TRENTO STUDENT LAW REVIEW

Vol. 4, No. 1 | April 2022

Published by the Trento Student Law Review Association, an independent student organization at the Faculty of Law of the University of Trento.

Address Trento Student Law Review Association
c/o University of Trento, Faculty of Law
Via Verdi 53
38122 Trento (Italy)
Email trentostudentlawreview@unitn.it
Website https://teseo.unitn.it/tslr

Submissions The *Trento Student Law Review* welcomes submissions of articles, essays, and book reviews. Manuscripts considered for publication are subjected to double-blind peer review. Contributors are invited to submit their pieces via online form. Please visit our website for further information.

Layout Lucrezia di Renzo
Cover Associazione Acropoli

www.acropolitrento.com

TRENTO STUDENT LAW REVIEW

VOL. 4 APRIL 2022 NO. 1

Contents

Prefazione

Matteo Maurizi Enrici
Direttore

Nel corso delle ultime settimane, un evento in particolare ha colpito tutti noi della *Trento Student Law Review*: la scomparsa del Professor Rodolfo Sacco, triste perdita che lascerà un profondo vuoto nella comunità accademica.

Nella sua essenza, essere maestro del diritto significa contribuire al pensiero giuridico attraverso idee che sappiano sopravvivere alla prova del tempo e del contraddittorio, fornire un prisma di lettura che incida sulla comprensione del giuridico, avendo un impatto su intere generazioni di giuristi. A testimonianza di quanto il pensiero dell'insigne giurista piemontese sia alle radici degli studi giuridici in Trento, ecco che al primo anno il primissimo approccio con il diritto avviene proprio conoscendo della teoria dei formanti da lui elaborata[1], dalle pagine di un volume che porta la sua firma[2].

Sostenitore della prima ora della *Trento Student Law Review*, scrivendo la nota introduttiva al nostro primo volume – il numero 0, il prof. Sacco volle sottolineare l'attitudine di questo progetto editoriale a sollecitare lo sviluppo della scienza giuridica con metodo dialogico non soltanto orizzontale, ma anche verticale: tra studenti e docenti. D'altro canto non gli sfuggì il valore formativo delle attività di questa redazione, assieme alla capacità di stimolare un senso critico nello studente, non più solo spettatore ma contributore attivo al processo di creazione della scienza giuridica.

Al professor Rodolfo Sacco che, avverso molti scettici, seppe indicare a chiare lettere le potenzialità di una rivista a gestione studentesca, desideriamo dedicare questo Volume 4, Numero 1.

---

1. Si veda Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 (1) The American Journal of Comparative Law, 1-34 (1991).

2. Rodolfo Sacco e Piercarlo Rossi, *Introduzione al Diritto Comparato* (7a ed., 2019), nonché Antonio Gambaro e Rodolfo Sacco, *Sistemi giuridici comparati* (4a ed., 2018) in *Trattato di Diritto Comparato*, diretto da Rodolfo Sacco (UTET, 2008).

Questo volume – in continuità con i precedenti – sta a dimostrare come questa realtà editoriale, per la sua stessa natura e struttura, sappia essere un foro di condivisione di idee. Questo è l'ideale che sta al cuore della *Trento Student Law Review*: l'articolo scientifico, il saggio che ne abbia i meriti e che soddisfi i requisiti di scientificità può e deve essere portato all'attenzione della comunità accademica, quali che siano i titoli dell'autore. Perché solo così facendo la scienza giuridica non si riduce a struttura verticistica di tipo oligopolistico: "Certo, il docente sa; e tutti vogliamo ch'egli trasmetta il suo sapere. Ma ciò non significa che lo scolaro debba sempre tacere. Perché mai non dovrebbe proporre temi? Perché non dovrebbe fare domande? Perché non dovrebbe fare obiezioni?"[3].

L'avvenuta pubblicazione richiama al dovere di riflettere sul lavoro della Redazione, in quanto momento ideale per tirare le somme del percorso che ha portato alla realizzazione di questo prodotto editoriale. Alcune novità di grande importanza hanno inciso sul modo in cui la *Trento Student Law Review* raggiunge il suo pubblico.

Attraverso la costante collaborazione con l'Ufficio Editoria Scientifica d'Ateneo, abbiamo completato la transizione sulla nuova piattaforma *Open Journal Systems (OJS)*, https://teseo.unitn.it/tslr. La transizione ci ha portati a un nuovo sito con la possibilità di proporre al nostro pubblico contenuti rinnovati e aggiornati, per mezzo di un'interfaccia grafica più fresca, moderna e accessibile.

Una particolare menzione di gratitudine va rivolta alla nostra Facoltà di Giurisprudenza dell'Università degli Studi di Trento, la collaborazione con la quale sta dimostrando come il desiderio di coinvolgimento della popolazione studentesca nel dibattito giuridico possa essere inteso come strumento formativo volto allo sviluppo di competenze trasversali e del senso critico.

3. Rodolfo Sacco, *Perché Una Nuova Rivista? Era Necessaria? Perché Una Rivista Studentesca? Era Necessaria?*, Trento Student Law Review, Vol. 1, Issue Zero – To Our Professors (2018).

In conclusione desidero ringraziare la Vicedirettrice, Emma Castellin, per l'importante opera di revisione conclusiva e correzione delle bozze, ma anche e soprattutto per il costante confronto, supporto e contributo alla supervisione dei lavori della redazione. Stima e ammirazione va dunque a tutta la Redazione della *Trento Student Law Review*, il cui lavoro in stretta collaborazione con gli autori dei singoli contributi ha reso possibile questo volume.

Preface

Matteo Maurizi Enrici
Editor-in-Chief

Over the last few weeks, one event in particular has struck all of us of the *Trento Student Law Review*: the passing of Professor Rodolfo Sacco, a sad loss that will leave a deep void in the academic community.

In its essence, to be a maestro del diritto (i.e., a teacher, a mentor in the field of law) means to influence legal thought through ideas that are equipped to survive the test of time and cross-examination, to provide an interpretative prism that affects the understanding of law, having an impact on entire generations of jurists. As a testament of how much the keen thinking of the distinguished Piedmontese jurist affects the essence of legal studies in Trento, the very first approach to law by first year students is made by learning about the theory of formants – which he developed[1] – from the pages of a book that bears his signature[2].

An early supporter of this publishing project, Professor Sacco wanted to emphasize in the introductory note to issue 0 the potential of stimulating the development of legal science by means of a dialogue method, not to be intended only horizontally but also as a vertical interaction : between students and teachers. On the other hand, the formative potential of the activities of this editorial board did not escape him, recognized in conjunction with the ability to stimulate critical thinking skills in the student, no longer a mere learner of notions but an active contributor to the process of creation of legal science.

To Professor Rodolfo Sacco, who – in the face of many sceptics – unmistakably pointed out the potential of a student-run law journal, we wish to dedicate this Volume 4, Number 1.

---

1. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 (1) The American Journal of Comparative Law, 1-34 (1991).

2. Rodolfo Sacco e Piercarlo Rossi, *Introduzione al Diritto Comparato* (7a ed., 2019), nonché Antonio Gambaro e Rodolfo Sacco, *Sistemi giuridici comparati* (4a ed., 2018) in *Trattato di Diritto Comparato*, directed by Rodolfo Sacco (UTET, 2008).

This volume – in continuity with its predecessors – demonstrates how this publishing reality, by its very nature and structure, can be a forum to share ideas. This is the ideal that lies at the heart of the *Trento Student Law Review*: a scientific article, an essay that has its merits and meets the requirements of scientificity can and must be brought to the attention of the academic community, regardless of the author's titles. Because only in this way can legal science not be reduced to an oligopolistic top-down structure: "Of course, the teacher knows; and we all want him to pass on his knowledge. But this does not mean that the pupil should always keep silent. Why should he not propose issues? Why shouldn't he ask questions? Why shouldn't he make objections?"[3].

The publication of this volume calls for reflection on the work of the Board of editors, as it is the ideal moment to take stock of the path that led to the creation of this editorial product. Some very important improvements have affected the way the *Trento Student Law Review* reaches its audience.

Through continued collaboration with the *Ufficio Editoria Scientifica d'Ateneo* (i.e., the University's Scientific Publishing Office), we have completed the transition to the new *Open Journal Systems (OJS)* platform, https://teseo.unitn.it/tslr. The transition has brought us to a new webpage, through which we can offer our readers renewed and updated content through a fresher, more modern and accessible graphical interface.

A special mention of gratitude goes to our Faculty of Law of the University of Trento, whose collaboration is demonstrating how the desire to involve students in the legal debate can be commonly perceived as an educational tool aimed at developing transversal skills, and critical thinking.

3. Rodolfo Sacco, *Perché Una Nuova Rivista? Era Necessaria? Perché Una Rivista Studentesca? Era Necessaria?*, Trento Student Law Review, Vol. 1, Issue Zero – To Our Professors (2018).

In conclusion, I would like to thank the Vice Editor-in-Chief, Emma Castellin first and foremost for the important work of final revision and proofreading, and for the constant exchange of views, support, and input to the supervision of the editorial work. Esteem and admiration are owed to the entire Board of the *Trento Student Law Review*, whose work in close collaboration with the authors of the individual article drafts made this issue possible.

Justice Breyer's principled pragmatism and Kagan's new living constitutionalism and lite textualism

Rachel Anne Rein *

Abstract: This article is a comparative study of United States Supreme Court Justice Breyer and Kagan's methods of judicial interpretation. By juxtaposing and comparing the justices' jurisprudence, this article aspires to clarify their methods and raise questions for further analysis. This article posits that the core of Breyer's interpretative methods is pragmatism. However, Breyer does account for values and purposes. Thus, he is a "principled pragmatist" for both constitutional and statutory interpretation. On the other hand, Kagan exercises a "new" living constitutionalism in her constitutional interpretation but interprets statutes as a "lite" textualist. Paragraph 1 introduces the article. Then, Paragraph 2 studies what Breyer and Kagan claim to be. Next, Paragraph 3 interrogates Breyer and Kagan's judicial methods in practice. Finally, based on the justices' methods, Paragraph 4 provides theories on what Breyer and Kagan may focus on in *Dobbs v. Jackson Women's Health Organization*, involving one of the United States' most contentious contemporary debates about abortion.

Keywords: Jurisprudence; constitutional law; statutory interpretation; Breyer; Kagan.

Table of contents: 1. Introduction. – 2. What Justices Breyer and Kagan Say They Are. – 2.1. Breyer. – 2.2. Kagan. 3. Breyer and Kagan's Judicial Interpretation in Practice. – 3.1. The Constitution. – 3.2. Statutory Analysis. – 4. Implications for Dobbs. – 5. Conclusion.

1. *Introduction*

Elena Kagan is now the most restrained liberal justice on the Supreme Court, but she began her legal scholarship as a young firebrand. In her Master's thesis at Oxford, Kagan claimed that judges try to "mold and steer" the law to achieve social goals, and she defended the bold practice[1]. Later, at her own judicial confirmation, Kagan dismissed her former statements as the musings of someone who had never set foot in law school[2]. As a justice, Kagan claimed that a judge's empathy must never factor into a decision, which must rest on "law all the way down"[3].

In contrast, Justice Stephen Breyer has tended to be more consistent. As an administrative law professor, he advocated for a pragmatic approach to regulations[4]. His decades-long tenure on the Court has since been marked by an extension of this pragmatic, "living" approach beyond regulations to the Constitution, statutes, and global

---

* Rachel Rein, J.D. (anticipated) Columbia, Class of 2022. She wishes to thank Judge Richard J. Sullivan (U.S. Second Circuit Court of Appeals), for whom she wrote the first draft of this Article as a capstone for his American Jurisprudence seminar. She appreciates his helpful guidance and comments.

1. See Meg Greene, *Elena Kagan: A Biography* at 50 (Greenwood Pub Group 2014).

2. Committee on the Judiciary United State Senate, *Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 64* (Jun 28- Jul 1, 2010) at 128, available at https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf (last visited April 10, 2022).

3. Thomas B. Griffith, *Was Bork Right About Judges?*, 34 Harvard Journal of Law & Public Policy 157, 163 (2011)..

4. Cass R. Sunstein, *Justice Breyer's Pragmatic Constitutionalism*, 115 Yale Law Journal 1719, 1719-20 (2006).

realities[5]. However, it is necessary to understand what the two justices have become today.

This article is a comparative study of Breyer and Kagan's methods of judicial interpretation. By juxtaposing and comparing the justices' judicial philosophies, this article aspires to clarify their methods and raise questions for further analysis. This article posits that the core of Breyer's interpretative methods is pragmatism. However, Breyer does account for values and purposes. Thus, he is a "principled pragmatist" for constitutional and statutory interpretation. On the other hand, Kagan exercises a "new" living constitutionalism in her constitutional interpretation but interprets statutes as a "lite" textualist.

Paragraph 2 analyses what Breyer and Kagan claim to be. Breyer claims to be a living constitutionalist, purposivist, and pragmatist, while Kagan advocates for an approach that sticks closer to constitutional and statutory text. Next, Paragraph 3 interrogates Breyer and Kagan's judicial methods in practice, to verify whether they comply with the approaches they advocate for. Paragraph 3 finds that on balance, both justices consistently follow their own advice. But this part also points out potential inconsistencies between Breyer and Kagan's claims and practice. Overall, Paragraph 3 centers on well-known constitutional and statutory opinions of Breyer and Kagan's, mainly ones that they have said exemplify their interpretative methods. Using these opinions as a sample, instead of choosing a random sample, offers the opportunity to either agree with the justices' assessment of their work or challenge it. These well-known cases, ones often fraught with social impact, are also more likely to differentiate the justices' interpretative methods[6]. Finally, based on the justices' methods, Paragraph 4 provides theories on what Breyer and Kagan may focus on in *Dobbs*

5. See, e.g., *Glossip v. Gross*, 576 U.S. 863, 908-978 (2015) (Breyer dissenting) (applying a pragmatic, living constitutionalist approach to Oklahoma's lethal injection process under *Trop*'s Eighth Amendment evolving standards of decency test); *Milner v. Department of Navy*, 562 U.S. 562 (2011) (Breyer dissenting) (using pragmatism in a statutory Freedom of Information Act case); See also Stephen Breyer, *The Court and the World: American Law and the New Global Realities* at 13 (First Vintage Books 2016) (applying pragmatic considerations to the Court's role in interpreting and applying international law).

6. Stephen Breyer, *The Authority of the Court and the Peril of Politics* at 85-87 (The Scalia Lecture, 2021).

v. Jackson Women's Health Organization[7], involving one of the United States' most contentious contemporary debates about abortion.

2. *What Justices Breyer and Kagan Say They Are*

In oral arguments for *American Hospital Association v. Becerra* in November 2021[8], Justices Breyer and Kagan asked a question simultaneously[9]. Breyer acknowledged the awkward blunder and joked that he and Kagan probably had the same question[10]. Kagan quipped, "I doubt it"[11]. Beyond showcasing Kagan's biting wit, Breyer and Kagan's recent short exchange begs the question: how do the two justices characterize how they interpret texts? Paragraph 2 asks the justices such questions, taking their words at face value from first-person distinguished lectures, as well as articles, interviews, and other texts.

2.1. *Breyer*

At first appearance, Breyer's words suggest he is a living constitutionalist, purposivist, and pragmatist[12]. Breyer has consistently supported a pragmatic, purposive approach to interpreting the Constitution and statutes, which requires considering current circumstances. Breyer first advocates that judges look to unchanging values, primary purposes, and objectives embodied in the Constitution in light of today's circumstances when interpreting vague constitutional provisions[13]. Breyer believes reading these values and original intent

7. See *Dobbs v. Jackson Women's Health Organization* (Supreme Court of the United States, pending).

8. See *American Hospital Association v. Becerra* (Supreme Court of the United States, pending).

9. *Am. Hosp. Ass'n. v. Becerra*, Transcript of Oral Argument at 44 (No. 20-1114).

10. See *id.*

11. See *id.*

12. See Stephen Breyer, *Making Our Democracy Work: A Judge's View* at 1-220 (Vintage Books 2011). See also Breyer, *The Authority of the Court and the Peril of Politics* at 87 (cited in note 6).

13. Stephen Breyer, *A Conversation on the Constitution: Judicial Interpretation with Justice Antonin Scalia and Justice Stephen G. Breyer* (Annenberg Found. Trust Sunnylands), available at https://assets.annenbergclassroom.org/

flexibly best responds to a changing society[14]. For example, Breyer calls one primary purpose and objective "active liberty"[15]. Active liberty describes people's participation in the democratic process[16]. So, Breyer advocates for courts to more heavily account for the Constitution's democratic nature when interpreting the Constitution and statutes[17]. In doing so, Breyer believes that courts will rightfully honor the American people's right to "an active and constant participation in collective power"[18].

For Breyer, when the Court applies the Constitution's text to circumstances today, it protects its enduring democratic purpose[19]. For example, Breyer looks to the value and purpose behind the Fourteenth Amendment to favorably interpret state school affirmative action policies in equal protection cases[20]. Breyer says the amendment

---

annenbergclassroom-conversation-judicial_interpretation.mp4 (last visited December 4, 2021). This approach appears to mirror how living constitutionalism entails evolving, adapting, and changing responses to unchanging values so that such values represent today's world. See David A. Strauss, *The Living Constitution*, (University of Chicago Law School, September 27, 2010), available at https://www.law.uchicago.edu/news/living-constitution (last visited April 11, 2022). For a more robust discussion of living constitutionalism, see generally David A. Strauss, The Living Constitution (Oxford University Press 2010). See also David A. Strauss, *Do We Have a Living Constitution?*, 59 Drake Law Review 973 (2011).

14. Stephen Breyer and Antonin Scalia, *Original Intent and a Living Constitution – A Discussion*, (C-SPAN, March 10, 2010) available at https://www.c-span.org/video/?292678-1/justices-breyer-scalia-constitution-forum (last visited April 11, 2022).

15. Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* at 4-5 (Vintage Books 2006). Breyer frames his discussion of constitutional and statutory interpretation in "the liberty of the ancients" instead of the "liberty of the moderns." "Active liberty of the ancients," coined by political philosopher Benjamin Constant, is a people's right to "an active and constant participation in collective power." This is the right Breyer hopes to honor by flexibly interpreting the Constitution and statutes. See *id.* at 3-5.

16. See *id.* at 4-5.

17. See *id.* at 5.

18. See *id.*

19. See Breyer and Scalia, *Original Intent and a Living Constitution* (cited in note 14).

20. See Antonin Scalia and Stephen Breyer, *A Conversation on the Constitution: Principles of Constitutional Statutory Interpretation (2009)* (University of Arizona James E. Rogers College of Law, January 24, 2019), available at https://www.youtube.com/watch?v=jmv5Tz7w5pk (last visited April 11, 2022).

intended to bring former slaves into full membership in American society[21]. He identifies inclusivity as the amendment's underlying value[22]. Breyer thus differentiates between positive discrimination (such as affirmative action that aims to achieve greater diversity) and invidious discrimination[23]. Affirmative action policies that promote diversity are more likely to be constitutional, according to Breyer, than policies that invidiously discriminate, attempting to exclude racial minorities[24].

Next, Breyer claims to be pragmatic[25]. Breyer argues that judges should first consider the purposes of the legal provision in question to inform judges' "ultimate objectives" [26]. Then, judges should assess the practical consequences of various interpretations[27]. Judges must study whether the implications of a decision further or inhibit constitutional provisions, especially in cases that impact vital social issues[28]. For example, Breyer claims allowing affirmative action in some cases could result in a more racially inclusive school system[29]. According to Breyer, judges should look beyond the law's text, its adopters' original intent, or judicial precedent, when necessary[30]. Judges should also

21. See *id.*

22. See *id.*

23. See Stephen Breyer, *An Evening with Supreme Court Justice Stephen Breyer* (Lyndon Baines Johnson Library and Museum, May 9, 2012), available at https://www.youtube.com/watch?v=lbuNnlve6Lc (last visited April 11, 2022).

24. See Scalia and Breyer, *A Conversation on the Constitution* (cited in note 20).

25. See Breyer, *An Evening with Supreme Court Justice Stephen Breyer* (cited in note 23).

26. Breyer, *The Authority of the Court and the Peril of Politics* at 86-87 (cited in note 6). Considering the purposes of a legal provision is also a purposive approach.

27. See Stephen Breyer, *Legally Speaking: Stephen Breyer* (University of California Television, February 2, 2012), https://www.youtube.com/watch?v=QqJSU-XPezTw; See Breyer, *The Authority of the Court and the Peril of Politics* at 86-87 (cited in note 6). Pragmatism asks judges to predict practical consequences of a potential decision to determine what decision most likely will meet their intended ends. See William James, *Pragmatism: A new name for some old ways of thinking* at 43 (Longmans, Green and Co., 1907).

28. See Breyer, *Legally Speaking* (cited in note 27).

29. See Breyer, *An Evening with Supreme Court Justice Stephen Breyer* (cited in note 23).

30. See Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 Yale Law Journal 1675, 1688-90 (2005-06).

avoid rigid doctrinal formulas and rules, especially in close cases[31]. In such cases, they instead need to balance many factors, make pragmatic judgments, and view matters of degree as dispositive[32]. Breyer says that pragmatism most accurately will determine legal meaning and fully promote democratic values[33]. Breyer emphasizes the importance of compromise to further promote democracy[34]. He suggests deciding cases on narrower bases so that justices can find common ground, avoiding the appearance of a political Court[35].

2.2. *Kagan*

Compared to Breyer, Kagan adopts a more measured interpretative approach. For statutory interpretation, she sometimes defines herself as a textualist, other times as a "textualist with caveats," who employs common sense and uses language sensibly[36]. She claims to look first at the "whole text" for context[37], and then at the structure of a statute before venturing beyond the text into other sources like legislative history[38]. She says she views legislative history with skepticism and avoids considering it as dispositive[39]. One may define Kagan as a lite textualist.

---

31. See *id.*

32. See *id.*

33. See *id.*

34. See Stephen Breyer, *Scalia Lecture: Justice Stephen G. Breyer, "The Authority of the Court and the Peril of Politics"* (Harvard Law School, April 7, 2021), available at: https://www.youtube.com/watch?v=bHxTQxDVTdU (last visited April 11, 2022).

35. See *id.*

36. See e.g., Elena Kagan, *Supreme Court Justice Elena Kagan discusses John Paul Stevens, Gerrymandering, Writing and More* (Georgia Law School, July 22, 2019), available at: https://www.youtube.com/watch?v=k21ShdZLV-Al (last visited April 11, 2022) (Kagan calls herself a textualist); Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* (Harvard Law School, November 17, 2015) available at: http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation (last visited April 11, 2022) (Kagan calls herself a textualist with caveats.).

37. See Kagan, *Supreme Court Justice Elena Kagan discusses John Paul Stevens* (cited in note 36).

38. See *id.*

39. See *id.* (She supposes that legislative text may "theoretically" be dispositive in some instances).

Laying out her method of constitutional interpretation, Kagan claims that she answers constitutional questions by looking at the text of the Constitution and at the Constitution's history, structure, and precedents[40]. She claims to consider the "broad sweep of history" instead of the Constitution's original public meaning[41]. Kagan also takes into great consideration consensus on the Court, fostering compromise when she can[42], especially on hot-button social issues, to avoid the Court appearing politicized[43]. She thus sounds like a new living constitutionalist[44]. Unlike originalists, Kagan does not look to original public meaning, but rather to how society has developed over time, applying unchanging values to new circumstances.

Furthermore, Kagan claims to keep her constitutional and statutory interpretative methods separate from her personal views[45]. Further retreating from pragmatism, Kagan notes that in statutory interpretation, doctrine must come before common sense[46]. However, Kagan's focus on consensus-building seems pragmatic, in that she believes

40. Griffith, *supra* note 3, at 163.

41. Elena Kagan, *A Conversation Between Justices Elena Kagan and Rosalie Silberman Abella* (University of Toronto Law School, November 15, 2018), available at: https://www.youtube.com/watch?v=RxfTA3XzA4Q (last visited April 11, 2022).

42. Elena Kagan, *Dean Minow talks with Associate Justice Elena Kagan '86 at HLS*, (Harvard Law School, September 10, 2014), available at: https://www.youtube.com/watch?v=SCLQWtKATpM (last visited April 11, 2022).

43. See Elena Kagan, *Eighth Annual John Paul Stevens Lecture with U.S. Supreme Court Justice Elena Kagan* (Colorado Law School, October 22, 2019), available at: https://www.youtube.com/watch?v=a_JQw_ZO4KI (saying the last thing the Court should appear to be is "polarized"); See Elena Kagan, *2019 Stein Lecture: U.S. Supreme Court Justice Elena Kagan* (University of Minnesota Law School October 24, 2019), available at: https://www.youtube.com/watch?v=E8NnDaxJMMA (Kagan indicates that consensus burgeons public trust and confidence in the institution of the Court).

44. See generally, Carson Holloway, *Elena Kagan's Living Constitution* (Public Discourse – The Journal of The Witherspoon Institute, July 2, 2010), available at: https://www.thepublicdiscourse.com/2010/07/1406/ (last visited April 11, 2022).

45. See Thomas B. Griffith, *Was Bork Right About Judges?*, 34 Harvard Journal of Law & Public Policy 157, 163 (2011). Breyer similarly notes that when principles of law and his personal views conflict, he necessarily chooses law. See Stephen Breyer, *Q&A: Justice Stephen Breyer* (C-SPAN, October 18, 2010), available at https://www.youtube.com/watch?v=wD46zkGd8k0 (last visited April 11, 2022). As an example, he describes how despite his personal animosity towards mandatory minimums, he is bound as a judge to uphold them.

46. See Kagan, *Eighth Annual John Paul Stevens Lecture* (cited in note 43).

that lack of consensus could potentially undermine public confidence in the Court.

She indicates that she works to build consensus by framing issues in ways in which the justices may hopefully find common ground. Her compromise-focused strategy suggests the possibility that Kagan may choose in some cases to frame the law narrowly or broadly, because of her will to favor a practical outcome – one that advances or clarifies the law in a way that inspires public support or at least avoids sowing public distrust. Thus, while Kagan claims that any form of constitutional theory must impose constraints on judicial discretion[47] stressing that one must start with the text with both the Constitution and statutes, her focus on consensus-building brings her, ever so slightly, closer to Breyer's pragmatism.

3. *Breyer and Kagan's Judicial Interpretation in Practice*

This section uses constitutional and statutory case studies to assess whether Breyer and Kagan actually adhere to their asserted methods of judicial interpretation, finding that both justices' practices are largely consistent with their preferred interpretative methods.

3.1. *The Constitution*

For constitutional analysis, one may argue that Breyer is a principled pragmatist, while Kagan exercises new living constitutionalism. Kagan's approach focuses heavily on unchanging values in a changing society, though not at the expense of doctrine or the occasional pragmatic consideration. Breyer, on the other hand, focuses primarily on practical results, occasionally considering constitutional values. In this way, both justices consistently apply their asserted interpretative methods[48].

47. See Elena Kagan, *A Conversation with U.S. Supreme Court Justice Elena Kagan*, (Harvard Law School, September 16, 2016), available at: https://www.youtube.com/watch?v=zxITcqE0orM (last visited (April 11, 2022)

48. See Part 1.1. and 1.2.

Breyer's interpretation of the Full Faith and Credit Clause (FFC) showcases his pragmatism. Breyer's majority opinion in *Franchise Tax Board v. Hyatt*[49] held that Nevada's Supreme Court violated the FFC when it upheld a judgment against a California agency that awarded damages higher than Nevada permitted in suits against the Nevada government[50]. Breyer's majority opinion does not appeal to precedent or text[51]. Instead, it reflects a compromise amid the FFC's "indeterminate [text]" and "uncertain [original meaning][.]"[52]. As one scholar noted, Breyer's pragmatic reasoning "finds vindication" in the Constitution's balance of state and federal power and in the "practical likelihood that [his majority] decision will reduce interstate friction without occasioning undue uncertainty or excessive litigation"[53]. In doing so, Breyer is adopting a pragmatic interpretation.

Breyer also claims, however, to exercise living constitutionalism in some cases. For example, Breyer cites *Roper v. Simmons*[54], in which he joined the majority opinion striking down the death penalty for minors, as a chief example of his living constitutionalism[55]. Breyer does not note the specific value that *Roper* exemplifies[56]. However, as *Roper* relies on *Trop v. Dulles*'s[57] evolving standards of decency test, one value Breyer could be referring to is human dignity or decency. Moreover, it is unclear how *Roper*'s decision honors people's participation in the political process. It is therefore difficult to find Breyer's active liberty, a core value that Breyer claims to attempt to uphold, in the *Roper* decision. If Breyer means that *Roper* is responsive to the death penalty debates in general, showing that the Court is not ignoring current social debates, then the outcome in *Roper* should not matter. By taking the case on the merits, the Court shows its willingness to revisit legal issues in today's light.

---

49. See *Franchise Tax Board v. Hyatt* (*Hyatt II*), 136 S. Ct. 1277 (2016).
50. *Article IV – Full Faith and Credit – Sovereign Immunity – Franchise Tax Board v. Hyatt*, 130 Harvard Law Review 317, 317-18 (2016).
51. See *id.*
52. See *id.*
53. See *id.*
54. *Roper v. Simmons*, 543 U.S. 551 (2005).
55. See Breyer, *A Conversation on the Constitution* (cited in note 13).
56. See *id.*
57. *Trop v. Dulles*, 356 U.S. 86 (1958).

Supposing that Breyer meant that *Roper* is responsive to the public's alleged anti-death penalty sentiment, one may conclude that he is advocating for a Court that is political instead of independent, even though Breyer generally condemned political decisions[58]. As the public is far from single-minded when it comes to the death penalty, it seems almost as if Breyer goes against active liberty by giving short shrift to public sentiment in his death penalty dissents.

For instance, one may argue that in Breyer's death penalty decisions he fails to adequately account for the fact that a majority of U.S. citizens support the death penalty and many citizens democratically voted for politicians that enacted state capital punishment laws[59]. In fact, in Breyer's dissent in *Glossip v. Gross*[60], he actively downplays nationwide support for the death penalty, arguing that the death penalty is unusual and disfavored[61]. Breyer's opinions on death penalty also focus on the practical effects that the death penalty imposes on capital defendants in U.S. prisons, including long delays on death row[62]. By focusing on the death penalty's effects on the criminal justice system, Breyer sounds like pragmatist Judge Richard Posner. Posner considered the implications of his decisions for the public good[63]; Breyer similarly enlarges his discussion of the death penalty into one about the United States prison system.

---

58. See *Dobbs v. Jackson Women's Health Org.*, Transcript of Oral Argument at 10 (No. 19-1392).

59. According to a 2021 Pew Research study, 60% of U.S. adults support the death penalty for people convicted of murder, and almost one-third of Americans *strongly* support it. See *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, (Pew Research Center June 2, 2021), available at https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/ (last visited April 11, 2022) See also *Dunn v. Price*, 139 S. Ct. 1312 (2019) (Breyer dissenting from grant of application to vacate stay); *Evans v. Mississippi*, 461 U.S. 939 (2018) (Breyer dissenting from the denial of certiori); *Sireci v. Florida*, 580 U. S. ___ (2016) (Breyer dissenting).

60. *Glossip v. Gross*, 576 U.S. 863 (2015) (Breyer dissenting).

61. See *id.* at 918-19, 938-942 (describing a decline in executions as well as the growing number of states that have abolished the death penalty).

62. See *id.* at 923-27 (describing lengthy delays on death row and egregious solitary confinement conditions that capital defendants often face, causing hallucinations, paranoia, and even self-mutilation).

63. Richard A. Posner, *What Am I? A Potted Plant?,* The New Republic (September 28, 1987).

This matters because Breyer seems to undermine a core value he reads in the Constitution, active liberty, by favoring a pragmatic discussion. If Breyer is willing to undermine a core constitutional value, one that supports the very purpose of our democracy, in favor of pragmatism, he could be better classified as a pragmatist, rather than a living constitutionalist. So, Breyer does not appear to fully practice the living constitutionalism he refers to when discussing his interpretative methods, at least not in death penalty cases.

Unlike Breyer, Kagan has chosen doctrine over common sense in ethically difficult cases. Doing so shows how she reconciles constitutional values with other means of interpretation, embodying a new living constitutionalism. In *Brown v. Entertainment Merchants Association*[64], a First Amendment case on the right of children to access violent video games, in which Kagan joined the majority[65], she indicates that First Amendment doctrine pulled one way, toward striking down a California law that imposed restrictions on violent video games[66]. "All of common sense[,]" on the other hand, pulled the opposite way: to restrict dangerous video games from vulnerable, impressionable children[67]. Kagan ultimately joined the majority opinion, striking down the California law[68]. In this case, Kagan does exactly what she claims to do: focus primarily on the doctrine. Kagan exemplifies a new living constitutionalist analysis by choosing not to put constitutional values over doctrine when the two diverge.

This case also exemplifies how Breyer seems likely to choose the "common sense" approach: to keep violent media out of kids' hands. He did indeed dissent, holding the California law constitutional[69]. Breyer's dissent does not depart from classic First Amendment analysis: he justifies then applies strict scrutiny[70]. But his dissent rings pragmatic in two ways. First, Breyer suggests a "flexible" application of strict scrutiny, instead of a "mechanical" one[71]. Breyer does not

64. *Brown. v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011).
65. See Kagan, *Eighth Annual John Paul Stevens Lecture* (cited in note 43)
66. See *id.*
67. See *id.*
68. See *id.*
69. See *Brown. v. Ent. Merchs. Ass'n,* 564 U.S. 786, 840 (2011) (Breyer dissenting).
70. See *id.* at 841-56.
71. See *id.* at 847.

describe what "mechanical" strict scrutiny analysis looks like. But Breyer's flexible approach would balance the proportion by which the statute harms speech compared to the benefits the statute aims to provide[72]. By balancing harms and benefits, Breyer employs choice-based analysis. His focus on the public good marks pragmatism[73]. Second, Breyer focuses on the practical effects of violent video games, introducing outside-the-record social science studies into his dissent to show how the games may harm children[74]. By emphasizing social science and statistics, even ignoring the limitations of the record to do so, Breyer exemplifies pragmatism's focus on policy and choices even above law.

Therefore, Breyer's focus on the practical consequences of constitutional decisions overshadows his focus on principles. In contrast, Kagan's commitment to unchanging values, but not at the expense of doctrine or other considerations, makes her a new living constitutionalist.

3.2. *Statutory Analysis*

For statutes, Kagan uses lite textualism, in contrast to Breyer's purposive approach[75]. Kagan infrequently allows legislative history to inform her analysis, moving her away from pure textualism. Breyer, on the other hand, often starts with legislative history, considering statutes in the context of their congressional purposes. So here, both justices similarly practice what they preach.

---

72. See *id.*

73. See Richard A. Posner, *Pragmatic Adjudication*, 18 Cardozo Law Review at 15-16 (1996).

74. *Brown*, 564 U.S. at 801.

