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Editor Prof. Michele Graziadei
Deputy Editor Dr Domenico di Micco

Contacts
info@isaidat.org - www.isaidatlawreview.org

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Indice

Global Perspectives and New Frontiers

Focusing on Some Issues of Human Rights

Intangible cultural heritage in Spain

Competition between the various levels of public administration

Josep Ramon FUENTES I GASÓ[*]

"*La locuzione 'difesa dell'ambiente e del patrimonio naturale e culturale', dal punto di vista scientifico è impropria, perché l'uomo, in ogni momento, crea, modifica, distrugge il proprio ambiente, il proprio patrimonio culturale, il proprio patrimonio naturale: la sua opera è continua creazione così come è continua distruzione. La locuzione può avere invece un significato se inserita in un quadro temporale di politica delle istituzioni o del diritto, nel senso che il progresso tecnologico in questo momento storico porta e sta portando ad una distruzione particolarmente rapida di parti notevoli del patrimonio culturale e naturale. In altre parole, mentre in precedenti periodi storici c'è stato un equilibrio tra il fatto creativo e il fatto distruttivo dell'uomo, oppure, con altro ordine di concetti, l'uomo come creatore ha prevalso sull'uomo distruttore, oggi questo equilibrio si è rotto e prevale l'elemento negativo: le forze distruttive sono maggiori delle forze costruttive"*, Massimo Severo GIANNINI, 1971.[1]

The study of the legal regime of the intangible cultural heritage is not an easy task, first of all because it is difficult to define the termand, secondly, by the various public administrations entrusted with its protection. To contribute to the analysis of this topic, the review of the state, regional and local regulations that exist in Spain and regulate intangible cultural heritage is carried out in this study. In this regard, the powers of the General Administration of the State provided for in the Spanish Constitution and Act 10/2015 of 26 May are reviewed, for the safeguarding of intangible cultural heritage, in addition, the treatment of intangible heritage in regional regulations is analyzed for the safeguarding of intangible cultural heritage, in addition, the treatment of intangible heritage in regional regulations is analyzed, and discusses some of the controversies that exist regarding the distribution of competences in this area.

El estudio del régimen jurídico del patrimonio cultural inmaterial no es tarea fácil, en primer lugar, por la dificultar para delimitar dicho término y, en segundo lugar, por las distintas Administraciones públicas a las que se les ha encomendado su protección. Para contribuir al análisis de este tema, se realiza en este trabajo, la revisión de la normativa estatal, autonómica y local que existe en España y que regula el patrimonio cultural inmaterial. En tal sentido, se revisan las competencias de la Administración General del Estado previstas en la Constitución española y la Ley 10/2015, de 26 de mayo, para la salvaguardia del patrimonio cultural inmaterial, adicionalmente, se analiza el tratamiento que recibe el patrimonio inmaterial en la normativa autonómica, y se exponen algunas de las controversias que existen respecto a la distribución de competencias en esta materia.

[*] Professor of Administrative Law at Rovira i Virgili University

[1] M.S. GIANNINI, *Difesa dell'ambiente e del patrimonio naturale e culturale* (1971), in *Scritti,* VI, Milano, 2005, p. 249.

1. PREAMBLE. THE CONCEPT OF INTANGIBLE CULTURAL HERITAGE.[2]

It is not an easy task to establish a notion of the term "intangible cultural heritage", is that, despite having a Law of Historical Heritage for more than 35 years, the term has undergone transformations not only from the general meaning of "cultural heritage", but also from the point of view of the goods that comprise it and the management models applied to them. Changes that derive largely from the perception that societies have had of their assets and the growing interest they have shown in "appropriating" this culturally[3].

As García Del Hoyo and Jiménez De Madariaga affirm, the term cultural heritage has suffered transformations along history, evolving since a perspective centered in material and/or natural elements, passing later for the addition of the concept of traditional and popular culture, to finally, add the idea of intangibility as an independent category which distinguishes among material and intangible[4].We could say that there are so many notions of cultural heritage as cultures exist on the planet, which denotes the impossibility of forming a univocal concept[5].

In an attempt to delimit, Querol Fernández gives us the concept of "cultural heritage" making reference to the "all the movable, immovable and intangible property that we have inherited from the past and that we have decided that it is worth protecting as our social and historical identity[6]". Although, it is an evolutionary process, according to García Canclini, "the advantage of not representing it as a set of stable and neutral goods, with values and senses fixed once and for all, but as a social process that, like other capital, accumulates, is converted, generates returns and is unevenly appropriate by various sectors[7]".

Thus, the cultural heritage is not exhausted in the material goods or vestiges of the past, but also includes what is known as living or intangible heritage: knowledge found in the memory of people, who do not remain immutable to time, but are alive[8] and are a determining element of a community, so that the "capacity of evocation" of goods would act as testimony of historical processes which have ended up determining a concrete collective identity – which according to Agudo Torrico[9]– must be legally protected[10].

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[2] *Vid. in totum*, J.R. FUENTES I GASÓ, *Régimen competencial del patrimonio cultural inmaterial*, in M.T. CARBALLEIRA RIVERA, M. TAÍN GUZMÁN, J.R. FUENTES I GASÓ (eds.), Patrimonio Cultural Inmaterial. De los Castells al Camino de Santiago, Valencia, 2021, pp. 97-114.

[3] A. DELGADO MÉNDEZ, S. LÁZARO ORTIZ, *El Patrimonio Cultural Inmaterial en España: de lo pintoresco a lo representativo*, in C. JIMÉNEZ DE MADARIAGA, Patrimonio cultural inmaterial de la humanidad, Huelva, 2022, p. 126.

[4] J.J. GARCÍA DEL HOYO, C. JIMÉNEZ DE MADARIAGA, *El Valor del Patrimonio Cultural Inmaterial. Métodos de estimación*, in C. JIMÉNEZ DE MADARIAGA (ed.), Patrimonio cultural inmaterial de la humanidad, Huelva, 2022, p. 153.

[5] G. DE LA HABA DE LOS RÍOS, *Protección internacional del patrimonio cultural. Especial referencia al patrimonio cultural subacuático,* doctoral thesis, Córdoba, 2022, p. 21.

[6] M. QUEROL FERNÁNDEZ, *Manual de Gestión del Patrimonio Cultural*, Madrid, 2010, p. 11.

[7] N. GARCÍA CANCLINI, *Las culturas populares en el capitalismo*, México, 1982, p. 82.

[8] I. MERINO CALLE, *Los comunes y el patrimonio cultural inmaterial en Europa,* Castilla-La Mancha, 2022, p. 184.

[9] J. AGUDO TORRICO, *Patrimonio y derechos colectivos*, in E. HERNÁNDEZ LEÓN, V. QUINTERO MORÓN (eds.), Antropología y Patrimonio: Investigación, documentación e intervención, Sevilla, 2003, p. 13.

[10] *Vid. in totum*, F. LÓPEZ RAMÓN, *Reflexiones sobre la indeterminación y amplitud del patrimonio cultural*, in Revista Aragonesa de Administración Pública, 15, 1999, pp. 193-217.

The "cultural good" or "bene culturale", according to the Italian denomination[11], from its material aspect as intangible– in words of Alonso Ponga – is "the fruit of social convention and above all of the capacity of one's own good to be a receiver and transmitter of many meanings that each generation deposits on it enriching it with the passage of time"[12]. Archaeological sites, as well as natural sites, gardens and parks, of artistic, historical or anthropological value. In addition, Spanish historical heritage includes assets that integrate intangible cultural heritage, in accordance with its special legislation.

For Gifreu I Font, "the diversification of the notion of heritage, both in its material and intangible concretions, allows to accommodate those manifestations and intangible expressions of the culture lived and recreated by society, communities and groups[13]".

Thus, "cultural heritage" includes "material or tangible heritage"– buildings, monuments, artifacts, clothing, artwork, books, machines, historical cities, archaeological sites – ; the "immaterial o intangible heritage" – representations, knowledge, skills, objects and cultural spaces; including oral language and traditions, performing arts, social practices and traditional crafts– and the "natural heritage" – landscapes, flora and fauna– . Could be included within the concept of cultural heritage, the "digital heritage" – created in digital form (digital art or animation) or digitized to preserve them (including texts, images, video, records)created in digital form (digital art or animation) or digitized to preserve them (including texts, images, video, records)[14] – .It is a concept that includes a significant variety of diverse, complex goods and manifestations and closely associated with the cultural identity of the community that produces them[15].

And is that the concept of cultural heritage – according to Gabardón De La Banda– has not remained static; it has evolved by incorporating new forms or cultural manifestations; being perhaps the one that presents the most interest in the analysis by the note of intangibility, the intangible heritage[16].

This is represented by meanings or heritage values that include the identity, culture, traditions, beliefs, memory and relationship with the environment of a people, ethnicity or human group. It is – in words of Marcos Arévalo – a heritage that reflects the living culture and that reaches the customs, traditions, social habits, practices on nature, knowledge, traditional medicine, music, dance, theatre, as well as all manifestations that reflect the way of life and identity of a people, ethnic or social group[17].

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[11] V. CERULLI IRELLI, Beni culturali e diritti collettivi e proprietà pubblica, in AA.VV. Scritti in onore di Massimo Severo Giannini, vol. 1, Milano, 1988, pp. 137-176. L. CASINI, *Todo es peregrino y raro...': Massimo Severo Giannini e i beni culturali*, in *Rivista Trimestrale Di Diritto Pubblico*, LXV,. 3, 2015, pp. 987-1005.

[12] J. ALONSO PONGA, *La construcción mental del Patrimonio Inmaterial*, in Patrimonio Cultural de España, 0 2009, p. 45.

[13] J. GIFREU I FONT, *Régimen jurídico de la protección y fomento del Patrimonio Cultural en Cataluña: estado de la cuestión*, in Patrimonio Cultural y derecho, 22, 2018, p. 328

[14] M. CARBALLEIRA RIVER, *El paisaje como bien cultural*, in J. FERNÁNDEZ TORRES, J. PRIETO DE PEDRO, J.M TRAYTER JIMÉNEZ (eds.) El Camino de Santiago y otros itinerarios: cultura, historia, patrimonio, urbanismo, turismo, ocio y medio ambient: Liber amicorum Enrique Gómez-Reino y Carnota, Tirant lo Blanch, Valencia, 2014, pp. 29-49.

[15] A. MUÑOZ VILLARREAL, *El derecho fundamental a la cultura en el marco de la globalización: especial referencia al patrimonio cultural* (en línea), 5, 2012, available at: https://www.munoz-arribas.com/wp-content/uploads/2012/03/El-derecho-fundamental-a-la-cultura-en-el-marco-de-la-globalizaci%C3%B3n.pdf

[16] J. GABARDÓN DE LA BANDA, *La tutela del patrimonio cultural inmaterial en España: la ley para la salvaguardia del patrimonio cultural inmaterial*", in Anuario jurídico y económico escurialense, 49, 2016, pp. 275-292.

[17] J. MARCOS ARÉVALO, *La tradición, el patrimonio y la identidad*, in Revista de Estudios Extremeños, 3, 2004, pp. 925-956.

Pinna[18] distinguishes three categories within the complex world of intangible heritage: 1. expressions embodied in a physical form of culture or traditional ways of life, highlighting religious rites, traditional economies, lifestyles, folklore, etc., 2. individual or collective expressions that do not have a physical form (language, memory, oral traditions, songs and unwritten traditional music), and; 3. the symbolic and metaphorical meanings of the objects that constitute it, hence the latter have two dimensions: their physical form and their meaning.

With regard to intangible cultural heritage, it is imperative to refer to the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage – hereinafter referred to as UNESCO Convention – , adopted in Paris on 17 October 2003, which is considered an innovative legal instrument, which aims to respond to the risks that threaten intangible heritage[19]. The UNESCO Convention in its article 2 establishes:

"(…) The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development."

According to García Del Hoyo and Jiménez De Madariaga one of the highlights of this definition is who is entitled to recognize what is intangible heritage[20]. Article 2 of the UNESCO Convention expressly states that they are "communities, groups and in some cases individuals" who determine what are the manifestations that should be considered as intangible cultural heritage, and not only or necessarily the experts and specialist in heritage who determine what are the manifestations that should be considered as intangible cultural heritage, and not only or necessarily the experts and specialist in heritage. "To be an intangible heritage for communities and groups, as defined in the Convention, is the first criterion to be met in order to inscribe an element in the lists of intangible heritage"[21]. Thus, what the Convention values or highlights is that the event in question is recognized by communities, groups and individuals as part of their intangible heritage[22].

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[18] G. PINNA, *Museums and Intangible Heritage*, in ICOM NEWS, 56, 4, 2004, p. 3, available at: http://icom.museum/fileadmin/user_uplo%20ad/pdf/ICOM_News/2003-%204/ENG/p3_2003-4.pdf

[19] M. AGÚNDEZ LERÍA, *La convención para la Salvaguardia de Patrimonio Cultural Inmaterial de la UNESCO y el Registro de Buenas Prácticas*, in R. MARTÍNEZ GARCÍA, M. TRISTÁN RICHARTE, I. PICÓ LEDESMA, B. GUILLÓ SOLER, J. ANIORTE PÉREZ (eds.), Las Buenas Prácticas en la gestión del patrimonio: Actas del Encuentro de Patrimonio Mundial Elche 2019*,* Alicante, 2021, p. 17.

[20] J.J. GARCÍA DEL HOYO, C. JIMÉNEZ DE MADARIAGA, *El Valor del Patrimonio Cultural Inmaterial*…, *op. cit.,* p. 161. In the same sense, *vid.* C. JIMÉNEZ DE MADARIAGA, *Patrimonio Cultural Inmaterial: la realidad imaginada*, in C. JIMÉNEZ DE MADARIAGA (ed.), Patrimonio cultural inmaterial de la humanidad, Huelva, 2022, pp. 53-80.

[21] Ibídem.

[22] We emphasize that this recognition by the communities of their intangible cultural heritage has been the subject of criticism and questioning which, in some cases, have required pronouncements by the Supreme Court, such as falconry and bullfighting. On this point, *vid.* J. BARCELONA LLOP, *Conflictos jurídicos en torno alpatrimonio cultural inmaterial:el caso de la cetrería y el de latauromaquia*, in M.T. CARBALLEIRA

A second element highlighted by the authors is that intangible cultural heritage is "safeguarded", which includes measures to ensure its viability, including: identification, documentation, research, preservation, protection, promotion, enhancement, transmission and revitalization of this heritage in its various aspects[23].

However, reviewing the legal system of the Spanish State, we find the Act 16/1985, of 25 June, of the Spanish Historical Heritage that in its article 46 mentions a set of elements that are part of the historical heritage:"the knowledge and activities that are or have been relevant expression of the traditional culture of the Spanish people in its material, social or spiritual aspects", referring thus to the intangible cultural wealth that has allowed the construction and consolidation of the culture of Spain and its different Autonomous Communities, which allows identifying them and even differentiating them.

Article 2 of Act 10/2015, of 26 May, for the safeguarding of the Intangible Cultural Heritage, contains a list of all those manifestations that must be considered intangible cultural heritage; which are "uses, representations, expressions, knowledge and techniques that communities, groups and, in some cases, individuals, recognize as an integral part of their cultural heritage", specifically:

1. Traditions and oral expressions, including linguistic modalities and particularities, namely; languages and their dialects, jargon, including code-subject sound productions, such as: bell ringing, whistles, among others.

2. Traditional toponymy as an instrument for the realization of the geographical designation of territories.

3. Performing arts, such as theatrical performances, choreographies, dances, dances, games and traditional sports, among others.

4. Social uses, rituals and festive acts. For Castro López and Ávila Rodríguez, this category groups courtship rites, courtship, marriage, wedding, conception, pregnancy, childbirth, birth, death and forms of mourning[24].

5. Knowledge and customs related with nature and the universe.

6. Traditional craft techniques.

7. Gastronomy, culinary preparations and food. These include ways of preserving, seasoning and processing food, for example by seasonal criteria or harvesting seasons.

8. Specific uses of natural landscapes. This category includes knowledge of land use and techniques of agriculture, livestock, among others.

9. Forms of collective socialization and organizations;

10. Sound manifestations, music and traditional dance. Musical compositions, traditional musical groups, and choirs should be considered included in this category.

Thus, the intangible cultural heritage is configured as the vivid wealth of peoples and nations; but because of its inviolability risks being lost in time, in the face of new technologies, the effects of economic globalization or the emergence of new socio-cultural standards and patterns; Hence it is necessary to protect, regulate and protect it.

We share the statements of Delgado Méndez and Lázaro Ortiz, that the recognition of the immaterial remains an open process, beyond the existence of a normative delimitation regarding the patrimony[25]. It is important to continue to recognize and protect intangible values, and not leave them to public administrations alone in the area of her-

RIVERA, M. TAÍN GUZMÁN, J.R. FUENTES I GASÓ (eds.), Patrimonio Cultural Inmaterial. De los Castells al Camino de Santiago, Valencia, 2021, pp.141-168.

[23] C. JIMÉNEZ DE MADARIAGA, *Patrimonio Cultural Inmaterial: la realidad imaginada*, pp. 53-80.

[24] M. CASTRO LÓPEZ, C. ÁVILA RODRÍGUEZ, *La salvaguardia del Patrimonio Cultural Inmaterial: Una aproximación a la reciente Ley 10/2015*, in RIIPAC: Revista sobre Patrimonio Cultural, 5-6, 2014-2015, pp. 89-124.

itage the task of determining the goods or manifestations that constitute the cultural heritage of its territory.

2. THE CHARACTERISTICS OF INTANGIBLE CULTURAL HERITAGE

One of the most obvious characteristics of the intangible cultural heritage is its intangibility, considered as a fundamental requirement for its existence. While some cultural manifestations may be accompanied by tangible material expressions– an example of this would be in the case of a typical dance or dance, its dress– ; such elements alone do not make up intangible heritage; for it is such dance or dance considered as a whole, which represents the intangible heritage, although it is necessary to preserve the tangible elements in order to protect the cultural manifestation to be protected.

Another element that identifies the intangible cultural heritage is its internalization by individuals or the group to which the cultural manifestation belongs. In the words of Castro López and Ávila Rodríguez, it is a marriage inherent to the community to which it belongs that is fed by the way of life of that group[26].

This gives intangible heritage the quality of living and dynamic. Being inherent in the human group to which it belongs, it is transmitted from generation to generation being able to mold and adapt to the characteristics and knowledge of future generations without losing its essence being able to mold and adapt to the characteristics and knowledge of future generations without losing its essence. This transmission is made by the knowers and bearers of the knowledge and skills of the cultural manifestation to recipients who have previously acquired the knowledge and knowledge in childhood– either because the transmission is from father to son or because the new recipient of the information acquired the knowledge in childhood– .

A final characteristic that can be attributed to the intangible cultural heritage is that of the circumscription of the cultural manifestation to a given time space that allows giving meaning and importance to the same. For example, some religious manifestations typical of the major week or holy week, are understood and analyzed from the space time in which they are developed.

3. THE LEGAL REGIME FOR INTANGIBLE CULTURAL HERITAGE

The legislation on intangible cultural heritage is relatively recent in Spain, despite being able to find supranational, national, regional and even local norms, in contrast to the legislation regulating the protection of the heritage, whose evolution can be seen how the law has not only been the recipient of the concern that the different epochs and societies have shown with respect to the goods that make up what in each moment has constituted its own notion of heritage, has also been a driving force for reflection on the content and scope of what we should understand, among others, as intangible cultural

[25] A. DELGADO MÉNDEZ, S. LÁZARO ORTIZ, *El Patrimonio Cultural Inmaterial en España…, op. cit,* p. 128.

[26] M. CASTRO LÓPEZ, C. ÁVILA RODRÍGUEZ, *La salvaguardia del Patrimonio Cultural Inmaterial: Una aproximación a la reciente Ley 10/2015*, p. 94.

heritage. Next, the national and regional regulations will be analyzed with a brief reference to local regulation.

3.1. *THE SPANISH CONSTITUTION*

The Spanish Constitution does not contain an express reference to the intangible cultural heritage; however, it contains a foundation that will allow the development of subsequent legislation both at national and regional level.

Such is the case of citizens' right of access to culture, provided for in article 44 of the Constitution, which, in conjunction with article 46 on the obligation of the public authorities to ensure the preservation of the historical, cultural and artistic heritage; as well as the promotion of its enrichment, give way to the existence of constitutional budgets that allow the protection of intangible cultural heritage in Spain[27].

In addition, Article 149.1., 28º attributes to the National Power the exclusive competence for the defense of the cultural, artistic and monumental heritage against the export and the plundering; as well as state-owned museums, libraries and archives "without prejudice to their management by the Autonomous Communities". Whereas, Article 149, 2 establishes that the State, without prejudice to the powers that the Autonomous Communities may assume, will consider the service of culture as an essential duty and attribution and facilitate cultural communication between the Autonomous Communities.

Article 148.1., 15º, 16º and 17º grants to the Autonomous Communities competences on museums, libraries and conservatories of music of interest to the Autonomous Community; the monumental heritage of interest to the Autonomous Community; the promotion of culture, research and, where appropriate, the teaching of the language of the Autonomous Community.

It can therefore be observed that in the area of protection of cultural heritage– in all its manifestations, including immaterial cultural heritage– competence is concurrent between the State and the Autonomous Communities, in pursuit of the preservation and encouragement of cultural values.

For Sanz Rubiales[28] the concurrence of these competences' rests on the general duty of collaboration that State and Autonomous Communities have on the basis that culture is the subject of responsibility of both territorial entities, there is no provision in the Constitution to affirm the existence of a "supra-autonomous projection" of the State regarding the protection and management of cultural heritage.

The exercise of those concurrent powers would be as follows:

In relation to museums, libraries and archives, the State shall have the exclusive competence – legislation and management – over those with State ownership, without prejudice to the management of some of these institutions being agreed with the Autonomous Communities where they are located, in which case the regulatory competence will remain exclusively the responsibility of the State[29]. Whereas the Autonomous Communities have full powers – legislation and management– of those museums, libraries

[27] According to M. CASTRO LÓPEZ, C, ÁVILA RODRÍGUEZ, the inclusion of the term "culture" in article 46 of the Constitution gives rise to the inclusion of intangible cultural heritage in the concept. *Vid.* M. CASTRO LÓPEZ, C. ÁVILA RODRÍGUEZ, *La salvaguardia del Patrimonio Cultural Inmaterial: Una aproximación a la reciente Ley 10/2015*, p. 98.

[28] I. SANZ RUBIALES, *Camino de Santiago y reparto competencial*, in J. FUENTES I GASÓ, M. CARBALLEIRA RIVERA, D. GONZÁLEZ LOPO (eds.), Camino de Santiago y Patrimonio Cultural. Una visión jurídica integradora, Barcelona, 2019, pp. 21-44.

and archives that are not state - owned, that is; those of regional, local and private ownership.

With regard to historical or cultural heritage, the State shall have basic regulatory competence limited to the defense against the export and plundering of the goods forming part thereof, regardless of ownership, whether public, – state, regional or local– [30]. For their part, the Autonomous Communities are responsible for legislative development in this area.

On this last point, Sanz Rubiales considers that this is not a classic distribution of powers on basic laws and development laws, but that this distribution rests on the necessary idea of cooperation. In this sense, the state regulations on cultural heritage will not be basic, despite establishing conditions for the exercise of the competences of the Autonomous Communities, neither the Autonomous Laws will be laws of development of the state laws although they share, use terms and concepts of the latter. On the contrary, this will be due to the need to maintain legislative homogeneity[31].

3.2. *THE SPANISH HERITAGE ACT*

The first state law regulating historical heritage is Act 16/1985 of 25 June on Spanish Historical Heritage, which in Title IV mentions ethnographic heritage as a special heritage that requires legal protection.

Article 47 of this Act classifies ethnographic heritage into three categories: 1. Ethnographic movable property; 2. Ethnographic movable property; and; 3. A category which, according to the literature, has been considered "ethnographic intangible property"[32]knowledge or activities derived from traditional models or techniques used by a given community.

The latter category of goods shall, – by virtue of Article 47.3 – , enjoy protection by the public administrations, which shall be responsible for carrying out the study and scientific documentation thereof in the case of knowledge or activities likely to disappear.

Regarding this Law, authors such as Castro López and Ávila Rodríguez, emphasize that, although the regulation on ethnographic cultural heritage may seem insufficient; it must be considered the historical context in which the same is approved – year 1985 was adopted, in which no real debate had taken place on the need to safeguard the cultural heritage– [33].Whereas, Vaquer Caballería[34], highlights the novel techniques of pro-

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[29] On this subject, among others, the judgments of the Constitutional Court No.103/1988, 31/2010 and 38/2013.

[30] On this subject, the decision of the Constitutional Court No.17/1991

[31] In this order of ideas I. GIFREU I quoted in J. FUENTES I GASÓ, *La protección jurídica del patrimonio cultural en la era smart city,* in J. FUENTES I GASÓ, M. CARBALLEIRA RIVERA, D. GONZÁLEZ LOPO (eds.), Camino de Santiago y Patrimonio Cultural. Una visión jurídica integradora, Barcelona, 2019, pp. 195-242, speaks of the difficulty of determining the fit of state and autonomous competences in a matter that by its nature is quite complex. This complexity derives not only from the contradictions between the state and autonomous system, but also from the interference of the urban planning regime of each Autonomous Community that regulates the protection of real estate heritage of cultural interest.

[32] *Vid.* Among others: M. CASTRO LÓPEZ, C. ÁVILA RODRÍGUEZ, *La salvaguardia del Patrimonio Cultural Inmaterial: Una aproximación a la reciente Ley 10/2015*, p. 93. J. GABARDÓN DE LA BANDA, *La tutela del patrimonio cultural inmaterial en España*, p. 282.

[33] M. CASTRO LÓPEZ, C. ÁVILA RODRÍGUEZ, *La salvaguardia del Patrimonio Cultural Inmaterial: Una aproximación a la reciente Ley 10/2015*, p. 94.

[34] M. VAQUER CABALLERÍA, *La protección jurídica del patrimonio cultural inmaterial*, in Museos.es: Revista de la Subdirección General de Museos Estatales, 1, 2005, pp. 88-99.

tection specific to the ethnographic intangible heritage, which are differentiated from the rest of the cultural property and which are characterized by the documentation or collection in material media that would turn that activity into an asset subject to protection.

3.3. *THE ACT FOR THE SAFEGUARDING OF INTANGIBLE CULTURAL HERITAGE*

Act 10/2015, of May 26, for the Safeguarding of Intangible Cultural Heritage originates from the obligation of the Spanish State to take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory, following the signature of the UNESCO Convention of 2003.

Its adoption constitutes a step forward in the regulation of intangible heritage, however, it has been a very controversial law. According to De Guerrero Manso[35], are the aspects that have generated criticism and controversy about the application of the Law. The first, referring to necessity and convenience – or not – , to pass legislation independent of Act 16/1985 of 25 June on Spanish Historical Heritage; the second, concerning the reasoning of the norm and, the third, the concern that the State has transferred its sphere of competence, regulating areas reserved to the Autonomous Communities.

This has led to Act 10/2015 being catalogued by Castro López and Ávila Rodríguez[36]as unnecessary and by Gabardón De La Banda[37]as a means of reviving the dispute over the competent administration, by promoting the intervention of the General Administration of the State in matters that fall to the Autonomous Communities[38], currently regulates at the state level the protection of intangible cultural heritage and establishes a basic and general concept of intangible heritage, to ensure the protection of culture.

This being the case, perhaps the most controversial part of Act 10/2015 is its Title III, dedicated to determining the competences in this area. In this sense, article 11 states that it is up to the General Administration of the State to guarantee the conservation of the Spanish intangible heritage in this sense, article 11 states that it is up to the General Administration of the State to guarantee the conservation of the Spanish intangible heritage, promote their enrichment and promote and protect the access of all citizens to their different manifestations. To this end, the necessary measures shall be taken to facilitate their cooperation with the other public authorities and with each other, as well as to collect and provide any information required for the purposes of this Act. To this end, the Commission– through the Ministry of Education, Culture and Sport, in collaboration with the Autonomous Communities – , the following functions:

1. The proposal, preparation, monitoring and revision of the National Plan for the Safeguarding of Intangible Cultural Heritage.
2. The management of the Intangible Cultural Heritage General Inventory.

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[35] C. DE GUERRERO MANSO, *La escasa y problemática regulación del patrimonio inmaterial en España*, in F. LÓPEZ RAMÓN, (ed.), El patrimonio cultural en Europa y Latinoamérica, Madrid, 2017, pp. 53- 85.

[36] The authors state that, in order to comply with the obligations imposed by the UNESCO Convention, it was not necessary to adopt a new legal text, but that this could be resolved by amending Act 16/1985 of 25 June on the Spanish Historical Heritage. *Vid.* M. CASTRO LÓPEZ, C. ÁVILA RODRÍGUEZ, *La salvaguardia del Patrimonio Cultural Inmaterial: Una aproximación a la reciente Ley 10/2015*, p. 111

[37] J. GABARDÓN DE LA BANDA, *La tutela del patrimonio cultural inmaterial en España*, p. 286.

[38] S. GONZÁLEZ CAMBEIRO, *La legislación sobre patrimonio cultural inmaterial en la Comunidad Foral de Navarra*, in Cuadernos de Etnología y Etnografía de Navarra, 91, 2017, pp. 69-92.

3 Safeguarding the intangible cultural heritage through the Declaration of Representative Manifestation of the Intangible Cultural Heritage, in the terms provided for in that law.

This last competence – the possibility for the General State Administration to make the declaration of Representative Manifestation of the Intangible Cultural Heritage, provided for in article 12 of the Law– empowers the State to declare ex officio the protection and take safeguard measures, under certain conditions, in respect of intangible cultural heritage property, which has been interpreted as "a clear encroachment on the autonomous competences, and contrary to the interpretation that the Constitutional Court has established on the scope of the competences cultural heritage "since it should be the responsibility of the Autonomous Communities[39].

4. INTANGIBLE CULTURAL HERITAGE IN REGIONAL LEGISLATION

The autonomous regulations on historical or cultural heritage began to be promulgated at the end of 1990 and have been incorporating, with different formulae and names, intangible cultural property.

Although there is no uniformity in the name, since some will refer to the "cultural heritage" as opposed to the phrase "historical heritage" that appears in Act 16/1985, it is no less true that, the autonomous legislation enacted between 1985 and 2007 has a great wealth in terms of definition and protection of cultural property, and that as stated Marzal Raga, the sensitivity of the autonomous legislation for the recognition of the intangible cultural heritage can be observed from the first laws of historical or cultural heritage, in which a wide range of declarations of cultural interest can be observed for the most significant in which a wide range of declarations of cultural interest can be observed for the most significant, as well as other recognitions for which without reaching the singularity required by the declaration of cultural interest and under different denominations (well inventoried, well catalogued, or of local relevance, etc.) also allow a singular protection of these manifestations[40]

Thus, highlight the Law of the Valencian Community – which, in its article 26 – , considers intangible assets activities, knowledge, uses and techniques representatives of traditional Valencian culture. In Cantabria[41]are included within the ethnographic her-

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[39] Other powers assigned to the General State Administration are:

1. Cooperate with the cultural action of the different public administrations.

2. To submit to UNESCO proposals for the inclusion of intangible cultural property on the Representative List of the Intangible Cultural Heritage of Humanity, in the List of Assets requiring Urgent Safeguard Measures.

3. To make before the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage of UNESCO requests for international assistance for the safeguarding of this heritage present in the national territory.

4. To promote, in conjunction with other States, the enhancement of shared intangible cultural heritage by encouraging the promotion of candidatures before competent international institutions to promote, in conjunction with other States, the enhancement of shared intangible cultural heritage by encouraging the promotion of candidatures before competent international institutions.

[40] R. MARZAL RAGA, *Concepto jurídico y tipología del patrimonio cultural inmaterial*, in M.T. CARBALLEIRA RIVERA, M. TAÍN GUZMÁN, J. R. FUENTES I GASÓ (eds.), Patrimonio Cultural Inmaterial. De los Castells al Camino de Santiago, Valencia, 2021, pp. 45-74.

[41] Act 11/1998, of October 13, of Cultural Heritage of Cantabria.

itage to the intangible elements; while in Aragon[42], highlights the need for research, scientific documentation and comprehensive collection of such intangible assets through material forms that ensure their transmission to future generations.

It should be noted that in 1993 Act 9/1993 of 30 September on the Catalan Cultural Heritage was published, which contains a definition of intangible cultural heritage since a specific law on the promotion and protection of popular and traditional culture and cultural associations had previously been adopted since a specific law on the promotion and protection of popular and traditional culture and cultural associations had previously been adopted.

In the opinion of Gabardón De La Banda, this group of laws mentioned contain the most important contributions in the definition and protection of cultural goods protection of cultural property. "The experience acquired in more than a decade of application of the Spanish historical heritage law is undoubtedly appreciated in most cases[43]".

After the adoption of the UNESCO Convention, another second group of laws can be found, among which the one enacted in Asturias[44], which includes intangible heritage in the field of ethnographic heritage; that of Castile and León[45]which does not incorporate intangible assets within the Cultural Assets; that of La Rioja[46]which considers activities, creations, traditional knowledge and practices, folklore events, popular commemorations as intangible assets traditional toponymy of rustic and urban terms and the linguistic peculiarities of Castilian spoken in that Autonomous Community; that of Navarre[47], and that of Murcia[48].

This group of laws for Pérez Galán, regulate the intangible heritage inspired by a folk notion of ethnographic or ethnological heritage[49].

However, since the adoption of Act 10/2015, some Autonomous Communities have amended or enacted complementary rules to existing legislation on intangible cultural heritage.

The first of these was the Community of Galicia which classifies intangible goods into two groups: 1. The uses, representations, expressions, knowledge and techniques, as well as the instruments, objects, artifacts and cultural spaces that are inherent to them, that communities, groups and in some cases individuals of the Community of Galicia; 2. The legacy of unique historical figures in shaping Galicia's cultural identity, regardless of intellectual property rights.

