TRENTO STUDENT LAW REVIEW

Vol. 5, No. 1 | April 2023

Published by the University of Trento through the Scientific Publications Office and TESeO - Trento Editions Service for Open science.

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Layout Lucrezia Di Renzo
Cover Associazione Acropoli

www.acropolitrento.com

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Prefazione

Matteo Maurizi Enrici
Direttore

Cari lettori,

è per me un grande piacere presentarvi l'ultimo volume della *Trento Student Law Review*. Ancora una volta, gli articoli che ospitiamo offrono nuove prospettive e punti di vista su questioni giuridiche attuali di grande importanza non solo per la comunità accademica ma anche per i professionisti del settore.

In generale, questo volume tratta una serie di argomenti pertinenti alle questioni giuridiche contemporanee, tra cui il populismo costituzionale, la moderazione dei contenuti online, i casi di ruling fiscale e i diritti di uso del suolo in Cina. Ogni articolo fornisce un'analisi unica, contribuendo a una comprensione più approfondita del complesso panorama giuridico in un mondo globalizzato.

Il primo brano, intitolato *Criminal and Constitutional Populism Under the Aristotelian Framework* di Giacomo Cotti, esamina il fenomeno moderno del populismo costituzionale utilizzando la teoria della giustizia di Aristotele. Cotti sostiene che la concezione di Aristotele della giustizia non può essere separata dalla politica e dalle virtù e che questo quadro è particolarmente utile per valutare la presunta costituzione deviante della democrazia. Attraverso una valutazione dei campi del diritto costituzionale e penale, Cotti dimostra come le teorie di Aristotele possano fornire utili spunti sul fenomeno moderno del populismo costituzionale.

In seguito, abbiamo *Content Moderation: How the EU and the U.S. Approach Striking a Balance between Protecting Free Speech and Protecting Public Interest* di Rrita Rexhepi, articolo che esplora la questione della moderazione dei contenuti, che sta diventando sempre più rilevante nell'era della politicizzazione e dei social media. Rexhepi esamina come la condivisione di contenuti sia regolamentata sia nell'UE che negli Stati Uniti, identificando i vantaggi e gli svantaggi di entrambi gli approcci. Sebbene entrambe le regioni abbiano adottato misure per regolamentare i contenuti online, esistono significative differenze nei loro approcci. Rexhepi raccomanda potenziali soluzioni alle difficoltà che entrambe le regioni affrontano nella regolamentazione dei contenuti online, tra cui la regolamentazione della trasparenza delle piattaforme, l'aumento della responsabilità e l'istituzione di organismi di vigilanza.

Il terzo articolo, *Recovery of Fiscal State Aid in Tax Ruling Cases and Principles of Legitimate Expectations and Legal Certainty* di Amil Jafarguliyev, discute l'applicazione dei principi di legittima aspettativa e certezza del diritto contro gli ordini di recupero nei casi di decisioni fiscali. Jafarguliyev esamina come questi principi dovrebbero essere applicati quando si tratta di interpretazioni nuove e imprevedibili delle norme di aiuti di Stato dell'Unione Europea, utilizzando esempi dai casi di decisioni fiscali Apple, Fiat e Starbucks. L'articolo sostiene che i principi di aspettative legittime e certezza del diritto non dovrebbero essere applicati in modo restrittivo quando si considera il recupero di aiuti di Stato fiscali.

Ultimo ma non meno importante, abbiamo *The Right to use Land in China: an Instrument of Economic Development?* di Camilla Mantese, un articolo che fornisce una revisione approfondita dei diritti di uso del suolo in Cina. L'articolo confronta le somiglianze e le differenze tra i diritti di uso del suolo in Cina e nel mondo occidentale, con un focus specifico sull'Italia. Mantese discute come il sistema di utilizzo del suolo si è evoluto storicamente e analizza il ruolo del leasing e della conversione del suolo. L'articolo esplora anche il ruolo dei tribunali nel bilanciare gli ideali socialisti e le esigenze capitalistiche attraverso alcune decisioni su diversi aspetti del diritto di uso del suolo.

La redazione desidera esprimere gratitudine agli autori che hanno contribuito con la loro produzione scientifica a questo volume: speriamo che questi articoli incoraggino ulteriormente il dibattito e la ricerca nel campo del diritto e che forniscano preziosi spunti per praticanti ed accademici.

La *Trento Student Law Review* è anche grata all'Università di Trento, all'Ufficio delle Pubblicazioni Scientifiche, a TESeO - Trento Editions Service for Open science e alla nostra Facoltà di Giurisprudenza per il loro continuo sostegno, che ha reso possibile la pubblicazione di questo volume.

In conclusione, desidero ringraziare la vicedirettrice Emma Castellin, tutta la redazione, i visiting editor e i collaboratori per il loro duro lavoro nella produzione di questo numero. Grazie al vostro impegno e passione la *Trento Student Law Review* continua a essere una fonte di ricerca giuridica innovativa e di alta qualità.

Cordiali saluti,

Matteo Maurizi Enrici
Direttore

Preface

Matteo Maurizi Enrici
Editor-in-Chief

Dear readers,

it is my pleasure to introduce you to the latest issue of the *Trento Student Law Review*. Yet again, the articles we host provide fresh insights and perspectives on current legal issues, which are of great importance not only to the academic community but also to practitioners.

Overall, this volume covers a range of topics relevant to contemporary legal issues, including constitutional populism, online content moderation, tax ruling cases, and land use rights in China. Each article contributes to a deeper understanding of the complex legal landscape in a globalized world.

The first essay, titled *Criminal and Constitutional Populism Under the Aristotelian Framework* by Giacomo Cotti, examines the modern phenomenon of constitutional populism using Aristotle's theory of justice. Cotti argues that Aristotle's account of justice cannot be separated from politics and virtues, and that this framework is particularly useful for assessing the perceived deviant constitution of democracy. Through an assessment of the fields of constitutional and criminal law, Cotti demonstrates how Aristotle's theories can provide valuable insights into the modern phenomenon of constitutional populism.

Next, we have *Content Moderation: How the EU and the U.S. Approach Striking a Balance between Protecting Free Speech and Protecting Public Interest* by Rrita Rexhepi, which explores the issue of content moderation, which is becoming increasingly relevant in the era of

politicization and social media. Rexhepi examines how content sharing is regulated in both the EU and the U.S., identifying the benefits and shortcomings of both approaches. While both regions have taken steps to regulate online content, significant differences exist in their approaches. Rexhepi recommends potential solutions to the difficulties that both regions face in regulating online content, including regulating platform transparency, increasing accountability, and establishing oversight bodies.

The third article, *Recovery of Fiscal State Aid in Tax Ruling Cases and Principles of Legitimate Expectations and Legal Certainty* by Amil Jafarguliyev, discusses the application of legitimate expectations and legal certainty principles against recovery orders in tax ruling cases. Jafarguliyev examines how these principles should be applied when dealing with novel and unpredictable interpretations of European Union State Aid rules, using examples from the Apple, Fiat, and Starbucks tax ruling cases. The article argues that legitimate expectations and legal certainty principles should not be applied in a restrictive way when considering the recovery of fiscal state aid.

Last but not least, we have *The Right to use Land in China: an Instrument of Economic Development?* by Camilla Mantese, an article that provides an in-depth review of land use rights in China. The article compares the similarities and differences between land use rights in China and in the Western World, with a specific focus on Italy. Mantese discusses how the land use system evolved historically and analyzes the role of land leasing and land conversion. The article also explores the role of the courts in balancing socialist ideals and capitalistic needs through some decisions on different aspects of the right to use land.

The Editorial board would like to express its gratitude to the authors who have contributed their scholarship to this volume: we hope that these articles will encourage further discussion and research in the field of law and that they will provide valuable insights to practitioners and academics.

The *Trento Student Law Review* is also grateful to our University of Trento, the Scientific Publications Office, TESeO - Trento Editions Service for Open science and our Trento Law School for their enduring support, which made the publication of this volume possible.

In conclusion, I would like to thank Vice Editor-in-Chief Emma Castellin, the entire editorial team, visiting editors, and collaborators for their commitment and hard work in producing this issue. Thanks to your dedication and passion, the *Trento Student Law Review* continues to be a source of innovative and high-quality legal research.

Faithfully yours,

Matteo Maurizi Enrici
Editor-in-Chief

Criminal and Constitutional Populism Under the Aristotelian Framework

Giacomo Cotti*

Abstract: Aristotle's work relies on the assessment of human nature and the search for the supreme good defined as the complete fulfillment of an active life. In his view, the Stagirite regards the community of the political type as the most conducive to the common and individual good. Therefore, the account of justice cannot be separated from the account of politics, and consequently from the account of virtues. These two concepts are indeed intrinsically connected. In fact, in his perspective, the best city requires the best citizens as the ideal ground to build up the best possible community, and vice versa. This conceptual framework seems particularly essential and useful to assess the modern phenomenon of constitutional populism. The basis of Aristotle's theory of justice (in its general, distributive, and corrective type) applied to the perceived deviant constitution of democracy demonstrates how the phenomenon works in the fields of constitutional and criminal law.

Keywords: Aristotle; justice; ethics; law; populism.

1. *Introduction*

Aristotle's work in the *Politics* intends to develop further and wider the issues previously treated on *Nicomachean Ethics,* the assessment of human nature, and the search for the supreme good (*eudaimonia*)[1]. The Stagirite regards the political community as a paramount requirement to achieve the ultimate fulfillment of human life. The political community, in fact, enables and compels the individual to exert his practical reason (*phronesis*) as well as his theoretical rationality, thus allowing the refinement of the whole of virtues[2]. He labels this type of community as the intrinsically natural human union[3], which comes into being for the innate human need for self-sufficiency but bolsters

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1. See Christopher Charles Whiston Taylor, *Politics*, in Jonathan Barnes (ed.), *The Cambridge Companion to Aristotle* at 233 (Cambridge University Press 1995). Defining in depth the concept of *eudaimonia* is beyond the scope of this article. For the sake of this inquiry, it is worth considering the outline provided by Terence H. Irwin, *Conceptions of Happiness in the Nicomachean Ethics*, in Christopher Shields (ed.), *The Oxford Handbook of Aristotle* at 495 ff. (Cambridge University Press 2012), who, evaluating the Aristotelian view, affirms that "the human good, (...) is activity of the soul in accordance with the best and most perfect (or complete) virtue in a perfect life. (...) Towards the end of the last book of the *Ethics*, he (Aristotle, ndr) seems to answer this question by arguing that the best and most perfect virtue is theoretical wisdom (*sophia*) exercised in theoretical study or contemplation (*theôria*) of universal and necessary truths about the universe."

