of individualism which have contributed to the birth of the term *gender*. Human beings as individuals live in the secular perspective, a supporter in this case, of the only culture at the foundation of the figure of a man.

This situation has encouraged, already for a while, the overcoming of the phase of lack of respect for the fundamental rights and a return to the respect of the principles that characterize the human being as a person, such as freedom and responsibility, unselfishness and dignity, sociality, solidarity and subsidiarity, and finally the continuity of life of mankind.

**Keywords:** Man's Nature, Rights, Person

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# PUBLIC SECURITY AND CRISIS OF WELFARE STATE

*Giuseppe Tropea* \*

*Annalaura Giannelli* \*\*

The chapter examines the downfall of the “criminological welfarism” as a mirror of the wider crisis, or at least restructuring, of the welfare state. From this perspective, security policies often replace social policies. The debate on the configurability of a right to security is explicative: some believe it can be framed in a comprehensive downsizing of welfare policies, in order to promote different priorities in social access to economic, political and legal resources. It seems more appropriate to speak of “security of rights” or “right to rights”, in order to highlight the relevance of legal certainty and clarity of legal sources and normative statements, to avoid uncontrolled drift towards an authoritarian state of prevention, characterized by the normalization of the exception and the emergency.

To configure these topics, already investigated by philosophy and sociology, with the tools of administrative law, a first test bench in the link between welfare state and privatization of security. These phenomena can't really be analyzed by the point of view of the “horizontal subsidiarity”, as from these phenomena raise big issues of a legal framework and compliance with the traditional cornerstones of public law and constitutional principles on the protection of fundamental rights and human freedoms.

The issue cuts across the question of the private patrols, the liberalization of security services, the outsourcing of the prison management, the privatization of public spaces, as it is happening for the so called gated communities.

The phenomena are quite widespread in the USA, but they are now catching on also in Europe and in Italy in particular. The controversial notion of “urban security” is itself questionable. It is not in line with the traditional concept of “public order and security”, as the adjective “urban” designates the place where are most perceived problems arising from global insecurity, from socio-economic insecurity (due to the crisis of 2007) and from the so called “strategic insecurity”, now assumed above all by the Islamic fundamentalism.

The risk, therefore, is into a certain way of understanding the interweaving of vertical and horizontal subsidiarity: the state legislation of last years has ended up attracting, in a form of “ascending subsidiarity”, the identification of policies, making everything as a form of “minor public security”, often at the expense of alternative models descending from regional legislation and good practices (especially at the local level, characterized by the attitude to pacific coexistence, social inclusion, urban regeneration of the suburbs).

A recent example of this phenomenon is given by a directive of the Minister of the Interior inviting Italian prefects to issue anti-degrading ordinances in order to keep away from the “red areas” (such as historic centers, tourist sites, areas close to schools and squares particularly frequented) drug dealers, thieves, muggers and squatters. The measure self-qualifies itself as an expression of policies “promoting the welfare of the community”, even though it is clear that the idea of security of which this measure is emanation (logics cultivated also in the name of a misunderstood principle of horizontal subsidiarity) end up being a clear substitute for the implementation of concrete welfare instruments (the freezing of the fund for urban regeneration and security in the suburbs).

The aim of the chapter is to illustrate the most evident consequences, in a perspective of administrative law, of the welfare state crisis in terms of public security, and to propose alternative interpretations for a review of public policies.

**Keywords:** Security, Welfare State, Horizontal Subsidiarity

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## FAMILY AND MULTICULTURAL SOCIETY

*Angela Valletta \**

Family relationships include different fields of life, registering a great conflict among the intersection of different cultural models. In this framework of great complexity, there is the immigration in Italy of non-European and European people, which represents a phenomenon destined to gain great significance which is no longer conceivable or sustainable only in terms of emergency. Indeed, the immigrant suffers the breakdown of a monolithic cultural model and the lack of a unique reference point of the socio-politic organization of the territory. Therefore, it is necessary to pay attention to the problems which the children of immigrants need to face, and one of the most obvious difficulties is that arising from the cultural and social uprooting of parents: their feeling of being foreign leads them to an even more rigid trust to the model of the culture of origin, causing non-integration into the new social model. Feeling lost from a cultural perspective and threatened from an economic and social point of view, they are unable to achieve a coherent synthesis between their educational models and the aspirations of integration for their children.

**Keywords:** Religious Liberty, Family, Education of Children, Multicultural Society, Cultural Identity

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# ABSTRACTS

## SOCIAL AND ECONOMIC SECTION

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### THE LANDSCAPE OF WATER CONFLICTS: ACTIONS FOR A FAIR MANAGEMENT

*Massimiliano Carioni* \*

*Federico de Andreis* \*\*

*Anna Maria Verrillo* \*\*\*

The debate on the right to get water has increased significantly and has taken on greater importance in recent years. Today, in fact, many conflicts are linked to the management of water resources, but this reason is not enough analyzed and often left out, by the great debates about international peace, in different areas of the world.

The civil society, in fact, continues to do its best in every part of the world to remove the management of water policies from the exclusive decisions of governments, especially when the executive powers are subjected to the policies of the World Bank – which includes two international institutions such as the IBRD (International Bank for Reconstruction and Development) and the IDA (International Development Agency), having the goal of fighting poverty and of organizing aid and funding for troubled states – and the IMF (International Monetary Fund), an organization international with a universal character.

This contribution aims to analyze the problem of access to water and to show a clear awareness of this actual issue, with respect to supranational institutions still very reluctant to define water as a human right and to national governments and to political parties incapable of really making themselves spokesmen of citizens' and humans' interests.

Therefore, we can state that it is up to pressure groups and to non-governmental organization (NGOs) the task to dialogue with the institutions, to oppose discouraging choices, to propose legal, political and management solutions, capable of guaranteeing a democratic government of water, through actions showing the real capacity for self-determination peoples, as subjects capable of moving politically in an autonomous manner and of collaborating internationally with each other for the promotion of their rights and international solidarity.

The action of civil society is based on the definition of the right to water, already implicitly established by the International Covenant on Civil and Political Rights and by the International Covenant on Economic, Social and Cultural Rights better known as the Covenants of 1966. The right to water represents a right implicitly referred to the definition of the right to life, health and development, rights enshrined by the international instruments of mandatory laws and by the national constitutions of all the countries of the world.

Furthermore, it must be considered how the right to water is already explicitly enshrined in the main instruments of international humanitarian law, in the Convention on the Rights of the Child and in the Convention on the Elimination of All Forms of Discrimination against Women.

The right to water must use management contribution, which must include a progressive tariff and a minimum free quantity of water available for each individual citizen.

Access to water is recognized by the United Nations as a human right, reflecting the fundamental nature of its basics in every person's life. Lack of access to safe, sufficient and affordable water, sanitation and hygiene facilities has a devastating effect on the health, dignity and prosperity of billions of people, and has significant consequences for the realization of other human rights.

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International human rights law demands a specific focus on those people who do not fully enjoy their rights, leading to explicitly 'pro-poor' development in many countries. It also requires a commitment to progressively reduce inequalities by tackling the discrimination and stigmatization that can lead to people being excluded from, or marginalized in relation to, water and sanitation access.

The issue is actual and the objectives of this research are to open a debate about the actual situation and to provide coherent and reliable data and information on key water trends and management issues.

**Keywords:** Water, Human Rights, International Law, Conflicts

# ARCHEOLOGY IN ALBANIA BETWEEN CULTURE, POLITICS AND ECONOMY

*Neritan Ceka* \*

The beginning of archaeology as a scientific discipline in Albania corresponds with the First World War as part of the activities of the Austro-Hungarian army. Between the two world wars archaeology linked to the foreign policies of France and Italy was developed and the first extensive excavations were carried out in Apollonia and Butrint, preferring Greek or Roman colonial archaeological sites. Especially the Italian mission directed by L. M. Ugolini had precise political aims, instructed by the fascist government of the time.

The installation of the communist regime has cancelled all the foreign archaeological concessions and has favoured the creation of national archaeology, oriented towards the elaboration of historical theses with nationalistic content. In this environment the Albanian archaeologists trained in Austria, Italy but also in Eastern countries like Russia, Bulgaria and Hungary have profited to develop a serious research on the international level. In the field of prehistory, it was mainly worked to clarify the processes of the formation of the Illyrian population, considered as the ancestor of modern Albanians. Important centres of prehistoric culture such as Maliq, Podgorie, Mati, Gajtan, etc. were discovered, being part of the prehistoric Balkan map.

In the field of antiquity, the research was directed towards Illyrian urban centres in the background of the Greek colonies of Apollonia and Dyrrhachium, such as Byllis, Amantia, Antigonea, Dimale, discovering important monuments and shedding light on the Illyrian culture of the Hellenistic period. The Greek and Roman colonies were major excavation sites, having as their purpose the creation of archaeological visited centres such as Apollonia and Butrint, in the context of the so-called vulgarization of culture. The third direction was the study in the archaeological level of the passage from antiquity to the medieval era when the process of the formation of the Albanian people in the base of the ancient Illyrian population was realized.

The creation of the great archaeological visited complexes and archaeological museums in Tirana, Durrës, Apollonia, etc. was another result of the professional work of Albanian archaeologists. The difficulties created by the lack of contact with foreign colleagues, professional literature, participation in international conferences, have had a negative impact on the scientific profile of Albanian archaeology of the communist era. In this period the positive impact of the cultural fund created by archaeology in the local development and of tourism in general was not taken into consideration.

After the fall of the communist system, Albanian archaeology had a period of openness towards collaboration with foreign colleagues, mainly from Italian, French, German and American universities, but also for the creation of a new generation of Albanian archaeologists, specialized abroad. The other novelty of this period was the impact that the archaeological parks and museums, created in the years of isolation, had in the development of local communities and especially cultural tourism. Politics, no longer involved in research programs and theses, had a negative impact on the dynamics of research and archaeological excavations, drastically limiting financial funds and intervening in the administrative part of research institutions and the management of archaeological heritage.

The presentation of the main archaeological sites of Apollonia, Dyrrhachium, Butrinto and Byllis will occupy part of the time of my communication, to create for the presents the image of the rich archaeological heritage of Albania and the ample possibilities of their integration in the projects of local development and diversification of tourism in general.

**Keywords:** Archeology, Culture, Tourism, Local Development

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# CARE SAFETY, CLINICAL RISK MANAGEMENT AND PATIENT WELL-BEING: AN ECONOMIC-BUSINESS APPROACH

*Ubaldo Comite \**

The health service and its resources represent a complex system in which multiple heterogeneous and dynamic factors interact, such as the plurality of health services, the different management models, the specialized skills, the different professional, technical-health and economic-administrative roles, the heterogeneity of processes, the specificities of individual health needs and the results to be achieved. In the health sector, in fact, there are many factors that combine to define the “degree of risk” of the system, these can be schematically grouped into the following categories:

1) Structural-technological factors represented by the characteristics of the healthcare facility, the plant (planning and maintenance), the safety and logistics of the environments, the equipment and instrumentation (operation, maintenance, renewal), infrastructure, networks, digitalization and automation.

2) Organizational-managerial factors and working conditions represented by the system’s organizational structure (roles, responsibilities, work distribution), human resources policy and management (organization, leadership styles, reward system, supervision and control, training and updating, workload and shifts), from the organizational communication system, from the ergonomic aspects (including workstations, monitors, alarms, noise, light) and from policies for the promotion of patient safety (guidelines and diagnostic-therapeutic pathways, error reporting system).

3) Human factors (individual and team) that are identified in the characteristics of the personnel (perception, attention, memory, ability to make decisions, perception of responsibility, mental and physical conditions, psychomotor skills), in professional skills, in interpersonal dynamics and group and in the consequent level of cooperation.

4) User characteristics such as epidemiology and socio-cultural aspects (demographic aspects, ethnicity, socio-economic environment, education, ability to manage situations, complexity and simultaneous presence of acute and chronic diseases), the social network.

5) External factors that include legislation and legal obligations, financial constraints, the socio-economic-cultural context, the influences of public opinion and the media, professional associations and public protection and insurance companies.

In this context, the realization of safe and reliable care is inspired by the principle of pursuing the defense of life, the protection of the physical and mental health of the sick person and the relief of suffering. The legislator has set the problem of the prevention of adverse events related to the provision of health services, and the related consequences, as the foundation of the problem. However, observation of the facts indicates that the actions taken to reduce the incidence of avoidable adverse events in healthcare, even in developed countries, are still insufficient with economic effects that are unsustainable. The negative economic effect occurs in particular in litigation and compensation, in diagnostic-therapeutic treatments, in negative publicity and damage to reputation, as well as in social costs in the form of growing morbidity of the population, reduction of working capacity, loss of confidence in the health system and institutions. It has therefore become a priority to make changes in health organizations to meet regulatory obligations as well as to satisfy ancient, and still current, ethical and deontological principles to guarantee health.

As in other complex systems, accidents and errors that can be assimilated theoretically to an enterprise risk can also occur in the health sector, which, even intuitively, appears to be proportional to the complexity of the system itself.

The purpose of this work is to provide a possible systematic answer to the problems concerning the issues of care safety and risk management related to the provision of health services, which still today and in countries with highly evolved health systems including Italy, find no adequate solution. All through an economic-business approach.

**Keywords:** Health Authorities, Management, Clinical Risk, Welfare, Patient, Safety

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# THE PHENOMENON OF MIGRATION: THEORIES AND EMPIRICAL EVIDENCES

*Salvatore D'Acunto* \*  
*Francesco Schettino* \*  
*Domenico Suppa* \*\*

The potential growth of migration flows affects many different areas of the world, for example: from South America to North America, from Africa to Europe. The problem of migration is current and relevant, the need for some form of political intervention is urgent, but for this purpose, it is necessary to deepen the knowledge of the phenomenon and its causes. In this document we propose an analysis of current migrations from a critical perspective with respect to more traditional approaches, generally based on the “economic convenience” of rational individuals with respect to migration. Indeed, social and cultural factors can push migratory flows, playing a far more important role than the often false perspective (due to asymmetric information) of an improvement in the material living conditions of migrants. After having described the dimensions and the geography of the phenomenon, the standard explanations and their elements of weakness are exposed. Furthermore, some possible alternative explanations are proposed, contemplating determinants not included in more traditional analyses. Therefore, the discriminating elements between the different theoretical approaches are the subject of an econometric test, on transnational data ranging from 1980 to 2012. Finally, the results of the analysis are summarized together with their implications in terms of adequate policies to tackle migration phenomena.

**Keywords:** Migration, Inequality, Low Opportunity

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# NEW CHALLENGES OF THE GLOBAL ECONOMY: HUMAN TRAFFICKING AND CIVIL AVIATION ORGANIZATIONS

*Federico de Andreis* \*

*Giuseppe Iarrusso* \*\*

*Sara Petruzzo* \*\*\*

Human trafficking, or modern slavery, is an old problem. However, in the past few decades, human trafficking has become a global concern, with a global dimension, even because globalization has made human trafficking an easier task for criminal organizations.

Human trafficking is the trade of humans for the purpose of sexual slavery, forced labour, commercial sexual exploitation, forced marriage, extraction of organs or tissues, including for surrogacy and ovary removal.

Human trafficking can occur within a country or trans-nationally and it is considered as a crime against the person because of the violation of the victim's rights of movement through coercion and because of their commercial exploitation.

We can state that human trafficking represents a trade in people, especially women and children, and does not necessarily involve the movement of the person from one place to another, even it happens quite often.

According to the ILO (International Labour Organization), this “trade” is one of the fastest-growing activities of trans-national criminal organizations and must be condemned as a violation of human rights by international conventions.

This research will concern the study of human trafficking but, in order to carry out that analysis, the history of the evolution of human rights will be traced as well as its remarkable and innumerable changes, in legislation but also in recognition, due to the major change related to globalization.

Each human being, in fact, is entitled to have its human rights respected, but it can be difficult to identify the human right and their evolution, as a consequence of the globalization forces.

One of these consequences is that, due to the economic force of globalization, the world's inequalities are constantly growing: millions of people, in fact, continue to suffer from forced evictions, inadequate access to education and basic health treatment and appalling working conditions and they could represent the ideal victims of human trafficking.

Globalization, in its most literal sense, represents the process of making, transformation of things or phenomena into global ones. It can be described abstractly as a process by which the people of the world are unified into a single society and function together. This process is a combination of economic, technological, socio-cultural, and political forces and aviation represents one of its result and also one of its instrument, because constitutes “the business of freedom” and also connects businesses to markets, reunite families and friends, and facilitate tourism and cultural exchange.

Unfortunately, the global air transport system can also be exploited by criminals for the illegal trafficking of men, women and children but, although the responsibility for identifying, apprehending and prosecuting those perpetrating human trafficking rests with governments and national law enforcement agencies, the airline industry recognizes that it can play an important role in helping to prevent this crime.

After defying the existing legislation on human trafficking and smuggling and studying in deep the role of international organizations on this matter, the research will focus on the role of aviation organizations in the fight against human trafficking.

Aviation is one of the primary modes of transportation utilized by traffickers and the growth of the aviation market also increased the profits of this trade.

Preventing the trafficking of human beings is one of the biggest issues for civil aviation, considering that airlines could undertake a number of actions to fight this trafficking; i.e. sharing of

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best practices, staff training and reporting; in fact, once trained, airlines, airports, ground handling, security screening and customs staff can provide an important source of intelligence to prevent this “new” global issue.

In the final part of this research, we will focus on the steps, useful to actuate correct policies in the aviation organizations to fight this illegal but fruitful business. The first step issue is increasing awareness; the second step is training aviation organizations’ personnel in recognizing victims and perpetrators. Due to the growing numbers of victims being transported by air, personnel training on identifying and responding to trafficking in persons becomes one of the best assets in the global crusade against this issue.

Human trafficking and the consequent are serious and widespread crimes, often hidden, that affect millions of women, men and children across the globe. Over 66% of all trafficking victims are estimated to be transported across at least one international border (UNODC, 2018<sup>1</sup>) and quite often airports and airlines are places used by traffickers and victims. There is an under-representation of transportation-related literature on human trafficking. The literature on sex trafficking dominates the field of human trafficking. Research networks and research collaboration between the source and destination countries is important. Future research plans need to focus on transportation and organizational issues in order to define possible ways to prevent it and on exploited/trafficked laborers, in order to know better them and to be able to recognize the victims.

Generally, this research aims to give full awareness about what modern slavery and human trafficking are and how affects the aviation sector.

**Keywords:** Human Trafficking, Globalization, Human Rights, Aviation

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<sup>1</sup> UNODC. (2018). *Global report on trafficking in persons*. Retrieved from <https://www.unodc.org/unodc/data-and-analysis/glotip.html>

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## SOCIAL TOURISM AND WELFARE

*Francesco Favia* \*

*Iris Cekani* \*\*

The social aspects of tourism and its recognition as an inalienable right make it an element of welfare. Saint-Denis Paris 2008-2009 European project where holidays were financed to “groups of difficult citizens” which resulted in a reduction in social tensions and petty crimes.

Tourism and above all social tourism is an element of human wellness. The term social tourism made its appearance in the late forties and early fifties of the twentieth century. It indicated the tourist activities promoted by non-profit organizations in favor of the “popular classes”. Others argue that social tourism presents itself as a transversal phenomenon that affects various subjects and organizations in various ways, as well as different types of tourism, including residential ones, and that therefore the flows would be generated by socialization reasons. In other words, social tourism is independent of the resource that characterizes the holiday and focuses on the satisfaction of social needs. According to the authors of this study, the distinctive aspects of social tourism are those of an organized formula, aimed at a homogeneous public, which proposes characteristics of sociality and protects weak categories. Today few speak of social tourism. We prefer other terms, more “politically correct”, but also more generic. The problem is not just terminological. Social tourism is in the shade also because many do not consider it possible to hypothesize a different way of conceiving and doing tourism. In our country, however, albeit painstakingly, it survives and indeed shows a recovery in tourism understood as a service, a moment of encounter, relationship, affirmation of the person, exchange of cultures and mutual experiences. In our research we will see one of these socializing aspects linked to an Italian phenomenon, that of second homes and which relationships are intertwined between individuals.

**Keywords:** Tourism, Social, Welfare, Law, Territory, Wellness, Socializing

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# SOCIAL POLICIES OF CASTILLA-LA MANCHA: A CASE STUDY

*Fernando García Chamizo \**

*“I want to be the president of all but if I can and if I may, more the president of people with disabilities”* (García-Page as cited in Castilla-La Mancha Media, 2019<sup>1</sup>).

In Spain, social welfare competencies are transferred to each of the 17 autonomous communities. Among them is Castilla-La Mancha, a vast region located in central Spain, mainly rural with about 2 million inhabitants, spread over 919 municipalities.

Providing homologous social services in such a geographically dispersed territory (79,463 square kilometers) is not a simple task.

The regional government has endeavored that in both the smallest and least populated towns there are attentions and benefits similar to those of the most populous provincial capitals, such as Albacete, Guadalajara and Toledo.

What programs have been carried out in the last years in the social field and what are the future plans in the form of laws:

- the Early Attention Law, to ensure that it is universal and public, inclusive and coordinated from 0 to 6 years;
- the Law on Access to the Environment of Persons with Disabilities;
- the development of the Law of Protection and Guaranteed Support of Persons with Disabilities, which was unanimously approved in the regional courts of Castilla-La Mancha, whose enforcement decrees are already being drafted.

Let us start from the current reality that in Castilla-La Mancha there are 180,000 people with some type of disability. Every day, 10,000 of them need to receive attention, for which over 2,000 professionals work in the 250 resources in the region. In the last 4 years, about 200 new professionals have been incorporated into this Third sector, as it is also called.

The Board of Communities of Castilla-La Mancha wants to demonstrate its commitment to disability and in July 2019, for the first time, it has established a general direction of disability in its structure.

Some rankings, such as the Dependency Observatory (2018) on real 2017 data set Castilla-La Mancha in second place in Spain with a grade of B, in relation to other autonomous communities, in terms of dependence, with almost 60,000 dependents included in the public dependency system in May 2019 (IMSERSO<sup>2</sup>). Attention coverage has increased from 56 percent in 2015 when Castilla-La Mancha was ranked 17th in the ranking previously referred to 90 percent.

What budget items does the regional government intend to invest (10,000 million euros a year of global budget) and how many are the potential beneficiaries of them? Knowing that the objective is that the disability system provision system is leading in Spain.

Currently, in the different specialized care devices such as occupational centers, training services, day centers, sheltered homes, residences, centers for serious disabilities or early care centers Castilla-La Mancha dedicates 1.9 million euros a day to the so-called Welfare, Health, Education and Social Welfare State.

This autonomous community wants to enhance an effort to support the incorporation into the labor market of people with disabilities and, therefore, intends to legally reserve 10% of public procurement places to special employment centers. In addition, it will also modify the Law on access to public service so that the agendas and tests are adapted to people with intellectual disabilities.

**Keywords:** Spain, Castilla-La Mancha, Dependency, Third Sector, Social

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<sup>1</sup> Castilla-La Mancha Media. (2019, July 5). *Emiliano García-Page toma posesión como presidente del Gobierno de Castilla-La Mancha: así ha sido el acto*. Retrieved from <https://www.cmmedia.es/noticias/castilla-la-mancha/toma-de-posesion-de-garcia-page-presidente-gobierno-clm/>

<sup>2</sup> <https://www.imserso.es/InterPresent2/groups/imserso/documents/binario/estsisaad20190531.pdf>

# TERRITORIAL GAPS IN WELFARE SPENDING IN ITALY

*Pietro Iaquina* \*

*Francesco Sassone* \*\*

The share of GDP dedicated to welfare has always been an indicator of the development of a population. The higher this quota, the greater the development. But what happens within a nation if sub-national structures devote funding to this sector (as in the case of Italy)?

It is very interesting to study the evolution of public spending dedicated to welfare through the database of the Cohesion Agency<sup>1</sup>, which has data on territorial public accounts with a detail that in some items also reaches the municipal level.

This opportunity makes it possible to highlight possible differences, at the local level, in spending dedicated to welfare, in a profound detail, which makes it possible to investigate also the individual general items.

From this, it will be possible to construct synthetic indexes of inequality, so as to be able to create rankings with respect to the location of the expenditure.

Furthermore, the demographic aspects, which are always discriminated at the territorial level, highlight the future scenarios that will occur at the population level, and it will be quite easy to cross-reference population data with data on welfare spending and create an explanatory model that can adequately interpret the relationships existing between these quantities.

**Keywords:** Share of GDP, Development, Public Spending

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<sup>1</sup> Agenzia per la Coesione. (2019). *Sistema CPT: on line il nuovo aggiornamento 2019 dei Conti Pubblici Territoriali con i dati consolidati al 2017*. Retrieved from [https://www.agenziacoesione.gov.it/news\\_istituzionali/sistema-cpt-on-line-il-nuovo-aggiornamento-2019-dei-conti-pubblici-territoriali-con-i-dati-consolidati-al-2017/](https://www.agenziacoesione.gov.it/news_istituzionali/sistema-cpt-on-line-il-nuovo-aggiornamento-2019-dei-conti-pubblici-territoriali-con-i-dati-consolidati-al-2017/)

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# TOURISM EMPLOYEE WELFARE MEASURES IN TOURISM AND YOUNG EMIGRATION: THE CASE OF ALBANIA

*Brunilda Licaj* \*

Tourism is considered one of the most important sectors for the development and growth of a country. Albania has a high potential in the development of this sector in all its aspects such as seaside, cultural, mountain, rural, historical, medical, adventure tourism. Employee welfare includes the schemes that benefit the employees working in the company. Although it is a costly procedure for the companies yet it is needed as it helps in the overall development of the employees.

The chapter investigates the effects of the tourism boom and how employment changed in Albanian tourism market in the last years. The analysis is focused on the real young emigration rate in the tourism sector as a result of welfare improvements in Albanian economy and also a limited soft investment in tourism.

This study helps to improve the performance of the human resources in Albanian tourism industry where the number is expected to rise by 3.2% in 2017 to 275,500 jobs and rise by 2.9% pa to 368,000 jobs in 2027.

The study analyzes the facts gathered in 20 accommodation structures related to the workforce. Part of it focuses on the analysis of the migration of former students of tourism profiles at Durres A. Moisiu University.

At the end of the chapter, recommendations are given that may well affect the policy of the state regarding employment in tourism and management in the future in order to fully diversify them.

**Keywords:** Tourism Employee Welfare, Employment, Soft Skills, Emigration, Professional

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# PROMOTING THE WELLBEING OF UNEMPLOYED: A PILOT STUDY

Minou Ella Mebane \*

Maura Benedetti \*\*

Several futurists are convinced that in the next decade's AI (artificial intelligence), robotics and other technologies will make a large part of today's jobs obsolete. In 2013, Oxford University researchers estimated that 47 percent of U.S jobs are at risk of automation in the next two decades (Frey & Osborne, 2013<sup>1</sup>). AI will decimate jobs, reshape what works means and how wealth is created (Ford, 2015<sup>2</sup>; Lee, 2017<sup>3</sup>; Irwin, 2018<sup>4</sup>). AI will reduce many low-paying jobs (e.g., factory workers, construction workers and drivers) but also some higher income ones (e.g., radiologists and telemarketers, paralegals) (Lee, 2017<sup>3</sup>). This could increase the number of unemployed middle-aged workers, who might find it harder to adapt to the digital age workplace.

While much attention has been given to youth unemployment, few psychologists have explored how to support older people who are unemployed, and how being unemployed affects their well-being and health. Recent studies have shown that it is harder for unemployed adults to rejoin the job market: as employees become older, they tend to remain unemployed for longer and their possibility of finding a job diminishes (Böheim, Horvath, & Winter-Ebmer, 2011<sup>5</sup>). Analyzing recent OECD data, Axelrad, Malul, and Ruski (2018)<sup>6</sup> stated that unemployed workers aged 45 and older tend to struggle more in finding new employment. On average, the hiring rate in OECD countries for people aged 50 and over is less than half that for workers aged 25-49 (Axelrad, Malul, & Ruski<sup>6</sup>). Furthermore, Lahey (2005)<sup>7</sup> highlights the negative impact of age discrimination on older workers.

People who lose their job at the age of 50 or 60 can experience "employment trauma". Considering that age issues may lead to more jobless older workers becoming marginalized, it is important to find new tools to help older unemployed people to cope better with being jobless and increase their wellbeing. As community psychologists, we believe that empowering such people is a crucial first step in this direction. Helping jobless older people obtain greater sociopolitical empowerment is an important way of helping them deal with the particular difficulties of unemployment and implement changes in their lives and increase their wellbeing. Several studies (Fisher, 2008<sup>8</sup>; Aday & Kehoe, 2008<sup>9</sup>; Rogers & Robinson, 2004<sup>10</sup>) have shown a positive relation between empowerment and wellbeing.

It is important for community psychologists to find new tools to address the increasing number of older workers who become unemployed. Previous research (Francescato & Zani, 2013<sup>11</sup>; 2017<sup>12</sup>)

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<sup>1</sup> Frey, C. B., & Osborne, M. A. (2013). *The future of employment: How susceptible are jobs to computerisation?* Retrieved from [https://www.oxfordmartin.ox.ac.uk/downloads/academic/The\\_Future\\_of\\_Employment.pdf](https://www.oxfordmartin.ox.ac.uk/downloads/academic/The_Future_of_Employment.pdf)

<sup>2</sup> Ford, M. (2015). *The rise of the robots: Technology and the threat of mass unemployment*. London, the UK: OneWorld Publications.

<sup>3</sup> Lee, K.-F. (2017, June 24). The real threat of artificial intelligence. *The New York Times*. Retrieved from <https://www.nytimes.com/2017/06/24/opinion/sunday/artificial-intelligence-economic-inequality.html>

<sup>4</sup> Irwin, N. (2018, June 12). If the robots come for our jobs, what should the government do? *The New York Times*. Retrieved from <https://www.nytimes.com/2018/06/12/upshot/if-the-robots-come-for-our-jobs-what-should-the-government-do.html>

<sup>5</sup> Böheim, R., Horvath, G. T., & Winter-Ebmer, R. (2011). Great expectations: Past wages and unemployment durations. *Labour Economics*, 18(6), 778-785. <https://doi.org/10.1016/j.labeco.2011.06.009>

<sup>6</sup> Axelrad, H., Malul, M., & Luski, I. (2018). Unemployment among younger and older individuals: Does conventional data about unemployment tell us the whole story? *Journal for Labour Market Research*, 52(1), 1-12. <https://doi.org/10.1186/s12651-018-0237-9>

<sup>7</sup> Lahey, J. N. (2005). *Do older workers face discrimination?* (Center for Retirement Research at Boston College, Brief Report). Retrieved from <http://crr.bc.edu/briefs/do-older-workers-face-discrimination>

<sup>8</sup> Fisher, B. J. (2008). Enhancing the efficacy and empowerment of older adults through group formation. *Journal of Gerontological Social Work*, 51(1-2), 2-18. <https://doi.org/10.1080/01634370801967513>

<sup>9</sup> Aday, R. H., & Kehoe, G. (2008). Working in old age: Benefits of participation in the senior community service employment program. *Journal of Workplace Behavioral Health*, 23(1-2), 125-145. <https://doi.org/10.1080/1555240802189521>

<sup>10</sup> Rogers, B., & Robinson, E. (2004). *The benefits of community engagement. A review of evidence*. London, the UK: Active Citizenship Centre, Home Office.

<sup>11</sup> Francescato, D., & Zani, B. (2013). Community psychology practice competencies in undergraduate and graduate programs in Italy. *Global Journal of Community Psychology Practice*, 4(4), 1-12. <https://doi.org/10.7728/0404201303>

has provided evidence that you can promote social political empowerment by teaching community psychology competencies to students through CSCL (computer supported collaborative learning). Most of these studies, however, have used only student samples as the training program participants. It was not known whether community psychology programs based on CSCL could be used outside educational contexts to tackle social issues.

This research contributes to this search by presenting a qualitative pilot study in which community psychology empowerment methodologies and CSCL were used jointly in a program designed to empower unemployed middle-aged workers.

Our innovative intervention was based on four different phases of a sociopolitical empowerment methodology (Francescato & Zani, 2017<sup>12</sup>):

1) *Re-motivation*. The main objective of the first phase is to help participants to understand their motivations, and their authentic desires identifying historical and contextual connections. In this process, participants in small groups reflect, using different tools on how experiences in family, educational and mass media settings have influenced their desires and expectations and formulate desired goals.

2) *Assessing competencies and qualities*. In the second phase, participants on the empowering program summarize the formal and informal competencies they acquired during their studies and through life experiences. As Francescato, Tomai, and Solimeno (2008)<sup>13</sup> point out, through this program they are helped to describe what they are good at. They reflect on their capacities, interests, values, personal qualities, weak points and resources. They are encouraged to identify their soft skills (e.g., ability to work in teams, to communicate well, to solve problems) and technical skills (e.g., writing computer codes, operating equipment, painting). During this phase, several tools are used to assess competencies (e.g., tests, questionnaires). Through the assessment process, they identify their key competencies and qualities and how well suited they are for certain jobs, business strategies or careers, or other projects.

3) *Exploring the environmental contexts*. The main aim of the third phase is to give people an opportunity to understand “the world outside” (Solimeno, 2008<sup>13</sup>). Participants explore environmental contexts of increasing complexity: from groups to organizations and local and virtual communities, using shorter versions of intervention methodologies developed by European community psychologists (Francescato & Zani, 2013<sup>11</sup>, 2010<sup>14</sup>). They explore the strong and weak points of small groups, and organizations using Participatory Multidimensional Organizational Analysis (PMOA) and/or their communities through the profiling methodology (Francescato & Zani, 2013<sup>11</sup>, 2010<sup>14</sup>).

4) *Congruency between individual desires and contexts*. In this crucial phase, participants explore the congruence between their desires, fears and competencies (that emerged in the first and second phases) and what the outside world seems to offer and requires (that emerged in the third phase). They also use CSCL to explore what are the available opportunities on the Internet and discuss their ideas of desirable futures with other participants.

The main aim of our pilot course was to improve the managers’ level of social political empowerment and their positive attitudes towards their personal lives and futures and help them identify new life projects and increase their wellbeing. Results showed that this aim was fully reached with our participants and that the empowering training methodology developed by Francescato et al. (2008)<sup>13</sup> and Francescato and Zani (2017)<sup>12</sup> tested mainly face to face with university students could be successfully employed using both face to face and online learning settings with older workers who had lost their jobs. However, our pilot sample was very small and other studies will have to be performed with larger samples.

**Keywords:** Empowerment, Wellbeing, Community Psychology, Unemployment, CSCL (Computer Supported Collaborative Learning)

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<sup>12</sup> Francescato, D., & Zani, B. (2017). Strengthening community psychology in Europe through increasing professional competencies for the new territorial community psychologists. *Global Journal of Community Psychology Practice*, 8(1), 1-14. <https://doi.org/10.7728/0801201703>

<sup>13</sup> Francescato, D., Tomai, M., & Solimeno, A. (2008). *Lavorare e decidere meglio in organizzazioni empower e empowering*. Milan, Italy: Franco Angeli.

<sup>14</sup> Francescato, D., & Zani, B. (2010). Community psychology in Europe: More needed, less wanted. *Journal of Community & Applied Social Psychology*, 20(6), 445-454. <https://doi.org/10.1002/casp.1066>

## ATYPICAL WORK AND SAFETY AT WORK

*Fiorenza Misale \**

For years I have been dealing with safety in the workplace and the perception of occupational risks by participating in numerous conferences on the subject.

The multiplication of flexible jobs tends to consume most of the forms of security that the International Labor Organization has proposed to define the so-called “decent work” or “decent”.

These forms of security eroded by the multiplication of flexible jobs are: employment security, professional security, safety in the workplace, income security and social security.

According to data published by INAIL, workers employed with atypical contracts have a much higher accident rate than the average rate recorded for workers in industry and services.

The reasons are manifold: first of all the tendency to let the workers carry out those riskier jobs, those defined with the three D’s: strenuous (difficult), dangerous (dangerous) and dirty (dirty); in fact the data show how the common workers employed in manual jobs in sectors with high accident risk such as construction and trade are employed with supply contracts.

Over the last few years, scholars of various disciplines (sociologists, psychologists, occupational physicians) have pointed out that the recent transformations of work towards term contractual forms have negative implications for the health of workers.

Even in Italy the surveys, although scarce, tend to confirm the negative relationship between temporary work and job security.

Different dimensions of vulnerability add up and intertwine; the vulnerability of the contractual condition results in real physical vulnerability and consequently a “vulnerable career”.

At the basis of the risk, there is basically a learning deficit of the techniques, skills and specific knowledge necessary for the performance of a task, which is the direct consequence of the temporary nature and fragmentation of work experiences. The atypical worker who is continually in new business contexts and is engaged in work experiences that are always different and of limited duration will never have the time to adapt completely to the working environment in which he will be working nor, at least, will he have the opportunity to know them and, therefore, to avoid their potential risks; all this will also negatively influence the perception of the risks themselves, and if we add to this the scarce importance attributed to the training by the companies and the consequent training deficits of the workers we realize how the condition of atypicality, as a whole, places the workers in a situation of greater danger than workers who work with permanent contracts.

If we consider the INAIL data on the increase of accidents *in itinere*, we cannot neglect in many activities the acceptance to continuous movements from one place of work to another (even very distant), to which many workers are subjected; the so-called “riders” are a striking example, workers who deal with home delivery for large food delivery companies (for example JustEat, Deliveroo, Snam, Foodora) that on the one hand use protection devices that do not comply with the regulations from others work in unsafe climatic conditions (rain, snow).

To speed up deliveries and get more compensation they are also subject to a greater risk of injury.

Precarious workers report higher levels of stress than workers in standard work relationships because they are faced with high levels of uncertainty regarding access to work, the terms and conditions of such work and future earnings. They engage in further efforts to look for work and balance the demands of multiple employers. They have low earnings, few benefits and reside in low-income families.

They also have greater exposure to risks due to inadequate/absent training, also with reference to the knowledge of health and safety legislation.

Lower work experience and knowledge of workplace risks, measured based on the duration of the employment relationship, is a possible mechanism to explain the coherent association between temporary workers and occupational accidents.

The transition from fixed-term employment to permanent employment was followed by

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an increase in job security, lasting job satisfaction and a medically proven absence of illness. The receipt of a permanent employment contract after fixed-term employment is associated with favorable changes in job security and job satisfaction. The methods of payment also influence the incidence of accidents: in a study aimed at comparing health and safety at work by comparing 100 factory workers and 100 external workers it emerged that the incidence of accidents was much higher among external workers who they were paid by the piece; this can be explained by the need to speed up work times in order to produce more goods and get more compensation. The European Campaign on Occupational Health and Safety of temporary workers was launched by the Committee of Senior Labor Inspectors (SLIC) in September 2017 at the Luxembourg conference center and will run until May 2019. Most European labor inspectorates are mobilized to guarantee respect for European and national health and the safety of work obligations through inspections carried out both in temporary work agencies and in user companies. All sectors are concerned: construction, agriculture, food production, hotels, restaurants and catering, etc. In conclusion, the prevalence of atypical work should lead us to reflect on the need for greater attention to the issue of safety at work, also with a view to containing the number of serious and fatal accidents at work.

**Keywords:** Perception of Occupational Risks, Safety, Occupational Health, Security

# FROM CORPORATE SOCIAL RESPONSIBILITY TO SUSTAINABILITY: A NEW CORPORATE DEVELOPMENT MODEL

*Nadia Oliva \**

This chapter aims at analyzing the close relationship between the concept of corporate social responsibility and that of sustainability and to explain how the settlement of financial, social, and environmental objectives is essential to modern industrialization, which is able to adjust to changes in the system and values.

Old capitalism, based on the maximization of profits, is giving way to modern industrialism that is respectful of deontological codes and aimed at pursuing sustainable objectives. The protection of the eco-systems, the safeguard of the environmental balance, and the right employment of natural resources are all corporate objectives.

In the global economic scenario in which competition and internationalization dominate, the enterprises that adopt sustainable strategies improve the corporate image, enrich their reputation with the stakeholders and on the market in general, granting themselves survival in the long term; furthermore, they have the possibility to increase the loyalty of a higher number of customers who require compliance with environmental and social standards, responsible commercial practices, and who purchase consciously.

Ethics and economics are not just dichotomic categories: they are an integral part of a common project.

The enterprise is not an autonomous subject but it is part of the environment in which it operates, in which it interacts with its territory and in which is constantly influenced by the competitive context. Therefore, the relations and the dependencies that exist between these elements imply business and social policy choices that create benefits for all parties. Indeed, the company must grow and in order to do so it must invest and create while respecting the ecosystem it is part of.

Sustainable management also implies positive financial profits because it creates added value and competitive advantages. Indeed, the employment of best practices that respect the environment and the society entails a high reputational capital, a strong cohesion with the stakeholders, a safe and motivating work environment, and facilitation in accessing credit and tax advantages.

This strategic transition is a valid *modus operandi* for the future and an ambitious goal to reach for the safeguard of the planet.

Many are the prompts to study for such an ample and complex topic, which is not only about society and the environment but also about peculiar and valuable stakeholders, such as future generations.

The implementation of a system of social responsibility is one of the topical arguments of scientific research, because, today, we have the responsibility to save the planet from destruction and to preserve the future for our young people.

This is a challenge to be accepted with a sense of social responsibility extended to all fields of human actions. In order to supply a proper measure of the social performances and of the best practices put in place during their operations, the socially responsible enterprises have started to voluntarily draw a social report as well as their usual balance sheet, which is a mere accounting document. Such accounting supplies valid indications on the creation of shared value and the pursuit of sustainable objectives and it is intended to be the certification of the ethical principles and deontological codes an enterprise that is more conscious of its social identity acts by.

**Keywords:** Corporate Social Responsibility, Sustainability, Stakeholders, Shareholders, Shared Value

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## ECONOMIC AND SOCIAL POLICIES FOR WOMEN: A GENDER ANALYSIS

*Maria Pompò \**

This article addresses one of the most important issues of the 2000s, namely gender equality. Special attention is to be paid to *gender budget*, and public policies must guarantee equality between women and men. Economic and social policies are not neutral, and have different impacts on women and men; hence, it is important to achieve gender mainstreaming through public spending. Creating an increasingly open and inclusive society is fundamental for the sustainable development of a country. The Agenda 2030 itself aims at achieving gender equality, eliminating all forms of discrimination, from the point of view of education, social security, labour market and putting an end to violence and sexual exploitation.

**Keywords:** Gender Equality, Equity, Inclusion, Female Enterprise, Female Economy

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### SOCIAL CITIZENSHIP: THE PROTECTION OF RELIGIOUS DIVERSITY AS AN ENGINE OF ECONOMIC DEVELOPMENT

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**Keywords:** Social Citizenship, Religious Influences, Religiously Oriented Economy, Social Well-Being, Intercultural Marketing

#### 1. “Formal” citizenship vs. “social” citizenship in an intercultural society: Religious affiliation as an identity code

The “classical” definition of citizenship – which determines the set of reciprocal rights and duties of individuals within the National State – now seems insufficient, since it mainly highlights the aspect of the relationship between the citizen – understood as the individual who receives the relevant legal-formal qualification – and the State. In reality, current citizenship is deeply transformed, in a world dominated by multi-ethnic pluralism derived from the coexistence of cultural and religious diversity.

The multi-ethnic change of today’s society finds its undisputed cause in migration<sup>1</sup>. The entry of new individuals into the national territories has led to a structural change in the anthropological composition of European societies.

Movements of people, cultures, senses, and customs have posed the problem, which is not an easy one to solve, not only of regulating the modalities of social integration of migrants but above all, being a result of it, of “whether and to what extent” they are the holders of rights and duties.

In a landing place having a precise and prevalent social and denominational imprint, such as to also address the legal system, practices, and the economy, the main problem to be confronted is that of the protection of ethnic diversity, or as it could also be said, of minorities. They have a constant difficulty in expressing and manifesting their being “different”, but, at the same time, they claim ever wider spaces for action and protection.

We need to go a step further than the classic concept of citizenship, we need to talk about “substantial” citizenship, that is a *status* that takes into account diversity, a condition of recognition and effective exercise of the fundamental rights of the “Other”, of the requests and instruments of protection concretely granted to minorities. It’s about social citizenship.

The notion of social citizenship is given to us by Marshall. He identifies three components of citizenship, namely the rights that belong to the individual as such and as a member of a community: civil rights, political rights, and social rights. Civil rights, developed in the 18th century, consist of those rights of a citizen necessary for individual freedom (e.g., freedom of speech, freedom of thought, freedom of religion, right to property, right to justice); political rights, developed in the 19th century, arise not as an addition to civil rights, but as the granting of old rights to new members of the population (e.g., the right to vote). Finally, social rights, already developed in the 19th century but only contextualised in the 20th century, have been the result of struggles by the

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<sup>1</sup> During the 1th International Scientific Conference on *Welfare and market: A social, economic, and legal analysis* (University Giustino Fortunato, Benevento – October 18 and 19, 2019), in his presentation, Professor Suppa stated that the percentage of migrations is currently increasing in proportion to the growth of the indigenous population. This is a fact that should be taken into account not only from a political point of view, but also from a social and economic one.

working classes to reduce inequality between citizens. They guarantee a minimum of economic well-being and security up to the right to participate fully in the social heritage and to live the life of a civilised person, in accordance with the rules in force in society. These rights are the most important, especially taking into account the formal and substantial composition of the current society since they must be recognized to the individual as such, even if belonging to a culture other than that of the majority.

Social rights precede the definition of citizenship and its connotations. They are, in fact, the chronological and logical presupposition of the conceptualization of citizenship and its contents. The legal conferral of citizenship should therefore not be made subordinate to the conferral of ownership of rights. The rights and their social recognition are pre-existent to the birth of the state institutions, therefore also of the legal and formal ownership.

In this work, when we talk about social citizenship and when we talk about the conferment of citizenship, we do not mean it in its classic, juridical and formal sense, but rather as the effective possibility of the “different from the autochthonous” to be able to express itself within the community in its actions, to be able to see effective answers to its moral and material needs. Social law is positive freedom, it reflects active citizenship: the right to decline within society and the market while respecting the principles of law, but also cultural differences.

Minorities must have the opportunity to take an active part in democratic community life, in the social, legal, and market spheres in the host territory. It is not enough “simply” to integrate oneself by adopting the behaviour and values of the natives, it is, instead, a confrontation and also a clash with a different culture by questioning the roots of society itself. A society that must be open to otherness.

As we all know, religious belonging plays an important role in these dynamics because faith is an index of personality definition. It influences the way each individual is in the social and institutional, as well as private, environment.

Individuals belonging to minority cultures and religions, in fact, make requests for the preservation of identities that are mainly based on confessional belonging.

Religious freedom is one of the fundamental human rights that are guaranteed at the international level and, therefore, the promotion of the fundamental rights of the person takes on central importance in the construction of citizenship that must not only be formal and local, but also substantial and, indeed, social.

Globalization brings together very different people and stories, bringing together multiple cultures, but not producing, in most cases, the “familiarity” among the citizens of the multicultural society. The contact between different semantic, cultural, and religious universes is certainly not a prelude to harmony and brotherhood, reinforcing, on the contrary, prejudices and revealing differences that in most cases are not “exploited” to enrich themselves and others, but used as a shield and as a “weapon” to fight their own battle of values.

The integration of “different” subjects presupposes a form of harmonization of the relations between politics and religion. As anticipated, this is not enough, however. This type of stabilisation requires not only a consensus within the host civil society but also cooperation between national and supranational institutions and religious communities.

In the concept of “citizenship”, minorities or large sections of the population, characterised by differences from the dominant cultural codes, should find public recognition of their needs. Being a citizen does not only have to do with time spent in a determinate place or having a particular status. Being a citizen in an intercultural society means being part of a community of communication, sharing a lexicon of subjectivity with others, and using it as an interface to weave and regulate interindividual relations. Therefore, the state institutions will not have to eliminate the differences but will have to confront them and put in place the necessary instruments so that they are regulated, even legally.

In a multicultural reality, it is necessary to give importance to social-integrative citizenship, and it is for this reason that the concept of classical citizenship regarding the legal-formal relationship between the subject and the State/the host community is no longer adequate. It must also be characterised by the recognition of specific rights which take account of the culture and religion to which the members of the population belong. Social citizenship must be conceived from

a promotional point of view and this happens when it is the result of real paths for all those who live and contribute to the growth of a given territory and constitute the necessary human capital.

Those who are part of the social territory – be it local or supranational – must be identified as members who, in the same way, are endowed with differences between them to which correspond as many values, interests, social and economic needs. It is therefore undeniable that the construction and consolidation of an idea of social and integrative citizenship requires a personalistic conception of the citizen. This conception is reflected in the being and action of the subject characterized by an inclusive identity of the religious fact.

This is also highlighted by the Italian Constitution, as we will see further in the last part of the exposition. Article 3 makes a difference between formal and substantive equality. This legal provision states that different situations cannot be treated in the same way, therefore it is not possible to have a social-legal regulation, but also an economic regulation (understood as supply and demand) that uniquely reflects, and in some cases arbitrarily, the different situations present in the territory of stabilization. Nor should the majority's cultural-religious affiliation guide the coordinates of the needs and services of the community.

Ethnic backgrounds create social subjectivity and also legal subjectivity since the legitimacy and effectiveness of local, transnational, or supranational institutions depend on the possibility of including differences within the law of individual states. Therefore, the state systems will have to be able to elaborate models of cosmopolitan citizenship, able to accommodate the differences declined by individuals rooted in cultural and religious traditions that are separated by a simple geographical distance.

## 2. The relationship between religion, economy, and social well-being

Religions influence and advise their followers on a whole series of behaviours that are translated into actions and acts full of juridical, social, and even economic content.

Religion, or rather the effective protection of religious freedom, plays an important role in social development, especially in marketing dynamics.

The faithful observer, in fact, assigns to the confessional prescriptions a greater duty with respect to the right of state production, considering it a duty to obey it.

The relationship between religion and the economy is an ancient link. Religious freedom and economic well-being are in fact directly linked, in the sense that effective protection of the former corresponds to a proportional increase in market and business opportunities. In the territories in which it is effectively guaranteed to individuals as such, to the so-called “social citizens”, the exercise of their religious practices and the fulfilment of the relevant requirements, in fact, the social tensions and conflicts between the various groups living together in the same territory diminished, and there is also an increase in economic activity in general and in particular in both domestic and foreign investment.

Religion and economics constitute the largest system of religious marketing. The faithful, influenced by their fideistic belonging, make daily commercial choices that respect the cultural and religious precepts in which they are reflected.

The fact that a given product or service is “religiously correct” means that it is the subject of market demand of those who, in the absence of the requirements of the confession of belonging, would not benefit from the same. It is as if religions affixed a sort of seal of quality with respect to the product on the market. The compliance with the fideistic prescriptions, also in the marketing, takes place because it is attributed to them a sort of content of truth for the simple fact of their origin.

For many years now, companies have been driven to produce goods and services that are religiously oriented and that, therefore, meet the social needs of minorities, giving them the opportunity to respond to their concrete market demands, which turn into personal well-being and, therefore, social.

One of the typical examples that is reported, is that of the Islamic communities. Let us think of how much the market for so-called *halal* products has increased, respecting the religious canons of the relative Muslim confession. *Halal* goods understood as clothes, objects, creams, drinks but above all as food goods, are “normally” usable today in the European market.

The material availability of religious friendly products has a positive impact on the life of the faithful since they will be able to fulfill an option of faith. On the contrary, the absence, within

the territory where the subject now lives daily, of religiously correct consumer goods determines a sort of “frustration” of the identity of the individual, since it lacks in the aspect related to their beliefs. Therefore, a market open to products that reflect the material and moral needs of the subject as faithful, would be a guarantee for the individual himself and a kind of harmonization in cultural coexistence. This option would result in an integration of “diversity” and an increase in community welfare.

The awareness for the believer to be in a social-legal system where the market provides goods and services “religiously correct” makes it possible for him to find a concrete response between “what he would like to do” and “what he can actually do” creating a sort of social cohesion and respect for the order in which it is found, arising from the well-being and security of the individual.

The subject has three roles: that of social citizen-citizen, that of consumer, and at the same time that of believing subject. The recognition of his religious freedom and its free influence in the market world will contribute to the “welfare state”. It is understood as an environment open to otherness and differences capable of dampening social quarrels, developing the collective market and, therefore, ensuring the welfare of the community.

After all, in their doctrines, religions have always linked the ethics of behaviour to economic systems. In a multicultural society, the influence of ethical references makes it possible to claim the idea of economic development and a possibility of freedom of action in marketing equal for all, eliminating the inequalities that often characterize modern societies. Persons, regardless of whether they are legal citizens or “simply” social citizens, play an active role in market processes. Part of the “traditional” consumers will be guided in their economic choices by preferential indices arising from their cultural-religious affiliations. Consumers, therefore, acting consistently according to their “guidelines” will influence the economic, political, and even institutional orientation of modern society, while ensuring new opportunities for its development.

Intercultural marketing aims not only to respond to demand and provide a market supply that meets the needs of religious minorities. It is also an instrument for integration into the multicultural world. Businesses, in fact, enter into a relationship with other cultures and, starting from the need of the individual believer, generate an economy able to manage a pluralism that in turn becomes an element of competitive advantage through the esteem of all identities, generating social welfare.

### **3. Final considerations: The rules laid down in the Italian Constitution**

Religious freedom is the code of the individual’s personality and the right of the social citizen and not only of the “recognized” one. It must be evaluated and exercised as an option that would allow everyone to have access to the same opportunities.

The Italian Constitution provides for a series of articles from which it is clear that the protection of the individual as such, regardless of “legal qualifications”, as well as the opening of our system (formal or substantial?) to otherness. These are Articles 2, 3, 7, 8, 19, and, in the case that we are dealing with, also Article 41.

Articles 7 and 8 of the Constitution, together with Article 19 (which protects religious freedom), enshrine the multi-religiousness of our order and our territory. They prescribe the recognition of the Catholic confession – majority religion – and also of the “other” religious confessions; they allow for the regulation of one’s own relations, by means of appropriate legal instruments, with the State, in order to guarantee the rights of one’s followers and to give adequate regulation to matters of common interest.

Article 2 perfectly reflects the principles set out above. It “recognizes and guarantees the inviolable rights of a person, both as an individual and in the social formations where his personality takes place and requires the fulfilment of the mandatory duties of political, economic, and social solidarity”.

Article 3(1) enshrines the principle of equality, which should be understood not only in the formal sense but also in the substantive one, with a “prohibition” of treating different situations in the same way, guaranteeing citizens – in my opinion also the “social” ones – the same social identity. Institutional interventions must be activated in favour of them regardless of cultural and religious differences.

In accordance with the second paragraph of Article 3, the State must try to remove obstacles, including those of an economic nature, which prevent the exercise of the rights of liberty and the full development of the human person. Removing the obstacles could and should consist in, considering as mentioned above, active interventions by the State aimed at encouraging the production by marketing operators and the usability of religiously friendly goods for the faithful-consumers. Goods and services that, in fact, would allow individuals with certain beliefs, customs, and cultural “duties” to be able to make their own economic choices, the fruit of their own personality, and to have powers of action in the community, as they possess legal, economic, and social means to do so.

“The Italian legal system can and must intervene in the field of production processes, correcting distortions or making up for market failures and ensuring to each individual the quantity and quality of all goods and services necessary for a free and dignified life” (Decimo, 2018, p. 12).

Article 41 of the Italian Constitutional Charter has also been appointed, the purpose of which is free economic initiative and the protection of private autonomy in this area. The legislation provides for the non-interference of the State in the definition of the economic objectives of private entities. The legal system, therefore, cannot impose on economic operators the production and marketing of certain goods or services, in the case that we are interested in religiously friendly goods. However, the State, taking into account also the articles set out above, must be attentive to the real needs of its citizens. It could therefore decide to promote the creation or development of certain market sectors – with social purposes precisely – through economic incentives for companies; it could decide to finance companies present on the market for the creation of new goods that meet the needs of a cut of the minority population that are, therefore, “religiously correct” according to the precepts of certain religious denominations or cultural affiliations.

Furthermore, Article 41 of the Constitution lays down in the second and third paragraphs two important principles for the purposes of the above. In particular, according to the rule, private economic initiatives may not be carried out in conflict with social utility or in such a way as to cause damage not only to security but also to freedom and human dignity. The third paragraph represents that the law must provide for the appropriate programmes and controls so that economic activity, both public and private, can be directed and coordinated for social purposes.

The constitutional provisions in question, therefore, in addition to ensuring the protection of religious freedom, as a fundamental right of individuals, prepare a series of guidelines for the State in order to support the development and social and economic well-being of the community.

The fact that society is multicultural means that within a common national territory there are communities characterized by different values, faiths, aggregative structures, social and legal rules. Multiculturalism cannot be built by demanding to create a uniformity of subjects living within that territory; on the contrary, it is important that everyone finds an answer to their own identity needs, obviously balancing these rights with the principles in force in the reception system. Only through specific legal regulations and an effective possibility of public action and intervention that take into account the peculiarities of each, it is possible to guarantee fair protection of the individual instances and the consequent preservation of their respective identities.

The various cultures that coexist in the same place if not regulated by a truly intercultural legal system can give rise to clashes that would affect the institutional and social structure of the community.

The National States, but also the supranational institutions, should set as a concrete objective that of increasing the level of protection of religious freedom, identified as a fundamental right of the subject, as well as a prerogative in the creation of its own identity.

This cannot be achieved by crystallising this protection in declarations of principle, but by putting in place specific legal instruments implementing it.

Within the multicultural society, one cannot expect that “the Other” relegates in an absolutist and automatic way his own culture, his own customs, his own religiosity, within the only private context, because this would be equivalent to annul the subject involved in interpersonal relations and towards the institutions. It would not be itself, and above all, this would create internal conflicts and, therefore, an individual malaise that would be poured into the community environment.

The current and future commitment of the law, or rather, of contemporary rights, must not be

based on “whether” to recognize cultural diversity and the related rights of those living in the same territory. They should focus on “how” to ensure legal recognition of those identities, regardless of the formal recognition of their qualification within the host State.

We need to work from a legislative, judicial, administrative, and also moral point of view towards greater respect for fundamental rights, which are obviously interpreted in a multi-religious and intercultural way.

## References

1. Alon, I., & Chase, G. (2005). Religious freedom and economic prosperity. *Cato Journal*, 25(2), 399-406. Retrieved from [https://www.researchgate.net/publication/236984043\\_Religious\\_freedom\\_and\\_economic\\_prosperity](https://www.researchgate.net/publication/236984043_Religious_freedom_and_economic_prosperity)
2. Angelucci, A. (2017). Libert  religiosa e cittadinanza integrativa. Alcune note sul ‘vivere assieme’ in una societ  plural. *Stato, Chiese e Pluralismo Confessionale*, 39, 1-13. Retrieved from [https://www.statoechiese.it/images/uploads/articoli\\_pdf/Angelucci.M\\_Libert%C3%A0.pdf](https://www.statoechiese.it/images/uploads/articoli_pdf/Angelucci.M_Libert%C3%A0.pdf)
3. Anttonen, A., & Sipil , J. (1996). European social care services: Is it possible to identify models? *Journal of European Social Policy*, 6(2), 87-100. <https://doi.org/10.1177/095892879600600201>
4. Arcopinto, A. (2014). I simboli religiosi nel diritto vivente. In A. Fucillo (Ed.), *Esercizi di laicit  interculturale e pluralismo religioso* (pp. 179-219). Retrieved from [https://www.academia.edu/10714405/I\\_simboli\\_religiosi\\_nel\\_diritto\\_vivente\\_in\\_AA\\_VV\\_Esercizi\\_di\\_laicit%C3%A0\\_interculturale\\_e\\_pluralismo\\_religioso\\_Giappichelli\\_Torino\\_2014\\_pp\\_179\\_219](https://www.academia.edu/10714405/I_simboli_religiosi_nel_diritto_vivente_in_AA_VV_Esercizi_di_laicit%C3%A0_interculturale_e_pluralismo_religioso_Giappichelli_Torino_2014_pp_179_219)
5. Arcopinto, A. (2019). L’utilizzo delle religioni nel marketing d’impresa: Profili di tutela giuridica. *Calumet – Intercultural Law and Humanities Review*, 1-20. Retrieved from [http://www.windogem.it/calumet/upload/pdf/mat\\_81.pdf](http://www.windogem.it/calumet/upload/pdf/mat_81.pdf)
6. Arcopinto, A., & Gravino, F. (2018). Migranti e identit  religiose tra principi costituzionali e opera di bilanciamento. In G. Dammacco, & C. Ventrella (Eds.), *Religioni, diritto e regole dell’economia*. Bari, Italy: Cacucci Editore.
7. Barro, R. J., & McCleary, R. M. (2003). Religion and economic growth. *American Sociological Review*, 68(5), 760-812. <https://doi.org/10.2307/1519761>
8. Berzano, L. (2003). Religione ed economia: Il contesto del pluralismo e dei mercati religiosi. *Religioni e Societ *, 46, 73-80. <https://doi.org/10.1400/14716>
9. Billotti, D. (2013). *Approcci critici al pluralismo confessionale*. Cosenza, Italy: Pellegrini.
10. Cardia, C. (2008). Libert  religiosa e multiculturalismo. *Stato, Chiese e Pluralismo Oconfessionale*, 1-9. <https://doi.org/10.13130/1971-8543/1096>
11. Cimbalo, G. (2007). Laicit  come strumento di educazione alla convivenza. *Stato, Chiese e Pluralismo Confessionale*, 1-59. <https://doi.org/10.13130/1971-8543/907>
12. Cnaan, R. A., Boddie, S. C., Handy, F., Yancey, G., & Scheinder, R. (2002). *The invisible hand: American congregations and the provision of welfare*. Retrieved from [https://books.google.com.ua/books?hl=en&lr=&id=RZ7AAli9RvMC&oi=fnd&pg=PR6&ots=UuyKPB6th3&sig=KFEceWWSgk23ujWhoxZrVChOKk&redir\\_esc=y#v=onepage&q&f=false](https://books.google.com.ua/books?hl=en&lr=&id=RZ7AAli9RvMC&oi=fnd&pg=PR6&ots=UuyKPB6th3&sig=KFEceWWSgk23ujWhoxZrVChOKk&redir_esc=y#v=onepage&q&f=false)
13. Cnaan, R. A., Wineburg, B., & Boddie, S. C. (1999). *The newer deal social work and religion in partnership*. New York, NY: Columbia University Press.
14. Colaiani, N. (2006). *Uguaglianza e diversit  culturali e religiose: Un percorso costituzionale*. Bologna, Italy: Il Mulino.
15. Consorti, P. (2008). Pluralismo religioso: Reazione giuridica multiculturalista e proposta interculturale. In A. Fucillo (Ed.), *Multireligiosit  e reazione giuridica* (pp. 197-199). Torino, Italy: Giappichelli.
16. Consorti, P. (2010). *Diritto e religione*. Roma, Italy: Laterza.
17. Cox, H. (1999). The market as God: Living in the new dispensation. *The Atlantic*, March 1999. Retrieved from <https://www.theatlantic.com/magazine/archive/1999/03/the-market-as-god/306397/>
18. Dammacco, G. (2008). Multiculturalismo e mutamento delle reazioni. In A. Fucillo (Ed.), *Multireligiosit  e reazione giuridica* (p. 83). Torino, Italy: Giappichelli.
19. De Schutter, O. (2010). *International human rights laws*. Cambridge, England: Cambridge University Press.
20. Decimo, L. (2018). Le influenze religiose nel mercato di beni tra libert  giuridiche ed economiche. *Calumet – Intercultural Law and Humanities Review*, 6, 1-17. Retrieved from [https://www.researchgate.net/publication/326317510\\_Le\\_influenze\\_religiose\\_nel\\_mercato\\_di\\_beni\\_tra\\_liberta\\_giuridiche\\_ed\\_economiche](https://www.researchgate.net/publication/326317510_Le_influenze_religiose_nel_mercato_di_beni_tra_liberta_giuridiche_ed_economiche)
21. Donati, P., & Sgritta, G. B. (1993). *Politica sociale e cittadinanza*. Milano, Italy: Franco Angeli.

22. Dupuis, C. (2001). De la “religion marketing” vers le marketing “religieux”. *Marketing Magazine*, 11, 16. Retrieved from <https://www.e-marketing.fr/Marketing-Magazine/Article/De-la-religion-marketing-vers-le-marketing-religieux-8035-1.htm>
23. Facchi, A. (2006). *I diritti nell'Europa multiculturale*. Roma, Italy: Laterza.
24. Ferlito, S. (2005). *La religione, il giurista e l'antropologo*. Soveria Mannelli, Italy: Rubbettino.
25. Ferrari, S. (2012). Le minoranze religiose. In R. Coppola, & C. Ventrella (Eds.), *Laicità e dimensione pubblica del fattore religioso. Stato attuale e prospettive. Atti del I Convegno Nazionale di Studi A.D.E.C.* (pp. 65-71). Bari, Italy: Cacucci.
26. Fuccillo, A. (2008). La multireligiosità tra possibile “normazione” ed ipotetica “autonormazione”. In A. Fuccillo (Ed.), *Multireligiosità e reazione giuridica* (p. 268). Torino, Italy: Giappichelli.
27. Fuccillo, A. (2011). *I mercanti nel tempio: Economia, diritto e religioni*. Torino, Italy: Giappichelli.
28. Fuccillo, A. (2015). *Il cibo degli dei: Diritto, religioni, mercati alimentari*. Torino, Italy: Giappichelli.
29. Fuccillo, A. (2015). Saziare le anime nutrendo il pianeta? Cibo, religioni, mercati. In A. G. Chizzoniti, & M. Tallacchini (Eds.), *Cibo, religione e diritto. Nutrimento per il corpo e per l'anima*. Tricase, Italy: Libellula Edizioni.
30. Fuccillo, A. (2018). La Koinè giuridica tra economia, diritto e funzione nomopoietica delle religioni. In G. Dammacco, & C. Ventrella (Eds.), *Religioni, diritto e regole dell'economia* (pp. 27-52). Retrieved from [https://www.academia.edu/37558801/La\\_Koin%C3%A8\\_giuridica\\_tra\\_economia\\_diritto\\_e\\_funzione\\_nomopoietica\\_delle\\_religioni](https://www.academia.edu/37558801/La_Koin%C3%A8_giuridica_tra_economia_diritto_e_funzione_nomopoietica_delle_religioni)
31. Fuccillo, A. (Ed.). (2017). Superare la sola eguaglianza formale: Verso la libertà religiosa delle opportunità. In *Le proiezioni civili delle religioni tra libertà e bilateralità. Modelli di disciplina giuridica* (pp. 57-74). Napoli, Italy: Editoriale Scientifica.
32. Fuccillo, A. (Ed.). (2018). Protezione della libertà religiosa e sviluppo economico. In *Diritto, religioni, culture. Il fattore religioso nell'esperienza giuridica* (2nd ed.). Torino, Italy: Giappichelli Editore.
33. Fuccillo, A., & Sorvillo, F. (2013). Religious freedom and objectives for economic intercultural development. *Stato, Chiese e Pluralismo Confessionale*, 10, 1-19. <https://doi.org/10.13130/1971-8543/2906>
34. Fuccillo, A., Sorvillo, F., & Decimo, L. (2016). Diritto e religioni nelle scelte alimentari. *Stato, Chiese e Pluralismo Confessionale*, 18, 1-34. Retrieved from [https://www.statoechiese.it/images/uploads/articoli\\_pdf/fuccillo\\_diritto.pdf?pdf=diritto-e-religioni-nelle-scelte-alimentari](https://www.statoechiese.it/images/uploads/articoli_pdf/fuccillo_diritto.pdf?pdf=diritto-e-religioni-nelle-scelte-alimentari)
35. Grim, B. J. (2014). Is religious freedom good for business? A conceptual and empirical analysis. *Interdisciplinary Journal of Research on Religion*, 10, 2-19. Retrieved from [https://www.religjournal.com/articles/article\\_view.php?id=85](https://www.religjournal.com/articles/article_view.php?id=85)
36. Lavoie, D., & Chamlee-Wright, E. (2000). *Culture and enterprise: The development, representation and morality of business*. London, England: Routledge.
37. Lillo, P. (2007). *Globalizzazione del diritto e fenomeno religioso*. Torino, Italy: Giappichelli.
38. Lynch, J. (1989). *Educazione multiculturale in una società globale*. Roma, Italy: Armando Editore.
39. Marshall, T. H. (1963). *Cittadinanza e classe sociale*. Torino, Italy: UTET.
40. Napolitano, E. N. (2002). *Il marketing interculturale. Le identità diventano valore*. Milano, Italy: Franco Angeli.
41. Napolitano, E. N., & Visconti, L. M. (2007). Le offerte per i migrant. In C. Fiorio, E. M. Napolitano, & L. M. Visconti (Eds.), *Stili migranti*. Retrieved from [http://images.bi.camcom.it/f/StudiPubblicazioni/st/stili\\_migranti\\_volume.pdf](http://images.bi.camcom.it/f/StudiPubblicazioni/st/stili_migranti_volume.pdf)
42. Nardella, C. (2015). *La migrazione dei simboli. Pubblicità e religione*. Milano, Italy: Guerini Scientifica
43. Nussbaum, M. C. (2009). *Libertà di coscienza e religione*. Bologna, Italy: Il Mulino.
44. Pino, G. (2008). Identità personale, identità religiosa e libertà individuali. *Quaderni di Diritto e Politica Ecclesiastica*, 1, 119-151. Retrieved from <http://www1.unipa.it/gpino/Pino,%20Identita%20religiosa.pdf>
45. Ricca, M. (2008). “Multireligiosità”, “multiculturalità”, “reazioni dell'ordinamento”. Tre segnavia per il diritto interculturale. In A. Fuccillo (Ed.), *Multireligiosità e reazione giuridica* (p. 157). Torino, Italy: Giappichelli.
46. Ricca, M. (2008). *Oltre Babele. Codici per una democrazia interculturale*. Bari, Italy: Dedalo.
47. Ricca, M. (2012). *Pantheon: Agenda della laicità interculturale*. Palermo, Italy: Torri del Vento.
48. Ricucci, R. (2015). *Cittadini senza cittadinanza. Immigrati, seconde e altre generazioni: Pratiche quotidiane tra inclusione e estraneità*. Torino, Italy: Edizioni SEB27.
49. Rivetti, G. (2007). Religione, immigrazione ed integrazione tra politiche europee in cerca di identità e criticità normative statuali. In M. Parisi, & V. Tozzi (Eds.), *Immigrazioni e soluzioni legislative in Italia e Spagna: Istanze autonomistiche, società multiculturali, diritti civili e di cittadinanza* (pp. 361-378). Campobasso, Italy: Editrice AGR.
50. Rivetti, G. (2008). Migrazione e fenomeno religioso: Problemi, opportunità e prospettive. In G. B. Varnier (Ed.), *La coesistenza religiosa: Nuova strada per lo stato laico* (pp. 108-126). Soveria Mannelli, Italy: Rubbettino.
51. Roach, S. (2005). *Cultural autonomy, minority rights and globalization*. Farnham, UK: Aldershot Ashgate.



52. Santerini, M. (2001). *Educare alla cittadinanza: La pedagogia e le sfide della globalizzazione*. Roma, Italy: Carocci.
53. Santoro, R. (2008). *Appartenenza confessionale e diritti di cittadinanza nell'Unione Europea*. Bari, Italy: Cacucci Editore.
54. Sciortino, G. (1994). Introduzione. In F. Angeli (Ed.), *Comunità societaria e pluralismo. Le differenze etniche e religiose nel complesso della cittadinanza*. Milano, Italy: Franco Angeli.
55. Sen, A. (2002). *Etica ed economia*. Bari-Roma, Italy: Laterza.
56. Shea, N. (2000). Religious freedom and American foreign policy. In P. Marshall (Ed.), *Religious freedom in the World*. Nashville, TN: Broadman & Holman.
57. Simonott, P. (2010). *Il mercato di Dio. La matrice economica di ebraismo, cristianesimo e islam*. Roma, Italy: Fazi Editore.
58. Sorvillo, F. (2016). *Economie & religioni, l'agire per fede alla prova dei mercati*. Cosenza, Italy: Luigi Pellegrini Editore.
59. Sorvillo, F. (2016). Lo spazio religioso dell'azione economica. L'offerta bancaria e il metaprofit incontrano la confessionalità. *Calumet – Intercultural Law and Humanities Review*, 5, 1-18. Retrieved from [https://www.academia.edu/33195327/Lo\\_spazio\\_religioso\\_dellazione\\_economica\\_Lofferta\\_bancaria\\_e\\_il\\_metaprofit\\_incontrano\\_la\\_confessionalit%C3%A0](https://www.academia.edu/33195327/Lo_spazio_religioso_dellazione_economica_Lofferta_bancaria_e_il_metaprofit_incontrano_la_confessionalit%C3%A0)
60. Stefani, P. (2017). Migrazioni e religioni: Identità religiosa e integrazione della differenza nel governo del fenomeno migratorio. In S. D'Acunto, G. De Siano, & V. Nuzzo (Eds.), *In cammino tra aspettative e diritti: Fenomenologia dei flussi migratorie condizione giuridica dello straniero* (pp. 427-446). Napoli, Italy: ESI.
61. Tedeschi, M. (2012). Le minoranze religiose tra autonomia e immobilismo del legislatore. In R. Coppola, & C. Ventrella (Eds.), *Laicità e dimensione pubblica del fattore religioso. Stato attuale e prospettive. Atti del I Convegno Nazionale di Studi A.D.E.C.* Bari, Italy: Cacucci.
62. Valletta, A., & Arcopinto, A. (2017). Simboli religiosi, pubblicità e marketing. In A. Fuccillo (Ed), *Le proiezioni civili delle religioni tra libertà e bilateralità: Modelli di disciplina giuridica* (pp. 457-742). Napoli, Italy: Editoriale Scientifica.
63. Viola, F. (2005). Conflitti di identità e conflitti di valore. *Ars Interpretandi*, 10, 61-96.
64. Wirth, L. (1945). The problem of minority groups. In R. Linton (Ed.), *The science of man in the world crisis* (p. 347). New York, NY: Columbia University Press.

# CREATIVE CITIES AND RELIGION: THE POTENTIAL CONTRIBUTION OF RELIGION TO THE DEVELOPMENT OF CULTURE IN URBAN AND SUBURBAN SPACES

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**Keywords:** Creative Cities, Religion and Art, Religion and Creativity, Urban Religion, Abandoned Religious Buildings

## 1. Introduction

The post-industrial character of contemporary societies makes it even more necessary to re-evaluate the role of culture as a new engine for economic and social development. That culture can represent an important factor of economic growth in the current post-industrial society is affirmed by Paola Dubini (2018). The rediscovery of the cultural heritage as an important growth factor also passes through the adequate enhancement of the intangible cultural heritage of Humanity, understood under the *Convention for the Safeguarding of Intangible Cultural Heritage* of UNESCO (2003)<sup>1</sup>, as that set of living traditions transmitted by our ancestors such as oral expressions, including language, performing arts, traditional craftsmanship, social practices, rituals and parties, knowledge and practices concerning nature and universe.

In addition to the immediate relationship that links religious confessions to material cultural heritage – we refer, above all, to sacred art, places of worship of a historical and cultural nature, religious museums and archives – it seems evident that religions share an extraordinary cultural heritage, even of an intangible kind, in the light of the wide wisdom of values, languages, traditions, and rituals they have been carrying for centuries (Glenn, 2011, Chapters 4, 6, 8, and 9). Hence, the importance of involving religions within those programs aimed at promoting culture and creativity. Among the various projects, it is worth mentioning the *Creative City Project* launched by UNESCO in 2004, which currently sees the participation of 180 cities (of which 9 Italian cities) from 5 different continents, distinguished by having elected creativity and culture as the engine of its economic development.

In many of these experiences, the contribution of religious communities appears decisive, as can be seen with regard to the *Music creative cities*, in which the role of the religiously inspired musical tradition is immediately tangible (religion and music are intertwined; for a focus about Lutheran music see d'Arienzo, 2018). By way of example, it's possible to refer to the case of the city of Varanasi (UNESCO creative city of music in India) – strongly focused on *Buddha Purnima Festival* – or Kingston, where, in addition to Christian Gospel music, the local musical background includes Rastafarians and the religious Rastafari music *Nyabingi drumming* (music is integral to the Rastafari faith; see Middleton, 2015). There are also numerous projects promoted in collaboration between the various creative cities concerning religious music. Consider, for example, the initiative organized by the city of Kansas City (creative city of music in the USA) together with the Mexican city of San Cristóbal de las Casas (creative city for crafts and folk art), entitled “*Tell me a history with Gospel, Llorona!*”.

Likewise, the religious element – as will be seen shortly – also assumes prominent relevance in the other sectors of creativity and culture contemplated by UNESCO, such as arts, gastronomy, and literature.

## 2. The relationship between religion and creativity

The question of the relationship between religious belonging and the propensity to creativity has been widely addressed in psychology and sociology, sometimes with diametrically opposed conclusions.

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<sup>1</sup> For a commentary of the Convention for the Safeguarding of Intangible Cultural Heritage of UNESCO (2003) see Blake (2006).

There is no lack of reconstruction in the literature to consider religion an obstacle to the development of creativity. This is because the religious affiliation of the individual believer generally is expressed in an attitude of obsequious respect for traditions, ending up discouraging openness towards diversity, often perceived as an element in contrast with the rules that mark the existence of religious communities (Okulicz-Kozaryn, 2015). Therefore, according to these guidelines, the conformism that would seem to characterize the personality of the individual believer would prevent that moment of contrast with the established order – breaking rule – which is usually reputed an important factor of creativity and innovation (Brenkert, 2009).

Other studies, on the contrary, maintain that the spirit of cooperation that characterizes the life of religious communities (about the concept of the religious community see d'Arienzo, 2006) can certainly be a stimulus for creativity (Assouad & Praveen Parboteeah, 2018) since the joint exercise of religious activities would seem to increase the problem-solving ability of individual adepts (Day, 2005). Furthermore, has been found that religion cultivates morality, and morality is positively associated with creativity (Shen, Yuan, Yi, Liu, & Zhan, 2017; Liu, Guo, Sun, Wang, & Wu, 2018).

Otherwise, a more pragmatic approach, starting from the difficulty of looking at the religious phenomenon in a unified way, tends to differentiate the impact on creativity according to the individual religious denominations present in the reference territory (Dana, 2009). However, the validity of such a method of investigation – often conducted on a purely national scale – is criticized by those who maintain that it is possible to observe a connection between religious belonging and creativity exclusively in advanced and prosperous economic contexts (Liu et al., 2018).

Beyond the opposing positions<sup>2</sup>, which does not seem to take into proper account the “modernization” effort made by the main religions (in this sense the evolution of the Catholic magisterium is significant, tending to outline the new image of the Church as an “outgoing Church”, see Francesco, 2015, and Gozzi, 2006; with regard to the modernization of Hebraism see Filoramo and Bidussa, 2008), the contribution of religious confessions to economic and social development is indisputable, especially in those urban contexts increasingly characterized, also by reason of recent migratory dynamics, in a multicultural and multi-religious sense.

### 3. Religion and creativity in urban spaces

Contemporary urban areas have now become a space shared by many ethnic and religious groups. In spite of a postmodern conception of religion understood as “a private and internalised matter, requiring no specific physical space” (Geel & Beyers, 2018), the religious belonging represent nowadays, particularly for immigrants, an essential element of identity, to express, in addition to the public spaces through the use of religious symbols of their own faith, also with the performance of daily behaviors, which, without translating into external manifestations of the exercise of faith, indirectly contribute to enriching the cultural and social heritage of the urban contexts (Burchardt & Westendorp, 2018, p. 161).

The vitality of religious communities within cities is such as to lead to the overcoming of those narratives aimed at identifying in the secularization the immediate consequence of urbanization and modernity<sup>3</sup>, to the point of inducing the doctrine to elaborate the concept of “post-secular

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<sup>2</sup> Although it seems to be preminent the orientation that affirms the negative impact of religiosity on national creativity there is no lack of studies aimed at affirming the difficulty of proceeding to a precise examination of the relationship between religiosity and creativity. The case of Buddhism is emblematic: “On one hand, Buddhism may “de-emphasize materialism and encourage acceptance and quietude” suggesting that Buddhism does not encourage change and innovation. On the other hand, Buddhism emphasizes impermanence and recommends its adherents to engage in mindfulness and meditation practice, which can improve creativity” (Liu et al., 2018).

<sup>3</sup> “The emergence of urbanization processes during the 19th and 20th centuries has been described by many scholars as a transformation that accompanied the modernization of society and was therefore deeply connected with it. In this panorama, the religious sphere, together with that of rituals, occupied a residual space destined to disappear. These paradigms had a considerable weight at the time of the birth of the anthropology of complex societies, which was profoundly influenced by them. In the course of modernization, the religious sphere was also relegated by anthropologists to more rural or “traditional” societies. The city presented itself as lacking all those traits and structures considered strictly rural, so little attention was given to religion and all the phenomena connected to it, if not as a “superstructural” language of some specific situations of social stratification. When these institutions were in the city, they were considered either as survivals or as the result of a “tribalization” that in a certain sense ruralized the city, attenuating its modern characteristics” (González Díez & Gusman, 2016, pp. 92-93).

city” (Casanova, 2013), with the purpose of highlighting the renewed importance assumed by religion in urban spaces, in spite of alleged models of neutrality and asepticity of public space.

Also, because of the proliferation, especially in Asia, of real megalopolises – strongly innovative and creative also thanks to the presence of various religious communities – it is therefore proposed to analyze the contribution to creativity and urban development offered by the religious confessions. The peculiarity of the role assumed by religions in metropolitan contexts has led part of the doctrine to elaborate the concept of “urban religion” (Kuppinger, 2019), with the aim of emphasizing the liveliness and originality of the initiatives promoted in the social, cultural and artistic fields by religious groups (Garbin & Strhan, 2017), as well as their peculiarity with respect to the manifestations of the same belief in rural areas<sup>4</sup>.

Preliminarily, as confirmed by recent studies, it should be noted that the positive impact of religions on the creativity and progress of urban areas would seem to be favored by the multi-religious character of contemporary cities. Indeed, according to these reconstructions, the “competition” that is activated between the different groups present in the same urban territory, stimulating the evolution of the single religions, seems to be able to represent an important factor of innovation and creativity, as well as of spiritual progress for the entire local community<sup>5</sup>.

Although at first analysis, it would seem that the main contribution of religions to art and creativity resides in those testimonies of the past kept in places of worship and museums, numerous researches are directed to demonstrate, on the contrary, the current existence of complex interactions between religion, art and creativity in global cities and the presence of contemporary art, and more generally of creativity and expressive life, inspired by faith in “places that are situated beyond the beaten path of famous houses of worship and dominant art worlds” (Kuppinger, 2017b, p. 343). We refer, in particular, to the numerous culinary and sartorial creations inspired by the faith or musical works resulting from the reworking of popular musical genres, as well as, more generally, to “informal or vernacular arts, expressive cultures, and creativity in ‘unexpected places’, where ordinary pious urbanites engage in creative activities, generate astounding artefacts and creative expressions, critically engage cities and spaces and produce meaning for themselves, their neighbours and communities” (Kuppinger, 2017b).

That contemporary religious expressiveness manifests itself in “unexpected places” – generally situated in the peripheral areas of cities – can be explained by the “trivialization” of city centers, which have become increasingly uniform and similar to one another and have fallen into global touristic and artistic circuits<sup>6</sup>. So they tend to expel and ignore the different religious expressions inspired by religion, regardless of the fact that these practices may originate from immigrant communities.

In fact, the urban artistic contributions of the religious matrix are not limited to migrant populations, sprouting rather in every religious community that continues “to practice and refine existing art forms and creative practices, incorporate, invent or discover new creative expression or genres, move to inhabit urban new spaces, or transform, remake and adjust popular and other cultural

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<sup>4</sup> “As established urban faith traditions and communities encountered rural arrivals and their religiosities, new religious traditions, practices, faith-based venues, quests for different spiritualities and faith-based socialities, and modes of meeting, worshipping, and religious learning emerged and articulated with existing spiritual geographies. Some resulted in new modes of religious engagements or houses of worship, while others inserted new practices or spiritualities into existing congregations and religious spaces. Resulting transformations in urban religion and spiritual practices triggered a renewed scholarly interest in the rapidly changing scenery of urban religions, religiosities, religious practices, spiritual activities, and geographies. By the 1990s, a growing number of scholars studied emerging and changing religious communities, individual pieties, and the localization of new/immigrant faith communities and practices. They took a keen interest in rapidly transforming spatialities of established and new religious communities and renegotiations of existing urban religious geographies” (Kuppinger, 2019, p. 8).

<sup>5</sup> The relationship between multi-religiosity and creativity in urban areas has been affirmed by the USC Center for Religion and Civic Culture, on the base of studies carried out in the city of Los Angeles and Seoul. The project has involved case studies within six religious traditions (Christian, Jewish, Buddhist, Hindu, Muslim, new religious movements). For further information see <https://crcc.usc.edu/rcci/>

<sup>6</sup> “Secular fashionable definitions, dominant intellectual and artistic networks, privileged urban locations, profitable art markets and broader political and economic contingencies largely define what is seen and recognised as relevant expressions of contemporary creativity. Other trends, spaces, sites, activities, creative expression or artefacts have often ignored, marked as insignificant or even forcefully pushed aside as inappropriate. In recent decades, scholars and observers have taken a growing interest in diverse manifestations of vernacular and informal creativities that unfold away from the globalised limelight of commercialised arts venues and circuits” (Kuppinger, 2017b, p. 345).

forms and expressions to serve their spiritual purposes”<sup>7</sup>.

Some of these experiences deserve to be briefly outlined.

Particularly significant in the city of Chicago – especially in the southern suburbs – has been the contribution of the Muslim association Chicago’s Inner-City Muslim Action Network, that, after 11th September 2001, has fought to eradicate the climate of diffidence expressed towards the Islamic community by proposing numerous initiatives aimed at enhancing the principles of justice, brotherhood, and urban tolerance. The activities started with the initial transformation of Marquette Park into a creative space for the multicultural and interreligious celebration of events, revolve around the monthly magazine *Café Magazine* and the organization of the “International Urban” Festival of IMAN biennial art, in which art rises as a vehicle to redesign the city and the world (Ali, 2017).

For example, the role of religious associations in the London suburbs has been translated into the development of new musical genres (Rosowsky, 2018), as well as an admirable action to enhance the art of painting on glass, used for the creative recovery of numerous abandoned churches in the suburbs, thanks above all to the participation of female artists, the most unknown (Ahmed & Dwyer, 2017).

Still in Europe, the Islamic community of Stuttgart stands out for its liveliness in the culinary and sartorial sector, as well as for decorative art, applied with excellent results in the decoration of the interior of mosques (Kuppinger, 2017a).

Returning to the contaminations between religiosity and music, it is worth noting the “mystical cosmopolitanism” that distinguishes the experience of Islam in Senegal, starting from the city of Dakar, which is affected by the spread of a new musical genre, the *Sufi Hip Hop*, practiced by adherents of the *Fayda Tijaniyya Sufi* as an instrument of preaching and acting of the religious precepts, appreciated above all by the young (Hill, 2017). Equally unique is the *Festa de Divino Espirito Santo of Sao Luis do Maranhao* in Brazil, in which, religious faith, culinary art and traditional music come together in rituals of particular symbolic and cultural value. The party is characterized by the creation of enormous cakes, for the presence of women intent on playing percussion, and for its religious syncretism, which reflects the presence of Afro-Brazilian religious practices (Barton, 2017).

Finally, unprecedented from an architectural point of view, it is the creative effort of the numerous Miami immigrant Catholic communities, coming from different Latin American countries and, therefore, primarily committed to building their own internal union through the use of colonial art in the construction or restoration of religious buildings.

Precisely through the use of the common language of colonial art, the religious authorities, emphasizing the commonality of history, were able to use the common colonial cultural base as an “action strategy” for the creation of a unity community despite to the differences (Garcia, 2017).

The mentioned experiences represent only a part of the numerous initiatives adopted by religious communities in support of the artistic and cultural creativity of urban areas (Kuppinger, 2019), thus deprived of degradation and abandonment.

#### **4. A further factor of development and revitalization of degraded urban areas: The shared use of abandoned buildings of suburbs and historical centers**

The state of abandonment in which a growing number of religious buildings are located represents, like other phenomena, a significant factor of urban decay, which has so far not been adequately solved. Even because, the shared use of religious buildings – which can play a crucial role in promoting inter-religious dialogue and coexistence between different ethnic-religious communities – has not always seen sufficient involvement of the most recently established religious groups (see Cardia, 2018, which, with reference to the Italian situation, underlines how the practices of

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<sup>7</sup> “New pious aesthetic practices emerge as larger cultural contexts transform and produce new artistic expressions and genres. Established and often invisible vernacular creative activities continue to flourish as the pious carry their expressive practices into the future. Popular creative practices, like the culinary arts, have recently come to new prominence as ‘foodies’ discover ethnic and religious food practices and products. Faith-inspired creativity includes a vast realm beyond the construction and embellishment of houses of worship, as the faithful use, create and remake an extensive field of musical genres and expressions, experiment with sartorial styles and expressions” (Kuppinger, 2017b, p. 347).

sharing places of worship have substantially regarded only the Catholic and Romanian Orthodox religious communities). On the other hand, it cannot be overlooked that, in addition to positive experiences, there must be some failures with regard to experimenting with practices of “inter-ritual hospitality” (about the reasons for the failures of such experiences see Moyaert, 2017).

This does not take away from the fact that the problem of abandoned religious buildings, already present in Europe in recent decades and now tangible also in Italy<sup>8</sup>, raises the need to study interventions aimed at the recovery or at least the use of these assets, which they cover, in addition to their sacred character, also an unquestionable historical, social, cultural and, not least, artistic value. Therefore, the failure to use such a substantial material and immaterial heritage, in addition to its negative impact in terms of urban anthropology, determines an inevitable depletion of the tourist and economic potential of the individual metropolitan areas, contributing to their progressive decay.

Already with the *Resolution of the Parliamentary Assembly of the Council of Europe* (May 9, 1989) the problem of abandoned places of worship was dealt with – considered an issue now of interest not only confessional but also civil – highlighting the need to foster, thanks to the collaboration between local authorities and denominational actors, the adoption of necessary recovery and redevelopment measures (Cavana, 2009, p. 2). From this solicitation, numerous initiatives have been deployed, with the aim of preserving the destination for the public worship of buildings that have by now been abandoned thanks to the development, within them, of further activities of a social and cultural nature.

On this point, of particular interest is the Flemish experience, in which the central government imposed on individual councils of maintenance annexed to the places of worship – under penalty of revocation of all public funding – the development of a strategic plan concerning the use of all the insistent churches in the territory, establishing, in the event of inaction, the shared use of places of worship between different religious groups or the final destination of the property for non-cult purposes, in agreement with the competent confessional authorities (Dimodugno, 2017). The focus on suburban churches represents the central point of the strategic plan outlined by the city of Antwerp, in which, in order to promote social cohesion, the mixed-use of churches among the various religious communities has been strongly encouraged (Dimodugno, 2017, p. 29).

As traced by the administrative practice of the city of Antwerp, urban regeneration, the regeneration of the economic-social context, the promotion of coexistence and the contrast to the degradation of peripheral metropolitan areas can also pass through the recovery or reuse of abandoned places of worship, by virtue of their natural predisposition to become a center of aggregation, since they are spaces generally open to the public.

Also with regard to the Italian situation, the re-use, in an inter-religious or intercultural key, of abandoned buildings of worship could represent a tool for the “redemption” of the suburbs. The adoption of such initiatives would, however, seem to be favored by the dynamism shown by the confessional actors in suburban areas, where they are often committed to facing, through the organization of frequent cultural and social initiatives, also those phenomena of radicalization that undermine the integration of the immigrant religious communities in destination societies (Cesareo & Bichi, 2010).

It cannot in fact be denied that in the face of a substantial immobilism of the secular orders towards the peripheries (the inaction of politics towards the suburbs reflects the inertia shown towards recently established religious groups, see Tedeschi, 2011), it is necessary to record, on the contrary, increased attention of the religious confessions on the subject. In particular, the most recent indications of the Magisterium of the Catholic Church find in the peripheries a terrain of challenge on which the “outgoing Church” must measure itself in order to oppose an effective contrast to the phenomena of marginalization and poverty, expression of the widespread “culture of waste”

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<sup>8</sup> “A similar problem arises today with particular urgency in Europe, a land of ancient Christianity, due to the effects of secularization, demographic trends and the spread of new cults, which have determined a significant decrease in the practice of public worship in many countries; both for the distribution of the population over the territory and for the effects of urban planning, which at times first determined the depopulation of the countryside and mountain localities, and today a progressive abandonment of historic centres and the expansion of new urban suburbs; finally, because of the risk of deterioration and abandonment to which a large part of the historical-artistic heritage of religious interest is exposed, in Italy as well as in Europe, also due to the contraction of priestly and religious vocations, the increase in the management and maintenance costs of real estate and the limits of public finance” (Cavana, 2009, pp. 1-2).

(these indications, clearly stated in the Encyclical Letter *Laudato si'*, had already been announced by Pope Francis in the Apostolic Exhortation *Evangelii Gaudium*, 2013). No less significant is the effort made by immigrant religious communities – also with the collaboration of confessional groups already rooted in the host countries – for the social and economic integration of migrants (d'Arienzo, 2016), starting from the most peripheral city areas.

In this sense, the material and cultural heritage represented by places of worship can constitute a tool that can be immediately used to promote interreligious dialogue, to stimulate creativity and social relations in depressed areas, as well as to guarantee the right to the availability of places of worship, constitutionally guaranteed, to the faithful of different religious denominations.

Even in the case of religious buildings owned by religious organizations, the experimentation of such practices presupposes, in addition to the collaboration between the different religious confessions, the necessary support of the local civil authorities (to be noticed is the recent signing of Sharing and Citizenship Agreements between numerous Italian cities and local Islamic communities, see Celsi, 2017), especially as regards the urban profiles, that often constitute an obstacle to the success of these initiatives. Otherwise, in the case of ownership of the cult building by other public bodies, in addition to the agreement between the different religious confessions and the possible supervision of the superintendency, the stipulation of a special agreement with the public owner would be required to achieve the aim of allocating the good to an inter-religious or intercultural use.

Instead, as regards the properties owned by the “Fondo Edifici di Culto” – the owner of numerous abandoned religious buildings (for the complete list of the 820 churches owned by F.E.C. consult see F.E.C., n.d.) – it seems instead to be considered precluded from any possibility of assigning the building to a place of worship shared by several religious communities, in light of the peculiarities of the institution, centered on a mixed management State – Catholic Church (Botti, 2014). Therefore, the desirable disposal of religious buildings belonging to the F.E.C., that they have no historical or architectural significance (Botti, 2014, pp. 41-42), would guarantee the possibility of using this considerable patrimony also for cultural initiatives, as well as inter-religious and inter-ritual hospitality, soliciting the revitalization of important city areas, including some important historical centers, such as that of Naples (F.E.C. is the sole owner of 43 churches in the city of Naples, some of which are currently closed to the public, see *Napoli Today*, 2014) or Venice (for more information about the prospects of reusing over thirty closed and abandoned churches in Venice see Marini and Roversi Monaco, 2017).

At the same time, in addition to the immediate positive repercussions of economical and social nature, religious groups of more recent settlement, often without a place of worship, could obtain the availability of spaces where decently practice their religious faith.

## 5. Conclusion

The Italian legal system has normative instruments that could adequately allow the enhancement, also in economic and social terms, of cultural assets of religious interest<sup>9</sup>, including abandoned buildings of worship.

At the moment, in fact, it does not seem possible to deny that the provision of the art. 9 of Legislative Decree 42/2004<sup>10</sup> has not released yet its full potential, having been interpreted so far in light of the principle of necessary bilateralism, rather than as an expression of a potential multilateralism in the management of cultural heritage, which would be equally able to guarantee – perhaps even in a better way – the enhancement of cultural heritage of religious matrix.

As demonstrated also by the experiences just examined – we refer above all to the colonial revisitation of the parish churches of Miami by Latin American immigrants (Garcia, 2017) – the recovery and re-use of the Italian cultural heritage to become an important factor in

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<sup>9</sup> In doctrine it was considered possible to apply to the management of cultural assets of religious interest, the UNESCO site management model, in which the enhancement of the cultural property – in compliance with the provisions of art. 3 of Law 77/2006 (which refers to art. 9 of Legislative Decree 42/2004) – is based on agreements between public bodies and private entities inspired by principles of sharing, negotiation and negotiated planning (Tigano, 2018).

<sup>10</sup> Art. 9, first paragraph of D. Lgs. 42/2004 states: “*For cultural assets of religious interest belonging to institutions of the Catholic Church or other religious confessions, the Ministry and, as far as it is concerned, the Regions provide with regard to the needs of worship in agreement with the respective authorities*”.

the development of urban creativity, in addition to the integration and social revitalization of degraded suburbs or historical centers, it would need new forces, which could only be drawn with the essential involvement of all religious actors. In other words, having taken note of the frequent failures of a model based exclusively on bilateral collaboration in the enhancement of abandoned religious buildings, on the contrary, new experiences of multilateral management of this heritage should be encouraged.

In conclusion, the presence of multi-religious contexts seems to allow better management of cultural and religious heritage. The current Italian situation seems to confirm the validity of those theses elaborated in psychology and sociology, which identify in the presence of several religious denominations, within the same urban space, a factor of spiritual progress and development of the society's creativity, to the difference of contexts characterized in a single confessional sense.