The second, the Autonomous Community of the Balearic Islands[50]for whom the intangible cultural heritage is represented by: uses, representations, expressions, knowledge, techniques, instruments, objects, artifacts and any other material supportlinked to intangible assets, as well as the spaces, places, cultural and natural itineraries that are in-

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[42] Act 3/1999, of March10, on the Aragonese Cultural Heritage.

[43] J. GABARDÓN DE LA BANDA. *La tutela del patrimonio cultural inmaterial en España*, p. 283.

[44] Act 1/2001 of March 6 on Cultural Heritage.

[45] Act 12/2002 of 11 July on the Cultural Heritage of Castilla y León

[46] Act 7/2004 of 18 October on the Cultural, Historical and Artistic Heritage of La Rioja.

[47] Foral Act 14/2005, of November 22, 2005, on the Cultural Heritage of Navarre.

[48] Act 4/2007, of March 16, 2007, on Cultural Heritage of the Autonomous Community of the Region of Murcia.

[49] B. PÉREZ GALÁN, *Los usos de la cultura en el discurso legislativo sobre patrimonio cultural en España. Una lectura antropológica sobre las figuras legales de protección*, in Revista de Antropología Experimental, 11, 2011, pp. 11-30.

[50] Act 18/2019, of 8 April, on the safeguarding of the intangible cultural heritage of the Balearic Islands.

herent to them, and that communities, groups, people recognize as an integral part of their cultural heritage.

Thirdly, we can find the Act 6/2019, of 9 May, of Basque Cultural Heritage that in its article 2, 3. c) considers intangible cultural heritage "expressions or knowledge, together with the instruments, objects and cultural spaces that are inherent to them, that communities, groups and, where appropriate, individuals recognize as an integral part of their cultural heritage", stressing that this heritage is passed on from generation to generation and is constantly recreated by communities and groups according to their environment, their interaction with nature and their history.

Finally, we will refer to Act 11/2019, of 25 April, Cultural Heritage of the Canary Islands[51]Article 3 defines intangible cultural heritage as "the uses, representations, expressions, knowledge and techniques of the aboriginal peoples of the Canary Islands, of popular and traditional culture that communities, groups and, in some cases, individuals recognize as an integral part of the cultural heritage of the Canary Islands" and in the text of which it develops the different levels of protection; the techniques and the procedure for the declaration of an asset of cultural interest, among other aspects[52].

Regarding this Law, González Sanfiel comments that in this Law there is a strengthening of the insularization to limit the municipal, taking into account that the competences already recognized to the Autonomous Community – instruct the procedures for declaring assets of cultural interest, prior authorizations, mandatory reports, precautionary measures, sanctions, among others – , new competences are incorporated that affect the sphere of the municipality[53]. These powers include:

1 It is granted a similar regime to cultural goods and their determinations that prevails over municipal catalogues, to which are imposed hierarchically the catalogues of the Autonomous Community, turning this instrument into a piece of municipal indirect control.

2 Municipalities are required to ensure that their municipal heritage councils are represented by the corresponding island council– article20.1 – .

3 The municipalities are obliged to keep a public register on each island in which all public goods and spaces contained in the municipal catalogues will be registered– article 55.1 – , which places an administrative burden on local management when it is taken into account that the law itself creates a cultural heritage information system that centralizes all information– article 13 – .

4 The Law creates new violations, which may fall on the local management, as it is, not to inform the island Cabildos of the granting of licenses when in the case of historical sets have a plan in force – article138.1. ñ – .

Thus, it seems that this law ignores or distrusts the role of municipalities as protective bodies of cultural heritage. Hence, while it can be well observed that the autonomous legislation has been the one that has allowed the development and evolution of the notions of ethnographic or intangible cultural heritage; it is no less true that part of this new legislation has also generated suspicion about the regime of distribution of competences– as in the case of the Canary Islands– only this time it is from the Autonomous Community to the municipalities.

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[51] Act 11/2019, of 25 April, of Cultural Heritage of Canarias.

[52] A. GONZÁLEZ SANFIEL, *La 'nueva' ley de Patrimonio cultural de Canarias: desconfianza hacia los Municipios*, in Patrimonio Cultural y Derecho, 23, 2019, pp. 137-160.

[53] A. GONZÁLEZ SANFIEL, *La 'nueva' ley de Patrimonio cultural de Canarias: desconfianza hacia los Municipios*, p. 158.

5. CULTURAL HERITAGE IN LOCAL LEGISLATION

At the local level it can be observed that Act 7/1985, of 2 April, regulating the bases of the local regime guarantees that the Spanish municipalities will exercise competence in cultural promotion and the protection and management of historical heritage.

In this sense, García Rubio highlights the importance of the municipality in the protection of cultural heritage by stating that:

"*when addressing the role of municipalities in the conservation of cultural heritage, we must start with the aforementioned constitutional premises, given the presiding character enjoyed by the Fundamental Law within the whole legal and institutional order. Theseconstitutionals are binding for the administrative activity related to the conservation of the historical heritage and, therefore, for any public authority, including councils*[54]".

However, the amendment of article 25 of Act 7/1985, made by Law 27/2013 of 27 December, rationalization and sustainability of the Local Administration, has not left immune the historical cultural area. Prior to the reform, Article 25.2 in letter e) of Act 7/1985 conferred its own powers in matters of "historical-artistic heritage" and in letter m) in matters of "cultural and sports activities or facilities".

With the reform, the reference to "historical-artistic heritage" is limited to the "protection and management of historical heritage", now included in the letter a), and the content of the letter m) has become "promotion of culture and cultural facilities".

In addition, in letter a) the explicit reference to "conservation and rehabilitation of the building" is now added, a "new" competence in art. 25.2 in Act 7/1985, although it was already exercised in compliance with urban legislation and Act 8/2013 of 26 June on urban rehabilitation, regeneration and renewal.

It may be asked whether the deletion of the term "artistic" from Law 8/2013 implies a decrease in the powers of local authorities for the management of intangible cultural heritage, on the understanding that this includes "uses, representations, expressions, knowledge and techniques that communities, groups and in some cases individuals", in accordance with Article 2 of Law 10/2015, of 26 May, for the safeguarding of the Intangible Cultural Heritage, or if on the contrary it will be appropriate to carry out a more exhaustive analysis of Law 8/2013 in accordance with the corresponding regional legislation to determine whether there is a real detriment to the competences of local authorities, – as is the case in the case of the Canary Islands, as explained in the previous paragraph –.

6. EPILOGUE

It has not been an easy task to define competences in the field of cultural heritage. There are doctrinal disputes regarding the competences that the Autonomous Communities have in front of the National Power and between municipalities in respect of the Autonomous Communities and between municipalities in respect of the Autonomous Communities.

Act 10/2015, of 26 May, for the Safeguarding of the Intangible Cultural Heritage, seems to be a normative instrument that favors the intervention of the State in front to

[54] F. GARCÍA RUBIO, *The actors involved by the protection of cultural heritage in Spain*, in D. RENDERS, J. MORAND -DEVILLER, J. GIFREU I FONT, (eds.), Patrimoine architectural, sites et paysages saisis par le droit de l'urbanisme / Architecturical heritage, sites and landscapes seized by Urban Law, Bruselas, 2019, p. 93.

the Autonomous Communities to declare the representative manifestation of the intangible cultural heritage and to promote its protection.

We agree with Sanz Rubiales that the exercise of competences in the field of intangible cultural heritage should be guided by the principle of collaboration between the different territorial political entities.

In view of this, it should be recalled that public administrations work to ensure the well-being of the individual – and should be the focus of public bodies – . In this regard, they should design public policies and carry out actions in the field of cultural heritage related to the use and conservation of heritage– material and intangible – ; cultural development and planning, integrated urban management and governance and the relationship with citizenship.

The preservation of the cultural values of the Spanish people, with its different nuances and the richness provided by the inhabitants of each Autonomous Community, requires the joint work of the State, Autonomous Communities, municipalities and society to allow future generations to know their origins and highlight their culture.

To this end, plans for the development and implementation of innovative services for the enjoyment and promotion of cultural heritage developed jointly between administrations at different levels and, in particular local, it is essential to reach out to foundations, cultural associations, the third sector and even all voluntary associations operating in the territory and which can help promote the active participation of all citizens in partnership with city governments.

Islamic insurance as an innovative mechanism for mitigating the impact of poverty and promoting sustainable development

Jihane BENARAFA[*]

Technological innovation has revolutionised the global financial landscape, significantly impacting Islamic finance and takaful in particular. Risk management practices, transparency and profitability, have benefited from considerable improvement due to the automation and efficiency introduced in the underwriting and claims processes. Adopting emerging technologies such as blockchain and artificial intelligence has also ensured security and reliability in this area, thus contributing to achieving sustainable development goals. Indeed, microtakaful, as a sub-sector of takaful, promotes financial inclusion by protecting low-income communities. Access to such services has been made even more accessible through the technological inclusion of large segments of the population, which helps mitigate the impact of poverty. This study aims to analyse, without claiming to exhaust the topic, the impact of technological innovation on Islamic finance, focusing on takaful and microtakaful.

L'avvento dell'innovazione tecnologica ha rivoluzionato il panorama finanziario globale, esercitando un impatto significativo sulla finanza islamica e, in particolare, sul takaful. Le pratiche di gestione del rischio, la trasparenza e la redditività hanno beneficiato di un miglioramento considerevole grazie all'automazione e all'efficienza introdotte nei processi di sottoscrizione e liquidazione dei sinistri. L'adozione di tecnologie emergenti quali la blockchain e l'intelligenza artificiale hanno inoltre garantito sicurezza e affidabilità in tal settore, contribuendo così al raggiungimento di obiettivi di sviluppo sostenibile. Il microtakaful, quale sottosettore del takaful, promuove infatti l'inclusione finanziaria, fornendo protezione alle comunità a basso reddito. L'accesso a tali servizi è stato reso ancor più agevole grazie all'inclusione tecnologica di vasti strati della popolazione, cosa che permette di mitigare l'impatto della povertà. Il presente studio intende analizzare, pur senza la pretesa di esaurire l'argomento, l'impatto dell'innovazione tecnologica sulla finanza islamica, focalizzandosi sul takaful e sul microtakaful.

[*] Lecturer in Comparative Law, University "La Statale" of Milan.

1. INTRODUCTION

In recent decades, scholars and experts in the field of Islamic finance[1] have highlighted the correspondence between the United Nations sustainable development goals (SDGs)[2] and the underlying philosophy of Islamic finance, as well as the latter's role as an emerging financial alternative aimed at promoting economic and social development[3]. In particular, its contractual profit- and loss-sharing structures, its solidarity approach to mitigating the impact of poverty, the use of instruments such as *zakat* (compulsory alms), *waqf* (pious foundation) and *qardhasan* (interest-free loan), as well as the use of *sukuk* (islamic certificates) for mobilizing resources for infrastructural development were highlighted.

From a global sustainable development perspective, establishing synergies between Islamic financial institutions and capital markets assumes a crucial role, aiming to address issues such as the vulnerability of the most disadvantaged socioeconomic groups, financial stability and the promotion of sustainable development. The effective collection and allocation of resources is a key element in achieving these goals. Therefore, it is of paramount importance to examine the contribution that Islamic finance, in its various expressions, such as insurance in accordance with Islamic "*takaful*" precepts, could make to the realization of goals related to sustainability[4].

Considering the needs of an ever-changing society, financial services can be employed to achieve *Maqasid al-Sharia*, or the goals of Islamic law. Although substantial differences exist between the pillars of sustainable development and the classical definition of *Maqasid al-Sharia*, the philosophical adherence to Islamic conventions emphasizes the need for a joint effort[5].However, some key distinctions remain in terms of ap-

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[1] Islamic finance can be seen as an autonomous system based on an economic theory developed and formalised according to the dictates of Islamic law. This system's principle of profit and loss sharing makes it unique, which allows it to be classified as ethical finance. For a general overview of *Sharia*-compliant finance, see, among others, H. VISSER, *Islamic Finance. Principles and Practice*, 3rd ed., Cheltenham, 2019; A. HASSAN, S. MOLLAH, *Islamic Finance. EthicalUnderpinnings, Products, and Institutions*, Cham, 2018;G. CAUSSE-BROQUET, *La financeislamique*, 2nd ed., Paris, 2012; J. CHARBONNIER, *Islam: droit, finance et assurance*, Bruxelles, 2011; G.M. PICCINELLI, *La finanza islamica tra crisi globale e innovazione: la prospettiva europea*, in M. PAPA, G.M. PICCINELLI, D. SCOLART (a cura di), *Il libro e la Bilancia*, *Studi in memoria di Francesco Castro*, II, Napoli, 2011; M. EL GAMAL, *Finance islamique. Aspectslégaux, économiques et pratiques*, trad. fr. J. HAVERALS, Bruxelles, 2010; I. ZAMIR e A. MIRAKHOR, *An Introduction to IslamicFinance Theory and Practice*, 2nd ed., Singapore, 2007; H. AHMED, *IslamicLaw*, *Adaptability and Financial Development*, in *IslamicEconomic Studies*, 2006, XIII, pp. 119-141; I. WARDE, *IslamicFinance in the Global Economy*, Edimburgo, 2000; F. VOGEL, F. HAYES, *IslamicLaw and Finance: Religion, Risk and Return,* in *Kluwer Law International*, 1998, III, pp. 38-39; G.M. PICCINELLI, *Introduzione: i principi e gli istituti finanziari islamici: alcuni aspetti giuridici relativi alle banche islamiche*, in *Oriente Moderno*, 1988, LXVIII, pp. 1-44.

[2] Sustainable development goals or *Ahdàf al-Tanmiya al-Mustadàma* (in Arabic) emphasise the importance of a holistic approach to development, integrating poverty alleviation, promotion of economic growth and environmental protection. While the two have cultural and historical differences, both recognise the need to jointly address social, economic and ecological challenges to ensure a sustainable and prosperous future for all.J. BENARAFA, *Sostenibilità e Maqasid al-Sharia in ottica comparata*, in S. LANNI (ed.), *Sostenibilità globale e culture giuridiche comparate*, Torino, 2022.

[3] H. AHMED, M. MOHIELDIN, J. VERBEEK, F. ABOULMAGD, *on the Sustainable Development Goals and the Role of Islamic Finance*, in *World Bank Policy Research Working Paper*, 2015. Available at https://ssrn.-com/abs tract=2606839; J. ZARROUK, *The Role of Islamic Finance in Achieving Sustainable Development*, in *Development Finance Agenda,* 2015, III, pp. 4-5.

[4] R. WILSON, *Making Development Assistance Sustainable Through Islamic Microfinance*, in *IIUM Journal of Economics and Management,* 2017, XV, p. 197-217.

proaches to poverty, equity, and financial solutions[6].First, the Islamic conception of poverty is based on net worth, in contrast to the United Nations sustainable development goals, which take an income approach. While these goals focus on poverty reduction in terms of income, Islamic philosophy assesses economic well-being in terms of wealth and resource distribution, while also considering the social and spiritual context. Second, Islamic philosophy encourages equity and harmony among individuals, paying attention to the diversity and uniqueness of each person. The sustainable development goals, on the other hand, focus primarily on equity between countries and within nations, without specific emphasis on individual diversity and uniqueness. While the goals aim to promote gender equality, inequality reduction and social inclusion, the concept of *Maqasid al-Sharia* emphasizes the importance of respecting cultural, religious and individual differences, recognizing the need to balance the rights and responsibilities of all individuals in society. Finally, the Islamic approach suggests customizing non-interest-bearing financial products in terms of lending and resource mobilization, tailoring them to the peculiarities of the areas of focus and avoiding uniform solutions. This is a major difference from the strategy for achieving the sustainable development goals, which tends to promote universal development models and standardized solutions to global challenges. The *Maqasid al-Sharia* concept implies that financial solutions should be tailored to specific local needs and circumstances, taking into account the cultural and religious traditions and values of the communities concerned[7].

In parallel, technological innovation is of crucial importance in promoting sustainability in the context of Islamic finance; the latter is based on the principles of Islamic law[8]which encourage social justice, economic responsibility and environmental sustainability[9].The adoption of emerging technologies such as digitization, big data analytics, blockchain, and the use of digital platforms can contribute significantly to achieving the sustainability goals inherent in Islamic finance while mitigating economic disparities and promoting social justice[10].

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[5] Al-Ghazali, an eminent Persian jurist and a key figure in the history of Islamic thought, pointed out that the primary purpose of Islamic law is to safeguard and guarantee five cardinal objectives, namely *Maqasid al-Sharia*, which also serve as evaluative criteria for determining the function of Islamic social welfare. From this perspective, the promotion of the *deen* (well-being of a faith-based society), *nafs* (life), *'aql* (the intellect), *nasl* (descent) and *maal* (wealth) is imperative, first and foremost. From this it follows that any act that can ensure the protection and realization of these five goals is welcomed, as they are deemed intrinsically related to the collective interest. In light of this realization, it is recognized that in addition to ensuring basic needs, such as access to food and housing, it is equally imperative that the individual, his or her family and assets be adequately protected. Cf., S.M. GHAZANFAR, A. AZIM ISLAHI,*Economic Thought of an Arab Scholastic: Abu Hamid Al-Ghazali (AH450-505/1058-1111AD)*, in S. M. GHAZANFAR, S. TODD LOWRY (eds), *Medieval Islamic Economic Thought: Filling the Great Gap in European Economics*, London, 2003.

[6] A. T. DIALLO, A. S. GUNDOGDU, *Sustainable Development and Infrastructure. An Islamic Finance Perspective*, Cham, 2021, pp. 1-20.

[7] M.K. HASSAN, M. SARAÇ, A. KHAN, *Introduction*, in M.K. HASSAN, M. SARAÇ, A. KHAN (eds), *Islamic Finance and Sustainable Development*, Cham, 2021.

[8] For an overview of the sources of Islamic law, it is significant to refer to, among others: L. MEZZETTI, *Dirittoislamico, Storia, fonti, istituzioni, società*, Torino, 2022; W.B. HALLAQ, *Introduzione al dirittoislamico*, trad. it. B. SORAVIA, Bologna, 2013; G.N. PICKEN (ed.), *IslamicLaw*, Routledge, London-New York, 2010; S. ALDEEB, *Il diritto islamico: fondamenti, fonti, istituzioni*, M. ARENA (a cura di), Roma, 2008; F. CASTRO, *Il modello islamico*, G. M. PICCINELLI (a cura di), Torino, 2007; L. MILLIOT, F.P. BLANC, *Introduction à l'ètudedudroitmusulman,* 2nd ed., Paris, 2001; J. SCHACHT, *Introduzione al diritto musulmano*, Torino, 1995; Y. LINANT DE BELLEFONDS, *Traité de droitmusulmancomparé*, Paris-La Haye, 1973; D. SANTILLANA, *Istituzioni di diritto musulmano malikita con riguardo anche al sistema sciafiita*, vol. II, Roma, 1938.

[9] H. ASKARI, Z. IQBAL, A. MIRAKHOR,*Introduction to Islamic economics: Theory and application*, Singapore, 2014.

Indeed, emerging technologies that are radically transforming even the Islamic financial sector and facilitating the achievement of sustainability goals include blockchain, artificial intelligence, and digital platforms[11].In particular, the blockchain network enables the implementation of smart contracts, which can reduce transaction costs and increase the efficiency of Islamic financial transactions. In addition, such technology can increase the level of transparency and traceability of transactions, ensuring compliance of Islamic financial practices with *Sharia* principles[12].Similarly, artificial intelligence and machine learning can be used to assess the risks and opportunities associated with sustainable investments in the Islamic financial sector. To this end, artificial intelligence algorithms can analyse massive amounts of data to identify firms that adhere to sustainable practices and comply with *Sharia* principles. This process can facilitate more efficient resource allocation and more informed investment decisions.

Digital crowdfunding platforms and technological innovation are two key elements in promoting economic, social, and environmental sustainability in Islamic finance and the *takaful* sector which has reached a value of $30.5 billion by 2022. This sector is expected to reach a size of $54.9 billion by 2028, registering a compound annual growth rate of 10.2 percent over the period 2023-2028[13].

First, digital crowdfunding platforms enable broader access to Islamic financial products and services, making them available to a wide range of users. This aspect is particularly important for promoting social justice, as it can facilitate the participation of individuals and businesses from different economic and geographic backgrounds, reducing barriers to access and enabling a more equitable distribution of financial resources.

Moreover, technological innovation can promote the efficiency, transparency and accessibility of *takaful* services, a *Sharia*-compliant insurance model based on mutuality and solidarity. Adopting advanced technology solutions can help improve risk management, optimize decision-making processes and reduce operational costs while providing adequate protection to participants and promoting the economic sustainability of the system.

Big data analytics and blockchain, specifically, can offer significant benefits for the *takaful* industry. Big data analytics enables the collection and analysis of large amounts of information, improving the ability to assess risks and opportunities, and facilitating the creation of customized products and services. Blockchain, on the other hand, can provide greater transparency and security in transactions, reducing the possibility of fraud and error, and improving trust among participants.

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[10] A. SAREA, A. ELSAYED, S. BIN-NASHWAN (eds), *Artificial Intelligence and Islamic Finance: Pratical Application for Financial Risk Management*, London-New York, 2022; H.M. GAZALI, J. JUMADI, N.R. RAMLAN, N.A. RAHMAT, *Application of Artificial Intelligence (AI) in Islamic Investments*, in *Journal of Islamic Finance*, 2020, IX, pp. 70-78; A.A.SA'AD, S.M. ALHABSHI, A. MOHD NOOR, R. HASAN, *Robo-Advisory for Islamic Financial Institutions: Shariah and Regulatory Issues*, in *European Journal of Islamic Finance*, 2020; N. KHAN, *Artificial Intelligence Application in Islamic Finance Industry*, in *Global Islamic Finance Report*, 2019, pp. 122-133.

[11] M.R. RABBANI, S. KHAN, E.I. THALASSINOS, *FinTech, Blockchain and Islamic Finance: An Extensive Literature Review*, in *International Journal of Economics and Business Administration*, vol. VIII, 2020, pp. 65-86.

[12] S.R. MAT RAHIM, Z.Z. MOHAMAD, J. ABU BAKAR, F.H. MOHSIN, N. MD ISA, *Artificial Intelligence, Smart Contract and Islamic Finance*, in *Asian Social Science*, 2018, XIV, pp. 145-154.

[13] The International Market Analysis Research and Consulting Group (IMARC Group) ranks among the leading management strategy and market analysis consultancies internationally, has recently compiled a report titled "*Takaful Market: Global Industry Trends, Share, Size, Growth, Opportunity and Forecast 2023-2028*" in which it highlights the prospects and potential for expansion of the *takaful* industry globally. That document can be found at: https://www.imarcgroup.com/takaful-market

The objective of this paper is to offer some insight into how technological innovation in the *takaful* sector can help achieve economic, social, and environmental sustainability goals and will focus, in particular, on *microtakaful*, which targets the most vulnerable segments of society, such as rural communities and low-income households.

2. *TAKAFUL* FROM A SUSTAINABILITY PERSPECTIVE AND THE ROLE OF TECHNOLOGICAL INNOVATION

Takaful testifies to the ability of *Sharia*-compliant finance to evolve and keep up with innovation. For years, conventional insurance was not considered compatible with the *lex divina* and was only taken out in mandatory cases since it contained elements prohibited by Islamic law.

Takaful in the conventional insurance landscape known in the West is perceived as a modern form of protection that adheres to the ethical-religious principles of Islamic law[14].Founded on the idea of shared responsibility, cooperation, solidarity, and observance of Islamic law requirements not found in conventional insurance, *takaful* aims to protect a specific risk, especially in predominantly Islamic countries such as Malaysia, Sudan, Brunei, Pakistan, and MENA countries[15].

This structure aims to preserve assets, protecting them from risks that could jeopardize a household's economic well-being, while simultaneously tapping the considerable potential that exists in various global markets. At the heart of *takaful* are the concepts of "cooperation" and "solidarity," which are the pillars of a holistic financial ecosystem aimed at protecting people, the environment and economic sustainability. *Takaful* and the conventional model both pursue the same goal of providing reasonable financial security against unforeseen risks that may affect a person's property or life. Despite sharing a common purpose, both models have a distinct and peculiar architecture rooted in their respective traditions.

In "non-Islamic" insurance, a random insurance contract with consideration is entered into between the insured and the insurer. The insured pays a premium for the risk that the insurer agrees to cover. The contract defines precisely the risk covered, the exclusions, the duration of coverage, the maximum amount of indemnity, and, in some cases, the extent of damage or loss for which the insurer is not liable. If the insured experiences a loss caused by a contractually covered event, the insurer provides indemnification, as the risk is transferred from the insured to the insurer. Otherwise, the insurer retains the premiums advanced[16]. This contract structure differs from that which follows

[14] M. M. BILLAH, E. GHLAMALLAH, C. ALEXAKIS (eds), *Encyclopedia of Islamic Insurance, Takaful and Retakaful,* Cheltenham, 2019, p. 137.

[15] P.N.F.N. MOHDFAUZIet al.(eds), *Takaful: aReview on Performance, Issues and Challenges in Malaysia*, in *Journal of Scientific Research and Development*, 2016, III, pp. 71-76; W.J. KWON, *Islamic Principle and Takaful Insurance: Re-evaluation*, in *Journal of Insurance Regulation*, 2007, XXVI, p. 53.It should be noted that the first *takaful* company was established in Sudan in 1979, with another founded in Bahrain the same year. It is also worth noting that numerous *takaful* companies emerged in the Middle East and Malaysia during the 1980s. In Malaysia, the *takaful* legislation was enacted by the parliament in 1984.

[16] The literature on the conventional insurance contract is extensive. For an informative overview, it is sufficient to refer toA. LA TORRE, voce *Assicurazione (genesi ed evoluzione)*, in *Enc. dir.*, I, 2007. On the history of insurance and the economic and social aspects cfr. A. DONATI, G. VOLPE PUTZOLU, *Manuale di diritto delle assicurazioni*, Milano, 2019; P. CORRIAS, *Il contratto di assicurazione. Profili funzionali e strutturali*, Napoli, 2016; M. ROSSETTI, *Il diritto delle assicurazioni,* vol. I, Padova, 2011; S. AMOROSINO, L. DESIDERIO (a cura di), *Il nuovo codice delle assicurazioni. Commento sistematico*, Milano, 2006; A. LA TORRE, *L'assicurazione nella storia delle idee. La risposta giuridica al bisogno di sicurezza economica ieri e oggi*, 2nded., Milano, 2000; G. CASSANDRO, *Genesi e svolgimento storico del contratto di assicurazione*, in ID. *Saggi di storia del diritto commerciale*, Napoli, 1982; B. DINI, *Introduzione al volume di Melis. Origi-*

Islamic law, based on the *tabarru'* (donation) contract, which eliminates disputes regarding *riba*(prohibition of interest), *gharar* (prohibition of absolute uncertainty) and *maysir* (prohibition of speculation)[17].

Considering the principles of *Sharia* law, Islamic scholars have unanimously rejected the Western insurance model, raising three cardinal objections. The first objection concerns the uncertainty regarding the outcome of the insurance contract, which could generate injustice for one of the parties involved. Second, experts argue that one of the contracting parties could receive more than what was initially invested, depending on the circumstances, setting up a situation analogous to gambling. Such a situation is based on historical knowledge of the probability of occurrence of an event, in accordance with the law of large numbers. The last objection raised concerns the nature of most investments, made through interest-based financial instruments, which are considered illicit under Islamic law[18].

The presence of these objections has highlighted the urgency of finding insurance solutions in accordance with the dictates of *Sharia*, as insurance is a requirement that protects the interest of the community. This perspective implies that while recognizing the importance of divine will, it is also necessary to take appropriate precautions in order to protect individual and collective assets. Only subsequent to these preventive measures can one entrust the safeguarding of one's well-being to the divine will.

Therefore, *takaful* emerges as an innovative alternative designed to meet the needs of a particular market segment characterized by a traditionalist perspective. Today's potential customers are predominantly young, middle-income consumers who are influential

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ni e sviluppi delle assicurazioni in Italia/secoli XIV-XVI), vol. I, Roma, 1975; E. SPANESI, *Aspetti dell'assicurazione medievale*, Milano 1975.

[17] The Western insurance model, in its current configuration, has been found incompatible with the principles of Islamic law by virtue of the presence of three prohibited elements, namely *riba*, *gharar* and *maysir*, in insurance transactions. As a result, *Sharia* does not authorize insurance business, at least in its current form. In an alternative *Sharia*-compliant model, *riba* is absent, as all investments are made in accordance with ethical-religious principles. Consequently, the income generated from such investments is considered lawful (*halal*), and the use of income from lawful investments to pay claims raises no objection from Islamic experts. As for *gharar*, its prohibition is respected through the adoption of the *tabarru'* contract, in which one participant contributes to a common fund (the *takaful* fund) belonging to all participants. The uncertainty inherent in a *tabarru'* contract is tolerated and does not affect its validity. Finally, with regard to *maysir*, its prohibition is observed because the *takaful* contract does not represent a contract of exchange (or sale and purchase) but a *tabarru'* contract. In the context of *takaful*, the company does not hold ownership of the *takaful* fund, which instead belongs to the *takaful* participants or, in the case where the *takaful* fund is a *waqf*, to Allah Almighty. Cf.A. MALIK, K. ULLAH, *Introduction to Takaful. Theory and Practice*, Singapore, 2019; M.M. BILLAH, E. GHLAMALLAH, C. ALEXAKIS(eds), *Encyclopedia of Islamic Insurance, Takaful and Retakaful,* cit.

[18] The origin of islamic economics, and islamicfinance in particular, can be traced back to the time of the Prophet Muhammad. Before receiving divine revelation, Muhammad was a merchant in Mecca, a city that was a key crossroads for caravans along the route between Yemen and Syria. At that time, trade was seen as one of the key pillars of the Mecca economy, along with the Ka'ba, the ancient abode of Allah. Cf.M. CAMPANINI, *Maometto. La vita e il messaggio di Muhammad il profeta dell'Islam*, Roma, 2020, p. 26; P. CRONE, *Meccan Trade and the Rise of Islam*, Princeton, 1987.Before *takaful*, a *Sharia*-compliant insurance model identified in the 1970s, merchants in northern Arabia used to establish a risk mutual fund called *hilf*. This fund was intended to support those facing unforeseen events of natural origin or travel-related dangers. In addition, Arab merchants assumed a guarantor role through the mechanism known as *daman khatar al-tariq*, which provided for the coverage of any losses incurred as a result of attacks by brigands in the course of commercial travel. See in this regard, A. BHATTY, S. NISAR, *Takaful Journey: the Past, Present and Future*, in S. NAZIMALI, S. NISAR (eds), *Takaful and Islamic Cooperative Finance,* Cheltenham-Northampton, 2016, pp. 4-14; S.O. ALHABSHI, S.H.S. ABDUL RAZAK, *Takaful: Concept, History, Development, and Future Challenges of its Industry,* in *Islam and Civilisational Renewal Journal*, 2009, I, p. 281-3.

and technologically advanced, connected daily to the web through the use of the Internet and social media. They aspire to identify with certain values, sometimes manifesting a more traditionalist attitude than their parents and showing greater connection with the principles of faith, rather than their ethnicity. Consequently, the introduction of technological innovations has become indispensable to ensure the accessibility of *takaful* products and services on a global scale, overcoming obstacles related to the territory of residence.

Technology solutions can contribute to enhancing the efficiency, transparency and flexibility of *takaful* operations, positively impacting economic, social and environmental sustainability. Digitization and automation of internal and external processes reduce administrative costs and improve the efficiency of *takaful* operations. This can translate into lower fees for participants, facilitating the accessibility of *takaful* to a wide range of individuals and consequently promoting financial inclusion. In addition, the use of big data analytics and the application of predictive models play a crucial role in enabling *takaful* companies to optimally identify and manage risks, promoting efficient resource allocation and enhancing financial sustainability. Big data processing can, likewise, facilitate the development of customized products within *takaful* companies and promote more sustainable behaviors among participants. What's more, the adoption of blockchain technology and smart contracts can bring significant improvements to the transparency, security and efficiency of *takaful* operations. Blockchain-based smart contracts have the potential to automate underwriting, claims management and profit-sharing processes, greatly reducing administrative costs and limiting the risk of fraud. In addition, digital platforms can act as catalysts for collaboration between different *takaful* actors and organizations from other sectors, such as microfinance and social enterprises. This interdisciplinary cooperation can help promote sustainable and innovative insurance solutions, enriching *takaful* service offerings and expanding the socioeconomic impact of such solutions[19].

The adoption of technology in companies results in a lasting competitive advantage, thanks to the rapid transmission of information that enables customers to efficiently identify the service that best suits their needs from both a quality and economic perspective. This activity fosters the growth of individual companies and, consequently, the entire *takaful* industry globally. Some operators focus on virtual offices to provide home-based solutions, digital insurance portfolios to facilitate online transactions, and digital claims settlement systems to tap this potential.

Technological innovation can also drive the development of more environmentally sustainable *takaful* products and services. *Takaful* companies, for example, can use tools to monitor and manage risks related to climate change and natural disasters, offering more targeted insurance coverage and incentives for adopting sustainable behaviors. In addition, growing awareness of environmental and social issues has led to the launch of "Green" and socially responsible *takaful* products, which aim to promote sustainability through investments in green and socially beneficial projects[20].These products can help finance projects that support the United Nations sustainable development goals, such as renewable energy, sustainable agriculture, and water conservation.

Therefore, technological innovation can support the realization of sustainability goals in the *takaful* sector through digitization, automation, big data analytics, blockchain, digital platforms, and the development of more environmentally and socially sustainable

[19] M. RADWAN et al., *Takaful Industry and Blockchain: Challenges and Opportunities for Costs' Reduction in Islamic Insurance Companies*, in *European Journal of Islamic Finance*, 2020.

[20] A.A. MUHAMAT et al., *Green Takaful as a Climate Finance Tool*, in *Advanced Science Letters*, 2017, XXIII, pp. 7670-73.

products and services. To maximize the positive impact of these technologies, it is critical that *takaful* stakeholders collaborate and take a holistic approach to sustainability[21].