2. See *id.* at 234.

3. See Aristotle, *Politics* at 1.2.1252b 27-33 (CDC Reeve tr. Hackett 1998).

its existence for the sake of good life itself. Accordingly, he labels this sort of community as the intrinsically natural human union, since it comes into being for the innate need for self-sufficiency but bolsters its existence for the sake of good life itself[4].

In order to fully understand this point, it is important to consider how Aristotle distinguishes human beings from other gregarious beasts. Aristotle famously labels the human being as "a naturally political (animal)"[5]. He also underlines that rational speech (*logòs*) is what sets humans apart because it allows for the perception and expression of what is just and unjust. He further notes that "it is community in these that makes a household and a city-state"[6]. With these premises in mind, it becomes clear that the ability to conceptualize justice is a distinguishing factor that separates human beings from beasts and qualifies the polis in comparison to other forms of alliances that do not render citizens just and upright[7]. The Stagirite introduces the concept of constitution in a political community as "the organization of offices in city-states, the way they are distributed, what element is in the authority of the constitution, and what the end is of each of the communities"[8].

These premises underpin a crucial point in the connection between ethics and politics: they highlight the relationship between virtue, justice, and the forms of government. In fact, Aristotle grounds his constitutional theory on the distinction between "those constitutions that look to the common benefit" and "those which look only to the benefit of the rulers", labelling the first ones "correct" and "deviations" the formers, "for they are like rule by a master, whereas a city-state is a community of free people"[9]. These are indeed corrupt versions of the just forms of government: tyranny is a deviation of kingship; oligarchy is a deviation of aristocracy; democracy is a deviation of the

4. See *ibid*.

5. Aristotle, *Nicomachean Ethics* at 1.7.1097b 12 (Terence Irwin tr. Hackett 2nd ed. 1999).

6. Aristotle, *Politics* at 1.2.1253a17-18 (cited in note 3).

7. See *id.* at 3.9.1280b11-12.

8. *Id.* at 4.1. 1289a15-18; see also *id.* at 3.1.1274b37-40, 6.1278b8-11.

9. *Id.* at 3.6.1279a16-21.

so-called polity[10]. These three broken constitutions, in the Aristotelian view, prove unable to reach the goal of the common good[11], because by definition, they do not aim at the common good, but at the benefit of those in power (the tyrant, the few, or the many)[12]. The upshot is a general deficiency of justice under these regimes since they do not allow for the exercise of virtue, which is essential to the implementation of justice.

Given this framework, the Aristotelian analysis of the various forms of government, dealt with in the *Politics*, cannot be harmlessly set apart from the account of the different virtues of character considered in his ethical treatises, and from justice as well[13], since the two provinces of political theory and principles of ethics are, for the Stagirite, inextricably entwined[14]. Indeed, the best city requires the best citizens, as well as the best citizens require the best city, as the ideal ground upon which the best possible community can be built[15].

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10. See *id.* at 3.6.1279a22-1279b8. In brief, kingship is the government of a single ruler for the common benefit, whereas the command of a minority is an aristocracy if it pursues the city's good, and the government of the many is a polity if it aims at the community's best interest. See generally Anselm H. Amadio and Anthony J.P. Kenny, *Political theory of Aristotle* (Encyclopedia Britannica, last modified January 3, 2023), https://www.britannica.com/biography/Aristotle/Political-theory (last visited April 10, 2023).

11. See *ibid.*

12. See *ibid.*

13. See Jean Roberts, *Routledge Philosophy Guidebook to Aristotle and the Politics* at 17 (Routledge 2009).

14. See Taylor (cited in note 1).

15. In this framework, the pattern of the virtue of friendship (*philia*) becomes particularly explicative of the condition of justice under a broken constitution, since "Justice also naturally increases with friendship" (Aristotle, *Nicomachean Ethics* at 8.9.1160a7 (cited in note 5)).

Giving the example of tyranny, it is exactly this kind of sentiment that a tyrant strives to annihilate, through means such as the forbidding of messes, associations, schools, and other kinds of meeting (see Aristotle, *Politics* at 5.11.1313a41-b1 (cited in note 3)), reliance on spies, in order to control his subjects' freedom of expression (See *id.* at 5.11.1313b11-16), and calumniations, which cause discordance among the governed (See *id.* at 5.11.1313b16-18). In fact, civic friendship is undeniably a threat to a despot's rule over the polis, for it encourages alliance and like-mindedness between citizens, hence the development of virtues and the pursuit of the common good (see Marguerite Deslauriers, *Political Unity, and Inequality,* in Marguerite Deslauriers and Pierre Destrée (eds.), *The Cambridge Companion to Aristotle's Politics* at 120-121 (Cambridge University Press 2013), thus contrasting with the ruler's own advantage (Aristotle,

In the light of this inquiry, the account of justice and its link to the account of other virtues plays a pivotal role, to the point that it is worth taking into consideration the role of virtues as a basis for the Aristotelian theory of justice.

In this vein, this article aims to delineate the layout and the functioning of general, distributive, and corrective justice within the spectrum of the deviant constitutions analyzed by Aristotle[16], with reference to democracy. Ultimately, this paper will try to show how the Aristotelian framework proves useful to address the modern problem of populism in the constitutional and criminal law fields. To that end, this paper will outline first the concept of justice developed by Aristotle and how this notion is declined within its distributive and corrective justice subdivisions. It will proceed to apply these concepts to the sphere of erroneous forms of government (tyranny and oligarchy) sketched by the Stagirite), and to his vision of democracy, examining its constitutive features and fallacies. Having outlined this framework, it will be possible to apply the results of the proposed analysis to the layout of constitutional democracy, highlighting the points of contact between the modern phenomenon of populism and the failures identified by Aristotle. The overlapping of these two levels will therefore provide the starting point for developing some solutions to the consequences of the mentioned phenomenon in the realms of constitutional law and criminal justice, using the Italian legal system as a case study.

Politics at 4.10.1295a20-21 (cited in note 3)). Consequently, a dictator does not only avoid fostering his citizen's friendship, but he also constrains it, for the governed are allowed neither to participate in the public life nor to take advantage of leisure, compulsory requirement in order to live a noble and happy life (See *id.* at 3.9.1280b40-1281a1). This conceivably results in a widespread deficiency in the exercise of virtues of character towards each other, and therefore in an underdevelopment of general justice (see Aristotle, *Nicomachean Ethics* at 5.2.1129b32-1130a5 (cited in note 5).

Even under an oligarchic regime, the arrangement of friendship seems inherently faulty, because of the disproportion in power and riches in the state, which makes the growth of such bond between unequal individuals unlikely (Aristotle, *Nicomachean Ethics* at 1158b30-33 (cited in note 5)). For an account of *philia* under a democratic regime, see para. 3.

16. Aristotle, *Nicomachean Ethics* at 1158b30-33, para 3 (cited in note 5).

2. *Justice according to Aristotle*

For the scope of this inquiry to be clear, it is prudent to first define the framework of the subject itself. This work's primary sources on Aristotle's justice are *Nicomachean Ethics,* Book V, and *Politics,* Book III, with the former that can be conceptually subdivided into two main sections[17]. The first one, which comprises chapters 1 to 5, consists of the construction of his assumption of justice as a state of character, while in the second one (chapters 6-11) the author supports his theory[18].

The Stagirite's idea of the path toward the ultimate realization of human life[19] is thoroughly explained by the Doctrine of the Mean[20]. Virtue is the right extent, determined by reason[21] and prudence[22], to which every single virtue of character is practiced[23] that is to say, it is neither unreservedly pursued nor completely neglected - and where material things are neither craved for nor ignored[24]. It is the capacity to reach the right mean between excesses and deficiencies[25] or, to put it in other words, "the ability to see, on each occasion, which course of action is best supported by reasons"[26].

In this context, Aristotle welcomes the idea that ethical individual virtues are a combination of "rational, emotional, and social skills"[27]. To lead a proper life, individual virtues must be exercised jointly and harmoniously, as if they were a whole[28]. This practice is only pos-

17. See Charles M. Young, *Aristotle's Justice*, in Richard Kraut (ed.), *The Blackwell Guide to Aristotle's Nicomachean Ethics* at 179 (Blackwell 2006).

18. See Ronald Polansky, *Giving Justice Its Due*, in Ronald Polansky (ed.), *The Cambridge Companion to Aristotle's Nicomachean Ethics* at 152 (Cambridge University Press 2014).

19. See Richard Kraut, *Aristotle's Ethics* (Stanford Encyclopedia of Philosophy, May 1, 2001), available at https://plato.stanford.edu/entries/aristotle-ethics/ (last visited April 10, 2023).

20. See Aristotle, *Nicomachean Ethics* at 2.6 (cited in note 5).

21. See *id.* at. 6.1.1138b21-34.

22. See *id.* at 6.7.1144b21.

23. See *id.* at 2.7.1107a1-26.

24. See *id.* at 338, Glossary.

25. See *id.* at 2.7.1107a1-5.

26. Kraut, *Aristotle's Ethics* (cited in note 19).

27. *Ibid.*

28. See *ibid.*

sible by applying general rules to concrete cases: the individual must therefore acquire the ability to discern, on each occasion, which is the best way to act[29]. This process is the so-called *phronesis* (practical wisdom), which individuals must acquire not only through study (e.g., of philosophy, mathematics, etc.) but also through the exercise of those social, emotional, and decision-making capacities which make them capable of applying the supreme good in practice, each time depending on the situation[30].