## References

1. Ahmed, N., & Dwyer, C. (2017). "Living, changing light": Stained glass art and gendered creativity in suburban churches. *Culture and Religion*, 18(4), 371-387. <https://doi.org/10.1080/14755610.2017.1376695>
2. Ali, M. (2017). "Art is not just about entertainment": The social activism and cultural production of Chicago's Inner-City Muslim Action Network (IMAN). *Culture and Religion*, 18(4), 353-370. <https://doi.org/10.1080/14755610.2017.1377982>
3. Assouad, A., & Praveen Parboteeah, K. (2018). Religion and innovation. A country institutional approach. *Journal of Management, Spirituality & Religion*, 15(1), 20-37. <https://doi.org/10.1080/14766086.2017.1378589>
4. Barton, S. A. (2017). Race, faith and cake: Foodways at a Festa de Divino Espírito Santo. *Culture and Religion*, 18(4), 448-473. <https://doi.org/10.1080/14755610.2017.1376693>
5. Blake, J. (2006). *Commentary on the 2003 UNESCO convention on the safeguarding of the intangible cultural heritage*. Leicester, UK: Institute of Art and Law.
6. Botti, F. (2014). Edifici di culto e loro pertinenze, consumo del territorio e spending review. *Chiese e Pluralismo Confessionale*, 27, 35-56. <https://doi.org/10.13130/1971-8543/4301>
7. Brenkert, G. G. (2009). Innovation, rule breaking and the ethics of entrepreneurship. *Journal of Business Venturing*, 24(5), 448-464. <https://doi.org/10.1016/j.jbusvent.2008.04.004>
8. Burchardt, M., & Westendorp, M. (2018). The im-materiality of urban religion: Towards an ethnography of urban religious aspirations. *Culture and Religion*, 19(2), 160-176. <https://doi.org/10.1080/14755610.2018.1444656>
9. Cardia, C. (2018). Edifici di culto e nuove religioni. *Il Diritto Ecclesiastico*, 119(1-2), 13-29.
10. Casanova, J. (2013). Religious associations, religious innovations and denominational identities in contemporary global cities. In M. Burchardt, I. Becci, & J. Casanova (Eds.), *Topographies of faith: Religion in urban spaces* (pp. 113-127). Leiden, the Netherlands: Brill. [https://doi.org/10.1163/9789004249073\\_008](https://doi.org/10.1163/9789004249073_008)
11. Cavana, P. (2009). Il problema degli edifici di culto dismessi. *Stato, Chiese e Pluralismo Confessionale*. Retrieved from <https://www.statoechiese.it/contributi/il-problema-degli-edifici-di-culto-dismessi>
12. Celsi, F. R. (2017). Pluralismo religioso, multiculturalismo e resilienza urbana: Profili di diritto ecclesiastico. *Stato, Chiese e Pluralismo Confessionale*, 12, 1-28. <https://doi.org/10.13130/1971-8543/8288>
13. Center for Religion and Civic Culture. (2014, March 21). *Religious Competition and Creative Innovation project*. Retrieved from <https://crcc.usc.edu/rcci/>
14. Cesareo, V., & Bichi, R. (2010). *Per un'integrazione possibile. Periferie urbane e processi migratori*. Milan, Italy: Franco Angeli.
15. d'Arienzo, M. (2006). Confessioni religiose e comunità. In M. Tedeschi (Ed.), *Comunità e soggettività* (pp. 279-292). Cosenza, Italy: Luigi Pellegrini.
16. d'Arienzo, M. (2016). Appartenenza religiosa e reti sociali dei migrant. *Diritto e Religioni*, 11(2), 270-289.
17. d'Arienzo, M. (2018). Linguaggi liturgici e identità religiose nella Riforma Protestante. La musica nel rito luterano e calvinista. *Diritto e Religioni*, 13(2), 143-165.
18. Dana, L. P. (2009). Religion as an explanatory variable for entrepreneurship. *International Journal of Entrepreneurship and Innovation*, 10(2), 87-99. <https://doi.org/10.5367/000000009788161280>
19. Day, N. E. (2005). Religion in the workplace: Correlates and consequences of individual behaviour. *Journal of Management, Spirituality & Religion*, 2(1), 104-135. <https://doi.org/10.1080/14766080509518568>
20. Dimodugno, D. (2017). Il riuso degli edifici di culto: Profili problematici tra diritto canonico, civile e amministrativo. *Stato, Chiese e Pluralismo Confessionale*, 23, 18-27. <https://doi.org/10.13130/1971-8543/8808>
21. Dubini, P. (2018). "Con la cultura non si mangia". *Falso!* Bari-Rome, Italy: Laterza.
22. F.E.C. (n.d.). *Chiese*. Retrieved from <https://archivioidigitalefec.dlci.interno.it/fec/chiese>



23. Filoramo, G., & Bidussa, D. (Eds.). (2008). *Le religioni e il mondo modern* (Vol. 2 Ebraismo). Turin, Italy: Einaudi.
24. Francesco. (2015). *Dieci parole per una Chiesa in uscita*. Rome, Italy: Paoline Editoriale Libri.
25. Francesco. (n.d.). *Esortazione apostolica Evangelii Gaudium n. 15*. Retrieved from [http://www.vatican.va/content/francesco/it/apost\\_exhortations/documents/papa-francesco\\_esortazione-ap\\_20131124\\_evangelii-gaudium.html](http://www.vatican.va/content/francesco/it/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html)
26. Francis. (2013, November 24). *Apostolic exhortation Evangelii Gaudium*. Retrieved from [http://www.vatican.va/content/francesco/en/apost\\_exhortations/documents/papa-francesco\\_esortazione-ap\\_20131124\\_evangelii-gaudium.html](http://www.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html)
27. Garbin, D., & Strhan, A. (Eds.). (2017). *Religion and the global city* (1st ed.). London, England: Bloomsbury Academic.
28. Garcia, A. (2017). Colonial art ass ethnic unifier. *Culture and Religion*, 18(4), 409-427. <https://doi.org/10.1080/14755610.2017.1376691>
29. Geel, L., & Beyers, J. (2018). The apparatus theory: 'Religion in the city'. *HTS Theological Studies*, 74(4), 1-9. <https://doi.org/10.4102/hts.v74i4.4927>
30. Glenn, P. H. (2011). *Tradizioni giuridiche del mondo. La sostenibilità della differenza*. Bologna, Italy: Il Mulino.
31. González Díez, J., & Gusman, A. (2016). Religioni e città. Approcci emergenti in antropologia urbana. Introduzione. *ANUAC*, 5(1), 91-106. <https://doi.org/10.7340/anuac2239-625X-2247>
32. Gozzi, G. (2006). Una modernizzazione islamica. *Jura Gentium*. Retrieved from <https://www.juragentium.org/forum/horchani/it/gozzi.htm>
33. Hill, J. (2017). A mystical cosmopolitanism: Sufi Hip Hop and the aesthetics of Islam in Dakar. *Culture and Religion*, 18(4), 388-408. <https://doi.org/10.1080/14755610.2017.1376694>
34. Kuppinger, P. (2017a). Piously creative: Islam, art and creativity in Stuttgart, Germany. *Culture and Religion*, 18(4), 428-447. <https://doi.org/10.1080/14755610.2017.1376692>
35. Kuppinger, P. (2017b). Religion, art and creativity in the global city. *Culture and Religion*, 18(4), 343-352. <https://doi.org/10.1080/14755610.2017.1402419>
36. Kuppinger, P. (2019). Introduction: Urban religions. *City & Society*, 31(1), 8-16. <https://doi.org/10.1111/ciso.12202>
37. Liu, Z., Guo, Q., Sun, P., Wang, Z., & Wu, R. (2018). Does religion hinder creativity? A national level study on the roles of religiosity and different denominations. *Frontiers in Psychology*, 9, 1912. <https://doi.org/10.3389/fpsyg.2018.01912>
38. Marini, S., & Roversi Monaco, M. (2017). Le chiese chiuse di Venezia. Mappatura, progetti e criteri di riuso di una costellazione di edifici a fondamento di una nuova idea di città. *IN\_BO. Ricerche E Progetti Per Il Territorio, La Città E L'architettura*, 8(11), 358-369. <https://doi.org/10.6092/issn.2036-1602/6466>
39. Middleton, D. J. N. (2015). *Rastafari and the arts: An introduction* (1st ed.). <https://doi.org/10.4324/9780203481653>
40. Moyaert, M. (2017). Infelicitous inter-ritual hospitality. *Culture and Religion*, 18(3), 324-342. <https://doi.org/10.1080/14755610.2017.1339100>
41. Napoli Today. (2014, May 7). Napoli, città di "chiese negate": Una convenzione per riaprirle. *Napoly Today*. Retrieved from <http://www.napolitoday.it/cronaca/convenzione-fec-soprintendenza-chiese.html>
42. Okulicz-Kozaryn, A. (2015). The more religiosity, the less creativity across US counties. *Business Creativity and the Creative Economy*, 1(1), 81-87. <https://doi.org/10.18536/bcce.2015.07.1.1.09>
43. Riccardi, A. (2016). *Periferie. Crisi e novità per la Chiesa*. Milan, Italy: Jaca Book.
44. Rosowsky, A. (2018). Globalisation, the practice of devotional songs and poems and the linguistic repertoires of young British Muslims. *Culture and Religion*, 19(1), 90-112. <https://doi.org/10.1080/14755610.2017.1416645>
45. Shen, W., Yuan, Y., Yi, B., Liu, C., & Zhan, H. (2017). A theoretical and critical examination on the relationship between creativity and morality. *Current Psychology*, 38, 469-485. <https://doi.org/10.1007/s12144-017-9613-9>
46. Tedeschi, M. (Ed.). (2011). Le minoranze religiose tra autonomia e immobilismo del legislatore. In *Quasi un bilancio* (pp. 217-228). Cosenza, Italy: Pellegrini.
47. Tigano, M. (2018). Un "modello Unesco" per la gestione, in chiave economica, dei beni culturali di interesse religioso. *Stato, Chiese e Pluralismo Confessionale*, 23, 1-21. <https://doi.org/10.13130/1971-8543/10328>
48. UNESCO. (2003). *Convention for the safeguarding of intangible cultural heritage 2003*. Retrieved from [http://portal.unesco.org/en/ev.php-URL\\_ID=17716&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html)
49. Younis, S. (2015). Dal caftano di 'Abduh le ideologie islamiche di oggi. *Oasis Center*, 21, 14-23. Retrieved from <https://www.oasiscenter.eu/it/dal-caftano-di-abduh-le-ideologie-islamiche-di-oggi>

# NEW GUIDELINES FOR SOCIAL INCLUSION POLICIES RELEVANT TO MENTAL ILLNESSES INSIDE THE PRISON CONTEXT

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**Keywords:** Folli Rei, Rei Folli, Psychiatric Illness While Incarcerated, Forensic Psychiatric Hospitals, Alternative Penalties to Prison, Dignity, Rights of Detainees

## 1. Introduction

In the public imagination, prisoners have long been considered “social waste” (De Rossi, Bologna, Colcerasa, & Renzulli, 2011) to be eliminated from the social context and to be hidden in separate places, just like mental patients, to be then considered people receiving national and supranational rules, towards which to impose limits in order of the deprivation of one’s own personal freedom, and even to apply guarantees on how this action is carried out. The research is mainly based on the prison overpopulation and on the possible means to solve the problem, in the specific case, the scarce legal protection against detained people who – if they were carriers of mental illness, occurred at the sentence – suffered strong discrimination in the execution of the sentence, because there was no compliance of the therapeutic needs guaranteed by Art. 47-ter, c. 1-ter of Law n. 354 of 1975, to other prisoners suffering from serious physical pathologies. It is about double discrimination suffered by many individuals living in strong social isolation, whether for mental conditions or for the place where they serve their sentence. The problem becomes complicated when a discriminatory element, such as prison, can be the cause of the unbalance and, therefore, of serious pathologies of the prisoners (so-called *rei folli*). Recently, the Constitutional Court has intervened to solve this complicated puzzle and in judgement n. 99 of 2019, argued that mental disorders can get worse and intensify due to reclusion, to the point of implying, in extreme cases, a real incompatibility between prison and mental disorder. Moreover, the judges of the Court have established that “in contrast to the constitutional principles ex. Art. 2, 3, 27, third paragraph, 32 and 117, the first paragraph of the Constitution, the absence of an alternative to prison, which prevents the judge from deciding that the sentence is served outside the detention institutes, even if, after all the necessary medical inspections, it has been found a mental disease causing such serious suffering that, cumulated with the ordinary affliction of the prison, brings forth an additional sentence contrary to the sense of humanity”.

Such convicts with an occurred mental disease, even if the residual sentence is longer than four years, have finally the possibility of being treated in the small Departments for the safeguard of mental illnesses and by the DSM (Departments of Mental Illness), existing in prisons, but even – if these intra-wall remedies are inadequate for the serious mental illness – outside the prison, through alternative measures arranged by the surveillance court, such as the institutions for the mandatory or optional deferral of the sentence, or through the house detention, also called “humanitarian” or “derogating”, on the same terms of physical illness, ex. Art. 147 and 148 penal code.

## 2. The judgement of the Constitutional Court n. 99 dated 19 April 2019

Through Judgement n. 99 of 19 April 2019, the Constitutional Court has recovered the reform proposal formulated by the Commission Pelissero that wanted to extend Art. 47 penal code (optional postponement of the sentence execution towards convicts suffering from serious physical illnesses) even to serious mental disabilities and to abrogate Art. 148 penal code (mental disorder occurred to the convict), seeing that the OPG (Forensic Psychiatric Hospitals) have been dismantled (where also *rei folli* to whom the execution of the sentence was precluded, due to the occurred mental illness,

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were accepted). On the one hand, if the proposals put forward by the ministerial Commission have not been taken into consideration by the subsequent rearrangement law of penal rules, of the penal procedure and the penitentiary law (Law n. 103 of 2019), on the other hand, judgement n. 99 of 2019 tried to put at the core of the debate the protection of the health of detainees with mental illness (Della Bella, 2018) but also the unease of the prison police expressed, as we will see later, through the increase of the suicides rate in prison. The Constitutional Court has cancelled what was put into effect by the Legislative Decrees of 2 October 2018, n. 123 and 124, executive of Law n. 103 of 2017, paragraph 16, which had completely removed the matter of psychiatric assistance in penal institutions. On the contrary, as for Art. 148 penal code, the Constitutional Court itself argued about the judgement under review that “has now become inapplicable, because overtaken by legislative reforms that, without expressly prescribing their repeal, have completely emptied it of its contents...”.

Into the merits, judgement n. 99/2019 resolves the doubt of constitutionality raised by the Cassation Court on the difficult question of the rights of the psychic patients, finally managing to equalize detainees, suffering from serious physical illness to those suffering from a serious deep-rooted mental illness. The question submitted to the judgment of the Constitutional Court refers, in particular, to the prisoners who – if they were carriers of mental illness, occurred after the conviction – suffered from strong discrimination in the execution of the sentence, because the therapeutic needs guaranteed by Art. 47-ter, c. 1-ter of Law n. 354 of 1975, to other prisoners suffering from serious physical pathologies, was not taken into consideration. Such decision allowed that even these prisoners with an occurred mental illness, who had to serve sentences even longer than four years (for “humanitarian” criteria), had to be assisted in the health sections of prisons, or outside the prison, with alternative measures arranged by the surveillance court, such as the institutions of the mandatory or optional respite of the sentence, or the house arrest, “humanitarian” or “derogating”, like the physical illness, ex-Art. 147 and 148 penal code. House arrest can therefore be applied to the prisoner, suffering from occurred serious mental illness and can take place “at home or in another place of private residence”, or in a “public place of medical care, assistance or reception”, as provided for in Art. 284 criminal procedures code and as reaffirms paragraph 1 of the same Art. 47-ter penitentiary order. Consequently, we can deduce that house detention constitutes “not an alternative measure to the sentence, but an alternative sentence to detention or, if you like, an execution method of the sentence”, adding that it is accompanied by “restrictive provisions of freedom, under the vigilance of the supervisory magistrate and with the intervention of the social service” (Leonardi, 2007).

### **3. Judge’s assessment of the detainee suffering from mental illnesses**

The judge has to evaluate, on the basis of the constitutional law, if the penitentiary treatment is individualized case by case, but at the same time, has to weigh up the riskiness and the treatment progress, because every different situation deserves a different treatment.

The decision about if the condemned person, suffering from a serious mental illness, is in the condition to remain in prison or to be transferred to an external place, is a difficult task that has to be assessed, case by case and moment by moment, according to the individual situation. The supervisory judge will no longer use the criterion linked to the mere presence of serious mental illness – meant, in a general sense, as a social stigma implying the logic of the mental hospital – but the medical test of the prisoner, of his social and family conditions, of the care structures and services offered by the prison, of the protection needs of the other prisoners and all the personnel, working inside the penitentiary institution, which shall be adequately balanced by the need to safeguard the safety of the community. If the requirements of public safety prevail, the supervisory magistrate will deem them impedimental to the concession of alternative measures. The same judge will adopt precise criteria to define the mental illness and to offer his evaluation, as well as the management ways and the operational effects on mental health departments and professional responsibilities. After the achievement of the DSM certification of serious mental illness and the preparation of a therapeutic path and of psychiatric assistance, the condemned person can be committed on probation, through an order indicating the “prescriptions” he/she has to comply with. However, in order to ensure the respect of the sentence and that justice and health competencies are set out, it is fundamental to

define the meaning of “serious mental illness” and to establish the relationship between “prescriptions” and “program of care” (Galliani, 2018). Otherwise, the measures that do not take into consideration the feasibility of the PT, would shift onto the public healthcare conditions of mere maladjustment to detention in prison, compromising the places of care that have to manage false patients<sup>1</sup>.

#### 4. The non-physical and mental health of the restricted and the reference community

With respect to physical pathology, the Court of Human Rights has declared that the State has to take into account the practical needs of imprisonment, adequately ensuring the health, but also the well-being of the detainee. In this regard, the administration of the required medical care cannot be denied in no case, e.g. *Kudla v. Poland* [gc], n. 30210/96, § 94, Cedu 2000-XI; *Rivière c. France*, n. 33834/03, § 62, 11 July 2006 (Conti, 2013), that have to be provided within the prison and correspond to those given to the entire population. In order to protect the physical integrity of those people deprived of their freedom, the release of the prisoner or his transfer to a civil hospital is justified, when the disease is particularly difficult to be treated. As for mental illness, on the other hand, thanks to the recent judgement of 19 April n. 99 of 2019, the Constitutional Court has solved the doubt of constitutionality raised by the Cassation Court on the difficult issue of the rights of the psychic patients, finally managing to equalize detainees, suffering from serious physical illness to those suffering from a serious deep-rooted mental illness. In doing so, the Court took an important step towards the realization of some provisions of the European penitentiary policies (Council of Europe: Committee of Ministers, 2006) in order to change the rigid detention system – without affecting, at present, the granitic Penal Code Rocco of 1930 – involving the population of prisoners, including the rei-folli<sup>2</sup>. The sentence will not have repercussions only on rei folli, but also because it will shed light on the penitentiary institution, considered until now a *Sancta Sanctorum* of the Italian penal system. The legislator had already perceived the problem of detainees with mental illnesses and with Law n. 354/75, on Art. 11, established that: “each penitentiary institution has to avail itself of the professional advice of at least one specialist in psychiatry”. This provision imposed the Prison Administration to introduce within the penal institutions, an intra-wall psychiatric service, managed by a group of professionals, able to ensure a necessary therapeutic continuity, in order to face situations of psychic discomfort<sup>3</sup>.

It is about the so-called “small departments for the protection of mental health”, authorized to host infirm and mentally disabled people inside prisons (ex. Art. 111, c. 5 and 112, c. 2 of Presidential Decree n. 230/00), as well as those individuals convicted to penalty, reduced due to partial defect of the mind, at the moment of the fact perpetration (89 penal code).<sup>4</sup> The Court has often stressed that the condition of the frailty of the convict produces a positive obligation for the State to guarantee the respect of worthy conditions for the individual. This would confirm the attention of the Constitutional Court to the previous decisions of the Strasbourg Court and therefore, to the respect of the total prohibition of torture or inhuman or degrading treatments (EDU Court, second section, judgement n. 17 November 2015, *Bamouhammad v Belgium*, paragraph 119; EDU Court, Grand

<sup>1</sup> The non-official data drawn by SIP (National Conference of 21-23 June) on April 2019, underline that every year more than 400 people (5%), coming from prison, are transferred to psychiatric structures without any clinical indication on the imprisonment methods considering that 8 thousand real patients obtain a non-detention security measure at the DSM or detention in the REMS.

<sup>2</sup> Art. 12 of the European Prison Rules provides that, in case of incompatibility between detention inside prison and people suffering from mental illnesses, they should be detained in an institution expressly conceived for this purpose. If, however, these people are exceptionally detained in a prison, their situation and their needs have to be regulated by special rules.

<sup>3</sup> See the goal project for the protection of mental health in the penitentiary field, issued to implement the reform of penitentiary medicine with Legislative Decree n. 230 of 22 June 1999. The goals highlight the need to maintain a strong collaboration between the territory, represented by the DSM, and the psychiatric service in the penal institutions; Art. 111 c. 5 and 112 c. 2 of Presidential Decree n. 230 of 30 June 2000 (Regulation bearing the rules on the penitentiary system and on the privative and restrictive measures of freedom), published in G.U. (Official Gazette) n. 195 of 22 August 2000 – Suppl. Ord. n. 13. Finally, the Decree of the Council of Ministers President of 1 April 2008, which will provide an adequate regulatory response to prisoners in the period in which the OPG (Judicial Psychiatric Hospitals) were still open.

<sup>4</sup> See the Agreement of 13 October 2011, sanctioned in Unified Conference, on the document bearing “Integration to priority addresses on interventions in judicial psychiatric hospitals (OPG) and in Care and Custody Homes (CCC) referred, as per Annex C of the Decree of the Council of Ministers President, 1st of April 2008”.

Chamber, judgement of 26 April 2016, *Murray v Low Countries*, paragraph 105). In the event of infringement, it is mandatory “that the jurisdictional authority provides for the interruption of imprisonment”, remembering that the area of the prohibition application ex Art. 3 of the ECHR, has to be extended to the entire prison system, also including the prison psychiatric department, because even in this place it could be practiced “a degrading treatment when used therapies are improper and the detention extends over a significant period of time...”.

The long wave against prejudice goes until the heart of the Italian prison system, affecting the automatism (absence of collaboration) that were deemed unacceptable because they preclude the access to benefits (Art. 85, point e) of Law n. 103 of 2017 (Alterations to penal code, penal procedure code, and penitentiary system). Vide, then, the ECHR October 2018, Art. 41 bis, which condemned Italy for inhuman and degrading treatments, having prevented Bernardo Provenzano, who was serving an impedimental life sentence and who was at death’s door, to enjoy the benefits regarding his bad physical conditions, because he was however considered an individual at a high level of perilousness. The same concerns the judgement of the EDU Court that in the case *Marcello Viola c. / Italy* (n. 2), Appeal n. 77633/16, judgement of 13 June 2019, condemned Italy for infringement of Art. 3 Human Rights Convention, that is the right of the prisoner condemned to impedimental life imprisonment not to be subjected to inhuman and degrading treatment, and therefore, to enjoy discounts of penalty or benefit. Thanks to this last ECHR decision, the legislator has to take his cue to change the prison rules and to conform to some penal institutions (for example, the special detention regime), with international human rights standards.

## 5. Prison overpopulation and its potential pathogenesis

Mental health in prison is a particularly sensitive area within the general health of prisoners. That’s because recently, mental health has been strongly compromised by the conditions of detention life – especially in contexts characterized by a systemic and structural prison overpopulation (Edu Court, judgement of 8 January 2013, *Torreggiani and others c. Italy*) – intervened the Constitutional Court, the National Bioethics Council and the Strasbourg Court, in order to defend health protection as a human and constitutional right, valid both inside and outside prison walls, in conditions of equal treatment between free individuals and prisoners. Starting from the postulate on the basis of which the punishment of prison is per se a distortion of the fundamental individual rights (Pelissero, 2018), mental health is undermined by the suffering linked to imprisonment (World Health Organization, 2014), that is to the renunciation of autonomy, of sexual choices, of identity and security, which would be followed by a process of adaptation to the prison environment (Sanna, 1990). Scientific studies by The Regional Health Agency (ARS) of Tuscany and the Ministry of Health (2015) show the development of prison-reactive syndromes<sup>5</sup> that are similar to those related to prolonged stay in closed institutions (Schnittker & John, 2007).

However, the point is not only linked to the illness of the prisoner but of the prison itself, especially when this is illegal because it contains more prisoners than those set by law. Therefore, in order to try to understand how prison can show up and, in case, produce more or less serious forms of psychic distress of the restricted, usually before the execution of the sentence and while serving it, it is necessary to analyze the data that describe the Italian penal system (Pellegrini, 2019)<sup>6</sup>.

The increase in the population detained in the first decade of 2000 in many European countries, including Italy, is related to the principle of “tough on crime” (Simon, 2007), that is the legislative exacerbation and the massive use of coercive systems of repression of crimes. The growth of the prison population, compared with the rest of Europe, proved to be anomalous in Italy (+ 1% in the last decade; + 7.5% from 2016 to 2018), even if crimes have largely decreased in comparison with the average of the continent<sup>7</sup> (SPACE, 2018). Consequently, the reason for such

<sup>5</sup> Among these syndromes, we find the imprisonment syndrome, persecutory, isolation and sensory deprivation syndrome, states of regression, inaction syndrome and freezing syndrome, motor syndrome, adjustment, vertigo at the exit and creative function.

<sup>6</sup> The author uses the data of the Emilia-Romagna Region Report 2017 on health in prison in Emilia-Romagna, according to which the problem of mental health and pathological addictions in penal institutions is considerable, with 16.1% of prisoners showing clinically significant psychiatric cases. Most of these are neurotic and somatoform disorders (40%), personality disorders 19.4%, substance abuse-addiction 37.8%, heroin, 29.4% cocaine, while psychotic disorders are less than 8%.

<sup>7</sup> For example, murders between 2015 and 2016 decreased by 14.6% against an average of 3.3%; from 2012 to 2016 the robberies decreased by 24%; home burglaries of 10%.

an increase does not depend on the linear increase in criminality and on the number of detained individuals, in particular foreigners, who decreased by 3.68%<sup>8</sup> in the last ten years. In fact, the number of crimes is constantly on the decline, according to the latest Antigone data. If in 2003 on 100 foreigners duly domiciled in Italy, 1.16% of them ended up in prison, today the percentage has decreased by 0.36%<sup>9</sup>. Then, the highest number of prisoners becomes clear through the long duration of the preventive detention, with the ineffective legislation about drugs, which inter alia, represents one of the main causes of entry and stay in prison<sup>10</sup>, but also through the scarce investment in alternative measures that can often be more effective in reducing relapses. The Italian prison overpopulation is so dramatic that it constitutes an additional punishment per se. The data shows that Italian prisons can hold statutorily 50,480 convicts, while at present they are 60,522. Compared with the European average of 93%, Italian prisons are much more crowded with a rate of 115%, which means that, instead of hosting 100 prisoners, 115 are present. Since 2008 we are in a situation of great overpopulation, with extreme peaks in 2010/11 (68,258), and if in the next five-years period, the number seemed to stabilize, decreasing to 52,162 – or rather not exceeding too much the European average – it increased again in the following years reaching 60,522. The increase in the prison population, as shown by recent statistical data, was one of the factors, which led to a notably increase not only in the number of prisoners suffering from mental illnesses but also to exacerbate mental disorders<sup>11</sup>. The demonstration of the difficult life inside prisons resides in the increase in prisoners' suicides<sup>12</sup>. In the past, the National Bioethics Committee had already expressed itself on suicides inside prisons, producing a document (17 January 2003) in which it was underlined that the suicides rate was about 20 times higher than the national one, not to mention the staggering number of self-destructive behaviors. Consequently, the prison has to be considered not only as a punishment but also as a degrading place, and we would say pathogenic too, seeing that even the police employed in prison surveillance are strongly affected by the suicidal phenomenon, which has assumed exponential proportions with respect to the country's average.<sup>13</sup>

## 6. The prison deflation and the scarce alternative measures

On the threshold of the third millennium, the Council of Europe has produced several recommendations aimed at promoting the use of alternative measures to prison, just to reduce the prison population and the relapse (Committee of Europe, 2010). If in many European countries, it brought forth to a series of reforms aimed at replacing prison with alternative measures, in Italy this process has stopped. Until prison is meant as an ordinary sanction, while alternative measures ancillary, it is difficult to believe that such measures can replace or even overcome prison as the main form of social control of the repressive character. Alternative measures have a deflationary power that can be often neutralized by public opinion that subordinates them to prison (Firouzi, Miravalle, Ronco, & Torrente, 2018). Rehabilitation is an ideal that seems to contradict itself in favor of pursuing the control-oriented function of alternative measures during the various phases of resorting to alternatives to detention. The gap between care and control characterizes the application of

<sup>8</sup> Data of the Ministry of Justice ([www.giustizia.it](http://www.giustizia.it)) show that foreign prisoners present in Italian prisons, as of 31 July 2019, are equal to 33.42% that is 20,088 on a global prison population of 60,522. About 10 years ago, foreign prisoners were 37.15% or 24,067 on a global prison population of 64,791.

<sup>9</sup> See XV half-year report of Antigone, 25 July 2019 ([www.antigone.it](http://www.antigone.it)).

<sup>10</sup> Data of the Ministry of Justice of 30 June 2019 ([www.giustizia.it](http://www.giustizia.it)) show that among the categories of crime, including the highest number of involved subjects is the crime against wealth (33,709), against the person (24,541) and of the drug law (21,337).

<sup>11</sup> The Italian Society of Medicine and Penitentiary Health estimated that in 2015, around 42.000 prisoners (77%) on 54.000 have a mental discomfort ([www.sanitapenitenziaria.org](http://www.sanitapenitenziaria.org)).

<sup>12</sup> According to the data provided by the Ministry of Justice, from 1990 to 2011, 1128 people committed suicide in the country's prisons. Starting from 2011, the survey was replaced by the data processing in the informative system Critical Events, used at the Office for Inspection and Control Activity – Situation Room, whose result was a gradual decrease in the rate of suicides, starting again in 2017 with 48 cases and even 61 in 2018. Contrarily, according to the data provided by the dossier 'Dying of Prison, provided by Restricted Horizons, updated in August 2019, from 2000 to today suicides were 1085, equal to about one-third (2970) of the total deaths among persons deprived of their liberty (Deaths for unclear causes, overdoses, appalling healthcare and suicides).

<sup>13</sup> To demonstrate the particular stressful working situations within a penitentiary institution, according to the aggregate official data of suicides, submitted by the Ministry of the Interior, in the five-year period 2009-2014, 47 prison police officers committed suicide. According to the data provided by the Study Center of Restricted Horizons, there were 143 suicides among the members of the Penitentiary Police Corps (1997-2018). See [www.poliziapenitenziaria.it](http://www.poliziapenitenziaria.it), in which it was ascertained an average of 7 suicides per year, which according to ISTAT parameters would correspond to 14.25 cases each 100,000. In summary, among the members belonging to the Penitentiary Police, one commits suicide 3 times more than in the Italian society.

probation (Vanstone, 2004; Bhui, 2001; Hemmes & Stohr, 2000, Bondeson, 1994); the more we move towards control, the more the Welfare State model is endangered. Hence, the need to revise the cultural approach to the recourse to prison, as a total institution, in order to lay the foundations of a more solid penal and prison system, supporting the respect of civil rights, because through the alternative measures to the sentence, it is required the minor sacrifice of personal freedom, combining security policies and social interventions, aimed at fighting the cases of marginality. This would help the prison's deflationary policy, perhaps together with a real operation of strong decriminalization, of replacement of the juvenile prison with various social structures, of wide remission, and finally, of the use of several alternative measures that allow prisoners their reintegration into the society. The value of the person shall never be diminished in prison; on the opposite, the human dignity of the prisoner must remain intact, even behind bars (Silvestri, 2014). Penalty ex. Art. 27, co. 3, Constitution, must not have a purely afflictive purpose, but rather has to aim at the rehabilitation of the condemned. In comparison with the deprivation of personal liberty, any limitation in the exercise of the rights of prisoners, which is not strictly functional to this target, acquires an additional afflictive value (Judgement Constitutional Court n. 135 of 2013). For this reason, the judicial authority is competent to set out all the provisions that balance the right to health with due safety, for example for AIDS patients. Even if it does not imply the automatic postponement of the expiration of the sentence, it is required that the evaluation is entrusted to the judge, giving priority to the needs of humanitarian nature (Judgement Constitutional Court n. 264 of 2009). In case of suspension of ordinary treatment rules, ex Art. 41-bis penal code, it has to be verifiable by the judge in order to ascertain that the provision is compatible with the right to health (sentence n. 390 of 2002). The security requirements of custody limit the expansion of the rights that constitute human dignity. From a constitutional point of view, the right to take advantage of alternative measures to prison has to be founded on this balancing, provided that their adoption is not blocked by reasonable safety reasons, which the judge has to assess on a case-by-case basis. House detention would guarantee more decent living conditions in comparison with the prison restriction.

To the prescription of Art. 27 of the Constitution corresponds whether Art. 3 of the ECHR, which is the prohibition of torture and penalties consisting of inhuman and degrading treatment, or Art. 4 of the EU Charter of Fundamental Rights (Prohibition of torture and penalties or inhuman or degrading treatments). The inhuman prison conditions would prevent the process of re-orientation of the prisoner towards the values of sociality and legality, while penalties would seem as a vengeance of the authority, which deprives the prisoners of their personal freedom and humiliates them, eliminating the minimal conditions of respectable life, apart from their merits or demerits. According to the sentence Torreggiani, overpopulation causes a situation of suffering in prisoners that exceeds the discomfort induced by the deprivation of personal freedom.

The Constitutional Court (judgement n. 279 of 2013), aware of the gravity and complexity of the Italian prison situation, confirming a previous decision (judgement n. 23 of 2013), has declared inadmissible the problems related to prison overpopulation, as an act of deference towards the legislator, reserving however in a subsequent procedure, due to the inertia of the Parliament, to adopt the necessary decisions aimed at breaking off the execution of the sentence in conditions opposed to the sense of humanity. Moreover, the Court has even believed that the postponement of the sentence was not the only possible remedy but showed some drawbacks (the prisoner could prefer the execution of the sentence with house arrest, instead of the postponement).

## 7. Alternative penalty to prison

Following the precept of Beccaria, the right to have rights within the penal area, that is the right to execute a human sentence, makes sure that the sentence is not be transformed into a crime (Corleone & Pugiotto, 2012). In order to avoid that the penalty constitutes violence, it has to be the minimum possible, in the sense that it has to be introduced a minimum criminal right as a normative model (Ferrajoli, 2011). If we consider the prisoners, the crimes typology, and the detention conditions due to overpopulation, we would notice that demagogic security policies have affected mostly immigrants and drug-addicted. Such people, economically and socially weak, were the victims of the so-called *laws to fill prisons*, including the Bossi-Fini law (Law n. 189 of 30 July 2002), the ex Cirielli law (Law n. 151 of 5 December 2005) and the Fini-Giovanardi law (Law n. 49 of 21 February 2006).

In order to invert the process of letting become chronic the overpopulation within the Italian penal system, as claimed by the European Court of Human Rights, it would be necessary to change radically social and security policies, so that prison does not constitute an *extrema ratio*. The constitutional jurisprudence and the Constitution inflect the term sentence in the plural, to indicate the prison and even other penalties that have to aim to the rehabilitation of the condemned person and have to consist in treatment in accordance with the sense of humanity. The rehabilitative principle has to respect necessarily the dignity being due to the human being as such. The prison must respect and promote the freedom of prisoners and encourage a process of self-realization. The respect for the dignity of the person takes on a value that goes beyond the mere prohibition of inhuman and degrading treatments. Some measures of alternative penalty to prison and of decriminalization, through measures based on alternative measures to prison, could consist of:

- the greater use of early release, (proposed by the Head of the Penitentiary Administration Department, as a remark on the judgement Torreggiani, as a defense clause);
- in the conversion of the order of execution of the prison sentence into an obligation to stay at home, with possible prescriptions established by the judge responsible for the execution;
- in the request for constitutional illegitimacy of Art. 147 penal code, in the part where it does not foresee, besides the cases expressly considered therein, the hypothesis of optional postponement of the executive;
- in the order of the supervisory magistrate – clerical or under the complaint of the interested person – to the Director of the penal institute, to the regional Superintendentship or the Department of penitentiary administration, not to proceed with the assignment or the acceptance of other prisoners, if not upon the getting out of others.

The intervention of European jurisprudence – even if it asserts that inside Italian prisons, infringements on the dignity of the person are perpetrated – consists of occasional and jurisprudential answers that are per se not always sufficient (Ruotolo, 2014). As well as the constitutional jurisprudence, which cannot perennially solve penal problems, so that it is necessary an intervention of the Parliament and of the Government that gives priority on the important theme of the political debate, to be added to the agenda. If the Courts can order the reduction of the prison population, they cannot replace the legislator in the structural penal and social policy choices. Consequently, in the future, it will be necessary to act on two fronts: the therapeutic measures alternative to prison and the prison health in the strict sense. The challenge, with respect to the first objective, consists in recognizing the greater effectiveness of alternative measures, as a precondition for a real policy of deflation instruments inside prisons, in opposite trend with the prison-centric system, which instead promotes penal expansionism. It will be necessary to offer staff training for those who work in the external execution (U.E.P.E. – Office for the external penal execution); secondly, it will be fundamental to work on public opinion that does not even consider alternative measures of penalties at the same rank of the detention ones, but by far inferior. The solution concerning alternative measures would align itself with the reform of the criminal policy turned to overcome the instrumental use of the criminal law characteristic of the “penal populism”<sup>14</sup> (Fiandaca, 2013), which identified prison as the institution par excellence of the penal system. At the regulatory level, however, some specific interventions could affect Art. 47 penal order, and have been carried out through the introduction of the provisional application of house arrest (Art. 2 Legislative Decree n. 78 of 10 July 2013, conv., with an amendment in the Law n. 94 of 9 August 2013) and with the due extension of the possibility of applying the on probation care to the social service (Art. 3 of the Legislative Decree n. 146 of 23 December 2013, conv., with an amendment in Law n. 10 of 21 February 2014). The National project called INSIEME<sup>15</sup> was created in 2016 for the achievement of the second objective, with the aim to break up the vicious circle of mental suffering in prison and to introduce a welfare therapeutic path that could combine the different professional figures who work within the prisons, which assured a therapeutic and welfare continuity even after the release from prison.

One can add also the MEDICS project (Mentally Disturbed Inmates Care and Support), set up in 2013, upon request by the European Commission, for the improvement of detention treatment, through the synergy of all institutions, because the prison cannot act on its own. The reached conclusions comply with those of Table 10 of the General States on penal execution, promoted in

<sup>14</sup> In answer to the fear resulting from some crimes, criminal populism is aimed at achieving popular consent demagogically.

<sup>15</sup> Project INSIEME – Mental health in prison, promoted by SIMSPe, SIP and the Psychiatric Italian Society of Addictions with the support of Otsuka.



2015 by the Ministry of Justice, that is the need to arrange a more effective system to monitor the needs of prisoners, by creating a digital medical record to be shared between the penitentiary administration and the health facilities of the territory and the need to provide alternatives to detention for those convicted suffering from mental illnesses (for example, a therapeutic measure on the same lines of the measures for drug-addicted).

## 8. Conclusion

Mentioning the words of the Court's judgement, the mental illness, behind bars, has to be treated not only within the small departments for the protection of mental health or by the DSM in prison, but in external places (house or public places of care, assistance or reception), with modalities that guarantee safety, but above all, health. The delicate balancing between surveillance and we would say cure instead of punishment, as Foucault (2010) wrote, allows to obtain the optimum by the prison.

The judgement n. 99 of 2019 is part of a juridical context that tried to amend the inequalities between “rei folli” and “folli rei”, reviewing the function of security measures and rethinking the principle of the double binary<sup>16</sup> (Palazzo, 2016; Pelissero, 2016). Despite the innovative contribution of judgement n. 99 of 2019, as we pointed out in my work about the field of mental illness, the Criminal Code of 1930 resisted the judgement and the thorough changes introduced by the Basaglia Law n. 170 of 1978, regarding the opening of mental hospitals and by the Law n. 81 of 2014, regarding the closing of the forensic psychiatric hospitals. The effort made by the Court with judgement n. 99 of 2019 was to give a propelling thrust to the person placed at the center of the community. However, in order to execute the sentence, it is important to involve the Ministry of Health, the Regions, the ASL, and the DSM, as well as the entire community welfare system. The future overview after the judgement is completely new and concerns alternative solutions to the prison, whose contribution could be the summoning of an executive regional Conference, involving all the subjects, but also the allocation of new economic resources. People who get sick in prison should be treated not only inside the prisons, but be included in the community, because as per indications of the MEDICS project, such situations have to find the solution required by civilization rules. In collaboration with the justice system, it is, therefore, necessary to activate the competent social services for the territory, acting in concert with organizations such as the UEPE and the Department of juvenile justice and of community. The DSM competent for the territory shall have to identify the places where to carry out alternative measures to the subjects, whose serious mental illness is incompatible with the detention. In this regard, it is essential to regional planning of the single local health corporations. One could say that the old, but still current logic of the double binary – that is of the binomial social perilousness and security measure – could be replaced by this sentence, which would stir again the hope of a reforming project that involves healthcare and justice. For this purpose, it will be possible to carry out the observation of the person in the community and freedom. To do this, it will be essential to realize educational actions and observatories, but also to work out guarantees and protections so that the system is open to the social community rather than being relegated to the skilled workers. However, some points of the sentence under examination do not meet a broad consensus by the doctrine (Spinelli, 2019), not only on the difficult structural equalization of the physical illness to the psychic one – the physical illnesses have a limited duration in the course of time, while the psychiatric ones would have a perpetual character and therefore the objective impossibility of healing – but also and above all, because of a passage in the judgement, where the judge, if he considers prevailing the needs of public security, in the single case, will impose the penal detention to the prisoner, suffering from serious mental illness, rather than the transfer to an external place of care. Not to mention the growing number of “false patients”, perpetrators of crimes, that is those who are suffering from Antisocial and Personality Disorder who – in order to reduce the prisons overpopulation – would be entrusted to psychiatrists for the prevention of crimes reiteration, transforming the places of care into precautionary and custody places. The recent judgement n. 99 of 2019 has been pronounced in socio-cultural climate, almost secure and justicialist, in which “prison-centric” policies are resolved by crowding prisons with convicts, beyond the danger

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<sup>16</sup> The legislator has delegated the government to review the entire system of personal security measures in Art. 13, c. 1, lett. b of the large unified text (bill AC 4368).

limits and preventing prisoners inmates from internalizing, at the end of the condemnation, the re-socialization that makes them ready to be socially rehabilitated. The scarce regulation of the alternative measures to prison sentences, as well as the increase in the penalization of some crimes, seem to confirm the existence of a penal populism that continues to grow and to strongly condition the legislator. Real examples of the recent change in the cultural climate on security can be inferred from the decree-law on the subject of public order and security (Legislative Decree n. 53 of 14 June 2019); from the amendments of the penal code and other provisions on legitimate self-defense (Law n. 36 of 26 April 2019,); by the decree on International protection and immigration, public security... (Legislative Decree n. 113 of 4 October 2018, turned with an amendment in Law n. 132 of 1 December 2018,); finally, from the urban safety decree (Legislative Decree n. 14 of 20 February 2017). Such measures, despite statistical data, prove the contrary<sup>17</sup>, indulge a crime perception exaggerated by mass media, increasing the social dangerousness that from delimited and restricted areas, reserved by the Rocco Code, would run over until occupying places of punishment that originally did not appertain to it.

This dangerous justicialist air could disappear with the recent judgement of the Court, which would recover what was hardly developed in favor of the right to the health and the care of prisoners with mental problems, but rather would guarantee new therapeutic and health solutions. Previously analyzed National projects could improve prison healthcare, using a model based on the continuity of care. However, this would happen only if the cultural approach to the resort to prison, as a total institution, would be revised in order to fix the basis of a penal system more solid and more defender of civil rights. Therefore, it will be necessary to have a prison system characterized by the humanization of punishment and by solidarity, which has to be considered as due rights, being aware that legality, especially in prison, is a value to be affirmed with greater determination and... it would be a real pity if the legislator should not adopt any inclusive policy in this regard.

## References

1. Antigone (2019, July 25). *XV half-year report of Antigone*. Retrieved from <https://www.antigone.it>
2. Bhui, H. S. (2001). *New probation: Closer to the end of social work?* *British Journal of Social Work*, 31(4), 637-639. <https://doi.org/10.1093/bjsw/31.4.637>
3. Bondeson, U. V. (1994). *Alternatives to imprisonment: Intentions and reality boulder*. New York, NY: Westview Press.
4. Committee of Europe. (2010). Recommendation CM/Rec (2010) 1 of the Committee of Ministers to member states on the Council of Europe Probation Rules. Retrieved from [https://www.pmscr.cz/download/mezdoken\\_European\\_Probation\\_Rules.pdf](https://www.pmscr.cz/download/mezdoken_European_Probation_Rules.pdf)
5. Conti, R. (2013). La giurisprudenza della Corte europea dei diritti dell'uomo sul sovraffollamento carcerario e i diritti del detenuto. *Politica del diritto*, 44(4), 441-480.
6. Corleone, F., & Pugiotto, A. (2012). *Il delitto della pena. Pena di morte ed ergastolo, vittime del reato e del carcere*. Roma, Italia: Ediesse.
7. Council of Europe: Committee of Ministers. (2006). Recommendation R (2006) 2 of the Committee of Ministers to member states on European Prison Rules. Retrieved from <https://www.refworld.org/docid/43f3134810.html>
8. De Rossi, D. A., Bologna, L., Colcerasa, F., & Renzulli, S. (2011). *L'universo della detenzione. Storia architettura e norme dei modelli penitenziari*. Ugo Mursia Editore.
9. Della Bella, A. (2018, November 7). Riforma dell'Ordinamento penitenziario: Le novità in materia di assistenza sanitaria, vita detentiva e lavoro penitenziario. Decreti legislativi 2 ottobre 2018, n. 123 e 124 (G.U. 26 ottobre 2018). *Diritto Penale Contemporaneo*. Retrieved from <https://archiviodpc.dirittopenaleuomo.org/d/6317-riforma-dell-ordinamento-penitenziario-le-novita-in-materia-di-assistenza-sanitaria-vita-detentiva>
10. Ferrajoli, L. (2011). *Diritto e ragione. Teoria del garantismo penale*. Roma, Italia: Laterza.
11. Fiandaca, G. (2013). Populismo politico e populismo giudiziario. *Criminalia. Annuario di scienze penalistiche*, 8, 95-121. Retrieved from <http://www.edizioniets.com/criminalia/2013/pdf/02-1-Fiandaca2.pdf>
12. Firouzi, O., Miravalle, M., Ronco, D., & Torrente, G. (2018). Al di fuori della prigione. I risultati dell'Osservatorio europeo sulle alternative al carcere. *Studi Sulla Questione Criminale*, 13(1), 89-115.
13. Foucault, M. (2010). *Sorvegliare e punire. Nascita della prigione*. Einaudi.

<sup>17</sup> See Yearbook of official statistics of the Inner Administration, by the Central Statistics Office, November 2015. As for predatory crimes, in 2014 there was a sharp decrease in bank robberies (equal to -25.5 %) and in houses (-6.0%).

14. Galliani, D. (2018). Eguaglianza e rieducazione fanno il trattamento penitenziario il resto è incostituzionale. *Quaderni Costituzionali*, 4. <https://doi.org/10.1439/91785>
15. Hemmens, C., & Stohr, M. K. (2000). The two faces of correctional role: An exploration of the value of the correctional role instrument. *International Journal of Offender Therapy and Comparative Criminology*, 44(3), 326-349. <https://doi.org/10.1177/0306624X00443006>
16. Leonardi, F. (2007). Le misure alternative alla detenzione tra reinserimento sociale e abbattimento della recidiva. *Rassegna penitenziaria e criminologica*, 2. Retrieved from <http://www.rassegnapenitenziaria.it/cop/4825.pdf>
17. Palazzo, F. (2016, March 30). La riforma penale alza il tiro? Considerazioni sul disegno di legge A.S. 2067 e connessi. *Diritto Penale Contemporaneo*. Retrieved from <https://archiviodpc.dirittopenaleuomo.org/d/4786-la-riforma-penale-alza-il-tiro-considerazioni-sul-disegno-di-legge-as-2067-e-connessi>
18. Pelissero, M. (2016, March 30). La politica penale delle interpolazioni. Osservazioni a margine del disegno di legge n. 2067 testo unificato. *Diritto Penale Contemporaneo*. Retrieved from <https://archiviodpc.dirittopenaleuomo.org/d/4784-la-politica-penale-delle-interpolazioni>
19. Pelissero, M. (2018). Salute mentale e carcere: una necessità dimenticata. *Questione Giustizia*, 3. Retrieved from [https://www.questionegiustizia.it/rivista/articolo/salute-mentale-e-carcere-una-necessita-dimenticata\\_568.php](https://www.questionegiustizia.it/rivista/articolo/salute-mentale-e-carcere-una-necessita-dimenticata_568.php)
20. Pellegrini, P. (2019, April 9). *Salute mentale e assistenza in carcere. Superare le divisioni ideologiche e tornare ad investire*. Retrieved from [https://www.quotidianosanita.it/lettere-al-direttore/articolo.php?articolo\\_id=72898](https://www.quotidianosanita.it/lettere-al-direttore/articolo.php?articolo_id=72898)
21. Ruotolo, M. (2014). Riflettendo sul senso della pena e sui diritti dei detenuti. *Ragion Pratica*, 43(2).
22. Sanna, M. N. (1990). Sindromi relative alla carcerazione. In F. Ferracuti (Ed.), *Trattato di criminologia, medicina criminologica e psichiatria forense*. Milano, Italia: Giunti.
23. Schnittker, J., & John, A. (2007). Enduring stigma: The long-term effects of incarceration on health. *Journal of Health and Social Behavior*, 48(2), 115-130. Retrieved from <https://www.jstor.org/stable/27638699>
24. Silvestri, G. (2014). La dignità umana dentro le mura del carcere. *Diritto Pubblico*, 1, 3-14.
25. Simon, J. (2007). *Governing through crime: How the war on crime transformed American democracy and created a culture of fear*. New York, NY: Oxford University Press.
26. SPACE (Council of Europe Annual Penal Statistics). (2018). *The report No. 15 on the detention conditions: Prisons in Europe, numbers and policies*. Retrieved from <https://www.coe.int/en/web/prison/space>
27. Spinelli, G. (2019). L'inderogabilità e la tutela del diritto alla salute (anche) mentale del soggetto detenuto: La sentenza Corte cost. n. 99/2019. *Osservatorio costituzionale*, 4, 115-126. Retrieved from [https://www.osservatorioaic.it/images/rivista/pdf/2019\\_4\\_08\\_Spinelli.pdf](https://www.osservatorioaic.it/images/rivista/pdf/2019_4_08_Spinelli.pdf)
28. The Regional Health Agency (ARS) of Tuscany, & the Ministry of Health. (2015). *The health of prisoners in Italy: The results of a multicentric study*. Retrieve from <https://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/publications/partner-publications/regional-health-agency-of-tuscany/the-health-of-prisoners-in-italy-the-results-of-a-multicentre-study>
29. Vanstone, M. (2004). Mission control: The origins of humanitarian service. *Probation Journal*, 51(1), 34-47. <https://doi.org/10.1177/0264550504041376>
30. World Health Organization. (2014). *Prisons and health*. Retrieved from [https://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0005/249188/Prisons-and-Health.pdf](https://www.euro.who.int/__data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf)

# THE SECURITY OF REAL ESTATE TRANSFERS: THE GUARANTEE FUNCTION OF THE RECORDING FOR THE CONSUMER

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**Keywords:** Safety, Real Estate Transfers, Consumer's Protection, Guarantee Function, Recording

## 1. The guarantee function of the recording of property transfers

The recourse to public disclosure exists in all legal systems, as it aims to obtain transparency and safety results in several sectors and through several degrees of disclosure. Through disclosure, the law aims at “giving information regarding a certain legal situation to people who are unrelated to those who have created, or who are the immediate recipients of the fact that created that situation” (Nicolò, 1973).

Disclosure can concern both the subjects and the assets: the subjects can be either individual, or legal entities, or de facto entities; the assets can be either unmovable properties or, by the effect of the new regulation, as the ever-increasing mobilization of wealth dictates, movable goods, loans, and guarantees. The situations subject to disclosure respond to considerations of opportunities more than to a logical principle; and most of all, they respond to objectives that are pursued from time to time, attracting, within the orbit of the disclosure system, subjects or assets for the purpose of transparency, so as to monitor their constitutive and developmental history (Mariconda, Verde, Trapani, Capaldo, & Atlante, 2009).

The disclosure given to a certain event does not obviously entail that all “third parties” acquire its actual knowledge. However, the relevant codes, on the basis of legal knowledge, consider verified the actual knowledge of the disclosed situation. The system supplied by the law is to be read in light of the heterogeneity of the happenings that it deems to be worthy of being the object of disclosure, and through the different modalities with which the knowledge is pursued, without underestimating that the effects of it are also different. The evolution of the modalities through which the circulation of wealth is realized creates several problems, which highlight the need for certainty and transparency, reachable through the recourse to a disclosure “system” that is able to supply shared solutions. It is a widespread opinion that the recording of property transfers is the most relevant and articulate declaratory disclosure system, that is, a form of disclosure which, having as a basis the pursuit of the objective of any form of disclosure (that is third parties knowledge of given facts), is charged with a further and specific function that generally consists in making the effect of the deed immediately produced by the parties, enforceable against third parties from the moment it comes into being (Pugliatti, 1957). Together with a more general purpose meant to enforce an ample transparency disclosure against any third party, the recording produces a specific and peculiar result consisting in the enforceability against some third parties of the results of an event that has taken place between other parties (Mariconda et al., 2009). Part of the legal theory strongly opposes this formulation, affirming, on the contrary, that the recording does not represent, except for rare and incidental occasions, a form of disclosure of the rights on the property from the moment it is placed on the market; having, instead, as a purpose, that of being a tool for the resolution of specific conflicts amongst several assignees, from a common perpetrator, of rights on the property. In other words, there is no other disclosing function as it is, because the one deriving from the recording is but an indirect consequence that comes into being because of its function, which is to resolve conflicts between several assignees (Gazzoni, 1991). According to a different orientation, it is reductive to limit the complex property recording system to a means to resolve pathological conflicts (Mariconda et al., 2009). There are many and relevant hypotheses in which the law asks for the recording outside of the typical effectiveness of art. 2644 c.c., and the interest that is satisfied here is

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so very evident, even outside of the strong protection of an interest in the prevalence of one's own purchase, that the importance and the usefulness of the recording cannot be reduced so much. It is enough to think about the obligation to record deeds regarding several subjects who conduct specific public functions every time that it is provided by law and also outside the hypothesis of specific relevance of the recording.

## 2. Recordings and the principles of exceptionality and compulsoriness

Traditional literature qualifies the recording as an exceptional institution, the recourse to which is subordinate to the principle of compulsoriness of legal situation subject to disclosure.

The affirmation of the exceptional nature of the recording is deeply rooted in the contemporary Italian case law, despite the fact that, by the effect of the reforms introduced in the civil code from 1942 on, as well as the special legislation and the principles that can be gained from the Constitution and Community law, the recording has been progressively placed in a totally different regulatory framework, oriented toward the protection and the safety of the transactions. This regulatory framework prevents the possibility to make enforceable against third parties any rights, obligations, and burdens that are hidden and not recognizable. Finally, let us not leave behind the fact that today; the recording is clearly finalized toward public interests (Petrelli, 2009b).

The relevance of the procedure and the regulatory changes intervened is such as to legitimate a real overturning of the values (Petrelli, 2009a) in light of which, what is exceptional and residual, today, is no longer the regulations regarding the recording, but rather those that solve conflicts between subjective rights, basing themselves on deeds that are hidden and not recognizable to third parties. The Italian system is now oriented toward the direction of the dynamic safety of the business. For these reasons, the traditional orientation that, basing itself on the French legal theory, considers exceptional the employment of the disclosure tool used to protect the legal circulation of wealth, arriving often to the point of positing the tout court enforceability against third parties of legal situations (even if not legally recognizable) as a general rule, regardless of the disclosure, should this not expressly be provided for by law, is not deemed to be justifiable.

The expansion of situations worthy of being disclosed (at least regarding property), clashes with one of the most declaimed principles in the doctrine and in the case law and that is the principle of compulsoriness of the recording hypothesis. It is affirmed with certainty that the recording hypothesis is compulsory, exhausting themselves in those expressly provided for by law and for which a literally and restrictive explanation is provided (Petrelli, 2009a).

It is usual to justify the principle of compulsoriness on the basis of the presumed exceptionality of the institution of recording, which waives some general principles that are typical of purchases with the transfer of business: particularly the principle of consensus-based effects, to which are linked the *pro tempore potioriore* (prevalence of whom, with regards to the date, perfects his purchase before time, regardless of the subsequent disclosure) and *nemo plus iuris ad alium transferre potest quam ipse habet* principles. The strength of the principle of consensus-based effects stated for the first time in the Napoleon Code<sup>1</sup> and transferred to the Italian civil code in 1865 (despite the set of rules regarding the recording had been already inserted in the set of rules of the above-mentioned code), today, must be considered lessened: there is no doubt that the effect of the agreement is, after all, regulated by Art. 1376 c.c., however, the “dogmatic” character of this last regulation has failed, as shown by the undisputed possibility to conventionally waive the regulation (Camardi, 1988). Furthermore, it is to be noted that, today, the consensus-based effects principle finds its place in a cultural context in which there are persisting talks regarding its possible obsolescence, in view of the new principles in the European agreement regulation. According to another orientation, the recording would furtherly waive the principle of freedom of form, and it would be unusual, since it would shrink the free exercise of one's rights, subordinating them to the observance of a given formality (Coviello, 1928). To this purpose it is easy to rebut that modern legal theory clearly separates form and legal disclosure (Gazzoni, 1991): it appears evident that the fulfilling of

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<sup>1</sup> In which it was considered like a real principle of natural law, which brought to the elimination of any link to the declaratory efficacy of the recording, which was present, instead, in the previous French set of rules.

the disclosure obligation; far from being the reason for a burdening and a slackening of legal transactions, entails increased transparency and knowledge of property situations and implements trust and certainty of the transactions, leading to the quickening of property circulation. Consolidated case law distances itself from strict positions anchored to the principles of exceptionality and compulsoriness. In law, there are many generous solutions in tangible cases for which recording is not expressly provided for, with the subsequent admissibility of the recording of “atypical” situations. In other words, as already highlighted, there emerge the interests (maybe not always appropriately taken into consideration) in the extension of the range of operativity of the recording, for the purpose of guaranteeing an ample knowledge of the relevant legal situation in property circulation. The operativity limits of the recording involve an analysis of the institution that is too often anchored to the legal system that generated it: the entire disclosure system used to have a much more circumscribed function and scope of application compared to the modern ones: this also affects the lacks in the regulation regarding recording in a socio-economic reality that is quickly evolving, able to supply its interpreter with “new problems of common interest”, which require legal answers that are often non-compatible with traditional conceptualizations (Petrelli, 2009a).

Therefore, it becomes essential to identify the recordable particular case and in what measure the will of the parties may arrive to make enforceable against third parties the negotiated obligations produced by them, analyzing the measure in which the legislator has meant to protect the safety of the circulation of property in relation to the protection of the subjective rights. The circumstance cannot, however, exclude the fact that the rule of property circulation, save for a few exceptions, is that of the resolution via the recording of circulation conflicts and, consequently, the enforceability against third parties of legal situations not merely mandatory or personal whenever there is a lack of knowledge by legal disclosure. Only exceptionally, the “higher” nature of the conflicting interests entails the enforceability even when there is a disclosure lack or a failure<sup>2</sup>.

### 3. The features of deeds subjects to recording

Legal disclosure represents a secondary particular case that necessarily entails a primary particular case that must be made public (Pugliatti, 1957). It appears evident that the identification of the primary particular case is essential in laws that regulate the prerequisite, the object, and the effects of disclosure (Petrelli, 2009b).

In terms of property recording, the main provision is found in Art. 2645 c.c. If, as already highlighted, the legal fundament of the recording consists in the guarantee of the safety of property circulation, with this regulation the legislator has certainly meant to ensure the completeness of the entire disclosure system, with a provision able to be flexible and to therefore face the complexity and the evolution of the primary particular cases susceptible of being disclosed, since they are deemed to be relevant for third parties. It has been highlighted how Art. 2645 c.c. represents an important positive index, in the sense of a tendential recordability on certain premises; even in absence of an expressed law provision: the expression “unless the law expressly states that recording is not required” opens up to a presumption of recordability which clearly opposes the main orientation, both in the legal theory and in the law, regarding the “compulsoriness” of recordings. Such statement, together with the principle of compulsoriness in the hypothesis of a refusal to record (Art. 2674 comma 2 c.c.), brings up, in the entire property recording system, a tendency toward recordability, which places itself, both on a procedural level and a substantial one, in a tendential re-interpretation, in the category of the recordable particular cases, of all those having the features that are to be identified. Such identification must happen, first and foremost, on the basis of Art. 2645 c.c., but also taking into account the tendency to expand the disclosure system. At any rate, it can be assumed that the feature that is common to all the deeds subject to recording resides in their relevance and their enforceability against third parties (Petrelli, 2009a).

Regarding the deeds producing solely inter partes effects, (and, therefore, of a merely compulsory nature), it must be assumed that they are non-recordable, with the consequence that

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<sup>2</sup> See the hypothesis of legal usufruct of the parents on the property of their minor child, enforceable against third parties without need for recording.

an explicit regulative provision is needed (or, anyway, a regulation that is the product of a systematic interpretation) to the purpose of subjecting to recording a deed producing compulsory effect restricted to the contracting parties (as it happens, for example, in the recording of a preliminary agreement: before the introduction of Art. 2645-bis c.c. the non-recordability was absolutely certain). As provided by Art. 2645 c.c. every deed or provision producing any of the effects of the agreements mentioned in Art. 2643 c.c. regarding movable property or property rights, must be recorded. The effects concerned are fundamental, transfer of property, clearance, and foreclosure effects which are effects that are typical of transaction agreements (Falzea, 2007).

Being them contractual, their common factor is given by the derivative nature of the related legal situations, that is, the legal changes deriving from the agreements mentioned in Art. 2643 c.c. Oftentimes, in the legal theory as in jurisprudence, there have been debates related to the re-interpretation in the scope of the provision set out by Art. 2645 c.c., to the particular cases producing similar effects to those expressed in Art. 2643 c.c.: it has been authoritatively observed how there has not been enough attention placed on the distinction between the effects of the agreements, which are the legal changes produced by the same and the rights, which are, instead, the object of the change (Petrelli, 2009b). The object of the legal changes, that is the contractual effects mentioned in Art. 2643 c.c. and recalled by Art. 2645 c.c., is represented by unmovable property and property rights, which constitute the legal relationship that is the object of the contractual effect. The expression “property rights” distances itself from the strict list of the typical property rights (usufruct, easement, superficies, use, and housing) contained in Art. 2643 c.c. Despite part of the legal theory has considered that, with this expression, already deemed “elastic”, the legislator has intended to refer to a single hypothesis of property rights (both beneficial and real rights), it has to be argued that, if this is the case, the legislator could have realized a *relatio* for the rights mentioned in Art. 2643 c.c. (as it happens, for example, in the first subsection of Art. 2652 Par. 1 c.c.). To the purpose of never underestimating terminological importance (Tarello, 1980), it has to be affirmed that, by “independently” indicating the property rights object of legal changes deriving from the agreements mentioned in Art. 2643 c.c., the legislator has intended to dictate a concept that was independent of those rights and that is certainly more ample and comprehensive<sup>3</sup>. To this purpose, it is useful to underline that the surfacing, with Art. 2645 c.c., of a category of property rights wider than those analytically identified by Art. 2643 c.c., is not in contrast with the text of the regulation contained in Art. 2644 c.c. (which regulates the so-called circulation conflicts), since, the latter, mentions property rights, or, more generically, the rights. The expression “unmovable property”, contained in Art. 2645 c.c. obviously recalls both the property rights on it and, as provided by Art. 813 c.c., the personal property rights that have as an object both unmovable property and the related shares, unless otherwise provided by law (Cass. S.U. of 12 June 2006, n. 13523). Therefore, it is important to highlight that the expression “personal property rights” contained in Art. 813 c.c. allows the inclusion, in the provision of Art. 2645 c.c., of all the other property rights which, even though not clearly expressed by such provision, have a place in the Italian law system.

Leaving behind the long-standing issue of the admissibility of the so-called atypical personal property rights, the new personal property rights are certainly a part of the new operational scope of the recording. These are the rights the real character of which can clearly be deduced by the law, despite them not belonging to the definition of the traditional personal property rights, like for example, air rights (Cavallaro, 2009), shared property rights (Gazzoni, 1991), personal property right of use of parking spots (Cass. of 6 June 1968, n. 1711), perpetual, exclusive usage rights in residences (Baralis & Caccavale, 2003) and the so-called permitted building volume (Leo, 2011). To the purpose of protecting property circulation, even the stricter followers of the principle of compulsoriness admit the recording of many “unnamed” particular cases, so that the relevant socio-economic needs that generated such figures may not be compressed.

The solution, which leads to the recordability of any deed having as an object any “personal property right”, even a non-traditional one, as long as it is admitted by the legal system, is in line with

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<sup>3</sup> According to Cass. 15 January 1986 n. 174, in Riv. Not., p. 753, the legislator has intended to provide for those rights that are comparable to the typical property rights, as they turn into a burden on property, like, for example, some irregular property rights and some types of *propter rem* obligations.

the European civil law legal systems, which, in most cases, extend the disclosure to the generality of personal property rights, indicated by the disclosure regulations through the deferment to the related general category and not through the listing of single rights. Art. 2645 c.c., aside from unmovable property, indicates “property rights”: the latter clearly constituting legal situations that are different from the personal property rights they derive from, as provided by Art. 813 c.c., already included in the expression “unmovable property”. The independence of the conceptual category of property rights entails the need to strictly limit its operational scope, in light of the ratio and the purposes of property public disclosure, the function of which is clearly that of ensuring the safety of legal transactions.

#### 4. The recording and the safety of legal transactions

It is necessary to start from the fact that the recording must, first of all, satisfy the need to ensure the legal knowledge of the changes related to legal situations that can affect the legal scope of third parties. However, on the other hand, Art. 2644 c.c. links, to such legal knowledge, the effect of determining the enforceability against certain third parties of the disclosed legal situation, ensuring, in the conflict, the prevalence of whoever recorded first. The prerequisite for the functioning of Art. 2644 c.c., expressly recalled by Art. 2645 c.c. is, therefore, the enforceability against third parties that are the owners of the rights in conflict (Retrelli, 2009b). With reference to the concept of enforceability, it is necessary to highlight that it is employed both by the legislator and by the legal theory in contexts that are totally different amongst themselves and, therefore with different definitions. The enforceability is contemplated in Art. 2644 c.c. is not the one concerning the deed or the agreement, but the one related to their legal effects, and it has been defined precisely as “resale right” (Comporti, 1977). The enforceability of the personal property right, then, is a feature that, at least partly, exists before the recording; meaning that, on the basis of the positive set of rules, the recording, even when generally necessary, is not sufficient to the purpose of making enforceable against third parties a legal situation. In other words, recording a credit right or another personal situation does not make them enforceable against third parties, because the recording does not change the nature of the right; on the contrary, for those situations that the legal system provides with a “resale right”, the recording contributes to determining its enforceability. Not to be left behind is the fact that in some particular situations (which will be analyzed in further chapters) the disclosure itself attributes the feature of the enforceability against third parties to a right: (which pre-exists as a merely compulsory legal situation): for example in the recording of a preliminary agreement or, according to an interpretation, in the restrictions on the intended use as provided by Art. 2645 c.c. Going back to the analysis of the literal interpretation of the regulations, examining Art. 2643 c.c. one can grasp the common denominator of the legal situations (personal property rights and usage rights) that can be noticed, in their incidence, in the legal scopes of third parties (purchasers, creditors). The list provided by the regulation determines a “transformation” of legal situations enforceable against third parties and it is clear that it does not contemplate any particular case producing effects that are merely compulsory or personal. From the part of Art. 2645 c.c. that realizes a relation to the effects of the agreements mentioned in art. 2643 c.c., clearly emerges the fact that there is a will to subject to recording the sole particular cases apt to produce effects that are enforceable against third parties. As previously stated, property rights recalled by Art. 2645 c.c. can only be those provided with resale right and, therefore, enforceable against third parties (Vettori, 2002). The faithful confirmation of this reconstruction is found in Art. 17 Par. 4 of Regulation n. 52/1985, which allows the insertion, in the transfer of title, of only the “conditions concerning real rights”, meaning, by this expression, those that are qualified, by nature, to affect the legal scope of third parties. In this provision, the reality is not a synonym of real right (or personal property right), but it recalls the more ample concept of enforceability against third parties. Therefore, there are two regulations (Art. 2645 c.c. and Art. 17 comma 4 Law n. 52/1985) from which we can deduce the recordability of all the deeds producing legal changes having as an object the ample category of property rights enforceable against third parties: category which includes the typical personal property (real) rights listed in Art. 2643 c.c., which enunciates them in a simple yet non-exhaustive manner. In other words, next to a specific and analytic simplification (incomplete as such), of the most important and recurrent cases, the legislator provides the amplest rule (Art. 2643 is an expression of it), which, at the same



time is described more comprehensively by Art. 2645 c.c. providing for the imperfections of the incomplete list. Finally, the effects are recalled by Art. 2645 c.c. is the same as the agreements mentioned by Art. 2643 c.c., even though they can concern only one of these effects. They refer to property rights that can be different from those mentioned by Art. 2643 c.c., as long as they are, by their own nature, enforceable against third parties. The expansion deriving from the provision set out by Art. 2645 c.c., compared to the list provided by Art. 2643 c.c., therefore, involves both the recordable particular cases (deeds and provisions that are separated from the agreements) and the legal changes, as well as the legal situations, that form the object of the change itself (“property rights” enforceable against third parties that differ from the typical ones). At the same time, Art. 2645 c.c. has a function of system closure (Confortini, 1983), preventing the recording of deeds and provision producing effects that are not the ones described above or that concern property rights non-enforceable against third parties. This is not, however, a system of typicality but, on the contrary, it codifies a typicality rule founded, though, on elastic and general categories, in agreement with systematic reasons connected to the object and the function of disclosure, and not to analytic and detailed provisions, unsuitable for reaching the completeness objective of the disclosure system. The consistency, on a systematic level, of the rules that can be deduced by Art. 2645 c.c. with the property recording function, the general principles in the matter of legal circulation and with the rules regulating legal disclosure, leads to consider this provision as an expression of a general principle, also valid for recordings with an efficacy that is different from the typical one. Such a systematic interpretation of Art. 2645 c.c. does not relieve the interpreter from having to identify with more precision the “property rights enforceable against third parties”, which will then require the recording of the related deeds.

## References

1. Baralis, G., & Caccavale, C. (2003). Diritti di uso “esclusivo” nell’ambito condominiale. *Consiglio Nazionale del Notariato Studi e materiali*, 2, 489-503.
2. Camardi, C. (1988). Principio consensualistico, produzione e differimento dell’effetto reale. In *Studi in onore di P. Rescigno, III*. Milano, Italia: Giuffrè.
3. Cavallaro, M. (2009). Il diritto di sopraelevazione nel sistema dei diritti reali. *Rivista Dir. Civ.*, 2, pp. 43 e ss.
4. Comporti, M. (1977). *Contributo allo studio del diritto reale*. Milano, Italia: Giuffrè.
5. Confortini, M. (1983). *La multiproprietà*. Padova, Italia: CEDAM.
6. Coviello, L. (1928). La domanda di rivendica e la trascrizione. *Giur.It.*, 1, pp. 1347 e ss.
7. Falzea, A. (2007). Complessità giuridica. *Enc. Dir., Annali*, 1, pp. 207 e ss.
8. Gazzoni, F. (1991). La trascrizione immobiliare. Milano, Italia: Giuffrè.
9. Leo, M. (2011). Il trasferimento di cubature. *Studi e Materiali*, 6(2), CNN, 2/2011.
10. Mariconda, G., Verde, C., Trapani, G., Capaldo, G., & Atlante, N. (2009). Le pubblicità. In P. Perlingieri (Ed.), *Trattato di diritto civile del consiglio nazionale del notariat*. Napoli, Italia: Italian Scientific Editions
11. Nicolò, R. (1973). *La trascrizione. Appunti dal Corso di diritto civile*. Milano, Italia: Giuffrè.
12. Petrelli, G. (2009a). *L’evoluzione al principio della tassatività nella trascrizione immobiliare*. Retrieved from <http://www.gaetanopetrelli.it/catalog/documenti/00000622/Petrelli%20-%20Tassativita%20nella%20trascrizione%20immobiliare%20-%202009.pdf>
13. Petrelli, G. (2009b). Pubblicità legale e trascrizione immobiliare, tra interessi privati e interessi pubblici. *Rassegna di Diritto Civile*, 3.
14. Pugliatti, S. (1957). *La trascrizione. La pubblicità in genere*. In A. Cicu, & F. Messineo (Eds.), *Trattato di diritto civile e commerciale*. Milano, Italia: Giuffrè.
15. Tarello, G. (1980). L’interpretazione della legge. In A. Cicu, & F. Messineo (Eds.), *Trattato di diritto civile e commerciale*. Milano, Italia: Giuffrè.
16. Vettori, G. (2002). Gli effetti del contratto nei confronti dei terzi. In M. Bessone (Ed.), *Trattato di diritto privato (V. Il contratto in generale)*. Torino, Italia: Giappichelli.

# WELFARE AND THIRD SECTOR

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**Keywords:** Welfare, Third Sector, No Profit, General Interest Purposes, Asset Destination

## **1. Public welfare and private organizations of the Third sector between charity, pluralism and horizontal subsidiarity**

The extraordinary affirmation of non-profit private organizations (Barbetta, 1996; Propersi & Rossi, 2015; Ponzanelli, 1985, 1992, 2001; Basile, 2014; Bianca, 2002; Costanza, 2012; De Giorgi, 1982; De Giorgi, 2009; Ferrara, 1915; Fusaro, 1992a, 1992b; Galgano, 1996, 2006; Rescigno, 1968, 1988; Zoppini, 1995) since the last decades of the latest century is undoubtedly due to the gradual decline of the State as a “welfare state”, and also to the serious economic crisis that in the 90s of the same century has affected modern democratic States (Zaninelli, 1996).

However, the economic and legal doctrine have highlighted how the reasons of said affirmation should instead be sought in the failure of the State and of the market in the sector of social interest services (health, education, etc.), where in fact the bureaucratic mediation and the contractual composition proved to be ineffective in contrast to the effectiveness and efficiency of private non-profit organizations, which have been considered by the public more reliable due to their peculiar functional characterization (Hansmann, 1980, 1981; Ponzanelli, 1985; Barbetta, 1996; Preite, 1988). And this especially when, after the political prejudices have been overcome, their suitability to carry out an economic and occupational function has been generally recognized (Costi, 1968; Rescigno, 1967; Campobasso, 1994; Galgano, 1978; Marasà, 1996; Ponzanelli, 1995; Preite, 1988).

From the point of view of domestic law, however, all this corresponds to an evolution of the legal system in the direction of the full affirmation of the constitutional principles of the protection of the individual and of the pluralism (Perlingieri, 2006), with the consequent individualistic reinterpretation of the “bare and essential” general discipline contained in the Civil Code promulgated in 1942. It corresponds also to the progressive expulsion from the system of forecasts and techniques aimed at impeding a pluralistic oriented social structure and to the enactment of variegated and complex special laws in order to accommodate the new pluralist instances.

In fact, despite a Civil Code which had originally chosen not to ignore, unlike what happened in the past with liberal-inspired codes, the existence of non-profit private organizations, only the fall of the fascist regime and the entry into force of the Constitution created the conditions for the affirmation of a pluralistic society (Antonini & Pin, 2011) and for the adoption of a series of special laws which, although episodic and sectorial, have first of all dismantled the original design of the 1942 Civil Code, by purifying it, in particular, of those provisions that most reflect the political thought of the time of its enactment (De Giorgi, 1999; Ponzanelli, 1995; Rescigno, 2005; Vittoria, 1989).

The special legislation which has actually incorporated the results of the statutory evolution, also with regards to the profile of the full compatibility of non-profit private organizations with the business activity, was identified as “supporting legislation”, providing benefits and facilitations due to the general interest nature of the aims pursued, and allowing the implementation of the privatization and outsourcing processes which were deemed necessary to face the aforementioned economic crisis of the last decade of the latest century (Bonelli, 2001; Freni, 2003; Ibba, 2001; Maltoni, 2006; Napolitano, 2003, 2005; Raimondi & Ursi, 2006; Sciarretta, 2013).

It has been also of decisive importance for the development of the sector, in many States that, like our, have joined the European Union, the breakthrough into the various legal systems of the principle, deriving from EU law, of horizontal subsidiarity, which has in fact revolutionised the approach of the relations between public welfare and private welfare in a particular historical moment of contraction of public spending due to budgetary constraints imposed by EU institutions (Musella & Santoro, 2012).

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The so-called “reform” of the Third Sector was enacted in 2017 within this changed social, economic, and legal context. This complex reform, in a renewed climate of public-private collaboration, recognises and assigns a specific identity to entities that are not characterized only for the negative element of the non-distribution constraints, but also for the positive elements of the pursuit of civic, solidarity, and social utility purposes by exercising one or more activities of general interest principally or exclusively. In this way, the reform encourages the public-private collaboration within the context of a clear tendency to configure public interventions no longer as a limit to private autonomy, but as an assurance that such autonomy will be carried out in full compliance with the rules (Ponzanelli, 2019).

The new rules outline, in fact, an area where private autonomy is not excluded, but “conformed”, so as to characterize itself as functional autonomy, in which the limits deriving from the social utility of its exercise (and from the civic and solidarity aims that it is institutionally appointed to pursue) are inserted.

These limits contribute to design the scope of application of the Third Sector reform (art. 1, Law 106/2016 and art. 4 of Legislative Decree 117/2017), which, according to the recent rules, could significantly affect the cultural and socio-economic system of our country (Bozzi, 2017; Fici, 2019), as well as the role of public welfare, to improve the latter’s contents and forms.

The organisational structures contemplated by the new rules are neither only the remedy to be used when a State or market failure occurs, nor a means for the public Authority to evade the responsibilities associated with the carrying out of certain activities of general interest. With respect to said activities, the State and the competent public bodies retain their power of intervention, not only when private action results inadequate or ineffective, but also when State’s power should be exercised in the form of control and coordination for the realization of the common good.

Therefore, Third Sector Entities can be described by recurring to an organisational models of horizontal subsidiarity, as well as those of solidarity, which in this way breaches into social and economic relations and into the market, implementing the values of pluralism stated by our Constitution (Fici, 2019, p. 4).

The recent history of our country seems to confirm the important cultural, social and economic role of the private social sector, and the most authoritative doctrine, while making some critical considerations on the new discipline, recognizes the latter potential applications suitable to restore the Third Sector in its original attitude as a privileged instrument of cooperation with the Public Authority for the implementation of the general interest (Costanza, 2019, p. 3).

The law dated June 6, 2016, n. 106 delegating the government “for the Reform of the Third Sector, social enterprise, and the universal civilian service”, contemplates the definition of “Third Sector” and envisages the introduction in our legal system of a Code of the Third Sector, as well as the revision of the rules set out in Title II of Book I of the Italian Civil Code, according to the guiding principles and criteria set out by the same delegating law.

However, as widely known, said revision, although it is mentioned in a recent draft law for the revision of the civil code<sup>1</sup>, has not been achieved during the implementation of the delegating legislation.

## **2. Reform of the Third sector and asset destination for general interest purposes**

Instead, the law n. 106 of 2016 was implemented with the Decree of July 3, 2017, n. 115, providing for a new regime for “social enterprises”, and with the Legislative Decree dated July 3, 2017, n. 117 (*Third Sector Code*), which has introduced into our legal system new categories among the intermediate bodies pursuing non-profit goals (Ponzanelli, 2017; Fici, 2018), the “Third Sector Entity”, providing for regulation that, although clearly built around the model of special sector laws, represents a significant legislative change also with interpretative implications (Quadri, 2018, p. 709).

The Third Sector legislation provides for the requirements to be qualified as a Third Sector Entity (Poletti, 2017, p. 204) and for a set of rules which places Third Sector Entities among the ones established for the realization of non-profit goals set out in the Book I of the Civil Code, such as

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<sup>1</sup> DDL S. 1151, March 19, 2019, XVIII Legislature.

the associations and foundations. The category of Third Sector Entity is in turn divided into sub-categories, for the most part corresponding to subjects already introduced in our legal system by means of previous legislative interventions and now replaced by the new rules (e.g., voluntary organizations, social promotion associations, mutual aid societies, and social enterprises). The reform has also introduced new categories of Third Sector Entities (e.g., philanthropic organizations and associative networks). The above-mentioned types of entities constitute the “typical” collective organizations of the Third Sector, unlike the associations and foundations of the Third Sector or other private entities other than companies (art. 4, paragraph 1, Legislative Decree n. 117 of 2017), which instead was given the role of “atypical” entities.

This new legislation is highly complex and, under the profile of identifying the applicable discipline, it gives rise to a “stratification” of “special notions” (Quadri, 2018, p. 709), but which, although looking towards the “families” of the Third Sector, aims exclusively to respect the typological identity of the various entities of the Third Sector without, however, renouncing to a unitary category based on some characterizing elements (Ponzanelli & Montani, 2018, p. 37; Borzaga, 2018, p. 63).

When it turns to examine the recently introduced set of regulations and its most characterizing profiles, it is possible to point out that the Third Sector is the field of choice for comparison and interdisciplinarity. The latter is particularly evident in the constant references to the principles of effectiveness, efficiency, and cost-effectiveness of the management, an expression of the introduction of the economic-corporate language in a sector of civil law where collective bodies, according to an ancient formulation, “moral bodies”, were once considered extraneous to the conduct of economic activities.

The new regulation, instead, confirms an expansive attitude of corporate law, making, among other things, the boundary line between corporate bodies and associations or foundations flexible (Granelli, 2018; Marasà, 2018; Marcelli, 2018; Montani, 2018).

Among the most important new aspects of the reform, there are the provisions of duties and responsibilities for the entities’ internal bodies, in order to guarantee the allocation of the entity’s assets to the pursuit of its institutional purposes.

In fact, the mere establishment of a collective body in compliance with the legal requirements is aimed to impose on the assets and activities of the same a constraint of destination to pursue the entities’ institutional purposes (Di Raimo, 2017, p. 92).

However, as anticipated, the new regulation shows that the destination of assets relies on a series of controls and obligations, and primarily of allocation and reinvestment obligations, the breach of which is a source of liability (Fici, 2018, p. 99).

And in fact, the guarantee of the effective destination of the entity’s assets to the achievement of its institutional purposes is ensured also by the absence of subjective profit, in relation to which the Legislator has foreseen, in order to avoid abuse and speculative intents, the general prohibition of direct or indirect distribution of profits or operating surpluses (art. 8, paragraph 2, L. D. 117/2017), also in case of withdrawal or in any other case of individual dissolution of the association relationship, with the consequent obligation to reinvest such sums in the entity’s activity. The prohibition is completed by the provision which, in case of dissolution or extinction of the collective organization, obliges its members to devolve the residual assets to other Third Sector Entities (art. 9, L. D. 117/2017).

Therefore, the configuration of destination and reinvestment obligations leads to the belief that the new regulation intended to guarantee the destination for the purpose through the provision of rules which, without excluding the power to dispose of the assets and resources belonging to the entity, are destined to its exercise and the pursuit of its institutional purpose, contemplating a surrogacy mechanism intended to operate when the entity’s capital consistency is changed as a result of disposals of some of its assets. The reform provides also rules on controls, responsibilities, and fines in order to ensure the correct management and define the scope of relevance of the conduct of members of corporate bodies which are contrary to the purpose of the entity.

In addition, the reform provides for reporting obligations in which scope depends on the economic dimension of the entity, the public origin of the resources, and, most importantly, the exercise of business activity (Propersi, 2011). A careful observance of such rules allows internal control bodies (if any), or the persons in charge of supervision and external control, to verify

the proper management of the assets and activities, the lack of which is a prerequisite for the applicability of the liability regime dictated for members of the corporate bodies.

### 3. Conclusion

In a renewed cultural climate inspired by the fundamental values of solidarity, pluralism and horizontal subsidiarity, the Third sector is an instrument for implementing these principles.

For this reason the recent reform aims to encourage and support its development and to establish a unitary discipline that is able to offer answers to practical and interpretative questions still open, first of all, the guarantee of the destination of the assets to the realization of the results.

In this perspective, the reform of the Third sector proposes organizational models, outlining their structure and requiring a sound and prudent management of the asset – inspired by the principles of effectiveness, efficiency and transparency – on which it develops an articulated regime of controls and responsibilities, which, being part of a framework, mostly organic and unitary, seems to give sufficient account of the interests of third parties that are taken into consideration here: financiers, beneficiaries of the entity's activities, creditors and third parties having good faith cause. In this way the reforms ensures the asset allocation of the entity by regulating the activity of the corporate bodies and identifying the responsibility of their members.

### References

1. Antonini, L., & Pin, A. (2011). Gli aspetti costituzionali, amministrativi e tributari del terzo settore. In S. Zamagni (Ed.), *Libro bianco sul terzo settore*. Bologna, Italy: Il Mulino.
2. Barbetta, G. P. (Ed.). (1996). *Senza scopo di lucro*. Bologna, Italy: Il Mulino.
3. Basile, M. (2014). Le persone giuridiche. In G. Iudica, & P. Zatti (Eds.), *Trattato di diritto privato* (2nd ed., pp. 16-706). Milan, Italy: Giuffrè.
4. Bianca, C. M. (2002). *Diritto civile* (2nd ed., Vol. 1: La normagiuridica. I soggetti). Milan, Italy: Giuffrè.
5. Bonelli, F. (2001). *Il codice delle privatizzazioni nazionali e locali* (Contratti & commercio internazionale) Milan, Italy: Giuffrè.
6. Borzaga, C. (2018). Opportunità e limiti della riforma del terzo settore. In A. F. A. Fici (Ed.), *La riforma del Terzo settore e dell'impresa sociale* (p. 57-63). Retrieved from <http://hdl.handle.net/10807/134334>
7. Bozzi, L. (2017). Terzo settore: Osservazioni “a prima lettura” su una riforma culturale prima che giuridica. *Contratto e Impresa*, 33(4), 1253-1280.
8. Campobasso, G. F. (1994). Associazioni e attività di impresa. *Rivista di Diritto Civile*, 2, 581.
9. Costanza, M. (2012). I soggetti: Gli enti non commerciali. In P. Perlingieri (Ed.), *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Vol. 2, p. 160). Napoli, Italy: Edizioni Scientifiche Italiane.
10. Costanza, M. (2019). Enti non commerciali. Dall'a tipicità strutturale all'atipicità funzionale. In F. Rossi (Ed.), *Autonomia privata e strutture organizzative. Enti del libro primo del codice civile e Terzo settore*. Retrieved from <http://hdl.handle.net/11588/807836>
11. Costi, R. (1968). Fondazione e impresa. *Rivista di Diritto Civile*, 1, 17-28.
12. DDL S. 1151, March 19, 2019, XVIII Legislature.
13. De Giorgi, M.V. (2009). Le organizzazioni collettive. In N. Lipari, & P. Rescigno (Eds.), *Trattato di diritto civile* (Vol. 1). Milan, Italy: Giuffrè
14. De Giorgi, M. V. (1982). Le persone giuridiche in generale: Le associazioni e le fondazioni. In P. Rescigno (Ed.), *Trattato di diritto private* (Vol. 2). Turin, Italy: Utet.
15. De Giorgi, M. V. (1999). Il nuovo diritto degli enti senza scopo di lucro dalla povertà delle forme codicistiche al groviglio delle leggi speciali. *Rivista di Diritto Civile*, 45(3), 287-323.
16. Di Raimo, R. (2017). Destinazione e disciplina del patrimonio. In M. Gorgoni (Ed.), *Il codice del terzo settore. Commento al Decreto legislativo 3 luglio, 2017, n. 117* (p. 92). Pisa, Italy: Pacini Editore.
17. Ferrara, F. (1915). *Teoria delle persone giuridiche* (1st ed.). Turin-Napoli, Italy: Marghieri-UTET.
18. Fici, A. (2018). Fonti della disciplina, nozione e governance degli enti del terzo settore. In A Fici (Ed.), *La riforma del terzo settore e dell'impresa sociale. Una introduzione* (p. 83-122). Napoli, Italy: Editoriale Scientifica.
19. Fici, A. (2019). Profili e principi generali della riforma del Terzo Settore. In A. Fici, E. Rossi, G. Sepio, & P. Venturi (Eds.), *Dalla parte del Terzo Settore. La Riforma letta dai suoi protagonisti*. Bologna, Italy: Laterza.
20. Freni, E. (2003). Le privatizzazioni. In S. Cassese (Ed.), *Trattato di diritto amministrativo* (2nd ed., Part 4, p. 3947). Milan, Italy: Giuffrè.

21. Fusaro, A. (1992a). *L'associazione non riconosciuta: Modelli normative ed esperienze atipiche*. Padua, Italy: CEDAM.
22. Fusaro, A. (1992b). Voce "Fondazione". *Digesto delle Discipline Privatistiche – Sezione Civile*, 8, 359.
23. Galgano, F. (1978). L'imprenditore commerciale. In F. Galgano (Diretto da), *Trattato di diritto commerciale e di diritto pubblico dell'economia* (2nd ed.). Padua, Italy: CEDAM.
24. Galgano, F. (1996). *Le associazioni. Le fondazioni. I comitati*. Padua, Italy: CEDAM.
25. Galgano, F. (2006). Delle persone giuridiche. In A. Scialoja, & G. Branca (Eds.), *Commentario del Codice Civile* (2nd ed., Art. 11-35). Bologna-Rome, Italy: Zanichelli-Roma Società Editrice del Foro Italiano.
26. Granelli, C. (2018). Impresa e Terzo settore: Un rapporto controverso. *Jus Civile*, 5, 715-735. Retrieved from [http://www.juscivile.it/contributi/2018/47\\_Granelli.pdf](http://www.juscivile.it/contributi/2018/47_Granelli.pdf)
27. Hansmann, H. B. (1980). The role of nonprofit enterprise. *Yale Law Journal*, 89(5), 835-901. <https://doi.org/10.2307/796089>
28. Hansmann, H. B. (1981). Reforming the nonprofit corporation law. *University of Pennsylvania Law Review*, 129(3), 497-623. <https://doi.org/10.2307/3311741>
29. Ibba, C. (2001). La tipologia delle privatizzazioni. *Giurisprudenza Commerciale*, 28(4), 464-487.
30. Maltoni, A. (2006). Enti pubblici e privati in forma di fondazione: Regime giuridico e modalità di intervento nei settori dei servizi alla persona. *Diritto Amministrativo*, 14(4), 773-846.
31. Marasà, G. (1996). *Contratti associativi e impresa*. Padua, Italy: CEDAM.
32. Marasà, G. (2018). Appunti sui requisiti di qualificazione degli enti del terzo settore: Attività, finalità, forme organizzative e pubblicità. *Le Nuove Leggi Civili Commentate*, 41(3), 671-702.
33. Marcelli, V. M. (2018). L'ente del terzo settore e l'esercizio di attività d'impresa. In A. F. A. Fici (Ed.), *La riforma del Terzo settore e dell'impresa sociale* (p. 123). Retrieved from <http://hdl.handle.net/10807/134334>
34. Mignozzi, A. (2019). La responsabilità civile degli amministratori degli enti del Terzo settore. Profili ricostruttivi. In F. Rossi (Ed.), *Autonomia privata e strutture organizzative* (p. 107). Naples, Italy: Edizioni Scientifiche Italiane.
35. Montani, V. (2018). L'attività economica e imprenditoriale del Terzo settore. In G. Ponzanelli, & V. Montani (Eds.), *Dal "groviglio delle leggi speciali" al Codice del Terzo settore*.
36. Musella, M., & Santoro, M. (2012). *Il terzo settore nell'età della sussidiarietà orizzontale*. Turin, Italy: Giappichelli.
37. Napolitano, G. (2003). Soggetti privati «enti pubblici»? *Diritto Amministrativo*, 11(4), 801-828.
38. Napolitano, G. (2005). L'attività amministrativa e il diritto privato. *Giornale di Diritto Amministrativo*, 5, 481-487.
39. Perlingieri, P. (2006). *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (3rd ed.). Napoli, Italy: Edizioni Scientifiche Italiane.
40. Poletti, D. (2017). Costituzione e forme organizzative. In M. Gorgoni (Ed.), *Il codice del terzo settore. Commento al Decreto legislativo 3 luglio, 2017, n. 117* (p. 205). Pisa, Italy: Pacini Editore.
41. Ponzanelli, G. (1985). *Le "non profit organizations"*. Milan, Italy: Giuffrè.
42. Ponzanelli, G. (1992). Enti senza scopo di lucro. *Digesto Quarto, Discipline Privatistiche*, 7, 468-470.
43. Ponzanelli, G. (1995). Gli enti collettivi senza scopo di lucro nell'attesa della riforma. *Giurisprudenza Commerciale*, 1, 515.
44. Ponzanelli, G. (2001). *Gli enti collettivi senza scopo di lucro* (2nd ed.). Turin, Italy: Giappichelli.
45. Ponzanelli, G. (2017). La nuova categoria degli enti del terzo settore: Alcune considerazioni introduttive. In M. Gorgoni (Ed.), *Il codice del terzo settore. Commento al Decreto legislativo 3 luglio, 2017, n. 117* (pp. 1-3). Pisa, Italy: Pacini Editore.
46. Ponzanelli, G. (2019). Una nuova stagione per le formazioni sociali intermedie fra Stato e individuo: Le novità della legge di riforma del Terzo settore. In F. Rossi (Ed.), *Autonomia privata e strutture organizzative. Enti del libro primo del codice civile e Terzo settore*. Retrieved from <http://hdl.handle.net/11588/807836>
47. Ponzanelli, G., & Montani, V. (2018). Dal "groviglio di leggi speciali" al Codice del Terzo settore. In A. F. A. Fici (Ed.), *La riforma del Terzo settore e dell'impresa sociale* (pp. 31-56). Retrieved from <http://hdl.handle.net/10807/134334>
48. Preite, D. (1988). *La destinazione dei risultati nei contratti associative*. Milan, Italy: Giuffrè
49. Propersi, A. (2011). Governance, rendicontazione e fonti di finanziamento degli enti non profit. In S. Zamagni (Ed.), *Libro bianco sul Terzo settore* (pp. 283-372). Retrieved from <http://www.adrianopropersi.it/wp-content/uploads/2016/04/lbts.pdf>
50. Propersi, A., & Rossi, G. (2015). *Gli enti non profit*. Milan, Italy: Giuffrè.
51. Quadri, E. (2018). Il terzo settore tra diritto speciale e diritto generale. *La Nuova Giurisprudenza Civile Commentata*, 34(5), 708-715.
52. Raimondi, S., & Ursi, R. (Eds.). (2006). *Fondazioni e attività amministrativa (Atti del convegno – Palermo, 13 maggio 2005)*. Turin, Italy: Giappichelli.
53. Rescigno, P. (1967). Fondazione e impresa. *Rivista delle Società*, 812-819.

- 
54. Rescigno, P. (1968). Voce Fondazione (diritto civile). *Enciclopedia del Diritto*, 17.
  55. Rescigno, P. (1988). *Persona e comunità: Saggi di dirittoprivato* (Vol. 2). Padua, Italy: CEDAM.
  56. Rescigno, P. (2005). Sulla riforma del diritto delle associazioni e fondazioni. *Vita Notarile*, 57(1), 61-67.
  57. Sciarretta, F. (2013). Associazioni e fondazioni con compiti di amministrazione pubblica. *Giurisprudenza Commerciale*, 40(5), 951-984.
  58. Vittoria, D. (1989). Gli enti del primo libro del codice civile: L'attuale assetto normativo e le prospettive di riforma. In P. Rescigno (Ed.), *Le fondazioni in Italia e all'estero*. Padova, Italy: CEDAM.
  59. Zaninelli, S. (1996). Gli sviluppi storici. In G. P. Barbetta (Ed.), *Senza scopo di lucro. Dimensioni economiche, legislazione e politiche del settore nonprofit in Italia* (pp. 117-146). Bologna, Italy: Il Mulino.
  60. Zoppini, A. (1995). *Le fondazioni: Dalla tipicità alle tipologie*. Napoli, Italy: Jovene.

# PUBLIC DUTIES AND PRIVATE MANAGEMENT IN THE INTEGRATED WATER SERVICES IN ITALY: STILL LOOKING FOR BALANCE

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**Keywords:** Public Management, Water Services, Privatization, Regulation, Competition

## 1. Introduction

One of the most debated issues in the process of privatization of water has always concerned the distinction between ownership and management of water services networks (Merusi, 2004; Garofalo, 2010). A strictly connected issue in the field is the separation between management and regulation of water service. The need for regulation of water and sanitation services is mainly linked to the fact that they are provided with a monopolistic industrial structure (Franceys, 2000). Therefore, the private operator could abuse its market power, generating a loss of welfare for the concerned community. Another reason regards the external effects of the management on public health and the environment (Marin, 2009). Generally, the goals meant to be achieved through the correct regulation of the water sector are environmental protection against over-exploitation (establishing, in particular, an efficient allocation of resources among possible alternative uses), and a guarantee of universal access to good quality drinking water to protect public health and ultimately consumer protection, assuring acceptable levels of service and price (Franceys & Gerlach, 2008).

Regulation affects specific factors, such as price, service level and operating costs, investments, consumer protection, drinking water quality, environmental protection. Regulation is also seen as an imperfect substitute for competition (Rees, 1998). On the one hand, it allows safeguarding consumer rights, while on the other hand, it consents companies to provide incentives to invest and operate efficiently. In particular, if we consider that the structure of the water services market presents a competition for the market rather than one within the market, regulation has the fundamental task of ensuring that supply services are assigned through a transparent and open tender. This would ensure that the results of the tender follow the principle of competitiveness, thus favouring and improving efficiency (Agarwal et al., 2000). It is desirable that the “supervisor” is a third subject, independent and qualified from a technical point of view, both when the fostering takes place with the mode of the tender, and when the Local Authority uses in-house or fostering direct to a public/private society (Iaione, 2012). The Ronchi Decree did not pay much attention to the form of tenders and, in particular, of the subjects who must take care of their implementation: guarantees of correctness, transparency, equal treatment must be granted even in very delicate phases. If, on the one hand, the Local Authority cannot stay outside the fostering commissions (since the foster concerns a local public service), the regulation should provide that commissions always include independent members, providing both formal and substantial guarantees for the fostering procedure. This guarantee function should take place right from the drafting of the service contract, which is the document aimed at defining references and parameters of the tender. A similar approach should be extended to the jury called to settle the disputes out of court. Even in this case, indeed, local authorities should be involved in the procedure, especially when the foster is neither an in-house nor a mixed public-private society, but it is important that the jury is a composite body, hosting qualified independent experts as well as direct representatives of the customers. For the regulatory functions, it seems reasonable to establish a specific Authority or to expand the existing competences of both the Authority for Electricity and Gas and the Authority for Competition and Market, while the foster tenders could involve both supervisor’s representatives and members of the territorial offices of the Court of Auditors. The jury could host representatives of the regulator, as referents for the technical aspects, as well as representatives of consumer organizations.

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## **2. The discipline introduced by Art. 23-bis of Law Decree n. 112/2008 amended from the so-called Ronchi Decree**

Article 23-bis of Law Decree n. 112/2008, converted with modifications from Law n. 133/2008, in the version modified by Art. 15 of Law Decree n. 135/2009, converted by Law n. 166/2009, with the declared intention “to favour the widest diffusion of the principles of competition, freedom of establishment and freedom to provide the services of all the economic operators interested in the management of services of general interest in the local area”, introduces also for the integrated water service a system for assigning local public services based on two ordinary methods of assignment with a single possibility of the derogation provided by Par. 3.

The ordinary procedure foresees either the award of a contract to entrepreneurs or company or the assignment to a mixed public and private company, provided that the selection of the participating subjects takes place through public competitive procedures concerning the quality of partner and the assignment of specific operational tasks related to the management of the service and that the member is assigned participation of no less than 40 per cent (par. 2) (Marotta, 2011).

Therefore, the reform of local public services reintroduces those so-called mixed public/private companies that seemed definitively set aside, since the 2008 version of Art. 23-bis did not explicitly admit the reference of such kind of companies. The Italian legislator restored the European model of Public Private Partnership (PPP), which – according to some analysts – in Italy did not always prove positive results (Antonelli, Balbo, Tinagli, Schepers, & Bianchi, 2013). In fact, rather than being inspired by the European PPP model, mixed companies have proved to be the instrument for private entrepreneurs to become shareholders of enterprises enjoying privileges due to public companies in order to manage monopolistic positions rather than providing more efficient services (Trimarchi Banfi, 2012). One hundred years of local public services sector (Merusi, 2004) seemed to concentrate technical skills within local public companies, while private companies were practically absent from the sector (Napolitano, 2005).

The so-called Ronchi Decree establishes further limits and constraints on public management, now permitted only as an “exception” from the ordinary tender procedure. Local authorities aimed at maintaining public management, are therefore forced to provide adequate publicity to their choice and to motivate the renunciation of the tender “on the basis of market analysis and contextually to transmit a report with the results of the aforementioned verification to the Competition and Market Authority”, which has to express a mandatory, but not binding opinion (Lucarelli, 2010; Piperata, 2006).

## **3. The “alleged” ban on direct management of local public services with an economic interest in the decision of the Italian Constitutional Court n. 325/2010**

In its decision no 325/2010 (of 17 November 2010), the Italian Constitutional Court rejected the appeals presented by seven regions complaining about the constitutional illegitimacy of Art. 23-bis of the Ronchi Decree, affirming that the Italian legal system foresees a “ban on direct management of local public services”<sup>1</sup> (Aiello, 2011; Cuocolo, 2011; Spuntarelli, 2011; Cecchetti, 2012). According to the Court, however, this ban has not been set by Art. 23-bis – which simply developed what already existed – but was introduced by Art. 35 of Law n. 448/2001<sup>2</sup> and Art. 14 of Law Decree n. 269/2003<sup>3</sup>, converted, with modifications, from Law n. 326/2003. The decision claims that this prohibition would be constitutionally legitimate as Italy, using the sphere of discretion allowed by the EU Law, chose to prohibit the direct management of local public services and enacted legislation that sets this prohibition. Thus, immediately after identifying this alleged prohibition of direct management, the Court seems to review its position, affirming that this would not be

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<sup>1</sup> The decision was followed by a wide number of critical comments by scholars and experts.

<sup>2</sup> Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato – Legge Finanziaria 2002 (Finance Act, 2002).

<sup>3</sup> Disposizioni urgenti per favorire lo sviluppo e per la correzione dell’andamento dei conti pubblici (Law Decree for the Development and Correction of Public Budget).

an absolute ban, but rather a prohibition of direct management by a special company. In fact, the Constitutional Court considers the in-house provision as a form of direct management, carried out through a subject who is a legal entity distinct from the contracting authority identified without a procedure of public assignment. Both EU Law and the CJEU jurisprudence allow direct assignment only as an exception to the general principle of identification of the subject supplier of a service or contract or a concessionaire of public service by tender. The in-house providing would therefore simply be a form of direct management. However, this is outsourced management, because it is realized through a subject formally distinct but, in essence, fully controlled by the local authority providing the service. A direct assignment to a subject formally external to the public administration is allowed only if the assignee is not a subject independent from the contracting organisation. This means that the in-house providing is a direct form of management for the concerned services, even if they formally result to be outsourced: the form of joint-stock company confers a personality legal autonomy to the in-house society (Marotta, 2011).

A successful abrogative referendum (held on 12 and 13 June 2011) arose the question of what is the “resulting legislation” to the outcome of the referendum, especially if the rules provided by Art. 113 TUEL could apply again to the matter after the abrogation occurred by referendum. Admitting the referendum request, the Constitutional Court was very clear: recalling its previous jurisprudence<sup>4</sup>, it excluded the revival of the rules previously repealed by those abolished through a referendum. The Court specified its point in the decision n. 28 of 2011<sup>5</sup>, repeated it in the sent. n. 13 of 2012 (concerning the admissibility of other referendums)<sup>6</sup> and finally reaffirmed it in the decisions n. 199 of 2014, 62 of 2012, and 320 of 2011.

#### **4. The legislative measures after the referendum: The different position of the integrated water service inside the general regulation of local public services**

After the referendum abrogation, the Italian Government quickly intervened with a new regulation of the local public services. Although adopted by different Governments, both acts (Decree n. 138 of 2011 – Art. 4, and Decree n. 1 of 2012) supported the management of local public services based on the protection of the competition and the market (Piperata, 2011). Law Decree n. 138/2011 was adopted by the right-wing government Berlusconi IV, while Law Decree n. 1/2012 was passed by the government formed in 2011 under the leadership of Senator Mario Monti, after the resignation of the Prime Minister Silvio Berlusconi. Art. 4 of the Law Decree n. 138/2011, entitled “Adaptation of the regulation of local public services to the referendum and European Union legislation”, made a clear choice in favour of the liberalization of local public services, through the enactment of forms of competition in the market, with several operators providing the same service.

Subsequently, Art. 25 of the Law Decree n. 1/2012 added an Art. 3-bis to the already mentioned Law Decree n. 138/2011, whose Par. 1 states that “in order to protect competition and environment, Regions and the Autonomous Provinces of Trento and Bolzano organize the development of local public services in optimal and homogeneous areas or territorial basins” (which must have as a minimum reference the size of the provincial territory) and whose dimensions “must allow economies of scale and differentiation able to maximize the efficiency of the service”. The subsequent Parr. 2, 3, and 4 of Art. 3-bis highlights one more time the preference of the legislator for the competition in the management of local public services.

Nevertheless, Par. 2 introduces a different element from the mere protection of competition, stating that when the service is entrusted through a public procedure “the adoption of instruments for the protection of employment is an element of evaluation of the offer”. Since the protection of employment and support of mere competition do not necessarily match, it seems relevant to note this partially different approach followed by the new regulation (Chirulli, 2015).

<sup>4</sup> See decisions n. 40 of 1997 and n. 31 of 2000.

<sup>5</sup> In the decision n. 28 of 2011 (concerning another referendum filed the same day of the sent. n. 24) the Court stated that “the abrogation, as a result of the possible acceptance of the referendum proposal, of an abrogative provision is [...] unsuitable to make valid again rules that have already been expunged from the legal order”.

<sup>6</sup> For a further evaluation of the Constitutional Court of Italy on legislation revival after referendum abrogation (concerning electoral legislation) see Part I, pp. 81-120 and Part II, pp. 211-252 in Barcellona (2014).

## 5. The novelties introduced by Law Decree n. 133 of 12 September 2014 and by Law n. 221 of 28 December 2015

Relevant innovations have been introduced by Law n. 164/2014, which converted the Law Decree n. 133/2014 (so-called *Sblocca Italia*). Its Art. 7 amended Section III of Legislative Decree n. 152/2006, which ruled the management of water service. The new norm maintained the concept of integrated water service provided by Art. 141, Par. 2, intended as a system of public services for the collection, supply and distribution of water for civil use of sewerage and waste water purification, which must be managed according to principles of efficiency, effectiveness and economy, in compliance with European and national regulations. However, this approach does not seem to pay enough attention to the fact that private investments in public services are likely mainly when they result conveniently for investors (Tonetti, 2013). Furthermore, Art. 7 confirmed the choice of organizing the service based on optimal territorial areas: therefore, after the abolishment of the AATO<sup>7</sup>, it is up to the regions to organize the service defining the territorial areas of enactment (Law n. 42/2010)<sup>8</sup>.

Law Decree n. 133/2014 amended Art. 147 of the Legislative Decree n. 152/2006, confirming the obligatory participation of local authorities in the governing body, establishing the substitute power of the President of the Region in case of non-compliance, and affirming the uniqueness of the management within the optimal areas, instead of that of unity, allowing, when the territorial context coincides with the entire regional territory, the assignment of the integrated service water in areas as wide as provinces and metropolitan cities<sup>9</sup> (Azzariti, 2015).

The “*Sblocca Italia*” decree also intervened on the procedures for assigning public services, repealing Art. 150 of Legislative Decree n. 152/2006, entitled “Choices of the form of management and awarding procedures”, and introducing Art. 149-bis. In particular, it stated that the management must be carried out in compliance with the so-called “*Piano d’Area*” (Area Plan)<sup>10</sup> and according to the principle of unified management. In any case, the regions have the right to identify sub-sectors that must be at least as wide as the provincial or the metropolitan city area.

## 6. The most recent provisions on integrated water services

The so-called *Testo Unico* contained in Legislative Decree n. 175/2016 (as amended by Legislative Decree n. 100/2017) sets which forms are allowed to enact organizing and managing services of general economic interest (Furno, 2013). The renounce to enact the other legislative delegation provided by Law n. 124/2015, regarding the “reorganization of the discipline of local public services of general economic interest” (Gigliani, 2015), was definitely a lost opportunity for rearranging and rationalizing an extremely fragmentary discipline.