It is indisputable that the current challenge is to process data from devices and sensors to offer competitive insurance products and services quickly. Within the *takaful* industry, additional sub-sectors have been identified, including *microtakaful*, whose primary purpose is to offer accessible and affordable insurance products to people with limited incomes. This helps to address challenges related to poverty, food security, health and education. In this context, the role of technological innovation emerges as crucial in promoting human well-being, eradicating poverty, combating inequality, and fostering social and economic development.

3. *MICROTAKAFUL*: A MODEL FOR ALLEVIATING POVERTY AND PROMOTING SUSTAINABLE DEVELOPMENT

Based on the observations made, *takaful* represents a *Sharia*-compliant insurance model based on the principles of solidarity and risk sharing. *Microtakaful*, as a subcategory of *takaful*, aspires to provide insurance coverage to vulnerable individuals in society who need protection. However, these individuals often lack the financial resources to obtain such coverages, as in the case of rural communities and low-income households.

It is important to preliminarily outline that *microtakaful* does not differ substantially from *takaful*, as both models adopt similar management mechanisms, such as *wakala*, *mudaraba*, and *waqf*.[22]Although there are fundamental similarities and adherence to the same basic principles, *microtakaful* has not had the same level of attention given to

[21] P. NUGRAHENI, R. MUHAMMAD, *Innovation in the Takaful Industry:aStrategy to Expand the Takaful Market in Indonesia*, in *Journal of Islamic Marketing*, 2019.

[22] Several organizational models can be adopted in the *takaful* industry one of them is the *wakala* model. In this model, the *takaful* fund represents the principal who engages a *takaful* company as an agent (*wakil*) to provide various services such as risk management, administration, and distribution of resources among participants. The *takaful* company, as an agent, is solely responsible for the management of the *takaful* fund and is therefore also called a takaful operator. The *takaful* operator receives a fee for services rendered, which is usually a predetermined percentage of the contributions made by participants. The fee may also be based on the operator's performance in managing the fund. The *wakala* model is valued in Islamic finance because it respects *Sharia* principles, including the prohibition of usury (*riba*), equitable risk-sharing, and financial ethics based on cooperation and solidarity among participants. Another approach employed in takaful is the *mudaraba* (partnership) model, in which *takaful* fund members (known as *rabb al-mal*, i.e., equity holders) and the takaful managing entity (referred to as *mudarib*, i.e., expertise provider) enter into a *mudaraba* agreement. This agreement determines the coverage provided and how the results obtained from underwriting are to be shared. The excess profit is divided between the participants and the *takaful* operator according to a predetermined ratio. This system allows the *takaful* operator to benefit from the profits from underwriting activities and to share in the positive returns from premium investments. Another approach, particularly adopted in Pakistan, is based on the waqf structure, a charitable institution in which participants offer items of value for a specific cause. This involves allocating the benefits from the use of non-consumable assets (such as buildings or vehicles) to selected beneficiaries. The *waqf* is a legal entity capable of owning or managing property, filing lawsuits and being sued. The *waqf* model in *takaful* is similar to the *wakala* model, except that the *takaful* fund is given the status of a *waqf* fund. In this scheme, shareholders of the *takaful* operator establish a *waqf* fund through an initial contribution (a portion of the capital) and invite citizens to contribute. The *waqf* fund's charter, drafted by the *wakif* (*takaful* operator), will establish the protection that the *waqf* fund will offer its members. Cf.S. ARCHER, R. A. ABDEL KARIM, V. NIENHAUS, *Business Models in Takaful and Regulatory Implications*, in S. ARCHER, R. A. ABDEL KARIM, V. NIENHAUS (eds), *Takaful Islamic Insurance. Concepts and Regulatory Issues*, Singapore, 2009, p. 11 ff.

takaful products, despite the expansion of inclusive finance in the financial-insurance sector, because potential participants in *microtakaful* programs are low-income individuals who do not meet the requirements to access insurance policies due to their socioeconomic status.

Individuals in lower income brackets are generally exposed to the same dangers found among those with middle and higher incomes; however, they often lack the ability to access insurance programs tailored to their needs. In this context, some government authorities are pondering the adoption of policies to support lower-income segments of the population through the promotion of micro-insurance policies, financing a portion of the insurance premium through funds collected through *zakat* (compulsory almsgiving).[23]As a result, with the financial assistance provided by the *zakat* fund, such individuals could benefit from *microtakaful* plans that could provide adequate coverage, thus helping to prevent their inexorable settlement in the cycle of poverty.[24]

Low-income households are generally aware of their vulnerability to risks and are sometimes willing to pay, albeit modestly, to protect themselves from them. However, the insurance market tends to underestimate this customer segment, to which resources should be devoted to implement ad hoc plans that provide an affordable contribution. To date, alternative solutions to this instrument are merely apparent, that is, those aimed at providing a temporary and not a lasting remedy. For these reasons, providing support in the form of insurance appears to be significantly more impactful than social protection based on the disbursement of sums of money. Improving access to insurance can

[23] *Zakat*, a fundamental pillar of Islam, constitutes a religious obligation prescribed in the Quran. This precept requires the faithful to contribute a fixed portion of their wealth, determined according to specific criteria, to support the most vulnerable sections of the population. This share is then distributed among eight categories of beneficiaries, listed in the Quran, which include the poor, the needy, debtors, needy travelers, new converts, slaves and prisoners being freed, and those working in the collection and distribution of *zakat* itself. Its main objective is to promote values such as generosity and empathy within the Muslim community, while helping to reduce economic disparities among its members. The practice of *zakat* is intrinsically linked to the concept of wealth purification. Through the donation of a portion of their material possessions, the faithful can purify their souls and draw closer to God. At the same time, *zakat* serves as a means of raising awareness of the needs of others, stimulating empathy and solidarity among community members. In addition, *zakat* helps reduce economic disparities within society, promoting a climate of social inclusion and cohesion. Undoubtedly, the practice of *zakat* fosters the establishment of an environment characterized by greater equity and justice, in which the needs of the most vulnerable segments of the population are taken into account and met. Therefore, *zakat* represents a pivotal element of the Islamic social and economic system, aiming to promote values such as generosity and empathy among its believers. Through the redistribution of wealth, this religious practice helps to reduce economic disparities within the Muslim community, promoting inclusion and social cohesion. Cf.N. NAWAI, F.S. RUZAIMAN, *The Impact of Zakat Distribution*, in A.G. ISMAIL, R. ABDULLAH, M.H. ZAENAL (eds), *Islamic Philanthropy*, Cham, 2022; A. H. SADEQ, *A Survey of theInstitution of Zakah: Issues, Theories and Administration*, 2nded., Jeddah, 2002, p. 13; J. BENTHALL, *Financial Worship: the Quranic Injunction to Almsgiving*, in *Journal of the Royal Anthropological Institute*, 1999, pp. 27-42; H. DEAN, Z. KHAN, *Muslim Perspectives on Welfare*, in *Journal of Social Policy,* 1997, XXVI, pp. 193-209; M.K. JAFREE, M.R. AMIN, *Administering Zakah: State of the Art and Looking Beyond*, in S. A. HANNAN et al. (eds), *Zakat and Poverty Alleviation*, Dhaka, 2003, pp. 80-88.

[24] H. ZAKARIYAH, A.A.O.M. AL-OWN, A. AHMAD, *Exploring the Potential of Using the Zakat Fund in Structuring Islamic MicroTakaful*, in B. ALAREENI, A. HAMDAN (eds), *Innovation of Businesses, and Digitalization during Covid-19 Pandemic*, Cham, 2023, pp. 121-132; N.A. MOHD ROM, Z. ABDUL RAHMAN, *Financial Protection for the Poor in Malaysia: Role of Zakah and Micro-takaful*, in *Journal of King Abdulaziz University: Islamic Economics*, 2012, pp. 119-140; A.S. RUHANA, *The Role of Zakat In Social Protection In Islamic Developing Countries: A Contributing Instrument*, in *Ekonomi Islam Indonesia*, 2019;A.H. BASHIR, *Reducing Poverty and Income Inequalities: Current Approaches and Islamic Perspective*, in *Journal of King Abdulaziz University, Islamic Economics*, 2018, XXXI, pp. 93-104; W.D. OLANIPEKUN, A.N. BRIMAH, H.M. SANUSI, *The Role of Zakat as a Poverty Alleviation Strategy and a Tool for Sustainable Development : Insights from the Perspectives of the Holy Prophet (PBUH)*, in *Oman Chapter of Arabian Journal of Business and Management Review,* 2015*,* V, pp. 8-17.

enable people living in poverty to increase their livelihoods and emancipate themselves from the state of need[25].

Therefore, *Sharia*-compliant microinsurance could be a suitable mechanism to protect the economically disadvantaged at an affordable cost. To develop this instrument (aimed at providing security for the poor and promoting sustainable poverty reduction), it is crucial to involve *takaful* actors.Indeed, *takaful* actors could contribute their know-how, government institutions, regulators, transnational and nongovernmental organizations, *zakat* funds, where their management is entrusted to state agencies, as well as the adoption of innovative technological tools that facilitate access to such services.

In order to maximize the positive impact of technological innovation in the sector, it is crucial to consider a few key factors. Cooperation among different stakeholders, such as *takaful* companies, Islamic financial institutions, governments and non-governmental organizations, can accelerate the adoption of technological innovations and promote the spread of *microtakaful* among vulnerable communities. In addition, the establishment of an appropriate regulatory framework and government incentives can facilitate the adoption of innovative tools and foster the development of the takaful and *microtakaful* sectors while ensuring consumer protection and compliance with *Sharia* principles.

Investments in training and skill development of *takaful* professionals are essential to ensure the ability to effectively adopt and implement innovative technologies and address the specific needs of vulnerable communities. Technological innovation in *takaful* should be complemented by efforts aimed at promoting the financial inclusion of rural communities and low-income households by ensuring access to a wide range of financial services, in addition to *microtakaful*, to improve their resilience and economic well-being.

In summary, technological innovation can have a significant impact in the *takaful* and *microtakaful* sector, contributing to the achievement of sustainability goals and improving the livelihoods of the most vulnerable communities. However, it is imperative that these efforts are supported by effective collaboration among different stakeholders, an appropriate regulatory framework, and ongoing efforts in training and skills development.

4. CONCLUSION

There is no doubt that sustainability goals find consensus among all players in the financial and insurance industry, both in the conventional and Islamic lawcompliant contexts. The current prevailing trend is to use innovative tools to achieve these goals while maintaining a competitive position in the market, not only in terms of cost but also efficiency.

Consequently, it is undeniable that technological innovation holds the potential to revolutionize the *takaful* and *microtakaful* sectors, which are based on the principle of solidarity and mutual aid, emphasizing the importance of collective welfare. Such innovations help to consolidate customer trust and increase customer satisfaction. In fact, *takaful* promotes greater transparency and accountability to customers, mitigating the risk of conflicts of interest and ensuring fair distribution of profits among participants.

[25] A.A.A. ZWIETA, H. ZAKARIYAH, *Using Zakat Funds as Contributions for Micro-health Takaful: a Shariah Perspective*, in *Journal of Islam in Asia*, 2020, XVII pp. 1-20; M. COHEN, J. SEBSTAD, *Reducing Vulnerability: the Demand for Microinsurance*, in *Journal of International Development*, 2005, XVII, pp. 397-474.

Through the adoption of these technologies, insurance products become more affordable, personalized and efficient for the most vulnerable segments of society. In addition, the *takaful* sector can contribute significantly to strengthening the resilience of rural communities and low-income households in the face of adverse events, in addition to achieving sustainability goals.

Il coinvolgimento politico del giudiziario nel Regno Unito

Silvia FERRERI[*]

I giudici delle corti del Regno Unito proclamano il sollievo di non essere trascinati in contese politiche, a differenza di quanto accade con la Corte Suprema USA. I giudici della *Supreme Court of the UK* esprimono riluttanza ad assumere il ruolo di interpreti di principi molto generali per trarne argomento in liti cariche di ideologia. A più riprese, si è anche sottolineata la differenza rispetto alla Corte Europea dei diritti dell'uomo che pare più soggetta ad allargare le previsioni della Convenzione del 1950, al di là della stretta lettera degli articoli sottoscritti dagli Stati membri. In anni recenti, tuttavia, le corti del Regno Unito sono state coinvolte in liti vertenti sui rispettivi poteri dell'esecutivo e del Parlamento, mentre ulteriori vertenze lumeggiano nel prossimo futuro. L'equilibrio tra giudici e politici è sottoposto ad uno *stress test* interessante.

Judges in the UK declare they are satisfied of not being involved in political controversies as much as their colleagues sitting at the USA Supreme Court who are asked to find replies in very general principles expressed in the Constitution of 1787. At various instances, judges in the UK have also underlined the difference between their role and the ECHR who inclines to reading the articles of the European Convention of 1950 in a broad way, beyond the provisions that were originally subscribed by Member States. In recent years, however, judges in the UK have been involved in debates between the executive branch and Parliament while further litigation seems to be arising. The balance between courts and politicians in undergoing a stress test of some interest for observers.

1. IL PANORAMA

In coincidenza con la decisione della Corte Suprema nordamericana,nel 2022, di esautorare il precedente *Roe v. Wade* in materia di aborto[1], Lady Hale, già presidente della *Supreme Court* del Regno Unito, ha concesso un'intervista[2].

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[*] Professore Ordinario di Diritto Comparato e di Anglo – American Law presso l'Università degli Studi di Torino

[1] *Dobbs v. Jackson Women's Health Organization,* 597 U.S. ___ (2022), June 24, 2022, online: https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

[2] BBC Radio 4, *Baroness Hale on Roe v Wade*, Woman's Hour, 2022: https://www.bbc.co.uk/programmes/m001br85 (3 Settembre 2022).

Il discorso, molto misurato e prudente, esordiva con il rallegrarsi del fatto che nel Regno Unito una situazione altrettanto spinosa, e carica di ideologia, non potrebbe verificarsi secondo le tradizioni inglesi, perché, a differenza dagli USA, non esiste una Carta costituzionale scritta che abbia rango superiore alla legge. In questo modo, diceva Lady Hale, le corti possono esimersi dall'intervenire in questioni che è meglio lasciare alla decisione dei Parlamenti.

Il sollievo di non essere trascinati nell'agone per questioni che hanno implicazioni morali pesanti è stato condiviso in varie occasioni da molti giudici[3]. Anche Lord Sumption[4],di orientamento conservatore, si è rallegrato in passato che sia l'assemblea eletta a trovare un compromesso su questioni in cui è difficile tracciare una linea netta tra giuridico e morale (come in materia di omosessualità), anzi, guardando proprio agli Stati Uniti, questo giudice suggeriva che la conferma si trovi nella "continuing controversy in the United States about the decision of the US Supreme Court in *Roe v Wade* to recognise judicially the almost unrestricted constitutional right of a woman to an abortion".Riforme introdotte dal potere giudiziario sono più difficili da accettare da parte della generalità dei cittadini: pur deprecabile per i propri difetti, i dibattito politico – tramite il compromesso delle posizioni conflittuali - è riuscito nel tempo a portare a molte riforme[5]. Quelle legate a letture della costituzione, da parte di soggetti non eletti democraticamente, sono più vulnerabili a ripensamenti.

Lady Hale, nella propria recente intervista, aggiungeva, con sagacia, che, comunque, sarebbe consigliabile che questioni le quali non possono in alcun modo ricadere su una parte della popolazione (= aborto e componente maschile), non fossero decise da chi non ne avrà mai un'esperienza diretta (in particolare, il riferimento pare rivolto ai 6 giudici uomini della Corte Suprema USA, controbilanciati solo da 3 giudici donna, di cui due dissenzienti sul merito della decisione). Ovviamente, aggiungeva l'intervistata, il potenziale padre dev'essere ascoltato, ma la decisione compete in ultima battuta alla gestante: non è necessario che ogni aspetto dell'esistenza sia elevato a questione di diritto.

Il compito di *judicial review* della legislazione e di *overruling* di precedenti in conflitto con la Costituzione che compete alla Corte Suprema USA dopo la decisione *Marbury v. Madison* (1803)[6], induce ad una politicizzazione dei giudici, scelti per gli orientamenti ideologici, oltre che per le capacità giuridiche. La tradizionale esperienza per cui ogni dissapore politico negli Stati Uniti "finisce prima o poi per trasformarsi in una vertenza giuridica"[7] non ha un equivalente così ovvio nel Regno Unito. Viceversa, negli Stati Uniti, il rischio che la politica del partito prevalente al Congresso venga messa in

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[3] In modo analogo, Lord Hoffmann, un altro giudice (all'epoca: della House of Lords), aveva osservato, all'entrata in vigore dello *Human Rights Act 1998:* " I must admit that I … feel particularly comfortable with the fact that, for example, the law on abortion has been made by the elected representatives of the people rather than being deduced from some very general statements in the Bill of Rights. I do not relish the role of a Platonic guardian and I am pleased to live in a society that does not thrust it upon me" (Lord HOFFMANN, *Human rights and the House of* Lords, in *Modern Law Rev*., vol. 62, 1999*,* p. 159 ss., p. 162).

[4] La generalità delle persone ricorda forse questo Lord per le posizioni recisamente contrarie al *lockdown* in Inghilterra nel periodo dell'epidemia di Covid nel 2020, nell'ottica per cui ciascuno deve assumere le proprie responsabilità e giudicare con il proprio senso comune quale sia la condotta da seguire per evitare contagi. J. COGGON, *Lord Sumption and the values of life, liberty and security: before and since the COVID-19 outbreak,* in *Journal of Medical Ethics,* vol. 48, n. 10, 2022, online:https://jme.bmj.com/content/48/10/779 (consultato:10 gennaio 2023).

[5] Lord SUMPTION, *The limits of the law*, originally presentedas the27th *Sultan Azlan Shah Lecture,* Kuala Lumpur, Nov. 20, 2013, p. 200 ss., a p. 222, disponibile online: https://www.sultanazlanshah.com/pdf/2021/SAS_Lecture_27.pdf (consultatoil 9 gennaio 2023).

[6] *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).

scacco dalla Corte Suprema, tramite una diagnosi di invalidità costituzionale di qualche intervento legislativo, alimenta una furiosa attenzione agli orientamenti politici dei candidati.

Nello stesso discorso svolto in Inghilterra all'indomani della sentenza USA, si confermava invece che le opinioni politiche della corte di vertice nel Regno Unito sono piuttosto schermate, talvolta addirittura ignorate dai diversi membri della Corte[8]. E' vero che nella designazione alla funzione di giudice supremo da parte del Lord Cancelliere (assistito da una commissione di consulenza)[9], intervengono considerazioni di opportunità o di discrezionalità. Infatti,la stessa Lady Hale è diventata Presidente della Corte non nel primo momento utile, ma, in quanto donna, in un secondo tempo, quando si è di nuovo resa vacante la stessa posizione di prestigio[10]. Si può quindi supporre che qualche valutazione di opportunità (o di pregiudizio) guidi talune scelte connesse alle cariche più prestigiose del potere giudiziario, ma gli orientamenti politici non sembrano pesare in modo importante nel Regno Unito.

Il tema dell'autonomia dei giudici dalle controversie politiche è stato affrontato ripetutamente da Lady Hale anche in altre sedi[11]. In effetti, a seguito della decisione resa dalla Corte Suprema, guidata ancora nel 2019 da Lady Hale, sulla pretesa del Governo di prolungare il periodo di inattività del Parlamento ("prorogation of Parliament") di cui si dirà oltre, l'*Attorney General* dell'epoca, Geoffrey Cox,in veste di consigliere giuridico della Corona, affacciò l'idea di sottoporre le nomine giudiziarie ad un "parliamentary scrutiny". La mossa avrebbe implicato un approccio più politico alla selezione dei candidati. La reazione della Presidente della Corte Suprema fu la seguente: "We do not want to turn into the Supreme Court of the United States, whether in powers or in process of appointment. … I do know that there is no member of the judiciary, or indeed most of the legal profession, who would favour the politicisation of judicial appointments. We have an independent, merit-based appointment which most of us are extremely comfortable with."[12]

In epoche più remote, un giudice aveva espresso in termini anche più drastici la propria opinione del sistema di reclutamento nordamericano sintetizzando l'idea nel fatto che "we are not used to being told what we have to do".

La questione riemerge periodicamente e, sovente, il parallelo con gli Stati Uniti non è contemplato in maniera favorevole. Vediamo alcuni eventi recenti in cui questioni di alto significato politico hanno provocato lo scrutinio delle corti inglesi (o del Regno Unito)[13].

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[7] A. DE TOCQUEVILLE, *De la démocratie en Amérique,* 1848, Parigi, Tome 2, p. 168. «Il n'est presque pas de question politique, aux États-Unis, qui ne se résolve tôt ou tard en question judiciaire ». Lo stesso autore osserva: «La cour Suprême […] On peut même dire que ses attributions sont presque entièrement politiques, quoique sa constitution soit entièrement judiciaire » (Tome 1,p. 242).

[8] A. FORREST, *Lady Hale warns government against US-style 'politicisation' of court appointments. "* 'We don't want to be politicised,' says outgoing Supreme Court president – who also condemns 'unfortunate' press attacks on top judges", *The Independent,* Friday 27 December 2019 https://www.independent.co.uk/news/uk/politics/lady-hale-boris-johnson-supreme-court-appointments-conservatives-a9261131.html.

[9] Constitution Committee - Twenty-Fifth Report, *Judicial Appointments,* 7 March 2012 (https://publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27202.htm

[10] *Desert island Discs*,*BBC Radio 4*, 24 September 2021 https://www.bbc.co.uk/programmes/m000zt7b

[11] In qualità di invitata al programma della BBC Radio 4,*Today*, https://www.independent.co.uk/news/uk/politics/lady-hale-boris-johnson-supreme-court-appointments-conservatives-a9261131.html

[12] BBC Radio 4*, cit*., 27 Dicembre 2019.

[13] Come noto, dal 2005 la Corte Suprema del Regno Unito ha giurisdizione finale anche per talune vertenze che originano in Scozia: *ConstitutionalReformAct 2005*, sect. 40 e successivi emendamenti: *Courts Reform*

2. ESPERIENZE RECENTI

Il quadro rassicurante di una estraneità effettiva della giustizia dall'agone politico è stato perturbato, da qualche anno, da frequenti incursioni dell'esecutivo in ambiti delicati, in zone in cui l'equilibrio dei poteri viene chiamato in discussione.

Parte della tensione deriva dalla scelta, del tutto politica, di incorporare la Convenzione Europea dei diritti dell'uomo. Il Trattato del 1950 era stato a suo tempo approvato (4/11/1950) dall'esecutivo, apponendo la prima tra le firme degli Stati aderenti, senza tuttavia ammettere il ricorso individuale alla Corte Europea dei diritti dell'uomo di Strasburgo[14]. Solo nel 1998 però il Regno Unito ha approvato lo *Human Rights Act*[15]che ha riconosciuto ai giudici britannici il potere di dichiarare l'incompatibilità di un provvedimento interno in contrasto con la Convenzione, dando luogo ad un diritto al risarcimento per chi sia stato pregiudicato dall'applicazione dell'atto confliggente con la Convenzione[16].

In questa maniera, si è attribuito al potere giudiziario un certo sindacato sulla legittimità anche delle leggi, sia pure nella forma attenuata di una dichiarazione che non neutralizza l'atto legislativo: resta infatti nelle mani del Governo il compito di adeguare la normativa ai parametri europei, sollecitando un intervento del Parlamento che corregga le norme illegittime.

E' bastato questo cambiamento di equilibri per generare una giurisprudenza abbastanza nutrita di pronunce che hanno rilevato difetti della legislazione, spesso in relazione ai diritti degli immigrati o dei detenuti. Uno dei campioni della difesa dei diritti umani si è rivelato Lord Bingham che ha valutato illegittime alcune norme in materia di contrasto al terrorismo perché discriminavano tra prigionieri di nazionalità inglese e detenuti invece stranieri, provenienti da Stati verso i quali l'estradizione era sconsigliabile per l'inadeguatezza delle garanzie verso i carcerati[17].

Ripetutamente, inoltre, il Regno Unito è incorso nella disapprovazione della Corte di Strasburgo: sia per il trattamento dei sospettati di terrorismo nordirlandese, sia per l'adeguatezza dei mezzi di appello consentiti verso sentenze di organi giudiziari interni[18], in qualche caso piuttosto restrittivi. Da ultimo, come noto, il ruolo della Corte EDU

(Scotland) Act 2014, Sch. 5 para. 33 (conseguenza: "introduced a requirement to obtain permission to appeal in civil case": https://www.supremecourt.uk/docs/jurisdiction-of-the-supreme-court-in-scottish-appeals.pdf)

[14] "In November 1958, the argument over the optional clauses (giving the Court jurisdiction and individuals the right to 'petition' the Court) was re-introduced to the UK Parliament. Lord Layton stated: "*the right of individual petition is perhaps the most fundamental"http://hansard.millbanksystems.com/lords/1958/nov/18/european-convention-on-human-rights*. "Eventually, in 1966, the UK accepted the optional clauses. In 1998, Protocol 11 to the Convention made the right of individual petition compulsory".

[15] *UK Public General Acts* 1998 c. 42, https://www.legislation.gov.uk/ukpga/1998/42/section/1

[16] Sect. 8: "(1)In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
(2)But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.[…]

[17] A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department, (Respondent), X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2004] UKHL 56

[18] *Osman v Ferguson* [1993] 4 All ER 344 (CA). Presso la Corte Europea dei Diritti dell'Uomo: *Osman v. United Kingdom*, [1998] ECHR 101; 1998, 29 *EHRR,* p.245; (1999) *Family law,* p. 86 (in riferimento all'art. 6(1) della convenzione, diritto ad un giusto processo e idonei strumenti di ricorso). L'episodio è molto

è venuto alla ribalta quanto al progetto, del partito conservatore al Governo, di deportare gli immigrati illegali verso il Ruanda: un piano bloccato all'ultimo momento da un provvedimento urgente della Corte di Strasburgo la quale ha accolto i ricorsi che imputavano agli strumenti governativi di ledere il diritto ad una valutazione corretta delle posizioni individuali dei rifugiati [19].

L'episodio ha rinfocolato le aspirazioni separatiste di parte dell'opinione pubblica che propende per la denuncia della Convenzione dei diritti dell'uomo, sulla scorta del precedente dell'uscita dall'Unione Europea. In particolare Dominic Raab ha presentato un progetto legislativo che intende limitare l'effetto della giurisprudenza della Corte Europea dei diritti dell'uomo nel Regno Unito, come oltre illustrato a proposito del *Bill of Rights Bill*.[20]

La vita della Convenzione Europea dei diritti umani nel Regno Unito è comunque sempre stata burrascosa[21]. Sostanzialmente, un equivoco sembra essere stato alla radice dei dissapori successivi: la firma della Convenzione era intervenuta sul presupposto che l'Inghilterra fosse la sede elettiva dei diritti umani e che compito delle nuove istituzioni fosse garantire che anche altrove fossero attuate le garanzie già presenti nel Regno Unito. Poco peso si era dato invece al fatto che la stessa legislazione di uno Stato di common law potesse cadere sotto rimproveri e sanzioni[22].

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noto: la polizia inglese trascurò di intervenire su denunce di comportamenti pericolosi di un insegnante verso un allievo nei cui confronti aveva sviluppato un affetto morboso. Alla fine, dopo vari comportamenti criminali, il docente uccise il padre dell'allievo. La questione del corretto comportamento della polizia, rispetto alle informazioni ricevute via via, fu soggetta a due scrutini successivi, ma non superò la Corte d'Appello: circostanza criticata dagli attori in giudizio davanti alla CEDU. Il Lord Justice, Lord Hoffmann, in un commento extragiudiziale ha criticato severamente la presa di posizione della Corte di Strasburgo (che ha giudicato insufficiente la legislazione inglese sul filtro degli appelli). A parere di Lord Hoffmann, la Corte europea è poco informata dei meccanismi interni al sistema di common law (Lord Hoffmann, *'Human rights and the House of* Lords,62 MLR *(*1999*)* 159, p. 162: "I am not sure, on a reading of the judgment of the court and the concurring judgment of the British judge, whether they had persuaded themselves that they were really dealing with the right to a hearing rather than the merits of the substantive tort law under which the Court of Appeal had held that Mrs Osman was bound to lose. […] I am bound to say that this decision fills me with apprehension. Under the cover of an Article which says that everyone is entitled to have his civil rights and obligations determined by a tribunal, the European Court of Human Rights is taking upon itself to decide what the content of those civil rights should be. In so doing, it is challenging the autonomy of the courts and indeed the Parliament of the United Kingdom to deal with what are essentially social welfare questions involving budgetary limits and efficient public administration".

[19] La Corte europea, nel provvedimento d'urgenza, non ha espresso un parere sul merito, ma richiesto tempo per valutare le posizioni, considerando "concerns raised by the UN high commissioner for refugees that asylum seekers moved to Rwanda as part of the plan will not be able to access 'fair and efficient procedures' related to their refugee status claims". Cfr. *Press Release*, issued by the Registrar of the Court, ECHR 197 (2022),14.06.2022 (seeker's imminent removal from the UK to Rwanda – HUDOC, *https://hudoc.echr.coe.int › app › conversion › pdf)*

[20] Il testo, nella forma datata 2022, è reperibile (bill117) nel sito del Parlamento online: https://bills.parliament.uk/bills/3227 (consultato 11 dicembre 2023)

[21] B. DICKSON, *Safe in their hands? Britain's Law Lords and human rights,* online by Cambridge University Press, **02 January 2018,** https://www.cambridge.org/core/journals/legal-studies/article/abs/safe-in-their-hands-britains-law-lords-and-human-rights/5782817FB10D455D06A7427CB43AD990

[22] D. BEDINGFIELD, *Lord Sumption and the Limits of the Law: Is the Human Rights Project Undemocratic and Elitist?,*in *Family Law Week,* 11 Gennaio 2017, online:*https://www.familylawweek.co.uk (*"Lord Hoffman, in an article published in 1999 by the Modern Law Review …' *When we joined, indeed, took the lead in the negotiation of the European Convention, it was not because we thought it would affect our own law, but because we thought it right to set an example for others and to help ensure that all member states respected these basic human rights which were not culturally determined but reflected our common humanity'.* In other words, the UK did not need a document setting out "human rights"; the rest of Europe most certainly

A suo tempo, nel 1999, uno dei giudici più stimati, Lord Hoffmann, scriveva che, per certuni, l'immagine della Corte Suprema, dopo l'entrata in vigore dello *Human RightsAct*,era fondata sul modello della Corte Suprema USA o del *Bundesverfassungsgericht* tedesco "(S)o it is assumed that once the House of Lords has got its feet under the constitutional table, it will find itself having to resolve similar highly charged issues. I think that this assessment ignores some very considerable differences between this country on the one hand and the United States and Germany on the other"[23].

In particolare, Lord Hoffmann sottolineava la differenza rispetto al ruolo della Corte Suprema USA intervenuta, nel tempo, in campo politico soprattutto in casi in cui si avvertiva ampiamente l'esigenza di cambiamento, ma in cui i sistemi di"checks and balances" del sistema politico nordamericano paralizzavano la capacità tanto del potere esecutivo che di quello legislativo di portarli a termine. Al contrario,nel Regno Unito,il Parlamento non ha incontrato difficoltà nel legiferare in molte materie di diritti umani "Starting in the1960s, the legislation decriminalising suicide, abolishing the death penalty, against racial discrimination, regulating abortion, against sex discrimination, regulating the conduct of the police in the investigation of crime and so on" così che una buona quota della normativa sui diritti umani che, negli Stati Uniti è stata edificata dalle corti sulla base di affermazioni molto generali del *Bill of Rights*, è stata invece oggetto di legislazione dettagliata da parte del Parlamento. Come risultato, "This political consensus over a wide area of human rights does not exist in the United States, where the looseness of the party system allows more scope for anti-libertarian populism. […] The result of these various political strands is that judicial intervention is an accepted feature of American life, resulting in a *public awareness of the importance of the Supreme Court and the views of the individual justices* who are called upon to decide these issues"[24]. A parere di Lord Hoffmann, invece la situazione è ben diversa nel Regno Unito in cui la gente si aspetta che questioni del genere siano decise dal Parlamento, come è avvenuto in passato. La conclusione è che sarebbe veramente deplorevole "if the knowledge that the courts were the ultimate arbiters of conformity with human rights resulted in Parliament being more ready to pass populist measures which infringed them".

In qualche misura, dalle cronache dei recenti passaggi governativi nel Regno Unito, sembra proprio che i politici abbiano avviato una prassi del tipo immaginato da Lord Hoffmann: una disinvolta attività legislativa, incurante dei limiti, una sfida ai guardiani del diritto, almeno a giudicare dai recenti interventi delle corti in materie altamente politiche. I politici paiono dare per scontato che, se mai, saranno i giudici a raddrizzare le esuberanze dei membri del Parlamento.

Un altro giudice conservatore, Lord Sumption, ha (più recentemente rispetto a Lord Hoffmann) accusato la corte di Strasburgo di essere "the most notable monument of this tendency to *convert political questions into legal ones*"[25]. Infatti la Corte è diventata il vessillifero internazionale della creazione giurisprudenziale del diritto fondamentale "extending well beyond the text which it is charged with applying. It has over many years declared itself entitled to treat the Convention as what it calls a 'living instru-

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did. Lord Sumption's and Lord Hoffman's primary contention is that the UK delegates in 1950, when the Convention was drafted, did not intend that the document would do very much at all".

[23] LORD HOFFMANN,*Human Rights and the House of* Lords, *cit.*, in MLR, vol. 62, 1999,p. 159, accessibile online: https://www.academia.edu/44641304/Human_Rights_and_the_House_of_Lords

[24] Corsivo aggiunto.

[25] Corsivo aggiunto.

ment'" [26]. Questo approccio ha trasformato la Convenzione da strumento di difesa contro il dispotismo (come inteso dai suoi redattori) in uno stampo ("template") per moltiaspetti dell'ordine giuridico interno agli Stati. Ne è derivato il riconoscimento di molti diritti nuovi, che non sono espressamente previsti nella lettera del Trattato. Di conseguenza, si avverte un significativo deficit di democraziain importanti aree di "social policy". "Most of the human rights recognised by the Convention are qualified by express exceptions for cases where the national law or action complained of was 'necessary in a democratic society' (or some equivalent phrase)….their inclusion in the Convention to a considerable extent *removes them from the arena of legitimate political debate, by transforming them into questions of law for judges*"[27]. L'accusa – che preannuncia la più recente politica dei conservatori – è dunque di eccesso di potere della Corte di Strasburgo.