Aristotle draws from the very beginning a distinction between general (or broad, universal) and special (or narrow, particular) justice[31]. The former amounts to an achievement that requires the coordinated exercise of multiple good states of character, as being upright and lawful needs the practice of the whole of virtue[32]. The latter, on the other hand, is a distinct virtue of character, assimilated with the other personal virtues (e.g., courage, temperance, liberality, etc...), and it is concerned with the search for what is fair in concrete cases[33].

In his inquiry, the Stagirite goes even further, highlighting these concepts in parallel to the demarcation of injustice: justice is contrary to injustice, which is also divided into general and special injustice[34]. Hence, the author considers both justice and injustice more than individual concepts[35]. They are the very foundations of Aristotle's idea of justice[36]. In *Nicomachean Ethics* Book V[37], Aristotle deeply explains how fairness (i.e., special justice) is an intermediate state, examining justice in distribution[38], and justice in rectification[39]. However, the same is not also done for lawfulness (i.e., general justice): hence, he probably assumes that the latter is an intermediate state per se because it comprises other virtues (including special justice itself), thus

29. See *ibid.*
30. See *ibid.*
31. See Young, *Aristotle's Justice* at 181 (cited in note 17).
32. See *id.* at 181-183.
33. See *ibid.*
34. Aristotle, *Nicomachean Ethics* at 5.1.1129a33 (cited in note 5).
35. *Id.* at 5.1.1129a28.
36. See *id.* at 5.5.1133b30-33.
37. *Id.* at 5.1.1129b30-2.1130a16.
38. *Id.* at 5.3.1131b10-13.
39. *Id.* at 5.4.1131b25-27.

encompassing their individual means, as Young suggests[40]. Aristotle, therefore, draws a picture that represents universal justice as including special justice, among the other virtues of character. Special justice is also essential to the exercise of general justice: hence, the relationship between these two types of justice exists and is that of a part to a whole[41].

In this framework, Aristotle further develops his theory[42]. The difference in structure and discipline for "justice", as foreseen in Book 2 is acknowledged by its subdivision into general and special[43]. In fact, examining the two sorts, he identifies the first one with adherence to law; he remarks "what we call just is whatever produces and maintains happiness and its parts for a political community"[44]. This is the reason why this kind of justice is subsequently recalled as "supreme among virtues"[45] or "complete virtue to the highest degree"[46]; indeed, the Aristotelian view of the *polis* (the city-state, the perfect and most desirable community for individuals) postulates that individuals must behave in accordance with the law (*nomos*, general Greek word comprehensive of written and customary law)[47]. In fact, the law is what prescribes the correct way to act in relation to others and the right demeanor between members of the same society; it also simultaneously orders sanctions for the impact of our actions upon our neighbors[48]. As such, citizens must exercise the entirety of virtues of character to abide by the rules[49]. This is why, "in justice, all virtue is summed up"[50].

Thereafter, Aristotle proceeds to describe by defining its structure the second kind of justice, which he labels "special"; its sphere of action is different when compared to the universal type, as it is concerned with the individual quality of being fair[51]. Indeed, it regards

40. Young, *Aristotle's Justice* at 181 (cited in note 17).
41. See Polansky, *Giving Justice Its Due* at 156-157 (cited in note 18).
42. Aristotle, *Nicomachean Ethics* at 5.5.1133b30-33 (cited in note 5).
43. *Id.* at 2.7.1108b7-9.
44. *Id.* at 5.1.1129b18-19.
45. *Id.* at 5.1.1129b28.
46. *Id.* at 5.1.1129b31.
47. See *id.* at 5.1.1129b18-32.
48. See Polansky, *Giving Justice Its Due* at 155 (cited in note 18).
49. See Aristotle, *Nicomachean Ethics* at 5.1.1129b32-35 (cited in note 5).
50. *Id.* at 5.1.1129b30.
51. *Id.* at 5.2.1130b9-10.

divisible goods (i.e., honor, wealth, and safety); goods that one desires more than his fair share. Special justice distinguishing factor is hereby brought into analysis: *pleonexia* (greed)[52]. This is the very element that separates particular justice from its contrary, special injustice (i.e., the unfair), and that singles it out from universal justice[53]. Consequently, the narrow type of justice regards fairness in measure. It does not encompass other virtues of character but combines itself with them: honor with magnanimity and proper pride; wealth with liberality and magnificence; safety with courage[54]. Special justice has a diverse interest from all of these forms of excellence: it refers to justice in all those states[55].

Aristotle then highlights the existence of two sub-types of special justice: justice in distribution and corrective justice. The first one regards proportion in shares of goods and honors in a state, while the second rectifies wrong allocations of resources resulting from transactions[56].

More precisely, distributive justice, by definition, concerns the identification of those who count as equal and those who do not in the community, and the corresponding standard[57]: freedom, which is also the end in a democratic polis[58]. In more modern terms, distributive justice seems concerned with the correct allocation of posts in public administration, relations between public bodies, rules on checks and balances, the election of the legislative assembly, and appointment at the cabinet.

Corrective justice, in turn, regards the application of justice in concrete cases and employs liability as a conceptual tool to rectify wrongs[59]. It levels off the loss suffered by reversing the damage on the infringer, thus stigmatizing an unfair behavior, and restoring

52. See Young, *Aristotle's Justice* at 183 (cited in note 17).

53. See Aristotle, *Nicomachean Ethics* at 5.2.1130b7-29 (cited in note 5).

54. See Young, *Aristotle's Justice* at 183 (cited in note 17).

55. See *ibid*.

56. See Marlena G. Corcoran, *Aristotle's Poetic Justice*, 77 Iowa L. Rev. 837, 842 (1992).

57. See Aristotle, *Nicomachean Ethics* at 5.3.1131a20-25 (cited in note 5).

58. See Judith A. Swanson and C. David Corbin, *Aristotle's 'Politics': A Reader's Guide* at 100-102 (Continuum 2009).

59. See Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 The University of Toronto Law Journal 349, 349 (Autumn 2002).

equality[60]. This type of justice, as mentioned, presides over interactions, both voluntary and involuntary, and assesses whether or not someone is to blame for an injustice, and whether or not the counterpart needs compensation[61]. It clearly shares a resemblance with the modern law of contracts and torts[62].

Corrective and distributive justice are nothing alike. Distributive justice may involve a plurality of parties, whereas corrective justice concerns only two of them[63]; the differentiation even occurs on the ground of merit, which is the standard for sharing a benefit or a burden and it illustrates the contents for distributive justice. On the other hand, corrective justice applies arithmetically to restore the fairness of either voluntary or involuntary) transactions[64]. Therefore, if distributive justice seems keen to regulate "the fair distribution of public goods among individuals or groups within a political system"[65], rectificatory justice "attempts to undo illegitimate losses and gains through bilateral and direct vindication", thus governing the area of private bargains[66].

However, these are not only descriptive figures of justice in the narrow sense. Aristotle considers the constitution of the police its edifice[67]; "and a constitution, in turn, is a kind of justice"[68]. Indeed, whereas a city-state is secured by the administration of justice carried out by judges (who apply corrective justice)[69], a form of government is mainly concerned with distributive justice[70]. Thereby, whereas Aris-

60. See *ibid.*

61. See *ibid.*

62. See *ibid.*

63. See Jason W. Neyers, *The Inconsistencies of Aristotle's Theory of Corrective Justice*, 11 Can. J. L. and Jurisprudence 311, 311 (1998).

64. See *id.* at 311-312.

65. *Ibid.*

66. *Id.* For a different perspective, see Thomas C. Brickhouse, *Aristotle on Corrective Justice*, 18 The Journal of Ethics 187, 187-205 (2014), according to which corrective justice seems "bifunctional", and strives to restore the imbalance of both rights and wrongs.

67. Aristotle, *Politics* at 3.2.1276a17-b13 (cited in note 3).

68. David Keyt, *Distributive Justice in Aristotle's Ethics and Politics*, 4 *Topoi* 23, 23 (1985).

69. See Aristotle, *Nicomachean Ethics* at 5.4.1132a1-30 (cited in note 5).

70. See Keyt, *Distributive Justice in Aristotle's Ethics and Politics* at 23 (cited in note 68).

totelian political philosophy engages with the analysis and assessment of the various forms of government, it falls in the realm of justice in distribution[71]. On the contrary, where private interests are concerned, this is a matter of rectificatory justice.

3. *Aristotle on Deviant Constitutions*

To fully understand the account of democracy, a brief introduction to the broken constitutions outlined by Aristotle and their display of justice is useful. It bears repeating that Aristotle builds his constitutional theory on the distinction between "those constitutions that look to the common benefit" and "those which look only to the benefit of the rulers", labeling the first ones as "correct" and "deviations" the others[72]. More precisely, in his account of the different forms of government, Aristotle defines tyranny as the deviant form of kingship, because it is the rule of one, who aims at his private interest, over the interest of the many[73]. This distinguishes it from monarchy itself, insofar as not the law, but the ruler's will is in charge of the constitution[74]. The Stagirite ultimately labels tyranny as the worst constitutional form[75], for it encompasses elements of democracy and oligarchy, seen as other unjust forms of government, and displays errors of both[76].

This opinion results in specific consequences on the conceivable functioning of the distributive and the corrective type of justice. As mentioned above, under a tyranny the end is the ruler's benefit, and if authority is assigned on such a basis, a substantial imbalance of power emerges between the despot and the rest of the city-state[77]. Since the rule of a tyrant is undeserved, this arrangement affects distributive justice, because this way equals gets unequal shares (of goods, wealth, posts, etc.) in the polity[78]. Such an asymmetry involves even

71. See *ibid*.
72. See note 9.
73. See Aristotle, *Politics* at 4.11.1295a20-21 (cited in note 3).
74. See *id.* at 4.11.1295a15-20.
75. *Id.* at 4.8.1293b27-30.
76. See *id.* at 5.10.1310b4-6.
77. See *id.* at. 4.10.1295a18-21.
78. See *id.*

other partitions of common assets, since *pleonexia* (greed) is one of the most common offenses of a despot[79], for he is prone to excessive acquisitiveness, especially of money and property[80]. Aristotle stresses this out, when he enumerates impoverishment and taxation as instruments used by tyrants to maintain their power[81], and when listing confiscation of private possessions as a cause of change in constitutions[82]. Furthermore, appropriation of wealth, a feature that tyranny shares with oligarchy, proves to be an end in itself[83]. Therefore, these Aristotelian concepts permit to classify distributive injustice as a characteristic feature of tyrannical regimes.