Instead, the enactment of Legislative Decree n. 175/2016 produced an evident asymmetry between the regulation of the subjects entrusted with public services and the incomplete discipline of methods of assignment, organization, and management of public services with economic interest. Nevertheless, a relationship of mutual influence between the two levels is acknowledged (Miccù & Francaviglia, 2018).

The Consolidated Act (*Testo Unico*) on local public services of general economic interest (Law n. 24/2015) introduced a rational stabilization of the existing provisions, in particular with regard to the European Directives on procurement and concessions (Directives n. 23 and 24 of 2014),

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<sup>7</sup> AATO is an acronym for Optimal Territorial Area Authority: public entities, required by law to oversee over-municipal and/or interprovincial territorial basins, which have the purpose of rationalizing the interventions within their competence, optimizing the management of economic and environmental resources. Examples are the Water Authorities and the Waste Service Authorities.

<sup>8</sup> Art. 1 of Law n. 42/2010 (converting the Law Decree n. 2/2010, and containing “urgent interventions concerning local authorities and regions”) added Par. 186-bis to Art. 2 of the Finance Act 2010 (Law n. 191/2009), decreeing the abolishment of the AATO starting one year after its approval (that means, by 27 March 2011).

<sup>9</sup> Principi per la tutela, il governo e la gestione pubblica delle acque e disposizioni per la ripubblicizzazione del servizio idrico, nonché delega al Governo per l’adozione dei tributi destinati al suo finanziamento (Law Decree on the Principles for the Protection, Government and Public Management of Water).

<sup>10</sup> The Area Plan is an instrument for the specification of the Regional Territorial Coordination Plan, and is developed for specific areas that allow to “identifying the proper solutions for all those territorial contexts that require specific, articulated and multidisciplinary approaches to planning”.

the new Code of Public Contracts (Legislative Decree n. 50/2016 integrated and corrected with Legislative Decree n. 56/2017), and a series of provisions on the same matter, including those contained in the 2014 and 2015 stability laws (Law n. 147/2013 and Law n. 190/2014). The declaration of unconstitutionality by the Italian Constitutional Court Decision n. 251 of 2016 (Bifulco, 2017; Lugarà, 2017; Sterpa, 2017), which abrogated some parts of the c.d. “*Delega Madia*” (Law 124/2015), produced an interruption of this reform process (Fracchia, 2016). The Court noted that the rules subject to the legislative delegation, although related to areas affecting the jurisdiction of the State, also concern matters of residual or concurrent regional jurisdiction, and therefore lacked constitutional legitimacy, caused by the violation of the “principle of loyal cooperation”.

The delegation for the adoption of the related implementing decrees, in fact, requires the acquisition of an opinion rather than an agreement in the so-called Unified Conference (*Conferenza Unificata*). The unconstitutionality, however, is limited to the provisions of delegation contained in Law n. 124/2015 and does not affect the relative implementing rules. Therefore, the decrees already issued (including the Legislative Decree n. 175/2016, on public-participation companies, which came into force on 23 September 2016) must be considered fully in force. Instead, since it was not sent to the Official Gazette for subsequent publication, the Consolidated Act on local public services of general economic interest is not in force (Spadoni, 2017).

After the referendum, the European legislation represented the only stable norm on assignment and management of integrated water services (as well as all other non-special public services). Thus, it was unclear which Italian internal provisions remained applicable in the field. A wide debate affected this specific point: some experts stated that among the few provisions still in force after the referendum was Par. 2 and 3 of Art. 150 of Legislative Decree n. 152/2006. These provisions stated, respectively, that the awarding of management of the integrated water service takes place “by means of a tender governed by the principles and by the EU Law, in compliance with the criteria set forth in Art. 113, Par. 7, of the Legislative Decree n. 267 of 18 August 2000”, and that the same management “can also be entrusted to companies owned exclusively and directly by municipalities or other local authorities included in the optimal territorial area, [...] provided that the private partner has been chosen, prior to the assignment, with a tender to be carried out according to the procedures described in Par. 2” (Cerulli Irelli, 2012, p. 54).

This position clashes with the already mentioned impossibility of reviving the rule repealed by Art. 23-bis. It should instead be considered that the framework of the rules on the assignment of the integrated water services was based exclusively on European law, on very few internal provisions (Law Decree n. 135/2009), as well as on some provisions contained in Art. 113 *Testo Unico degli Enti Locali* and concerning infrastructures, networks, and relationships between manager and local authorities<sup>11</sup>.

## **7. Public evidence in water management: the applicability of Legislative Decree n. 50/2016 to the integrated water services**

The relationship between the discipline of public contracts and integrated water service is essential in order to define the proper assignment of services according to Art. 149-bis of Legislative Decree n. 152/2006, especially when the competent local institution decides to apply to the market. The mentioned Legislative Decree n. 50/2016 does not set specific rules for services of general economic interest, expressly excluded by Art. 12 of the Law Decree (Passarelli, 2016). As in the previous discipline, water falls within the so-called “Special sectors”, which implies the application of the Procurement Code (*Codice degli appalti*) to certain works or services assigned by the service manager, where, with reference to the entrusting procedures of integrated water services, only those criteria that grant “economy, effectiveness, impartiality, equal treatment, transparency, proportionality, publicity, protection environment and energy efficiency”, regarding the so-called “excluded public contracts” ruled by Art. 4, of the Legislative Decree n. 50/2016, apply.

Local institutions can actually choose only between the private market and the direct assignment (Cavallo Perin, 2014). If the market option must comply with the principles set out in Art. 4 of

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<sup>11</sup> See Parr. 1-4, 5-ter, 9-13.

Legislative Decree n. 50/2016, it is important to clarify which norms apply to the in-house management of the integrated water services. The requirements for the in-house providers are ruled by Art. 149-bis of Legislative Decree n. 152/2006, recalling the related European provisions and therefore Art. 5, Legislative Decree n. 50/2016 and Art. 6, Legislative Decree n. 175/2016, which currently clarifies such requirements. These provisions, however, do not perfectly match; besides, also the in-house management option must be reasonably motivated by the public subject (Bassi, 2014).

It remains to verify how the legislation on investee companies (*“società partecipate”*), as amended by Legislative Decree n. 100/2017, applies to the public services system with economic interest and in particular on the integrated water service, especially how Legislative Decree n. 175/2016 affects the current discipline of the integrated water service, after the 2011 referendum and with regard to the jurisprudence by the Constitutional Court. Since the Legislative Decree pursues also the “protection and promotion of the competition and the market” (Art. 1, Par. 2), a certain similarity can be seen between this discipline and those regarding local public services and integrated water service.

In its first opinion on the *“Testo Unico sulle società a partecipazione pubblica”* (Legislative Decree n. 175/2016) especially with reference to the interpretation of the institute of in house providing<sup>12</sup>, the Council of State affirmed that the general principle of favouring competition must inform the systematic approach of the whole *Testo Unico*, taking account of the provisions of Art. 1. This should especially affect services of general economic interest: the choice of the market and not of the in house procedure can indeed represent a useful instrument of economic liberalization, allowing the access of new operators in the economic sector (Travi, 2014).

Another element to be clarified is the meaning of “services of general economic interest” provided by Art. 2, Par. 1, lett. i) of the *Testo Unico*, which defines such services as those “provided or likely to be provided against payment on a market”. The concept of “economic remuneration”, included within market dynamics, seems to imply a capacity of the service itself to be remunerative for its (public or private) provider and could question the approach followed by the Italian Constitutional Court. This stated that the “economic interest” of the public service would consist of the simple coverage of the related costs (Corte Costituzionale, 2010).

With regard to the definition of the areas of activity of public companies, listed by Art. 4, par. 2, of the consolidated text, it can be noted that letters a) and c) speak only of “services of general interest”; actually, they clearly refer also to services of general economic interest (and, therefore, to the public services of economic interest), not only for the plain provision contained in Art. 2, Par. 1, lett. h), of the *Testo Unico*, but also for the systematic nature of the very concept of “services of general interest” in the European context. The Treaty does not rule this element, but this emerges in the Community practice from the expression “services of general economic interest”, which is instead used in the Treaty. It is a broader expression of “services of general economic interest” and concerns both those market and non-market services that public authorities consider to be of general interest and subject to specific public service obligations (European Commission, 2003).

Therefore, the aforementioned regulations provide a precise idea of the general goal pursued by Legislative Decree n. 175/2016 about public services with economic relevance. This not only reorganizes the legal discipline provided to public administrations in order to perform certain “activities of production of goods and services strictly necessary for the pursuit of their institutional purposes”, like the production of a service of general economic interest. It also clarifies the principle of protection of competition (in favour of the market), meant to inform the whole discipline, and supports the entrepreneurial nature of the different kinds of publicly owned companies entitled to provide such services<sup>13</sup>. Thus, the *Testo Unico* enhances both the approach (in favour of the competition) recently undertaken by the regulation on local public services and the friction points of such evolution with the special regulation of integrated water services, as amended by the 2011

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<sup>12</sup> See Opinion 986/2016.

<sup>13</sup> This position is confirmed by the Italian Council of State in its opinion n. 968 of 2016, concerning the first version of the *Testo Unico*, which states that “finally, European law, in the frame of the processes of economic liberalization and without directly interfering with privatization processes, allows private and public companies to carry out business activities, as well as service activities of general interest, economic or otherwise, as long as the antitrust rules and the guarantee procedures for the choice of contractors or economic partner are respected”.

referendum (Massarutto, 2012).

This is confirmed when the manager of integrated water services is an in-house company: in this case, in fact, both the *Testo Unico* and the new code of public contracts and Legislative Decree n. 152/2006 apply. The in-house discipline posed by Art. 16, of the Legislative Decree n. 175/2016 must therefore be coordinated with the rule set by Art. 5 of the Legislative Decree n. 50/2016 since the two concepts do not coincide perfectly from the lexical point of view (Miccù & Francaviglia, 2018).

## 8. Conclusion

The relationship between the rules on in-house management and integrated water service is quite complex since they present substantial differences for the governance of the water sector. This regards the eligibility of private capital within an in-house company providing integrated water services. On the one hand, these investments are admitted by the European law and, today, also by the national legislation (Legislative Decree n. 50/2016, Art. 5, Par. 1, lett. c); Legislative Decree n. 175/2016, Art. 16, Par. 1). On the other hand, they seem to be excluded from Art. 149-bis, which expressly mentions “fully public companies” as possible direct service providers. The interpretative dilemma becomes even more evident by the fact that Art. 149-bis refers to the European legal system for what concerns the requirements of in house management (Directive 2014/24/EU of 26 February 2014) and sets, therefore, an in itself contradictory rule. It is necessary to understand whether and to what extent this reference to the EU law is able to produce effects on the direct assignment of integrated water services (ItaliaSicura, 2015).

The question receives different solutions, according to which kind of relationship among the legal sources are supposed to apply. For example, an interpretation of Art. 149-bis complying with the European law would imply that “fully public companies” may also include “partially public companies”, which meet the European requirements for the direct award of a service of general economic interest. On the other hand, accepting the specialty criterion would lead to opposite results. Due to its special nature, integrated water services regulation should therefore be allowed to derogate to the prescriptions about in-house requirements, established by the European regulations and now also accepted by the Code of the contracts and the *Testo Unico*: consequently, direct providers of integrated water services should undergo full public participation.

The latter opinion appears preferable since it finds positive feedback in both the literal and in the systematic interpretation of the mentioned provision. With reference to the first, the term “full public companies” leaves little room for hermeneutical activity, while with reference to the second one, it is necessary to relate the corporate structures of the direct providers of integrated water services with the referendum abrogation of part of Art. 154 of the Legislative Decree n. 152/2006, and the subsequent prohibition to include adequate remuneration of capital in the tariff of the services (Miccù & Francaviglia, 2018). Many authoritative scholars have questioned the legitimacy of this prohibitive. According to Rodotà (2016), the Legislator were heading towards the “delivery to private individuals” of the management of water services, despite the referendum of 2011: “the key point is precisely that of public management, relegated to an exceptional regime by the new rules and the *Testo Unico* on local services, that even restored the criterion of ‘adequacy of the remuneration of invested capital’ deleted from the referendum”. Extremely critic about the exclusive public nature of the management of water services is Staiano (2011). According to him, “it is necessary to overcome the belief [...] that management of water resources by private companies leads to privatization of water as a good and as a resource: water remains in any case a public good, so qualified by law, and this cannot avoid to produce consequences on its management, whoever the manager is, public or private. Besides, we must reflect that its public management – whatever its form is: direct in economy or through special company – cannot be considered a general and absolute [...] of the best protection and widest extension of the fundamental right to water”. Nevertheless, this prohibition allowed to overcome the dogma of the necessary liberalization of water services, paving the way for their (re)new(ed) public status, due to the particular non-commercial nature of water resources.

In the end, the Italian legal system still tries to keep together a discipline intended to eliminate any form of profit from the management of integrated water services (rather than eliminating

its undeniable economic relevance), allowing public bodies to entrust private operators to the management of the services (Boscolo, 2012).

Nevertheless, every subject operating in the sector should remind that access to water is and remains a basic right for every human being, crucial for the quality of life in every environment, as not only national but also international regulation of the matter expressly recognizes (Hilderling, 2006; Sultana & Loftus, 2012; Winkler, 2012; Thielbörger, 2014; Soboka Bulto, 2014; Langford & Russell, 2017; Fiechter-Widemann, 2017). Legal experts still debate about which category of good fits to water (Miccù & Palazzotto, 2016; Rodotà, 2012), while other contributions stress the relationship between the availability of basic goods and sustainability of economic development for the future generations (Bifulco, 2013). The Italian Constitutional Court has endorsed the legislator's pro-competitive choice, aimed at making public service management more difficult than competitive mechanisms, affirming at the same time the economic relevance of the service and excluding regions from its regulation. The outcome of the 2011 referendum proved how the Italian citizens were concerned about the private and competitive management of the service. The fact is that the current discipline still did not clear its effective regime, and still has to make its definitive preference among the public, private, or hybrid option in the sector (Costantino, 2011).

## References

1. Agarwal, A., Delos Angeles, M. S., Bhatia, R., Cheret, I., Davila-Poblete, S., Falkenmark, M.,.... Wright, A. (2000). *Integrated water resources management*. (TAC Background Papers No. 4. Retrieved from <https://www.gwp.org/globalassets/global/toolbox/publications/background-papers/04-integrated-water-resources-management-2000-english.pdf>
2. Aiello, C. M. (2011). La Consulta "salva" la riforma dei servizi pubblici locali dalle censure regionali (ma ammette il referendum abrogativo). *Corriere giuridico*
3. Antonelli, S., Balbo, L., Tinagli, A., Schepers, S., & Bianchi, P. (2013). Pubblico-privato: Forme di interazione in evoluzione. *Economia e Management*, 4, 77-92. Retrieved from <https://th8.bocconialumni.it/dotAsset/a2bd1884-5d76-48e4-8e7d-ca6f2158703f.pdf>
4. Azzariti, G. (2015). *Ri-pubblicizzare il servizio idrico* (Audizione presso la Commissione Ambiente del 28 ottobre 2015 nell'ambito dell'esame in sede referente della proposta di legge C. 2212). Retrieved from <https://www.osservatorioaia.it/images/rivista/pdf/Azzariti%20audizione%202015.pdf>
5. Barcellona, G. (2014). Osservazioni sul problema della reviviscenza e sulla rilevanza della intentio referendaria: muovendo da Corte cost. n. 13/2012. *Politica del Diritto*, 45(2), 211-252. <https://doi.org/10.1437/76756>
6. Bassi, N. (2014). Gli obblighi di servizio pubblico come strumenti polifunzionali di regolazione dei mercati. *Rivista della Regolazione dei Mercati*, 2. Retrieved from [http://www.rivistadellaregolazioneideimercati.it/Article/Archive/index\\_html?ida=22&idn=2&idi=-1&idu=-1](http://www.rivistadellaregolazioneideimercati.it/Article/Archive/index_html?ida=22&idn=2&idi=-1&idu=-1)
7. Bifulco, R. (2013). *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale*. Roma, Italia: FrancoAngeli.
8. Bifulco, R. (2017). L'onda lunga della sentenza 251/2016 della Corte costituzionale. *Federalismi.it*, 3, 2-7. Retrieved from [https://www.federalismi.it/nv14/articolo-documento.cfm?hpsez=Primo\\_Piano&content=L%2527onda+lunga+della+sentenza+251/2016+della+Corte+costituzionale&content\\_auth=%253C%253ERaffaele+Bifulco%253C/b%253E&Artid=33494](https://www.federalismi.it/nv14/articolo-documento.cfm?hpsez=Primo_Piano&content=L%2527onda+lunga+della+sentenza+251/2016+della+Corte+costituzionale&content_auth=%253C%253ERaffaele+Bifulco%253C/b%253E&Artid=33494)
9. Boscolo, E. (2012). *Le politiche idriche nella stagione della scarsità. La risorsa comune tra demanialità custodiale, pianificazioni e concessioni*. Milano, Italia: Giuffrè
10. Cavallo Perin, R. (2014). I servizi pubblici locali: modelli gestionali e destino delle utilities. In P. L. Portaluri (Ed.), *L'integrazione degli ordinamenti giuridici in Europa* (pp. 23-40). Retrieved from <https://www.robertocavalloperin.it/wp-content/uploads/75-Servizi-pubblici-locali-modelli-gestionali.pdf>
11. Cecchetti, M. (2012). L'organizzazione e la gestione del servizio idrico integrato nel contenzioso costituzionale tra Stato e Regioni. Un colosso giurisprudenziale dai piedi d'argilla. In M. Gigante (Ed.), *L'acqua e la sua gestione. Un approccio multidisciplinare* (pp. 59-115). Napoli, Italia: Jovene.
12. Cerulli Irelli, V. (2012). La disciplina delle acque e servizio idrico integrato. In M. Gigante (Ed.), *L'acqua e la sua gestione. Un approccio multidisciplinare* (pp. 37-58). Napoli, Italia: Jovene
13. Chirulli, P. (2015). I servizi pubblici locali e il servizio idrico integrato tra legislatore, Corte costituzionale e (presunta) "volontà" referendaria. *Federalismi.it*, 7, 2-39.
14. Corte Costituzionale. (2010). *Decision n. 325/2010*. Retrieved from <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2010&numero=325>

15. Costantino, F. (2011). La guerra dell'acqua. Dalla proprietà del bene alla gestione del servizio. *Rivista AIC*, 3, 1-32. Retrieved from [https://www.rivistaaic.it/images/rivista/pdf/Costantino\\_guerra\\_acqua.pdf](https://www.rivistaaic.it/images/rivista/pdf/Costantino_guerra_acqua.pdf)
16. Cuocolo, L. (2011). La Corte costituzionale "salva" la disciplina statale sui servizi pubblici locali. *Giornale di Diritto Amministrativo*, 17(5), 484-493.
17. Directive 2014/24/EU of 26 February 2014. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>
18. European Commission. (2003). *Green paper on services of general interest. COM (2003) 270 final*. Retrieved from [http://aei.pitt.edu/45893/1/com2003\\_0270.pdf](http://aei.pitt.edu/45893/1/com2003_0270.pdf)
19. Fiechter-Widemann, E. (2017). *The human right to water: Justice ... or sham?: The legal, philosophical, and theological background of the new human right to water*. Eugene, OR: Pickwick Publications.
20. Fracchia, F. (2016). Pubblico e privato nella gestione dei servizi pubblici locali: Tra esternalizzazione e municipalizzazione. *Federalismi.it*, 14, 2-25. Retrieved from <https://www.federalismi.it/nv14/editoriale.cfm?eid=408>
21. Franceys, R. (2000). Water and public-private partnership. Keynote speech presented at the *2nd World Water Forum*, The Hague, The Netherlands, March 17-22, 2000.
22. Franceys, R., & Gerlach, E. (2008). Involving and empowering poor customers. In R. Franceys, & E. Gerlach (Eds.), *Regulating water and sanitation for the poor: Economic regulation for public and private partnerships* (pp. 211-226). London, UK: Earthscan.
23. Furno, E. (2011). La never ending story dei servizi pubblici locali di rilevanza economica tra aspirazioni concorrenziali ed esigenze sociali: Linee di tendenza e problematiche aperte alla luce del d.l. n. 138/2011, convertito nella l. n. 148/2011. *Giustizia Amministrativa*, 1-20.
24. Garofalo, L. (2010). Osservazioni sul diritto all'acqua nell'ordinamento internazionale. *Analisi Giuridica dell'Economia*, 1, 15-28. <https://doi.org/10.1433/32570>
25. Giglioni, F. (2015). La nuova disciplina dei servizi pubblici locali di interesse economico generale in attesa dell'esercizio della delega. *Federalismi.it*, 20, 2-7. Retrieved from <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=30595>
26. Hildering, A. (2006). *International law, sustainable development and water management*. Eburon Academic Publishers.
27. Iaione, C. (2012). *Le società in-house: Contributo allo studio dei principi di auto-organizzazione e auto-produzione degli enti locali*. Retrieved from [http://www.jovene.it/public/allegati/38559\\_Sommario\\_Indice-Iaione-Societ%C3%A0.pdf](http://www.jovene.it/public/allegati/38559_Sommario_Indice-Iaione-Societ%C3%A0.pdf)
28. ItaliaSicura. (2015). *Sviluppo delle infrastrutture idriche. Investimenti pubblici nel Servizio Idrico Integrato*. Report.
29. Langford, M., & Russell, A. F. S. (2017). *The human right to water: theory, practice and prospects*. Cambridge, UK: Cambridge University Press.
30. Lucarelli, A. (2010). I modelli di gestione dei servizi pubblici locali dopo il decreto Ronchi. Verso un governo pubblico partecipato dei beni comuni. *Analisi Giuridica dell'Economia*, 1, 127-142. <https://doi.org/10.1433/32576>
31. Lugarà, R. (2017). Sentenze additive di procedura...legislativa? Il problematico seguito della sent. n. 251 del 2016. *Rivista AIC*, 1, 1-15. Retrieved from [https://www.rivistaaic.it/images/rivista/pdf/1\\_2017\\_Lugar%C3%A0.pdf](https://www.rivistaaic.it/images/rivista/pdf/1_2017_Lugar%C3%A0.pdf)
32. Marin, P. (2009). Public-private partnerships for urban water utilities: A review of experiences in developing countries. *Trends and Policy Options*, 8, Retrieved from <http://documents1.worldbank.org/curated/en/984921468182666780/pdf/Public-private-partnerships-for-urban-water-utilities-a-review-of-experiences-in-developing-countries.pdf>
33. Marotta, S. (2011). La depubblicizzazione dei servizi idrici. Dalla municipalizzazione all'obbligo di esternalizzazione. *Munus*, 1, 177-198. Retrieved from [https://www.academia.edu/25343824/La\\_depubblicizzazione\\_italiana\\_dei\\_servizi\\_publici\\_locali](https://www.academia.edu/25343824/La_depubblicizzazione_italiana_dei_servizi_publici_locali)
34. Massarutto, A. (2012). *La riforma della regolazione dei servizi idrici in Italia. L'impatto della riforma: 1994-2011* (IEFE Research Report No. 9). Retrieved from <https://www.green.unibocconi.eu/wps/wcm/connect/f37540ab-fbd7-4818-87a2-d45ce14e8e75/Research+Report+9.pdf?MOD=AJPERES&CVID=kM4jHXR>
35. Merusi, F. (2004). Cent'anni di municipalizzazione: dal monopolio alla ricerca della concorrenza. *Diritto Amministrativo*, 1, 37-57.
36. Miccù, R., & Francaviglia, M. (2018). Società pubbliche e servizi di interesse economico generale: il caso del servizio idrico integrato. *Federalismi.it*, 10, 2-33. Retrieved from [https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36294&content=&content\\_author=](https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36294&content=&content_author=)
37. Miccù, R., & Palazzotto, F. (2016). Smoke on the water o della ripubblicizzazione dell'acqua. Lo statuto giuridico della risorsa idrica tra beni demaniali, beni comuni e doveri di tutela dell'amministrazione. *Nomos*, 3, 1-24. Retrieved from <https://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2017/01/miccupalazzotto-corretto.pdf>
38. Napolitano, G. (2005). *Regole e mercato nei servizi pubblici*. Bologna, Italia: Il Mulino.



39. Passarelli, G. (2016). Servizio idrico: Visioni costituzionalistiche e contrattualistiche a confronto nei casi di morosità incolpevole. In R. Louvin (Ed.), *Oltre il Referendum. Percorsi di consolidamento per l'acqua come bene comune* (pp. 77-90). Retrieved from [https://www.academia.edu/26650355/OLTRE\\_IL\\_REFERENDUM\\_Percorsi\\_di\\_consolidamento\\_per\\_l\\_acqua\\_come\\_bene\\_comune](https://www.academia.edu/26650355/OLTRE_IL_REFERENDUM_Percorsi_di_consolidamento_per_l_acqua_come_bene_comune)
40. Piperata, G. (2006). Servizi pubblici locali. *Dizionario Di Diritto Pubblico*, 6.
41. Piperata, G. (2011). Il lento e incerto cammino dei servizi pubblici locali dalla gestione pubblica al mercato liberalizzato. *Munus*, 1, 33-68.
42. Rees, J. A. (1998). *Regulation and private participation in the water and sanitation sector* (TAC Background Papers No. 1). Retrieved from <https://www.gwp.org/globalassets/global/toolbox/publications/background-papers/01-regulation-and-private-participation-in-the-water-and-sanitation-sector-1998.pdf>
43. Rodotà, S. (2016, March 21). Cinque anni fa il referendum. La democrazia, i cittadini e le nuove norme sui servizi idrici. *La Repubblica*. Retrieved from [https://www.repubblica.it/politica/2016/03/17/news/la\\_battaglia\\_dell\\_acqua-135664855/](https://www.repubblica.it/politica/2016/03/17/news/la_battaglia_dell_acqua-135664855/)
44. Rodotà, S. (2012). Beni comuni: Una strategia globale contro lo human divide. In M. R. Marella (Ed.), *Oltre il pubblico e il privato. Per un diritto dei beni comuni* (pp. 311-332)., Verona, Italia: Ombre Corte.
45. Soboka Bulto, T. (2014). *The extraterritorial application of the human right to water in Africa*. Cambridge, UK: Cambridge University Press.
46. Sorace, D. (2010). I servizi pubblici economici nell'ordinamento nazionale ed europeo, alla fine del primo decennio del XXI secolo. *Diritto Amministrativo*, 18(1), 1-26.
47. Spadoni, B. (2017). I servizi pubblici locali dopo la Delega Madia. *Diritto dei servizi pubblici*. Retrieved from <http://www.dirittodeiserviziubblici.it/articoli/articolo.asp?sezione=dettarticolo&id=713>
48. Spuntarelli, S. (2011). L'affidamento dei servizi pubblici locali di rilevanza economica al vaglio della Corte e il caso del servizio idrico integrato. *Giurisprudenza Italiana*.
49. Staiano, S. (2011). Note sul diritto fondamentale all'acqua. Proprietà del bene, gestione del servizio, ideologie della privatizzazione. *Federalismi.it*, 5. Retrieved from <https://www.federalismi.it/nv14/articolo-documento.cfm?artid=17695>
50. Sterpa, A. (2017). Sentenza n. 251/2016: Può la Corte costituzionale ampliare il contenuto necessario della legge di delega ex art. 76 Cost? *Federalismi.it*, 10, 2-13. Retrieved from <https://www.federalismi.it/AppOpenFilePDF.cfm?artid=34013&dpath=document&dfile=16052017164803.pdf&content=Pu%25C3%25B2+la+Corte+ampliare+il+contenuto+necessario+della+legge+delega+ex+art.+76+Cost%3f+-+stato+-+dottrina+-+>
51. Sultana, F., & Loftus, A. (2012). *The right to water: politics, governance and social struggles*. New York, NY: Earthscan.
52. Thielbörger, P. (2014). *The right(s) to water: The multi-level governance of a unique human right*. Berlin, Germany: Springer.
53. Tonetti, A. (2013). Investimenti infrastrutturali e (in)certezza delle regole: il caso del servizio idrico. *Giornale di Diritto Amministrativo*, 11, 1-25. Retrieved from [https://images.irpa.eu/wp-content/uploads/2011/10/Tonetti\\_Articolo-Idrico.pdf](https://images.irpa.eu/wp-content/uploads/2011/10/Tonetti_Articolo-Idrico.pdf)
54. Travi, A. (2014). La disciplina tariffaria nel servizio idrico integrato. *Rivista della Regolazione dei Mercati*, 1. Retrieved from [http://www.rivistadellaregolazioneideimercati.it/Article/Archive/index\\_html?id=7&idn=1&idi=-1&idu=-1](http://www.rivistadellaregolazioneideimercati.it/Article/Archive/index_html?id=7&idn=1&idi=-1&idu=-1)
55. Trimarchi Banfi, F. (2012). Procedure concorrenziali e regole di concorrenza nel diritto dell'Unione e nella costituzione (all'indomani della dichiarazione di illegittimità delle norme sulla gestione dei servizi pubblici economici). *Rivista italiana di diritto pubblico comunitario*, 22(5), 723-744.
56. Winkler, I. T. (2012). *The human right to water: Significance, legal status and implications for water allocation*. Portland, OR: Hart Publishing.

# INCLUSION POLICIES AND INTERCULTURAL DIALOGUE: THE ROLE OF RELIGIOUS ORGANIZATIONS

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## 1. Migration and prospects for inclusion

The fervent religious pluralism that characterizes contemporary society has also been conditioned by recent migratory flows (Fucciolo, 2019b).

The intensification of the migratory phenomenon has profoundly affected social structures, determining the coexistence within the same space of living of different “identities” religious and cultural (Lillo, 2016).

Immigration not only brings about the “physical movement” of people across territorial borders but, in particular, the migrant brings with him the traditions of his own culture, which affect many aspects of daily life. Having arrived in a welcoming society, migrants often feel a feeling of strangeness and otherness (Ambrosini, 2019a). In some cases, the believer-migrant tends to adapt to the host culture by denying his or her cultural and religious identity, or by temporarily erasing his or her roots (Pasore & Tenaglia, 2014; Finzi, 2014). In other cases, on the other hand, the migrant adopts attitudes such as morbid attachment to his religious traditions, which become the vehicle through which to preserve his or her “cultural environment” (Ambrosini, 2014).

In this perspective, religious communities are of importance that goes beyond the confessional aspect. They become not only the place to seek those elements of continuity with the past, that is, of memory of the traditions of the country of origin but also, and above all, an opportunity to cultivate new social relationships and to seek essential services (Scrini, 2018). Religious entities, in fact, not only respond to needs from a liturgical point of view but provide migrants with practical support for integration within new societies; such as legal assistance or housing, language training, educational or professional support, financial assistance from host congregations<sup>1</sup>. To give an example, we would like to mention the Waldensian deaconries who have set up reception projects for asylum seekers. Extraordinary Reception Centres (CAS) have been created, providing essential services such as linguistic and cultural mediation, guidance and support for work placement, as well as housing and social. Other interventions have been activated by the Adventist Church through the Adventist Agency for Development and Aid, which response to the need to offer migrants housing solutions (Ingoglia, 2017).

Religions through their own precepts and the action of their own bodies encourage the development of a truly pluralist and inclusive society (Madera, 2018). Institutions, together with religious organisations, should commit themselves to identify and exploit the potential of cultural

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<sup>1</sup> Since 2015, the EU has funded the research project entitled “*Migrant Christianity*”, which has helped to analyse a field of study, that of migration and religion, which is still not very deep in Europe. Starting from a comparative-qualitative study of the evangelical integration of migrants in some of the main Protestant Churches of Spain and Italy, he examined the role played by faith, on the one hand, and by the Churches, on the other hand, in assisting migrants with their process of integration into society as a whole and with the need to cope with discriminatory working conditions and exploitation. The project developed by collecting life stories of members of Ghanaian and Latin American origin from Protestant Churches in both countries. Interviews were conducted with parish priests, religious leaders and representatives of Italian and Spanish Protestant organizations. Subsequently, observations were made during religious ceremonies, prayer meetings, activities of youth groups and female ecclesial communities and other related informal social events. Research has revealed how migrants “use religion and religious networks to develop their integration into immigration contexts and to address racialization”. “*Migrant Christianity*” has specified some challenges that Protestant Churches must face: on the one hand the development of sensitivity on the missionary level, regardless of religious affiliations, and on the other the building of “Integrated Churches”, through the promotion of interreligious dialogue. For further insights migration, religion and work in comparative perspective. Evangelical ‘ethnic churches’ in Southern Europe (<https://cordis.europa.eu/project/rcn/194822/brief/it>).

diversity linked to the phenomenon of immigration, which is a resource for society<sup>2</sup> (Greco, 2018). Cultural and religious diversity is, in fact, one of the elements of the development of the social and economic well-being of the community. The concept of cultural diversity as a development element is set out in Art. 3 of the Universal Declaration on Cultural Diversity: “Cultural diversity broadens the choice available to everyone; it is one of the sources of development, understood not only in terms of economic growth but also as an opportunity for access to an intellectual, affective existence, satisfactory moral and spiritual” (UNESCO, 2001).

The first step in this direction could be the enhancement of the person culturally “different” through the promotion of intercultural dialogue based on the criterion of tolerance (Marshall et al., 2018). The CEI in 2015 has identified some criteria “to extend the ecclesial network of reception for asylum seekers and refugees who arrive in our country, in compliance with the present legislation and collaboration with the civil institutions”<sup>3</sup>. Although the processes of first reception have become an increasingly important field of action for religious and non-profit institutions, the Western world, apparently evolved, is increasingly fraught with tensions arising from the “diversity” typical of immigrant populations and, that activism that is still lacking in institutions is emerging in the charitable sphere, in the form of a “welfare from below” informal and voluntary<sup>4</sup>.

## 2. Solidarity and hospitality in the confessional organizations

The work of religious organizations is based on the principle of solidarity and hospitality. This principle, common to the main religious traditions, is understood as a necessity for human and Christian brotherhood and presupposes the recognition, first and foremost, of the value of the dignity of the human person. It is linked to the idea of overcoming every possible form of discrimination and marginalisation linked to sex, age, race, language, religion, geographical origin, socio-cultural and economic conditions, and political convictions (Masi, 2018a).

Religious systems, in particular, suggest values upon which the legal system itself should be based, including the principle of solidarity and acceptance.

The Church has developed a doctrine that focuses on the person and his dignity by dealing with the phenomenon of migration (Sabbarese, 2018). In light of the great principles of the Social Doctrine of the Catholic Church, the phenomenon of migration must be understood as a resource and not as an obstacle to development. Immigrants must be welcomed as persons and helped, together with their families, to integrate into social life (Pontificio Consiglio Della Giustizia E Della Pace, n.d.). Catholic precepts propose a reflection of a cultural, ethical, and religious nature on which to base the intercultural and interreligious dialogue.

In a multi-religious and multicultural society, people must learn to live in harmony, accepting each other in their own diversity (Masi, 2018b).

In 2004, the Church was involved in the migration phenomenon for a long time and promulgated the *l'Istituzione Erga Migrantes Caritas Christi* (Pontificio Consiglio Della Pastorale per I Migranti e Gli Itineranti, n.d.), the first official pontifical document addressing the problems of uprooting and welcoming migrants into the global society (Brusca, n.d.). The document invites the faithful to listen and to know each other. In countries where “cultural and religious pluralism” is lived, religious

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<sup>2</sup> An example of practical experience of enhancing cultural diversity is Riace. In 1998 in this small municipality of Reggio Calabria about three hundred refugees arrived and, since it was undergoing a process of depopulation already some years before, in 1999 Domenico Lucano (elected mayor in 2004) founded the association “*Riace Città Futura – G. Puglisi*” in order to promote the social inclusion of migrants through a series of initiatives aimed at combining welcome, local development and the recovery of traditions. Among these, the most important were represented by the assignment to migrants of abandoned houses, the recovery of ancient trades of the place, the realization of a system of differentiated collection, the creation of an ecological island, the redevelopment of green areas, the opening of a clinic, the provision of free educational services, school buses and crèches, the recovery of an aquifer, etc. That of riace has represented a model of acceptance and sustainable social inclusion in fact; the realization of these initiatives aimed at migrants has automatically generated a benefit to the community itself. Today riace is known as the “Host Country” and has been studied internationally for some years as a practice of social inclusion.

<sup>3</sup> On the basis of the guiding criteria dictated by the CEI in 2015, the Italian Episcopal Council issued a vademecum containing a series of guidelines for the Italian Dioceses on the reception of asylum seekers and refugees (Ingoglia, 2017).

<sup>4</sup> An example of institutionalising a bottom-up reception system, that has seen the enhancement of cultural diversity as an opportunity for intercultural rebirth was the Calabria Region that enacted the law n. 18 of 2009 “Reception of asylum seekers, refugees and social, economic and cultural development of local communities”. This law provides for an integrated regional reception system based on the promotion of specific interventions in favour of asylum seekers, refugees and holders of subsidiary or humanitarian protection measures in the region (Greco, 2018).

organizations must respect and promote cultural diversity, in full recognition of the “treasure of rich human diversity”<sup>5</sup>. The very pontificate of Pope Francis placed the phenomenon of migration at the center of his ministry. In the messages launched on the occasion of the World Days of Migrants and Refugees, he constantly dwells on the principles of the Doctrine of the Church: “to welcome, protect, promote and integrate migrants and refugees” (Papa Francesco, 2019).

The Church’s attention is increasingly focused on respect for the human rights of migrants. The specificity of the pastoral care to be ensured to them is based on a careful evaluation of the concrete circumstances in order to call for appropriate collaboration between the Churches of departure and those of arrival “to facilitate effective and appropriate pastoral care”, for example in cases where the number of migrants from the same ethnic group or language consists of<sup>6</sup>.

The principle of solidarity, together with that of hospitality, is a virtue common to the other great religious traditions, among which Islam acquires importance.

The words of the Prophet “Desire for your brother what you desire for yourself” must be the guideline for a correct reading of the Koran and the Sunna (Decimo, 2016).

The Muslim community must live in brotherhood and cooperation with respect for the needs of society or respect for the fundamental rights of individuals and the nation, whether material, moral or intellectual (Ranadan, 1961). According to Shari’a, or Islamic law, the dhimmi, generally Jews or Christians can freely profess their religion in exchange for the payment of a special tax of “compensation” (*jizya*) (Rahman, 1981). The exaltation within the sacred scriptures of the principles of justice, equality, and brotherhood is addressed to any individual regardless of denominational affiliation (Al-Ghannūshī, 1993).

The principle of solidarity in Islamic society is an essential pillar that translates into cooperation in order to offer help, protection, and support (Solidarity in the Muslim Community, 2010). Verse 8,63 of the Koran states<sup>7</sup>: “*If you had spent all that in the earth, you could not have brought their hearts together; But Allah brought them together. Indeed, He is exalted in Might and Wise*” (Fuccillo, 2017). Concerning the life of dignity, Islam guarantees a life of dignity for every human being, irrespective of one’s race, nationality, or ethnicity (Islam for Christians, 2014). In the Qur’an, God says: “And We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference” (17,70).

The teachings of the Islamic religion underline the importance of the principle of solidarity and integration among men. In this regard, we recall the saying of Allah “help ye one another in righteousness and piety, but help ye not one another in sin and rancour: fear Allah. For Allah is strict in punishment” (5,02).

The very concept of hospitality is a virtue that is at the base of the Islamic ethical system (Siddiqui, 2016). The Koranic verse states: “*God commands justice, to do good, to be generous to friends and relatives and he forbids all shameful actions, injustices and rebellion: he teaches you that it is possible to receive a reproach*” (16,90). Much of the Koranic exaltation is on “to give” to the needy also through taxes, almsgiving, or charity, as a way to create new relationships of brotherhood and solidarity (Fuccillo, 2019a; Siebel & Imady, 2006). Law in verse 2,274 “*Those who spend their wealth [in God’s way] by night and by day, secretly and publicly – they will have their reward with their Lord. And no fear will there be concerning them, nor will they grieve*”.

The doctrine of the Jewish religion and consequently the interpretations and applications of religious norms are also based on the recognition of the dignity of the human person and his personality (Ferrari, 2018). The same term *kavod ha-beriot* (honor to human creatures), which originates from the *Talmud*, is considered a supreme value for the Jewish community. The concept of hospitality is inherent within the *Torah*, which is an expression of the three fundamental rights present in society: respect for personal dignity, rights to equality, and equality of individuals, regardless of their social position (Tedeschi, 2018).

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<sup>5</sup> For the first time in a papal document, much attention was paid to migrants from other Churches and non-Catholic communities, with particular reference to Christians from Eastern Europe, and migrants from other religions, Muslims in particular (Sabbarese, 2018).

<sup>6</sup> The Church has its own specific pastoral care for migrants due to the fact that the ordinary one is insufficient or completely lacking. Of extreme importance, then, is the task of the Bishops of origin, in agreement with the Episcopal Conference and the hierarchical structures of the Eastern Catholic Churches, to seek priests of the same language or nation of migrants (Sabbarese, 2018; De Paolis, 1991).

<sup>7</sup> The English text is available in <http://corpus.quran.com/>

### 3. Faith-based organizations and welfare migration

The principles of solidarity and acceptance, common to the main religious traditions, also inspire the activity of their organizations. The 4.8% of organisations that operate in the Third Sector are faith-based organizations. The social success of these organizations is even more evidenced by the progressive retreat of public institutions from welfare objectives.

The faith-based organizations<sup>8</sup> play directly or are promoters of activities of social utility for the benefit of the community and play on a fundamental role in migratory dynamics.

Religious organizations, regardless of confessional affiliation, help migrants to deal with the many problems they encounter during the “settlement phase” in the host country, countering attitudes xenophobic, and at the political level, by promoting policies of inclusion (Ingoglia, 2017). In addition to spiritual resources, religious organizations provide the migrant with material resources, in the form of assistance and support in the settlement process. They play an important “cohesion role”, acting as mediators between the contexts of origin and the receiving communities (Ambrosini, 2010; Ambrosini, 2014; Hirschman, 2014; Levitt, 2003; Hagan & Ebaugh, 2003). They become “shock-absorbers” of social and cultural conflicts that, in many cases, arise from migratory phenomena<sup>9</sup>.

In recent years, the increase in migration flows has led to forms of cooperation between organisations belonging to different religious groups, creating a “multi-religious approach to integration”. These forms of multi-religious cooperation<sup>10</sup>, initiated by religious organisations, are also subsidised by European governments.

The German project “*Weisst Du Wer Ich bin?*” it was launched in 2016 and the participating organizations are the Council of Christian Churches in Germany, the Turkish-Islamic Union for Religious Affairs, the Islamic Council for Germany, the Council of Islamic Cultural Centres, the Council of Muslims in Germany, and the Central Council of Jews in Germany. The project aims to encourage Muslim, Christian, and Jewish communities and organisations to cooperate on projects that focus on assisting migrants in the integration process. The project is supported by the German Federal Ministry of the Interior, which has made available at local level 500,000 euros for multi-religious initiatives promoted by at least two organizations of different religious affiliations) active at the local level integration of migrants<sup>11</sup>.

The positive results of the cooperation of religious organisations in migration dynamics can be summarized in the following table (Lyck-Bowen & Owen, 2019; Kerwin & Nicholson, 2019):

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<sup>8</sup> Examples of faith-based organizations and agents include: international faith-based humanitarian organizations, national and local faith-based humanitarian organisations (either directly or indirectly linked to national faith-based bodies), local worship communities (e.g., mosques, synagogues, temples, churches, gurdwara, etc.), youth, women or other informal, social, faith-based groups within worship communities, local and national denominational leadership (e.g. ayatollahs, imams, bishops, clerics, rabbis, swamis, bhikkhus, lamas, monks and nuns, etc.).

<sup>9</sup> Studies have shown that the cessation of religious and welfare activity by a religious organization in a city contributes to the social and economic collapse of the community in which it operated. The social decline of the communities analysed is even greater when religious organizations strongly engaged in intercultural and interreligious dialogue fail (Kinney & Combs, 2016).

<sup>10</sup> There are many examples in Europe. The Refugee Support is a project run by the British Red Cross, Hampshire, Isle of Wight and Surrey that aims at providing emotional and practical support including helping asylum seekers and refugees gain access to important services and adapting to their new life. The British Red Cross cooperates with a wide range of organizations including non-religious organizations such as Southampton and Winchester Visitors Group (SWVG), mono-religious organizations such as the Citylife Church’s City Life Education and Action for Refugees (CLEAR) and multi-faith organizations such as Southampton Council of Faiths (SCoF). Source: <https://www.redcross.org.uk/about-us/what-we-do/how-we-support-refugees>

The Swedish project was established during the autumn of 2015 when a large number of migrants arrived to Stockholm central train station. A local mosque initially decided to provide food and shelter to some of the migrants. A local church wanted to help out as well and rather than starting their own project they decided to contact the mosque. This led to a cooperation that helped thousands of transiting migrants. Both the church and the mosque soon realised that providing shelter and food were only the first steps and that there were other ways they could help the migrants in the longer term. Hence, the two institutions decided to set up the project *Goda Grammar* (Good neighbours) that include language classes and a service that provides legal advice as well as information about the community, which local or national authority should be approached about different issues. Source: <https://www.facebook.com/groups/godagrannar/>

The Polish project “*Dialogue for Integration – a Multi-Faith Approach*” was initiated by Afryka Connect Foundation, an organization that was set up to promote better relations. The organization hosted seminar meetings in four different cities (Krakow, Lodz, Wroclaw and Poznan) where members of different religious communities, local community leaders and representatives from local governments and non-governmental organizations were invited to discuss the role of religion and religious communities in the process of integrating migrants. The aims of the project were to improve integration by supporting networking and exchange of knowledge and ideas between relevant stakeholders, building the capacity of religious communities and attempting to develop shared recommendations on the role of religious communities in promoting integration.

<sup>11</sup> Source: <https://www.weisstduwerichbin.de/ueber-uns/das-projekt/>

**Table 1.** Cooperation of religious organisations in migration dynamics

<i>Integration services and processes benefits</i>	<i>Organisational and religious community benefits</i>	<i>Broader community/ Societal benefits</i>
Overcome some of the recognised 'barriers' to integration.	Cooperation with one other religious organisation → foster interest in working with other religions/inspire others to cooperate as well = building of horizontal relationships/network.	Shift perspectives on the role of religion in society.
Religious leaders can encourage their congregations to warmly welcome the migrants.	Led to internal dialogue about the importance of human beings working together regardless of their religiosity.	Alleviation of racism and radicalisation.
Help migrants understand the different features of host communities, and how interreligious collaboration and cooperation can help build more accepting and cohesive societies.	Building relationships between people from different religions through working for a common aim.	Expect cooperation will promote interreligious dialogues and cooperation.
Help host communities meet and understand new migrants and their needs from different religions.	Bottom-up effect = cooperation at the local level → establishment of interreligious councils at the local, regional, and national level → building of vertical relationships/networks.	Working for a common cause → opportunity to show common humanity/love for all.
		Working for a common cause → opens space for interreligious dialogue and exchange of knowledge about each other's religious beliefs, festivals, and life in general.

Religious organizations offer the migrant a “shelter” after the traumatic migrant event, assist him in the search for housing and a job, providing, sometimes, the economic resources necessary to start a “new” life in the community.

Their role is therefore important on two fronts: one of inclusion in a new social context and the other of safeguarding and rebuilding cultural identity. Religious organizations become, in fact, “cornerstones” of the defence of the migrant’s cultural heritage but also of a partial reworking of the subjective identity that is not hostile to the host society. They act as mediators between the contexts of origin and the receiving companies. Their action is an intercultural tool, preventing the cultural “isolation” of the migrant as well as the spread of religious radicalization.

The action of religious organisations and their cooperation with other faith organisations therefore plays a key role in migration and intercultural dialogue, as well as for social welfare. This requires the adoption by governments of legal and economic measures to promote these projects and to network relationships.

In the Italian legal system, the growing commitment of religious entities to social activities has prompted the legal systems to foresee new forms of organisation. The Third Sector Code (D.lgs. 117/2017), which has uniformized and harmonized the legal discipline of non-profit organizations, extending the legal discipline also to religious bodies. The Third Sector Code provides for a special legal discipline for religious organizations acting in the social sector, which takes into account the particular (religious as well as social) goals that they pursue. The introduction of this legal discipline shows how the legislature wanted to promote and, therefore, promote religious bodies ETS, Third sector bodies (Fuccillo, 2010; 2018b; 2019b; Fuccillo, Santoro, & Decimo, 2019).

The same extension is provided for by the discipline of “social enterprise” (D.lgs. 112/2017), which draws inspiration from the idea that business activities can also have social importance. The legislature’s interest in promoting and developing community-favouring activities also emerges from the introduction of benefits companies, which pursue common benefit purposes. This corporate form allows a part of the profits to be allocated for common benefit purposes, which also includes assistance and aid to migrants.

#### 4. The importance of “alliance” between religions and legal systems for migration

Religions, from the above perspective, could be “precious allies” of legal systems in dealing with migratory phenomena. They, through the work of individual religious organisations and their cooperation, provide important material help to migrants and the community.

The faith plays an important role in the lives of conflict and disaster-affected communities, and the role and influence of faith communities and faith-based organizations in protection. Faith runs deep in the veins of conflict and disaster-affected communities and plays a major role in their lives. It helps people cope with trauma; it validates their humanity; it informs their decisions; and it offers guidance, compassion, consolation, and hope in their darkest hours. At-risk or affected communities turn to the faith-based organisation for physical protection, material assistance, guidance and counselling, spiritual confirmation, compassion, and understanding.

The UNHCR’s Dialogue on Faith and Protection in December 2012 highlighted the important role that faith-based organizations and local religious communities play in protecting asylum-seekers, refugees, and the internally displaced and stateless people.

The principle of solidarity and acceptance among individuals is an element common to all great religious traditions. Religions, through their own precepts, protect and promote the human dignity of each individual. This principle guides the activities of religious organisations and forms the common element for the construction of new forms of interfaith collaboration that shall be used to protect human rights. In this way, religions play a real “nomopoietic function” (Fuccillo, 2018a), as they are able to promote the formation of norms and practices that are truly inclusive of cultural and religious differences and therefore contribute positively to the well-being of individuals and the community. This extraordinary capacity of religions can be a valuable aid to the legal systems which are called upon to manage and support, socially and economically, the large migratory flows.

#### References

1. Al-Ghannūshī, R. (1993). *Al-hurriyyat fi addawla al-islamiyya*. Beirut, RL: Markazder-asat al-wehda al arabiyya.
2. Ambrosini, M. (2010). *Richiesti e respinti: l’immigrazione in Italia: come e perché*. Milano, Italia: Il Saggiatore.
3. Ambrosini, M. (2014). *Non passa lo straniero? Le politiche migratorie tra sovranità nazionale e diritti umani*. Assisi: Cittadella.
4. Ambrosini, M. (2019). La religione degli immigrati, fattore di coesione, in *Aggiornamenti sociali. Orientarsi nel mondo che cambia*. Retrieved from <https://www.aggiornamentisociali.it/articoli/la-religione-degli-immigrati-fattore-di-coesione/>
5. Ambrosini, M. (2019a). Immigrazione e pluralismo religioso. Dati e motivazioni di un cambiamento d’epoca. *Osservatorio nazionale sulle politiche sociali*. Retrieved from <https://welforum.it/immigrazione-e-pluralismo-religioso-dati-e-motivazioni-di-un-cambiamento-depoca/>
6. Brusca, C. (n.d.) *La Chiesa e le migrazioni nell’Istituzione Erga migrantes caritas Christi*. Retrieved from <https://core.ac.uk/download/pdf/226023053.pdf>
7. Cammarosano, P., & Urpis, O. (2012). *Patrie, migrazioni e culture. Aquileia e l’Europa nel tempo*. Casamassima Libri.
8. Consorti, P. (2008). Pluralismo religioso: reazione giuridica multiculturalista e proposta interculturale. In A. Fuccillo (Ed.), *Multireligiosità e reazione giuridica*. Torino, Italia: Giappichelli.
9. De Paolis, V. (1991). La pastorale del migranti nelle direttive della Chiesa: Percorsi di comunione interculturale. *Comunione e disciplina ecclesiale*. Città del Vaticano.
10. Decimo, L. (2016). “Inclusive citizenship”: *The necessity to establish a interfaith dialogue in modern Islamic society*. In A. Fuccillo (Ed.), *The Marrakech declaration. A bridge to religious freedom in Muslim countries*. Napoli, Italia: Editoriale Scientifica. Retrieved from [https://www.researchgate.net/publication/326317764\\_INCLUSIVE\\_CITIZENSHIP\\_The\\_necessity\\_to\\_establish\\_a\\_interfaith\\_dialogue\\_in\\_modern\\_islamic\\_society](https://www.researchgate.net/publication/326317764_INCLUSIVE_CITIZENSHIP_The_necessity_to_establish_a_interfaith_dialogue_in_modern_islamic_society)
11. Decimo, L. (2017). *Le organizzazioni religiose nel prisma costituzionale dell’art. 20*. Napoli, Italia: Editoriale Scientifica.
12. Di Prima, F. (2011). Il volontariato religioso nell’ordinamento giuridico italiano (l’incompiuta integrazione tra società civile e società religiosa), in Stato, Chiese e pluralismo confessionale. *Rivista Telematica*. Retrieved from [https://www.statoechiese.it/images/uploads/articoli\\_pdf/di\\_prima\\_il\\_volontariatom.pdf?pdf=il-volontariato-religioso-nellordinamento-giuridico-italiano-lincompiuta-in](https://www.statoechiese.it/images/uploads/articoli_pdf/di_prima_il_volontariatom.pdf?pdf=il-volontariato-religioso-nellordinamento-giuridico-italiano-lincompiuta-in)

13. Ferlito, S. (2008) *Società multireligiosa e interpretazione normativa*. In A. Fuccillo (Ed.), *Multireligiosità e reazione giuridica*. Torino, Italia: Giappichelli.
14. Ferrari, S. (2018). Alla ricerca di una concezione dinamica e plurale dei diritti umani. Il contributo delle tradizioni giuridiche ebraica e cristiana. In M. Di Marco, & Ferrari, S. (Eds.), *Ebraismo e Cristianesimo nell'età dei Diritti Umani*. Torino, Italia: Giappichelli.
15. Finzi, I. (2014). *Genitorialità e migrazione: riflessi intorno alla complessità della valutazione e del sostegno quando le famiglie vengono da altri mondi*. <https://doi.org/10.3280/MG2014-003014>
16. Fuccillo, A. (2008) *La multireligiosità tra possibile "normazione" ed ipotetica "autonormazione"*. In A. Fuccillo A. (Ed.), *Multireligiosità e reazione giuridica*. Torino, Italia: Giappichelli
17. Fuccillo, A. (2008a). *Dare etico. Agire non lucrativo, liberalità non donative e interessi religiosi*. Torino, Italia: Giappichelli.
18. Fuccillo, A. (2010). La funzione solidaristica delle formazioni sociali di interesse religioso: nuove prospettive. In V. Tozzi, G. Macri, & M. Parisi (Eds.), *Proposta di riflessione per l'emanazione di una legge generale sulle libertà religiose*. Torino, Italia: Giappichelli.
19. Fuccillo, A. (2018b). *La Koinè giuridica tra economia, diritto e funzione nomopoietica delle religioni*. In G. Dammacco, & C. Ventrella (Eds.), *Religioni, Diritto e regole dell'economia*. Bari, Italia: Cacucci Editore. Retrieved from [https://www.academia.edu/37558801/La\\_Koin%C3%A8\\_giuridica\\_tra\\_economia\\_diritto\\_e\\_funzione\\_nomopoietica\\_delle\\_religioni](https://www.academia.edu/37558801/La_Koin%C3%A8_giuridica_tra_economia_diritto_e_funzione_nomopoietica_delle_religioni)
20. Fuccillo, A. (2018c). Gli enti religiosi nel "terzo settore" tra la nuova impresa sociale e le società di benefit. *Quaderni di diritto e politica ecclesiastica*, 2, 341-366.
21. Fuccillo, A. (2019a). Le proiezioni collettive della libertà religiosa. *Stato, Chiese e pluralismo confessionale: Rivista Telematica*, 18. Retrieved from [https://www.statoechiese.it/images/uploads/articoli\\_pdf/Fuccillo.M\\_Proiezioni.pdf?pdf=le-proiezioni-collettive-della-liberta-religiosa](https://www.statoechiese.it/images/uploads/articoli_pdf/Fuccillo.M_Proiezioni.pdf?pdf=le-proiezioni-collettive-della-liberta-religiosa)
22. Fuccillo, A. (2019b). *Diritto, religioni, culture. Il fattore religioso nell'esperienza giuridica*. Torino, Italia: Giappichelli.
23. Fuccillo, A., Santoro, R., & Decimo, L. (2019). *Enti religiosi ETS. Tra diritto speciale e regole di mercato*. Napoli, Italia: Edizioni Scientifiche Italiane.
24. Fuccillo, A., Sorvillo, F., & Decimo, L. (2017) The courts and the code Legal osmosis between religion and law in the cultural framework of civil law systems. *Stato, Chiese e pluralismo confessionale: Rivista Telematica*, 28. Retrieved from [https://www.researchgate.net/publication/326317768\\_The\\_courts\\_and\\_the\\_code\\_Legal\\_osmosis\\_between\\_religion\\_and\\_law\\_in\\_the\\_cultural\\_framework\\_of\\_civil\\_law\\_systems](https://www.researchgate.net/publication/326317768_The_courts_and_the_code_Legal_osmosis_between_religion_and_law_in_the_cultural_framework_of_civil_law_systems)
25. Greco, R. R. (2018). La differenza come risorsa nel modello di accoglienza ed inclusione sociale di Riace. Il paradigma costituzionale della solidarietà come strumento di riconoscimento e valorizzazione della diversità culturale. *Atti del Workshop*, 97-112. <https://doi.org/10.1285/i9788883051432p97>.
26. Hagan, J., & Ebaugh, H. R. (2003). Calling upon the sacred: migrants' use of religion in the migration process. *International Migration Review*, 37(4), 1145-1162. <https://doi.org/10.1111/j.1747-7379.2003.tb00173.x>
27. Hirschman, C. (2014). The role of religion in the origin and adaptation of immigrant groups in the United States. *International Migration Review*, 38(3), 1206-1233. <https://doi.org/10.1111/j.1747-7379.2004.tb00233.x>
28. Ingoglia, A. (2017). Welfare migration e enti religiosi. *Jus*, 3. Retrieved from <https://jus.vitaepensiero.it/news-papers-welfare-migration-ed-enti-religiosi-4831.html>
29. Islam for Christians. (2014). *Human Solidarity in Islam*. Retrieved from <http://www.islamforchristians.com/human-solidarity-islam/>
30. Kerwin, D., & Nicholson, M. (2019). The effects of immigration enforcement on faith-based organizations: An analysis of the FEER survey. *Journal on Migration and Human Security*, 7(2), 42-51. <https://doi.org/10.1177/2331502419854103>
31. Kinney, N., & Combs, T. B. (2016). Changes in religious ecology and socioeconomic correlates for neighborhoods in a metropolitan region. *Journal of Urban Affairs*, 38(3), 409-428. <https://doi.org/10.1111/juaf.12211>
32. Levitt, P. (2003). "You know, Abraham was really first migrant": Religion and transnational migration. *International Migration Review*, 37(3), 847-873. <https://doi.org/10.1111/j.1747-7379.2003.tb00160.x>
33. Lillo, P. (2016). Pluralismo giuridico e libertà confessionali. *Stato, Chiese e pluralismo confessionale: Rivista Telematica*, 40. Retrieved from [https://www.statoechiese.it/images/uploads/articoli\\_pdf/lillo.m\\_pluralismo.pdf?pdf=pluralismo-giuridico-e-liberta-confessionali](https://www.statoechiese.it/images/uploads/articoli_pdf/lillo.m_pluralismo.pdf?pdf=pluralismo-giuridico-e-liberta-confessionali)
34. Lyck-Bowen, M., & Owen, M. (2019). A multi-religious response to the migrant crisis in Europe: A preliminary examination of potential benefits of multi-religious cooperation on the integration of migrants. *Journal of Ethnic and Migration Studies*, 45(1), 21-41. <https://doi.org/10.1080/1369183X.2018.1437344>
35. Madera, A. (2018). Quando la religione si intrinseca con la tutela di genere: quale impatto sulle dinamiche di accoglienza? (Prime osservazioni a margine di Cass. Sez I, 24 Novembre 2017, n. 28152). *Stato, Chiese e pluralismo confessionale: Rivista Telematica*, 14. Retrieved from [https://www.statoechiese.it/images/uploads/articoli\\_pdf/Madera.M\\_Quando.pdf?pdf=quando-la-religione-si-interseca-con-la-tutela-di-genere-quale-impatto-sull](https://www.statoechiese.it/images/uploads/articoli_pdf/Madera.M_Quando.pdf?pdf=quando-la-religione-si-interseca-con-la-tutela-di-genere-quale-impatto-sull)



36. Marshall, K., Casey, S., Fitzgibbon, A., Karam, A., Lyck-Bowen, M., Nitschke, U., ... Wilson, E. (2018). *Religious roles in refugee resettlement: Pertinent experience and insights, addressed to G20 members* (Discussion Paper No. 11). Retrieved from <http://www.economics-ejournal.org/economics/discussionpapers/2018-11/>
37. Masi, G. A. (2018a). *Ambiti applicativi del principio di solidarietà*. Retrieved from [https://www.academia.edu/37275320/Ambiti\\_applicativi\\_del\\_principio\\_di\\_solidariet%C3%A0](https://www.academia.edu/37275320/Ambiti_applicativi_del_principio_di_solidariet%C3%A0)
38. Masi, G. A. (2018b) *Il principio di solidarietà nella dottrina sociale della Chiesa*. Retrieved from [https://www.academia.edu/37253098/Il\\_principio\\_di\\_solidariet%C3%A0\\_nella\\_dottrina\\_sociale\\_della\\_Chiesa](https://www.academia.edu/37253098/Il_principio_di_solidariet%C3%A0_nella_dottrina_sociale_della_Chiesa)
39. Papa Francesco. (2019, September 29) Messaggio del Santo Padre Francesco per la 105ma giornata mondiale del migrante e del rifugiato. *La Santa Sede*. Retrieved from [http://www.vatican.va/content/francesco/it/messages/migration/documents/papa-francesco\\_20190527\\_world-migrants-day-2019.html](http://www.vatican.va/content/francesco/it/messages/migration/documents/papa-francesco_20190527_world-migrants-day-2019.html)
40. Pastore, F., & Tenaglia, S. (2014). *Appartenenza religiosa e scelte lavorative delle donne*. In A. Fucillo (Eds.), *Esercizi di laicità interculturale e pluralismo religioso*. Torino, Italia: Giappichelli.
41. Pontificio Consiglio Della Giustizia E Della Pace. (n.d.). *Compendio della dottrina sociale della Chiesa*. Retrieved from [http://www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_it.html](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_it.html)
42. Pontificio Consiglio Della Pastorale per I Migranti e Gli Itineranti. (n.d.). Istruzione Erga Migrantes caritas Christi. Retrieved from [http://www.vatican.va/roman\\_curia/pontifical\\_councils/migrants/documents/rc\\_pc\\_migrants\\_doc\\_20040514\\_erga-migrantes-caritas-christi\\_it.html](http://www.vatican.va/roman_curia/pontifical_councils/migrants/documents/rc_pc_migrants_doc_20040514_erga-migrantes-caritas-christi_it.html)
43. Rahman, A. (1981). *Non-Muslim under Shari'ah (Islamic law)*. Lahore, PK: Kazi.
44. Ramadan, S. (1961). *Islamic law: Its scope and equity*. London, UK: P. R. Macmillan.
45. Ricca, M. (2012). *Pantheon. Agenda della laicità interculturale*. Palermo, Italia: Torri del Vento.
46. Sabbarese, L. (2018). Cura dei migranti tra pastorale della mobilità e mobilità pastorale. *Rivista de Investigaciòn de la Cátedra Internacional Conjunta Inocencio*, 3(7), 123-149. Retrieved from <http://repositorio.ucam.edu/bitstream/handle/10952/4264/4-%20Sabbarese.pdf?sequence=1&isAllowed=y>
47. Scanagatta, G. (2018). La sfida delle migrazioni e i valori della dottrina sociale della Chiesa. *Attualità, In Evidenza, Politica*. Retrieved from <https://www.giovaniscanagatta.it/tag/immigrazione/>
48. Scrinzi, F. (2018). "Chiese integrate, dialogo interreligioso e laicità". *Confronti. Mensile di Religioni, Politica, Società*. Retrieved from [https://www.researchgate.net/publication/330449373\\_Chiese\\_integrate\\_dialogo\\_interreligioso\\_e\\_laicita](https://www.researchgate.net/publication/330449373_Chiese_integrate_dialogo_interreligioso_e_laicita)
49. Siddiqui, M. (2016). Divine welcome: The ethics of hospitality in Islam and Christianity. *ABC Religion & Ethics*. Retrieved from <https://www.abc.net.au/religion/mona-siddiqui-hospitality-as-welcoming-in-gods-name/12503800>
50. Siebel, H. D., & Imady, O. (2006). *Principles and products of Islamic finance* (Working Paper No. 1). Retrieved from [https://www.econstor.eu/bitstream/10419/23655/1/2006-1\\_Principles\\_and\\_products\\_of\\_Islamic\\_finance.pdf](https://www.econstor.eu/bitstream/10419/23655/1/2006-1_Principles_and_products_of_Islamic_finance.pdf)
51. Solidarity in the Muslim Community. (2010). *The importance of ethics and values in Islamic civilization – Rageb El sergany*. Retrieved from <https://rasoulallah.net/en/articles/article/11953>
52. Sorvillo, F., & Decimo, L. (2017). Fedeli che migrano: il volto degli esodi contemporanei. In S. D'Acunto, A. De Siano, V. Nuzzo (Eds.), *Cammino tra aspettative e Diritti. Fenomenologia dei flussi migratori e condizione giuridica dello straniero*. Napoli, Italia: Edizioni Scientifiche Italiane.
53. Tedeschi, B. G., (2018). *Ebraismo e diritti umani: una prospettiva dal diritto positivo*. In M. Di Marco, & S. Ferrari (Eds.), *Ebraismo e Cristianesimo nell'età dei Diritti Umani*. Torino, Italia: Giappichelli.
54. UNESCO. (2001). *Dichiarazione universale dell'unesco sulla diversità culturale. Adottata all'unanimità a Parigi durante la 31esima sessione della Conferenza Generale dell'UNESCO, Parigi, 2 novembre 2001*. Retrieved from [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/declaration\\_cultural\\_diversit\\_y\\_it.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/declaration_cultural_diversit_y_it.pdf)

# THE “CATHOLIC” IMPACT INVESTING

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**Keywords:** Catholic Church, Finance, Solidarity, Impact Investors, Social and Economic Inclusion

## 1. Introduction

The *sustainability* of economic and social policies and their impact on the well-being of the community have been the subject of extensive debate over the last few decades<sup>1</sup>. Particular attention is directed to the finance’s world, as an integral sector of the economy, with the aim of promoting socially responsible investment strategies.

The Catholic Church also seems to contribute to this future challenge through choices that aren’t without exemplariness<sup>2</sup>. Recent practices in the use of capital, inspired by the desire to pursue social and distributive justice, make it possible to count it among the protagonists of the so-called *impact investing* (about the impact investing, see Buggy-Levine and Emerson, 2011; Wendt, 2018; Mazzullo, 2019).

This form of investment falls within what is more widely defined as *ethical finance*, understood both as the *ethics of finance* and as the *ethics in finance*<sup>3</sup> (on the relationship between religions, ethics, and economics, see Freni, 2017; Delille, 2013; Signori, Rusconi, and Dorigatti, 2012; Alford, Rusconi, and Monti, 2010; D’Arienzo, 2009; Tettamanzi, 2009; Parisi, 2007). Ethicality cannot concern only the attitude of the operator, but it’s necessary that the logic of the market is permeated with it so that the moral requirements dictated by the criterion of the common good can find concrete realization.

More specifically, impact investing can be understood as a method of allocating resources in which the capital is intentionally placed to the financing of initiatives that generate both a defined and measurable social or environmental value and a fair return<sup>4</sup>.

*Impact investors* are defined, therefore, as socially motivated operators because they invest in companies, organisations, and financial funds with the aim of channelling capital towards the resolution of social problems – integration and inclusion, social housing, health, and educational services – or environmental – renewable energies, access to water resources, recycling and waste

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<sup>1</sup> The community of states, which met at the United Nations in September 2015, approved the *Agenda 2030* for a sustainable development, the key elements of which are the 17 *Sustainable Development Goals* (SDGs) and the 169 sub-targets, which aim to end the poverty, combat the inequality and promote the social and economic development. They also include aspects of fundamental importance for sustainable development such as tackling climate change and building peaceful societies. Sustainable development goals are universally valid, which means that all countries must make a contribution to achieving the goals according to their capacities, no longer distinguishing between developed, emerging and developing countries (UN, 2015).

In this regard, D’Arienzo (2016) analyses the issue of socio-economic inclusion of diversity as an objective of sustainable development, with a view to achieving collective well-being closely linked to the religious identity of individuals. D’Arienzo (2016) points out that the comparison with different cultures and legal traditions implies a careful analysis of the impact that the religious factor assumes in the processes of financial integration. The economic initiative of migrants – says D’Arienzo (2016) – stems from the need to live in the host territory according to the dictates of the professed religion relating to the different areas of life, including the use of savings (on the subject, see also Videtta, 2018; Tassara, 2017; Lucia, Duglio, and Lazzarini, 2018; Sachs, 2015; Ciani Scarnicci, Marcelli, Pinelli, Romani, and Russo, 2014; Guido and Massari, 2013).

<sup>2</sup> There are several Catholic institutions – in particular the *Episcopal Conferences* – that have taken significant initiatives in this area. The *Catholic Agency for the Development of the Catholic Church of England and Wales* and the *United States Episcopal Conference*, for example, have developed guidelines for ethical and sustainable responsibility, while the *French Episcopal Conference* has established an investment fund, the so-called *Ethica*, to give priority to those companies that promote the creation of socially responsible economic value. This information is available at [economato.chiesacattolica.it](http://economato.chiesacattolica.it).

<sup>3</sup> According to D’Arienzo (2012), “[...] More than an ‘ethical’ economy [...] it is, on the contrary, desirable to recover an ‘economic ethics’ precisely for the development of a globally open society, but above all essentially more just” (p. 198).

<sup>4</sup> It was in the United States that the Rockefeller Foundation coined the term “impact investing” in 2007. It establishes the *Global Impact Investing Network* (GIIN), a non-profit organisation whose primary objective is to promote this financial strategy, through development, education, and research activities that attract capital towards investments aimed at reducing the poverty and the negative environmental impact. In Europe, this mission was entrusted in 2013 – under the British G8 Presidency – to the *Social Impact Investment Task Force* (SIIT), which subsequently became the *Global Steering Committee on Impact Investment* (Global Steering Group), with the aim of promoting international impact investment. To date, in fact, in addition to the G7 countries, the international group includes Argentina, Australia, Brazil, Finland, India, Israel, Mexico, and Portugal for a total of 15 countries, plus the representation of the European Union.

management, sustainable agriculture, reforestation and forest management – of a given community.

However, it is good to specify the difference in respect to the so-called *socially responsible investment* (there are numerous studies on the subject; among the many, see Ballestero, Perez-Gladish, and Garcia-Bernabeu, 2015; Forte, 2013; Strasser, 2011). This approach is characterised by a desire to reduce the negative effects of the investment. Through the use of a screening system, the resources are tended to avoid being directed towards companies whose policies have insufficient social, environmental, and governance impacts.

*Impact investing*, on the other hand, is primarily governed by the investor's precise intention to generate a positive social or environmental impact. Further distinctive features of this type of investment are the measurability of the impact and its sustainability, commensurate with the relationship between the objectives achieved and the return on capital employed.

With the affirmation of the investment strategy with impact, a new ethical way of doing finance has been introduced, by virtue of which it is possible to stimulate the productive contribution of each person to the collective good without renouncing to profit.

## 2. The “project” intervention of Pope Francis

*Impact investing* could be considered the new paradigm of economic action and to be a fervent supporter of it is Pope Francis. The *impact investor*, in particular, is defined by him as “an investor who is conscious of the existence of serious unjust situations, instances of profound social inequality and unacceptable conditions of poverty affecting communities and entire peoples” (Bulletin of the Holy See n. 0442).

The logic that animates this investment form – that is the need to promote social, economic, and environmental development at the service of the common good of peoples, as already noted – contributes to the restoration of the anthropological and ethical sense of the economy and, therefore, of the finance.

As the Pontiff says, it is necessary to counter the economy of exclusion in which the financial markets govern the fate of peoples rather than serving their needs (Bulletin of the Holy See n. 0442). Hence, the need to re-establish a just hierarchical order, with a view to allow the overcoming of “an impersonal economy lacking a truly human purpose”<sup>5</sup>.

In this perspective, the principle of moral responsibility – to be understood “as the prerequisite of the legal responsibility in its proper sense”<sup>6</sup> – has implied and implies a rethinking of investment choices in terms of social justice (to believe that the principle of indirect moral responsibility redefines the very concept of justice are Albanese, Beccegato, Caiffa, and Lombardi, 2010), attributing particular importance to the system of impact investing. In other words, the ethical responsibilities transmitted by Catholic doctrine are also called to extend to the indirect consequences of personal and collective behaviour in the financial world.

Many impact strategies follow the guidelines on socially responsible investment outlined in 2003 by the *United States Conference of Catholic Bishops*, based on the following principle: implement a financial policy that ensures ethical and social management of economic resources but, at the same time, also responsible in order to achieve a reasonable rate of return (USCCB, 2003)<sup>7</sup>.

Two main approaches can be derived from the application of the criteria laid down. The first

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<sup>5</sup> “One cause of this situation is found in our relationship with money, since we calmly accept its dominion over ourselves and our societies. The current financial crisis can make us overlook the fact that it originated in a profound human crisis: the denial of the primacy of the human person! We have created new idols. The worship of the ancient golden calf (cf. Ex 32:1-35) has returned in a new and ruthless guise in the idolatry of money and the dictatorship of an impersonal economy lacking a truly human purpose. The worldwide crisis affecting finance and the economy lays bare their imbalances and, above all, their lack of real concern for human beings; man is reduced to one of his needs alone: consumption” (Francis, 2013a, point 55).

<sup>6</sup> D’Arienzo (2016) notes that “the social dimension implicit in the principle of responsibility appears to be the foundation of ‘ethical’ responsibility as a prerequisite for legal responsibility in the proper sense. [...] In this sense, one could highlight a differentiation between the ethical and legal aspects of the concept of responsibility, that is in the distinction between ‘being responsible’ and ‘having responsibility’. In the first case, the term indicates a quality that the subject assumes in relation to his own choices; in the second case, this capacity is attributed to the subject by the system as a consequence of a behaviour or in any case in relation to the legal activities carried out” (D’Arienzo, 2012b, p. 12).

<sup>7</sup> The guidelines for socially responsible investment were also prepared by the *Catholic Agency For Overseas Development* of England and Wales, the *Latin American Episcopal Conference* together with the *World Union of Catholic Entrepreneurs*, the *German Episcopal Conference* and the *Evangelical Church* ([economato.chiesacattolica.it](http://economato.chiesacattolica.it)).

could be identified as *not doing*, which is refusing to invest or disinvest in societies whose products or policies are contrary to the values of Catholic moral teaching. The other approach, by supporting investment policies that promote the progress of the community in accordance with the ethical principles of the Church, can be said *of doing*.

For his part, Pope Francis also became the driving force behind precise indications to which socio-economic action should conform. In May 2018, in fact, it has been published the document “*Oeconomicae et pecuniariae quaestiones. Considerations for an ethical discernment regarding some aspects of the present economic-financial system*”, drafted by the Congregation for the Doctrine of the Faith in collaboration with the Dicastery for Promoting Integral Human Development (see Holy See Press Office, 2018; on point Vecchi, 2018). In line with what has already been stated in the encyclicals *Caritas in Veritate*, *Evangelii Gaudium*, and *Laudato si*, it is reaffirmed the need for external regulation of the financial market dynamics and, above all, of an ethical basis that structures all economic policy so that it can ensure the material well-being of the majority of humanity<sup>8</sup>.

With the publication of the guidelines on finance, the Catholic Church also intends to contribute to the correct orientation of reason “in order to liberate every realm of human activity from the moral disorder that so often afflicts it”<sup>9</sup>. This is on the assumption that there is no area of human action that can be considered outside or impervious to ethical principles based on freedom, truth, justice, and solidarity. Economic and financial decisions also have moral implications and must therefore be assessed in terms of their human and social consequences, as well as their technical performance<sup>10</sup>.

The focus on the emergence of sustainable finance, which places the well-being of the human person at the centre, has been the leitmotif of the Vatican meetings dedicated more specifically to the system of investments with a social impact<sup>11</sup>.

The first Vatican Conference (VIIC), entitled “*Investing for the poor: How impact investments can serve the common good in the light of Evangelii Gaudium*”, was held in 2014. Organized by the Pontifical Council for Justice and Peace (now the Dicastery for the Promoting Integral Human Development), the Catholic Relief Services – the official international humanitarian agency of the Catholic community in the United States, governed by a board of directors comprising clergy, most of them bishops elected by the United States Conference of Catholic Bishops, as well as religious and Catholic lay men and women – and the Mendoza College of Business (University of Notre Dame), the conference focused on how an impact investing can align with the Church’s mission in developing an inclusive economic system.

The meeting was followed, in 2016 and 2018, by two further Vatican Conferences entitled respectively “*Making the year of mercy a year of impact for the poor*” (Di Turi, 2016) and “*Scaling*

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<sup>8</sup> “Although global economic well-being appears to have increased in the second half of the twentieth century with an unprecedented magnitude and speed, at the same time inequalities proliferate between various countries and within them. Moreover, the number of people who live in conditions of extreme poverty continues to be enormous. The recent financial crisis might have provided the occasion to develop a new economy, more attentive to ethical principles, and a new regulation of financial activities that would neutralise predatory and speculative tendencies and acknowledge the value of the actual economy. Although there have been many positive efforts at various levels which should be recognized and appreciated, there does not seem to be any inclination to rethink the obsolete criteria that continue to govern the world. On the contrary, the response seems at times like a return to the heights of mvopic egoism, limited by an inadequate framework that, excluding the common good, also excludes from its horizons the concern to create and spread wealth, and to eliminate the inequality so pronounced today” (Holy See Press Office, 2018, point 5).

<sup>9</sup> “[...] In order to liberate every realm of human activity from the moral disorder that so often afflicts it, the Church recognizes among her primary duties the responsibility to call everyone, with humble certainty, to clear ethical principles. The shared human reason, that ineffaceably characterizes every person, demands an enlightened discernment in this regard. Moreover, human rationality searches, in truth and justice, for the solid foundation that sustains its operation and maintains its sense of direction” (Holy See Press Office, 2018, point 3).

<sup>10</sup> “The Church’s social doctrine has always maintained that justice must be applied to every phase of economic activity, because this is always concerned with man and his needs. Locating resources, financing, production, consumption and all the other phases in the economic cycle inevitably have moral implications. Thus every economic decision has a moral consequence. The social sciences and the direction taken by the contemporary economy point to the same conclusion. Perhaps at one time it was conceivable that first the creation of wealth could be entrusted to the economy, and then the task of distributing it could be assigned to politics. Today that would be more difficult, given that economic activity is no longer circumscribed within territorial limits, while the authority of governments continues to be principally local. Hence the canons of justice must be respected from the outset, as the economic process unfolds, and not just afterwards or incidentally. Space also needs to be created within the market for economic activity carried out by subjects who freely choose to act according to principles other than those of pure profit, without sacrificing the production of economic value in the process. The many economic entities that draw their origin from religious and lay initiatives demonstrate that this is concretely possible. [...]” (Benedict XVI, 2009, point 37).

<sup>11</sup> The reports of the Vatican Conferences are available at [www.viiconference.org](http://www.viiconference.org).

*investment in service of integral human development*” (CFO, 2018). The aim of the meetings, held between the experts of impact investments and the Catholic leaders, was mainly to evaluate and share the financial models that allow facing the systematic challenges of particular importance for the Church and for the whole community. This is on the assumption that it is necessary to create an interface between Catholic communities that want to access capital and have an impact on the investment market that already exists.

On the road to a *new humanism* in economic and financial activity, various religious organizations have accepted the Pontiff’s proposal. The Catholic Impact Investing Collaborative, established in the same year as the first Vatican Conference, is distinguished by its awareness-raising work aimed at spreading the impact investing among the Catholic institutions<sup>12</sup>. The Oblate International Pastoral Investment Trust<sup>13</sup> – a non-profit foundation set up by the Missionary Oblates of Mary Immaculate in the United States – and the Ascension Investment Management<sup>14</sup> – the largest American non-profit Catholic health care system – also work in the same direction, proposing investment strategies in the management of the shares of numerous entities in the ecclesiastical hierarchy, in accordance with the guidelines dictated in relation to socially responsible investments.

Of particular significance is the influence that the Pontiff’s choices are making on collective behaviour, but also on other main religions.

The Jewish Observatory JLens<sup>15</sup>, which guides the implementation and monitoring of the impact investing processes of Jewish institutions, has established the Jewish Advocacy Found in 2015 due to the absence of a public equity investment option aligned with the Jewish teachings.

At the “*Faith in finance*” Summit, held by the Alliance of Religions and Conservation in Switzerland in 2017, the Observatory was asked to provide Jewish organisations with an overview of how they can pursue sustainable progress, including through the impact investments. This led to the publication of the document “*Investment insights for the Jewish community to further the UN’s Sustainable Development Goals*”, which shows the seventeen development objectives recommended in the United Nations Agenda 2030, highlighting their conformity with the Jewish tradition (JLens Investor Network, 2017).

In its third part, the report is specifically dedicated to the impact investing system. It is argued that the impact investment can be considered the modern approach of a concept that in reality goes back over time: invest the economic resources to improve the world and minimize the negative effects. Then, the chapter proceeds to an analysis of the benefits that the use of the financial instrument can bring to the Jewish community, but also of those that could be the implementation issues<sup>16</sup>.

In recent years, we have also seen the consolidation of the investment ecosystem with an Islamic financial impact (on the system of Islamic finance, see D’Arienzo, 2012a, 2017, 2018; Gradoli, del Carmen de la Orden de la Cruz, and Sánchez González, 2016; Alvaro, 2014, p. 15; Hamau and Mauri, 2009; Siagh, 2008). The Global Islamic Finance and Impact Investing Platform, co-founded in 2016 by the Islamic Development Bank and the Istanbul International Center for Private Sector Development, serves as a platform for an innovative collaboration for those who wish to adhere to this financial method (IICPSD/UNDP, 2014).

Impact investing has undoubtedly initiated a change in the *modus operandi* of religious organizations, historically and mainly based on a charity model and now called upon to operate more

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<sup>12</sup> The Catholic Impact Investment Collaborative (CIIC) was initiated in the Midwest of the United States and is now expanding globally. CIIC participants collectively manage over \$50 billion in assets and come from a wide range of Catholic institutions including Ascension Health, Franciscan Sisters of Mary, Daughters of Charity, Mercy Investment Services, Dayton University, Catholic Relief Services, SSM Health, Marianist Province of the US, Healey International Relief Foundation and others. This information can be found at [www.catholicimpact.org/what-we-do](http://www.catholicimpact.org/what-we-do).

<sup>13</sup> The information on the institutional activity of the entity is available on the official website [www.oiptrust.org](http://www.oiptrust.org).

<sup>14</sup> See [www.ascensioninvestmentmanagement.com](http://www.ascensioninvestmentmanagement.com).

<sup>15</sup> Founded in 2012, JLens is a network of investors that acts as a bridge between the Jewish community and the impact investing system. Further information can be found at [www.jlensnetwork.org](http://www.jlensnetwork.org).

<sup>16</sup> In 2013, the Observatory conducted a survey entitled “*Impact investments: Rabbinical perspectives*”. In his summary report, the Rabbi Irving “Yitz” Greenberg argues: “Investing is one of the most powerful areas of economic, social, and political impact. Done right, investing can create the infrastructure of a better life, enabling a higher level of human dignity and health for all. To overcome poverty and hunger, to push forward equality and justice, to heal the environment, to create a more liveable world for us and for our future generations – can there be a more noble set of goals?” (Hammerman, 2013).

and more as socially motivated investors.

The importance attached to the world of finance in the change towards sustainability is particularly significant, even more so if it is supported by the ethical choices made by the main religions.

### 3. Profit and solidarity: A possible combination also for the Catholic Church

The intention is shown by religious institutions to generate – through innovative forms of use of their funds – a social impact with the expectation of a fair return highlights a revaluation of the fertile circularity between profit and gift.

The new ethical reflection proposed by Pope Francis brings back to the centre the principle of gratuitousness, understood as “the discovery and implementation of the true and the just, [...] in which profit and solidarity are no longer antagonistic”<sup>17</sup>.

On the assumption that “the money must serve and not govern”<sup>18</sup>, the Pontiff insists on a financial reform that – through the work of international political institutions called upon to compensate for the inability of markets to regulate themselves in a fair and just manner<sup>19</sup> – neutralizes the speculative aspects to pursue the authentic welfare of the community. Only in a human perspective of financial action, in fact, it can operate that virtuous circle between profit and solidarity which allows the positive potential of the markets to be generated.

From an ethical point of view, it is unacceptable not simply to profit but rather to avail oneself of inequality for one’s own advantage, in order to create enormous profits that are damaging to others; or to exploit one’s dominant position in order to profit by unjustly disadvantaging others, or to make oneself rich through harming and disrupting the collective common good. And such a practice is morally deplorable “when the intention of profit by a few through the risk of speculation even in important funds of investment, provokes artificial reduction of the prices of public debt securities,

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<sup>17</sup> “Well-being must therefore be measured by criteria far more comprehensive than the Gross Domestic Product of a nation (GDP), and must take into account instead other standards, for example, safety and security, the growth of ‘human capital’, the quality of human relationships and of work. Profit should to be pursued but not ‘at any cost’, nor as a totalizing objective for economic action. The presence of humanistic standards and cultural expressions that value generosity turn out to be both useful and emblematic here. Thus the discovery and implementation of the true and just as good in themselves, become the norms for evaluation. [22] Profit and solidarity are no longer antagonists. In fact, where egoism and vested interests prevail, it is difficult for the human person to grasp the fruitful interchange between profit and gift, as sin tends to tarnish and rupture this relationship. In a fully human perspective, there is actualized an interchange between profit and solidarity that, thanks to the freedom of the human person, unleashes a great potential for the markets. An enduring call to acknowledge the human quality of generosity comes from the rule formulated by Jesus in the Gospel, called the golden rule, which invites us to do to others what we would like them to do for us (cf. Mt 7, 12; Lk 6, 31)” (Holy See Press Office, 2018, point 11; see also Müller, 2014).

<sup>18</sup> This is what Pope Francis affirms in *Evangelii Gaudium*: “A financial reform open to such ethical considerations would require a vigorous change of approach on the part of political leaders. I urge them to face this challenge with determination and an eye to the future, while not ignoring, of course, the specifics of each case. Money must serve, not rule! The Pope loves everyone, rich and poor alike, but he is obliged in the name of Christ to remind all that the rich must help, respect and promote the poor. I exhort you to generous solidarity and to the return of economics and finance to an ethical approach which favours human beings” (Francis, 2013a, point 58).

<sup>19</sup> The proposal for an ethical financial reform doesn’t deviate from what was already stated during the *Magisterium* of Benetto XVI who hoped, with the intention of facing global problems, to establish a world political authority: “In the face of the unrelenting growth of global interdependence, there is a strongly felt need, even in the midst of a global recession, for a reform of the United Nations Organization, and likewise of economic institutions and international finance, so that the concept of the family of nations can acquire real teeth. One also senses the urgent need to find innovative ways of implementing the principle of the responsibility to protect and of giving poorer nations an effective voice in shared decision-making. This seems necessary in order to arrive at a political, juridical and economic order which can increase and give direction to international cooperation for the development of all peoples in solidarity. To manage the global economy; to revive economies hit by the crisis; to avoid any deterioration of the present crisis and the greater imbalances that would result; to bring about integral and timely disarmament, food security and peace; to guarantee the protection of the environment and to regulate migration: for all this, there is urgent need of a true world political authority, as my predecessor Blessed John XXIII indicated some years ago. Such an authority would need to be regulated by law, to observe consistently the principles of subsidiarity and solidarity, to seek to establish the common good, and to make a commitment to securing authentic integral human development inspired by the values of charity in truth. Furthermore, such an authority would need to be universally recognized and to be vested with the effective power to ensure security for all, regard for justice, and respect for rights. Obviously it would have to have the authority to ensure compliance with its decisions from all parties, and also with the coordinated measures adopted in various international forums. Without this, despite the great progress accomplished in various sectors, international law would risk being conditioned by the balance of power among the strongest nations. The integral development of peoples and international cooperation require the establishment of a greater degree of international ordering, marked by subsidiarity, for the management of globalization. They also require the construction of a social order that at last conforms to the moral order, to the interconnection between moral and social spheres, and to the link between politics and the economic and civil spheres, as envisaged by the Charter of the United Nations” (Benedict XVI, 2009, point 67).

without regard to the negative impact or to the worsening of the economic situation of entire nations”<sup>20</sup>.

In the system of impact investing, Pope Francis supports the original link that exists between profit and solidarity, legitimizing its coexistence as long as it is extraneous to any speculative intent.

With this form of capital use, the patrimony of Catholic organizations can therefore be simultaneously allocated to medium to long-term investments and to works of mercy, without such activities necessarily having to be considered irreconcilable. In other words, it has been asserted that the Pontiff’s proposal could contribute to the transition from a “sequential” financing model, in which the Church first produces wealth and then donates it, to a “parallel” model, in which these objectives can be achieved simultaneously. This is what *the Economist* maintains about the effects that the adherence of the Catholic Church to the impact investing can generate (The Economist, 2017).

Pope Francis hopes that it will be possible to achieve, through impact investing, a more structural awareness of the contribution that finance can make to the realization of increasingly social and distributive justice. And he is the first pontiff to attribute *dignitas* to the combination between the finance and the real economy. It promotes, in a completely innovative perspective, a new common commitment that doesn’t consider charity the only form of social contribution and that is contrary to the realization of an exclusive purpose of profit.

#### 4. Concluding remarks

The project of an inclusive economy, supported by Pope Francis through his adherence to the strategies of impact investing, seems to be seen as a peculiar condition for a truly democratic society (Pope Francis’ thought on democracy is expressed in his pastoral letter, Francis, 2013b).

Finance that indirectly does good works can create the essential conditions for an ethical and socio-economic development that contrasts “the concentration of power, inequalities between nations, the distribution of economic resources in a way contrary to the universal destination of goods, the use of wealth by those who own it who ignore social justice”<sup>21</sup>.

Although this perspective may give rise to some perplexity if one considers the traditional Catholic way of doing charity, the important developments that have taken place to confirm its possible configuration as a complementary instrument for the realization of an economy of communion.

Nor can the use of economic resources that indirectly carry out good works lose its charitable purpose because it is associated with the achievement of a financial return. This different criterion of doing finance, as asserted by the Pontiff, can well align itself with the teachings of the *Catholic Magisterium*.

The involvement of the Church, but also of the other main religions, indicates the incisive contribution that different actors can make to a change of course towards renewed welfare policies.

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<sup>20</sup> “What is morally unacceptable is not simply to profit, but rather to avail oneself of an inequality for one’s own advantage, in order to create enormous profits that are damaging to others; or to exploit one’s dominant position in order to profit by unjustly disadvantaging others, or to make oneself rich through harming and disrupting the collective common good. Such a practice is particularly deplorable from the moral point of view when the intention of profit by a few through the risk of speculation even in important funds of investment, provokes artificial reduction of the prices of public debt securities, without regard to the negative impact or to the worsening of the economic situation of entire nations. This practice endangers not only the public efforts for rebalancing, but also the very economic stability of millions of families, and at the same time compels government authorities to intervene with substantial amounts of public money, even to the extent of artificially interfering in the proper functioning of political systems. The speculative intention, often in today’s economic-financial environment, risks supplanting all other principal intentions that ground human freedom. This factor is devouring the immense patrimony of values that renders our civil society a place of peaceful coexistence, encounter, solidarity, renewed reciprocity and of responsibility for the common good. In this context, words such as ‘efficiency’, ‘competition’, ‘leadership’, and ‘merit’ tend to occupy the entire space of our civil culture and assume a meaning that ends up in impoverishing the quality of exchanges, reducing them to mere numerical coefficients” (Holy See Press Office, 2018, point 17).

<sup>21</sup> These are the four risks that already in 1994 the document of the Pontifical Council for Justice and Peace, entitled “*The Modern Development of Financial Activities*”, associated with the world of finance (de Salins & Villeroy de Galhau, 1994).

## References

1. Albanese, G., Beccegato, P., Caiffa, P., & Lombardi, A. (2010). *L'era della consapevolezza. La responsabilità indiretta: Un nuovo principio per cambiare il mondo*. Padua, Italy: Messaggero Editions.
2. Alford, H. J., Rusconi, G., & Monti, E. (Eds.). (2010). *Responsabilità sociale d'impresa e dottrina sociale della Chiesa cattolica*. Milan, Italy: Franco Angeli.
3. Alvaro, S. (2014). La finanza islamica nel contesto giuridico ed economico italiano. *Quaderni Giuridici*, 4, 1-66. Retrieved from <http://www.consob.it/documents/11973/201676/qg6.pdf/6e7aeadd-cfe3-4d72-90b6-b4c4ea683f0e>
4. Ballestero, E., Perez-Gladish, B., & Garcia-Bernabeu, A. (2015). *Socially responsible investment. A multi-criteria decision making approach*. Cham, Switzerland: Springer. <https://doi.org/10.1007/978-3-319-11836-9>
5. Benedict XVI. (2009). *Caritas in Veritate*. Retrieved from [http://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate.html](http://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html)
6. Buggy-Levine, A., & Emerson, J. (2011). Impact investing: Trasforming how we make money while make a difference. *Innovations: Technology, Governance, Globalization*, 6(3), 9-18. [https://doi.org/10.1162/INOV\\_a\\_00077](https://doi.org/10.1162/INOV_a_00077)
7. Bulletin of the Holy See n. 0442.
8. Christian Finance Observatory (CFO). (2018). *Third Vatican conference on impact investing*. Retrieved from <https://www.viiconference.org/wp-content/uploads/2018/07/Speakers-Third-Vatican-Conference-on-Impact-Investing.pdf>
9. Ciani Scarnicci, M., Marcelli, A., Pinelli, P., Romani, A., & Russo, R. (Eds.). (2014). *Economia, ambiente e sviluppo sostenibile*. Milan, Italy: Franco Angeli.
10. D'Arienzo, M. (2009). Chiesa ed economia. *Diritto e Religioni*, 2, 214-224.
11. D'Arienzo, M. (2012a). I fondamenti religiosi nella finanza islamica. *Diritto e Religioni*, 12(1), 197-198.
12. D'Arienzo, M. (2012b). *Il concetto giuridico di responsabilità. Rilevanza e funzione nel Diritto Canonico*. Cosenza, Italy: Pellegrini.
13. D'Arienzo, M. (2016). Appartenenza religiosa e reti sociali dei migrant. *Diritto e Religioni*, 22(2), 270-289.
14. D'Arienzo, M. (2017). L'economia islamica nella globalizzazione dei mercati. *Diritto e Religioni*, 24(2), 523-544.
15. D'Arienzo, M. (2018). La contrattualistica islamica in un'economia globalizzata. In A. Mantineo, & S. Montesano (Eds.), *Islam. Dal pregiudizio ai diritti* (pp. 121-150). Cosenza, Italy: Pellegrini.
16. de Salins, A., & Villeroy de Galhau, F. (1994). *The modern development of financial activities in the light of the ethical demands of christianity* (p. 56). Pontifical Council for Justice and Peace.
17. Delille, G. (2013). *L'economia di Dio: Famiglia e mercato tra cristianesimo, ebraismo, Islam*. Naples, Italy: Salerno Editrice.
18. Di Turi, A. (2016, June 26). Investitori "a impatto" radunati in Vaticano. Cresce la finanza che lotta contro la povertà. *Avvenire*, A26. Retrieved from [http://www.italiasolidale.org/doc/fondatore/Avvenire\\_Nazionale%2026%20giugno.pdf](http://www.italiasolidale.org/doc/fondatore/Avvenire_Nazionale%2026%20giugno.pdf)
19. Forte, A. (2013). Corporate social responsibility in the United States and Europe: How important is it? The future of corporate social responsibility. *International Business & Economics Research Journal*, 12(7), 815-823. <https://doi.org/10.19030/iber.v12i7.7970>
20. Francis. (2013a). *Evangelii Gaudium*. Retrieved from [http://www.vatican.va/content/francesco/en/apost\\_exhortations/documents/papa-francesco\\_esortazione-ap\\_20131124\\_evangelii-gaudium.html](http://www.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html)
21. Francis. (2013b). *Papa Francesco. Noi come cittadini noi come popolo*. Vatican City: Libreria Editrice Vaticana.
22. Freni, F. (2017). Codificazione etica e deontologia nei settori del lavoro, del mercato e della finanza. La libertà di coscienza e la transizione dell'oeconomicus corportivismo professionale alla democratica cooperazione interculturale. *Stato, Chiese e Pluralismo Confessionale*, 34, 1-104. Retrieved from [https://www.statoechiese.it/images/uploads/articoli\\_pdf/Freni.M2\\_Codificazione.pdf?pdf=codificazione-etica-e-deontologia-nei-settori-del-lavoro-del-mercato-e-dell](https://www.statoechiese.it/images/uploads/articoli_pdf/Freni.M2_Codificazione.pdf?pdf=codificazione-etica-e-deontologia-nei-settori-del-lavoro-del-mercato-e-dell)
23. Giovanni, E. (2018). *L'utopia sostenibile*. Bari-Rome, Italy: Laterza.
24. Gradoli, M., del Carmen de la Orden de la Cruz, M., & Sánchez González, P. (2016). Vie d'inclusione dei musulmani in Europa: Marketing halal e banca islamica. *Stato, Chiese e Pluralismo Confessionale*, 24, 1-35. <https://doi.org/10.13130/1971-8543/7320>
25. Guido, G., & Massari, S. (2013). *Lo sviluppo sostenibile. Ambiente, risorse, innvazione, qualità*. Milan, Italy: Franco Angeli.
26. Hamai, R., & Mauri, M. (2009). *Economia e finanza islamica. Quando i mercati incontrano il mondo del profeta*. Bologna, Italy: Il Mulino.
27. Hammerman, J. (2013). *Impact investing: Rabbinic perspectives. Based on the Rabbinic survey on Jewish values and investment decisions* (Jumpstart Report, Issue 5). Retrieved from <https://www.jlensnetwork.org/single-post/2013/07/29/Impact-Investing-Rabbinic-Perspectives>



28. Holy See Press Office. (2018, May 17). "Oeconomicae et pecuniariae quaestiones". Considerations for an ethical discernment regarding some aspects of the present economic-financial system" of the Congregation for the Doctrine of the Faith and the Dicastery for Promoting Integral Human Development. *Summary of Bulletin*. Retrieved from <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/05/17/180517a.html>
29. IICPSD/UNDP. (2014). *Islamic finance and impact investing*. Retrieved from [www.undp.org/content/dam/istanbul/docs/Islamic\\_Finance\\_Impact.pdf](http://www.undp.org/content/dam/istanbul/docs/Islamic_Finance_Impact.pdf)
30. JLens Investor Network. (2017). *Investment insights for the Jewish community to further the UN's Sustainable Development Goals*. Retrieved from [http://www.arcworld.org/downloads/JLens\\_Jewish\\_Investment\\_Insights.pdf](http://www.arcworld.org/downloads/JLens_Jewish_Investment_Insights.pdf)
31. Lucia, M. G., Duglio, S., & Lazzarini, P. (Eds.). (2018). *Verso un'economia della sostenibilità. Lo scenario e le sfide*. Milan, Italy: Franco Angeli.
32. Mazzullo, A. (2019). *Diritto dell'imprenditoria sociale. Dall'impresa sociale all'impact investing*. Turin, Italy: Giappichelli.
33. Müller, G. (2014). *Poor for the poor: The mission of the Church*. Vatican City: Vatican Publishing House.
34. Parisi, M. (2007). Principio di sussidiarietà orizzontale e finanza etica: Due nuovi strumenti operativi per le formazioni sociali religiose? In A. De Oto, & F. Botti (Eds.), *Federalismo fiscale, principio di sussidiarietà e neutralità dei servizi sociali erogati. Esperienze a confronto*. Bologna, Italy: Bononia University Press.
35. Sachs, J. D. (2015). *L'era dello sviluppo sostenibile*. Milan, Italy: Egea Edizioni.
36. Siagh, L. (2008). *L'Islam e il mondo degli affari. Denaro, etica e gestione del business*. Milan, Italy: Etas.
37. Signori, S., Rusconi, G., & Dorigatti, M. (2012). *Etica e finanza*. Milan, Italy: Franco Angeli.
38. Strasser, K. (2011). *Socially responsible investment*. Munich, Germany: GRIN Verlag.
39. Tassara, C. (2017). *Cooperazione internazionale allo sviluppo: Governo, economia e società. Evoluzione delle politiche e scenari future*. Rome, Italy: Edizioni Nuova Cultura.
40. Tettamanzi, D. (2009). *Etica e capitale. Un'altra economia è possibile?* Milan, Italy: Rizzoli.
41. The Economist. (2017, August 19). The Catholic church becomes an impact investor. *The Economist*. Retrieved from <https://www.economist.com/finance-and-economics/2017/08/19/the-catholic-church-becomes-an-impact-investor>
42. UN. (2015). *17 Sustainable Development Goals (SDGs)*. Retrieved from <https://www.unric.org/it/agenda-2030>
43. United States Conference of Catholic Bishops (USCCB). (2003). *Socially responsible investment guidelines*. Retrieved from <https://www.usccb.org/about/financial-reporting/socially-responsible-investment-guidelines>
44. Vecchi, F. (2018). "Oeconomicae et pecuniariae quaestiones": Vadecum di suggerimenti al legislatore temporale per un ritrovato disciplinamento etico dei mercati finanziari. *Diritto e Religioni*, 2, 25-49. Retrieved from [press.vatican.va](http://press.vatican.va)
45. Videtta, C. (2018). *Cultura e sviluppo sostenibile. Alla ricerca del IV pilastro*. Turin, Italy: Giappichelli.
46. Wendt, K. (Ed.). (2018). *Positive impact investing. A sustainable bridge between strategy, innovation, change and learning*. Cham, Switzerland: Springer. <https://doi.org/10.1007/978-3-319-10118-7>

# NEW TECHNOLOGIES AND INDIVIDUAL GUARANTEES: THE “TROJAN HORSE”

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## 1. Introduction

It is undeniable that the appearance of the so-called “Trojan horse” on the investigation scenario might ensure an incredible contribution to overcoming limits that, in time, have been highlighted on the front of “traditional”, so to speak, wiretapping (Pio, 2016, p. 161). First of all, there is the evolution of the technology used by communication and messaging tools, such as *Whatsapp*, *Telegram*, *Snapchat*, *Skype*, which, in order to guarantee the privacy and security of the users, employ encryption systems which make communication impossible to wiretap<sup>1</sup>. The remote-control system, instead, overcomes these barriers and allows to not only recover the “lost or compromised” efficacy of the wiretapping techniques in use but to also enhance them so much as to open new unexplored prospects in the field of investigations.