3. LA DENUNCIA DEL TRATTATO DELL'UNIONE EUROPEA. LA *BREXIT*.

Il secondo episodio che ha trascinato i giudici sul fronte delle controversie politiche riguarda, come noto, la *Brexit*.

La contesa ha visto, da un lato, il Governo che pretendeva di esercitare un "prerogative right" della Corona denunciando il Trattato dell'Unione Europea in modo analogo a come si firma una convenzione (con la sola partecipazione del rappresentante del Governo) e, dall'altro lato, alcuni cittadini (in particolare Mrs. Miller) che pretendevano il rispetto del ruolo del Parlamento: questo avrebbe dovuto esprimersi collegialmente sulla decisione, *prima* che l'esecutivo procedesse alla denuncia del Trattato[28]. Questa vicenda ha scatenato reazioni clamorose della stampa più conservatrice che ha qualificato i giudici "nemici della gente"[29] per il fatto di avere tutelato le prerogative del Parlamento di fronte ai salti in avanti del Governo a guida del partito conservatore che voleva incassare la popolarità per avere portato a termine l'uscita dall'UE.

Come noto, le tesi contrapposte vedevano il Governo avvalersi dei "prerogative rights" della Corona, i residui privilegi del sovrano, che comprendono attività di carattere internazionale come l'adesione a trattati e convenzioni, e i sostenitori del ruolo del Parlamento. Come espresso da uno degli avvocati che peroravano la causa dell'attrice in giudizio, una volta che la denuncia del Trattato ex art. 50 fosse stata depositata, "azionando il grilletto, il proiettile sarebbe partito" e un eventuale intervento successivo del Parlamento non avrebbe potuto intercettarne la corsa. L'argomento principale per i giu-

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[26] LORD SUMPTION, *The limits of the law*, *cit.*, p. 214.

[27] Corsivo aggiunto. In qualche misura questa prospettiva riecheggia, involontariamente, le posizioni "originaliste" di alcuni giudici della Corte Suprema USA (Antonin Scalia, e oggi, la sua allieva Amy Bartlett) rispetto alla Costituzione del 1787 che non dovrebbe essere letta con gli occhi moderni, ma con l'atteggiamento originale di coloro che redassero il testo (e che, in molti casi, non potevano prefigurare i mutamenti sociali sopravvenuti).A titolo di esempio, Scalia ricorda "*Sodomy* was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had *criminal sodomy laws*. In fact, until 1961, all 50 States outlawed *sodomy*, and today, 24 States and the District of Columbia continue to provide criminal penalties for *sodomy* performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."*Bowers v. Hardwick* 478 U.S., (1986), p. 192—194

[28] *R (Miller) v Secretary of State for Exiting the European Union*[2018] AC 61

[29] Il titolo "*Enemies of the People*" apriva l'articolo in prima pagina di James Slack sul *Daily Mail* del 4 Novembre 2016

dici fu la considerazione che il Trattato dell'UE attribuisce ai cittadini degli Stati Membri taluni diritti immediati, come ad esempio il ricorso alla Corte di Giustizia del Lussemburgo. Per questo motivo non era lecito che il Parlamento venisse scavalcato: altrimenti i cittadini avrebbero perso alcuni diritti senza essere ascoltati tramite i *Members of Parliament* che li rappresentano.

In quell'occasione, i giudici di primo livello e quelli di ultima istanza (in quanto la vertenza passò direttamente dalla High Court alla Supreme court, attraverso il "*leapfrog* appeal" che consente di evitare il grado intermedio di appello) furono scrutinati dalla pubblica opinione in modo aggressivo e invadente: le loro fotografie furono esposte in prima pagina, i tratti delle loro personalità indagati con insistenza.

Nonostante l'invadenza dei *mass media*, i giudici hanno deciso in termini strettamente giuridici, insistendo con energia sulla circostanza che la vertenza non riguardava affatto l'opportunità o meno della *Brexit*, ma le modalità con cui la procedura per recedere dal trattato dovesse svolgersi.

4. *PROROGATION OF PARLIAMENT*. IL RINVIO DELLA CONVOCAZIONE DEL PARLAMENTO

Come ulteriore occasione di intervento giudiziario in materia politica vale la pena di ricordare la tentata forzatura del Governo inglese nell'intento di limitare il tempo per la discussione del processo di denuncia del Trattato dell'UE.Come noto, il progetto, per poter dichiarare "*Brexitdone*" (secondo gli slogan di Boris Johnson), si è tradotto nel provvedimento, controfirmato dalla Regina, che procrastinava la ripresa dei lavori parlamentari, oltre il termine abituale del calendario di Westminster. La questione della "prorogation of Parliament" ha dominato la stampa britannica con schieramenti contrapposti e animosi, secondo la nuova tendenza che sembra avere oscurato la consueta flegma inglese.

Mentre il Governo affermava l'esigenza di procrastinare il rientro autunnale del Parlamento "per consentire al Governo di curare importanti dossier da sottoporre all'assemblea parlamentare", l'ostinata Mrs. Miller – già attrice in giudizio per la procedura di uscita dall'UE –, sosteneva che ridurre il tempo di discussione, portando la data di convocazione dei parlamentari a ridosso della scadenza ultima per la notifica alle istituzioni europee, impediva un serio dibattito.

La vicenda culminò nella sentenza resa dalla Corte Suprema, unanime e contraria al Governo[30].

Non è irrilevante ricordare che il diritto del Parlamento di riunirsi è cruciale alla democrazia: uno dei punti fondamentali di scontro tra il Parlamento e il re nel XVII secolo fu proprio la mancata convocazione dei parlamentari. Infatti il *Bill of rights* del 1688[31] prevede, tra le accuse rivolte a Giacomo II, il fatto che non si erano tenute sedute assembleari sufficienti e perciò si richiedeva a Mary e Guglielmo d'Orange, nell'assumere il trono, di impegnarsi a che "for Redresse of all Grievances and for the amending strengthening and preserveing of the Lawes Parlyaments ought to be held frequently"[sic]. Solo l'accettazione di questa condizione, insieme a quelle pertinenti alla libertà di religio-

[30] *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent), Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41, sentenza resa il 24 Settembre 2019 dopo l'udienza del 17, 18 e 19 Settembre 2019. La rapidità con cui la sentenza fu emessa è indicativa dell'urgenza avvertita sulla questione.

[31] 1688 c. 2 (Regnal. 1_Will_and_Mar_Sess_2)

ne, all'utilizzo della giuria scelta in maniera neutrale, al divieto di pene crudeli e inusuali, di confische illegittime ecc., consentì di instaurare una nuova dinastia (Mary Stuart e William d'Orange) sul trono d'Inghilterra.

Si tratta quindi di una materia di importanza costituzionale. Anche in questo caso, come nel precedente episodio sulla procedura da seguire per la *Brexit*, sono in gioco i "prerogative rights" della Corona: i privilegi residui del sovrano. La questione delle date di convocazione del Parlamento "is a prerogative power exercised by the Crown on the advice of the Privy Council", ma da almeno un secolo è una questione di routine. L'ultimo caso in cui un monarca annunciò personalmente la convocazione del Parlamento risale alla Regina Vittoria nel 1854[32].

L'esito della decisione, nel 2019, fu che il rinvio (*prorogation*) della convocazione era 'unlawful, void and of no effect'. Condanna netta del comportamento dei componenti del Governo e del Privy Council.

La contrapposizione tra giudici e politici non era stata così evidente da tempi remoti, anche perché l'errato consiglio del Primo Ministro alla Regina[33] l'aveva indotta ad un provvedimento illegittimo, con una responsabilità dell'esecutivo grave anche agli occhi dell'opinione pubblica, molto sensibile alla dignità della Corona. Infatti i giudici precisano "We know that in approving the prorogation, Her Majesty was acting on the advice of the Prime Minister. We do not know what conversation passed between them when he gave her that advice. We do not know what conversation, if any, passed between the assembled Privy Counsellors before or after the meeting. We do not know what the Queen was told and cannot draw any conclusions about it."

La circostanza che la scelta circa la data in cui convocare il Parlamento abbia natura politica, a parere della Corte, non esclude che la questione possa essere sottoposta ad un giudizio di legalità quanto al modo in cui il potere sia stato esercitato. Infatti, in passato in una serie di vertenze a partire dal XVII secolo le corti hanno protetto la sovranità del Parlamento da minacce provenienti dall'utilizzo dei "prerogative powers", ora "the sovereignty of Parliament would … be undermined … if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased" (par. 42). Non è ad arbitrio dell'esecutivo che l'organo legislativo si può riunire.

Quanto alla legittimità della durata del periodo in cui i lavori parlamentari sono sospesi, la Corte assume come parametro il concetto di sovranità e osserva che le corti hanno stabilito limiti all'esercizio legittimo del potere chiarendo che occorre una giustificazione ragionevole per impedire o frustrare tale principio (par. 49). Nel caso di specie, viceversa, (par. 56), non si tratta di una sospensione normale in vista del Discorso della Regina. Il rischio è di impedire al Parlamento di adempiere al proprio ruolo costituzionale "for five out of a possible eight weeks between the end of the summer recess and exit day on the 31st October", nel momento stesso in cui un cambiamento fondamentale doveva avvenire nella Costituzione del Regno Unito proprio 31 Ottobre 2019 (i.e. l'uscita dall'UE)(par. 57 della sentenza).

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[32] Nella premessa della sentenza, par. 3, i giudici ricordano: "Under current practice, a proclamation is made by Order in Council a few days before the actual prorogation, specifying a range of days within which Parliament may be prorogued and the date on which the prorogation would end."

[33] La questione sottoposta alla corte, infatti, non riguardava la legittimità dell'uscita dall'UE, ma "whether the advice given by the Prime Minister to Her Majesty the Queen on 27th or 28th August 2019 that Parliament should be prorogued from a date between 9th and 12th September until 14th October was lawful". La corte, nel giudizio enunciato oralmente da Lady Hale e Lord Reed, osserva che la questione "arises in circumstances which have never arisen before and are unlikely ever to arise again. It is a "one off".

Quanto alla ragionevolezza della scelta, la corte osserva: "no reason was given for closing down Parliament for five weeks. Everything was focussed on the need for a new Queen's Speech", con un lungo intervallo mentre la redazione del discorso inaugurale del sovrano(che include il programma dei diversi ministeri per il prossimo mandato) non richiede normalmente più di 6 giorni[34]. In conclusione, la Corte raggiunge la convinzione che "It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five week" (par. 61).

La formulazione non è casuale: *manca ogni* motivazione, a maggior ragione difetta *una valida* ragione.

Tra i documenti prodotti davanti alla corte, fa spicco un'annotazione del Primo ministro che descrive l'attività parlamentare in modo riduttivo: "The Prime Minister's reaction was to describe the September sitting as a 'rigmarole'. Nowhere is there a hint that the Prime Minister, in giving advice to Her Majesty, is more than simply the leader of the Government seeking to promote its own policies; he has a constitutional responsibility" (par. 60 dellamotivazione).

In effetti, la Corte aveva a propria disposizione, come risultato di una richiesta di produzione di documenti rilevanti avanzata dagli attori in giudizio (*disclosure*), tre scritti[35]: uno dei quali consiste in un'annotazione, manoscritta, del Primo Ministro sgradevolmente sbrigativa rispetto alle funzioni di colleghi in Parlamento la cui attività di settembre è giudicata una tiritera, una manfrina, una serie di adempimenti insignificanti ("a rigmarole")[36].

Un commento superficiale, spregiativo, non gradito a nessun organo costituzionale.

La fermezza con cui la Presidente della Corte, Lady Hale, ha dato lettura della sentenza, in una seduta collegiale ripresa dai mezzi di comunicazione[37], ha dato il senso dell'indignazione dei giudici di fronte ad un comportamento spregiativo verso i principi costituzionali della tradizione inglese.

5. LA DECISIONE SULLA PRETESA SCOZZESE DI RINNOVARE IL REFERENDUM PER L'INDIPENDENZA

La Scozia gode di poteri legislativi autonomi in forza della *devolution* effettuata tramite lo *Scotland Act 1998*, ma ripetutamente si sono avvertite istanze separatiste.

L'avvenuta denuncia del Trattato dell'UE ha rinfocolato il desiderio di maggiore indipendenza: il *Lord Advocate* (*senior law officer* del Governo Scozzese) nel 2022 ha rivolto alla Corte Suprema del Regno Unito una interrogazione sulla legittimità per il Parlamento scozzese di indire un nuovo referendum[38].

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[34] Par. 59: secondo la testimonianza offerta da sir John Major (già primo ministro, conservatore), "the work on the *Queen's Speech* varies according to the size of the programme. But a typical time is four to six days."

[35] Par. 18: "annexed to a witness statement from Jonathan Jones, Treasury Solicitor and Head of the Government Legal Department"

[36] Par. 18: "The Prime Minister's handwritten comments on the *Memorandum*, dated 16th August. They read: "(1) The whole September session is a rigmarole introduced [words redacted] t [sic] show the public that MPs were earning their crust. (2) So I don't see anything especially shocking about this prorogation. (3) As Nikki nots [sic], it is OVER THE CONFERENCE SEASON so that the sitting days lost are actually very few."

[37] La ripresa del 24 settembre 2019 è reperibile su youtube: Supreme Court prorogation ruling in full - YouTube

Mentre il precedente voto era stato autorizzato dal Parlamento di Westminster attraverso un "Order in Council" del 2013 [39], attualmente il Parlamento non intende procedere ad estensioni delle competenze scozzesi.

La questione, altamente sensibile, verte quindi sull'interpretazione, alquanto ovvia, della norma che riserva al Parlamento di Westminster materie che riguardano rispettivamente "the Union of the Kingdoms of Scotland and England" e "the Parliament of the United Kingdom" .

E' difficile argomentare che un referendum sull'indipendenza non coinvolga l'Unione dei Regni (o che non colpisca il Parlamento del Regno Unito)[40]. In conformità a quanto disciplinato dalla normativa sulla autonomia scozzese, e in modo analogo a quanto previsto anche nello *Human Rights Act,* chi propone un progetto legislativo deve includere una dichiarazione secondo cui il testo sottoposto all'assemblea parlamentare non contraddice le norme di carattere generale (nel caso di specie quelle sull'autonomia limitata della Scozia).

Dal momento che il progetto proviene dal Governo scozzese, il *Lord Advocate*[41] ha chiesto una interpretazione preliminare sull'effettiva potestà della Scozia di indire un referendum senza il consenso del Parlamento del Regno Unito.

L'argomento meno vulnerabile,tra quelli avanzati dal Governo scozzese, verte sul fatto che il secondo referendum avrebbe solo un valore consultativo (*advisory)*, ma anche questo argomento non ha convinto la corte. La risposta, ragionevole, è la seguente: "*Even if such a vote didn't produce a legally binding result, it would still amount to an "important political event" with "important political consequences", "much more than a purely abstract or consultative exercise and could not be legally allowed on this basis".*

La limpida conclusione cui la corte è giunta è quindi nel senso che (par.92) la norma dello *Scottish Independence Referendum Bill*la quale prospetta come domanda "Should Scotland be an independent country?" è pertinente ad una materia riservata (al Parlamento del Regno Unito). In particolare"(2) it relates to (i) the Union of the Kingdoms of Scotland and England and (ii) the Parliament of the United Kingdom".

La decisione, non particolarmente problematica dal punto di vista giuridico, ha offerto alla Corte Suprema l'occasione per ribadire alcuni principi interpretativi della legislazione, ad esempio insistendo[42], nella lettura del par. 1(f), secondo il significato corrente delle parole, in modo coerente con il generale approccio all'interpretazione dello *Scotland Act* «as explained … by Lord Hope in *Imperial Tobacco Ltd v Lord Advocate*[2012] UKSC 61; para 14:

'The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is *constant and predictable*. This

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[38] [2022] UKSC 31, 23 novembre 2022, online: https://www.supremecourt.uk/cases/docs/uksc-2022-0098-judgment

[39] In forza dello *Scotland Act*, sect. section 30(2) (e l'adeguamento della lista di materie esclusive per il Parlamento di Westminster)

[40] *Scotland Act*, section 29(2)(b) e Schedule 5 (Par. 1(b) e (c))

[41] *Scotland Ac*t , Schedule 6, paragraph 34 : "The Lord Advocate, the Attorney General, the Advocate General or the Advocate General for Northern Ireland may refer to the Supreme Court any devolution issue which is not the subject of proceedings."

[42] Par. 38 della sentenza, sul significato del par. 1 (f) (""any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters").

will be achieved if the legislation is construed according to the *ordinary meaning* of the words used'»[43].

Troviamo quindi un rafforzamento del principio generale sul dovere delle corti di attenersi all'«*ordinary meaning*» della parole usare dal legislatore.

Sul versante politico, la sentenza colpisce un nervo scoperto degli scozzesi, da sempre insofferenti per le ingerenze di Londra. In questo caso però, contrariamente a quanto avvenuto per la *Brexit* e il rischio di "*prorogation*" del Parlamento, i mezzi di comunicazione non hanno approfittato per contestare il potere giudiziario e la vicenda si è chiusa in (momentaneo) consenso.

Un'appendice litigiosa si apre però rispetto al veto opposto dal Parlamento di Westminster contro il progetto di legge scozzese volto a facilitare la rettifica dell'attribuzione del genere negli documenti ufficiali (*Gender Recognition Certificate*) (GRC), anche per adolescenti di 16 anni e a prescindere da certificati medici e psicologici[44]. La bozza approvata dal Parlamento scozzese è stata messa in *standby* dall'intervento del Governo che intende impedire la promulgazione del testo nella versione attualmente varata dal Parlamento scozzese. L'opposizione del Ministro per la Scozia (A. Jack) nel Governo di RishiSunak che ha rifiutato (ex art. 35, *Scotland Act 1998*) di sottoporre il testo legislativo al "RoyalAssent", ossia alla promulgazione, è fondata su perplessità quanto alle ripercussioni in materia di parità tra di genere[45].

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[43] Corsivo aggiunto.

[44] *Gender Recognition Reform (Scotland) Bill*, approvato in forma quasi definitiva, salvo emendamenti finali, dal Parlamento Scozzese (22 dicembre 2022): https://www.gov.scot/news/gender-recognition-reform-bill-passed/ (consultato 19 gennaio 2023). Nel commento del Governo: "Trans people aged 16 and older [sect. 8A] applying for a GRC will be required to make a legally binding declaration that they are already living in their acquired gender and intend to do so permanently … Removing the current requirement under the *Gender Recognition Act 2004* for applications to have evidence of a diagnosis of gender dysphoria aligns with international best practice and the consensus view of United Nations Human Rights bodies". L'unica richiesta alla persona che chiede il certificato è di fare una dichiarazione (8 C): "that the applicant—
(ii) meets the condition in section 8A(2),
(iii) either—
(A)is aged 16 or 17 and has lived in the acquired gender throughout the period of six months ending with the day on which the application is made, or
(B) is aged at least 18 and has lived in the acquired gender throughout the period of three months ending with the day on which the application is made,
(iv) intends to continue to live in the acquired gender permanently,
(v) understands that it is an offence to knowingly make a statutory declaration under this section which is false in a material particular […]"https://www.gov.scot/news/gender-recognition-reform-bill-passed/ (consultato 19 gennaio 2023)

[45] Scottish Secretary Alister Jack: "I am concerned that this legislation would have an adverse impact on the operation of Great Britain-wide equalities legislation". Nel documento ufficiale che espone le ragioni del veto (*Policy statement of reasons on the decision to use section 35 powers with respect to the Gender Recognition Reform (Scotland) Bill)*leggiamo, tra l'altro: "amendments remove any requirement for third party verification or evidence from the process.
5. The Bill also amends provisions for the process by which people from overseas can obtain a GRC under Scots law […]The Bill will make modifications of the law as it applies to the reserved matters. Sections 2-6and 16 of the Bill make modifications to the 2004 Act [*Gender Recognition Act* 2004]". Quanto alle conseguenze deteriori che ne deriverebbero, si segnala: "The first category of adverse effects created by the Bill comes from the substantive modifications it makes to the basis upon which a GRC is obtained, so as to diverge Scotslaw from the law in the rest of the UK i.e. it *creates 2 parallel and very different regimes* for issuing and interpreting GRCs.15. The Bill does not purport to require that a Scottish GRC issued under its terms would have any legal effect other than in Scots law […]".https://assets.publishing.service.gov.uk/government/uploads/system/uploads/at-

La reazione della Prima Ministra, Nicola Sturgeon, è stata di dura opposizione: si profila il rischio che le Corti siano nuovamente chiamate ad intervenire in una lite per attribuzione di competenze legislative tra i due Parlamenti a seguito della *devolution* del 1998[46]. La minaccia "*It will inevitably end up in court*" pronunciata da Nicola Sturgeon è alquanto esplicita. Il coinvolgimento delle corti in contese politiche sembra diventare una prassi continua.

6. IL *BILL FOR A BRITISH BILL OF RIGHTS*. LA PROPOSTA DI APPROVARE UNA VERSIONE PROPRIA DEI DIRITTI FONDAMENTALI, AUTONOMA DALLA CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO

La proposta di recuperare autonomia anche sul versante dei diritti dell'uomo, per approvare una carta britannica di diritti fondamentali, già avanzata da Dominic Raab[47], è in sospeso dopo l'avvento di Rishi Sunak al Governo. Benché il progetto stia molto a cuore al ministro del Governo conservatore[48] (che l'aveva già avanzato all'epoca di David Cameron), e sia sopravvissuto ad un intermezzo dovuto al Governo di Liz Truss(autrice di un primo stallo), acque di burrasca minacciano il procedimento.

In passato si era progettata un versione scritta della costituzione consuetudinaria del Regno Unito: nel 2009 Jack Straw, ministro della giustizia, aveva dichiarato "Alongside the codification of individual rights, there is a growing debate on the desirability of codifying the constitution. … Many argue that the time has come to draw together in a single text the various constitutional authorities upon which we rely. […].One possible reform is a *Bill of Rights and Responsibilities* that builds on the *Human Rights Act*. Back in 1998 I described the HRA as 'a floor and not a ceiling'. It guarantees civil rights but does not cover social and economic rights which have developed since the Second World War". L'ipotesi era di un percorso con un referendum popolare[49].

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tachment_data/file/1129495/policy-statement-section-35-powers-Gender-Recognition-Reform-_Scotland_-Bill.pdf

[46] P. CRERAR, L. BROOKS, *Rishi Sunak blocks Scotland's gender recognition legislation*, in *The Guardian*, Mon 16 Jan, 2023, "Nicola Sturgeon has said there were 'no grounds' for the UK government to block the legislation … Scotland's first minister has said her government was likely to mount a legal challenge in response, saying the use of section 35 [*Scotland Act 1998*] would create a 'very, very slippery slope indeed' and would embolden the UK government to do the same in other areas. ..A court battle would inevitably be presented by the SNP as Westminster denying Holyrood its democratic right to make its own laws – hot on the heels of the Supreme Court verdict on another referendum – and could bolster the independence cause" *online:* https://www.theguardian.com/world/2023/jan/16/rishi-sunak-blocks-scotlands-gender-recognition-legislation (consultato 18 gennaio 2023).

[47] "On 22 June 2022, the Secretary of State for Justice, Dominic Raab, published the *Bill of Rights Bill*. This would repeal and replace the Human Rights Act (HRA) 1998, which gives effect in UK law to the rights and freedoms in the European Convention on Human Rights (ECHR). A scrutiny is constantly conducted by a network of academics (having London King's college as reference) in *UK in a changing Europe*: https://ukandeu.ac.uk/explainers/the-bill-of-rights-bill/

[48] La nomina da ottobre 2022 conferitagli è di "Deputy Prime Minister, Lord Chancellor and Secretary of State for Justice".

[49] *Constitutional change and the future of parliamentary democracy*, 24 November 2009, Magna Carta Institute, Brunei University, http://www.justice.gov.uk/news/speech241109a.htm (access on November 24th 2009): "However, this would take time, it would need to be done on a consensual basis and would in my view require a referendum. … we are currently using deliberative forums to get objective evidence about what people think of the idea of a Statement of Values, a Bill of Rights and Responsibilities and indeed a written constitution".

La situazione è oggi diversa: il progetto è in rotta di collisione con le precedenti acquisizioni. Il proposito del testo, già sottoposto ad una prima lettura parlamentare, è di restituire supremazia alle corti del Regno Unito rispetto alla Corte Europea dei diritti dell'uomo e rendere esplicito il potere di ignorare sentenze europee sui diritti umani, restringendo le possibilità di invocarne la protezione nei ricorsi contro il Governo[50]. Come noto, la vicenda è stata esaltata dallo scontro sul progetto di esiliare gli immigrati irregolari,giunti nel Regno Unito, instradandoli verso il Ruanda: la Corte di Strasburgo ha infatti emesso un provvedimento d'urgenza che ha sospeso l'allontanamento dei soggetti candidati a quella che si può definire una sorta di deportazione.

A parere degli scettici, in realtà il distanziamento dalla Convenzione europea non può avvenire in questa forma: "only an exit from the European Convention would definitely emancipate the UK from the scrutiny over the legitimacy of their legislation"[51].

Si apre quindi una eventualità ulteriore di intervento del potere giudiziario: il modo di procedere del Governo potrebbe nuovamente essere soggetto a *judicial review* per la tattica che i politici intendono adottare. È altamente discutibile che il Parlamento possa unilateralmente modificare il ruolo della Corte di Strasburgo senza denunciare il Trattato firmato nel lontano 1950. L'incuranza dei conservatori per le forme delle procedure costituzionali sta diventando cronica.

Il potere giudiziario in Inghilterra ad inizio 2023 ha già dato un segnale importante tramite la High Court di Londra ammettendo che 11 migranti, candidati all'espulsione verso il Ruanda, hanno diritto ad invocare i diritti dell'uomo davanti alle corti del Regno Unito[52].

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[50] *Bill to Reform the law relating to human rights*, sect. 1: …"In particular, this Act clarifies and re-balances the relationship between courts in the United Kingdom, the European Court of Human Rights and Parliament by ensuring—
(a) that it is the Supreme Court (and not the European Court of Human Rights) that determines the meaning and effect of Convention rights for the purposes of domestic law (see section 3(1));
(b) that courts are no longer required to read and give effect to legislation, so far as possible, in a way which is compatible with the Convention rights (see paragraph 2 of Schedule 5, which repeals section 3 of the Human Rights Act 1998);
15(c) that courts must give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about the balance between different policy aims, different Convention rights and Convention rights of different persons are properly made by Parliament (see section 7).
20(3) It is affirmed that judgments, decisions and interim measures of the European Court of Human Rights —
(a) are not part of domestic law, and
(b) do not affect the right of Parliament to legislate". https://publications.parliament.uk/pa/bills/cbill/58-03/0117/220117.pdf (consultato 11 gennaio 2923).

[51] Rajiv Shah, già consigliere di Boris Johnson, ha dichiarato. "There is nothing that we can do on the domestic level to change the fact that we are bound by Strasbourg. The proposed *bill of rights* cannot do that. The only way to do so is to leave the ECHR": J. ELGOT, *The Guardian*, 7 Sep 2022, https://www.theguardian.com/law/2022/sep/07/liz-truss-halts-dominic-raab-bill-of-rights-plan.

[52] D. CASCIANI, *Migrants facing potential removal to Rwanda under the Home Office's relocation scheme have won permission to challenge the policy*, *BBC News*, UK, Jan. 16, 2023. https://www.bbc.com/news/uk-64294461: "During Monday's High Court hearing, Lord Justice Lewis and Mr Justice Swift said that 11 migrants could ask the Court of Appeal to consider whether Rwanda's assurances to the UK amounted to sufficient guarantees of safe and fair treatment."

Resta da ricordare la circostanza che l'emancipazione dei vincoli europei figura nel *Conservative Manifesto* 2019[53], il che giustifica una certa ostinazione dei conservatori[54] nel perseguire il piano pubblicizzato. Al momento in cui scriviamo, il ministro della Giustizia del precedente Governo, Robert Buckland, un barrister (*King's Counsel*), ha esercitato pressioni sul primo ministro Rishi Sunak perché eviti una lunga contesa con il Parlamento che assorbirebbe ampie ore di discussione in momenti in cui l'ordine del giorno del *Cabinet* è sovraccarico. Il rischio di *impasse* riguarderebbe specialmente la *House of Lords* dove i parlamentari del partito conservatore si troverebbero molto divisi sulla questione [55].

Sullo sfondo del discorso aleggia la preoccupazione ventilata da Lord Hoffmann agli inizi della vigenza dello *Human Rights Act 1998*: "the jurisprudence of the Strasbourg court does create a dilemma because it seems to me to have passed far beyond its original modest ambitions and is seeking to impose a Voltaire an uniformity of values upon all the member States. This I hope we shall resist"[56].

È quindi una questione di *resistenza* che viene proposta ai britannici, negli ultimi anni molto propensi a enfatizzare la propria insularità.

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[53] *Conservative Party 2019 Election Manifesto*, p. 48, paragrafo "*Protecting our Democracy*": "After Brexit we also need to look at the broader aspects of our constitution: the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people. […] *We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government. We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays*. In our first year we will set up a Constitution, Democracy & Rights Commission that will examine these issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates" (corsivo aggiunto).

[54] Specialmente da parte di Dominic Raab,*Deputy Prime Minister, Lord Chancellor and Secretary of State for Justice* (25 Ott. 2022), nel Governo guidato da Rishi Sunak .

[55] A.ALLEGRETTI, Sunak's next U-turn may be to ditch Raab's bill of rights, The Guardian, 8 dicembre 2022, online: https://www.theguardian.com/law/2022/dec/08/rishi-sunak-next-u-turn-may-be-to-ditch-dominic-raab-bill-of-rights**.** Da ultimo, H. SIDDIQUE: "More than 150 civil society groups have written to Rishi Sunak urging him to commit to retaining the Human Rights Act and rule out its replacement by a British bill of rights" (The Guardian, 10 dicembre 2022, https://www.theguardian.com/law/2022/dec/10/civil-society-calls-on-rishi-sunak-to-commit-human-rights-act-bill-of-rights).

[56] LORD HOFFMANN, *Human rights, cit.,* in *Modern Law Rev*., 1999, p. 166. Dello stesso LORD HOFFMANN: *The Universality of Human Rights'. Judicial Studies Board Annual Lecture*. London, *Judicial Studies Board,* 2009. Available at: http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-hoffman-19032009

L'evoluzione delle norme sull'accesso fiduciario alle risorse digitali negli Stati Uniti

Arkadiusz WUDARSKI[*]

This paper focuses on US legislation before the drafting of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) in 2015, examining the legal and social issues faced by American lawyers in their search for a balance between facilitating fiduciary access and respecting privacy. Special attention is paid to the first legislative initiatives at the state level as well as to models of regulations that represent opposite approaches to access to digital assets: the Privacy Expectation Afterlife and Choices Act (PEAC) and the Uniform Fiduciary Access to Digital Assets Act (UFADAA). The analysis will consider the requirements for gaining access to the account of a deceased user, conflicts between legally protected interests federal and state laws, and the meaning of such legal terms as digital assets, fiduciary, custodian, content of an electronic communication, et. al. The reasons for the failure of these acts to receive final approval are also analysed. The research is based on American doctrine, state and federal legal acts, documentation of the legislative process, and the work of expert groups, including, primarily, the Uniform Law Commission (ULC).

Questo contributo si occupa della legislazione statunitense prima della stesura del Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) del 2015 ed esamina i problemi giuridici e sociali affrontati dai giuristi americani nella loro ricerca di un bilanciamento tra la facilitazione dell'accesso fiduciario e il rispetto della privacy. Particolare attenzione è rivolta alle prime iniziative legislative a livello statale così come ai modelli di regolamentazione che rappresentano approcci opposti all'accesso delle risorse digitali: il Privacy Expectation Afterlife and Choices Act (PEAC) e lo Uniform Fiduciary Access to Digital Assets Act (UFADAA). L'analisi prende in considerazione i requisiti necessari per ottenere accesso all'account di un soggetto deceduto, i conflitti tra gli interessi protetti dalla legge federale e quelli protetti dal diritto statale e il significato di alcuni termini giuridici come: risorse digitali, fiduciario, custode, contenuto di una comunicazione elettronica. Il saggio intende altresì offrire un'analisi delle ragioni che hanno condotto alla mancata traduzione in norme vigenti di questi progetti. Il presente lavoro si basa essenzialmente sull'analisi della dottrina americana, delle leggi statali e federali degli Stati Uniti, nonché della documentazione relativa al lavoro svolto dai gruppi di esperti tra cui, principalmente, l'Uniform Law Commission (ULC).

[*] Professore di diritto civile comparato, Uniwersytet Zielonogóre, Europa-Universität Viadrina Frankfurt (Oder), Uniwersytet Szczeciński. La riflessione che qui offro all'Isaidat Law Review riprende una precedente pubblicazione apparsa nella rivista "Forum Prawnicze" n. 1/2020, pp. 3 – 21. Ringrazio qui Jarosław Krzewicki per il lavoro di traduzione che ha reso possibile la presente pubblicazione.