In light of this inquiry, the role of corrective justice under a despotic regime can be outlined accordingly. This type of justice concerns the just in voluntary and involuntary transactions and, unlike the distributive type, treats individuals as equals[84]. Author Richard Kraut, describing its general features, pinpoints a meaningful link between rectifications of wrongs and equality in the community[85]. He asserts a missed punishment does not only damage the victim but corresponds to a recognition of a manifest superiority in the status of the offender[86]. This leads to a separation in the community between privileged individuals and underprivileged ones, ultimately pointed out as "tyrants and subjects"[87].

On the other hand, oligarchy, which Aristotle considers the second worst among the incorrect constitutions[88], is the rule of the wealthy, and consequently few, over the city-state for their advantage[89]. As noted by John Cooper, an oligarchic state is conceived like a

79. See Fred D. Miller Jr., *Nature, Justice, and Rights in Aristotle's Politics* at 281, 302-303 (Oxford University Press 1995).

80. See *id.* at 283.

81. Aristotle, *Politics* at 5.11.1313b18-27 (cited in note 3).

82. *Id.* at 5.10.1311a25-28.

83. See *id.* at 5.10.1311a10-13.

84. See Aristotle, *Nicomachean Ethics* at 5.4.1131b25-1132a5 (cited in note 5).

85. Richard Kraut, *Aristotle: Political Philosophy* at 149-150 (Oxford University Press 2002).

86. *Id.*

87. *Id.* at 149.

88. Aristotle, *Politics* at 4.2.1289b3-4 (cited in note 3).

89. See *id.* at 4.41290b19-20.

commercial alliance, which pursues preservation and growth in possessions[90]. Accordingly, individuals display no interest in each other's virtues and vices[91].

Justice in distribution under an oligarchy seems broadly influenced by the fundamental characteristics of such a regime. This polity is defined as the rule of the few, rich citizens over the city, whose aim is their private advantage[92]. The partition of offices and goods among individuals and groups must reflect this order. Richard Kraut observes that, in the partition of tasks, the notables lay claim to more power than the many, consistent with their wealth and their greater contribution to the good of the state[93]. The Stagirite himself recognizes their entitlement, for they retain the vast majority of land and are more experienced in conducting business[94]. Accordingly, in this form of government, justice in distributable goods appears to really be inequality, because it deals with divisions between unequals[95]. Since wealth is the end of this type of constitution and its standard as well, the most relevant offices should be assigned to the rich[96]. However, given this context, an oligarchy must endeavor to survive by means of artificial decorum and deception[97], but it could not endure unless it enlists the aid of the lower classes[98]. Since poverty and interdiction from offices create adversaries in a city-state[99], a deviant constitution is preserved blending its elements with those from the opposite faction[100].

Therefore, oligarchy admits different compositions in terms of distribution consistent with such policy, which the Stagirite counsels

90. John M. Cooper, *Political Animals and Civic Friendship*, in Richard Kraut and Steven Skultety (eds.), *Aristotle's Politics: Critical Essays* at 71 (Rowman & Littlefield Publishers 2005).

91. See *id.* at 72.

92. See Aristotle, *Politics* at 3.9.1279b34-1280a6 (cited in note 3).

93. Kraut, *Aristotle: Political Philosophy* at 448 (cited in note 85).

94. Aristotle, *Politics* at 3.13.1283a30-37 (cited in note 3).

95. See *id.* at 3.9.1280a11-15.

96. See *id.* at 4.4.1290b14-20.

97. See *id.* at 4.13.1297a14-34.

98. See Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 288 (cited in note 79).

99. See Aristotle, *Politics* at 3.11.1281b28-30 (cited in note 3).

100. See *id.* at 5.9.1309b18-35.

in order to make the constitution longer lasting[101]. In fact, oligarchs should leave some lucrative offices to the poor, or at least avoid high-handed and covetous behavior, in that they should not steal from public revenues[102]. For the many can accept exclusion from civic posts, inasmuch as they may devote leisure to their work, but not when wealthy people profit from it[103]. In fact, factions arise in such polity even because of arrogance and acquisitiveness, of private estates or public revenues, or because of exclusion from the constitution itself[104]. In its best version, posts are assigned according to a high standard of property possession, but still, only those who meet this requirement are admitted to participate in the polity[105]. Moreover, wealthy citizens are expected to invest part of their riches in the preparation of liturgies, since they foster the people's sympathy and trust[106]. Kraut underlines how this behavior is required by Aristotle to approach its ideal city-state, where these public services restrict the individuals' private use of wealth[107]. Therefore, these considerations underline how an oligarchic regime displays different and higher, degrees of distributive justice, approximating a just arrangement as it progresses towards a democratic regime[108].

Because of the previous analysis, the breach of corrective justice seems particularly pernicious in an oligarchy. Since oligarchs are predisposed to start factions, against the many, and against each other, incorrect rectifications of trivial violations can become sources of contempt, thus giving rise to discord between notables and jeopardizing the very survival of the polity[109]. In this realm, Aristotle lists as causes of change in an oligarchy quarrel about inheritances[110], weddings, and trials[111]. At the same time, it is worth noticing that, according to Aristotle, judges in an oligarchy are recruited among those who fulfill the

101. *Id.* at 5.9.1309a19-22.
102. See *id.* at 5.8.1308b34-1309a20.
103. See *ibid.*
104. See *id.* at 5.3.1302b5-28.
105. See *id.* at 4.5.1292b39-42.
106. See *id.* at 6.8.1321a33-40.
107. Kraut, *Aristotle: Political Philosophy* at 326-327 (cited in note 85).
108. *Id.* at 370.
109. See Aristotle, *Politics* at 5.4.1303b18-31 (cited in note 3).
110. *Id.* at 5.4.1303b31-37.
111. *Id.* at 5.7.1306a31-1306b1.

minimum standard of assessment, since the poor are allowed to participate only in the best-case scenario, whereas in the others they are object of deception, to conserve the constitution[112]. This entails even a fine for lack of attendance as jurors for the notables, while the poor receive little sanctions or none[113]. This policy discourages the many from undertaking their task, thus leaving the administration of justice in the hands of the oligarchs[114]. Cooper observes that, if the constitution is conceived as a joint enterprise, the only real concern is to avoid injustice within the terms of the agreement and prevent cheating in business and other instances[115]. This partial delivery of corrective justice is likely to be affected consequently[116].

4. *Aristotle on Democracy*

In the domain of deviant constitutions, the very opposite of tyranny, being many in charge of the constitution[117], and the downside of oligarchy, being the power in the hands of the poor[118], is democracy.

Aristotle characterizes democracy as the government of the poor and free; considers it as the broken form of polity, which is, instead the correct form of government by the people[119]; and underlines how democracy stands out as the most moderate among the unjust forms[120].

Concerning the first feature, it is clear that, under a democratic regime, the many rule[121]. However, the sheer number of rulers appears

112. See *id.* at 4.13.1297a14-35.

113. See *ibid.*

114. See *ibid.*

115. Cooper, *Political Animals and Civic Friendship* at 72 (cited in note 90).

116. See Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 81 (cited in note 79).

117. Aristotle, *Politics* at at 5.10.1312b3-5 (cited in note 3).

118. See *id.* at 3.9.1279b17-20.

119. *Id.* at 3.7.1279b5-8.

120. *Id.* at 4.2.1289b4-5.

121. Democracy as a form of government derives from the conjunction of the Greek words *démos* (people) and *krátos* (power), but, in the ancient Aristotelian view, it bore a negative meaning. As mentioned, the Stagirite used it to indicate the broken version of popular government, which today we could translate with ochlocracy or demagoguery. However, democracy is today associated with a mostly positive meaning. The first requisite of modern democracy is the principle of popular sovereignty,

somehow incidental[122]. The real distinguishing factor among the deviant constitutions is the ideology underpinning democracy: freedom, and not wealth or the tyrant's desire, is the criterion employed to establish who counts as equal in the community[123]. And freedom is a trait of every citizen, rich and poor alike[124]. In the Stagirite's opinion, in the city-state both the poor and the wealthy err in overestimating the importance of their asset of freedom: in fact, under a democratic government people sustain that, since they share the same status of free citizens, they must enjoy equality in every other field[125], thus avoiding any kind of assessment conducted on a more adapted basis (i.e., merit)[126]. This leads to a distribution of "honors" on the grounds of presumed equality, and not on the grounds of competence, evaluation, distinction, etc.

Regarding the second characteristic, as mentioned above, democracy seems to be the corruption of the germane constitution of polity. The distinction lies in the aim: when the mass rules for the common and non-partisan advantage, we have the so-called *politeia*, listed among the good constitutions[127]. The classist view of democracy prevents the community from reaching the supreme good since the rulers aim at their interest, not at the mutual benefit. This explains how,

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expressed through universal suffrage - the right to vote and to be elected. Another key feature of modern democracy, and a consequence of popular sovereignty, is the majority rule, the principle according to which the minority must accept and follow the decisions taken by the majority. However, the principle of popular sovereignty must adhere, in turn, to the rules of constitutionalism. Being subject to constitutional limitations, the majority rule is limited to standards and procedures whose objective is the respect of fundamental values and the involvement of the minority in decisional processes. These constraints are pivotal for the very existence of what we call democracy. In sum, modern constitutional democracy accords the majority a limited power, so its right to take decisions should not extend to the point of denying the rights of the minority - and every mechanism created to reach this goal seems therefore banished. For these brief considerations, see *Democrazia. Diritto costituzionale*, in Enciclopedia Treccani, https://www.treccani.it/enciclopedia/democrazia-diritto-costituzionale (last visited April 10, 2023)

122. See Andrew Lintott, *Aristotle, and Democracy*, 42 Classical Quarterly 114, 116 (1992).

123. See *ibid.*

124. See Aristotle, *Politics* at 3.8.1279b34-80a6 (cited in note 3).

125. See Lintott, *Aristotle and Democracy* at 116 (cited in note 122).

126. See Aristotle, *Politics* at 6.2.1317b43-44 (cited in note 3).

127. See *id.* at 3.7.1279a36-38.

at the same time, Aristotle maintains that democracy seems the most tempered of the broken forms of government: it is established upon the same core organizing principle of the polity, that is the majoritarian rule. However, since the goal is the common good, governance must adhere to the will of the people, yet it remains in accordance with the rule of law, which is crafted exactly to prevent the rulers from going astray and exploiting their power. Still, democracies are deemed by the Stagirite more stable and more durable than other broken constitutions, because, thanks to the principle of equality, they allow other social groups - especially the middle class - to participate in public offices[128]. According to this view, the Stagirite draws a distinction between the types of democracy: the regime based on pure equality, governed therefore by the rule of the many, according to the majoritarian rule; the democracy in which offices are assigned on the basis of property, where the relevant amounts are low; the regime in which every fully-fledged citizen, or every citizen in general, may partake in the city-state; and the worst type, the dictatorship of the masses, where the people rule as a one, and it is their will - not the law - that commands unreservedly[129].