The new tool consists of a self-installing virus which is inoculated in the electronic equipment target of a possible investigation (*smartphone*, *computer*, *tablet*), manually and in *off-line* mode; or, more often, through the *Internet*, via email attachments and updates of programs and applications; and it allows online search activities, that is, the acquisition of data already saved in the device, and *online surveillance*, in real-time, of what is visualized on the screen or typed on the keyboard or falls within the range of the microphone or *webcam* (see on this point Caprioli, 2017; Alesci, 2016; Amato, 2016, 2018a; Aterno, 2014; Barrocu, 2017; Balsamo, 2016; Bene, 2018; Bontempelli, 2018; Brighi, 2018; Camon, 2017; Cajani, 2016; Cassibba, 2018; Curtotti, 2017; Daniele, 2017; Stefano, 2016; Felicioni, 2016; Filippi, 2016; Gaito and Furfaro, 2016; Giordano, 2017b, 2018; Giunchedi, 2014; Lasagni, 2016; Marandola, 2017; Nocerino, 2016; Orlandi, 2018; Parlato, 2018; Signorato, 2018a, 2018b; Torre, 2015, 2017; Testaguzza, 2014).

It is a tool equipped with an unprecedented intruding ability because it allows the interception of “all the connection data in the ‘infected’ device (data, e-mail, both webmail and outlook); and it allows the activation of the microphone, and, therefore, it can also receive conversations happening in the space that surrounds the subject who has access to the material contained in the device, anywhere he might be located”; It is able to “activate the *web camera*, allowing the acquisition of images”; it can “search” the *hard disk* and “copy, either totally or partially, all the memory units of the targeted information system”; it can “decode everything that is typed on the keyboard connected to the system (*keylogger*) and visualize whatever appears on the screen of the targeted device (*screenshot*)”<sup>2</sup>.

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<sup>1</sup> As Zonaro (2016) explains: “Una comunicazione telefonica che intercorre tra due utenti [...] è intercettabile grazie alla collaborazione dell’Operatore di telefonia a cui appartiene l’utente bersaglio che ‘devia’, duplicandola, la conversazione al sistema d’intercettazione installato presso la Procura richiedente. Lo stesso concetto è valido per tutte le intercettazioni di conversazioni tra presenti, sia che avvengano con microspie funzionanti su rete radiomobile GSM/UMTS [...] sia che vengano captate con microspie digitali in radiofrequenza, il cui segnale venga poi instradato su rete telefonica. Dunque, in questi casi l’intercettazione è possibile perché il segnale vocale (o il testo nel caso di SMS/MMS e FAX) transita su reti direttamente gestite dagli Operatori di telefonia. Le cose cambiano quando il messaggio transita attraverso la rete internet ed è cifrato all’origine”; here, “è il protocollo di comunicazione a non essere direttamente gestito e controllato” by the phone service provider employed by the user. This happens because “la navigazione in internet avviene grazie ad un meccanismo di ‘impacchettamento’ delle informazioni che poi vengono inviate a destinazione; ogni singolo pacchetto di dati contiene al suo interno sia l’“indirizzo” del mittente che quello del destinatario. I pacchetti di dati in rete possono viaggiare sia ‘in chiaro’, ossia leggibili da chiunque li intercetti, oppure ‘cifrati’, ossia leggibili solo ed esclusivamente da chi possiede la chiave di decrittazione”; this implies “che chiunque riuscisse ad intercettare il flusso di pacchetti costituenti il messaggio (compreso l’Operatore di telefonia al quale l’utente si appoggia per usufruire dei servizi internet), si ritroverebbe in mano una serie di informazioni digitali assolutamente inutilizzabili in quanto non decifrabili” (p. 164).

<sup>2</sup> The detail of the functions of the remote-control system has been described by Cass. pen., sez. un., 28 April 2016, Scurato, at [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it). Furthermore, on its application potential, see Filippi (2017), who underlines that “non va

The vastness of the information that can be acquired is such that it becomes unnecessary to put stress on the incidence of this new evidence research technique on the investigation ground. Rather, what is more relevant, is the modalities through which the protection of the individual rights is ensured when a tool that is potentially capable to annihilate the right to privacy, the inviolability of the home, the inviolability and the secrecy of correspondence and any other form of communication and is, therefore, able to affect rights that are constitutionally and conventionally guaranteed comes into place (Art. 2, 14, 15, 8 E.c.h.r.).

It is an issue that is not certainly limited to safeguarding the rights of a person under investigation. Coming to the fore, indeed, is the protection of the guarantees related to third parties that have nothing to do with the case and whom, given the extent of the operational range of the new tool, might get involved, despite themselves, in the wiretapping (for example, let us think about the existence, in the monitored device, of audio, video, and document files attributable to third parties; on this point, see Signorato, 2019).

## 2. The legislative silence on the possible uses of the remote-control system

Being in the presence of functions that, under a legal framework, span from wiretapping to inspection, to search, up to requisition, the legislator could have and should have said a lot (this hoped Spangher, 2016, p. 188, regarding the mandate for the reform of wiretapping). Instead, inspired by a mandate that has been maybe laid upon a sort of self-restraint registered in the application filed, Lgs. D. 29 December 2017, no. 216 considers the remote-control system as a mere wiretapping execution modality. Consequently, in the legislative view, the “*virus* represents, from an electronic profile, what the wiretapping equipment represents from a physical aspect” (Perna, 2016, p. 171).

Whether it is a choice consciously meant to contain the use of the intruding agent<sup>3</sup> or rather an underestimation of the application potential of the tool, the result is that many further activities accomplishable through the remote-control system are left without regulation, with the consequence of consigning the respect of individual rights in the hands of the practice, as if the sense of responsibility of the operators is sufficient protection against a “bulimic” (the proper definition in terms of “*bulimico’ congegno*” is expressed by Filippi, 2016, p. 180) use of the tool.

The chosen form, indeed, gives the impression of a legislator that winks at the needs of the investigation, leaving the door open to an enlargement of the areas managed by the Public Prosecutor. Let’s imagine that the gathering of material realized through the employment of the remote-control system has involved the many tracks memorized by the portable device, such as voice notes, audio-video recording, etc.; it would be naively optimistic of anyone, acting on the sole tapping modality, to deem neutralized the temptation to send forth the evidential result as atypical evidence, which needs only a minimum guarantee in the shape of a decree by the investigation “*dominus*”. After all, this is what the jurisprudence has expressed so far regarding the legitimacy of the *Trojan horse* used for the so-called *online search* activities. It has been indeed affirmed that a decree by the public prosecutor, allowing, via the remote-control system, the acquisition of a copy of the digital documentation contained in the computer used by the defendant is legitimate, because, inter alia, being it a non-communicative type of data, the tapping activity cannot affect rights that are guaranteed by the Constitution<sup>4</sup>.

Such options, however, would be incompatible with those that are provided for by the Constitution (Art. 14 and 15 Cost.) and through which are banned all investigations and evidence that are ascribable to “probative and investigative particular cases that are already regulated by procedural law” (this way Caprioli, 2017, whom on this point observes how “*in questo caso la loro*

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sottovalutato il rischio che il captatore informatico possa essere preventivamente impostato per cancellare anche il tracciamento delle operazioni dallo stesso eseguite, senza perciò lasciare nemmeno tracce del suo passaggio” (p. 543).

<sup>3</sup> In this respect, for example, Curtotti and Nocerino (2017) express this, which, compared to the indications contained in the mandate, stress “il richiamo alle sole intercettazioni ambientali – e non anche a quelle informatiche o telematiche – nonché il riferimento all’attivazione del microfono quale unica attività esperibile tramite l’uso del virus” (pp. 571-572). In the same way, even in reference to the doctrine contained in Lgs. D. no. 216/2017 (Griffo, 2018).

<sup>4</sup> Cass. pen., sez. V, 14 October 2009, Virruso, in *CED Cass.*, n. 246954, which has outlined this particular case within the scope of the atypical evidence on the basis of the consideration according to which, the activity that has been authorized by the Public Prosecutor did not have as a target, a “*flusso di comunicazioni*”, requiring a communication with other subjects, but “*una relazione operativa tra micro processore e video del sistema elettronico*” and, therefore, “*un flusso unidirezionale di dati confinati all’interno dei circuiti del computer*”.

*ammissibilità dipenderà dal rispetto delle condizioni dettate per l'attività tipica*", p. 488). In relation to such profile, indeed, all activities consisting in the intruding agent activating the video camera the *target* device is equipped with can be considered acceptable within the limits provided for by the Joint Divisions<sup>5</sup>, because they are activities related to video recording; or also, where the conditions laid out by Art. 266-bis c.c.p. are fulfilled, the acquisition of communications developing through online messaging systems can be attributed within the operational area of online wiretapping (see on this point Bronzo, 2018).

The point, however, as already clearly observed elsewhere, is that the online search activities conducted via the digital virus are not possible to frame in the typical outline of inspection, search, and seizure.

First of all, indeed, in these acts, considering especially the functional obligations meant to grant the right of defense, the surreptitious and concealed employment, which would instead be postulated in the application, of the remote-control system, is not allowed<sup>6</sup>. Regarding the means to research evidence, indeed, "the right of defense is guaranteed, provided that, before (in case of inspection), during or after (in case of search and seizure) the execution of the act, the defense lawyer be properly advised. The prevision of such obligations leads to consider that, despite such acts are to be conducted without warning; inspection, search and seizure must still be evident activities" (in these terms, Trogu, 2014; Marcolini, 2010).

Furthermore, these prospects contradict the principle of "proportionality of the interference compared to the purpose" which stems from reading constitutionally and conventionally oriented toward the laws regarding inspection, search, and seizure<sup>7</sup>. From these provisions, indeed, emerge some connotations of temporariness – for an implementation to be conducted within a timing strictly necessary in order to find and obtain the thing or person, – and of determination of the res object of the investigation, which the remote-control system does not seem able to ensure (Testaguzza, 2014), not even when, coming to the fore, is the pure wiretapping activity. Bearing in mind the changes that have drawn Art. 267, para. 1 c.c.p., indeed, the decree authorizing the wiretapping amongst those present through the inoculation of a remote-control system on a portable electronic device, allows the indication of the places an times in relation to which the activation of the microphone is allowed to happen even "indirectly"<sup>8</sup> and, therefore, through the employment of "open" formulas which, nonetheless, contradict the essence of the specification itself.

Despite the unambiguity of the constitutional and conventional indications<sup>9</sup>, and in spite of the new, clearer configuration of the right to the safeguard of the "digital projection of

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<sup>5</sup> The reference goes to Cass. pen., sez. un., 28 March 2006, Prisco, in *Cassazione Penale*, 2006, p. 3937, with notes by Ruggieri (2006), as well as in *Rivista Italiana di Diritto e Procedura Penale*, 2006, p. 1537, with note by Camon (2006). With this ruling, the Supreme Court has framed, within the scope of atypical evidence, any video recordings of non-communicative behaviors conducted in public places by the Criminal Investigation Department, affirming their usability following the analysis, in joint consultation, of the modalities adopted to obtain them (Art. 189 c.c.p.). Such video recordings, on the contrary, may not be conducted within a "domicile", since it would be considered a breaching of Art. 14 Cost., with the consequence of having their acquisition forbidden even at the preliminary stage. Finally, should the video recording be conducted in an environment in which intimacy and privacy are granted, even though it cannot be considered a "domicile", the usability of the atypical evidence is admitted, prior to obtaining an authorization motivated by the judicial authority.

<sup>6</sup> This point is well highlighted by Filippi (2017), that, however, highlights how "è vero che il costituente nel 1947 non poteva prevedere gli sviluppi della tecnologia"; nevertheless "aveva ben chiara la natura dell'atto investigativo compatibile con la Costituzione e, nello scrivere gli art. 13 e 14, ha voluto consentire soltanto atti investigative palesi, perché quando ha voluto ammettere un atto occulto, come l'intercettazione, non ha posto limiti alla natura dell'atto, adottando nell'art. 15 Cost. una formula aperta che lascia spazio ad ogni 'limitazione' della libertà e della segretezza delle comunicazioni" (p. 546).

<sup>7</sup> It is the same perspective that, after all, must also guide the reading of the laws that regulate the subject of wiretapping, just as the European Court for Human Rights teaches in relation to Art. 8 E.c.h.r. (on this point see Corte e.d.u., sez. II, 10 April 2007, Panarisi c. Italia; furthermore, Corte e.d.u., Grande Camera, 4 December 2015, Zakharov c. Russia).

<sup>8</sup> In the report accompanying the outline of Lgs. D. no. 216/2017, are indicated, for simplification, some formulas meant to explain the authorizing decree, referring in particular to "ovunque incontri il soggetto x"; "ogni volta che si rechi nel locale y". It is an aspect that is inevitably related to the additional issue, timely reported by careful regulation, linked to the possible acquisition of material from earlier, and, anyway, antecedent to the authorization of the judge (Marandola, 2017, p. 1287).

<sup>9</sup> Regarding this aspect, it is particularly relevant the reference to the principle of predictability of the surveillance measure. This, indeed, implies, as specified by Corte e.d.u., 10 February 2009, Iordachi c. Moldavia, that the internal regulation must show a sufficiently clear and detailed content, so as to offer the citizens an adequate indication regarding the circumstances in which the public authority has the power to implement such measures. The purpose of the power and the modalities of his exercise must be indicated with sufficient clarity, so as to ensure the individual a suitable protection against arbitrary interferences. The hope that, in actualizing the mandate, there would be more attention placed upon the teaching expressed by the European law regarding wiretapping has been express unanimously by the doctrine (Turco, 2017, p. 323).

the individual”<sup>10</sup>, the legislator should have undertaken the task of expressly locking the area of employment of the remote-control system, containing its use through a set of guarantees meant to limit its operational area, and to neutralize any investigative action exceeding the strict limits of a restricted space; this because, as taught by the best practice, it is easy to imagine that “despite the best intentions, that “threshold” will be crossed” (Spangher, 2016, p. 188).

### 3. The perplexities posed by the new regulation

Even imagining that the unorthodox uses of the remote-control system will be the one to plague the much-troubled field of wiretapping, it is certainly to be taken into account that unquestionable advocacy of this tool is relentlessly destined to stem especially from the consideration according to which the procedural area more affected by the digital *virus* is that of organized crime, in which the intruding agent, at least from the point of view of the prerequisite of lawfulness, can count of a broader field of action<sup>11</sup>.

However, aside from this context and, therefore, from a more general point of view, the advocacy of the remote-control system is destined to become evident in consideration of the centrality of the wiretapping tools for the execution of the investigation activity, even in new fields, such as those dedicated to the research of voice tracks. Under this last profile, actually, it is undeniable that strong support to the growth of this specific investigation sector may come from the choices envisaged through mandate-law and through Lgs. D. no. 216/2017 which, as it is known, have configured the operational spaces, for the digital *virus*, that were somehow hindered by the ruling of the Joint Divisions, which had fixed a few points that seemed to be kept dormant regarding the employment of this new evidence research tool<sup>12</sup>.

Whatever the procedural area of reference is, the imperative is the same: what counts is the respect of wiretapping conducted with traditional tools: *conditio sine qua non* of the usability of the collected data is the respect of the provisions set out by Art. 266 e ss. c.c.p. This is why it becomes essential to trace the boundaries in which the legislator has placed this new evidence research tool.

For this aspect, at least on one side, the legislative view seems to express a firm strictness when delineating the concept of organized crime in relation to the concept approved by the Court of Cassation<sup>13</sup> in order to rebuild the operational perimeter of digital wiretapping<sup>14</sup>. To the elimination of

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<sup>10</sup> Which, as Caprioli (2017) underlines: “*destinata ad allargare i confini del diritto all'intimità della vita privata e al rispetto della dignità personale: un nuovo ed ulteriore spazio virtuale al cui interno – esattamente come nel domicilio e nei circuiti comunicativi riservati – ciascuno deve essere in grado di manifestare liberamente la propria personalità, al riparo da occhi e orecchi indiscreti*” (p. 491). For the statement related to the existence of “*spazi virtuali di manifestazione della personalità, che coincidono con l'interesse sostanziale alla protezione di informazioni 'riservate' e al loro controllo nello svolgimento di rapporti giuridici e personali online e in altri 'spazi informatici'*” (Flor, 2009). For the recognition of an independent right to the confidential and discreet use of information technologies, see Bundesverfassungsgericht, 27 February 2008.

<sup>11</sup> Where the proceedings are related to the crimes as per Art. 51, comma 3-bis e 3-quater, p.c.c. the remote-control system is usable also in case the communications happen in the places specified in Art. 614 c.c.p., without any need to have previous indication of the places or limitations in time. This expresses Amato (2018a, pp. 56-57), on the basis of the formulation of Art. 267, para. 1, second sentence, c.c.p., and taking into account the rules relating to exceptions set out by Art. 13, d.l. 152/1991, conv. in reg no. 203/1991. Regarding common crimes, instead, it is always necessary to obtain the above-mentioned indication, even considering that “*l'intercettazione nei luoghi indicati dall'Art. 614 Cp sarebbe consentita solo ivi si stia laddove svolgendo l'attività criminosa*”.

<sup>12</sup> The reference goes to Cass. pen., sez. un., 28 April 2016, Scurato (www.penalecontemporaneo.it, 4 July 2016), which, upon ruling on the matter, has affirmed that “*deve escludersi la possibilità di compiere intercettazioni nei luoghi indicati dall'art. 614 c.p.*” through the sensor “*al di fuori della disciplina derogatoria per la criminalità organizzata di cui all'art. 13, d.l. n. 152 del 1991, convertito in legge n. 203 del 1991, non potendosi prevedere, all'atto dell'autorizzazione, i luoghi di privata dimora nei quali il dispositivo elettronico verrà introdotto, con conseguente impossibilità di effettuare un adeguato controllo circa l'effettivo rispetto del presupposto, previsto dall'art. 266, comma 2, c.p.p., che in detto luogo si stia svolgendo l'attività criminosa*”; “*è invece consentita la captazione nei luoghi di privata dimora ex Art. 614 c.p., pure se non singolarmente individuati e se ivi non si stia svolgendo l'attività criminosa, per i procedimenti relativi a delitti di criminalità organizzata, anche terroristica, secondo la previsione dell'art. 13, d.l. n. 152 del 1991*”; and finally, that “*per procedimenti relativi a delitti di criminalità organizzata devono intendersi quelli elencati nell'art. 51, comma 3-bis e comma 3-quater, c.p.p. nonché quelli comunque facenti capo a un'associazione per delinquere, con esclusione del mero concorso di persone nel reato*” (Balsamo, 2016, p. 2274; Camon, 2017, p. 76; Corasaniti, 2016; Felicioni, 2016, p. 21; Lasagni, 2016, p. 1; Nocerino, 2016, p. 3565).

<sup>13</sup> Before the Scurato ruling, for the affirmation according to which the definition of organized crime entails not only mafia related and assimilated crimes, as well as the association crimes provided for by special incriminating laws, but also any other type of criminal organization, ex. Art. 416 Cod. Pen., related to several types of criminal activities, with the exclusion of

the reference, next to the traditional criminal hypothesis as per Art. 51, par. 3-bis e 3-quater, c.c.p., of the particular case analyzed by Art. 416 c.p.<sup>15</sup>, corresponds, however, an extension of the wiretapping possibility also in the area of “common crimes” which, furthermore, makes one of the key arguments of the Scurato ruling decline. Despite, indeed, the structure of this decision reads “it is impossible, for such an investigation tool, prior individuation of the places of interests, given the unstable nature of the tool itself” (Cass. pen., sez. un., 28 April 2016, Scurato, p. 16). The indication of the chronological and space coordinates becomes an essential requirement of the decree of authorization (Art. 267, para. 1, second sentence, c.c.p.).

It is clear how, in such a scenario, the risk of application nonchalance accompanies consistent doubts; especially in relation to respecting the domicile and the privacy of uninvolved third parties, and for this aspect, in truth, the legislator has acted on Art. 268 c.c.p., introducing paragraph 2-bis which forbids “the recording, even a concise one, of all communications considered irrelevant to the investigation, in regards to both the object and the subject involved, as well as those equally irrelevant ones which involve personal data deemed sensible by law”, and it provides, furthermore, that in such cases, in the operations report, “only date, time and the device the recording has been conducted on must be indicated”. Despite it is a provision that is certainly meant to ensure what has been defined as “guarantee regulation” (in these terms Amato, 2018c, p. 42), there remains the topicality of the doubts expressed by whom, already with regards to the guiding standards of the mandate, affirmed that, “since the Criminal Investigation Department cannot possibly know in advance if the person met by the one carrying the device, or the domicile they are going to occupy, or the topic of the conversation that will be discussed will have a criminal content, it is clear that the Criminal Investigation Department, unless in possession of divinatory powers, will be forced to listen and record all conversations, and only secondly will they evaluate their relevance” (Filippi, 2017, p. 551).

Also, further doubts arise in relation to the tangible possibility of intermittent wiretapping. It is clear, indeed, that, since the itinerant nature of the infected device, in order to ensure selective wiretapping, which corresponds to the chronological and space limitations, outlined in the authorization decree, constant supervision of the remote-control system should be in place, so as to grant the prompt deactivation in an abusive contest; nevertheless, this would not only entail considerable “personnel expenses”, but it would also risk revealing the presence of the intruding agent; the problem stems from the fact that “continuous activation and deactivation could trigger a sudden low battery level of the infected device, as well as an evident user’s data consumption, risking the wiretapped subject to perceive the presence of the *virus*” (see on this point Parodi, 2017, p. 576).

Recovery of the guarantee function could absolve the extension of the enforcement requested of the judge, whom, next to the indications of the reasons why the wiretapping appears “absolutely necessary to the purpose of the progression of the investigation” will have to indicate why such form of wiretapping is deemed to be “necessary” (Art. 267, para. 1, second sentence, c.c.p.). Of course, despite it looks clear that the idea is to denote the digital wiretapping as of *extrema ratio* nature, to be used only where traditional method do not satisfy the investigation needs to be posed by the particular case (Giordano, 2017a, p. 401), it is also undeniable that, in this case also, the issue will move to the ground of application, which has basically been made the recipient of the task of establishing the motivational *quantum* sufficient to reveal the absolute indispensability of the tool<sup>16</sup>.

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the mere participation of people in the crime, in which the requirement of organization is missing, Cass. pen., sez. un., 22 March 2005, Petrarca, in Cassazione penale, 2005, 2916.

<sup>14</sup> Through the changes introduces with regulation dated 9 January 2019, no. 3, the Legislator has compared the doctrine related to hidden wiretapping of crimes committed by public officials against the Public Administration, to that which is typical of organized crime offences and terrorism, establishing the operativity of the provisions as per Art. 13 L.D. no. 152 dated 1991 for the cases in which such crimes are punished with no less than 5 years imprisonment (for more information see Giordano, 2019; Signorato, 2019, p. 250).

<sup>15</sup> As highlights Turco (2017), it is a delimitation “*che, probabilmente, risente delle preoccupazioni manifestate dalla dottrina il giorno dopo la pronuncia delle Sezioni Unite, per il significativo allargamento del ‘doppio binario’ venutosi a creare*” and that “*si rivela chiaramente rispettosa di quel principio di ‘proporzione’ che – secondo le indicazioni provenienti da Strasburgo – deve sussistere tra la forza intrusiva del mezzo usato per investigare e la calibrata compressione dei diritti fondamentali delle persone che ne deriva*” (p. 317).

<sup>16</sup> Anticipating “*un possibile lassismo del Governo in sede attuativa*”, already, with regards to the mandate, observed that “*maggior attenzione avrebbe dovuto essere posta dal legislatore ai requisiti minimi che il provvedimento autorizzativo deve contenere*” (Curtotti & Nocerino, 2017, p. 579).

#### 4. New tool and old criticalities: The urgent wiretapping

The operational endurance of the reform seems destined to compete on the ground of the motivation of the provision, however on a different front. The reference refers to the cases that allow the initiative of the Public Prosecutor, and in regards to which, the Legislator assumes an attitude of sound caution when allowing the investigation *dominus* to arrange a wiretapping activity amongst those present via remote-control system “only in proceedings related to crimes provided for by Art. 51, paragraphs 3-*bis* e 3-*quater* c.c.p.” (Art. 267, para. 2-*bis*, c.c.p.), while, at the same time, introducing a concept of strengthened urgency, which forces the judge to explain not only, as the rule applies, the existence of a “valid reason to believe that a delay might seriously be detrimental to the purpose of the investigation” (Art. 267, para. 2, c.c.p.), but also the reasons that make it necessary to turn to the remote-control system (Art. 267, para. 1 e 2-*bis*, c.c.p.) and those that “make it impossible to respect the provisions of the judge” (Art. 267, para. 2-*bis*, c.c.p.).

A critical profile of this provision might emerge, however, from renouncing to indicate, in the procedure activated to validate an urgent wiretapping activity, some more strict connotations compared to the original traditional wiretapping hypothesis (Art. 267, para. 2, c.c.p.). The issue inspects, essentially, the regulation that assigns to the decision of the cautionary judge the same “effects provided for by para. 2” (Art. 267, para. 2-*bis*, second sentence, c.c.p.), because the deferment to such provision, risks to be used as a crowbar for an improper extension of the boundaries posed by the use of the remote-control system upon provision of the Public Prosecutor.

The problem stems from the fact that so far, compared to the traditional urgent wiretapping, the devaluation of the protective efficacy of the judicial intervention has been of such a magnitude as to lead to thinking that, in this sector, we are witnessing a heterogony of the purposes of the validation, which is going from being a functional space to the purpose of the examination of the operations conducted by entities that have acted as substitutes, to a place systematically appointed to the annulment of the illegitimate act. This perspective stems from the letter of Art. 267, para. 2, c.c.p.; in this context, the sanction of non-usability of the wiretapping provided for by the Public Prosecutor is contemplated only in case of missing validation, and this is enough to retain that, once the validation is in place, any formal defect in the provision, including the missing motivation regarding the conditions of the wiretapping, is considered rectified<sup>17</sup>.

If this orientation is transferred to the field of the new form of wiretapping, the consequences, under the aspect of the safeguard of the right to privacy, of the inviolability of the domicile, of the secrecy of the communications, would be disastrous. It would end up, indeed, creating a sort of fast track for the initiatives of the Public Prosecutor<sup>18</sup>, with the consequent, insidious stimulus, to create a pretext to turn to the urgent wiretapping power, being the possibility to count on a mechanism that allows the neutralization of all the defects of the act a great incentive, especially through an *iter* that is conducted *inaudita altera parte*.

The fatal diffusivity of the tool requires that any salvific temptation be eradicated, reinforcing the many arguments that, as compared to the traditional urgent wiretapping (La Regina, 2011), can retract the idea of a rectifying efficacy of the validation, with regards to the motivation-lacking decree.

On one side, indeed, no diriment value can be recognized in the regulative description of the sole

<sup>17</sup> In this respect, the supervision by the validation judge “if it results in the certification of the legitimacy of the wiretapping intervention implies [...] the acknowledgment of the urgent reasons” (so, Cass. pen., sez. II, 7 September 2016, Alestra, in CED Cass., n. 267968; previously, Cass. pen., sez. fer., 24 August 2010, Crupi, *ivi*, n. 248253; Cass. pen., sez. V, 16 March 2010, Baldissin, *ivi*, n. 247266; Cass. pen., sez. VI, 16 July 2009, Iaria, *ivi*, n. 244872; Cass. pen., sez. II, 4 December 2006, Figliuzzi, *ivi*, n. 235859; Cass. pen., sez. I, 22 April 2004, Termini, *ivi*, n. 228245; Cass. pen., sez. II, 4 May 2001, Berlingeri, *ivi*, n. 219901; Cass. pen., sez. V, 28 October 1997, Caputo, *ivi*, n. 209973; Cass. pen., sez. II, 22 November 1994, Seminara, *ivi*, n. 200989).

<sup>18</sup> It is clear, furthermore, that the goal consisting of compressing the perimeter of the non-usability of urgent wiretapping through the idea of a rectifying efficacy of the validation, creates an evident inequality within Art. 267 c.c.p. because, in spite of the homogenization assumed by Art. 271, para. 1, p.c.c. for the consequences of the authorized or urgent act that is conducted outside the cases allowed by law or without the observance of the related discipline, a privileged treatment might be granted to the validating wiretapping, because it is only in “authorized” cases that any violation makes non-usable the results of wiretapping. Nevertheless, as correctly highlights Camon (1996), if this were the sense to be attributed to urgent wiretapping, “*non sarebbe azzardato sospettare di incostituzionalità l'art. 267 comma 2*” c.c.p., also because, “*se proprio si volesse introdurre un regime differenziato, sarebbe logico che la disciplina più severa valesse per l'intercettazione disposta dal pubblico ministero, non per quella concessa dal giudice*” (pp. 105-106).

consequences linked to a missing validation. The reference complies with the formulation of Art. 267, para. 2, c.c.p. which, compared to Art. 13, para. 3, Cost., and with the further validation hypothesis regulated in the standard code of procedure<sup>19</sup>, seems to be the result of a formulation technique that has nothing to do with the rectifying character of the provision and that, if anything, by focusing on the fate undergone by the act intended for testing, it is presumably meant to reinforce the strength of the discipline of reference.

On the other side, it seems really hard to qualify as “validation” a judicial examination that leaves the act untouched despite the violation of the requirements set out by law regarding its legitimate employment. With the appointment of the validation power, indeed, the judge is only assigned the task of verifying the respect of the conditions dictated to the purpose of exercising a vicarious power. Any salvific action would contradict the essence of a mechanism that has been conceived to detect possible illegitimacies, and not certainly to deprive the act of the defects that genetically afflict it. This line of reasoning, after all, seems to find confirmation in the position prospected often by the Joint Sections, when the non-usability of the results of the wiretapping operations, in cases in which the decree urgently issued by the Public Prosecutor is rendered with a lack of motivation, is affirmed<sup>20</sup>; and, more generally, when the limits that any judge meets regarding the deficiencies of an act upon which looms an enforcement obligation provided for in favor of the Public Prosecutor; since, in these cases, it has been stressed that the decision-maker may not replace the accusation authority in rendering “a justifying motivation” in order to integrate the provision that might be missing it<sup>21</sup>, *a fortiori* it must be affirmed that the judge may not hold the gaps in a Public Prosecutor’s act through a rectifying efficacy decision.

## 5. Conclusion

Despite these affirmations, however, there remains the fear that the protection of the non-usability of the results of the wiretapping via digital *virus* will not be able to represent a sufficiently strong barrier against the input of illegitimately acquired results on the processual scene. Despite the fact that the area of the usability bans has also been extended, by the reform, to two more absolute non-usability hypotheses, that is, that of the data acquired during the operations conducted prior to the inoculation of the remote-control system and that of the data acquired out of the time and place limits indicated in the authorization decree (Art. 271, comma 1-*bis*, c.c.p.) – it is still a sector in which the investigatory culture has reinforced the art of reuse. The tendency to save, more often than not in the shape of atypical evidence, the acquisitions conducted in spite of fundamental guarantees, aggravates a great deal the threat of a regulatory void left by the Legislator with regard to the countless operational potentialities of the remote-control system, risking, this way, to create some dangerous opening to employment modalities of the tool that would be able to affect the privacy of the individual in a way so penetrating as to cause damage that is, furthermore, difficult to repair through the operativity of a sanction that is limited to act in order to delete cognitive material

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<sup>19</sup> Under a more general profile, indeed, wherever the legislator has chosen to describe the results of validation, only the cases in which the provision adopted in substitution is destined to be overwhelmed have been considered. Emblematic, on this point, is the hypothesis of precautionary seizure, in relation to which is described, in terms of loss of efficacy, the sole consequence destined to be produced in case the judge does not issue a validation order within ten days of receiving the application (Art. 321, para. 3-*ter*, c.c.p.).

<sup>20</sup> In this regard see Cass. pen., sez. un., 21 June 2000, Primavera, in *Diritto Penale e Processo*, 2001, p. 621, with note by Filippi (2001), in which – despite affirming the legitimacy of the motivation *per relationem* – it has been established that the lack of motivation in decrees authorizing or prolonging the wiretapping operations amongst those present, or in those meant to validate the decrees issued in cases of urgency by the Public Prosecutor, as well as these last ones, entails the non-usability of the results of the wiretapping activity.

<sup>21</sup> See Cass. pen., sez. un., 29 November 2005, Campenni, in *Cassazione Penale*, 2006, p. 1347, which, with regards to wiretapping of conversations or telephone communications and to the authorization of the employment of implants that are different from those supplied to the Public Prosecutor’s Office as provided for by Art. 268, para. 3, c.c.p., has established that the judge is not allowed to amend the decree of the Public Prosecutor, replacing him in rendering a motivation that has not been given by the investigator and to integrate it, this way taking over spheres of enforcement discretion that are under the responsibility of the Public Prosecution (on the ruling see Griffo, 2006; Garofoli, 2007). In the same way, in matter of probative seizure, see Cass. pen., sez. un., 28 January 2004, Ferrazzi, in *Cassazione Penale*, 2004, p. 1913, which has clarified that, wherever the Public Prosecutor has not indicated the justifying reasons of the measure in the decree, the Review Judge is not legitimized to integrate the provision, deciding on his own the justifying reasons of the restraint on the asset.



from the trial<sup>22</sup>.

There are more ample risks that cannot be neglected, and they are linked to the use of the remote-control systems as massive surveillance means. It has been recently reported, after all, the creation and the insertion, on platforms, accessible to anyone, of a series of apparently harmless *apps* commonly used, that, in reality, have allowed the inoculation of the remote-control system to the damage of a considerable number of unaware people (Simonetta, 2019).

The red line is always the risk of degeneration and the need to “secure the ‘trojan system’”, through the configuration of a series of regulations, both primary and secondary, conceived in the function of the real application potential of the new investigation tool.

It is, furthermore, a necessity highlighted also by the Authority for the protection of personal data, through an advisory to the Parliament and the Government<sup>23</sup> meant to pinpoint some technical aspects on which it would be opportune an intervention in a view of strengthening the individual and community guarantees. Therefore, for example, it has been suggested the input of a regulation meant to provide that “the actual installation of the portable electronic device and the deriving acquisition functionalities of the remote-control system may fully be realized only after having verified the univocal association between the device affected by the software and the one considered in the judicial authorization provision”. It is highlighted, furthermore, the opportunity to introduce a “clear ban of all remote-control systems that are able to erase the traces of the operations conducted on the hosting device” and, more generally, so as to prevent the existence of possible inhomogeneities in the security levels, the opportunity to “provide for the adoption of a sole protocol of transmission and management of the data destined to flow on the servers installed in the wiretapping facilities of the Public Prosecutor’s Offices for their conservation”.

It would therefore be desirable a modification not only of the Code of Criminal Procedure but also of the Technical Rules that regulate the use of the new tool<sup>24</sup>. The M. D. 20 April 2018, indeed, has also shown to be deficient under many aspects; so, this way, despite underlining that “the digital programs that are functional to the execution of the wiretapping activities via the remote-control system on portable electronic devices are elaborated in a way that ensures integrity, security and authenticity of the received data on all transmission channels related to the remote-control system” (Art. 4, para. 1, M. D. 20 April 2018), the actual operation modalities, through which the safeguard operations not only of the wiretapping results but also of the personal data of the interested party, will come into place, are not specified.

Also, in relation to this last aspect, it would be fit to add some provision meant to regulate the training of the personnel in charge of the use of this new investigation tool, to the purpose of stimulating and implementing the development and the rooting of a culture of the security of the data and the information gathered<sup>25</sup>. These are, after all, inescapable conditions where there is a will to protect both the rights of the interested party and the quality of the inspection.

However, the indiscriminate temptation is still too strong to leave room for a regulation that is really capable of conjugating guarantees and operational efficacy. It does not seem like an isolated case, in fact, that the ministerial indications lack what a careful doctrine, imagining all the possible contents of the releasing decree, considered “the minimum guarantee” for a law that is so invasive of the individual rights and freedom (Aterno, 2017). Neither does the implementation law refers to the need for the remote-control systems to be equipped with tracking systems able to ensure that the software used are limited to exclusively conduct the authorized operations.

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<sup>22</sup> In the same way, see Bronzo (2018, p. 240), whom, beginning from the “*facilità con la quale un’attività può trasmodare nell’altra*”, highlights the risk that “*la più dettagliata specificazione delle modalità esecutive dell’intercettazione ex Art. 267 comma 3 c.p.p.*” may outline as a merely formal guarantee.

<sup>23</sup> The document is available at [www.garanteprivacy.it](http://www.garanteprivacy.it).

<sup>24</sup> The reference goes to M. D. 20 April 2018, stating “*Disposizioni di attuazione per le intercettazioni mediante inserimento di captatore informatico e per l’accesso all’archivio informatico a norma dell’art. 7, comma 1 e 3, D. Lgs. 29 Dicembre 2017, n. 216*” (Torre, 2019a; Suraci, 2018).

<sup>25</sup> An indication, in this respect, is also found in Aterno and Pietrosanti (2019) that, furthermore, understandably so, also highlight the opportunity to “strengthen the regulations on contracts and subcontracts in the wiretapping sector using the remote-control system”.

## References

1. Alesci, T. (2016). L'intercettazione di comunicazioni o di conversazioni tra presenti con il Trojan horse è ammissibile anche nei luoghi di privata dimora per i reati di criminalità organizzata. *Processo Penale e Giustizia*, 5, 28.
2. Amato, G. (2016, August 13). Reati di criminalità organizzata: possibile intercettare conversazioni o comunicazioni con un "catturatore informatico". *Guida al Diritto*, 34-35, 76.
3. Amato, G. (2018a). Per l'uso del "trojan" compromesso non facile sulle regole (D. lgs 29 Dicembre 2017 n. 216). *Guida al Diritto – Settimanale di Documentazione Giuridica*, 25(7), 55-59.
4. Amato, G. (2018b, February 3). Per l'uso del "trojan" compromesso non facile sulle regole. *Guida al Diritto*, 7. Retrieved from [https://www.guidaaldirittodigital.ilsole24ore.com/art/primo-piano/2018-02-03/per-l-uso-trojan-compromesso-non-facile-regole-181502.php?uuid=ABHnTGAC#art\\_intercettazioni](https://www.guidaaldirittodigital.ilsole24ore.com/art/primo-piano/2018-02-03/per-l-uso-trojan-compromesso-non-facile-regole-181502.php?uuid=ABHnTGAC#art_intercettazioni)
5. Amato, G. (2018c, February 3). Un tentativo parziale di coniugare privacy e investigazioni. *Guida al Diritto*, 7. Retrieved from <https://www.guidaaldirittodigital.ilsole24ore.com/art/primo-piano/2018-02-03/un-tentativo-parziale-coniugare-privacy-e-investigazioni-124709.php?uuid=ABsM4EAC>
6. Atero, S. (2014). Digital forensics (investigazioni informatiche). In *Digesto delle discipline penalistiche* (Settimo agg., p. 217). Turin, Italy: Utet Giuridica.
7. Atero, S. (2017). *Catturatore informatico e regolamento tecnico: Quid juris per la modalità "screen shot"?* Retrieved from [http://www.dirittopenaleinformatica.it/wp-content/uploads/2018/03/S.-ATERNO\\_Catturatore-informatico\\_quid-iuris-per-modalit%C3%A0-screen-shot-1.pdf](http://www.dirittopenaleinformatica.it/wp-content/uploads/2018/03/S.-ATERNO_Catturatore-informatico_quid-iuris-per-modalit%C3%A0-screen-shot-1.pdf)
8. Atero, S., & Pietrosanti, F. (2019, April 9). Intercettazioni via trojan, come evitare un nuovo caso Exodus: I problemi da risolvere. *Sicurezza Digitale*. Retrieved from <https://www.agendadigitale.eu/sicurezza/intercettazioni-via-trojan-come-evitare-un-nuovo-caso-exodus-i-problemi-da-risolvere/>
9. Balsamo, A. (2016). Le intercettazioni mediante virus informatico tra processo penale italiano e Corte Europea. *Cassazione Penale*, 5, 2274.
10. Barrocu, G. (2017). Il catturatore informatico: Un virus per tutte le stagioni. *Diritto Penale e Processo*, 23(3), 379-390.
11. Bene, T. (2018). La riforma parziale (e il gorilla invisibile). In T. Bene (Ed.), *L'intercettazione di comunicazioni* (pp. 15-24). Bari, Italy: Cacucci Editore.
12. Bontempelli, M. (2018, December 20). Il catturatore informatico in attesa della riforma. *Diritto Penale Contemporaneo*, 1-15. Retrieved from <https://archiviodpc.dirittopenaleuomo.org/d/6383-il-catturatore-informatico-in-attesa-della-riforma>
13. Brighi, R. (2018). Funzionamento e potenzialità investigative del malware. In G. Giostra, & R. Orlandi (Eds.), *Nuove norme in tema di intercettazioni. Tutela della riservatezza, garanzie difensive e nuove tecnologie informatiche* (pp. 211-233). Turin, Italy: Giappichelli.
14. Bronzo, P. (2018). Intercettazione ambientale tramite catturatore informatico: Limiti di ammissibilità, uso in altri processi e divieti probatori. In G. Giostra, & R. Orlandi (Eds.), *Nuove norme in tema di intercettazioni. Tutela della riservatezza, garanzie difensive e nuove tecnologie informatiche* (pp. 236-262). Turin, Italy: Giappichelli.
15. Cajani, F. (2016). Odissea del catturatore informatico. *Cassazione Penale*, 11, 4140. Retrieved from <http://telematici.com/wp-content/uploads/2016/12/F.CAJANI-Odissea-del-catturatore-informatico.pdf>
16. Camon, A. (1996). *Le intercettazioni nel processo penale*. Milano, Italy: Giuffrè.
17. Camon, A. (2006). Le sezioni unite sulla video registrazione come prova penale: Qualche chiarimento e alcuni dubbi nuovi. *Rivista Italiana di Diritto e Procedura Penale*, 4, 1550-1569.
18. Camon, A. (2017). Cavalli di Troia in Cassazione. *Archivio della Nuova Procedura Penale*, 28(1), 91-100.
19. Caprioli, F. (2017). Il "catturatore informatico" come strumento di ricerca della prova in Italia. *Revista Brasileira de Direito Processual Penal (RBDPP)*, 3(2), 483-510. <https://doi.org/10.22197/rbdpp.v3i2.71>
20. Cassibba, F. (2018). La circolazione delle intercettazioni tra "archivio riservato" e catturatore informatico. In O. Mazza (Ed.), *Le nuove intercettazioni* (pp. 163-178). Turin, Italy: Giappichelli.
21. Corasaniti, G. (2016). Le intercettazioni "ubiquitarie" e digitali tra garanzia di riservatezza, esigenze di sicurezza collettiva e di funzionalità del sistema delle prove digitali. *Diritto dell'Informazione e dell'Informatica*, 88.
22. Curtotti, D. (2017). Il catturatore informatico nella legislazione italiana. *Rivista di Scienze giuridiche*, 3, 382-411. Retrieved from <https://jus.vitaepensiero.it/news-papers-il-catturatore-informatico-nella-legislazione-italiana-4843.html>
23. Curtotti, D., & Nocerino, W. (2017). Le intercettazioni tra presenti con catturatore informatico. In G. M. Baccari, C. Bonzano, K. La Regina, & E. M. Mancuso (Eds.), *Le recenti riforme in materia penale: Dai decreti di depenalizzazione (d.lgs. n. 7 e n. 8/2016) alla "legge Orlando" (l. n. 103/2017) e relativi decreti attuativi (3 ottobre 2017)* (pp. 557-586). Padua, Italy: Cedam.
24. Daniele, M. (2017). Contrasto al terrorismo e catturatori informatici. *Rivista di Diritto Processuale*, 72(2), 393-406.

25. Di Bitonto, M. L. A. (2006). Le riprese video domiciliari al vaglio delle Sezioni Unite. *Cassazione Penale*, 1(12), 3950-3962.
26. Felicioni, P. (2016). L'acquisizione da remoto di dati digitali nel procedimento penale: Evoluzione giurisprudenziale e prospettive di riforma. *Processo Penale e Giustizia*, 5, 118-138. Retrieved from <https://dialnet.unirioja.es/servlet/articulo?codigo=5672540>
27. Filippi, L. (2001). Decreto che autorizza l'intercettazione telefonica e motivazione per relationem. *Diritto Penale e Processo*, 7(5), 621-634.
28. Filippi, L. (2016). L'ispe-perqui-intercettazione "itinerante": Le Sezioni Unite azzeccano la diagnosi ma sbagliano la terapia (a proposito del captatore informatico). *Archivio Penale*, 2, 348-353. <https://doi.org/10.12871/97888674171174>
29. Filippi, L. (2017). La legge delega sulle intercettazioni. In G. M. Baccari, C. Bonzano, K. La Regina, & E. M. Mancuso (Eds.), *Le recenti riforme in materia penale: Dai decreti di depenalizzazione (d.lgs. n. 7 e n. 8/2016) alla "legge Orlando" (l. n. 103/2017) e relativi decreti attuativi (3 ottobre 2017)* (pp. 525-556). Padua, Italy: Cedam.
30. Flor, R. (2009). Brevi riflessioni a margine della sentenza del Bundesverfassungsgericht sulla c.d. Online Durchsuchung. *Rivista Trimestrale di Diritto Penale dell'Economia*, 22(3), 695-716.
31. Flora, G., & Marandola, A. (2019). *La nuova disciplina dei delitti di corruzione. Profili penali e processuali (L. 9 gennaio 2019 n. 3 c.d. "spazzacorrotti")*. Pisa, Italy: Pacini Editore.
32. Gaito, A., & Furfaro, S. (2016). Le nuove intercettazioni "ambulanti": Tra diritto dei cittadini alla riservatezza ed esigenze di sicurezza per la collettività. *Archivio Penale*, 68(2), 309-330. <https://doi.org/10.12871/97888674171172>
33. Garofoli, I. F. (2007). Le intercettazioni e la motivazione del decreto del pubblico ministero tra esigenze investigative e tutela dei principi costituzionali. *Diritto penale e processo*, 13(1), 58-76.
34. Giordano, L. (2017a). La delega per la disciplina delle intercettazioni tra presenti mediante immissione di captatori informatici (Comma 84, Lett. E, L. n. 103/2017). In T. Bene, & A. Marandola (Eds.), *La riforma della giustizia penale* (pp. 396-406). Milan, Italy: Giuffrè.
35. Giordano, L. (2017b, March 20). Dopo le Sezioni Unite sul "captatore informatico": Avanzano nuove questioni, ritorna il tema della funzioni di garanzia del decreto autorizzativo. *Diritto Penale Contemporaneo*, 3, 177-195. Retrieved from <https://archivioldpc.dirittopenaleuomo.org/d/5267-dopo-le-sezioni-unite-sul-captatore-informatico-avanzano-nuove-questioni-ritorna-il-tema-della-funz>
36. Giordano, L. (2018). La disciplina del "captatore informatico". In T. Bene (Ed.), *L'intercettazione di comunicazioni* (pp. 15-24). Bari, Italy: Cacucci Editore.
37. Giordano, L. (2019). Il ricorso al "captatore informatico" nelle indagini per i reati contro la pubblica amministrazione. In G. Flora, & A. Marandola (Eds.), *La nuova disciplina dei delitti di corruzione*. Pisa, Italy: Pacini Giuridica.
38. Giunchedi, F. (2014). Captazioni "anomale" di comunicazioni: Prova incostituzionale o mera attività di indagine? *Processo Penale e Giustizia*, 4(5), 133-138.
39. Griffo, M. (2006). Limiti all'integrazione del decreto adottato ai sensi dell'art. 268 comma 3 c.p.p. – Sez. un., 29/11/05, dep. 24/01/06, n. 2737, Campenni. *Cassazione Penale*, 46(4), 1347-1365.
40. Griffo, M. (2018, February 6). Una proposta costituzionalmente orientata per arginare lo strapotere del captatore. Dalla sentenza Scurato alla riforma Orlando. *Diritto Penale Contemporaneo*, 2, 23-44. Retrieved from <https://archivioldpc.dirittopenaleuomo.org/d/5835-una-proposta-costituzionalmente-orientata-per-arginare-lo-strapotere-del-captatore>
41. La Regina, K. (2011). *L'udienza di convalida dell'arresto in flagranza o del fermo. Dal genus alla species*. Padua, Italy: Cedam.
42. Lasagni, G. (2016, October 7). L'uso di captatori informatici (troians) nelle intercettazioni "fra presenti". *Diritto Penale Contemporaneo*, 1-22. Retrieved from <https://archivioldpc.dirittopenaleuomo.org/d/4995-luso-di-captatori-informatici-trojans-nelle-intercettazioni-fra-presenti>
43. Marandola, A. A. (2017). Sviluppo tecnologico e uso del c.d. captatore informatico. *Studium Iuris*, 11(11), 1285-1287.
44. Marcolini, S. (2010). Le cosiddette perquisizioni on line (o perquisizioni elettroniche). *Cassazione Penale*, 7-8, 2855-2868. Retrieved from [https://www.academia.edu/26648814/Le\\_cosiddette\\_perquisizioni\\_on\\_line\\_o\\_perquisizioni\\_elettroniche](https://www.academia.edu/26648814/Le_cosiddette_perquisizioni_on_line_o_perquisizioni_elettroniche)
45. Nocerino, W. (2016). Le Sezioni Unite risolvono l'enigma: l'Utilizzabilità del "captatore informatico" nel processo penale. *Cassazione Penale*, 10, 3546-3584.
46. Orlandi, R. (2018). Usi investigativi dei cosiddetti captatori informatici. Criticità e inadeguatezza di una recente riforma. *Rivista Italiana di Diritto e Procedura Penale*, 2, 538-556.
47. Parlato, L. (2018). Problemi insoluti: Le perquisizioni on-line. In G. Giostra, & R. Orlandi (Eds.), *Nuove norme in tema di intercettazioni. Tutela della riservatezza, garanzie difensive e nuove tecnologie informatiche* (pp. 289-323). Turin, Italy: Giappichelli.

48. Parodi, C. (2017, April 4). La riforma “Orlando”: La delega in tema di “captatori informatici”. *Magistratura Indipendente*. Retrieved from <https://www.magistraturaindipendente.it/la-riforma-orlando-la-delega-in-tema-di-captatori-informatici.htm>
49. Perna, F. (2016). Il captatore informatico nell'attuale panorama investigativo: Riflessi operative. *Parola Alla Difesa*.
50. Pio, E. (2016) Intercettazioni a mezzo captatore informatico: Applicazioni pratiche e spunti di riflessione alla luce della recente decisione delle Sezioni Unite”. *Parola Alla Difesa*, 1, 161.
51. Ruggieri, F. (2006). Riprese visive e inammissibilità della prova. *Cassazione Penale*, 3945.
52. Signorato, S. (2018a). Le indagini digitali. Profili strutturali di una metamorfosi investigativa. Turin, Italy: Giappichelli.
53. Signorato, S. (2018b). Modalità procedurali dell'intercettazione tramite captatore informatico. In G. Giostra, & R. Orlandi (Eds.), *Nuove norme in tema di intercettazioni. Tutela della riservatezza, garanzie difensive e nuove tecnologie informatiche* (pp. 263-276). Turin, Italy: Giappichelli.
54. Signorato, S. (2019). Intercettazioni di comunicazioni. In R. Orlandi, & S. Seminara (Eds.), *Una nuova legge contro la corruzione. Commento alla legge 9 gennaio 2019, n. 3* (pp. 245-260). Turin, Italy: Giappichelli.
55. Simonetta, B. (2019, March 30). Un migliaio di italiani spiati per errore da hacker di Stato grazie ad app per Android. *Il Sole 24 Ore*. Retrieved from [https://www.ilsole24ore.com/art/un-migliaio-italiani-spiati-errore-hacker-stato-grazie-ad-app-android-AB3ObWjB?refresh\\_ce=1](https://www.ilsole24ore.com/art/un-migliaio-italiani-spiati-errore-hacker-stato-grazie-ad-app-android-AB3ObWjB?refresh_ce=1)
56. Spangher, G. (2016). Trojan: Urge la legge. In R. Romanelli (Ed.), *Trojan horse: Tecnologia, indagini e garanzie di libertà* (p. 188). Retrieved from <https://docplayer.it/28340840-Trojan-horse-tecnologia-indagini-e-garanzie-di-liberta.html>
57. Stefano, P. (2016). Grande fratello sì, intercettazioni con lo smartphone ma solo per la criminalità organizzata. *Il Foro Italiano*, 141(9), 513-518.
58. Suraci, L. (2018). D. M. 20 aprile 2018: Il c.d. “archivio riservato delle intercettazioni”. *Diritto Penale e Processo*, 10, 1258-1262.
59. Testaguzza, A. (2014). I sistemi di controllo remoto: Fra normativa e prassi. *Diritto Penale e Processo*, 20(6), 759-766.
60. Torre, M. (2015). Il virus di Stato nel diritto vivente tra esigenze investigative e tutela dei diritti fondamentali. *Diritto Penale e Processo*, 21(9), 1163-1172.
61. Torre, M. (2017). *Il captatore informatico. Nuove tecnologie investigative e rispetto delle regole processuali*. Milan, Italy: Giuffrè.
62. Torre, M. (2019a). D.M. 20 aprile 2018: Le disposizioni di attuazione per le intercettazione mediante inserimento di captatore informatico. *Diritto Penale e Processo*, 10(10), 1254-1258.
63. Torre, M. (2019b). Il captatore informatico dopo la legge c.d. “spazza-corrotti”. *Diritto Penale e Processo*, 5(5), 648-652.
64. Trogu, M. (2014). Sorveglianza e “perquisizioni” online su material informatico. In A. Scalfati (Ed.), *Le indagini atipiche*. Turin, Italy: Giappichelli.
65. Turco, E. (2017). La ricerca della prova ad alta efficacia intrusiva: Il captatore elettronico. In A. Scalfati (Ed.), *La riforma della giustizia penale* (pp. 307-324). Turin, Italy: Giappichelli.
66. Zonaro, M. (2016). Il Trojan – Aspetti tecnici e operativi per l'utilizzo di un innovativo strumento d'intercettazione. *Parola Alla Difesa*.

# CIVIL LIABILITY AND DEFENSIVE MEDICINE

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## 1. Introduction

Civil liability may be considered, under a functional point of view, as a technique of indirect market regulation, since the risk to incur in liability for damages provides an incentive to invest in safety. The idea is that any raise of the stick of civil liability for a given activity would determine a corresponding increase of efforts, by firms operating in the relevant market, aimed at reducing the risk or compensation until the point where, roughly speaking, any further investment in safety would cost more than the risk to pay redress to damaged clients and users.

The above technique of indirect market regulation may work only insofar as the risk to compensate damages is allocated onto the same subject called to invest further resources in safety. Therefore, such a *paradigm*<sup>1</sup> of civil liability invariably requires identification of a “culpable” person liable for redress, which is likely to be the *producer* of a given product of the *provider* of a given service<sup>2</sup>.

This approach based on fault and deterrence works in several cases (e.g., damages for defective products), but is inappropriate in others, such as health-care, where increases in liability may drive, and actually drove, to “defensive medicine” strategies, i.e., practices, not in the interest of patients, aimed at protecting doctors against potential plaintiffs (U.S. Congress, Office of Technology Assessment, 1994) which showed harmful also for patients themselves. Strategies that are driving health-care systems toward what was called the “medicine of jurisprudential obedience” (Fiori, 2007; Cassell, 2005).

A rich and valuable literature shows, in fact, that, in some sectors such as health-care, the current paradigm of civil liability may turn unreliable and not capable of producing the expected regulatory results, since increases of civil liability beyond certain limits do not procure any further gain in safety and, to the contrary and paradoxically, conduce to a reduction of market efficiency and overall safety of patients. At the end of the day, unlimited increases in medical civil liability damage all market actors, including patients, who were supposed to receive benefit by the increase of liability itself.

It seems, therefore, necessary to unwind the increase of civil liability against doctors and hospitals in order to guarantee that health-care systems may develop in an efficient and safe way, especially because the negative consequences brought by defensive medicine are particularly harsh, both in term of costs for national communities and increase of other negative externalities.

It is important to note that defensive medicine cannot be resolved, in health-care, by a trend reversal, simply by reducing civil liability and corresponding patients’ rights to redress in case of damages. On the patients’ side, claims to redress for health damages are recognised, in most jurisdictions, as deriving from constitutional rights to health. The “solidarity” approach inspiring current civil liability would not allow preventing damaged patients from being recognised a redress which, therefore, is rather difficult to be repealed.

This complex situation does not allow simple solutions but requires a well-designed action to allow public health-care to remain in place the way we know it. We claim that the problem of defensive medicine could be much reduced by introducing a “no-fault” compensation systems for

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<sup>1</sup> A *paradigm* is the conceptual tool defining methods, problems and solving problems accepted by a given community (Kuhn, 1962). Paradigms influence interpretation in two ways. First of all, they allow one to detect objects and relationships that *each paradigm* allows to detect, but they prevent detection of objects and relationships incompatible or “hidden” to it. According to Kuhn (1962, p.44) paradigms, in other words, provide schemes into which is it possible to “order” the world, so that without such schemes there would be only a “*great blooming, buzzing confusion*”. Secondly, and consequently, the paradigm accepted in a given moment represents the conceptual tool under which one defines problems which are considered solvable and the relevant solution methods (Kuhn, 1962), where reference is made to “normative” functions of paradigms.

<sup>2</sup> See below, subsections 2 and 3.

damages produced by medical treatments if such treatment respected scientifically validated standards of action (i.e., guidelines and similar), insofar as Evidence-Based Medicine shows that respect of standards is capable of producing an increased level of safety when compared to any other model (Guyatt, 1991; Evidence-Based Medicine Working Group, 1992; Sackett, Rosenberg, Gray, Haynes, & Richardson, 1996). Provided, as better clarified below (see subsection 4), that this should not prevent doctors from disapplying guidelines and standards when this appears appropriate in the single case.

## 2. The “traditional” paradigm of civil liability and its evolution toward a “solidarity” approach

The current paradigm of civil liability laws is based on the assumption that civil liability plays and should play an important role in deterrence. It is thought that any increase of liability on producers and suppliers of goods and services will increase investments in safety (because, in this view, higher investment in safety would be aimed at preventing incurring in liability), so that the tougher civil liability rules on producers and other professionals, the higher the overall level of safety within the system (Calabresi, 1970; Cooter & Ulen, 2008; Viscusi & Hersh, 2013).

As noted above, such a technique of indirect market regulation may work only insofar as the risk to compensate damages is allocated onto the same subject called to invest further resources in safety. Therefore, the current *paradigm* of civil liability is coupled with another assumption, under which the right of patients damaged from medical treatments to receive compensation (and, more in general, any right of redress under civil liability law) requires an “offender”, so to say, a person found culpable for given damage and therefore liable of redressing it.

In fact, the idea that civil liability requires somebody’s “fault” is deeply rooted in legal thinking: it emerged in Justinian law and was further consolidated in the *jus commune* and canon law (Mazeaud & Tunc, 1957), beginning some thousand and five hundred years ago. This idea, inspiring the whole system of civil liability as a paradigmatic principle, was called, in German literature, the “dogma of fault” – *Verschuldensdogma* (Von Jhering, 1867).

Such paradigmatic centrality of “fault” evolved over time but remained in place, when most relevant social, political, and economical changes made legal thinking evolve toward an increasing quest for solidarity in all western legal systems, regardless of their civil-law or common-law basic structure (De Cupis, 1979; Jossierand, 1910; Sperl, 1902; Lunney, Nolan, & Olphant, 2000; Taylor, 2015). Even though with all odds inherent to these different traditions, where English law is traditionally less concerned with solidarity in private law than continental civil law systems.

The quest for solidarity, greatly prompted by the factual consequences and upheavals derived after the industrial revolution, brought legislators to consider unjust that damages following certain (intrinsically risky) activities should be borne by consumers and other end-users of goods and services unless a “fault” of producers or other professionals could be proven in court.

Such evolution brought to a relevant variation in civil liability legislation (within the same paradigm, we believe), which lead to the “asymmetric” discipline of civil liability and the adoption of loss-spreading strategies for civil liability laws (Comporti, 1965; Cooter, 1991). Under such development, which evolved throughout the whole XX century, legislators reallocated the cost of accidents from customers and end-users to producers and other professionals, since the latter was thought to be in a better position to spread the cost of accidents and arrange for appropriate prevention policies.

The above-said need to reallocate the cost of accidents onto producers and other professionals widened the potential of deterrence raised by civil liability law as regards risky activities. More, in particular, the borders of civil liability were extended beyond the cases where the plaintiff could provide evidence of a “fault” by the producer or professional, i.e. to all those cases where producers and professionals could not show that the damage was not attributable to them, cases where there was scientific uncertainty as to the cause of the harmful effects or even where such cause was unknown (Montinaro, 2012; Faure, Visscher, & Weber, 2016). This evolution was pursued through similar techniques in different western legal systems, mainly: the inversion of the burden of proof and the imposition of strict liability on producers and other professionals, the development of

the precautionary principle in many fields of application, etc.

In medical civil liability, such path included sector-specific evolutions, such as the imposition of an obligation of results with respect to many treatments and especially routine ones (in English law through the “*res ipsa loquitur*” doctrine (*Donoghue v. Stevenson*, AC 562, 1932), in Germany through the *Anscheinsbeweis* or *prima facie Beweis* doctrine (Stauch, 2008), etc.). Some jurisdictions even turned an extra-contractual medical liability into a contractual one which favors patients, inter alia, as regards burden of proof following the German doctrine of *Faktischesvertragsverhältnisse* (Haupt, 1943), as it happened in Italy with the theory of “*contatto sociale*” (Cass. of 22 January 1999 n. 589; Castronovo, 1990).

This evolution, even if relevant and somehow innovative, represented a mere incremental advancement of the same traditional paradigm based on fault and deterrence. In fact, the development just summarised was limited, basically, only to reallocate the “cost of accidents” from customers and users to producers and professionals (in our case: from patients to doctors) within the same conceptual and legal framework already in place (including the deterrence function). What changed, in other terms, was balancing of interests, not rethinking techniques for satisfying them, insofar as the concept of “fault” was widened, in some cases toward strict liability, simply in order to widen the potential of deterrence also to cases where the fault could not be positively assessed in court, with the aim of inducing producers and other professionals to increase investments in safety correspondingly (Savatier, 1945; Comporti, 1965).

The same (mere) incremental evolution may be observed in the adoption of loss-spreading techniques as the provision of mandatory insurance for producers and professionals. In fact, also in this case the traditional paradigm based on fault, focusing on the relationship between a damaged patient and a culpable doctor, keeps being held and legislation limits itself to reallocate the financial cost or compensation onto insurance companies.

### 3. Current centrality of the “traditional” paradigm of civil liability based on fault and deterrence

The above-mentioned paradigm may be considered indisputable in legislation, where civil liability is invariably considered also for its potential of deterrence and, therefore, an increase of civil liability is considered as a regulatory technique to foster investments in safety by producers and professionals. Also in law and economics literature, such a paradigm is very rarely contested: it is sometimes disputed if civil liability rules should be imposed in some sectors to enhance safety instead of *ex-ante* regulation and when such rules could be capable of producing appropriate incentives.

However, it is assumed that civil liability plays a role of indirect regulation, insofar as the risk to redress damaged customers and end-users determine an incentive of producers and other professionals to invest in safer products and services<sup>3</sup> (Faure, 2014, 2015; Viscusi, 2012). It is not common, in fact, that steps are made to rethink and redesign the concept of civil liability; most of the times, the latter keeps being considered, as such, invariably designed as a deterrence instrument (even if sometimes not appropriate) having a direct positive impact on safety.

Even sophisticated studies, at the supranational level, have considered, and still consider, civil liability as performing the central function of deterrence along with that of compensation (OECD, 2006). A similar approach seems to be implicit, e.g., within the “*Principles of European Tort Law*” (PETL) drafted by the European Group on Tort Law<sup>4</sup> – it ought to be noted, however, that this approach is somehow unavoidable, since the mentioned principles represent a summary of existing European legislation, where the paradigm based on fault and deterrence is certainly in place.

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<sup>3</sup> This consensus on the said traditional paradigm is supported even when civil liability rules are approached critically. As an example, sometimes one finds authors reconsidering critically the efficiency of civil liability rules in preventing safety risks. In pursuing such strategy, however, they suggest preference for *ex ante* regulation with reference to some markets. Occasionally it is highlighted, in literature, that incentives produced on safety by civil liability rules may be not appropriate in some markets. However, also in this case critics tend to focus on the context where such rules are applied and not on the rules (and their design) themselves.

<sup>4</sup> See <http://www.egtl.org/PETLEnglish.html>

#### 4. The “breach” of the “traditional” paradigm

Now it is recognised that the paradigm based on “fault” and deterrence showed reliable and appropriate in several instances, e.g. with reference to general consumer legislation enacted, among many others, through Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products<sup>5</sup>.

Such a paradigm, however, showed inappropriate in other cases, as health-care (as well as other sectors). A rich and valuable literature shows, in fact, that the increase of asymmetric protection of patients through increases of medical civil liability beyond a certain limit does not produce further increments in safety (OECD, 2006) but, instead, determines the adoption of “defensive” strategies (the so-called “defensive medicine”) and imposes very relevant negative externalities, such as:

- increase in costs of the national health system (Mello, Chandra, Gawande, & Studdert, 2010);
- over-prescription of exams, treatments, and medicines, determining which also determine an increase of iatrogenic risks and damages;
- inefficiencies and loss of quality of the health-care system;
- abandonment of the sector by insurers and an overall increase of insurance premiums;
- abandonment of risky specialties by doctors, hospitals and universities;
- refusal to provide treatment in, particularly, serious cases.

What is most relevant is that, in some sectors such as health-care, beyond certain limits, the current paradigm of civil liability based on fault and deterrence turns completely unreliable, since further increases of civil liability do not procure any gain in safety and, to the contrary and paradoxically, conduce to a reduction of market efficiency and patients’ overall safety.

Moreover, such a paradigm, as it is currently understood and applied in most western jurisdictions, create perverse effects capable of preventing, or at least hindering, the development of well-grounded risk management systems. In fact, on the one hand, several current civil liability legislation, inspired by the said traditional paradigm, provide doctors a disincentive to share information on risks, harmful events and latent errors and failures, which are required to define evidence-based safety standards and, therefore, develop reliable guidelines (Reason, 1990a; Bayley, 2019), since this may amount, in law, to incur in civil liability. As an example, research carried out in 2006–2007 on around a thousand doctors in 18 Italian hospitals showed a shocking result: the great majority of doctors considered Reporting and Learning Systems much useful for their profession but less than half contributed to it providing relevant information fearing legal consequences (Albolino, Tartaglia, Bellandi, Amicosante, Bianchini, & Biggeri, 2010).

On the other hand, notwithstanding Evidence-Based Medicine (EBM) allows, nowadays, the development of most accurate and reliable guidelines, current civil liability rules provide doctors a disincentive to apply them, since their respect may not be sufficient to relieve them from civil liability<sup>6</sup>.

The current situation, therefore, requires a prompt (r)evolution of the civil liability paradigm, since past increases of liability on doctors and hospitals in the recent past did not enhance safety and, instead, imposed severe negative externalities on the whole health care system (OECD, 2006).

We claim that the above reported negative externalities could be drastically reduced, without losing the safety and efficiency of the health-care system, if doctors and hospitals could be relieved from civil liability for damages in cases when scientifically validated standardised actions (guidelines, etc.) are complied with. This claim is made on the assumption (and its relevance is limited insofar as this assumption is confirmed, which is to be verified when drafting guidelines) that following standard actions inspired by Evidence-Based Medicine make overall accidents and damages lower than those experienced in a system where standards are not defined or complied with (Haynes et al., 2009; Shekelle et al., 2013). In other words: even if respect of standards could determine unwanted damages on patients in some cases, adherence to scientifically validated standards should be promoted in all cases where such adherence appears, at a systemic level, a safer strategy than any other.

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<sup>5</sup> On this issue it is possible to read, among others, the five reports on the application of Directive 85/374/EEC concerning liability for defective products (1995, 2000, 2006, 2011 and 2018).

<sup>6</sup> The problem seems rather well-spread in different jurisdictions regardless of their belonging to either civil law or common law systems.



Of course, this should not prevent doctors from disapplying guidelines and standards when this appears appropriate in the single case, in order to allow them application of their professional knowledge to specific instances where guidelines could be not suitable (professional knowledge that is depreciated by defensive medicine in the first place. In fact, practitioners understand and experience defensive medicine “as unnecessary and meaningless medical actions, carried out mainly because of external demands that run counter to the GP’s professionalism” (Hvidt, Lykkegaard, Pedersen, Pedersen, Munck, & Andersen, 2017). Possibility to disapply the standard, however, would not contradict the nature of “safe harbor” of adherence thereto.

## 5. The need for a new paradigm of (medical) civil liability law

As far as its scopes are concerned, the law binds economic and social activities in order to contribute to the pursue of welfare. As regards the way such a goal is aimed at, however, the law cannot define arbitrarily its goals and (especially) means. It needs to take into the highest consideration the functioning of economic and social contexts addressed, in order to develop well-grounded, affordable, reliable, and effective rules (De Jong, Faure, Giesen, & Mascini, 2018).

As noted above, the failure of the current paradigm of medical civil liability legislation based on fault and deterrence may be observed and empirically proved. This conclusion is indisputable when one notes that the recent increases in civil liability made it worst the position of both doctors and patients and, moreover, imposed much relevant negative externalities on whole health-care systems. It follows that it requires a radical modification.

Such modification, however, is particularly important in these days not only because of the incentives provided to practice “defensive medicine”. What is more relevant is that the traditional paradigm of medical civil liability is very likely to prevent the development of markets toward intensive use of artificial intelligence and robotisation, which are likely to play an increasingly more relevant role in health care, especially through machine learning and deep learning technologies (Sigmoidal, 2020; Hernandez, 2014; PWC, 2017).

In fact, the current paradigm allows redress to damaged patients pursuant to the rules that need to identify a “fault” by somebody, which means that, in case of damaged produced by a robot, judges and lawyers would seek to impose civil liability either on its producer or on the author of the computer program that makes it work – the only “somebody” available to be imposed liability on<sup>7</sup>. This does not consider that systems of artificial intelligence evolve over time (and will do it much more in the next future) on the basis of the information and feedback gathered and processed by thousands of different shared sources so-called “machine learning” and “deep learning” (Amidei, 2017; Guerra, 2018). In fact, the possibility that robots and programs “behave” far independently from instructions initially provided by programmers and constructors led the European Parliament (2015) to propose “creating a specific legal status for robots, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons with specific rights and obligations”. We believe that such proposal is undesirable, since robots cannot and should not be considered as “persons” under current civil law; however, it clearly shows the need to shift away “obligations” from producers and programmers when robots are capable of acting rather autonomously from their original design. This process clearly shows that the relationship of cause and effect, as regards causation of damages, may be not linear as we are used to believe and that adoption of a “no-fault” approach to redress damaged patients could show more efficient than the current system<sup>8</sup> (Kizer & Blum, 2005).

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<sup>7</sup> Application of the traditional paradigm of civil liability, in fact, would not foster safety even with respect to technological issues; instead, it would expose producers and programmers to unforeseeable, unreasonable and potentially unlimited claims for civil liability without any “fault” of theirs being in place. This would disincentive them from entering into the market or developing it, thus hindering technological evolution.

<sup>8</sup> Also in this case it appears that the problems and disincentives evidenced above are somehow connected to the issue of standardisation and standardised action. We claim that the above-noted problems and disincentives would be drastically reduced if producers and programmers could be relieved from civil liability for damages in all cases when the robot (both in its physical components and in its artificial intelligence aspects) complied with production and programming scientifically validated standards: the issue of technical safety standards with specific respect to robot is dealt with, among others, in Guerra (2018), Virk (2013). Of course, also in this case respect of standards could determine unwanted damages on patients. However, my claim is made on the same assumption (to be further verified in all relevant cases) that in several cases adoption of artificial intelligence and robots determines a relevant increase in safety within health-care systems and reduce the overall number and

It is indisputable that investments in research on new technologies should be fostered and supported (or, at least, not discouraged): new technologies determine a sensible increase in safety within health-care systems and reduce the overall number and relevance of damages and deaths, as available data already show with respect to the current situation (Kizer & Blum, 2005).

This is certainly one of the reasons why we believe that modern technology, sometimes, requires new specific legislation instead of mere adjusting of existing legislation; a “law of the horse”, as it was said (Easterbrook, 1996; Lessing, 1999; Calo, 2015; Stradella, 2013). Without appropriate legislation, in fact, rules developed centuries ago in much different contexts could provide perverse incentives and produce undesirable negative externalities.

What is most important to note, here, is that all negative externalities noted above cannot be resolved, in health-care, by a trend reversal, simply by reducing civil liability and corresponding patients’ rights to redress in case of damages. In fact, on the patients’ side, claims to redress for health damages are commonly recognised, in most jurisdictions, as deriving from acknowledged constitutional rights to health (the Constitution of the World Health Organization, 1946; UDHR, 1948; United Nations, 1967). The “solidarity” approach which now pervades juridical systems, recalled above, would not allow preventing damaged patients from being recognised a redress which, therefore, is rather difficult to be repealed.

It is surprising that in other branches of research such problems were deeply studied and scholars reached the conclusion that risky activities incorporate a certain percentage of risk depending not on the person performing them but on the activities themselves (Reason, 1990b). Errors happen and will happen regardless of how civil liability is severe so there is no point in increasing it beyond the limit where all actors in the relevant market are disadvantaged.

## 6. A new paradigm of (medical) civil liability law

We claim that a new legal approach should be developed in medical civil liability law, aimed at maintaining redress for damages on the patients’ side (micro-systemic level) but shifting away from doctors and hospitals (when the scientifically validated standard of action are complied with) the obligation to pay for such redress. We claim that this evolution would reduce incentives to practice defensive medicine, reduce disincentives to invest in medical technology, and decrease all inefficiencies and negative externalities deriving therefrom (macro-systemic level) (OECD, 2006).

In other words, the law of redress for medical damages should evolve from an issue of civil liability into one of financial management of losses, which would take into a much higher account the “systemic” need for the appropriate functioning of complex institutions and markets (as modern health-care systems).

In fact, what could appear to favor single patients in the short-run (e.g. sentencing a doctor to compensate certain damage suffered by the patient following a very complex surgical intervention, regardless of a concrete “fault” being ascertained in court) may eventually damage all future patients if it prevents the whole health-care system from functioning appropriately and developing into a more technological, evidence-based and safer system (because of the incentives and disincentives brought about by the sentencing itself; in the example: doctors would refuse complex surgical interventions).

The possibility of balancing the two apparently conflicting goals noted above is not unknown to some legal systems. “No-fault” legislation on redress following medical damages may be found in some jurisdictions like New Zealand, Finland, Denmark, and Sweden (OECD, 2006).

It is no clear, however, whether such pieces of legislation are simply capable of being “transplanted” into different legal systems and of reducing (if not resolving) the problem of defensive medicine, insofar as they:

- are not targeted to the problem of standardisation and are mainly conditioned to the damaged patient waiving civil litigation, instead. Therefore, they have a narrower scope with respect to the issue of enhancing standardisation in view of a safer system. We propose, instead, that redress of (statistically) “inevitable” damages coming from compliance to scientifically validated standards, within sectors characterised by high risk and high scientific and/or technological content, should not

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relevance of damages and deaths when compared to health-care based only on human action. So the provision of incentives to technological innovation, provided that it respects scientifically validated standards, appears a safer strategy than any other.

be imposed on persons performing the relevant activities or supplying products onto the market as long as given criteria, to be developed within an agreed framework, are complied with (e.g. treatment was appropriate, guidelines complied with scientific validation principles and were applied appropriately, etc.). Said in other words, we believe that, in health-care, legal systems should bear the risk that application of scientifically validated standards could determine harmful consequences in individual cases insofar as, under a systemic point of view, such application allows a significant reduction of the overall risks and damages<sup>9</sup> (World Health Organization, 2009; Looker & Kelly, 2011);

- are rather different and targeted to the different jurisdictions adopting them, so that it appears difficult to transplant similar solutions, as they are, into different legal systems. We believe that there is much room for future research in order to define a somehow “general theory” of no-fault compensation schemes implementable, even though different technical means, in different jurisdictions;

- may not reduce, in themselves, excessive litigation (and, therefore, “defensive medicine”): as it was noted, the rather positive outcome experienced in New Zealand seems to depend on “the absence of a culture of suing in New Zealand” which pre-existed in the country (Wallis, 2017), which makes it unreliable that introduction of similar legislation could lead to similar results in the jurisdiction where civil litigation is much higher and showed an increase in the last decades (OECD, 2006). It is necessary, therefore, to take into account cultural differences between countries and assess how much they may influence the outcome of the proposed reform, if the case developing corrective measures in order to reach the goals aimed at;

- are currently showing deficiencies as regards incentives to safety, in absence of the deterrence (though to be) brought about by civil liability. In fact, pure “no-fault” models raise concerns as to their appropriateness to limit the risk of moral hazard, exactly as it happens in New Zealand (Howell, Kavanagh, & Marriott, 2002). In this sense, we claim that “no-fault” schemes should not apply out of the scope briefly recalled here (i.e., compliance with scientifically validated standards), otherwise, the system would lose the deterrence that civil liability may still produce (e.g., providing application of “fault” rules in case of gross negligence). Moreover, “no-fault” schemes should be combined with “fault” rules in order to take advantage of the benefits brought by each of them, narrowing their flaws by their reciprocal interplay. In any case, where “no-fault” schemes apply, they should be matched with a set of rules capable of providing incentives to safety. We believe that such a set of rules should be uncoupled from deterrence on individuals (e.g., deterrence induced by civil liability should not be replaced with deterrence induced by disciplinary sanctions, as it happened in New Zealand) and should rather be inspired by organizational and procedural criteria, thus shifting paradigmatic centrality from individuals to systemic risk management;

- are designed, interpreted, and applied as “exceptions” to “common” civil liability systems, which are considered applicable by default. On the other hand, we believe that no-fault redress schemes should raise, in relevant sectors and with reference to relevant cases, to the role of an independent and alternative system of redress on an equal footing to “fault” civil liability – a sort of “double track” legislation on redress for damages.

Of course, the adoption of a “no-fault” redress system for medical injuries, targeted on the need to foster standardization of medical treatments, would require the definition of many different variables – which may only be briefly referred to here. First of all, it would be needed to define certain standards as “scientifically validated” and an appropriate validation system. Definition of a third, independent, party in charge with redress to damaged patients in the application of a “no-fault” scheme, of its functioning and its funding, would also be needed. It will also be needed definition of standardized amounts of compensation under a “no-fault” scheme. On all these issues it seems possible to take inspiration, at least in part, from jurisdictions such as Sweden and New Zealand (Antoci, Maccioni, & Russu, 2016; Weiler, 1993; Towse & Danzon, 1999; OECD, 2006).

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<sup>9</sup> Even if this idea is somehow disruptive and would influence the way this issue is understood, also under an ethical point of view, its feasibility may be found in some small and limited pieces of legislation (without any capability of extensive application by way of interpretation) which provide similar mechanisms of compensation in standardised medical activities bearing some statistical risks but much more beneficial effects: it is the case, e.g., of no-fault compensation following adverse effects attributed to vaccination, where adverse effects are very rare in comparison with the more than 2.5 million deaths prevented only in 2008 by vaccination.

## References

1. Albolino, S., Tartaglia, R., Bellandi, T., Amicosante, A. M. V., Bianchini, E., & Biggeri, A. (2010). Patient safety and incident reporting: survey of Italian healthcare workers. *BMJ Quality & Safety*, 19(3), 8-12. <https://doi.org/10.1136/qshc.2009.036376>
2. Amidei, A. (2017). Robotica intelligente e responsabilità: Profili e prospettive evolutive del quadro normativo europeo. In U. Ruffolo (Ed.), *Intelligenza artificiale e responsabilità*. Milano, Italia: Giuffrè.
3. Antoci, A., Maccioni, A. F., & Russu, P. (2016). The ecology of defensive medicine and malpractice litigation. *PLoS ONE*, 11(3), e0150523. <https://doi.org/10.1371/journal.pone.0150523>
4. Bayley, C. (2019). What medical errors can tell us about management mistakes. In P. B. Hofmann, & F. Perry (Eds.), *Management mistakes in healthcare: Identification, correction and prevention* (pp. 74-83). <https://doi.org/10.1017/CBO9780511545528.006>
5. Calabresi, G. (1970). *The cost of accidents: A legal and economic analysis*. New Haven, Yale University Press.
6. Calo, R. (2015). Robotics and the lessons of cyberlaw. *California Law Review*, 103, 513-563. Retrieved from <https://digitalcommons.law.uw.edu/faculty-articles/23/>
7. Cass. of 22 January 1999 n. 589. Retrieved from <https://www.camera.it/temiap/2014/10/15/OCD177-550.pdf>
8. Cassell, E. J. (2005). Consent or obedience? Power and authority in medicine. *New England Journal of Medicine*, 352, 328-330. <https://doi.org/10.1056/NEJMp048188>
9. Castronovo, C. (1990). Obblighi di protezione. In *Enciclopedia Giuridica*. Treccani, Roma, ad vocem.
10. Comporti, M. (1965). *Esposizione al pericolo e responsabilità civile*. Napoli, Italia: Edizioni Scientifiche Italiane.
11. Constitution of the World Health Organization. (1946). Retrieved from [https://treaties.un.org/doc/Treaties/1948/04/19480407%2010-51%20PM/Ch\\_IX\\_01p.pdf](https://treaties.un.org/doc/Treaties/1948/04/19480407%2010-51%20PM/Ch_IX_01p.pdf)
12. Cooter, R. D. (1991). Economic theories of legal liability. *Journal of Economic Perspectives*, 5(3), 11-30. <https://doi.org/10.1257/jep.5.3.11>
13. Cooter, R., & Ulen, T. (2008). *Law and economics* (5th ed.). Boston, MA: Addison Wesley.
14. De Cupis, A. (1979). *Il danno: Teoria generale della responsabilità civile*. Milano, Italia: Giuffrè.
15. De Jong, E. R., Faure, M. G., Giesen, I., & Mascini, P. (2018). Judge-made risk regulation and tort law: An introduction. *European Journal of Risk Regulation and Tort Law*, 9(1), 6-13. <https://doi.org/10.1017/err.2017.74>
16. Directive 85/374/EEC of 25 July 1985 on liability for defective products. Retrieved from [https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/liability-defective-products\\_en](https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/liability-defective-products_en)
17. Donoghue vs Stevenson, AC 562 (1932). Retrieved from <https://legalheritage.sclqld.org.au/donoghue-v-stevenson-1932-ac-562>
18. Easterbrook, F. H. (1996). Cyberspace and the law of the horse. *The University of Chicago Legal Forum*, 207-216. Retrieved from [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2147&context=journal\\_articles](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2147&context=journal_articles)
19. European Parliament. (2015). *Draft report with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL))*. Retrieved from [https://www.europarl.europa.eu/doceo/document/JURI-PR-582443\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/JURI-PR-582443_EN.pdf)
20. Evidence-Based Medicine Working Group. (1992). Evidence-based medicine: A new approach to teaching the practice of medicine. *JAMA*, 268(17), 2420-2425. <https://doi.org/10.1001/jama.1992.03490170092032>
21. Faure, M. G. (2014). The complementary roles of liability, regulation and insurance in safety management: Theory and practice. *Journal of Risk Research*, 17(6), 689-707. <https://doi.org/10.1080/13669877.2014.889199>
22. Faure, M. G. (2015). Private liability and critical infrastructure. *European Journal of Risk Regulation*, 6(2), 229-243. <https://doi.org/10.1017/S1867299X00004530>
23. Faure, M. G., Visscher, L.T., & Weber, F. (2016). Liability for unknown risk – A law and economics perspective. *Journal of European Tort Law*, 7(2), 198-228. <https://doi.org/10.1515/jetl-2016-0010>
24. Fiori, A. (2007). La medicina delle evidenze e delle scelte sta declinando verso la Medicina dell'obbedienza giurisprudenziale? *Riv. it. med. leg.*, 4-5, 925-931.
25. Guerra, G. (2018). *La sicurezza degli artefatti robotici in prospettiva comparatistica*. Bologna, Italia: Il Mulino.
26. Guyatt, G. H. (1991). Evidence-based medicine. *ACP Journal Club*, 114(2), A-16. <https://doi.org/10.7326/ACPJC-1991-114-2-A16>
27. Haupt, G. (1943). Über faktische Vertragverhältnisse. In *Leipziger Rechtswissenschaftliche Studien* (Volume 124). Leipzig, Deutschland: Weicher.
28. Haynes, A. B., Weiser, T. G., Berry, W. R., Lipsitz, S. R., Breizat, A.-H. S., Dellinger, E. P., ... Safe Surgery Saves Lives Study Group (2009). A surgical safety checklist to reduce morbidity and mortality in a global population. *New England Journal of Medicine*, 360(5), 491-499. <https://doi.org/10.1056/nejmsa0810119>

29. Hernandez, D. (2014, June 2). Artificial intelligence is now telling doctors how to treat you. *WIRED*. Retrieved from <https://www.wired.com/2014/06/ai-healthcare/>
30. Hondius, E. (2010). *The development of medical liability* (Volume 3). Cambridge, Cambridge University Press.
31. Howell, B., Kavanagh, J., & Marriott, L. (2002). No-fault public liability insurance: evidence from New Zealand. *Agenda*, 9(2), 125-149. <https://doi.org/10.22459/AG.09.02.2002.04>
32. Hvidt, E. A., Lykkegaard, J., Pedersen, L. B., Pedersen, K. M., Munck, A., & Andersen, M. K. (2017). How is defensive medicine understood and experienced in a primary care setting? A qualitative focus group study among Danish general practitioners. *BMJ Open*, 7(12). <https://doi.org/10.1136/bmjopen-2017-019851>
33. Jossierand, L. (1910). Les transports. In E. Thaller (Ed.), *Traité général théorique et pratique de droit commercial* (Volume 18). Paris, France:
34. Kizer, K. W., & Blum, L.N. (2005). Safe practices for better health care. In K. Henriksen, J. B. Battles, E. S. Marks, et al. (Eds.), *Advances in patient safety: From Research to Implementation* (Volume 4: Programs, tools, and products). Retrieved from <https://www.ncbi.nlm.nih.gov/books/NBK20613/>
35. Kuhn, T. (1962). *The structure of scientific revolutions*. Chicago, IL: The University of Chicago Press.
36. LeCraw, L. L. (2007). Use of clinical practice guidelines in medical malpractice litigation. *Journal Oncology Practice*, 3(5), <https://doi.org/10.1200/JOP.0752501>
37. Lessig, L. (1999). The law of the horse: What cyberlaw might teach. *Harvard Law Review*, 113(2), 501-549. <https://doi.org/10.2307/1342331>
38. Looker, C., & Kelly, H. (2011). No-fault compensation following adverse events attributed to vaccination: A review of international programmes. *Bulletin of the World Health Organization*. Retrieved from [www.who.int/bulletin/10-081901.pdf](http://www.who.int/bulletin/10-081901.pdf)
39. Lunney, M., Nolan, D., & Oliphant, K. (2000). *Tort law text and materials*. Oxford: Oxford University Press.
40. Mazeaud, H., & Tunc, L. (1957). *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* (5th ed.). Paris, France: Montchrestien.
41. Mello, M. M., Chandra, A., Gawande, A. A., & Studdert, D. M. (2010). National costs of the medical liability system. *Health Affairs*, 29(9). <https://doi.org/10.1377/hlthaff.2009.0807>
42. Montinaro, R. (2012). *Dubbio scientifico e responsabilità civile*. Milano, Italia: Giuffrè
43. OECD. (2006). Medical malpractice: Prevention, insurance and coverage options. *Policy Issues in Insurance*, 11. <https://doi.org/10.1787/9789264029057-en>
44. PWC. (2017). *What doctor? Why AI and robotics will define new health*. Retrieved from <https://www.pwc.com/gx/en/industries/healthcare/publications/ai-robotics-new-health/ai-robotics-new-health.pdf>
45. Reason, J. (1990a). *Human error*. <https://doi.org/10.1017/CBO9781139062367>
46. Reason, J. (1990b). The contribution of latent human failures to the breakdown of complex systems. *Philosophical Transactions of the Royal Society of London. Series B: Biological sciences*, 327(1241), 475-484. <https://doi.org/10.1098/rstb.1990.0090>
47. Sackett, D. L., Rosenber, W. M. C., Gray, J. A. M., Haynes, R. B., & Richardson, S. (1996). Evidence-based medicine: What it is and what it isn't. *BMJ*, 312, 71. <https://doi.org/10.1136/bmj.312.7023.71>
48. Samanta, A., Samanta, J., & Gunn, M. (2003). Legal considerations of clinical guidelines: Will NICE make a difference? *Journal of Royal Society of Medicine*, 96(3), 133-138. <https://doi.org/10.1177/014107680309600310>
49. Savatier, R. (1945). *Traité de la responsabilité civile en droit française civil, administratif, professionnel, procedural* (2nd ed., Volume, 1). Paris, France: Librairie générale de Droit et de Jurisprudence.
50. Shekelle, P. G., Wachter, R. M., Pronovost, P. J., Schoelles, K., McDonald, K. M., Shojania, K., ... Winters, B. D. (2013). *Making health care safer II: An updated critical analysis of the evidence for patient safety practices* (Evidence Report No. 211). Retrieved from [https://www.researchgate.net/publication/259723370\\_Making\\_Health\\_Care\\_Safer\\_II\\_An\\_Updated\\_Critical\\_Analysis\\_of\\_the\\_Evidence\\_for\\_Patient\\_Safety\\_Practices](https://www.researchgate.net/publication/259723370_Making_Health_Care_Safer_II_An_Updated_Critical_Analysis_of_the_Evidence_for_Patient_Safety_Practices)
51. Sigmoidal. (2020, October 14). *Artificial intelligence and machine learning for healthcare*. Retrieved from <https://sigmoidal.io/artificial-intelligence-and-machine-learning-for-healthcare>
52. Sperl, H. (1902). *Über das Schadenersatzrecht nach dem deutschen bürgerlichen Gesetzbuche*. Wien, Österreichisch: Manz Verlag.
53. Stauch, M. (2008). *The law of medical negligence in England and Germany: A comparative analysis*. Retrieved from <http://ndl.ethernet.edu.et/bitstream/123456789/53150/1/08.pdf>
54. Stradella, E. (2013). Approaches for regulating roboting technologies: Lessons learned and concluding remarks. In E. Palmerin, & E. Stradella (Eds.), *Law and Technology. The challenge of regulating technological development*. Pisa, Italy: Pisa University Press.
55. Taylor, S. (2015). Differing cultures of civil liability. In *Medical accident liability and redress in English and French law*. <https://doi.org/10.1017/CBO9781316212721>
56. Towse, A., & Danzon, P. (1999). Medical negligence and the NHS: An economic analysis. *Health Economics*, 8(2), 93-101. [https://doi.org/10.1002/\(SICI\)1099-1050\(199903\)8:2%3C93::AID-HEC419%3E3.0.CO;2-G](https://doi.org/10.1002/(SICI)1099-1050(199903)8:2%3C93::AID-HEC419%3E3.0.CO;2-G)

57. U.S. Congress, Office of Technology Assessment. (1994). *Defensive medicine and medical malpractice, OTA-H--602*. Retrieved from <https://ota.fas.org/reports/9405.pdf>
58. United Nations. (1967). *The international covenant on economic, social and cultural rights*. Retrieved from [https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch\\_iv\\_03.pdf](https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf)
59. Universal Declaration of Human Rights (UDHR). (1948). Retrieved from [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)
60. Virk, G. S. (2013). The role of standardisation in the regulation of robotic technologies. In E. Palmerini, & E. Stradella (Eds.), *Law and technology. The challenge of regulating technological development* (pp. 311-324). Pisa, Italy: Pisa University Press.
61. Viscusi, R. K. (2012). Does product liability make us safer? *Regulation*, 35(1), 24-31. <https://doi.org/10.2139/ssrn.1770031>
62. Viscusi, W. K., & Hersh, J. (2013). *Assessing the insurance role of tort liability after Calabresi* (Vanderbilt Law and Economics Research Paper No. 12-35). <https://doi.org/10.2139/ssrn.2189090>
63. Von Jhering, R. (1867). *Das Schuldmoment im römischen Privatrecht. Eine Festschrift*. Gießen, Deutschland: Verlag Von Emil Roth.
64. Wallis, K.A. (2017). No-fault, no difference: No-fault compensation for medical injury and healthcare ethics and practice. *British Journal of General Practice*, 67(654), 38-39. <https://doi.org/10.3399/bjgp17X688777>
65. Weiler, P. C. (1993). The case for no-fault medical liability. *Maryland Law Review*, 52(4), 908-950. Retrieved from <https://core.ac.uk/download/pdf/56358225.pdf>
66. World Health Organization. (2009). *State of the world's vaccines and immunization* (3rd ed.). Retrieved from [http://whqlibdoc.who.int/publications/2009/9789241563864\\_eng.pdf](http://whqlibdoc.who.int/publications/2009/9789241563864_eng.pdf)

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# ORGANISATION AND TORTIOUS LIABILITY

*Domenico Palumbo* \*

**Keywords:** Company, Organisation, Liability, Adequacy

## 1. Introduction

Corporate and criminal liability with respect to the implementation of an appropriate organisation model continues to be a quite relevant topic insofar as it poses a series of questions, among which that of establishing whether the concept of adequacy under private law is different as compared to that provided under Legislative Decree No. 231/2001.

Legislative Decree No. 231/2001 undoubtedly introduced a brand new approach by parting the waters in its provisions for the construct of entities' criminal (and corporate) liability to find a home within our legal system.

Such liability is in turn related to the commission of predicate offences on the part of the entity's top managers, on the one hand, and the benefit that the legal person receives out of the commission of said offences, on the other.

In such regard, Legislative Decree No. 231/01 provides for the adoption of organisation models aimed at dictating internal rules to be implemented by the entity, the compliance with which ought to avert any criminal offences. Said models act as justification exempting the entity from criminal liability, insofar as they prove that the entity, as such, has taken all possible precautions to ensure that no criminal offences are committed.

In fact, even before Legislative Decree No. 231/01 took effect, legal literature underscored the need to strike a balance between putting appropriate breaks on management on one hand, and avoiding any wing clipping to the entrepreneurial strategies of joint-stock company directors on the other.

The balance between these two needs is expressed in the introduction to Legislative Decree No. 231/2001 and in Articles 2403-2381 of the Italian Civil Code in terms of corporate law.

As a matter of fact, the two provisions in question refer to the concept of adequacy in the organisation model. The first, Article 2403 of the Italian Civil Code, tasks the board of statutory auditors with supervising the adequacy of the organisation model; Article 2381 of the Italian Civil Code provides for the possibility of appointing directors with delegated powers, in relation to whom it grants the board of directors the power/duty to act having gathered all of the necessary information, and given the information acquired, the onus of considering the adoption of a suitable organisation model, appropriate to the company structure.

Given the above, it is worth assessing whether the concept of adequacy in the organisation (as described by any envisioned organisation model) referred to under Articles 2381 and 2403 of the Italian Civil Code is identical to that provided under Legislative Decree No. 231/01 and, if deemed different, whether the concept in question has been given the credit it deserves.

Where correctly identified, the principle of adequacy in the organisation model, other than constituting an exempting circumstance with regard to the offence in question, may be construed as encouraging economic development in companies and within the industry of reference as a whole.

## 2. The adequacy principle in special legislation

In order to vest the adequacy principle with content that is independent of criminal law, we retraced the sector-specific regulations, in addition to the Civil Code provisions. First and foremost, all provisions protecting the share capital, and thus creditors, may be associated with the construct of adequacy.

The company's external representation implies a baseline principle, that is to say, the share

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capital's integrity, which not only plays an internal organisational role (by virtue of the share capital allotment, the shareholders asset and management rights are regulated) but also external, acting as the creditors' main security.

On the contrary, the sector-specific legislation, especially banking and finance law, included provisions referring to the adequacy of the organisation structure, even before both Legislative Decree No. 231/2001 and Articles 2381 and 2403 of the Italian Civil Code, as amended.

The Italian Consolidated Banking Law shows that the Bank of Italy is tasked with issuing provisions on the adequacy – in terms of assets – of credit institutions and entities subject to supervision. Said principle is also found in the Italian Consolidated Law on Finance, which provides, under Article 149, that in companies listed on the stock market, the board of statutory auditors supervises the adequacy of the organisation structure and that of the instructions given by the parent company to any subsidiaries.

Therefore, it is clear that, without prejudice to the general principle of unity of law, also pursuant to sector-specific legislation, an independent concept of adequacy in the organisational structure exists in private law.

It is thus apparent that, pursuant to banking law, an adequate structure ought to aim at avoiding that entities subject to audit run a series of risks in relation to their assets, so as to avert any insolvency liable to affect not just the entity, but the banking and credit system as a whole.

It follows that, especially in a period of economic crisis, risk management is essential to maintaining the stability of the corporate entity and the market as a whole.

A general concept of organisational structure may thus be inferred, to which a joint-stock company must necessarily aspire, which can be summarised as the combination of a series of variables relating to the organisational structure, systems, operational processes, asset risk management, as well as management style and corporate culture.

### **3. Law No. 231/01 within the scope of civil proceedings and possible developments**

Despite what has been stated so far, regrettably, up to this point, we have seen a rather restrictive application of the concept of adequacy. In other words, it is unclear whether adopting an adequate organisational model simply means adopting a model that avoids the commission of criminal offences or whether directors are liable for not having urged the company to equip itself with an organisational structure more effective and consistent with the business that the company intends to pursue, considering that the adequate organisational structure referred to in Article 2381 of the Italian Civil Code incorporates the principles of Legislative Decree No. 231/2001, but it does not comprehensively include all of them.

Naturally, even wishing to consider the two concepts of adequacy independent of each other, the issue of the judge's powers of assessment arises with regard to the interpretation of Article 2381 of the Italian Civil Code.

It is clear that, where a restrictive view of the law is adopted, the issue does not arise, because if adopting an adequate organisation model only means adopting an organisation model preventing the commission of offences, the civil court cannot convict the director when, despite the fact that the company's intrinsic lack of a suitable organisation has been detected, no offences entailing criminal liability have been committed.

If, however, it is accepted that Article 2381 of the Italian Civil Code incorporates the principles of Legislative Decree No. 231/2001, but it does not comprehensively include all of them and that, therefore, regardless of the commission of the offences, the failure to adopt adequate organisational models in relation to the business activity that the company intends to carry out may be punished, a different issue arises: the boundaries of the judge's assessment, comprising the objectives that the company has set itself, the analysis of the organisation structure it has adopted, including the system of internal controls, as well as the assessment in terms of the suitability of this structure to pursue its set objective without causing damage to third parties and the national economy.

Given all the above, we believe that the first assessment that the judge may make is the one relating to the consistency and adequacy of the share capital.



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The recurring hypothesis of the desired undercapitalisation of the company, to avoid both internal control and the costs of appointing the board of statutory auditors and its remuneration, may be qualified as an inadequate organisation model.

Very often, limited liability companies are voluntarily undercapitalised despite the fact that a significant turnover exists.

#### **4. A comparative approach**

Since Article 2381 of the Italian Civil Code is a regulation intended to operate within the framework of joint-stock companies, the question could be whether the concept of adequacy of the organisation structure indicated therein and also contained in Legislative Decree No. 231/2001 may extend to limited liability companies.

The answer ought to be seemingly affirmative in consideration of the fact that the principle of adequacy, as construed by criminal provisions, civil provisions and sector-specific regulations, appears to be a principle percolating through the entire system, aimed at ensuring that joint-stock companies are endowed with a suitable system of internal controls aimed, first of all, at avoiding the commission of criminal offences and, secondly, at ensuring that the entity is sufficiently capitalised with respect to the obligations undertaking and the business to be carried out.

A paradox could ensue whereby a limited liability company adopts the codes of conduct set out in Legislative Decree No. 231/01 but voluntarily keeps the share capital below the minimum threshold above which the appointment of a board of statutory auditors is required.

On this point, the activity of the directors is essential, as they ought to inform their peers on the board and the company of the inadequacy of the organisational structure, calling a shareholders' meeting to appoint the board of statutory auditors, adjust the organisational structure in relation to the turnover of the company and, therefore, as a result, increase the share capital.

This is the case, for example, within the English legal system, in which a company operating in the financial sector must adopt an organisational model appropriate to the business risk it bears.

This principle is then extended to all commercial companies regardless of the activity they carry out, financial or otherwise.

Furthermore, the organisational model must also include a system for managing reputational risks (understood, briefly, as risks linked to the "unreliability" of the entity), a concept that is quite foreign to our culture and to our joint-stock companies. On the contrary, this concept plays a pivotal role in English law and within common-law principles.

Moreover, in that system, an organisational system suitable to avoid, in addition to reputational risk, internal risks, such as fraud or bankruptcy, must be adopted; external risks, understood as being ductile, such as risks also connected to natural, political or man-made events; and finally, business risks.

At this point, the issue of identifying the directors responsible for managing the organisational risk arises.

It is debated whether it is the executive directors or the non-executive directors, that is, in relation to the Italian system, the board as a whole or the directors with delegated powers alone. Another issue is who may claim said liability.

A single answer may be given to this question by referring the problem to our system as well because the question arises in the same terms.

If, pursuant to Article 2381 of the Italian Civil Code, the function of the board of directors is of a supervisory nature, the directors still retain the power or duty to be informed, from liability of both the board and the directors with delegated powers may be derived for two substantially different types of conduct.

The former, the executive directors, for failing to inform the board of directors of the need to adopt an appropriate organisation model; the latter for having failed to adopt an appropriate organisation model.

Clearly, the managing director shall be liable for having failed to inform the board of directors of the inadequacy of the organisation model.

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## 5. Persons with standing

The question remains as to who is entitled to claim such liability.

I believe that we ought to consider the provisions on corporate liability actions pursuant to Article 2393 of the Italian Civil Code as subsequently amended and supplemented; therefore, the following parties shall be considered to claim such liability: a) the company in itself must be identified as having standing, when in good standing or, in the event of bankruptcy, through the bodies overseeing the bankruptcy proceedings; b) the creditors, who suffer indirect damage as a result of the loss of assets resulting from the failure to manage risk; c) the minority shareholders when they bring a personal liability action against directors.

In addition, unless it is assumed that Article 2381 of the Italian Civil Code only applies when the prerequisites set by Legislative Decree No. 231/2001 are present, it is still arguable whether liability may be claimed by individual shareholders. The question arises not so much because it is not admissible for an individual shareholder to bring a liability action aimed at ascertaining, in the first instance, omissions on the part of the directors with regard to the creation of an appropriate organisation structure, but rather with regard to the actual possibility that an individual shareholder might have suffered direct damage from the breach of the rules on the suitability of the organisation model.

The last question concerns the practical applicability to the limited liability company or rather the identification, within the said company, of the persons entitled to claim liability for failure to urge the adoption of an appropriate organisational model, given that, in the case at hand, application by analogy is involved, with all the ensuing difficulties related to the independent rules concerning limited liability companies currently in force.

The solution is provided by Article 2476 of the Italian Civil Code, which entitles individual shareholders to bring legal action for personal liability against directors, but not in relation to direct damage, but rather the possible damage to the company, which is also entitled to this effect.

Finally, even if it is not stated in a specific provision, in derogation from Article 2476 of the Italian Civil Code, legal action brought by creditors based on Article 2043 of the Italian Civil Code and the application by analogy of Article 2381 of the Italian Civil Code could also be envisioned.