75. An in-depth study of Breyer and Kagan's approaches to administrative regulations, in addition to statutes and the Constitution, was outside the scope of this article, though Breyer's take on regulations appears pragmatic. See Stephen Breyer, *Regulation and Its Reform* at 191 (Harvard University Press, 1982) (indicating that an understanding of the specific issue warranting the regulation would aid in choosing the right regulation). While Kagan has not written prolifically on the subject like Breyer, for a taste of her approach toward regulations, See Elena Kagan, *Presidential Administration*, 114 Harvard Law Review 2245, 2376-77 (2000-01) (discussing how courts could develop post-*Chevron* doctrine promoting presidential power over agency action).

Yates v. United States[76] offers a clear example of Kagan's lite textualism[77]. Kagan's dissent admonishes the majority, including Breyer, for not taking the text seriously enough[78]. Her dissent focuses on the ordinary meaning of "any tangible object"[79]. Kagan argues that "any tangible object" includes undersized fish that a fisherman destroyed to avoid a fine[80]. Kagan first notes that the ordinary dictionary definition of tangible object includes discrete, physical objects like fish[81]. Kagan then uses several textualist canons, including studying context, to confirm her interpretation. She looks to the words immediately surrounding "tangible object" in § 18 U.S.C. 1519, the evidence tampering statute at issue, noting the expansive plain meaning of "any"[82]. She shows how the words "record, document, or tangible object" in U.S.C. § 1512, the federal witness tampering law, cover physical evidence in all forms[83]. Here, Kagan does not think any single canon of textualism reigns supreme[84]. Instead, she asks what is the common denominator in evidence tampering is[85]. Is the common denominator things that store information[86]? No, it is things that provide information to prosecutors and investigators[87]. If Kagan's analysis stopped here, she would be a pure textualist.

However, Kagan then demonstrated her willingness to consider legislative history sparingly by looking at the legislative history of § 1519[88]. She shows that Congress enacted § 1519 "to apply broadly to

76. *Yates v. United States*, 574 U.S. 528 (2015) (Kagan dissenting).

77. See *id.* at 552-53.

78. Kagan also made the same claim in a lecture conversation with a law student audience. Elena Kagan, *A Conversation with US Supreme Court Justice Elena Kagan*, (George Washington University Law School, March 23, 2017), available at https://www.youtube.com/watch?v=8jdBa6MPhmY (last visited April 11, 2022).

79. *Yates*, 574 U.S. 528 (Kagan dissenting).

80. See *id.*

81. See *id.* at 553-54.

82. See *id.* at 555.

83. See *id.* at 556-67.

84. Kagan, *Supreme Court Justice Elena Kagan discusses John Paul Stevens* (cited in note 36).

85. See *id.*

86. See *id.*

87. See *id.*

88. *Yates*, 574 U.S. at 557-58 (Kagan dissenting).

any acts to destroy or fabricate physical evidence"[89]. Here she even employs purposivist reasoning by noting that the section was intended to close a loophole that allowed criminals to destroy evidence themselves so long as they did not induce another person to do so[90]. But her analysis of legislative history and mention of congressional purposes only serve to support her textual analysis. She reads the statute's clear purpose only to make sure her textual interpretation does not conflict with it. So, Kagan uses a lite textualist analysis, primarily focusing on the text but allowing legislative history to confirm the text's ordinary meaning.

Similarly, Kagan's majority opinion in *Milner v. Department of Navy*[91] takes a textualist tack[92]. In *Milner*, Kagan's majority held that the Navy must not withhold information about storing explosives under the Freedom of Information Act (FOIA)[93]. There, Kagan similarly thought the text should control the outcome[94]. Kagan notes that in *Milner*, the text of FOIA was "perfectly clear"[95]. Yet, lower courts had "made up" "very elaborate doctrine" irrelevant to the text and had applied it throughout the country for decades beforehand[96].

Kagan's majority opinion does analyze legislative history. She addresses Congress's removal of an exemption for "international employment rules" in FOIA's text before FOIA's enaction[97]. By analyzing evidence of legislative history, Kagan demonstrates to not discount it entirely. This is what separates her from pure textualists like Justice Thomas or Scalia. However, Kagan does not consider muddled or sparse legislative history, especially when the text is clear[98]. Thus, Kagan ultimately ignores the ambiguous, "scant" legislative history in *Milner* in favor of FOIA's clear statutory language[99]. Here, Kagan is

89. See *id.* at 558.
90. See *id.* at 557-58.
91. *Milner*, 562 U.S. at 562.
92. See *id.*
93. See *id.* at 564-65.
94. See *id.*
95. See *id.*
96. See *id.*
97. See id. at 572.
98. See *id* at 572.
99. See *id.*

doing exactly what she maintains she does. She employs textualism, but a forgiving variety.

Contrast Kagan's lite textualist approach in the *Milner* majority opinion with Breyer's lone purposive dissent in *Milner*. Where Kagan avoids legislative history and sticks to FOIA's text, Breyer sticks almost solely to FOIA's legislative history. Here, Breyer showcases the purposivist methods he described in his books, lectures, and interviews by structuring his dissent around Congress's purpose in enacting FOIA[100]. Breyer does what he declares he does.

Following D.C. Circuit precedent, Breyer concludes that a FOIA exception would apply in the case at bar, excusing the Navy from releasing its explosives information[101]. To determine Congress's purpose in enacting the FOIA exception, Breyer starts with both the Senate and House Reports[102]. He shows that the House Report describes the exemption as applying to operating rules, guidelines, and procedures for various government agents[103]. The Navy's information falls in a sufficiently similar category, Breyer concludes. Further delving into legislative intent, Breyer notes that Congress did not alter the FOIA exception at issue when it amended FOIA[104]. Congress knew about the D.C. Circuit interpretation of the exception at that time[105]. This, Breyer reasons, is evidence that Congress thought the D.C. Circuit's opinion was in line with the congressional purpose for the FOIA exception. Finally, Breyer's approach employs common sense: for the past thirty years, courts have followed the D.C. interpretation – why stop now[106]? So, though Breyer and Kagan's substantive methods differ starkly, they are similarly consistent in applying the methods they each advocate for in judicial interpretation.

100. See *id*. (Breyer, J., dissenting).
101. See *id.* at 585.
102. See *id.* at 587-88.
103. See *id.* at 588.
104. See *id.* at 586.
105. See *id.*
106. See *id.* at 585.

4. *Implications for Dobbs*

Given the two justices' interpretative methods, one could ask how they are likely to vote in *Dobbs.* The October 2021–2022 term case asks the justices to decide whether a law in Mississippi that bans nearly all abortions after fifteen weeks' gestational age is unconstitutional[107]. *Dobbs* thus addresses one of this nation's most contentious social debates since gay marriage: abortion[108]. It comes after a long line of abortion decisions in the Supreme Court and lowers circuit courts, including *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Roe v. Wade*[109]. Whatever the outcome, *Dobbs* is likely to have wide-ranging implications for women's bodily autonomy, the protection of fetal life, religion, and the right to privacy.

First, given the sharp divide between the justices on the right to abortion, evident in their oral argument in Dobbs, the Court is unlikely to come to a unanimous decision. Instead, a majority of six justices will likely overturn *Roe* and *Casey* or hold on a narrow ground, offering an undue burden standard instead of a viability line. Breyer, Kagan, and Justice Sotomayor will likely dissent. Breyer (or Sotomayor) seems more likely to pen the dissent than Kagan, given Kagan's strong focus on consensus-building, though Kagan would almost certainly join. Breyer's principled pragmatism would probably lead him to focus in dissent on the negative practical consequences of the Court overruling *Roe v. Wade*[110] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[111]. On the other hand, Kagan's new living constitutionalism would seem to lead her to center on the constitutional liberty interest at stake.

The dissent would likely mirror Breyer's focus on *stare decisis* in oral argument. In oral argument, Breyer cautioned that if the Court ignored *stare decisis* to overrule *Roe* or *Casey*, the Court would undermine its

107. *Glossip v. Gross*, Transcript of Oral Argument at 4-5 (cited at note 60).

108. See Obergefell v. Hodges, 576 U.S. ___ (2015).

109. See *Timeline of Important Reproductive Freedom Cases Decided Cases By the Supreme Court* (A.C.L.U.), available at https://www.aclu.org/other/timeline-important-reproductive-freedom-cases-decided-supreme-court (last visited April 11, 2022).

110. *Roe v. Wade*, 410 U.S. 113 (1973).

111. *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992).

legitimacy. He wrote that, "to overrule under fire in the absence of the most compelling reason, to reexamine a watershed decision, would subvert the court's legitimacy beyond any serious question"[112]. He further stressed the importance of showing that the Court overturns cases based on principle, not political or social pressure[113]. Otherwise, the Court could subject itself to public condemnation[114]. Breyer showcases his living constitutionalist focus on principles by noting the importance of only overturning cases based on principle. Likewise, Breyer focuses on his main constitutional value and purpose, active liberty, and its promotion, by aiming to protect the Court's legitimacy. Finally, by warning of public condemnation, Breyer reveals his pragmatic concerns about the practical consequences of overturning *Roe* on American democracy and judiciary.

On the other hand, Kagan's new living constitutionalism would seem to lead her to request that the dissent include a discussion of the constitutional values implicated in *Dobbs*. For example, a Kagan-inspired dissent passage may reaffirm the liberty interest, privacy right, or autonomy value implicated in *Roe* and *Casey*[115]. But what about living constitutionalism's focus on a changing world? Kagan's constitutional method thus suggests she may think about whether the Court should account for new research showing the harmful impacts of abortion bans on poor women's physical health, economic well-being, and education[116]. These impacts could show the necessity of protecting women's liberty and privacy, which are unchanging constitutional values[117]. During oral argument, other justices took the lead asking about the values at stake – whether the value was liberty or the right to privacy[118]. Instead, Kagan spent most of her time in oral argument on *stare decisis*, as Breyer did[119]. Why? Initially, it could mean that

112. *Glossip v. Gross*, Transcript of Oral Argument at 10 (cited at note 60).

113. See *id.*

114. See *id.*

115. See generally *id.* at 6, 72 (a discussion on how best to characterize the right and value at interest).

116. See *id.* at 31, 48, 52.

117. See *id.*

118. Justices Thomas and Alito extensively focused on constitutional values. See *id.* at 6, 49-50, 71-74, 85-86.

119. See Sarah Isgur, *How SCOTUS Will Rule on Dobbs, in 3 Scenarios* (Politico, December 2, 2021), available at: https://www.politico.com/news/

Kagan views the values discussion as encompassed within *stare decisis*. By honoring precedent, the Court maintains its legitimacy, honoring federalist and democratic values. Next, maybe Kagan does not think much has changed – that access to abortion impacts women's liberty and privacy in the same ways as it used to. Or perhaps the societal "change" is the fifty years of cases since *Roe* supporting its precedent. There would need to be an excellent reason to disregard fifty years of precedent to violate women's liberty and privacy here. Finally, Kagan's *stare decisis* focus could be due to her alleged *new* living constitutionalism, a method that does not place constitutional values above all other considerations. Kagan may think that in Dobbs, abiding by *stare decisis* is more important than the case's constitutional values.

So, Breyer's principled pragmatism leads him towards practical consequences and the democratic value of active liberty. Kagan's new living constitutionalism would seem to lead her to a values-based discussion, but instead, it leads her to support *stare decisis*. However, stare decisis is consistent with new living constitutionalism.

5. *Conclusion*

This article leaves open at least a few questions about Breyer and Kagan's judicial interpretation for further study. For example, the article leaves open how often did Breyer or Kagan stick to their favored means of interpretation. This article's selected opinions provide insights into Breyer and Kagan's analysis in action. But the article largely relies on opinions Breyer and Kagan have discussed, and even justices are not immune from confirmation bias. The decisions chosen here are also relatively well-known, perhaps selected at the expense of lesser-known opinions that may have gone against the grain.

However, even an empirical analysis would not be perfect. In such an analysis, would one factor in opinions only? One may also ask whether an analysis would include concurrences and dissents, too. Even further, one may wonder whether opinions that Breyer and Kagan joined but did not write should be included Finally, would one

---

magazine/2021/12/02/abortion-supreme-court-dobbs-ruling-scenarios-523692 (last visited April 11, 2022).

weigh decisions equally, perhaps limiting the analysis to merits decisions? Despite the shortcomings of this article's qualitative case study assessment, the above questions illuminate that an empirical study may not provide definitive answers.

This article maintains that we should start instead with the most challenging cases that test justices' interpretative methods. These complicated cases invite more analysis than their more straightforward counterparts with limited social impact. And they often inspire markedly diverse reasoning and conclusions from Breyer versus Kagan. It may still be "law all the way down," but the law sure looks different to each justice.

L'interruzione volontaria di gravidanza tra diritti costituzionali e questioni irrisolte

Un'analisi sull'evoluzione della tematica e sulle criticità che in essa si celano

Emma Pivato*

Abstract: L'interruzione volontaria di gravidanza costituisce un tema attorno al quale si sviluppa un ricco dibattito sociale e giuridico. Sebbene abbia avuto ingresso nell'ordinamento italiano in tempi risalenti, per mezzo della legge n. 194 del 1978, ancora oggi non cessa di originare criticità delle quali gli interpreti non possono evitare di farsi carico. A riguardo, estremamente esemplificativi sono i dati riguardanti le difficoltà di accesso alla procedura abortiva in Italia, evidenziate in più occasioni dal Consiglio d'Europa. Ampliando l'orizzonte d'analisi, è possibile rilevare come negli Stati Uniti si stia verificando un picco di contenzioso a seguito dell'entrata in vigore del Texas Heartbeat Act. La complessità delle questioni legate all'aborto trova fondamento e giustificazione nei diritti costituzionalmente rilevanti che si devono considerare e bilanciare il più ragionevolmente possibile: il diritto alla vita e alla salute della madre; i corrispondenti diritti del nascituro; il diritto del personale sanitario a veder rispettata la propria sensibilità etica. Il presente contributo si pone come obiettivo quello di analizzare il tema in una prospettiva che consenta di inquadrare e comprendere in che misura i suddetti diritti sussistano e siano tutelati. Privilegiare una chiave di lettura comparata che consideri il percorso storico attraversato dall'ordinamento statunitense e, parallelamente, da quello italiano, consentirà di cogliere come le due esperienze giuridiche abbiano affrontato questioni analoghe relativamente alla questione dell'aborto e come abbiano offerto soluzioni non dissimili.

Parole chiave: Aborto; giurisprudenza costituzionale; inizio vita; legge 194/1978; obiezione di coscienza.

Abstract: voluntary termination of pregnancy is a topic of debate under a social and legal point of view. Act no. 194/1978 regulated the subject in the Italian legal system. Although many years have passed, the right to abortion still raises critical issues that legal experts should consider. In this regard, some examples may be very helpful. To begin with, data concerning women's difficulties in accessing abortion procedures in Italy should be discussed, as the Council of Europe has already delivered some decisions on the matter. Broadening the horizon of analysis, it should be noted that, following the entry into force of the Texas Heartbeat Act in the U.S. legal system, the number of cases concerning the right to abortion has dramatically increased. The complexity of the issues related to the right to abortion is due to a variety of constitutionally relevant rights which must be reasonably balanced: a mothers' rights to life and to health; an unborn child's corresponding rights; health care personnel's right to see their ethical sensitivity respected. This contribution aims to analyze the issue in a perspective that allows readers to understand to what extent the mentioned rights exist and are protected. Comparing and contrasting the U.S. and the Italian legal systems will also help readers understand that the two countries have faced similar problems and have provided similar solutions.

Keywords: Abortion; constitutional case law; beginning of life; Act no. 194/1978; conscience clause.

Sommario: 1. L'evoluzione storica dell'interruzione volontaria di gravidanza. – 1.1. Il contesto italiano. – 1.2. Il percorso statunitense. – 2. Viene emanata la legge n. 194 del 22 maggio 1978: emergono complesse questioni da bilanciare. – 2.1. Gli artt. 4 e 6: la prospettiva temporale nell'interruzione volontaria di gravidanza. – 2.2. L'art. 9: l'obiezione di coscienza. – 3. L'inizio della vita e la sentenza del T.A.R. Lazio n. 8465 del 2001. – 4. La situazione attuale e le relative criticità. – 5. In sintesi: i diritti costituzionali che entrano in gioco. – 6. Conclusioni.

1. *L'evoluzione storica dell'interruzione volontaria di gravidanza*

1.1. *Il contesto italiano*

Per lungo tempo, nel panorama giuridico italiano, l'aborto è stato considerato un delitto. Già il codice Zanardelli contemplava svariate fattispecie volte a reprimere, in primo luogo, la condotta della donna che «con qualunque mezzo, adoperato da lei o da altri con il suo consenso» si fosse procurata l'aborto (art. 381). In secondo luogo, agli articoli successivi, si puniva anche chiunque procurasse l'interruzione di gravidanza. La cornice edittale prevista era differente a seconda della presenza o meno del consenso dell'interessata. Tali norme erano collocate nel Titolo IX, rubricato *Dei delitti contro la persona*.

Con l'entrata in vigore del codice Rocco vennero mantenute le sopracitate fattispecie, contemplate agli artt. 545 e seguenti. Particolarmente significativo e da notare è il cambiamento che subì la loro collocazione sistematica: furono ricomprese sotto il Titolo IX, dedicato ai delitti contro l'integrità e la sanità della stirpe. Alfredo Rocco, nella Relazione presentata nell'udienza del 19 ottobre 1930 per l'approvazione del testo definitivo del codice penale, giustifica in questi termini la scelta:

> Mi è parso, invece, che la principale ragione d'essere della incriminazione di tali pratiche sia da trovarsi nella offesa all'interesse che ha la nazione, come unità etnica, di difendere la continuità e la integrità della stirpe. Non può invero dubitarsi che ogni atto diretto a sopprimere o isterilire le fonti della procreazione sia un attentato alla vita stessa della razza nella serie delle generazioni presenti e future che la compongono e quindi un'offesa

> all'esistenza stessa della società etnicamente considerata, cioè all'esistenza della nazione[1].

Il Ministro Guardasigilli prosegue poi riconoscendo che esistano lesioni di altri interessi quali il buon costume sociale e la moralità pubblica, tuttavia si preoccupa di ribadire che la massima offesa che le pratiche abortive recano è all'integrità e alla continuità della razza, senza la quale lo Stato non può perdurare.

Nei decenni successivi le donne che desideravano o erano costrette ad abortire, per non incorrere nelle sanzioni penali, ricorrevano a metodi clandestini altamente rischiosi per la loro stessa vita. Non è possibile stimare in modo preciso le cifre che testimoniano la portata del fenomeno, tuttavia la sua rilevanza era chiaramente percepita.

> Secondo una recente inchiesta sulla situazione demografica italiana, eseguita da una ricercatrice americana per conto dell'Università di Berkeley, ogni giorno, in Italia, si sottopongono a pratiche illecite per interrompere la gravidanza almeno quattromila donne: si tratterebbe quindi di 1.460.000 aborti criminosi per anno!
> A Milano una rivista ha ritenuto di poter affermare che si verificano circa 200 mila aborti clandestini all'anno.
> A Roma, la dottoressa Luisa Zardini De Marchi ha compiuto un'inchiesta nelle borgate più povere. I risultati, raccolti nel volume Inumane vite, sono drammatici: su 558 donne dell'età

---

* Emma Pivato è iscritta al quarto anno del corso di laurea in Giurisprudenza presso l'Univeristà di Trento, con un forte interesse per il diritto costituzionale e le questioni bioetiche. Nel 2016 ha partecipato al progetto National High School Model United Nations (NHSMUN) a New York. In più occasioni ha avuto modo di pubblicare contributi nella rivista online del progetto Gazzetta filosofica.

1. Si veda Alfredo Rocco, *Relazione a S.M. il Re del Ministro Guardasigilli Rocco, per l'approvazione del testo definitivo del Codice penale*, Gazzetta Ufficiale del Regno d'Italia n. 251, pp. 4492-4493 (26 ottobre 1930), all'indirizzo https://www.gazzettaufficiale.it/do/gazzetta/foglio_ordinario1/1/pdfPaginato?dataPubblicazioneGazzetta=19301026&numeroGazzetta=251&tipoSerie=FO&tipoSupplemento=GU&numeroSupplemento=0&progressivo=0&numPagina=1&edizione=0 (ultimo accesso 28 febbraio 2022).

> media di trentuno anni, il tasso degli aborti procurati e confessati è stato di due per ogni due-tre figli viventi[2].

La giurisprudenza di merito, onde evitare di comminare le pene previste in un numero così elevato di casi, era solita riconoscere l'applicazione dello stato di necessità di cui all'art. 54 c.p[3]. Ad ogni modo, la soluzione presentava criticità non trascurabili: la fruibilità dell'esimente veniva meno ove mancasse il requisito del «pericolo attuale di danno grave alla persona».

Il requisito dell'attualità era quello che generava i maggiori ostacoli nella prassi giurisprudenziale[4]. La formula «pericolo attuale» comprende, *in primis*, l'ipotesi in cui la verificazione della lesione sia imminente. In secondo luogo, può dirsi attuale un pericolo perdurante, che si realizza cioè quando l'offesa si sta già concretizzando, ma non si è ancora esaurita. Non risulta improbabile, però, che la concreta situazione nella quale si venga a trovare la donna incinta possa non rientrare in una delle due ipotesi ora riportate: si pensi al caso in cui vi sia la probabilità che una patologia pregressa della madre possa significativamente peggiorare, ledendo la salute o la stessa vita dell'interessata, ma non sia invece possibile raggiungere l'assoluta certezza che ciò avvenga (una situazione simile, come si avrà modo di osservare tra poco, fu quella che si impose all'attenzione del giudice delle leggi nella storica sentenza n. 27 del 1975). Siffatta circostanza può verificarsi, ad esempio, in presenza di patologie cardiovascolari o neoplasie[5]. Pertanto, di fronte a un ampio ventaglio di ipotesi, la giurisprudenza era

2. Si veda Senato della Repubblica, *Disegno di legge: Norme per la regolamentazione dell'aborto*, 18 giugno 1971, V Legislatura, n. 1762.

3. Si veda Luciano Moccia e Fabrizio Pensa, *I profili penalistici dell'aborto. Le varie tipologie: aborto terapeutico, eugenetico e selettivo* (15 febbraio 2008), all'indirizzo https://www.altalex.com/documents/news/2008/02/13/i-profili-penalistici-dell-aborto-tipologie-aborto-terapeutico-eugenetico-selettivo (ultimo accesso: 28 marzo 2022); si veda anche Carlo Casonato, *Introduzione al biodiritto* p. 38 (G. Giappichelli Editore, Torino, 3a ed. 2012).

4. Si veda Giorgio Marinucci, Emilio Dolcini e Gian Luigi Gatta, *Manuale di Diritto Penale. Parte Generale* p. 330 (Giuffrè Francis Lefebvre, Milano, 8a ed. 2019).

5. Si veda Italian Obstetric Surveillance System (ItOSS), *Primo rapporto ItOSS: Sorveglianza della mortalità materna* (2019), all'indirizzo https://www.epicentro.iss.it/itoss/pdf/ItOSS.pdf (ultimo accesso: 27 marzo 2022).

chiamata a confrontarsi con la difficoltà di non poter applicare l'art. 54 c.p., onde evitare di forzarne eccessivamente il tenore letterale.

Fu proprio tale stato dei fatti a provocare l'intervento della Corte Costituzionale, chiamata a pronunciarsi relativamente al caso di una donna (M.C.) la quale aveva abortito in conseguenza del rischio, non imminente, che la sua forte miopia degenerasse in cecità con l'avanzare della gravidanza. L'apparato argomentativo della Corte si presenta stringato e pare non essere fra i più lineari. In un primo momento sembra propendere verso la salvaguardia del concepito: dopo aver considerato più giusta la collocazione che il reato di aborto aveva nel codice Zanardelli, rinviene nell'art. 2 della Costituzione il fondamento della tutela in quanto norma che «riconosce e garantisce i diritti inviolabili dell'uomo, fra i quali non può non collocarsi, sia pure con le particolari caratteristiche sue proprie, la situazione giuridica del concepito»[6]. Nel proseguire la trattazione, però, la Consulta ammette che non può esservi equivalenza tra il diritto alla vita e alla salute della madre, che è già persona, e la protezione dell'embrione, che individuo deve ancora divenire. Pertanto dichiara «l'illegittimità costituzionale dell'art. 546 del codice penale, nella parte in cui non prevede che la gravidanza possa venir interrotta quando l'ulteriore gestazione implichi danno, o pericolo, grave, medicalmente accertato nei sensi di cui in motivazione e non altrimenti evitabile, per la salute della madre»[7]. La Corte, inoltre, mostrandosi consapevole delle insidie applicative che lo stato di necessità celava, ebbe cura di sottolineare che «la condizione della donna gestante è del tutto particolare e non trova adeguata tutela in una norma di carattere generale come l'art. 54 c.p. che esige non soltanto la gravità e l'assoluta inevitabilità del danno o del pericolo, ma anche la sua attualità, mentre il danno o pericolo conseguente al protrarsi di una gravidanza può essere previsto, ma non è sempre immediato»[8].

Il panorama finora delineato testimonia il percorso, non privo di insidie, che la disciplina dell'interruzione volontaria di gravidanza ha subito nel secolo scorso e che condurrà, pochi anni dopo la

6. Si veda Corte costituzionale, 18 febbraio 1975, n. 27.
7. Si veda *ibid.*
8. Si veda *ibid.*

summentovata sentenza della Corte costituzionale, all'adozione della legge n. 194 del 22 maggio 1978, della quale si tratterà in seguito.

1.2. *Il percorso statunitense*

Le vicende relative all'interruzione volontaria di gravidanza non hanno interessato solo il nostro ordinamento. In ottica comparatistica, è interessante analizzare quanto avvenuto negli stessi anni '70 nel contesto statunitense. Come si avrà occasione di osservare, sembra di poter scorgere rilevanti punti di contatto tra l'esperienza americana e quella italiana da ultimo inquadrata.

Negli Stati Uniti, le normative volte a regolare le pratiche riproduttive erano state tipicamente ritenute di competenza esclusiva dei singoli Stati. Nel 1973 tuttavia, a seguito del caso *Roe v. Wade*, il quale divenne (e resta tutt'ora, salve alcune precisazioni che si svolgeranno in seguito relativamente alle emergenti istanze odierne) il leading case imprescindibile in materia di interruzione volontaria della gravidanza, la Corte Suprema diede impulso alla modificazione di tale impostazione e ricavò dalla Costituzione federale alcuni principi che si imponevano alle giurisdizioni statali in virtù di quanto stabilito dal sesto articolo. La vicenda riguardò la legittimità costituzionale degli articoli 1191-1194 e 1196 del codice penale dello Stato del Texas, i quali punivano l'aborto qualora non fosse finalizzato alla salvaguardia della vita della madre.

Norma L. McCorvy, meglio conosciuta come Jane Roe (pseudonimo che utilizzò nel corso del giudizio), era rimasta incita a seguito di uno stupro e aveva tentato di abortire illegalmente. La donna, assistita da due avvocatesse, sollevò una causa dinanzi alla Corte distrettuale del Texas, che si pronunciò a favore della Roe e, basandosi sul IX Emendamento, dichiarò incostituzionale la legge. Il procuratore distrettuale, quindi, ricorse in appello presso la Corte Suprema, la quale confermò il verdetto (con una maggioranza di 7 voti a 2), riconoscendo la sussistenza del *right to abortion.* Si ritenne però di considerare una diversa base normativa, fondando l'argomentazione sull'interpretazione del XIV Emendamento. Elemento caratterizzante, che ha attirato a più riprese l'attenzione degli studiosi che si sono apprestati a commentare la pronuncia in esame, fu la scelta dei giudici di dedurre il diritto all'aborto dal *right of privacy*. Risulta inoltre utile sottolineare come

tale diritto alla *privacy* non sia espressamente menzionato dalla Costituzione federale, ma fosse già stato evidenziato dalla Corte Suprema alcuni anni prima, e inserito in un quadro riconducibile alla cd. *penumbra* dei diritti del *Bill of Rights*. Una siffatta impostazione potrebbe portare a ritenere che, di conseguenza, il fondamento costituzionale del *right to abortion* non sia particolarmente stabile. Tale ipotesi sembrerebbe essere supportata dall'osservazione delle tendenze *pro life* che periodicamente (da ultimo, come si avrà modo di esaminare in seguito, in tempi molto recenti) emergono nel contesto statunitense e mirano ad ottenere la limitazione della possibilità di abortire. Sembra opportuno, per completezza, evidenziare come il concetto di *privacy* impiegato nella giurisprudenza statunitense sia da ricondurre a quello italiano di autodeterminazione, e non a quello di riservatezza. Non a caso, nell'ambito della CEDU, il parallelismo è da rinvenire con l'art. 8, sul diritto al rispetto della vita privata e familiare.

Un elemento che merita di essere posto in luce riguarda la scansione in trimestri delineata dai giudici in relazione all'avanzamento della gravidanza, la quale trovò ampio riscontro nell'ambito della circolazione dei modelli. In particolare:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
> (c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother[9].

Due furono i principi fondamentali che la Corte stabilì con fermezza nella pronuncia e che da quel momento rimasero a caratterizzare il

9. Si veda *Roe v. Wade*, 410 U.S. 113 (1973).

successivo e ancora attuale dibattito sull'interruzione di gravidanza: l'assoluto rifiuto di stabilire in modo esatto il momento in cui la vita potesse dirsi iniziata e l'impossibilità di considerare il nascituro alla stregua di una persona già esistente. Non si può fare a meno di notare la somiglianza di quest'ultima puntualizzazione con quanto affermerà qualche anno più tardi la Consulta nella sentenza 27/1975, precedentemente richiamata.

Alcuni spazi per la limitazione del diritto all'aborto cominciarono ad aprirsi a seguito di un caso del 1989, *Webster v. Reproductive Health Service*. La questione riguardava la legittimità costituzionale di una legge del Missouri[10], modificata nel 1986, che affermava nel preambolo una specifica *theory of life* secondo la quale il bambino non ancora nato avesse un interesse alla vita, alla salute e al benessere. Inoltre, tra le disposizioni ivi contenute, vi era l'obbligo dei medici di accertare la *viability* del feto prima di procedere all'interruzione di gravidanza e il divieto di avvalersi di personale o risorse pubbliche a fini abortivi se la vita della madre non fosse stata in pericolo. Per *viability* si intende la possibilità di restare in vita all'esterno dell'utero materno. Da un punto di vista medico, si ritiene che il nascituro acquisti una *chance* significativa di sopravvivenza autonoma una volta raggiunte le 24 settimane di gravidanza, quando i polmoni e gli altri organi vitali sono già sufficientemente sviluppati.

La Corte Suprema ritenne la legge conforme a Costituzione. In particolare, si ritenne che la *theory of life* proposta non limitasse il diritto di aborto in termini sostanziali, infatti «the preamble does not, by its terms, regulate abortions or any other aspect of appellees' medical practice»[11].

Sulla base di questa sentenza, alcuni Stati iniziarono a introdurre discipline volte a restringere le possibilità di esercizio del diritto delle donne ad interrompere la gravidanza, ferma restando l'impossibilità di negarlo.

Pochi anni più tardi, nel 1992, con il caso *Planned Parenthood of Southeastern Pennsylvania v. Casey*, si assiste a una modificazione dell'indirizzo varato in *Roe v. Wad*. Tenuto conto degli sviluppi che le

10. Si veda Missouri Revised Statutes, Title XII Public Health and Welfare, Chapter 188 - Regulation of Abortions.

11. Si veda *Webster v. Reproductive Health Service*, 492 U.S. 490 (1989).

tecniche mediche avevano conosciuto, la differenziazione in trimestri venne accantonata e si privilegiò il riferimento alla *viability*: una volta raggiunta tale fase, lo Stato avrebbe potuto impedire l'interruzione di gravidanza, a meno che non sussistesse un rischio clinicamente accertato per la salute o la vita della madre. In sintesi, mentre nel 1973 il criterio per misurare la costituzionalità delle leggi in materia era stato individuato nel più rigido *strict scrutiny* (si richiedeva infatti, perché l'intervento statale fosse legittimo, la sussistenza di un *compelling state interest*), con *Casey* si optò per lo standard più mite dell'*undue burden*, che avrebbe condotto alla dichiarazione di incostituzionalità solo qualora la normativa avesse comportato un onere eccessivo e sproporzionato per la donna.

In conclusione, è da segnalare come in tempi più recenti si stia assistendo alla proliferazione di leggi statali che denotano la precisa intenzione di condurre a un *overruling* del leading case. Ultimo di una nutrita serie è il *Texas Heartbeat Act* del marzo 2021, il quale dispone che, successivamente alla sesta settimana di gravidanza, si possa abortire solo in presenza di una *medical emergency*, ossia per salvare la vita o la salute dell'interessata. È appena il caso di evidenziare come il termine imposto sia altamente stringente e possa, nella maggioranza dei casi, non essere sufficiente affinché la donna entri a conoscenza del proprio stato. Se, trascorso il periodo indicato, la donna interrompe la gravidanza, si dispone che la stessa e chiunque le procuri i mezzi per abortire o le pratichi la procedura possano essere denunciati e condannati a pagare una sanzione pecuniaria. È inoltre riconosciuta una somma di denaro a chi compie la denuncia.

La legge texana ha suscitato una serie di contenziosi, che ad oggi non conoscono ancora un esito definitivo. Il più recente tra questi è il caso *Whole Woman's Health v. Jackson*[12], sollevato da associazioni a difesa del diritto di aborto, le quali hanno contestato la costituzionalità del *Texas Heartbeat Act*. Il 10 dicembre 2021 la Corte Suprema degli Stati Uniti, alla quale era stato richiesto di intervenire con un provvedimento d'urgenza, ha stabilito che i querelanti non avrebbero potuto intentare causa contro i giudici statali o avverso il procuratore generale: la controversia può tuttavia procedere contro il *Texas Medical Board*

12. Si veda *Whole Woman's Health et al. v. Austin Reeve Jackson, Judge, et al.*, 594 U. S. ____ (2021).

e le altre autorità preposte al rilascio delle licenze mediche. Tramite questa pronuncia, il caso è stato rinviato alla Quinta Corte d'Appello che, in data 17 gennaio 2022, ha ritenuto di rimettere la questione alla Corte Suprema del Texas.

2. *Viene emanata la legge n. 194 del 22 maggio 1978: emergono complesse questioni da bilanciare*

A seguito della sentenza n. 27 del 1975 della Corte costituzionale, nel contesto giuridico italiano divenne ancora più nitida l'esigenza di introdurre una normativa idonea a regolamentare la spinosa materia dell'interruzione volontaria di gravidanza.

Al fine di cogliere la rilevanza di tale consapevolezza giova ricordare che gli anni '70 furono caratterizzati da riforme epocali, le quali investirono svariati ambiti della società. Come si ha avuto modo di rilevare più sopra, negli Stati Uniti si era avviato un processo che mirava a un tendenziale riconoscimento del diritto di scegliere sulla propria vita e sul proprio corpo.