The Aristotelian account of friendship (*philia*) provides useful evidence of the plausible functioning of general justice in the latter regime[130]. The Stagirite grounds his description of democracy on the sheer contrast with oligarchy, thus pointing out the fundamental and pivotal mistrust between rich and poor that permeates the city-state[131]. This basic burden oppresses relationships between citizens of different classes in the polis, thus impairing the goal of the common good since each faction aims at its own[132]. The weakening of friendship is the natural upshot of this sub-optimal situation[133].

128. *Id.* at 4.12.1295b-1296a20.

129. *Id.* at 4.4.1291b30-1292a39. The middling class, in particular, is perceived as more stable and reliable since they do not desire other people's assets, nor are they envied - for they are not rich.

130. See Aristotle, *Nicomachean Ethics at* 8.9.1160a7 and at 8.1.1155a4 (cited in note 5).

131. See Kraut, *Aristotle: Political Philosophy* at 446-447 (cited in note 85).

132. See *ibid.*

133. See *id.* at 467.

Nonetheless, democracy still entails an appreciable level of *philia* because the poor disputes with the wealthy over the power in the *polis* but are ultimately prone to form a cohesive political unit, with the sole purpose to satisfy their claim for equality[134]. Therefore, this factious relationship still encompasses a basic level of community (*koinonia*), in that both sides, although operating for their own advantage, engage in a reluctant collaboration in the legal and economic areas[135]. However, this arrangement does not permit obtaining some sort of "like-mindedness" (*homonoia*)[136], because there is a crucial disagreement between both sides over the principle of their power[137]. Consequently, this democracy is fragile, because its intrinsic rivalry can only be concealed under the mantle of participation in offices; thus, the risk of the emergence of an extreme form of democracy, by way of the subversion of the rule of law by the many, seems not preposterous[138]. This sort of government of the people deviates into tyranny since the multitude has authority over the constitution and commands as a single ruler[139]. The ultimate democracy employs the same sort of devices used by Cleisthenes in Athens, as explained in the *Politics*: it adds new tribes, reduces the number of cults, and disbands citizens' associations, all this to control *philia* among the many[140].

General justice is likely to be undermined as a consequence, since such a regime aims only at the benefit of those in power, and accordingly vexes the rich[141]. In this framework, Richard Kraut examines the Aristotelian thought and affirms that the considered regime - democracy, but even oligarchy, to a lesser extent - in its best version

134. See Aristotle, *Politics* at 5.1.1302a10-12 (cited in note 3).

135. See Kraut, *Aristotle: Political Philosophy* at 466 (cited in note 85).

136. Like-mindedness means concord. According to Aristotle, "a city is said to be in concord when (its citizens) agree on what is advantageous, make the same decision, and act on their common resolution." (Aristotle, *Nicomachean Ethics* at 9.5.1167a26-28 (cited in note 5).

137. Kraut, *Aristotle: Political Philosophy* at 468 (cited in note 85).

138. See *id.* at 469-470. After all, the Stagirite acknowledges that "passion perverts rulers even when they are the best men. That is precisely why law is understanding without desire." (Aristotle, *Politics* at 3.16.1287a31-32 (cited in note 3)).

139. See Aristotle, *Politics* at 4.5.1292a4-18 (cited in note 3)

140. See *id.* at 6.5.1319b20-32.

141. See Kraut, *Aristotle: Political Philosophy* at 382 (cited in note 85).

still comprises a worthy degree of justice:[142] in fact, the best attainable condition requires the utilization of such persistent strife to reach a stable equilibrium of opposing forces[143]. For example, since the many hate wealthy people, they can enlist their help to undertake public services and, in doing so, they would prevent the elite from acquiring more power and money;[144] and, as Aristotle suggests, although the poor are badly prepared to perform significant offices, they may still reach an elementary type of justice by gathering in the assembly to exert control over the rich[145]. In the case of democracy, friendship is fostered among citizens through a compromise in which both parties agree on a rough parity of power, ensuring mistrustful cooperation that encloses a mutual benefit[146]. They still maintain their opposite views, but nonetheless, they succeed in achieving an acceptable level of friendship and justice, more than in any other deviant constitution, as Aristotle acknowledges[147]. Thus, the many poor can practice an elementary type of virtue by controlling the opposite faction's wrongs, even when virtue is not the end in itself[148]. Kraut pinpoints that a democracy can be considered not quite unjust only when it achieves its moderate form, through a minimal degree of friendship[149]. In such a regime, those in power can prevent the constitution from degenerating into a tyranny through the practice of virtue, hence accustoming citizens into being, if not entirely, at least semi-good[150]. Therefore, a law-abiding behavior that fulfills the condition of justice as lawfulness is somewhat conceivable[151], and a tantamount level of universal justice is attainable in turn[152].

However, since in his work the Stagirite considers different types of democracy, depending on which different parts of inhabitants of the city-state have authority, general justice is bound to vary

142. *Id.* at 448.
143. See *id.* at 467-468.
144. See *id.* at 447-448.
145. See *ibid*.
146. See *id.* at 469.
147. Aristotle, *Nicomachean Ethics* at 8.11.1161b10-11 (cited in note 5).
148. See Kraut, *Aristotle: Political Philosophy* at 451 (cited in note 85).
149. *Id.* at 382.
150. See *id.* at 437.
151. See Aristotle, *Nicomachean Ethics* at 5.1.112b12-19 (cited in note 5).
152. See Kraut, *Aristotle: Political Philosophy* at 382-383 (cited in note 85).

accordingly[153]. A significant testing ground for this assumption is the pattern of generosity under a democratic regime. The Greek word that stands for such virtue, *eleutherios*, encompasses a double meaning, as it translates both the English adjectives generous and civilized[154]. Aristotle employs the term in both senses: in the *Nicomachean Ethics*, first when he describes the particular virtue of character linked to giving and taking money[155], and secondly when he delineates what behavior is proper to a fully developed individual[156]. Therefore, Irwin suggests, the Stagirite recognizes these two meanings, the narrower and the broader, as intrinsically united, since the former, the generous one, is evidently a concrete expression of the latter, the civilized one.[157] Hence, the relationship between generosity and the correct attitude of a civilized, happiness-aiming person is that of a part to a whole, in as much as this framework parallels the single virtue-universal justice rapport.[158] To put it simply, the individual practice of generosity advances the human being toward the best version of himself.

This is particularly relevant in the case of democracy because such a constitution involves a characteristic tendency towards the equalization of assets[159]. Richard Kraut, evaluating the Aristotelian defense of common use of private property, underscores how communal property might jeopardize the development of the virtue of generosity[160]. The author clarifies that generosity intervenes only in personal relationships, and thus cannot truly increase through the layer of public expenses[161]. Indeed, economic means are the key to the implementation

153. See Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 161 (cited in note 79).

154. Aristotle, *Nicomachean Ethics* at 331, Glossary (cited in note 5).

155. *Id.* at 3.5.1115a20-21.

156. *Id.* at 10.9.1179b8. According to the description proposed by Irwin, the civilized individual possesses the correct type of education, and therefore pursues only those virtues and enjoyments that are valorized by its formation. He eschews any prejudiced devotion to irrational pleasures and needs that pertain to the body, since enjoying those boorish activities is the hallmark of the servile lot. For this description, See *id.* at 331, Glossary.

157. *Id.* at 331, Glossary.

158. See *ibid.*

159. See Aristotle, *Politics* at 3.9.1280a8-19 (cited in note 3).

160. Kraut, *Aristotle: Political Philosophy* at 339-342 (cited in note 85).

161. *Ibid.*

of generosity, since they allow individuals to employ this excellence by giving assistance to family members and friends, on special occasions or whenever necessary[162]. The weakening of such ties, resulting from an abolition of private ownership and from the conceivable subsequent arise of quarrels[163], would make it impossible to nurture the virtue of generosity, therefore to a significant impairment of general justice, since it requires the exercise of all excellences, not only of a certain amount of them[164]. Moreover, Kraut further comments on the Aristotelian vision of generosity when he affirms that this *aretê* could not be equally improved through citizens' collective participation in decisions about the use of public wealth for the common benefit[165]. Even Miller, who confirms how the use and alienation of property are mandatory in the refinement of generosity, points out this interpretation of the Aristotelian concept of ownership[166].