# WELFARE AND INTERCULTURAL EDUCATION: THE ROLE OF THE TEACHING OF CATHOLIC RELIGION

Paolo Palumbo \*

**Keywords:** Religious Education, Intercultural Dialogue, Welfare, Interreligious Dialogue, Laicity

## 1. The teaching of catholic religion (IRC) and the intercultural education

The intercultural approach that could characterize the education system (Ciarini & Giancola, 2016; Ascoli, Ranci, & Scritta, 2016; Malizia, 2008), or, better still, each single school teaching, also characterizes the teaching of Catholic Religion (IRC) in relation to the intrinsic peculiarities of this discipline. The IRC, with its ongoing set of problems, constitutes a continuity element in the Italian public schools (Talamanca, 1975; Cardia, 2011; Butturini, 1987; Dall Torre, 2014; Turchi, 1994; Serra, 2014; Cavan, 2016; Bilotti, Mantineo, & Montesano, 2014; Benigni, 2017; Fiorita, 2012; Licastro, 2017). This very particular cultural-religious discipline has never been removed, despite the succession of several administrations and forms of State (from the liberal one of the XVII century to the totalitarian one, up until the present pluralist democracy State) whilst it could be reasonably affirmed that, from the Unification of Italy to date, it has always characterized the educational project of the national education system (Cavana, 2016). The presence of the religious teaching in the Italian public educational offer has origin in specific religious, historical, and cultural motives, in order to reach more incidental reasons for inclusion. The management of the coexistence of several religious faiths within multicultural societies, like in Italy<sup>1</sup>, introduces, in our set of laws, the need for an IRC methodology that allows to better conjugate the agreed decree with the new requirements of the cultural and religious pluralism within the educational institutions<sup>2</sup>, and this methodology, as we will explain further, appears to be already typical of this discipline. It appears evident, today more than ever, how the IRC issue is one of the most challenging the Government is called to face, between *“l’urgente necessità di rispettare le convinzioni di ciascuno e la consapevolezza che la propria tradizione reca un patrimonio spirituale irrinunciabile; fra l’obiettivo educativo di formare coscienze libere e l’esigenza di porre al di sopra di tutto valori come la dignità della persona e il bene comune”* (De Luca, 2009), which directly affect the rights and the freedom potentially interfering with the juxtaposition between “laics” and “devotees” (Serra, 2014). It is only fitting, therefore, to examine in depth which one is or should be the role of the IRC in the context of the educational and personal development policies that the State is bound to guarantee in the most general view of the intercultural approach to education, and under which the attributability of the educational institution to the social sphere, maintained by the principle of laicity (Palumbo, 2019), an inclusive<sup>3</sup> and intercultural one (Fuccillo, 2019), and by the need to provide a general knowledge of the cultural-religious phenomenon, that assumes leading importance for the life of many people, imposes that the teaching of a single religion is deepened in a correct, critical and non-pre-conceptual way. The IRC does not only have to enter into a dialogue with several ideas of religious, philosophical and anthropological nature, but it must highlight the educational potential implied in the Christian vision; not only does it have to be committed to the field of theoretical research, but it must also be able to detect tangible educational paths for the promotion of a mentality that is able to conjugate the needs

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<sup>1</sup> According to the most recent evaluations, indeed, the number of foreigners residing in Italy as of 1 January 2019, who practice the Christian religion remain amongst the highest (two million and 815 thousand – about 53,6% of the total of the resident foreigners – amongst these are Catholics, orthodox, evangelists and other Christians), followed by the Muslims (one million and 580 thousand). On this topic it is possible to check the statistics of the possible to check the 2019 Immigration Statistics Dossier, edited by the IDOS center for study and research (Cardia, 2020).

<sup>2</sup> The foreign students in Italian schools, according to the data provided by the Ministry of Education, as of 31 August 2018 were 818.421. In the Single Gateway of the School Data (<https://dati.istruzione.it/opendata/>), the data can be consulted and it is possible to download tables and graphs regarding the territorial distribution.

<sup>3</sup> *“In tal senso si è voluto adoperare nel titolo di questa prolusione l’aggettivo ‘inclusiva’ sia dal punto di vista dello Stato che, aderente alla lettura che ne fa la Corte costituzionale, non esprime avversione verso il fatto religioso; sia in quanto indicativo di una laicità aggregante e aperta, una laicità cioè, per intenderci, diversamente intesa rispetto a quella c.d. ‘alla francese’”* (Ferrante, 2017, p. 16).

of individual freedom, of supportive responsibility and the complete truth of the meaning of life. In order to find a place on this line of thought, without forgetting that religion is imposed because it is a source of culture<sup>4</sup>, just where this most representative matrix equals a search for meaning, the IRC is called to enhance its “cultural” and inter dialogical character and to favor those educational experiences that help the student choose, aiming at strengthening its religious identity. The present challenge is, indeed, the clear emergence of the nature of the interculturality of the IRC. The educational proposal of the IRC in its complexity is dialectic: to search for dialogue and, together, help to establish roots in one’s own religious tradition. The achievement of the ability to establish a dialogue is linked to several conditions and entails some prerequisites, such as the need to not absolutize our certainties, to not rise above others, to overcome prejudice and stereotypes related to other cultural-religious faiths. It is the school itself, well established in the territory, and the IRC itself, taught in an intercultural perspective, to require orientation in working in such perspective (Peron, n.d.). Intercultural education, therefore, necessarily involves religion, which is always part, if not the origin of all cultures (Palumbo, 2019). The merging point between religion and culture is existential; it exists in the field of the questions of meaning. Indeed, as the Council Declaration Nostra Aetate affirms, regarding the relations between the Church and the non-Christian religions, “men expect from the various religions answers to the unsolved riddles of the human condition, which today, even as in former times, deeply stir the hearts of men” (Concilio Ecumenico Vaticano II, 1965). Therefore, any actions or interventions that aim at reducing the religious experience to an individual fact or that consider religion as an obstacle to dialogue, or even as a cause for clashes of civilizations are to be considered contradictory (Fuccillo, 2019).

On the basis of the present regulation, the Agreement on the concordatory review of 1984<sup>5</sup> states the commitment of the Republic of Italy to guarantee the IRC, “*riconoscendo il valore della cultura religiosa e tenendo conto che i principi del cattolicesimo fanno parte del patrimonio storico del popolo italiano*”<sup>6</sup>, in any state school of all levels (except universities), save the possibility, for the single students to renounce it, according to a teaching model objectively mandatory and subjectively discretionary. Such decrees, in the combination with articles 7 and 8 of the Constitutional Charter, recognize the students the right to choose whether or not to avail themselves of the teaching of a single religion that is not necessarily the catholic religion (Taranto, 2015). Such teaching must be guaranteed in the framework of the objectives of the school<sup>7</sup>, that is, a cultural, and not a catechetical type of setting.

To date are still in force both the Arrangement with the Catholic Church, as seen with the 1984 Agreement, in which the IRC is regulated as synthetically highlighted earlier, and the Agreements with the Tavola Valdese (1984)<sup>8</sup>, with the Union of the Jewish Communities (1987)<sup>9</sup>, with the Assemblies of God in Italy (1986)<sup>10</sup>, with the Italian Union of the Adventist Churches of the Seventh Day (1986)<sup>11</sup>, with the Evangelist Baptist Christian Union of Italy (1993)<sup>12</sup>, with the Evangelical-Lutheran Church of Italy (2012)<sup>13</sup>, with the Italian Hindu Union (2012)<sup>14</sup>, with the Apostolic Church in Italy (2012)<sup>15</sup>, with the Church of Jesus Christ of Latter-day Saints (2012)<sup>16</sup>, with the Sacred Orthodox Archdiocese of Italy (2012)<sup>17</sup>, with the Italian Soka Gakkai Buddhist Institute (2015)<sup>18</sup> and, however in phase of approval, with the Association of the Church of England (2019)<sup>19</sup>, in which the Republic, with the purpose of guaranteeing that public schools be the center of cultural, social and civil promotion, open to the input of all the components of society, ensures the right of the

<sup>4</sup> It has been affirmed that “[...] ogni cultura assume una religione di riferimento che ne diventa una sorta di presupposto fondante” (Consorti & Valdambri, 2018, p. 18).

<sup>5</sup> Accordo tra la Santa Sede e la Repubblica italiana che apporta modificazioni al Concordato lateranense, 18 febbraio 1984, available in the Internet.

<sup>6</sup> Art. 9, n. 2.

<sup>7</sup> Cf. l. 121/1985, Art. 9, n. 2.

<sup>8</sup> Cf. l. 449/1984, Art. 9.

<sup>9</sup> Cf. l. 101/1989, Art. 11.

<sup>10</sup> Cf. l. 517/1988, Art. 9.

<sup>11</sup> Cf. l. 516/1988, Art. 12.

<sup>12</sup> Cf. l. 116/1995, Art. 9.

<sup>13</sup> Cf. l. 245/2012, Art. 5.

<sup>14</sup> Cf. l. 246/2012, Art. 5.

<sup>15</sup> Cf. l. 128/2012, Art. 9.

<sup>16</sup> Cf. l. 127/2012, Art. 12.

<sup>17</sup> Cf. l. 126/2012, Art. 7.

<sup>18</sup> Cf. l. 130/2016, Art. 6.

<sup>19</sup> Agreement dated 30.07.2019, Art. 4.

represented religious faiths to respond to the request of the students, of their families or of the school bodies, regarding the study of the religious fact and its implications, with cultural activities that are applied in the area of the activities provided for by the education system, and according to modalities agreed with the bodies provided by the same education system (Toniolo, n.d.). In this way, the aim is to expand, in a pluralistic sense, the approach to the religious dimension within public schools, despite the possibility provided by the Agreements with the non-Catholic faiths “[...] *meriterebbe di essere meglio sfruttata dalle famiglie e dalle stesse confessioni di minoranza, che fino ad oggi non hanno invece quasi mai chiesto l'applicazione*” (Cavana, 2016, p. 19). In relation to religious communities lacking agreement, as per the Implementing Regulation of the Law on the admitted Religious Cults<sup>20</sup>, whenever the number of students justifies it and, for any reason, should it not be possible to use the temple, the State may offer some school premises for the religious teaching of the children<sup>21</sup>. It is anyway possible, instead of the religious teaching<sup>22</sup>, that the students avail themselves of alternative activities, that may be deemed to be more respondent to their interests<sup>23</sup> or, also, they may avail themselves of an exemption to attend any sort of activity, without having to submit to any alternative obligations, in observance of the individual autonomy of the students and their freedom of religion (Corte Cost., sent. 203/1989 and sent. 13/1991; Barca, 2010; Feliciani, 1994; Fama, 2004).

The present regulation of the IRC in the Italian Public School dates back to 35 years go, but it already “*riflette una stagione storica in larga parte superata*”(Cavana, 2016, p. 16), both because of the religious pluralism that is typical of a multicultural society, such as the Italian one, as it is described nowadays, and as a result of a recapture of the public scene from the religious factor, recognized more and more, as advanced earlier, as a factor of cultural and social identity “*nella prospettiva della costruzione di una comune cittadinanza basata sul rispetto delle diverse identità sociali e culturali ed anche sulla necessaria condivisione di alcuni fondamentali valori e principi di convivenza*” (Cavana, 2016, p. 17). Such profile has strongly emerged in the provisions and indications subsequent to the season of agreements, in line with the intercultural approach of the educational system.

The pastoral Note of the Italian episcopate on the teaching of Catholic Religion in Italian public schools titled *Insegnare religione cattolica oggi* and dated 19 May 1991<sup>24</sup>, clarifies that the IRC is an educational and cultural service offered to all those who are prepared to consider the great issues of man and culture, to recognize the constructive and insuppressible role that, in these issues, has the religious reality and to discuss the message and the values of the catholic religion expressed in the history of our people<sup>25</sup>. Therefore, the Note specifies the topic of complementarity between religious and cultural dimension, bringing to light the typical elements of the teaching of Catholic Religion that, in its actual implementation, shows how the religious dimension and the cultural dimension that are typical of the human person and the human history, are not alternatives to one another but are intimately linked and accessory to one another<sup>26</sup>, enhancing the role of the Catholic Religion teacher that is typical of his/her educational service. The Catholic Religion teacher, indeed, has to favor the merge between faith and culture, between gospel and history, between the needs of the students and their deepest aspirations. His/her teaching, therefore, demands a continuous ability to verify and harmonize the different and complementary planes: theological, cultural pedagogical, educational.

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<sup>20</sup> Cf. L. 1159/1929.

<sup>21</sup> Cf. R.D. 289/1930, Art. 24.

<sup>22</sup> The last available report, which dates back to the school year 2015/16, shows that 88,5% of the students has chosen to avail themselves of the Catholic Religion lesson. In high schools, the lesson was chosen by 81,6% of the students, whereas in nursery schools the data rises to 91,7%.

<sup>23</sup> The scheduling of the alternative teaching should be inserted within the PTOF provided by Reg. 107/2015, coherently with what provided by the paragraph 14, which defines the Plan as the fundamental document constituting the cultural and planning identity of the school institution, where the curricular, extracurricular, educational and organizational planning that the single schools adopt within their own autonomy is made clear.

<sup>24</sup> The pastoral Note on the teaching of Catholic Religion “*Insegnare religione cattolica oggi*”, available on the web, has been unanimously approved by the XXXIV General Assembly of the C.E.I. (Rome, 6-10 May 1991). Previously, the text had been object of the consideration of the Bishops in a group of study of the XXXIII General Assembly (Collevalenza, 19-22 November 1990), and in the session of the Permanent Council dated 11-14 March 1991.

<sup>25</sup> Cf. n. 7.

<sup>26</sup> Cf. n. 14.

In 1994, the C.E.I.<sup>27</sup>, beseeching the cooperation between Church and State “*per la promozione dell'uomo e il bene del Paese*”<sup>28</sup>, underlined the complementarity of the contents of the IRC and of the objectives of the school, specifying that one principle of reference of the IRC and its teachers is, first and foremost, the respect for the freedom of the student, which translates in help for his personal growth as well as for the maturation of his religious identity and of the awareness of his religious roots finalized to the intercultural dialogue.

With the so-called Moratti<sup>29</sup> reform, the IRC has had to adapt to the process of modernization started within the school, seeking a better agreement between orientation and the educational profiles outlined in the national indications, the general educational objectives (OFG), and the specific learning objectives (OSA/IRC). Therefore, starting from October 2003<sup>30</sup>, the C.E.I. has subscribed, with the Ministry of Public Education, more agreements related to OFG/OSAs for each school level. The orientation of the reform<sup>31</sup> was to enhance the human person, to articulate educational paths according to cyclic progressivity, to establish concepts of identity and difference, to guarantee the cooperation between school and family for the recovery and the safeguard of the historical, human and cultural heritage without neglecting “*il conseguimento della formazione spirituale e morale*”<sup>32</sup>, in this line, the C.E.I. has shared specific OSAs for each cycle of study, founded mostly on the Christian-Catholic morals, on the recognition and the interpretation of the Christian-Catholic signs symbols, without neglecting to recall the need, for the IRC, to educate the young to the dialogue with other churches, other Christian Church communities and with other religions<sup>33</sup>. So, amongst the other achievements for the development of the competencies at the end of secondary school, today it is also expressly stated that: “*L'alunno è aperto alla sincera ricerca della verità e sa interrogarsi sul trascendente e porsi domande di senso, cogliendo l'intreccio tra dimensione religiosa e culturale. A partire dal contesto in cui vive, sa interagire con persone di religione differente, sviluppando un'identità capace di accoglienza, confronto e dialogo*”. So, in the 2012 agreement for secondary schools, it is specified that “*L'IRC, nell'attuale contesto multiculturale, mediante la propria proposta, promuove tra gli studenti la partecipazione ad un dialogo autentico e costruttivo, educando all'esercizio della libertà in una prospettiva di giustizia e di pace*”. So that at the end of the course of studies, the student is in condition to develop a mature critical sense and a personal life project, reflecting on his own identity in relation to the Christian message, open to the exercise of justice and solidarity in a multicultural context as well as to comprehend the role of religion in society and in the perspective of a constructive dialogue founded on the principle of religious freedom, acquiring, amongst others, the ability to dialogue with religious and cultural positions different from his own, in an atmosphere of reciprocal respect, comparison, and enrichment. In addition to these factors are the indications provided by the Pastoral Orientation of the Italian episcopate for the decade 2010-2010 *Educare alla vita buona del Vangelo*<sup>34</sup> which recommend, regarding scholastic education and training, the acquisition of a critical sense and an openness to dialogue, together with higher awareness and attestation of one's own historical, cultural and religious identity, to contribute to the growth of students with strong personalities but prone to acceptance and ability to favor integration processes<sup>35</sup> and, lastly, the reference to the Apostolic Constitution *Veritatis Gaudium* dated

<sup>27</sup> Message of the Presidency of the C.E.I. to the students, the families and the teachers on the teaching of Catholic Religion, 6 June 1994, available on the internet.

<sup>28</sup> L. 25 March 1985, n. 121, Art. 1.

<sup>29</sup> Cf. L. 53/2003.

<sup>30</sup> Agreement between the Ministry of Education and the Italian Episcopal Conference (C.E.I.) regarding the specific learning objectives of the IRC in nursery schools and primary, 23 October 2003, available on the Internet.

<sup>31</sup> Cf. L. n. 53/2003, Art. 1

<sup>32</sup> *Ivi*, Art. 2.

<sup>33</sup> Agreement between the Ministry of Education, of University and Research and the President of the Italian Episcopal Conference: “*Obiettivi specifici di apprendimento per la scuola secondaria di I grado*”, 26 May 2004, available on the internet; Agreement between the Ministry of Education and the Italian Episcopal Conference (C.E.I.) regarding the specific learning objectives for the teaching of Catholic religion for the systems of High Schools, Secondary Schools, and Institutes for Second Education Cycle, 13 October 2005, available on the internet; Agreement between the Ministry of Education, of University and Research and the President of the Italian Episcopal Conference on the educational indications for the teaching of Catholic Religion in nursery and first cycle schools, 1 August 2009, available on the internet; Agreement between the Ministry of Education, of University and Research and the President of the Italian Episcopal Conference on the educational indications for the teaching of Catholic Religion in second education cycle schools and in courses of professional studies and training, 28 June 2012, available on the internet.

<sup>34</sup> The text of the Orientations is available on the Internet.

<sup>35</sup> Cf. n. 46.

January 29, 2018 (Francesco, 2018) which, however, addressed specifically toward the ecclesiastical faculties, offers a valuable framework regarding the source of inspiration and the general objectives of the theological education, to be intended in a more ample sense. Indeed, amongst the criteria of the reform of the ecclesiastical studies, the Law indicates that of all-round dialogue, not intended like a mere tactic attitude, but as an intrinsic need in order to make a community experience out of the joy of Truth and to deepen its meaning and its practical implications, for the creation of an authentic culture of the merging between all the authentic and vital cultures, thanks to the reciprocal exchange of their gifts<sup>36</sup>, to the point of stating that the ecclesiastical faculty must finalize its activity toward: “Then, the students are to be instructed so as to make them ready to teach and to fill other suitable intellectual posts as well as to prepare them to promote Christian culture and to undertake a fruitful dialogue with the people of our time”<sup>37</sup>.

Five years after the 2012 Agreement, the Episcopal Commission of the C.E.I. for the Catholic Education, for the school and the University, on 1 September 2017 (Commissione Episcopale per l’educazione Cattolica, la Scuola e l’università, 2007), has sent a *Lettera agli Insegnanti di Religione cattolica* in which they underline the need to enhance the elements of knowledge, already present in the scholastic indications, of the religions and cultures that are different from the Christian and Catholic one, for the purpose of favoring, starting from the school, the processes of interaction, of dialogue and integration of the high number of immigrants in our Country. The close relationship between IRC and intercultural and interreligious education has been often highlighted even in the messages that the CEI presidency publishes in view of the choice to choose to study the Catholic Religion during the school year<sup>38</sup>. There remains stable the recall of the Encyclic Letter *Caritas in Veritate*, which offers a significant perspective to the intercultural dialogue in the educational framework when it affirms that: “today the possibilities of interaction between cultures have increased significantly, giving rise to new openings for intercultural dialogue: a dialogue that, if it is to be effective, has to set out from a deep-seated knowledge of the specific identity of the various dialogue partners” (Benedict XVI, 2009b). In this vision the diversity ceases to be intended as a problem, to become a resource in a community characterized by pluralism that is an occasion to open the entire system to all differences, if the person is educated to the dialogue. Therefore, Benedict XVI reminds us that, with the teaching of Catholic Religion, “*la scuola e la società si arricchiscono di veri laboratori di cultura e di umanità, nei quali, decifrando l’apporto significativo del cristianesimo, si abilita la persona a scoprire il bene e a crescere nella responsabilità, a ricercare il confronto e a raffinare il senso critico, ad attingere dai doni del passato per meglio comprendere il presente e proiettarsi consapevolmente verso il futuro*” (Benedict XVI, 2009a) but, in order to realize this, the IRC must be “beside” other disciplines not as an accessory, but in a necessary interdisciplinary dialogue.

This setting is reflected in a series of actions implemented on an international level by the Council of Europe which, for the past few years, has organized study meetings dedicated to the religious dimension of the intercultural dialogue<sup>39</sup> with the objective of promoting and enhance the fundamental values of the Council of Europe and to favor reciprocal respect and consciousness, tolerance and understanding within the European society thanks to the valuable consideration contribution of the representatives of the religions traditionally present in Europe, the representatives of the non-religious convictions and other actors of the civil society. In over a decade of meetings, many times the consideration of the Council of Europe has focused on the educational issue (years 2008, 2009, 2012, 2014, and 2016). The first European Conference on the Religious Dimension and Intercultural Dialogue, held on 23 and 24 April 2007, gave origin to the Declaration of San Marino<sup>40</sup> which, still today, represents a reference point for the topics that have been an object of consideration of the Council of Europe over all these years. The Declaration, examining the role of the religious dimension and the intercultural dialogue concludes affirming that religions might elevate or enrich the objectives of the dialogue and make it so that such dialogue develops in the respect of certain essential conditions, that is, the common ambition to protect the dignity of any human being through

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<sup>36</sup> Cf. n. 4.

<sup>37</sup> Art. 81 §2.

<sup>38</sup> Available on the website [www.chiesacattolica.it](http://www.chiesacattolica.it).

<sup>39</sup> The site dedicated to this initiative is [www.coe.int/en/web/cm/exchanges](http://www.coe.int/en/web/cm/exchanges).

<sup>40</sup> The text of the Declaration of San Marino is available on the internet.

the promotion of the human rights, including the equality between women and men, to strengthen social cohesion and to favor the comprehension and the harmony between the several cultures present on the European continent, hoping, in terms that are still valid, that the religious dimension of our cultures will reflect in a proper manner, in particular, in the educational systems but also the public debates and the media. The same Pope Francis, during the Disquisition at the Council of Europe of November 25, 2014, has said that the will of the Council of Europe to invest in the intercultural dialogue, including its religious dimension, through the meetings on the religious dimension of the intercultural dialogue must be accepted with favour (Francesco, 2014).

The harmony and the cooperation between national, supranational and ecclesiastical institutions on the theme of the educational relevance of the intercultural dialogue and the religious dimension of such dialogue are at the basis of the global event promoted by Pope Francis in October 2020 on the topic *“To rebuild the global educational treaty”*<sup>41</sup>: a meeting to revive the commitment for and with the young generations, renewing the passion for more open and inclusive education, able to patiently listen, to constructively dialogue and to mutually understand, resulting in crucial, in the educational setting, the role of the dialogue between religions, since *“è una condizione necessaria per la pace nel mondo, e pertanto è un dovere per i cristiani, come per le altre comunità religiose”* (Francesco, 2013). It is right in the dialogical approach, indeed, that *“impariamo ad accettare gli altri nel loro differente modo di essere, di pensare e di esprimersi. Con questo metodo, potremo assumere insieme il dovere di servire la giustizia e la pace, che dovrà diventare un criterio fondamentale di qualsiasi interscambio. Un dialogo in cui si cerchi la pace sociale e la giustizia è in sé stesso, al di là dell’aspetto meramente pragmatico, un impegno etico che crea nuove condizioni sociali”* (Francesco, 2013).

## 2. Theology of the “intercultural” dialogue

The teaching of Catholic Religion must be provided in conformity with the doctrine of the Church<sup>42</sup>. A good and correct practice for the teaching of Catholic Religion, indeed, finds its main reference in the Christian-Catholic theology, and the service to the doctrine, which implies the believing research of the intelligence of faith, that is, theology, is a need the Church cannot renounce (Congregazione Per La Dottrina Della Fede, 1990). In the recalled Apostolic Constitution *Veritatis Gaudium*, Pope Francis sets as a criterion for a renovation of the theological studies—and of theology – that of dialogue; more recently, in the occasion of the speech held on 21 June 2019 during his visit to Naples he has clarified that *“while “dialogue” is not a magic formula, theology is certainly helped in its renewal when it takes it seriously, when it is encouraged and favored among teachers and students, as well as with other forms of knowledge and with other religions, especially Judaism and Islam. Students of theology should be educated in dialogue with Judaism and Islam to understand the common roots and differences of our religious identities, and thus contribute more effectively to the building of a society that values diversity and fosters respect, brotherhood and peaceful coexistence”*. *Dialogue must be a method of study and theology must also be: “kerygmatic theology, a theology of discernment, of mercy and of welcoming, in dialogue with society, cultures and religions for the construction of the peaceful coexistence of individuals and peoples”* (Francesco, 2019). The theology of dialogue finds fundamental references from the encyclic *Ecclesiam suam* by Paul VI of 1964 (Paolo VI, 1964), considered as a ‘manifesto del dialogo’ (Coda, 2011), and from the council teaching of *Lumen Gentium* (Concilio Ecumenico Vaticano II, 1964), *Gaudium et spes* (Concilio Ecumenico Vaticano II, 1965d), *Ad gentes* (Concilio Ecumenico Vaticano II, 1965c) and *Dignitatis humanae* (Concilio Ecumenico Vaticano II, 1965a). Some evident clarifications have certainly been those expressed both by the International Theological Commission of 1997 (Commissione Teologica Internazionale, 1997), which moves in the direction of an inclusive Christocentrism and by the Congregation for the Doctrine of Faith in 2000 (Congregazione Per La Dottrina Della Fede, 2020) that has confuted some erroneous or ambiguous positions in the thematic approach of the dialogue between religions. An important explanation offered by the most recent teaching is the one regarding the relation between a theology of the dialogue and cultures. In the *Evangelii Gaudium* Pope Francis

<sup>41</sup> The text of the Instrumentum laboris is available on the website dated to the event [www.educationglobalcompact.org](http://www.educationglobalcompact.org).

<sup>42</sup> DPR 751/1985, DPR 202/1990 and DPR 175/ 2012.



sustains that grace supposes culture, and God's gift becomes flesh in the culture of those who receive it (Francesco, n.d.), so that it becomes difficult to think of a Christian faith that is not mediated by the historical, practical, and cultural condition of the human being. Consequently, theology must turn to go back not only to the single culture but to the cultures, in their relations and bindings. Christianity, if we think of the evangelical tales, has indeed had to enter in relation with several cultural elements, affirming itself as a *naturaliter* intercultural religion (Galli, 2015): "We would not do justice to the logic of the incarnation if we thought of Christianity as monocultural and monotonous. While it is true that some cultures have been closely associated with the preaching of the Gospel and the development of Christian thought, the revealed message is not identified with any of them; its content is transcultural. Hence in the evangelization of new cultures, or cultures which have not received the Christian message, it is not essential to impose a specific cultural form, no matter how beautiful or ancient it may be, together with the Gospel. The message that we proclaim always has a certain cultural dress, but we in the Church can sometimes fall into a needless hallowing of our own culture, and thus show more fanaticism than true evangelizing zeal"<sup>43</sup>. However, the issue goes deeper into the Catholic belonging, as the Pope Emeritus Benedict XVI reminds us in the famous speech of Ratisbona of 12 September 2006<sup>44</sup>, in which, citing R. Panikkar, he recalled how, in order to be real Catholics, it is necessary to: "*accettare l'interpellazione delle altre culture e aprirci al resto del mondo che non appartiene al filone culturale abramitico*", and clarifying, later on, in *Caritas in Veritate*, that such intercultural dialogue (Aroldi, Branca, Colombo, & Santerini, 2001) in order to be efficient, must have as a starting point the intimate awareness of the specific identity of the interlocutors<sup>45</sup>. And again, it is still the theologian Ratzinger to explain: "*Non dovremmo più parlare propriamente di inculturazione ma di incontro delle culture o [...] di interculturalità. Infatti inculturazione presuppone che una fede, per così dire, culturalmente spoglia si trasponga in una cultura religiosamente indifferente. Processo in cui due soggetti fino a quel momento estranei si incontrano e realizzano una sintesi. Ora, questa rappresentazione è artificiosa e irrealistica, perché non esiste una fede priva di cultura e, al di fuori della moderna civiltà tecnica, non esiste una cultura priva di religione. Soprattutto però non si riesce a vedere come due organismi in sé totalmente estranei l'uno all'altro, possano tutto d'un tratto diventare una totalità vitale, in un trapianto che come prima cosa li mutila entrambi. Solo se si tengono ferme la potenziale universalità di tutte le culture e la loro reciproca apertura, l'interculturalità può portare a nuove forme feconde*" (Ratzinger, 2003). The theology of the "intercultural" dialogue requires, therefore, with indications that appear to be particularly valuable – on the basis of presupposition – even in relation to the topic that is being deepened, a willing attitude to the permanent release of the cultural rights that are our own, according to what observed by Claude Geffré: "*un cristianesimo autosufficiente che non testimoniassero una certa mancanza, sarebbe incapace di accogliere la parte di irriducibilità delle altre manifestazioni dello Spirito all'opera nella storia*" (Geffré, 2007), but also, it requires the knowingness that, for a full comprehension of others, it is necessary to learn how to see the world and oneself with their eyes also (Sclavi, 2003). Paul VI, already, in the recalled encyclical *Ecclesiam suam* had underlined that in any dialogic relationship: "then, before speaking, we must take great care to listen not only to what men say, but more especially to what they have it in their hearts to say. Only then will we understand them and respect them, and even, as far as possible, agree with them"<sup>46</sup>.

### 3. The intercultural religious education: IRC and IdR in the layout of the Italian laicity

The educational approach of intercultural type has the objective to create respect amongst cultures and types of non-conflictual cohabitation; it wants to educate "in" the pluralism, respecting, on one side the subjectivity of the freedom of conscience and on the other side the objectivity of truth. The prefix *inter* implies, indeed, relation and exchange. The teaching of Catholic Religion, for its part, and also as described, in the framework of the intercultural educational approach, enriches and

<sup>43</sup> Cf. n. 117.

<sup>44</sup> Available at [www.vatican.va](http://www.vatican.va).

<sup>45</sup> Cf. n. 26.

<sup>46</sup> Cf. n. 20.

completes a plural and inclusive educational system, in fact, it would be recommendable to pinpoint the religious educational dimension as the one that primarily favors the maturation of a person/citizen able and aware of inclusive relations and thoughts. Other studies have already demonstrated how, during the course of history, religious education has always had a peculiar attitude to promote order and social cohesion (Benigni, 2016). This is why it is worth to share the thought of who considers that teaching Catholic Religion in the present context and the framework of the fundamental educational and theological approaches: “[...] *non significa insegnare a conoscere tutte le religioni, accostandole sullo stesso piano, per poi lasciare all’educando la possibilità di decidere quella che gli sembra più giusta*” but rather “[...] *vuol dire insegnare la religione alla quale si è liberamente scelto di aderire, quella ritenuta appropriata per la realizzazione del soggetto; ma accanto all’educazione ad una determinata etica, ad un certo credo e ad un dato culto, occorre educare all’incontro, al confronto e al dialogo con i soggetti di orientamento religioso differente*” (Portera, 2003), so that, facilitating the encounter, the discussion and the dialogue with people of different cultures, the fundamental contribution that the IRC gives to the Italian school system in the intercultural educational approach is even more clear and effective.

The religious dimension of the human person, the plurality of the religious traditions of the students, the need for an intercultural education are, as described, issues that affect the school as such, in its nature of the educational and cultural institution, but the teacher of Catholic Religion (IdR), for its field of work and, therefore, for its overall position in relation to colleagues and students, is particularly involved in those issues in which opportunities and difficulties cross. The main objective is the development of a profound comprehension and of respect for the faiths and the traditions of others, which contribute to bringing out a sense of solidarity and citizenship (Giorda, 2014). The challenge is to manage to create a shared lexicon that may help in the intercultural relationships created by the religious diversity, and that may allow all the students the same growth and development opportunities and making it so that their religious affiliations do not act as an obstacle. This way, as Benedict XVI has indicated to the teachers of Religion, the IRC aims to “*allargare gli spazi della nostra razionalità, riapirla alle grandi questioni del vero e del bene, coniugare tra loro la teologia, la filosofia e le scienze, nel pieno rispetto dei loro metodi propri e della loro reciproca autonomia, ma anche nella consapevolezza della loro intrinseca unità che le tiene insieme. La dimensione religiosa, infatti, è intrinseca al fatto culturale, concorre alla formazione globale della persona e permette di trasformare la conoscenza in sapienza di vita*” (Benedict XVI, 2009a). Therefore, with the teaching of Catholic Religion, the school and society are enriched with true laboratories of culture and humanity, in which, by deciphering the significant contribution of Christianity, the person is enabled to discover the good and to grow in responsibility, to seek confrontation and to refine the critical sense, to draw from the gifts of the past to better understand the present and to consciously project himself towards the future (Benedict XVI, 2009a), studying and deepening “the faith” as a responsibility that calls for decisions, that leads to comparison and that certainly does not exist in order to offer easy reassurances. The IRC, starting from the revealed Christian message, contributes to breaking the ideological barriers, to compare with other systems of meaning, to verify the irrationality of prejudices and stereotypes of different ideological matrixes, in order to prospect a prophetic vision of the future, a perspective of plural teaching, albeit often disregarded over the years, but that allows to face the specific cultural objects on the matter, at the sign of the conviction that knowledge and the relation with the other and with the others are essential to know oneself because of the enter the process of development of the personal, collective and historical identity.

The IdR should be work, therefore, at organizing its teaching, assuming, first of all, a perspective of cognitive and emotional/existential decentration (Damiano, 1993) and should highlight connections and bindings showing a dynamic understanding of the religious cultures (Mantovani, 2004). The IdR must also be aware of his/her role of an intercultural mediator. Mediation is not meant to be aseptic and conflict-free neutrality; in fact, mediation lives in an asymmetry of power, part of the awareness of the human indeclinability of the conflict, but commits to manage it (Consorti, 2013) using fundamental traits and manifestations of intercultural competence: empathy, flexibility, patience, openness, tolerance and, most of all: curiosity.

The IRC, and a really competent IdR aware of his/her responsibility may certainly play

a fundamental role in making the educational institution find an orientation, a new path to follow that allows to relocate reference points and values, in order to rebuild a “*grammatica dell’umano*” (Bianchi, 2003): “*Credo sia urgente individuare un luogo in cui le giovani generazioni sviluppino la consapevolezza che tutti i gruppi umani si trovano oggi di fronte ad un bivio: o stabilire un equilibrio tra tutte le differenze che popolano il pianeta, affinché si crei tra di loro un dialogo e un’interazione, o accettare di acuire sempre più le lacerazioni che già ci dividono, con il pericolo di vivere in una continua guerra, in una continua minaccia di distruzione e di annientamento*” (Callari Galli, 2000, p. 101). And if the school is the best place to manage this merging, to develop these educational paths leading to an intercultural relationship, the IRC, amongst all teachings, is the most adequate to contribute to this undeniable project and the IdR is the teacher that, even in reason of his/her cultural training and of his/her professional experience, has the right competences to favor a fuller realization of the intercultural dimension of every teaching of the school, rediscovering, even in this interdisciplinary relationship, his/her role of mediator.

The IRC is, therefore, a subject that must be promoted and not demonized within the Italian school system, that must not be abolished<sup>47</sup>, but rather, it must be potentiated, with better transversal employment of the discipline that is naturally dedicated to interculturality. In other words, it is necessary to aim at an “optimization” of the IRC and of the role that it covers within the educational path of the students. The argument of who believes that the moment has come for a substitution of the IRC with a “laic” discipline is a road with no exit: this would mean to renounce all the potential that the subject, for how we have described it, already offers and could furtherly give to the Italian educational system.

Finally, an IRC as described appears fully coherent with the context of the fundamental principles of the Italian organization in which it is called to operate and, in particular, with the principle of laicity of the State (Dalla Torre, 2012) which receives its content from the civil and religious society to which it is strictly linked. Laicity, indeed, can and must: “*consentire, da una parte, di valorizzare il religioso come capitale culturale di cui conservare memoria in quanto insieme della cultura umana, dall’altra, di garantire a ciascun cittadino delle società multiculturali l’esercizio del diritto personale di coscienza e di scelte etiche*” (Pajer, 2002, p. 65) and it remains an index of openness, of acceptance of all the people, recognized in their identity and in the values they carry, expressing trust in their positive contribution to the social constitution and, in this respect, it is a structured concentrated on a constant study of the cultural-religious phenomena, of their changes and their peculiarities. This way, the IRC will still be able, for a long time, to “*rappresentare una risorsa ed un fondamentale contributo alla formazione culturale e umana delle giovani generazioni [...] soprattutto per il significato più ampio che la sua presenza all’interno della scuola pubblica conferisce al nostro modello di convivenza. Un modello di convivenza, aperto e pluralista, che non relega la religione ai margini della sfera pubblica [...] ma riconosce in essa un importante fattore di sviluppo della personalità e di socializzazione*” (Cavana, 2016, p. 28).

## References

1. Accordo tra la Santa Sede e la Repubblica italiana che apporta modificazioni al Concordato lateranense, 18 february 1984. Retrieved from [https://www.vatican.va/roman\\_curia/secretariat\\_state/archivio/documents/rc\\_seg-st\\_19850603\\_santa-sede-italia\\_it.html](https://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19850603_santa-sede-italia_it.html)
2. Aroldi, P., Branca, P., Colombo, A., & Santerini, M. (2001). *Il magistero della Chiesa sulla multiculturalità*. Milano, Italia: Vita e Pensiero.
3. Ascoli, U., Ranci, C., & Sgritta, G.B. (2008). *Investire nel sociale. La difficile innovazione del welfare italiano*. Bologna, Italia: Il Mulino.
4. Barca, A. (2010). *L’insegnamento della religione cattolica nella scuola che cambia*. Roma-Bari, Italia: Laterza.

<sup>47</sup> The last in time order is the motion to abolish the IRC presented, in 2019 to the Senate by Riccardo Nencini and signed by Emma Bonino, Europa; Maurizio Buccarella, 5 Stelle; Roberto Rampi, PD; Loredana De Petris, LEU; Carlo Martelli, Gruppo Misto; Elena Fattori, 5 Stelle; Tommaso Cerno, PD; Matteo Mantero, 5 Stelle.

5. Benedict XVI. (2009a). *Discorso agli insegnanti di religione cattolica*. Retrieved from [http://www.vatican.va/content/benedict-xvi/it/speeches/2009/april/documents/hf\\_ben-xvi\\_spe\\_20090425\\_insegnanti-religione.html](http://www.vatican.va/content/benedict-xvi/it/speeches/2009/april/documents/hf_ben-xvi_spe_20090425_insegnanti-religione.html)
6. Benedict XVI. (2009b). *Encyclic letter Caritas in veritate*. AAS, 101(26), 641-709.
7. Benigni, R. (2016). Educazione alla convivenza ed educazione religiosa: Un binomio antico e moderno. In E. Camassa (Ed.), *Democrazie e religioni. Libertà religiosa diversità e convivenza nell'Europa del XXI secolo* (pp. 333-355). Atti del convegno nazionale, Trento, 22-23 October 2015: Editoriale scientifica.
8. Benigni, R. (2017). *Educazione religiosa e modernità. Linee evolutive e prospettive di riforma*. Torino, Italia: Giappichelli.
9. Bianchi, E. (2003). *Cristiani nella società*. Milano, Italia: Rizzoli.
10. Bilotti, D., Mantineo, A., & Montesano, S. (2014). *Insegnamenti e insegnanti di religione nella scuola pubblica italiana*. Milano, Italia: Giuffrè.
11. Butturini, E. (1987). *La religione a scuola. Dall'Unità ad oggi*. Brescia, Italia: Queriniana.
12. Callari Galli, M. (2000). *Antropologia per insegnare*. Milano, Italia: Mondadori.
13. Cardia, C. (2011). *Risorgimento e religion*. Torino, Italia: Giappichelli.
14. Cardia, C. (2020). La libertà religiosa nell'Italia multiculturale. I traguardi ancora da realizzare. In P. Palumbo (Ed.), *Religioni, laicità, democrazia. Profili critici e comparatistici* (pp. 11-24). Naples, Italia: Editoriale scientifica.
15. Cavana, P. (2016). L'insegnamento religioso nella scuola pubblica italiana: una tradizione da rinnovare. *Revista*. <https://doi.org/10.13130/1971-8543/7335>
16. Ciarini, A., & Giancola, O. (2016). *Le politiche educative in Italia: Tra spinte esogene, cambiamenti endogeni e diseguaglianze persistenti*. *La Rivista delle Politiche Sociali*, 2. Retrieved from [https://www.researchgate.net/publication/316915483\\_Le\\_politiche\\_educative\\_in\\_Italia\\_tra\\_spinte\\_esogene\\_cambiamenti\\_endogeni\\_e\\_diseguaglianze\\_persistenti](https://www.researchgate.net/publication/316915483_Le_politiche_educative_in_Italia_tra_spinte_esogene_cambiamenti_endogeni_e_diseguaglianze_persistenti)
17. Coda, P. (2011). *Il dialogo con l'altro. La novità conciliare*. Vita Monastica, 65.
18. Commissione Episcopale per l'educazione Cattolica, la Scuola e l'università. (2007). *Lettera agli insegnanti di religione cattolica*. Retrieved from <https://irc.chiesacattolica.it/wp-content/uploads/sites/29/2017/08/29/LETTERA-AGLI-INSEGNANTI-DI-RELIGIONE-CATTOLICA.2017.pdf>
19. Commissione Teologica Internazionale. (1997). *Il Cristianesimo e le religioni*. Retrieved from [http://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_cti\\_1997\\_cristianesimo-religioni\\_it.html](http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1997_cristianesimo-religioni_it.html)
20. Concilio Ecumenico Vaticano II. (1964). *Dogmatic Constitution Lumen gentium*.
21. Concilio Ecumenico Vaticano II. (1965a). *Declaration on Religious Freedom Dignitatis Humanae on the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious promulgated by His Holiness Pope Paul VI on December 7, 1965*. Retrieved from [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html)
22. Concilio Ecumenico Vaticano II. (1965b). *Declaration on the relation of the church to non-Christian religions Nostra Aetate, proclaimed by His Holiness Pope Paul VI on October 28, 1965*. Retrieved from [https://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651028\\_nostra-aetate\\_en.html](https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en.html)
23. Concilio Ecumenico Vaticano II. (1965c). *Decree Ad gentes, sull'attività missionaria della Chiesa*. Retrieved from [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decree\\_19651207\\_ad-gentes\\_it.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651207_ad-gentes_it.html)
24. Concilio Ecumenico Vaticano II. (1965d). *Pastoral Constitution on the Church in the modern world Gaudium et Spes* (Promulgated by His Holiness, Pope Paul VI on December 7, 1965). Retrieved from [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html)
25. Congregazione per la Dottrina della Fede. (1990). *Istruzione: Donum veritatis*. Retrieved from [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19900524\\_theologian-vocation\\_it.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19900524_theologian-vocation_it.html)
26. Congregazione per la Dottrina della Fede. (2000). *Dominus Iesus. Declaration on the Unicity and Salvific Universality of Jesus Christ and the Church*. Libreria Editrice Vaticana
27. Consorti, P. (2013). *Conflitti, mediazione e diritto interculturale*. Pisa, Italia: Pisa University Press.
28. Consorti, P., & Valdambriani, A. (2013). *Gestire i conflitti interculturali ed interreligiosi. Approcci a confront*. Pisa, Italia: Pisa University Press.
29. Corte Cost., sent. 203/1989 and sent. 13/1991. Retrieved from <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1989&numero=203>

30. Dalla Torre, G. (2012). Sana laicità o laicità positiva? *Stato, Chiese e pluralismo confessionale*. <https://doi.org/10.13130/1971-8543/2522>
31. Dalla Torre, G. (2014). *Lezioni di diritto ecclesiastico*. Torino, Italia: Giappichelli.
32. Damiano, E. (1993). *L'azione didattica. Per una teoria dell'insegnamento*. Roma, Italia: Armando.
33. De Luca, G. (2009). Irc ed educazione religiosa nella scuola pubblica italiana: Prospettive educative per il dialogo interculturale. In A. Passaseo (Ed.), *La religione come dimensione dell'interculturalità e come condizione dell'agire dello Stato*. Atti del Seminario di Studi del Seminario di Studi del Dottorato di ricerca italo-tedesco "Pedagogia e Sociologia interculturale", Mainz, February 19-24 2009.
34. Famà, A. (2004). L'insegnamento della religione cattolica nelle scuole pubbliche. Un lungo cammino. *Osservatorio Delle Libera ed Istituzioni Religiose*, 1-11. Retrieved from [https://storicamente.org/sites/default/images/figures/2009/ora\\_di\\_religione/ora\\_di\\_religione\\_2009\\_07.pdf](https://storicamente.org/sites/default/images/figures/2009/ora_di_religione/ora_di_religione_2009_07.pdf)
35. Feliciani, G. (1994). L'insegnamento della religione cattolica nelle scuole pubbliche tra normativa canonica e legislazioni civili. *Ius Ecclesiae*, 6, 159-176.
36. Ferrante, M. (2017). Diritto, religione, cultura: Verso una laicità inclusive. *Stato, Chiese e Pluralismo Confessionale*, 35. Retrieved from <https://www.statoechiese.it>
37. Fiorita, N. (2012). *Scuola pubblica e religioni*. Tricase, Italia: Libellula.
38. Francesco. (2013). *Apostolic Exhortation Evangelii Gaudium, the proclamation of the Gospel in the today's world*. Retrieved from [http://www.vatican.va/content/francesco/en/apost\\_exhortations/documents/papa-francesco\\_esortazione-ap\\_20131124\\_evangelii-gaudium.html](http://www.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html)
39. Francesco. (2014). *Discorso al Consiglio d'Europa*. Retrieved from [http://www.vatican.va/content/francesco/it/speeches/2014/november/documents/papa-francesco\\_20141125\\_strasburgo-consiglio-europa.html](http://www.vatican.va/content/francesco/it/speeches/2014/november/documents/papa-francesco_20141125_strasburgo-consiglio-europa.html)
40. Francesco. (2018). *Apostolic Constitution Veritatis gaudium on Ecclesiastical Universities and Faculties*. Retrieved from <http://www.vatican.va/content/francesco/en/events/event.dir.html/content/vaticanevents/en/2018/1/29/veritatis-gaudium.html>
41. Francesco. (2019). *Discorso durante la visita a Naples in occasione del convegno "La teologia dopo Veritatis Gaudium nel contesto del mediterraneo", 21 June 2019*. Retrieved from <https://www.vatican.va>.
42. Fuccillo, A. (2019). *Diritto, religioni, culture. Il fattore religioso nell'esperienza giuridica*. Torino, Italia: Giappichelli.
43. Galli, C. M. (2015). Il ritorno del Popolo di Dio. Ecclesiologia argentina e riforma della Chiesa. *Il Regno – Attualità*, 5.
44. Geffrè, C. (2007). Il paradosso dell'incarnazione di fronte al pluralismo delle religioni. In A. Cortesi & A. Tarquini (Ed.), *Teologia dell'incarnazione oggi*. Dio dell'umanità, umanità di Dio. Firenze, Italia: Nerbini.
45. Giorda, M. (2014). L'insegnamento della storia delle religioni nella scuola italiana. In G. Arrigoni, C. Consonni, & A. Però (Eds.), *Proposte per l'insegnamento della storia delle religioni nelle scuole italiane*. Bergamo, Italia: Sestante.
46. Licastro, A. (2017). *Il Diritto statale delle religioni nei Paesi dell'Unione Europea*. Milano, Italia: Giuffrè.
47. Malizia, G. (2008). *Politiche educative di istruzione e formazione. La dimensione internazionale*. Roma, Italia: Istituto Salesiano Pio XI.
48. Mantovani, G. (2004). *Intercultura. E' possibile evitare guerre interculturali?* Bologna, Italia: Il Mulino.
49. Pajer, F. (2002). La religione come componente culturale nell'educazione scolastica dei cittadini europei. *Religione e società*, 37.
50. Palumbo, P. (2019). La sostenibilità del rapporto diritto, religione e cultura. In D. A. Benitez & C. Fava (Eds.), *Sostenibilità: sfida o presupposto?* (pp. 291-311). Milano, Italia: Wolters Kluwer – Cedam.
51. Palumbo, P. (2019). Libertà religiosa e nuovi equilibri nelle relazioni tra Stato e confessioni religiose. Una introduzione, a settant'anni dall'entrata in vigore della Costituzione italiana. In *Libertà religiosa e nuovi equilibri nelle relazioni tra Stato e confessioni religiose*. Napoli, Italia: Editoriale scientifica.
52. Paolo VI. (1964). *Ecclesiam suam*. Retrieved from [http://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf\\_p-vi\\_enc\\_06081964\\_ecclesiam.html](http://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_06081964_ecclesiam.html)
53. Peron, D. (n.d.). *La scuola dell'autonomia e l'Irc*. Retrieved from <http://irc.vicenza.chiesacattolica.it/documenti/didattica/documentiamoci/ircdialogoecumenico2.pdf>
54. Portera, A. (2003). *Pedagogia interculturale in Italia e in Europa. Aspetti epistemologici e didattici*. Milano, Italia: Vita e Pensiero.
55. Ratzinger, J. (2003). *Fede, verità, tolleranza. Il cristianesimo e le religioni del mondo*. Milano, Italia: Cantagalli.
56. Sclavi, M. (2003). *Arte di ascoltare e mondi possibili. Come si esce dalle cornici di cui siamo parte*. Milano, Italia: Mondadori.
57. Serra, B. (2014). L'ora di religione tra diritti fondamentali ed esigenze organizzative. Annotazioni a trent'anni dall'Accordo di Villa Madama. *Stato, Chiese e Pluralismo Confessionale*, 20. Retrieved from <https://www.statoechiese.it>

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58. Talamanca, A. (1975). *Libertà della scuola e libertà nella scuola*. Padova, Italia: Cedam.
  59. Taranto, S. (2015). L'insegnamento religioso nella scuola pubblica è compatibile con un modello politico liberale? Uno sguardo alla legislazione italiana. *Stato, Chiese e pluralismo confessionale*, 16. Retrieved from [https://www.statoechiese.it/images/uploads/articoli\\_pdf/taranto.m\\_linsegnamento.pdf?pdf=linsegnamento-religioso-nella-scuola-pubblica-e-compatibile-con-un-modello-](https://www.statoechiese.it/images/uploads/articoli_pdf/taranto.m_linsegnamento.pdf?pdf=linsegnamento-religioso-nella-scuola-pubblica-e-compatibile-con-un-modello-)
  60. Toniolo, A. (n.d.). *L'IRC a scuola secondo la legislazione vigente*. Retrieved from <https://www.irc.vicenza.chiesacattolica.it>
  61. Turchi, V. (1994). Gli insegnamenti di religione nel sistema scolastico italiano. *Diritto e Società*, 1, 191-216.

# THE INTERNET, CULTURES AND RELIGIONS TOWARDS AN INTECULTURAL WEB

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**Keywords:** Social Media, Religious Denominations, App, Privacy Protection, Social Security

## 1. Technological evolution, society and relations

Surely technological transformation has contributed to social development. Especially, Internet diffusion between instruments of communication has redefined social (Bauman, 2008) and cultural geography (Longo, 2012<sup>1</sup>; Mosco, 2000<sup>2</sup>). This also has determined a change of lifestyle (De Vita, 2005<sup>3</sup>), personal and relational (Cucci, 2016), affecting the individuals and community choices (La Barbera, 2005). In this perspective, it's considered that the distinctive feature of the Internet is the formation of not linear relations with dynamics that are avoided by the parts (Vecoli, 2013). Therefore, technological news have structured news spaces (Tosoni, 2013), real and virtual (De Kerckhove, 1995<sup>4</sup>), contributing to the formation of "universes of experience unrelated to the material and concrete dimensions that do not exist at least in the physical and tangible sense to which we have been accustomed" (La Barbera, 2005, p. 114). New behavioral (Cucci, 2016) and relational (Ciotti & Rongaglia, 2010<sup>5</sup>) models have been raised by new technologies reach, and they can lead to bonds and liquid relationships (Cantelmi, 2016; Benasayang & Schimt, 2013<sup>6</sup>).

The use of these instruments has created new opportunities (Aroldi & Scifo, 2002) answering to new needs that emerge from the intercultural society. The Internet, especially, as virtual territory, represents a platform of diversity: the web allows the intersection between languages, cultures, and heterogeneous social backgrounds. Indeed, digital language has given the impulse to network birth, as assumed as a universal language. Therefore, the Internet represents a valid opportunity for growth and cultural mediation. For its realization, this opportunity requires the operation of the institutions to promote instruments that support the development of diversity into interaction. An active rule has been conducted by the Alliance of Civilization of the United Nations (UNAOC). Since its foundation, it has realized the aim to explore the roots of actual polarization between society and cultures and to recommend a practice program of action to face this problem. The organism has provided analysis and it has proposed practical recommendations that establish the base for the realization plan of Alliance of Civilization of the United Nations. In this sense, the Alliance of Civilization of the United Nations has become one of the main platforms of the United Nations for intercultural dialogue, tolerance, and cooperation. There are four operation sectors by which UNAC action is externalized: education, youth, migration, and media. The activities of the project, based on these four areas, can have an essential rule contributing to reduce the intercultural tensions and to build bridges between the communities. For this, the Alliance of Civilization of the United Nations annually finances projects to take on challenges set by the actual society. In 2012 the occasion has been offered to the

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<sup>1</sup> Longo (2012) highlights the exponential growth of information and communication technologies.

<sup>2</sup> Mosco (2000, p. 37) believes that with new technologies, in particular with new telecommunications, we would witness a "death of geography".

<sup>3</sup> De Vita (2005, p. 9) believes that technological transformation has also produced a communicative transformation which, as happened in history, also transforms society and culture.

<sup>4</sup> De Kerckhove (1995, p. 18) states that the human mind, with the technologies of the digital age, has the possibility of using means to directly and intensely modify one's mind, one's sensoriality. He therefore introduces the term "psychotechnology" to indicate a technology of mind, a technological device capable of modifying, extending or supporting psychic activity in some way.

<sup>5</sup> Ciotti and Rongaglia (2010, p. 293) underline that that the society of the 21th century witnesses a digital revolution, capable of conditioning the imaginary and of forming the conscience of man.

<sup>6</sup> Benasayang and Schimt (2013, p. 48) underline that the term desire has been replaced with the term "birthmarks".

start-up of the entire world, providing the creation of apps and games for an innovative smartphone to promote intercultural dialogue, avoiding conflicts and global tensions. There have been a lot of proposals, intended for the promotion of specific questions, like equality of sexes, growth of young people, integrations of migrants and the best religious and cultural tolerance. As an alternative, they could facilitate communication among cultures and different or even opposite civilizations.

## 2. New instruments of social communication in the teachings of the Catholic Church

The effect of technological change on social development has also been emphasized by the Catholic Church (Grienti, 2010<sup>7</sup>). Its teaching considers “new means of social communication” as “potential instruments of education and cultural enrichment, of commerce, and political participation, of dialogue and intercultural tolerance” (Pontifical Council of Social Communications, 2002b). With the decree *Inter Mirifica* of 4 December 1963 (Second Vatican Council, 1964), about the means of social communication, it has been declared the opening prospect of Conciliate Fathers in comparison to “those wonderful technical inventions... which more directly concern the spiritual faculties of man and which have offered new possibilities of communicating, with the maximum facility, all sorts of news, ideas, teachings”. Technological progress is, therefore, seen favorably if it is gradual and coherent with the ethical dimension of man (Barbour, 1993<sup>8</sup>).

In this prospect Giovanni Paolo II, with the Message for the XXXIX Mondial Day of Social Communication, has affirmed that “Modern technologies have unprecedented possibilities to operate the good, to spread the truth of our salvation in Jesus Christ and to promote harmony and reconciliation”, recognizing that “the bad use can do an incalculable evil, giving rise to misunderstanding, prejudice and even conflict. The unity of the human family must be promoted through the use of these great resources” (John Paul II, 2005).

Catholic Church shows itself keeping up with time, considering not only as positive the technological progress but also a possible “way to conversation among people of different countries, cultures, and religions. The new digital area, so-called cyberspace, allows us to meet each other and to know the values and traditions of others” (Benedict XVI, 2009).

Therefore, Catholic teaching adds value to the capability of technology to produce relationships: “New technologies allow people to meet beyond the boundaries of space and cultures themselves, introducing a whole new world of potential friendships. This is a great opportunity, but it also involves major attention and awareness regarding the possible risks” (Benedict XVI, 2011). In a message for the 47th World Day of Social Communication of 2013, Benedict XVI also underlines the opportunity that social digital network contributes “to encourage forms of dialogue and debate that, if they are realized with respect, attention to the privacy, responsibility, and dedication to the truth, can consolidate the bonds of unity among people and effectively promote the harmony of the human family. The challenge social networks have to face is to be truly inclusive” (Benedict XVI, 2013).

Francesco’s teachings certainly stand in continuity in comparison to that of his predecessors in the Petrine ministry. With the establishment of the Secretariat for Communication in 2015 (Francis, 2015), the Pope entrusts to the new Dicastery all the competencies related to the technological relations of the Vatican. He is aware virtual world can constitute the opportunity of new bonds creation, of meeting and solidarity among all, because “it is not enough to pass along digital ‘roads’, that is simply to be connected, but it’s necessary that the connection is guided by the true meeting... the digital network can be a place rich in humanity, not a net of lines but of human beings” (Francis, 2014).

The Internet and new technologies are therefore considered as means “to realize concretely the character of the ‘communion’ of Church” (Pontifical Council of Social Communications, 1992). Network, in particular, represents a “means of social communication, a God’s gift that illuminates the long journey of humanity... the media are cultural factors that contribute to transmitting

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<sup>7</sup> Grienti (2010) reviews the Vatican documents of the 20th century, in order to highlight the Church’s duty to understand and integrate new technology to the extent that it serves an evangelization plan.

<sup>8</sup> Barbour (1993, p. 12) reviews the theological currents that have adopted the idea of Internet as an instrument and not as an end.



information and teachings” (Foley, 2002).

However, Francesco has put his attention also on risks connected to the diffusion of new technological instruments, which “can be used to take advantage of, to manipulate, to dominate and to corrupt” (Pontifical Council of Social Communications, 2002b). On one hand, if the use of the Internet “represents an extraordinary possibility of access to knowledge, it is also true that it has been revealed as one of the places more exposed to the disinformation and the conscious and targeted distortion of facts and of interpersonal relationships, that often take the form of discredit” (Francis, 2019). In this sense, he encourages to a “constructive communication which, in rejecting prejudices towards the other, supports a meeting culture, thanks to which it can learn to look at reality with conscious trust” (Francis, 2017). The risk that settles in the use of new technological reality is the creation of a digital place “where it can fiddle or hurt, have a productive discussion or a moral lynching” (Francis, 2016). Technological development causes a responsibility for the other that, although virtual, is real, has its dignity that has to be respected.

So returns the affirmation that even digital instruments favor the communion in the Church, “where the union isn’t based on ‘like’, but on the truth, on ‘amen’, with which everyone adheres to the Body of Christ, welcoming the others” (Francis, 2019).

### 3. Confessional strategies and intercultural perspectives: The case of religious apps

Technological evolution certainly involves religious confessions. For both traditional and new religious movements (Dawson & Hennebry, 2004<sup>9</sup>), this dynamic declared through the introduction of concrete tools of knowledge and communication (Vecoli, 2013), favors a perspective of growth and development and encourages the respect of spiritual and ethical values, of knowledge and religious ones (Larsen, 2004<sup>10</sup>).

With regard to this, it has been observed that “intercultural exchanges without religion... don’t improve one another’s understanding” (Ventura, 2017, p. 44). Indeed, it is believed that religion has a central role in the dynamics of social development because major protection of relative freedom corresponds to a decrease in social tensions and an increase of social and economic wealth (Fuccillo, 2019). Therefore, the protection of religious freedom does not have to be exhausted in the statements of principle but it has to be translated through concrete tools of application.

There have been different confessional proposals on the network (Neumaier, 2019): the creation of online Christian communities, the use of the Internet as a window of the knowledge of monastic life (Jonveaux, 2019), or an instrument of proselytism (Rota, 2019), propaganda (exposure) through religious videogames (Rautalahti, 2018; Highland & Yu, 2008).

Among these, apps, both cultural and religious, can therefore constitute an important instrument of interaction between technology and religion and they can contribute to tracing the path towards the creation of an intercultural web.

Indeed there are several apps designed to promote intercultural dialogue, trying to avoid conflicts and global tensions. Several proposals have been aimed at the promotion of specific issues, such as the equality of sexes, youth development, migrant integrations, and facilitating dialogue between different or even opposite cultures and civilizations.

A review of some of them will allow understanding of how these digital tools favor the culture meeting.

*Ibn Battuta* is an app born in Spain and sees as protagonist Ibn Battuta, a famous Moroccan Muslim explorer who lived in 1300, who has used the pilgrimage to Mecca to visit different continents: China, India, Persia, Egypt, Tunisia, and Andalusia. The app download allows us to follow him during his travels and to know the Muslim culture. Some questions about the visited places and the known traditions test the user about his knowledge of the Arab world.

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<sup>9</sup> Dawson and Hennebry (2004, p. 257) argue that although the new religious movements can make use of the web in their missionary activity, the effectiveness of this type of strategy, however, clashes with the need for concrete relationships: for example, conversion constitutes a social process that cannot be ignored from the direct contact of the faithful potential with a specific member of the cult.

<sup>10</sup> Larsen (2004, p. 17) highlights the immense amount of data attributable to the religious phenomenon: more than 100,000 are the web pages containing the word “God”.

*Earth Touchable* is a New Zealand app, dedicated to global citizenship for children: it, through a rich series of contents, shows the cultures and the habits of countries and of regions of the whole world, told by local children. It is a world map, on which it is possible to navigate rapidly and easily and to click on a world area that you want more knowledge of. So children have a possibility to visit the world through virtual contact with families and schools, see the games that children play and present themselves to other cultures.

*Sankar*, literally “harmony through acceptance”, is an app that allows exploring other cultures. The app uses animated articles and videos to explain the concepts of tolerance and acceptance in 18 several cultures from every part of the world. Each unit is followed by quizzes to assess the amount of information learned and to measure the level of respect for the culture. Then, the app allows users to create their own content, and to share it, to build a database of cultural knowledge.

Another instrument of connection between the Internet and religion are religious apps. Indeed, religion is a fundamental element for the culture of an individual and a population. It offers important parameters of knowledge, allowing the translation of integration in interaction, and in this sense, it can constitute an important interactive instrument.

Different and particular are the initiatives adopted by some religious confessions to fulfill the ultimate goal in which they believe – for the Jesuits, with the videogame *World of Warcraft* – or to evangelize – the Jesuits have created the digital platform *Second Life*, which allows the user to access to a virtual company with an avatar (Spadaro, 2007). Surely, an app with religious content is the most famous digital-religious tool. The relative market, indeed, is in significant development.

We can think about app as an expression of catholic religion: *ilRosario* that allows reciting the rosary wherever you are; *CEI-Liturgia delle ore*, useful for praying for those who cannot physically come to the Church; *iBreviary* that offers the prayer of the Breviary and the liturgy texts in a digital format. In 2018 was born *Follow JC Go*, an app developed by the Ramòn Panè Foundation on the occasion of approaching march to the 2019 World Youth Day. It received the approval of Pope Francesco and allows to “capture” bible characters like the hunting to Pokèmon, and to let them come into their “e-team” (evangelization team) through questions about theme and charities. The originality of this app also lies in the attention to the player’s bodily and spiritual health: indeed it controls the levels of “hydration, nutrition and spirit prayer”, while GPS localization allows the user to move inside of their own city, discovering clues, collecting coins and meeting characters.

The Islamic approach to technological development is positive and “creative” (Bunt, 2009a), considering it as a fundamental tool of propaganda and diffusion of little know currents: Internet indeed represents a necessity, in order to “colonize the new virtual territory” and an occasion to rebuild the idea of *umma* (Bunt, 2009b). Islam has also projected several apps, which permit digital exercise of Muslim religion: *iSalam* and *Qibla Bussola*, that indicate the direction of Mecca from any position of the world; *Muslim Pro: Athan Corano*, whose the main features are: the indication of precise prayer times based on the user’s geographical position, video and audio notifications for calls to prayer with a choice of different voices for the muezzins, the fasting period during Ramadan, access to the Koran with audio recitations, phonetic transcriptions and translations, halal restaurants and mosques closer to the user, a Muslim calendar to calculate sacred holidays; *Muslim Mate-Ramadan 2019* that offers the exact times of prayers (including alarms and weather conditions), the calculation of Zakat, the localization of Islamic place of a certain geographical area (butchers, bookstores, primary schools, secondary schools, high schools, universities, clothes shops, services, cultural centers, museums, conferences or meetings), Islamic events; *Muslim Assistant*, an app which offers to the user an assistant whose job is to remember the duties of a practicing Muslim (prayer, food and the fulfillment of other Islamic precepts); *Shabakah al-Salat* (Prayer Net), that geolocates the user and offers Islamic Centers and Mosques in the area where you are ( for the moment it’s only available for Android systems): it was realized by no-profit managing authority al-Khuwarizmi – Minorities and Communities, and it proposes to provide a series of services and facilities to Islamic Community in Italy, to facilitate and perhaps stimulate the congregational practice of the Prayer of Faithfuls, focusing on the network of Islamic Centers; *Islamic Phone*, a touch mobile phone of last generation with a series of designed application to promote “everyday religious practice” for all Muslim believers: first of all the Koran, with music and imagine of the text that flows following the acting, allowing also the translation in various languages; the hadith (words of the Prophet’s

tradition); the announcement of the prayer hours; the invitation to prayer (adhan). With an electronic compass, it indicates the direction of Mecca (Qibla) and there also is a calculator in the software to determine exactly the amount of the Zakat. The Islamic Superior Council has approved the introduction of this instrument, to provide the security clearances and the certifications which stand out in the religious matter, especially for the Koranic verses.

For the Jews, network, despite its usefulness, favors the risk of cultural homologation: the presence of sites that, allow asking long-term questions that appeared in territories where the user physically is, impedes the creation of intercultural dynamics that could bear from the construction of real bonds in physical places (Vecoli, 2013). On app matters, however, *Light My Fire* has been offered to the digital market, dedicated to the holy festival Hanukkah, also called “Lights Festival”. The app permits us to choose one of the famous lamps (traditional or modern) of the Jewish Museum of New York and “turn it on” virtually with our family to celebrate the festivity. Blessings are available in English, Jewish, and transliterated Jewish.

The Buddhists have instead proposed *Obo-san bin*, literally “delivery of the Lord Monk”: it is a service created in 2013 by a start-up of Tokyo and relaunched by Amazon to the Buddhist faithful, through which believers can call a Buddhist monk at home to celebrate the religious ritual he needs.

Instead, Hinduism is represented by *Sankar*, the most download spiritual channel in India: it is dedicated to Indian philosophy, to religion, and spiritual solidarity, to culture and its diffusion. Its popularity can be appreciated by the highest number of views. The app transmits live programs and documentaries about holy places like temples, religious cities, and religious festivities spread in India.

#### 4. Download between privacy protection and the threat to social security

The virtuality of the network and the tools it offers does not always meet users who decide to download an app to exercise their cult or to enter into a parallel community to the real ones. It can happen someone downloads an app just for curiosity or for knowledge that ends in itself.

The use of a religious app can, therefore, expose the user to different problems, which are particularly remarked in the legal field. Among this particular attention is reserved for the protection of user privacy. Indeed, download allows the provider to access both the phone data (telephone book, photos, videos, position data) and the user’s sensitive data (Fuccillo, 2019), from which it is possible to deduce the user’s (or not) confessional belonging. These data are treatment object by the application that often illegitimately assigns them to third companies for purposes that the user generally does not know. The Privacy Guarantor obliges the managers of the same to provide sufficient information on the data that will be processed, on the related purposes, on the identity of the owner and of any managers of data treatments: thus, is guaranteed transparency towards the user and the consequent free and informed consent to the processing of his own data.

The digital world, therefore, creates considerable problems in regard to a concrete possibility of sensitive data control by users: thus, it seems more opportune to guarantee transparency regarding the treatment of data in question than to intervene on the relative ways of control. The user, indeed, aware of the risks he will be able to decide, from time to time, if and which apps to download and use and also if and with what purpose to permit the use of his own sensitive data also of religious interest to the app provider.

Another problem is represented by the level of security an app can offer. The case is represented by *Euro Fatwa App*, a simple and coincided guide of Islamic jurisprudence launched by the European Council for Fatwa and Research (ECFR)<sup>11</sup> to enable European Muslims to adhere to Islam rules and customs and to fulfill their duties as Islamic citizens while taking care of legal, social and cultural specialties of European societies. The app contains all the decisions and sentences collected by ECFR until 1997. The app offers various services, which include: all the jurisprudence collected by ECFR; the main religious questions about European Muslims; a simple but clear identification of subjects; a rapids capacity of research that offers the results in order of relevance; the possibility to share fatwa with others apps and social media; to update the new fatwa without having to update the app; it is not

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<sup>11</sup> The Council is an independent specialized Islamic organization, composed of a large group of over 30 well-known qualified scholars working on the European scene, who know Islamic jurisprudence as well as an awareness of the current environment.

required an Internet connection to surf and to search for contents; it supports Arabic and English language. The app can be used in French, German, Italian, Portuguese, and Turkish.

The app was created by the organization founded by the Islamic theologian Yusuf al-Qaradawi, repeatedly accused of Islamic radicalization and hate speech. Al-Qaradawi was banned from the United States, France, and Great Britain for his extremist ideas and to have supported some of the suicide bombers in Israel. On the App Store, the app *Euro Fatwa* is described as “a simplified guide to the fiqh, released by the European Research and Fatwa Council, designed to allow European Muslims to adhere to the regulations and directives of Islam and to fulfill their duties as Muslim citizens”. The app, therefore, does not explicitly support terrorism. Inside, however, we can read that “terrorism doesn’t cover, in its mandate, forms of legal resistance against foreign occupation through all available means, including armed resistance” and there are anti-semitic contents and other questionable material, at least in according to what some critics say. The German security agency has described the app as “a fundamental element in the process of Muslims radicalization in Europe”.

A different opinion is Apple, which has published Guide Lines on 19 June 2019, establishing that the apps don’t contain shocking or offensive materials (Art. 1). In particular, l’art 1.1.1 prohibits an app that has “defamatory, discriminatory, or petty contents, including references or comments on religion, race, sexual orientation, gender, national/ethnic origin or other targeted groups. The examination of *Euro Fatwa*, therefore, has not found any violation of guidelines”. Examples of cultural and religious apps constitute ways through which technological evolution can respond to new social needs. Therefore, also the web can be thought of as an intercultural key: it indeed is an accessible interactive suitable, through a correct use, to favor the well-being and society development, and the transition from multicultural integration to intercultural interaction.

## References

1. Alpa, G. (2017). Il diritto come veicolo di culture e strumento di mediazione interculturale. *Diritti Dell’uomo*, 2, 275-282.
2. Aroldi, P., & Scifo, B. (2002). *Internet e l’esperienza religiosa in rete*. Milano, Italia: Vita e Pensiero.
3. Barbour, I. (1993). *Ethics in an age of technology*. San Francisco, CA: Harper, San Francisco.
4. Bauman, z. (2008). *Paura liquida*. Roma-Bari, Italia: Laterza.
5. Benasayang, M., & Schimt, G. (2013). *L’epoca delle passioni tristi*. Milano, Italia: Feltrinelli.
6. Benedict XVI. (2009). *Message for the 43rd World Communications Day: New technologies, new relationships. Promoting a culture of respect, dialogue and friendship*. Retrieved from [http://www.vatican.va/content/benedict-xvi/en/messages/communications/documents/hf\\_ben-xvi\\_mes\\_20090124\\_43rd-world-communications-day.html](http://www.vatican.va/content/benedict-xvi/en/messages/communications/documents/hf_ben-xvi_mes_20090124_43rd-world-communications-day.html)
7. Benedict XVI. (2011). *Message for the 45th World Communications Day: Truth, proclamation and authenticity of life in the digital age*. Retrieved from [http://www.vatican.va/content/benedict-xvi/en/messages/communications/documents/hf\\_ben-xvi\\_mes\\_20110124\\_45th-world-communications-day.html](http://www.vatican.va/content/benedict-xvi/en/messages/communications/documents/hf_ben-xvi_mes_20110124_45th-world-communications-day.html)
8. Benedict XVI. (2013). *Message for the 47th World Communications Day: Social networks: portals of truth and faith; new spaces for evangelization*. Retrieved from [http://www.vatican.va/content/benedict-xvi/en/messages/communications/documents/hf\\_ben-xvi\\_mes\\_20130124\\_47th-world-communications-day.html](http://www.vatican.va/content/benedict-xvi/en/messages/communications/documents/hf_ben-xvi_mes_20130124_47th-world-communications-day.html)
9. Bunt, R. G. (2009a). *iMuslims: Rewiring the House of Islam*. London, UK: Hurst & Co.
10. Bunt, R. G. (2009b). L’Islam digitale (Internet). In G. Filoramo, & R. Tottoli (Eds.), *Le religioni e il mondo moderno*, 3, *Islam*. Torino, Italia: Einaudi.
11. Cairola, A. (2012). Linguaggi religiosi e laicità: A partire dai nuovi strumenti di comunicazione. In A. Ciancio, G. De Minico, & M. Villone (Eds.), *Nuovi mezzi di comunicazione e identità*. Roma, Italia: Aracne.
12. Cantelmi, T. (2016). Relazioni tecnoliquide: L’amore e l’amicizia ai tempi della rivoluzione digitale. In *Matrimonio e processo: La sfida del progresso scientifico e tecnologico*. Città del Vaticano: Libreria Editrice Vaticana.
13. Ciotti, A., & Roncaglia, G. (2010). *Il mondo digitale. Introduzione ai nuovi media*. Bari, Italia: Laterza.
14. Cucci, G. (2016). *Internet e cultura. Nuove opportunità e nuove insidie*. Milano, Italia: Ancora.
15. Dawson, L. L., & Hennebray, J. (2004). New religions and the Internet: Recruiting in a new public space. In L. L. Dawson, & D. E. Cowan (Eds.), *Religion online. Finding faith on the Internet*. New York, NY: Routledge.
16. De Kerckhove, D. (1995). *La civilizzazione video-cristiana*. Milano, Italia: Feltrinelli.

17. De Vita, R. (2005). Relazioni sociali e comunità virtuali. In F. Berti, R. De Vita, & M. Mareschi (Eds.), *Comunità, persona e chat line. Le relazioni sociali nell'era di Internet*. Retrieved from <https://www.dispi.unisi.it/sites/st06/files/allegatiparagrafo/22-05-2013/sr15.pdf>
18. Foley, J. P. (2002). *Chiesa e Internet*. Città del Vaticano: Libreria Editrice Vaticana.
19. Francis. (2014). *Message for the 48th World Communications Day: Communications at the service of an authentic culture of encounter*. Retrieved from [http://www.vatican.va/content/francesco/en/messages/communications/documents/papa-francesco\\_20140124\\_messaggio-comunicazioni-sociali.html](http://www.vatican.va/content/francesco/en/messages/communications/documents/papa-francesco_20140124_messaggio-comunicazioni-sociali.html)
20. Francis. (2015). *Apostolic Letter issued Motu Proprio for the establishment of the secretariat for communication*. Retrieved from [http://www.vatican.va/content/francesco/en/apost\\_letters/documents/papa-francesco\\_lettera-ap\\_20150627\\_segreteria-comunicazione.html](http://www.vatican.va/content/francesco/en/apost_letters/documents/papa-francesco_lettera-ap_20150627_segreteria-comunicazione.html)
21. Francis. (2016). *Message for the 50th World Communications Day: Communication and mercy: A fruitful encounter*. Retrieved from [http://www.vatican.va/content/francesco/en/messages/communications/documents/papa-francesco\\_20160124\\_messaggio-comunicazioni-sociali.html](http://www.vatican.va/content/francesco/en/messages/communications/documents/papa-francesco_20160124_messaggio-comunicazioni-sociali.html)
22. Francis. (2017). *Message for the 51st World Communications Day: "Fear not, for I am with you" (Is 43:5). Communicating hope and trust in our time*. Retrieved from [http://www.vatican.va/content/francesco/en/messages/communications/documents/papa-francesco\\_20170124\\_messaggio-comunicazioni-sociali.html](http://www.vatican.va/content/francesco/en/messages/communications/documents/papa-francesco_20170124_messaggio-comunicazioni-sociali.html)
23. Francis. (2019). *Message for the 53rd World Communications Day: "We are members one of another" (Eph 4,25). From social network communities to the human community"*. Retrieved from [http://www.vatican.va/content/francesco/en/messages/communications/documents/papa-francesco\\_20190124\\_messaggio-comunicazioni-sociali.html](http://www.vatican.va/content/francesco/en/messages/communications/documents/papa-francesco_20190124_messaggio-comunicazioni-sociali.html)
24. Fuccillo, A. (2019). *Diritto, religioni, culture. Il fattore religioso nell'esperienza giuridica*. Torino, Italia: Giappichelli.
25. Grienti, V. (2010). *Chiesa e Internet. Messaggio evangelico e cultura digitale*. Firenze, Italia: Academia Universa Press.
26. Helland, C. (2005). Online religion as lived religion. Methodological issues in the study of religious participation on the Internet. *Online – Heidelberg Journal of Religions on the Internet, 1.1*, 1-16. Retrieved from <http://archiv.ub.uni-heidelberg.de/volltextserver/5823/1/Helland3a.pdf>
27. Highland, M., & Yu, G. (2008). Communicating spiritual experience with video game technology. *Online – Heidelberg Journal of Religions on the Internet, 3*. <https://doi.org/10.11588/rel.2008.1.397>
28. John Paul II. (2005). *Message for the 39th World Communications Day: The communications media: At the service of understanding among peoples*. Retrieved from [http://www.vatican.va/content/john-paul-ii/en/messages/communications/documents/hf\\_jp-ii\\_mes\\_20050124\\_world-communications-day.html](http://www.vatican.va/content/john-paul-ii/en/messages/communications/documents/hf_jp-ii_mes_20050124_world-communications-day.html)
29. Jonveaux, I. (2019). Internet in the monastery – Construction or deconstruction of the community? *Online – Heidelberg Journal of Religions on the Internet, 14*. Retrieved from <https://doi.org/10.17885/heiup.rel.2019.0.23948>
30. La Barbera, D. (2005). Le dipendenze tecnologiche. La mente dei nuovi scenari dell'addiction "tecnomediata". In V. Caretti, & D. La Barbera (Eds.), *Le dipendenze patologiche. Clinica e psicopatologia*. Milano, Italia: Cortina Raffaello.
31. Lana, A. G. (2018). Data protection e libertà fondamentali nell'era della globalizzazione e della società digitale. *Diritti dell'uomo, 1*.
32. Larsen, E. (2004). Cyberfaith: How Americans pursue religion online. In L. L. Dawson, & D. E. Cowan (Eds.), *Religion Online. Finding faith on the Internet*. New York, NY: Routledge.
33. Longo, G. O. (2012). *Homo technologicus*. Milano, Italia: Ledizioni.
34. Mazziotti, A. (2017). Fake news, fake people e società della (dis)informazione: Riflessioni su democrazia, informazione e libertà fondamentali al tempo dei social network. *Diritti dell'uomo, 1*.
35. Mosco, V. (2000). Webs of myth and power. Connectivity and the new computer technopolis. In A. Hermann, & T. Swiss (Eds.), *The World Wide Web and contemporary cultural theory*. New York, NY: Routledge.
36. Neumaier, A. (2019). Christian online communities – Insights from qualitative and quantitative data. *Online – Heidelberg Journal of Religions on the Internet, 14*. <https://doi.org/10.17885/heiup.rel.2019.0.23946>
37. Pace, V. (2013). *La comunicazione invisibile. La religione in Internet*. Cinisello Balsamo: Edizioni San Paolo.
38. Pedullà, L. (2012). Accesso a internet, libertà religiosa informatica e buon costume. *Stato, Chiesa e Pluralismo Confessionale: Rivista telematica, 35*. Retrieved from [https://www.statoechiese.it/images/uploads/articoli\\_pdf/pedullm\\_accesso.pdf?pdf=accesso-a-internet-liberta-religiosa-informatica-e-buon-costume](https://www.statoechiese.it/images/uploads/articoli_pdf/pedullm_accesso.pdf?pdf=accesso-a-internet-liberta-religiosa-informatica-e-buon-costume)
39. Pontifical Council of Social Communications. (2002a). *Pastoral instruction Aetatis novae on social communications on the 20th anniversary of Communio et Progressio*. Retrieved from [http://www.vatican.va/roman\\_curia/pontifical\\_councils/pccs/documents/rc\\_pc\\_pccs\\_doc\\_22021992\\_aetatis\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/pccs/documents/rc_pc_pccs_doc_22021992_aetatis_en.html)

40. Pontifical Council of Social Communications. (2002b). *Ethics in the Internet*. Retrieved from [http://www.vatican.va/roman\\_curia/pontifical\\_councils/pccs/documents/rc\\_pc\\_pccs\\_doc\\_20020228\\_ethics-internet\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/pccs/documents/rc_pc_pccs_doc_20020228_ethics-internet_en.html)
41. Rautalahti, H. (2018). Video games facilitating discussions of good and bad religion. *Online – Heidelberg Journal of Religions on the Internet*, 13. <https://doi.org/10.17885/heiup.rel.2018.0.23844>
42. Ricca, M. (2017). Democrazia interculturale ed educazione giuridica. Apprendere l'uso del diritto nella scuola multi-etnica. *Diritti dell'uomo*, 2. Retrieved from [https://www.academia.edu/35033247/Democrazia\\_interculturale\\_e\\_educazione\\_giuridica\\_Apprendere\\_l\\_uso\\_del\\_diritto\\_nella\\_scuola\\_multi\\_etnica](https://www.academia.edu/35033247/Democrazia_interculturale_e_educazione_giuridica_Apprendere_l_uso_del_diritto_nella_scuola_multi_etnica)
43. Rota, A. (2019). Religion, media, and joint commitment – Jehovah's witnesses as a 'plural subject'. *Online – Heidelberg Journal of Religions on the Internet*, 14. <https://doi.org/10.17885/heiup.rel.2019.0.23949>
44. Second Vatican Council. (1964). *Decret on the media of social communications Inter Mirifica*, 4th December 1963. Retrieved from [http://www.documenta-catholica.eu/d\\_1962-1965-%20Concilium%20Vaticanum%20II%20-%20Constitutionnes,%20Decclarationes%20et%20Decreta%20-%20EN.pdf](http://www.documenta-catholica.eu/d_1962-1965-%20Concilium%20Vaticanum%20II%20-%20Constitutionnes,%20Decclarationes%20et%20Decreta%20-%20EN.pdf)
45. Spadaro, A. (2007). Second Life: Il desiderio di un'altra vita. *La Civiltà Cattolica*, 3. Retrieved from <https://www.laciviltacattolica.it/articolo/second-life-il-desiderio-di-unaltra-vita/>
46. Tosoni, F. (2013). *Psicopatologia web-mediata. Dipendenza da internet e nuovi fenomeni dissociativi*. <https://doi.org/10.1007/978-88-470-2817-3>
47. Vecoli, F. (2013). *La religione ai tempi del web*. Bari, Italia: Laterza.
48. Ventura, M. (2017). Preghiera a più voci. Non c'è silenzio nelle religioni (ma ci sono incomprensioni). *Corriere della Sera*. Retrieved from <https://www.intercultura.it/download/id:474/>

# RELIGIOUS FREEDOM AND CSR: INTERNATIONAL STANDARDS AND THE ACCOUNTABILITY ON HUMAN RIGHTS IN ITALIAN ETS

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**Keywords:** Religious Freedom, Corporate Social Responsibility (CSR), Accountability, Human Rights, Third Sector Entities

## 1. Introduction

International standards on business and human rights and on corporate social responsibility (CSR) define a system of rules currently in use to combat human rights abuses in modern industrial society.

On the basis of these rules, governments adopt the so-called National Action Plans (NAPs), which also Italy has recently adopted by approving the 2012-2014 Action Plan on Corporate Social Responsibility and the 2016-2021 Action Plan on Business and Human Rights.

In line with what is foreseen by these international standards, the NAPs require companies to report on human rights (accountability<sup>1</sup>) in their social communications (social disclosure).

In this context, the protection of religious freedom plays a fundamental role as part of the range of needs that characterize modern intercultural societies.

As we have known, these themes are part of the bigger discussion concerning the relationship between economics, law, and religion, which has been attracting the interest of scholars for some years now (among the most recent studies in Italy see Dammacco, 2018; Dammacco and Ventrella, 2018; Fuccillo, 2016; Sorvillo, 2016a; Lapi, 2016; Valletta, 2016; Carnì, 2016; for the older contributions, refer to Fuccillo and Sorvillo, 2013; Fuccillo, 2011).

In fact, from a scientific point of view, macroeconomic models have been developed by connecting freedom of religion and belief with economic performance.

Grimm, Clark, and Snyder (2014), for example, identify a positive link between freedom of religion and belief and competitiveness, estimating that in countries that promote these freedoms there is a reduction in social hostility which contributes to economic development. The results of the scientific research by Hylton, Rodionova, and Deng (2008) on these issues are also noteworthy. They note that laws and practices that restrict religious freedom and belief strengthen corruption, reduce economic growth, and are positively associated with social inequality.

These studies have stimulated reflection on human rights (and, therefore, on religious freedom), extending it to the field of corporate relations.

Lin highlights the link between religions and corporate social responsibility (Lin, 2013), while Cui, Jo, and Na (2017) and Cui and Jo (2019) confirm that managers of companies based in communities with a strong religious character are more committed to CSR and show greater capacity to prevent and/or reduce the risks associated with business activities.

Among the common characteristics of these theories is the attention paid to human rights, which is considered an essential condition for progress.

In this regard, it should be noted that the regulatory framework is constantly updated by initiatives such as the “UN Forum on Business and Human Rights”. A global platform set up to develop the multi-level debate on business and human rights.

The reflections coming from the Forum are placed in an evolutionary context focused on the strengthening of corporate social responsibility and corporate accountability, which translates into

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<sup>1</sup> The word “*accountability*” generally indicates the ability to explain the reasons, methods and effects of a given management act. It therefore refers to the obligation to account for decisions taken and, symmetrically, to the related forms of accountability for results achieved or not achieved. For a more detailed definition, please refer to the *FormezPA* teaching material edited by Reggi (2017); or to the accountability item in the Dictionary of Economics and Finance of the Treccani Encyclopedia (Treccani, 2012).

the adoption of codes of ethics<sup>2</sup> or social accountability<sup>3</sup>.

This orientation influences the external communication of companies which, through reporting tools, are invited to clarify the possible impact of their actions on human rights, both internally and externally, mainly because of their impact on both territories and local communities.

This research in this regard is divided into two parts.

The first part investigates the role of religious freedom in international standards on business and human rights.

The second part, on the other hand, deals with the theme of accountability on human rights in the Italian non-profit area<sup>4</sup>, a sector recently affected by the reorganization of the Legislative Decree No. 117/2017.

In this context, the process of accountability provided by Art. 14 of Decree No. 117 also involves entities who operate like association structures subjects with an associative structure (Third Sector Entities, and from now also only ETS) who operate by expressing a certain tendency or pursue “different activities” with social religious and or cultural aims.

These instances, in particular, can have a specific interest in the accountability on human rights because through the adherence to the so-called systems of non-financial reporting (NFR)<sup>5</sup> clearly reaffirm values and cultures of which they are the direct expression.

From this point of view, the research clarifies the system of social accountability of these entities, providing food for thought for a strategic sector for economic development, both national and international.

## 2. Religious freedom, international standards on business and human rights and corporate social responsibility

The guarantee of religious freedom is a need recognized in most contemporary legal systems<sup>6</sup>. Within this framework, religions have regained influence by constituting a solution of the main social issues.

From this point of view, religious freedom is linked to the sphere of human rights, within which a recently created aspect is dedicated to the relations between “business and human rights”. Two worlds are ontologically different that the law has the difficult mission of combining.

In a time, when economic growth dominates (the risks associated with new forms of the economy, such as the sharing economy, are well highlighted in the contribution of Ferlito, 2018), the greatest challenge for human rights defenders is to balance the needs of a capitalist society

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<sup>2</sup> The code of ethics can be defined as the “Constitutional Charter” of the company, i.e., the company Charter that sets out all the rights, duties and responsibilities of the body towards the so-called “stakeholders” (employees, suppliers, customers, public administration, shareholders, financial market, etc.). Its violation, among other things, is linked in the Italian legal system to the administrative liability profiles of entities, as set out in Legislative Decree No. 231 of 2001 June 8, containing “Regulations on the administrative liability of legal persons, companies and associations, including those without legal personality, pursuant to Art. 11 of Law No. 300 of 29 September 2000”, and subsequent additions made by Law No. 68/2015 on offences against the environment and Law No. 69/2015 on corporate offences.

<sup>3</sup> Other legal and financial tools more generally attributable to the non-financial reporting category are: the environmental report, the sustainability report, the mission report, the mandate report and the gender report.

<sup>4</sup> The idea that the company should pursue objectives other than profit maximization has aroused particular interest among scholars. The legal doctrine has thus included some organizational models within a new category called *metaprofit*, with which are identified those entrepreneurial subjects (e.g., benefit corporations) whose innovative character is represented by an action teleologically oriented beyond (meta-) from the mere profit (profit), and which direct their objectives towards humanitarian, social and environmental goals, in the conviction that the ethical development of the enterprise represents a logical category fundamental both for the sustainability of the current economic model and for the integral human development (on this perspective see Mion and Loza Azaui, 2011; but also Sorvillo, 2016b).

<sup>5</sup> In the EU, these obligations have been laid down for multinational enterprises by Directive No. 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive No. 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, while in the Italian legal system they are laid down by Legislative Decree No. 254 of 30 December 2016, which introduced them for public interest entities (PIEs) constituting a “large group”. The latter type of companies, in particular, is defined by Legislative Decree No. 254 as a “group consisting of a parent company and one or more subsidiaries which, on a consolidated basis, have had, on average, over 500 employees during the financial year and whose consolidated financial statements meet at least one of the following criteria: 1) total assets in the balance sheet exceeding EUR 20,000,000; 2) total net revenues from sales and services exceeding EUR 40,000,000”.

<sup>6</sup> The right to religious freedom characterizes many constitutional charters (e.g., Art. 19 of the Italian Constitution) and many international charters of rights of the Western world (e.g., Art. 9 ECHR or Art. 18 DUDU). It, however, is fundamental also in systems strongly characterized from the religious point of view, where since the signing of the Marrakech Declaration a process of substantial enhancement of this freedom is underway (on the just mentioned profiles, see Fuccillo, 2016b; or Sabbarese and Santoro, 2017).



with the essence of fundamental rights<sup>7</sup>. The Guiding Principles on Business and Human Rights (UNGPs) and the UN Global Compact (UNGC)<sup>8</sup> are among the most interesting international inspirations as they support the balancing work mentioned above, pushing states and companies towards the construction of more sustainable societies in terms of equity, rights protection, and inter-generational solidarity.

Within this framework, religious freedom plays a decisive role as it provides economic actors with an innovative approach in global competition.

The Guiding Principles were approved by the European Council of Human Rights with Resolution No. 17/4 of 2011 June 16 in the implementation of the UN “Protect, Respect and Remedy” Framework (UN, 2008, 2011), in order to prepare the Guidelines on Business and Human Rights and Social Responsibility of multinational enterprises.

Their content is organized in 3 pillars<sup>9</sup> and 31 principles from which derives the obligation for states to respect, protect and implement the human rights and fundamental freedoms recognized by the main international Charters<sup>10</sup> (Pillar I), an equal obligation for businesses (Pillar II) and, always for states, the additional duty to provide remedies (judicial and non-judicial) to deal with cases of abuse or possible violation of this type of freedom (Pillar III).

It is also foreseen, in the implementation of Pillar II, that enterprises must comply with specific constraints: 1) avoiding causing and/or contributing to causing a negative impact on human rights in the course of their activities, indicating when such problems occur; and 2) committing themselves to prevent and/or reduce negative impacts on human rights when they depend on or derive from their external relations, even if they have not directly contributed to producing them (Anedda, 2014; OHCHR, 2012; UN, 2015, p. 1).

The Guiding Principles recognize enterprises as social actors who able to interact positively or negatively with the dynamics of protection of fundamental rights. In particular, religious freedom in the light of the previously mentioned Universal Declaration of Human Rights and the other international Charters for protecting the proclaimed human rights.

The UN Global Compact in this respect contains another useful set of principles for the protection and the enhancement of religious freedom within business activities. The UN document in fact reaffirms that “Business must support and respect the protection of proclaimed human rights” (Principle I); that “Companies should be certain that they are not in conflict in human rights abuses” (Principle II) and, finally, that “Companies shall ensure the elimination of all discrimination (including religious discrimination) with respect to workers and employment” (Principle III). It also requires companies and organizations that adhere to it to support and apply further principles within their sphere of influence: the protection of labor (Principles III, IV, V, and VI), the protection of the environment (Principles VII and IX), and the fight against corruption within and outside the company (Principle X) (on the profiles concerning the fight against corruption in the Muslim legal systems, see the interesting article by ‘Arafa, 2014). Still from the principles of the Global Compact, as well as from the Guiding Principles on Business and Human Rights, it can be seen that religious freedom can serve as an instrument for evaluating business activities from various points of view, including

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<sup>7</sup> Think for instance to the protection of the physical integrity of workers and the possible violations of the right to health, or to the exploitation in the labour market and the related issues on the right to decent and stable pay.

<sup>8</sup> In addition to the Guiding Principles on Business and Human Rights and the UN Global Compact, there are the Sustainable Development Goals (SDG’s), the goals of the Agenda 2030 and the Millennium Goals. All together they outline the goals for a sustainable development.

<sup>9</sup> The three “Pillars” approved by the Human Rights Council in the above-mentioned Resolution No. 17/4 provide as follow: Pillar I “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”; Pillar II “Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”; Pillar III “As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy”.

<sup>10</sup> In addition to the Universal Declaration of Human Rights (UN, 1948), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (UN, 1966), the UNGPs also refer to the Declaration on Fundamental Principles and Rights at Work of the International Labour Organization (ILO, n.d.), as well as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN, 1992) approved by the UN General Assembly with Resolution No. 47/135 of 18 December 1992.

the construction of a more sustainable economy and more solid business ethics. In this context, religions stimulate business innovation by determining more careful behavior from the point of view of their social responsibility.

Coming back now to the regulatory side, it should be stressed here that a fundamental contribution to a modern definition of CSR also comes from the economic policies implemented by the European Union in business.

The European Union defined CSR initially in the European Commission's Green Paper of 2011 July 18 entitled "Promoting a European framework for corporate social responsibility". In the latter, CSR was defined "[...] as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis" (COM, 2011, p. 7). Subsequently, with the new Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2011 October 25 entitled "A renewed EU strategy 2011-2014 for corporate social responsibility", the Commission reviewed and went beyond the Green Paper notion on CSR, offering a more up-to-date version. As a consequence, CSR is now defined as "the responsibility of companies for their impact on society", and it is reiterated that "[...] in order to fully meet their social responsibility, companies must have a process in place to integrate ethical and human rights issues into their core business and core strategy operations, with the aim of 1) do everything possible to create a shared value between their owner/shareholders, consumers, and other stakeholders and civil society; 2) identify, prevent and mitigate possible adverse effects of business activity on society" (European Commission, 2011). For this reason, companies are required to commit themselves both to "prevent" as well as "mitigate" any negative effects of business activity, but also to cooperate with social actors in order to create "shared value", i.e., the ethical element considered to be at the basis of the common good and aimed at allowing each individual an integral human development view of their social responsibility (on the definition of "integral human development" see Benedict XVI, 2009).

It is clear from what has been said that among the social actors involved in the work of renewing CSR, religions certainly cannot be absent. This explains the importance that the international institutions have also reserved for them in the legal reflection on a business and human rights.

The World Economic Forum (WEF) has recognized the fundamental role of religions in the economic and social progress, including them among the systemic actors for the solution of global challenges. Thus, in the report entitled "The role of faith in systemic global challenges" we read: "The World Economic Forum recognizes that faith plays a dynamic and evolving role in society. [...] The power of faith to impact global issues and shape global perspectives is a fundamental reason why the Forum consistently engages faith leaders and perspectives in our work. As part of our efforts to incorporate an understanding of the impact of faith in our analysis of complex global trends and challenges, the Forum established the Global Agenda Council on the Role of Faith. Council members comprise the world's foremost experts to provide through leadership that furthers the faith agenda within Forum's activities" (WEF, 2016, p. 3). In this way, is underlined the essence of religions to bring together people from different traditions and cultures around shared challenges, such as the fight against inequality and poverty ("*Can religion make economic growth more fair?*", "*Faith leaders: A secret weapon in the fight against diseases*"), climate change ("*Four reasons why climate change can't be solved without religion*"), exploiting economy and trade ("*The faith factor and the global financial system*" and "*Faith and international trade and investment*") or the exploitation of workers and human capital ("*The faith factor in employment, skills and human capital*"). For international institutions, it is the ability of religions to create shared value that makes the difference, and for these reasons, they are included among the best drivers to implement ethical elements in entrepreneurial activity. Religions consider the common good as a cornerstone of the so-called economy of happiness. An economy is directed to achieve a possible "sustainable happiness" by adhering in a convincing manner to the key principles of international organizations that are listed, among others, in the cited Global Compact and Guidelines on Business and Human Rights.

### 3. From CSR to accountability: Human rights reporting in religious bodies ETS and social enterprise

Addressing the issue of corporate social responsibility diachronically in the evolution of the dialogue between institutions and religions provides a reference with which economic actors communicate to stakeholders and civil society, with which they can measure their social responsibility and the levels of results achieved. In short, it is a question of introducing the issue of accountability on human rights in the context of CSR by providing operational tools that belong to the so-called non-financial reporting category.

The reference is to the so-called Social Report or CSR Report (Corporate Social Responsibility Report), i.e., the document with which an organization – company, public or private body or association – periodically communicates to the outside world the results of its activity, not limiting itself to financial and accounting aspects only (with regard to the social report and other methods of economic and financial reporting of non-profit entities see Propersi and Rossi, 2003; CNDCEC, 2019, pp. 44-51; and the contribution of Esposito, 2019).

This document has become increasingly important over time, especially in the view of the fact that the so-called intangible assets, i.e., the reputation and credibility in the eyes of the community, have become a fundamental resource in markets around the world.

These considerations, which at first sight could appear misleading because they normally refer to companies in the for-profit sector, are actually functional and perfectly applicable also to entities of an ontologically different nature, such as non-profit sector entities (for some profiles relating to religious entities, non-profit, and solidarity-based economy, see Parisi, 2018). Among these, especially the religious bodies that own ETS branches or social enterprise (on the ETS and social enterprise among the various contributions, see Fuccillo, Santoro, and Decimo, 2019; Fuccillo, 2018; Fuccillo, 2007; Consorti, 2018) adhere to the accountability on human rights, because with its implementation they communicate externally, in a clear and effective way the values and religious culture that characterizes their action (on the accounting of religious entities engaged in the non-profit sector, see D'Este, 2018).

The concept of accountability, for example, is well known in the circles of the Catholic Church which in its universal canonical legislation includes canon 1287 which in §1 sanctions the obligation to present an annual report on the administration of the ecclesiastical patrimony to the diocesan Ordinary, while in §2 mentions the legal provision to “account” to the faithful for the use made of the Church’s goods (for appropriate insights into accountability in the Catholic Church, see Miñambres, 2019a, 2019b).

It can, therefore, be affirmed that if the effectiveness of the instruments of accountability is consolidated among international enterprises, it is equally well known in “religious circles” where such instruments are counted among the means of “dialogue” with ecclesial communities.

The theme of the reporting and external communication of non-profit entities should therefore also be referred to as religious entities, with respect to which there is a relationship of continuity with regard to the specific field of non-worship activities.

Moving on to the operational instruments, it should be said that on 4 July 2019 the Ministry of Labor and Social Policy approved the Decree containing the “Adoption of the guidelines for the preparation of the social report of Third Sector Entities” which replaces, at least as far as the social enterprise is concerned, the previous provisions of the Decree of 24 January 2008 containing the “Guidelines for the preparation of the social report by the organizations that carry out the social enterprise, in accordance with Art. 10, para. 2, of Legislative Decree No. 155 of 24 March 2006”, but also the “Guidelines and schemes for the preparation of the social report of non-profit organizations” issued in 2011<sup>11</sup> by the now-dissolved Agency for the Third sector<sup>12</sup>.

The new guidelines in §6 “Structure and content of the social report” make specific reference

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<sup>11</sup> By resolution of the Third Sector Agency No. 147 of 15 April 2011, pursuant to Art. 3, para. 1, letter a) of Presidential Decree No. 329 of 21 March 2001.

<sup>12</sup> The Agency for the Third sector (formerly Agenzia for the Onlus) was suppressed in 2012 following the entry into force of Legislative Decree No. 16 of 2 March 2012 (Art. 8, para. 23), converted with amendments by Law No. 44 of 26 April 2012. Currently, its functions have been transferred to the Ministry of Labour and Social Policies.

to “other information of a non-financial nature, concerning social aspects, gender equality, respect for human rights, the fight against corruption, etc.” (point 7).

Reporting on human rights, therefore, is included among the specific items of the social report<sup>13</sup>.

On this point, however, by virtue of the generic nature of the aforementioned normative reference, it is to be considered that the analytical indications prepared by the dissolved Third Sector Agency in the 2011 Guidelines are still a useful reference parameter for the exhaustive compilation of the human rights section of the document. With regard to the latter, and for the reasons given above, a specific reference to the protection of religious freedom could constitute an added value both for ETS and social enterprises, “normal” so to speak, and for those constituted by civilly recognized religious bodies.

Also on the instruments of accountability, the provisions of Law No. 125 of August 11, 2014, on “General regulations on international cooperation for development” should be underlined.

The latter states in Art. 1 (Subject matter and purpose) that “1. International cooperation for sustainable development, human rights and peace, called ‘development cooperation’, is an integral and qualifying part of Italy’s foreign policy. It is inspired by the principles of the United Nations Charter and the Charter of Fundamental Rights of the European Union. Its action, in accordance with the principle laid down in Art. 11 of the Constitution, contributes to the promotion of peace and justice and seeks to promote solidarity and equal relations between peoples based on the principles of interdependence and partnership. 2. Development cooperation, in recognizing the centrality of the human person, in his or her individual and community dimension, shall pursue, in accordance with international programs and strategies defined by the United Nations, other international organizations and the European Union, the fundamental objectives to a) eradicate poverty and reduce inequalities, improve people’s living conditions and promote sustainable development; b) protect and uphold human rights, the dignity of the individual, gender equality, equal opportunities and the principles of democracy and the rule of law; c) prevent conflict, support processes of pacification, reconciliation, post-conflict stabilization, consolidation and strengthening of democratic institutions. 3. Humanitarian aid shall be implemented in accordance with the relevant principles of international law, in particular the principles of impartiality, neutrality and non-discrimination, and shall aim to provide assistance, relief and protection to the populations of developing countries who are victims of disasters. 4. Italy promotes education, awareness and participation of all citizens in international solidarity, international cooperation and sustainable development”.