Di conseguenza, nell'ambito della fisiologica dialettica che caratterizza diritto e società, la sfera legislativa fu chiamata a rispondere all'avanzare della sensibilità sociale. Anche il tema dell'interruzione volontaria di gravidanza, come forse si sarà già evinto, ne venne inevitabilmente coinvolto.

Nemmeno il contesto italiano, d'altro canto, rimase immune dalle emergenti tensioni sociali: il primo dicembre del 1970 era entrata in vigore la legge sul divorzio; con la legge n. 151 del 1975 si era introdotta la riforma del diritto di famiglia; la legge n. 405 dello stesso anno, aveva istituito i consultori familiari.

Sul fronte dei movimenti per la liberalizzazione dell'aborto, spiccò la figura di Adele Faccio (1920 – 2007). Nel 1973 contribuì alla fondazione, in collaborazione con personalità quali Emma Bonino e Marco Pannella, del Centro d'informazione sulla sterilizzazione e sull'aborto (CISA), il quale divenne un fondamentale punto di riferimento per le donne che desideravano accedere alla procedura abortiva in condizioni di sicurezza. Si avrà probabilmente già intuito che, almeno nei primi anni di vita, il Centro operò sfidando apertamente le imposizioni del dettato normativo. Nel gennaio 1975, durante la giornata conclusiva

di una conferenza internazionale sull'aborto, la Faccio dichiarò pubblicamente di aver volontariamente interrotto una gravidanza e si fece arrestare. Il suo atto di disobbedienza civile sollevò vivaci dibattiti, creando così una situazione che costrinse le istituzioni a prendere posizione sul tema dell'aborto.

Il 9 giugno 1977 fu presentata alla Camera dei deputati la proposta di legge denominata "*Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza*"[13]. Il testo definitivo approdò in Senato solo l'anno successivo, a causa di rallentamenti dovuti alle non facili contingenze storiche e politiche. Il 22 maggio 1978, infine, fu pubblicata in Gazzetta Ufficiale la legge n. 194, che regola la possibilità di accesso delle donne alla procedura abortiva. Non manca, inoltre, di considerare la posizione dell'obiettore di coscienza. Fin da subito la normativa gettò un potente fascio di luce sulla complessità dell'argomento che mirava a regolare: si imposero all'attenzione degli interpreti articolate questioni giuridiche che necessitavano di essere approfondite al fine di equilibrare al meglio i distinti diritti costituzionali coinvolti. Si avrà modo di analizzarne, nel prosieguo della trattazione, alcuni elementi peculiari.

2.1. *Gli artt. 4 e 6 della legge 194/1978: la prospettiva temporale nell'interruzione volontaria di gravidanza*

Si è avuto modo di evidenziare come la scansione in trimestri proposta dalla Corte Suprema degli USA abbia avuto grande fortuna sul piano comparatistico. Ciò è ben visibile nell'impostazione della legge n. 194 del 22 maggio 1978, che all'art. 4 recita:

> Per l'interruzione volontaria della gravidanza entro i primi novanta giorni, la donna che accusi circostanze per le quali la prosecuzione della gravidanza, il parto o la maternità comporterebbero un serio pericolo per la sua salute fisica o psichica, in relazione o al suo stato di salute, o alle sue condizioni

13. Si veda Camera dei deputati, *Proposta di legge: Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza,* 9 giugno 1977, VII Legislatura, n. 1524, all'indirizzo http://legislature.camera.it/chiosco.asp?source=/altre_sezioni-sm/9964/9986/9987/documentotesto.asp&content=/_dati/leg07/lavori/schedela/trovaschedacamera.asp?pdl=1524 (ultimo accesso: 31 marzo 2022).

> economiche, o sociali o familiari, o alle circostanze in cui è avvenuto il concepimento, o a previsioni di anomalie o malformazioni del concepito, si rivolge ad un consultorio pubblico istituito ai sensi dell'articolo 2, lettera a), della legge 29 luglio 1975, n. 405, o a una struttura sociosanitaria a ciò abilitata dalla regione, o a un medico di sua fiducia.

Sono molteplici gli elementi che meritano di essere sottoposti ad analisi. Innanzitutto, pare appropriato porre in luce che il consultorio, ai sensi dell'art. 2, lettera d), della legge oggetto della trattazione, deve certo contribuire «a far superare le cause che potrebbero indurre la donna all'interruzione della gravidanza», tuttavia tale intervento non può tramutarsi in un'operazione di convincimento volta a condizionare la libera scelta dell'interessata. Si osservi primariamente come l'unico soggetto al quale è affidato il compito di «accusare le circostanze» sia proprio la madre. Siffatta impostazione trova conferma nel successivo articolo 5, il quale dispone che il padre del concepito possa partecipare all'individuazione dei problemi sottoposti all'attenzione del consultorio solo «ove la donna lo consenta». È opportuno richiamare, come elemento utile per approfondire quanto sostenuto, ciò che la Corte Costituzionale ha affermato in una pronuncia concernente il potere autorizzatorio del giudice tutelare in merito all'interruzione di gravidanza di una minore. In questa situazione, quantomai meritevole di attenzione e salvaguardia, la Consulta ribadisce che al decidente è attribuito un «compito che (alla stregua della stessa espressione usata per indicarlo dall'art. 12, secondo comma, della legge n. 194 del 1978) non può configurarsi come potestà co-decisionale, la decisione essendo rimessa – alle condizioni previste – soltanto alla responsabilità della donna»[14].

Proseguendo con la disamina della norma, si presti attenzione al fatto che viene contemplata tanto la salute fisica quanto quella psichica della donna, e che le circostanze che vengono richiamate, in relazione alle quali la madre può compiere la propria scelta, sono di svariata natura (non solo, quindi, di carattere medico: si menzionano pure le «sue condizioni economiche, o sociali o familiari, o alle circostanze in cui è avvenuto il concepimento»). Ne scaturisce, dunque, un impianto

14. Si veda Corte costituzionale, ordinanza 15 marzo 1996, n.76.

volto a offrire la più ampia libertà di valutazione possibile: ci si confronta con un concetto di salute il quale si colora di una dimensione soggettiva che la donna può delineare in maniera confacente alla sua personalità.

Con l'avanzare della gravidanza, dopo il novantesimo giorno, la prospettiva muta e l'interruzione di gravidanza può essere praticata: «a) quando la gravidanza o il parto comportino un grave pericolo per la vita della donna; b) quando siano accertati processi patologici, tra cui quelli relativi a rilevanti anomalie o malformazioni del nascituro, che determinino un grave pericolo per la salute fisica o psichica della donna» (art. 6).

Il legislatore ha operato una scelta che potesse risultare idonea ad un migliore bilanciamento degli interessi costituzionalmente rilevanti: secondo la logica adoperata, mentre negli stadi iniziali il feto non può definirsi pienamente persona e pertanto prevalgono la salute (ampiamente intesa, come si è avuto modo di evidenziare) e la vita della madre, nella fase più avanzata il nascituro è considerato meritevole di maggiore tutela. Può senz'altro cogliersi l'eco della pronuncia n. 27 del 1975 (vd. *supra*).

Il tema della posizione giuridica del nascituro è oggetto di numerosi dibattiti. Quest'ultimo, secondo quanto stabilito in ambito giuridico, non è identificabile pienamente come persona, tuttavia risulta evidente che non possa essere considerato alla stregua di una *res*.

A riguardo, si sono sviluppate teorie differenti: da una parte, un primo filone, anche in virtù della giurisprudenza della Cassazione in materia di danno da nascita[15], afferma che soggettività e capacità giuridica siano due aspetti differenti e solo la prima (intesa come possibilità di essere parte in un rapporto giuridico) potrebbe essere riconosciuta in capo al concepito.

Una seconda posizione, al contrario, critica che gli possa essere attribuita soggettività propria. Viene citata a sostegno una più recente pronuncia della Suprema Corte:

> Ritiene, pertanto, il collegio che la protezione del nascituro non passi necessariamente attraverso la sua istituzione a soggetto di diritto [...].

15. Si veda Cassazione civile, 11 maggio 2009, n. 10741.

> E' tanto necessario quanto sufficiente, di converso, considerare il nascituro oggetto di tutela, se la qualità di soggetto di diritto (evidente astrazione rispetto all'essere vivente) è attribuzione normativa funzionale all'imputazione di situazioni giuridiche e non tecnica di tutela di entità protette[16].

Considerare il feto come oggetto (e non più soggetto) di salvaguardia lo sottoporrebbe a una possibilità di tutela attuale finalizzata alla creazione di una soggettività futura. Similmente, si propone di negare il concetto di soggettività del nascituro, che sarebbe protetto in quanto persona, cioè "realtà umana che preesiste, anche giuridicamente, al diritto positivo e a causa della quale il diritto è costituito"[17].

Alcune brevi considerazioni consentono di chiarire la base di questa teoria. *In primis*, si pone in evidenza che quello di soggetto di diritto è considerato un criterio di imputazione di situazioni giuridiche. Per poter essere titolari di simili situazioni è necessario che l'individuo agisca e si inserisca in una rete di rapporti sociali (quanto più stretti essi saranno, tanto più sorgeranno diritti in capo all'interessato). Secondo i sostenitori di questa tesi, allora, appare coerente affermare che, se il soggetto non è ancora nato, manca il presupposto stesso per il suo partecipare attivo (e non solo passivo) alla compagine sociale. Di conseguenza, se si attribuisse al feto soggettività giuridica, non risulterebbe poi possibile riconoscergli posizioni di tutela adeguate. Circostanza, questa, che cambierebbe qualora si considerasse invece il nascituro oggetto di (e non soggetto a) protezione: l'oggettività è vista come vero e proprio criterio di tutela, per attuare il quale non è richiesto alcun agire attivo.

2.2. *L'art. 9: l'obiezione di coscienza*

L'ordinamento italiano prevede per legge l'obiezione di coscienza in relazione a una gamma assai ristretta di ipotesi. L'art. 9 della legge n. 194 del 1978 è dedicato a tale tematica e dispone che «il personale sanitario ed esercente le attività ausiliarie non è tenuto a prendere parte alle

16. Si veda Cassazione civile, 2 ottobre 2012, n. 16754.

17. Si veda Giorgio Oppo, *Declino del soggetto e ascesa della persona*, 48 Rivista di diritto civile 829 (2002).

procedure di cui agli articoli 5 e 7 ed agli interventi per l'interruzione della gravidanza quando sollevi obiezione di coscienza, con preventiva dichiarazione». Segue poi l'indicazione della procedura necessaria al fine di presentare la dichiarazione stessa.

La possibilità di obiettare ha sollevato innumerevoli questioni nel corso degli anni, ed è tuttora al centro di vivaci dibattiti.

Pare conveniente ribadire che «l'obiezione di coscienza esonera il personale sanitario ed esercente le attività ausiliarie dal compimento delle procedure e delle attività specificamente e necessariamente dirette a determinare l'interruzione della gravidanza, e non dall'assistenza antecedente e conseguente all'intervento»[18].

Tale inciso ha occasionato alcuni interventi della Corte Costituzionale. In questa sede si desidera sottoporre al lettore una sentenza che presenta presupposti di fatto che potrebbero apparire insoliti: a rifiutare di adempiere ai doveri stabiliti dalla legge non è un esercente la professione sanitaria, quanto invece un organo giudicante.

Nel 1987 giunse all'attenzione del giudice delle leggi la questione di legittimità costituzionale degli artt. 9 e 12 della l. 22 maggio 1978 n. 194 nei limiti in cui suddette disposizioni non consentivano al giudice tutelare di sollevare obiezione di coscienza relativamente alle procedure di cui all'art. 12 e, in particolare, in rapporto al potere di autorizzare la minore a decidere l'interruzione della gravidanza. Vennero menzionati quali parametri di riferimento, oltre che l'art. 3 Cost. (per disparità di trattamento col personale sanitario e paramedico), gli artt. 2, 19 e 21, ritenuti complessivamente inerenti alla garanzia di tutela dei propri diritti inviolabili, sia di professione di fede religiosa che di libertà di manifestazione del pensiero.

La Consulta, con la sentenza 25 maggio 1987, n. 196, dichiarò non fondata la questione. Il ruolo del giudice, infatti, rimane esterno alla procedura volta a riscontrare i parametri necessari per potersi procedere all'aborto. Quest'ultimi ricadono sotto l'ambito di valutazione dei medici e il magistrato deve attenervisi, potendo intervenire solo nella sfera relativa alla capacità del soggetto. Date le premesse, la conclusione dell'*iter* argomentativo appare, di conseguenza, piuttosto chiara: essendo altamente circoscritti i margini di azione del giudice tutelare, non sussiste alcuna disparità col personale sanitario, il quale è il solo

18. Si veda art. 9, co. 3, l. 22 maggio 1978, n.194.

chiamato a prendere la decisione che condurrebbe all'interruzione di gravidanza.

Per tornare all'obiezione sollevata in ambito medico, è pertinente procedere a una breve disamina della giurisprudenza di legittimità. In una sentenza del 2013, la sesta Sezione penale della Cassazione così statuiva:

> Infatti, la L. n. 194 del 1978, art. 9, comma 3, esclude che l'obiezione possa riferirsi anche all'assistenza antecedente e conseguente all'intervento, riconoscendo al medico obiettore il diritto di rifiutare di determinare l'aborto (chirurgicamente o farmacologicamente), ma non di omettere di prestare l'assistenza prima ovvero successivamente ai fatti causativi dell'aborto, in quanto deve comunque assicurare la tutela della salute e della vita della donna, anche nel corso dell'intervento di interruzione della gravidanza[19].

Fu pertanto rigettato, nel caso di specie, il ricorso di una ginecologa la quale, nonostante le richieste dell'ostetrica e gli ordini ricevuti telefonicamente dai superiori, si era rifiutata, in quanto obiettrice, di assistere una donna in una fase successiva all'aborto indotto per via farmacologica da un altro sanitario. Ciò aveva costretto il primario a raggiungere l'ospedale e intervenire d'urgenza per evitare che la paziente avesse una pericolosa emorragia. Argomentazioni dello stesso tenore si rinvengono anche in una pronuncia assai più recente, sempre della stessa sesta Sezione penale[20].

Nel prosieguo della trattazione, si avrà modo di trattare più profusamente delle numerose criticità che il fenomeno dell'obiezione di coscienza solleva attualmente, con le quali gli interpreti non possono evitare di confrontarsi.

19. Si veda Cassazione penale, 2 aprile 2013, n. 14979.
20. Si veda Cassazione penale, 13 maggio 2021, n. 18901.

3. *L'inizio della vita e la sentenza del T.A.R. Lazio n. 8465 del 2001*

Un aspetto che merita approfondimento è relativo al calcolo del giorno a partire dal quale si fanno decorrere i novanta giorni che fungono da parametro *ex*. art. 4 della legge 194/1978. È una questione di non poco conto, considerate le conseguenze che secondo la normativa discendono dal calcolo dei trimestri (vd. *supra*).

Solitamente la comunità scientifica considera come primo giorno di gestazione il primo giorno dell'ultima mestruazione. Tale termine iniziale è tuttavia frutto di una determinazione convenzionale, e non corrisponde in modo certo al momento in cui effettivamente l'embrione già esista e inizi il suo sviluppo. Sotto il profilo scientifico, è possibile osservare e descrivere (con una precisione che si incrementa nel tempo, con il perfezionarsi dello sviluppo tecnologico) il processo evolutivo che a partire dall'incontro dei gameti conduce alla nascita di un nuovo essere umano. Risulta però proficuo tenere presente che l'essere in grado di indicare in quali fasi si articoli tale percorso non equivale a poter definire quando la vita abbia inizio. Quest'ultimo è infatti un ambito in cui un ruolo di primaria importanza è ricoperto dalla sensibilità etica e morale di ognuno, che dipende da fattori concatenati all'individualità della persona e che caratterizzano il suo modo di approcciarsi alle istanze che l'ambiente sociale propone.

La giurisprudenza non ha mai disconosciuto l'estrema rilevanza che la coscienza soggettiva riveste. Si ricordi in questa sede quanto già esposto nella trattazione del caso *Roe v. Wade* (v. *supra*) relativamente al deciso *self restraint* della Corte Suprema, la quale rifiutò tassativamente di fornire una definizione del momento in cui una vita possa dirsi cominciata[21]. La medesima impostazione fu ripresa nel 1975 dalla Corte costituzionale italiana, che sulla questione rimase silente[22]. In aggiunta, è possibile affermare che probabilmente il legislatore, per il tramite dell'art. 9 della legge 194/1978 poco sopra analizzato, abbia inteso tutelare proprio il personale sentire dei sanitari i quali ritengano che l'aborto interrompa un'esistenza già presente.

Il quadro da ultimo delineato dà contezza, in sintesi, di un elemento assai significativo: esimendosi dallo stabilire criteri univoci in materia

21. Si veda *Roe*, 410 U.S. 113
22. Si veda Corte costituzionale, 1975, n. 27 (citata alla nota 6).

di inizio vita, il diritto consente la comparsa di un ambiente pluralista nel quale il singolo abbia la possibilità di comportarsi nel rispetto della propria interiorità.

Quanto appena rilevato trova riscontro nella sentenza del T.A.R. Lazio del 12 ottobre 2001, n. 8465.

La vicenda trasse origine dall'immissione in commercio del medicinale Norlevo (più comunemente conosciuto come "pillola del giorno dopo"), autorizzata con decreto dal Ministero della Sanità[23]. Le associazioni Movimento per la Vita Italiano e Forum delle Associazioni Familiari impugnarono il provvedimento sostenendo che gli effetti terapeutici del prodotto, impedendo lo sviluppo del concepito, contrastassero con il diritto costituzionalmente garantito all'esistenza della vita umana fin dalla fecondazione, che suddetto effetto non fosse coerente con le cautele stabilita dalla legge n. 194/1978 e che le informazioni di presentazione del prodotto avessero carattere ingannevole, omettendo di indicare che esso agisce dopo la fertilizzazione.

Il T.A.R. respinse la doglianza dei ricorrenti relativa alla dubbia legittimità costituzionale del decreto in quanto «le norme di rango costituzionale non recano una nozione certa circa il momento iniziale della vita umana e l'estensione dell'ambito di tutela nel corso del suo sviluppo»[24]. Proseguiva poi sottolineando come il tema fosse fonte di dibattito in ambito scientifico, biomedico e religioso e non avesse trovato soluzione in una regolamentazione dedicata. Pertanto, data l'assenza di puntuali disposizioni di diritto positivo, è assente un immediato parametro di raffronto in base al quale possa dedursi, avverso il decreto impugnato, il vizio di violazione di legge.

In secondo luogo, il Tribunale evidenziava che nemmeno la legge 194/1978 «enuncia una puntuale nozione clinica dell'inizio della "gravidanza", e cioè se tale momento coincida con la fecondazione dell'ovulo, ovvero con il suo annidamento nell'utero materno, evento che si verifica in un lasso temporale di circa sei giorni dalla fecondazione»[25].

La sentenza però accolse l'impugnazione relativa al carattere ingannevole del foglio illustrativo del prodotto, il quale non specificava

23. Si veda Decreto AIC/UAC, 26 settembre 2000, n. 510
24. Si veda T.A.R. Lazio, 12 ottobre 2001, n. 8465.
25. Si veda *ibid.*

che il farmaco, potendo anche impedire l'impianto (oltre che bloccare l'ovulazione), era idoneo a intervenire su un ovulo nel quale poteva dirsi iniziato un processo di sviluppo. Tale indicazione, secondo il T.A.R. «si rende necessaria proprio in presenza di differenziati orientamenti etici e religiosi circa il momento iniziale della vita umana, così da rendere edotto in maniera chiara e non equivoca che il farmaco agisce sull'ovulo già fecondato impedendo le successive fasi del processo biologico di procreazione»[26]. Da ciò si potrebbe evincere che il momento di inizio della vita, in ragione del pluralismo evidenziato anche nella pronuncia, possa dipendere da una libera scelta della donna: sarà lei a scegliere se assumere il Norlevo, e quindi intervenire su un gamete fecondato (per alcuni già da considerarsi "vita"). Se invece la sua sensibilità la porterà a ritenere che già in quel momento la vita sia presente, si asterrà dall'assumere la pillola.

L'impiego del Norlevo ha occasionato numerosi dibattiti in merito alla sua qualificazione di abortivo o semplice metodo di contraccezione. Gran parte delle questioni aperte è venuta meno quando, il 4 febbraio 2014, è stata pubblicata in Gazzetta Ufficiale la revisione dell'AIFA relativamente alla scheda tecnica della pillola del giorno dopo a base di Norlevo[27]. È stata espunta la precedente dicitura «il farmaco potrebbe anche impedire l'impianto» e si è scritto «inibisce o ritarda l'ovulazione». Pertanto, da quel momento, il Norlevo è da considerarsi un puro contraccettivo.

4. *La situazione attuale e le relative criticità*

Nel prosieguo appare pertinente, per completezza, offrire una breve analisi sulla situazione odierna. Gli oppositori dell'aborto basano le proprie tesi su principi quali il diritto alla vita del nascituro, che dovrebbe essere tutelato sin dal principio. Tuttavia, come si è ampiamente avuto modo di riscontrare, la definizione di inizio della vita soffre di una significativa mancanza di determinabilità. Proprio

26. Si veda *ibid.*

27. Si veda Gazzetta Ufficiale, *Serie generale, n. 28, Suppl. ordinario n. 10* (04 febbraio 2014), all'indirizzo https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2014-02-04&atto.codiceRedazionale=14A00534&elenco30giorni=false (ultimo accesso: 22 marzo 2022).

su questa evidenza si fonda la contro argomentazione di coloro che difendono il *right to abortion*: in assenza di soluzioni univoche è bene lasciare che sia la donna ad autodeterminarsi.

L'opportunità di sollevare obiezione di coscienza, nella prospettiva della legge 194/1978, avrebbe potuto rappresentare un metodo efficace per bilanciare ragionevolmente gli interessi in gioco. Cionondimeno, è necessario evidenziare che lo scopo sembra essere stato raggiunto solo in parte: con l'avanzare del tempo, l'esercizio dell'obiezione da parte di un elevato numero di sanitari ha iniziato a costituire un serio ostacolo alla possibilità dell'interessata di accedere alla procedura di interruzione in modo sicuro e non eccessivamente oneroso.

La relazione del Ministro della Salute sull'attuazione della legge 194/78, che ha pubblicato i dati definitivi del 2019 e quelli preliminari del 2020, riferisce:

> Nel 2019, la quota di obiezione di coscienza risulta elevata, specialmente tra i ginecologi (67% rispetto al 69% dell'anno precedente). Tra gli anestesisti la percentuale di obiettori è più bassa, con un valore nazionale pari a 43,5%, in lieve diminuzione rispetto all'anno precedente (46,3%). Ancora inferiore, rispetto ai medici e agli anestesisti, è la proporzione di personale non medico che ha presentato obiezione nel 2019: 37,6%[28].

Nonostante i numeri siano in leggera diminuzione, il valore assoluto di coloro che sollevano obiezione rimane significativamente elevato, rendendo così assai gravoso l'accesso alla procedura abortiva.

L'Associazione Luca Coscioni ha riportato i risultati di un'indagine compiuta a cura di Chiara Lalli, docente di bioetica e storia della medicina all'università *La Sapienza* di Roma e Sonia Montegiove, analista informatica, programmatrice e formatrice. L'inchiesta giornalistica era finalizzata ad appurare, mediante uno studio sui dati emersi dal documento del Ministero, se la legge n. 194/78 fosse effettivamente applicata. Il dato a spiccare maggiormente è che in Italia «ci sono almeno

28. Si veda Ministero della Salute, *Relazione del Ministro della Salute sulla attuazione della legge contenente norme per la tutela sociale della maternità e per l'interruzione volontaria di gravidanza (legge 194/78): dati definitivi 2019 e dati preliminari 2020*, all'indirizzo https://www.salute.gov.it/imgs/C_17_pubblicazioni_3103_allegato.pdf (ultimo accesso: 25 febbraio 2022).

15 ospedali in cui il 100% dei ginecologi è obiettore di coscienza»[29]. Ci si potrebbe spingere ad affermare che, soprattutto in alcune zone del Paese, un istituto nato come eccezione per garantire il rispetto della visione etica dei soggetti, abbia sovvertito la regola.

Giova sicuramente ricordare che il legislatore, probabilmente prevedendo tali possibili risvolti, ha stabilito che «l'obiezione di coscienza non può essere invocata dal personale sanitario ed esercente le attività ausiliarie quando, data la particolarità delle circostanze, il loro personale intervento è indispensabile per salvare la vita della donna in imminente pericolo»[30]. Se ne deduce pertanto che il diritto alla vita della donna prevale rispetto a quello del personale sanitario a vedere rispettata la propria sensibilità etica e religiosa.

In secondo luogo è opportuno sottolineare come, all'art. 9, comma 4 della stessa legge n. 194 ora citata, si disponga che «gli enti ospedalieri e le case di cura autorizzate sono tenuti in ogni caso ad assicurare l'espletamento delle procedure previste dall'articolo 7 e l'effettuazione degli interventi di interruzione della gravidanza»[31]. Nel prosieguo, si affida alla regione il controllo sull'attuazione, che deve essere garantita anche attraverso la mobilità del personale.

Tale previsione si giustifica in ragione di quanto efficacemente posto in luce da parte della dottrina:

> L'istituto in questione [...] se per un verso opportunamente riconosce come meritevoli di tutela le motivazioni di ordine ideologico, religioso ed etico, che possono essere opposte da chi si trova nella condizione di entrare in conflitto con i propri convincimenti nell'espletamento della propria attività lavorativa, per altro verso attribuisce ai sanitari obiettori non solo il potere di determinare – in qualche misura – il contenuto della propria prestazione lavorativa (espungendo una serie di attività) anche nell'ambito di un rapporto di lavoro subordinato, ma anche di incidere sull'intera organizzazione della struttura

29. Si veda *In almeno quindici ospedali italiani c'è il 100% di ginecologi obiettori di coscienza,* all'indirizzo https://www.associazionelucacoscioni.it/notizie/comunicati/in-almeno-quindici-ospedali-italiani-ce-il-100-di-ginecologi-obiettori-di-coscienza (ultimo accesso: 25 febbraio 2022).

30. Si veda art. 9, co. 5, l. 194/1978.

31. Si veda *Id*., co.4.

> sanitaria (producendo, talvolta, anche un effetto a cascata su altre strutture)[32].

Per l'appunto, una delle maggiori problematiche è costituita dall'impossibilità delle strutture ospedaliere di garantire la prestazione, dato l'elevato numero di obiettori. È pertinente evidenziare che l'incisività di una simile situazione varia a seconda del territorio considerato. Stando agli elementi esaminati, sono 11 le regioni in cui c'è almeno un ospedale con il 100% di obiettori: Abruzzo, Basilicata, Campania, Lombardia, Marche, Piemonte, Puglia, Sicilia, Toscana, Umbria, Veneto[33].

Il composito quadro territoriale conduce inevitabilmente al sorgere di rilevanti disparità di trattamento a danno delle donne che intendano avvalersi dell'interruzione volontaria di gravidanza: la possibilità che la legge n. 194/1978 assicura loro dipende, nel concreto, dalla zona geografica in cui sono inserite. Viene meno, in questo modo, la tutela degli interessi costituzionalmente rilevanti dell'interessata. È quanto ha ribadito anche il Consiglio d'Europa.

> Pregnant women seeking to access abortion services are treated differently depending on the area in which they live; in addition, the differential treatment on this basis may by extension have an adverse impact on women in lower income groups who may be less able to travel to other parts of Italy or abroad in order to access abortion services. [...]
> There is no public health or public policy justification for this difference in treatment. [...]
> The government has not invoked any objective justification for the difference in treatment[34].

32. Si veda Enza Pellecchia, *Aborto farmacologico e disciplina dell'interruzione volontaria della gravidanza*, 1 La Nuova Giurisprudenza Civile Commentata 31 (2010).

33. Si veda *In almeno quindici ospedali italiani c'è il 100% di ginecologi obiettori di coscienza* (citato alla nota 29).

34. Si veda Commitee of Ministers, *Resolution CM/ResChS(2016)3: Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 91/2013* (6 luglio 2016), all'indirizzo https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680687bdc (ultimo accesso 26 febbraio 2022).

Al fine di far fronte alle suddette criticità, alcune regioni hanno provveduto a riservare determinate possibilità occupazionali a personale medico non obiettore.

In tempi meno vicini, la Regione Puglia, tramite deliberazione della Giunta regionale n. 735 del 15 marzo 2010[35], aveva limitato l'accesso ai Consultori ai ginecologi obiettori. Nacque una controversia che approdò dinanzi al T.A.R., il quale stabilì che «una procedura selettiva che escluda aprioristicamente i medici specialisti obiettori dall'accesso ai Consultori appare [...] discriminatoria oltre che irrazionale poiché non giustificata da alcuna plausibile ragione oggettiva»[36]. In particolare, il Tribunale ebbe cura di porre in luce che l'obiezione di coscienza, come si è ricordato in precedenza, esonera il soggetto solo dalle procedure specificamente e necessariamente dirette a determinare l'interruzione della gravidanza, e non dall'assistenza antecedente e conseguente. Pertanto, si afferma, attività di informazione, assistenza psicologica o volte ad accertare le condizioni cliniche della gestante, che sono proprie di un Consultorio, possono essere affidate anche a personale obiettore. Se, al contrario, ciò si impedisse (in mancanza, peraltro, di ragioni oggettive) si violerebbero gli artt. 3, 19 e 21 della Costituzione. Nella fattispecie in analisi inoltre, anche l'art. 4, Cost., relativo al diritto al lavoro, subirebbe una lesione. La sentenza del T.A.R. pugliese si conclude con un passaggio peculiare, che vale la pena di osservare: il Collegio indica un'alternativa procedurale alla Regione, così da poter salvare la legittimità dei futuri concorsi tramite un attento bilanciamento. Si suggerisce la predisposizione di bandi che riservino il 50% dei posti disponibili a medici non obiettori, e la restante metà a medici invece che si avvalgono dell'obiezione.

Nel 2014, il Lazio, nel disporre il riordino dei Consultori aveva adottato alcune prescrizioni tali per cui, secondo alcune organizzazioni antiabortiste, i medici obiettori di coscienza sarebbero stati spinti a non chiedere l'assunzione in un Consultorio familiare pubblico della

35. Si veda Bollettino ufficiale della Regione Puglia, n. 61 (07 aprile 2010), *Deliberazione della Giunta regionale 15 marzo 2010, n. 735*, all'indirizzo https://burp.regione.puglia.it/documents/20135/485643/DELIBERAZIONE+DELLA+GIUNTA+REGIONALE+15+marzo+2010%2C+n.+735+%28id+5042112%29.pdf/21b5e2a-e-75c4-bfd4-bfd0-fcb268e9f941?version=1.0&t=1622725627250 (ultimo accesso: 24 marzo 2022).

36. Si veda T.A.R Puglia, 14 settembre 2010, n. 3477.

Regione, o a dimettersi da esso o a violare il dettato della propria coscienza[37]. Optando per una soluzione in piena antitesi con quella pugliese appena citata, il T.A.R. Lazio aveva rigettato il ricorso proposto dalle associazioni[38] le quali lamentavano, per quanto è utile riportare ai fini del presente contributo, la violazione degli artt. 2, 19 e 21, Cost. e dell'art. 10 della Carta dei diritti fondamentali dell'Unione Europea (cd. Carta di Nizza). Si noti sin d'ora che gli artt. 19 e 21 sono basi costituzionali che anche in questa seconda fattispecie entrano in gioco, in quanto comunemente ritenute dalla giurisprudenza il fondamento dell'istituto dell'obiezione di coscienza. Un elemento che, al contrario, spicca e caratterizza il caso laziale, è il riferimento di parte ricorrente alla prospettiva europea, che il Tribunale mostra di accogliere nella propria argomentazione.

In primo luogo, il T.A.R. rigetta una delle principali doglianze delle associazioni antiabortiste, riportata poco sopra, in quanto esclude che l'obiettore possa sentire turbata la propria coscienza nella misura in cui l'attività che svolga all'interno del Consultorio sia di natura informativa o meramente accertativa delle condizioni mediche della donna. Anche il Collegio di Bari del 2010 aveva prestato attenzione a siffatta circostanza, la quale potrebbe essere riassunta nei termini seguenti: se la prestazione richiesta al sanitario non comporta direttamente la fine del processo di sviluppo del feto, allora qualificarsi o meno come obiettore non dovrebbe avere rilevanza sullo svolgimento della stessa. Pertanto non può comportare l'esclusione dalla struttura: una base comune ai due Tribunali, quindi, ma che conduce a risultanze opposte, in virtù dei differenti assunti posti alla base delle argomentazioni ricorrenti. Nel caso pugliese, nel quale la Regione escludeva a priori chi sollevasse obiezione dalla procedura di gara, tale assunto era servito ai giudici per difendere la posizione dei medici. Viceversa nel caso del Lazio, nel quale l'esclusione non risultava esplicitamente dalle misure adottate, ma era percepita come tale dal personale obiettore, il Collegio ha impiegato la suddetta tesi per respingere il ricorso.

37. Si veda Bollettino ufficiale della Regione Lazio, n. 41, Supplemento n.1 (22 maggio 2014), *Decreto del Commissario ad Acta 12 maggio 2014, n. U00152*, all'indirizzo https://www.regione.lazio.it/sites/default/files/documentazione/DCA-U00152_12-05-2014.pdf (ultimo accesso: 24 marzo 2022).

38. Si veda T.A.R. Lazio, 02 agosto 2016, n. 8990.

Il Tribunale di Roma, infine, recepisce l'istanza dei ricorrenti fondata su una base di tutela europea, concentrando però l'analisi sull'operato del Consiglio d'Europa, più che su quello della Corte di Giustizia dell'Unione Europea (i cui principi stabiliti in materia, tuttavia, afferma di considerare e rispettare). Si sottolineò, pertanto, come il provvedimento della Regione fosse volto a riparare alla violazione della Carta sociale Europea accertata dal Consiglio d'Europa l'anno precedente.

Più di recente, il Comitato europeo dei diritti sociali è tornato ad esprimersi:

> 532. The Committee also notes that although the situation seems to be improving, there are still major disparities at local level. It asks for information in the next report on the measures taken to reduce the remaining disparities at local and regional level and the 114 results obtained, in the light of updated data.
> 533. It considers in the meantime that the situation has not yet been brought entirely into conformity with the Charter with regard to discrimination against women wishing to terminate their pregnancy and the violation of their right to health because of problems accessing abortion services (Article 11§1 and Article E, read in conjunction with Article 11§1 for Complaints Nos. 87/2012 and 91/2013)[39].

5. *In sintesi: i diritti costituzionali che entrano in gioco*

Arrivati a questo punto della trattazione, appare proficuo analizzare più nel dettaglio i valori costituzionalmente protetti che gli interpreti devono tenere in considerazione per giungere al miglior bilanciamento possibile tra i contrastanti interessi in gioco. Ciò appare fondamentale per garantire il pluralismo ideologico tipico di qualsiasi società democratica.