1. 1. L'AMBITO E LO SCOPO DELLA RICERCA

La digitalizzazione riguarda ormai molti ambiti della nostra vita; influisce non solo sul comportamento di un individuo, ma determina anche, nella dimensione globale, il funzionamento dell'intera società. Gli Stati Uniti sono il precursore dei cambiamenti tecnologici e il leader dei servizi di Internet che hanno rivoluzionato la nostra realtà[1]. Basti pensare che nel 2019 ben il 79% dei cittadini statunitensi aveva un profilo su un *social network*[2] e che il Paese è anche la sede del più grande sito di *social networking* online: Facebook[3]. La storia dello sviluppo di questo portale[4] è di per sé sufficiente a illustrare l'importanza della digitalizzazione nelle nostre vite. Basti qui menzionare che Facebook ha raggiunto il primo milione di utenti nel 2004 ovvero appena un anno dopo l'inizio della sua attività. Nel 2007 era già utilizzato da 58 milioni di persone e nel 2017 il numero di utenti ha superato i 2 miliardi[5]. Oggi, fino a un miliardo di persone utilizzano quotidianamente questa piattaforma[6]. Si scopre, tuttavia, che la digitalizzazione non riguarda soltanto il tempo della nostra esistenza in vita, ma che dura altresì anche dopo la nostra morte. Ciò interroga una serie di questioni giuridiche fondamentali, che possono essere ampiamente riassunte nella seguente domanda: che cosa succede al nostro mondo virtuale dopo la nostra morte e, in particolare che cosa accade alle risorse digitali ivi archiviate? Gli Stati Uniti sono stati dei precursori anche nel tentativo di rispondere a questa domanda. Infatti per primi hanno introdotto delle regole di accesso fiduciario ai beni digitali in caso di morte o d'inabilitazione dell'utente che hanno avuto non poca risonanza anche al di fuori dei confini della Federazione.

Considerando la natura globale dei servizi Internet, che di solito non sono limitati a un solo paese, nonché il ruolo dominante delle aziende americane in questo settore, si può vedere infatti come l'impatto della legislazione statunitense si sia dimostrato particolarmente rilevante. Per questi motivi ci concentreremo qui sull'analisi del processo di unificazione delle regole di accesso alle risorse digitali entro i confini di un'amministrazione fiduciaria negli Stati Uniti e sulla valutazione, dal punto di vista europeo, delle soluzioni giuridiche adottate. Ripercorreremo peertanto gli inizi dello sviluppo della legislazione americana a livello statale, esaminando i problemi che i giuristi americani hanno dovuto affrontare nella ricerca di soluzioni appropriate. Infine analizzeremo le fasi di

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[1] Nel 2018 il mercato americano dei servizi Internet aveva oltre 312 milioni di utenti ed era uno dei più grandi al mondo, vedi J. CLEMENT, *Internet usage in the United States – Statistics&Facts*, https://www.statista.com/topics/2237/internet-usage--in-the-united-states/ (consultato il 31.01.2020).

[2] Si tratta di circa 247 milioni di persone, Percentage of U.S. population with a social media profile from 2008 to 2019, https://www.statista.com/statistics/273476/percentage-of-us-population-with-a--social-network-profile/ (consultato il 31.01.2020).

[3] Numero di adulti americani che usano Facebook nel febbraio 2018 per fascia di età: 18-29 (82%), 30-44 (89%), 45-54 (88%), 55-64 (84 %), 65 e oltre (77%), https://www.statista.com/statistics/200548/users-with-social-site-accounts-by-age-group/ (visto il 31.01.2020).

[4] Numero di utenti Facebook: 1 milione (1° dicembre 2004), 6 milioni (1° dicembre 2005), 12 milioni (1° dicembre 2006), 58 milioni (1° dicembre 2007), 360 milioni (1° dicembre 2009), 500 milioni (21 luglio 2010), 1 miliardo (4 ottobre 2012), 2 miliardi (27 giugno 2017) - Dati di Facebook, Our History, https://newsroom.fb.com/Company-Info/ (consultato il 31.01.2020).

[5] Vedi i dati forniti da Facebook il 27 giugno 2017: M. NOWAK, G. SPILLER, *Two Billion People Coming Together on Facebook*, https://newsroom.fb.com/news/2017/06/two-billion-people--coming-together-on-facebook/ (visto il 31.01.2020).

[6] Datiforniti da Mark Zuckerberg il 27 agosto 2015 su Facebook, https://www.facebook.com/zuck/posts/10102329188394581 (visto il 31.01.2020).

creazione del *Revised Uniform Fiduciary Access to Digital Assets Act* (RUFADAA) del 2015, documento che è diventato la base per l'unificazione del diritto statunitense.

2. ACCESSO ALL'*ACCOUNT* DI POSTA ELETTRONICA (2005)

Negli Stati Uniti la ricerca di una base giuridica per le regole di accesso ai contenuti digitali *post mortem* è stata oggetto di un lungo processo, che può essere suddiviso in tre fasi[7]. Il primo Stato[8] che ha regolato questo problema, anche se solo parzialmente, è stato il Connecticut nel 2005[9]. La necessità di normare questo tema è scaturita dal rifiuto di fornire a una vedova l'accesso all'*account* di posta elettronica del marito defunto, che conteneva informazioni importanti sulla loro attività d'impresa comune[10]. Il campo di applicazione di questo strumento legislativo[11] era, tuttavia, molto ristretto giacché riguardava solo l'accesso all'*account* di posta elettronica del defunto[12] e non copriva altre risorse digitali[13]. Forse questa scelta può essere spiegata in ragione del grado di digitalizzazione della vita sociale all'epoca dei fatti che era abbastanza limitato. A quel tempo, infatti, solo il 7% degli Americani utilizzava i *social media*[14]. Di conseguenza il fornitore del servizio di posta elettronica[15], a seguito delle modifiche legislative, era tenuto

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[7] Questa divisione è introdotta da A.B. LOPEZ, *Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets*, in George Mason Law Review, 24, 1 2016, pp. 192–215; vedi G.W. BEYER, N. CAHN, *Digital Planning: the Future of Elder Law*, in National Academy of Elder Law Attorneys Journal, 9, 1, 2013, pp. 142–145; una diversa classificazione a tre livelli delle soluzioni degli stati in base a diversi ambiti di diritti, ovvero: (1) basato sulla posta elettronica: accesso alla posta elettronica, (2) utilizzabile: la possibilità di chiudere l'*account* e talvolta anche la sua ulteriore manutenzione e (3) possesso - trasferimento di risorse digitale a un'altra persona, suggerisce M.D. GLENNON, A *Call to Action: Why the Connecticut Legislature Should Solve the Digital Asset Dilemma*, in Quinnipiac Probate Law Journal, 28, 1, 2014, pp. 61-66.

[8] È difficile dare la priorità alla California, il cui regolamento, adottato nel 2002, non riguardava direttamente l'accesso all'*account* dell'utente deceduto. Richiedeva solo al *provider* di servizi Internet di informare il cliente almeno 30 giorni prima della chiusura dell'*account*. Le informazioni dovevano essere inviate tramite e-mail. Tale soluzione era quindi in pratica inutile per l'amministratore del patrimonio che non conosceva l'indirizzo di posta elettronica del defunto o non aveva dati di accesso ad esso, si veda: § 17538.35 (a) California Code. Codice delle imprese e delle professioni (2011); G.W. BEYER, N. CAHN, *Digital Planning*..., p. 143.

[9] Legge del 24 giugno 2005 - An Act Concerning Access to Decedents' Electronic Mail Accounts (Legge sull'accesso agli *account* di posta elettronica dei deceduti), entrata in vigore il 1° ottobre 2005, https://www.cga.ct.gov/2005/act/Pa/2005PA-00136- R00SB-00262-PA.htm (consultato il 31.01.2020)

[10] Si veda la giustificazione del disegno di legge del Senato (SB), n. 262 del 5 aprile 2005, predisposto dalla commissione giustizia: Judiciary Committee, Report on Bills Favorably Reported By Committee, https://www.cga.ct.gov/2005/jfr/s/2005SB-00262-R00JUD-JFR.htm (consultato il 31.01.2020).

[11] § 45a-334a Connecticut General Statutes (segue: CT Gen Stat) (2012), https://law.justia.com/codes/connecticut/2012/title-45a/chapter-802b/section-45a-334a (consultato il 31.01.2020).

[12] § 45a-334a è stato sostituito il 1° ottobre 2016 da § 45a-334b - § 45a-334s CT Gen Stat. Le nuove normative implementano le soluzioni del modello RUFA-DAA; Attuale codificazione della legge del Connecticut vedi https://www.cga.ct.gov/current/pub/titles.htm (consultato il 31.01.2020).

[13] A.B. LOPEZ, *Posthumous Privacy*..., pp. 193–194; M.D. GLENNON, *A Call to Action*..., pp. 50–51; M.W. COSTELLO, *The "PEAC" of Digital Estate Legislation in the United States: Should States "Like" That?*„ in Suffolk University Law Review", 49, 2016, pp. 436–437.

[14] Dati basati sulla ricerca condotta dal Pew Research Center: A. PERRIN, *Social Media Usage: 2005–2015*, https://www.pewresearch.org/internet/2015/10/08/social-networking-usage-2005-2015/ (consultato il 31.01.2020); A.B. LOPEZ, *Posthumous Privacy*..., p. 203.

[15] Il termine "fornitore di servizi di posta elettronica" (*electronic mail service provider*) è stato definito nel § 45a-334a (a) (1) CT Gen Stat.

a fornire all'esecutore del testamento o all'amministratore del patrimonio, l'accesso all'*account* del defunto[16] o a una copia del suo contenuto senza che si prendessero in considerazione altri aspetti. A tal fine era necessario presentare una domanda scritta[17], che doveva essere accompagnata da una copia del certificato di morte nonché da un certificato di nomina a esecutore testamentario o ad amministratore del patrimonio[18]. Per di più si noti che il regolamento si applicava solo ai cittadini che, al momento della loro morte[19], erano residenti nel Connecticut.

La regolamentazione dell'eredità delle risorse digitali rientrava era quindi affidata ai singoli stati e si è quindi dovuto aspettare altri due anni per vedere i successivi sviluppi. Il percorso è stato, quindi, molto lento, giacché nel 2007 solamente altri due stati avevano seguito il percorso del Connecticut: Indiana[20] e Rhode Island[21]. La soluzione del Rhode Island[22] ricalcava quella adottata nel Connecticut e pertanto si limitava a fornire l'accesso al solo *account* di posta elettronica del defunto[23]. Diversa e più avanzata si rivelò invece la scelta dell' Indiana che consentiva la messa a disposizione di qualsiasi documento o informazione lasciati dal defunto in formato elettronico[24]. Il *custodian*, cioè la persona che archivia elettronicamente documenti o informazioni di un'altra persona[25], era quindi obbligato ad astenersi dal distruggerli e a conservarli per un certo periodo di tempo[26]. Vale la pena notare qui che il legislatore dell'Indiana, nella sintesi del disegno di legge, qualificava i diritti sui documenti elettronici come diritti di proprietà ovvero *estate property*[27]. Per la prima volta i diritti relativi alle risorse online venivano ricondotti al diritto di proprietà[28] senza che però venisse fornita alcuna esaustiva spiegazione di tale scelta.

[16] Il termine "conto di posta elettronica" (*electronic mail account*) è definito in § 45a-334a (a) (2) CT Gen Stat.

[17] Naturalmente, la base per l'accesso all'*account* di posta elettronica potrebbe essere anche la decisione del tribunale ereditario competente, § 45a-334a (b) (2) CT Gen Stat.

[18] § 45a-334a (b) (1) CT Gen Stat.

[19] § 45a-334a (b) CT Gen Stat.

[20] Vedi: Bozza del Senato SB n. 212 (2007) presentata l'8 gennaio 2007 dal Senatore Ford e approvata nella prima sessione della 115a Assemblea Generale; si veda la documentazione completa del processo legislativo http://iga.in.gov/legislative/archive/bills/2007/SB/0212 (consultato 31.01.2020).

[21] Si veda: An Act Relating to ProbatePractice and Procedure, LC01978, 2007 – S 0732, il disegno di legge è stato presentato all'Assemblea Generale il 15 febbraio 2007 dai senatori Jabour, Connors i McBurney, http://webserver.rilin.state.ri.us/BillText/BillText07/SenateText07/S0732.pdf (consultato il 31.01.2020).

[22] Si veda: § 33-27-3 State of Rhode Island General Laws (Leggi generali dello Stato del Rhode Island - R.I. GenLaws); il contenuto di questa disposizione è stato successivamente modificato e l'intero regolamento è stato infine abrogato e sostituito da nuove disposizioni in An Act Relating to ProbatePractice and Procedure - RevisedUniformFiduciary Access to Digital Assets Act. Questo disegno di legge è stato presentato all'Assemblea Generale il 14 marzo 2019 dai senatori Lombardi, McCaffrey, Lynch Prata, Conley e Archam-bault (LC002098/SUB A, 2019 – S 0592 SUBSTITUTE A). I nuovi regolamenti (§ 33-27.1-1 - § 33-27.1-19 RI GenLaws) implementano le soluzioni del modello RUFADAA, https://trackbill.com/bill/rhode-island-senate-bill-592- -an-act -relating-to-probate-practice-and-procedure-revised - uniform-fiduciary-access-to-digital-assets-act-reguces - fiduciary-and-design-recipient-access-to-digital-assets-- relative-alla-pratica-di-successione-e-procedura-creando - l'accesso-fiduciario-uniforme-riveduto-alle-attività-digitali-act - per-promuovere-l'uniformità-della-legge-tra- states-that - enact-it / 1726459 / (consultato il 31.01.2020).

[23] Confronta la categoria E-mail Based, proposta da M.D. GLENNON, *A Call to Action*..., pp. 61–63.

[24] § 29-1-13-1.1 (b) IC (2007). M.D. GLENNON, *A Call to Action*…, pp. 65–66, include i regolamenti dell'Indiana e della Virginia nella categoria Possesory.

[25] § 29-1-13-1.1 (a) IC (2007).

[26] § 29-1-13-1.1 (c) IC (2007).

[27] Digest of SB 2012 (13.03.2007), Electronic documents as estate property, http://iga.in.gov/legislative/archive/bills/2007/SB/0212 (consultato il 31.01.2020).

[28] A.B. LOPEZ, *Posthumous Privacy*..., p. 194.

Di conseguenza, tra il 2005 e il 2007, l'attenzione si concentrò unicamente sulla presenza o sull'assenza dei requisiti formali richiesti per la trasmissione *mortis causa* del contenuto dell'*account* di posta elettronica del defunto.

3. ACCESSO AI SITI WEB (2010-2014)

La seconda fase dell'attività legislativa riguarda gli anni dal 2010 al 2014. A quel periodo risalgono infatti gli atti normativi adottati da Oklahoma, Idaho e Louisiana. Le scelte di questi Stati miravano ad ottenere una regolamentazione più ampia e dettagliata, che coprisse cioè l'accesso a tutti i servizi digitali del defunto. Tale evoluzione legislativa è stata la conseguenza della progressiva digitalizzazione della società, verso cui si è cercato di tenere il passo. I legislatori nel far ciò hanno quindi prestato attenzione alle questioni relative alla protezione del diritto d'autore, al rispetto della legge federale e alla responsabilità del fornitore di servizi. La dottrina ha espresso ampio sostegno ai cambiamenti legislativi, indipendentemente dalle divisioni politiche[29], e le decisioni sono state quasi sempre adottate all'unanimità.

Così nel 2010 l'esecutore testamentario e l'amministratore del patrimonio sono stati autorizzati dalla legislazione dell'Oklahoma[30] ad assumere il controllo degli *account* di posta elettronica del defunto e dei suoi *social network*, *microblog* e piattaforme di *short message service*[31]. Tale autorizzazione consentiva l'accesso e l'utilizzo dell'*account* e la conseguente possibilità di chiuderlo. L'anno successivo[32], la questione è stata affrontata anche in Idaho[33] dove, in maniera pressoché analoga, venivano definiti i poteri dell'esecutore[34] ed il suo procedimento di nomina[35]. È stato, inoltre, chiaramente stabilito l'obbligo di esercitare tali diritti nel solo interesse del defunto[36].

Nel 2014 la Louisiana è entrata a far parte degli Stati che hanno regolamentato l'eredità delle risorse digitali. La regolamentazione di questo Stato è più dettagliata e include diversi aspetti nuovi e importanti. Come in altri Stati, l'esecutore testamentario[37] era legalmente autorizzato a prendere il controllo degli *account* digitali del defunto[38]. Il rego-

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[29] Naturalmente, numerose modifiche ed emendamenti sono stati introdotti in varie fasi del lavoro legislativo e alcuni progetti di legge sono stati modificati poco prima della loro adozione definitiva, cfr. A.B. LOPEZ, *Posthumous Privacy*..., p. 196.

[30] La legge del 29 aprile 2010 è entrata in vigore il 1° novembre 2010; Oklahoma ALS (Advance Legislative Service) 2010, cap. 181, progetto della Camera dei Rappresentanti, (House Bill - HB) n. 2800; storia del processo legislativo, http://www.okle-gislature.gov/BillInfo.aspx?Bill=HB2800&Session=1000 (consultato il 31.01.2020)

[31] § 58-269 Oklahoma Statutes (2016); per la codificazione della legge dell'Oklahoma vedi http://www.okle-gislature.gov/osstatuestitle.html (consultato il 31.01.2020).

[32] A.B. LOPEZ, *Posthumous Privacy*...,p. 195.

[33] La legge del 16 marzo 2011 è entrata in vigore il 1° luglio 2011; Idaho ALS 2011, cap. 69, bozza del Senato SB n. 1044; storia del processo legislativo, https://legislature.idaho.gov/sessioninfo/2011/legislation/S1044/ (consultato il 31.01.2020).

[34] L'amministratore del patrimonio è definito in vari modi nella legislazione statale, ad esempio in Oklahoma è un rappresentante personale, in Louisiana è un rappresentante di successione (*succession representative*), in Connecticut è un amministratore. La differenza di nomenclatura non influisce sull'essenza dell'istituzione.

[35] I regolamenti dell'Oklahoma, dell'Idaho e anche del Nevada (vedi sotto) sono stati classificati alla categoria Actionable, M.D. GLENNON, *A Call to Action*...,pp. 63–65.

[36] La limitazione dei poteri poteva essere inclusa nella legge, nel testamento e anche nella decisione dell'autorità competente (§ 15-3-902 IS).

[37] Art. 3191 (A) Louisiana Code of Civil Procedure (La. Code Civ. Proc.) (2015).

[38] Naturalmente, fatte salve le limitazioni imposte da un testamento o dalla decisione del tribunale competente; arte. 3191 (C) La. Code Civ. Proc. (2015).

lamento adottato[39] obbligava la persona[40] chiamata a gestirli[41] a renderli disponibili[42] agli aventi diritto entro 30 giorni dal ricevimento dell'ordine del tribunale[43]. Allo stesso tempo, il concetto di *account* veniva qui definito in un modo molto più ampio e quindi capace di comprendere le più varie forme di attività digitale[44]. Allo stesso tempo, sono state prese in considerazione anche le limitazioni nell'uso dell'*account*. La persona che rappresenta l'utente è personalmente responsabile di qualsiasi violazione del *copyright* che si dovesse verificare nell'uso dell' *account* del *de cuius*[45].

Le scelte legislative non sono state, tuttavia, uniformi. La Virginia[46] ed il Nevada[47] hanno infatti preso vie significativamente diverse non garantendo questo un ampio spettro di possibilità che abbiamo appena descritto. Lo Stato del Virginia si è infatti limitato unicamente alla regolamentazione dell'accesso all'*account* di posta elettronica del minore deceduto[48]. Pertanto, la questione fondamentale, riguardante l'accesso all'*account*[49] dopo la morte di un soggetto maggiore d'età, è rimasta aperta. Come in Louisiana, è stata esclusa la responsabilità del fornitore di servizi digitali[50], il quale era obbligato a fornire l'*account* Internet entro 60 giorni[51]. In caso di controversia e procedimento giudiziario, il fornitore di servizi poteva astenersi dall'adempiere a tale obbligo fino alla definizione dello stesso[52]. Ovviamente, l'accesso all'*account* non poteva essere contrario alle disposizioni di legge (statali e federali)[53], alle decisioni dei tribunali, al contenuto del testamento, al rapporto fiduciario, al contenuto della procura rilasciata, nonché alle disposizioni contrattuali[54], comprese le restrizioni derivanti dalla licenza[55].

Un'altra soluzione è emersa in Nevada. In questo Stato, il legislatore ha introdotto soltanto misure per la chiusura di *account* Internet, genericamente intesi[56] e altre risorse

[39] Art. 3191 (D) (1) La. Code Civ. Proc. (2015).

[40] Salvo eccezioni di legge (cpv. 2) e nella misura consentita dalla legge federale.

[41] Letteralmente, si tratta di qualcuno che archivia, mantiene, gestisce, controlla, gestisce o amministra elettronicamente gli *account* digitali del defunto (*any person that electronically stores, maintains, manages, controls, operates, or administers the digital accounts of a decedent*).

[42] Letteralmente, si tratta di consegnare o consentire all'amministratore dell'eredità di accedere o possedere qualsiasi account digitale della persona deceduta. (*transfer, deliver, or provide a succession representative access or possession of any digital account of a decedent*).

[43] Si tratta di: *letters testamentary*, *letters of administration or letters of independent administration*.

[44] Art. 3191 (H) La. Code Civ. Proc. (2015).

[45] Art. 3191 (F) La. Code Civ. Proc. (2015).

[46] La legge del 13 marzo 2013, Virginia ALS 2013, capitolo 280, progetto della Camera dei Rappresentanti (House of Representatives - HB) n. 1752.

[47] Legge del 1° giugno 2013, Nevada ALS 2013, capitolo 325, bozza del Senato SB n. 131.

[48] § 64.2-110 (A) VA Code (2014).

[49] Un *account* digitale è definito nel § 64.2-109 VA Code (2014). Secondo questa disposizione, si tratta di un *account* elettronico tenuto, gestito, controllato o operato dal minore in conformità con i termini del contratto di fornitura di servizi che è stato effettivamente concluso da lui. Questo termine include blog, e-mail, multimedia, *account* personali, sociali e altri *account* online o simili man mano che la tecnologia si evolve. Questo concetto non include i conti definiti nel § 64.2-604 VA Code (2014) di cui è parte un istituto finanziario, una società di partecipazione finanziaria o un'impresa collegata all'istituto finanziario.

[50] § 64.2-110 (D) VA Code (2014).

[51] Il termine decorre dalla presentazione della domanda unitamente al certificato di morte, § 64.2-110 (B) VA Code (2014).

[52] § 64.2-110 (B) VA Code (2014).

[53] § 64.2-110 (C) VA Code (2014).

[54] Il termine *Terms of service agreement* è definito nel § 64.2-109 VA Code (2014).

[55] § 64.2-110 (A) VA Code (2014).

[56] Il legislatore ha solo indicato, a titolo esemplificativo, *social network*, siti web che forniscono servizi che richiedono la registrazione dell'utente, microblog, siti web che consentono l'invio di brevi messaggi di testo, nonché siti web in cui sono conservati account di posta elettronica (e-mail), § 143.188.1 (a) 1 -5 Nevada Re-

digitali[57] dopo il decesso del titolare[58], ma non ha regolamentato l'accesso al loro contenuto. Si è introdotto poi l'obbligo di adempiere agli obblighi contrattuali nei confronti del fornitore di servizi o dell'amministratore dell'*account*, in particolare il rispetto dei termini di servizio[59]. Così la legislazione del Nevada è apparsa andare in una direzione diversa rispetto alle quelle precedentemente analizzate e ha ridotto significativamente la possibilità di disporre delle risorse digitali del defunto.

Sul piano della legislazione statale vediamo quindi un quadro a tratti incompleto e carente di sistematicità[60]. Le leggi statali si sono infatti concentrate nell'affrontare problemi contingenti, relativi solo a specifici beni digitali del defunto. Molte altre importanti questioni giuridiche relative, ad esempio, all'inabilitazione dell'utente, non sono state risolte[61].

4. UFADAA (2014)

4.1. *LAVORI DELLA COMMISSIONE PER L'UNIFORMAZIONE DEL DIRITTO*

La legislazione sin qui introdotta, incompleta e disorganica, e la mancanza di interventi legislativi nella maggior parte degli Stati[62] sono diventati un problema sempre più acuto. Il formante legislativo non è stato in grado[63] di tenere il passo con le enormi dinamiche di digitalizzazione della vita sociale[64]. Questo situazione ha quindi acceso un vivo dibattito e ha dato impulso alla ricerca di nuove soluzioni giuridiche sistematiche,

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vised Statutes (Nev. Rev. Stat.) (2015), vedi: estensione § 143.188.1 (b) Nev. Rev. Stat. (2015).

[57] § 143.188.1 Nev. Rev. Stat. (2015).

[58] Ciò non si applicava ai conti finanziari, in particolare ai conti bancari e di investimento, § 143.188.2 Nev. Rev. Stat. (2015).

[59] § 143.188.3 Nev. Rev. Stat. (2015).

[60] Per una breve panoramica della situazione giuridica nel 2011, si veda: N. CAHN, *Post-mortem Life Online*, in Probate&Property, 25, 4, 2011, pp. 36-39.

[61] Criticamente M.D. GLENNON, *A Call to Action*..., n.1, p. 66.

[62] Proposte legislative in altri stati, vedi: G.W. BEYER, N. CAHN, *Digital Planning*..., pp. 145-146.

[63] La descrizione e la valutazione critica dell'utilità degli strumenti giuridici tradizionali per la gestione delle risorse digitali è svolta da J.P. HOPKINS, I.A. LIPIN, *Viable Solutions to the Digital Estate Planning Dilemma*, in Iowa Law Review Bulletin, 99, 2014, pp. 64-71; si veda anche: R. PINCH, *Protecting Digital Assets after Death: Issues to Consider in Planning for Your Digital Estate*, in Wayne Law Review, 60, 2014, pp. 559 ss.

[64] Nel 2011, il valore delle risorse digitali dei consumatori statunitensi (inclusa un'ampia gamma di prodotti, fra cui *account* di posta elettronica, foto, musica e giochi online) è stato stimato a quasi $ 55.000. La ricerca è stata condotta da McAfee, l'unità tecnologica di sicurezza di Intel; K. GREENE, *Passing Down Digital Assets*, in Wall Street Journal (31 agosto 2012), http: //goo.gl/7KAaOm (consultato il 31.01.2020); vedi: NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Uniform Fiduciary Access to Digital Assets Act with Prefatory Note and Comments*, Seattle 2014 (di seguito: NCCUSL, *Uniform Fiduciary Access* ...), prefatory note, p. 1, https: // perma.cc/Z7XU-NSKQ (consultato il 31.01.2020); il numero di abbonati Internet a banda larga permanenti negli Stati Uniti è aumentato da 7,07 milioni a 110,51 milioni nel 2000-2018, https://www.statista.com/statistics/183614/us-households-with-broadband--internet -access-since-2009 / (consultato il 31.01.2020); il numero di americani adulti che utilizzano Internet tra il 2000 e il 2018 è aumentato in ciascuna fascia di età: 18-29 anni (dal 72% al 98%), 30-49 anni (dal 61% al 97%), 50-64 anni (dal 46% all'87%), 65 e oltre (dal 14% al 66%), https://www.statista.com/statistics/184389/adult-internet-users-in-the-us-by-age --since-2000 / (consultato il 31.01.2020); per ulteriori indagini statistiche sull'uso di Internet, vedere https://www.statista.com/topics/2237/internet-usage-in--the-united-states/ (consultato il 31.01.2020)

comuni a tutti gli Stati[65]. La gravità della situazione è stata rilevata dalla *Uniform Law Commission* (ULC)[66] che ha così nominato un gruppo di esperti[67] affidando loro la redazione di un progetto di legge[68]. Il 31 maggio 2011 è stata quindi presentata una proposta per regolamentare l'accesso agli *account* Internet e ai diritti di proprietà digitale in caso di inabilitazione o decesso dell'utente[69]. Tale proposta è stata, poi, integrata successivamente[70] il 5 luglio 2011[71].

Nonostante tali interventi, alcune domande sono però rimaste aperte come, ad esempio, quelle che riguardano la reale portata dei poteri del fiduciario, i suoi limiti, e il rapporto tra il suo operare e l'autorità giudiziaria.

Un altro aspetto rimasto oscuro è la distinzione tra il diritto di proprietà delle risorse digitali e il diritto ad accedervi. Parimenti, restava mancante una definizione precisa di concetti di base quali quello di risorsa digitale[72] o *account*. Altrettanto inesplorato rimaneva il rapporto tra le disposizioni di legge e le condizioni contrattuali di prestazione dei servizi, nonché quello tra la tutela della *privacy* del defunto e la possibilità di intervento sui suoi dati da parte del fiduciario[73]. Di conseguenza, il progetto ha subito modifiche[74]

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[65] G.W. BEYER, N. CAHN, *Digital Planning*..., p. 149 ss.

[66] La Commissione per l'unificazione del diritto è stata istituita nel 1892. È un'associazione senza scopo di lucro (non profit) senza personalità giuridica; è costituito da comitati statali, compresi i comitati che rappresentano il Distretto di Columbia, Porto Rico e le Isole Vergini. Ogni giurisdizione determina in modo indipendente il numero e le regole per la nomina dei commissari. Il gruppo di oltre 300 membri dell'Autorità per l'aviazione civile (ULC) è composto principalmente da giuristi professionisti, giudici e professori di diritto, ma ci sono anche legislatori degli stati. I commissari non vengono pagati per il loro lavoro; devono appartenere a un ordine degli avvocati professionali, il che a sua volta significa che devono avere un esame di stato legale. L'autorità per l'aviazione civile (ULC) intraprende una serie di azioni per unificare la legge. Data la sua composizione, obiettivi e ambito di attività, è anche indicata come Nazionale Conferenza dei Commissari per l'Unificazione delle Leggi degli Stati (National Conference of Commissioners on Uniform State Laws), www.uniformlaws.org/aboutulc/overview (accesso il 31.01.2020); vedere ULC, Observers´ Manual 2019, https://www.uniformlaws.org/HigherLogic/System/DownloadDo-cumentFile.ashx?DocumentFileKey=9d6da222-e3e8-4530-993f-fb078ab41a1c&forceDialog=0 (accesso il 31.01.2020); sulla storia di ULC: R.A. Stein, Forming A More Perfect Union, A History of the Uniform Law Commission, LexisNexis 2013, passim.

[67] Il gruppo era composto dalle seguenti persone: S. Brown Walsh (presidente), T.P. Berry, D.D. Biklen, S.Y. Chow, V.C. Deliberato, M.S. Feinstein, G.H. Hennig, S.C. Kent, S.K. Nichols, D. Robbins, L. Shetterly, N. Cahn (relatore). Inoltre, al gruppo era ex officio inclusi: H. Lansing (Presidente ULC), G. Hagerty (presidente della sezione) e L. Karsai (direttore esecutivo).

[68] I principi di base della redazione degli atti modello da parte della ULC si veda: ULC, *Drafting Rules*, 2012, https://www.uni-formlaws.org/HigherLogic/System/DownloadDocumen-tFile.ashx?DocumentFileKey=5aef78f0-b413-8740-230a-a21b8bc24d16&forceDialog=0 (consultato il 31.01.2020)

[69] Project Proposal: Fiduciary, Powers and Authority to Access Online Accounts and Digital Property During Incapacity and After Death.

[70] Riguardavano le seguenti questioni: (1) quali modelli degli atti e statuti ULC sono correlati alla proposta di progetto e (2) quali organizzazioni e gruppi di interesse potrebbero essere interessati a questa proposta.

[71] Vedi: *Suplement do Project Proposal*..., https://www.uni-formlaws.org/HigherLogic/System/Download-Documen-tFile.ashx?DocumentFileKey=4ae67ea5-6e34-f1bb-4b9e-d143b18f78b9&forceDialog=0 (consultato il 31.01.2020).

[72] La ricerca del significato del termine *digital assets* in fonti non legali è intrapresa da M.D. GLENNON, *A Call to Action*...,pp. 53–54; per i tipi di risorse digitali vedi: N. CAHN, *Post-mortem Life*...,pp. 36–37; G.W. BEYER, N. CAHN, *Digital Planning*..., pp. 137-138; conf: J.P. HOPKINS, I.A. LIPIN, *Valble Solutions*...,pp. 63–64; R. PINCH, *Protecting Digital*..., pp. 547–550; L. MCCARTHY, *Digital Assets and Intestacy*, in Boston University Journal of Science and Technology Law, 21, 2015, pp. 385–386.

[73] S. BROWN WALSH, N. CAHN, *Uniform Fiduciary Access to Digital Assets Act*, First Working Draft, 11.11.2012, https://www.uniformlaws.org/HigherLogic/System/DownloadDo-cumentFile.ashx?DocumentFileKey=efd9daf8-3562-170e-3db6-462a7fb6f882&forceDialog=0 (consultato il 31.01.2020).

ed è stato oggetto di un ampio dibattito[75] che ha coinvolto i rappresentanti di vari gruppi sociali[76]. I lavori della Commissione ULC sono proseguiti con la stesura di diverse versioni del testo normativo, le quali sono state successivamente oggetto di commenti, rivisitazioni e modifiche [77]. Dopo tre anni di lavoro è stata adottata la bozza di legge sull'accesso fiduciario uniforme alle risorse digitali (*Uniform Fiduciary Access to Digital Assets Act* – UFADAA)[78], la cui attuazione veniva raccomandata in tutte le legislazioni statali.

4.2. *GLI OBIETTIVI PRINCIPALI*

Lo scopo di UFADAA era quindi quello di garantire la sicurezza giuridica dei dati del *de cuius*, attraverso la nomina di un fiduciario la cui attività doveva essere disciplinata[79].

Di conseguenza tale testo normativo, attraverso una terminologia specialistica, individuava alcuni concetti di base appositamente definiti[80]. Una delle maggiori sfide affrontate dalla Commissione è stata quella di chiarire il concetto di risorsa digitale (*digital asset*). L'ambito ristretto delle normative statali non era infatti riuscito a far fronte alle dinamiche del cambiamento tecnologico e si era rivelato rapidamente inefficace. La rivoluzione digitale ha quindi imposto una definizione ampia di questi concetti[81]. Per questo motivo, si è deciso di definire ampiamente il concetto di risorsa digitale[82].

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[74] Vedi la bozza presentata per la discussione alla riunione del comitato il 15-16 febbraio 2013, https://www.uniformlaws.org/HigherLogic/System/DownloadDocu-mentFile.ashx?DocumentFileKey=8207ff62-cc7d-2762-a617-462f79fd8c4d&forceDialogDialogic = 1 (consultato il 31.01.2020).