Law No. 125, moreover, pursuant to Art. 23, para. 2, letter c), provides, among the subjects of the Italian development cooperation system, “civil society organizations and other non-profit subjects referred to in Art. 26”, that is “[...]; b) non-profit organizations of social utility (today, Third Sector Organizations), which are statutory aimed at development cooperation and international solidarity; [...]”.

Art. 17, No. 10, then establishes that all public and private entities referred to in Art. 23, para. 2, who wish to participate in development cooperation activities benefiting from public contributions must comply with the code of ethics adopted by the Italian Agency for Development Cooperation, which expressly refers to the international regulatory sources on working conditions, environmental sustainability, and legislation to combat corruption and organized crime, and therefore, ultimately, the general principles prepared by the Global Compact and the Guiding Principles on Business and Human Rights.

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<sup>13</sup> The new guidelines were issued in implementation of Art. 9, para. 2, of Legislative Decree No. 112 of 3 July 2017 and Art. 14, para. 1, of Legislative Decree No. 112 of 3 July 2017. 117, which provide, respectively, that the social enterprise must deposit with the register of companies and publish on its website the social report prepared in accordance with the guidelines adopted, precisely, by decree of the Minister of Labour and Social Policy, after consulting the National Council of the Third Sector, and taking into account, among other elements, the nature of the activity carried out and the size of the social enterprise, also for the purposes of assessing the social impact of the activities carried out; while, for Third Sector Entities with revenues, annuities, income or revenues in any case denominated above 1 million euros, which they must deposit with the single national register of the Third Sector, and publish on their website, their social report prepared taking into account, among other elements, the nature of the activity carried out and the size of the entity, also for the purposes of assessing the social impact of the activities carried out. The parties required to prepare the social report are, therefore, the ETS and the social enterprises within the quantitative (revenues) and qualitative limits just mentioned. In addition, the entities that the regulatory provisions oblige to this type of reporting also include: volunteer service centres (Art. 61, para. 1, letter l), Legislative Decree No. 117/2017); social cooperatives (which, following the reform, will be considered social enterprises *ex lege*) and groups of social enterprises with the obligation, pursuant to Art. 4, para. 2, Legislative Decree No. 112/2017, to prepare it in consolidated form.

This legislation virtually closes the circle since, starting from the International Guidelines on Business and Human Rights, it once again underlines the importance of accountability tools, imposing them on ETS and social enterprises engaged in international cooperation. Another sector in which, as is well known, civilly recognized religious bodies are strongly committed.

## References

1. Anedda, L. (2014). *Business e diritti umani* (Linee Guida, Working Paper No. 1, Collège Universitaire Henry Dunant, Geneva).
2. Arafa, M. A. (2014). Corporate social responsibility and the fight against corruption – The concept of CSR in Egypt after the 2011 revolution. In F. Emmert, & R. H. McKinney (Eds.), *Corporate social responsibility in comparative perspective* (pp. 185-225). Retrieved from [https://www.academia.edu/35498222/Corporate\\_Social\\_Responsibility\\_in\\_Comparative\\_Perspective](https://www.academia.edu/35498222/Corporate_Social_Responsibility_in_Comparative_Perspective)
3. Benedict XVI. (2009). *Encyclical letter Caritas in Veritate*. Retrieved from [http://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate.html](http://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html)
4. Carni, M. (2016). Intermediazione e contratti assicurativi tra libertà, pluralismo religioso e discriminazione. In E. Camassa (Ed.), *Democrazie e religioni*. Naples, Italy: Editoriale Scientifica.
5. CNDCEC. (2019). *Riforma del Terzo settore: Elementi professionali e criticità applicative*. Retrieved from <https://commercialisti.it/documents/20182/323701/Allegato+-+Informativa+n.+31-2019.pdf>
6. Commission of the European Communities (COM). (2011). *Promoting a European framework for corporate social responsibility* (Green Paper). Retrieved from <https://ec.europa.eu/transparency/regdoc/rep/1/2001/EN/1-2001-366-EN-1-0.Pdf>
7. Consorti, P. (2018). Il nuovo “Codice del Terzo Settore” con particolare attenzione alla disciplina degli enti ecclesiastici (o religiosi?). In G. D’Angelo, & G. Fauceglia (Eds.), *Rigore e curiosità. Scritti in memoria di Maria Cristina Folliero* (pp. 273-288). Turin, Italy: Giappichelli.
8. Cui, J., & Jo, H. (2019). Pray local and act global? Christian religiosity in the U.S. and human rights. *Business Ethics: A European Review*, 28(3), 361-378. <https://doi.org/10.1111/beer.12219>
9. Cui, J., Jo, H., & Na, H. (2017). Corporate social responsibility, religion, and firm risk. *Asia-Pacific Journal of Financial Studies*, 46(2), 305-340. <https://doi.org/10.1111/ajfs.12171>
10. D’Este, C. (2018). Gli adempimenti contabili degli enti religiosi. In A. Gianfreda, & M. Abu Salem (Eds.), *Enti religiosi e riforma del terzo settore* (pp. 303-323). Tricase, Italy: Libellula Edizioni.
11. Dammacco, G. (2018). *Fattore religioso, mercato e impresa*. Retrieved from <https://www.cacuccieditore.it/ProductAttachments/DownloadFile/0aee54e6-6d91-44f6-ba71-99d540ac39c2>
12. Dammacco, G., & Ventrella, C. (Eds.). (2018). *Religioni, diritto e regole dell’economia*. Retrieved from <https://www.cacuccieditore.it/ProductAttachments/DownloadFile/a53ccd4d-6452-470c-80e7-9b6b421cbd81>
13. Directive No. 2014/95/EU of the European Parliament and of the Council of 22 October 2014. Retrieved from <http://data.europa.eu/eli/dir/2014/95/oj>
14. Esposito, P. (2019). Scritture contabili e sociali accountability degli enti ETS e delle imprese sociali. In G. A. M. Trimarchi (Ed.), *Orientamenti per il terzo settore: Primi passi della prassi*. Milan, Italy: Key Editore.
15. European Commission. (2011). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for corporate social responsibility*. Retrieved from <https://ec.europa.eu/transparency/regdoc/rep/1/2011/EN/1-2011-681-EN-F1-1.Pdf>
16. Ferlito, S. (2018). Sharing economy or the poisoned fruit of neoliberalism. *CALUMET – Intercultural Law and Humanities Review*.
17. Fuccillo, A. (2007). Impresa sociale. Nozione. In M. V. De Giorgi (Ed.), *La nuova disciplina dell’Impresa sociale: Commentary on Legislative Decree no. 155 of 24 March 2006* (pp. 49-78). Padua, Italy: Cedam.
18. Fuccillo, A. (2018). L’impresa sociale. In A. Gianfreda, & M. Abu Salem (Eds.), *Enti religiosi e riforma del terzo settore* (pp. 101-135). Tricase, Italy: Libellula Edizioni.
19. Fuccillo, A. (Ed.). (2011). *I mercanti nel tempio. Economia, diritto e religione*. Retrieved from <https://www.giappichelli.it/media/catalog/product/excerpt/9788834819814.pdf>
20. Fuccillo, A. (Ed.). (2016a). *Le proiezioni civili delle religioni tra libertà e bilateralità. Modelli di disciplina giuridica*. Naples, Italy: Editoriale Scientifica.
21. Fuccillo, A. (Ed.). (2016b). *The Marrakech Declaration: A bridge to religious freedom in Muslim countries?* Naples, Italy: Editoriale Scientifica.

22. Fuccillo, A., & Sorvillo, F. (2013). Religious freedom and objectives for intercultural economic development. *International Journal of Religious Freedom*, 6(1/2), 217-233. Retrieved from [https://www.academia.edu/22997682/Religious\\_freedom\\_and\\_objectives\\_for\\_intercultural\\_economic\\_development](https://www.academia.edu/22997682/Religious_freedom_and_objectives_for_intercultural_economic_development)
23. Fuccillo, A., Santoro, R., & Decimo, L. (Eds.). (2019). *Gli enti religiosi ETS. Tra diritto speciale e regole di mercato*. Naples, Italy: Edizioni Scientifiche Italiane.
24. Grimm, B. J., Clark, G., & Snyder, R. E. (2014). Is religious freedom good for business? A conceptual and empirical analysis. *Interdisciplinary Journal of Research on Religion*, 10, 1-19. Retrieved from <https://www.religjournal.com/pdf/ijrr10004.pdf>
25. Hylton, K. N., Rodionova, Y., & Deng, F. (2008). *Church and state: An economic analysis* (Boston University School of Law, Working Paper No. 08/24, pp. 1-48). <https://doi.org/10.2139/ssrn.1156433>
26. ILO. (n.d.). *The Declaration on Fundamental Principles and Rights at Work*. Retrieved from <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>
27. Lapi, C. (2016). Libertà religiosa ed economie alternative. Spunti di ricerca. In F. Dal Canto, P. Consorti, & S. Panizza (Eds.), *Libertà di espressione e libertà religiosa in tempo di crisi economica e di rischi per la sicurezza* (pp. 245-250). Pisa, Italy: Pisa University Press.
28. Law No. 300 of 29 September 2000. Retrieved from <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/2377889.pdf>
29. Legislative Decree No. 231 of 2001 June 8. Retrieved from [https://sherloc.unodc.org/cld/document/ita/2001/legislative\\_decree\\_8\\_june\\_2001\\_no\\_231\\_english.html](https://sherloc.unodc.org/cld/document/ita/2001/legislative_decree_8_june_2001_no_231_english.html)
30. Legislative Decree No. 254 of 30 December 2016.
31. Lin, C. (2013). *Religions & corporate social responsibility*. Retrieved from <http://www.cliffordlin.com/religion-and-corporate-social-responsibility>
32. Miñambres, J. (2019a). Governance e accountability nella gestione dei beni ecclesiastici. In A. Aste (Ed.), *La trasparenza nella gestione dei beni ecclesiastici: Dalla governance alla accountability. La sfida della rendicontazione tra pastoraltà e contabilità* (pp. 13-27). Rome, Italy: Marcanum Press.
33. Miñambres, J. (2019b). Rilevanza canonica dell'accountability dell'amministrazione di beni ecclesiastici. *Ius Ecclesiae*, 31(1), 135-150. <https://doi.org/10.19272/201908601008>
34. Mion, G., & Loza Adauì, C. (2011). *Verso il metaprofit. Gratuità e profitto nella gestione d'impresa*. Siena, Italy: Cantagalli.
35. Parisi, M. (2018). Enti religiosi, no profit ed economia solidale. Sull'interventismo statale dell'associazionismo di tendenza etico-religiosi nelle attuali tensioni riformistiche. In G. D'Angelo (Ed.), *Rigore e curiosità. Scritti in memoria di Maria Cristina Folliero* (pp. 541-544). Turin, Italy: Giappichelli.
36. Propersi, A., & Rossi, G. (2003). *Gli enti non profit*. Milan, Italy: Il Sole 24 Ore.
37. Reggi, L. (2017). *Cosa è l'accountability*. Retrieved from [http://focus.formez.it/sites/all/files/ud12\\_cosa\\_e\\_accountability.pdf](http://focus.formez.it/sites/all/files/ud12_cosa_e_accountability.pdf)
38. Sabbarese, L., & Santoro, R. (2017). *La dichiarazione di Marrakech: Proiezione e tutela della libertà religiosa nei paesi islamici*. Rome, Italy: Urbaniana University Press.
39. Sorvillo, F. (2016a). *Economie e religioni: L'agire per fede alla prova dei mercati*. Cosenza, Italy: Pellegrini Editore.
40. Sorvillo, F. (2016b). Lo spazio religioso dell'azione economica. L'offerta bancaria e il metaprofit incontrano la confessionalità. *CALUMET – Intercultural Law and Humanities Review*, 1-18. Retrieved from [https://www.academia.edu/33195327/Lo\\_spazio\\_religioso\\_dellazione\\_economica\\_Lofferta\\_bancaria\\_e\\_il\\_metaprofit\\_incontrano\\_la\\_confessionalit%C3%A0](https://www.academia.edu/33195327/Lo_spazio_religioso_dellazione_economica_Lofferta_bancaria_e_il_metaprofit_incontrano_la_confessionalit%C3%A0)
41. Treccani. (2012). *Accountability*. *Dizionario di Economia e Finanza*. Retrieved from [http://www.treccani.it/enciclopedia/accountability\\_%28Dizionario-di-Economia-e-Finanza%29/](http://www.treccani.it/enciclopedia/accountability_%28Dizionario-di-Economia-e-Finanza%29/)
42. UN Office of the Higher Commissioner (OHCHR). (2012). *The corporate responsibility to respect human rights: An interpretative guide*. Retrieved from <https://digitallibrary.un.org/record/734366?ln=en>
43. United Nations (UN). (1948). *Universal Declaration of Human Rights*. Retrieved from <https://www.un.org/en/universal-declaration-human-rights/>
44. United Nations (UN). (1966). *International Covenant on Civil and Political Rights*. Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
45. United Nations (UN). (1966). *The International Covenant on Economic, Social and Cultural Rights*. Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>
46. United Nations (UN). (1992). *The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*. Retrieved from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/076/55/IMG/N9307655.pdf?OpenElement>
47. United Nations (UN). (2008). *Protect, respect and remedy: A framework for business and human rights* (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, No. A/HRC/8/5). Retrieved from <https://digitallibrary.un.org/record/625292?ln=en>

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48. United Nations (UN). (2011). *Guiding principles on business and human rights: Implementing the United Nations "Protect, respect and remedy" framework* (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, No. A/HRC/17/31). Retrieved from <https://www.ohchr.org/en/issues/transnationalcorporations/pages/reports.aspx>
  49. United Nations (UN). (2015). *Frequently asked questions about the guiding principles on business and human rights*. <https://doi.org/10.18356/79c110b0-en>.
  50. Valletta, A. (2016). Canoni religiosi e modelli finanziari: Argini alla crisi e sostegno allo sviluppo economico. In F. Dal Canto, P. Consorti, & S. Panizza (Eds.), *Libertà di espressione e libertà religiosa in tempo di crisi economica e di rischi per la sicurezza* (pp. 321-337). Pisa, Italy: Pisa University Press.
  51. World Economic Forum (WEF). (2016). *The role of faith in systemic global challenges*. Retrieved from [http://www3.weforum.org/docs/WEF\\_GAC16\\_Role\\_of\\_Faith\\_in\\_Systemic\\_Global\\_Challenges.pdf](http://www3.weforum.org/docs/WEF_GAC16_Role_of_Faith_in_Systemic_Global_Challenges.pdf)

# DISCRIMINATION AGAINST WOMEN MIGRANT WORKERS IN THE ITALIAN AGRICULTURAL SECTOR: MAIN ISSUES AND POSSIBLE NORMATIVE SOLUTIONS

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**Keywords:** Discrimination, Agriculture, Women Migrant Workers, European Union Law, Italian Law, Human Rights

## 1. Introduction

In Europe and in Italy, the female component of the agricultural job market is not predominant. According to the latest data published by Eurostat, women make up on average 35.1% of the workforce in the agricultural sector in the 28 member states of the European Union (Eurostat, 2017). This figure is also observable with reference to the presence of foreign workers in the European and Italian labour market. Although the incidence of foreign workers in the Italian agricultural sector tripled between 2007 and 2017 – from 5.3% to 16.6% of total workers – this phenomenon mainly concerns male workers. Female foreign workers are, in fact, mostly (and disproportionately) present in the care sector, with particular reference to childcare and elderly care (IOM, 2017, p. 3; Centro Studi e Ricerche IDOS, 2018, p. 257). In the provinces involved in the analysis of the project *Net.Work – Rete Antidiscriminazione* (the Project)<sup>1</sup>, the lower incidence of foreign female workers in the agricultural sector compared to their male counterparts was further confirmed<sup>2</sup>. Despite this, the women migrant workers in the agricultural sector are by no means negligible from a qualitative point of view. In a sector of the labour market already characterized by difficult working conditions, a high risk of exploitation and poor protection from both legal and practical points of view – such as, precisely, the agricultural sector – women migrant workers encounter specific problems due to their gender, their migrant status, and their nationality. These problems are worthy of attention and specific analysis beyond the numerical data linked to their presence in the agricultural sector of the Italian and European labour market.

This chapter, therefore, will focus on some interesting points raised by the survey conducted in carried out in the context of the Project, adopting a gender perspective. The first paragraph will be devoted to the phenomenon of segmentation of the Italian labour market. The channelling of migrant workers in sectors of the labour market such as agriculture, and its specific meaning for migrant women employed in this sector, will also be analysed in the light of some statistical evidence emerging from the analysis of the Project. A second paragraph will then be devoted to the issue of effective access by women migrant workers to the legal protections established under Italian law and jurisprudence in relation to maternity and work/family balance. A third paragraph will focus on the forms of discrimination suffered by women migrant workers, with a special focus on the lack of specific legal protections against multiple and intersectional discrimination. Notwithstanding a certain awareness concerning these forms of discrimination by women migrant workers themselves, Italian law does not seem to devote sufficient attention to this serious phenomenon. The fourth paragraph will deal with the most serious forms of coercion against women migrant workers employed in the agricultural sector. Despite paying specific attention to the perception of coercion, the investigation carried out within the Project did not specifically aim to detect forms of gender-based violence by employers, let alone instances of trafficking in human beings. This paragraph, therefore, will not specifically comment on the incidence of these phenomena in the agricultural sector of

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<sup>1</sup> Project *Net.Work – Rete Antidiscriminazione* was carried out between 2016 and 2018 under the direction of Cidis Onlus and the scientific coordination of Alisei Coop. In this context, the Institute for Research on Innovation and Services for Development of the National Research Council of Italy (CNR-IRISS) took part to the project by, among other activities, gathering data on discrimination against migrant workers in the agricultural sector in the Campania region (with a special focus on the provinces of Caserta, Napoli, and Salerno).

<sup>2</sup> In particular, 76.9% of agricultural workers was male, and 23.1% was female.



the Campania labour market. Its main objective will instead be to critically analyse the link between the lack of legal protections of socio-economic rights of women migrant workers in this sector and the existence of instances of abuse and violence by employers, highlighting the limited character of any legal response exclusively based on criminal repression. Finally, some concluding observations will reflect on the most effective normative solutions to the highlighted problems.

## 2. Labour market segregation in Italy from a gender perspective

Despite the higher incidence of men among migrant workers in the agricultural sector, the channelling of third-country nationals in the agricultural sector (due to legal and socio-economic factors) affects not only male but also female migrant workers in quite peculiar ways. In relation to third-country nationals, Italian immigration policies have favoured this segregation through the system of annual entry quotas established by the so-called *Decreto Flussi*. This tool, first adopted by Law no. 40 of 6 March 1998, provides for an annual quota of residence permits for self-employment or dependent employment for third-country nationals. Pursuant Art. 21 (4-bis) of the so-called *Testo Unico Immigrazione* (Legislative decree no. 286 of 25 July 1998), the annual Decreto Flussi must be prepared on the basis of the actual demand for employment shown by data elaborated by the Ministry of Labour on a regional basis. The 2018 Decreto Flussi (Decree of the President of the Council of Ministers of 15 December 2017) has confirmed the trend that has been observable for several years, namely, that of *de facto* precluding the possibility for third-country nationals to enter the national territory to carry out non-seasonal employment. This possibility is indeed granted to a very narrow number of categories. The total quota of 12850 admissions allowed by the Decreto Flussi for this purpose, indeed, is largely made up of a quota reserved for the conversion of other residence permits into permits for the purpose of self-employment or dependent employment. Setting aside the former, the 2018 Decreto Flussi allows entry into Italy for non-seasonal work exclusively for privileged categories of workers (entrepreneurs who intend to invest capital in Italy, freelancers, holders of corporate offices, well-known artists, and citizens who intend to set up start-ups in Italy) and, to a small extent, to foreign citizens who have followed training courses abroad as well as to some national categories of workers of Italian origin. On the other hand, the Decreto Flussi does not provide for similar restrictions for the entry of seasonal workers in the hospitality and agricultural sectors. For 2018, the Decreto Flussi establishes a quota of 18.000 entries for a series of nationalities, reserving a quota of 2000 units for those who have already carried out seasonal work in Italy in the last five years. The only restriction in this context concerns the nationality of workers since the Decreto Flussi restricts the possibility of entry for seasonal work only to workers from certain third states. Eight of these states, however, are among the first thirteen countries of birth of migrant agricultural workers in Italy (Centro Studi e Ricerche IDOS, 2018, p. 284).

In the light of this brief analysis of the Italian legal framework concerning the entry of third-country national workers, it is possible to assume that the described system contributes at least in part to the channelling of these workers towards the agricultural sector and seasonal work. One of the starting hypotheses of the Project postulated that the very channelling of third-country nationals in the agricultural sector – and in other sectors characterized by poor legal protection and difficult working conditions – could itself constitute a form of discrimination. Confirming the tendency of recent Italian immigration policies to deny any possibility of regular immigration for the purpose of employment to third-country nationals, beyond seasonal work in the tourism and agricultural sectors, the 2018 Decreto Flussi appears to further reinforce this phenomenon, adding to factors such as the high demand for low-paid workers among employers.

Regardless of the legal framework, the channelling of male and female migrant workers into unskilled occupations has also been linked to a strong demand by employers in this regard – a phenomenon that worsened in Italy following the 2008 economic crisis (Fellini, 2018). This combination of legal and socio-economic factors has generated forms of occupational segregation for all foreign workers, channelling them in seasonal work and/or informal work if they are unable to fall within the annual quotas established by Italian law. The data collected during the Project, however, highlight particularly critical issues for workers in the agricultural sector. First, for migrant women, the gap between their level of education and qualifications, on the one hand, and the type of

employment they carried out, on the other, was greater than for migrant men. In other words, the phenomenon of over-qualification has emerged as more striking for migrant women. Second, it is interesting to note that the presence of women in the agricultural sector – albeit numerically less relevant than that of men – does not appear to be linked to the holding of residence permits for seasonal work, nor to a lack of prospects due to the irregularity of their residence status. To a much greater extent than men, the women interviewed (83% against 45.5% of men) were found to be regularly residing on the Italian territory. This can be explained by two factors. First, the fact-finding survey confirmed the national data relating to the significant presence of EU citizens among migrants residing in Italy. Indeed, at the national level, more than a third of migrants who reside in Italy are EU citizens, and the data, collected within the Project, show an equally significant incidence of EU citizens among the interviewed women migrant workers (as many as 30.8% compared to 5.8% of EU among male workers). Secondly, the women interviewed stated that they hold a residence permit for family reasons much more frequently than their male counterparts (50% of women compared to 4.7% of men).

These data suggest that offering opportunities for regular immigration for the purpose of work beyond seasonal employment in the sectors of agriculture and tourism is an essential but not necessarily sufficient tool to ensure job mobility and reduce occupational segregation. In particular, for women workers in the agricultural sector who are Union citizens, this segregation does not seem strictly linked to legal factors. As is well known, indeed, EU citizens enjoy the freedom of movement and residence throughout its territory<sup>3</sup> and can carry out self-employment or dependent employment without a residence and work permit<sup>4</sup>. For EU citizen women migrant workers in the agricultural sector, therefore, the abovementioned labour market segregation could be explained by the poverty and social exclusion experienced by certain national groups. For example, a similar phenomenon has been detected in relation to women migrant workers from Eastern Europe, with particular reference to Romanian citizens employed in the agricultural sector (Palumbo & Sciorba, 2018).

### **3. The protection of the rights of women workers in the agricultural sector and their applicability to migrant women**

The Testo Unico on the protection and support of maternity and paternity<sup>5</sup> recognizes to all agricultural workers the right to maternity benefits (Maternity/Paternity Testo Unico). For fixed-term workers, Art. 63 (2) requires their enrolment in the lists of agricultural workers for at least 51 days. Art. 7 of the Maternity/Paternity Testo Unico also prohibits employers from assigning pregnant workers to dangerous, tiring, or unhealthy jobs, including agricultural jobs that involve the handling and use of toxic or harmful substances. Women employed in the agricultural sector have the right to abstain from these activities for the duration of the pregnancy and for seven months after giving birth. These legal protections must not penalize the worker in any case, since Art. 7 also provides that she will be assigned to other tasks for the relevant period (without any effect on her salary) and that only if this is not possible, the worker will be asked to abstain from work. Subject to the aforementioned requirement of 51 working days resulting from the lists of agricultural workers, female and male workers in this sector also have the right to parental leave pursuant Art. 32 (1) of the Maternity/ Paternity Testo Unico.

With respect to maternity allowance, Art. 74 of the Maternity/Paternity Testo Unico establishes an explicit duty for municipalities to pay such an allowance (if the economic resources of the working mother's family unit are below a certain threshold) only to Italian citizens, citizens of the European Union, as well as holders of long-term residence permits. With decision no. 95 of 7 March 2017, the Constitutional Court declared the manifest inadmissibility of a question of constitutionality related

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<sup>3</sup> The normative basis of European Union citizens' freedom of movement is provided by Art. 3(2) of the Treaty on European Union, Art. 21 of the Treaty on the Functioning of the European Union and by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/2004.

<sup>4</sup> In addition to the mentioned norms of primary and secondary EU law, this matter is regulated in the Italian domestic order by Legislative Decree no. 30 of 6 February 2007.

<sup>5</sup> *Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità, a norma dell'articolo 15 della legge 8 marzo 2000*, Legislative Decree no. 151 of 26 March 2001.

to Art. 74, on the basis of the observation, that the referring court had neglected to assess the applicability on the one hand of the principle of equality in relation to social benefits between foreigners holding a residence permit for humanitarian reasons (as enshrined in Art. 34, paragraph 5 of Legislative Decree No. 251 of November 19, 2007)<sup>6</sup>, and, on the other hand, of Art. 12 of Directive 98/2011/ EU<sup>7</sup>, which establishes the right to equal treatment in the field of social security for third-country nationals holding single work permits. Although the Constitutional Court left to the referring court the assessment of the applicability of such provisions to the described situations, it has been rightly observed that this decision has *de facto* expanded the scope of application of the norms on maternity allowance (Romeo, 2018) on the grounds, among other things, of the recognition of the principle of equal treatment in relation to holders of single work permits. However, these clarifications did not produce the effect of ensuring a homogeneous recognition of the right to a maternity allowance for third-country nationals holding residence permits for the purpose of employment by Italian municipalities. With particular reference to the areas involved in the fact-finding survey of the Project, for example, among the most represented municipalities, the practical application of Art. 74 of the Maternity/Paternity Testo Unico generally continues to exclude from this benefit women migrant workers who hold a single work permit.

A similar exclusion of this category occurred in relation to birth allowances (or the so-called “baby bonus”). Art. 1 (125) of Law no. 147 of 2013<sup>8</sup> established this benefit with the aim to foster higher birth rates, establishing the payment of a monthly allowance for each child born or adopted between 1 January 2015 and 31 December 2017 until the third year of age (or three years after adoption). This benefit was limited to families with an income of less than 25,000 euros per year. The allowance was subsequently recognized by the 2018 budget law<sup>9</sup>, which in Art. 1 (248) established its applicability also for children born or adopted from 1 January 2018 to 31 December 2018, for the first year of age of the child or for the first year of adoption. In any case, these provisions envisaged access to the birth allowances exclusively to children of Italian citizens, of EU citizens, or of third-country nationals who are holders of long-term residence permits. With respect to this difference in treatment between EU citizens and long-term residents, on the one hand, and third-country nationals holding temporary residence permits, on the other, Italian jurisprudence considered that the exclusion of the latter from the benefit was illegitimate. In particular, several Italian Courts of Appeal found that the restriction provided for in Art. 1 (125) of the 2015 law is incompatible with Art. 12 of Directive 98/2011 and with the principle of equal treatment enshrined in it (see *Brescia Court of Appeal, judgment no. 444 of 24 November 2016*; *Milan Court of Appeal, judgment no. 1003 of 8 May 2017*; *Turin Court of Appeals, judgment no. 792 of 20 September 2017*). Recognizing the direct effects of Art. 12 of the Directive by virtue of the clear and unconditional nature of the obligation established therein, the case law in question has recognized to holders of single work permits the right to receive birth allowances in conditions of equality with Italian citizens.

In light of the clarifications provided for by Italian jurisprudence, it should be emphasized that female workers holding a residence permit for family reasons or a residence permit for seasonal work are excluded from the birth allowance. Indeed, the former do not fall within the scope of Art. 12 of Directive 98/2011, while for the latter, Art. 25 of the Testo Unico provides for limited access to social security and social assistance benefits due to the limited duration of their employment contracts and to the special nature of their employment. In particular, this provision recognizes foreign seasonal workers only with access to insurance in case of disability, old age, and bereavement, against accidents at work and occupational diseases, against diseases, and to maternity insurance. On the other hand, benefits for workers’ families and involuntary unemployment insurance are not recognized in this category of workers.

To complete the analysis of relevant Italian legislation on the protection of women migrant

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<sup>6</sup> *Attuazione della direttiva 2004/83/CE recante norme minime sull'attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta*, Legislative decree no. 251 of 19 November 2007.

<sup>7</sup> Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state, OJ L343/2011.

<sup>8</sup> *Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato 2014*, Law no. 147 of 27 December 2013.

<sup>9</sup> *Bilancio di previsione dello Stato per l'anno finanziario 2018 e bilancio pluriennale per il triennio 2018-2020*, Law no. 205 of 27 December 2017.

workers in the agricultural sector, it is appropriate to carry out a brief analysis of the rules concerning access to nursery schools in the light of the indications provided by the Constitutional Court. Over time, the institution of nursery schools in Italian law has assumed a dual function – since it is recognized as having an educational function for the child and at the same time as a form of social assistance for parents with economic difficulties (*Constitutional Court, judgment no. 107 of 10 April 2018*). In any case, it is undeniable that this service still plays a fundamental role in fostering work/family balance for working women. This is even more true for women migrant workers, who are less likely than their Italian counterparts to be able to count on the support of family or social networks. The access to nursery schools is regulated by Italian regions, to which Art. 6 of Law no. 1044 of 6 December 1971<sup>10</sup> entrusts the task of establishing general criteria for the creation, management, and control of the nursery schools themselves. With judgment no. 107 of 10 April 2018, the Constitutional Court established the important principle whereby access to nursery schools is directly related to the concept of substantial equality under Art. 3 (2) of the Italian Constitution “as it allows parents (in particular mothers) without adequate financial means to carry out employment” (*Constitutional Court, judgment no. 107/2018, para 3.1*). On the grounds of this observation, the Court declared the unconstitutionality of Art. 1 (1) of Veneto’s regional Law no. 6 of 21 February 2017, in so far as it established priority in the admission to nursery school for the children of parents who had been residing in Veneto for at least fifteen years or who had worked in the region for the same period.

Despite the existence of the described legal safeguards recognized by Italian law and jurisprudence, women migrant workers employed in the agricultural sector often experience conditions of disadvantage and difficulty. First, the fact-finding survey carried out by the Project confirmed the existence of difficult working conditions for all migrant workers employed in the Campania agricultural sector. The average number of weekly working days reported by the interviewees is slightly less than 6, while the average number of daily working hours amounts to 8.3 with an average daily wage of 29.1 euros. In light of these data, it is clear that the characteristics of the agricultural work carried out by migrant workers make full conciliation between work and eventual family responsibilities extremely difficult. Migrant women workers, who like Italian women workers still bear the majority of family and care burdens in comparison to their male counterparts, are particularly affected by this phenomenon. The absence of family support networks in Italy, the difficulty in accessing basic social and welfare services, and the existence of a wage gap in this context are all factors that contribute to aggravating work/family imbalances (see, for instance, Kilkey and Urzy, 2017, pp. 2578-2579, whose observations concerning the regional context in Sicily appear to be applicable, albeit with some distinctions, to the broader national context). At the regional level, the fact-finding survey of the Project revealed a much higher incidence of married couples among interviewed female workers in comparison to male workers (56.8% against 49.1%). In addition, regardless of marital status, the vast majority of female workers interviewed (77%) said they had children, compared to just over half of male workers (53.9%). The same disparity between men and women is observable for workers with cohabiting children (67.1% of female workers and 39.7% of male workers). The picture of the family situation of women migrant workers in the agricultural sector emerging from the Project’s survey, therefore, suggests that this category – much more than its male counterpart – can benefit from immigration and labor policies that are sensitive to the parental and family needs of migrant workers in this sector.

The high incidence of informal employment in this sector also has a specific meaning for women migrant workers. In the absence of an employment contract, they are excluded from an effective enjoyment of a series of rights that Italian law recognizes to female workers in general and to agricultural workers in particular. Although the workers interviewed during the Project’s survey stated that they had worked or that they currently worked without an employment contract to a lesser extent than men, the experience of informal work for migrant women also leads to an absence of protection during pregnancy and motherhood, which is also reflected in an impossibility of reconciling work and family burdens. In the most extreme cases, these difficulties can generate such vulnerable conditions in working mothers as to make them exposed to forms of blackmail and abuse by employers (Palumbo & Sciarba, 2018, p. 30; Mangiatordi, 2010).

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<sup>10</sup> *Piano quinquennale per l’istituzione di asili-nido comunali con il concorso dello Stato*, Law no. 1044 of 6 December 1971.

#### 4. Discrimination against women migrant workers in the agricultural sector

With respect to discrimination against women migrant workers in the agricultural sector, the concepts of multiple and intersectional discrimination are particularly important. On the one hand, multiple discrimination involves multiple grounds for discrimination that can be isolated and analysed separately. On the other hand, intersectional discrimination arises from the interaction of multiple and inextricably linked grounds for discrimination. Born in the context of US legal doctrine as a method of analysis of the experiences of discrimination of African-American women, this concept can be effectively applied in the European and Italian context to migrant women workers (on the concept of intersectional discrimination, see Bello, 2015; Bullock and Masselot, 2012, pp. 62-64; Crenshaw, 1991; Hannett, 2003, pp. 68-70). The latter, in fact, may present a series of characteristics that sometimes ground multiple or intersectional discrimination (migrant status, gender, ethnic origin, religion, and so on). With specific reference to migrant women, the *Shadow Report* presented by the CEDAW Platform “Work in Progress” for the period 2016-2017 (CEDAW, 2015) has shown that the phenomenon of multiple discrimination affects migrant women in every area of their life, including employment. On this point, the report identified access to an autonomous residence permit as the first tool for preventing this phenomenon as well as gender-based violence also within the employment relationship. The *Shadow Report* also focused specifically on the condition of foreign workers in the agricultural sector, underlining its particular seriousness. On this point, the inadequacy of the overall intervention of the Italian authorities was also highlighted in the period following the approval of Law no. 199 of 29 October 2016 (the so-called law on *caporalato*). According to the report, in particular, “in the ghettos where Romanian, Central African, and Nigerian agricultural labourers live, migrant women are submitted to a double exploitation regime: both as employees and as forced prostitutes for other workers and/or their bosses” (CEDAW, 2015, p. 23).

The issue of violence against foreign agricultural workers will be briefly examined in the next paragraph. Here, we will focus on the problem of the recognition of multiple and intersectional discrimination by Italian law and by victims themselves, with particular reference to the workers interviewed during the Project. The general anti-discrimination Italian framework is made up of legislative decrees nos. 215 and 216 of 9 July 2003<sup>11</sup>, which respectively implemented Directive 2000/43/EC on racial and ethnic discrimination<sup>12</sup> and Directive 2000/78/EC on a general framework for equal treatment in employment and occupation<sup>13</sup>. Reflecting on the provisions of the preambles of the aforementioned directives, these sources merely recall the need to adopt a perspective that takes into account the different impacts that the same forms of discrimination can have on women and men. In addition to a generic reference relating to the existence of forms of racism of a cultural and religious nature in Art. 1 of Legislative Decree 215/2003, it is not possible to detect any further reference to the issue of multiple and intersectional discrimination in this legal framework. A similar absence of references also characterizes the prohibition of discrimination on racial, ethnic, national, or religious grounds enshrined in Art. 43 of the *Testo Unico*. In relation to the workplace, in particular, paragraph 2 (e) of Art. 43 prohibits any act or behaviour of the employer that produces a detrimental effect by discriminating, even indirectly, the workers on the grounds of ethnic origin, language, religion, or citizenship. The same provision also establishes a prohibition of indirect discrimination, defined as any detrimental treatment consequent to the adoption of criteria that disproportionately disadvantage workers on the grounds of ethnic origin, language, religion, or citizenship, and that concerns requirements that are not essential to the performance of the working activity. It is therefore clear that the principle of non-discrimination contained in Art. 43 of the *Testo Unico* does not take into consideration the possibility of multiple or intersectional discrimination. Finally, the same type of approach can be found in Legislative Decree no. 198 of 11 April 2006 (the so-called “Code of equal

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<sup>11</sup> See respectively Attuazione della direttiva 2000/43/CE per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica 2003, Legislative decree no. 215 of 9 July 2003 and Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro, legislative decree no. 216 of 9 July 2003.

<sup>12</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 189/2000.

<sup>13</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/2000.

opportunities between men and women”)<sup>14</sup>.

In the light of a lack of awareness and attention towards the phenomenon of multiple and intersectional discrimination under Italian law, the fact-finding survey carried out in the context of the Project has highlighted interesting data regarding the perception of discrimination by the interviewed workers. On the one hand, the data that emerged from the questionnaires revealed that gender is the most widely declared reason for discrimination, and in most cases the only one perceived. On the other hand, a significant percentage (26.5%) of women workers who declared that they had been discriminated against on the grounds of sex indicated their condition of foreigners as a concurrent discrimination ground. This shows not only the existence of forms of multiple and intersectional discrimination in the agricultural sector to the detriment of women migrant workers but also a certain perception of the phenomenon among them. In light of the difficulties in detecting multiple forms of discrimination highlighted by legal doctrine and of the substantial lack of interest in the law and Italian jurisprudence towards this phenomenon, this awareness is noteworthy.

## 5. The exploitation and coercion of women migrant workers in the agricultural sector

Women migrant workers can be subjected to forms of physical or psychological violence both because of their gender and because of their nationality or ethnic origin. In some cases, therefore, their experiences of abuse and violence can also be seen as forms of discrimination. In relation to the right not to suffer physical or sexual violence, the Committee on Economic, Social and Cultural Rights has for example observed that gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social, and cultural rights, on a basis of equality<sup>15</sup>. A similar characterization was made by the Committee for the Elimination of Discrimination Against Women in its General Recommendation no. 19<sup>16</sup>. The latter also defined sexual harassment in the workplace as a form of gender-based violence<sup>17</sup>.

The questionnaire administered in the context of the Project was not aimed at specifically detecting cases of violence against the women migrant workers interviewed. However, the questions asked in relation to the perception of forms of coercion eventually suffered in the workplace have provided some interesting indications. For example, precisely in relation to the perception of coercion, the men interviewed indicated more than women that they had received physical or psychological threats or threats related to their irregular status. From the questionnaire, it is not possible to infer whether this data is motivated by a greater reticence of the interviewed women workers to report having suffered threats or simply to an actual lower incidence of this phenomenon among them. In any case, it is interesting to recall that in other regional contexts – and specifically, in relation to the significant presence of female agricultural workers from Romania in different areas of Sicily – the existence of sexual abuse and blackmail by employers to the detriment of this category has been widely documented and commented on (CEDAW, 2015; Palumbo & Sciarba, 2018; Centro Studi e Ricerche IDOS, 2018, p. 288). This phenomenon suggests that the vulnerability generally experienced by migrant workers in a sector such as agriculture takes on specific connotations for women, which are rarely taken into consideration by the Italian legal framework on the protection against violence and trafficking in human beings. On the one hand, the main Italian provisions on gender-based violence against migrants (with the exception of those on human trafficking) focus on violence suffered within the family<sup>18</sup>. On the other hand, in relation to the phenomenon of trafficking

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<sup>14</sup> *Codice delle pari opportunità tra uomo e donna, a norma dell'articolo 6 della legge 28 novembre 2005*, Legislative decree no. 198 of 11 April 2006.

<sup>15</sup> Committee on Economic, Social, and Cultural Rights, General Comment no. 16 (2005), para. 27.

<sup>16</sup> Committee for the Elimination of Discrimination Against Women, General Recommendation no. 19 (1992).

<sup>17</sup> Committee for the Elimination of Discrimination Against Women, General Recommendation no. 19 (1992), para. 17-18.

<sup>18</sup> A clear illustration of this tendency, for instance, concerns the introduction of Art. 18-bis in the *Testo Unico Immigrazione*, as established by Law-decree no. 93 of 14 August 2013 (entitled “*Disposizioni urgenti in materia di sicurezza e per il contrasto della violenza di genere, nonché in tema di protezione civile e di commissariamento delle province*”). Art. 4 of the law-decree – entitled to the protection of foreigners who are victims of domestic violence – has recognised the possibility for victims of criminal offences concerning domestic violence to obtain a residence permit “for humanitarian reasons”, restricting its scope of application to victims of non-isolated acts of physical, sexual, psychological or economic violence that occur within the family or between current or former spouses of persons linked by a relationship (ongoing or no longer in place).

in human beings, the clear prevalence of victims subjected to sexual exploitation has overshadowed the peculiarities of trafficking for the purpose of labour exploitation in the agricultural sector when this concerns migrant women<sup>19</sup>. The prevalence of female victims in the context of trafficking for sexual exploitation on the one hand, and of men victims of trafficking for labour exploitation, on the other hand, is also observable at the European level (Europol, 2016). This data, in turn, are mirrored in the jurisprudence of the European Court of Human Rights (ECtHR), whose judgments on the matter of trafficking in human beings against women have concerned almost exclusively cases of sexual exploitation (*Rantsev v. Cyprus and Russia*, 2010; *V. F. v. France*, 2011; *M. and others v. Italy and Bulgaria*, 2012; *F. A. v. the United Kingdom*, 2013; *L. E. v. Greece*, 2016; *S. M. v. Croatia*, 2018).

In relation to foreign agricultural workers, in any case, the main limitation of the Italian legal framework on the repression of human trafficking, of slavery or servitude, and of other phenomena of violence and abuse of workers in the agricultural sector does not concern the lack of criminal law protections. On this point, the Italian legislator has intervened on several occasions in recent years, also for the purpose of ensuring the implementation of EU directives on the matter. In 2003, for example, Art. 600 and 601 of the Italian Criminal Code were reformed<sup>20</sup>. In its current formulation, Art. 600 provides for the crime of “reduction or maintenance in slavery or servitude”, supplemented by the conduct of those who exercise powers corresponding to those of the right of ownership over a person or who keeps a person in a state of continuous subjection, forcing them, *inter alia*, to carry out employment or to provide sexual services. Trafficking in persons is instead punished by Art. 601 of the Italian Criminal Code, which also refers to the abuse of authority as well as to the exploitation of a situation of vulnerability, of physical or mental subordination, or of necessity among the means to carry out the conduct prohibited by this provision. The reference to situations of vulnerability was specifically introduced in Art. 601 of the Italian Criminal Code by Legislative decree no. 24 of 4 March 2014<sup>21</sup>, with which Italy implemented the aforementioned Directive 36/2011/EU on trafficking. For victims of trafficking, Art. 18 of the Testo Unico recognizes the right to obtain a residence permit and to participate in assistance and social integration programs, provided that “real dangers for [their] safety emerge” as a result of their attempts to escape situations of violence or exploitation by criminal organizations or of statements made in the context of preliminary investigations or criminal proceedings. In addition to the legislation against trafficking, slavery, or servitude, Italy has adopted a specific law to repress the gangmaster system (or *caporalato*). In particular, Law no. 199 of 2016<sup>22</sup> reformed Art. 603-*bis* of the Italian Criminal Code relating to the crime of illicit brokerage and labour exploitation, extending the scope of application of the fund for anti-trafficking measures also to victims of these crimes.

Beyond the actual degree of implementation of the described protections, an important limitation of the Italian legal framework on trafficking and violence in the agricultural sector concerns the absence of awareness in relation to the importance of ensuring access to socio-economic rights and a stable migratory status as a form of prevention of these phenomena. This research has highlighted some critical issues related to the exclusion of women migrant workers in the agricultural sector from rights granted to Italian, EU citizen, or long-term resident workers. In the light of these observations, it is clear that the impossibility of reconciling work and family life and the absence of forms of assistance and support specifically aimed at women migrant workers in the agricultural sector inevitably make existing legal protections against exploitation and coercion by employers incomplete. Partial recognition of the link between the difficult living and working conditions of migrants employed in the agricultural sector and their condition of vulnerability to exploitation and trafficking came by the ECtHR in its judgment of *Chowdury v. Greece*, 2017. Although this judgment concerned male migrant workers, the clarifications provided by the Court in relation to positive state regarding the prevention and repression of trafficking and forced labour are also relevant for the

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<sup>19</sup> According to the data gathered by the Equal Opportunities Department (*Dipartimento Pari Opportunità*), 85.09% of victims of trafficking in 2017 were women, and 78.28% of total victims (men and women) had been subjected to sexual exploitation (Osservatorio Interventi Tratta, n.d.).

<sup>20</sup> *Misure contro la tratta di persone*, Law no. 228 of 11 August 2003.

<sup>21</sup> *Attuazione della direttiva 2011/36/UE, relativa alla prevenzione e alla repressione della tratta di esseri umani e alla protezione delle vittime, che sostituisce la decisione quadro 2002/629/GAI*, Legislative decree no. 24 of 4 March 2014.

<sup>22</sup> *Disposizioni in materia di contrasto ai fenomeni del lavoro nero, dello sfruttamento del lavoro in agricoltura e di riallineamento retributivo nel settore agricolo 2016*, Law no. 199 of 29 October 2016.

purposes of this research. The *Chowdury* judgment, in particular, originated from the appeal of a group of workers from Bangladesh who irregularly resided in Greece regarding the violation of the prohibition of forced or compulsory labour enshrined in Art. 4 of the European Convention on Human Rights (ECHR). The applicants had been recruited to harvest strawberries inside greenhouses under the control of armed guards and had never received wages previously agreed upon. During a confrontation with their employers, part of the applicants had been seriously injured. Although criminal proceedings for the crime of trafficking in human beings had been initiated against the individuals who had recruited the applicants, Greek authorities had considered this crime to be non-existent due to the lack of objective elements. In this case, the ECtHR recognized a violation by Greece of its positive obligations to prevent and repress trafficking and forced labour under Art. 4 ECHR. For our purposes, a particularly interesting aspect of the *Chowdury* judgment concerns its assessment of the existence of a condition of the vulnerability of the applicants. As is known, the abuse of a vulnerable position is one of the means provided for in the definition of trafficking in human beings adopted by international and European Union law. In particular, Art. 4 (a) of the Council of Europe Convention against Trafficking (Council of Europe, 2005) defines this conduct as the recruitment, transportation, transfer, harbouring, or receipt of persons either by violent means (such as the threat or the use of force itself, or abduction) or with other forms of coercion, including “abuse of power or of a position of vulnerability”. In presence of these conditions, the Convention considers any consent given by the victim as irrelevant. A similar reference to the abuse of a condition of vulnerability is observable in the definition of trafficking adopted by Directive 36/2011/EU<sup>23</sup> on the prevention and repression of trafficking in human beings. Art. 2 (2) of the Directive also clarifies that “a position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved”.

In light of the definition of trafficking in human beings adopted by international and European Union law, the ECtHR correctly concluded that the applicants in the *Chowdury* case were in a vulnerable condition resulting from their status as irregular migrants on the Greek territory. In particular, the ECtHR observed that, even assuming the existence of an initial consent to perform the activities for which they had been recruited, it was necessary to consider that the applicants had started to work “at a time when they were in a situation of vulnerability as irregular migrants without resources and at risk of being arrested, detained and deported” (*Chowdury v. Greece, 2017, para. 97*). Therefore, the ECtHR identified the existence of forced labour and trafficking in human beings in the present case.

Although the condition of irregularity was the main feature from which the ECtHR inferred the vulnerability to trafficking and exploitation of the applicants in the *Chowdury* case, it should be noted that in any case, EU citizenship does not offer particular protection from forms of abuse and violence by employers. In fact, the data available to Europol highlight that the majority of victims of trafficking for the purpose of labour exploitation are EU, mainly from Central and Eastern Europe (Europol, 2016, p. 24). Beyond the specific observations of the ECtHR in the *Chowdury* judgment, it is possible to conclude that similarly to the irregular residence, factors such as the lack of decent housing, of access to support policies for working mothers and to forms of social security by women migrant workers can contribute significantly to create a condition of vulnerability to coercion and exploitation by employers.

## 6. Conclusion

In this research, some of the main issues concerning women migrant workers in the agricultural sector of Campania and Italy have been highlighted. While some of the discussed problems are more closely related to social and economic factors, on several occasions the research had analysed the absence of specific legal safeguards or the lack of effective implementation of existing legal protections. With some important exceptions (including the contributions mentioned in this chapter), these problems have rarely been studied and commented on by Italian scholars. Unlike the domestic work sector,

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<sup>23</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA L, OJL 101/2011.



where most of the migrant women in Italy are concentrated (Centro Studi e Ricerche IDOS, 2018), the condition of women migrant workers in the agricultural sector has been subject to less academic attention. Beyond the numerical data, however, the presence of migrant women workers in this sector is certainly worthy of attention. First, the analysis carried out in this research shows that in relation to this category serious problems of the effectiveness of existing laws aimed at the prevention and repression of exploitation and coercion persist. These issues are relevant beyond the agricultural sector; moreover, if considered from a gender perspective, they acquire a specific meaning and can be seen as transversely applicable to different sectors of the labour market. The latter also includes domestic work, with which it would be possible to draw interesting parallels (for example, with respect to the effects of job insecurity and migrant status on the workers' capability to react to situations of exploitation).

Precisely with a view to contrasting phenomena of exploitation and coercion to the detriment of women migrant workers in the agricultural sector, it is clear that a repressive legal response is necessary but not sufficient. In particular, the response of Italian and European law cannot be exclusively based on criminal law. There is no doubt that the adoption of repressive measures of *caporalato*, of slavery or servitude, and of violence against women workers in the agricultural sector is indispensable to avoid the creation of a climate of impunity and to guarantee an effective reparation of the damage suffered by victims. However, this research aimed to highlight that effective prevention of exploitation and coercion in this context can only be achieved through the recognition of socio-economic rights to foreigners employed in the agricultural sector. The lack of policies in support of working mothers (including policies aimed at the realization of a satisfactory work/family balance), of opportunities for regular labour migration, of the possibility of acquiring a stable residence status and emerging from informal work, are primary causes of the vulnerability of women migrant workers in the agricultural sector to discrimination, exploitation, and violence and abuse by employers. Without a holistic approach, any policy aimed at repressing these phenomena inevitably offers a short-sighted and merely *ex-post* response to already exacerbated situations, without intervening on their primary causes and without considering the role of immigration and labour law in generating vulnerability for women migrant workers.

## References

1. Bello, B. G. (2015). Diritto e genere visti dal margine: Spunti per un dibattito intersezionale al diritto antidiscriminatorio in Italia. *Diritto e Questioni Pubbliche*, 15, 141-171. Retrieved from [http://www.dirittoquestionipubbliche.org/page/2015\\_n15-2/009\\_Mono1\\_Bello.pdf](http://www.dirittoquestionipubbliche.org/page/2015_n15-2/009_Mono1_Bello.pdf)
2. Brescia Court of Appeal, judgment no. 444 of 24 November 2016.
3. Bullock, J., & Masselot, A. (2012). Multiple discrimination and intersectional disadvantage: Challenges and opportunities in the European Union legal framework. *Columbia Journal of European Law*, 19, 57-82.
4. CEDAW. (2015). *CEDAW shadow report*. Retrieved from [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ITA/INT\\_CEDAW\\_NGO\\_ITA\\_27675\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ITA/INT_CEDAW_NGO_ITA_27675_E.pdf)
5. Centro Studi e Ricerche IDOS. (2018). *Dossier statistico immigrazione*.
6. Chowdury v. Greece, application no. 21884/15, ECHR, judgment of 30 March 2017. Retrieved from [https://sherloc.unodc.org/res/cld/case-law-doc/traffickingpersonscrimetype/\\_irb/2017/chowdury\\_and\\_others\\_v\\_\\_greece\\_html/CASE\\_OF\\_CHOWDURY\\_AND\\_OTHERS\\_v.\\_GREECE.pdf](https://sherloc.unodc.org/res/cld/case-law-doc/traffickingpersonscrimetype/_irb/2017/chowdury_and_others_v__greece_html/CASE_OF_CHOWDURY_AND_OTHERS_v._GREECE.pdf)
7. Codice delle pari opportunità tra uomo e donna, a norma dell'articolo 6 della legge 28 novembre 2005, legislative decree no. 198 of 11 April 2006. Retrieved from <https://www.camera.it/parlam/leggi/deleghe/testi/06198dl.htm>
8. Committee for the Elimination of Discrimination Against Women, General Recommendation no. 19 (1992). Retrieved from <https://www.ohchr.org/en/hrbodies/cedaw/pages/recommendations.aspx>
9. Committee on Economic, Social and Cultural Rights, General Comment no. 16 (2005), par. 27.
10. Constitutional Court, judgment no. 107 of 10 April 2018.
11. Constitutional Court, judgment no. 107/2018, cit., para 3.1.
12. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Retrieved from <http://data.europa.eu/eli/dir/2000/43/oj>
13. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Retrieved from <http://data.europa.eu/eli/dir/2000/78/oj>

14. Council of Europe. (2005). *Council of Europe convention on action against trafficking in human beings* (CETS No. 197). Retrieved from <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008371d>
15. Crenshaw, K. (1989). Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago Legal Forum*, 1989(1), 139-167. Retrieved from <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf>
16. Crenshaw, K. (1991). Mapping the margins: Intersectionality, identity politics, and violence against women of color. *Stanford Law Review*, 43(6), 1241-1299. <https://doi.org/10.2307/1229039>
17. Decree of the President of the Council of Ministers of 15 December 2017. Retrieved from <https://www.gazzettaufficiale.it/eli/id/2018/01/16/18A00308/sg>
18. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004.
19. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA L. Retrieved from <http://data.europa.eu/eli/dir/2011/36/oj>
20. Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011. Retrieved from <http://data.europa.eu/eli/dir/2011/98/oj>
21. EU. (2012). *Treaty on European Union*. Retrieved from [http://data.europa.eu/eli/treaty/teu\\_2012/oj](http://data.europa.eu/eli/treaty/teu_2012/oj)
22. EU. (2012). *Treaty on the functioning of the European Union*. Retrieved from [http://data.europa.eu/eli/treaty/tfeu\\_2012/oj](http://data.europa.eu/eli/treaty/tfeu_2012/oj)
23. Europol. (2016). *Situation report: Trafficking in human beings in the EU* (No. 765175). Retrieved from [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/situational\\_report\\_trafficking\\_in\\_human\\_beings-\\_europol.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/situational_report_trafficking_in_human_beings-_europol.pdf)
24. Eurostat. (2017, December). *Agriculture, forestry and fishery statistics: 2017 edition*. Retrieved from <https://ec.europa.eu/eurostat/documents/3217494/8538823/KS-FK-17-001-EN-N.pdf/c7957b31-be5c-4260-8f61-988b9c7f2316>
25. F. A. v. United Kingdom, application no 20658/11, ECHR, decision of 10 September 2013. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-127061>
26. Fellini, I. (2018). Immigrants' labour market outcomes in Italy and Spain: Has the Southern European model disrupted during the crisis? *Migration Studies*, 6(1), 53-78. <https://doi.org/10.1093/migration/mnx029>
27. Hannett, S. (2003). Equality at the intersections: The legislative and judicial failure to tackle multiple discrimination. *Oxford Journal of Legal Studies*, 23(1), 65-86. <https://doi.org/10.1093/ojls/23.1.65>
28. Kilkey, M., & Urzi, D. (2017). Social reproduction in Sicily's agricultural sector: Migration status and context of reception. *Journal of Ethnic and Migration Studies*, 43(15), 2573-2590. <https://doi.org/10.1080/1369183X.2017.1286971>
29. L. E. v. Greece, application no 71545/12, ECHR, judgment of 21 January 2016. Retrieved from [https://ec.europa.eu/anti-trafficking/case-law/le-v-greece\\_en](https://ec.europa.eu/anti-trafficking/case-law/le-v-greece_en)
30. Legislative Decree n. 251 of 19 November 2007. Retrieved from <https://www.refworld.org/docid/545248d04.html>
31. Legislative Decree n. 30 of 6 February 2007, implementation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 6 February 2007. Retrieved from <https://www.refworld.org/docid/544fc3754.html>
32. Legislative Decree No. 151/2001. Retrieved from [https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2001-04-26&atto.codiceRedazionale=001G0200&queryString=%3FmeseProvvedimento%3D%26formType%3Drice\\_semplice%26numeroArticolo%3D%26numeroProvvedimento%3D151%26testo%3D%26annoProvvedimento%3D2001%26giornoProvvedimento%3D&currentPage=1](https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2001-04-26&atto.codiceRedazionale=001G0200&queryString=%3FmeseProvvedimento%3D%26formType%3Drice_semplice%26numeroArticolo%3D%26numeroProvvedimento%3D151%26testo%3D%26annoProvvedimento%3D2001%26giornoProvvedimento%3D&currentPage=1)
33. Legislative decree no. 215 of July 9, 2003: Implementation of the Council Directive 2000/43/EC for the equal treatment between persons irrespective of racial or ethnic origin. Retrieved from <http://hdl.handle.net/20.500.12389/20124>
34. Legislative Decree no. 286 of 1998, Testo unico sull'immigrazione, 25 July 1998. Retrieved from <https://www.refworld.org/docid/54a2c23a4.html>
35. M. and others v. Italy and Bulgaria, application no. 40020/03, ECHR, Judgment of 31 July 2012. Retrieved from <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-112576%22%7D>
36. Mangiadori, M. (2010). Il lavoro della donna nel settore agricolo: Tra retaggi culturali e innovazione. *Osservatorio sul Mezzogiorno*, 1(2). Retrieved from [http://www.csddl.it/csddl/attachments/452\\_II%20lavoro%20della%20donna%20nel%20settore%20agricolo.pdf](http://www.csddl.it/csddl/attachments/452_II%20lavoro%20della%20donna%20nel%20settore%20agricolo.pdf)
37. Milan Court of Appeal, judgment no. 1003 of 8 May 2017.
38. Osservatorio Interventi Tratta. (n.d.). *Data concerning the timeframe between 1 January 2017 and 31 December 2017*. Retrieved from <http://www.pariopportunita.gov.it/wp-content/uploads/2017/12/Riepilogo-SIRIT-2017.pdf>

39. Palumbo, L., & Sciarba, A. (2018). *The vulnerability to exploitation of women migrant workers in agriculture in the EU: The need for a human rights and gender based approach*. Retrieved from [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604966/IPOL\\_STU\(2018\)604966\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604966/IPOL_STU(2018)604966_EN.pdf)
40. Rantsev v. Cyprus and Russia, application no. 25965/04, ECHR, judgment of 7 January 2010. Retrieved from [https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/rantsev-v-cyprus-and-russia-application-no-2596504\\_en](https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/rantsev-v-cyprus-and-russia-application-no-2596504_en)
41. Romeo, G. (2018). Il cosmopolitismo pragmatico della corte costituzionale tra radicamento territoriale e solidarietà. *Rivista AIC, I*. Retrieved from <https://www.rivistaaic.it/it/rivista/ultimi-contributi-pubblicati/graziella-romeo/il-cosmopolitismo-pragmatico-della-corte-costituzionale-tra-radimento-territoriale-e-solidariet>
42. S. M. v. Croatia application no 60561/14, ECHR, Judgment of 19 July 2018. Retrieved from <http://hudoc.echr.coe.int/eng/?i=001-184665>
43. The International Organization for Migration (IOM). (2017). *Migrants' contributions to Italy's welfare* (Issue 2). Retrieved from <https://italy.iom.int/en/news/online-briefing-migrants%E2%80%99-contributions-italy%E2%80%99s-welfare>
44. Turin Court of Appeals, judgment no. 792 of 20 September 2017.
45. V. F. v. France, application no. 7196/10, ECHR, decision of 29 November 2011. Retrieved from [https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/vf-v-france\\_en](https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/vf-v-france_en)

# CONCEPTIONS OF HUMAN NATURE AND RIGHTS

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**Keywords:** Man's Nature, Rights, Person

## 1. Introduction: Human species, human being, human individual and human genome

The nature of man evolves in itself biologically and culturally and has a purpose, for which, teleologically considered in all its dimensions, is naturally addressed to respect for life and freedom of each individual and to respect for the environment (Eccles, 1979; UNESCO, 1997). So it does not tend towards the globalization of the societal technocratic paradigm in which today's culture delves more and more (Pope Francis, 2015). A paradigm that represents the totalitarian society, in any of its forms, either as an expression of some men's domination on others or as an expression of industrial domination on nature, in favour of the few and at expense of the many. From here the incentive to equally consider everybody's life in recognition and respect of their rights. Recognition and respect that is to be proportional to the needs of the necessary existence and the existential development of each person, and the improvement of live conditions.

Recognition and mutual respect that imply a reference to the concepts of human species, human being, human individual, and human person, in order to specify more clearly the problem of the social dimension of human nature.

Human species, human being, human individual, and human person are independent entities. As for human species, we should remember that it precedes the human being because the human being just comes from it. Human species is actually present in the universal moment that exists in each human being. In this sense, then, human species is something previous to the human being, so it is to the human individual and person.

In the nature of human being and, consequently of human individual and human person, the characteristics of human species and the specific principles of each individual are present; these principles are the universal ones and the individuating ones and they make each human being an individual very different from the others, but different because of the way the individuating principles occur. Specifically, in each human being, universal and individuating principles are present. Distinction, this already known in Greek-Roman Age; present in Aristotle's work<sup>1</sup> and resumed by Cicero (Ferrero & Zorzetti, 1986), it is a classical distinction that, re-proposed by St. Thomas (Centi, 1997), entered the common culture suffering non-essential variations, due to the different dimension of man's nature privileged by the author who reintroduced it.

Lastly, in the affluent society, that could have brought the biological evolution of man to a final point (Eccles, 1979), the human evolution would have only been cultural, that is why we often consider culture as the only foundation of man's nature and not nature and culture. In this way, we undermine the basis of the classical distinction between man's universal and individuating principles. Principles that, we shouldn't forget, are both present in the nature of every man, although in different ways.

However, speaking about man's nature, we should take into consideration that in each human individual we see a universal principle, common to all men, and a particular one, specific to each human; we should also consider that universal principles are articulated in several dimensions.

## 2. Man's nature and rights

Man's universal principles are the foundation of his fundamental or natural (Bobbio, 1990) rights and the specific or individuating principles are the principles of his non-fundamental rights; these last

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<sup>1</sup> See <http://classics.mit.edu/Aristotle/nicomachaen.10.x.html>

principles are intended to guarantee in the first place the exercise of fundamental rights and not the realization of man's desires, that are not founded in nature or anyway not related to the respect of his nature.

If it's agreed on what has just been said, the consequence is that individuating rights should never be used against fundamental rights and the right to freedom should never be used against the right to life. Respect for the right to life that is now the cultural context of bioethics, intended as an ethic of life. Man's life that in its necessary essence has been re-proposed biologically and culturally by the UNESCO (1997) in the Universal Declaration on the Human Genome and Human Rights.

Then, about freedom, we don't have to forget that this is the ability of reason to judge which action has to be taken in specific cases, in order to meet the values of life. The ability that is obviously followed by a practical judgement, which is consent and choice of that action.

Freedom is therefore intended as an essential moment for the exercise of reason. As such it becomes a moment that is independent and founding of the man's nature and its related right.

The exercise of the right to freedom leads human individual to develop reason in speaking to others, namely to change into a social animal. Specifically, as social animal, he has to open to others, to the social fabric. However, with a view to do so, he has to harmonically use all the dimensions of his nature. He has to socially act also in the respect of others' rights and have towards them the same respect he has towards himself.

If a man prefers to exercise some dimensions rather than others, he is inevitably pushed to dominate those who don't choose the same dimensions; in defence of his behaviour he uses the assertion of his interests (Hume), of his power (Nietzsche), of his *libido* (Freud).

### 3. The overcoming of the traditional anthropologic paradigm

The traditional anthropologic paradigm, mentioned in the previous paragraphs, has been overcome in the last 150 years, years characterized by scientific and technological progress (Eccles, 1979). This paradigm has been overcome by the paradigm of the transhuman, the result of a culture intended, indeed, mainly as scientific and technological progress. This last has been to some extent overcome by the post-human paradigm (Cingolani & Metta, 2005).

These last two paradigms about man's nature are not new in the history of philosophical and scientific thought; they find their conceptual origins at least at the start of the modern age with Francis Bacon. In his *The Great Works of Nature Especially in Relation to Human Uses*<sup>2</sup>, he listed the potential offered by nature that from over 150 years (Eccles, 1979), became practicable, partially because of science and technology progress. We are referring to a long life, to the reinforcement of intellectual and physical abilities, to the partial elimination of aging, etc.

1) The transhuman paradigm has to be seen as the result of the philosophical, scientific, and technological thought, and in particular of bionics, the science that studies electronic systems which emulate man's behaviour. Bionics that is on the right way to build artefacts whose job is to recover the natural abilities that man has lost, and to imitate the original functions of human organs. However, the transhuman is still a human individual, able to keep thinking of and creating new programmes of life.

2) The post-human paradigm (Marchesini, 2002; Pulcini, 2005; Fuschetto, 2010; Cingolani & Metta, 2005) is totally different. The post human individual, using artificial intelligence, could plan individual lives that are completely socially independent. In short, the risk is that the posthuman could be released from the guide of a *recta ratio* and could be programmed to have higher intelligence than a natural one. The undesirable event, as we could move towards a low concept of man, who would be represented only through his autonomy and his artificial rationality, but deprived of any human dimension. He would be a machine.

From here the opportunity to refer to the precaution principle in order to support the non-manipulation of the human genome. Possibility, on the contrary, was supported by

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<sup>2</sup> We say "at least" thought about the myth of Icarus, son of Daedalus and Naucrates, to whose body the father adapted wings made of wax, to help him run away from Crete Labyrinth. But Icarus flew too high, too close to the sun, wax melted and he fell into the sea.

Harris (1992) who adopted a firm decision in favour of this manipulation. The position that is strongly criticized, among the others, by Fukuyama (2002), in his *Our Posthuman Future: Consequences of the Biotechnology Revolution*.

The use of the precaution principle looks here essential because, at a time when technocracy dominates, we are thinking of programme man's nature in order to increase profits. For example, with genetic engineering, we could think about modifying man's genome in order to program men who are physically gifted, to design a social class intended for arduous jobs.

But a question springs to mind if the use of the precaution principle is enough to stop the attempt of manipulating the human genome, even if it is anyway a good remedy.

We must agree that this principle isn't strong enough as the age in which we live in an age of laxity in the ethic and social field, as aforementioned. However, we cannot exclude the possibility of urging man to abandon his setup as an individual of human species and to lean towards his setup as a human person. From here the opportunity to justify this proposal.

It is necessary to remind that in different times of human history, unfortunately, a good part of human beings is not made of people, but of individuals. And a human individual is not a human person, as we will see better later. Here it is enough to remember that one could be defined as *Homo Praedatorius* and the other one as *Homo sapiens*.

When the majority of members of a society are human individuals, society doesn't live a life of splendour. In times when only a few human beings live like people, humanity is forced to live an era of decadence. And, unluckily, this is our epoch. For more than 150 years, indeed, the most important cultural conquests have been only in the scientific and technological field, the result of scientific thought. Consequently, in these social sectors, that characterized the technological society, humanity is living a golden age. But the technological society is only one of the forms of life in human society. In fact, the technologist, before being that, is a man with his values. From here man's necessity to take this responsibility principle as the North Star of his conduct (Jonas, 1979)<sup>3</sup>.

So our age appears with an intrinsic laceration. In some cultural sectors, it progresses, and in others, it does not progress or it even regresses. It declares legally licit what is against the continuity of human species' life, so it privileges too much, for example, the *libido*, dimension of man's nature; man, in turn, privileges a decay of morals. This privilege takes shape in accepting the condition of freedom without limits, that vaguely reminds us of the epoch of "*A furia di lussuria fu si rotta, che libito fe' licito in sua legge, per torre il biasmo in cui era ridotta*"<sup>4</sup>.

In favour of progress in the scientific and technological fields I could recall, as Aristotle said, that about the principles based on science "we do not need to search for further explanations", as they get their credibility from themselves, so the scientific progress is linear; on the other hand, principles based on opinion, have to be adopted by everybody "or by the majority, or by the wise men, and among these or by everybody or by the majority"<sup>5</sup>. Synthetically, the scientific progress historically runs along a straight ascending line, while the philosophical, humanistic one runs along an ascendant line that it is not straight but sinusoidal.

But we can have an effective Renaissance only if during the rebirth all the dimensions of man's nature are involved, together with the sector of culture in which they are practiced. It would also happen if science is not only used for technology's sake in different fields like medicine, communications, war, etc, so man should take as a guide of his own conduct, the values that led him to a civil evolution in the history, like altruism, solidarity, respect for his own dignity and the dignity of others, either of a religious or secular nature. Man's nature adopts fundamental characteristics of humanism and religious renewal, political renewal, and naturalism. Man's nature that, then, does not erase its religious and metaphysical dimension from its paradigm (Pico della Mirandola & Garin, 1994).

Therefore man has to be supported by his own dignity, which should lead him to take as guide the value of authenticity, of identity that implies the liberation from subjugation to political power and

<sup>3</sup> In this volume we read: "Humanity existence means simply that men live; the fact that they live well represents the following commandment. The pure ontic fact of their existence becomes, for those who haven't been asked before, the ontological commandment on which basis humanity has to keep on existing. That anonymous "first commandment" is implicitly in all the others (...). Entrusted to the instinct of procreation for its immediate realization".

<sup>4</sup> Alighieri, D. *Inferno*. Canto 5, vv. 55-57.

<sup>5</sup> Aristotle. *Topics*, I (A), 1, 100b, 18-20.

the power of media. He also has to present himself as supplied with the ability of self-design, following only his own nature's suggestions (Xingjian & Gallo, 2018; Morin & Lazzari, 2001; Fukuyama & Amato, 2019). Nature that, in order to be permeated and guided by the reason, takes him to use as a fundamental point the *Homo Sapiens* with his characteristics and not the *Homo Praedatorius* who, obeying the principles of biological evolution, is led by violence and aggressiveness. This last behaves towards others as a ruthless being, like in the sad phenomenon, spread in the last few years, of femicide. The figure, this of the *Homo Praedatorius* that has been unfortunately reintroduced in the history of humanity nearly a century ago, leading humanity towards an epoch of decadence.

However, we should never forget that either in bad and good times, social actors are always the human beings who must be respected for their necessary essence; it does not matter if they behave as individuals or as persons.

At this point, it is necessary to specify the concept of individual and that of person and therefore the characteristics that help to shape one concept and the other.

#### 4. The individual

The figure of the *Homo Praedatorius* "ambitious and ruthless creature, acting according to the principle of biological evolution, that is survival of the most suitable one" (Eccles, 1979, p. 120), taken as a model by individualism for several decades, led the human being to face a transformation.

Studies on individualism showed this transformation. Since the last decades of the last century, lifestyles on a social aspect followed the way of hedonistic consumerism and we experienced the reintroduction of individualistic anthropology oriented toward a minimum State, to which you can ask to satisfy all man's desires. We could say then, that the essence of the individualistic anthropology has gone through a process of hybridization and then became individualistic.

Already in the 60s, with Morin and Rabbito (2002) we remember the coming of private individualism as a product of a mass culture that permeates human beings' life and overcomes the traditional figure of bourgeois individualism, creating a radical transformation of custom.

This transformation brought the individualistic anthropology to meet the hedonistic sense of life. This is a kind of anthropology that thanks to mass communication, to consumerism, and technological progress, encouraged customs' permissiveness; it is well connected to unlimited freedom that is peculiar to the existential intimacy of man in the individualism, and that is oriented towards a variety of social backgrounds.

This individualistic tendency, based actually on a variety of social backgrounds is led to demand the recognition of new rights and to make the request to have a private individual life, free from social constraints.

Consequently, if we want to take stock of the form of today's individualism, we could say that it developed in different directions that create new anthropologic figures. These forms take as their foundation a culture separated from the cultural development that led the human being to overcome the characteristics of the *Homo Praedatorius*; he, as mentioned before, behaves towards others as an egotistic being, without social scruples.

This phenomenon led humanity to regress and not to live in accordance with values like altruism, love towards others, solidarity, etc., values typical of the human being as a person; because of this phenomena humanity is going to experience another age of decadence.

That's why freedom, lacking in limits of conduct, led the human being to look for a sexual orientation regardless of his natural conformation. A socio-cultural phenomenon, expression of transhumanism that turns against man's nature and privileges culture only as a point of reference for man's life.

The phenomena of sexual orientation, result of waves of woman revolution, is oriented to affirm a society pervaded with secularism and its values of egotism, mass consumption, amusement. It could be an expression of a phase of decadence in the history of society and not of a phase of splendour, because it is based on a conception of man's nature that doesn't have a religious or metaphysical dimension. Briefly, this society is an expression of a phase in human history in which human being is a mass individual, characterized by his egotism, his vision of life as mainly oriented towards

consumerism and amusement, while it does not privilege the human being with his values: altruism, social solidarity, respect for himself and others.

The above-mentioned considerations reinforce the idea that in the history of western society, this phase of decadence, expression of the human being as individual who lives in the perspective of secularism, *Etsi deus non daretur* (Grozio & Fasso, 1961). So, a human being, who deprives the man's nature of its religious dimension, lives a life devoted to amusement and consumerism.

This situation has relentlessly opened the way for the word gender, as opposed to the word sex. Gender gives up the natural sexual complementary difference between man and woman, and it is a result of social politics in the Anglo-American debate about the nature-culture relationship.

The renunciation of natural diversity and sexual complementarity of man/woman is an expression of secularism and is aimed at demonstrating sexual equality. Unaccomplished goal, as sexual equality has been now rejected even in the American feminist context. Actually, the feminist Scott (2017) has recently taken a position against the equation secularism as sexual equality, trying to demonstrate that the gender theory is naturally unfounded and to prove that relationship nature-culture is unavoidable. In this way, she shows that the last feminist movements are somewhat trends or forms of custom that cannot be translated into legal rules and that amusement cannot be used as the value to support the gender.

## 5. The desired return to the person: The welfare state

If now we ask which is the attribute that makes a person unique, the answer is the classic and traditional one: the reason intended as that man's faculty thanks to which man is distinguished from animals and that leads him to respect himself and others<sup>6</sup>.

The reason, then, as an attribute of man's nature that leads man to communicate with others. Still resorting to Aristotelian categories, we may say that reason is the characteristic that, through its use, changes a man from a reasonable animal (*logikon*) into a social one (*politikon*).

It should be also recalled that reason, shaping the person's rationality, has to be intended as an essential attribute that allows a person to go beyond the appearance of things and to intellectually understand their intrinsic order. The reason, therefore, as an attribute that is substantial if it is used, if it can't be temporary used, or if it is used only occasionally.

This last distinction has been of great importance in the history of philosophy, because reductionist anthropology, not accepting reason's substantiality as an attribute of man's nature, but instead, as an operational instrument, could propose different anthropological forms. It could also disavow the intellectual moment of human reason. Disavowal that led towards the absolutizing of reason, for each knowledge is reason's work.

From here Kant, with reason absolutization and individual self-consciousness as prodromes of subjectivity in terms of an autonomous entity, proposed reason as the ability of self-determination and its very intellectual exercise. Characters these, present either in contractualism or in ethical non-cognitivism.

Non-cognitivism that, not recognizing to reason the capacity to know even the necessary essence of things, it doesn't give to reason the ability to distinguish right from wrong in morals, but recognizes the subject as the ultimate source of moral (Kant, 1980).

The conclusion is that, in this philosophical frame, reason presents self-determination and autonomy as its fundamental attributes. Moreover, in this doctrinal perspective, the person who cannot exercise reason even temporary cannot be considered the centre of rights' charge that is rights' subject.

The consequence of this reductive anthropological conception is that the individual is recognized as a person only if he is able to act morally. If the individual is not able, he is qualified as a potential person, so for some scholars, he can obtain rights only gradually, as he becomes able to use them. In this way, the road to the theory of evolution is open (Engelhardt, 1986).

This reductive anthropological conception, determined by rationalism and based on

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<sup>6</sup> The reference to Aristotle is unavoidable. For man, as the only animal that's got reason, see in particular but not only Aristotle. *Politics*, I, 2, 1253 a 9; cfr VII, 13, 1332 b.



non-cognitivism and contractualism, cannot be reduced to the evolutionary theory but includes also other philosophical theories. I am referring to Hume empiricism, qualified as a reductionist anthropological conception of senses, a fundament of utilitarianism, for which the person is characterized by perception and not reason.

Furthermore, the reductive anthropological conception does not include in its context only the anthropology of senses, but also all the theories that privilege one man's dimension on the others. We are referring, for example, to the privilege of strength dimension that led to the theory of the will to power (Nietzsche), or to the libido, that led to the vaguely sexual theory (Freud), etc.

The reductive anthropological conception is not to be privileged in any of its concretizations; instead, we should privilege the anthropological conception that harmonically welcomes every dimension of man's life, the metaphysical one included. The metaphysical dimension actually enriches man's nature because opens its origin to the mystery.

The different anthropological conceptions that I just mentioned, even the reductive ones, are the foundation of different bioethics (Fornero, 2009).

However, a person represents the central role of cultural evolution in society and history. Centrality that, with its characters of altruism, solidarity and subsidiarity offers itself as foundation and criterion of ethicality. Ethicality to be intended as an expression of dignity and identity of the human person (Morin & Lazzari, 2001). Ethicality of which foundation is eventually the practical judgement of reason; this judgement acts as a person's moral conscience and, thanks to the rational reflection, the person becomes aware of itself and decides to act for his own sake and the sake of others.

But this is possible if we agree with the connection between social rights and welfare state. If we accept that positive meaning and rules would be given to relation rights, earlier left to the social dimension of single human beings and social groups.

In brief, social rights receive the chrism of legitimacy if they go through reciprocity if they represent social obligations to agree with. Obligations that lead the single man towards the society and the State social obligation towards the state-citizens mutuality, to be intended not as simple assistance, but as the constitutional bond of citizenship relationships (Curducci, 2017).

## References

1. Aristotle. (n.d.). *Nicomachean Ethics*, 10. Retrieved from <http://classics.mit.edu/Aristotle/nicomachaen.10.x.html>
2. Bacon, F. (2009). *Philosophical writings*. Turin, Italia: UTET Libreria.
3. Bobbio, N. (1990). *The age of rights*. Turin, Italy: Einaudi.
4. Carducci, M. (2017). Stato sociale. In E. Sgreccia, & A. Tarantino (Eds.), *Enciclopedia di bioetica e scienza giuridica*. Napoli, Italia: Edizioni Scientifiche Italiane.
5. Centi, T. S. (1997). *Somma contro i gentili*. Torino, Italia: UTET.
6. Cingolani, R., & Metta, G. (2005). *Umani e umanoidi. Vivere con I robot*. Bologna, Italia: Il Mulino.
7. Eccles, J. C. (1979). *The human mystery*. Berlin – Heidelberg, Germany: Springer International.
8. Engelhardt Jr., H. T. (1986). *Manuale di bioetica*. Milano, Italia: il Saggiatore.
9. Ferrero, L., & Zorzetti, N. (1986). *De Officis by Cirero*. Turin, Italy: UTET.
10. Fornero, G. (2009). *Bioetica cattolica e bioetica laica*. Milano, Italia: Mondadori Bruno
11. Fukuyama, F. (2002). *Our posthuman future: Consequences of the biotechnology revolution*. New York, NY: Picador.
12. Fukuyama, F., & Amato, B. (2019). *Identità. La ricerca della dignità e i nuovi populismi*. Milano: Italia, UTET.
13. Fuschetto, C. (2010). *Darwin teorico del postumano. Natura, artificio, biopolitica*. Milano-Udine, Italia: Mimesis.
14. Grozio, U., & Fasso, G. (1961). *Prolegomeni al diritto della guerra e della pace*. Bologna, Italia: Zanichelli.
15. Harris, J. (1992). *Wonder woman and Superman. Genetic manipulation and future of the man*. Oxford University Press.
16. Jonas, H. (1979). *Il principio responsabilità. Un'etica per la civiltà tecnologica*. Einaudi.
17. Kant, I. (1980). *Fondamenti della metafisica dei costumi*. Retrieved from <http://www.nilalienum.it/Filosofia/Filosofia/Autori%20e%20Opere/Kant/Kant-Fondazione-della-metafisica-e-dei-costumi.pdf>
18. Marchesini, R. (2002). *Post-human. Verso nuovi modelli di esistenza*. Torino, Italia: Bollati Boringhieri
19. Morin, E., & Lazzari, S. (2001). *Il metodo. Vol. 5: L'identità umana*. Raffaele Cortina Editore.
20. Morin, E., & Rabbito, A. (2002). *Lo spirito del tempo*. Maltemi.
21. Pico della Mirandola, G., & Garin, E. (1994). *Oratio de hominis dignitate*. Pordenone, Italia: Studio Tesi.

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22. Pope Francis. (2015). *Encyclical letter on the care of the common home*. Retrieved from [http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20150524\\_enciclica-laudato-si.html](http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html)
  23. Pulcini, E. (2005). Dall'homo faber all'homo creato: Scenari del post umano. In I. Sanna (Ed.), *La Sfida Del Post Umano: Verso Nuovi Modelli Di Esistenza?* (pp. 13-26) Roma, Italia: Studium.
  24. Scott, J. W. (2017). *Sex and Seculrism: How secularism has been used to justify the subordination of women*. Princeton, NJ: Princeton University Press.
  25. UNESCO. (1997). *Universal Declaration on the Human Genome and Human Rights*. Retrieved from [http://portal.unesco.org/en/ev.php-URL\\_ID=13177&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html)
  26. Xingjian, G., & Gallo, S. (2018). *Per un nuovo rinascimento*. La nave di Teseo

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# FAMILY AND MULTICULTURAL SOCIETY

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**Keywords:** Religious Liberty, Family, Education of Children, Multicultural Society, Cultural Identity

## 1. Cultural identity and multicultural society

Nowadays, the interactions between different societies and cultures are becoming more and more thick and intricate. For the first time, on such a large scale, a multicultural condition of human coexistence is emerging, in which the fundamental coordinates within which man conceives his existence, those of space and time, come to be shared and coexisted through ways of interpretation and intervention going back to different social and cultural horizons. The whole world is proposing itself as a global multicultural society, characterized by the intensity of exchanges at all levels and by the interdependence of economies, due to scientific-technological progress, the speed of transport, and the immediacy of the means of communication to distance.

This process goes on everywhere between two opposite tensions: on the one hand, a tendency to make values, languages, goods, meanings universal; on the other, a tendency to reserve, specify, separate. It is, however, undeniable that never in this historical period such a vast number of individuals have proved so thirsty for relationships and knowledge: everything that is produced, though, represented, is widespread, exported, sold and all cultures, although at different levels and in different ways, are involved in an incessant exchange. In the face of all this, however, episodes of intolerance and violence recently occurred in some European countries, and also in Italy, demonstrate the persistence, even in our society, of racist instincts, attitudes, and ideologies based on disinformation, prejudice, and the refusal of diversity, which inevitably fuel selfish and particularistic closures. Alongside convinced forms of openness, tendencies to closure coexist, marked by autarchic visions and a misunderstood defense of one's cultural identity. The new generations mature and study in this climate.

Today's challenge – for them and for us – is a different capacity to deal with relations with differences, aimed at investing all the fields of our way of life: from the redistribution of resources to the organization of work, from participation in cultural activities and social education and training policies, from the guarantee and protection of civil coexistence to the planning of a future of solidarity and cooperation.

It is necessary to start a process of searching for new ways of thinking and living for the slow and laborious construction of a path that does not exclude anyone and requires the ability to re-read the meanings of concepts such as cultural identity, ethnic identity, assimilation, integration, identity-otherness. It is a question of overcoming a univocal, autarkic, and self-referential view of the world in the direction of the development of a multicultural condition of human existence.

We must therefore have and propose new reference schemes to interpret and address the different realities around us, with which we must interact. Our cultural identity is not something that is safeguarded, expressed, and communicated within closed ethnic and territorial boundaries, but something that protects itself, feeds itself in a constant confrontation and that often requires verification, even negotiation with identities different living together.

The solicitations coming from the need for balance between national identity and multicultural dimension, in view of a common enrichment based on respect, exchange, dialogue, and reciprocity, also re-propose the urgency of the school's promotional, orientation, and formative role, which can be decisive for designing future scenarios in which different cultures open up to the relationship without being in a perspective of reducing differences, in which cultural, social and genetic hybridization are accepted, giving life to a society that always seeks new spaces of communications, ready to overcome the limits and constraints of unilateral interpretations of reality.

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## **2. The children of immigrants**

In this highly complex framework is the immigration of the inhabitants of European and non-European countries into Italy, which represents a now irreversible phenomenon, is destined to acquire greater significance in the coming years and which is no longer thinkable or sustainable only in terms of emergency. It is known that the life of immigrants in culturally different societies is a source of great tension, both at collective level and at individual level, for the guest and the host.

As far as the immigrant nucleus is concerned, upon arrival, the breaking of a monolithic cultural model and the lack of a univocal reference to a socio-political organization of the territory.

If we focus on the problems faced by the children of immigrants, one of the most obvious difficulties is that arises from the cultural and social uprooting of parents: they often try to replace their painful experience of extraneousness, which they feel about the new culture, through a rigid fidelity to a model of the culture of origin that with the passage of time becomes more and more stereotyped and formal. Thus, feeling lost, from a cultural point of view, and threatened from an economic and social point of view, they are unable to achieve a coherent synthesis between the educational models that they believe is right to testify and the aspirations for integration that they have for their children. For the latter, therefore, the formation of a renewed and balanced cultural identity is hampered by the fear of being considered traitors to the original culture and deprived of the support of compatriots, who always remain an important point of reference.

When relations with the culture of the host society develop in a context of conflict and ambiguity, the foreign minor experiences a situation of strong internal contradiction, with consequent attitudes of rejection, rebellion, unease, deviance. It is, therefore, necessary to involve him as soon as possible in a training course that helps him to enter society without mythologizing or despising his culture of origin, to be considered worthy of respect: it is in fact on the basis of a balanced knowledge of oneself and of others that the evolution of identity, both individual and cultural, becomes truly free and conscious.

## **3. Foreign minors adopted**

In some respects, the condition of the foreign child adopted is different from that of a foreign minor immigrated alone or with his family. There are also points of analogy: to a greater extent, the more the child arrives in Italy not very small, the more the adoption of a foreign child implies a wide and unconditional willingness of the adoptive parents to accept and to value the diversity of the child coming from another country, therefore his belonging to a culture, to a way of thinking and living that can also be very distant. The new parents must have the ability to face all the problems of the child's growth with balance and wisdom, especially in the phase of building their own identity, which will have to deal with the cultural identity of origin and with the cultural identity of adoption. Through the comparison between the values brought by the foreign minor, and the values conveyed by the adoptive parents, it is possible to establish a double system of an alliance, at the center of which the adopted child may find himself divided between contradictory loyalties, capable of sharpening in the typical phase of adolescent crises. Even the most sensitive adoptive parents able to establish a valid relationship with the emotional and emotional world of the child can experience difficult moments of disorientation and impotence in the face of such crises. Then the tendencies to over-protectionism on the minor, the deletion of the identity of his past, and the primacy of the educational and behavioral models of belonging on those of origin of the minor can take over in them.

In this situation, on the other hand, it becomes indispensable to support the child in the conquest of self-esteem, in the acceptance of diversity of which he is the bearer of wealth to be shared with others, in the desire for self-organization and serene life.

## **4. The scholastic insertion of the foreign minor**

In the immigrant families, on the one hand, there is a great investment in the scholastic success of the children and, on the other, the will to keep the systems of family value intact and the religious, linguistic, community references to which they belong. If the adult immigrant could continue for

years to live in a condition of social invisibility, limiting relations as much as possible, often without knowing the social, health, and educational services, the presence of minors breaks the isolation and forces the foreign parent to hire social roles and not just the limited and marginal one of foreign workers. He must inform himself, move in society in a different way, use services and facilities to guarantee better-living conditions for his son. The migration project is redefined, then, on the basis of new aspirations, of expectations for the success of the children, of a less provisional and marginal social integration through school integration. In this context, many foreign parents live with anxiety, fear, and mistrust when they make the choice to entrust their children to another institution like the school. Other and distant by language, religion, nutrition, schedules. Another and less controllable in the values and educational models proposed and pursued. Foreign parents tend, therefore, to maintain a rigid division between the two spaces: the family one and the school one. If in the country of origin there were no significant fractures between the family educational model and the external one of social and community organization, the migration situation shows, in a more or less strong way, the differences and the distances between the two spaces of socialization. And so, when entering school, foreign parents often have weak and inadequate information and tools to cope with the parental role in the host society. The concerns of parents who have adopted a foreign child at the time of entering school are no less important. If foreign parents, also due to the lack of knowledge of the language and communication difficulties, tend to remain on the margins of participation in school life, the adoptive parents need to see the school as a valid interlocutor and an ally in supporting the difficult task of the education of the foreign child. On various occasions they make themselves available to agree with the teachers the behavioral styles able to guarantee a reassuring context for the child, to know the expectations, the motivations, the logic of the school, to avoid misunderstandings and to nurture a deep mutual knowledge.

#### ***4.1. The responsibilities and resources of the school***

The school assumes a fundamental role in the preparation of an adequate organizational structure both for the reception of the foreign minor and for the training offer in an intercultural key. It is necessary for the school to collect information related to personal data, previous education, eating, and religious habits, family and extracurricular experiences, and parents' expectations. As far as eating habits are concerned, the news in these days is about a school in Mestre where school canteens are again at the center of the controversy. After the ban in a school in Naples to bring food from home, it is the turn of Mestre (Venice), where some Bengali Muslim parents have asked for an alternative menu based on halal meat – which means “lawful”, slaughtered that is according to the dictates of the Koran – for their children. The request, advanced during the conversation between parents and teachers, has already sparked controversy and reactions. The Dean proposes a solution – “Parents could apply for a meat-free menu – suggests the head teacher of the primary school “Cesare Battisti” in Mestre – perhaps inserting it in the registration form. In this way the children could integrate the meat during dinner”.

Despite the fact that the institute's classes are made up of 60% of children of foreign origin, the Dean points out that “at the moment the school is not able to guarantee halal meat”. As it can well be pointed out, the scholastic institutions are not ready to face this kind of problem, thus not favoring the integration of the foreigner, violating the religious and cultural principles of the hetero-cultured. In addition to the news on the student, collected indirectly, it is necessary to make observations that allow ascertaining as abruptly as possible the linguistic-communicative abilities, the relational modalities, the attitudes, and the motivations. Furthermore, it is crucial that a methodology is adopted that is not only centered on the minor in the case in which the foreign student reports hardship, loneliness, self-exclusion.

Educational integration should be conceived as the construction of an educational habitat capable of capturing the awareness of the loss of significant horizons and figures in the minor foreigner, between multiple affective and identifying difficulties, making it possible:

- cognitive facilitation (we learn better if the work climate is full of acceptance messages);
- reduction of the emotional and cognitive vulnerability rate to which the child is exposed;
- the cultural confirmation – and therefore the legitimacy – of a different story from that of

the majority of the other students.

It should not be overlooked that the school differs from other cultural information agencies, first of all, the mass media, which, more or less intentionally and more or less effectively, educate the new generations, due to the relational dimension that characterizes it and through which the relationship with knowledge becomes above all a relationship with the people who are mediators of that knowledge. Precisely because of this specificity, the school's action translates into innumerable, precious opportunities to significantly affect the growth process human and social development of foreign minors, fostering a sense of trust, self-esteem, and motivation towards academic success and contributing to averting the risk of deviance, with particular attention to implementing individualized educational and learning paths.

#### *4.2. The school as a place of education for interreligious coexistence*

The observations are written in this work perhaps may appear obvious or even trivial. In effect, very often, the problems related to an interreligious cohabitation are simply correlated, but it is not just a bit, a lack of knowledge – if not a real ignorance – about the beliefs and culture of the other.

As it has been effectively written, “a pluralistic society, which moreover loves to define itself as cognitive, is democratic in terms of religious custom when it ensures, with the freedom to believe, also the right to know”. Stresses in this regard also come from international declarations. Among the many documents, it is worth mentioning the UNESCO Report of the International Commission on Education for the 21st century, which identifies four pillars on which building educational systems, the first is “knowledge” and the fourth is “learning to live together”. The document presses on the need to change the understanding of others, of their history, their traditions, and their spiritual values, adopting a dialogical dialogue that knows how to face the unavoidable difficulties, and also possible conflicts, in an intelligent and peaceful way, using “that lack of understanding that leads to hatred and violence among adults”. The teaching of the history of religions and customs can serve as a useful reference point for future behavior. It is precisely this last point that is crucial, which also closely concerns our country. Indeed, as it is well known, in our school system, according to the agreement of Villa Madama dated back on 18th February 1984, there is a teaching of the Catholic religion that is confessional and optional, and therefore is not able to reach the entire school audience, while, as far as the object is concerned, it is not thematically directed to investigate the history and heritage of beliefs of other religions. Moreover, the even praiseworthy prediction, recurrent in all the agreements between the Italian State and confessions other than the Catholic one, of proposing the “study of the religious fact and its implications”, according to their own vision, in response to requests from the students, from their families or school structures, had very little practical implementation. Then, it arises the need for the State to assume, as its own competence, the study of the religious factor (alongside the confessional one, on the basis of the aforementioned bilateral agreements) in terms of – as stated above – the history and the complex of principles and traditions of the main religions. In this regard, it would be desirable to have specific teaching aimed at this, even in the atavistic mistrust of our school system (but also of our culture in general, both that of a so-called “lay” matrix, as well as that of the so-called “religious elaboration”, specifically “catholic”), with regard to studies of religious sciences of non-confessional nature. Another possible way (but – I would think – preferably in a complementary and non-alternative way) could be to reserve an area of the in-depth study of these subjects within serious and effective civic education teachings (now often referred to as “citizenship education”). Again, specific attention to the history and cultural baggage of the main religions should be dedicated, transversally, to the study and development of programs of other teachings, such as history, philosophy, the arts, music, Italian and foreign literature. The important thing is that, however, we acquire the awareness of this knowledge and training gap in our school system, and that we study the consequent initiatives to be taken, in order to achieve “a common literacy to the fact and the religious problem at the service of the cultural difference of all the students, for their common citizenship”. The religious teachings (or history of religions) proposed should then be characterized to enable the transition from the cognitive aspect of a multicultural, as a condition of real being (so to say “empirical”), to the pedagogical commitment to interculturality, as an objective to be pursued, performing an ethical-civic function, in the sense that the same secular

education to the values of civil coexistence and human rights can, indeed must, be usefully supported by the knowledge of one's own religion and of the other religions mainly present on the territory. Just as the notion of pluralism can have a purely empirical-descriptive value, or even assume an axiological-deontological meaning, so the reference to cultural plurality can be understood only in a factual and phenomenal, empirical sense (in the sense of a multicultural), or to express also an indication of value, in the direction and in the sense of interculturality. A desirable final result of this path should be, in addition to leading to respecting and enhancing the "diversity" aspects of the other, also that leading to look for and to improve in the other, the elements of empathy, "likeness" and "proximity". All this in the presupposition and in the context of a "truly lay school, not because a-religious or anti-religious", but because "a place of welcome, in which all religious and cultural options, rather than being eliminated or confused, remain distinct but in dialogue" (Ministerial Decree of June 3, 1991). The diversity between cultures is something to be valued, not to be feared.

## 5. The intercultural education

Intercultural education involves a school project that intends to intervene in the profound social transformations caused by the coexistence of different cultures, promoting the formation of knowledge and attitudes oriented towards the possibility of a dynamic relationship between cultures. Although the educational intervention of the school cannot by itself govern change, it nevertheless constitutes an indispensable contribution in the perspective of overcoming ethnocentrism and preventing its ideological degeneration, as it refers to the following aspects to be considered inseparable:

- schooling of pupils from other cultures;
- intercultural education of students even in the absence of foreign students in the classes;
- the prevention of racism and anti-Semitism;
- the protection of minorities and their cultural and linguistic heritage.

It is known that each of us, knowingly or unintentionally, makes a privileged or exclusive reference to it, insofar as it identifies with its own group.

The child in particular starts from an attitude according to which his own culture is obvious and natural, the only possible, undisputed foundation of his own hierarchy of values, source of every possible criterion of judgment. Even if social changes bring him into contact with different mentalities, the culture of belonging cannot fail to be an integral part of his personality, a framework of knowledge, behavior, and values. When the child leaves the phase of psychological egocentrism of the first years of life, decentralizing himself in the relationship with others and returning to himself in the process of structuring his own personality, he can overcome ethnocentrism through a gradual decentralization of his own point of view, acquiring the awareness that there are other possible responses to social life, to then return to one's own culture with a richer perception of who we are and who we could be. Intercultural education aims to foster a constructive dialectic between identity and otherness, removing the conception of diversity understood as inferiority, social danger, synthesis of the negative.

The path is not only cognitive and intellectual but invests in the very construction of the self. Therefore, the question assumes, especially for children and adolescents, a general relevance that affects the overall development of the personality. Intercultural education is not extraneous even to the fundamental processes of learning, to the extent that knowledge is structured even from contrasts, through the detection of differences and the procedures with which these are compared.

The importance of the dialectic identity/alterity has become visible in recent times, when the intense change and the increasing levels of contradiction and conflictuality have made the formation processes more complex, requiring each one a firm self-perception and, at the same time, plasticity adequate to the pace of change.

In this context, the action of the school includes:

- the promotion of attitudes inspired by mutual understanding, tolerance, critical judgment, respect for one's own traditions, solidarity;
- the refusal of any xenophobic and racist demonstration;

- creation of moments of linguistic help for the most disadvantaged and mastery of communication skills in Italian;
- support for immigrant families to understand how the school system operates and works, what it asks them, and the reasons for the attention given to relational behaviors adopted by teachers with their children, whose vulnerability is not only cognitive but also emotional;
- inclusion in the study programs of topics related to foreign cultures present in the territories to which the schools belong;
- the search for interdisciplinary connections aimed at enhancing the culture and traditions of others;
- opening up to representatives of foreign communities, so that they can carry out collaborative and supportive functions, also as witnesses called to talk about ways of life, customs, concepts of their culture and what it means, as an ethnic minority, to live in our country;
- the comparison with all the extracurricular multicultural occasions in which the various institutes can participate with their schools (music, theater, exhibitions, events, and parties).

Ultimately, intercultural education in schools takes on the purpose of promoting, supporting, and enhancing training for understanding, cooperation, overcoming prejudices and stereotypes, acquiring conceptual elements on the anthropological nature of human cultures, availability towards the other peoples and their cultures, to the correct construction and mastery of the principle of identity.

### *5.1. Programs for intercultural education*

There is no lack of references to intercultural education in school programmatic documents in our country. Already in the programs of the 1979 middle school we find the reference to a school “not anchored to a single interpretation of reality, but actually open to all the ferments and contributions of the outside world” and as regards the dimension of socialization it is specified as it involves putting the students “in contact with the problems and cultures of societies other than Italian, thus also favoring the formation of the citizen of Europe and the world, educating to a mental attitude of understanding that overcomes any unilateral vision of problems and it brings us closer to the intuition of values common to men even in the diversity of civilizations, cultures and political structures” (Ministerial Decree of June 3, 1991).

In the programs of the elementary school of 1985, even if the expression “intercultural education” does not yet appear, the dimensions of “understanding and cooperation with other people” and the work of preventing and combating the formation of “stereotypes and prejudices in the comparisons of people and cultures” are widely valued.

But it is in the Guidelines for the kindergarten of 1991 that the question is placed in its specificity when it is perceived that “the accentuation of situations of a multicultural and multi-ethnic nature [...] can translate into an opportunity for enrichment and maturation in view of a coexistence based on cooperation, exchange and productive acceptance of diversity as values and opportunities for democratic growth” and, among the aims of this school, the maturation of identity qualifies “not in an exclusive and ethnocentric form, but in view of understanding of communities and cultures other than their own”. In this text it is expressly stated that a special emphasis is placed on “multiculturality education that requires the greatest possible attention for the knowledge, recognition, and enhancement of the diversity that can be found in the school itself and in social life in a broad sense” (Ministerial Decree of June 3, 1991).

In the 90s, the Ministry of Public Education returned to the intercultural question several times, addressing it in its general terms and the more specific terms of the presence of Italian schools of foreign students. Declarations coming from teachers of the various school orders and different disciplines make it possible to see how the interpretation of an intercultural education that should be able to go through the entire training process and be configured as a style that accompanies and qualifies the way of teaching. Consequently, limitative interpretations that confine intercultural education to certain spaces and times seem to be overcome by the school and the importance of contact with the different cultures and of directly lived experiences is affirmed. Today, in fact, the vast majority of teachers have gained the conviction that their work cannot be exhausted on a technical-informative level, but extends to the complex problems that a child’s psychological and



cultural growth entails. The school is certainly committed to the cognitive dimension, which constitutes its institutional reason, but is also called to consider the encounter with knowledge in its profoundly formative contributions. Thus, from nursery school to upper secondary school, themes and methodologies are set up – from games to dramatizations, from environmental research to anthropological and social-historical analyzes – which introduce and progressively deepen the meaning of the discourse far beyond the generic appeal to respect for the other and the different.

## **5.2. Health education**

The action of the school for health education concerns everyone but has its own specificity for foreign minors. Health should not be understood exclusively as physical well-being but as harmony physical psychic-relational components. It is, therefore, a value to be built, which calls into question different competencies and, from a pure health issue, gradually turns into a markedly educational problem. Physical well-being is closely linked to psychological well-being, to well-being that derives from the way of facing reality and considering life. Health is presented as a gradual conquest and as a value builds and assimilates living meaningful experiences, capable of giving the person the possibility of taking root in reality and feeling the pleasure, the beauty, and the joy of belonging to living beings and to the family of human beings. Health solidifies, offering the person concrete opportunities to experience independence, autonomy, and true freedom, so as to make any form of dependent behavior and physical or psychological self-destruction incompatible and unacceptable. The elimination of discomfort seems important but not yet sufficient: in fact, it is possible to mature the idea of health as a full value that guarantees the quality of life. All this has particular importance for foreign minors.

Their parents' awareness of the commitments related to prevention and health education, in the context of the Parents Project, can be an important and primary objective, especially if we consider the social and cultural problems of immigrant families. We know, in particular, that the problems of preadolescent and adolescent development are exacerbated in the context of the complexity that characterizes the social inclusion of immigrant families, who feel invested with a heavy-duty to guide the choices of the child, made more difficult due to the coexistence of value and cultural systems not always easily ascribable to an educational continuity network among the adults who deal with him, with consequent risks of mental distress and deviant behavior. The Parents Project, through meetings with experts and workgroups, represents an essential opportunity to foster dialogue and communication between school and immigrant family, and between immigrant family and other families. It is important that immigrant foreign parents are not left alone to face ambivalences and fears and that a school can be set up as a space for confrontation, a sort of alliance between adults (immigrant parents with other parents, parents with teachers). In this way, the collective elaboration of the specific anxieties of the parental role activated by the evolution of the children's personality no longer provokes insurmountable protective defenses.