39. Si veda European Committee of Social Rights, *Follow-up to decisions on the merits of collective complaints, Findings 2018* (dicembre 2018), all'indirizzo https://rm.coe.int/findings-2018-on-collective-complaints/168091f0c7 (ultimo accesso 26 febbraio 2022).

In prima battuta, pare appropriato approfondire la situazione del nascituro. Si è avuta occasione, nei paragrafi precedenti, di accennare la questione, in particolare richiamando le antitetiche posizioni di coloro che vorrebbero riconoscere al feto 'soggettività giuridica' e chi, dal lato inverso, propende per considerarlo 'oggetto di tutela'. Centrale, per una trattazione del tema che tenga presente il dato costituzionale, è la sentenza n. 27 resa dal giudice delle leggi nel febbraio 1975. Tale pronuncia pone la tutela del concepito sotto l'ambito di protezione fornito dall'art. 2 della Costituzione. L'eco di tale impostazione concettuale, che attribuisce grande rilievo al diritto alla vita del soggetto non ancora nato, è probabilmente rinvenibile anche nell'art. 1 della legge n. 194 nella parte in cui recita che lo Stato «riconosce il valore sociale della maternità e tutela la vita umana dal suo inizio».

Non ci si può tuttavia esimere dal ribadire ancora una volta come, sul piano fattuale, sia altamente problematico assicurare una forma così intensa di salvaguardia dal momento che il menzionato «inizio» è vittima di un'indeterminatezza che, allo stato attuale delle conoscenze biologiche, non può essere elisa. Nella sentenza 27/1975, la Corte individua un ulteriore fondamento della tutela del concepito nell'art. 31 della Carta costituzionale.

V'è da considerare un ulteriore elemento, che pare confermare l'impossibilità di determinare contorni certi entro i quali articolare la difesa dell'esistenza del feto: si abbia cura di ricordare che nella medesima pronuncia la Consulta concluse il proprio percorso argomentativo, forse inaspettatamente date le premesse, optando per la prevalenza dei diritti della madre. Si volle infatti sottolineare che il nascituro gode sì di tutela, ma in virtù delle caratteristiche che gli sono proprie.

Proseguendo nella disamina, ci si volga ora verso colei che sale sull'altro piatto di questa bilancia, che pare talvolta impossibile da equilibrare: la donna che desidera procedere all'interruzione di gravidanza. Molteplici sono gli interessi costituzionalmente rilevanti dei quali è portatrice. Innanzitutto, come forse sarà intuitivo evincere, è opportuno contemplare, alla stregua di quanto fecero i giudici costituzionali nel 1975, l'art. 32, Cost. È, d'altronde, proprio il diritto alla salute uno dei fondamenti che giustifica l'accesso alla procedura

abortiva anche se sia trascorso il termine di 90 giorni[40], con il quale si è avuto modo di confrontarsi più sopra. L'altra ragione per cui la legge n. 194/1978 consente tale opzione è il diritto alla vita della donna[41]. Ecco quindi che quello stesso diritto alla vita che serve, per un verso, a proteggere il nascituro, torna ad essere centrale nella riflessione, questa volta però spostando l'ago della bilancia in direzione a lui sfavorevole.

È doveroso inoltre, per ottenere una visione organica dei diritti della madre, gettare un'ulteriore occhiata al caso *Roe v. Wade* (vd. *supra*). Ricordando lo sviluppo concettuale che la Corte Suprema degli Stati Uniti abilmente tratteggiò in quella sede, può sembrare agevole rinvenire un altro elemento degno di tutela: il diritto all'autodeterminazione della gestante. Il *right of privacy* infatti, come già accennato, vi corrisponde concettualmente, e non ha nulla a che spartire con la riservatezza (alla quale il linguaggio comune ha associato il concetto di *privacy*).

Non si può poi fare a meno di riprendere le considerazioni svolte dal Comitato europeo dei diritti sociali e poco sopra menzionate. Un'evidenza che si impone prepotentemente agli occhi dell'organismo è che la difficoltà d'accesso all'interruzione volontaria di gravidanza può variare anche in base alla zona geografica d'Italia in cui l'interessata si trovi. Tale situazione, che peraltro è stata sottolineata da più parti[42], ha spinto il Comitato a denunciare una violazione del principio di uguaglianza, che nell'ordinamento italiano è protetto dall'art. 3 della Costituzione.

Infine, è necessario analizzare la posizione dell'obiettore. L'obiezione di coscienza, istituto che si è avuto modo di abbozzare nelle pagine precedenti, nasce come eccezione. Essa è volta, quindi, a consentire di venire meno ad obblighi imposti per legge, così da assicurare che alcune posizioni rientranti nella sfera interiore dell'individuo e fondate su diritti costituzionalmente rilevanti ottengano riconoscimento e tutela. Chiarita la natura di tale strumento, pare altrettanto essenziale illustrare quali articoli della Carta costituzionale siano ad esso connessi. Si richiami, primariamente, la sentenza della Consulta,

40. Si veda art. 6, comma l, lettera b), l. 194/1978.

41. Si veda *Id*., lettera a).

42. Si veda in generale T.A.R Puglia, 2010, n. 3477 (citato alla nota 36); T.A.R. Lazio, 2016, n. 8990 (citato alla nota 38); *In almeno quindici ospedali italiani c'è il 100% di ginecologi obiettori di coscienza* (citato alla nota 29).

n. 196 del 25 maggio 1987. Nella pronuncia sono contemplate varie disposizioni: oltre che l'art. 3 Cost., gli artt. 2, 19 e 21, inerenti nel complesso alla tutela dei propri diritti inviolabili. L'art. 3 può entrare in gioco in casi come quello di cui si occupò la Corte, nei quali una categoria di soggetti che l'art. 9 della legge 194/1978 non equipara agli esercenti la professione sanitaria, lamenta siffatta circostanza. Oppure, come nel caso affrontato dal T.A.R. di Bari[43], la norma viene alla luce quando l'avvalersi o meno dell'obiezione di coscienza si tramuta in un criterio non oggettivo di esclusione da (o inclusione in) una determinata categoria. Per completezza vale la pena di osservare che, nel caso pugliese, in conseguenza del *vulnus* arrecato al diritto di uguaglianza, risulta leso anche l'art. 4 della Costituzione, che tutela il diritto al lavoro.

Particolarmente interessante ai fini della presente esposizione è che, nuovamente, è possibile notare come l'art. 2 Cost. venga ad essere citato, questa volta come strumento di tutela per il terzo dai soggetti di cui ci si sta occupando. Una norma poliedrica dunque, che accomuna e contemporaneamente pone in contrapposizione i protagonisti principali della complessa tematica (quella dell'aborto) che ci si propone di inquadrare.

Fondamentali sono, infine, gli artt. 19 e 21. Sono, con ogni probabilità, i più importanti valori costituzionali sottesi all'esercizio dell'obiezione di coscienza. Ciò si può evincere anche dalla lettura delle sentenze dei Tribunali amministrativi regionali di Puglia e Lazio, più volte citati in questa sede. La libertà di professare la propria fede religiosa e la libertà di manifestazione del pensiero possono essere considerate, anche da un punto di vista storico, come le basi di una società democratica: non possono esservi pluralismo, confronto e autodeterminazione in un contesto che ne neghi i presupposti, imponendo a tutti i consociati un solo modo possibile di intendere i comportamenti umani e leggere la realtà in cui sono inseriti.

A ben vedere, si potrebbe per l'appunto affermare che l'istituto dell'obiezione di coscienza non è altro che il riconoscimento di quanto appena evidenziato: uno spazio in cui l'individuo possa, con il consenso della legge, sviluppare la propria sensibilità secondo direttrici sue proprie, che non sempre sono in pieno accordo con quelle recepite dalla normativa vigente. Se opportunamente gestito, un tale

43. Si veda T.A.R Puglia, 2010, n. 3477 (citato alla nota 36).

strumento potrebbe originare occasioni di confronto tra contrapposte visioni concernenti una stessa questione, e aiutare a sviluppare nel modo migliore la dialettica tra consociati e tra consociati e legislatore.

Quanto sta avvenendo nel periodo attuale è, però, sintomo di un cortocircuito che sta conducendo, sembrerebbe, a un rovesciamento dell'equilibrio che l'obiezione di coscienza avrebbe dovuto rafforzare. Paradossalmente, si potrebbe ipotizzare che l'istituto, nato come eccezione al fine di garantire che ognuno fosse libero di coltivare il proprio sentire in un clima pluralista, stia diventando invece una regola che, a causa della sua sempre più ampia diffusione, finisca per imporre nuovamente una sola possibilità di intendere l'inizio della vita.

6. *Conclusioni*

In conclusione, appare con chiarezza come l'interruzione volontaria di gravidanza offra tuttora numerosi spunti di riflessione. Gli anni trascorsi dall'emanazione della legge 194/1978 non sono stati sufficienti ad esaurire il dibattito in materia, come manifestano i picchi di contenzioso che periodicamente si impongono, talvolta prepotentemente, all'attenzione degli interpreti. L'evoluzione scientifica e le mutevoli sollecitazioni provenienti dalla realtà in cui i soggetti sono chiamati ad inserirsi determinano un costante cambiamento nella sensibilità religiosa, culturale ed etica dell'individuo e della stessa società che promana i nuovi impulsi. Ciò viene recepito, più o meno intensamente, anche dalle Corti e pertanto contribuisce a colmare di significato gli interessi costituzionalmente rilevanti che il tema affrontato sottende. Quanto più le istanze sociali saranno irruente e divergenti tra loro, tanto più il bilanciamento delle posizioni da tutelare risulterà complesso ma, d'altro canto, maggiormente necessario. Proprio tale quadro è quello che oggi gli operatori del diritto (non solo nell'ordinamento italiano) si trovano a dover affrontare, come efficacemente dimostrano il caso del *Texas Heartbeat Act* e le rilevazioni del Comitato europeo dei diritti sociali che si è avuto occasione di affrontare in questa sede.

Inherent vice as all-risk exclusion and its clarification from common law point of view

Hoda Asgarian *

Abstract: There is an assumption among shippers that as soon as their cargo is insured, their insurance policy would cover any loss caused under any occasion, while there are certain occasions in which insurance policy will not provide coverage. Inherent vice is an important instance in which the shipper's claim over the cargo is not eligible. This notion is varied from the perils of the sea. It simply refers to any damage caused to the cargo due to the inherent nature of the goods as opposed to any damages inflicted on the goods by the carrier. In other words, the damage is inflicted by internal causes rather than external ones. Some examples of the aforementioned term can be deterioration due to product instability, rust forming due to metal materials/moisture, and combustion (batteries or other substances). The main reason that makes it impossible to be claimed is that it is most clearly outlined in the contract terms or there is no causation found (no exterior causation). This paper will elaborate on the extended meaning of the inherent vice which is not favored by marine insurance with the help of case law.

Keywords: Inherent vice; perils of the sea; fortuitous; insurance; all risks; proximate cause.

1. *Introduction*

Over a long period of time, insurance was chiefly a side activity to trading, envisaged by merchants to share among themselves the risks of maritime trade. When profit-seeking replaced protection-seeking in the insurance business in the seventeenth century, the role of insurance became more prominent[1]. The extent of marine insurance coverage is portrayed either expressly in the policy itself or implied by virtue of the Marine Insurance Act 1906[2]. Besides, the insured may expand the coverage of insurance by paying an additional premium, unless otherwise stated, if the policy includes the Inchmaree clause, as the clause is known as an additional perils clause[3].

In case of damage to cargo or a vessel, the relationship between the right of the insured to recover for the insured risk on one hand, and

* Hoda Asgarian is a lawyer and general counsel at the AVA Digital Banking company. She has worked at Unilever as a legal consultant and has legal experience over a decade. She holds LL.M of Maritime Law from Lund University-Sweden. She has recently published an article; The Doctrine of Deviation, Its Historical and Legal Roots; Baku State University Law Review, Vol.7, 2021. She is interested in both academic and experimental side of law.

1. See *Book Review: Marine Insurance: Origins and Institutions, 1300–1850*, 28 International Journal of Maritime History 813 (2016).

2. See Howard Bennett, *Reading Marine Insurance Contracts: determining the scope of cover*, 27 Asia Pacific Law Review 239 (2019).

3. See Babazadeh Araz Farhad Oghlu, *Inchmaree clause as an additional perils clause in marine insurance law*, available at https://www.researchgate.net/publication/326697716_Inchmaree_Clause_as_an_Additional_Perils_Clause_in_Marine_Insurance_Law (last visited April 3, 2022).

the right of the insurer to rely upon the defense of inherent vice, on the other hand, is an important issue which needs to be analyzed.

In insurance contracts, commercial common sense has restricted the scope of cover by accepting the risk of losses which is intervened by "external accidental factors"[4]. Regarding this, section 55 (2) (c) of the Marine Insurance Act of 1906 is relevant. It is a UK Act of Parliament that governs not merely English Law but also dominates marine insurance worldwide through its wholesale adoption by other jurisdictions. Section 55 (2) (c) stipulates, *inter alia*, that: "Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter"[5]. In other words, one can say these losses are natural incidents of carriage of goods by sea[6].

Moreover, the act of case law which has ruled out the term "risks" shows a logical commercial assumption keeping natural losses out. Besides, section 55(2) (c), by considering the bargain situation between the insurer and insured, sheds light on the fact that the assumed exclusion of natural losses from cover does not depend on the express wording in the policy[7].

As Lord Summer mentioned in *Gaunt*[8]*,* inherent vice, following section 55 (2) (c), has been excluded from the "all-risks" policy. An "all-risk" policy covers all risks of physical loss or damage to a vessel from an exterior cause unless otherwise excluded. Inherent vice, or wear and tear or nature of the subject matter, is among one of the common exclusions[9]. This is because insurance covers "a casualty that happens

4. Howard Bennett, *Fortuity in the Law of Marine Insurance,* 3 Lloyd'S Maritime & Commercial Law Quarterly 315, 327 (2007).

5. David M. Sassoon, *Damage Resulting from Natural Decay Under Insurance, Carriage and Sale of Goods Contracts*, 28 The Modern Law Review 180, 181 (1965).

6. See Bennett, *Fortuity in the Law of Marine Insurance* at 327 (cited in note 4).

7. See *id.*

8. *British & Foreign Marine Insurance Co Ltd v. Gaunt*, 6 Ll.L.Rep. 188 (House of Lords 1921).

9. See Marilyn Raia, *Marine-Insurance-101* (Bullivant Houser, May 11, 2010), available at https://www.bullivant.com/Marine-Insurance-101/#:~:text=An%20%E2%80%9Callrisk%E2%80%9D%20policy%20covers%20all%20risks%20of%20physical,only%20from%20the%20perils%20named%20in%20the%20policy (last visited April 3, 2022).

to the subject matter which is not from the natural behavior of that subject matter in the circumstances under which it is carried".

Respectively, inherent vice differentiates between damage caused by any external occurrence and damage arising exclusively from the nature of the good itself. Damage from inherent vice can be as unexpected as damage caused by perils of the sea[10].

Arnold shows a tendency toward the limited concept of inherent vice, by stating that "the underwriter is not liable for the losses arising solely from a source of decay or corruption inherent in the subject insured, or as the phrase is, from its proper vice as when food becomes rotten, or flour heats or wine turns sour, not from external damage, but entirely from internal decomposition"[11].

Knowing the specific scope of inherent vice can be challenging. Generally, marine policy regulations are in favor of the insurer regarding the unknown unfitness of cargo in a specific voyage. This article explores the extended meaning of inherent vice in the carriage by sea which is not completely accepted by marine insurance. To achieve this goal, case law will be considered, as it has contributed to defining the actual standing point of inherent vice.

The article is structured as follows: first, the concept of inherent vice will be examined in paragraph two, then paragraph three will analyze inherent vice and inevitable losses, in this paragraph the natural behavior of the subject matter will be discussed as well. Furthermore, the concept of "perils of the sea" will be discussed comprehensively in paragraph four. The article will end with a conclusion regarding the examinations carried on throughout the whole paper.

2. *Concept of inherent vice*

The term inherent vice or nature of the subject matter insured, which is embedded in subsection 55 (2) (c) of the Marine Insurance Act, is aimed chiefly at the sort of "vice proper" described in *Blower v.*

10. See *T.M. Noten B.V. v. Harding*, 2 Lloyd's Rep. 283 (Court of Appeal 1990).

11. Jonathan Gilman, et alt., *Arnold's Law of Marine Insurance and Average* at para. 782 (Sweet & Maxwell, 17th ed. 2008).

Great Western[12]. It states: "that sort of vice which by its internal development tends to the destruction or the injury of the animal, or a thing to be carried, and which is likely to lead to such a result".

In *Soya v White*[13], the absence of a definition for inherent vice resulted in the prominent explanation by Lord Diplock stating "the risk of deterioration of goods shipped as the result of their natural behavior in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty"[14]. This notion addresses deficiencies in the subject matter, as well as broadens the notion of the natural function of the subject matter unless an unplanned external incident happens[15].

A better definition of inherent vice is given by Arnold as follows: "inherent vice means that the insurer is not liable for the loss or deterioration which arises solely from a principal of decay or corruption in the subject insured [...] not from external damage, but entirely from internal decomposition." It means "inability of cargo to withstand the ordinary incidents of the voyage" is not "always" because of inherent vice[16].

Inherent vice does not mean damage that must inevitably happen, instead, it regards the difference between damage caused by external incident and damage resulting exclusively from the nature of the cargo[17].

There is little difference in practice between the inherent vice and the nature of the subject matter insured, which sometimes makes it hard to use them interchangeably. The latter pictures the behavior of the subject matter being what it is in the usual and expected course of transit. The courts have considered the following as cases of inherent vice in cargo: fruit decomposing as a natural process; timber shipped green and wet which undertook damage because the quality

12. *Blower v. Great Western Railway Company,* 3 S.C.R. 159 (Supreme Court of Canada 1879).

13. *Soya GmbH Mainz Kommanditgesellschaft v. White*, 1 Lloyd's Rep 122 (House of Lords 1983).

14. See *id.* at 125.

15. See Bennett, *Fortuity in the Law of Marine Insurance* at 327 (cited in note 4).

16. *Global Process System Inc and Another v Syarikat Takaful Malaysia Berhad (The "Cendor Mopu")*, 2 Lloyd's Rep. 72 (Queen's Bench Division (Commercial Court) 2009).

17. See *T.M. Noten B.V.*, 2 Lloyd's Rep. 782 (cited in note 10).

and conditions prohibited its sound delivery; leather gloves in cartons sorted in containers and shipped during the monsoon season from Calcutta to Rotterdam damaged by moisture, originally from the gloves condensing on the inside of the top of the container and falling on the cargo therein[18].

2.1. *Concept of inherent vice: test*

Moore-Bick J[19] stated that if what the sea experienced is more severe than could be rationally expected, it is likely that the loss was caused by the perils of the sea. On the contrary, if it was no more than that, the real cause of the loss is the inherent incompetence of the goods to undergo the ordinary incidents of the voyage. Hence, if the cargo is not fit to endure a more severe event than normal ones, the loss must be due to the inability of the transformer to withstand the ordinary incident of that particular voyage[20]. Conversely, Ms. Blanchard – attorney for the Appellant in *N. E. Neter* – indicated that if the condition is not more severe than normal while a loss occurred, it is not necessarily a base to conclude that it is caused by inherent vice[21].

Arnold states that the inability to hold out the ordinary incidents of a voyage is evidently an appropriate test of inherent vice[22]. Mr. Justice Blair clarified the above-mentioned definition in the *Mayban* case, by adding the word 'inherent' before the phrase 'inability to hold out' and made it more sensible[23].

2.2. *Concept of inherent vice: fortuity*

In general terms, due to the nature of the goods being carried, the motion of waves could cause crackings in the cargo. Conversely, in

18. See Donald O'May, *O'May on Marine Insurance* at 197 (Sweet & Maxwell 1st ed. 1993).

19. See *Mayban General Insurance Bhd v Alstom Power Plans Ltd*, Lloyd's Rep IR 18 (Queen's Bench Division Commercial Court 2005).

20. See *id.*

21. See *N. E. Neter & Co., Ltd v Licenses & General Insurance Co., Ltd*, 77 LI L Rep 202 (King's Bench Division 1943).

22. See *T.M. Noten B.V.*, 2 Lloyd's Rep. 22-26 (cited in note 10).

23. See *Global Process System Inc and Another*, 2 Lloyd's Rep. (cited in note 16).

case the motion is adverse in a way it causes the breakage of the legs is called fortuity against the cargo insured[24].

According to section 55 (2) (c), "inherent vice will afford a defense if the sole cause of the loss is the internal decomposition or deterioration of the cargo insured unless the policy otherwise provides"[25]. Nevertheless, if the loss is the result of the inability of the cargo to withstand the ordinary incidents of the voyage and some fortuitous but not uncommon external occurrence, the inherent vice likely represents the overriding cause. Nonetheless, in many cases, the strength of both causes is roughly equal. Therefore, if the external cause is an insured peril and there is no exclusion of inherent vice, the insured is eligible to recover. Instead, if there is an exclusion of inherent vice, the claim will fail[26].

Therefore, in this regard when there is no exclusion and all-risk phrase is brought in insurance, it could be defined as a promise to pay upon the fortuitous and extraneous event of loss or damage to a particular thing or person from any cause whatsoever, except when occasioned by the intentional or fraudulent acts of the insured[27].

Thus, the term "all risks" does not contain inherent vice and ordinary deterioration. It covers a risk not a certainty. Not only is it not natural behavior of the subject matter, but also it is not a loss that was caused by an insured's act of exposing the cargo to get damaged. Akin to what was stated above, Viscount finally affirmed that "there must be something like an accident that brings the policy into play"[28].

"The precise scope of all risks policy depends on the policy wording". When there is no differing target, four factors within the *Gaunt* case were applied for further guidance[29]. One of them is fortuity, meaning that the loss should not be caused by the assured's voluntary

24. See *id.* at 252.

25. *Soya GmbH Mainz Kommanditgesellschaft*, 1 Lloyd's Rep (cited in note 13).

26. See *Global Process System Inc and Another* at 253 (cited in note 16).

27. Andrew C. Hecker, Jr. and M. Jane Goode, *Wear and Tear, Inherent Vice, Deterioration, Etc.: The Multi-Faceted All-Risk Exclusions*, 21 Tort & Insurance Law Journal 634 (1986).

28. *Global Process System Inc and Another* at 251-254 (cited in note 16).

29. Bennett also stated the scope of voluntary conduct which can be seen in the law of unseaworthiness. It is stated in Marine Insurance Act (MIA), c 41 UK (1906), sections 39-40, but in the cargo policy there is no warranty of seaworthiness and no analogous part in the Act about the cargo worthiness.

conduct, and the other is that the loss should not be a certainty. Besides, it should be regarded as external to the insured property.

Based on the above, it can be said that in *Gaunt*, the concept of inherent vice is discussed as the mere cause of the loss or damage without the intervention of any external events or the cause resulting from a specific peril[30]. Willful wrongdoing, whether it is on purpose or based on recklessness, will stop the claim. In this concept, if the insured knew the spectral calculation and still gave the rig to sail, it can be regarded as the reckless running of the risk[31].

Fortuity echoes two points. The first point being that "insurance policies are not designed to finance routine maintenance; some natural wear and tear to a vessel is a natural product of a vessel's normal existence. Perils of the sea do not include the silent, natural, gradual action of the elements upon the vessel, which is just another way of describing ordinary wear and tear"[32]. The second one is brought in the *Xantho*[33] case by Lord Herschel who famously defines "the purpose of the policy is to secure an indemnity against accidents which may happen, not against an event which must happen".

It is almost impossible to foresee the usual act of some elements during a specific voyage in any specific vessel. Though, insurers do not regard such loss as fortuitous[34].

3. *Scope of inherent vice*

One might limit inherent vice to loss or damage that occurred solely because of internal characteristics of the insured adventure. It can also be extended to a loss or damage as a result of many internal characteristics of the subject matter and risks of the insured voyage.

30. See Ayça Uçar, *Perils of the Seas and Inherent Vice in Marine Insurance Law* (Routledge 1st ed. 2020).

31. See *Global Process System Inc and Another* at 251-254 (cited in note 16).

32. *J. J. Lloyd Instruments Ltd. v. Northern Star Insurance Co. Ltd. (The "Miss Jay Jay")*, 1 Lloyd's Rep. 264, 271 (Queen's Bench Division 1985).

33. *Thomas Wilson, Sons & Co v Owners of the cargo per the Xantho (The "Xantho")*, 12 App. Cas. 503, 514 (House of Lords 1887).

34. *Global Process System Inc and Another* (cited in note 16).

In the former situation, the same rule is applied in cooperation with inherent vice and ordinary wear and tear. In other words, it could be said that it may not be defined that breakage or deterioration will occur in an ordinary course of transit, but the innate nature of an insured subject matter may usually cause a loss or damage which is unavoidable[35]. In the latter situation, inherent vice and inherent frailty must be regarded independently. For instance, if the voyage of a cargo of eggs takes longer than usual, many of them would be in danger of getting rotted, which is the exact meaning of inherent vice regarding the nature of the eggs. Many are also prone to get broken which is not regarded as an inherent vice, hence the loss in excess of ordinary breakage will be covered (contrary to one regarded as inherent vice) provided that operation of an insured peril can be proved[36].

3.1. *Scope of inherent vice: action of wind and waves*

In order to get covered by the marine insurance policy, the accident or casualties should be fortuitous. Perils of the sea are not regarded as ordinary incidents during the course of a journey and, hence, they are covered by the marine insurance policy. The action of wind and waves is not usually regarded as perils of the sea but in case they are stronger than normal, they render the insurance policy into full coverage of loss. This depends on various issues such as the weather, the course of the voyage, its type, and also the severity of the incident.

Based on section 55(1) of the 1906 Act: "*Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against*". It does not matter whether the current was to be expected since in the schedule to the 1906 Act the adjective "*ordinary*" qualifies "*action*" and not "*winds and waves*", the action of wind and waves can be a "peril of the seas" whether or not the conditions could rationally have been predicted and foreseen[37].

35. Bennett, *Fortuity in the Law of Marine Insurance* at 328 (cited in note 4).

36. See *T.M. Noten B.V.*, at para. 22-26 (cited in note 10).

37. See Toby Stephens and Alex Kem, *Marine Insurance Court Updates High Court, Court of Appeal and Supreme Court Cases July 2013 to March 2014 Update 4*, at 14, available at https://docplayer.

Regarding the type of voyage, Mustill J.[38] stated that the routine action of wind and waves are aimed to show that the type of voyage is important. As the case in point, the normal action of waves in the Mediterranean will be different from the normal action of waves around the Cape of Good Hope. Hence, the casualties done as a result of waves might be treated differently by the insurance policies. The topmost aim of the definition is to exclude the ordinary wear and tear that can be expected to happen as a result of that ordinary action[39]. In other words, distinguishing between the ones which may happen from those that must happen, where the latter is out of the scope of marine insurance.

For example, Tucker J. in *N E Neter*[40] identified that stowing in the rainy weather, which is something beyond the wear and tear of the voyage, was fortuitous.

3.2. *Scope of inherent vice: the burden of proof*

As a basic rule, when a vessel confronts an accident over the course of voyage, the burden of proof lies on the insurers to present inherent vice as the proximate cause.

In *Mayban*[41], regarding the burden of proof, Moore-Bick expressed that the loss should be recovered under the policy insured[42]. "The insured only needs to prove the loss but accident and not the exact nature of it"[43]. Lord Sterndale M.R.[44] declared "I think that where the evidence shows damage quite exceptional and such as has never in a long experience been known to arise under normal condition of such voyage, there is evidence of a casualty or something accidental, and of a danger or contingency which might or might not arise, although the particular nature of the casualty was not ascertained". For instance,

net/7741204-Marine-insurance-case-updates-high-court-court-of-appeal-and-supreme-court-cases-july-2013-to-march-2014-update-4-toby-stephens-and-alex-kemp.html (last visited April 3, 2022).

38. See *J. J. Lloyd Instruments Ltd.* at 271 (cited in note 32).
39. See *id.*, at 262.
40. *N. E. Neter & Co., Ltd*, 77 LI L Rep (cited in note 21).
41. *Mayban General Insurance Bhd*, Lloyd's Rep IR 18 (cited in note 19).
42. *British & Foreign Marine Insurance Co Ltd*, 6 Ll.L.Rep. (cited in note 8).
43. See *id.*
44. See *id.*

when the same cigarettes have been shipped in a similar type of packing to the same destination at the same time of the year in which there was no harm occurred, it would be ample evidence to show that when the cargo was damaged during the transit, with the aforementioned condition, there must have been a casualty or something accidental[45]. Regardless of this, there must be evidence that establishes the comparability of the different shipments relied on.

In order to better clarify the burden of proof, it is worth mentioning what Lord Sumner elaborated in the *Gaunt* case to note how the 'quasi-universality' of the description affects the onus of proof in one way: "The claimant insured against and averring a loss by fire must prove loss by fire, which involves proving that it is not by something else. When he averses loss by some risk coming within 'all-risks', as used in this policy, he only needs to provide evidence reasonably showing that the loss was due to a casualty, not to certainty or to inherent vice or wear and tear. That is easily done. I do not think he has to go further and pick out one of the multitude of risks covered, to show exactly how his loss was caused. If he did so, he would not bring it anymore within the policy"[46].

There is another point of view offered by the Supreme Court held in *Volcafe Ltd v Compania Sud Americana de Vapores SA ("CSAV")*[47] which is different from the above with different reasoning and base for the judgment. In the High Court, the judge argued the case based on the doctrine of *res ipsa loquitur* (i.e., "the thing speaks for itself"). Under this doctrine, negligence is presumed if the actor had exclusive control of what caused the injury, even in the absence of evidence of the actor's negligence and held that the shipowner should disprove its negligence. The Court of Appeal set aside the decision declaring that as the shipowner claims for inherent vice the burden of proof shifts to

45. See *E.D. Sassoon & Co. Ltd. v Yorkshire Insurance Co.*, 14 LIL Rep. 129, 167 (King's Bench Division 1923).

46. *Thirty Years of Inherent Vice-From Soya v White to the Cendor MOPU and beyond* (Law Explorer, October 5, 2015), available at https://lawexplores.com/thirty-years-of-inherent-vice-from-soya-v-white-to-the-cendor-mopu-and-beyond/ (last visited April 3, 2022).

47. EWCA Civ 1103 (2016). See also Theodora Nikaki, *Carriage of Goods, Inherent Vice: Who proves what and how*? (International Maritime and Commercial Law, November 23, 2016), available at https://iistl.blog/2016/11/23/inherent-vice-who-proves-what-and-how/ (last visited April 3, 2022).

the cargo owner and who owns the assets must prove under Article IV Rule 2(m) and 2(q) of the Hague Rules. The Hague Rules of 1924 (formally the "International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature") is an international convention to impose minimum standards upon commercial carriers of goods by sea. It represented the first attempt by the international community to find a workable and uniform way to address the problem of ship owners regularly excluding themselves from all liability for loss or damage to cargo. The objective of the Hague Rules was to establish a minimum mandatory liability for carriers.

This was overturned by the Supreme Court referring to the principles of bailment at common law which in its opinion "since the Hague Rules did not deal with the mode of proving a breach and questions of evidence, these will be governed under the law of evidence and the rules of procedure in the appropriate forum", which is the English Court in this case. Hence, the Supreme Court clarified the vague question of the burden of proof and held that the carrier shall bear the legal burden to disprove that the loss or damage sustained was caused by its breach of Article III Rule 2 of the Hague Rules or to prove that the defense under Article IV Rule 2 of the Hague Rules applies[48].

4. *Inherent vice and inevitable loss. The effect of moisture*

In the case *Noten v Harding*[49] which supports *Arnold's* constricted view of inherent vice, gloves were wrapped in Kraft paper and placed in doubly walled corrugated cardboard cartons each containing 120 pairs of gloves. The cartons were wrapped up with tape and secured by plastic bands. At the dockside, they were placed into 20 ft. closed-top box containers. In the policy, the cargo was insured under "all risks" ICC (A) which excluded the loss caused by inherent vice or nature of the subject matter insured. After the voyage, the gloves were found to be wet, stained, moldy, and discolored. It was common ground that

48. *Who shall bear the burden of proof in cargo damage claims?* (ONC Lawyers, January 31, 2019), available at https://www.onc.hk/en_US/publication/who-shall-bear-the-burden-of-proof-in-cargo-damage-claims, (last visited April 3 2022).

49. *T.M. Noten B.V.* (cited in note 10).

the damage was the result of moisture condensing in the inside of the top of the container and falling on the gloves packed inside the container[50]. This echoes the importance of load management being an extensive subject and first and foremost involving the interface between the ship and the port, meaning that if one fails to fulfill its requirements the other is affected too[51]. Hence besides the advantages that the carriage of goods in sealed containers has, there are some drawbacks such as specific environmental conditions that can arise inside such a container[52].

Justice Philips of the English Queen's Bench Division expressed that the insurers are liable under the warehouse-to-warehouse clause[53] for the container which formed part of that transit. A warehouse-to-warehouse clause is a provision in an insurance policy that provides for coverage of cargo in transit from one warehouse to another. It usually covers cargo from the moment it leaves the origin warehouse until the moment it arrives at the destination warehouse. Separate coverage is necessary to ensure goods before and after the transit process.

In this case, the damage occurred as the result of the water from an external source onto those goods. However, the quality of the goods contributed to the loss as well because they had absorbed moisture before it was positioned in the container. Justice Philips disagreed that the natural behavior of the goods was the cause and regarded this case as the one "where the proximate cause of the damage to the goods has been external to the goods, even if a characteristic of the goods has helped to create that external cause"[54].

---

50. See *id.* at 290.

51. See Alan E. Branch, *Elements of Port Operation and Management* at 56 (Chapman and Hall, 2nd ed. 1986).

52. See *The Loss of Goods Due to Inherent Vice - T.M. Noten B.V. v. Harding* (i-law.com, 1991), available at https://www.i-law.com/ilaw/doc/view.htm?id=367522 (last visited April 6, 2022).

53. See Daniel Liberto, *Warehouse-to-Warehouse Clause 2021* (Investopedia, July 08, 2021), available at https://www.investopedia.com/terms/w/warehouse-to-warehouse-clause.asp (last visited April 5, 2022).

54. J. Kenrick Sproule, *Inherent Vice in Marine Insurance Law: The Case Of the "Bengal Enterprise" T.M. Noten B.V. V. Paul Charles Harding* (FAGUY & CO.), available at https://sflawblog12.wordpress.com/2012/01/01/inherent-vice-in-marine-insurance-law-the-case-of-the-bengal-enterprise-t-m-noten-b-v-v-paul-charles-harding/ (last visited April 4, 2022).

The Court of Appeal stated that "the goods deteriorated as a result of their own natural behavior in the ordinary course of the contemplated voyage, without the intervention of any fortuitous external accident or casualty. The damage was caused because the goods were shipped wet"[55]. It means that the excessive moisture which emanated from the gloves while getting shipped under an expected and typical condition of the voyage is the real and leading cause of the loss. Although the insured has the right to claim that the damage to the goods was caused by a combination of other elements, there was no evidence before the court to establish the conditions in which they were shipped. Therefore, damage might be the result of inherent vice without being unavoidable and "there was nothing in the facts to suggest any untoward event or an unusual event of any kind"[56].