[75] Ai lavori sul modello di regolazione, in letteratura fanno riferimento, tra gli altri: A.B. LOPEZ, *Posthumous Privacy*, cit., pp.189ss., 203ss.; J. LEE, *Death and Live Feeds: Privacy Protection in Fiduciary Access to Digital Assets*, in Columbia Business Law Review, 2, 2015, pp. 689 ss.

[76] La posizione è stata espressa, tra l'altro, da S. DelBianco, C.M. Szabo e J.J. Halpert che rappresenta l'azienda NetChoice (8 luglio 2013); R.O. Rash, D.H. Rash (5 luglio 2013) e A.S. Bohm (3 luglio 2013) che agisce per conto dell'American Civil Liberties Union (ACLU), un'organizzazione non governativa con oltre mezzo milione di membri e 53 filiali negli Stati Uniti.

[77] Si vedano i commenti presentati, tra gli altri, da: E. CARROLL, *Comments on the March 2014 draft* (18.03.2014); CH. KUNZ, FADA *Draft for March 21–22, 2014*, Meeting (17.03.2014); J. GREGORY, ULC FADA additional comments (17.03.2014); J. GREGORY, *March draft of the Fiduciary Access to Digital Asset Act* (FADA) (16.03.2014); S. KENT, *Fiduciary Access to Digital Assets Ac*t, March 21–22, 2014, Meeting Draft (10.03.2014); D. MOLZAN, *Personal Representative Access to Digital Assets*(7.03.2014); S. BROWN WALSH, *Fiduciary Access to Digital Assets* Drafting Committee March 2014 Meeting; Summary of Changes and Issues (28.02.2014); J. GREGORY, CH. KUNZ, *Comments* (23.02.2014),https://www.uniformlaws.org/vie-wdocument/committee-archive-13?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ec-df22&tab=librarydocuments (consultato il 31.01.2020).

[78] https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6745a319-c0e5-6240-bdb5-336214d245c5&forceDialog=1 (consultato il 31.01.2020).

[79] NCCUSL, Uniform Fiduciary Access..., prefatory note, p. 1.

[80] Art. 2 UFADAA; art. 2 RUFADAA.

[81] A.B. LOPEZ, *Posthumous Privacy*...,pp. 204–205.

[82] Art. 2 n. 9, frase 1 UFADAA.

Sono quindi emersi quattro profili[83] di gestore fiduciario[84]: (1) un esecutore testamentario[85], (2) un tutore[86], (3) un agente[87] e (4) un fiduciario[88]. L'UFADAA ha dato loro ampio accesso alle risorse digitali, presumendo che l'utente acconsentisse alla condivisione ed alla gestione del proprio *account*[89]. Di conseguenza, l'autorizzazione riguardava l'accesso a: (1) il contenuto di un messaggio elettronico[90], (2) un catalogo di messaggi elettronici inviati e ricevuti[91] e anche (3) altre risorse digitali a cui l'utente deceduto o l'inabilitato aveva diritto[92]. Tuttavia, la portata dell'accesso a queste risorse digitali era variabile. Le limitazioni erano contenute nelle disposizioni di legge[93] e potevano anche derivare da un rapporto di fiducia[94], da un testamento[95] o da una decisione del tribunale[96].

La questione se si potesse presumere il consenso dell'utente è stata oggetto di dibattito. In molti hanno, infatti, segnalato l'incompatibilità delle soluzioni proposte con la legge federale[97] e, soprattutto, hanno espresso preoccupazione per la violazione della *privacy* delle persone che hanno scambiato messaggi con l'utente tramite posta elettronica[98].

Per quanto riguarda il contenuto dei poteri del fiduciario è bene ricordare essi derivavano dai diritti dell'utente. Il fiduciario poteva, quindi, compiere solamente gli atti a cui il *de cuius* era autorizzato[99]. Egli subentrava solo al posto dell'utente[100]. Il fiduciario aveva quindi il diritto di accedere, controllare e copiare il contenuto digitale solo nella misura consentita dal diritto del *de cuius*[101]. Fornire l'accesso al fiduciario è quindi cosa ben diversa dal trasferirgli la proprietà o concedere la gestione dei dati[102]. La gestione delle risorse digitali era invece disciplinata da diversa normativa. Quindi, ad esempio, se un utente avesse creato un personaggio virtuale in un gioco online e avesse avuto i dirit-

[83] Allo stesso modo, nel progetto di lavoro sulle norme (FADA), cfr. J.D. LAMM, CH.L. KUNZ, D.A. RIEHL, P.J. RADEMACHER, *The Digital Death* ...,pp. 414–415.
[84] Art. 3 (a) UFADAA; conf. art. 3 (a) RUFADAA.
[85] Art. 4 UFADAA.
[86] Art. 5 UFADAA.
[87] Art. 6 UFADAA.
[88] Art. 7 UFADAA.
[89] J. RONDEROS, *Is Access Enough?: Addressing Inheritability of Digital Assets Using the Three-Tier System Under the Revised Uniform Fiduciary Access to Digital Assets Act*, in Transactions. The Tennessee Journal of Business Law, 18, 2017, p. 1037.
[90] Definizione del termine Content of an electronic communicationzob. art. 2 N 6 UFADAA, conf. art. 2 N 6 RUFADAA.
[91] Definizione del termine Catalogue of electronic communicationszob. art. 2 N 4 UFADAA, conf. art. 2 N 4 RUFADAA.
[92] Art. 4 – art. 7 UFADAA.
[93] § 2702 (b) U.S.C.; conf. anche art. 8 (b) UFADAA.
[94] Art. 7 (a) UFADAA.
[95] Art. 4 UFADAA.
[96] Art. 4 – art. 7 UFADAA.
[97] Limitazioni e difficoltà nel fornire l'accesso al contenuto di posta elettronica risultanti dallo Stored Communications Act (SCA), in particolare § 2702 U.S.C., nel contesto di Ajemian vs. Yahoo! Inc. descrive A.B. LOPEZ, *Death and the Digital Age: The Disposition of Digital Assets*, in Savannah Law Review", 3, 1, 2016, pp. 82-84.
[98] A.B. LOPEZ, *Posthumous Privacy* ..., pp. 205-206 con ulteriori argomenti sollevati da ACLU e NetChoice; conf. S. DELBIANCO, C.M. SZABO e J.J. HALPERT in rappresentanza dell'associazione NetChoice (7/8/2013) e A.S. BOHM (3 luglio 2013) che agisce per conto dell'ACLU.
[99] NCCUSL, Uniform Fiduciary Access..., art. 9, pp. 23–24.
[100] In maniera positiva su una tale soluzione, sulla base della versione precedente del regolamento: (FADA), J.D. LAMM, CH.L. KUNZ, D.A. RIEHL, P.J. RADEMACHER, *The Digital Death* ..., p. 415.
[101] Art. 9 (a) UFADAA.
[102] NCCUSL, Uniform Fiduciary Access..., art. 2, p. 7.

ti di proprietà ad esso correlati, la competenza del fiduciario di vendere un tale personaggio e i diritti di proprietà ad esso correlati rimaneva disciplinata dalla legge sull'eredità[103].

L'accesso di un fiduciario non era da considerarsi come trasferimento dell'*account* ad altra persona o come modalità alternativa di utilizzo dello stesso[104]. Vale anche la pena notare che l'UFADAA ha previsto l'esclusione di responsabilità dell'amministratore, dei suoi dipendenti e agenti per un atto o un'omissione in buona fede[105]. La responsabilità del danno rimarrebbe, invece, a carico del fiduciario che ha agito in malafede[106].

4.3. *L'IMPLEMENTAZIONE*

Fra il 2014 e il 2015 il processo legislativo per l'adozione di UFADAA è stato avviato in ben ventisette Stati, per poi incontrare una forte resistenza e interrompersi improvvisamente [107]. Tale situazione è ben illustrata da quanto avvenuto nello stato dell'Illinois[108], dove il disegno di legge del Senato (SB 1376) ha superato rapidamente e senza intoppi le fasi legislative successive. Tutto ciò lasciava prevedere che la legge sarebbe stata approvata. Successivamente però, il 31 maggio 2015, il disegno di legge è stato restituito alla *House Rules Committee*, il sostanziale congelamento del progetto[109]. Le ragioni di tale ripensamento possono essere individuate nelle proteste di alcuni gruppi di cittadini, nonché nella parallela mancata approvazione dell'UFADAA in molti altri Stati[110]. Infatti, anche gli altri stati che avevano avviato tale processo legislativo, ad eccezione del Delaware, alla fine non hanno adottato l'UFADAA nel loro ordinamento. Tra le ragioni di tale battuta d'arresto vi sono le attività di *lobbying* da parte delle società del settore IT e l'attività delle organizzazioni che si battono a tutela delle libertà civili, nonché i dubbi sollevati durante l'iter legislativo in merito alla portata del regolamento[111]. La mancata approvazione dell'UFADAA, tuttavia, è scaturita anche dai numerosi dubbi relativi alla tutela della *privacy*[112], come ad esempio il fatto che tale progetto si basasse sulla presunzione del consenso da parte della persona deceduta o legalmente inabilitata circa l'accesso alle sue risorse digitali da parte del fiduciario. I fornitori di servizi Internet hanno invece sostenuto la tesi contraria ovvero quella per cui si sarebbe dovuto partire da una presunzione di mancato consenso. Questo anche in linea con i risultati di alcuni studi che hanno dimostrato che oltre il 70% degli Americani desidererebbe proteg-

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[103] NCCUSL, Uniform Fiduciary Access..., art. 9, p. 23.
[104] Art. 8 (b) N. 2 UFADAA; NCCUSL, Uniform Fiduciary Access..., art. 8, p. 18.
[105] Art. 10 UFADDA; art. 16 (f) RUFADAA.
[106] Art. 9 (h) UFADAA.
[107] M.D. WALKER, *The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age*, in Real Property, Trust and Estate Law Journal, p. 58; i 26 Stati sono indicati da A.B. LOPEZ, Posthumous *Privacy*..., pp.189, 206.
[108] Documentazione completa del processo legislativo, http://www.ilga.gov/legislation/BillStatus.asp?GAID=13&GA=99&DocNum=1376&DocTypeID=SB&SessionID=88&LegID=87872&SpecSess=&Session= (consultato il 31.01.2020).
[109] Cosa è avvenuto formalmente con la fine del mandato del Senato il 10 gennaio 2017.
[110] J.R. GOTTLIEB, *ULC Rewrites 'Uniform Fiduciary Access to Digital Assets Act* (2015-07-20), https://www.illinoisestate-plan.com/ulc-rewrites-uniform-fiduciary-access-to-digital--assets-act/# sthash.6ZJs28w-b.dpuf (consultato il 31.01.2020).
[111] J. WALKER, *Return of the UFADAA: How Texas and Other States 'Adoption of the RUFADAA can Change the Internet*, in Estate Planning and Community Property Law Journal, 8, 2016, p. 585.
[112] A.B. LOPEZ, *Posthumous Privacy*...,pp. 190, 207; J. LEE, *Death and Live*...,pp. 679–693.

gere la propria *privacy* anche dopo la morte[113] e sarebbe favorevole a consentire l'accesso *post mortem* alle proprie comunicazioni elettroniche unicamente in caso di previo ed espresso consenso[114]. Accanto a queste sostanziali perplessità è stata, inoltre, segnalata anche la necessità di migliorare la tutela dei terzi, di individuare con precisione i diritti del fiduciario, di definire la nozione di "accesso", nonché quella di rimuovere le ambiguità giuridico – linguistiche presenti nel progetto in questione[115]. Infine, sono state sollevate preoccupazioni in merito alla responsabilità dei fornitori di servizi Internet in relazione al nuovo regolamento[116].

Come dicevamo poc'anzi, le soluzioni contenute nell'UFADAA sono state invece adottate nello Stato del Delaware[117], dove, nonostante le modifiche apportate durante l'*iter* legislativo, ad esempio per ciò che riguarda il concetto di risorsa digitale[118], permanevano ancora diversi aspetti poco chiari. L'opposizione a tale disegno di legge da parte degli *internet service providers* (come Google, AOL e NetChoice)[119] non hanno avuto successo. Così la legge (HB 345) è stata firmata dal Governatore il 12 agosto 2014 ed è entrata in vigore il 1° gennaio 2015[120].

5. PEAC

Sull'onda delle critiche nei confronti dell'UFADAA, è stato preparato da NetChoice, una associazione di categoria dei gestori che forniscono servizi Internet[121], un disegno di legge alternativo: il *Privacy Expectation After Life and Choices* Act (PEAC)[122]. Il dichiarato intento di questo progetto era quello di proteggere la *privacy* dei contenuti digitali dell'utente deceduto, migliorando così l'efficienza della gestione dei suoi dati. Il progetto, che consisteva di soli sette articoli, si basava sulla concezione opposta rispetto a quella che ha animato l'UFADAA e quindi su un accesso fortemente limitato ai dati elettronici[123]. Infatti il PEAC ha distinto due categorie separate di dati, vale a dire il "registro dei messaggi e altre informazioni per l'utente"[124] e il "contenuto del messaggio elettronico"[125]. La prima categoria coincideva con il concetto di "catalogo di messaggi elettronici"[126] e si limitava alle sole informazioni che identificavano la persona con cui l'utente ha corrisposto tramite posta elettronica, l'ora e la data della corrispondenza e l'indirizzo di posta elettronica[127]. La seconda categoria era molto più ampia e compren-

[113] Parlando in generale della privacy dopo la morte nel mondo digitale, N.M. BANTA, *Death and Privacy in the Digital Age*, in North Carolina Law Review, 94, 2016, pp. 927–990.

[114] Vedi i risultati della ricerca sulla privacy: NetChoice, Afterlife. Empowering users to control who can see their online accounts, https://perma.cc/W9NA-QR6F (consultato il 31.01.2020).

[115] J. LEE, *Death and Live*...,pp. 697–701.

[116] M.D. WALKER, *The New Uniform*...,p. 58.

[117] Vedi la storia del processo legislativo, https://legiscan.com/DE/bill/HB345/2013 (consultato il 31.01.2020).

[118] Per una panoramica delle soluzioni adottate, vedi J. Lee, Death and Live..., pp. 671–673.

[119] A.B. LOPEZ, *Posthumous Privacy*...,p. 207.

[120] Vedi il testo della legge. https://legiscan.com/DE/text/HB345/id/1023563 (consultato il 31.01.2020)

[121] A questei appartengono, tra gli altri: Airbnb, Aol, PayPal, Ebay, Facebook, Google, Yahoo!, HomeAway, Hotels.com, Wing, https://netchoice.org/about/ (consultato il 31.01.2020).

[122] https: //netchoice.org/library/privacy-expectation-afterlife--choices-act-peac/ (consultato il 31.01.2020).

[123] Per una panoramica di PEAC vedi: J. Lee, Death and Live...,pp. 673-674; più in generale M.W. Costello, Il "PEAC", pp. 441 ss.

[124] Art. 6 (F) PEAC (*record or other information pertaining to a user*).

[125] Vedi art. 6 (A) PEAC (*contents*) e art. 6 (B) PEAC (*electronic communication*).

[126] Conf. art. 2 N. 4 UFADAA; art. 2 N. 4 RUFADAA.

[127] Inoltre l'art. 6 (F) PEAC si riferisce direttamente ai criteri stabiliti nel § 2702 (c) U.S.C.

deva gli stessi poteri che aveva l'utente a seguito dell'accesso all'*account* con nome utente e password[128]. Si noti che i termini "contenuto"[129] e "messaggio elettronico"[130] ai sensi del PEAC corrispondevano alle definizioni già contenute nell'UFADAA[131]. In entrambi i casi, infatti, anche se l'accesso non includeva il contenuto di messaggi elettronici, il fornitore di servizi Internet avrebbe potuto dare accesso all'esecutore testamentario o all'amministratore del patrimonio ai dati del *de cuius* solo sulla base di una sentenza definitiva del tribunale competente[132]. Al fine di decidere, il tribunale avrebbe dovuto effettuare una serie di opportuni accertamenti. Sarebbe stato necessario, tra l'altro, anche stabilire se la divulgazione delle informazioni violasse o meno la legge vigente[133] e se vi fossero altre persone aventi diritto all'*account* del defunto (utenti o proprietari)[134].

Inoltre l'*Internet Service Provider* avrebbe anche potuto rifiutarsi di divulgare i record e il contenuto dei messaggi eliminati dall'utente o che si trovavano in un *account* inattivo[135]. Questo quale conseguenza del principio secondo cui non possono essere trasmessi più diritti sull'account di quelli che spettavano al defunto.

Il progetto PEAC non è andato indenne da una serie di controversie. Far dipendere l'accesso all'*account* del defunto dalla pronuncia di un tribunale, era infatti un grave onere sia per le persone interessate all'accesso, che per i tribunali. Pertanto, l'opportunità di questa soluzione è stata giustamente rimessa in discussione[136]. Inoltre, queste rigide condizioni di accesso all'*account* hanno di fatto limitato in modo significativo la portata del PEAC stesso. In linea di principio, le soluzioni proposte avrebbero potuto essere efficaci solo in una situazione in cui l'utente avesse fatto un testamento e avesse chiaramente indicato una persona autorizzata alla gestione dell'*account*. Nella prassi, tuttavia, si sono verificati pochi casi simili[137].

Possiamo quindi dire che il modello proposto dal PEAC non risolveva i problemi esistenti, ma determinava semmai un più limitato accesso all'*account* dell'utente deceduto, fallendo nel tentativo di realizzare le più ambiziose intenzioni dell'UFADA. Di conseguenza, il PEAC non ha ottenuto un ampio sostegno. Solo quattro stati (California[138],

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[128] A.B. LOPEZ, *Posthumous Privacy*...,p. 208.

[129] Definizione dei contenuti - art. 6 (A) PEAC è uguale a quella del § 2510 n. 8 U.S.C. e copre anche il tema di una comunicazione (*subject line of a communication*).

[130] Definizione*electronic communication*del art. 6 (B) PEAC è uguale a quella del § 2510 N. 12 U.S.C

[131] Cfr. Definizione di *Content of an electronic communication* - art. 2 n. 6 UFADAA, art. 2 n. 6 RUFADAA; definizione di *Electronic communication* - art. 2 n ° 11 UFADAA, art. 2 n ° 12 RUFADAA.

[132] Art. 1 (A) PEAC; art. 1 (B) (c) PEAC.

[133] In particolare, § 2701 e segg. U.S.C. e § 222 U.S.C.; art. 1 (A) (e) PEAC; art. 1 (B) (c) (vii) PEAC.

[134] Art. 1 (A) (d) PEAC; arte. 1 (B) (c) (vi) PEAC.

[135] Importante qui erano le impostazioni dell'account effettuate dall'utente, che determinavano cosa accade all'*account* inattivo dopo il tempo specificato nel contratto.

[136] Y. MANDEL, *Facilitating the Intent of Deceased Social Media Users*, in Cardozo Law Review, 39, 2018, p. 1938; AB. LOPEZ, *Posthumous Privacy*..., p. 211.

[137] Meno della metà degli americani fa testamento e solo pochi si ricordano di smaltire le proprie risorse digitali, vedi A.W. COVENTRY, *Update on Fiduciary Access to Digital Assets*, in Pasternat&Fidis (12/02/2016), https://www.pasternakfidis.com/update-on--fiduciary-access-to-digital-assets-2/ (consultato il 31.01.2020); vedi Y. MANDEL, *Facilitating the Intent*..., p. 1938, nota 217.

[138] Progetto AB n. 691 del 20 aprile 2015; documentazione del processo legislativo, http://leginfo.legislature.ca.gov/faces/bill-Histor yClient.x html? bill_id = 201520160AB691 (consultato il 31.01.2020).

Oregon[139], Virginia[140], Wyoming[141]) hanno davvero vagliato la possibilità di adottarlo. Tuttavia, solo lo Stato del Virginia[142] nel 2015 ha basato la sua legislazione effettivamente sul PEAC e, seppur con diversi emendamenti[143], ha introdotto le soluzioni in essa contenute. Va però detto che già nel 2017 il Virginia ha definito nuove regole per l'accesso alle risorse digitali, ispirandosi al modello RUFADAA[144] e pertanto il breve lasso di tempo in cui la sua legislazione, ispirata al PEAC, è stata in vigore non ha consentito un effettivo vaglio della sua reale operatività.

6. RUFADAA (2015)

Alla ricerca di un compromesso, il comitato CAA ha verificato le soluzioni adottate nell'UFADAA e nel 2015 ha così presentato una versione modificata del modello di legge – conosciuta come RUFADAA[145]. Il documento stabilisce diverse regole di accesso al catalogo e al contenuto del messaggio elettronico. Sulla base di tale disciplina, l'amministratore può rendere disponibile il catalogo, se l'utente non lo ha espressamente escluso o il tribunale non ha deciso diversamente[146]. La divulgazione del contenuto di un messaggio elettronico richiede quindi il consenso espresso dell'utente o una decisione del tribunale[147]. Quindi questo nuovo progetto di legge introduce un sistema di autorizzazione all'accesso a tre livelli[148]. Su un primo livello si colloca l'eventuale scelta dell'utente di decidere se consentire o meno l'accesso postumo ai suoi dati. Su un secondo livello invece, in caso di assenza di tale esplicita indicazione nello strumento elettronico da parte del de cuius si dovrà cercare una sua eventuale volontà in tal senso, ad esempio nel suo testamento[149]. Solo in assenza delle due predette ipotesi, si potrà cercare una soluzione nei termini e nelle condizioni generali del contratto per la fornitura di servizi che il *de cuius* aveva in essere[150]. RUFADAA - a differenza di UFADAA e

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[139] Progetto della Camera dei Rappresentanti HB House of Representatives, n. 2647 (2015), presentato dai membri della Camera J. Williamson, J. Barker e il senatore A. Roblan, https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB2647 (consultato il 31.01.2020), https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2647/Introduced (consultato il 31.01.2020).

[140] Progetto del Senato SB n. 1450 (2015) con documentazione completa dell'iter legislativo, http://lis.virginia.gov/151/sum/SB1450.HTM (consultato il 31.01.2020).

[141] Project No. 16LSO-0041, Working Draft 0.5 (2016), ht t ps: //wyoleg.gov/InterimComm Committee/2015/SDI-0728APPEN-DIX12.pdf (consultato il 31.01.2020).

[142] § 64.2-109 – § 64.2-115 VA Code (2016).

[143] Sull'attuazione del PEAC in Virginia, vedi M. OBENSHAIN, J. LEFTWICH, *Protecting the Digital Afterlife: Virginia's Privacy Expectation Afterlife and Choices Act*, in Richmond Journal of Law and the Public Interest, 19, 1, 2015, pp 44-49.

[144] § 64.2-116 - § 64.2-132 Code VA (2018); emendamento alla legge (17/02/2017), http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+CHAP0033 (consultato il 31/01/2020); Progetto della Camera dei Rappresentanti, (HB House of Representatives) n. 1608 (2017) con documentazione completa del processo legislativo, http://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+HB1608 (consultato il 31.01.2020).

[145] RUFADAA con un commento, https://www.unifor-mlaws.org/HigherLogic/System/DownloadDocumen-tFile.ashx?DocumentFileKey=112ab648-b257-97f2-48c2-61fe109a0b33&forceDialog=0 (consultato il 31.01.2020).

[146] Art. 8 RUFADAA.

[147] Art. 7 RUFADAA.

[148] § 4(a)–(c) RUFADAA; J. RONDEROS, *Is Access Enough?...*, p. 1038 ss.

[149] L'utente può anche includere le sue istruzioni relative alle risorse digitali in un altro documento; arte. 4 (b) RUFADAA

[150] Art. 4 (c) RUFADAA.

PEAC[151] - è stata ben accolta ed è divenuta la base per l'unificazione della legge americana[152]. Ad oggi ci troviamo quindi di fronte a quello che sembra essere un modello promettente e forse definitivo. Solo i prossimi anni ci diranno effettivamente quale sarà la sua reale portata e gli eventuali limiti nella sua applicazione.

[151] Confronto delle normative contenute in UFADAA, PEAC e RUFADAA, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a45a0fc6-4cb4-0b25-a4cf-1792f1852355&forceDialog.01=0 (consultato il 31.12.2010).

[152] Le procedure legislative per RUFADAA sono ancora in corso solo nel Distretto di Columbia (230141), Massachusetts (HB 3368) e Pennsylvania (SB 320), https://www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728 -81c6-b39a91ecdf22 (consultato il 31.12.2019).

The maze pathways: interactions through human rights

Giuliana DIAS VIEIRA[*]

The use of the labyrinth or maze as a metaphor to introduce the reflections on the challenges encountered by law to deal with the transjuridicity paradigm is a valuable tool for the recognition of an obvious complexity. Interactions guided by the case-law affirmation of human rights, both in the national and international level, present themselves as search paths for understanding these movements of transformation and legal, social and cultural interrelations.

This study aims to address the role of human rights, as interpreted by national and international courts, as an important tool for building compatible paths with the simultaneous, and not necessarily contradictory, recognition of multiplicity and diversity, while highlighting universal features.

Specifically, we will seek to evaluate the extent to which transnational judicial dialogue is being led by human rights, through the analysis of some cases of the Inter-American Court of Human Rights, of the European Court of Human Rights, and the International Court of Justice, which have increasingly cross-referenced legal and case-law sources to confirm, illustrate or specify human rights. Apart from being reciprocal and transnational influence, it is a phenomenon that, although not new, has intensified in the contemporary world, as a dynamic way that challenges legal formalism and announces a tendency able to inspire the conciliation between relativity and universality.

La metafora del labirinto per introdurre la riflessione sulle sfide legali relative al paradigma della transgiuridicità è un valido strumento per rilevare una evidente complessità della questione. Le interazioni guidate dal riconoscimento dei diritti umani nei singoli casi giudiziari, sia a livello nazionale che a livello internazionale, si presentano come percorsi di ricerca per la comprensione di questi movimenti di trasformazione e interrelazioni giuridiche, sociali e culturali.

Questo contributo ha lo scopo di occuparsi del ruolo dei diritti umani, così come interpretato dalle corti nazionali ed internazionali, come uno strumento importante per costruire dei percorsi compatibili con il riconoscimento simultaneo e non necessariamente contraddittorio della molteplicità e della diversità sottolineando al contempo le caratteristiche universali.

Nello specifico cercheremo di valutare la portata del dialogo giudiziario transazionale condotto in relazione ai diritti umani, attraverso l'analisi di alcuni casi della Corte Interamericana dei diritti umani, della Corte Europea dei diritti dell'uomo e della Corte Internazionale di Giustizia che hanno sempre più incrociato le fonti giuridiche e giurisprudenziali per confermare, illustrare o specificare i diritti umani. Oltre alla reciproca influenza transnazionale si tratta di un fenomeno che anche se non è del tutto nuovo si è intensificato nella mondo contemporaneo come un meccanismo dinamico che ha sfidato il formalismo giuridico e ha annunciato una tendenza in grado di ispirare la conciliazione tra la relatività e l'universalità.

[*] Giuliana Dias Vieira, PhD in International and European Law from the University of Paris I – Sorbonne (2012), member of the International Laboratory in Transjuridicity Research (LABIRINT) and Law Professor at the State University of Paraíba.

1. INTRODUCTION

The use of the labyrinth as a metaphor to introduce the reflections on the challenges encountered by law to deal with the transjuridicity paradigm is a valuable tool for the recognition of an obvious complexity. Interactions guided by the case-law affirmation of human rights, both in the national and international level, present themselves as search paths for understanding these movements of transformation and legal, social and cultural interrelations. Without fearing the necessary engagement with contemporary central themes, such as global governance, worldwide interdependence, cosmopolitanism e communitarianism, the study aims to illuminate the debate around human rights as an instrument of connection, as a link of communication vectors between national and international legal orders. The use of the labyrinth as a metaphor serves as a guide to the reflections proposed here and to add to other analysis already used by several authors to illustrate the challenges of thinking and understanding Law today, such as for example the pyramid (Kelsen), the archipelago (Timsit), the rhizome or a group of clouds (Delmas-Marty), the hydra (Teubner), the rhapsody (Vogliotti), the network (Ost), amongst others.

This study aims to address the role of human rights, as interpreted by national and international courts, as an important tool for building compatible paths with the simultaneous, and not necessarily contradictory, recognition of multiplicity and diversity, while highlighting universal features. For this reason, it is proposed a reflection that takes into consideration the movement of construction and affirmation of human rights protection, since it is not yet possible to glimpse a world state environment able to standardize a truly universalized world system of human rights protection. In this context, it is acknowledged as a theoretical premise to distinguish the concept of "fundamental rights" – affirmed by national constitutions and "human rights"- concerning human rights in International Law, which arouse the debate over their axiological validity. What entails taking into account the grounds of human rights in natural law or, on the other hand, recognizing the identity function of fundamental rights, linked to cultural diversity, at the same time that it can be used as an instrument to universalize and humanize.

Specifically, we will seek to evaluate the extent to which transnational judicial dialogue is being led by human rights, through the analysis of some cases of the Inter-American Court of Human Rights, of the European Court of Human Rights, and the International Court of Justice, which have increasingly cross-referenced legal and case-law sources to confirm, illustrate or specify human rights. Apart from being reciprocal and transnational influence, it is a phenomenon that, although not new, has intensified in the contemporary world, as a dynamic way that challenges legal formalism and announces a tendency able to inspire the conciliation between relativity and universality. Therefore, this work first analyzes human rights as a mechanism of interaction throughout transnational dialogue, carried out mainly by the performances and interactions of regional human rights protection systems (2), to treat then the multiplicity and diversity in judicial dialogue, investigating the movements that claim particularities and universal tendencies (3).

2. HUMAN RIGHTS AS AN INTERACTION MECHANISM IN TRANSNATIONAL DIALOGUE

The activity of the regional courts of human rights, although linked to the respective Conventions, shows a series of interconnections with other human rights protection systems. This perspective can be confirmed by the constant use of "cross references" of jurisprudence themselves as well as external conventional sources, in order to strengthen, confirm or modify a certain argument in the affirmation and protection of human rights. Thus, the "cross interpretation" and "normative cosmopolitanism" can be characterized as transnational dialogues, since they reflect the complexity of frequent interactions, and at the same time indicate methodological practices that exceed the traditional practice of legal formalism to create a remarkable interpretative pragmatism in the international scene of human right protection. These opening movements allow us to identify many relations of interdependence, similarities and particularities, setting a scene of high porosity in the field of human rights protection. This context takes the shape of a labyrinth, permeated by uncertain, fragmented and intercrossed paths – validating the maze metaphor (a). Simultaneously, these interactions reflect a relevant legal interaction, which contributes to give evidence of the opening of national and international legal systems that underlights the evolution of the perception of Law and takes the shape of a true transnational dialogue (b).

2.1. *THE MAZE METAPHOR – LAW, HUMAN RIGHTS AND FUNDAMENTAL RIGHTS*

The complexity of legal and judicial interactions in the world today is very akin to the maze metaphor. Specifically in the field of human rights, the maze appears with special interest, given the evident challenges to formulate the fundament and the function of human and fundamental rights.

In Greek mythology, the famous labyrinth of Crete can be used as a starting point to these reflections. It was built by Daedalus in an ingenuous architectonic shape to make it impossible for those in there to find their way out without help. In the labyrinth of Daedalus lived the Minotaur – Monster with the head of a bull and body of man, who devoured the human tributes paid to the King of Crete, Minos. The only hero that entered the labyrinth with the help of Ariadne was Theseus, who challenged the Minotaur, beating him and saving the others from the maze and the monster. The labyrinth of Crete has been used in many ways to interpret and reflect over human condition, it`s limitations, challenges, finitude, amongst others.

In the fantastic world of Jorge Luis Borges, the maze metaphor is spayed out in several of his stories. It illustrates the maze as a space of complexity. In "The House of Astérion", for example, Borges uses the "house" suggesting "maze" as a symbol for an imprisonment space, with bifurcations and repetitions where the exit is a challenging enigma. "All parts of the house are repeated over and over, every place is another place. (…) The house is as big as the world; it is the world itself. (…) Everything repeats many times, fourteen times, but there are two things in the world that seem to only exist a single time: above, the intricate sun; below, Astérion. Maybe i have created the stars and the sun and the huge house, but i can't remember any longer"[1]Astérion is the Mino-

[1] J.L. BORGES, *Aleph - Conto "A casa de Astérion*", São Paulo, 2008. p. 62.

taur, finding it hard to live with the other, who cannot be a man neither an animal. Waiting for his redeemer, Astérion asks himself "What will my redeemer be like?, I ask myself. Will he be a bull or a man? Maybe a bull with a man`s face? Will he be like me?"[2]. These questions of identity are also present in Borges work, revealing a fantastic world that is so real to our maze world, as a metaphor for the complex network between individuals.

Looking at this maze as a complex space of human and fundamental rights, we propose another metaphoric possibility - to consider a fundamental tension between western thinking on human rights, anchored in Natural Law, which preexisted Law itself, and the pluralist or communitarian thinking which highlights human rights as social constructions in a well-defined space-time context. This problem, apparently incompatible and labyrinthic, could be solved by using the reflection proposed by Eduard Dubout and Sébastien Touzé[3] which consists on taking into consideration the possibility that human rights could serve as an instrument of articulation for the construction of a space that connects different legal orders or systems, capable of creating a universalizing tendency. That tendency is identified by dialogue processes between fragmented and complex spaces, composed of several actors in different realities.

2.2. *TRANSNATIONAL DIALOGUE*

Considering the inexistence of a global State, legal thinking in global sphere has found fertile paths to develop, without however maintaining the Nation State as the central element. In this context, the construction and integration of international law have also been made with the participation of new actors coming from different realities. National, international and transnational actors, as well as private and public, individual and collective actors, they all have participated in the construction of more diverse normative systems, to regulate territorialized or non-territorialized activities, whether they would be internal, international or transnational. Empiric observation of this complex scenario has made more and more evident the need to rescue the relevant position that human being should have in the contemporary world. Certain rights gain relevance in this context – human rights specifically, for they bring along a sense of hope in the idea that their growing affirmation may have a role in the organization of the multiple, the different and the equal. As noted by Cançado Trindade, permanent international penal jurisdiction has finally been established.