This line of reasoning is clearly applicable to the extreme form of democracy, in which popular leaders engage in confiscations of properties - which Aristotle considers an expression of injustice[167]- instead of ensuring that the many are not too indigent[168]. Excessive poverty negatively affects leisure and hinders the practice of virtue, therefore, with respect to the present inquiry, it favors ungenerosity, which the Stagirite labels as "unjust"[169]. Therefore, in a demagogue-led democracy, the goal of general justice seems meaningfully constrained by this lack of generosity between individuals. However, this pattern ranges widely within the spectrum of different kinds of democracy, since the worst type inhibits the surfacing of such excellence, for this regime overlaps with tyranny[170]. By contrast, other sorts of democratic government conceivably foster generosity to increasingly higher degrees, the more they lean towards a polity, for they aim at a superior

162. See *ibid*.
163. See Aristotle, *Politics* at 2.5.1263b7-25 (cited in note 3).
164. See Kraut, *Aristotle: Political Philosophy* at 340-341 (cited in note 85).
165. *Id.* at 341-342.
166. Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 324-325 (cited in note 79).
167. Aristotle, *Politics* at 6.3.1318a24-26 (cited in note 3).
168. See *id.* at 6.7.1320a5-33.
169. Aristotle, *Nicomachean Ethics* at 5.2.1130a19-20 (cited in note 5).
170. See Aristotle, *Politics* at 4.5.1292a17-18 (cited in note 3).

constitution, the so-called polity[171]. In fact, interpreting the Aristotelian thoughts, the same Kraut argues that there is no real contradiction between communal property and such a virtue since the *polis* should not subtract too much wealth from its citizens, but only a portion, the "correct mean". Hence citizens must be allowed to utilize part of their resources to pursue happiness, which also comprises fostering the virtue under scrutiny[172]. This scheme reinforces the idea of a parallelism between the generosity-civilized attitude relationship and the particular virtue-universal justice connection[173]. This relation is highlighted even by the English translation of *eleutheros* ("free"), hence a term grammatically and conceptually germane to the Greek notion of generosity[174]. Irwin highlights how this proximity evaluates such virtue as the correct standpoint of a free citizen[175]. Therefore, the considered virtue proves to be a useful gauge of the condition of universal justice in a democratic city-state: the more generosity is implemented among individuals, the more the broad type of justice, the universal one, seems to approach its Aristotelian correct arrangement[176]. As mentioned above[177], distributive justice, by definition, concerns the identification of those who count as equal and those who do not in the community, and the relative basis[178]. The end in a democratic polis is freedom, and, consistently, the same holds for the standard[179]. However, for Aristotle, democrats have an incorrect conception of freedom, as under such labels they dignify the rule of the many and the notion that everyone should live an unregulated life[180]. As Jill Frank underlines when interpreting the vision expressed in the *Politics*, the Stagirite rejects their flattening equalization based on freedom as the measure for the partition of goods in the community, for it is

171. See *id.* at 3.7.1279a36-38.
172. Kraut, *Aristotle: Political Philosophy* at 339-342 (cited in note 85).
173. See Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 292-294 (cited in note 79).
174. Aristotle, *Nicomachean Ethics* at 331, Glossary (cited in note 5).
175. *Ibid.*
176. See notes 170 and 171.
177. See notes 57 and 58.
178. See *ibid.*
179. See *ibid.*
180. See *ibid.*

a parameter more prone to arithmetic than to geometric equality[181], which is the correct feature of distributive justice[182]. In fact, in the context of a comparison between the Aristotelian and the liberal democratic property model, the author explicitly remarks how a just distribution must take into consideration equality and differentiation alike[183].

By contrast, inclusiveness is the distinguishing mark of a democratic state in the *Politics*, in that it strives to extend the threshold of fully-fledged citizenship, thus making entitlement to distributable goods and political rights a volatile limit[184]. In accordance with these assumptions, it is no wonder that for the Stagirite the preferable kind of democracy is the type based on a small level of property assessments and composed of similar people - viz. farmers[185]. Aristotle admits that such order is compatible with the ownership of only a certain amount of land, small enough to allow even the poor to participate in offices when necessary[186]. This arrangement is beneficial for the construction of a democratic *polis* under multiple points of view, for it constrains greed[187], allows widespread participation[188], encourages good government[189], and prevents wrongdoings[190]. Accordingly, this small allotment system promotes farmers' hard work instead of their compulsive political participation, since the former activity is profitable while the latter is not; simultaneously, this arrangement permits a share of the

181. Jill Frank, *Integrating Public Good and Private Right: The Virtue of Property*, in Aristide Tessitore (ed.), *Aristotle and Modern Politics: The Persistence of Political Philosophy* at 271-272 (University of Notre Dame Press 2002). As Irwin puts it, the democratic notion of equality seems arithmetic since the people maintain that every free citizen possesses an equal merit, therefore an equal entitlement to partake in the city-state and to have possessions. On the other hand, oligarchs invoke a geometric (or proportional) equality, since the criteria for the subdivision of divisible goods (resources, offices etc.) - therefore merit - is based on wealth. Cfr. Aristotle, *Nicomachean Ethics* at 250, Glossary (cited in note 5).

182. See *ibid*.

183. *Id.* at 272-273.

184. See Aristotle, *Politics* at 4.4.1291b14-29 (cited in note 3).

185. *Id.* at 6.4.1319a4-5.

186. *Id.* at 4.5.1291b38-40.

187. See *id.* at 6.4.1318b11-14.

188. See *id.* at 4.5.1291b39-40.

189. See *id.* at 6.4.1318b32-33.

190. See *id.* at 6.4.1319a1-4.

wealthy in public offices[191]. This treatment prevents the exclusion of rich citizens from public affairs and obtains their collaboration with the democratic political order[192]. It is useful, as Aristotle advises, to distribute offices that do not assign supreme authority to those who partake less in the polity[193].

Nonetheless, apart from this best-case scenario, other versions of majority rule vary in accordance with the inclusion of progressively worse groups of inhabitants in the polity[194], thus resulting in different, and inferior, degrees of justice in distribution[195]. The extension of citizenship to worthless individuals ultimately leads to the establishment of the worst kind of democracy, which indulges in tyrannical abuse of political rights and common assets[196], that is to say, the unrestrained acquisition of power and wealth by the ruling class over the excluded "elite". In particular, the urban crowd, which outnumbers the upper or middling segments of the city, uses its leisure to assemble, thus gaining a profit out of political activities thanks to the earning of wages given to people in offices[197]. Furthermore, such a regime resorts to vicious means such as property seizure, excessive taxation, and public lawsuits brought against wealthy individuals, everything in order to win the multitude's trust - thus in contrast with distributive justice itself[198]. Besides, even when revenues are obtained, Aristotle criticizes their wasteful utilization, which is common in democracies, embodied by means of indiscriminate and addictive distributions to the poor, something he discards as "pouring water into the proverbial leaking jug"[199].

These means provide a sheer contrast with the Stagirite's theories for a fair distribution, for he demands not only a restraint in confiscations and in common ownership of land but also better support

191. See Swanson and Corbin, *Aristotle's 'Politics': A Reader's Guide* at 102 (cited in note 58).

192. See *ibid*.

193. Aristotle, *Politics* at 5.8.1309a26-30 (cited in note 3).

194. See *id.* at 6.4.1319a30-40.

195. See Aristotle, *Politics* at 1291b30-1292a6 (cited in note 3).

196. See Swanson and Corbin, *Aristotle's 'Politics': A Reader's Guide* at 103 (cited in note 58).

197. See Aristotle, *Politics* at 6.2.1317b28-34 (cited in note 3).

198. See *id.* at 5.5.1305a3-7.

199. *Id.* at 6.7.1320a29-31.

towards the poor[200]. This encompasses purposeful donations of surpluses, means to work, or opportunities to escape poverty, as in Carthage[201]. Therefore, democracy contemplates different kinds of distributive justice, for different types of such polity[202]. In this perspective, it is noticeable that a democratic city-state seems to miss the mark of a correct partition of divisible goods over the vast majority of the spectrum, since it pursues the benefit of one single class, the poor, whereas the advantage of the others, the wealthy, results disproportionately overshadowed[203].

Hence, the democratic regime pursues its misinterpreted end, freedom, through a straightforward equalization that levels off individuals' merits and riches, regardless of the Aristotelian formula for a just allocation, which claims that equals should get equal shares[204].

Even for what concerns corrective justice, it is essential to consider the type of democracy that is being examined. In this political regime, the administration of justice is carried out through the active participation of citizens, for example when serving as jurors, since the selection from all is held to be a defining democratic trait[205]. Nevertheless, Aristotle outlines such arrangement in two ways: the first three considered types of democracy entail no wages for judicial services, while the least form, the tyranny of the multitude, comprises a payment for jurors[206].

This layout conceivably influences the quality of justice in rectification, for a fee stimulates participation and frequency of meetings because citizens have the leisure to engage in such activities since they can make a profit out of it[207]. The upshot is a pejoration in the quality of judgments, since the Stagirite mentions the very opposite of the described order, absence of revenues and short sessions for the courts,

200. See Swanson and Corbin, *Aristotle's 'Politics': A Reader's Guide* at 103-104 (cited in note 58).

201. See *ibid.*

202. See note 194.

203. See Swanson and Corbin, *Aristotle's 'Politics': A Reader's Guide* at 106 (cited in note 58).

204. See note 184.

205. See Aristotle, *Politics* at 4.16.1301a10-12 (cited in note 3).

206. *Id.* at 4.6.1292b22-1293a11.

207. See Aristotle, *Politics* at 6.2.1317b28-34 (cited in note 3).

as the right arrangement for this sort of issue[208]. Moreover, courts play a pivotal role under this extreme form of democracy, inasmuch as through them the demagogues persuade the multitude, bringing spiteful cases against notables to expropriate their land[209].

Thus, the arithmetic equality that characterizes this sort of particular justice appears endangered by the aforementioned money-hungry behavior and by its related malicious intent[210]. Richard Kraut observes that this pattern covers *pleonexia*, the kind of injustice related to distributable goods[211]. He argues that the unjust juror eventually gains prestige, honor, and money from his service[212]. In addition, this latter also enjoys wronging the victim, and thus lets the infringement of his rights go uncorrected[213]. In this framework, a person ends with more than his fair share, and vice versa for the injured party[214]. By contrast, in the preferable kinds of democracy, unpaid and infrequent jury service ensures purposeful participation and controls the risk of court misuse[215]. As a confirmation, Kraut highlights how the fair juror restores the loss of the victim, thus respecting the mandate of arithmetical equality[216]. In the same vein, a remarkable feature of the administration of justice in a democratic *polis* is Aristotle's warning on the hazard of having poor and base people participating in relevant offices[217]. He alerts that such persons would predictably err and act unfairly, for they are deficient in *phronesis* and in justice alike[218].