4.1. *Inherent vice and inevitable loss. The effect of moisture: the natural behavior of subject matter*

Relating to this issue, no evidence could be found regarding the issue that the moisture came from the air inside the container rather than the gloves when they were stuffed. One part of Lord Bingham's argument was based on the opinion of an expert in moisture migration within a cargo. As the temperature of airdrops, it becomes less able to contain moisture which causes dew point. The greater the moisture contents of the air, the higher the dew point. The expert explained with his technical knowledge that leather is hydroscopic[57], and in the humid atmosphere of Calcutta, absorbed moisture as the cardboard did. Gloves kept absorbing water until an equilibrium state occurred between the gloves and the atmosphere. Once they had been stuffed in the container, they rapidly equilibrated with the atmosphere within the container, where it absorbed or disclosed a little moisture. It is noteworthy that in that case it was accepted on behalf of the insured that if the damage claimed had been targeted by excessive moisture in

55. See *Id.*

56. *Who shall bear the burden of proof in cargo damage claims?,* ONC Lawyers, 2019 (cited in note 48).

57. See *Id.*

the gloves, but without the intervening process of condensation on the roof of the containers, the position would have been different[58].

4.2. *Inherent vice and inevitable loss. The effect of moisture: discussion*

The insured claimed that the investigation which was made was not trustworthy because there had been numerous shipments of gloves before, during which no such loss occurred. There were some elements that made the condition and had to be compared, and which would normally affect the result, such as the process under which they were manufactured in Calcutta, the situation in Calcutta, and also the course of transit where it was involved. It was held by the court of appeal "that the loss was fortuitous in the sense of not factually inevitable was no answer to an inherent vice defense. The fortuity required to rebut such a defense related to the events of the transit"[59].

As Bingham LJ said, the gloves were damaged because they were shipped wet, regardless of the fact that the moisture penetrated around the container before doing the damage that was complained of[60].

Another similar case in this regard is *C.T. Bowring v. Amsterdam London Insurance* in which a cargo of ground nuts imported from China to Rotterdam and Hamburg was damaged by heating and "sweat" from the ship's holds. Such cargo is regarded as hydroscopic[61]. The judge declared that: "it is impossible to trace the source where the moisture comes from in order to trace the origin of the water which came to the goods. It may be from the moisture in the air within the container or through the ventilator. Then, the water comes from the universe to the goods ignoring the source"[62]. It is inferred that the judge presumed that as long as the goods themselves contain ample

58. See *Global Process Systems Inc. and another v. Syarikat Takaful Malaysia Berhad*, 1 UKSC 5, 7 (The Supreme Court 2011).

59. Bennett, *Fortuity in the Law of Marine Insurance* at 344 (cited in note 4).

60. See *Who shall bear the burden of proof in cargo damage claims?,* ONC Lawyers, 2019 (cited in note 48).

61. See Rajiv Ranjan, *My Attempt to Understand Condensation Losses under Marine Policies* (LinkedIn, November 14, 2019), available at https://www.linkedin.com/pulse/my-attempt-understand-condensation-losses-under-marine-rajiv-ranjan/ (last visited April 5, 2022).

62. 36 LI.L. Rep. 309 (King's Bench Division 1930).

moisture, the damage shall be attributed to its inherent vice instead of the external elements which cannot be measured or calculated[63]. On the contrary, in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* (henceforth referred to as the *Layland shipping)*[64,] it was declared that "a broad common sense commercial view should be taken as to the real or dominant cause of the damage"[65]. In his explanation, the term 'proximate cause' should be construed to mean 'predominant' or 'efficient cause'[66]. In *Noten v Harding*, the gloves were damaged because of their natural behavior in emanating moisture. Hence, there was no fortuity, chance, or casualty because the process of convection, condensation, and wetting was a natural and ordinary chain of events, each of which followed naturally and independently from the other. As *Bowring's* case had different clauses and different facts, the view given by the judge, in this case, is not acceptable in Bingham's opinion because he stated that even if the moisture came from the damaged cargo, it was fortuitous whether it fell on the insured cargo or other cargo[67].

Accordingly, on one hand, there is no common sense in the business if we do not know the process in which the water comes from the external origin. On the other hand, the common sense of business says that the gloves were the only and the most tangible source of the water[68].

Although the concept of inherent vice indicates some defect in the subject matter insured, the gloves were not defective in any ordinary sense, the s 55 (2) (c) must be read as the whole phrase "inherent vice or nature of the subject matter insured".

---

63. See Meixian Song, *Rules of Causation under Marine Insurance Law from the Perspective of Marine Risks and Losses* at 119 (University of Southampton, thesis for the degree of Doctor of Philosophy, 2012).

64. A.C. 350, 363-369 (King's Bench Division 1918).

65. Who shall bear the burden of proof in cargo damage claims?, ONC Lawyers, 2019 (cited in note 48).

66. *The cause of loss* (Law Explorer, October 16, 2015), available at https://lawexplores.com/the-cause-of-loss//, (Last visited April 5, 2022).

67. Unreported judgment.

68. *Who shall bear the burden of proof in cargo damage claims?,* ONC Lawyers, 2019 (cited in note 48).

5. *Perils of the sea*

Perils of the sea are often called out as extraordinary forces of nature faced by maritime ventures on the course of the journey. An expanded explanation would be that peril of the sea covers damages to shipments during the voyage by the Acts of God. It covers those accidents or casualties which do not happen due to the free will of a human being[69]. There are different perils of the sea such as stranding, sinking, collision, heavy wave action, and high winds[70]. The three important and principal perils are, collision, stranding, and foundering. These are results, not causes; accidents, not forces[71]. In this sense, one cannot regard the ordinary act of waves and wind as perils of the sea, but it should be a fortuitous accident or casualties of the seas[72].

Regarding the burden of proof, it is not sufficient for the insurer to prove that the weather conditions encountered by the vessel were reasonably predictable, but he must prove that those conditions were bound to occur as the ordinary incidents of any normal voyage of the kind being undertaken[73] and perils of the sea are not confined to cases of exceptional weather or weather that was unforeseen.

The notion of insured perils meaning the ones which are insured under an insurance policy is very crucial as the insurer will indemnify the insured against certain loss or damage falling under the scope of the perils of the sea and not among the exclusions namely inherent vice[74].

---

69. See *What Are the Perils of the Sea in Marine Insurance?* (Secure Now, August 12, 2021), available at https://securenow.in/insuropedia/perils-sea-marine-insurance/ (last visited April 5, 2022).

70. See *Perils of the sea* (Assignment Point), available at https://www.assignmentpoint.com/business/finance/perils-of-the-sea.html (last visited April 5, 2022).

71. See Everett V. Abbot, *Perils of the Seas: a study in marine Insurance*, Vol. 7, No. 4 Harvard Law Review 221, 227 (1893).

72. See *What are the Perils of the sea in the Marine Insurance?* (Secure Now, August 12, 2021) available at https://securenow.in/insuropedia/perils-sea-marine-insurance/ (last visited April 5, 2022).

73. See William Melbourne, *The Court of Appeal restricts the scope of the defense of "inherent vice" in marine cargo insurance* (CLYDE & Co, January 2010), available at https://www.clydeco.com/clyde/media/fileslibrary/Publications/2010/Marine%20Insurance%20Update_January%202010.pdf (last visited April 05, 2022).

74. See Wan Izatul Asma Wan Talaat, *Perils of the Sea: A Conclusive Definition?* XXXII No 1 INSAF: Malaysian Bar Journal 55 (INSAF, 2003).

Relating the above, *Cendor Mopu* has an important position in the history of the inherent vice as it not only clarifies that inherent vice exception is solely where the loss emits from the internal characteristics of the goods, but also made it clear that there cannot be two causes for damage and if there is a peril of the sea then there is no room for inherent vice, and both cannot be applied[75]. In the decision made on 1st Feb 2011 the Supreme Court held that in order to defend successfully under inherent vice, the intrinsic nature of the subject matter insured must be the mere cause of the loss. There must be no intervention by any external source[76].

Following the history of failure of the leg during the transit, which was caused by the level of stress, the surveyors suggested that in order to clarify the case, the leg which might not have efficient fatigue fails to tolerate the full tow must be investigated again.

Because of the increasing degree of cracking around the pinholes in Cape Town, the repairs were done. After less than one week, one of the legs got lost at the sea. The next day, the other two legs fell off in quick succession[77].

The insured had appointed exports to manage the transit, hence any arrangements had to face the confirmation of a marine surveyor for the purpose of insurance. In this case, they asked the surveyor to calculate the integrity of the legs for the two purposes of transportation as well as for its use at the location. This way of transportation had the eminent danger of imposing stresses on the legs which were evaluated carefully. Nevertheless, there was a substitute choice that was safer, but it was too costly, and the court agreed upon the issue that the unwillingness of the insured to crop was reasonable. The rig was confirmed and got ready for the voyage with regard to the sea

75. See Ayça Uçar, *The meaning of the perils of the seas and the definition of Inherent Vice in the Supreme Court decision "the Global Process System Inc and Another v Siyarikat Takaful Malaysia Berhad (The Cendor MOPU)"* (University of Exeter, September 22, 2017), available at https://ore.exeter.ac.uk/repository/handle/10871/32455?-show=full (last visited April 5, 2022).

76. See Rupert Banks, *Legal Update: 'Cendor Mopu'-Inherent vice and perils of the sea* (Standard Club, March 1, 2011), available at https://www.standard-club.com/knowledge-news/legal-update-cendor-mopu-inherent-vice-and-perils-of-the-sea-2547/ (last visited April 5, 2022).

77. See *Berghoff Trading LDT and others v. Swinbrook Developments LDT and others*, 2 Lloyd's Rep 233, 244-245 (Court of Appeal 2009).

motion analysis and weather data for the proposed route by the first consultant.

On the one hand, this is fair to emphasize the fact that the insured and the insurers relied upon the surveyors and consultants on counting the ability of the legs to endure the voyage around the Cape. The act of the insured in placing the rig on a barge with the knowledge that the leg was not proper for that voyage or being reckless about the fitness of the rig is not acceptable. On the other hand, surveyors relied on the simplistic analysis and acknowledged the legs for the last part of the voyage. This made the fact obvious that the surveyors did not know about the spectral analysis[78]. Once again both insurers and insureds trusted the surveyors' assessments which had no suggestion on deficiency in the ability of the legs to bear the last part of the journey.

Although the weather was normal, the leg was not just rolling from side to side or pitching forward and backward, the leg breaking waves means a mixture of these motions, which go around in big circles and different directions. Consequently, the stresses caused by that are compound[79].

5.1. *Perils of the sea: fortuity*

Fortuity is related to incidents that might happen, not that must happen and it has to be an accident not a normal course of events[80].

Events that must happen in the ordinary course of navigation were excluded by the word accidental in the present case. The word accidental refers to fortuity, in the absence of which there is no recoverable loss. However, if an event that might happen does not happen, it is still regarded as accidental because it is not guaranteed to occur.

There is no doubt that the accident in *Cendor Mopu* was inevitable. Hence the court must hold that a leg-breaking wind was not certain to occur on the voyage because the cargo was properly stowed and was in good condition. In order to clarify the facts, surveyors had been consulted on the issue of how the rig should be carried. "They certified

78. See *id.* at 247.

79. See *id.* at 248.

80. See Richard Lord QC, *Approximate Causes and Perils of Perils of the Seas*, available at https://bila.org.uk/wp-content/uploads/2019/04/Issue-126-Lord.pdf (last visited April 05, 2022).

that it was fit for the voyage". The Court of Appeal correctly declared that a "leg-breaking wave" had felled the first leg, resulting in more prominent stress on the other two legs, which ultimately also broke off[81]. Then it was not ordinary wear and tear in which the legs would simply suffer numerous metal cracking. It means "a leg-breaking was not bound to occur" in any ordinary voyage round the Cape which results in the breaking of the first leg. Even if it was highly probable, the probability was unknown to the insured and was a risk that was insured under this policy[82]. In addition, climatic conditions were deeply hostile as to cause the legs to break was the very risk against which the respondents had insured[83].

In *T M Noten,* the court declared that on the basis of spectral figures, if a surveyor knew them, the rig would not be permitted to start the voyage. This is because it would increase the chance of failing the leg in which it happened, however, the judge found that "the failure of the legs as this rig was towed round the Cape was very probable, but it was not inevitable"[84]. Moreover, the possibility of the presence of two causes "perils of the sea" and "inherent vice" which leads the claim to be failed, was rejected on the ground that "this is not a realistic possibility"[85].

The specialists recognized that the reason for the loss was repeated bending of the legs under the pressure of the barge at the sea. The weather was within the range that could practically have been experienced[86].

---

81. See Borden Ladner Gervais, *Inherent vice vs. peril of the seas* (Lexology, July 25, 2021), available at https://www.lexology.com/library/detail.aspx?g=-97d58a02-0d36-490c-83fc-3bee0f723d6f (last visited April 05, 2022).

82. See Rupert Banks, *Legal Update:'Cendor Mopu'-Inherent vice and perils of the sea* (Standard Club, March 1, 2011), (last visited April 5, 2022) (cited in note 76).

83. See *Inherent Vice & Perils of the Seas* (Steamship Mutual, February 2010), avaiable at https://www.steamshipmutual.com/publications/Articles/ViceandPeril0210.html (last visited April 06, 2022).

84. *Durham Tees Valley Airport LTD v. Bmibaby LTD and another*, 2 Lloyd's Rep 246, 249 (High Court (Chancery Division) 2009).

85. See *id.* at 261.

86. See *id.*

5.2. *Perils of the sea: a new perspective*

In *Mopu* defending under inherent vice was restricted dramatically, which led to commensurately increasing the utility of cargo insurance for cargo owners, and also supporting the cargo insurance market[87]. As the court of appeal mentions, insurers have a defense only where the inherent vice is the proximate cause of the loss. Although it is not necessary for inherent vice to be the only cause of the loss, it will only provide a defense when there is no other external cause that results in an insured peril. This idea was not accepted under the grounds that in case there is a specific and foreseeable loss it is caught by the exception of inherent vice. Hence, the insurance coverage would be limited to loss which is wholly the result of unusual perils or unusual examples of known perils. It can be said in other words that, in a situation where the loss is caused by the mixture of inherent vice and sea conditions, the ordinary rule states that "a loss approximately caused by one insured and one expected peril" is not covered but displaced. Hence the insured is able to get recovered unless the sea conditions were ordinary and did not amount to a proximate cause of loss. It was later held in this case that a leg-breaking wave was not bound to occur, even though it was highly probable, and the insurance was against that probability.

Besides, the judgment in *Global Process* narrows the test for inherent vice and broadens the variety of events that may be regarded as fortuitous external accidents. It is now evident that inherent vice will not be deemed the sole proximate cause of a loss simply because the other external events experienced were "reasonably to be expected". This may make it easier for an insured to defend from an insurer's claim that cover is excluded from an "all-risks" policy because the loss was due to inherent vice[88].

87. See *Restricting the defense of inherent vice* (University of Nottingham Commercial Law Centre), available at https://www.nottingham.ac.uk/research/groups/commercial-law-centre/research/restricting-the-defence-of-inherent-vice.aspx (last visited April 5, 2022).

88. See Sam Tacei and Ajita Shaha, *Wave goodbye to inherent vice exclusions*? (Edwards Angell Palmer & Dodge LLP, March 2010, available at https://www.lexology.com/library/detail.aspx?g=cf8d2039-3424-4e00-b5f4-666f11c7ab08 (last visited April 5, 2022).

5.3. *Perils of the sea: discussion*

On the one hand, based on *Cendor Mopu* case, the burden of proof in an inherent vice is with the insurers, and it is not enough only to prove that the condition of the sea was no more than ordinary, because insurers have the protection of the law of non-disclosure and misrepresentation whether to accept the risk. Besides, they also benefit from the contractual freedom to restrict their liability by reference to the possibility of loss occurring[89].

On the other hand, the decision which was held in *Mayban*[90] confined the scope of cover far beyond any logically assumed exclusion of ordinary losses and designated a total division between the hull and cargo insurance that does not seem to respond to commercial common sense[91]. If numerous spells of bad weather conditions at different levels of the carriage could be regarded as normal and natural incidents which continuing the voyage without facing them might be considered unusual, then the decision to continue the voyage could be regarded as rational[92]. The approach would be that if an insured peril is not a proximate cause, the inherent vice can be the sole and proximate cause[93].

6. *Conclusion*

Insofar as the inherent vice is concerned, section 55(2) (c) is used as an explanation of the scope of cover and not as an implied contractual exclusion. Meanwhile, the key aim of the definition is to exclude the ordinary wear and tear that would be expected as a result of that ordinary action[94].

89. See Bennett, *Fortuity in the Law of Marine Insurance*, at 348 (cited in note 4).
90. *Mayban General Insurance Bhd*, Lloyd's Rep IR 18 (cited in note 19).
91. Sam Tacei and Ajita Shaha, *Wave goodbye to inherent vice exclusions*? (Edwards Angell Palmer & Dodge LLP).
92. See *id.*
93. See *Durham Tees Valley Airport LTD*, 2, Lloyd's Rep (cited in note 84).
94. See *British & Foreign Marine Insurance Co Ltd v. Gaunt* (cited in note 8).

Even though the concept of inherent vice shows some deficiencies in the insured subject matter, Section 55 (2) (c) must be read as the whole phrase "inherent vice or nature of the subject matter insured".

By looking at the different definitions given on inherent vice, in my opinion, the best goes with *Arnold's*[95] definition "in the subject insured, [...] not from external damage, but entirely from internal decomposition". It means that the "inability of cargo to withstand the ordinary incidents of the voyage" is not "always" because of inherent vice[96].

The commercial experience shows a definite range of possibilities of a certain type of loss that the rational person considers insurance a wise and prudent investment. Besides if cargo is not able to bear the foreseeable perils, it cannot be called a "risk" within the meaning of the "all risks" insuring clause, because in this case the main object of the insurance which is a possibility, will disappear[97].

Regarding the issue of burden of proof as mentioned before, *Cendor Mopu* endorsed the idea that the burden is with the insurers. It can be said that the main difficulty which has been encountered in the context of "all risks" policies on cargo has been the issue of determining the burden of proof. This could vary case by case and based on the proximate cause of the voyage.

Eventually, although inherent vice needs to be discussed separately on the particular aspects of every case, from my point of view, the commercial common aspect of the marine sector needs a wider insurance cover. It seems that the best way is to consider the concept of law in practice and adapt to the necessities of the modern market which brings new methodologies to meet new necessities.

95. *T.M. Noten B.V. v. Harding* (cited in note 10).
96. See Gilman, *Arnold's Law of Marine Insurance and Average* (cited in note 11).
97. See note 29.

GDPR and Ethereum blockchain: a Compatibility Assessment

Claudia Martorelli*

Abstract: Blockchain technology could bring many advantages to our society, in many different areas. In particular, it could improve individuals' control over their data. Through blockchain, data could be shared easily and in a secure way among different actors, thus preventing its accumulation in single points of failure. As the use of blockchain technology becomes widespread, its compatibility with Regulation (EU) 2016/679 (the General Data Protection Regulation, 'GDPR' or 'Regulation' hereafter) has emerged as a point of tension. Some have argued that blockchain pursues the same objectives as the GDPR, but it does so in ways which are different from those established by the Regulation. This is mainly due to the fact that the Regulation implies a centralized data collection system, where it is possible to single out an accountable central entity, against which users' rights have to be safeguarded. Whereas, in public permissionless blockchain projects, the network is decentralized, no single entity is responsible for it, and the decision-making power is shared among different stakeholders. It has been argued that this incompatibility, and the resulting regulatory uncertainty, will asphyxiate the development of this technology. Being the Ethereum blockchain the one which, at the time of writing, promises to be the most suitable to be adopted in a variety of use cases, this paper assesses whether, having regard to the allocation of GDPR responsibility roles, to the legal bases and principles of data processing, and to the data subject's rights, it is possible to consider the Ethereum blockchain GDPR-compatible.

Keywords: GDPR; blockchain; ethereum; data protection law.

1. *Introduction*

The main focus of this article, rather than a compliance assessment of the Ethereum blockchain, is to be a resource to provide an assessment of its potential to become GDPR compliant.

The issues related to the power that big tech companies gain from the large amount of data they collect have been deeply discussed in the past few years. This continuous harvesting of data has led to the age of "surveillance capitalism, a form of tyranny that feeds on people but is not of the people"[1]. This surveillance is characterized by a strong asymmetry of power between centralized online operators and end-users, who "are generally left in the dark with regard to the data collected, processed or inferred about them"[2]. Not only individuals'

*Claudia Martorelli is a law graduate who attended specialization courses in Privacy and Data Protection from the LUISS Guido Carli University of Rome, Italy; she also boasts a Foreign Languages and Literature degree from the Sapienza University of Rome. After a Master of Laws in Technology in Europe obtained at Universiteit Utrecht in Netherlands, she is currently doing a legal internship at Portolano Cavallo legal firm, which provides legal advice to companies in the Digital, Media and Technology.

1. See Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, 513, Profile Books, 2019.

2. See Primavera De Filippi, *The Interplay Between Decentralization and Privacy: The Case of Blockchain Technologies*, Journal of Peer Production, 2016.

privacy, but also competition[3] and democracy[4] have been negatively affected by this concentration of power. The freedom of the individual – conceived as freedom from manipulation – and right to privacy, are increasingly felt to be in danger.

In the last few years another related debate has flourished: blockchain technology as a solution to the drawbacks of the Web 2.0. It expected to take place as a consequence of the spreading of this technology, the new surge of decentralization is supposed to bring many opportunities, such as the empowerment of individuals on their own data,[5] the reduction in hacks and data breaches[6], and the elimination of central points of control acting as intermediaries, thus possibly increasing competition in digital markets[7].

The most relevant project aiming at this new stage of decentralization is the Ethereum blockchain, which, unlike Bitcoin which only allows cryptocurrency transactions, is designed to allow users to carry out operations of varying complexity[8]. In fact, Ethereum blockchain has a far-reaching disruptive potential, that goes far beyond financial applications, and can impact 'asset-registries, voting, governance, and the internet of things'[9], only to name a few.

---

3. See Javier Espinoza, *EU vs Big Tech: Brussels' Bid to Weaken the Digital Gatekeepers* (2020), available at https://www.ft.com/content/4e08efbb-dd96-4bea-8260-01502aaf1bd7 (last visited April 8, 2022).

4. See Eliza Mackintosh, *No Matter Who Wins the US Election, the World's "fake News" Problem Is Here to Stay* (2020), available at https://edition.cnn.com/2020/10/25/world/trump-fake-news-legacy-intl/index.html (last visited April 8, 2022).

5. See Nguyen Binh Truong and others, *GDPR-Compliant Personal Data Management: A Blockchain-Based Solution*, IEEE Transactions on Information Forensics and Security (2019); Guy Zyskind, Oz Nathan and Alex Sandy Pentland, *Decentralizing Privacy: Using Blockchain to Protect Personal Data, 180, IEEE Security and Privacy Workshops,* 2015.

6. See Michèle Finck, *Blockchains: Regulating the Unknown* at 670, 19, German Law Journal, 665, 2018.

7. See Essentia 1, *Why the Web 3.0 Matters and You Should Know about It* (January 30, 2018) available at https://medium.com/@essentia1/why-the-web-3-0-matters-and-you-should-know-about-it-a5851d63c949 (last visited April 8, 2022).

8. See Ethereum Foundation, *What is Ethereum?*, available at https://ethdocs.org/en/latest/introduction/what-is-ethereum.html (last visited April 8, 2022).

9. See *Id.*

However, it has been pointed out that public and unauthorized blockchains, like Ethereum, and the GDPR are incompatible at a conceptual level[10], even if they share the same objectives: empowering individuals[11]. This is due to the GDPR being drafted taking into account a centralized method for data collection and storage that cannot be reconciled with the decentralization typical of this type of blockchain[12]. Some authors even argued that blockchains and the GDPR cannot coexist[13]. This alleged incompatibility is going to be a problem also for those projects that, at present, do not deal with personal data. In fact, the European data protection law runs the risk of becoming "the law of everything": as our daily life is increasingly mediated by information technology, any data could be plausibly argued to be personal[14].

It is argued that the incompatibility issue is more problematic for public and permissionless blockchains than for permissioned ones[15]. This is mainly because, in permissioned blockchains, it is still possible to have a clear definition of roles among the subjects involved, thus facilitating the application of the GDPR. However, also public and unofficial blockchains can be characterized by power concentration, typically with regard to the software development process[16]. Furthermore,

10. See Michèle Finck, *Blockchains and Data Protection in the European Union at 2*, 1, Max Planck Institute for Innovation and Competition Research Paper Series, 2018.

11. See *Id*, see also Lokke Moerel, *Blockchain and Data Protection* in The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms at 217, 231 (Larry A DiMatteo, Michel Cannarsa and Cristina Poncibò eds., 2019); Nguyen Binh Truong and others, *GDPR-Compliant Personal Data Management: A Blockchain-Based Solution*, IEEE Transactions of Information Forensics and Security, 2019.

12. See Finck, *Blockchains and Data Protection in the European Union* (cited in note 10).

13. See The European Union Blockchain Observatory and Forum, *'Blockchain and the GDPR'* (2018), available at https://www.eublockchainforum.eu/sites/default/files/reports/20181016_report_gdpr.pdf (last visited April 8, 2022).

14. See Nadezhda Purtova, *The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law*, 10, Law, Innovation and Technology 40, 41, 2018.

15. See *The European Union Blockchain Observatory and Forum, Blockchain and the GDPR*, 16 (2018); Anisha Mirchandani, *The GDPR-Blockchain Paradox: Exempting Permissioned Blockchains from the GDPR*, 29, Fordham Intellectual Property, Media and Entertainment Law Journal, 2019.

16. See Michele Finck, *Blockchain Regulation and Governance in Europe*, 19, Cambridge University Press, 2018.

the concrete governance of a specific project can be analyzed in order to identify responsibility roles[17]. Nevertheless, the identification of responsibility roles is only one of the tensions pointed out in the literature, which also include the difficulty of ensuring compliance with data processing principles and the possibility of guaranteeing data subjects an effective exercise of their rights.

This article analyses the Ethereum blockchain because it is the public blockchain with the greatest number of application and users[18], although the conclusions that will be drawn for features generally shared among this type of blockchains can be applied in different projects as well.

After providing an introductory definition of the GDPR and the blockchain technology, the conditions that have to be met for the GDPR to be applicable to the Ethereum blockchain will be assessed From Section 6 to 15, there will be an Ethereum-focused analysis of the major issues highlighted by the literature in the application of the GDPR to public permissionless blockchains.

2. *General Data Protection Regulation*

From 1995 to May 2018, Directive 95/46/EC was the main EU legal data protection instrument[19]. Even if it provided a high level of harmonization, Member States still had discretion in their national implementation and application. These differences could undermine the functioning of the single market and "distort competition"[20]. The adoption of a more coherent legal framework for the protection of personal data was also needed due to the new challenges brought by

17. See Valeria Ferrari and Alexandra Giannopoulou, *Distributed Data Protection and Liability on Blockchains*, Internet Science (Svetlana S Bodrunova eds. 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3316954 (last visited April 8, 2022).

18. See The European Union Blockchain Observatory & Forum, March 2021 Trends Report (2021).

19. See European Union Agency for Fundamental Rights and Council of Europe, Handbook on European Data Protection Law, 29, (2018).

20. Recital 9 GDPR.

the rapid technological developments and by globalization, which increased the scale of the collection and sharing of personal data[21].

The GDPR was adopted in 2016 and became applicable from the 25th of May 2018[22], repealing Directive 95/46/EC. Under EU law, regulations are directly applicable and there is no need for national implementation, therefore the GDPR provides a single set of data protection rules across the EU. However, there still exist differences on its interpretation among national Data Protection Authorities (DPAs)[23].

In the regulatory text of the GDPR is stated that it has been made "technologically neutral"[24], meaning that it can be applied regardless of the characteristics of a given technology. an attempt has been made to structure it in such a way that it can be observed in a set of general overarching principles that have to be applied to the specific data processing operation[25].

The main objectives pursued by the Regulation are "the protection of natural persons with regard to the processing of personal data" and the "free movement of personal data"[26]. To fulfill the first objective, it establishes the role of the "controller" – the main responsibility role in the Regulation – a natural or legal person determining the purposes and means of the processing[27]; and the overarching principle of the controller's accountability. In this way, it ensures that the processing of personal data is carried out in a responsible way through the introduction of a number of obligations that vary in accordance with the types of personal data being processed and with the level of risk entailed by the processing. The 'data subject' is the natural living person whose personal data are being processed.

21. See Recitals 6 and 7 GDPR.

22. See GDPR Article 99.

23. For an assessment of how the different approaches adopted by national DPAs is impairing competition in digital markets, *see* Damien Geradin, Theano Karanikioti, Dimitrios Katsifis, *GDPR Myopia: How a Well-Intended Regulation ended up Favoring Google in Ad Tech*, TILEC Discussion Paper, 2020.

24. GDPR Recital 15.

25. See Michele Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?*, 98, 2019.

26. GDPR Article 1.

27. GDPR Article 4 (7).

3. *Blockchain Technology*

Blockchain technology first appeared in 2008 in the Bitcoin White Paper by Satoshi Nakamoto, where he announced the creation of a peer-to-peer system that would allow individuals to securely transact with each other without the need of a trusted middleman[28]. On January the 3rd 2009, Nakamoto mined the genesis block of the Bitcoin blockchain, where he also included an encrypted message – "The Times 03/Jan/2009 Chancellor on brink of second bailout for banks": the headline of The London Times issued that same day[29]. Among the Bitcoin community, this message is considered a further indication of the will of Nakamoto to create a completely new financial system, in which central institutions, like banks, would not be needed anymore[30]. Generally speaking, through blockchain, individuals are able to lower the uncertainties that arise when transacting with each other, not through trusted third parties, but through code[31].

As suggested by Primavera De Filippi[32], Nakamoto's creation seems to be the fulfillment of Timothy C. May's prophetic words describing "tamper-proof boxes" allowing people to interact with each other in a totally anonymous manner, escaping government control and all it entails[33]. Even if the original idea behind blockchain technology can thus be linked to the Crypto-anarchist movement[34], and

---

28. See Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, 1 (2008), available at https://bitcoin.org/bitcoin.pdf (last visited April 8, 2022).

29. See Jamie Redman, *A Deep Dive Into Satoshi's 11-Year Old Bitcoin Genesis Block* (January 3, 2020) available at https://news.bitcoin.com/a-deep-dive-into-satoshis-11-year-old-bitcoin-genesis-block/ (last visited April 8, 2022).

30. See Giannopoulou and Ferrari, *Distributed Data Protection and Liability on Blockchains* (cited in note 17).

31. See Michèle Finck, *Blockchains: Regulating the Unknown*, 19 German Law Journal 665, 669 (2018).

32. Primavera De Filippi and Aaron Wright, *Blockchain and the Law: The Rule of Code, 2,* , Harvard Univ Pr, (2018).

33. See Timothy C. May, *The Crypto Anarchist Manifesto* (1988).

34. As stated by May in the Crypto Anarchist Manifesto "The State will of course try to slow or halt the spread of this technology, citing national security concerns, use of the technology by drug dealers and tax evaders, and fears of societal disintegration. Many of these concerns will be valid; crypto anarchy will allow national secrets to be trade freely and will allow illicit and stolen materials to be traded. An anonymous computerized market will even make possible abhorrent markets for assassinations

was mainly intended to empower individuals and to escape the law, today blockchain is widely used by those traditional intermediaries that it was meant to rule out – banks[35], financial intermediaries, companies[36], even governments[37]– and has increasingly been addressed by regulators.

The value of blockchain technology has been recognized by the European Commission as well[38], thus giving the European Union the possibility of adopting a pan-European regulatory sandbox to better understand how to regulate the use cases of this technology without hampering its development[39]. In fact, blockchain technology is seen as an opportunity for Europe to lead technological development in a way that is finally respectful of European values.

In simple terms, blockchain can be defined as a decentralized distributed database that allows a large number of actors to store synchronized copies of the same data[40]. Data are grouped in blocks, which are linked to one another through the hashing process[41].

This process consists in the creation of an alphanumeric code (so-called hash) that represents the data contained in each block, so that if these data are manipulated, the resulting hash will be different.

---

and extortion. Various criminal and foreign elements will be active users of CryptoNet. But this will not halt the spread of crypto anarchy".

35. See Ryan Browne, *Big Banks Take Baby Steps Toward Commercializing Blockchain*, (November 20, 2020), available at https://www.cnbc.com/2020/11/20/big-banks-take-baby-steps-toward-commercializing-blockchain.html (last visited April 9, 2022).

36. See Michael del Castillo, Blockchain 50 2021, (February 2, 2021) available at https://www.forbes.com/sites/michaeldelcastillo/2021/02/02/blockchain-50/?sh=4043e2fc231c (last visited April 8, 2022).

37. See Kaspar Kojus, *Welcome to the Blockchain Nation*, (July 7, 2017), avalaible at https://medium.com/e-residency-blog/welcome-to-the-blockchain-nation-5d9b46c06fd4 (last visited April 9, 2022).

38. See European Commission, *Blockchain Technologies*, (2021) , avalaible at https://ec.europa.eu/digital-single-market/en/blockchain-technologies (last visited April 8, 2022).

39. See European Commission, *Legal and Regulatory Framework for Blockchain*, (2021) https://ec.europa.eu/digital-single-market/en/legal-and-regulatory-framework-blockchain (last visited April 8, 2022).

40. See *The European Union Blockchain Observatory and Forum, 'Blockchain and the GDPR'* (2018), 14.

41. See Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?* at 3 (cited in note 25).

Given that each block also contains the hash of the previous block, if the previous block is manipulated, then the resulting hash of all the following blocks will change as well, originating a new version of the chain that will not correspond to the version shared by all the other nodes in the network. Therefore, hash-chaining makes the blockchain temper-evident[42].

The mechanism through which the network agrees on which new block to add to the chain is called the consensus protocol. In reference to the Ethereum and the Bitcoin blockchains, it is used the "proof of work" protocol[43]: validating nodes compete to solve a mathematical problem; the first node to solve it, broadcasts the block to the rest of the nodes, which accept the block – only if all transactions in it are valid – by working on creating the next block in the chain, using the hash of the accepted block as the previous hash[44].

As illustrated in the table below, blockchains can be distinguished in public/private, permissionless/permissioned, according to their characteristics in terms of usage and validation. The distinction between public and private depends on whether some kind of authorization is needed in order to become a participating node[45], for instance when the administrator of the system has to grant access to the user. If no authorization is needed, and therefore anyone could access the information stored on a blockchain, the blockchain is said to be public[46]. The distinction between permissionless and permissioned refers to whether any authorization is needed in order to become a

42. For more information on how it works, in-depth information is available at https://blockchain.regulatingbig.tech/#!/blockchain (last visited April 8, 2022).