The school environment thus incorporates the most complex dynamics of the entire social system and, in the awareness of expectations on a personal, relational and institutional level, takes care of the repainting of the cultural offer through the implementation of a training itinerary aimed at preventing discomfort and of deviance. Educating to prevent, however, is a goal that cannot be linked to school resources alone. It is practicable through a close alliance between school, family, cultural, religious and socio-health institutions of the territory, in order to significantly affect the capacity for active and critical processing of the foreign minor, committed to creating a personal way of being, thinking, planning, acting, interacting.

In conclusion, the words of Pope Francesco (as cited in Branca, 2017) are significant: "Only the Spirit can arouse diversity, plurality, multiplicity, and, at the same time, make unity. Because when we are the ones who want to make diversity, we make schisms and when we want to make unity we do uniformity, homologation".

## **References**

1. Aletti, M. (Ed.). (2003). *La religione postmoderna*. Milano, Italy: Glossa.
2. Aletti, M., & Rossi, G. (Eds.). (2004). *Identità religiosa, pluralismo, fondamentalismo*. Turin, Italy: Centro Scientifico Editore.

3. Bacchi, E., & Bacchi, N. (1997). *Scuola e cittadinanza: La libertà di apprendimento oltre la tormentata questione scuola privata-scuola statale*. Negarine-Verona, Italy: Il Segno dei Gabrielli Editori.
4. Barré, C. (2003). *L'enseignement de la science des religions au lycée, ou comment participer au débat démocratique de toute société en quête de sens* (Thèse de doctorat soutenue à l'Université de Strasbourg).
5. Bastian, J.-P., & Collange, J.-F. (Eds.). (1999). *L'Europe à la recherche de son âme: Les Eglises entre l'Europe et la nation*. Genève, Switzerland: Labor et Fides.
6. Baubérot, J. (Ed.). (1994). *Religions et laïcité dans l'Europe des Douze*. Paris, France: Syros.
7. Branca, P. (2017, July 1). Nelle parabole evangeliche la trama che conduce all'incontro con l'Altro. *Dialoghi Mediterranei*. Retrieved from <http://www.istitutoeuroarabo.it/DM/nelle-parabole-evangeliche-la-trama-che-conduce-allincontro-con-laltro/#:~:text=%C2%ABSolo%20lo%20Spirito%20pu%C3%B2%20suscitare,Cos%C3%AC%20Papa%20Francesco>
8. Camdessus, M., Daniel, J., Eco, U., & Riccardi, A. (2002). *Islam e Occidente: Riflessioni per la convivenza*. Roma-Bari, Italy: Laterza.
9. Campiche, R. J. (Ed.). (1997). *Cultures jeunes et religions en Europe*. Paris, France: Editions du Cerf.
10. Campiche, R. J. (Ed.). (2003). Régulation de la religion par l'état: Nouvelles perspectives. *Archives de Sciences Sociales des Religions*, 48(121), 5-18. <https://doi.org/10.4000/assr.2382>
11. Canavero, A., & Durand, J.-D. (Eds.). (1999). *Il fattore religioso nell'integrazione europea*. Milan, Italy: Edizioni Unicopli.
12. Casanova, J. (2000). *Oltre la secolarizzazione. Le religioni alla riconquista della sfera pubblica*. Bologna, Italy: Il Mulino.
13. Colaïanni, N. (2006). *Eguaglianza e diversità culturali e religiose. Un percorso costituzionale*. Bologna, Italy: Il Mulino.
14. Consorti, P. (2013). *Conflitti, mediazione e diritto interculturale*. Pisa, Italy: Pisa University Press.
15. De Vita, R. (2003). *Identità e dialogo*. Milan, Italy: Franco Angeli.
16. De Vita, R., & Berti, F. (Eds.). (2003). *Pluralismo religioso e convivenza multiculturale. Un dialogo necessario*. Milano, Italy: Franco Angeli.
17. De Vita, R., Berti, F., & Nasi, L. (Eds.). (2004). *Identità multiculturale e multireligiosa. La costruzione di una cittadinanza pluralistica*. Milan, Italy: Franco Angeli.
18. Decreto Ministeriale 3 giugno 1991 "Orientamenti dell'attività educativa nelle scuole materne statali" (Ministerial Decree of June 3, 1991). Retrieved from <https://www.gazzettaufficiale.it/eli/id/1991/06/15/091A2596/sg>
19. Dianin, G. (Ed.). (2003). *L'Europa e le religioni: Identità religiose e progetto di costituzione europea*. Padua, Italy: Messaggero.
20. Ferrari, S. (2003). *Lo spirito dei diritti religiosi. Ebraismo, cristianesimo e Islam a confronto*. Bologna, Italy: Il Mulino.
21. Ferrari, S., & Ibán, I. C. (1997). *Diritto e religione in Europa occidentale*. Bologna, Italy: Il Mulino.
22. Fuccillo, A. (2019). *Diritto, religioni, culture: Il fattore religioso nell'esperienza giuridica* (3rd ed.). Turin, Italy: Giappichelli.
23. Küng, H. (2004). *Perché un'etica mondiale? Religione ed etica in tempi di globalizzazione*. Brescia, Italy: Queriniana.
24. Kurtz, L. R. (2002). *Le religioni nell'era della globalizzazione: Una prospettiva sociologica*. Bologna, Italy: Il Mulino.
25. Kymlicka, W. (1999). *La cittadinanza multiculturale*. Bologna, Italy: Il Mulino.
26. Laporta, R. (Ed.). (2001). *Educare al senso della vita nella scuola di Stato*. Florence, Italy: La Nuova Italia.
27. Pajer, F. (2009). Educazione alla cittadinanza e istruzione religiosa. *Pedagogia e Vita*, 67(1), 106-128.
28. Rémond, R. (1999). *La secolarizzazione. Religione e società nell'Europa contemporanea*. Roma-Bari, Italy: Laterza.
29. Rescalli, G. (1995). *Il cambiamento nei sistemi educativi. Processi di riforma e modelli europei a confronto*. Florence, Italy: La Nuova Italia.
30. Rescalli, G. (1999). *La scuola privata nell'Unione europea. Esperienze a confronto*. Florence, Italy: La Nuova Italia.
31. Ricca, M. (2008). *Oltre Babele. Codici per una democrazia interculturale*. Bari, Italy: Edizioni Dedalo.
32. Santerini, M. (2008). Studenti musulmani e prospettive dell'educazione interculturale. In A. Ferrari (Ed.), *Islam in Europa/Islam in Italia tra diritto e società* (pp. 149-169). Bologna, Italy: Il Mulino.
33. Tozzi, V. (Ed.). (2002). *Integrazione europea e società multietnica. Nuove dimensioni della libertà religiosa*. Turin, Italy: Giappichelli.
34. Turchi, V. (2014). Laicità e laicismo: Origini storiche e ragioni attuali di una dicotomia. In G. Boni, E. Camassa, P. Cavana, P. Lillo, & V. Turchi (Eds.), *Recte sapere: Studi in onore di Giuseppe Dalla Torre* (Diritto ecclesiastico, Vol. II, pp. 1231-1251). Turin, Italy: Giappichelli.

- 
35. Turchi, V. (2017). Convivenza delle diversità, pluralismo religioso e universalità dei diritti. Modelli di approccio. Indicazioni metodologiche. *Stato, Chiese e Pluralismo Confessionale*, 16, 1-27. <https://doi.org/10.13130/1971-8543/8427>
  36. Valletta, A. (2016). Religious education. Revisions of school curricula by the educational institutions. In A. Fuccillo (Ed.), *The Marrakech Declaration: A bridge to religious freedom in Muslim countries?* Napoli, Italy: Editoriale Scientifica.
  37. Ventura, M. (2001). *La laicità dell'Unione europea. Diritti, mercato, religione*. Turin, Italy: Giappichelli.
  38. Ventura, M. (2008). Grillo parlante o Pinocchio? Come sta nascendo il diritto ecclesiastico dell'Italia multiculturale. In A. Fuccillo (Ed.), *Multiculturalità e reazione giuridica*. Turin, Italy: Giappichelli.
  39. Vincent, G., & Willaime, J. P. (Eds.). (1993). *Religions et transformations de l'Europe*. Strasbourg, France: Presses Universitaires de Strasbourg.
  40. Willaime, J. P. (2004). *Europe et religions: Les enjeux du XXIème siècle*. Paris, France: Fayard.
  41. Zanotti, A. (Ed.). (2001). L'insegnamento universitario delle scienze religiose e teologiche. Prospettive italiane ed esperienze straniere. *Quaderni di Diritto e Politica Ecclesiastica*, 1, 3-211.

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# PAPERS

## SOCIAL AND ECONOMIC SECTION

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### THE LANDSCAPE OF WATER CONFLICTS: ACTIONS FOR A FAIR MANAGEMENT

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**Keywords:** Water, Human Rights, International Law, Conflicts

#### 1. Introduction

Water is indispensable for every human being and in the new millennium we cannot speak of innovation and technology when there are countries that are still struggling to have water as a service.

The aim of this work is to reaffirm the existence of a fundamental right of every human being, capable of guaranteeing human life itself, his dignity, but above all the need for a constant commitment of society throughout the world for water management.

A uniform legal project should be implemented at every level of government, indicating a public service accessible to all.

The aim is to reaffirm the centrality of the right to water, underlining the importance of the activity of civil society organizations which, in every part of the world, strive to guarantee drinking water for all, affirming the true principle which is at the basis of human rights: the right of every person to have his or her fundamental rights protected, regardless of their origin, by self-determination.

A functioning and non-discriminatory system should be created, through national plans operating in the political and legislative field.

The action that must be developed and aimed at is international cooperation in the field of water, especially between states that share watercourses, so as to provide a common legal instrument and a common project, to be used as an alternative to conflicts.

#### 2. Water as a source of life

Water was born in the depths of the universe, through the attraction of hydrogen by oxygen, as well as by the transport of comets (composed of ice and rock), attracted by the planets.

Water covers most of the earth's surface to which it guarantees life and constitutes  $\frac{3}{4}$  of our muscles and brain, it is present in us through food, drinking, and in the normal activity of metabolism. These simple notions serve to remind us that water is the source of life (Comitato Italiano per il Contratto Mondiale Sull'acqua, 2001).

However, only 3% of it is sweet, therefore usable by individuals for their life: agriculture, upbringing, therapeutic techniques, energy, and production in general.

The main problem of this resource is given by its unequal distribution, because some countries (for example Canada) own almost unlimited resources and access to water, while others, such as

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Yemen, Israel, or Egypt have very low resources. Therefore we can state also there is a lack of access in some countries, as Brazil and Zaire, where even if the water is available, a significant part of the population does not access it.

This flaw is shown by different diseases affecting their population: typhus, dysentery, cholera, hepatitis, gastroenteritis, eye and skin infections, parasitic diseases, and other diseases caused by lack of hygiene and by insect bites.

Surely the management of this resource is not easy; in fact, the data speak of exploitation destined for 70% to agriculture<sup>1</sup>, 22% to industry, and 8% to the domestic usage. The current condition of scarcity and inequity in distribution generates 10,000 deaths per day, mainly children; and the predictions talking about a progressive worsening of the situation, which could bring, in 2025, to 4 million the number of humans without clean water.

From now until 2050, an increase in the processes of urbanization, hydrological variability, and environmental degradation is expected to make the problem worse. Already in the past century, a three times population increase corresponded to a six times demand for water increase.

The lack of persuasive rules in the countries of the South of the world, regarding environmental impact, allows highly polluting works.

What emerges from these analyses is worrying speculation against the right to health, which affects the living conditions of the weakest individuals: the countries of the South of the World, indigenous peoples, and, in particular, women and children.

It is not a coincidence that the right to water is explicitly stated in the Convention on the Rights of the Child of 1989 (United Nation, 1989), a treaty that recognizes specific rights for children<sup>2</sup>, and in the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (United Nations, 1979), that takes an important place in bringing the female half of humanity into the focus of human rights concerns<sup>3</sup>.

The lack of explicit references to the right to water in many instruments of international law about human rights are given by the fact that water is not only an essential need and an indispensable element for human life, but it is also a limited resource, an economic asset that must be managed to guarantee its supply as demand increases.

In reality, it remains important to protect and implement the rights already recognized; in fact, it must be understood that any human rights (civil, political, economic, social, or cultural) can be guaranteed by international agreements, can be guaranteed apart from the water supply.

This lack of development of fundamental human rights, especially in underdeveloped or developing countries, has greatly facilitated the speculation of many transnational companies, which consider that the only solution to the problems of managing this finite resource could be its liberalisation, which guarantees free competition between private companies, weakening the public management or leaving to this a simple controlling role.

What we can certainly tell us that it is impossible to define this right, without recognizing its multidimensionality and complexity.

Actually, a uniform project should be implemented legally and at each level of government, to get a clear political commitment which indicates new priorities (it has been calculated that 1% of current military budgets would be sufficient to revolutionize the distribution of water).

### 3. Water as service

Without a strong presence of a public service accessible to all, whose management is shared, the condition reported today by all the competent organizations will be perpetuated: the latest Commission on Social Determinants of Health<sup>4</sup> report denounces the cases of private speculation (in

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<sup>1</sup> Wheat production is an essential element for the autonomy of a state, but requires huge investments: a ton of wheat requires 1,000 cubic meters of water; 10% of world wheat production, however, is supported by non-renewable water sources.

<sup>2</sup> See Art. 24.

<sup>3</sup> See Art. 14.

<sup>4</sup> The Commission on Social Determinants of Health (CSDH) was established by WHO (World Health Organization), in March 2005 to support countries and global health partners in addressing the social factors leading to ill health and health inequities. The Commission aimed to draw the attention of governments and society to the social determinants of health and in creating

Tanzania, public water costs 0.1 US dollars, compared to 0.6 US dollars for private individuals) which have effects on the disadvantaged classes which, having no services or health education, spend time and money on medical treatment, with consequent loss of work that is often daily.

Nowadays, about 70% of the poor in the world are women, and the fact that searching for water takes away their time to work or to educate themselves, excludes them from the chance to participate in social life<sup>5</sup>.

Further topic related to water access, is to recognize the risk to children's health, as well as the right for indigenous peoples to actively participate in the management of water services in their areas, given their total dependence on water for survival.

Water access and supply, also, play cultural importance and we can state that the awareness of private individuals in contributing to a sustainable and publicly shared system, calls for participation, supervision, and proactive activism of NGOs, governments, and financial institutions at all levels.

The aim should be to reaffirm the centrality of the right to water, whose implementation requires first of all the application of existing fundamental rights, such as life and health, (impossible to implement without the right to water), in addition to the definition of the right to water, as stated in the General Comment No. 15 drafted by the Committee on Economic Social and Cultural Rights in 2002, which acquires great political significance in view of a legal position also.

Furthermore, the importance of the activity of those civil society organizations that struggle to guarantee drinking water for all should be underlined.

From their experiences, in fact, we can get proof of the participatory and inclusive potential of civil society, which has demonstrated its competence and maturity, participating in a challenge for the affirmation of the true principle at the base of human rights: the right of each individual (with particular attention to women, children, and indigenous peoples) to see their fundamental rights respected and protected independently of their belonging to any institutional reality.

After recognizing these indisputable political successes, it is necessary now to work to fully realize the right to water in international law, taking up all the juridical and nearly-juridical interventions that clearly go towards its definition.

The definition of this right will be essential in order, for the international system, to face the challenges of the new millennium, dealing with a truly global issue whose political and geostrategic balances will depend on in the future.

#### **4. The definition of the human right to access water**

The "holders" of the human right to get water are all the inhabitants of the planet, given that water is an essential good for the survival of human beings, and it is a non-replaceable good.

First of all, we must consider the categories that suffer most from inequitable water distribution, namely women and children.

Too many people today live without sufficient access to the water resource, and it is possible to identify them all over the world.

However, some areas experience particular hardships, starting with the African continent, where mostly women suffer the most serious discomforts, as the United Nations Commission on Sustainable Development has verified, denouncing how women spend eight hours traveling six kilometres in search of drinking water.

As we said, this waste of time has an effect on a private woman of their participation in social life, in educational processes, and in getting a role in the production system, because only 2% of world land ownership is held by women, despite the fact that they produce between 60% and 80% of the earth's products.

Women also have a fundamental role in domestic life, given that the hygiene of the entire family nucleus depends on them; a very serious problem especially if we consider that today, in the developing countries, around 2.000.000 children die from diseases, linked to the shortage of water.

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better social conditions for health, particularly among the most vulnerable people. The Commission delivered its report to the World Health Organization in July 2008 and it subsequently ended its functions.

<sup>5</sup> The report establishes that twenty liters of water per person per day must be available; at a maximum distance of 1 km. African women live in territory even six kilometers away from the water supplied areas, and to reach them they travel eight hours.

Children, in fact, are the other major human category heavily penalized by the difficult access to water, in particular, because of their not fully developed immune system and, therefore, more prone to suffer infections due to the use of non-drinking water.

A significant example, recently found by UNICEF and WHO (2019) is that of diarrhea, which normally requires simple pediatric care, in the southern hemisphere, which determines every year countless deaths among children. Another problem is that of dysentery, which in developing countries affects children 4-5 times a year, leading to lethal dehydration and which in any case leaves indelible traces in the body. But it is mainly the pollution of the springs that determines the risks of more serious infections, together with the presence of stagnant water.

The mentioned report shows the serious gap between rural and urban areas, the risk of overpopulation which threatens global purification, and the annual loss of children due to the absence of the right hygienic and sanitary conditions.

Another human group at risk is represented by poor people, precisely because they lack the financial instruments necessary to pay for the supply of water and, above all, because they are excluded from the political and decision-making processes that marginalize them, making impossible to improve their conditions.

Another reality strongly affected by a shortage of water resources is the indigenous populations, for which water is also a strong symbolic value, and which therefore suffer greatly from the expropriation of the resources or their contamination.

## **5. “Water wars” and the water distribution**

There are numerous conflicts in the world related to water, such as civil wars and conflicts between states. Disputes over access to water resources happen for several reasons including lack of water, military action, political clashes, or development disputes. The combination of expanding and shifting populations, increased energy consumption, resource mismanagement, overuse, and climate change is stressing water supplies.

The term “water wars” means a conflict in which the appropriation of water resources is part of the reasons that determine its outbreak; in fact, the water resources can be the purpose or simply the means to obtain other purposes (i.e., the bombing of Sarajevo in 1999). In other words, water conflict is a term describing a conflict between countries, states, or groups over access to water resources.

The United Nations recognizes that water disputes result from opposing interests of water users, public or private.

A wide range of water conflicts appears throughout history, though rarely are traditional wars waged over water alone. Instead, water has historically been a source of tension and a factor in conflicts that start for other reasons. However, water conflicts arise for several reasons, including territorial disputes, a fight for resources, and strategic advantage.

These conflicts occur over both freshwater and saltwater, and both between and within nations. However, conflicts occur mostly over freshwater; because freshwater resources are necessary, yet scarce, they are the centre of water disputes arising out of the need for potable water, irrigation, and energy generation. As freshwater is a vital, yet unevenly distributed natural resource, its availability often impacts the living and economic conditions of a country or region. The lack of cost-effective water supply options in areas like the Middle East, among other elements of water crises can put severe pressures on all water users, whether corporate, government, or individual, leading to tension and possibly aggression. Recent humanitarian catastrophes, such as the Rwandan genocide or the war in Sudanese Darfur, have been linked back to water conflicts.

Many conflicts have been determined by the need to control water courses. The fundamental problem, according to many researchers and scholars, is related to the absence of development research and technologies.

The need has been defined to cooperate and to exchange knowledge and translate it into a unitary project for more correct use of resources.

Despite the fact that the UNCLOS – UN International Convention on the Law of the Sea was

voted in 1982 and was established in 1994, it has not succeeded in resolving conflicts on the water issue; a problem in front of which the doctrine is not univocal, and tends to be politicized.

Generally, water is considered a resource of the territory, for which full territorial sovereignty is legitimate.

In fact, the main doctrine relating to the allocation of resources between states is exactly that of absolute territorial sovereignty.

Another doctrine is the one of absolute territorial integrity, according to which each state must allow a watercourse to continue, in order to preserve the natural distribution of water and its availability on each territory, no country, in fact, can interrupt the flow, increase or decrease the range.

Another doctrine is that named “the first appropriation” which asserts the right of ownership to the first who values them; however, the constant use of the watercourse is required in order not to incur, in the cancellation of the property right.

However, the texts drawn up by the United Nations do not recognize this doctrine.

The theme of the right to water also pushes local governments to take political positions and make institutional choices that clearly show the application of the principle of subsidiarity.

This theory seems to be acceptable from an environmental point of view, especially thanks to the development of the principle of collection/return of used water; however, the basins are sometimes too large, and consequently, we note the difficulty of managing them.

Thus, it has been perceived as the need to create a global approach to water resources management, resulting in the idea of “fair use and distribution”.

Many international instruments (international declarations and covenant), in fact, tried to guarantee and implement the right to use and access water, over the years.

The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (United Nations, 1992) defines the theme starting from the borders between states and from some definitions relating to the cross-border impact, requiring parties to prevent, control, and reduce transboundary impact, use transboundary waters reasonably and equitably and ensure their sustainable management. Thus, parties bordering the same transboundary waters have to cooperate by entering into specific agreements and establishing joint bodies. As a framework agreement, the Convention does not replace bilateral and multilateral agreements for specific basins or aquifers; instead, it fosters their establishment and implementation, as well as further development.

The principles are the implementation of measures to prevent the discharge of dangerous substances, even if the existence of a causal link between these substances and the transboundary impact was not demonstrated; and the “polluter pays”, that means that the costs of preventing and combating pollution are attributable to the polluter.

Finally, we can underline the principle of the conscious use of the resource, i.e., the principle of not affecting it, causing discomfort for future generations.

Therefore, a significant role must be given to the UN Convention on the Law of the Non-navigational Uses of International Watercourses of 1997 (United Nations, 2014).

The document sought to impose upon UN member states an obligation to consider the impact of their actions on other states with an interest in a water resource and to equitably share the resource, mindful of variant factors such as population size and availability of other resources.

Each member state that shares in a resource are required to provide information to other sharing states about the condition of the watercourse and their planned uses for it, allowing sufficient time for other sharing states to study the use and object if the use is perceived to be harmful. The document permits a state with an urgent need to immediately utilise a watercourse, providing that it notifies sharing states both of the use and the urgency. If use is perceived to be harmful, it requires member states to negotiate a mutually acceptable solution, appealing for arbitration as necessary to uninvolved states or international organizations such as the International Court of Justice.

The treaty also requires states to take reasonable steps to control the damage, such as caused by pollution or the introduction of species not native to the watercourse and imposes an obligation on states that damage a shared water resource to take steps to remedy the damage or to compensate sharing states for the loss. It includes provisions for managing natural damage to waterways, such as caused by drought or erosion, and mandated that sharing states notify others immediately of emergency conditions related to the watercourse that may affect them, such as flooding or



waterborne diseases.

The fundamental problem is related to the cooperation, specified in the Art. 6, which sets rigid conditions that are difficult to negotiate; in fact, it is possible to introduce new forms of exploitation as long as they are fairer; however, states that are against a review of uses will always be able to enforce the rule that prohibits causing significant damage.

Despite the doubts about the actual cogent capacity of the Convention, some states have decided to adopt it for the solution of their own local controversies: it is the case of Zimbabwe and Mozambique.

In 2002 the two countries went towards the creation of an agreement to establish a joint Commission for the management of their rivers.

The Commission is composed of a fair number of representatives of the two states and will promote the exchange of information and techniques for the best water management; any disputes will be settled amicably or by arbitration (from a third country); if it is not possible to find an agreement, they will refer to the Convention; this aspect is very important because it affirms the recognized importance of the law imposed within the UN.

Another perspective of particular interest was given by the Committee on Economic Social and Cultural Rights, which expressly declared water as a human right. Water is a limited resource and a fundamental public good for life and health, affirming the right to water as necessary to human dignity.

With the General Comment No. 15: The Right to Water, states are urged to protect this right without discrimination.

A fundamental aspect is the quantity of water to be guaranteed per person is 50 liters per day, taking into account the cases of particular needs.

It is specified that water must be free from all impurities; therefore hygiene must be ensured. Thus, also the accessibility is taken into account. It must be guaranteed for everyone without discrimination, within the state of belonging; this accessibility must be physical (proximity from the source with respect to places of public life) and accessible in safety; accessibility must also be economic, without discrimination, with particular reference to the most vulnerable and marginal sectors of society, in particular women, children, minority and indigenous groups, refugees, asylum seekers, migrant workers, and prisoners; the role of water resources in educational structures is highlighted as a matter of particular urgency.

## 6. Conclusion

As we have seen, scarcity of fresh water is an increasingly critical public health problem in many parts of the world.

Conflicts over water, both within countries and between countries, are sharply increasing; however, few of these conflicts have led to violence.

Water problems can lead to food shortages, energy crises, and ultimately economic and governmental instability (Levy & Sidel, 2011).

Because of its fundamental necessity, water scarcity has been both a source of regional dispute and a tool of military conflict throughout history; watercourses crossing international borders are too commonly a source of dispute.

In fact, water has been the cause of tribal conflict and border tension and has been used for ethnic warfare, terrorism, and political actions and, often, it has often been used as an excuse for ethnic violence.

Despite many conflicts surrounding the control and utilization of freshwater sources, possible conflict can be anticipated and resolved with proper planning, education, and cooperation.

Even if large-scale water wars are unlikely to happen in the near future, small-scale disputes and rising tensions can anyway lead to a larger conflict. Water conflict, on any level, is a result of freshwater scarcity which all peoples are affected by. By doing our own part in proper water management, education, and cooperation, seeds for future conflict can be uprooted before they sprout.

Effective policies in better water management should include water quality education; holistic sanitary community improvement; improvement of water regulation enforcement; water quality

protection at wellheads and distribution points; strengthening of natural protected areas; upgraded emergency response to potential water crises and, finally, creation of hydrological and water quality data storage systems that are transferrable and compatible (Kremer, 2012).

## References

1. Comitato italiano per il Contratto Mondiale Sull'acqua. (2001). *H2OK: Campagna EAS Acqua bene comune dell'umanità*.
2. Gleick, P. H. (1993). Water and conflict: Fresh water resources and international security. *International Security*, 18(1), 79-112. <https://doi.org/10.2307/2539033>
3. Klare, M.T. (2001). *Resource wars: The new landscape of global conflict* (1st ed.). New York, NY: Holt Paperbacks.
4. Kremer, D. K. (2012). The past, present, and future of water conflict and international security. *Journal of Contemporary Water Research & Education*, 149(1), 88-95. <https://doi.org/10.1111/j.1936-704X.2012.03130.x>
5. Levy, B. S., & Sidel, V. W. (2011) Water rights and water fights: Preventing and resolving conflicts before they boil over. *American Public Health Association*, 101, 778-780. <https://doi.org/10.2105/AJPH.2010.194670>
6. Renner, M. (2010). Troubled waters: Central and South Asia exemplify some of the planet's looming water shortages. *World Watch*, 23, 14-20 Retrieved from <https://www.questia.com/magazine/1G1-226086898/troubled-waters-central-and-south-asia-exemplify>
7. United Nations Children's Fund (UNICEF), & the World Health Organization (WHO). (2019). *Progress on household drinking water, sanitation, and hygiene 2000-2017: Special focus on inequalities*. Retrieved from [https://www.who.int/water\\_sanitation\\_health/publications/jmp-2019-full-report.pdf](https://www.who.int/water_sanitation_health/publications/jmp-2019-full-report.pdf)
8. United Nations. (1979). *Convention on the Elimination of All Forms of Discrimination against Women adopted and opened for signature, ratification & accession by General Assembly resolution 34/180 of 18 December 1979*. Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>
9. United Nations. (1989). *Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989*. Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
10. United Nations. (1992). *The Convention on the Protection and Use of Transboundary Watercourses and International Lakes*. Retrieved from [https://treaties.un.org/doc/Treaties/1992/03/19920317%2005-46%20AM/Ch\\_XXVII\\_05p.pdf](https://treaties.un.org/doc/Treaties/1992/03/19920317%2005-46%20AM/Ch_XXVII_05p.pdf)
11. United Nations. (2014). *UN Convention on the Law of the Non-navigational Uses of International Watercourses adopted by the General Assembly of the United Nations on 21 May 1997*. Retrieved from [https://legal.un.org/ilc/texts/instruments/english/conventions/8\\_3\\_1997.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf)

# CARE SAFETY, CLINICAL RISK MANAGEMENT AND PATIENT WELL-BEING: AN ECONOMIC-BUSINESS APPROACH

*Ubaldo Comite \**

**Keywords:** Health Authorities, Management, Clinical Risk, Welfare, Patient, Safety

## 1. Introduction

The National Health Service and its resources represent a complex system in which operate many heterogenic and dynamic factors, such as the plurality of the health services, the various management models, the specialized skills, the different professional roles (both technical-healthcare related and economic-administrative ones), the heterogeneity of processes, the specificity of the singular health needs and the results to be reached (Comite, 2018). In the healthcare sector, indeed, there are many factors concurring to define the “risk degree” of the system; and they can be schematically grouped in the following categories:

1. Structural-technological factors, represented by the features of the healthcare unit, of the plant design (design and maintenance), by the safety and logistic of the environments, by the equipment and the tools (functioning, maintenance, renovation), by the infrastructures, coverage, digitalization, and automation.

2. Organizational-managerial tools and work conditions represented by the organizational structure of the system (roles, responsibilities, work distribution), by policy and management of human resources (organization, leadership styles, incentives system, supervision and control, training and updating, workload and shifts), by the organizational communication system, by the ergonomic aspects (such as, for example, monitor, alarms, noises light) and by the policies aimed at promoting the safety of the patient (guidelines and patient diagnosis/treatment plan, error report system).

3. Human factors (both individual and team-related), which is identified in the characteristics of the staff (perception, attention, memory, ability to make decisions, perception of responsibility, mental and physical conditions) in the professional skills, in the interpersonal and group dynamics, and in the subsequent level of cooperation.

4. Users’ characteristics, such as epidemiology and socio-cultural aspects (demographic aspects, ethnicity, socio-economic environment, education, ability to manage situations, complexity and compresence of acute and chronic conditions), social networking.

5. External factors including the regulation and the obligations set out by the law, the financial limits, the socio-economic-cultural context, the influence of the public opinion and of the media, of the professional organizations and public protection organizations as well as of the insurance companies.

In this context, the realization of safe and reliable treatments is inspired by the principle of pursuing the safeguard of life, of physical and psychical health of the sick person, and the relief of suffering, conjugating the affordability of the management (Barresi, 2014).

The Law has placed at the base of the issue the concept of prevention of adverse events linked to the delivery of the health service, and of the related consequences.

However, the observation of the facts indicates that the actions realized in order to reduce the incidence of adverse events that are evitable in the healthcare sector, even in developed countries, are still insufficient, with financial effects that are, however, intolerable. The negative financial effects occur especially in legal proceedings and compensations, in diagnostics and treatments, in negative exposure and damaged reputation, as well as in social costs, in the form of growing morbidity of the population, reduction of the working ability, loss of trust in the health system and in the institutions. It has therefore become a priority to make some changes in the health organizations in order to respond to the regulatory requirements as well as to satisfy old yet new ethical and

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deontological principles meant to safeguard health (Ministry of Health, 2018).

As in other complex systems, even in the healthcare sector some accidents and mistakes may occur, which are comparable to a “business risk” that, even intuitively, appears to be proportional to the complexity of the system itself.

It is important, therefore, to provide a possible systematic response, even following a business approach, to problems concerning the issues of safety of the treatments and of the management of the risk linked to the delivery of the health services that still, to date, and in countries with highly evolved healthcare systems, such as Italy, do not always find an adequate solution (Comite, 2017).

## 2. The clinical risk, principles, and models

Every health organization may define itself as a complex system in which the activity is executed with the succession of a series of actions in which human, technological, environmental, and other factors intervene.

In this respect, the extreme complexity of every health organization makes it so that the risk of an adverse event is a built-in element, therefore ineradicable. The management of the risk has, therefore, the purpose to contain and/or avoid adverse events, through a process of systematic identification, evaluation, and treatment of the present and potential risks linked to the activities conducted within the health structure.

By the term “clinical risk” is defined as the possibility that a patient suffers “involuntary damage or discomfort, attributable to the treatments received, which causes an extension of the time spent in the hospital, a worsening of his/her health conditions or death” (Bizzarri & Farina, 2018, p. 43) (Table 1).

The term “health treatments” includes a diagnostic investigation.

The clinical risk management activity deals, through specific actions, with identifying, preventing, and managing the error risk in the health care sector, by creating a culturally favorable environment for the reporting of adverse events and by learning from these events as a guarantee for the patients (Casati, 2000).

**Table 1.** Clinical risk glossary

<b>Adverse event</b>	An unexpected, unintentional, or undesirable event related to the treatment process, not associated with the clinical condition of the patient, which entails damage to the patient, with or without after-effects or an extension of the time spent in the hospital.
<b>Active fault</b>	Failure in executing an action as planned (execution error) or choice of an incorrect plan in order to reach a certain objective (planning error); it occurs shortly after the adverse event.
<b>Latent fault</b>	A failure in executing an action that has happened far back in time and space from the adverse event.
<b>Sentinel event</b>	A particularly serious adverse event, potentially descriptive of a serious malfunctioning of the system, which may entail death or serious damage for the patient, and that determines a loss of trust of the citizens toward the healthcare system. Because of its seriousness, it is sufficient for any of these events to happen once for the organization to a) operate an immediate survey to verify what eradicable or reducible factors have caused or have contributed to causing it and b) implement adequate corrective measures.
<b>Damage</b>	Any negative consequence deriving from the occurrence of the event.
<b>Accident</b>	An event that has caused or that had the potential to cause an adverse event.
<b>Near miss</b>	High-risk situations or events that, for fortuitous reasons or because of a prompt intervention of an operator have not determined an accident.
<b>Barriers</b>	Protection of the patient, divided into physical or technological barriers (hardware), operational barriers (software, procedures, checks, organizational system) human barriers (healthcare staff, the patient himself and/or his relatives).
<b>Contributing factors</b>	Factors that have contributed to the realization of the human error, due to some characteristics of the patient, factors linked to the task, individual factors, factors linked to the work team, factors linked to the work environment, organizational factors, factors linked to the institutional background.
<b>Risk</b>	Potential condition or event, intrinsic or extrinsic to the process, that can modify the expected outcome of the process. It is measured in terms of probabilities and consequences, as the product of the probability that a specific event might occur (P) and the seriousness of the damage that results from it (G); in the calculation of the risk is also considered the ability of the human factor to understand ahead of time and contain the consequences of the potentially damaging event (K factor).

Source: Ministry of Health of Italy (<http://www.salute.gov.it>).

### 3. Identification, analysis, and risk management methods and tools

Risk is innate in any human activity. There are no zero-risk activities. Safety is, therefore, the protection against unacceptable risks. To study adverse events or almost-adverse events so as to identify the causes that mostly have contributed to them and to learn from one's mistakes may avoid that such an event may recur.

There are several methods and tools for error analysis and for risk management<sup>1</sup> that have been developed over the past few decades at an international level, especially in Anglo-Saxon countries, and that have been introduced also in many Italian healthcare realities. The purpose of the analysis methods is to highlight the insufficiency in the system that may contribute to the occurrence of an adverse event and to highlight and project proper protective barriers. The purpose of the analysis methods is to identify the deficiencies in the system that can contribute to the triggering of an adverse event and to identify and design the appropriate protective barriers.

Despite the final objective is common, they might follow two different approaches that do not exclude one another:

1. *Proactive approach*: the analysis starts from the review of the processes and of the existing procedures, identifying, in the different phases, the critical points. This approach can be used even in the conceptual and design phases of new procedures, processes, and technologies aimed at realizing protective barriers able to prevent the human/active error.

2. *Reactive approach*: the analysis starts from an adverse event and goes back to retrace the sequence of events with the purpose of identifying the factors that have caused or that have contributed to causing the main event. In a health organization, where risk management processes are introduced, both approaches can be used (Martini & Pelati, 2011).

#### 3.1. Risk identification tools

The tools for the identification of risks are divided into a) reporting system; b) safety briefing; c) safety walkaround; d) focus group; e) medical records review; f) screening; g) observation (Buscemi, 2009).

##### *Reporting systems*

An efficient reporting system is an essential component of a program for the safety of the patient. It is a structured modality for the gathering of information related to the occurrence of adverse and/or almost-adverse events. The purpose of it is to provide information on the nature of the events and on the related causes, so as to be able to learn and intervene with appropriate preventive measures and, more in general, to spread the knowledge and favor specific research in areas deemed to be most critical. Regarding the contents, the system can be:

- open, that is, to gather any type of data related to adverse or almost-adverse events, referring to the whole of the services;
- predefined, that is, to gather all the data related to a definite list of events (for example, sentinel events<sup>2</sup>) or to a specific area (for example, drugs).

Regarding the reporting modality, it can happen via a predetermined or free text format, sent via e-mail, phone, electronic filing, or via the web, making sure to implement all the proper forms of protection and confidentiality of the reporting.

In the reporting system, the figure that is being reported must be specified. In some systems, the reporting is done by general management, in others, it is made by the operators. Some systems

<sup>1</sup> According to the definition of the British Standard Institution, risk ( $R$ ) is the relation between probability ( $P$ ) that a dangerous event might occur and the seriousness ( $G$ ) or magnitude of its consequences ( $R = P * G$ ). For an in-depth analysis see <https://www.bsigroup.com>.

<sup>2</sup> List of sentinel events: procedure in wrong patient, surgical procedure in the wrong part of the body (side, organ, or part); wrong procedure on right patient; tool or other material left in the surgical site, which requires a subsequent or further procedures; transfusion reaction due to ABO incompatibility; death, coma or serious damage deriving from errors in the drug treatment; maternal death or serious disease related to labor and/or childbirth; death or permanent disability in healthy newborns weighting > 2500 grams not related to congenital disease; death or serious damage due to fall of the patient; suicide or attempted suicide of a patient in hospital; violence on a patient, violent acts toward an operator, death or serious damage due to malfunctioning of the transport system (intra-hospital, extra-hospital); death or serious damage due to incorrect assignment of triage code in the 118 operation center and/or within the ER; unforeseen death or serious damage due to surgical procedure; any other adverse event causing death or serious damage to the patient (Ciuffreda, Corrà, & Marcon, 2001).

even allow relatives, patients, and citizens to report events.

A reporting system must allow the identification of new and suspected risks, for example, complications never recognized associated with the consumption of drugs or new products and, therefore, the gathering of data must always be followed by an analysis.

The difficulty that healthcare organizations find in adhering to the reporting operations may have different reasons:

- the belief in a scarce efficacy of the system and the resistance to changes;
- a defensive attitude;
- investment in resources.

The adverse events and almost-adverse events reporting system allows the acquisition of information related to similar cases already occurred in other organizations, offering the opportunity to generalize the problem and to develop more efficient solutions that, therefore, may be made available.

The reporting systems are divided into two categories:

1. Learning systems (usually voluntary systems, designed to guarantee a continuous improvement of the quality of the treatments. The recommendations that are elaborated, after careful analysis, are useful in order to redesign and improve the healthcare processes).

2. Accountability systems (they are based on the principle of accountability, they are compulsory and are often limited to a predefined events list, for example, sentinel events). The majority of the accountability systems use disincentivizing mechanisms such as fines and sanctions. The efficacy of these systems depends on the ability to convince whomever needed to report and act with consequential measures. These systems may also be considered as learning systems if the information received is analyzed with transparency and the actions undertaken are spread to all operators).

The majority of the reporting systems developed are placed in one of the two categories, but the objective of the two systems are incompatible with one another, however, from this choice derives the compulsoriness or the voluntary nature of the system.

Furthermore, in Italy, the so-called incident reporting systems have been implemented on a regional level and in healthcare organizations. These systems gather all adverse and almost-adverse events in order to favor the analysis and the provision of preventive actions.

#### *Safety briefing*

The safety briefing is a simple and easy-to-use tool to ensure a culture and a shared approach toward the safety of the patient. It is a method that allows the creation of an environment in which the safety of the patient is seen as a priority in a situation that stimulates the sharing of information regarding potential or real risk situations. It consists of a brief debate, a conversational yet structured discussion regarding the potential risks for the patient that are present in the operational unit.

In quantitative terms, it allows easy measurement of the achievement of the safety objectives. The safety briefing must not be punitive, it may refer to a list of safety issues, it must be easy to use, easily applicable, and usable for all the problems regarding the safety of the patient. The conduction of the meeting requires the choice of a moderator that is able to explain the reasons and the objectives.

The briefing may be conducted at the beginning of a shift, by gathering, for a maximum five minutes, all operators that are involved in the treatment of the patient.

It starts with the detection of problems, data, observations (in absence of a specific situation it can revolve around potential issues). At the end of the shift, there must be a *debriefing* (another very short meeting), with the purpose of investigating whether or not there have been potentially risky situations during the course of the activity or whether there are questions from the patients or their relatives. The introduction of this method must be tailored to the needs of the operational unit, granting, anyway, regularity, continuity, and response to the problems that arise. The immediate return is the higher accountability in the individual behaviors, higher attention toward the safety of the patient, the improvement of the work environment, the enhancement of the “teamwork”.

#### *Safety walkaround*

This method consists in “visits” that the people in charge of the safety, upon mandate given by management, conduct in the operational units in order to identify, together with the staff, the issues linked to safety. The staff is invited to report events, causation or concurring factors, almost-events, potential problems, and possible solutions. An important added value derives from the fact that

the information gathered in this process often have already a solution that lies in the description of the event and can therefore bring, sometimes, to the introduction of an immediate change that improves immediately the safety and the assistance process. The representatives identify some priorities amongst the events and the healthcare team develops solutions shared with all the staff. The gathering must be anonymous and the issues that emerge are entered in a database that registers the reports and the subsequent corrective actions.

The organization modalities entail meetings, within the operational units, between the experts and a small group or singular operators, which last a few minutes, in which they try to gather and stimulate all the reports of the staff for what concerns damage or risk situations.

Some of the most common barriers to overcome are the fear of the operators to be punished or blamed for having reported and the mistrust in the subsequent corrective actions. It is, therefore, very important to provide feedback to the operational units, so as to make them understand the importance and the serious consideration the reports are treated with.

The culture of the safety of the patient is included in a more ample cultural change which provides an open relation between the various operators and an atmosphere of integration and cooperation.

What must be clear to all those that conduct the visit, but most of all to the frontline staff, is that the object of the investigation is not the individual behaviors, but the system implemented for the safety of the patient. The proposed system stimulates the staff to observe behavior and practices in a critical light and to recognize the risks from a different point of view. It is extremely useful that the system becomes official and recognized. This modality has the advantage to be a low-cost one, and it allows the identification of the risks and changes needed in a specific contest, it does not require staff, structures, or infrastructures.

#### *Focus group*

The focus group is a typical methodology in social research. Introduced years ago, in the healthcare system, it is useful to identify all aspects of a problem starting from the experiences and the perceptions of the people who have come into contact with that specific problem. Therefore, they can be conducted either with singular professional figures or with a team, with patients, relatives, and other stakeholders. The discussion, which lasts about half an hour, must be led by a qualified moderator.

The efficacy of the focus group depends on the questions made, which must be open and allow the discussion and maximum interaction.

During the discussion, it is possible to let emerge adverse or almost-adverse events, latent insufficiencies, as well as the essential elements concurring in determining the local safety culture, useful to the purpose of pinpointing the most efficient strategies to introduce in the specific context.

#### *Medical records review*

The review of the medical records has represented a cornerstone in the studies on errors in healthcare. It constitutes the most used method, over time, for the assessment of quality. It allows investigations on the decision-making processes and on the observations of the outcome analyzing the compliance with guidelines and protocols.

The reviews of the medical records might happen in an explicit way when the reviewer searches for specific types of data or events, or, in an implicit way, wherever an expert physician makes a judgment related to an adverse event and/or error, for example, the consequences related to the missing viewing of a lab exam or the missing change of therapy after the report of adverse reactions. The medical records review process can also be used to monitor the progress made in the prevention of adverse events when, for example, safer practices are introduced and, through the review, the level of implementation of them is evaluated.

The degree of detection of the events through this process is very much discussed and is based, essentially, on the quality and quantity of the information. Some information, like, for example, lab exams, prescriptions, medical reports, are objectively researchable, while not all the phases of the decision-making process are traced in the clinical documentation and remain, therefore, implicit.

Furthermore, the researcher releases a personal opinion which is affected by his/her specific competence, as well as by other variables. While serious adverse events are almost always reported, minor errors and conditions never are, and almost-adverse events are rarely noted.

The result is that the medical records are useful in preliminary investigations, but they give very

limited contextual information. Other limitations to the use of this technique are the high cost, the need for a homogeneous preparation of the researchers, the drawing of a reading grid.

The selection of the medical records to review can be focused on a specific type of event related to critical points of the existential process.

#### *Screening*

This method has the purpose of identifying possible adverse events using the data available in the healthcare systems. Databases can be researched retroactively or in real time; or else, the traditional paper archives can be consulted. This way it is possible to identify the presence of certain events, previously classified as “indicators”, like, for example, a return in the operating room or repeated hospitalizations for the same problem or the prescription of an antidote in case of adverse events due to drugs

#### *Observation*

The observation to find out errors is a methodology that must be used in a targeted manner and limited in time. It uses an external and expert observer, called to detect, even with the help of grids, the discrepancies between the healthcare processes implemented, and the expected standards. The method is used mostly to detect errors in the therapy. Observations on the administering of drugs have demonstrated a high number of errors.

The observation requires hard work and, therefore, has high costs. However, it offers very detailed information which facilitates the comprehension not only of the happening but also of the process and the dynamics that have led to the event. It is a method that can be used intermittently, where the resources allow it, to both identify and understand the insufficiencies in the systems, and to monitor the improvement actions.

### ***3.2. Analysis tools***

A clinical risk management program<sup>3</sup> uses different types of tools for the risk analysis, examining events, when they occur, with reactive methods, or analyzing the processes in order to prevent events, with a proactive modality.

There are many possible approaches for the evaluation of the quality and safety of the treatments, but if the objective is to realize a safe healthcare process, the proactive approach is to be preferred to the reactive one.

The first category of tools includes the root cause analysis (RCA), the second one includes the failure mode and effect analysis (FMEA), and the failure mode and effect criticality analysis (FMECA).

#### *The root cause analysis*

The root cause analysis is a tool, for the improvement of quality, that helps individuals and organizations to identify causes and contributing factors related to an adverse event and, on the basis of the results, improvement projects can be developed. As an analysis technique, RCA has firstly been used in engineering and in other systems, including aviation and the airspace industry, since these systems needed the development of strategies for the knowledge of the risk factors. In the engineering sector, some databases have been filled, which are capable of gathering an enormous quantity of information deriving from the application of this analysis technique, and the gathered data have helped the deepening of the knowledge of the causes and contributing factors of adverse events. Therefore, to provide a system, such as this, is useful in the healthcare sector.

RCA is a retrospective analysis that allows the comprehension and the reason for the occurrence of an event. It can be applied to all healthcare sectors: hospitals for acute cases, emergency areas,

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<sup>3</sup> Risk management consists of a coordinated group of activities that an organization conducts in a systematic way in order to identify, prevent, and keep under control the risks, and in order to reduce to a minimum the occurrence of errors or accidents. Particularly, clinical risk management is done by the Unit in charge that, supported by the Quality Manager, implements actions meant to prevent the rise of clinical and/or organizational events that may create a damage to the patients and the operators. In the strategic objectives of Health Care organization, the points oriented toward risk management are highlighted. The clinical risk management may be defined as a structured methodological approach that takes into consideration all the risks that an organization can face and that, therefore, includes: identification, evaluation, treatment, monitoring, with the objective to reduce the probability of the events to occur, or to reduce the seriousness of their consequences (Lega, 2001).



rehabilitation, mental illness, home hospitalization, and in various branches of treatments outside of hospitals.

The RCA requirements are:

- the establishment of an interdisciplinary group constituted by experts in the matter;
- the participation of those involved in the incident;
- impartiality in highlighting potential conflicts of interest.

Further requirements that grant the accuracy and the credibility of the RCA are the participation of management and of all those that are most interested in the process and in the system, as well as the confidentiality, that is, the information that comes into one's knowledge must be protected, not disclosed, with levels of data protection established priorly (Wilson, Dell, & Anderson, 1993).

*The failure mode and effect analysis and the failure mode and effect criticality analysis*

The FMEA is a method very much used to identify the weaknesses of the processes with a proactive approach. The objective of its implementation in healthcare systems is to avoid adverse events that might cause damage to patients, relatives, and operators. It is a method meant to examine a process, prospectively, with the purpose to highlight its possible weaknesses and, therefore, to redesign it. The method was created in the United States in 1949, in the military field, and applied to the healthcare reality starting from the nineties.

It is based on the systematic analysis of a process, conducted by a multidisciplinary group, to identify the modalities of the possible failure of a process or project, the reason for the effects that might be obtained, and what could make the process safer. The application of the method provides, first of all, the identification of a manager that organizes a multidisciplinary workgroup, consisting of operators and experts.

The first phase, the investigative one, provides the analysis of the literature, the gathering of the documentation, and possible interviews with the operators. The second phase is the analysis phase, during which the process is subdivided into macro activities. Each macro activity is analyzed on the basis of singular tasks to be completed. For each singular task are pinpointed the possible errors (types of error). The error probability is quantitatively evaluated, while the seriousness of its consequences is evaluated qualitatively. In order to make an "assessment of the risk", the modality of occurrence of the error or fault (failure mode) and their effect (failure effect) are analyzed. Therefore, it is a type of qualitative and quantitative analysis.

The analysis of the entire process entails, therefore, the identification of the areas with an intervention priority and it is articulate in the following four points: 1) breakdown of the process in phases, with the elaboration of a flow chart; 2) definition of "what could go wrong" (failure mode); 3) definition of "why" the insufficiency might occur (failure causes); 4) definition of the possible effects (failure effects).

The group, then, assigns to each phase a number of risk priorities (RPN) or priority index risk (IPR) that consists in:

- detection probability (score from 1 to 10);
- seriousness (score from 1 to 10).

The application of this technique is ample and may be used before introducing new processes, to modify the existing processes, to use, in different contexts, processes that are already consolidated, and, lastly, to prevent the repetition of an event that has already occurred.

The advantages include a) improvement of the quality, reliability, and safety of the process; b) the identification of critical areas of a process through logic and structured procedure; c) the reduction of the time needed in order to develop a process and the related costs; e) help in identifying the criticalities; f) the supply of a database.

The main limitation of this analysis technique is that the insufficiencies are treated as if they were singular units statistically analyzed, while, in the healthcare sector, the adverse events are the result of multiple insufficiencies and conditions that are often related (Stamatis, 1995).

At the moment in which further quantitative analysis is added to FMEA to calculate the level of criticality of the problem found (criticality analysis), with the attribution of a criticality index, the FMECA technique is applied.

### *Clinical audit*

The word audit<sup>4</sup> derives from the Latin word, which means “to hear”, to listen, and to learn, and it was used first in the “financial” framework when the landlords asked their administrators to account for the employment of the resources in a given time frame.

Audit in healthcare was introduced by Florence Nightingale, a nurse, and a statistics expert, in 1854, during the Crimean War, in relation to the high mortality of the patients undergoing surgery. After the application of the analysis method, on the basis of the results obtained, new strict preventive measures were introduced which allowed the reduction of the mortality rates from 40% to 2%.

The audit allows a) guarantee that the patients receive the best possible care; b) an improvement in the clinical practice; c) improvement of the multidisciplinary work; d) facilitation of the optimization of the available resources; e) an opportunity for training and refreshers.

In the specific framework of the safety of the patients it allows to: a) identify the risks related to the clinical activity and to the organization; b) identify errors or almost-adverse events; c) identify the causes, the contributing and concurrent factors of adverse events; c) identify the causes; d) identify the framework of improvement.

The audit consists of a series of meetings in which the team, possibly a multidisciplinary and a multi-professional one, analyzes a clinical case or a healthcare path, identifying the differences with the predetermined standards or, should they not be available, with the opinion of internal and external experts. The audit employs the clinical and administrative documentation and possible evidence in order to provide a discussion with the amplest scope of information. It would be beneficial to identify, in the group, a moderator that can ensure the availability of the documentation for the related investigation, the efficient conduction of the meetings, and the related reporting.

The contents of the audit can be: a) the outcome of the clinical activities and of the healthcare activities; b) the services; c) the resources and their employment; d) all the forms of assistance, either formal or informal; e) the organizational processes.

The general phases of which an audit cycle is composed are: 1) the choice of topic: it can be about the evaluation of the treatments, services, policies, and organizations. The criteria that can help in the definition of the priorities refer to the frequency of the problems, to the seriousness of the consequences, and to the possibility to implement preventive solutions or measures; 2) the definition of the purpose and of the objectives: the purpose and the objectives must be detailed and specific; 3) identification of the standards: the clinical audit is an activity based on the comparison with defined treatment standards and services. The standards must have certain characteristics that can be summarized with the acronym SMART: *specific* (related to the topic), *measurable* (effectively definable), *achievable* (with the available resources), *research-based* (based on evidence), *timely*, updated; 4) gathering and analysis of the data: the data can be gathered with the review of the clinical documentation, with interviews to patients and/or staff, with questionnaires or through reporting systems. The data have to be gathered using quantitative or qualitative methods, or both; the data must be analyzed with the simple descriptive statistical analysis. The analysis and the interpretation of the data must always have as a reference point the standard chosen, and the reading of the data must allow the decisions to be made, analyzing all available options. Finally, an intervention plan will be elaborated with recommendations, actions, responsibilities, and timing; 5) monitoring of the expected results following the changes introduced: the re-audit phase is conducted only after the changes have been introduced, it must follow the same plan as the audit and only the fields interested by the changed are to be re-audited.

At the end of the audit, a report is to be drawn and improvement measures must be identified. The audit process, in order to be a safety tool, must become systematic and therefore, the measures introduced following the audit must be monitored in time.

A very delicate phase is the one in which the results are communicated to the operational unit, which must be involved in all the improvement measures (Spanò & Tradori, 2015).

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<sup>4</sup> An audit is a method of structured and systematic analysis meant to improve the quality of the health services, applied by professionals, through the systematic discussion of the assistance provided with explicit criteria, to identify differences with the known or best practice standards, to implement the change opportunities pinpointed and to monitor the impact of the corrective measures introduced (Scopetani, 2010).

#### 4. Safety as a non-dynamic event: The relation between quality and safety

Safety is an abstract concept. It does not exist in nature, but safety is not a “non-event”. It is a dangerous threat, because a non-event tends, by nature, to be given for granted.

In an organization, when one is forced to face constant productive tension, the absence of undesired events may be a reason to take resources away from safety. Since safety is not a definite characteristic, it needs a series of active and dynamic provisions to obtain constant results: safety is therefore defined as a non-dynamic event.

In many activities, the concept of safety is given for granted, as in the transport sector (plane, car, train, boat), in building construction, in the industry, at work, and also on a domestic level. In all these fields, the safety issues have been faced much earlier than in the healthcare field, where they have been accepted at least a decade late, starting from the nineties (Trincherio & Lega, 2016).

Very interesting is the “Reason” classification regarding the safety culture, founded on 1) learning culture; 2) informed culture; 3) right culture; 4) reporting culture; 5) flexibility culture (Reason, 2000).

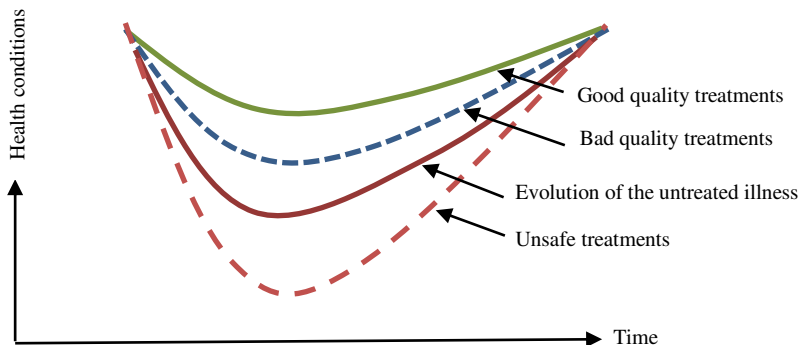
As well as the concept of safety, the definition of quality is also not easy.

Quality is, in general, any characteristic, property, or condition of a person or a thing that is useful to determine the nature of them and to distinguish them from the others (positive quality, negative quality, physical quality, morals, chemical qualities of the matter, a person with many good qualities, first or second quality goods, a good quality/bad quality product, etc.).

In the healthcare sector, where the concept of quality has also arrived late compared to other fields, quality reflects the gap between what can be done and what is actually realized in a certain context. When the gap is small, the quality is good, when it is large, the quality is bad (Leggeri & Perrella, 2011).

According to Donabedian, there exists a relationship between the quality of the healthcare assistance and the illness described in a table that has the good quality treatments indicated on the top and the unsafe ones, that worsen the evolution of the untreated illness, below (Figure 1).

**Figure 1.** Quality of the healthcare assistance and evolution of the illness



Source: Donabedian (2003).

The healthcare quality also includes the manner and kindness the treatments are provided with Donabedian (2009). Maxwell identified six dimensions of quality in healthcare: 1) technical excellence; 2) social acceptability; 3) kindness; 4) cost; 5) access equity; 6) response to needs (Malinverno, 2013). What was missing in Maxwell’s dimensions was, however, safety.

The concepts of quality in healthcare have been introduced starting from the nineties, after the sudden growth of the quality concept in the industry, the automotive one first, and applied in the postwar period, and extended to all the western countries starting from the seventies.

The Quality Regulations (ISO9001), presently, are applied to the healthcare systems as a voluntary modality of excellence assessment, but their fundamental principles have permeated the accreditation regulation.

## 5. Conclusion

The objective involving the management of clinical risks is to increase the safety of the patients, (as well as other actors, such as healthcare assistants and visitors, who interact with the healthcare organization), improve the outcomes and, indirectly contain the costs, reducing adverse events that can be prevented and, consequently, any occasion for legal proceedings.

The risk management function is to provide, to the organization, all the needed information in order to “learn from one’s mistakes”, overcoming the punitive idea of the error as a failure ascribable to individual responsibilities (that is, responsibilities of the singular operators), taking into account that very often, the operator that makes a mistake is facilitated to it by favorable conditions linked to the organizational context and/or to the corporate strategic choices.

In conclusion, risk management is the whole of the activities that allow the continuous development of the improvement of clinical assistance, in order to guarantee a higher safety to the patients, taking also into account: a) staff safety (biological risk, accidents, etc.), b) environmental safety (structures, machinery, plants), c) risks related to external emergencies or uncontrollable factors (essential services interruptions, maxi-emergencies, etc.), d) legal-administrative risks (proceedings, insurance cover, some elements linked to professional responsibility).

The clinical risk management process must be, therefore, characterized by the multidisciplinary integration amongst professionals and by the accountability of the operators, which are essential elements in order to realize and implement actions meant to reduce adverse events, granting treatment safety and patient well-being.

Therefore, the organization’s strategy must revolve around a constant and gradual risk management process, that becomes the tool of the clinical government where the focus is the safety of the patients, of the operators, and of the organization in general (Comite, 2011).

Risk management must become the *modus operandi* of all the operators that, through good practice contribute to avoiding adverse events occurring to the patients.

## References

1. Barresi, G. (2014). *Il rischio clinico nelle aziende ospedaliere: Strumenti di analisi e profili di gestione*. Milan, Italy: Franco Angeli.
2. Bizzari, G., & Farina, M. (2018). *Strategia e gestione del rischio clinico nelle organizzazioni sanitarie: Approcci, modalità, strumenti e risultati*. Milan, Italy: Franco Angeli.
3. Buscemi, A. (2009). *Il risk management in sanità: Gestione del rischio, errori, responsabilità professionale, aspetti assicurativi e risoluzione stragiudiziale delle controversie*. Milan, Italy: Franco Angeli.
4. Casati, G. (Ed.). (2000). *Il percorso del paziente*. Milan, Italy: Egea.
5. Ciuffreda, M., Corrà, P., & Marcon, G. (2001). Come identificare e prevenire errori e danni derivanti dalle cure. *Professione*, 9, 41-45.
6. Comite, U. (2011). Healthcare authorities: Between functional integration and clinical governance. The economic-business aspect and managerial determinants of clinical practice. *Proceedings of the EBES 2011 Conference – Zagreb*.
7. Comite, U. (2018). Clinical assistance and management innovations in healthcare: From the patient to the integrated management. Paper presented at the *7th International Multidisciplinary Conference on Knowledge & Human Resources Management for a Sustainable Development (ICTEA 7)*. Rende, Italy: University of Calabria.
8. Comite, U. (Ed.). (2017). *Advances in health management*. <https://doi.org/10.5772/65535>
9. Donabedian, A. (2003). *An introduction to quality assurance in health care*. England, UK: Oxford University Press.
10. Donabedian, A. (2009). *Il maestro e le margherite: La qualità dell’assistenza sanitaria secondo Avedis Donabedian*. Rome, Italy: Il Pensiero Scientifico.
11. Lega, L. (2001). *Logiche e strumenti di gestione per processi in sanità*. Milan, Italy: McGraw-Hill.
12. Leggeri, R., & Perrella, G. (2011). *La gestione del rischio clinico. La sicurezza del paziente e la lotta agli sprechi nelle strutture pubbliche e private*. Milan, Italy: Franco Angeli.
13. Malinverno, E. (2013). *La qualità in sanità: Metodi e strumenti di clinical governance*. Bari, Italy: Carocci.
14. Martini, M., & Pelati, C. (2011). *La gestione del rischio clinico*. Milan, Italy: McGraw-Hill.

15. Ministry of Health. (2018). *Sicurezza dei pazienti e gestione del rischio clinico: Manuale per la formazione degli operatori sanitari*. Retrieved from <http://www.salute.gov.it>
16. Reason, J. (2000). Human error: Models and management. *British Medical Journal*, 320, 768. <https://doi.org/10.1136/bmj.320.7237.768>
17. Scopetani, G. (2010). *Metodologie per l'audit nei servizi e nella PA. La misurazione dei comportamenti: Tecniche e strumenti innovativi*. Milan, Italy: Franco Angeli.
18. Spanò, F. M., & Tradori, V. (2015). *Sistemi di auditing e controllo nelle organizzazioni sanitarie*. Rome, Italy: Rirea.
19. Stamatis, D. H. (1995). *Failure mode and effect analysis: FMEA from theory to execution*. Retrieved from <https://ru.scribd.com/document/366579590/Stamatis-D-H-failure-Mode-and-Effect-Analysis-FMEA-From-Theory-to-Execution-American-Society-for-Quality-ASQ-2003>
20. Trincherò, E., & Lega, L. (Eds.). (2016). *Governare la sala operatoria nell'ospedale del XXI secolo. Qualità, sicurezza, efficienza*. Milan, Italy: Egea.
21. Wilson, P. F., Dell, L. D., & Anderson, G. F. (1993). *Root cause analysis: A tool for total quality management* (1st ed.). Milwaukee, Wisconsin: ASQ Quality Press.

# NEW CHALLENGES OF THE GLOBAL ECONOMY: HUMAN TRAFFICKING AND CIVIL AVIATION ORGANIZATIONS

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**Keywords:** Human Trafficking, Globalization, Human Rights, Aviation

## 1. Introduction

Human trafficking is the act of recruiting, transporting, transferring, harboring, or receiving a person by means of threat, force, coercion, or deception to achieve control over another person for the purpose of exploitation.

The crime of human trafficking is complex and dynamic, taking place in a wide variety of contexts and difficult to detect. One of the greatest challenges in developing targeted counter-trafficking responses and measuring their impact is the lack of reliable, high-quality data related to the scale of human trafficking and the profile of victims.

According to the ILO (International Labour Organization), this “trade” is one of the fastest-growing activities of trans-national criminal organizations and must be condemned as a violation of human rights by international conventions.

Human trafficking is firmly connected to globalization that, in its most literal sense, represents the process of making, a transformation of things or phenomena into global ones. It can be described abstractly as a process by which the people of the world are unified into a single society and function together.

This process is a combination of economic, technological, socio-cultural, and political forces and aviation represents one of its result and also one of its instruments because connects businesses to markets, reunite families and friends, and facilitate tourism and cultural exchange.

Unfortunately, the global air transport system can also be exploited by criminals for the illegal trafficking of men, women, and children but, although the responsibility for identifying, apprehending, and prosecuting those perpetrating human trafficking rests with governments and national law enforcement agencies, the airline industry recognizes that it can play an important role in helping to prevent this crime.

## 2. Globalization and international migration

Globalization in the 21st century is an objective phenomenon that manifests itself as a complex system of non-linear relations between their subjects and objects, which involves the development of new challenges, problems, and threats that must be tackled not only on the national stage but especially at an international level.

People in favour of globalization usually point to the following benefits: greater economic integration mainly due to the massive reduction in trade and investment barriers, greater movement of the workforce, which provides access to more and better-paying jobs, integrated regional areas, increased access to an abundance and diversity of goods and services for the consumer and associated lowered prices brought about by competition, increased capital flows, and increased access to and affordability of health care.

One of the most specific features of this new wave of globalization is represented by the high degree of mobility, together with other trends, some of them really negative, like rising rate of unemployment in the developed countries, nuclear threat, environmental degradation, and the growing

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of social rage.

Globalization and international migration are two concepts that will continue to divide opinions depending on which side of the fence one is sitting on.

People in remote villages with almost no roads and without any infrastructures can communicate with the rest of the world through mobile phones and the internet and this is certainly a positive aspect.

They have access to the global market through the diffusion, adoption, and use of information and communication technologies (ICTs) and ICT-based goods and services such as e-agricultures, mobile banking, electronic commerce, e-health solutions, and mobile agricultural services.

These few examples suggest that the manifestation of globalization is affecting the way people interact with each other and their living environment. Remote communities' access to the global market is no longer linked to new roads or ports, it is occurring through migrant social and global technology networks.

Several issues generate controversy like international migration, in part because it touches on so many other aspects – economics, demographics, politics, national security, culture, human rights, language, and even religion.

Overcoming these difficulties is essential, however, in large part because migration is a constant of human history: people have always tried to find new and better conditions of life and will continue to do so. Furthermore, many countries will need to attract immigrants in the years to come as they face population ageing and seek to fill gaps in their employment forces. And countries with existing large immigrant communities will also need to find ways to improve the conditions of migrants in areas like education and employment. All this is a special challenge for countries in the OECD area; Since the mid-1970s, the share of immigrants in their populations has almost doubled to about 8.3%; by contrast, the share in less developed countries is much lower. Numbers and trends just under 3% of the world's population, or about 190 million people, live outside their country of birth. That figure may seem low, but as migrants tend to move to a relatively small number of destinations, they may account for quite large slices of the population within individual countries. In the OECD area, they make up more than 23% of the population in both Australia and Switzerland but only around 3% in Finland and Hungary. By and large, migration is a story of the movement of people to countries that are wealthier (but not necessarily "rich") compared with their homeland. This means that as well as people going from developing to developed countries, substantial numbers also go between developing countries. By using the expression "north" to represent the developed world and "south" for the developing world, we can say that about a third of the world's migrants travel from north to north; another third travel from south to north; and the final third travel from south to south.

The nature and the causes of migration are not the same in all countries.

In the United States and France, for instance, most of those, immigrating legally, are doing so for family reasons – they are either going to join close relatives who are already living in these countries or to begin married life. In others, such as Switzerland, most immigrants travel because they have a right to work and live in the country.

There are other differences.

In the traditional "settlement countries," such as Australia, Canada, and the United States, most immigrants are planning to settle permanently. Conversely, in an economic free-movement zone such as the European Union, migration is more likely to be temporary. All these factors, as well as countries' needs for high and low skilled labour, dramatically affect the policies with which governments seek to manage the phenomenon. However, it's important to note that much migration is not directly controlled by governments. In many cases, people effectively have a right to settle abroad, perhaps because the country recognizes an entitlement to the family reunion, or because it has made commitments to take in certain numbers of asylum seekers, or because it's in a free movement zone. And there's the phenomenon of irregular – or "illegal" immigration – pressing issues in countries such as Italy and Greece but also the United States at their southern border and one that has tended to increase public antipathy and social rage even to legal migration. Indeed, the existence of irregular immigration and the perceived failure of migrants to integrate successfully – especially in some European countries – have helped drive a trend in many OECD countries in recent years to make traditional migration more difficult, especially in family migration.

There is also a new emphasis on encouraging immigrants to play a bigger role in managing their

own integration. Language courses are becoming widespread, as are information programs that provide practical advice and describe the country's administrative systems and the formalities to be fulfilled.

The weakness of these programs is that migrants are increasingly likely to be asked to demonstrate that they have the knowledge and skills needed to navigate life in their new places. At the same time, there are some signs of a shift to so-called "pro-active" migration policies aimed at encouraging skilled migrants to occupy particular roles in the workforce, especially in areas like information technology, medicine, and accounting.

Education plays a central role in helping young migrants to improve their life-conditions in their new homes. Furthermore, it helps them to learn the local language and provide them with some of the skills and competencies needed for their profession as well as creates social and cultural bridges to native communities. However, the extent to which education should encourage young migrants to culturally "integrate" is a debated issue in many countries. In academic terms, how well do young migrants perform in education? The OECD's PISA program of student assessment provides some interesting insights. In three of the traditional settlement countries – Australia, Canada, and New Zealand – immigrant students did every bit as well as native students in the 2006 round of PISA assessments. In a number of other countries, most notably Austria, Belgium, Denmark, France, Germany, the Netherlands, and Sweden, they did noticeably less well.

In Denmark, only about 1% of second-generation immigrants were top performers, against 7% for natives. What factors explain such variations? Before answering that, it's important to state that these numbers represent averages: just as with native children, migrants are a diverse lot, and even in countries where the average score of migrant children is on the low side, there are plenty of young migrants who do well. As a group, the performance of migrant children is determined by their family backgrounds, language abilities, and the capacity of the local education system to support non-native students.

The admission policies of the countries where they settle can also be important: in countries that rely more on selection systems to admit migrants, such as Australia, migrants are more likely to be better educated and better off than in other countries, where they perceive the presence of the state as less strong.

What can education systems do to help young migrants fulfill their potential and their ambitions? Efforts may begin early in pre-school care and education by giving them a head start in learning the local language. Kindergartens that combine education with care may also bring major benefits to very young children from poorer families at a crucial stage of their development.

Later on, schools may support young migrants with special preparatory classes, although there is much debate over how long these should continue before children enter mainstream schooling. Similarly, although there is little argument over the benefits of quickly.

Migration and development. The impact of migrants on the countries in which they settle receives a lot of coverage, but the other side of the coin receives less attention: namely, what is the impact of emigration on the countries and economies that migrants leave behind. For countries in the developing world, migration can be a blessing and a curse: a blessing for providing remittances and overseas contacts and experience; a curse for taking away the brightest and the best. To look at the negatives first, the loss of highly skilled and professional workers – the "brain drain" – is often regarded as one of the main dangers of migration, even if the risks are sometimes overrepresented, as most of the times people who have gone abroad could bring back home new skills.

Nevertheless, in areas such as healthcare and other delicate sectors, the loss of trained staff from developing countries is a source of concern. On the positive side, remittances can be an important source of overseas revenues for many developing countries. For 2007, the World Bank estimated remittances to developing countries were worth at least \$240 billion (but as much of the money that migrants send home goes through informal channels, the real figure was almost certainly higher). While this number looks set to fall as a result of the global economic slowdown, remittances are likely to have a great impact on developing countries in reducing poverty, even if their role in fuelling economic growth is so low.

Obviously, the latest wave of globalization has had a huge impact on the issue of human rights as well, especially in terms of exploitation and other kinds of abuses, but there has been a great effort



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in spreading through technology the awareness of their importance and pushing the ruling class to pursue objectives in this sense with a major weight.

This increased attention led to the development of human rights law and several agencies were created both on the national and international stage in order to address the question of the impact of globalization on people's rights.

While proponents of globalization state that it played a key role in making the world more conscious about the issue, making easier the movement of people and ideas, critics focus their attention on rising inequality and the depression of socio-economic rights, which they tend to consider the main dimension of the new global world. Moreover, they affirm great opportunities that come with an interconnected world are unevenly distributed among the different social categories, affecting in a very negative way human rights, especially in the developing countries of Asia and Africa, where the production of goods for the "rich" is mainly set. Today the issue of human rights, reflected in the Universal Declaration of Human Rights, represents the main responsibility for governments and other political and economic institutions in the direction of the indivisibility of such tutelage.

An objective that still stands far to be reached, considering how the new era of globalization has affected some parts of the Earth.

### **3. Trafficking and smuggling**

Over the past years, public attention has gradually turned to the experiences of migrants along the precarious routes to developed countries.

Quite often the migrants are also a victim of human trafficking because sometimes they are ready to believe in anyone just to have the possibility of better living condition. In other cases, also the families of victims are responsible to sell them to a trafficker, due to the desperate condition of their lives.

Therefore, migration and human trafficking could not be discussed as two separate issues (IOM, 2017).

Human trafficking is one of the most serious human rights violations of our modern world that brings high profits to traffickers through the acquisition and exploitation of human beings by improper means such as force, fraud, or deception. Smuggling of migrants involves the facilitation of illegal entry of a person into a state of which that person is not national or resident, for financial or another material benefit.

Human trafficking and the smuggling of migrants represent great challenges for our world.

Trafficking in human beings is a phenomenon sadly known in the history of humanity. It has its roots in the distant past and can be traced back to the more general phenomenon of slavery that accompanied the first developments of humanity.

This practice involves the use of force, deception, or coercion for the purpose of exploiting the person who becomes a victim.

It does not, therefore, seem to be a completely new and unknown phenomenon; it can be confused with other cases ranging from the smuggling of migrants to illegal immigration and undeclared work.

Trafficking in human beings is a criminal market, managed by criminal organizations operating in different countries of the world and with different dimensions.

There are significant differences between the smuggling of migrants and trafficking in persons, although in the common language the two figures could tend to merge.

It is, therefore, important to understand what is meant by the term trafficking to avoid using it as a synonym for other different criminal activities.

There are two distinct cases.

The term smuggling actually means "aiding and abetting illegal immigration"; a smuggler, in fact, provides illegal access for a migrant person to a country in exchange for payment. In this case, migrants invest their own capital, built up through savings, by selling their properties or by asking friends and family for a loan with the promise of returning it to them. Migrants buy the transport service together with their documents. Once they reach their destination, their relationship with the traffickers ends. Therefore, we can state that the smuggling represents an economic activity that exploits the desire of migrants to move and enter illegally in the countries of destination or transit, but

it finds its conclusion at the end of the migrants' trip.

Trafficking, on the other hand, refers to the actual phenomenon of human trafficking, transportation, or transfer of persons for the purpose of exploitation, where victims are recruited directly by traffickers through the exercise of violence or deception. The victims, once deprived of their identity documents and reduced to a state of slavery, are traded and exploited mainly in the markets of prostitution, begging, undeclared work, and trafficking in human organs.

This crime leads to violations of human rights and fundamental freedoms, weakens the rule of law, undermines economic stability, grows through corruption, and poses a serious threat to the lives and safety of individuals.

Detecting and investigating crimes of trafficking in human beings is a difficult task.

In their own country, victims of trafficking often live in poverty and privation, quite often they have no jobs and are undereducated; they dream of a better future in other countries where a favorable economic situation attracts people.

Traffickers can easily deceive the victims with false promises, offering them good living conditions, training, real work, and the chance to earn money. Once they have arrived at their destination, the reality for the victims is quite different. Whether they are women, men, or even children, the victims are exploited.

Trafficking is "a parasitic phenomenon", in fact, it feeds on other related issues, such as prostitution, undeclared work, poor reception, marginalization, and other areas of exploitation.

Contrary to what happens for smuggling, once the victims arrived in other countries, their relationship with traffickers do not end, because they are exploited for a long period of time, until being sold to a "new" abuser.

Trafficking is practiced for various purposes, some of which are listed below.

#### *Sexual exploitation*

Individuals subject to sex exploitation discrimination are not only women. Normally, they can be exploited in streets, in apartments, or in nightclubs and they are kept under control by criminal organizations thanks to mechanisms of physical and psychological coercion that make it even more difficult to undertake a path of escape. They are often bound to pay a disproportionate debt that they are forced to repay with the meager earnings of their work.

Trafficking for the purpose of sexual exploitation, over the years has also been the subject of continuous transformations under the profiles of the crimes, the structure of criminal organizations, and the methods of coercion exercised on the victims (Wooditch, 2011).

#### *Labour exploitation*

It refers to a set of situations in which victims are forced to perform some work against their will, under the threat of violence or some other form of punishment; also, in this case, their freedom is limited as well as their discretion.

Labour exploitation organizations benefit from the vulnerability of migrants and their need to support themselves. The lack of documents or alternatives leads these people to accept terrible living conditions, with very long working hours and without breaks, performing heavy, harmful, or dangerous tasks, housing in inhuman sanitary conditions, many times worse than in the country of origin.

#### *Exploitation in begging and illegal activities*

People forced to beg by criminal organizations, ask for money or perform services such as washing car windows, retailing paper handkerchiefs, lighters, keyrings, flowers. Often they are pregnant women, minors, or people with physical problems to arouse compassion and get more money.

For this reason, any system of interventions that focuses only on trafficking will not be fully effective; only the policies that govern these "collateral" phenomena can do so; trafficking is also fought and especially outside trafficking. For example, by opening channels for foreign workers, humanitarian channels, and avoiding victimization processes. All policies of management of migratory flows should be implemented and not only of a fight against trafficking (Carchedi & Orfano, 2007).

Trafficking involves the segregation of the personality, phenomena of depersonalization, and consequent loss of identity.

In addition to social uprooting, loneliness, and language difficulties, there is also the terrible experience of trafficking, which represents the destruction of a dream or a project. Therefore, from the mechanisms of idealization we pass to those of confusion, loss of confidence, and even

mechanisms of identification with the aggressor, with further behaviors of depression, aggressiveness towards oneself, and others.

For this reason, it is difficult to identify trafficked persons. It should be a multi-stage process aimed at understanding whether a person is a victim through so-called trafficking indicators. These indicators favor the identification of these subjects through the analysis of the case and, in general, of elements that emerge from the interviews with the person or from further circumstances.

The identification of victims is a crucial moment; it represents, in fact, the first step to ensure that the victim is adequately protected, supported, and protected and that they have the opportunity to get out of their situation of subjugation and receive appropriate protection.

The identification process is sometimes very long and complex, due to the resistance of the victims themselves for various reasons such as lack of trust in the authorities, fear, and diffidence in telling all or part of the facts of which they were the protagonists in spite of themselves (Farrel, McDevitt, & Fahy, 2010).

Instead, in some cases, we can recognize a sort of self-identification, when it is the people themselves who report on the trafficking affair and, therefore, recognize themselves as victims.

The subjects in charge of identification must be qualified and specially trained. Police, border police, health personnel, and, in general, all those who have contact with foreign people can also be trained.

#### **4. Trafficking and civil aviation**

Seeking a better future, make numerous individuals enter the trap of human trafficking. This hope feeds these criminal channels and although slavery, in whatever sense it means, is commonly thought to be a thing of the past, human traffickers generate hundreds of billions of dollars in profits by trapping millions of people in horrific situations around the world.

The International Labor Organization estimates that forced labor and human trafficking is a \$150 billion industry worldwide and that there are 40.3 million victims of human trafficking globally (ILO, 2017).

Like any business, in the globalization era, human trafficking typically depends on transportation systems to operate. Traffickers recruit victims and utilize common transportation systems to both, bring new victims to their trafficking operations as well as to transport current victims to different places where they will be trafficked and abused.

Therefore, mass transportation hubs like airports are key points for victim identification and public awareness. It is also critical that survivors are provided access to transportation as this might be the main obstacle to their leaving a trafficking situation (Anthony, 2018).

Aviation is the business of freedom. Airlines connect businesses to markets, reunite families and friends, and facilitate tourism and cultural exchange. Unfortunately, the global air transport system can also be exploited by criminals for the illegal trafficking of men, women, and children.

A resolution denouncing human trafficking was passed at the last IATA Annual General Meeting.

The resolution also reaffirms airlines' commitment to a number of actions to fight human trafficking: sharing of best practices, staff training, and reporting (IATA, 2018).

The aviation industry, in fact, is under increasing pressure to scrutinize its mode of operation in order to identify critical intervention points where they can help and actively address this violation against human rights.

In addition to ethical supply chain management, recently there has been an urgent call for airlines to train staff to profile passengers and report potential trafficking cases, thus intercepting the transportation of victims before they disappear into a life of exploitation.

Several factors are now at play that has made it increasingly unattractive for the aviation industry to adopt the "do nothing" approach towards human trafficking.

Facilitating commerce, reuniting family and friends, and often the starting point for countless voyages of self-discovery, aviation is functional to human trafficking.

In the era of globalization, airports and airlines are used by human traffickers to move their victims to their final destination. With recent figures speculating that about 500,000 victims a week or 71,000 a day move via commercial flights around the globe (Light, 2017).

We can state that over 60% of human trafficking victims are known to be trafficked across at least one international border (ILO, 2017) so we know some are taking flights and passing through airports.

However, human trafficking can be difficult to detect so victims often remain hidden in plain sight.

Governments and law enforcement that have the primary responsibility to identify, apprehend, and prosecute the perpetrators of human trafficking have a huge task at hand. This provides some explanation as to why they are increasingly looking for customer-facing transportation staff, including airline personnel, to be trained in specific human trafficking awareness.

These additional sets of eyes and ears can provide vital intelligence. Airline staff is seen as particularly critical given they spend more time with passengers than any other group, so is likely best placed to witness any suspected trafficking situations.

There is here is so much the aviation industry can do to help prevent trafficking.

## 5. Conclusion

We can state that aviation is one of the primary modes of transportation utilized by traffickers and the growth of the aviation market also increased the profits of this trade.

Preventing the trafficking of human beings is one of the biggest issues for civil aviation, considering that airlines could undertake a number of actions to fight this trafficking; i.e., sharing of best practices, staff training and reporting; in fact, once trained, airlines, airports, ground handling, security screening, and customs staff can provide an important source of intelligence to prevent this “new” global issue.

To prevent this crime, the first step is increasing awareness; the second step is training aviation organizations’ personnel in recognizing victims and perpetrators.

Due to the growing numbers of victims being transported by air, personnel training on identifying and responding to trafficking in persons becomes one of the best assets in the global crusade against this issue.

Research networks and research collaboration between the source and destination countries is important. Future research plans need to focus on transportation and organizational issues in order to define possible ways to prevent it and on exploited/trafficked laborers, in order to know better them and to be able to recognize the victims.

There is here is so much the aviation industry can do to help prevent trafficking.

## References

1. Anthony, B. (2018). *On-ramps, intersections, and exit routes: A roadmap for systems and industries to prevent and disrupt human trafficking*. Retrieved from <https://polarisproject.org/on-ramps-intersections-and-exit-routes/>
2. Carchedi, F., & Orfano, I. (2007). *La tratta di persone in Italia: Evoluzione del fenomeno ed ambiti di sfruttamento*. Milan, Italy: Franco Angeli.
3. Chumakov, A. N. (1994). *Philosophy of global problems*. Moscow, Russia: Znanie.
4. Chumakov, A. N. (2016). *Metaphysics of globalisation: Cultural-civilization context*. Moscow, Russia: Prospect.
5. European Court Of Human Rights (ECtHR). (2019). *Factsheet – Trafficking in human beings*. Retrieved from <https://echr.coe.int/Pages/home.aspx?p=press/factsheets&c=>
6. Farrel, A., McDevitt, J., & Fahy, S. (2010). Where are all the victims? Understanding the determinants of official identification of human trafficking incidents. *Criminology & Public Policy*, 9(2), 201-233. <https://doi.org/10.1111/j.1745-9133.2010.00621.x>
7. Flores, M. (2012). *Storia dei diritti umani*. Bologna, Italy: Il Mulino.
8. IATA. (2018). *Airlines denounce human trafficking and commit to action* [Press Release No. 35]. Retrieved from <https://www.iata.org/en/pressroom/pr/2018-06-05-03/>
9. ILO. (2017). *Global estimates of modern slavery: Forced labour and forced marriage*. Retrieved from [https://www.ilo.org/global/publications/books/WCMS\\_575479/lang--en/index.htm](https://www.ilo.org/global/publications/books/WCMS_575479/lang--en/index.htm)
10. IOM. (2017). *Migrant vulnerability to human trafficking and exploitation: Evidence from the Central and Eastern Mediterranean Migration Routes*. Retrieved from <https://publications.iom.int/books/migrant-vulnerability-human-trafficking-and-exploitation-evidence-central-and-eastern>
11. Leman, J., & Janssens, S. (2019). *Human trafficking and migrant smuggling in Southeast Europe and Russia: Learning criminal entrepreneurship and traditional culture*. London, England: Palgrave Macmillan.

12. Light, F. (2017). *Combating human trafficking in airlines. Motivations, obstacles and solutions in developing front-line staff's anti-trafficking role*. Mekong Club. Retrieved from <https://themekongclub.org/2019/06/19/combating-human-trafficking-in-airlines/>
13. OSCE. (2018). *From reception to recognition: Identifying and protecting human trafficking victims in mixed migration flow*. Retrieved from <https://www.osce.org/secretariat/367061>
14. OSCE. (2018). *The critical role of civil society in combating trafficking in human beings*. Retrieved from <https://www.osce.org/secretariat/405197>
15. UNODC. (2010). *Basic training manual on investigating and prosecuting the smuggling of migrants*. Retrieved from <https://www.unodc.org/unodc/en/human-trafficking/electronic-basic-training-manual-on-investigating-and-prosecuting-smuggling-of-migrants.html>
16. UNODC. (2015). *The concept of "exploitation" in the trafficking in persons protocol*. Retrieved from [https://www.unodc.org/documents/congress/background-information/Human\\_Trafficking/UNODC\\_2015\\_Issue\\_Paper\\_Exploitation.pdf](https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf)
17. UNODC. (2015). *The role of recruitment fees and abusive and fraudulent recruitment practices of recruitment agencies in trafficking in persons*. Retrieved from <https://respect.international/the-role-of-recruitment-fees-and-abusive-and-fraudulent-practices-of-recruitment-agencies-in-trafficking-in-persons/>
18. UNODC. (2018). *Global report on trafficking in persons*. Retrieved from <https://www.unodc.org/unodc/data-and-analysis/glotip.html>
19. Wooditch, A. (2011). The efficacy of the trafficking in persons report: A review of the evidence. *Criminal Justice Policy Review*, 22(4), 471-493. <https://doi.org/10.1177/0887403410386217>

# SOCIAL POLICIES IN CASTILLA-LA MANCHA: A CASE STUDY

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**Keywords:** Spain, Castilla-La Mancha, Dependency, Third Sector, Social

## 1. Introduction

“The key to society is cohesion, which begins with the development, implementation and notable increase of social policies” (García-Page as cited in La Voz de Talavera, 2019).

The President of Castilla-La Mancha, Emiliano García-Page, during his re-election by an absolute majority in the debate of the X Investiture Session (July 3, 2019), commissioned the Department of Social Welfare to increase the social policies of the regional government he rules.

It is a new stage of social consolidation in Castilla-La Mancha (C-LM), focused on improving the welfare of all Castilla-La Mancha citizens and especially the welfare of those people or families most vulnerable.

C-LM aims at consolidating a modern public welfare system, which generates wealth and opportunities, fights inequalities, is close to people, and acts as a dynamic element of the territory; in short, a system that is at the forefront of social care. Along these lines, within an enlarged organisational structure, it has created a new Directorate-General for Disability, which reflects the drive and commitment of the Government of Castilla-La Mancha to people with disabilities, their families and the associative framework.

The demographic challenge and depopulation are at the forefront of the political agenda because they represent a question of equal opportunities and non-discrimination, which requires action from all spheres of government, including social policies. If the objective is to fight depopulation, equal rights and opportunities must be guaranteed for women and men regardless of where they live, whether in an urban or rural environment.

The social services and care for dependent persons must adapt to the complex territorial structure. The vast extension and geographical dispersion make it challenging to provide resources and services on the ground in the context of numerous ageing population. Besides, the risk of depopulation is already generating inequalities and placing the population at risk of poverty and exclusion.

Durán (2018) in *La riqueza invisible del cuidado* (The Invisible Wealth of Care) (University of Valencia), analyses how unpaid work, concerning caring for people, is related to social and economic structures. Care is the central axis on which this ideology is based. It makes the enormous capacity of “invisible resources” flourish. She says they are not considered in the classical economic analysis perspective but are very present in family structures and entail, in most cases, very severe conditioning factors for women.

## 2. Legal framework

1) *Art. 1 Act 39/2006, of December 14, 2006, on the Promotion of Personal Autonomy and Care for Dependent Persons* (Law No. 39/2006)

In 2002, under the Spanish Presidency, the European Union decided on three criteria that should govern the dependency policies of the member states: universality, high quality and sustainability overtime of the implemented systems.

It is a fact that the social action third-sector entities have been participating for years attending the people in the situation of dependency and supporting the effort of the families and of local corporations in this area. These entities constitute an essential social network that prevents the risks of exclusion of those affected.

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Administratively, the law establishes three levels of protection:

- A minimum cover, defined and financially guaranteed by the General State Administration.
- As the second level of protection, by means of a cooperation and funding system between the General State Administration and the autonomous communities, that must be implemented through agreements for the development and application of the other benefits and services included in the Act.

- Thirdly, the autonomous communities may, if they deem it appropriate, develop an additional level of protection for citizens.

Besides, the same law distinguishes three degrees of dependency:

- Grade I or moderate dependency;
- Grade II or severe dependency;
- Grade III or high dependency (Law No. 39/2006, Article 26).

The act foresees a subsidiary financing of the system by the different public administrations.

“The contribution of the autonomous community will be, per year, at least equal to that of the General State Administration as a consequence of the provisions of this section and the previous one” (Law No. 39/2006, Article 32).

The Dependency Act also provides for quality assurance in the System of Autonomy and Care for Dependency (Law No. 39/2006, Article 34).

2) *Resolution of July 13, 2012, of the Secretary of State for Social Services and Equality, publishing the Agreement of the Territorial Council of the System for Autonomy and Care for Dependency to improve the system for autonomy and care for dependency* (Resolution of July 13, 2012).

3) *Decree No. 3/2016, of January 26, 2016, establishing the catalogue of services and economic benefits of the System for Autonomy and Care for Dependency in the autonomous community of Castilla-La Mancha and determining the intensity of the services and the applicable compatibility regime* (Decree No. 3/2016, 2016).

In order to promote personal autonomy and dependency care, it includes the following social services and economic benefits:

1) *Services:*

- Services for the promotion of personal autonomy. In these Sepap-MejoraT services, more than 400 professionals work in the 127 services that serve 275 municipalities, thanks to the itinerant services that take care where necessary.

- Qualification.

- Occupational therapy.

- Early attention. As of September 2019, this early attention service of the Government of Castilla-La Mancha serves a total of 5,400 children in the region. In the autonomous community, 300 professionals attend girls and children with “some difficulty” in this area (Sánchez, as cited in Cortes de Castilla-La Mancha, 2019b).

- Cognitive stimulation and activation.

- Psychosocial facilitation for people with mental illness or intellectual disability.

- Personal support and care in accommodations that support community inclusion.

- Advice, guidance, assistance and training in assistive technologies and adaptations to facilitate the activities of daily life.

- Promotion, maintenance and recovery of functional autonomy, including technical aids and assistive devices.

- Home help.

- Tele-assistance. In August 2019, C-LM had 53,000 users, an increase of 176% compared to June 2015.

- Day-centre service for people with disabilities. In Castilla-La Mancha, in September 2019, there are 180,000 people with disabilities. Every day, 10,000 of them need to receive care, for which more than 2,000 professionals work in the 250 resources of the region. In the last four years, around 200 new professionals have joined this Third sector.

• Service of diurnal stays of attention to older adults – permanent or temporary residential care service for the elderly. The network of homes for the elderly has 1,600 places, and 500 people work there directly.

• Homes for the elderly. With 15 homes in Castilla-La Mancha, it employs 1,600 direct workers and nearly 500 indirect workers.

- Permanent or temporary residential care service for people with physical disabilities.
- Permanent support housing.
- Intermittent support housing.
- Residences for severely affected persons.
- Permanent or temporary residential care service for people with intellectual disabilities.
- Supported housing.
- Community residences.
- Comprehensive care centres for severely affected persons.

#### 2) *Economic benefits (PE):*

• PE linked to the service: intended to finance the cost of services in the catalogue;

• PE for care in the family environment: its recognition is exceptional and is intended to finance expenses arising from the care provided by a non-professional caregiver;

• PE for personal assistance: intended to finance the recruitment of a Personal Assistant (Junta de Comunidades de Castilla-La Mancha<sup>1</sup>).

4) *1/2019, of January 8, of the procedure for the recognition of the situation of dependency and the right of access to the services and economic benefits of the system for autonomy and care for dependency in Castilla-La Mancha (Decree No. 1/2019).*

This decree maintains only those essential procedures to determine the situation of dependency and the right of access to services and benefits, with higher amounts for the economic benefit linked to the residential care service for persons with recognized dependency Grade II to ensure that no person in a situation of dependency is not attended to due to lack of economic resources. This decree simplifies the documentation necessary to verify economic capacity and introduces the novelty of the specific procedure, both for assessing the situation of dependency and for drawing up the individual care programme (PIA) for children under six years of age, as well as reducing the general maximum resolution period to half the time, i.e. three months. It also expressly recognises the compatibility of the Sepap-MejoraT service for the promotion of personal autonomy with the home help service (Decree No. 1/2019).

There are some services and economic benefits that the users can receive at the same time. These are telecare services, the promotion of personal autonomy, home help, daytime stays for the elderly, night centre and day centre for the disabled (Junta de Comunidades de Castilla-La Mancha).

### 3. Social and economic context

On June 25, 2019, Spain had a population of slightly less than 47 million inhabitants (INE, 2019). It had risen by 0.44% compared to the January 2019 census, with 23.9 million women and 23 million men, with 4.8 million foreigners, 4% more than the previous six-month period. The growth series has now reached three consecutive years (2016-2018), with 494,434 more inhabitants, after having suffered four years of sharp decline (2012-2015) of 378,087 inhabitants less.

On January 1, 2019, Castilla-La Mancha had 2,035,505 inhabitants, thanks to an increase of 7,841 foreign citizens who compensate for the negative vegetative difference between births and deaths (3,671) and internal emigration within the country itself (-1,199) (INE, 2019).

The unemployment rate in Castilla-La Mancha in the second quarter of 2019 amounts to 16.42% according to the Economically Active Population Survey, with a strong female component (21.10%) as opposed to male unemployment (21.10%) and above the national average, which stands at 14.2% (15.78% among women and 12.49% among men).

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<sup>1</sup> <https://www.castillalamancha.es/node/54463>



The employment rate in Spain has been rising (2.1% in the second quarter of 2019) since the last quarter of 2015 to a total of 19.8 million people working; still, it is half a million employed people below the maximum level reached in the third quarter of 2007, just before the onset of the economic crisis.

Spain's gross domestic product (GDP) in the second quarter of 2019 was 2.1% (after rising half a point about the first), in line with the growth of C-LM (2.2%) ("AIREF estima", 2019).

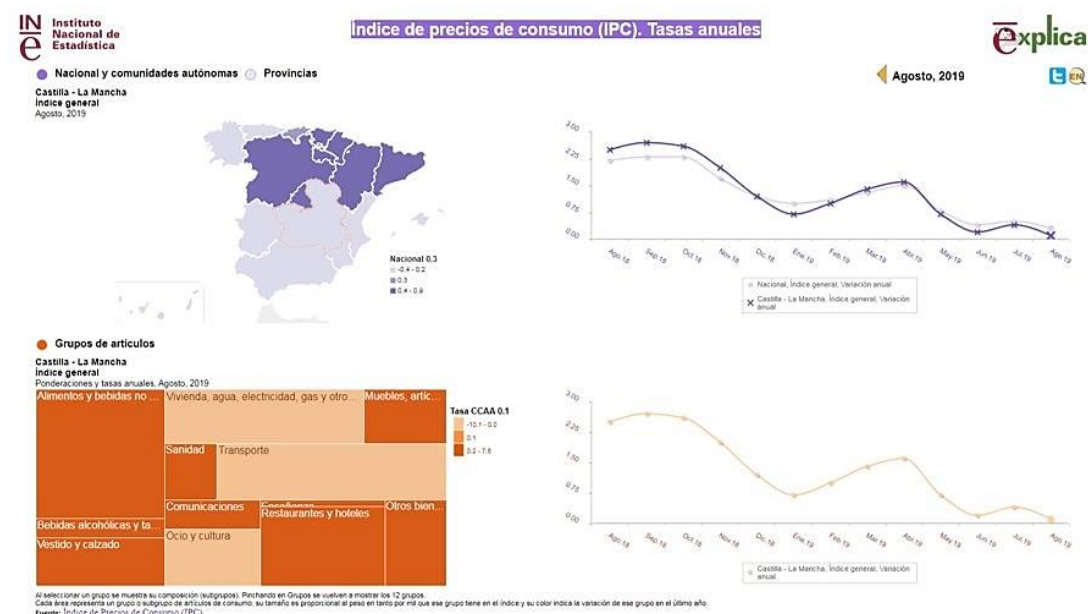
**Table 1.** C-LM's GDP 2019

Annual GDP	2019	42.559 mln €
GDP per capita	2019	20.875 €

Source: Expansion<sup>2</sup>.

In September 2019, the annual Consumer Price Index (CPI) in Castilla-La Mancha stood at 0.1%, two tenths below the variation in annual consumer prices in Spain (0.3%).

**Figure 1.** CPI C-LM vs the rest of the autonomous communities of Spain



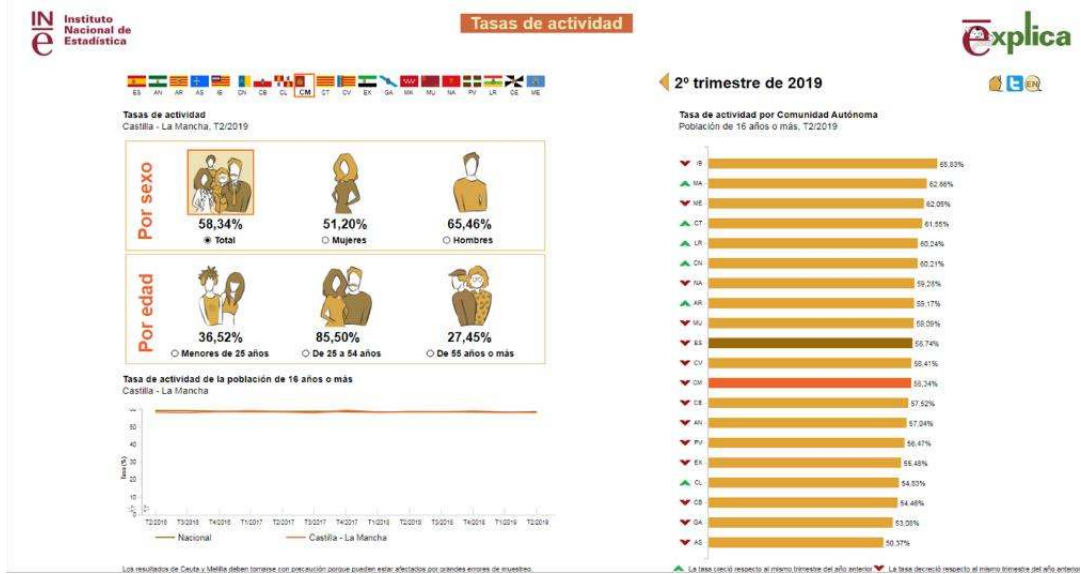
Source: INE<sup>3</sup>.

Although lowered by two-tenths percentual points in the latest outlook with BBVA Research, 2019, ("Madrid, Navarra y Castilla-La Mancha", 2019) GDP growth forecasts for Castilla-La Mancha are +2.3% in 2019 and +2.1% in 2020, aligned with the rest of the country. They are consistent with the continued recovery in employment, although employment would still be 1% below the pre-crisis level at the end of the period.

<sup>2</sup> <https://www.expansion.com/>

<sup>3</sup> <https://www.ine.es/>

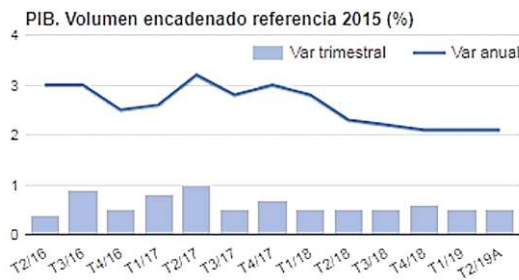
**Figure 2.** Employment rates in C-LM vs the rest of the autonomous communities of Spain



Source: INE.

Castilla-La Mancha accelerated its growth in 2018 to 2.8%, four-tenths more than the previous year and 0.2 percentage points higher than the average for Spain. This observed dynamism in private consumption, which increased more than anticipated, in a higher fiscal impulse than in other regions due to the acceleration of autonomous public expenditure, in the dynamism of investment and exports of goods.

**Figure 3.** Spain's growth 2015-2019



Source: INE.

This region would link six years of recovery (2014-2020) (BBVA Research, 2019).

In September 2019, the Social Observatory of La Caixa (2019), which gathers the analysis of a dozen experts on the social situation in Spain and on the capacity of existing aids and subsidies to guarantee a minimum income to all citizens, published a report on how to reduce poverty and inequality. Its authors urge an in-depth reform of Spain's social protection system to adapt it to new social and economic needs. Also, the report includes a concrete proposal for a universal basic income that ensures a minimum level of income to satisfy the most basic needs of every individual.

In the last decade, Spain has experienced a significant increase in levels of inequality, becoming the country in the European Union (EU) where inequality has increased the most. Child and youth poverty are the most worrying data. Spain is the third EU country with the highest ratio of working poor (13%), and one in four Spanish households with children is at risk of exclusion.

According to data from the European Commission, Spain is, together with Italy, the country where social transfers benefit the lowest incomes the least, being one of the tax systems that generate

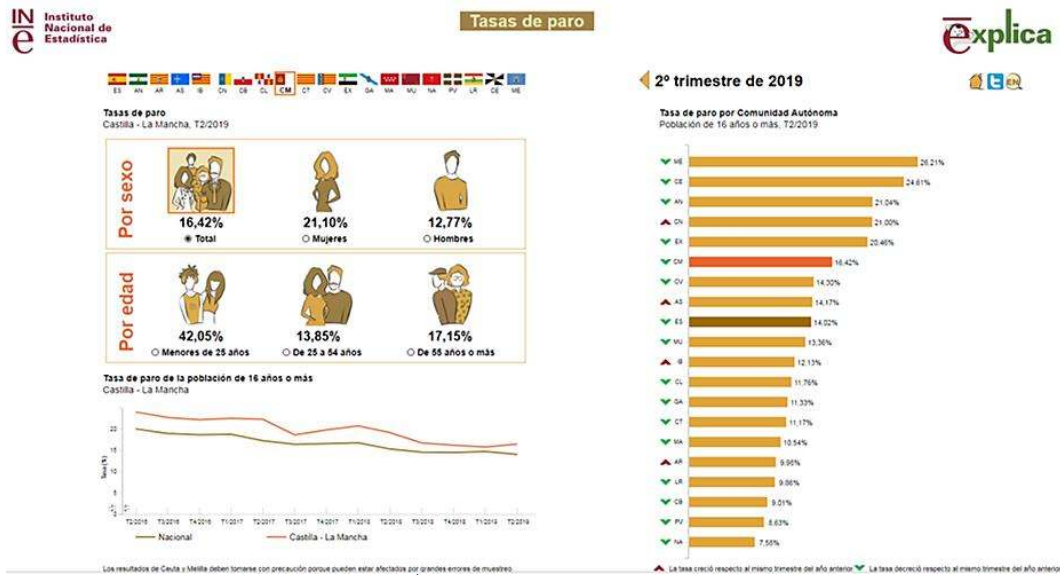
the least redistribution. The most reduced income bracket receives only 4% of all public sector cash transfers. Besides, according to the Public Employment Service (SEPE), currently, four out of ten unemployed people have exhausted their benefits and subsidies.