Given this layout, ostracism offers a significant puzzle for the functioning of corrective justice in a democratic city-state[219]. This procedure permits to exile for a fixed period an individual that surpasses his fellow citizens in external goods, such as political power, wealth, or

208. *Id.* at 6.5.1320a21-28.
209. See *id.* at 5.5.1305a3-7.
210. See notes 207, 209.
211. Kraut, *Aristotle: Political Philosophy* at 158 (cited in note 85).
212. *Ibid.*
213. See *ibid.*
214. See *ibid.*
215. See note 206.
216. Kraut, *Aristotle: Political Philosophy* at 158 (cited in note 85).
217. Aristotle, *Politics* at 3.11.1281b21-30 (cited in note 3).
218. See *ibid.*
219. See *id.* at 3.13.1284a17-32.

friends[220]. The Stagirite envisages that the correct constitution should be framed in order to avoid the recourse to such a device; nonetheless, he still endorses it as a corrective mean[221]. The main problem is that ostracism hits individuals who have not infringed on other persons' rights, as Miller correctly pinpoints[222]. While rectification targets past misdemeanors, ostracism seems forward-looking, and sanctions wrongs not already done.[223] Moreover, Aristotle underlines how this device is available as a powerful medium in the hands of deviant regimes, democracy included[224], and in faction disputes, and thus presents inherent aspects of danger[225]. Therefore, the argument that the Stagirite employs to justify its utilization is civic priority[226], for political justice requires it as an option to preserve the constitution[227].

To summarise, the framework of justice in rectification under a democracy seems to be substantially different under likewise types of democracy, to the point of being completely altered under the worst form, where its tyrannical features impair the same possibility of a fair rectification[228].

5. *Constitutional and Criminal Populism*

This brief excursus certainly does not claim to exhaust the investigation into the concept of justice according to Aristotle, nor to deepen its notion of democracy. However, it will serve to highlight how elements of this deviant form of government could today be seen

220. See *ibid*.

221. See Andrés Rosler, *Civic Virtue: Citizenship, Ostracism, and War*, in Deslauriers and Destrée (eds.), *The Cambridge Companion to Aristotle's Politics* at 156 (cited in note 15).

222. Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 246 (cited in note 79).

223. See Rosler, *Civic Virtue: Citizenship, Ostracism, and War* at 156-157 (cited in note 221).

224. Aristotle, *Politics* at 3.13.1284a33-1284b2 (cited in note 3).

225. *Id.* at 3.13.1284b 19-24.

226. See Kraut, *Aristotle: Political Philosophy* at 272 (cited in note 85).

227. See Rosler, *Civic Virtue: Citizenship, Ostracism, and War* at 157 (cited in note 221).

228. See note 138, 210.

in multiple manifestations of public powers. In fact, it is necessary here to refer to that political, social, and legal phenomenon now well known in modern Western democracies which goes by the name of populism. The concept, elusive and susceptible to numerous definitions[229], but for the purposes of this survey it will suffice to consider its main features, namely the presence of the people-elite dichotomy and the insistent appeal to the general will of the people[230].

These features bring a populist regime very close to the type of democracy that has been analyzed previously. In fact, they almost loyally mimic the functioning of the democratic regime set out above, with its counter position between classes or groups and the consequent unbalanced distribution of power and resources. The relevance of such considerations can be measured with reference to at least two aspects of the populist movement, namely constitutional and criminal populism.

Concerning the first phenomenon, populism has been traditionally viewed as the opposite of constitutional democracy, that is, democracy based not only on the will of the majority, but even in accordance with the fundamental law, up to the point that it disregards the liberal democratic regime per se or, to the very least, coexists with it in a parasitic fashion[231]. Populists often display dissatisfaction with legal boundaries and procedures, show aversion to institutions and intermediary bodies, and favors direct connections between the

229. For a more detailed inquiry on the phenomenon, see, e.g., Daniele Albertazzi and Duncan McDonnell, *Introduction. The Sceptre and the Spectre,* in *Twenty-first Century Populism. The Spectre of Western European Democracy* at 1-7 (Palgrave 2008).

230. Cfr. Vasileios Adamidis, *Democracy, populism, and the rule of law: A reconsideration of their interconnectedness*, Politics 1, 5 (2021).

231. See Paul Blokker, *Populist Constitutionalism* (VerfBlog, May 4, 2017), available at https://verfassungsblog.de/populist-constitutionalism/ (last visited April 10, 2023); Bojan Bugarič, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 German L.J. 390, 390-391 (2019); Giuseppe Martinico, *Fra mimetismo e parassitismo. Brevi considerazioni a proposito del complesso rapporto fra populismo e costituzionalismo*, 1 Questione giustizia 71, 77 (2019); Alessandro Bernardi, *La sovranità penale tra Stato e Consiglio d'Europa* at 177 ff. (Jovene 2019).

leaders and the masses[232]. In sum, populists pursue political governance through immediate means, rather than negotiated ones[233].

However, a sheer contrast with populist ideas seems not necessarily the case of a democratic order. As some authors argue, in fact, populism appears somehow to intermingle with constitutionalism since they share the same founding principle - that is, popular sovereignty[234]. According to this view, the relation with populism appears as a sort of radicalization of constitutionalism that exacerbates the concept of majority rule[235], up to the point to make populism "part of a revolutionary tradition within democratic thought and practice"[236]. Populists affirm that modern liberal democracy is insufficient to foster popular supremacy, that is to say, taking a course of action in accordance with the will of the majority[237]. The obstacle to the unrestrained general will of the people is to be found in the rule of constitutional law[238], which seems in turn the main difference between populism and constitutional democracy. Every institutional or procedural mechanism that limits the direct expression of the masses (e.g., central banks, independent authorities, electoral rules, legislative and administrative procedures) is subject to sharp criticism and fingered as a filter that hinders the expression of the popular will[239].

Given this framework, the so-called "legal resentment" that spreads from populists has been classified by Blokker as a multi-pronged

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232. *Ibid.*

233. See *ibid.* citing Nadia Urbinati, *Democracy, and populism*, 5 Constellations 110, 111 (1998).

234. See Paul Blokker, *Populist Constitutionalism* (cited in note 231); see also Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 European Constitutional Law Review 6, 11 (2016); Yves Mény, Yves Surel, *Populismo e democrazia* at 10-11, 35-38 (Il Mulino, 2000).

235. See Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity* at 6-26 (cited in note 234).

236. Paul Blokker, *Populism and Constitutional Reform. The Case of Italy*, in Giacomo Delledonne, Giuseppe Martinico, Matteo Monti and Fabio Pacini (eds.), *Italian Populism and Constitutional Law. Challenges to Democracy in the 21st Century* at 11-38 (Palgrave Macmillan 2020).

237. See *ibid.*

238. See Domenico Pulitanò, *Populismi e penale. Sulla attuale situazione spirituale della giustizia penale*, Criminalia 124 (2013), available at https://discrimen.it/wp-content/uploads/Criminalia-2013.pdf (last visited April 10, 2023).

239. See Mény and Surel, *Populismo e democrazia* at 59 (cited in note 234).

approach to the legal dimension of liberal democratic constitutionalism[240]. The rule of law, he argues, is accused to be a non-neutral and artificial engine of the policy-making process, not its background, thus removing the decisional power from the people[241]. On top of that, the procedural aspects of a pluralistic democracy are criticized as slow and farraginous, and perceived as obstacles to the direct representation of interests. What is more, populists take a skeptical stance on human rights and supranational law and jurisprudence, as they are conceived as non-democratic in nature, that is to say, not immediately stemming from a single political community, thus alienating from the true source of power in society[242].

These characteristics of constitutional populism must be linked with another key aspect, the pivotal role of "constituent power in populist projects"[243]. As highlighted by Möller, and quoted by Blokker, in fact, the "invocation of 'the people' is not only a matter of bolstering mere political discourse, but of constitutional politics addressing the higher-ranking dimension of the legal and political community, the distribution of powers, and the overall design of rulemaking and application"[244]. This line of reasoning goes even further, since "populism does not only refer to certain policy issues but invokes 'the people' as constituent power on which the political community relies"[245].

Such an assessment of a constitutional value connects the modern stance on populism to the concept of distributive justice advanced by Aristotle. The distribution of goods in a populist democracy (viz., public administrative offices, political powers, checks and balances, etc.) should belong unreservedly to the majority and should not bear restrictions from rules imposed either by the political community in the wider sense (including the excluded elite, be it a different class, group, faction, political party) - traditionally embodied in a modern democracy by a constitution or by constitutional law - nor should it

240. Blokker, *Populist Constitutionalism* (cited in note 231).

241. See *ibid*.

242. See *ibid*.

243. Blokker, *Populism and Constitutional Reform. The Case of Italy* at 11-38 (cited in note 236).

244. Kolja Möller, *Popular Sovereignty, Populism and Deliberative Democracy*, 42 Philosophical Inquiry 14, 17 (2018).

245. *Id.* at 17-18.

be enforced by means of supranational entities such as international organizations or courts[246]. The criteria for a just allocation of posts and powers, in sum, responds not on merit, attitude, or democratic turnover, but on immediate responsiveness to the people's will. Approximately the same exegetic path may be followed in relation to criminal populism, which brings into play both the Aristotelian notions of distributive and corrective justice.

In general, penal populism refers to the idea of political use of crime and criminal justice-related issues, according to a rationale that relies more on the search for social consensus than on real needs for intervention[247]. According to R. Cornelli, this particular kind of populism seems built around four cornerstones, which are: the presence of excessive popular feelings[248], the use of those very feelings as the basis of political decisions, mainly oriented to "social reassurance", the application of these decisions in the criminal field, perceived as the most adapted place to respond to collective emotional pressures, the development of a criminal policy that extends the criminal law area[249].

As a matter of fact, security and criminal justice are often the objects of political use in terms of collective relief, with primary concern on fears and alarms sometimes induced or over-emphasized by political media campaigns often exploiting the topic of crime[250]. Even in the most well-established democracies, the administration of criminal justice - in this view, the elite - is constantly pressed by media, society, and political forces, which are the people, to live up to their exigencies

246. See, e.g., *ibid*., where Möller evidence how "populists do not rely on a societal foundational force which checks and authorises public institutions, but in fact can also turn the constitutional structure or the state against the "elites", supranational agreements, or economic powers".