43. Ethereum will move to a Proof of Stake consensus in the future, meaning that users will need to stake a certain amount of ETH to become validators. Validators are randomly chosen to create blocks and are responsible for checking and confirming blocks created by others. A user stake can be lost if the user certifies malicious blocks. For more information on Proof of Stake, see *Proof-of-stake (PoS)* (April 16, 2021) available at https://ethereum.org/en/developers/docs/consensus-mechanisms/pos/ (last visited April 8, 2022).

44. See Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* at 3 (cited in note 29).

45. A node is a computer that stores a local copy of the blockchain.

46. See Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* at 14-15 (cited in note 29).

validating node, meaning, to be able to add data to the blockchain. If no authorization is needed, a blockchain is said to be permissionless[47].

In public permissionless blockchains, anyone can install the software and download a copy of the blockchain and become a full node that can participate in the storing and adding of data. No registration procedure is needed, no one owns the network[48]. The software is created and maintained by volunteers who, normally, change over time[49].

	Private	Public
Permissioned	Authorization is needed in order to access and add data to the blockchain	Authorization is needed only to add data to the blockchain, while data are publicly available
Permissionless	N/A	Anyone can access and add data to the blockchain

Table 1. Types of blockchain

The blockchain environment is multi-layered. Blockchains function on the Internet and TCP/IP protocol; blockchains provide an infrastructure for data management (layer 1), but also an infrastructure for the decentralized execution of software (layer 2)[50]. An example of this can be the Ethereum blockchain (layer 1) upon which smart contracts can be executed, as well as Ether transactions (layer 2).

47. See *Id.*
48. See *Id.*
49. See *Id.*
50. See Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?* at 4 (cited in note 25).

4. *Territorial Scope of Application of the GDPR*

For the GDPR to be applicable, the Ethereum Blockchain has to fall within its territorial and material scope of application, therefore the single processing operation must be examined to understand if this is the case. As a matter of fact, not all processing activities, carried out by the same controller or processor, may fall within the scope of application of the GDPR[51].

Article 3 GDPR establishes two main criteria to be considered: the "establishment" criterion under Article 3(1) and the "targeting" criterion under Article 3(2)[52].

Firstly, it is important to consider any real and effective activity exercised through stable arrangements[53] to determine if there is an establishment in the EU, by departing from a formalistic approach whereby undertakings are established solely in the place where they are registered[54]. When it comes to the assessment of the 'stable arrangement' for the provision of services online, the threshold is quite low, as the presence of even only one representative could be deemed to be enough[55]. However, such an establishment cannot exist merely because the undertaking's website is accessible in the Union[56].

To assess if the establishment criterion can be used to apply the GDPR to the Ethereum blockchain, one should be able to single out who the controller is. In Section 6 and following, the controllership issue will be analyzed deeper. For now, it is enough to argue that it is impossible to identify a proper establishment in the European Union or a stable arrangement for the provision of the service, because there is no such thing as official Ethereum headquarters anywhere in the world[57], and, as we will see in Section 8, in most cases, natural persons

51. See *European Data Protection Board, Guidelines 3/2018 on the Territorial Scope of the GDPR* (Article 3), 4, (2019).

52. See *Id*.

53. GDPR Recital 22.

54. Case C-230/14 Weltimmo v NAIH, 2015 para 29.

55. See *Id*, at 30.

56. Case C-191/15 Verein für Konsumenteninformation v. Amazon EU Sarl, 2016 para 76.

57. The Ethereum Foundation cannot be considered as an overarching responsible entity, since '*its role is not to control or lead Ethereum, nor are they the only organization that founds critical development of Ethereum-related technologies*', in About the Ethereum

will be identified as controllers, and relying on this criterion would make the application of the GDPR dependent on where these persons decide to reside. The absence of a central point of power in the Ethereum ecosystem is highlighted several times even in the home page of the website. Ethereum is regarded as a "community-run technology", and it is said that 'No government or company has control over Ethereum'[58]. Furthermore, it is rather difficult to know exactly where the individuals who can be appointed as controllers are effectively located.

Turning now to the targeting criterion, its applicability mainly depends on the presence of the data subject in the territory of the Union (I) at the moment of the offering of services or goods, or (ii) when the monitoring of the data subject's behavior takes place. In addition, it is necessary that the activity is intentionally offered to individuals in the Union[59] (services offered to individuals outside the Union, which are not withdrawn when such individuals enter the EU, will not be subject to the Regulation)[60].

The offering of services also includes the offering of information society services[61], regardless of whether a payment by the data subject is required in exchange[62]. The Ethereum blockchain can be considered an information society service as described by point (b) of Article 1(1) of Directive (EU) 2015/1535[63], which is referred to by Article 4 (25) GDPR. In fact, it is a service normally provided for remuneration,

---

Foundation (March 30, 2021) available at https://ethereum.org/en/foundation/ (last visited April 8, 2022).

58. See https://ethereum.org/en/ (last visited April 8, 2022).

59. See GDPR Recital 23.

60. See European Data Protection Board, *Guidelines 3/2017 on the territorial scope of the GDPR (Article 3)* 15 (2019).

61. Article 1(1) point (b) Directive (EU) 2015/1535: "any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".

62. See Case C-352/85 *Bond van Adverteerders and Others vs. The Netherlands State*, 1988 para 16; Case C-109/92 Wirth, 1993 para 15.

63. Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241.

without the parties being simultaneously present, through electronic means, and through the transmission of data on individual request[64].

The Ethereum service is intentionally offered to individuals in the European Union, since, as claimed in the Ethereum website, "it's open to everyone, wherever you are in the world – all you need is the internet"[65].

In conclusion, it is likely that the GDPR will apply to every public permissionless project under Article 3(2), since their aim is usually to offer a service accessible from all over the world.

5. *Material Scope of Application of the GDPR*

Article 2 GDPR defines the material scope of application of the Regulation, and it also provides a number of exemptions, such as the household exemption which will be examined later on[66].

The Ethereum blockchain falls within the material scope of the GDPR because it implies the processing of personal data by automated means. 'Processing' encompasses practically any activity involving personal data[67]. Automated data processing concerns any personal data processing carried out using a device (e.g., a computer)[68]. This broad interpretation of processing implies that the addition of personal data, its continued storage and any further operation on the blockchain constitute personal data processing[69]. Ethereum can be

64. This reconstruction considers the user perspective who is using blockchain to broadcast a transaction to the network. The perspective of nodes and miners should not be considered because their activity on the blockchain constitutes part of the service itself.

65. See *What is Ethereum?* available at https://ethereum.org/en/ (last visited April 9, 2022).

66. GDPR Article 2(1) provides that "this Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system".

67. GDPR Article 4(2).

68. See *European Union Agency for Fundamental Rights and Council of Europe, Handbook on European Data Protection Law*, law, 99 (2018).

69. See Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?* at 10 (cited in note 25).

defined as an append-only ledger as it is almost impossible to delete data once they are stored on it. As a consequence, data is continuously stored on the blockchain for as long as it functions. Secondly, to validate transactions it is necessary to verify all the previous transactions and for this reason past data have to be continuously processed.

As for the household exemption, Article 2 (2) (c) provides that the GDPR does not apply to the processing of personal data carried out by a natural person in the course of a purely personal or household activity, which is thus non-commercial/non-professional[70]. Accordingly, the Commission Nationale de l'Informatique et des Libertés (CNIL) stated that natural persons who use a blockchain for reasons unrelated to their profession or commercial activity do not assume the role of controllers, therefore "a natural person who buys or sells Bitcoin, on his or her own behalf, is not a data controller"[71]. However, the CJEU case law[72], as well as the Guidelines of Article 29 Working Party[73], require a further condition for the exemption to be applicable: the diffusion of personal data being restricted to a limited number of persons.

As for Ethereum blockchain, even individuals who use the blockchain for personal purposes are qualifiable as data controllers because data is accessible to an indefinite number of people. In fact, anyone can access the information stored in the blockchain, even without the need of downloading the software[74]. This is generally true for all public and permissionless blockchains[75]. Nonetheless, to support the CNIL point of view, it has been pointed out that making information publicly available in the blockchain is not like doing the same on a social

70. GDPR Recital 18.

71. See Commission Nationale de l'Informatique et des Libertés*, Solutions for a Responsible use of Blockchain in the context of Personal data*, 2 (2018).

72. Case C-101/01 Lindqvist, 2003 para 47; Case C-73/07 Satakunnan Markkinapörssi and Satamedia, 2008 para 44; Case C-212/13 Ryne , 2014 para 31 and 33; Case C-345/17 Buivids, 2019 para 43; Case C-25/17 Jehovan todistajat, 2018 para 42.

73. Article 29 Data Protection Working Party, Opinion 5/2009 on Online Social Networking, 6 (12 June 2009).

74. See https://etherscan.io/ (last visited April 9, 2022).

75. See Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?* at 12 (cited in note 25).

network. In fact, it would be much harder to single out a person only through on-chain data[76].

5.1. *Personal Data on the Blockchain*

The GDPR applies only to the processing of personal data: any activity involving data that does not fall within this category, such as anonymous data[77] , will not be regulated by the GDPR.

The concept of personal data[78] has to be interpreted broadly[79], in order to include any kind of statement about a living person, both objective and subjective, regardless of its correctness[80], and of the format or the medium on which it is contained[81].

Within this broad category, there are special categories of personal data which reveal sensitive information about an individual, such as political opinions or sexual orientation[82], to which the GDPR provides greater protection.

Even information that has undergone pseudonymization is still personal data[83]: pseudonymization is only a security measure that prevents the attribution of the personal data being processed to the data subject in the absence of additional information. For instance, in databases storing personal details of data subjects, names are replaced with numbers and the document containing the associations between names and numbers is stored elsewhere.

On the Ethereum blockchain there are two main types of data: accounts and transaction data, while there are two types of accounts:

76. See Jörn Erbguth, *Five Ways to GDPR-Compliant Use of Blockchain*, 5 European Data Protection Law Review 427, 431(2019).

77. Anonymous data refer to information relating to a person whose identification is irreversibly prevented.

78. Article 4 (1) GDPR defines personal data as 'any information relating to an identified or identifiable natural person ('data subject')'

79. Case C-434/16 Peter Nowak v Data Protection Commissioner, 2017 para 34.

80. Article 29 Working Party, Opinio 4/2007 on the concept of personal data, 6 (June 20, 2017).

81. See *Id*, at 7.

82. GDPR Article 9 (1).

83. GDPR Recital 26.

externally owned ones, and contract accounts, hereafter "contract"[84]. Externally owned accounts represent identities of external agents (such as human personas, mining nodes or automated agents), and use public-key cryptography to sign transactions[85]. Contracts have an associated code, whose execution is triggered by transactions launched from other externally owned accounts or contracts[86]. Contracts can serve different purposes, such as archiving data to the benefit of both other contracts or actors outside the blockchain for example, a contract can record membership in a particular organization. Moreover, they can serve as externally-owned account with a more complicated access policy that can manage "manage an ongoing contract or relationship between multiple users" or "provide functions to other contracts, essentially serving as a software library"[87].

Considering that transaction data consists in the data contained in a transaction, a transaction takes place between externally owned accounts and other accounts and consists of the transmission of a signed package of data[88]. There are three main categories of functions that transactions can complete: money transfer, contract creation and contract invocation[89]. Each transaction contains the recipient of the message, a signature identifying the sender, the amount of Wei[90] to transfer, an optional data field that can contain the message sent to a contract[91], the maximum number of computational steps the transaction execution is allowed to take, the fee the sender is willing to pay to have the transaction verified[92].

---

84. See Ethereum Community, *Account Management*, available at https://ethdocs.org/en/latest/account-management.html?highlight=address#keyfiles (last visited April 9, 2022).

85. See *Id.*

86. See Ethereum Community, *Contracts and Transactions*, available at https://ethdocs.org/en/latest/contracts-and-transactions/account-types-gas-and-transactions.html#eoa-vs-contract-accounts (last visited April 9, 2022).

87. See *Id.*

88. See *Id.*

89. See Jiajing Wu and others, *Analysis of Cryptocurrency Transactions from a Network Perspective: An Overview*, 3 (2020).

90. The base unit of Ether, the currency used on Ethereum.

91. The message is like a transaction, but it is produced by a contract and not by an account. Contracts can have relationships with other contracts through messages. MA message leads to the recipient account running its code.

92. See Ethereum Community (cited in note 87).

Each block in the Ethereum blockchain collects several pieces of information, among which there is the address of the miner[93] who validates the transactions, to which the fees of each transaction are sent; as well as the list of validated transactions[94].

Clearly, when accounts are used by natural persons, the address and the public key can be qualified as personal data[95] because they are "online identifies"[96].

As for contracts, the only use cases in which they do not qualify as personal data are the ones in which they are used as software libraries or when they are used by non-natural persons.

Regarding transactional data, this type of data can certainly be considered personal data when concerning transactions between accounts belonging to natural persons, and when personal data are stored in the message added in the optional data field[97].

Furthermore, it has been proved that, in the Ethereum blockchain, the identification of natural persons is reasonably likely to be possible, not only through the linking of on-chain data to other pieces of information collected by other means[98], but also through analytic on-chain data examination alone. For instance, it has been argued that the "linkability" of the identity of a user to a cluster of addresses is

93. Miners are validating nodes, meaning, nodes in the network that group the transactions into "blocks".

94. See Gabin Wood, Ethereum: A secure Decentralised Generalised Transaction Ledger, 5, Petersburg Version 41c1837 (February 14, 2021).

95. See Giannopoulou and Ferrari (cited in note 17). For the opposite conclusion, See Luis-Daniel Ibanez, Kieron O'Hara, Elena Simperl*, On Blockchains and the General Data Protection Regulation,* 6.

96. GDPR Recital 30 provides that "*natural persons may be associated with online identifiers [...] which, when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them*." Examples of online identifiers are cookies and IP addresses.

97. For an example of message, see https://etherscan.io/tx/0xcdcc5e38b063bb5b2007ec5106495cca1468ef2475d5adb2a680ba210e72a363, scroll the page and click on 'click to see more', under the invoice 'input data' click on the button 'view inputs as' and select 'UTF-8' (last visited April 9, 2022).

98. See Matthias Berberich, Malgorzata Steiner, *Blockchain Technology and the GDPR – How to Reconcile Privacy and Distributed Ledgers*, 2, European Data Protection Law Review, 2 422, 424 (2016); Also see Wu and others, *Account Management* at 10 (cited in note 84).

increased through the deployment of a smart contract's source code[99]. Moreover, since Ethereum is an account-based model[100], its users tend to use only a handful of addresses for their activities[101]. Address reuse has allowed the identification of a number of 'quasi-identifiers', such as time-of-day activity, transaction fee, transaction graph, leading to the profiling and deanonymization of Ethereum users[102]. In addition, law enforcement agencies have developed forensic chain analysis techniques to identify suspected criminals[103].

Finally, as the technological development that may take place during the processing must be considered to assess which means are reasonably likely to be used to identify a person, there is a general consensus on the qualification of public keys as personal data in public permissionless blockchains[104]. In fact, with regard to blockchain use cases built on the assumption that the infrastructure will serve as a perpetual record of transactions, as is the case for Ethereum, any data

99. See Shlomi Linoy, Natalia Stakhanova, Alina Matyukhina, *Exploring Ethereum's Blockchain Anonymity Using Smart Contract Code Attribution*, 15TH International Conference on Network and Service Management, (2019).

100. "*In an account-based cryptocurrency, native transactions can only move funds between a single sender and a single receiver, hence in a payment transaction, the change remains at the sender account. Thus, a subsequent transaction necessarily uses the same address again to spend the remaining change amount. Therefore, the account-based model essentially relies on address-reuse on the protocol level*", in Ferenc Béres, Istvan A. Seres, Andras A. Benczur, Mikeah Quintyne-Collins, *Blockchain is Watching You: Profiling and Deanonymizing Ethereum Users*, 1 (2020).

101. See *Id.*

102. See Béres, Seres, Benczur, Quintyne-Collins, *The European union Blockchain Observatory and Forum, Blockchain and the GDPR*, 20 (2018)); Béres, Seres, Benczùr, Quintyne-Collins, (cited in note 101); Wu and others, (cited in note 90, at 10).

103. See Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?* at 27 (cited in note 25).

104. See Commision nationale de l'Informatique et des Libertés, *Solutions for a Responsible use of Blockchain in the context of Personal Data* (2018), The European Union Blockchain Observatory and Forum, Blockchain and the GDPR (2018; Jean Bacon and Others, *Blockchain Demystified*, Queen Mary School of Law Studies Research Paper No. 268/2017, 40 (2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3091218 (last visited April 9, 2022) also see Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?*, (cited in note 25).

has to be considered personal data since it cannot be reasonably assumed that identification will remain unlikely in the future[105].

6. *Controllers, Joint controllers and Processors*

One of the most controversial issues in the application of the GDPR to public permissionless blockchains is the attribution of controller and processor responsibility roles to the actors involved. As already explained, this is mainly due to the fact that, in these environments, no central authority exists, and the power is split among different categories of actors, who have different roles in the functioning of a blockchain. In order to understand to what extent, they can be identified as controllers or processors, we need to understand how these roles are regulated first.

The controller is the figure who is practically entrusted with ensuring that the system complies with data protection law[106] and for this reason it has been argued that the broader the controllership concept is interpreted the more data subjects will be safeguarded[107]. A controller autonomously determines the purposes and means of the processing, regardless of whether it has access to the data being processed[108].

A processor is a distinct entity from the controller and is set to process personal data on behalf of and under the directions of the

105. See Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?* at 24 (cited in note 25). For a quick overview of the potential of quantum computing, see MacKenzie Sigalos, Hacking bitcoin wallets with quantum computers could happen – but cryptographers are racing to build a workaround, (June 10, 2021) available at https://www.cnbc.com/2021/06/10/long-term-crypto-threat-quantum-computers-hacking-bitcoin-wallets.html (last visited April 9, 2022).

106. See Finck, *Blockchain and the General Data Protection Regulatio*n at 37 (cited in note 25).

107. EUCJ Google *Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12 (2014) at para 32; *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, C-210/16 (2018) at para 28; *Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV*, C-40/17 (2019) at para 66.

108. *Wirtschaftsakademie Schleswig-Holstein* at para 38 (cited in note 108).

controller[109]. Therefore, the processor cannot carry out the processing for its own purposes, thus going beyond the controller instructions, but it can determine the non-essential means for processing.

The notions of controller and processor are functional concepts: their objective is to allocate responsibilities according to the actual roles of the parties and not according to formal designations. This implies that the legal status of an actor, independently from the fact that it has been appointed as a "controller" or a "processor", must be determined on the basis of its actual activities in a specific situation[110].

It is important to establish which level of influence on the purposes and the means of processing should entail the qualification of the controller. Decisions on the purposes of the processing have to be always made by the controller[111]. Then, regarding the determination of the means, a distinction can be made between essential and non-essential means[112]. Essential means are reserved for the controller. Examples are decisions taken about "the type of personal data which are processed, the duration of the processing, the categories of data subjects"[113]. On the contrary, non-essential means can be left to the processor. They concern the practical aspect of processing, like the decision to use given hardware or software, or the adoption of detailed security measures[114].

When the decision-making power on the purposes and essential means of the same processing activities is exercised by several different entities at the same time, those entities qualify as joint controllers[115]. In this case, the processing would not be possible without the participation of all parties, since their processing activities are "inextricably linked"[116]. Even when they do not share the same purposes, joint controllership can be established if they pursue complementary

109. European Data Protection Board, *Guidelines 07/2020 on the concepts of controller and processor in the GDPR* (September 2, 2020) at 24, available at https://edpb.europa.eu/sites/default/files/consultation/edpb_guidelines_202007_controllerprocessor_en.pdf (last visited April 6, 2022).

110. See *Id* at 7.

111. See *Id* at 13.

112. See *Id* at 14.

113. See *Ibid.*

114. See *Ibid.*

115. See *Id* at 18.

116. See *Ibid.*

or linked purposes. Such is the case when there is a mutual benefit arising from the same processing operation[117].

There is joint controllership also when one of the involved actors provides the means of the processing, such as a tool or other system, making them available to other entities. By deciding to use those means of processing for its own purposes, an entity will participate in the determination of the means of the processing[118]. However, the use of a common infrastructure will not always imply joint controllership. This would be the case when the processing 'could be performed by one party without the intervention from the other'; when the provider can be qualified as a processor because of the absence of any purpose of his own[119]; when each actor determines its own purposes[120].

Article 26 (1) GDPR requires joint controllers to determine, following a factual-based approach[121] and by means of an arrangement between them, the respective responsibilities for compliance with the obligations under the GDPR. However, Article 26 (3) establishes that data subjects may exercise their rights in respect of, and against each of the controllers, irrespective of any such arrangement. The fact that one party does not have access to the data processed would not be enough to exclude joint controllership[122].

7. *Ethereum Governance and Stakeholders*

In order to identify controllers and processors in the Ethereum blockchain, it is important to understand how stakeholders exercise

117. See *Id* at 19; *Fashion ID at* para 80 (cited in note 108).

118. In case C-210/16 the Court of Justice held that the administrator of a Facebook fan page takes part in the definition of the means of the processing of personal data related to the visitors of its fan page, by defining parameters based on its target audience.

119. See European Data Protection Board, *Guidelines 07/2020* at 20 (cited in note 110).

120. See *Id* at 23.

121. See *Wirtschaftsakademie Schleswig-Holstein at* para 43 (cited in note 108).

122. See *Id* at 38; *Jehovan todistajat* at para 69 (cited in note 73).

their decision-making power[123], as each group has different roles, incentives, interests and means of participation[124].

In general, there are two types of governance in the blockchain environment: on-chain or off-chain. In the Ethereum blockchain, governance relies on off-chain mechanisms. On-chain governance refers to rules and decision-making processes that have been encoded into the infrastructure of a blockchain[125], defining the interactions between participants within the infrastructure, through the infrastructure itself[126]. Off-chain governance means that 'the rules of governance are not written into the core blockchain protocol itself and must instead be dealt with at the social layer, i.e., humans talking to other humans'[127]. Off-chain governance allows for interventions into the blockchain protocol that are not prescribed by the protocol itself[128].

As for the governance in Ethereum, miners, developers and users signal their approval or disapproval of a protocol improvement proposal through private and community discourse[129]. Stakeholders' consensus cannot be obtained through on-chain voting[130]. This is to avoid favoring those with more Ethereum tokens[131], whom could be given more vote power. In this case, there are two scenarios that can occur: (i) if all stakeholders agree, the code changes are made smoothly; (ii) if they disagree, stakeholders can either try and convince other stakeholders to act in favor of their side, or, if consensus cannot be reached,

123. See *Giannopoulou and Ferrari* (cited in note 17).

124. See Finck, *Blockchain Regulation and Governance in Europe* at 198 (cited in note 16).

125. See Wessel Reijers et al, *Now the Code Runs Itself: On-Chain and Off-Chain Governance of Blockchain Technologies*, 37 TOPOI: International Review of Philosophy 17, 2 (2018).

126. See *Ibid.*

127. See *Ethereumbook* (May 9, 2018), available at https://github.com/lrettig/ethereumbook/blob/governance/contrib/governance.asciidoc (last visited April 8, 2022).

128. See Reijers et al, *Now the Code Runs Itself* at 3 (cited in note 125).

129. See EhtHub, *Ethereum Basics*, available at https://docs.ethhub.io/ethereum-basics/governance/ (last visited April 6, 2022).

130. See Bogdan Rancea, *What is Ethereum Governance? Complete Beginner's Guide* (Unblock, 7 January 2019) https://unblock.net/what-is-ethereum-governance/ (last visited April 6, 2022); also see The European Union Blockchain Observatory and Forum, Governance of and with Blockchains13 (2020).

131. See Rancea, *What is Ethereum Governance?* (cited in note 131).

they have the ability to hard fork the protocol and keep or change features they think are necessary[132]. In the latter case, there will be two blockchains that will have to "compete for brand, users, developer mindshare, and hash power"[133].

With regard to the various actors involved in the functioning and use of the Ethereum blockchain, first of all, there are core developers who work on the software that implements the protocol[134]. They are responsible for "fixing bugs, responding to technical issues, and coordination ongoing protocol updates"[135]. They can suggest software changes (as anyone with a Github account can do)[136], but they cannot impose such changes unilaterally.

Node operators, who are "the owners and managers of nodes that run the protocol"[137], participate in the network by storing a full or light copy of the ledger, decide whether to update protocol changes, and can send transactions to the network.

Miners are validating nodes, meaning, nodes in the network that group the transactions into "blocks and compete with one another for their block to be the next one to be added to the blockchain"[138]. They can determine the success of a protocol update by installing the software modifications[139].

Application developers build applications of arbitrary complexity that run on the blockchain[140].

---

132. See EthHub, *Ethereum Basics* (cited in note 130).
133. See *Ibid.*
134. See *Ibid.*
135. See Retting, *Ethereumbook* (cited in note 128).
136. See *Ibid.*
137. See EthHub, *Ethereum Basics* (cited in note 130).
138. See Ethereum Community, W*hat is Ethereum?*, available at https://ethdocs.org/en/latest/introduction/what-is-ethereum.html#how-does-ethereum-work (last visited April 6, 2022). As said before, this is likely to change in the future, since a Proof of Stake consensus is going to be adopted, in which validating nodes will be chosen randomly.
139. See Finck, *Blockchain Regulation and Governance in Europe* (cited in note 16).
140. See Retting, *Ethereumbook* (cited in note 128).

8. *Controllers and Processors in Ethereum*

Given that responsibility roles have to be identified with respect to the single processing operation, it is important to understand which processing operations take place on Ethereum. The participation of a variety of actors in the functioning of this blockchain means that an actor, or a group of actors, can qualify as data controller for a specific operation, and as processor for others. Furthermore, the multi-layered infrastructure of blockchain-based systems implies the presence of different controllers for different layers[141].

It has been argued that trying to find a controller at the infrastructure layer[142] is like assessing 'who the controller is with respect to the entirety of data processing via the Internet or via email functionality' since blockchain, like the Internet, is a general-purpose technology[143]. However, even if it is true that the Ethereum blockchain is a general-purpose technology, because anyone can send transactions for their own purposes and build applications on top of it, there is still an underlying interest that is relevant at the infrastructure layer – ensure the reliability and the functioning of the blockchain – which is realized through the processing of personal data, and which is not comparable to the way the Internet functions.

The processing operations carried out to achieve this interest consist of the fact that each node, in order to participate in the network, has to download the (full or partial) history of transactions, and in the fact that transactions can be added only through the creation of new blocks. The means through which this processing is carried out consist of the core software of Ethereum and the hardware provided by nodes and miners. This interest, and the means to achieve it, were established by the founders of Ethereum when they developed the infrastructure itself. Nowadays, core developers take care of the core software of Ethereum but, even if their opinions may be highly

141. See Finck, *Blockchain and the General Data Protection Regulation* at 4 (cited in note 25).

142. As a recall, the infrastructure layer in this work is considered to encompass the 'consensus layer', the 'network layer' and the 'data layer', as illustrated in Figure 1 at page 8. Practically speaking, it is where data are stored, where transactions are implemented and the security of the network ensured.

143. See Moerel, *Blockchain and Data Protection* at 217 (cited in note 11).

influential on the community[144], the actual implementation of the changes is left to nodes and miners[145]. With regard to nodes and miners, by downloading the software and participating in the functioning of the network, they share the interest in keeping the blockchain functioning, and in ensuring its reliability. They continue to exercise such decision-making power by choosing which version of the software to implement. Therefore, at the infrastructural level, nodes and miners can be qualified as joint controllers[146] with respect to the processing operations needed to keep the network functioning and reliable[147].

As regards the allocation of responsibility concerning the single transaction, some authors argued that nodes can be qualified as controllers[148], because they are not "subject to external instructions, autonomously decide whether to join the chain and pursue their own objectives"[149], and they can order, store and freely use data[150]. However, this interpretation cannot be considered accurate because it does not take into account the hypothesis in which nodes chose to passively run the software to facilitate the processing of transactions on behalf of users – a hypothesis in which they would qualify as processors,

144. See Michele Benedetto Neitz, *Ethical Considerations of Blockchain: Do We Need a Blockchain Code of Conduct?* (The FinReg Blog, January 21, 2020), available at https://sites.law.duke.edu/thefinregblog/2020/01/21/ethical-considerations-of-blockchain-do-we-need-a-blockchain-code-of-conduct/ (last visited April 6, 2022).

145. See Giannopoulou and Ferrari, *Distributed Data Protection and Liability on Blockchains* (cited in note 17).

146. The opposite conclusion is reached in The European Union Blockchain Observatory and Forum, *Blockchain and the GDPR* at 18 (cited in note 15), in which it is argued that "*nodes do not determine the purpose and means of processing. They are running the protocol in the hope of winning a reward, or in order to contribute to the stability of the network, and/or as a way to access the data that is relevant to them without relying on third-party intermediaries*".

147. For an analogous line of reasoning with respect to Bitcoin, see Bacon et al *Blockchain Demystified* (cited in note 104).

148. See Berberich and Steiner, *Blockchain Technology and the GDPR* at 424 (cited in note 98).

149. See Finck, *Blockchain Regulation and Governance in Europe* at 100 (cited in note 16).

150. See Finck, *Blockchain and the General Data Protection Regulation* at 47 (cited in note 25); under reference to Mario Martini, Quirin Weinzierl, *Die Blockchain-Technologie und das Recht auf Vergessenwerden*, 36 NVWz 1251 (2017).

rather than controllers[151]. Miners are generally qualified as processors, due to the fact that , even if they have influence over the means of the processing, they have no decision-making power over the purposes underlying the single transaction[152]. Finally, users are generally identified as data controllers with respect to the transaction they sign and broadcast to the network[153]. This is because they pursue their own purposes and decide the means by choosing to rely on the blockchain. This conclusion is also in line with the opinion on the Article 29 Working Party, which allows the user of a social media to be a controller[154]. However, it may be criticized that this allocation of accountability has the result of shifting the responsibility for the technology design from the actual designers to users[155], who are generally not aware of such legal implications. It is also difficult to determine how fines will be calculated in case a controller, in the Ethereum blockchain, failed to comply with the GDPR – given that Article 83 GDPR refers to the "annual worldwide turnover" – or even how an ordinary person could ever be able to pay the heavy fines the GDPR allows to impose[156].

For what concerns smart contracts, the developer could be qualified as controller or as processor according to his/her role in determining

151. See Bacon et al , *Blockchain Demystified* at 45 (cited in note 104); The European Union Blockchain Observatory and Forum, *Blockchain and the GDPR* at 18 (cited in note 15).

152. See Commission National de l'Informatique et des Libertés, *Solutions for a responsible use of Blockchain in the context of personal data* at 2 (cited in note 72); The European Union Blockchain Observatory and Forum, *Blockchain and the GDPR* at 18 (cited in note 15).

153. See Finck, *Blockchain and the General Data Protection Regulation* at 47 (cited in note 25); Commission National de l'Informatique et des Libertés, *Solutions for a responsible use of Blockchain in the context of personal data* at 2 (cited in note 72); The European Union Blockchain Observatory and Forum, *Blockchain and the GDPR* at 18 (cited in note 15); Finck, *Blockchain Regulation and Governance in Europe* at 101 (cited in note 16); Bacon et al, *Blockchain Demystified* at 44 (cited in note 104); Erbguth, *Five Ways to GDPR-Compliant Use of Blockchain* at 433 (cited in note 77); Giannopoulou and Ferrari, *Distributed Data Protection and Liability on Blockchains* (cited in note 17).

154. Article 29 Data Protection Working Party, *Opinion 5/2009 on online social networking* (2009) at 6.

155. See Finck *Blockchain and the General Data Protection Regulation* at 48 (cited in note 25).

156. See Finck, *Blockchains and Data Protection in the European Union* at 17-18 (cited in note 10).

the purpose of the processing[157]. For instance, if the software is developed by one of the parties deploying the smart contract, then the developer, as well as the other party, will qualify as controllers due to the influence on the determination of the purposes of processing. Whereas, if the software is developed by a third party and deployed by different actors for their own purposes, then the developer will rather qualify as processor and the parties as controllers.

As for blockchain-based applications (i.e. cases in which users will not interact with the infrastructure layer of the blockchain, but with a user-friendly interface)[158], the entity which developed, or is responsible for the application will act as an intermediary – meaning that it will add data to the blockchain on behalf of their users[159] – and will qualify as data controller, since it determines the means and the purposes of the processing[160].

From the analysis above, it is clear that there could be situations in which data controllers may be unable to comply with the GDPR requirements due to their insufficient control over data[161] (the implications deriving from such allocation of responsibilities will be analyzed deeper in Section 12). Taken alone, nodes, miners and users have very limited influence over the respective means of the processing: a single node would not be able to change the protocol or the history of transactions stored on the blockchain on its own; nodes or users could not bind miners, in quality of their relationship controllers-processors, through a contract ensuring compliance with GDPR requirements; single users would not be able to erase data to comply with an erasure request forwarded by the other party in the transaction, in quality of their relationship controller-data subject.

157. See Commission National de l'Informatique et des Libertés, *Solutions for a responsible use of Blockchain in the context of personal data* at 2 (cited in note 72).

158. Also tokens and smart contracts fall under the definition of application. However, in this paper an 'application' is considered to be something which closely resembles a 'regular' application, to which users generally think about when talking about applications.

159. See The European Union Blockchain Observatory and Forum, *Blockchain and the GDPR* at 17 (cited in note 15).

160. See Erbguth, *Five Ways to GDPR-Compliant Use of Blockchain* at 433 (cited in note 77).

161. See Finck, *Blockchain and the General Data Protection Regulation* at 52 (cited in note 25).

As Advocate General highlighted in his Opinion in *FashionID* case, law, and its interpretation, should never reach the result of imposing an obligation on addressees who cannot actually comply with them[162]. There should always be "a reasonable correlation between power, control, and responsibility"[163].

9. *Lawfulness of Processing*

The processing of personal data must be carried out in a lawful way, according to Article 5(1)(a) GDPR, meaning that the processing has to be justified by one of the legal grounds provided by Article 6(1) GDPR[164].

Consent[165] can be an appropriate basis for processing only when the data subject has control and can deny consent without detriment[166]. This will never be the case with respect to data processing on blockchain: first, by declining the storing of data on the blockchain, the processing operation could not take place at all; second, the data subject cannot be granted an effective choice and control over data once it is inserted in the system. Furthermore, the data subject could withdraw consent at any time[167], and in the case it does, data has to be erased, if there is no other purpose justifying the continued processing[168]. As it will be explained further on, deletion of data is not possible on Ethereum blockchain and the interest in keeping the

162. See Opinion of AG Bobek, *Fashion ID & Co. KG v Verbraucherzentrale NRW e.V*, C-40/17, December 19, 2018 at para 93.

163. See *Id*. at 91.

164. Which are: a) consent of the data subject; b) performance of a contract; c) compliance with a legal obligation to which the controller is subject; d) protection of the vital interests of the data subject or of another natural person; e) carrying out a task in the public interest; f) legitimate interest of the controller.