The international human rights courts (Inter-American and European Courts) have built a rich body of jurisprudence on the emancipation of the human being vis-a-vis their own State[4]. This process of providing internationalization to the protection of human rights has raised the possibility of finding in human rights a convergent place, which may, while maintaining its pluralism, act as a symbol for integration with universalizing tendency. For this reason, without having to become the law of laws – in a superiority sense, fundamental rights may be understood at least as an important element to the integration of systems[5]. One of the ways we can observe the integrator role of human rights is through identifying judicial dialogues that have constituted a common legal

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[2] Id., p. 62.

[3] E. DUBOUT, S. TOUZÉ, *Les droits fondamentaux: charnières entre ordres et systèmes juridiques*, Paris, 2010.

[4] A. A. CANÇADO TRINDANDE, *A humanização do Direito Internacional*. Belo Horizonte, 2006. p. 26.

[5] E. DUBOUT, S. TOUZÉ, Sébastien, op. cit., p. 16.

grammar, indicating the normative confluence and the "cross-fertilization" phenomenon among judges[6].

Transnational dialogue can be identified in references to external sources, jurisprudential and/or normative, by courts and judges, as so to bring closer contexts that were initially different, or also to differentiate different realities that may have equivalent normative frames. This experience is enriched by the reading that we may make of it, since it shows similarities in the concept of justice and in the use of common solutions to deal with common problems.

In the processes of regional integration, transnational dialogue happens in a vertical manner, because supranational and international courts have the primordial function of looking after the observance of their respective legal orders, although in these cases the respect of the "national margins of appreciation" is safeguarded. On the other hand, we witness the frequent use of "cross-references" even between different legal orders and systems without any formal bonds, as it is the case of the regional courts of human rights protection. Cross-referencing in these cases serves the purpose of reinforcing an argument, counterpointing an idea, or confirming an interpretation technique. From this perspective, the analysis of the contents of the judicial decisions of international courts that contain judicial dialogues may contribute to the investigation of the construction of a transnational judiciary community. While it shows how the use of human rights has taken the center stage in the apparently anarchic scenario of the international community, the dialogue between courts sheds light to reaffirm the multiple and the diverse, and creates a universalizing tendency.

3. MULTIPLICITY AND DIVERSITY IN JURISPRUDENTIAL DIALOGUE: A UNIVERSALIZING TENDENCY?

International and national courts have been the protagonists of transnational dialogue, confirming human and fundamental rights predisposition to interchanging ideas and approaches. Specifically in this space we analyze the panorama of international dialogue of the Inter American and European human rights courts and of the International Court of Justice.

a) THE INTER AMERICAN COURT OF HUMAN RIGHTS (ICHR)

The Inter American Court of Human Rights has frequently used decisions from other international courts as source of inspiration for interpretation and also for harmonizing the protection of human rights with other sources of international Law. Such is the case with the use of International Court of Justice jurisprudence, when dealing with the Consultation about the right to information over consular assistance[7], formulated by Mexico. The peculiarity of this case resides in the fact that the Inter American Court began to elaborate an interpretation idea that established a connection between consular protec-

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[6] L. BURGORGUE-LARSEN, *De l'internalisation du dialogue des juges. Mélanges en l'honneur du Président Bruno Genevois*, Paris, 2009. M. VARELLA, *Marcelo. Internacionalização do Direito: Direito Internacional*, *Globalização e Complexidade*, São Paulo, 2012.

[7] Corte IDH, 1o. out. 1999, *Direito à informação sobre assistência consular no âmbito das garantias do devido processo legal,* Série A no. 16.

tion (Vienna Convention 1963) and human rights protection. As well noted Pierre Marie Dupuy, "la CIJ du coup était confrontée à la question de savoir si ce fameux article 36 - au-delà des obligations faites à l`État d'envoi, énonçait des droits de la personne au sens de droit de l`homme ou simplement des droits individuels attachés à la qualité de ressortissants de l'un des États parties à la Convention de Vienne de 1963" [8]. Although the reasoning of the Inter American Court was not expressly quoted by the International Court of Justice, it is interesting to observe how the argument of the Inter American Court was used by other petitioning States at the International Court of Justice, like for example in the Lagrand and Avena cases. We can also see that, in the end, the pro homine argument developed by Inter American Court was implicitly followed by the International Court of Justice. As noted by Burgorgue-Larsen, " ce qui est remarquable dans cet avis c'est le lien presque indéfectible que la Cour de San José établit entre protection consulaire et protection des droits de l'homme"[9].

Another issue that was brought to appreciation of the Inter American Court regards the conditions of respect for human rights during armed conflict. Although the Inter American Court had the opportunity to pronounce over International Humanitarian Rights norms since the Palmeiras x Colombia case, affirming that the American Convention "only attributes competence to the Court to determine the compatibility of actions or norms of the States with the Convention itself and not with the Geneva Convention of 1949" [10], the Inter American Court later evolved in their own interpretation in the Bámaca Velásquez x Guatemala case. That evolution is marked by the recognition that even if it cannot declare a State responsible, from an international point of view, for the violation of international treaties that do not attribute such competence, "it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1948 Geneva Conventions and, in particular, common article 3"[11]. Article 3 deals with non-forfeitable rights, such as the right to life and the right to not be submitted to tortures or cruel treatment, inhumane or degrading. This means that after all, it is possible to take into consideration during the process of application of pertinent legislation, legal dispositions from other systems as relevant instruments of interpretation in the protection of the human being.

In the field of women`s rights to non-discrimination, it is also possible to identify a doctrinal "hybridization" after the acknowledgement by the Inter American Court of the work done by the Committee about the elimination of all forms of discrimination against women – created by the UN Convention of 1979. We look at the Campo Algodonero x México case, in which a serial killing of women in the city of Juarez, Mexico was the subject. In this case, the recognition of women`s rights exceeded the limits of the Inter-American Convention, at least in its theoretical basisas can be seen in several references to the report of UN`s CEDAW, even mentioning that the States may be held responsible for private actions in case they do not adopt measures with the proper attention to prevent the violation of women`s rights or to investigate and punish acts of violence and compensate the victims[12]. In addition to having also adopted the qualification of crime

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[8] P.M. DUPUY, *La protection consulaire sous les feux de la jurisprudence internationale, La protection consulaire*, Paris, 2006.

[9] L. BURGORGUE-LARSEN, *Les Cours Européenne et Interaméricaine des Droits de l'Homme et le Systeme Onusien,* in E. DUBOUT, S. TOUZÉ (eds.), op. cit., p. 96.

[10] IACHR, 4 February 2000, Preliminary Exceptions, #33, Las Palmeras v Colombia, series C no. 67.

[11] IACHR, 25 November 2000. Bámaca Velásquez v Guatemala, series C, no. 70, # 208.

in the terms proposed by UN experts "women`s homicide funded in matters of gender" and "feminicide".

These cases are merely exemplifying of the availability and openness of the interpretation carried out by the Inter American Court of Human Rights, recognizing the importance of taking into consideration other normative universes to widen, strengthen and ratify the Court`s understanding. Such interactions are relevant in this study because they confirm our hypothesis of transjuridicity, a growing complexity in our contemporary world.

b) EUROPEAN COURT OF HUMAN RIGHTS (ECHR)

The current international scene indicates a necessary adaptation of the jurisdictional function of international courts to the reality of constitutional pluralism. This situation is particularly striking in communitarian law, where the Court of Justice is submitted, in its jurisdictional function, to taking into consideration both national and international legal orders. It is important to remember that this scenario cannot be framed in the pyramidal model or in a hierarchic manner. The construction of the European project for economic interaction, as well as European Union`s insertion in the international and global context demand new forms of integration for the systems that are based in an efficient articulation in face of systemic pluralism. This articulation has been highlighted by the activity of European judges and by the European courts in a relatively active and efficient way through « judiciary diplomacy »[13]. In fact, the efforts made for this articulation have resulted in "an active judiciary diplomacy" made of encounters, simultaneously formal and informal, between judges and between their institutions »*[14]*. It is a diplomatic attitude, as it is placed at the service of conciliation and building relationships.

In this context, the power of the judge is enhanced, since he carries the responsibility, by means of his jurisdictional function, of outlining the relations between distinct legal systems. The European Courts entered the diplomatic game mostly to achieve reinforcement of the European institutional frame, and provide certain credibility to the European construction.

The European Human Rights Court (ECHR) has demonstrated not having any difficulty in using a European Union Court of Justice precedent to fundament its decisions and update some concepts form the European Convention of Human Rights. In the Vilho Eskelinen case, the European Court noted that "to face the european law is a way to use a precious source of indications"[15]. This initiative had the purpose of favoring the place of the European Charter of Human Rights as the international reference of the protection of rights encountered by the ECHR and to widen the protection of rights under the sphere of the European Council. In the Christine Goodwin x United Kingdom case, it was analyzed the right to marry of a transsexual, in light of article 12 of the European Convention of Human Rights, which guarantees the

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[12] IACHR, 16 November 2009, Preliminary Objections, background and reparation. González and others (Campo Algodonero x México, Series C no. 205, # 268.

[13] This is a novel term referring to the recent efforts of judges to reach a settlement and foster unity between jurisprudence and jurisdictions in a diplomatic manner. Its widespread use in legal literature is demonstrated below.

[14] L. BURGORGUE-LARSEN, *Les cours régionales des droits de l'homme - conclusions - pour une coopération interrégionale renforcée*, disponible sur « http://www.echr.coe.int », consulté le 15 avril 2011.

[15] ECHR, 19 April 2007, Vilho Eskelinen and others v. Finland, #60

fundamental right, for a man and a woman, of getting married and forming a family. To establish a more actual interpretation, consistent with today`s reality, the arguments of the ECHR were directed to widen the meaning of the Convention to establish that: "the Court observes that the content of article 9 of the recently adopted European Charter of Human Rights distances itself – and this has to be intentional – from article 12 in the Convention in order to not make reference to man and woman"[16].

The ECHR also expressly quotes decisions of the Court of Justice of the European Union, even to change its own opinion, to follow the opinion of the latter. As happens, for example, with two case that ended up becoming famous for having marked this change of opinion. They are the cases of Hoogendijk[17] and Stec[18], which were both cases of discrimination. In the first case, the ECHR changed its interpretation to follow the classical line of interpretation of the Court of Justice of the European Union, as so to recognize that the argument of social politics justifies in an objective and reasonable manner the existence of an indirect discrimination. The statistics of the case aimed to demonstrate that the Dutch regulations affected women more sensitively than men.In the second case, the ECHR was questioned about the possibility of a valid legal differentiation in treatment of men and women with regard to retirement age, by virtue of article 14 of the European Convention of Human Rights, combined with article 1 of Protocol no.1. The European Court concluded by the absence of such violation, expressly quoting the understanding of the Court of Justice, which cannot be disregarded within the context of interconnected protection of human rights in the european continent.

c) INTERNATIONAL COURT OF JUSTICE (ICJ)

Traditionally, the International Court of Justice did not usually put into practice cross-fertilization or the recognition of other legal universes. However, this position started to change in relation to a relatively recent case, in which the ICJ was questioned about its relation with other international bodies and courts of human rights. In the Ahmadou Sadio Diallo[19] case, although it did not take into consideration other legal universes, the ICJ highlighted the importance to the litigant States of knowing which law is applicable, for the sake of clarity and legal security and to know also what is the interpretation provided by other oversight bodies. To this point, we quote a extract of the decision: "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Convenanton that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which treaty obligations are entitled. Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question. In the present case, the interpretation given above of Article 12,

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[16] ECHR, Christine Goodwin v United Kingdom, decision of 11 July 2002, #100.
[17] ECHR, Hoogendijk v. Netherlands, 6 June 2005.
[18] ECHR, Stec and others v United Kingdom, 12 April 2006.
[19] ICJ, 30 November 2010, Ahmadou Sadio Diallo, Guinea v.Democratic Republic of Congo.

paragraph 4, of the African Charter is consonant with the case law of the African Commission on Human Rights established by Article 30 of the said Charter".

This simple example depicts the importance of this flow of ideas, standards and interpretations that constitute the great center of attention of these reflections, for it shows in a subtly way the interconnected and interlinked law, despite the apparent independence of international institutional universes.

4. CONCLUSIONS

The paths of the maze are not, by definition, simple and clear. Likewise, the process of affirmation of human rights in the international sphere lacks flexible mechanisms that allow us to ponder and articulate the local and the regional with global and universal. As we saw, jurisprudence has within itself the potential to serve as an instrument of interaction for the multiple and the diverse. The deepening of these reflections enable an approximation with universalizing tendencies while allowing the legitimation of jurisprudential discourse in other legal or institutional frameworks, in order to provide a true network of interconnections. Thus, it is possible to walk the labyrinths of ideas and connections that achieve their affirmation as they are built by the activity of the international courts and by the affirmation of human and fundamental rights.

Mozambican Courts and International Law

Francisco PEREIRA COUTINHO[*]

Mozambique has a monist constitution which deals extensively with international law. The country is also a member of regional international organizations, including the African Union and the Southern African Development Community. This openness to international law is more apparent than real. On the one hand, the Mozambican constitution safeguards its own supremacy and ranks international law on the level of ordinary law. On the other hand, regional integration in Africa is still rudimentary and it does not challenge State sovereignty. Moreover, references to international law in Mozambican courts are scarce and largely peripheral. The picture is not entirely bleak, as a couple of cases show that Mozambican judges are bypassing the constitution, and making every effort to avoid the international responsibility of the State by recognizing international law's supremacy over ordinary law.

Il Mozambico ha adottato una costituzione monista che tratta ampiamente il diritto internazionale. Il paese è anche un membro di organizzazioni internazionali regionali, tra cui l'Unione Africana e la Comunità per lo Sviluppo del Sud dell'Africa. Questa apertura al diritto internazionale è, però, più apparente che reale. Da un lato, infatti, la costituzione del Mozambico tutela la sua supremazia e posiziona il diritto internazionale nella gerarchia delle fonti al rango della legge ordinaria. Dall'altro lato l'integrazione regionale in Africa è ancora rudimentale e non mette in discussione la sovranità statale. Più precisamente i riferimenti al diritto internazionale nelle Corti del Mozambico sono rari ed in gran parte periferici. Il quadro non è però del tutto desolante dal momento che un paio di casi giurisprudenziali dimostrano che i giudici del Mozambico stanno bypassando la costituzione e stanno ponendo in essere ogni sforzo per evitare la responsabilità internazionale dello stato riconoscendo la supremazia del diritto internazionale sulla legge ordinaria.

1. INTRODUCTION

A black hole could euphemistically be used to describe the application of international law by Mozambican courts. Next to nothing is known about how Mozambican judges deal with international legal sources. Doctrinal studies analyze the constitutional provisions governing the domestic incorporation of international law, but do not assess the impact of international law upon judicial practice.

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[*] Associate Professor at Nova School of Law (Faculdade de Direito da Universidade Nova de Lisboa). Member of CEDIS – Research and Development Centre in Law and Society. This article builds on a report concerning the application of international law in the Mozambican legal order published, in Portuguese,in a comparative study coordinated by J Bacelar Gouveia and F Pereira Coutinho, *O Direito Internacional Público nos Direitos de Língua Portuguesa* (CEDIS, 2018). All direct quotes from doctrinal, legal and judicial sources in Portuguese were translated by the author. All websites acceded on 1 August 2022.

This article aims at shortening this gap. It starts by portraying the constitutional reception of international law in Mozambique. After listing the references to international law foreseen in the 1975 and 1990 constitutions (1.), it focuses on how the current 2004 Constitution of the Republic of Mozambique (CRM) regulates the incorporation of international law(2.). This is followed by the analysis of the very limited impact of African Union (AU) and the Southern African Development Community (SADC) memberships (3.), and a description of how the CRM positions international law in the domestic hierarchy of legal sources (4.).

Notwithstanding multiple references to international law principles, the Constitution ranks the bulk of international law sources equal to ordinary internal law. The empirical study on the judicial application of international law in Mozambique presented in the second part of this article shows that some judges are making every effort to avoid the international legal responsibility of the Mozambican State, even if that means bypassing the Constitution and recognizing the supremacy of international law *vis-à-vis* ordinary law. This case law analysis also reveals that international law is seldom used in the resolution of disputes, and that Mozambican judges struggle with the application of international law sources (5.).

2. INTERNATIONAL LAW IN THE MOZAMBICAN CONSTITUTION

The first Mozambican Constitution was approved on June 20, 1975, and entered into force on June 25, 1975.[1] Adopted in the context of the Cold War after a long Colonial War of Liberation, it featured a strong national sovereignty bias.[2] The main reference to international law was provided for in Article 23, which provided that "the People's Republic of Mozambique accepts, observes and applies the principles of the Charter of the United Nations and of the Organization of African Unity". The original constitutional text was revised in 1976 (twice), 1977, 1978, 1984, and 1986. Two references to the procedure of conclusion of international treaties and agreements were introduced in 1986.[3]

The second Mozambican constitution was approved on November 2, 1990, and entered into force on November30,1990. References to international law laid down in the constitution of 1975, as revised in 1986, were incorporated within the new constitutional provisions.[4]

The CRM was adopted on November 16, 2004, and entered into force on January 21, 2005. Unlike its two predecessors, it deals comprehensively with the domestic incorporation of international law (2.).

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[1] Article 73 CRM1975.

[2] See Article 1 CRM1975 ("The Popular Republic of Mozambique, which is the result of a secular resistance and a heroic and victorious struggle of the Mozambican people (...) against the Portuguese colonial domination and imperialism, is a sovereign, independent and democratic State").

[3] Articles 44(e) and 54(f) CRM1975.

[4] Articles 62(1), 122(b), 123(b), 135(1)(k) and 153(1)(f) CRM1990.

3. INCORPORATION OF INTERNATIONAL LAW IN MOZAMBIQUE

The sources of international law are incorporated into the Mozambican legal order without losing the international legal nature. The CRM is a monist constitution that provides for the conditional reception of international treaties and agreements (2.2. and 2.3.),[5] and for the automatic reception of other international legal sources (2.4.)[6].

The application of international treaties and agreements in Mozambique is subject to three cumulative conditions: i) regularity of the internal procedure of approval and ratification; ii) publication in the official gazette; iii) being binding on the Mozambican State.[7]

The application of treaties and agreements is contingent on respect for the mandated constitutional process for their approval.

The Mozambican Constitution establishes a dual procedure for the adoption of treaties (*strictu sensu)* and (executive) agreements. These are the two kinds of international conventions or treaties *latu sensu*:[8]i) solemn treaties (*strictu sensu*), which require an internal act after their signature, usually ratification, through which the State confirms its intention to be bound by the treaty; and ii)in the case of executive agreements, where the State is bound immediately upon signature.[9]

The procedural sequence set out for the adoption of solemn treaties requires the intervention of three main political institutions of the State. The negotiation is conducted by the Government, through the Council of Ministers, which has the task of "preparing the

[5] Article 18(1) CRM.
[6] Article 18(2) CRM.
[7] Article 18(1) CRM.
[8] The CRM uses the expression "international convention" only once in Article 136(4) ("If the subject-matters referred to in Article 178 (2) are the object of an international convention they can be submitted to a referendum, except if they relate to peace and to the rectification of borders").
[9] Article 11 of the Vienna Convention on the Law of Treaties between States (May 23, 1969) 1155 UNTS 331 (entered into force on January 27, 1980) ("Vienna Convention on the Law of Treaties"). Mozambique deposited its instrument of accession to the Vienna Convention on the Law of the Treaties with the United Nations Secretary-General on May 8, 2001 [2150 UNTS A-18232 (with effects as of June 7, 2001)], following the internal approval by the Council of Ministers through Resolution 22/2000 of September 19, published in the Official Gazette of the Republic, 1.st series, 2nd Supplement, 37, p. 180.

signature of international treaties".[10]The treaty is afterwards signed by the President of the Republic[11] and ratified by the Parliament (Assembly of the Republic).[12, 13]

The conclusion of executive agreements is far simpler. The Council of Ministers is responsible for negotiating, signing, ratifying and acceding to international agreements.[14] The signature ("celebration") of the agreement may be delegated to any minister, and binds the Mozambican State unless made *ad referendum*[15]. However, to be domestically enforced, the agreement must be approved by a resolution of the Council of Ministers.[16]

The decision on which kind of international convention to adopt is taken by the parties during the negotiations. However, the CRM limits the choice of executive agreements to international conventions which include "matters (...) within the executive competence of the Government".[17] This is a wide limitation, as the CRM grants primary and exclusive legislative competence to the Assembly of the Republic.[18] The Government can only legislate in the form of decree-laws with the express consent of the As-

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[10] Article 203 (1)(g) CRM. Within the Government, negotiations are led by the Ministry of Foreign Affairs and Cooperation (MINEC). Pursuant to Article 4(1)(s) and (t) of Presidential Decree 12/95, of December 29, 1995, the MINEC: i) prepares and participates in the negotiation, signature and completion of international treaties and agreements of interest to the Republic of Mozambique, and secures their incorporation into the national legal order; ii) studies treaties and international agreements and submits its ratification or accession by the Republic of Mozambique.

[11] The President of the Republic has the responsibility "to sign international treaties" in the realm of international relations(Article 161(b) CRM). This should be interpreted as referring to the moment of authentication (signature) of the treaties which marks the end of the negotiations. This power, which is given to the President of the Republic as the head of State, is often delegated in the MINEC (A. DIMANDE, *International Treaties in the Mozambican Legal Order*, in II Revista Jurídica Da Faculdade de Direito Da Universidade Eduardo Mondlane, 1997, p. 74. Such delegation breaches the principle of conferral (Article 134 CRM), pursuant to which "modifications of competences must be provided for in the Constitution" (J. BACELAR GOUVEIA, *Direito Constitucional de Moçambique*, Lisboa, 2015) at 467.This seems to be, however, a common constitutional practice in presidential systems of government, as evidenced by the case of Brazil (G. FERREIRA MENDES, P. G. GONET BRANCO, *Curso de Direito Constitucional*, 2016, p. 981.

[12] The process of ratification begins with the submission to the Parliament of a draft resolution by the President of the Republic. The resolution is reviewed by the Parliamentary Committee for International Relations, Cooperation and Communities, approved on a plenary session of the Assembly of the Republic [Articles 91(b), 120, 130(2), of the Organic Law of the Assembly of the Republic, published in the annex to Law 13/2013 of August 12, 2013], and then sent to the Government "for the purposes of issuance of the «letter of ratification» by the Ministry of Foreign Affairs, and deposit with the competent authorities designated by the treaty" (A. DIMANDE, *supra* note 12, at 80.

[13] Article 178 (1)(e) CRMgives the Assembly of the Republic the power to "approve and terminate treaties in matters within its competence". This provision cannot be applied. The ratification materially replaces the approval of the treaty by the Assembly of the Republic. Only if interpreted as referring to executive agreements and not solemn treaties could this provision have any *effect utile*. Such interpretation, however, is *contra legem*, and would make useless the distinction between solemn treaties and executive agreements, as in both cases Mozambique would be bound upon an act of the Assembly of the Republic, namely the ratification of solemn treaties and the approval of executive agreements.

[14] Article 18(1) CRM.

[15] Article 10(b) of the Vienna Convention on the Law of Treaties.

[16] Article 203(1)(g) CRM. The "ratification" and "accession" to agreements referred to in Articles 18(1) and 209(4) CRM are acts of approval by the Council of Ministers which have solely domestic effects. Thus, they do not hinder the possibility of Mozambique being binding on the international level upon the signature of the agreement. SeeLoureiro Bastos, 'O Direito Internacional Na Constituição Moçambicana de 2004', (2010)142 *O Direito*, at 150.

[17] Second part of Article 203(1)(g) CRM.

[18] Article 178(1) CRM.

sembly of the Republic.[19]International conventions which concern matters included within the competence of the Parliament should thus follow the form of a solemn treaty,[20] and international conventions exclusively related to matters included within the administrative competence of the Government should take the form of an executive agreement. The CRM does not foresee any mechanism by which the Parliament can authorize the Government to bind Mozambique to international agreements in domains which fall within the former's legislative competence.

Agreements approved by the Government which include matters falling within the Parliament's legislative scope of competences breach the constitution, and thus are unenforceable in the Mozambican legal order. One example, among many others,[21] is the "Agreement on the Principles and Legal Provisions for the Relationship between the Republic of Mozambique and the Holy See" ("Concordat"), signed on December 7,2011, and ratified by the Government through the Resolution 12/2012, of April 13, 2012. The Concordat was adopted by the Government as an agreement, although it includes matters which are clearly within parliamentary competence, such as tax benefits and exemptions[22],the regulation of marriage[23] or the postponement of military service.[24]

Domestic application of international treaties and agreements is conditional upon their publication. Both are published in the 1st series of the Official Gazette of the Republic, and include, as an annex, the Portuguese version of the treaties and agreements.[25]

Finally, in order to be applicable, international treaties and agreements must be internationally binding on the Mozambican State.[26]

The Mozambican constitution prevents the application of international treaties and agreements which do not yet bind Mozambique. Entry into force of treaties and agreements is contingent on what is established by the parties, either a specific date or, more usually, the consent to be bound by all the States participating in the negotiations (bilateral treaties and agreements) or some of them (multilateral treaties and agreements).[27]

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[19] Article 178(3) and Article 179 CRM.

[20] J. BACELAR GOUVEIA, *Direito Internacional Público,* Coimbra, 2013, p. 366, refers to the existence of a material constitutional limitation, pursuant to which international conventions which concern important matters must be concluded under the form of a solemn treaty.

[21] See Council of Ministers resolution No. 21/2000 of September 19, which ratifies the Convention on privileges and immunities of the United Nations of February 13, 1946.

[22] Article 127(2) CRM and Article 20 of the Concordat.

[23] Article 119(1) CRM and Article 14 of the Concordat.

[24] Article 263(2) CRM and Article 13(1) of the Concordat.

[25] Article 18(1) and Article 143(f) CRM. G. CISTAC, *A Questão Do Direito Internacional No Ordenamento Jurídico Da República de Moçambique,* in Revista Jurídica Da Faculdade de Direito Da Universidade Eduardo Mondlane, VI, 2004, p. 33, mentions the practice of publication of the Council of Ministers' resolutions approving international conventions, which often do not include in attachment the text of the treaties or agreements. AA. LONGO CHUVA, *A eficácia jurídico-constitucional das normas provenientes da Organização Mundial do Comércio (O.M.C.) no direito constitucional moçambicano*, in A. CHUVA et al. (eds.), Estudos de Direito Constitucional Moçambicano: contributos para reflexão, Maputo, 2012), exemplifies with the Resolution of the Council of Ministers 31/94, of September 20, 1994, on the results of the Uruguay Round of multilateral trade negotiations on the General Agreement on Tariffs and Trade (GATT), which does not include any of the texts or annexes of the World Trade Organization agreement.

[26] Article 18(1) CRM.

[27] Article 24(2) of the Vienna Convention on the Law of Treaties provides that, in the absence of a provision or an agreement, "a treaty enters into force as soon as consent to be bound by the Treaty has been established for all the negotiating States."

From the constitutional requirements of entry into force on the international level and publication in the Official Gazette of the Republic, it follows that the beginning of the domestic enforcement of a treaty or an agreement is:

(a) the date set in the treaty or the agreement, if that date is later than the date of publication in the official gazette;

(b) the date of publication in the official gazette, if this is later than the date of entry into force in the treaty or the agreement;

(c) the date of the notification to the other State (bilateral treaty or agreement) or deposit (multilateral treaty or agreement) of the instrument binding Mozambique to a treaty or an agreement which is already in force, if the notification occurred after the publication of the treaty or publication in the official gazette;

(d) the date of publication in the official gazette, if the latter happened after the notification or deposit of the instrument binding Mozambique to a treaty or an agreement already in force;

(e) the date mentioned in the notification of the deposit of the binding instrument necessary for the entry into force of the treaty or the agreement, if that date is after the publication of the treaty or the agreement in the official gazette;

(f) in the event the binding instrument required for the entry into force of the treaty or the agreement is from Mozambique, the relevant date will be either the date of publication of the treaty or the agreement in the official gazette or the date mentioned in the notification of the deposit of the instrument, depending on which occurs later.

Assessing whether a provision of an international treaty or agreement may be enforced is frequently a difficult task, as no notices are published in the official gazette announcing the entry into force of international treaties or agreements to which Mozambique is bound, and which have already been published in the official gazette. The task is sometimes made almost impossible by the delays of the MINEC in notifying or depositing instruments of ratification and approval of treaties and agreements already published in the official gazette.

Unsurprisingly, Mozambican courts applied provisions of international treaties and agreements published in the official gazette which were not yet binding on the Mozambican State. That was the case in a ruling of the Supreme Court of October 24, 1996,in a dispute regarding the allocation of parental responsibility[28]. A lower court (Judicial Court of the City of Maputo) was censured for not having heard the opinion of the minors "on the measures to be taken which directly concern them", thus disregarding the obligation stemming from the "principle set out in Article 12(1) of the Convention on the Rights of the Child, which is part of the internal legal order after the ratification act which took place by means of Resolution 19/90, of October 23, 1990 (BR 42 – 1st Series – 2nd Supplement)". Although this international convention was already in force when it was published in the official gazette,[29] the instrument of accession of the Mozambican State was only deposited on April 26,1994,[30] after the decision of the referring court (April 13, 1994). In other words, the Convention on the Rights of the Child was

[28] Case 24/95, available at http://www.saflii.org/mz/cases/MZTS/. This judgment was delivered while the 1990 CRM was still in force. This Constitution did not rule on the domestic incorporation of international law.

[29] The Convention on the Rights of the Child was adopted on 20 November 1989 and entered into force on 2 September 1990 (1577 UNTS 3).

[30] The Convention on the Rights of the Child binds Mozambique since 26 May 1994 (1775 UNTS 449).

not enforceable within the Mozambican legal order at the time of the delivery of the lower court ruling.[31]

Article 18(2) CRM establishes that the "rules of international law" produce effects in the Mozambican legal order "according to their method of reception". Given that treaty law incorporation is conditioned by the fulfillment of requisites established in Article 18(1) CRM, the automatic reception of other international law sources can be inferred,[32] namely customary law, general principles of law and unilateral acts of the States[33].

Secondary legislation adopted by international organizations to which Mozambique is a party is applicable under the conditions set forth in their founding treaties, which are in turn incorporated into the domestic legal order pursuant to Article 18(1) CRM. The next section demonstrates that the impact of the law and case law of international organizations and courts is very limited (4.).

4. LAW AND CASE LAW OF INTERNATIONAL ORGANIZATIONS AND COURTS

Mozambique is a founding member of the SADC (1992) and the AU (2000). Although aiming at developing economic integration[34] and at accelerating the political and socio-economic integration of the African continent[35], these international organizations do not have a supranational nature akin to the European Union,[36]as they display decision-making procedures entirely dominated by the Member States, parliaments with mere consultative[37] competences[38], and relatively weak courts, either because they were suspended (the SADC Tribunal) or their establishment delayed (the Court of Justice of the AU)[39].

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[31] This mistake had no relevance. The Supreme Court took no legal consequences from the breach of the Convention by the court of first instance and confirmed the latter's decision.

[32] The broad scope of the domestic reception of every international law sources is confirmed by Article 132(2) CRM, which rules that the Bank of Mozambique is governed "by international provisions to which the Republic of Mozambique is bound and which are applicable thereto".

[33] J. BACELAR GOUVEIA, *supra* note 12, at 409, considers, however, a "remarkable obstacle" the omission of any reference in Article 18 CRM to international customary law and international unilateral acts.

[34] Article 6(1)(a) SADC Treaty.

[35] Article 3(c) and (j) of the Constitutive Act of the African Union.

[36] F. LOUREIRO BASTOS, *A União Europeia e a União Africana – pode um puzzle de que não se conhece a imagem final servir de modelo à integração do continente africano?*, in Estudos jurídicos e económicos em Homenagem ao Prof. Doutor António de Sousa Franco I, Coimbra, 2006, pp. 1037–1038.

[37] The Parliamentary Forum is a "Consultative Assembly" established in 1996 as an autonomous institution of the SADC. It is based in Windhoek, Namibia, and aims at promoting democracy and human rights (F. VILJOEN, A. SAUROMBE, *Southern African Development Community (SADC)*, in R. WÖLFRUM (ed.) Max Planck Encyclopedia of Public International Law, Oxford, 2010).

[38] The Pan-African Parliament is one of the institutions provided for in the Constitutive Act of the AU. Based in Midrand, South Africa, it was established in 2004 after the entry into force of the Protocol establishing the African Economic Community relating to the Pan-African Parliament (signed on March 2, 2001), which grants advisory powers to the institution (Article 11). The recognition of legislative powers is foreseen in the Protocol to the Constitutive Act of the African Union concerning the Pan-African Parliament, signed in Malabo (Equatorial Guinea) on June 27, 2014, which requires the ratification of 28 Member States for its entry into force [in August 2022 only fourteen States had ratified this protocol (see https://au.int/en/treaties/protocol-constitutive-act-african-union-relating-pan-african-parliament).

[39] The Constitutive Act of the African Union foresees the establishment of the Court of Justice as one of the bodies of the AU (Article 5(1)(d) and Article 18). Its composition, competence and procedural rules are laid down in the Protocol of the Court of Justice of the African Union (signed on July 11, 2003, entered into force

Intergovernmentalism is at its most intense in the African context before the SADC, where secondary legislation is adopted unanimously by the Member States[40], and usually takes the form of protocols which have to be signed and ratified by the Member States[41]. The SADC does not impair the sovereign powers of its Member States, which can block the adoption or refuse to ratify protocols deemed contrary to their national interests.