The economic crisis and the austerity policies deployed by the administrations have generated a new pattern of poverty in Spain. At the same time, the traditional mechanisms of the Spanish welfare state, linked to stable labour trajectories and active contributory elements through the pension system, have left many social groups excluded from their field of protection. Specifically, 34% of the long-term unemployed (more than two years) are unable to re-enter the labour market; 26.6% of the population at risk of poverty or social exclusion; three out of ten children under 16 live below the poverty line, or a labour market unable to lift even those in employment out of poverty, with 13% of the working poor.

Experts identify four factors as key to understanding the recent evolution of inequalities in Spain: inequality in the labour market, generational inequality, fiscal inequality and inequality generated by technological change.

Work is the primary source of income for the population, so examining access to and quality of employment is one of the keys to economic inequality. Unemployment rates rose sharply during the crisis and, despite the recovery, are still far from pre-crisis levels.

**Figure 4.** Unemployment rates C-LM vs the rest of the CCAA in Spain



Source: Social Observatory of La Caixa<sup>4</sup>.

Women, young people and the unemployed over the age of 45 who are not qualified are the groups with the most considerable difficulty in finding employment. This fact leads to long-term unemployment, which is a real challenge for administrations. According to data from the September 2019 report of the Public State Employment Service (SEPE, 2019), currently, four out of ten unemployed people in Spain do not receive any help because they have exhausted their benefits and subsidies.

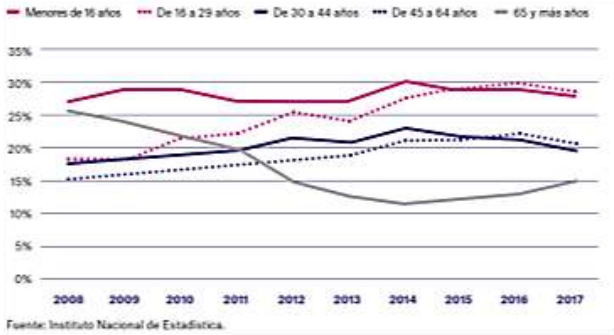
The crisis has also left an increase in wage inequality, particularly punishing the lowest incomes. The result of this process has been an increase of poor workers, who despite having a job, remain below the poverty line. In 2016, 13% of workers were living below the poverty line, with Spain being the third EU country with the highest ratio of working poor, after Romania and Greece.

One of the determining factors of the change experienced in Spanish social conditions, according to these authors of the La Caixa Observatory, is the one that has taken place in

<sup>4</sup> <https://observatoriosociallacaixa.org/en/>

the generational structure of poverty. At the beginning of the crisis, the over-65s were one of the sectors of the population with the highest rate of relative poverty. Currently, roles have been exchanged, and child poverty has emerged as the main problem of inequality in Spain, which in the last years of the recovery has primed in the under-30s. The presence of children in households increases the risk of poverty, as four out of ten are at risk of poverty.

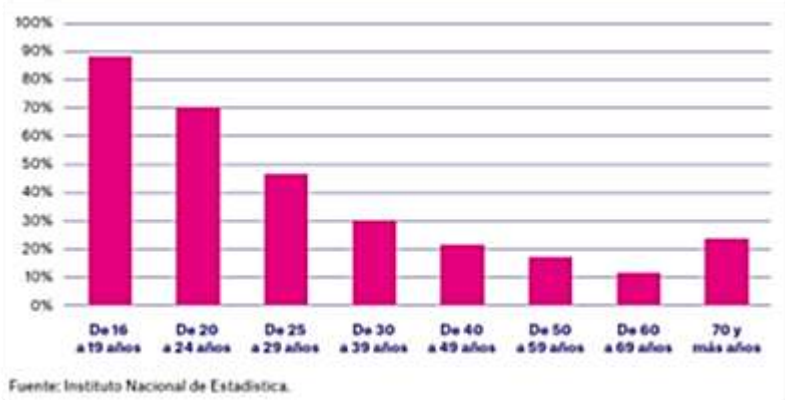
**Figure 5.** Risk of poverty rate by age, 2008-2017



Source: Social Observatory of La Caixa.

Early poverty is the main obstacle to equality of opportunity throughout life. According to an OECD study (2018), in Spain, a low-income family will need four generations to reach the middle class, a figure lower than the OECD average, but twice that of countries such as Denmark. Youth unemployment and precarious employment contribute to this situation, which means that relative poverty for young people has increased by more than ten points from 2008 to 2017, being the most at-risk population group. Workers under the age of 30 makeup 16% of the population but account for 33% of temporary contract workers.

**Figure 6.** Temporary rate by age group, 2018



Source: Social Observatory of La Caixa.

In Spain, in 2015, one out of every four young people who worked was below the poverty level, a figure that in 2016 remained considerably above the average for the population as a whole.

On the one hand, social spending in Spain (24.7% of GDP) is 5 points lower than the European average, where 6,300 euros were spent on purchasing power parity per person, compared to 10,800 euros invested by France or 8,200 in Italy. And the public effort dedicated to social protection stands at a scarce 16.8% of GDP, below the average for the Eurozone (20%), Greece (20.7%), France (24.4%) and Italy (21.1%). Spain is also occupying the penultimate position in the European ranking in relative spending for families and children, with only 0.7% of GDP.

The System of Care for Dependency provides employment in rural areas and contributes to equal opportunities.

The model adopted by this community for the care of dependent persons is eminently professional since it bets on benefits and services adapted to the needs of persons.

Castilla-La Mancha is on the podium as the third autonomous community, which provides more significant attention to people in a situation of dependency through professionalized services.

According to the IMSERSO (Institute for the Elderly and Social Services, dependent on the Ministry of Health, Consumption and Social Welfare of the Government of Spain), until August 2019 C-LM dedicates, within the System of Care for Dependency, 81.9% to professionalized resources. They include here:

- home help,
- teleassistance, and
- residential resources, among others.

The rest of its budgets for dependency, with a percentage of 18.1%, C-LM allocates it to economic benefits in the family environment (PECEF). In this way, it can be said that it is on a path towards professionalisation, with three initiatives combined to offer visibility to non-professional carers:

- the processes of recognition of professional skills and exceptional qualification;
- the specific training offered through the 'Caring for Those Who Care' training plan; and
- the recovery of gratuitousness in the individual agreements with the National Health System.

### ***3.1. Principles of the social welfare project***

The Social Welfare Project for the next four years is a concrete project coordinated around two principles:

- the construction of an inclusive community for people, different but equal in rights; different in capacity, income, age, dependency, but equal in protection, support and opportunities;
- the consolidation of a model centred on the person, generating wealth and employment through participation and collaboration.

### ***3.2. Social welfare model***

Social policy needs an innovative approach. Today's society has changed considerably in recent years; its needs, demands, concerns, changes in the welfare model, in the system of relations between the actors' present, how citizens relate to public authorities. All this makes it necessary to introduce new, innovative and emerging concepts in social policy.

To this end, there is a coordinated, transversal and equitable Welfare Model Proposal.

This model is based on the construction of an inclusive community, where an active community takes advantage of the potential of all its members.

In short, it is a matter of building a resilient society, in which the general population – without any exception – has equal access to benefits and services, as well as to the full development of their constitutional rights. The aim is to guarantee the participation of citizens in all aspects of society, whether in political, educational, social, cultural or economic fields.

The construction of an inclusive community also has to consider territorial issues, since there is a heterogeneous development depending on the territory, but it also has to take into account the specificity of individuals and families, because an inclusive society is one that recognizes that all people have the same value, only because they are human beings.

Building social welfare is the objective of Castilla-La Mancha in order to achieve an inclusive community in order to encourage all people to be able to exercise their rights and have the same opportunities.

That is why the Social Welfare Model of Castilla-La Mancha is focused on:

1. The needs of people and their environment. *An individualized model*, with the capacity to adapt to the specialized needs of each person and in which the environment and the system are

adapted to the person, the family, and not the other way around.

According to Vilà (2014), a gerontologist expert in social services, “integral and person-centred care is that which promotes the necessary conditions for achieving improvements in all spheres of quality of life and well-being of people, based on full respect for their dignity and rights, their interests and preferences and counting on their active participation”.

#### *2. Transversal and transdisciplinary model.*

Cross-cutting implies that the model must be applied from all government departments in a coordinated manner. These are people in a situation of dependency, the elderly, people with disabilities, who in turn are students, patients, unemployed, or in search of accessible housing.

Moreover, “transdisciplinary” means that the attention to people must be exercised from all the implied professional disciplines, fundamentally: the socio-sanitary, psycho-educational and therapeutic professionals like the occupational therapy, psychology, social work, social education, speech therapy and physiotherapy, among others.

#### *3. Model of closeness, dialogue, participation.*

It is a question of involving and involving all the actors present and where the entities that make up the third sector are crucial in the development of social policies and the provision of public services in collaboration with the administration.

The same applies to private entities that develop social services and resources in collaboration with the administration and that are essential for a welfare society.

#### *4. Professionalization and promotion of social research.*

Historically, the care and attention to people in Spain has been done by families and especially by women who, throughout their lives, dedicated all their efforts to help their struggling families or in need of care, without spare time or affection.

The chapter on dependency serves as a paradigmatic example. The approval of the Dependency Law in 2006 was an essential boost to the professionalisation and qualification of all professionals in the social area, but it also meant a new source of employment for professionals who carry out their work in centres or services.

Castilla-La Mancha is immersed in the process of professionalization of the Dependency System almost in its entirety, consubstantial to the quality of care it aspires to provide.

#### *5. Model-based on quality and efficiency.*

The social model of Castilla-La Mancha lies in doing the maximum with the existing resources and doing it with respect, with quality, with the contribution of local corporations, non-profit organizations and companies that collaborate with the administration and meet the objectives.

Through the implementation of the Public Residential Centres Quality and Efficiency Plan in each residential centre, there are 20 actions to improve person-centred care, optimise HR management and adapt infrastructures. This plan guarantees care and promotes personal autonomy, hand in hand with professionals and families.

The social project of Castilla-La Mancha is based on the construction of an inclusive community, where everyone can fit and which is aligned with the needs and demands of the people, placing people at the centre of the action.

It is necessary to undertake specific actions in favour of offering modern social welfare, generating employment and wealth, which is a motor of development and generator of opportunities.

The social project of C-LM revolves around five axes of social welfare as they are:

- the care of people, especially in a situation of dependency as a guarantee of rights (to be developed in point 5);

- improving people's quality of life;
- social welfare as an engine for the creation of wealth and employment;
- innovation and information and communication technologies at the service of social policy;
- the development of social infrastructures in rural and urban areas of Castilla-La Mancha.

In turn, these should be specified in ten lines of work that pass through:

- An “advanced” Dependency System. For this reason, it is a priority to attend to the long-term care needed by dependent persons with an advanced, modern, agile system that responds strictly to the needs of dependent persons and their families.

- An inclusive community that guarantees the well-being of people with disabilities.
- Minding that older people live in their environment with health and wellbeing, through the promotion of active ageing and personal autonomy. Here, the Thermalism allows maintaining 700 jobs in the nine spas of the region, in addition to near 2,500 indirect jobs.
- The consolidation of a public system of social services that can combat poverty and social inequality. In this sense, it is important to remember that social investment is not an expense, but rather, like any investment that is prized, it is associated with returns: how to fix the population, save resources for public and private coffers, and generate employment.
- The right to development through international cooperation and humanitarian aid.
- Attention to all family models, under the principles of prevention from the earliest age, family reconciliation, support for children and the fight against child poverty, through a “dual strategy: preventive and restorative”. Taking the emerging paradigm of social investment, which proposes preventive resources to prepare citizens during their lives and avoid (as far as possible) repair in situations of vulnerability (Tabarés Gutiérrez, 2016).
- In short, prevention is better than cure. This process should culminate legally with the passage of the Children and Families Act.
- The use of information and communication technologies (ICTs) applied to social policies; as a basis on which to build a system of social services and attention to new, innovative, resolute, decentralized dependence, at the service of people and the forefront of social care.
- The development of social infrastructures, with the aim of “opening, renovating and generating” new facilities. One hundred twenty-two social infrastructures were paralysed as a result of the necessary cut-outs due to the economic crisis, without being made available to the people for whom they were conceived. In September 2019, 50% of these resources have already been put into operation, and the rest is expected to be opened gradually depending on the needs and possibilities of the Executive of Castilla-La Mancha. Always with the backbone of the territory and social needs as priorities.
- Innovation, research and training in the field of social welfare, as a proposal for the obligatory future to consolidate actions such as:
  - The creation of the Observatory of Social Services and Dependency, a place from which to promote innovation and research in social policies and which will be a meeting point for professionals from all fields: public employees, entities and the academic world.
  - To promotion of the specialised training of professionals in academic and labour forums, as well as professional qualification and accreditation.

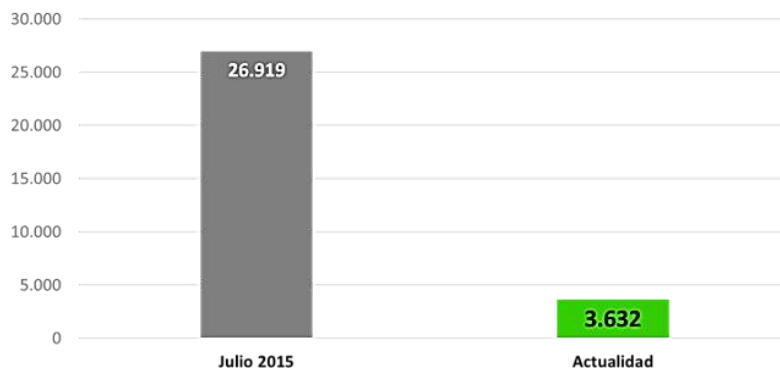
#### 4. The example of the dependency

“Dependency: is the lack or loss of physical, mental, intellectual or sensory autonomy; they need attention from another person or persons or important help to carry out basic activities of daily life or, in the case of persons with an intellectual disability or mental illness, from other supports for their autonomy” (Law No. 39/2006).

The Government of C-LM wishes to take advantage of the potential of the system of dependency, in its many situations, of a permanent nature where people, for reasons derived from age, illness or disability, making available to dependents and their families, existing resources, formulating a Strategy for the Regulation of Resources of the Environment and Attention to Solitude, based on proximity services, which can generate wealth and employment in the territorial balance.

Castilla-La Mancha, in contrast to the Spanish setback in the Dependency System, consolidates its positive trend since July 2015, as it has reduced the waiting list from 44% to 8.2%. Pending PIA files have been reduced by 87%, from 26,919 to 3,632.

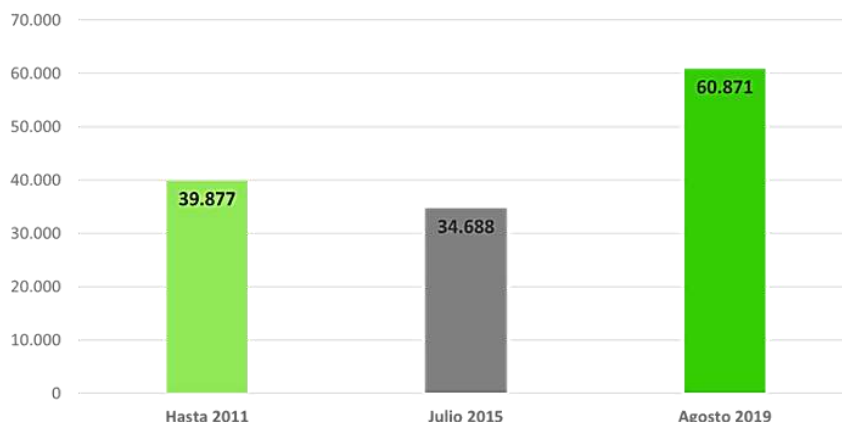
**Figure 7.** Pending PIA files June 2015 vs August 2019



Source: IMSERSO<sup>5</sup>.

In the period 2015-2019 there has been an increase in the number of people aided by the Castilla-La Mancha Dependency System, which for the first time stands at 60,871 beneficiaries, 75% more, and with an increase in benefits to 73,810, 57% more. These data were taken from the IMSERSO on August 31, 2019, when on July 31, 2015, there were 34,688 beneficiaries.

**Figure 8.** Evolution of beneficiaries of the C-LM Dependency System (2011-2019)



Source: IMSERSO.

Dependency care coverage has increased from 56 per cent to 92 per cent. In comparison with the rest of the autonomous communities, C-LM has gone from 17th to third place, through more effective management of the system.

There is greater legal security: the new Procedural Decree incorporates two new economic benefits for the elderly and disabled since August 5:

- service-related benefits (PVS), which grew 203% in this period with 8,439 users;
- home help users who are dependent on July 2019 increased by 128% to 16,417 users;
- users of the Autonomy Promotion Service and Sepap-MejoraT increased by 84% with 6,600 users;
- day-centre services: increased by 58% with 3,414 users;
- the number of residential users has grown by 22% with 12,157 users.

In the period between 2011 and 2015, 10,943 economic benefits for care in the family environment (PECEF) were lost, while since July 2015 11,500 economic benefits have been granted,

<sup>5</sup> <https://www.imserso.es>



of which 5,849 are PECEF and 5,655 are service-related benefits.

From August 2019 on, the volume of requests for dependency services in the region has doubled. Citizens now believe in the system because it responds to them and, moreover, they no longer have to pay the fees that had to be paid in the eighth legislature and that, since June 2016, the regional government eliminated.

The average number of applications in 2014 was 660 per month. As of August 2019, 1,347 applications were reported that same month.

For the degree of dependency coverage, C-LM is the autonomous community that has most reduced the number of people pending care since July 2015, has improved by nearly 36 percentage points.

In July 2015, the IMSERSO gave C-LM a degree of coverage of 56.01%, it was in penultimate place at the national level, the average being 63.44%. With the data published in August 2019, it climbed to fourth place, with a degree of coverage of 91.80%, surpassing by more than ten percentage points the Spanish average, which currently stands at 80.92%.

Castilla-La Mancha is the second community that has grown the most in the field of assisted persons since July 2015, starting from a ninth position with an average of 1.67 and currently in the second position.

The regional government is working on the consolidation of an advanced Dependency Care System that prioritises prevention and care for people in their environment, guaranteeing well-being in the event of disability and promoting active ageing in the elderly.

The most relevant legislative projects that are going to be developed this tenth legislature are:

- the Third Social Sector Act, which is expected to reach the regional Courts in November 2019 to create the necessary regulatory framework for betting on entities that have historically been providing public services;

- the new Early Attention Act is expected to begin this process in 2020.

The Councillor for Social Welfare herself, Aurelia Sánchez, pointed out concerning the rest of the new regional regulations: “There is still much work ahead” (Sánchez, as cited in Cortes de Castilla-La Mancha, 2019b).

She also stressed that this social welfare model has to be an “economic and job-generating engine”, not only in urban areas but also and “especially in rural areas”.

## 5. Conclusion

The Castilla-La Mancha Dependency System now sounds credible, at least for citizens and professionals.

The citizens express it: in 2014, there were 660 applications to the system of dependency per month. Currently, we are in about 1,400 applications.

The official statistics show it: it has advanced 13 positions in the comparison between the autonomous communities in terms of the degree of coverage. Currently, it is the third community (after Castilla y León and Navarra) with a degree of coverage of over 90%.

Independent professionals corroborated this. The State Association of Directors and Managers of Social Services rates the regional system with a notable high (8.2) in its opinion published in 2019. In 2015 failed with a 4.6 (Cortes de Castilla-La Mancha, 2019c).

Some criticisms voiced by opposition political parties are to know how many people will be helped from social welfare instead of advocating for projects, without having recovered the per capita expenditure before the crisis because “Castilla-La Mancha has yet to recover a quarter of social services in relation to 2009” (López, as cited in Cortes de Castilla-La Mancha, 2019b).

Aroca (as cited in Cortes de Castilla-La Mancha, 2019b) criticized that Castilla-La Mancha is “one of the regions with the highest number of cut-outs” and asked the Social Welfare Councillor, Aurelia Sánchez, what she is going to do to speed up the valuation of dependent people because “there are people who die without being valued or without having received services”.

Castilla-La Mancha has experienced a project of “positive change” (Camacho, as cited in Cortes de Castilla-La Mancha, 2019b) in the last legislature session, becoming the third region with the highest average annual social spending per potentially dependent person.

Another pending subject may be social policy research.

Castilla-La Mancha promises to continue innovating in the field of dependency, prioritizing prevention, personal autonomy and care for people in their environment, which is where most dependents want to live.

Aurelia Sánchez argues that the consolidation of the system “requires an arrangement of resources”. Hence, one of the future commitments of the Ministry is to “put the entire system of proximity resources in order with a specific strategy” that takes into account not only the most vulnerable people but emphasizes those who are in a situation of loneliness (Cortes de Castilla-La Mancha, 2019a).

Aurelia Sanchez promises that there will be “more residential places, more direct care and also the implementation of new proximity benefits and other benefits”.

With the aim, she added, that these people can “live at home but with specialized services”, through the promotion of programs such as the promotion of personal autonomy.

## References

1. AIReF estima que PIB de CLM creció un 2,2 % en el segundo trimestre (2019, August 1), *Guadalajara Diario*. Retrieved from <https://www.guadalajaradiario.es/autonomia/35497-airef-estima-que-pib-de-clm-crecio-un-2-2-en-el-segundo-trimestre.html>
2. BBVA Research. (2019). *Castilla-La Mancha economic outlook 2019*. Retrieved from <https://www.bbva.com/en/publicaciones/castilla-la-mancha-economic-outlook-2019/>
3. Cortes de Castilla-La Mancha. (2019a) *Diario de sesiones*. Retrieved from <https://www.cortesclm.es/web2/paginas/publicaciones/diario/comision/comision10/pdf/011BIESOC.pdf>
4. Cortes de Castilla-La Mancha. (2019b). *Logbook*. Retrieved from <https://www.cortesclm.es/index.php/publicaciones>
5. Cortes de Castilla-La Mancha. (2019c). *Videoteca*. Retrieved from <http://www.cortesclm.es/index.php/videoteca>
6. Crece la población en Castilla La Mancha en 3.563 personas (2019), *Expansion*. Retrieved from <https://datosmacro.expansion.com/demografia/poblacion/espana-comunidades-autonomas/castilla-la-mancha>
7. Decreto 1/2019, de 8 de enero, del procedimiento para el reconocimiento de la situación de dependencia y del derecho de acceso a los servicios y prestaciones económicas del sistema para la autonomía y atención a la dependencia en Castilla-La Mancha (Decree No. 1/2019) (2019, January 8). Retrieved from [https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2019/01/16/pdf/2019\\_230.pdf&tip o=rutaDocm](https://docm.castillalamancha.es/portaldocm/descargarArchivo.do?ruta=2019/01/16/pdf/2019_230.pdf&tip o=rutaDocm)
8. Decreto 3/2016, de 26/01/2016, por el que se establece el catálogo de servicios y prestaciones económicas del Sistema para la Autonomía y Atención a la Dependencia en la Comunidad Autónoma de Castilla-La Mancha y se determina la intensidad de los servicios y el régimen de compatibilidades aplicable (Decree No. 3/2016) (2016, January 26). Retrieved from <http://www.normativadependencia.org/dependencia/normadep.nsf/b94a4acb48c4e714c1257665005a23ac/34ae92dc3c1f4a9ec1257f49002c2277?OpenDocument#Art%C3%ADculo%2022.%20Intensidad%20del%20servi>
9. Durán, M. A. (2018). *La riqueza invisible del cuidado*. Valencia, Spain: University of Valencia.
10. Instituto Nacional de Estadística (INE). (2019). *Notas de prensa*. Retrieved from [https://www.ine.es/prensa/cp\\_e2019\\_p.pdf](https://www.ine.es/prensa/cp_e2019_p.pdf)
11. La Voz de Talavera. (2019, July 2). *Page plantea un plan de gobierno para la nueva Legislatura basado en la cohesión, competitividad y sostenibilidad*. Retrieved from <https://www.lavozdetalavera.com/noticia/52491/clm/page-plantea-un-plan-de-gobierno-para-la-nueva-legislatura-basado-en-la-cohesion-competitividad-y-sostenibilidad.html>
12. Ley No. 39/2006, de 14 de diciembre, de promoción de la autonomía personal y atención a las personas en situación de dependencia (Law No. 39/2006)(2006, December 14). Retrieved from <https://www.boe.es/eli/es/l/2006/12/14/39/con>
13. Madrid, Navarra y Castilla-La Mancha liderarán el crecimiento del PIB en 2019, según BBVA Research (2019, May 30), *Expansion*. Retrieved from <https://www.expansion.com/economia/2019/05/30/5cefc643468aeb154f8b4710.html>
14. OECD. (2018). *Estudio económico 2018 de la OCDE sobre España: Conseguir que el crecimiento beneficie a todos*. Retrieved from <http://www.oecd.org/economy/surveys/Conseguir-que-el-crecimiento-beneficie-a-todos-OCDE-estudio-economico-2018-espana-presentacion.pdf>

15. Resolución de 13 de julio de 2012, de la Secretaría de Estado de Servicios Sociales e Igualdad, por la que se publica el Acuerdo del Consejo Territorial del Sistema para la Autonomía y Atención a la Dependencia para la mejora del sistema para la autonomía y atención a la dependencia (Resolution of July 13, 2012) (2012, July 13). Retrieved from <https://www.boe.es/boe/dias/2012/08/03/pdfs/BOE-A-2012-10468.pdf>
16. Rodríguez Rodríguez, P., & Vilà i Mancebo, A. (Eds.). (2014). *Modelo de atención integral y centrada en la persona: Teoría y práctica en ámbitos del envejecimiento y la discapacidad*. Madrid, Spain: Tecnos.
17. Servicio Público de Empleo Estatal(SEPE). (2019). Observatorio de las Ocupaciones: 2019 Informe del Mercado de Trabajo de los Mayores de 45 años Estatal. Retrieved from <https://www.sepe.es/HomeSepe/que-es-el-sepe/comunicacion-institucional/publicaciones/publicaciones-oficiales/listado-pub-mercado-trabajo/informe-mercadotrabajo-estatal-mayores45>
18. Sevilla, J. (2019). *Reforzar el bienestar social: Del ingreso mínimo a la renta básica* (Observatorio Social de La Caixa Report). Retrieved from <https://observatoriosociallacaixa.org/es/informe-renta-basica>
19. Tabarés Gutiérrez, R. (2016). *El paradigma emergente de la inversión social*. Madrid, Spain: Tecnalia.
20. Vilà, T. (2014). *Rèquiem pels serveis socials locals*. Retrieved from <https://www.raco.cat/index.php/RevistaGirona/article/view/276328/364261>

# PROMOTING THE WELLBEING OF UNEMPLOYED: A PILOT STUDY

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**Keywords:** Empowerment, Wellbeing, Community Psychology, Unemployment, CSCL (Computer Supported Collaborative Learning)

## 1. Introduction

Several futurists are convinced that in the next decade's AI (artificial intelligence), robotics and other technologies will make a large part of today's jobs obsolete. In 2013, Oxford University researchers estimated that 47 percent of U.S jobs are at risk of automation in the next two decades (Frey & Osborne, 2013). AI will decimate jobs, reshape what works means and how wealth is created (Ford, 2015; Lee, 2017). AI will reduce many low-paying jobs (e.g., factory workers, construction workers and drivers) but also some higher income ones (e.g., radiologists and telemarketers, paralegals) (Lee, 2017). This could increase the number of unemployed middle-aged workers, who might find it harder to adapt to the digital age workplace. With respect to the European labour market, recent studies revealed that 54% of EU jobs are at risk of computerization (Bowles, 2014).

While much attention has been given to youth unemployment, few psychologists have explored how to support older people who are unemployed, and how being unemployed affects their well-being and health. Recent studies have shown that is harder for unemployed adults to rejoin the job market: as employees become older, they tend to remain unemployed for longer and their possibility of finding a job diminishes (Böheim, Horvath, & Winter-Ebmer, 2011). Analyzing recent OECD data, Axelrad, Malul, and Luski (2018) stated that unemployed workers aged 45 and older tend to struggle more in finding new employment. On average, the hiring rate in OECD countries for people aged 50 and over is less than half that for workers aged 25-49 (Axelrad et al., 2018). Furthermore, Lahey (2005) highlights the negative impact of age discrimination on older workers.

People who lose their job at the age of 50 or 60 can experience "employment trauma". Considering that age issues may lead to more jobless older workers becoming marginalized, it is important to find new tools to help older unemployed people to cope better with being jobless and increase their wellbeing. Community psychologists believe that empowering such people is a crucial first step in this direction. Helping jobless older people obtain greater sociopolitical empowerment is an important way of helping them deal with the particular difficulties of unemployment and implement changes in their lives and increase their wellbeing. Several studies (Fisher, 2008; Aday & Kehoe, 2008; Rogers & Robinson, 2004; Wallerstein, 2006) have shown a positive relation between empowerment and wellbeing.

It is important for community psychologists to find new tools to address the increasing number of older workers who become unemployed. Previous research (Francescato & Zani, 2013; 2017) has provided evidence that you can promote social political empowerment by teaching community psychology competencies to students through computer supported collaborative learning (CSCL). Most of these studies, however, have used only student samples as the training program participants. In Italy Francescato and her colleagues have carried out several studies in the last decade that have shown the efficacy of CSCL tools in promoting social political empowerment by teaching community psychology students competencies' such as affective education, community profiling and participatory multidimensional organizational analysis (Francescato & Mebane, 2015; Solimeno, Mebane, Tomai, & Francescato, 2008). Although a recent literature review (Francescato & Mebane, 2015) shows the efficacy of CSCL in promoting sociopolitical empowerment, we are not aware of previous research that has used CSCL to help older people experiencing difficulties after becoming

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unemployed. This article attempts to fill that gap by presenting a qualitative pilot study in which community psychology empowerment methodologies and CSCL were used jointly in a program designed to empower unemployed middle-aged workers.

In this chapter we will first describe the different phases of a sociopolitical empowerment methodology (Francescato, Tomai, & Solimeno, 2008) which has not yet been fully described in the international community psychology literature; and secondly, we will discuss a project in which empowerment methodology and CSCL were used jointly in a program designed to empower people who had lost their job, giving concrete examples of how community psychology competencies can be developed in online settings. This empowering training program was also innovative because it was based on blended methodologies, which included both online and face to face seminars.

## 2. Phases of sociopolitical empowerment

The process of political empowerment starts when one is able to recognize the social opportunities and the obstacles present in the settings one lives in and understands the power dynamics among different levels of contexts. Brusaglioni and Gheno (2000) maintain that the first level of empowerment is reached through the elaboration of new narratives which makes choices that were “unthinkable” become “imaginable”. However, narratives alone are not sufficient. Change can become possible only when the sociocultural and economic conditions that promote individual and collective empowerment are created. To become empowered, individuals need first of all to be able to hope for and imagine a better future (hopefulness component). They also have to have objectives and take a variety of actions to achieve them (self-efficacy component). To become socio-politically empowered requires a further process: becoming aware of how sociopolitical events, taking place even in more distant contexts, can influence negatively or positively one’s life (Francescato et al., 2008).

The empowering training program is usually performed in small groups of people who share the same study or work environment or neighborhood or who have experienced a similar crisis (divorce, addiction to alcohol or drugs, etc.). The program is divided into four phases: 1) re-motivation, 2) assessing competencies and qualities, 3) exploring environmental contexts, 4) verifying congruency between individual desires and contexts (Francescato et al., 2008; Francescato & Zani, 2017).

### 2.1. Phase I: Re-motivation

The first phase, known as “re-motivation”, explores desires and possible futures (Francescato et al., 2008; Francescato & Zani, 2013). The main objective of this phase is to help participants to understand their motivations, and their authentic desires identifying historical and contextual connections. In this process, participants in small groups reflect on how the influence of their personal and social past determines their desires. Examining elements of their past history helps participants to better understand their desires and expectations. Furthermore, during the empowering program they reflect on how their choices have been influenced by demands and requirements relating to various life contexts (e.g., family, friends). In this phase, the influence of today’s social media context is also explored. In small groups, participants discuss how their needs and wishes are influenced by mass media, talking about their favorite songs, movies, Internet sites and the values they convey. They also examine their political socialization in the family, peer groups, school and through mass media. In this phase, techniques such as *work*, *family sociocultural* and the *generational media* and *personal media narratives* are used (Francescato et al., 2008; Francescato & Zani, 2013).

In the *family sociocultural narrative*, participants investigate the cultural political and social values of the community setting in which they grew up. Particular attention is given to their emotional heritage; they focus on how positive and negative emotions were expressed in their family by their parents and grandparents. During this process, they try to get rid of their negative memories of the past and explore suppressed past desires (Francescato et al., 2008, Francescato & Zani, 2017).

In the *work narrative*, participants try to comprehend the values their families attributed to work. What jobs did their grandparents and parents have? What was their attitude towards work? Did they

work only for a living or did they like their jobs? Were they self-employed or did they work for an employer? Participants reflect on how their work choices have in part been influenced by their family background (Francescato et al., 2008).

The *generational media narrative* focuses on the analysis of the programs their generation tended to watch more during early adolescence (e.g., films, cartoons, TV shows) and *personal media narrative* examines films, programs, social networks, internet sites watched and used in the present. Participants are invited to reflect on how *what we see transforms who we are*. After applying each of these techniques, they are invited to write up future desires that have emerged (Francescato et al., 2008; Francescato & Zani, 2013).

## ***2.2. Phase II: Assessing competencies and qualities***

In the second phase, participants in the empowering programs summarize the formal and informal competencies they acquired during their studies and through life experiences. As Francescato et al. (2008) point out, through this program they are helped to describe what they are good at. They reflect on their motivations, capacities, interests, values, personal qualities, weak points and resources. They are encouraged to identify their soft skills (e.g., ability to work in teams, to communicate well, to solve problems) and technical skills (e.g., writing computer codes, operating equipment, painting). During this phase, several tools are used to assess competencies (e.g., tests, questionnaires). Through the assessment process, they identify their key competencies and qualities and how well suited they are for certain jobs, business strategies or careers or other projects. After analyzing their competencies, they choose their work project or desired change and try to identify the obstacles they need to overcome and the means needed for them to achieve their aims. The final step involves all members of the group helping each other to further explore the strategies they can use to achieve their goals (Francescato et al., 2008; Francescato & Zani, 2013).

## ***2.3. Phase III: Exploring the environmental contexts***

The main aim of the third phase is to give people an opportunity to understand “the world outside” (Francescato et al., 2008). Participants explore environmental contexts of increasing complexity: from groups to organizations and local and virtual communities, using shorter versions of intervention methodologies developed by European community psychologists (Francescato & Zani, 2010, 2013).

First of all, participants explore the strong and weak points of the small groups of which they are members (family, class, work and/or volunteer) and their impact on their lives. Then, they do the same using the PMOA (participatory multidimensional organizational analysis) schema for an organization of their choice. Finally, using the profiling methodology (Martini & Sequi, 1988) they explore their knowledge of the community in which they live or work. A brief description of these community psychology intervention methodologies can be found in English in Francescato and Zani (2010, 2013), Francescato and Aber (2015), and Francescato and Mebane (2015).

In the rapidly growing media world, participants are also encouraged in this phase to look at the ways in which their broader “virtual networks” may allow them to explore the opportunities offered by their virtual communities and online social networks (Francescato et al., 2008).

## ***2.4. Phase IV: Congruency between individual desires and contexts***

In the fourth phase, participants identify congruencies between individual desires, acquired skills and the limits and opportunities of their contexts and plan a number of changes (Francescato et al. 2008). In this crucial phase, therefore, they explore the congruence between their desires, fears and competencies (that emerged in the first and second phases) and what the outside world seems to offer and requires (that emerged in the third phase). In the fourth phase they identify priorities for personal change that they can manage on their own. For desired collective changes, they identify the other people, groups and/or institutions with whom they will have to network to achieve these wider goals (Francescato et al., 2008, Francescato & Zani, 2013).

In this next part of the article, we will illustrate how CSCL was first used as a part of

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an innovative project to promote the sociopolitical empowerment of unemployed managers. The training activities followed the four phases of the empowering sociopolitical program described above, adapted to produce a blended course. The main aim of the course was to improve the managers' level of social political empowerment and their positive attitudes towards their personal life and futures and help them identify new life projects.

### **3. Methods**

#### ***3.1. Participants***

Initially, eleven people participated in the training empowering program, seven of these completed it: five men and two women (ranging in age from 40 to 62) who had recently lost their white collar and managerial jobs (ranging from a few months to up to 3 years previously). The other participants left for family reasons or because they found new jobs during the blended course.

#### ***3.2. Methodology***

An experienced trainer and two tutors conducted the training course. A blended learning approach was used; people participated in both the online and face-to-face training activities. The training empowering program was based on collaborative learning and provided interactive learning opportunities. The blended learning had in-person classroom activities facilitated by the trainer and online structured independent and collaborative learning activities. This learning approach was used for several reasons: it reduced travel time and travel costs for participants not resident in Rome (where the course took place); the online learning modules (that lasted several weeks) allowed participants to work at their own pace through their four phases of the empowering program; the online forums gave them more time to join in the discussions and created a supportive and collaborative environment involving colleagues facing the same problems. Furthermore, during the online activities, tutors could monitor progress made and any difficulties the managers had trying to complete the tasks in the four empowering stages.

The training activities were based on the empowering sociopolitical program described above which is divided into four phases and was adapted to a blended course. In the first phase, the managers explored their authentic desires using techniques such as the work narrative, the family socio-cultural narrative, the generational media narrative and personal media narrative. In the second phase, they assessed their competencies (both soft skills and technical skills). In the third phase, they explored the resources of their environmental contexts through the PMOA and the profiling methodology. In the fourth phase, through personal reflection and group discussion, the managers explored the congruencies between the priorities they had identified, their acquired skills and the limits and opportunities of their contexts. The course was coordinated by two tutors who were available to support participants and answer questions that emerged during the course. Feedback on contributions was given at the end of each module and shared online with all the participants. The platform used for the online modules was Yahoo groups.

### **4. Examples of exercises from each empowering phase**

#### ***4.1. Examples from phase I: Re-motivation and exploring desires for the future***

The re-motivation phase was particularly important since most participants felt discouraged and somewhat anxious about their future. Feelings of worthlessness and helplessness are common among unemployed people and so in this phase, we worked a lot to overcome negative emotions related to unemployment and boost sociopolitical empowerment.

In this chapter, we will give examples of two exercises: 1) relating to the family socio-cultural novel focusing on emotional heritage, and 2) using media to deal better with emotions. Both exercises were done online.

#### 4.1.1. *Family sociocultural novel on emotional heritage*

Using the Yahoo group platform participants examined their family sociocultural novel, individually at first, then in pairs and finally as a group, focusing on how positive and negative emotions were handled in their families.

##### *Instructions for participants:*

“We would like you to analyze how your family dealt with negative emotions (e.g., rage, sadness, fear). Did they withdraw into a sulk? Did they shout when they got angry? How did they react when faced with obstacles? How were positive emotions (e.g., happiness, satisfaction) expressed? All emotions are justified and legitimate, but it’s important to focus on how they affect our behaviors. Finally, individually think about whether you would like to manage any of these emotions better and then share some of your thoughts, first with your partner and then with the group. At the end of the exercise put your favorite desires in your treasure box”.

##### *Online activity timetable:*

- By July 4th please read the material on community psychology and read the exercise.
- By July 6th please can you individually do the exercise on emotions you will find online called “Exercise on emotional capital”.
- By July 8th share some of your thoughts and memories with your partner through private emails and comment on the impression you had of their emotional capital background.
- By July 10th use the “emotional capital” forum to share some of your and your partner’s reflections on the emotional family background. As a group reflects on how we manage our emotions these days. How do emotions affect our actions? What are the consequences of these actions? Participants are invited to comment and discuss.

##### *Examples of participants’ comments from exercise 1:*

Mike: “In my family, angry emotions were not tolerated, whenever I was mad I was told that I had 5 minutes to get in a better mood”.

Milla: “In our family, we used to laugh a lot together. Sometimes I think my self-irony has helped me to face obstacles. Not taking myself too seriously has helped me to see that some of the problems I face are smaller compared to all the world issues”.

#### 4.1.2. *Learning to better manage positive and negative emotions through the use of media*

##### *Instructions to participants:*

To learn to deal with your emotions better, we would like you to explore how the media can help you manage your emotions. Choose individually if you want to experience more positive emotions through the use of media or use media to cope better with negative emotions and share your impressions with the group.

##### *Online activity timetable:*

- By July 13th: read the group reports on the exercises in the area database of Yahoo groups. Reading the issues we have addressed so far, do you think new desires have emerged? You can add new desires to your treasure box.
- By July 14th: read the material on empowerment training in the database and ask the tutors questions if anything is not clear.
- By July 16th: find emotional stimuli through media (watch a film at the cinema, watch a show, read a book, etc.) to experience positive emotions or to learn how to better manage negative ones and send a message to the group forum on your experience).
- By July 19th: begin to pursue some of your desires and plan small initial steps to achieve desired changes.

##### *Examples of comments by participants from exercise 2 on managing emotions through media*

During this week, Milla shared with us her opinion of the book *The 5 Tibetans*, which she liked a lot: “The book inspired me to take more care of my body. I understood that I need to pay more attention to my nutrition. Physical and mental balance are important for coping better with emotions”.



## ***4.2. Examples from phase II: Assessing competencies and qualities***

Since most of the managers had already attended traditional courses for improving CVs and skills during their months of unemployment, in this course we did not give them tests or questionnaires to assess their competencies but encouraged group discussions and support.

First individually, then in pairs and finally in groups, the managers reflected briefly on their qualities and competencies and on those they needed to improve. They analyzed which qualities they had, such as decision making and problem solving, and which competencies or skills they wanted to improve. After this phase, each participant had to put the desires that emerged from this phase in their treasure box. This part was done face-to-face.

*Instructions to participants:*

1) First individually, then in pairs reflect on all the qualities and competencies that have helped you during your career. Are there any competencies or skills that you would like to acquire? How? You have 45 minutes.

2) After you come back to the group, you can share some of your thoughts if you want.

*Examples of participants reflections:*

Sally: "Talking to John I realized that sometimes my "results driven attitude" has helped me through my career because of my ability to meet objectives on time; however, my career motivation has led to me doing things alone. In the future, I would like to be better at building social ties".

## ***4.3. Examples from phase III: Exploring the environmental contexts***

We describe two example exercises from this third phase: 1) social networks, 2) community profiling.

### ***4.3.1. Social network exercise***

*Instructions for participants:*

After reading the material on social networks, share comments and questions. Learn how to use the different social networks and how they can be useful to you. Explore the different social networks to find organizations or associations linked to your interests and desired projects.

*Online activity timetable:*

- By July 22nd read the social network file and share questions or make comments.
- By July 25th explore different social networks and think about how they could be useful for your project. In addition, using social networks find an association linked to your interests/desires. Share your impressions with the group.

*Examples of participants' reflections:*

The majority of participants carried out the activities suggested to them: some of them joined a virtual group for the first time and explored the beneficial effects of social networking sites.

Dave: "Social networks are useful because they help us keep up with what is happening around us. I particularly liked LinkedIn. I was able to search for different types of organizations that I would like to work for and to participate in interesting group discussions".

### ***4.3.2. Community profiling exercise***

*Instructions for participants:*

After reading the material on community profiling, share comments and questions. Explore the profiles to understand the strong points and weak points of a local community and find organizations or associations linked to your interests and desired project and try to visit them. Send the group a message with your impressions.

*Online activity timetable:*

- By July 27th read the community profiles file and reflect and share concerns or comments on the proposed theme.
- By July 31st explore a local community using the eight profiles, find associations that deal with the themes relating to your desires and try to visit them and share your impressions with the group.

*Examples of participants' reflections:*

Several participants shared with the group how they had used the community profiles technique to better understand the strengths and problem areas of the territorial contexts in which they lived.

John told the group that he had visited some volunteer organizations: "Contacting non-profit organizations, I discovered that the big ones are very structured and rigid. If you contact them to volunteer they tend to offer you simple tasks only (leafleting). Most of the smaller voluntary associations I visited were more flexible but less interesting".

#### ***4.4. Examples of phase IV: Congruency between individual desires and contexts***

In the final meetings, the participants chose which of their goals they wanted to achieve most, taking into account the strong and weak points of their community. We describe two exercises relating to this fourth phase 1) Project planning and 2) Looking at your life or work project through PMOA. Both exercises were performed during the last face-to-face encounter.

##### *4.4.1. Project planning*

*Instructions for participants:*

Reflect individually on the desires relating to your work project or life project that have emerged through this course. Taking into consideration the positive and negative aspects of the external context you have examined during the course choose three goals that you would like to achieve. First individually and then in pairs identify the steps required for you to plan one of your chosen projects.

*Examples of participant comments from exercise 1 on project planning:*

Lucy: "My goal is to find a job that would allow me to better balance work and family.

Subobjectives:

- pay more attention to health and social care (going to the hairdressers);
- share more time and experiences with my daughters;
- participate in public competitions to get a new job (sectors: for example, internal control);
- display my CV on LinkedIn;
- distribute my CV in personal;
- contact people in society *x* and *y* who might help me find a job".

##### *4.4.2. Looking at your life or work project through PMOA*

In this exercise, participants used a brief version of the PMOA to analyze an organization or work project of their choice. The PMOA analyzes four dimensions of the hard aspects and soft aspects of an organization (Francescato & Aber, 2015). The sociostructural dimension analyzes legal forms, market shares, economic aspects, structural limits and strategic objectives. The functional dimension concerns the tasks that have to be carried out to meet the organizational goals. The psychodynamic dimension explores the prevailing individual and group emotional variables among the people that work in the organization, through movie scripts or drawings or recurrent jokes. The psychoenvironmental dimension explores the fit between worker expectations and organizational pressures.

In particular, participants explored the psychodynamic dimension using the movie script technique. The participants were invited to develop a plot for a movie script about their life project. They were instructed to pick a movie genre (e.g., historical, science fiction, comedy or detective) and come up with a title, a plot, main characters and an ending for their movie script. After completing this creative phase and presenting the results to the others through narration, the group members were invited to discuss with the teacher the movie script content, the emotions they experienced in the narratives and the problems and strengths that emerged from their narratives about their projects.

#### **4.5. Example of a movie script by participants**

*Title:* Can dreams come true?

*Characters:* A girl and a nun.

*Plot:* Throughout her childhood the girl had been fascinated by missionary work, by giving without asking for anything in exchange. Since she had a very difficult personal life she did not follow her desire to help people. Growing up she was able to overcome her personal problems. In Madagascar, she meets a nun who convinces her to devote her life to volunteering and organizing surgery projects. The girl is very successful and exceeds the nun's expectations.

*End:* In three years, she creates an itinerant hospital and an equipped camper van that goes from village to village.

The participants reflected together on the movie script, which revealed determination, willpower, commitment, transformation, maturity and serenity. They suggested that the work project should satisfy desires for spiritual and altruistic behaviors.

### **5. Results**

At the end of the course, after they had completed the four phases, the participants declared in their final feedback that they were very satisfied. The main objectives of our pilot empowering program had been achieved. After participating in the empowering program, all the participants were more proactive and had a more positive attitude towards their future. All were able to identify at least two project ideas to improve their wellbeing. They were able to identify positive goals they wanted to pursue in different fields of their lives and find the resources available in the various contexts to pursue them. They planned the steps they needed to take to achieve their goals. In their final feedback at the end of the course, the participants also stated that they felt more empowered, more in control of their lives and that they were open to new possibilities they had not considered before the course. While monitoring the course, the tutors were able to record the progress of the participants both online and face to face.

### **6. Examples of participant feedback at the end of the course**

John said: "This empowering training program, especially the online part, was very useful to me for re-orienting myself, re-thinking what I can do in a new way. I learned to make the best of my past experiences and better understand my strengths and weaknesses. I focused on what I can do for me again. I learned to believe in a new life project and to look for resources in my local community and on the web".

Milla, another participant, commented: "Through this course, I was able to refocus on the personal interests that give me satisfaction. I understood that working so hard over these years I have sacrificed my creative side: my love for architecture, for example, restoring paintings and cooking. I realized that life is composed of many things, not just work. I decided that I want to follow my personal interests more. I found three courses: 1) interior design, 2) gardening, and 3) painting restoration. I just don't know which to start first!"

### **7. Conclusion**

Previous research (Francescato & Zani, 2013, 2017) has provided evidence that you can promote social political empowerment by teaching community psychology competencies to students through CSCL. Most of these studies, however, have used only student samples as the training program participants. It was not known whether community psychology programs based on CSCL could be used outside educational contexts to tackle social issues. This innovative pilot project contributes to filling this gap by showing that is possible to use CSCL to promote the sociopolitical empowerment of unemployed middle-aged workers. Moreover, our study supports previous research that has indicated that community psychology competencies can also be taught online using CSCL (Francescato & Mebane, 2015)

We are aware that our study has several limitations, such as the low number of participants and the qualitative evaluation of the course efficacy. Future programs that aim to increase the social political empowerment of unemployed middle-aged workers should involve a greater number of participants and use quantitative instruments, such as the social political empowerment scale (Francescato, Mebane, Sorace, Vecchione & Tomai, 2007), to verify course efficacy.

Unemployment can have a very negative impact on people's lives and it can negatively affect not only the jobless workers but also their families and community. A future challenge for community psychologists is to identify new tools that could be used to address this important issue. We believe that, despite its limitations, our pilot project is an important first step in this direction.

## References

1. Aday, R. H., & Kehoe, G. (2008). Working in old age: Benefits of participation in the senior community service employment program. *Journal of Workplace Behavioral Health*, 23(1-2), 125-145. <https://doi.org/10.1080/15555240802189521>
2. Axelrad, H., Malul, M., & Luski, I. (2018). Unemployment among younger and older individuals: Does conventional data about unemployment tell us the whole story? *Journal for Labour Market Research*, 52(1), 1-12. <https://doi.org/10.1186/s12651-018-0237-9>
3. Böheim, R., Horvath, G. T., & Winter-Ebmer, R. (2011). Great expectations: Past wages and unemployment durations. *Labour Economics*, 18(6), 778-785. <https://doi.org/10.1016/j.labeco.2011.06.009>
4. Bowles, J. (2014, July 24). *The computerisation of European jobs* [Blog post]. Retrieved from <https://www.bruegel.org/2014/07/the-computerisation-of-european-jobs>
5. Brusciagioni, M., & Gheno, S. (2000). *Il gusto del potere: Empowerment di persone e azienda*. Milan, Italy: Franco Angeli.
6. Fisher, B. J. (2008). Enhancing the efficacy and empowerment of older adults through group formation. *Journal of Gerontological Social Work*, 51(1-2), 2-18. <https://doi.org/10.1080/01634370801967513>
7. Ford, M. (2015). *The rise of the robots: Technology and the threat of mass unemployment*. London, the UK: Oneworld Publications.
8. Francescato, D., & Aber, M. S. (2015). Learning from organizational theory to build organizational empowerment. *Journal of Community Psychology*, 43(6), 717-738. <https://doi.org/10.1002/jcop.21753>
9. Francescato, D., & Mebane, M. (2015). Learning innovative methodologies to foster personal, organizational and community empowerment through online and face-to-face community psychology courses. *Universitas Psychologica*, 14(4), 1209-1220. <https://doi.org/10.11144/Javeriana.upsy14-4.limf>
10. Francescato, D., & Zani, B. (2010). Community psychology in Europe: More needed, less wanted. *Journal of Community & Applied Social Psychology*, 20(6), 445-454. <https://doi.org/10.1002/casp.1066>
11. Francescato, D., & Zani, B. (2013). Community psychology practice competencies in undergraduate and graduate programs in Italy. *Global Journal of Community Psychology Practice*, 4(4), 1-12. <https://doi.org/10.7728/0404201303>
12. Francescato, D., & Zani, B. (2017). Strengthening community psychology in Europe through increasing professional competencies for the new territorial community psychologists. *Global Journal of Community Psychology Practice*, 8(1), 1-14. <https://doi.org/10.7728/0801201703>
13. Francescato, D., Mebane, M., Sorace, R., Vecchione, M., & Tomai, M. (2007). EMPO: Una scala di misurazione dell'empowerment personale e politico. *Giornale Italiano di Psicologia*, 2, 465-490. Retrieved from [https://www.researchgate.net/publication/312450453\\_EMPO\\_Una\\_scala\\_di\\_misurazione\\_dellempowerment\\_personale\\_e\\_politico](https://www.researchgate.net/publication/312450453_EMPO_Una_scala_di_misurazione_dellempowerment_personale_e_politico)
14. Francescato, D., Tomai, M., & Solimeno, A. (2008). *Lavorare e decidere meglio in organizzazioni empowerd e empowering*. Milan, Italy: Franco Angeli.
15. Frey, C. B., & Osborne, M. A. (2013). *The future of employment: How susceptible are jobs to computerisation?* Retrieved from [https://www.oxfordmartin.ox.ac.uk/downloads/academic/The\\_Future\\_of\\_Employment.pdf](https://www.oxfordmartin.ox.ac.uk/downloads/academic/The_Future_of_Employment.pdf)
16. Irwin, N. (2018, June 12). If the robots come for our jobs, what should the government do? *The New York Times*. Retrieved from <https://www.nytimes.com/2018/06/12/upshot/if-the-robots-come-for-our-jobs-what-should-the-government-do.html>
17. Lahey, J. N. (2005). *Do older workers face discrimination?* (Center for Retirement Research at Boston College, Brief Report). Retrieved from <http://crr.bc.edu/briefs/do-older-workers-face-discrimination>
18. Lee, K.-F. (2017, June 24). The real threat of artificial intelligence. *The New York Times*. Retrieved from <https://www.nytimes.com/2017/06/24/opinion/sunday/artificial-intelligence-economic-inequality.html>
19. Martini, E. R., & Sequi, R. (1988). *Il lavoro nella comunità: Manuale per la formazione e l'aggiornamento dell'operatore sociale*. Rome, Italy: Carocci.

- 
20. Rogers, B., & Robinson, E. (2004). *The benefits of community engagement. A review of evidence*. London, the UK: Active Citizenship Centre, Home Office.
  21. Solimeno, A., Mebane, M. E., Tomai, M., & Francescato, D. (2008). The influence of students and teachers characteristics on the efficacy of face-to-face and computer supported collaborative learning. *Computers and Education*, 51(1), 109-128. <https://doi.org/10.1016/j.compedu.2007.04.003>
  22. Wallerstein, N. (2006). *What is the evidence on effectiveness of empowerment to improve health?* (WHO Regional Office for Europe, Health Evidence Network Report). Retrieved from [https://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0010/74656/E88086.pdf](https://www.euro.who.int/__data/assets/pdf_file/0010/74656/E88086.pdf)

# FROM CORPORATE SOCIAL RESPONSIBILITY TO SUSTAINABILITY: A NEW CORPORATE DEVELOPMENT MODEL

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**Keywords:** Corporate Social Responsibility, Sustainability, Stakeholders, Shareholders, Shared Value

## 1. From the shareholders to the stakeholders' theory

Up until the last century's early 70s, the dominant idea, when it came to building an enterprise, was that of acting in favour of maximum profit that was weakly linked to ethical values. In the following decades, instead, old capitalism began to give way to a more responsible industrialism, founded on moral rules and laws that were respectful of social and environmental wellbeing. Today more than ever there is a need to overcome the antinomy between the ethical and financial dimensions of human behaviour, since production, profit distribution, financial growth, and development are economic categories that need ethical principles, or else the economy will risk imploding and, therefore, collapsing (Marziantonio & Tagliente, 2003).

The evolution of modern capitalism, therefore, also depends on the ethical actions and choices of the entrepreneurs, aimed at reaching a profit, redefined as *quid pluris*, that goes to the advantage of the entire community (Sen, 2002).

Amartya Sen, Nobel Prize for economics, affirms that enterprises, being them organizations that use community resources, should take on a social responsibility toward the community, "A company is a social institution and, as such, has a citizenship right which makes it worthy of protection and, in some cases, of support. This same right, though, compels it to satisfy certain expectations that the community it belongs to has toward it, through the compliance with ethical rules and the implementation of supportive behaviours" (Robiglio, 2004). This is how the concept of corporate social responsibility (CSR) intended as the need for the enterprise to take on socially responsible behaviours and initiatives meant to pinpoint and respond to financial, social, and environmental expectations of a vast number of stakeholders is born (Oliva, 2016).

The European Commission defines corporate social responsibility as "the voluntary integration of the social and environmental preoccupations of the enterprises in their commercial operations and their relationships with the interested parties. Being socially responsible (adds the Commission), means (to invest) in human capital, in environment and relationships with the interested parties" (Commissione Delle Comunità Europee, 2011).

The Green Book points out that "by affirming their social responsibility and undertaking, under their initiative, tasks that go beyond conventional and regulatory needs they need to comply to", enterprises should force themselves to "elevate the regulations linked to social development, to environment protection and the respect of fundamental, rights, by adopting an open governmental system able to facilitate the interests of several interested parties within the scope of a global approach to quality and sustainable development" (Commissione Delle Comunità Europee, 2011).

The enterprise must affirm itself as a social actor and not just an economic one and it needs to aim at the well-being of society. It is a real change in the enterprise culture that undertakes the difficult road toward the affirmation of the culture of social responsibility, which is called out by society to actively participate in the solution of its issues and to the realization of a mission that integrates its profit logics (Mariano, 2005).

An enterprise is not an entity in itself, but it is an integral part of the socio-economic context in which it is inserted and to which it has to report. In this respect, there are two ethical theories that contrast: the shareholder's theory, supported by Berle (1931), and the stakeholder's theory supported by Dodd (1932).

In 1931 Berle affirmed that "all the powers attributed to a corporation or its management must always be exercisable only to the advantage of all the stakeholders" (Berle, 1931, p. 1049). According

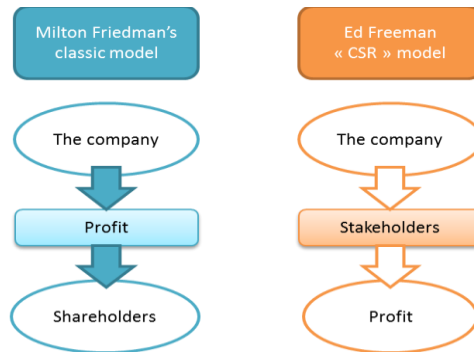
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to Berle (1931), indeed, managers should be considered as trustees, that is, trusted administrators of the investments of the shareholders. In 1932 Dodd affirmed its theory in opposition to that of his colleague, maintaining that the powers managers are invested with must be used to benefit the community while respecting the obligations toward consumers and workers. The debate regarding CSR continues, on a theoretical plane, and it sees the juxtaposition of the heterogenic views of scholars.

Amongst these, those of Milton Friedman and Edward Freeman deserve special attention. The stakeholder theory, developed by Freeman, sprouts from the moral minimalism line of thought, which was defended by Friedman, that has profit as its sole objective in an enterprise, since “social duties are under the responsibility of State and Governors” (Friedman, 1970, p. 126). Freeman, instead, opposes, Friedman’s theory, a theory aimed at pinpointing the “government methods to manage the relation between the company and the multiple groups of stakeholders it has to consider in the pursuit of its objectives” (Ferrari, Renna, & Sobrero, 2009, p. 87) (see Figure 1).

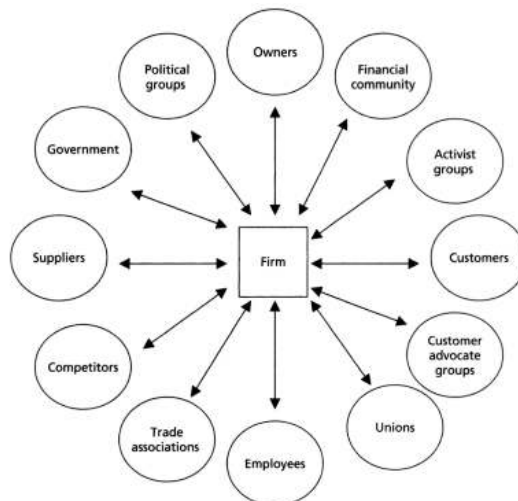
**Figure 1. Friedman vs Freeman**



Source: Blog Spider Mark, Kerr (2014).

Sharing the objectives with the interest holders improves strategy, business, and competitiveness in an enterprise. Furthermore, a 2009 study, Freeman proposes the substitution of the denomination corporate social responsibility, with the expression company stakeholder responsibility (Ferrari, Renna, & Sobrero, 2009) extending, this way, the RSI Concept to all those subjects that create value and to all types of companies (see Figure 2).

**Figure 2. Stakeholder’s map by Freeman**



Source: Freeman (1984, p. 55), as cited in Friedman and Miles (2006, p. 27)

As furtherly affirmed by Paolone (1998) the corporate system cannot be “considered as an entity solely finalized to the pursuit of the financial results that are highlighted in the income statement, but it is also to be seen in the fulfilling of the social function that derives from the fact that it was inserted in an environmental context from which it results to be highly influenced and conditioned. The company is, therefore, considered an entity that has been burdened with a responsibility that is not only financial but also social, in which the achievement of a financial objective is influenced by the social behaviour undertaken by the company itself” (p. 351). Consequently, to adopt a CSR policy means, for an enterprise, to go over the obligations and regulatory fulfilments which it is bound to comply with, and to voluntarily invest in socio-environmental progress.

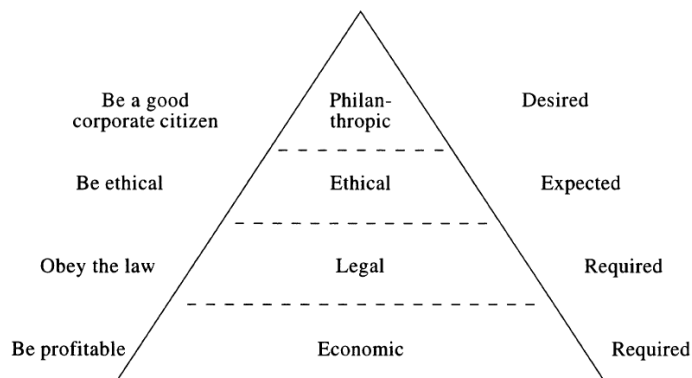
Corporate social responsibility is, essentially, an attitude that is able to keep together: 1) the entrepreneurial logic of profit; 2) the logic of environment and its protection; 3) the logic of a community in which the enterprise operates, and to balance them in a series of actions that bring new vitality to the enterprise and, in some cases, to the life of its stakeholders (Sobrero, 2006).

Over the years the debate continued, and a concept was reached according to which a company, in its operations, cannot exempt itself from its responsibility toward the society and the environment in which it operates and from which is strongly influenced. This responsibility is not just seen in strictly financial terms, but especially in an ethical, social view. An important step ahead was made by Carroll (1979), who stated that “corporate social responsibility includes financial, legal, ethical and discretionary expectations that society holds toward some organizations in a given moment” (p. 500).

To Carroll is owed the elaboration of the “corporate social responsibility pyramid” (see Figure 3) which supplies a multidimensional vision of the CSR concept. The elaborate model identifies four responsibility categories:

- Economic responsibility (required by capitalism);
- Legal responsibility (required by stakeholder);
- Ethical responsibility (expected by stakeholder);
- Philanthropic responsibility (desired by stakeholder).

**Figure 3.** Social responsibility pyramid



Source: Carroll (1991) as cited in Schwartz and Carroll (2003, p. 504).

According to Carroll’s theory, a responsible enterprise must respect the simultaneous fulfilment of the four above-mentioned typologies, that is, it must gain profit, enforce the law, be ethical and behave like a good citizen (Freeman, Rusconi, & Dorigatti, 2007).

This way, the vision according to which the activities of a company must not just exhaust in the production of goods and services for financial purposes, but they must also aim to satisfy all of its stakeholders, is affirming itself.

Two Harvard scholars, Porter and Kramer (2011) maintain that the search for economic value must also represent an advantage for society. According to the two scholars, creating shared value improves competitiveness within the enterprise in the same measure in which it improves



the financial and social progress of the community in which it operates. Porter and Kramer propose a strategic vision of CSR interpreted as a form of investment and not just as a simple cost weighing on the activity.

The line of reasoning under the theory of Porter and Kramer is that the community expresses social needs that management should have the possibility to perceive, so as to build a business model suitable for satisfying such needs. A company can effectively reach high efficacy levels if it applies the capitalistic logic to the resolution of social and environmental problems. Therefore, enterprises must be encouraged to create social and economic value at the same time, paying special attention to social issues that they are able to face, keeping in mind the idea according to which enterprises' competitiveness and community well-being are reciprocally interdependent.

Therefore, CSR can be seen as a road that must be travelled with two different speed levels. The first one, *CSR risk mitigation*, is the basic one, which must protect the fundamental rights of workers, the respect of the rules, and which must guarantee clear and transparent information for the consumers. The second one, *CSR shared value*, is the creative one, which operates in order to conjugate enterprises' competitiveness with the social needs of the stakeholders.

In the present multidirectional system, capitalism tends to conjugate business with social value more and more.

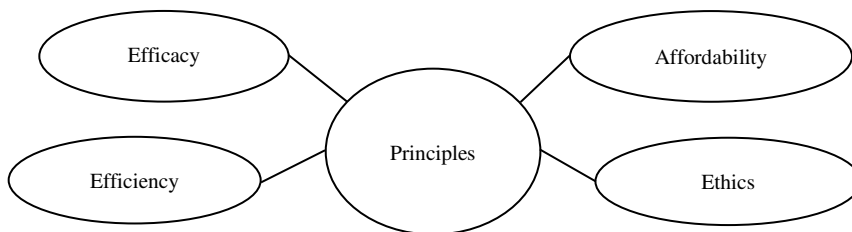
## 2. From social responsibility to sustainability

Enterprise social responsibility can be better intended in terms of "partial change of the objective function of the enterprise with the passage from the maximization of wealth of the shareholders to the maximization of the well-being of a group of stakeholders which includes, as well as investors, employees, suppliers, local communities and future generations" (Becchetti, Bruni, & Zamagni, 2014).

Corporate social responsibility is, essentially, an attitude that is able to keep together: 1) the entrepreneurial logic of profit; 2) the logic of environment and its protection; 3) the logic of a community in which the enterprise operates, and to balance them in a series of actions that bring new vitality to the enterprise and, in some cases, to the life of its stakeholders (Sobrero, 2006).

So, a central role in the modern enterprise system is reserved for ethics. Where the principles used to be three: efficacy, efficiency, and affordability, they are now four (see Figure 4), the fourth being ethics (Ricci, 2007). Indeed, only renewed ethics in a company's management can determine a cultural change that overtakes the dichotomy economics-ethics and sees in the latter a competitive advantage for enterprises.

**Figure 4.** The satellites of the guiding principle of enterprises



Source: Personal elaboration.

As Sciarelli (2004) underlines, the guide to financial behaviour must pass through Smith's invisible hand to a visible hand that can be identified in the moral manager, which is in the application of moral principles in the management of enterprises.

The concept of CSR is more incisively rooted in the economic field and this is the product of different causes, amongst which, the one related to the change in the environment that is external to the enterprise assumes relevant importance. The socio-economic scenario, lately, is indeed notably

changed by the effect of market globalization, technological development, and social dynamics and policies of the past decades (Rullani, 1994). This has entailed a structural change of the economies, associated with an extension of the markets and a higher competitiveness that has forced enterprises to face different stakeholders and to respond to their expectations, not just in financial terms, but also in ethical and social terms (Birindelli & Tarabella, 2001).

Indeed, the enterprise must grow, and to do so it must invest and create, whilst respecting the ecosystem it is part of. The need to pursue sustainable development and to adopt responsible strategies is new objectives that companies have proposed in their missions. This is how the concept of sustainability, strictly connected to that of CSR comes to life. The first time we heard talking about sustainability was in 1987 when the United Nations entrusted the World Commission on Environment and Development (WCED) the drawing of a report on the global situation, known as Brundtland Report. In this study the concept of sustainability is defined as: “a form of development that satisfies the needs of the present without jeopardizing the possibility, for the future generations, to satisfy their needs” (Brundtland, 1987), basing itself on an intergenerational scale and preferring an anthropocentric vision rather than an ecosystem-based one (Crivellaro, Vecchiato, & Scalco, 2012). Indeed, it is not the protection of the environment as such that is placed in the foreground, but rather the well-being of the people and the ability to generate value in the long run, so that future generations can benefit from it.

Sustainability is a challenge to be accepted with a sense of social responsibility extended to all fields of human action. Sustainable development has been the object of further analysis in the Rio Convention of 1992, in which the participating countries agreed upon the objectives and strategies to be adopted in the Agenda 21 (United Nations, 1992). In this document, the signing states were asked to implement national policies that would be respectful of the environment. These policies were meant to monitor and reduce greenhouse gas emissions in the atmosphere.

Within a few decades, the idea of the Sustainability Revolution (Edwards, 2005) has been establishing itself. According to this idea, the survival and the future development of both macrosystems (planet earth, countries, etc.) and microsystems (social organizations) imply a form of balance between three fundamental aspects: environmental impacts, social implications, and achievement of financial results (conservation and creation of wealth). On the front of social organizations and, in particular, of the entrepreneurial ones, the model of the sustainable corporation (that is, an organization that is founded on guiding principles and values and on business means oriented toward sustainable development) is emerging (Elkington, 1994; Siano, 2012).

Using this new approach founded on the idea that CSR = sustainability means to look at the future through four magnifying glasses. The first one focuses on human resources and the labour market, the second on the community, the third on the environment, and the fourth on the market.

**Figure 5.** The sustainability vision

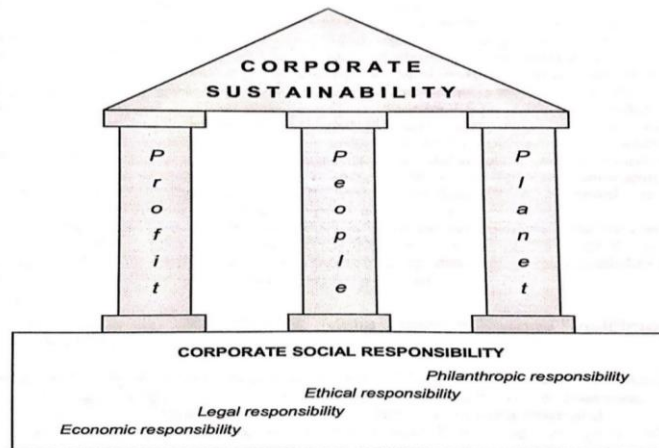


*Source: Personal elaboration.*

CSR is not substituted by the term “sustainability” but it stays in the background even though it is downsized (Crivellaro, Vecchiato, & Scalco, 2012). In a certain way, CSR can be considered

the basis on which stand the pillars of sustainability. Indeed, the multidimensional vision of the concept of CSR, according to Carroll's pyramidal model (Carroll, 1991), incorporates the economic, legal, ethical, and philanthropic principles that substantiate the three dimensions (planet, people, profit) of the triple bottom line. This link is expressed in the physical metaphor of the temple elaborated by Wempe and Kaptein (2002).

**Figure 6.** Relation between corporate social responsibility and corporate sustainability



Source: Siano (2012, p. 8).

The need to pursue sustainable development and to adopt responsible strategies is the new objectives that companies are planning in their missions. We are facing a new management vision of entrepreneurs that, as well as the production of goods and services, must also take responsibility for socio-environmental issues so as not to damage the territory, but rather, to protect the ecosystems. CSR, by interacting with all the fields of enterprise governance, with production, human resources, marketing, and policies, produces a cultural change in the way business is conducted that “does not mean to renounce profit so as to do good deeds; but rather, it intends to make a profit, maybe even more of it, but in a correct way, producing social well-being and not damages to the community, promoting balance and fairness and not exploitation; granting good quality of life and not pollution and diseases; spreading culture and wealth and not greedy destruction of human and environmental” (Mariano, 2005).

Companies must not create value only for the investors, but for the entire society and also for the entire planet, protecting it from the failure of natural systems: this is the real corporate morality.

### 3. Business sustainability: A new way to conduct an enterprise

The metamorphosis of the enterprises toward sustainability implies many advantages, not just for the planet but also for the business, and such a transition is a financially strategic choice and an ethically fitting one. It has recently emerged that ethics do not preclude financial performance; instead, in some cases, profit is even higher than the investments sustained, because with the green economy it is possible to reduce energy and raw materials costs. Research conducted by RGA, that is a consulting firm which studies solutions in the field of social responsibility, confirms that sustainability contributes to the success of the enterprise in the long term and it generates higher profits (Cici, Gallotti, Brambilla, & Rossetti, 2012). Indeed, the enterprises that, in their journey, want to embrace the concept of sustainability, must, above all, implement activities that allow the pursuit of financial and commercial objectives, whilst contributing to socio-environmental causes (which may concern health, assistance, fighting hunger, environmental protection, emergencies connected to natural or industrial disasters, right to education and so on). The logic behind CRM (Cause Related Marketing) is the win-win one; therefore, all the parties involved in the initiative enjoy a benefit in

terms of value created in their favour (Molteni, 2007). The objectives that the enterprise pursues are:

- improve corporate reputation;
- promote a new image of the responsible and socially involved company;
- increase its own market share and, consequently, increase profit.

It is only fitting to underline that the adoption of sustainable strategies by enterprises does not necessarily represent a cost, but, on the contrary, it implies several types of benefits. Indeed, it guarantees cohesion with the stakeholders, it improves the efficiency of the company's management, creating a more motivating work environment, and it allows easier access to bank credit and tax advantages.

CSR is an intangible resource, very important for the enterprise because it enhances its competitive advantage on the market and it can lead to a real transformation of society in the direction of the so-called business sustainability, which is at a higher level compared to corporate social responsibility. This new way to conduct business is more responsible and more valid in the results.

#### 4. Conclusion

This work has wanted to demonstrate that, today, enterprises must necessarily pursue a new corporate development model that is able to tangibly realize social and environmental objectives. At the same time, it has tried to demonstrate that management founded on responsible commitment and sustainable development generates higher profit. We have highlighted the main benefits and feasible opportunities in the long term for companies that, operating in a multifaced global market linked to many variables, need continuous efforts in order to survive and not fall under the blows of internationalization. Today, consumers have abandoned the passive approach which made them be dominated by the market and have become more careful and informed, and their choices are directed toward products of companies that operate on the basis of corporate responsibility projects, with production methods that are respectful of the employees, of the community and the environment. Therefore, corporate social responsibility is a necessary choice for all enterprises, both because consumers require it and because the market itself, from objectives that were exclusively financial, is moving its production processes toward socio-environmental interests.

There are examples of ethically managed enterprises that have had an increase in profits as well as an improvement in their reputation and external image (e.g., Mercedes Benz, Brunello Cuccinelli, Barilla, etc.).

Therefore, the road to sustainability is good for the business because it is a plus that is offered to stakeholders, and that allows them to face the present economic crisis. The investments obtained by companies that choose sustainable methods are identified by Eccles and Krzus (2010), of Harvard Business School, as the main factors that have allowed high sustainability companies to excel on the market, reaching financial and economic performances that are better than those of low sustainability companies.

It is then possible to affirm that sustainability brings advantages, both to the enterprises that have already adopted responsible management and have obtained maximum results and to those that are setting to undertake such strategy because they can increase commitment and motivation in their employees.

#### References

1. Becchetti, L., Bruni, L., & Zamagni, S. (2014). *Microeconomia. Un testo di economia civile*. Bologna, Italia: Il Mulino.
2. Berle, A. A. (1931). Corporate powers as power in trust. *Harvard Law Review*, 44(7), 1049-1074. <https://doi.org/10.2307/1331341>
3. Birindelli, G., & Tarabella, A. (2001). *La responsabilità sociale delle imprese e i nuovi strumenti di rendicontazione nell'esperienza bancaria italiana*. Milan, Italy: FrancoAngeli.
4. Brundtland, G. H. (1987). *Report of the World Commission on Environment and Development: Our common future*. Retrieved from <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>
5. Carroll, A. B. (1979). A three-dimensional conceptual model of corporate performance. *The Academy of Management Review*, 4, 497-505. <https://doi.org/10.2307/257850>

6. Carroll, A. B. (1991). The pyramid of corporate social responsibility: Toward the moral management of organizational stakeholders. *Business Horizon*, 34(4), 39-48. [https://doi.org/10.1016/0007-6813\(91\)90005-G](https://doi.org/10.1016/0007-6813(91)90005-G)
7. Cici, C., Gallotti, L., Brambilla, M., & Rossetti, S. (2012). *Tempi insostenibili? Secondo report su sostenibilità e competitività*. Retrieved from <https://docplayer.it/2200590-Tempi-insostenibili-carlo-cici-laura-gallotti-matteo-brambilla-sara-rossetti-secondo-report-su-sostenibilita-e-competitivita.html>
8. Commissione Delle Comunità Europee. (2001). *Libro Verde: Promuovere un quadro europeo per la responsabilità sociale delle imprese*. Retrieved from [https://www.europarl.europa.eu/meetdocs/committees/deve/20020122/com\(2001\)366\\_it.pdf](https://www.europarl.europa.eu/meetdocs/committees/deve/20020122/com(2001)366_it.pdf)
9. Crivellaro, M., Vecchiato, G., & Scalco, F. (2012). *Sostenibilità e rischio greenwashing. Guida all'integrazione degli strumenti di comunicazione ambientale*. Padova, Italia: Libreriauniversitaria.it edizioni.
10. Dodd, E. M. (1932). For whom are corporate managers trustees? *Harvard Law Review*, 45(7), 1145-1163. <https://doi.org/10.2307/1331697>
11. Eccles, R. G., & Krzus, M. P. (2010). One report: Integrated reporting for a sustainable strategy. Hoboken, NJ: John Wiley & Sons.
12. Edwards, A. R. (2005). *The sustainability revolution: Portrait of a paradigm shift*. Gabriola Island, B.C. Canada: New Society Publishers.
13. Elkington, J. (1994). Towards the sustainable corporation: Win-Win-Win business strategies for sustainable development. *California Management Review*, 36(2), 90-100. <https://doi.org/10.2307/41165746>
14. Elkington, J. (1997). *Cannibals with forks: The triple bottom line of 21st century business*. Oxford, UK: Capstone Publishing Limited.
15. Ferrari, L., Renna, S., & Sobrero, R. (2009). *Oltre la CSR: L'impresa del duemila verso la stakeholder vision*. Turin, Italy: ISEDI.
16. Freeman, E. R., Rusconi, G., & Dorigatti, M. (2007). *Teoria degli stakeholder*. Milano, Italia: FrancoAngeli.
17. Friedman, A. L., & Miles, S. (2006). *Stakeholders: Theory and practice*. Oxford, the UK: Oxford University Press.
18. Friedman, M. (1970, September 13). The social responsibility of business is to increase its profits. *The New York Times*. Retrieved from <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>
19. Kerr, N. J. (2014). *What responsibility does business have to society?* Retrieved from [www.mbaissues.com](http://www.mbaissues.com)
20. Macintosh, J. C. C. (1999). The issues, effects and consequences of the Berle-Dodd debate, 1931-1932, *Accounting, Organizations and Society*, 24(2), 139-153. [https://doi.org/10.1016/S0361-3682\(97\)00055-X](https://doi.org/10.1016/S0361-3682(97)00055-X)
21. Mariano, L. (2005). *Responsabilità etica e impegno sociale nei valori d'impresa*. Napoli, Italia: Liguori.
22. Marziantonio, R., & Tagliente, F. (2003). *Il bilancio sociale della gestione di impresa responsabile*. Milano, Italia: Maggioli, Santarcangelo di Romagna.
23. Molteni, M. (2007). Gli stadi di sviluppo del CSR nella strategia aziendale. *Impresa Progetto-Electronic Journal of Management*, 2, 1-25. Retrieved from [https://www.impresaprogetto.it/sites/impresaprogetto.it/files/articles/ip\\_2-07\\_saggio\\_molteni.pdf](https://www.impresaprogetto.it/sites/impresaprogetto.it/files/articles/ip_2-07_saggio_molteni.pdf)
24. Oliva, N. (2016). *Il bilancio sociale integrato per le Camere di Commercio: Una proposta alla luce dell'esperienza lombarda*. Milano, Italia: FrancoAngeli.
25. Paolone, G. (1998). *Il bilancio di esercizio delle imprese in funzionamento e dei gruppi societari*. Turin, Italy: Giappichelli.
26. Porter, M. E., & Kramer, M. R. (2011). Creating shared value: Redefining capitalism and the role of the corporation in society. *Harvard Business Review*, 89. Retrieved from [https://www.hbs.edu/faculty/publication%20files/2011-0609\\_fsg\\_creating\\_shared\\_value\\_20859152-c051-44dd-a2c0-761abf6bc2d1.pdf](https://www.hbs.edu/faculty/publication%20files/2011-0609_fsg_creating_shared_value_20859152-c051-44dd-a2c0-761abf6bc2d1.pdf)
27. Ricci, P. (2007). *Introduzione all'economia aziendale* (3rd ed.). Milano, Italia: Giuffrè.
28. Robiglio, C. (2004). *Etica d'impresa. L'impegno dei giovani imprenditori, Convention 9 June 2004*. Gruppo Giovani Imprenditori del Canavese.
29. Rullani, E. (1994). L'impresa "reale" e le sue prospettive: Una mappa dell'evoluzione in corso. *Finanza, Marketing & Produzione*, 4, 259-301.
30. Schwartz, M. S., & Carroll, A. B. (2003). Corporate social responsibility: A three-domain approach. *Business Ethics Quarterly*, 13(4), 503-530. <https://doi.org/10.5840/beq200313435>
31. Sciarelli, S. (2004). La responsabilità sociale dell'impresa. In P. Ricci (Ed.), *La responsabilità sociale dell'impresa: Il ruolo e il valore della comunicazione*. Milano, Italia: FrancoAngeli.
32. Sen, A. K. (2002). *Etica ed economia*. Roma-Bari, Italia: Laterza.
33. Siano, A. (2012). La comunicazione per la sostenibilità nel management delle imprese. *Sinergie: Rivista di studi e ricerche*, 30, 3-23. Retrieved from <https://ojs.sijm.it/index.php/sinergie/article/view/275>
34. Sobrero, R. (2006). La comunicazione sociale. Paper presented at the convention titled "Comunicazione e responsabilità sociale d'impresa", Università degli Studi di Bologna, Italia.
35. United Nations. (1992). *Agenda 21, Manuale per lo sviluppo sostenibile e azioni da compiere nel ventunesimo secolo*. Retrieved from <http://www.aitr.org/wp-content/uploads/2014/04/Agenda-21.pdf>
36. Wempe, J., & Kaptein, M. (2002). *The balanced company. A theory of corporate integrity*. <https://doi.org/10.1093/acprof:oso/9780199255504.001.0001>

# ECONOMIC AND SOCIAL POLICIES FOR WOMEN: A GENDER ANALYSIS

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**Keywords:** Gender Equality, Equity, Inclusion, Female Enterprise, Female Economy

## 1. Introduction

This contribution examines inequalities between women and men as well as the achievements made by women. Today's society recognises an active role for women: cultural changes, conjunctural, have made it possible to redesign gender relations. Women play a crucial role in society; they are mothers and workers, this means that coherently with the European Union strategy, it is necessary to implement policies for vocational training, which lead to creating more opportunities to find work; policies that allow for reconciliation between professional and family life. Overcoming disparities between men and women and achieving gender equality means fostering economic growth.

For the United Nations and the European Union, therefore, also for our country, gender equality is the crucial point from which to start also for the choices concerning public spending and, consequently, public policies. This orientation has raised problems, in particular, how to evaluate the results of equal opportunities policies; therefore, the problem of public spending and its impact on women becomes relevant. Therefore, the public decision-maker will have to take on the problem of equity, maintaining accounting rigour but also the consistency of the commitments made.

The approach followed to achieve gender equality is *gender mainstreaming*<sup>1</sup> – in other words all the tools and policies must guarantee gender mainstreaming, naturally through an assessment<sup>2</sup> and monitoring of the mechanisms and rules that underlie the processes implemented. This approach was used in Beijing in 1995, in the “Beijing Platform”, during the IV World Conference on Women (United Nations, 1995), to overcome gender inequalities. In the following year, the European Commission introduced this approach in communication as a necessary strategy for gender equality and, even today, gender mainstreaming is present in various documents such as the Strategic Commitment in favour of gender equality 2016-2019, which highlights the need for gender mainstreaming in all Union policies and actions. There are several bodies and institutions that seek to promote this strategy, including the European Institute for Gender Equality (EIGE)<sup>3</sup>, while within the Union there is the Commission for Women's Rights and Gender Equality (FEMM) of the European Parliament. At the level of individual countries, the approach is taken into consideration by departments and ministries for equal opportunities, education, family, and social policies. Gender mainstreaming is very much taken into consideration because every public policy concerning gender equality has consequences that do not end with the implementation of relevant provisions or programmes. Equal opportunities are also present in the Commission Communication to the Council *Integrating equal opportunities for women and men into all Community policies and actions* (Commission of the European Communities, 1996), which states: “(...) it is a question, in this perspective, of promoting the equality between women and men in all actions and policies, and this at all levels. This is what is called the principle of ‘mainstreaming’, which the Community has made its own (...)”<sup>4</sup>.

The issue of equity is today more than ever a question that touches our society very much, like equality between women and men conditions public choices. This means that gender equity is a crucial element to guarantee the efficient allocation of public resources. In this context, gender budgeting has

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<sup>1</sup> Gender mainstreaming is the reorganisation, improvement, development and evaluation of policy processes, aimed at incorporating a gender equality perspective in all policies at all levels and stages, by the actors normally involved in the policy-making process.

<sup>2</sup> Evaluation also of expenses.

<sup>3</sup> The EIGE is located in Vilnius (Lithuania) to collect data, process reports, and research and maintain contacts with non-governmental organisations and individual countries.

<sup>4</sup> Def., 21/02/1996.

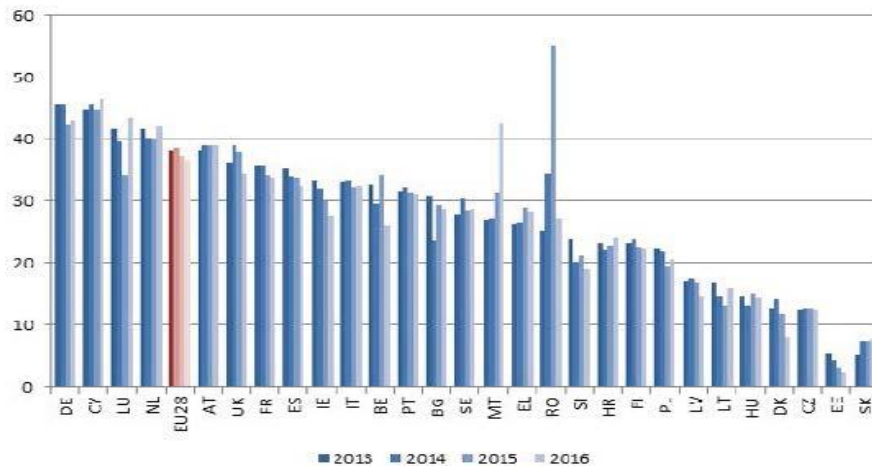
developed, which is nothing but the budget in which the allocation of public resources is evaluated according to “gender criteria”. The first gender budget dates back to the 1980s in Australia, to assess the impact public choices have on women. In Italy, the gender budget made its first appearance in 2000.

This contribution is structured as follows: the first paragraph examines gender inequalities, the second analyses the gender budget. Conclusions then follow.

## 2. Gender inequalities

In the 2018 report on equality between women and men, the Gender Commission clearly emerges annually; therefore, there is a clear gap. Although there has been considerable progress that has narrowed the gap between women and men, there are disparities, however. Unfortunately, many women are not independent of an economic point of view, as many women still cannot find a job or, the luckiest ones, even though working, receive a low salary and work an average of 6 hours more a week, often not included in their salaries. Unfortunately, women perform low professionalism jobs more than men, for example, cleaners, secretaries, personal carers. The percentage of women employed in activities with a high level of professionalism remains low. The gender employment gap is equal to 11.6%. In the European Union women account for 51% of the population; only 67% of them have a job, while 31% are self-employed. The employed women aged between 20 and 64 in Europe are equal to 66.5%, 11.5% less than the employed males in the same bracket, which represent 78%. Therefore, the gap is around 11.5%. In Italy, the gender employment gap is even higher (20%). Sweden has a gender employment gap of 4%, Denmark of 6.5%, and Germany of 4% (Eurostat, 2017). There is also a gap between women and men in terms of pay, equal to 16.2% in Europe. In the countries that joined the Union in 2004 (formerly the CEEC) the gender pay gap is stronger – for example, it is 25.3% in Estonia, 21.8% in the Czech Republic, and 21.5 % in Germany. In Italy, the gender gap is equal to 5.1%. A gender pay gap is recorded even in terms of pensions, with a Union percentage equal to 36.6% (European Commission, 2017a) (Figure 1).

**Figure 1. Gender pay gap in pensions**



Source: Eurostat (2017).

Women are also the most exposed to poverty, which reveals a problem of social exclusion, especially for over-75 women (Figure 2).

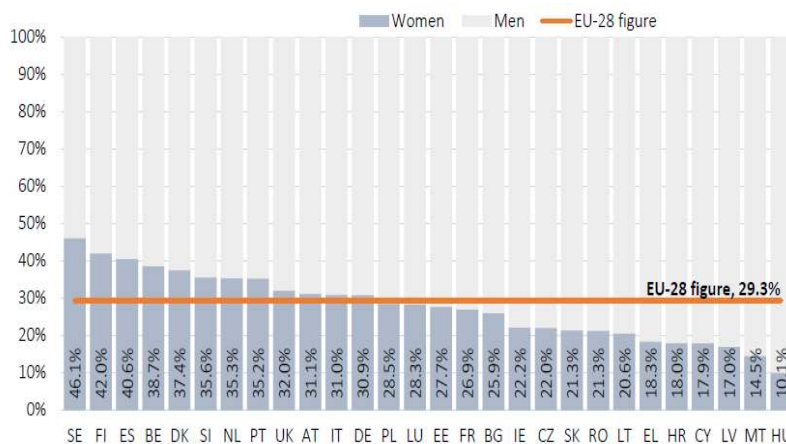
**Figure 2.** Percentages of women at risk of poverty



Source: European Commission, Eurostat.

There are few women with top positions in the world of work; in France, women on the boards of large companies do not exceed 40%, and it is a high percentage if compared to the EU average, which stands at 25%. In Italy the percentage is equal to 34%; therefore it presents a higher percentage than the average, like Sweden, Finland, Germany, Belgium, and Denmark (European Commission, 2017a). Women in politics are also underrepresented (Figure 3).

**Figure 3.** Women in politics



Source: EIGE.

In terms of equal opportunities, the Union tries in every possible way to urge member countries to implement rules that tend to reduce gender gaps.

It must be said that the problem of inequalities between women and men is not only economic but also cultural. There is indeed an unequal division of social roles and poor involvement of men in caring for the family. Greater sharing of family tasks is necessary. There is a cultural problem in which women are still given the exclusive role of caring for the family, for example, there is little use of paternity leave by fathers. In the Union, 31% of women work and are committed to caring for the family. Therefore, all forms of gender inequality must be eliminated, as it curbs social well-being; it is appropriate to create a growth model based on equal opportunities. In fact, around 60%-80% of food in the poorest countries results from women's work. Reducing gender inequality even in the possibility



of using resources means that the same land produces around 20%-30% more. Therefore, the increase in cultivated land production would remove the problem of deforestation in many other areas. According to Project Drawdown estimates, eliminating inequalities in agriculture means reducing emissions by around two billion tonnes until 2050. There is a close link between environmental sustainability and gender equality, which is why women in society must be valued and any prejudice removed. There is a close connection between climate change and gender inequalities and the 2030 agenda underlines this aspect.

Gender equality stems from the contingent need to guarantee the rights of women and girls, increasingly involved in society. In this perspective, the Charter for Women, the strategic commitment for gender equality 2016-2019, sets the following priorities:

- increased participation of women in the labour market and equal economic independence;
- reducing the gender gap in terms of wages, salaries, and pensions;
- fighting poverty among women;
- promotion of equality between women and men in the decision-making process;
- fight against gender violence and protection and support of victims;
- promotion of gender equality and women's rights worldwide (Charter for Women 2016-2019).

In the communication *Establishment of a European Pillar of Social Rights* (European Commission, 2017a) and the proposal for *Inter-institutional proclamation on the European Pillar of Social Rights* (European Commission, 2017b), fundamental principles and rights have been established, both in terms of employment, social protection, social inclusion, education, and equal opportunities. The inter-institutional agreement proposed by the Commission is based on the following pillars:

- Equal treatment and opportunities between women and men in all sectors, including with regard to participation in the labour market, terms and conditions of employment, and career advancement. It is also established that women and men have the right to equal pay for work of equal value.

- Equal treatment and opportunities in employment, social protection, regardless of sex, race, and ethnicity, and access to publicly available goods and services (European Commission, 2017b).

- Parents and carers have the right to appropriate leave, flexible working arrangements, and access to care services. Women and men have equal access to special leave in order to fulfill their care responsibilities and are encouraged to use them in a balanced way.

The message that transpires is that we must respect human rights and rethink economic policies, that is, how to protect women and also recognise their care work within the family and create a model of growth on equal opportunities.

### 3. The gender budget, a tool for equal opportunities

For cultural, social, or simply for conventions reasons we are led to make a clear separation between purely female and other male roles only. In this perspective, very different tasks are assigned to women and men, respectively. In doing so, in reality, a principle of gender equality is taken into account, which the United Nations, the European Union, and the various national governments increasingly seek to take into consideration also in the evaluation of public policies. Therefore, the public budget also responds to this need to affirm gender equality.

The Gender Budget was introduced at the beginning of the 1990s; in more modern times we talk about gender-sensitive budget, gender-responsive budget. The Gender Budget is based on the following assumptions:

- 1) equity, efficiency, and an incisive programme and implementation of public policies;
- 2) allocation and redistribution of public resources in a clear and simple way;
- 3) more information and community participation.

These assumptions mean we must reduce the inequalities between women and men, and that policies must achieve equal opportunities, bearing in mind gender differences. Moreover, public administrators must inform of their economic policy choices, their realisation, and results or, reference is made to the term *accountability*. With the Gender Budget, much importance is given not only to political choices but also to fiscal choices, meaning that political decision-makers must translate their commitment and objectives for gender equality into budget commitments, without neglecting the “care

economy". On the care economy, it is worth reporting the concept of Elson (1997): "production of goods and services for families and the community deriving from the activity of caring for people (...) paid or unpaid (...)". Unpaid work can be supported by public transfers (such as pensions and family allowances) but unpaid care work is excluded from the Public Accounts System. Both women and men work in the care economy, but overall it is based intensely on female work.

The care economy contributes to the well-being of individuals who are the object of care, but also contributes to the production system and the public system through the human resources it "produces", and to maintaining the social framework, i.e., providing the so-called human capital and the so-called social capital to the production system and the public system.

The Gender Budget appears in a particular phase of the budget cycle, namely:

- planning, to identify objectives;
- evaluation of the congruence of the allocation of resources to targets;
- checking on the correct destination of funds;
- assessment of the degree of achievement of the objectives.

Naturally, all the phases are connected.

Therefore, it is a budget in which there is a Gender programming. In France it takes the form of one of the Yellow Books; therefore, it is an annex to the finance law; also in Norway, it appears as a budget annex, while in Sweden it is a gender assessment present in the budget. In any case, it is a matter of unifying different skills: gender inequalities and public finance.

Regarding the literature on gender budgeting, five are the models to which reference is made:

- 1) internal to institutions;
- 2) external to institutions;
- 3) mixed or collaborative;
- 4) participatory or "from below";
- 5) sponsored.

In the first model ("Internal to institutions"), relevant bodies prepare the budget. In particular, the Treasury, which undertakes to carry out an analysis and a gender assessment; however, bearing in mind the indications of the Ministry or Department for Equal Opportunities.

In the second model we are dealing with gender auditing, therefore we operate outside institutions. It concerns independent organisations: associations, NGOs, which with the support of research groups scrupulously analyse the budget documents.

In the third model, independent institutions and organisations jointly carry out the gender analysis of economic-financial planning. In the "participatory or bottom-up" model there is consultation, continuous comparison between the local government and the organisations present in the territory.

The so-called "sponsored" model originally refers to the Commonwealth Secretariat and attempts to integrate gender issues into macroeconomic policies and thus into the budget.

Regarding gender budgeting analysis initiatives, international organisations also have an important role. Among these organisations, we remember the OECD (Organization for Economic Cooperation and Development). There are many developments and results achieved on the analysis of gender budgeting; in particular, public accounting tries to identify not only the economic and financial performances but also the consequences – that is, we try to use public resources to achieve equal goals for gender, focusing on the efficiency that policies allow to reach and neglecting the development and growth that public spending would allow women to obtain. However, in the last five years, the analysis has been further refined, since we do not dwell only on accounting results, but we try to achieve efficiency and effectiveness. The United Nations have introduced the Aristotelian idea that social systems must guarantee "the good of man", that is, promote human development. Here is where Sen (1985; 1993) comes in and speaks of "ability" (capability) and "functioning" (functioning). Functioning means what the person is able to do, while capacity is the combination of the various operations carried out; therefore it is necessary to focus attention on the subject's abilities. This means that the usefulness of a good is not important, since it does not identify the well-being of the individual, but they are the realisation of a set of abilities that allow for the realization of well-being.

Of course, the research lines on gender analysis of public budgets are constantly growing. In the paragraph, we have focused only on some models.

## 4. Conclusion

From the outset, economic theory has neglected the economic aspects of equal opportunities between women and men from their field of analysis. Therefore, women's rights have been forgotten by economists, as they are not relevant to economic results. This view has been called into question today, in which it is evident, especially after the economic crisis, that the economic system is more efficient if gender equality is guaranteed. The economic system cannot sustain itself; we must eliminate all forms of discrimination and guarantee the inclusion of women. This concept, in fact, was already present, in the nineteenth century in the writings of John Stuart Mill who considered the emancipation of women as important also for economic growth; in some ways, he represented a voice out of the chorus. In *The Subjection of Women* he wrote: “(...) Women are in different positions from each other in their service” (Mill, 1869). Naturally today there is greater participation of women in public life; this has contributed to improvement in the quality of life not only of women but of the whole society and economic development. A positive role should be given to the gender budget because it allows guiding political and social choices also in favour of women.

## References

1. Addabbo, T. (2003). *Gender auditing dei bilanci e delle politiche pubbliche*. CAPP, Università di Modena e Reggio Emilia. Retrieved from [https://www.juntadeandalucia.es/export/drupaljda/cehap\\_tindara\\_addabbo.pdf](https://www.juntadeandalucia.es/export/drupaljda/cehap_tindara_addabbo.pdf)
2. Budlender, D. (2001). *Review of gender budget initiatives*. Commonwealth Secretariat. Retrieved from <http://internationalbudget.org/wp-content/uploads/Review-of-Gender-Budget-Initiatives.pdf>
3. Commission of the European Communities. (1996). *Incorporating equal opportunities for women and men into all community policies and activities*. Retrieved from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1996:0067:FIN:EN:PDF>
4. Council of Europe. (1998). *Gender mainstreaming: Conceptual framework, methodology and presentation of good practices*. Final report of activities of the Group of Specialists on Mainstreaming EG-S-MS(98). Retrieved from <https://www.unhcr.org/3c160b06a.pdf>
5. Elson, D. (1997). *Gender-neutral, gender-blind, or gender-sensitive budgets? Changing the conceptual framework to include women's empowerment and the economy of care*. Preparatory Country Mission to Integrate Gender into National Budgetary Policies and Procedures, Commonwealth Secretariat, London.
6. European Commission. (2017a). *Comunicazione Della Commissione Al Parlamento Europeo, Al Consiglio, Al Comitato Economico e Sociale Europeo e Al Comitato Delle Regioni: Istituzione di un Pilastro europeo dei diritti sociali*. Retrieved from <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52017DC0250&from=en>
7. European Commission. (2017b). *Proclamazione interistituzionale sul Pilastro europeo dei diritti sociali*. Retrieved from <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52017DC0251&from=IT>
8. Eurostat. (2017). *Gender employment gap*. Retrieved from <https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tesem060>
9. Mill, J. S. (1869). *La servitù delle donne (The subjection of women)*. <https://content.apa.org/doi/10.1037/12288-000>
10. Mill, J. S. (2006). *Principi di economia politica*. Torino, Italia: UTET.
11. Nussbaum, M. (2002). *Giustizia sociale e dignità umana. Da individui a persone*. Bologna, Italia: Il Mulino.
12. Picchio, A. (2006). *Lo sguardo delle donne sui bilanci pubblici in una prospettiva di sviluppo umano*. In Casa Internazionale delle Donne (Ed.), *Il Bilancio di Genere – percorsi ed esperienze in Italia* (pp. 17-30). Retrieved from [http://www.womenews.net/wp-content/uploads/2014/11/BiG\\_20\\_02\\_06.pdf](http://www.womenews.net/wp-content/uploads/2014/11/BiG_20_02_06.pdf)
13. Risoluzione sulla comunicazione Commissione al Consiglio “Integrare la parità di opportunità tra le donne e gli uomini nel complesso delle politiche e azioni comunitarie” “mainstreaming” (COM(96)0067 C4-0148/96) Retrieved from <https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX:51997IP0251>
14. Sarraf, F. (2003). *Gender-responsive government budgeting* (International Monetary Fund Working Paper WR/03/83). <https://doi.org/10.5089/9781451850567.001>
15. Sen, A. K. (1985). *Commodities and capabilities*. North-Holland, Amsterdam.
16. Sen, A. K. (1993). *Capability and well-being*. In M. Nussbaum, & A. K. Sen (Eds.), *The quality of life*. <https://doi.org/10.1093/0198287976.003.0003>
17. Sharp, R. (2003). *Budgeting for equity: Gender budget initiatives within a framework of performance oriented budgeting*. Retrieved from [https://www.researchgate.net/publication/237129554\\_Budgeting\\_for\\_Equity\\_Gender\\_Budget\\_Initiatives\\_within\\_a\\_Framework\\_of\\_Performance\\_Oriented\\_Budgeting](https://www.researchgate.net/publication/237129554_Budgeting_for_Equity_Gender_Budget_Initiatives_within_a_Framework_of_Performance_Oriented_Budgeting)

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This book is the result of an interdisciplinary reflection that has involved legal experts, economists, sociologists, psychologists, from both Italy and abroad, on a theme that is particularly heart-felt and just as pertinent today within the debate of the academic community: the "Welfare".

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This book, through the transversal competences of the several authors involved, examines and deepens the main profiles that are at the center of the market's social economy and of a new welfare system, highlighting the present political framework characterized by a great, and mostly positive, interventionist mentality, but also by a missing overall view and by divergent reformist lines that obstruct the project of a new welfare system.

The book is divided into two sections, which contain, respectively, legal works and social-economic works. It is articulated in the first part, which gathers the abstracts, and the second part that gathers the papers.

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