165. GDPR Article 4(11) defines consent as "*any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.*"

166. See European Data Protection Board, *Guidelines 05/2020 on Consent Under Regulation 2016/679*, para 3 (2020).

167. GDPR Article 7(3).

168. GDPR Article 17(1)(b).

network working and reliable might justify the further processing of data under the legal basis of the legitimate interest – thus "avoiding" the issue of erasing data – consent should never be used as a legal ground for the processing.

The same applies to the "explicit consent" required by Article 9 (2) (a) for the processing of special categories of personal data, with the difference that in this case, the legitimate interest in preserving the network will not be a legal ground justifying the further processing of data in the case consent has been withdrawn.

The legal grounds listed in Article 6 (1) letters (c) compliance with a legal obligation to which the controller is subject, (d) protecting the vital interests of the data subject or of another natural person, (e) carrying out a task in the public interest, could be relied upon in very specific cases in which the Ethereum blockchain would be used, for example, as a means for voting in elections, or for the storage of healthcare data, or for banks to comply with AML obligations. However, at the moment these uses are taking place at a rather negligible level and, consequently, are of no relevance in this work. Therefore, my analysis will focus on the legal grounds provided in Article 6 (1) letter (b) performance of a contract, and (f) legitimate interest, which are the ones on which most of Ethereum blockchain processing operations could be relied on.

The same goes for the processing of special categories of data, for which the only legal ground that is worth discussing is provided in Article 9 (2) (e), which refers to processing of personal data which are manifestly made public by the data subject.

9.1. *Performance of a Contract*

For Article 6 (1) (b)[169] to be applicable, the controller should be capable of demonstrating (i) the existence of a contract, (ii) its validity

169. GDPR Article 6 (1) (b) provides that "*Processing shall be lawful only if and to the extent that at least one of the following applies: b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract*".

under the applicable contract law and that (iii) the processing is objectively needed to perform it[170].

To assess if the processing is necessary to perform the contract, one has to identify the specific purpose that is going to be achieved through the processing itself, so that if less intrusive alternatives are available, the processing cannot be considered as "necessary"[171]. The 'necessity' has to be assessed also from the perspective of 'an average data subject', therefore the data controller has to ensure that the processing constitute a reasonable expectation of the data subject when entering into the contract[172]. For instance, when ordering a product online, it is reasonable to ask for the customer's address only if home delivery has been required.

When users transact on Ethereum, it is reasonable to assume that in most cases the transaction is linked to a previous agreement between the parties. However, whether the transaction is qualifiable as a contract is something that depends on the circumstances of the specific transaction and on the (local) applicable contract law[173]. Whereas the "necessity" requirement is satisfied that, currently, knowledge of the recipient's address is the minimum condition for the transaction to take place.

At the application level, this legal basis may be invoked to the extent that the registration of data on the blockchain is necessary to perform the service requested by the user. However, the 'average data subject' may not be aware of the fact that data is going to be permanently stored on the blockchain.

When relying on this legal basis, processing should terminate when the contract is entirely performed[174], unless it is carried out for other purposes, authorised under other legal grounds and clearly

170. See European Data Protection Board, *Guidelines 2/2019 on the processing of Personal Data Under Article 6 (1)(B) GDPR in the context of the provision of Online Services to Data Subjects*, para 27 (2019).

171. See *Id*, at 24-25.

172. See *Id*, at 32.

173. For an overview of the legal status of smart contracts, *See* Nataliia Filatova, *Smart Contracts from the Contract Law Perspective: Outlining New Regulative Strategies*, 28, International Journal of Law and Information Technology 217, 242, 2020.

174. GDPR Article 17 (1) (a).

communicated at the beginning of processing[175]. In this case, as explained in the following section, the legitimate interest in preserving the network could be a viable legal ground to justify the further processing of data once the contract is terminated.

The necessity to perform a contract is not among the exceptions listed in Article 9 (2) for the processing of special categories of personal data for which the explicit consent of the data subject would be required. As a result, services demanding the processing of such data on Ethereum will not be compliant with the GDPR, mainly because the conditions for valid consent, and the erasure of data after the withdrawal of it, cannot be

To conclude, the possible application of Article 6 (1) (b) will depend on the context of the specific transaction and application, but there are some reasons to argue that processing could rely upon this legal ground.

9.2. *Legitimate Interest*

For Article 6 (1) (f)[176] to be applicable, the following three cumulative conditions must be met: (i) the interest pursued must be legitimate, (ii) the processing must be necessary for the purpose, (iii) the fundamental rights and freedoms of the data subject do not override the legitimate interest pursued.[177] Furthermore, this legal basis can be relied upon only after an assessment of the interest of the data controller and the rights and interests of the data subject has been carried out[178], so to avoid a disproportionate impact on the latter[179].

175. See European Data Protection Board, *Guidelines 2/2019 on the Processing of Personal Data Under Article 6(1)(B) GDPR in the context of the provision of Online Services to Data Subjects*, para 44 (2019).

176. GDPR Article 6 (1) (f) provides that "*Processing shall be lawful only if and to the extent that at least one of the following applies: processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child*".

177. Case C-13/16 R gas satiksme, 2017 para 28.

178. Article 29 Data Protection Working Party, Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller Under Article 7 of Directive 95/46/EC, 9 (9 April 2014).

179. See *Id*, at 41.

In order to be considered as 'legitimate', the interest of the controller has to be sufficiently specific, related to concrete and actual circumstances[180], and in accordance with the law[181].

Concerning the assessment of the impact of the processing on the data subject, consideration should be given to, *inter alia*, on one hand, whether the legitimate interest can be linked to the exercise of the controller's fundamental rights[182], or if it represents a public interest or an interest shared by the wider community[183], or if it is legally or culturally recognized[184], and on the other hand, the positive and negative consequences of the operation on the data subject, the nature of the data processed and whether it is publicly available, the reasonable expectation of the data subject regarding the use and disclosure of data, the status of the data subject and of the data controller[185].

According to Recital 49, the processing of personal data to the extent that is strictly necessary and proportionate to ensure the security of the network is a legitimate interest of the data controller. In this case, ensuring the reliability of the network has to be equated to ensuring its security, given that by storing a copy of the transactions history, each node prevents the unilateral modification of it by other malicious actors, and guarantees that only one version of the ledger exists, without the need of relying on a single central authority. Otherwise, nodes will not have any means to ensure that a sole version of the ledger exists.

This processing operation is proportional, given that nodes can decide whether to store a full, a light or an archive node, where only the

180. See *Id*, at 24; Case C-708/18 Asocia ia de Proprietari bloc M5A-ScaraA, 2019 para 44.

181. Article 29 Data Protection Working Party, Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller Under Article 7 of Directive 95/46/EC, 25 (9 April 2014).

182. Article 29 Data Protection Working Party, Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller Under Article 7 of Directive 95/46/EC, 34 (9 April 2014).

183. See *Id*, at 35.

184. See *Id*, at 36.

185. See *Id*, at 37-39.

latter stores a complete archive of historical states, while the others will result in pruned blockchain data[186].

The interest in ensuring the reliability and functioning of the network is specific enough to allow the balancing test to be carried out, and represent a concrete and actual interest, given that, at the moment of writing, Ethereum has around 2 million active nodes[187], and one Ether is worth 2.700 €[188].

Not only is the interest at stake shared by those who have invested in Ether, but it is also shared by a community of users and developers, and, finally, by society given that Ethereum has a high potential to render blockchain more user friendly for a variety of use cases.

Regarding the nature of the data being processed, in simple terms, data on Ethereum consists of public keys and transactions which will hardly be recognized as personal data by users themselves. As previously explained, messages added in transactions could store personal data, and the combination of on-chain data with off-chain data, or a deep and careful analysis of the blockchain itself, could increase the possibility of users' identification and, consequently, of their surveillance. However, in most cases, carrying out such a study will require a deep knowledge of the network, as well as a high level of IT skills. Furthermore, users may not be aware that transactions will be stored forever, or that there is the possibility that their identity could be discovered. In particular, the inability to delete data from the ledger constitutes a rather heavy impact on the data subject's rights and interests.

In conclusion, storing transaction history to ensure the reliability and the functioning of the network is a processing operation that should be justified under Article 6 (1) (f) because the interests and rights of data subjects are not likely to override the legitimate interest of the controllers. However, this could change depending on a data subject's specific situation.

186. See *Nodes and Clients* (April 2, 2021), available at https://ethereum.org/en/developers/docs/nodes-and-clients/ (last visited April 9, 2022).

187. See https://etherscan.io/nodetracker/nodes (last visited April 10, 2022).

188. See https://www.tradingview.com/symbols/ETHEUR/ (last visited April 10, 2022).

9.3. *Special Categories of Data Manifestly Made Public by the Data Subject*

Article 9 (2) (e) provides that the processing of special categories of data shall be permitted if data is made manifestly public by the data subject. Being it an exception to the general prohibition to process special categories of data, it has to be interpreted strictly and 'as requiring the data subject to deliberately make his or her personal data public'[189]. Furthermore, it would be incorrect to assume that in these cases the public availability of data is a sufficient condition to allow any type of data processing[190]. Rather, Article 6 has to be applied cumulatively with Article 9 to ensure that all relevant safeguards are satisfied, and that the processing of special categories of data is not granted a lower protection than personal data in general[191].

As far as Ethereum blockchain is concerned, it is unlikely that sensitive data can be considered as deliberately made public by the data subject. In fact, the user is likely to believe that their identity will remain unknown. Therefore, if an address were linked to a person's identity, and the transactions made were sufficient to reveal, for instance, their political opinions, further processing of data would be unlawful.

10. *Transparency*

In the following sections, the extent to which Ethereum's blockchain uses can ensure compliance with those data processing principles listed in Article 5 of the GDPR that are claimed to be 'incompatible' with public permissionless blockchains, such as transparency, data minimization and accountability will be discussed. A regulatory overview will be provided for each section, which will then be applied to Ethereum. According to Recital 39 GDPR, the transparency

189. See European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, 162 (2018).

190. Article 29 Data Protection Working Party, Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller Under Article 7 of Directive 95/46/EC, 15 (9 April 2014).

191. See *Id.*

principle requires that any information related to the processing of personal data must be easily accessible and easy to understand for the data subject. In particular, information should be given about the identity of the controller, the purposes of processing, the risks, rules, safeguards and rights linked to the processing and how to exercise them. This requirement is established also by Articles 13 and 14 of the GDPR.

The transparency principle is more easily complied with at the application layer, where is easier to single out an intermediary[192], rather than at the infrastructure or transaction layer, where it raises again the question of the connection between accountability and control[193]. Indeed, the information that the controller is required to make available to data subjects, according to Articles 13 – 14 GDPR, could be unreasonably burdensome to be provided in some cases. For instance, at the infrastructure level, as each node qualifies as a data controller, the identity and contact details of all of them should be made available to all users. At the transaction level, the parties involved often do not know each other, and since both parties qualify as controllers, requiring them to disclose their identities would imply a higher risk for the privacy of users, rather than a privacy improvement.

The GDPR lays down some exceptions to the obligation to provide information to the data subject, which differs according to whether the data have been collected directly from the data subject or not. In the former case, the only exception applies when the data subject already has the information[194]. In the latter case, the data controller is exempted from the obligation to give information when it is impossible, or it 'would involve a disproportionate effort', or when it is likely to 'seriously impair the achievement of that processing'[195]. In such cases, the controller shall take appropriate measures to protect the data subject's rights and interests, including making the information publicly available.

192. See Ibáñez, O'Hara, Simperl, *On Blockchains and the General Data Protection Regulation* at 10 (cited in note 95).

193. See Finck, *Blockchain and the General Data Protection Regulation* at 64 (cited in note 25).

194. GDPR Article 13 (4).

195. GDPR Article 14 (5) (b).

The 'impossibility' or the 'disproportionate effort' must be connected to the fact that personal data were not obtained directly from data subjects[196]. In addition, the 'disproportionate effort' exception cannot be routinely relied upon if controllers do not process data for archiving or statistical purposes[197].

The exception of the "serious impairment of objectives" can be if controllers are able to demonstrate that the provision of information alone would nullify the purpose of the processing[198].

While at the transaction level, the parties involved should disclose their identity to each other as personal data are collected directly from the data subject, at the infrastructure level, it could be argued that by downloading the history of transactions, nodes do not enter in direct contact with each user and that data are not collected directly from them. However, none of the exceptions provided by Article 14 (5) (b) apply. Requiring nodes to disclose their identity is not impossible, even if burdensome. Given that the processing is not taking place for archiving or statistical purposes, it would be irrelevant whether the provision of the information would imply a disproportionate effort. Finally, the disclosure of identities will not (directly) impair the objective of ensuring the reliability and the functioning of the network. However, it is questionable whether the network will have the same rate of active nodes in case they were required to disclose their identities.

In conclusion, in theory, it is possible to achieve compliance with the transparency principle in the Ethereum blockchain. In practice, this is unlikely to happen and, in any case, a reasonable interpretation of this principle should be adopted, so that individuals are not required to disclose more personal data than necessary.

196. Article 29 Data Protection Working Party, Guidelines on Transparency Under Regulation 2016/679, para 62 (11 April 2018).

197. See *Id,* at 61.

198. See *Id*, at 65.

11. *Data Minimization and Storage Limitation*

The principle of data minimization requires that the controller processes only the data which are necessary and adequate for the purpose of the processing. Given that the data minimization principle requires the controller to process personal data only if they are sufficient to fulfilll the specified purpose, even the processing carried out on insufficient data will be in violation of the GDPR[199]. Also, from the case-law of the CJEU it is possible to conclude that the assessment of compliance with the data minimization principle has to be carried out considering whether all possible reasons that could justify the processing of fewer data were taken into account when delimiting the scope of a processing operation[200].

As to the principle of storage limitation, Article 5 (1) (e) requires that personal data must be deleted or anonymized when they are no longer necessary[201]. This principle is important to ensure that personal data are erased or anonymized when the controller does not need it anymore[202]. Data controllers should always take a proportionate approach, balancing their needs with the impact of retention on individuals' privacy[203].

---

199. See Information Commissioner's Office, *Principle (c): Data minimisation*, available at https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/data-minimisation/ (last visited April 10, 2022).

200. Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd and Kärntner Landesregierung, 2014 paras 57-58, 69. The CJEU found that the generalised way in which the Data Retention Directive (Directive 2006/24/EC) covered "*all individuals and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime*", was in breach of the proportionality principle.

201. See European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law*, 129, (2018).

202. See Information Commissioner's Office, Principle (e): Storage limitation, https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/storage-limitation/ (last visited April 10, 2022).

203. See *Id.*

Data minimization and storage limitation are said to be at odds with the 'perpetual distributed storage'[204] of data, being blockchains append-only, ever-growing databases[205]. However, a deeper analysis reveals that, contrary to what is generally assumed, this is not the case: compliance with these principles has to be assessed in consideration of the purposes of the processing. As a matter of fact, the perpetual storage of data and the distributed nature of the ledger are necessary for ensuring the reliance and the functioning of the network. Therefore, data stored on blockchain will always remain necessary because they ensure that the state of the system is reliable and verifiable. The processing of users' public addresses is necessary for the proper functioning of the blockchain and is not possible to further minimise them[206]. However, there is room to argue that at the transaction level, as well as at the application layer, unnecessary data could be inserted in the transaction, but this will only render the transaction GDPR-incompliant, whereas it would not render the transaction or the blockchain GDPR-incompatible.

12. *Accountability*

Article 5 (2) introduces the principle of accountability, which requires controllers to safeguard data protection in their processing activities, and establishes their responsibility for ensuring and demonstrating that the processing operations they carried out are in compliance with the law[207].

The principle of accountability is clearly linked to the controller responsibility role. As highlighted in Section 8, the allocation of responsibilities deriving from the application of the GDPR to Ethereum blockchain leads to situations in which data controllers may be

204. See Berberich and Steiner, *Blockchain Technology and the GDPR – How to Reconcile Privacy and Distributed Ledgers* at 425, (cited in note 98).

205. See Lokke Moerel, *Blockchain & Data Protection... and Why They Are Not on a Collision Course*, 6, European Review of Private Law 825, 847-848 (2019).

206. See Commission Nationale de l'Informatique et des Libertes, *Solutions for a Responsible Use of Blockchain in the Context of Personal Data*, 7 (2018).

207. See European Union Agency for Fundamental Rights and Council of Europe, Handbook on European Data Protection Law 134, (2018).

unable to comply with the GDPR requirements due to their insufficient control over the data. The major obstacle is that single nodes, or users, would not be able to delete, modify or access data. Because of the structure of the network, they would not be able to choose processors and to bind them to the adoption of proper safeguards in the processing of data.

The resulting dissociation between control and responsibility clashes with the main objective pursued by both the accountability principle and the controller as a responsibility role, namely, to improve the effective application of data protection law[208], and to "ensure that responsibility is allocated in such a way that compliance with data protection rules will be sufficiently ensured in practice"[209].

The ever-growing complexity of data processing, which is ever more likely to comprise several different processes and to involve numerous parties holding differing degrees of control, increases the risk of accountability gaps. However, these gaps should not be filled by assigning responsibility to those who do not exercise any factual power[210].

In *Google Spain*, the CJEU held that the data controller has to ensure compliance with data protection law "within the framework of its responsibilities, powers and capabilities"[211]. Therefore, even if, at first glance, Ethereum blockchain may seem incompatible with the accountability principle, there is room to argue that, it will be reasonable to adopt a more flexible and realistic interpretation of the requirements leading to the qualification of controller, in cases where the actors qualifiable as controllers cannot comply with GDPR obligations. It has not the effect of allocating responsibility to subjects who are materially incapable of doing anything to avoid it, and it actually mirrors the extent of control held by actors involved in the processing operation.

208. Article 29 Data Protection Working Party, Opinion 3/2010 on the Principle of Accountability (July 13, 2010).

209. Article 29 Working Party, Opinion 1/2010 on the Concepts of "controller" and "processor", 1, (2010).

210. Case C-40/17 Fashion ID, Opinion of AG Bobek, 2019 para 71.

211. Case C 131/12 Google Spain, 2014 para 38.

13. *Right of Access*

Chapter III of GDPR is dedicated to the rights of the data subject. In the following sections, I will analyze only the most problematic ones to exercise in public permissionless blockchains, namely, the right of access, right to rectification, right to erasure.

Article 15 GDPR grants data subjects the right to obtain confirmation from the controller as to whether their personal data are being processed, and, consequently, access to personal data and to information, such as, *inter alia*, the purposes of processing, the categories of data processed, the recipients to whom data have been or will be disclosed. The boundaries defining the scope of application of the right of access have to be determined considering its objective[212], meaning, to allow the data subject to become aware of which data are being processed, and to check that they are accurate and processed in compliance with the law[213].

It is not possible for data subjects to be entitled to the right to obtain a copy of the original file in which their personal data appear as a consequence of their right of access. Data can be communicated through means other than the original file, for instance in order to safeguard the rights of other individuals if the original document also contains personal data related to them[214]. Indeed, the right of access cannot be exercised in a way which it adversely affects the rights and freedoms of others[215].

For the same reason, a controller can legitimately refuse access to data if it can be demonstrated that the data subject is not identifiable.[216]. In particular, granting access to information that is only linked to a non-obvious identifier, rather than against other information more clearly related to a person, represents a 'major privacy risk' due to the controller not being able to determine whether the information

212. Joined Cases C-141/12 and C-372/12 *YS v Minister voor Immigratie, Integratie en Asiel* and *Minister voor Immigratie, Integratie en Asiel v M and S.*, 2014 para 46.

213. See *Id,* at 59.

214. See *Id.*

215. GDPR Article 15 (4); GDPR Recital 63.

216. GDPR Article 11 (2).

requested is exclusively about the person making the request[217]. For example, a data controller may reject access requests based only on IP addresses, as this online identifier is linked to the device, which could be used by more than one individual.

The fulfillment of the data subject request in the Ethereum blockchain environment becomes problematic at the infrastructure level, where all nodes, including miners, can be qualified as joint data controllers. Consequently, a data subject could address any of them in order to request access to his/her personal data. However, nodes would not be able to satisfy the request because they only see encrypted and hashed data[218]. At the same time, it has to be pointed out that none of them could reasonably be able to ascertain whether information, to which access is requested, can be linked back to the individual making the request. Being data encrypted and not having the key to decrypt it, granting access would mean cracking the encryption used by others to protect their data. This could be a reason for data controllers to lawfully refuse access.

14. *Right to Rectification*

Article 16 GDPR states that the data subject has the right to obtain from the data controller the rectification of inaccurate personal data concerning him or her, in the light of the purpose for which data was collected[219]. Therefore, the data subject can obtain the rectification including by means of providing a supplementary statement, where appropriate.

217. See Information Commissioner's Office, *Personal Information Online Code of Practise*, 32, (2010).

218. See Finck, *Blockchain and the General Data Protection Regulation* at 10 (cited in note 25). Also see The European Union Blockchain Observatory and Forum, Blockchain and the GDP, 25 (2018). It has to be kept in mind that if a data subject wanted to know the transactions linked to his/her account, or to read data added in plain text, he/she would be able to check that information on his/her own, without the need to file an access request.

219. Case C-434/16 Peter Nowak v Data Protection Commissioner, 2017 para 53.

Article 29 Working party considers that only factual information can be inaccurate, not opinions[220]. Concerning the latter, opinions diverged as to whether the principle of accuracy applies: according to some, non-factual data *per se* cannot be accurate, while others argue that accuracy applies as they fall within the scope of application of data protection legislation[221].

It has been highlighted that, even when data is factually correct, there are other aspects that could offer a misleading impression of an individual, for instance when data are presented in a way that can lead to misinterpretation[222].

Given the immutability of transactions on Ethereum[223], it would be practically impossible to comply with data subjects' requests by substituting erroneous data with correct data. Single nodes could modify their version of the ledger; however, this would only mean that *their* version would be different from the *actual* version of the blockchain, which would be the version shared by, at least, 51% of nodes in the network. Furthermore, a hard fork[224] would be necessary in order to change data stored in past blocks, and to make the change effective for the majority of nodes,. However, a 'old' version of the chain, which contains the erroneous data, will continue to exist and, potentially,

220. Article 29 Working Party, Guidelines on the Implementation of the Court of Justice of the European Union Judgement on "Google Spain and Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" C-131/12, 15 (November 26, 2014).

221. See Diana Dimitrova, *The Rise of the Personal Data Quality Principle. Is it Legal and Does it Have an Impact on the Right to Rectification?*, 4 (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790602 (last visited April 10, 2022).

222. See *Id*, at 11. This conclusion can be inferred from the CJEU preliminary ruling in the case U v Stadt Karlsruhe (Case C-101/13 U. v Stadt Karlsruhe, 2014) in which, although the personal data of the applicant were factually correct, they were presented in a misleading format which led to their misinterpretation.

223. See *Is Ethereum Immutable?* https://docs.ethhub.io/questions-about-ethereum/is-ethereum-immutable/#immutability-and-the-dao-hard-fork (last visited April 10, 2022); Also see Ibáñez, O'Hara, Simperl, *On Blockchains and the General Data Protection Regulation* at 7 (cited in note 95).

224. 'A hard fork refers to a radical change to the protocol of a blockchain network that effectively results in two branches, one that follows the previous protocol and one that follows the new version' from Jake Frankenfield, Hard Fork (Blockchain) (4 March, 2021), available at https://www.investopedia.com/terms/h/hard-fork.asp (last visited April 10, 2022).

other miners and users who disagree with the hard fork, could continue using it[225], as shown in the figure below. Therefore, it is incorrect to assume that compliance with these requests could potentially be achieved by a periodical fork of the blockchain, as suggested by some scholars[226], because erroneous data could still continue to be processed in the old version of the blockchain.

Blocks from non-upgraded nodes	Follows old rules	↩	Follows old rules	↩	Follows old rules	↩	Follows old rules	↩	Follows old rules
Blocks from upgraded nodes	Follows old rules	↩	Follows old rules	↩	Follows new rules	↩	Follows new rules	↩	Follows new rules

Table 2. Representation of a hard fork

It is worth pointing out that requests of rectification, where the addition of supplementary information would be sufficient to rectify the data, could be complied with by any node, or even by the data subject on its own, through the broadcasting of new transactions to the network. However, rectification through the substitution of erroneous data will remain problematic due to the difficulties in changing the blockchain history.

15. *Right to Erasure*

Article 17 GDPR confers to data subjects the right to obtain from the controller the erasure of personal data concerning them if at least one of the conditions required is met[227].

225. See *Is Ethereum Immutable?*, available at https://docs.ethhub.io/questions-about-ethereum/is-ethereum-immutable/#immutability-and-the-dao-hard-fork (last visited April 10, 2022).

226. See Bacon and Others, *Blockchain Demystified* at 48 (cited in note 104); Also see Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?* at 73 (cited in note 25).

227. These are: the personal data are no longer necessary in relation to the purposes for which they were collected or processed; the data subject withdraws consent on which the processing was based; the personal data have been unlawfully processed; the erasure is needed to comply with a legal obligation; personal data have been

The right to erasure is not absolute[228]. As a matter of fact Article 17 (3) provides a number of cases where the erasure can be lawfully denied. The CJEU stressed the need to adopt a case-by-case approach when balancing clashing interests, taking into account the nature and the sensitivity of the information in question, and the interest of the public in accessing it[229].

As pointed out by Finck, the exact meaning of the term 'erasure'[230] has not been clarified yet. In *Google Spain*, the delisting from search results was considered to equal erasure, while in *Nowak*, the CJEU considered 'erasure' to mean 'destruction' of data[231]. However, the latter case was not about the right to erasure and the 'destruction' of data was the most straightforward means to achieve erasure[232]. The case-by-case approach, and the uncertainty about the real implication of the expression 'erasure' may be taken as indications that controllers should do all they can to obtain a result as close as possible to the destruction of data, within the limits of their own possibilities[233].

In the case of Ethereum blockchain, the major problem will derive from the immutability of the blockchain.

Therefore, alternative means for the destruction of data have been considered. In particular, the CNIL deemed the inaccessibility of data to be close enough to erasure[234]. However, inaccessibility could be achieved only through encryption and deletion of the private key, while if data were stored in plain text, the request of erasure would never be complied with. Furthermore, it was suggested, by analogy

---

collected in relation to the offer of information society services to a minor of 16 (or 13) years old, in the absence of consent given by the holder of parental responsibility.

228. In Case C 398/15 Manni, 2017, the CJEU found the interference with the right to privacy of the plaintiff was not disproportionate and did not grant the exercise of the right to erasure.

229. Case C 131/12 Google Spain, 2014 para 81.

230. See The European Union Blockchain Observatory and Forum, *Blockchain and the GDPR*, 25 (2018); Also see Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?* at 75 (cited in note 25).

231. Case C-434/16 Peter Nowak v Data Protection Commissioner, 2017 para 55.

232. See Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?* at 76 (cited in note 25).

233. See *Id.*

234. See Commission Nationale de l'Informatique et des Libertés, *Solutions for a Responsible Use of Blockchain in the Context of Personal Data*, 8 (2018).

with *Google Spain*, that it would be likely for users to address their requests to intermediaries like block explorers to obtain the removal of data from their indexes[235].

When no alternative means are available to comply with an erasure request, the only solution would be taking down the entire blockchain, at least in Europe, and implementing measures to prevent people residing in the EU from downloading the ledger again. However, the adoption of this measure would be rather drastic. It should follow from the balancing of a number of different interests. As a matter of fact, being Ethereum a general-purpose technology, it can be also used for many laudable scopes, such as the escaping of censorship by people living in authoritarian countries[236].

In conclusion, at the application layer, intermediaries could store encrypted data on the blockchain, so that the deletion of the private key could be enough to comply with an erasure request. Nevertheless, when data are stored in plain text or are publicly accessible, there would be no way to comply with an erasure request without taking down the entire blockchain, or without turning it into a permissioned one. However, data stored on a blockchain are not as easy to find as it would be in regular databases, since one should already have a hint of what to search for, or where to search it, and no "general" search can be carried out, for example through keywords[237]. In *Google* Spain, the CJEU considered the harm to an individual's right to privacy to be particularly serious "when the search by means of that engine is carried out on the basis of an individual's name. In fact, that processing enables any internet user to obtain through the list of results a

235. See Finck, *Blockchain and the General Data Protection Regulation: Can distributed ledgers be squared with European Data Protection Law?* at 76 (cited in note 25).

236. See Nir Kshetri, *Chinese Internet Users Turn to the Blockchain to Fight Against government Censorship* (February 25, 2019), available at https://theconversation.com/chinese-internet-users-turn-to-the-blockchain-to-fight-against-government-censorship-111795 (last visited April 10, 2022). Also see Roger Huang, *Chinese Netizens Use Ethereum To Avoid China's COVID-19 Censorship* (March 31, 2020), available at https://www.forbes.com/sites/rogerhuang/2020/03/31/chinese-netizens-use-ethereum-to-avoid-chinas-covid-19-censorship/ (last visited April 10, 2022).

237. For instance, to carry out a research using https://www.blockchain.com/explorer/?utm_campaign=dcomnav_explorer, the research can only be based on 'transaction', 'address' or 'block'. Therefore, at least one of these elements should be known at the moment of starting the research (last visited April 10, 2022).

structured overview of the information relating to that individual that can be found on the internet"[238]. The way in which information can be searched for in the blockchain could decrease the negative impact on the data subject whose data should be erased, making the taking down of the entire blockchain an even more disproportionate measure.

16. *Conclusion*

The alleged incompatibility between public permissionless blockchains and the GDPR and the growing relevance of Ethereum blockchain with respect to use cases suitable for addressing current problems of our society, has conveyed relevance to the issue of its compatibility with the GDPR.

From the analysis carried out, it has emerged that the GDPR applies to the Ethereum blockchain because it falls within its territorial and material scope of application. Moreover, Ethereum blockchain is a service unequivocally addressed also to people residing in the EU and it implies the processing of personal data through electronic means, due to the fact that accounts and transaction data can be considered personal data when related to a natural living person.

The issues highlighted by the literature, which give rise to the incompatibility between public permissionless blockchains and the GDPR, relate to three major areas: controllership, principles of processing, data subject rights.

Concerning the allocation of responsibility roles, even if it is possible to single out the categories of actors who qualify as controllers or processors for given processing activities, it has emerged the lack of correspondence between control and responsibility: those who are held responsible do not have enough control over data to ensure compliance with the law. This mismatch makes the possibility to comply with the principle of accountability a problematic topic

Compliance with the data subject's right of access would be possible only at the application and at the transaction layers; while at the infrastructure level, nodes could legitimately deny access to data due to the impossibility to ensure that data to which access is sought are

238. Case C 131/12 Google Spain, 2014 para 80.

actually linked to the subject making the request. The right to rectification and the right to erasure are not compatible with the immutability of Ethereum blockchain. However, there is room to argue that they could be respected if a given interpretation of the law is adopted, as long as it ensures sufficient protection of the data subject.

In conclusion, Ethereum blockchain and the GDPR are not incompatible. The major "compatibility" issue derives from the mismatch between responsibility and actual control over data, which could be overcome as blockchain use cases become more user-friendly. As a matter of fact, it is easier to reconcile control and responsibility in the entity which offers the service through an application, when users do not interact with the blockchain directly, but through the application.

The Origin of Right to Privacy and its Migration and Evolution in Nepal

Uddhav Gautam and Yatish Ojha*

Abstract: Warren and Brandeis' article, written more than 130 years ago, laid the foundation of the right to privacy. It mainly comprises two parts: the first is a condemnation against yellow journalism and the second is a compelling and efficacious plea for privacy laws. This paper illustrates how Warren and Brandeis differentiate the right to privacy from the property right and create a whole new chapter in the constitutional jurisprudence. Additionally, this paper analyzes the constitutional migration of the concept in the Nepalese legal system. Following doctrinal research methodology, we discuss the evolution of the right to privacy in the context of Nepal alongside three constitutional enactments and three distinct political regimes: monarchical, unitary republic, and federal republic systems. Hence, the considerations will focus on whether the migration of constitutional principles was effective by tracing a trajectory of case laws and what the recent privacy act entails. The analysis shows that privacy laws have been gradually improving in Nepal but require comprehensive revision.

Keywords: Right to privacy; Warren and Brandeis; Nepal; constitutional migration; Nepalese legal system.

1. *Introduction*

Privacy has always been a topic of concern in human societies. However, the right to privacy, as a constitutional right, results from recent developments. Since antiquity, people in nearly all societies have debated issues of privacy ranging from gossip to eavesdropping on surveillance[1]. Privacy is considered a topic of the utmost importance throughout the world. Nearly all national and international human rights laws guarantee privacy as a fundamental right, as exemplified explicitly for instance by article 12 of the Universal Declaration of Human Rights: "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks"[2]. Similar provisions are also to be found at articles 7 and 8 of the EU Charter of Fundamental Rights[3] and at article 8 of the European Convention on Human Rights[4]. Nearly every country in the world recognizes a right of privacy explicitly in their Constitution (e.g., Article 28 of the Nepalese Constitution). In the least, these provisions include rights

* Uddhav Gautam is a student of Comparative, European and International Legal Studies (CEILS) at University of Trento, Italy. Yatish Ojha is a student of Bachelors of Arts Bachelors of Law (B.A. LL.B) at Tribhuvan University, Nepal.

1. See Daniel J. Solove, *Understanding Privacy,* GWU Legal Studies Research Paper (2022).

2. See Art. 12, Universal Declaration of Human Rights ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation").

3. See Art. 7, tit. 1, *Charter of Fundamental Rights of the European Union* ("Everyone has the right to respect for his or her private and family life, home and communications"). See also Art. 8 tit. 1, cit. ("Everyone has the right to the protection of personal data concerning him or her").

4. See Art. 8, *European Convention on Human Rights* ("Everyone has the right to respect for his private and family life, his home and his correspondence").

of inviolability of the home and secrecy of communications – for instance, such provisions might be found in article 15 of the Constitution of Italy[5], and article 29 of the Constitution of Nepal[6]. Most recently written Constitutions such as South Africa's and Hungary's include specific rights to access and control one's personal information; in a number of other jurisdictions, supreme and constitutional courts have recognized a right to privacy as implicitly incorporated in the constitutional charters. For example, in the US, courts decisions have defined the corporation of privacy within the constitution, even though not mentioned particularly[7]. Thus, every legal system is aware of privacy and agrees to protect it.

This article traces the origin of the Right to Privacy in the world and then discusses the migration of the constitutional idea in the Nepalese legal system. It explains the evolution of the Right to Privacy in Nepal through a systematic and chronological study of Supreme Court cases in the field. It summarizes that the development of privacy laws in Nepal has revolved around constitutional interpretation by the court. However, in 2018 a specific act to regulate privacy matters was enacted in Nepal. Hence, we also aim to critically evaluate the Right to Privacy Act, 2018 of Nepal as specific-scope legislation in addressing contemporary privacy issues.

2. *The Origin and Meaning of Privacy*

Right to privacy, for the most part, seems to be absolute, but finding a mechanism to enforce it in this technologically overwhelmed global village seems to be a difficult task. Currently, privacy is intended as a far-reaching concept, encompassing freedom of thought, control over one's body, solitude in one's home, control over personal information, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations[8]. However, several questions

5. See Art. 15, *Constitution of the Italian Republic* ("Freedom and confidentiality of correspondence and of every other form of communication is inviolable").