Intergovernmentalism in the AU is less apparent. Not only are the decisions of AU bodies adopted by two thirds of the Member States if consensus is not reached, but secondary legislation also includes binding acts. Among them is the decision of the Assembly (of Heads of State and Government) authorizing the use of force against a Member State where international crimes are committed[42]. This would be a serious challenge to the principle of sovereign equality of States and non-interference in their internal affairs, but the decision of the Assembly needs to be supported by a resolution of the United Nations Security Council which expressly authorizes the use of force under Chapter VII of the United Nations Charter.[43]

The law of the regional international organizations to which Mozambique is a party lack the autonomy of European Union law. In 1963, the Court of Justice of the European Union declared in *Van Gend & Loos* that the European Economic Community Treaty, as it was then called, created a new legal system for the benefit of which the Member States limited their sovereign rights and whose subjects also encompassed their nationals.[44] This decision initiated a praetorian process of transformation of a set of legal instruments of international law into an autonomous legal order, from which stem rights which can be invoked by individualist national courts. Such a declaration of independence *vis-à-vis* the authority of the Member States would be impossible in the SADC or in the AU for the prosaic reason that the courts set forth in their founding treaties are not currently functioning (3.3. and 3.4.).

The SADC Tribunal is an institution of the SADC[45]. It has jurisdiction to deliver advisory opinions and deal with disputes on the application of the SADC Treaty, its protocols and acts, upon request from Member States, individuals (after all internal remedies

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on February 19, 2008). The establishment of the Court of Justice was delayed by the possibility of its merger with the African Court of Human and Peoples' Rights, which was finally decided in the Protocol on the Statute of the African Court of Justice and Human Rights (signed on July 1, 2008). In August 2022, the Protocol on the Statute of the African Court of Justice and Human Rights had collected just eight of the fifteen ratifications required for its entry into force (seehttps://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights).

[40] Article 19 SADC Treaty.

[41] Article 22 (3) SADC Treaty.

[42] Article 4(h) Constitutive Act of the AU.

[43] According to Article 53(1) of the United Nations Charter, no coercive action will be carried out in accordance with agreements or regional organizations without the authorization of the United Nations Security Council. It has been argued that Article 4(h) of the AU Constitutive Act should be interpreted as implying the prior consent of the Member States to unilateral humanitarian interventions of the AU in their territories (A.J. BELLAMY, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, in Ethics and International Affairs, 20, 2006, pp. 158–159. Such an interpretation cannot be accepted. Not only does it breach the supremacy of the Charter over treaty law (Article 103 of the Charter of the United Nations), but also introduce an unacceptable derogation of the United Nations system of collective security. See A. ABASS, *Calibrating the Conceptual Contours of Article 4(H*", in D. KUWALI, F. VILJOEN (eds.), Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act, Oxon, 2014, p. 38.

[44] *Van Gend& Loos*, 26/62, 61962CJ0026, p. 210.

[45] Article 16 SADC Treaty.

have been exhausted) and national courts.[46]Decisions on disputes are final and binding[47], and their execution secured by the Member States and the institutions of the SADC[48].

The SADC Tribunal is located in Windhoek, Namibia, and was established on November 18, 2005[49]. Its first rulings date from 2007. The court declared in *Mike Campbell* that the expropriation of white farmers' property carried out in 2005 by the Zimbabwean Government breached the right of access to justice[50] and the prohibition of discrimination based on race,[51] and ordered Zimbabwe to pay a compensation to the victims.[52] After Zimbabwe's refusal to comply with the judgment, the SADC Summit of Heads of State and Government decided to suspend the SADC Tribunal.[53] This episode is revealing in terms of the absolute ineffectiveness of the institutional mechanisms for monitoring compliance with SADC law.[54]

Overall, the SADC Tribunal dealt with fifteen cases.[55] None involved Mozambique.

An active international judicial body linked with the AU which holds mandatory jurisdiction over Mozambique is the African Court on Human and Peoples' Rights (AfCHPR).[56]

The AfCHPR has jurisdiction to deliver advisory opinions and to rule on disputes regarding the interpretation and application of the Charter, the Protocol and other relevant human rights instruments, at the request of the African Commission on Human and Peoples' Rights (ACHPR), States, intergovernmental organizations, non-governmental organizations and individuals.[57]Petitions from non-governmental organizations and individuals can only target States that have deposited a declaration accepting the Court's jurisdiction to decide complaints submitted by those entities.[58]AfCHPR decisions are binding on States which are parties to the Protocol.[59]

On July 17,2004, Mozambique ratified the Protocol, but failed to submit the declaration referred to in Article 5(3)AfCHPR Protocol. This explains why the Mozambican State received only one complaint before the AfCHPR. That sole petition was submitted

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[46] Articles 14, 15 and 16 of the Protocol to the SADC Tribunal, adopted on August 7, 2000 (entered into force on August 14, 2001).

[47] Article 16(4) and 20 SADC Treaty.

[48] Article 32(2) of the Protocol to the SADC Tribunal.

[49] The first President of the Court was a Mozambicannational (H.J. HENRIQUES, *A europeização indirecta do Direito Constitucional moçambicano – cláusula internacional*, in A.A. LONGO CHUVA (ed.), Estudos de Direito Constitucional Moçambicano: contributos para reflexão, Maputo, 2012, p. 149.

[50] Article 4(c) SADC Treaty.

[51] Article 6 (2) SADC Treaty.

[52] *Mike Campbell (Pvt) Limited (vs). Republic of Zimbabwe (2/2007) [2008] SADCT 2* (28 November 2008).

[53] The suspension was initially decided in 2010 and confirmed in Maputo on August 18, 2012. See O. JONAS, *Neutering the SADC Court by Blocking Individuals" Access to the Tribunal*, in International Human Rights Law Review*, 2, 2012, p. 294.*

[54] The SADC Treaty provides that Member States shall implement the decisions of the SADC Tribunal. Any failure to comply with this obligation must be informed to the SADC Summit of Heads of State and Government (Article 32(5) of the Protocol to the SADC Tribunal). Following Zimbabwe's refusal to comply with the *Mike Campbell* judgment, the SADC Tribunal informed the Summit accordingly, but the latter failed to adopt any appropriate measures (F. VILJOEN, A. SAUROMBE, *supra* note 38, at 33).

[55] Available at http://www.saflii.org/sa/cases/SADCT/.

[56] This court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, which was adopted by the Assembly of Heads of State and Government of the Organization of the African Union on June 10, 1998, in Ouagadougou, Burkina Faso, and entered into force on January 25, 2004.

[57] Articles 3, 4 and 5 AfCHPR Protocol.

[58] Articles 5(3) and 34(6) AfCHPR Protocol.

[59] Article 46 AfCHPR Protocol.

by individuals, and thus prompted a decision of inadmissibility on grounds of lack of jurisdiction of the AfCHPR to rule on the case[60].

In the African system of human rights, complaints against breaches of the African Charter on Human and Peoples' Rights made by individuals and non-governmental organizations which cannot be submitted to the AfCHPR may be referred to the ACHPR[61]. The legal nature of the ACHPR's decisions is unclear, but that has not affected its relevance to the development of the international law on human rights.[62]

Mozambique filed a complaint related to the SADC Summit's decision to suspend the SADC Tribunal. The ACHPR considered that there was no breach of the African Charter on Human and Peoples' Rights[63]. Two other complaints were declared inadmissible because the claimants did not exhaust the available national legal remedies[64].

Mozambican procedural law does not provide for the review of a judicial decision irreconcilable with a binding ruling delivered by an international court. The low probability of a conviction of the Mozambican State in an international jurisdiction prevents the risk of international responsibility stemming from this loophole. The SADC tribunal is currently suspended, and Mozambique does not accept the jurisdiction of the AfCHPR in procedures initiated by non-governmental organizations and individuals. Mozambique has also not submitted a declaration accepting the compulsory jurisdiction of the International Court Justice (ICJ) pursuant to Article 36(2) of the Statute of the ICJ,[65]and has not ratified the Statute of the International Criminal Court (ICC).[66]

The external impulses which have impelled changes in the Mozambican legal system have came from soft law instruments adopted by human rights bodies, such as recommendations from the ACHPR[67]and the United Nations Human Rights Council.[68]

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[60] Petition 005/2011, *Daniel Amare and Mulugeta Amare vs. Republic of Mozambique and LinhasAéreas de Moçambique*, available at http://www.african-court.org/fr/images/documents/Court/Cases/Judgment/Decision-%20Requete%20No%20%20005.2011%20%20Muluget%20c.%20Mozambican%20Airlines.pdf.

[61] The ACHPR was created by the African Charter on Human and Peoples' Rights (1520 UNTS 217, OAU Doc. CAB/LEG/67/3 Rev. 5, UN Reg in I-26363) and instituted in 1987. It includes eleven commissioners. Among its powers is the submission, every two years, of reports on the implementation of the African Charter on Human and Peoples' Rights in the Member States (Article 62 of the African Charter on Human and Peoples' Rights), and assessing complaints concerning the violation of the African Charter on Human and Peoples' Rights submitted by Member States and by individuals (Articles 47 to 59 of the African Charter on Human and Peoples' Rights).

[62] See R. MURRAY, D. LONG, *The Implementation of the Findings of the African Commission on Human Peoples´ Rights*, Cambridge, 2015, pp. 50–58.

[63] Petition 409/12, Luke Tembani Munyandu and Benjamin John Freeth (represented by Norman Tjombe) vs. Angola and thirteen other States, available at http://www.achpr.org/communications/decision/409.12_/.

[64] Petition 361/08,*J.E Zitha & P.J.L.Zitha* (represented by Liesbeth Zegveld) [available at http://www.achpr.org/communications/decision/361.08/] e Petition 434/12, *Filimão Pedro Tivane* (represented by Simeão Cuamba) [available at http://www.achpr.org/communications/decision/434.12/].

[65] As a member of the United Nations and a party to the Statute of the ICJ, Mozambique could be sued by another State –something which has never happened – but the case will only proceed to the merits with Mozambican consent.

[66] The accession of Mozambique to the Rome Statute of the ICC must be preceded by a constitutional amendment in order to overcome the prohibition of expulsion or extradition of nationals (Article 67(4) CRM) and the prohibition of extradition for crimes liable to a life sentence (Article 67(3) CRM).

[67] The ACHRP report concerning the period between 1999 and 2010 is available at http://www.achpr.org/pt/states/mozambique/reports/1-1999-2010/.

[68] The United Nations Human Rights Council was established by the UN General Assembly resolution 60/251, of March 15, 2006, with the objective of promoting the universal respect and protection of human rights and fundamental freedoms. The Council includes 47 States, 13 of which must be from Africa. According to F. CRUZ, *Proteção Dos Direitos Humanos Em Moçambique Realidade Ou Apenas*

5. HIERARCHY OF INTERNATIONAL LAW IN THE DOMESTIC SOURCES OF LAW

International law norms have "the same importance as infra-constitutional normative acts stemming from the Assembly of the Republic and the Government".[69]This is a corollary of the principle of constitutionality, according to which "constitutional provisions shall prevail over all other norms of the legal order".[70]

The supremacy of constitutional law will only be enforced if mechanisms of constitutional review of international law norms are available.

That is not the case of *ex ante* or preventive constitutional review by the Constitutional Council[71], which can only address laws of the Assembly of the Republic sent to the President of the Republic for promulgation[72].

Article 2(4) CRM unequivocally grants ordinary courts the power to refuse to apply international legal norms that breach the Constitution. The Constitutional Council has the final word, as it must adjudicate on any judicial decisions that refuse to "apply a legal provision based on its unconstitutional nature"[73].

Fernando Loureiro Bastos argues against the possibility of judicial review of international law based on the lack of any reference to provisions of international law or international legal sources in Article 213 CRM, which states that "courts shall not apply laws or principles which are contrary to the Constitution"[74]. However, it is not possible to infer from a *contrariu sensu* argument an authorization for courts to breach the Constitution whenever applying international law. Moreover, in this provision of the Constitution – and also in others (*e.g.* Article 245 (1)) –the word "laws" is broadly encapsulated with the meaning of "norms". A restrictive interpretation limiting the scope of Article 213 CRM to "laws"(*stricto sensu*) of the Assembly of the Republic would be contrary to the purpose of this provision, which is to prevent the application of unconstitutional provisions. This interpretation also opens the door to the possibility of abstract constitutional review of international law: pursuant to Article 244(1) CRM "the Constitutional Council appreciates and declares, with general binding force, the «unconstitutionality of *laws*»(italics added)upon the request of the President of the Republic, the President of Assembly of the Republic, one third of Members of Parliament, the Prime-Minister, the Attorney-General, the Ombudsman or two thousand citizens".[75]

The normative superiority of the Constitution over international law is not – and could never be – absolute. One of the effects of the process of globalization of the last

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Idealismo?, in P. JERÓNIMO (ed.), Os Direitos Humanos No Mundo Lusófono: O Estado Da Arte, Braga, 2015, p. 123."(in) the 2011 periodic review, Mozambique «willingly» accepted most recommendations made by Member States and observers to the Human Rights Council".

[69] Article 18(2) CRM.

[70] Article 2(4) CRM.

[71] Article 240(1) CRM grants the Constitutional Council the specific competence to administer justice in constitutional law matters. The court comprises seven judges nominated by the President of the Republic (one), the Parliament (five), and the Superior Council of the Judiciary (one) (Article 241(1) CRM).

[72] Article 162(1) and Article 245(1) CRM.

[73] Article 246(1)(a) CRM.

[74] F. LOUREIRO BASTOS, *supra* note 17, at p. 461.

[75] According to L.A. MONDLANE, *Relatório Sobre Moçambique à I Assembleia Da CJCPLP*, in Fiscalização Da Constitucionalidade e Estatuto Das Jurisdições Constitucionais Dos Países de Língua Portuguesa, 2010, p. 17, abstract constitutional review may address "legal provisions in force in the domestic legal order, as long as they were adopted by State bodies". See also F. LOUREIRO BASTOS, *supra* note 17, at p. 461.

decades is the constitutional relevance of core principles and standards of an international legal order which is no longer exclusively centered on the Westphalian paradigm of sovereign equality between States.[76] The international legitimacy of States is now largely dependent on the constitutional recognition of democratic principles and the protection of human rights.[77] These principles are manifestations of an *in fiery* international constitutionalism. They materialize in the so-called mandatory rules of general international law (*jus cogens*), which nowadays may be even regarded as a heteronomous limit to the original *pouvoir constituant*.

The CRM recognizes the obligations stemming from *jus cogens* rules by stating that the Mozambican State "accepts, observes and applies the principles of the Charter of the United Nations and the Charter of the African Union"[78]. In the Mozambican Constitution, other references are made to principles of international law, such as the respect for the sovereignty and territorial integrity, non-interference in internal affairs and sovereign equality,[79] self-determination of peoples,[80] and the prohibition of the use of force and peaceful resolution of conflicts[81]. International human rights law is expressly acknowledged through the statement that the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights shall be used as a standard for the interpretation and integration of fundamental rights provided for in the Constitution[82].

International law is recognized by the CRM as having the same hierarchical rank as normative acts adopted by the Assembly of the Republic or the Government. According to Article 142 CRM, the internal normative acts include legislative acts (laws of the Assembly of the Republic and decree-laws of the Government), regulatory acts (decrees of the Government) and political acts (motions and resolutions of the Assembly of the Republic). By virtue of the principle *lex posterior derogat lex priori*, treaties do not prevail over laws or decree-laws which were enforced afterwards, and the same happens with agreements, which do not take precedence over laws, decree-laws or Government decrees enacted on a later date. Other international legal sources can also be negated by the entry into force of incompatible provisions of a law, decree-law or government decree[83].

International law is part of the Mozambican legal order. From the moment of its entry into force, any incompatible legislative acts will become inapplicable. The problem

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[76] S. BESSON, *Sovereignty*, in R WÖLFRUM (ed.), Max Planck Encyclopedia of Public International Law, Oxford, 2011, pp. 48–49.

[77] According to A. PETERS, *The Globalization of State Constitutions*, in J. NIJMAN, A. NOLLKAEMPER (eds.), New Perspectives on the Divide between National and International Law, Oxford, 2007, p. 45. These principles were forged by national constitutionalism, exported to the international legal order, and more recently re-imported to the national constitutions. This phenomenon has led to a "vertical" convergence of international and constitutional law: in other words, the globalization of national constitutions and the constitutionalization of international (or global) law.

[78] Article 17(2) CRM.

[79] Article 17 CRM.

[80] Articles 19 and 20 CRM.

[81] Article 22 CRM.

[82] Article 43 CRM.

[83] As the relationship between international law and internal law is not one of validity, no revocation occurs. The incompatibility of emerging norms of national law does not have the effect of invalidating conflicting international law norms, but simply of precluding the production of effects of the latter in the national legal order. The revocation of those internal norms will allow the international law norms to fully resume its effects. The same applies *mutatis mutandis* in the case of conflict between domestic norms and subsequent international law norms.

is that the opposite also occurs: norms laid down in legislative acts trump the application of conflicting international law norms as of the moment of their entry into force.

There is accordingly a significant risk that the *pacta sunt servanda* principle will be infringed within the Mozambican legal order. The international responsibility of the Mozambican State will stem from the adoption of a law by the Assembly of the Republic or a decree-law or decree by the Government which includes, albeit inadvertently, norms that are contrary to the international obligations of the Mozambican State.[84]

Legal doctrine always considered international law to be ranked below the Mozambican constitution.[85]Article 18(2) CRM settled any remaining doubts on this matter. Fernando Loureiro Bastos qualifies this constitutional option as "open to criticism" and even "surprising", "to the extent that it is incompatible with the characteristics of international law and inconsistent with the incorporation of the Republic of Mozambique within the international community",[86] as well as "incongruous", because the constitutional text itself recognizes in Article 43 the importance of international legal instruments in the interpretation of fundamental rights.[87]

Ranking international law below the constitution cannot be regarded as surprising, as this remains the norm in comparative law.[88] The supremacy of constitutional law is mitigated in Mozambique by the recognition of the supra-constitutional nature of the Universal Declaration of Human Rights and the African Charter on Human and Peoples' rights ,[89] and the constitutionalization of several *ius cogens* rules and principles.[90] What surprises is the constitutional decision not to position international law above ordinary law.[91] In light of the increasing number of international conventions concluded by States, the decision to rank international treaties and agreements on the same level as legislative and regulatory acts increases the risk of breach of international treaty obligations. This may be rationalized as a defense mechanism against an international legal order which continues to be identified as preserving a European public law *ethos* with covert hegemonic and neo-colonial aspirations:

> «There is a certain resistance on the part of the Mozambican legislator regarding the reception of international law. Such resistance seems to be justified by the need to preserve legal monism. That is, the need to preserve the legal system's architecture, with the aim of achieving stability, coherence and harmony within the system. On the other hand, this resistance finds its deeper roots in the sovereign spirit and the self-determination of colonized and enslaved peoples – the aversion to a new neo-capitalist and capitalist trend. Regardless of its international integration and openness to globalization, the Mozambican legislator is still strongly and negative-

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[84] This risk is avoided when national law expressly foresees the supremacy of potentially conflicting norms of international law. According to H.J. HENRIQUES, *supra* note 50, at p. 158.This strategy was followed by Article 67 of the Law on Arbitration, Conciliation and Mediation (Law 11/99 of 8 July 1999), which establishes that "the multilateral or bilateral agreements or conventions adopted by the State of Mozambique in the context of arbitration, conciliation and mediation take precedence over the provisions of this law."

[85] Among others, A. DIMANDE, *supra* note 12, at p. 85, or G. CISTAC, *supra* note 26, at 47–48.

[86] F. LOUREIRO BASTOS, *supra* note 17, at p. 459 and p. 461.

[87] *Ibid.*, at p. 460.

[88] A. PETERS, *supra* note 78, at p. 259.

[89] Articles 43 CRM.

[90] Articles 17, 19, 20 and 22 CRM.

[91] V.S. VERESHTIN, *New Constitutions and the Old Problem of the Relationship Between International Law and National Law,* in European Journal of International Law, 7, 1996, p. 37.

ly marked by foreign law –the classic international law – which was imposed over many centuries and is still nowadays a symbol of servitude».[92]

6. APPLICATION OF INTERNATIONAL LAW BY MOZAMBICAN COURTS

6.1. *GENERAL REMARKS*

Any study of the application of international law by Mozambican courts is severely constrained by the limited availability of judicial databases. The sole exception is the Constitutional Council, which publishes all its decisions.[93] Some rulings of the Supreme Court are published by the *Southern African Legal Information Institute*[94]and by the *Legis Palop*.[95] The Supreme Court and the Administrative Court also publish some of their decisions online.[96]Some other decisions of these courts were included in collections organized by judges of the Supreme Court or law professors.[97]

A search of jurisprudential databases reveal a very small number of cases of application of international law by Mozambican higher courts: one in the Constitutional Council[98]; four in the Supreme Court[99]. This is an improvement from 1997, when Armando César Dimande noticed that in Mozambique, there was no example of the application of treaties "at least at the level of the Supreme Court and the district Court of Maputo".[100]

Analysis of the rulings which applied international law shows that Mozambican courts invoke international law to adjudicate legal disputes (5.2.), and also as a parameter within the interpretation and integration of domestic law (5.3.).

6.2. *INTERNATIONAL LAW IN JUDICIAL DISPUTE RESOLUTION*

The Mozambican constitution provides common courts with power to take decisions as far-reaching as the non-application of a law they deem unconstitutional.[101]It also grants them the power "to secure the observance of the law"[102] and to punish "breaches of legality".[103]

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[92] H. J. HENRIQUES, *supra* note 50, at p. 161.

[93] Available at http://www.cconstitucional.org.mz/Jurisprudencia.

[94] This database includes a few judgments delivered between 1992 and 2007, and is available at: http://www.saflii.org/mz/cases/MZTS/.

[95] Legis Palop is the official database of the African Countries of Portuguese Official Language, better known by the acronymn PALOP. It includes legislation and some case law. See http://www.legispalop.org/bd/.

[96] Available at http://www.ts.gov.mz/Jurisprudencia and http://www.ta.gov.mz/rubrique.php3?id_rubrique=134.

[97] See G. CISTAC, *Jurisprudência Administrativa de Moçambique - Vol. I (1994-1999)*, Maputo 2003.G. CISTAC, *Jurisprudência Administrativa de Moçambique - Vol. II (2000-2002)*, Maputo 2006), and J.F. GUIBUNDA, *100 Acórdãos Da Jurisdição Administrativa*, Maputo, 2012.

[98] Judgment No. 04/CC/2009, of March 17, available at www.cconstitucional.org.mz/Jurisprudencia.

[99] Case 24/95, judgment of 24 October 1995; Case 151/98, judgment of 26 March 1999; Case 213/99-A, judgment of 3 October 2002; Case 214/99, judgment of 23 February 2000. All these decisions are available at http://www.saflii.org/mz/cases/MZTS/.

[100] A. DIMANDE, *supra* note 12, at 87.

[101] Article 213 CRM.

[102] Article 211(1) CRM.

[103] Article 211(2) CRM.

The constitutional review of legality has been broadly interpreted by Mozambicans judges to include international law. This was the case in particular before the Supreme Court in a judgment of October 3,2002 (213/99), concerning a traffic accident which occurred in Maputo in 1995 involving two vehicles driven by a Mozambican citizen and a Nigerian citizen. A Maputo lower court condemned the Nigerian citizen to pay a penalty for several traffic misdemeanors and to compensate the Mozambican citizen.

The Attorney General requested the annulment of this judgment on the ground of its manifest illegality, arguing that the Nigerian citizen was a diplomat serving at the Embassy of Nigeria.

After qualifying the problem as concerning the application of diplomatic immunities, the Supreme Court stated that:

> "(...) the (Vienna Convention Diplomatic Relations) was received into the internal legal order through ratification by the People's Assembly –which is the Parliament and the highest legislative body, *and the supreme organ of authority of the State*– through Resolution4/81, of September 2, 1981. It has, therefore, formal legal rank equal to laws in a strict sense." (italics in the original)

Although the 1990 CRM, which was in force at the time of the ruling, did not take a stance on the position of international law in the domestic legal order, the Supreme Court granted international law a hierarchical rank similar to laws of the Assembly of the Republic. That was then the predominant doctrinal opinion,[104] which was later reflected in Article 18(2) CRM.

The first instance court's ruling was annulled by the Supreme Court as it contained a "manifest illegality", consisting of the breach of the immunities provided for in Article 31(1) of the Vienna Convention on Diplomatic Relations. The Supreme Court never discussed the possible normative conflict between this international legal provision and the Civil Procedure Code (CPC) rules granting jurisdiction to the court of first instance. In any case, despite the CPC being of the same hierarchical rankas the Vienna Convention on Diplomatic Relations, the provisions of the latter would always prevail as they bear the nature of *lex specialis*, and were adopted and enforced afterwards–in Mozambique the 1939 Portuguese Civil Procedure Code, which is still in force.

Two other first instance cases confirm the efforts of Mozambican judges to avoid the State's liability for the breach of international legal obligations.[105]

The first case concerned the enforcement of a court decision which condemned the Embassy of the United States of America to pay compensation for the unlawful dismissal of an employee. The Embassy did not intervene in the proceedings challenging the dismissal and did not appeal the Court's ruling. After a bank account of the Embassy was seized by a court order, the MINEC notified the Court that the enforcement order breached the Vienna Convention on Diplomatic Relations.

The intervention of the administration motivated the immediate lifting of the enforcement order. The court then asked the MINEC to clarify the legal force of the ruling condemning the Embassy, and rightly questioned "whether the Embassy should have used the means available to protect its interests?"

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[104] See A. DIMANDE, *supra* note 12, at p. 87. For whom international conventions applicable in Mozambique would have the "binding force of ordinary laws".

[105] The two cases were reported to me by A. Miguel Ndapassoa and by A. Leão, to whom I express my gratitude.

The MINEC answered in an opinion issued on August 11, 2008. According to the Mozambican Ministry for Foreign Affairs, the judicial decision that condemned the Embassy was invalid as it breached the immunities provided for in the Vienna Convention on Diplomatic Relations. In a singular interpretation of the principle of separation of powers, it also added that it bears the responsibility for the correction of miscarriages of justice:

> "The fact that (the MINEC) had to intervene shows that the Mozambican authorities were forced to put an end to the violation of the law by one of their own courts, and were informed of this situation by the diplomatic representation of a foreign country. This is both humiliating and unnecessary. In our view, this issue must be studied in the judicial training center, in addition to being necessary to inform judges about diplomatic immunities".[106]

The second case originated in a challenge to a dismissal brought against the World Food Program (WFP) in a provincial court of Sofala.[107] The court found it had no jurisdiction to rule on the matter based on Article 105 of the Charter of the United Nations, and Articles 2 and 8, section 29(a), of the Convention on Privileges and Immunities of the United Nations.[108]The ruling refers to an opinion of the public prosecutor of October 27, 2009, in which it is argued that national labor law rules were not applicable to the employment contract, and that any dispute was subject to international arbitration mechanisms agreed upon between the parties. The simultaneous application of Article 105 of the Charter of the United Nations and Article 2 of the Convention on Privileges and Immunities of the United Nations granted jurisdictional immunity to the WFP. Moreover, pursuant to Article 8, section 29(a), of the Convention on Privileges and Immunities of the United Nations, disputes arising from contractual relations established under private law in which the United Nations is a party shall be subject to appropriate modes of settlement to be established by the United Nations.

A similarity between these two cases is the absence of any reference to Article 18(2) CRM. The hierarchical equivalence between international law and normative acts of the Assembly of the Republic and the Government envisaged in this provision was ignored. In the first case, the seizure of the bank accounts ordered by the first instance court was cancelled following an (unconstitutional) administrative order. In the second case, the public prosecutor seems to assume the superiority of international law*vis-à-vis* ordinary law by over-ruling the precedence of internal law– Law 23/2007 (labor law code) –adopted after the entry into force in the Mozambican legal order of the two international conventions and which were relied upon to obtain immunity for an international organization.

Under the 2004 CRM, the Constitutional Council first took a stance on the incorporation and positioning of international law in the Mozambican legal order in a request for the preventive review of the constitutionality of a law submitted by the President of the Republic.[109]

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[106] The opinion was distributed to the members of the public ministry by the ordinance of the Attorney-General 312/GAB-PGR/2009, of August 20, 2009.

[107] Case 37/2006, of October 24, 2012 (Judge Ana Paula Sebastião José Muanheue).

[108] 1 UNTS 15 (signed on February 13, 1946, entered into force on 17 September1946).

[109] Case 04/CC/2009, of March 17, available at http://www.cconstitucional.org.mz/Jurisprudencia.

The Constitutional Council was asked to decide on the constitutionality of a provision of a law which granted the President of the Republic the authority to appoint the Chairman and the Vice-Chairman of the National Commission for Human Rights. The President of the Republic considered that the provision extended its competences in breach of the principle of conferral of presidential competences.

In an opinion referred to the Constitutional Council, the Commission for Legal Affairs, Human Rights and Legality of the Parliament argued that the competence attributed to the President of the Republic to appoint the Chairman and Vice-Chairman of the National Commission for Human Rights is an obligation stemming from the "Paris Convention on the Establishment of National Human Rights Commissions", which was "signed without any reservations by the Republic of Mozambique". This opinion was rejected by the Constitutional Council:

> "Firstly, the Convention adopting the so-called «Paris Principles» does not mandate a particular form of appointment of board members of the National Commission for Human Rights. On the contrary, regarding the «Composition and guarantees of independence and pluralism», the Convention calls for a discretion in the choice of the form of nomination, establishing, in paragraph 1, that «the composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation (...)», and, in paragraph 3, that «in order to ensure a stable mandate for the members of the national institution, without which there can be no independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate».
> Secondly, even if the Convention established a particular form of appointment which implied granting the President of the Republic a competence not included in the constitution, in compliance with the principle set forth in Article 18(2) of the Constitution, such an assignment would be subject to constitutional review."

Two conclusions on the incorporation of international law in the Mozambican legal order may be drawn from this decision: i) international legal provisions do not take precedence over the constitution; and ii) are subjected to the constitutional review mechanisms provided for in the CRM. The latter include the possibility of incidental review of the constitutionality of international law within the ambit of preventive review of the constitutionality of laws.

Another assumption which can be inferred from this case concerns the difficulties of Mozambican courts in determining the legal nature of international law sources. Both the Assembly of the Republic and the Constitutional Council refer to a "Paris Convention on the establishment of National Human Rights Commissions" and to a "Paris Convention on Human Rights", which were signed"(...) without reservations by the Republic of Mozambique". No such conventions exist. What the Constitutional Council presumably referred to are the "Principles relating to the Status of National Institutions (the Paris Principles)", adopted by UN General Assembly Resolution 48/134,onDecember 20,1993.[110]Therefore, they are *soft law* principles not binding on States[111].

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[110] UN Doc. A/RES/48/134.

[111] R. MURRAY, *The Role of National Human Rights Institutions*, in M. BADERIN, M. SSENYONJO (eds.), International Human Rights Law: Six Decades After the UDHR and Beyond, Oxon, 2010, p. 306.

6.3. *INTERNATIONAL LAW AND THE INTERPRETATION AND INTEGRATION OF NATIONAL LAW*

The supremacy granted to the constitution in Article 2(4) CRM requires that its provisions should be heeded when interpreting any other norm applicable in the Mozambican legal order, including international legal norms. The exceptions are the norms of the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, which are themselves an interpretative and integrative parameter of fundamental rights enshrined in the Constitution.[112]

No cases before the Mozambican courts have employed a consistent constitutional interpretation of situations involving the application of international legal provisions. This could have been the path followed by the Supreme Court decision of October 24, 1996 (Case 24/95). The Supreme Court considered that a first instance court failed to observe the obligation stemming from Article 12 of the Convention on the Rights of Children that the wishes of a minor be taken into account regarding which parent should be awarded parental responsibility. Although this was a self-executing provision,[113] the convention did not bind Mozambique at the time the first instance court decision was rendered. Given that the applicable national law allowed the court to carry out "all the essential steps" before delivering a decision,[114] the courts could have based the hearing of the minor upon an interpretation of national law in accordance with international law.

International law has occasionally been used as an additional argument in support of a particular interpretation of national law. References to international legal provisions have arisen when Mozambican courts make contextual remarks on the legal framework of the substantive matters at issue: i) in a decision of March 26, 1999 (Case 151/98-C), the Supreme Court stated that the case concerned the right to freedom, which is "one of the fundamental rights of the human person, enshrined in the constitutions of almost every country (see, in our case, Article 98), and in several international conventions, some already ratified by Mozambique and adopted as national law"; ii) in a decision of February 23, 2000 (Case 214/99-C), the Supreme Court concluded that pre-trial detention is a measure of coercion "strictly exceptional, not compulsory and subsidiary", which is based on "Articles 98 and 101 of the Constitution, as well in other ordinary law provisions (see Articles 286 and 291 of the Penal Code and Article 9(3) of the International Covenant on Civil and Political Rights, of December 16, 1966, which was received by national law through Resolution 5/91, of December12,1991, of the Assembly of the Republic"). None of these references to international law was decisive for the interpretation of national law.

7. CONCLUSIONS

Judicial references to international law in the Mozambican legal order are very limited. This is a relevant indicator that international law is generally being ignored by Mozambican judges, although the scarcity of available judicial databases does not allow for any definitive conclusion. Within the small number of cases in which international

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[112] Article 43 CRM.

[113] S. DETRICK, *Commentary on the United Nations Convention on the Rights of the Child*, The Hague 1999, p. 28.

[114] Article 96(1) of the Statute of Jurisdictional Assistance to Minors, approved by Decree-Law 41/71, of 28 December 1971.

law norms were invoked, there were substantive references, which even led to the non-application of conflicting internal norms, and *ad abundantiam* references, which were used for the purpose of reinforcing a certain interpretation of a national legal norm.

Formally, international legal norms incorporated pursuant to Article 18 CRM are integrated *qua tale* in the Mozambican legal order, and are given a hierarchical rank similar to normative acts of the Assembly of the Republic and of the Government. Analysis of the case law shows that Mozambican courts — or, at least, the Constitutional Council – deliberately trump international norms that breach the constitution, but that in other conflicts with national law of inferior rank, they may give prevalence to international law. This jurisprudential sample is not, however, sufficiently representative to allow for a definitive conclusion as to a definitive trend in the case law recognizing international law's supremacy over ordinary law. The sample is nonetheless revealing of the Mozambican courts' concern to avoid the responsibility of the State for the breach of international obligations which would most certainly arise from the resolution of normative conflicts between ordinary national law and international law through the application of the *lex posterior derogat lex priori* principle.