6. See Art. 29, par. 1, *Constitution of Nepal* ("Every person shall have the right against exploitation").

7. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8. See Solove, *Understanding privacy* (cited in note 1).

emerged in discussions regarding the right to privacy. Where does this right to privacy in legal statutes arise from? How valuable is it? What was it like during its origin? How was it differentiated from right to life or right to property? This series of queries lead us to a common birthplace: Samuel Warren and Louis Brandeis' paper, "The Right to Privacy"[9].

2.1. *Warren and Brandeis' "Right to privacy" paper*

Warren and Brandeis conceived an entirely new constitutional right by differentiating the right to privacy from other similar rights. The relevance of this paper in legal history is paramount: although not being a constitutional moment, it still gave rise to certain constitutional rights; although not being a broad statutory scheme, it spurred the adoption of numerous statutes nationwide in the United States[10]. Warren and Brandeis appeal to the courts of law to guarantee the right to privacy by combating the threats and breaches to it and thus, in practice, adding a new right: "the right to be let alone". This differs from the protection from assault, or protection of tangible and intangible property. Rather, privacy is constituted as a right to decide to what extent personal "thoughts, sentiments, and emotions shall be communicated to others"[11].

The relevance of the ideas expressed by Warren and Brandeis is widely recognized: the paper has been called an "unquestioned classic"[12], the "most influential law review article of all"[13], "one of the most brilliant excursions in the field of theoretical jurisprudence"[14], "an outstanding example of the influence of legal periodicals upon the American law", "a pearl of common-law reasoning" that

9. See Samuel Warren and Louis Brandeis, *Right to privacy,* 4 Harvard L.R. 193 (Dec. 15, 1890).

10. See Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 Cath. U. L. Rev. 703 (1990).

11. See Warren and Brandeis, *Right to privacy* (cited in note 10).

12. See Shapiro, Fred R., *The most-cited legal scholars*, 29(S1) The Journal of Legal Studies (2000).

13. See Kalven Jr, Harry, *Privacy in tort law-were Warren and Brandeis wrong,* Law & Contemp. Probs. 31 (1966).

14. See Adams, Elbridge L., *The Right of Privacy, and its Relation to the Law of Libel,* Am. L. Rev. 39 (1905).

"single-handedly created a tort", "momentous" and "brilliant" by the Supreme Court of Mississippi and the U.S. Court of Appeals for the Ninth Circuit[15]. Most notably, the paper has been called upon by the Supreme Court of Kentucky, in reaching its holding that a statute criminalizing sodomy violated the privacy and equal protection provisions of the state constitution[16]. The court, in this case, struck down the state's statute criminalizing consensual sodomy between same-sex partners. Had it not been for the paper, the right to privacy might not have been as protected as it is today. Warren and Brandeis, in this regard, have written a brilliant paper, which is relevant even today, as much as it was during the inception of the right to privacy.

2.2. *Development of Right to Privacy after Warren and Brandeis' paper*

Privacy refers to an individual's right to seclusion, or the right to be free from public interference. The "right to be alone" was already recognized, particularly by Judge Cooley[17]. The nature and extent of such a right was an issue to discuss. Mentioning political, social, and economic changes, Warren and Brandeis' illuminate the invasion of the right to privacy brought upon by those changes. The right to privacy is based upon a principle of "inviolate personality"[18]. It is different from protecting corporeal or intellectual property, but rather it focuses on protecting peace of mind, or "the right to one's personality"[19].

The attention of philosophical debate shifted focus on privacy during the second half of the twentieth century. Some authors focused on the control over private information[20], whereas others connects privacy with human dignity[21]. Charles Fried defended privacy as necessary for the development of varied and meaningful interpersonal

15. See Ben Bratman, *Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy,* Tenn. L. Rev. 69 (2001).

16. See *Commonwealth v. Wasson*, 842 S.W.2d 487 (1992).

17. See Warren and Brandeis, *Right to privacy,* (1890) (cited in note 10).

18. See *ibid.*

19. See *ibid.*

20. See William A. Parent, *A new definition of privacy for the law*, 2(3) Law and Philosophy 305, 338 (1983).

21. See Edward J. Bloustein, *Privacy as an aspect of human dignity: An answer to Dean Prosser*, 39 N. Y. Univ. Law Rev. 962 (1964).

relationships[22]. The concept of privacy by Warren and Brandeis focusing on private information was endorsed by Parent and Fried. Professor Ken Gormley divides legal privacy into five species: 1) The Privacy of Warren and Brandeis (Tort Privacy), 2) Fourth Amendment Privacy, 3) First Amendment Privacy, 4) Fundamental-Decision Privacy, and 5) State Constitutional Privacy. According to "The privacy of Warren and Brandeis" species the common law had nurtured a new right, simply known as privacy, which demanded acceptance in American jurisprudence. After the publication of the paper, there have been hundreds of books and articles written about the notion of privacy in the United States[23].

The right to privacy is different from the right against physical harm (i.e., battery and assault), or property rights. Traditionally, physical battery was incorporated under breach of the right to life, which later extended to the threat of battery, i.e., assault as well. Similarly, the right to property constitutes the right to own, acquire, sell, dispose, and possess physical property, which later extended to intangible and intellectual property as well. Laws of copyright were enacted and statutory rights were developed. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society[24]. But the right to privacy was something different. It should not be incorporated under common law right to life, or statutory intellectual and intangible rights such as copyright but rather, according to Warren and Brandeis, be developed as a distinct right to privacy which is the right to decide what shall be published.

The right to privacy accords the same protection to a casual letter, or an entry in a diary, and to the most valuable poem or essay, to a botch, or daub and a masterpiece[25]. It is different from the common law right which secures the right to decide "to what extent his thoughts, sentiments, and emotions shall be communicated to others"[26]. It is

22. See Charles Fried, *An Anatomy of Values: Problems of Personal and Social Choice,* Harvard University Press, 1970..

23. See Gormley, Ken, *One hundred years of privacy,* Wis. L. Rev. at 1335 (1992).

24. See Warren and Brandeis, *Right to privacy* (cited in note 10).

25. See *ibid.*

26. See *Millar v. Taylor,* 4 Burr. 201, 242 (1769), available at http://www.commonlii.org/uk/cases/EngR/1769/44.pdf (last visited April 4, 2022).

independent of copyright laws, which merely secures to the author, composer, or artist the entire profits arising from publication: privacy enables him to control absolutely the act of publication, and in the exercise, if his discretion, to decide whether there shall be any publication at all[27].This right to decide about what shall be divulged and made public is wholly independent of the material on which, or how, the thought, sentiments, or emotion is expressed. It is lost only when the author himself communicates his production to the public, publishing it[28]. The right to privacy does not depend upon means chosen by the person to whom the information, or emotions belong. It ceases to exist once the owner himself publicizes such information or emotions. This way, it is different from copyright, as copyright continues to exist even after the publication of the works.

Some critics argue that all the cases that have been thought to be violations of the right to privacy, can be adequately and equally well explained in terms of property rights or the right to life[29]. Such arguments are the result of treating private data and information as private property. This concept is a danger to the protection of privacy, as the right to privacy can be similar to other forms of property. Others contend that selective disclosure or concealment of information is usually done to mislead or manipulate others, and thus protection of individual privacy is less defensible[30]. Malicious intentions to conceal information cannot be protected by the law, hence, they argue the right to privacy should not be as important as it is made out to be. The US Supreme Court decision of Griswold v. Connecticut, which based its reason upon the Warren and Brandeis' paper, is also criticized as an attempt by the Supreme Court to take a side on a social and cultural issue, and as an example of bad constitutional law[31].

27. See *ibid.*

28. See *ibid.*

29. See Thomson, Judith Jarvis, *The right to privacy,* Philosophy & Public Affairs at 295-314 (1975), available at https://www.jstor.org/stable/pdf/2265075.pdf (last visited April 4, 2022).

30. See Posner, Richard A., *The economics of privacy*, 71 (2) The American economic review at 405-409 (1981), available at https://www.jstor.org/stable/pdf/1815754.pdf (last visited April 4, 2022).

31. See Bork, Robert H., *The Tempting of America: The Political Seduction of the Law,* Law Review 1990, no. 2 BYU, 1990, p. 665-672

Eventually, the contemporary privacy rights create a situation called the "privacy paradox". Justice William O. Douglas has stated, "we are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from the government"[32]. Individualists today are concerned that new technological and social developments may lead to the diminution, if not the destruction of privacy[33]. Privacy is a state in which one is not observed or disturbed by other people. It is toted with the inviolability of private life. Even though some critics still question the existence of the right to privacy by confusing it with other rights, the importance of the right to privacy has been rising every day in the contemporary world and as Justice William O Douglas said: "The right to be let alone is indeed the beginning of all freedom."

3. *Evolution of Right to Privacy in Nepal*

Various can be the implications and effects of the Constitutional migration phenomenon, positive or negative depending on whether it respects the recipient order and propose measures contrasting with conventional ideas or operate in an undemocratic way against national cultures and traditions[34]. Since Nepal is a state filled with cultural pluralism where more than 125 ethnicities thrive in a relatively small land, Constitutional migration is even more challenging. From its inception in the 19th century, the right to privacy took more than two centuries to migrate and establish itself democratically in the Nepalese legal system. Presently, it is a fundamental right in the Constitution of Nepal 2015.

The right to privacy enshrined under Article 28 of the Constitution provides that "Except, in circumstances provided by law, privacy in relation to the person, and their residence, property, documents,

32. See *Osborn v. United States*, 385 U.S. 323 (1966).

33. See Etzioni, Amitai, *A contemporary conception of privacy,* Telecommunications and Space Journal 6 at 81-114 (1999).

34. See generally Walker, Neil, *The migration of constitutional ideas and the migration of the constitutional idea: the case of the EU,* (2005), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=837106 (last visited April 5, 2022).

records, statistics, and correspondence, and their reputation are inviolable."

If we compare south-Asian constitutional traditions, only Nepal has listed the right to privacy as an inalienable right. Meanwhile, others have not defined it explicitly, as for example the case under Article 21 on the "Protection of life and personal liberty" in the Constitution of India and Article 43 on the "Protection of home and correspondence" in Bangladesh[35]. However, the introduction of the right spurred struggles and debates. Nepal underwent a series of political and social changes in the 90s after the first civil movement to eliminate the party-less Panchayat System or the royal coup. After the revolution, the promulgation of the Constitution of the Kingdom of Nepal restored democracy. While envisioning democratic principles to incorporate in the constitutional draft, members of the constitution commission travelled across the nation and abroad to learn ideas to fill up the canvas. Finally, they recommended human rights as one of the main issues to address as suggested by the Human Rights Organization of Nepal (HURON), the Forum for the Protection of Human Rights (FOPHUR), and Amnesty International[36]. Hence, for the first time the right to privacy was introduced in the Nepalese legal system. Since then, the Interim Constitution of Nepal 2007 and the present Constitution of Nepal have retained it. Nevertheless, the development of privacy laws owes a lot to the precedents established by the supreme court of Nepal as well.

Nepalese legal system has always had the doctrine of stare decisis (let the decision stand) in the apex court due to the influence of common law in its early constitutions[37]. In 1956, after the introduction of democracy in 1951 the Supreme court of Nepal was established by the

35. See Gautam, Dilli Raj, *An Assessment on the Constitution of Nepal 2015*, Journal of Political Science 20 (October), 2020, p. 46-60, available at https://doi.org/10.3126/jps.v20i0.31794 (last visited April 9, 2022).

36. See Hutt, Michael, *Drafting the Nepal constitution,* Asian Survey 31, no. 11, 1991, p. 1020-1039, available at https://www.jstor.org/stable/2645305?seq=1#metadata_info_tab_contents (last visited April 9, 2022).

37. See generally Acharya, Suman, *Historical Compartment of Nepalese Legal System,* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835576 (last visited April 9, 2022).

Supreme Court Act[38]. Since, its establishment, the Supreme Court has always had the authority to interpret the law in Nepal, albeit its independence is debatable before the 90s[39]. The court has consistently introduced and defined new legal concepts to initiate innovative legal trends in its jurisdiction. The notion of the Right to privacy is one of them. Although substantial changes have not been made constitutionally, the Supreme Court has always been examining and defining multiple facets of privacy laws through the decisions time and again. Observing chronologically the relationship between these cases, the evolution of privacy laws can be seen in judicial interpretation.

The Supreme Court decided upon the right to privacy for the first time in 1998 in the case of Annapurna Rana v. Gorakh Shamsher JBR and others[40]. The socio-political community of Nepal had to recognize equal rights for women at that time. In this context, the plaintiff, Gorakh Sumsher, demanded a virginity test of Annapurna Rana, the defendant. Married women were not entitled to ancestral property according to the existing law[41]. The defendant argued that the claims were against her right to privacy. In the case, the Supreme Court concluded that even the court cannot order the defendants to undergo the tests against their will because it would amount to a violation of their right to privacy as an inherent part of the right to liberty. Surprisingly, this family feud about inheritance has become a landmark decision in privacy matters. Increasingly more cases relating to privacy matters started to reach the Supreme Court after this case, and gradually a series of precedents developed privacy laws in Nepal.

A couple of years later, Sharmila Parajuli[42] filed a writ of a Mandamus demanding exclusive legislation against workplace sexual

38. See *Supreme Court Act,* repealed by the *Supreme Court Act*, 1990, available at http://rajpatra.dop.gov.np/welcome/book?ref=23 (last visited April 9, 2022).

39. See *Ibid*.

40. See *Annapurna Rana v. Gorakh Shamsher Jabara and others,* 40, Supreme Court of Nepal, 1998, available at https://nkp.gov.np/full_detail/5971 (last visited 9 April, 2022).

41. See Inheritance at *Civil Code, 1963 A.D,* repealed by The National Civil (Code) Act, 2017 A.D, Chapter 16, available at https://www.lawcommission.gov.np/en/wp-content/uploads/2018/10/muluki-ain-general-code-2020.pdf (last visited April 9, 2022).

42. See *Sharmila Parajuli and others v. His Majesty Government,* 46, Supreme Court of Nepal, 2004, available at https://nkp.gov.np/full_detail/3015 (last visited

harassment of women. The two-judge panel noted that the body and life of women are protected under the right to privacy and directed the state to protect the right to privacy of women in the workplace and public places by enacting the required laws. Similarly, while deciding Laxmi Devi Dhikta v. Government of Nepal[43], a case about reproductive rights, the joint bench observed the inviolability of the right to privacy. It extended the applicability of the right to privacy in cases of similar nature based on rights of women. However, no significant strides were made before 2006 by the court to explain the privacy laws of Nepal.

In 2006, Nepal underwent another significant political change after yet another revolution. The republican system of government replaced the constitutional monarchy of 1990, and a surge of changes came along with the interim constitution of 2006, giving sovereignty for the first time to the people. The judiciary also became more independent given that the separation of power was not shadowed anymore by the monarchical rule. On 25 December 2007, the Supreme Court in Sapana Pradhan Malla v. Government of Nepal[44] elaborated on various aspects relating to privacy. After the promulgation of the interim constitution[45], this landmark decision served as a foundational reference to interpret the right to privacy. Referring to Article 28 of the Interim Constitution of Nepal 2007, the court asserted the right to privacy as the main ground to protect the self-dignity of a person. The case was primarily concerned with the collection of private information of children, women, and HIV-infected people during the process of a lawsuit or a trial. In light of the pleas of claimants, the court opined that the protection of privacy of vulnerable and marginalized groups must be secured to ensure the right to justice[46].

April 9, 2022).

43. See *Laxmi Devi Dhikta v. Government of Nepal, Office of the Prime Minister and Council of Ministers,* 52, Supreme Court of Nepal, 2009, available at https://nkp.gov.np/full_detail/3444 (last visited April 9, 2022).

44. See *Sapana Pradhan Malla v. Government of Nepal, Office of the Prime Minister and Council of Ministers,* 49, Supreme Court of Nepal, 2007, available at https://nkp.gov.np/full_detail/3887 (last visited April 9, 2022).

45. See *The Interim Constitution of Nepal,* 2007, available at https://www.wipo.int/edocs/lexdocs/laws/en/np/np006en.pdf (last visited April 9, 2022).

46. See *Sapana Pradhan Malla v. Government of Nepal, Office of the Prime Minister and Council of Ministers,* 49, Supreme Court of Nepal, 2007, available at https://nkp.

Additionally, the bench defined the ambit of the right to information and the right to privacy and their intersection in a judicial process. In response to the question concerning whether privacy affects the right to information, the judges reasoned that information about a person, a citizen, must be kept private except in the cases provided by the law. The exceptions have been outlined in Section 4 of the Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases, 2064 (2007)[47]. The provision includes necessity clause for the protection of fair judicial hearing and consented disclosure of personal information[48].

The protection of privacy ensures other general rights such as the right to get treated as a human being and access services and facilities as a citizen and the right to live with dignity. The right to privacy of an HIV-infected person is necessary for their right to health, employment, education, labor, property, equality, and against discrimination. Furthermore, the court held that information, character, and data related to a person intersect with other rights such as the right to life, liberty, health, of women, of children, property, justice, and legal remedies. Therefore, the right to privacy of vulnerable groups like children, women, and HIV/AIDS infected people must be guaranteed as they are disadvantaged due to social, cultural, economic, and political reasons[49]. It protects the women from disparity during court proceedings, enables efficient juvenile justice without hindering the future for the children, and provides an effective way to tackle the social stigma for HIV/AIDS infected people.

The panel took a further step and defined the concept of the right to privacy. It held that privacy had a dual role, one as a fundamental human right and another as about the right of access to justice. Judges considered that ensuring privacy rights in judicial processes motivates parties to seek justice. To this reason, it cited Scott v. Scott, in which

---

gov.np/full_detail/3887 (last visited April 9, 2022).

47. See *The Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases*, 2064 (2007) Available at https://supremecourt.gov.np/web/assets/downloads/Gopaniyata_Nirdesika.pdf

48. See *ibid.*

49. See *Sapana Pradhan Malla v. Government of Nepal, Office of the Prime Minister and Council of Ministers,* 49, Supreme Court of Nepal, 2007, available at https://nkp.gov.np/full_detail/3887 (last visited April 9, 2022).

the court held that: "the state has an interest in the fair administration of justice. It requires that the victims and witnesses dispose without fear and intimidation and that the judge is given sufficient power to achieve that object"[50].

In explanation, it held that the right to opinion and expression also consists of a right not to express. Hence, only by ensuring privacy, the marginalized people can be given justice[51]. Thus, privacy does not always disturb the flow of information, for example, in the Victim and Witness Protection Scheme[52]. The scheme enables a covert court procedure applying protective measures before, during, and after hearing for "at-risk" witnesses[53]. Such provisions have been incorporated in Sections 24 and 25 of the United Nations Convention Against Transnational Organized Crime[54] to protect the witnesses from threats, intimidation, or other injuries. Consequently, the judicial system also functions efficiently without undermining privacy.

It might be a case where the accused wants information about the case according to the right to a fair trial, and the right to privacy may be prohibited by keeping some information private in camera court[55]. The court answered this contradiction, deciding that not all information about a judicial hearing need be public but a balance between open hearing and privacy concepts is to be found[56]. Right to information covers the public, but private information needs to be protected. It is neither legal nor justifiable to publicize them without consent[57].

What is commendable about this judgment is that the court after ordering the government to legislate went a step further to issue a directive to protect the right to privacy in specific types of cases within

50. See *ibid.*

51. See *ibid.*

52. See UNODC, *Victim Assistance and Witness Protection* (UNODC), available at https://www.unodc.org/unodc/en/organized-crime/witness-protection.html (last visited April 9, 2022).

53. See *ibid.*

54. See *United Nations Convention Against Transnational Organized Crime And The Protocols Thereto,* UNO (2004).

55. See *Sapana Pradhan Malla v. Government of Nepal, Office of the Prime Minister and Council of Ministers,* 49, Supreme Court of Nepal, 2007, available at https://nkp.gov.np/full_detail/3887 (last visited April 9, 2022).

56. See *Ibid*. at Section 19.

57. See *Ibid*.

the decision during the interim period in order to keep the name, surname, address, and other details of the parties private in sensitive cases[58]. It also outlined that privacy should be maintained from the first information report (FIR) till the final decision and further. This guideline improved privacy matters in various court proceedings such as rape and human trafficking cases where victims are women and children[59]. Even in the judicial decisions, the concept of privacy kept on evolving. A two-judge panel considered the case of Bikash Lakai Khadka[60] in 2014. The applicant appealed that due to the absence of no voting rights, his right to privacy was infringed and pleaded to amend the election laws in Nepal and introduce no vote right. The court defined the no vote right under the right to privacy and issued an order to make essential legal provisions and ensure this right. Slowly privacy concerns in contemporary issues started to show up in the court.

Nepal was relatively late to develop e-privacy and data protection laws. In 2016, Baburam Aryal[61] filed a petition claiming that Nepal Police was misusing the SMS and other data collected during the investigation of a murder case. Before this case, data protection was unregulated in Nepal. The court clarified that the private phone calls and SMS details also fall under the right to privacy. Therefore, it decided that using these details without a valid law to regulate data protection is illegal, and it endangers the "right to be let alone" of a person. Thus, a mandamus was issued to stop unregulated data usage and legislate regulatory laws. However, the court's role is not to actively make laws but to interpret and implement them. Regardless of the interpretation given by the court, due to political clashes and uncertainty about the promulgation of the new constitution, it took eleven more years for a privacy act to be enacted in Nepal. Before that, precedents guided privacy-related cases.

58. See *id*. at Section 19.

59. See *ibid.*

60. See *Bikash Lakai Khadka v. Chairman of Office of the Prime Minister and Council of Ministers*, 55, Supreme Court of Nepal, 2014, available at https://nkp.gov.np/full_detail/494 (last visited April 8, 2022).

61. See *Baburam Aryal and others v. Government of Nepal, Office of the Prime Minister and Council of Ministers*, 59, Supreme Court of Nepal, 2016, available at https://nkp.gov.np/full_detail/8741 (last visited April 8, 2022).

In 2017, the Supreme Court decided the case of Achyut Prasad Kharel[62]. In this case, the petitioners claimed that the publication of the personal details of a marginalized woman by a renowned national daily could be considered yellow journalism. Warren and Brandeis argued that the right to privacy prevents malpractices in journalism[63]. The petitioners in this case also asked the court to protect the right to privacy from yellow journalism as protecting the right to privacy of a marginalized community is a matter of public interest. The court departed from the plaintiff's arguments and decided that the published news was not necessarily yellow journalism. Nonetheless, the bench held that during publishing and broadcasting, conscious consent is necessary. Therefore, it decided that the publishers breached the right to privacy and the right to live with dignity.

Almost a decade after the second revolution in 2006, Nepal finally got its democratic constitution in 2015. An updated catalogue of fundamental rights was listed under chapter 3. To implement these rights enabling legislation was required, and therefore, for the right to privacy, the Right to Privacy Act, 2018 was passed.

4. *An analysis of the Right to Privacy Act, 2018*

It took three constitutions, a shift from monarchical to a federal structure, two mass movements, and almost three decades for Nepal to have a special-scope privacy act. Eventually the Privacy Act was adopted and came into effect in September 2018. For 28 long years, only the supreme court interpreted and implemented the right. Consequently, it could be argued that the development of privacy laws significantly lacked in Nepal. Ultimately, after the enactment of the Privacy Act, a surge of new cases and discussions arose.

62. See *Achyut Prasad Kharel v. Office of the Prime Minister and Council of Ministers and others*, 60, Supreme Court of Nepal, 2017, available at https://nkp.gov.np/full_detail/9052 (last visited April 8, 2022).

63. See Warren and Brandeis, *Right to privacy* at 193 (cited in note 10).

Apart from the Privacy Act, Nepal's National Civil Code[64] and Penal Code[65] also append privacy laws. However, they had a limited scope which Privacy Act, in this regard, was supposed to fill by complementing the existing laws. Under the constitution of Nepal, seven subjects are inviolable under the law, namely, the privacy of body, residence, property, document, data, correspondence, and character[66]. The Right to Privacy Act provides separate chapters to provide detailed definitions of these legal subcategories. For instance, chapter 2 elucidates the privacy of the body and family of a person, while chapter 3 deals with the residence[67].

The scope of the legislation envelops a wide array of contemporary privacy matters. It not only binds the state to protect the physical and mental privacy of a person but also empowers people to maintain the privacy of matters such as biological or biometric identity, gender identity, sexuality, sexual relation, conception or abortion, virginity, potency, or physical illness related to personal life[68]. By comparing its content with similar provisions adopted in other countries, it could be argued that it measures/pairs/correspond to the level of detail of the Data Protection Act of the UK[69], the US, or the regulation of the EU. However, practicality is an entirely disparate matter. The General Data Protection Regulations (GDPR) of the EU secures the protection of personal data, which is defined as any information relating to an identified or identifiable natural person by reference to an identifier such as a name, an identification number, location data,

64. See generally The National Civil (Code) Act, (2017), available at http://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Civil-code.pdf (last visited April 8, 2022).

65. See generally The National Penal (Code) Act, (2017), available at http://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Penal-Code-English-Revised-1.pdf (last visited April 8, 2022).

66. See generally The Constitution of Nepal.

available at https://www.refworld.org/docid/561625364.html (last visited March 10, 2022).

67. See generally *The Right to Privacy Act* (2018), available at https://www.lawcommission.gov.np/en/wp-content/uploads/2019/07/The-Privacy-Act-2075-2018.pdf (last visited April 8, 2022).

68. See *ibid.*

69. See generally *Data Protection Act 2018*, available at https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted (last visited April 8, 2022).

an online identifier, or to one or more factors specific to the physical, psychological, genetic, mental, economic, and cultural or social identity of that natural person[70]. The Data Protection Act 2018 of the UK contains identical provisions in Section 3[71]. Concurrently, in the case of the Nepalese Act, Section 2(c) defines personal information in a comparatively narrow way. It limits itself to specifying the types of personal information[72]. It provides for eight broad categories ranging from caste and ethnicity to criminal history and expressed opinion[73]. Nepalese legislation leaves little room for further interpretation and makes it rigid in many senses, unlike GDPR which also has aspirational principles[74].

Unlike the EU and the UK, the US does not seem to have a federal-level data protection act[75]. Instead, several privacy statutes such as the Fair Credit Reporting Act (FCRA)[76], Health Insurance Portability and Accountability Act (HIPAA)[77], Family Educational Rights and Privacy Act (FERPA)[78], Gramm Leach Bliley Act (GLBA)[79], Electronic Communications Privacy Act of 1986 (ECPA)[80], Children's Online Privacy Protection Act of 1998 (COPPA)[81], Video Privacy Protection Act (VPPA)[82], Freedom of Information Act (FOIA)[83], and the Privacy Act of 1974 regulate privacy in the US[84]. Even Nepal did not have a fed-

70. See generally Chris Jay Hoofnagle, Bart van der Sloot and Frederik Zuiderveen Borgesius, *The European Union general data protection regulation: what it is and what it means*, 28 Information & Communications Technology Law 65 (2019).

71. See *Data Protection Act*, at Section 3 (cited in note 68).

72. *The Right to Privacy Act*, Section 2 (c).

73. *See ibid*.

74. See generally Hoofnagle, Van der Sloot and Borgesius, *The European Union general data protection regulation: what it is and what it means* (cited in note 72).

75. See Jean Slemmons Stratford and Juri Stratford, *Data protection and privacy in the United States and Europe,* 22 Iassist Quarterly 17 (1999), 17, available at https://iassistquarterly.com/public/pdfs/iqvol223stratford.pdf (last visited April 8, 2022).

76. Pub L No 91-508, 84 Stat 1127 (1970).

77. Pub L No 104-191, 110 Stat 1936 (1996).

78. 20 U.S.C. § 1232g (1974).

79. Pub L No 106-102, 113 Stat 1338 (1999).

80. Pub L No 99-508, 100 Stat 1848 (1986).

81. Pub L No 105-277, 112 Stat 2681-728 (1998).

82. Pub L No 100-618, 102 Stat 3195 (1988).

83. Pub L No 89-487, 80 Stat 250 (1967).

84. See Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)* (Wirecutter, September 6, 2021), available at https://www.nytimes.

eral level act up until a couple of years ago. However, the separation of power enables the apex court to interpret the laws and annul them if found contradictory. It helps to keep the balance intact in many ways.

Despite that, normative deviations separate Nepal and foreign jurisdictions in privacy laws. The US privacy laws address citizens' distrust of by focusing on the potential misuse of personal data held by the government [85]. Therefore, US citizens have a right to access any data held by government agencies as per the Right to privacy act[86]of 1974, Section d[87] and the data minimization principles are to be followed by agencies when collecting data according to Section e (1)[88] of the same act. On the contrary, in the EU and the UK, the laws protect individual dignity more than potential liberty interference from government agencies[89]. Instead, the Nepalese privacy act provides unlimited power to the government agencies mentioning the rights of "authorized official" in different sections. Section 19(4) allows "any notice, information or correspondence may be listened to, marked or recorded, or cause to be listened to, marked or recorded with the consent of the concerned person or order of the authorized official."[90] Therefore, it significantly infringes the rights of an individual. Likewise, the statute falls short in clearly explaining the grounds for such interception. There is a hiatus in privacy and surveillance laws. Thus, it jeopardizes personal freedom and may risk turning the state into a police state, with the government with unlimited access to citizens' data.

A critical limitation in the Nepalese Right to Privacy Act is data protection. The issue of data protection has been increasingly paramount over the years. However, the Privacy Act does not address singularly data protection issues. Even though chapter 6 of the act is close as it is shown, it presses on statistics rather than data protection. To

---

com/wirecutter/blog/state-of-privacy-laws-in-us/ (last visited April 8, 2022).

85. See *ibid.*

86. The Right to Privacy Act, Pub L No 93-579, 88 Stat 1896 (1974).

87. See i*d.*, Sec. d 88 Stat at 1898.

88. See *id.*, Sec. e (1) 88 Stat at 1899.

89. See Daniel E. Newman, *European Union and United States Personal Information Privacy, and Human Rights Philosophy-Is There a Match.* 22 Temp. Int'l & Comp. LJ 307 (2008).

90. The Right to Privacy Act Sec. 19(2) (cited in note 87).

name a few of the problems, it falls short of including a transnational data regulation mechanism. It has no provisions on data destruction. It has no provisions to regulate privacy matters for big data. There is no concept of open data in the legislation. It also fails to provide sufficient protection to the concept of consent.

Moreover, Section 12(6) of the act confers officials unlimited power to access data without consent[91]. In sections 25[92], and 26[93], there is a restriction posed to the usage of collected personal information and data which also extends to research or journalistic investigation. While protecting the right to privacy, there should be provisions regulating open access to data remaining in the public body, yet the statute completely misses it. Another limitation of the statute is its contradiction to press freedom in Section 18[94]. The restriction creates tension among journalists to publish information they collect through investigation or undercover operations. Even though unlimited power limits privacy while publishing sensitive data, disclosure of certain information of public interest must be regulated. The exception to this restriction is provided in Section 34(e)[95] but it leaves a wide gap for interpretation by just mentioning a clause that says without making it contrary to the basic norms of privacy of the person. Here, the rules again seem inadequate to specify the preconditions for privacy protection. Other limitations of the law include the regulation of privacy in public places. Even in Section 16[96] prohibiting taking or selling unconsented photographs, privacy in public is left out.

Conclusively, it may be argued that the right to privacy is a personal right of an individual. Contrarily, the statute shows it as armour for the impartiality of government agencies. Hence, there is a need to create a fine line between privacy and information rights and demarcate their boundaries in the Nepalese jurisdiction. A case concerning the statute reached the court amidst the COVID-19 crisis. The case raised many questions on its practicability to address contemporary issues. Although recently promulgated, it failed to define the scope of

91. See *id.* at Sec. 12 (6).
92. See i*d.* at Sec. 25.
93. See *id.* at Sec. 26.
94. See *id.* at Sec. 18.
95. See *id.* at Sec. 34(e).
96. See *id.* at Sec. 16.

privacy in-depth, let alone sensitive issues about personal data and its relation with the right to information. In this writ petition[97], petitioner Roshani Poudyal condemned that the National Information Commission was infringing the privacy of the infected people, dead, and their families by publishing their personal information in different media. The court bridged the gap between the right to information and privacy via this judgment and held that the goal of the Right to Privacy Act of 2018 is to protect personal privacy even in public bodies in order to promote a dignified standard of living. Notwithstanding that the court can provide interpretation on the act, the actual goal of the legislation is to assist the court, not the other way around.

Although Nepal has made significant strides in developing privacy-related laws, the Act still fails to address many contemporary issues. As specific scope legislation, the Act aims to provide an expository explanation in the field. However, it falls short of addressing issues like data protection and information privacy subjects, making the statute vulnerable to contraventions. Be that as it may, the Supreme court has played a remarkable role in developing privacy-related doctrines and it continues to contribute effectively in holding and interpreting them in light of the constitutional spirit of equality, freedom, and proportionality. Accordingly, a revaluation of the legislation is indispensable to introduce regulation of critical privacy matters in the legal system.

5. *Conclusion*

The government, the press, and large corporations are intruding more into personal privacy[98]. This rate is even higher than it was during the 1890s[99]. The relevance of Warren and Brandeis' paper has become significantly greater than ever. The concept of limited

97. See *Roshani Paudyal and others v. Government of Nepal, Secretariat of the Prime Minister and Council of Ministers*, 62, NKP (online), Supreme Court of Nepal, 2020, available at https://nkp.gov.np/full_detail/9592 (last visited April 8, 2022).

98. See generally Jon L. Mills, *Privacy: the lost right*, (Oxford University Press 1st ed. 2008).

99. See generally Konrad Lachmayer and Normann Witzleb, *The challenge to privacy from ever increasing state surveillance: A comparative perspective*, 37 UNSW Law Journal 748 (2014).

government and regulated giant tech corporations is vital to govern privacy. As Prosser writes, privacy right originated from Warren and Brandeis' paper have now extended into a bundle of rights against intrusion upon a person's seclusion or private affairs and public disclosure of embarrassing facts about an individual[100]. The relevancy of privacy laws encompasses every jurisdiction. In this light, the migration of privacy right as a fundamental right in the Nepalese constitution seems pertinent. However, there are many pressing concerns in privacy matters, given that the Nepalese jurisprudence still has to develop its legal basis. The Privacy Act was enacted after three decades following the introduction of the right to privacy into the Nepalese legal system. However, it still does not incorporate several present-day issues. Thus, a comprehensive revision and social auditing of the act is essential to include the provisions that could answer contemporary contentions in privacy.

100. See generally Edward J. Bloustein, *Privacy as an aspect of human dignity: An answer to Dean Prosser*, 39 NYUL rev. 962 (1964).

Con il contributo finanziario di:

UNIVERSITÀ DEGLI STUDI DI TRENTO

Opera Universitaria di Trento

ISSN 2612-4874