247. See Ylenia Liverani, *L'enigma penale. L'affermazione dei populismi nelle democrazie liberali. Intervista ad Enrico Amati* (Extrema Ratio, December 30, 2020), available at https://extremaratioassociazione.it/wp-content/uploads/2021/01/amati-intervista-definitiva.pdf (last visited April 10, 2023). For a more detailed account on this notion, see John Pratt, *Penal populism* at 8 ff (Routledge 2007).

248. *I.e.*, towards a particular criminal phenomenon or episode.

249. Roberto Cornelli, *Contro il panpopulismo. Una proposta di definizione del populismo penale*, 4 Diritto penale contemporaneo - Rivista Trimestrale 129 (2019).

250. See Liverani, *L'enigma penale. L'affermazione dei populismi nelle democrazie liberali. Intervista ad Enrico Amati* (cited in note 247).

and expectations[251]. This arrangement tends to impinge on criminal law policy as a whole. It is increasingly evident the creation of offenses tailored to specific "enemies", such as migrants[252], mafia members[253], terrorists, road and sex offenders, corrupt officials, etc[254]. At the same time, on the procedural level, special investigative techniques (like wiretapping, undercover operations, etc.) as well as extensive use of pre-trial detention and other precautionary measures, are being deployed in order to tackle and prosecute particularly heinous crimes, according to the logic of the so-called "double track"[255].

However, it is worth noticing that the juxtaposition between the righteous mass and the perceived corrupt and inefficient elite in the realm of penal populism seems not only limited to the sphere of public criminal law policies but transcends to the area of private interests. As some authors suggested criminal populism entails the whole "realm of justice and the rule of law, the proper application of laws and the social conditioning that arises from improper application".[256] As a consequence, penal populism applies not only to the law-making process - the 'production' of criminal law -, but also to its application - that is to say, to the criminal law in action[257].

251. See Luciano Violante, Populismo *e plebeismo nelle politiche criminali*, Criminalia 197 ff. (2014).

252. See Marta Minetti., *International Legal Principles, Penal Populism and Criminalisation of 'Unwanted Migration'. An Italian Cautionary Tale*, 24 International Community Law Review 358, 368-369 (2022).

253. See *ibid.*

254. See generally Luciano Violante, *L'infausto riemergere del tipo di autore*, Questione Giustizia 101, 101 ff. (n. 1, 2019).

255. See, e.g., Antonio Bitonti, voce *Doppio binario*, Dig. disc. pen., Aggiornamento 393 ss. (UTET 2005).

256. Manuel Anselmi, *Populism: An Introduction* at 73 (Routledge 2018) as cited in Giovanni Damele, *The Judicial System at the Crossroads of Populism and Elitism*, in Democrazia e Sicurezza - Democracy and Security Review 157, 158 (2021).

257. See Giovanni Damele, *The Judicial System at the Crossroads of Populism and Elitism* at 158 (cited in note 256).

In this framework it is possible to discern another "mass", formed by the victims of crime/plaintiffs[258] and the community as a whole[259], whereas the perpetrators/defendants/prisoners are the wicked "elite" to counter - since they appear to be unduly shielded from the due consequences of their behavior (i.e., punishment) by condescending and liberal public authorities, especially judges[260]. Thus, the public-administered criminal justice transforms into an ancillary vehicle of private, vindictive justice[261]. The purpose of the trial, in this view, is no longer to ascertain personal responsibilities at the end of a fair trial and to impose a sanction that is proportionate and adequate, but to resort to quick sentencing and harsh penalties so as to avenge the suffering inflicted by the crime, and to commensurate sanctions to that very pain[262]. This idea of criminal law as a mere tool to rectify wrongs overshadows the very pillars of the rule of law[263], for example, the right to defense, due process, and presumption of innocence. In this scenario, the overexposure of jurisdictional activities to the mass media plays a pivotal role: the judicial system and its administrators seem to be summoned in the artificial courtroom of public mediatic opinion to account for the results achieved or missed - and the "judge" here becomes either politics or the mass[264]. The judicial decision

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258. See Ennio Amodio, *A furor di popolo. La giustizia vendicativa gialloverde* at 18-19, 145-149 (Donzelli Editore 2019); see also Enrico Amati, *Insorgenze populiste e produzione del penale*, in F. Giunta et. al. (eds.), Diritto penale e paradigma liberale: tensioni e involuzioni nella contemporaneità: atti del Convegno di Siena, Certosa di Pontignano, 24 e 25 maggio 2019 at 43-45 (Edizioni scientifiche italiane 2020).

259. See Manuel Anselmi, *Populismo e populismi*, in Stefano Anastasìa, Manuel Anselmi and Daniela Falcinelli, *Populismo penale: una prospettiva italiana* at 18-19 (Wolters-Kluwer 2020).

260. See Amodio, *A furor di popolo. La giustizia vendicativa gialloverde* at 18-19, 145-149 (cited in note 258); see also Amati, *Insorgenze populiste e produzione del penale* at 26 (cited in note 258).

261. See Vittorio Manes, *Diritto penale no-limits. Garanzie e diritti fondamentali come presidio per la giurisdizione*, 1 Questione Giustizia 86, 88 (2019).

262. See Amodio, *A furor di popolo. La giustizia vendicativa gialloverde* at 18 (cited in note 258).

263. See Filippo Sgubbi, *Monsters, and Criminal Law*, in Daniela Carpi (ed.), *Monsters and Monstrosity: From the Canon to the Anti-Canon: Literary and Juridical Subversions* at 289-292 (De Gruyter 2019).

264. See Manes, *Diritto penale no-limits. Garanzie e diritti fondamentali come presidio per la giurisdizione* at 294 ff. (cited in note 261).

seems therefore lost in this "bacchanal of opinions", where procedural safeguards and legal technical knowledge are of no use[265].

Given the above, clarification is needed. The interaction between political populism in criminal policies and judicial populism derives, as strikingly suggested by Professor Fiandaca, from the intrinsically populist character of criminal law per se, as it relates to the true identity "of a given population at a given historical moment"[266]. If the choice of what behaviors should be punishable by law ultimately belongs, in a democratic order, to the people, and if justice is administered "in the name of the people"[267], thus the populist idea cannot harmlessly set apart from democratic criminal law.

It is precisely this collective dimension of criminal law that requires clarity in the incriminations and in the sanctioning responses, in order to guide the behavior of the members of the community through an understandable message in which everyone can recognize the meaning that legitimizes the obedience requested by the state[268]. The law seems now as the safeguard of democracy, and democratic criminal law, no longer for its mere contents, which are presumed to be in line with liberal values; but for its decisional process, which permits, despite majority regime, parliamentary dialectics, the control of opinion public, and the constitutional review, which is capable of bridging the content "void" of democracy with a table of values constitutive of the most profound popular identity[269].

These features highlight a comparison with Aristotle's justice. Using the Stagirite's grammar, populism assesses the desirability and effectiveness of criminal law proposals on the grounds of *ethos* and *pathos* of the advocate, his credibility, perceived integrity, and his capability to arouse strong emotions in the audience, rather than on rational speech (*logòs*), that would be the case with checked facts, data,

265. *Id.*

266. Giovanni Fiandaca, *Populismo politico e populismo giudiziario*, in Criminalia 102 ff. (2013).

267. Article 101 §1, Constitution of the Italian Republic.

268. See Fiandaca, *Populismo politico e populismo giudiziario* at 102 ss. (cited in note 266).

269. See Francesco Palazzo, *Legalità penale. Considerazioni su trasformazione e complessità di un principio 'fondamentale'*, Quaderni fiorentini 1322 (2007).

logic, and legal reasoning[270]. Therefore, criminal policies supported by feelings of anger, or pity prevail on an evaluation of the merit and opportunity of the opponent's proposal[271]. Populists appeal to the moral superiority of the elite, and this stance justifies the belittling and delegitimization of its arguments rather than their refutations[272]. Opposing populists' demands means ostracism, expulsion of the "traitor" from the dignified mass[273]. This is the conceivable functioning of distributive justice in the criminal area: a decision-making process hampered by over-sensitivity and resentment which blur the substantial or procedural norm that is, the output of that very process to shape the law in order to serve not its purpose but the populist expectation of law, order, security, and promptness of the criminal justice system. Even corrective justice results are impaired by the populist ambiance. As mentioned above, the process of "victimization" of the administration of justice risks missing the focus of the criminal trial, which is to ascertain criminal responsibilities through the guarantees of a fair procedure. The moral argument and the blaming of the elite results in the demand for harsher sentences and rapid prosecutions even in the material case, to victimize the defendant given that the sanctions tend to amend the pain inflicted on the victim and the community as a whole, thus not aiming at the reinstatement of the transgressor[274].

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270. See Josè Javier Olivas Osuna, *from chasing populists to deconstructing populism: A new multidimensional approach to understanding and comparing populism*, 60 European Journal of Political Research 829, 838 (2021). The three considered means of persuasion derive from Aristotle's *Rhetoric*: *ethos* appeals to the credibility of the speaker; pathos relies on arousing emotions in the audience; *logos* involves the logical comprehension of the discourse. For an account of the application of these three figures to a legal argument, See generally Krista C. McCormack, *Ethos, Pathos, and Logos: The Benefits of Aristotelian Rhetoric in the Courtroom*, 7 Wash. U. Jur. Rev. 131, 131 ff (2014), available at https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1107&context=law_jurisprudence (last visited April 10, 2023).

271. See *ibid.*

272. See *ibid.*

273. See Jorgen Wilhelm Müller, *Populism and constitutionalism*, in Cristobal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo and Pierre Ostiguy (eds.), *The Oxford handbook of populism* at 593 (Oxford University Press 2017) as cited in Josè Javier Olivas Osuna, *From chasing populists to deconstructing populism: A new multidimensional approach to understanding and comparing populism* at 838 (2021).

274. See Anselmi, *Populismo e populismi* at 18-19 (cited in note 259).

6. *Populism under the Aristotelian framework: outcomes and (possible) countermeasures*

This result suggests a conclusion, based on the analyzed decline of virtues under this polity. Since such a deviant constitution (in the Aristotelian view) aims, by definition, not at the common good, but at the benefit of those in power (the mass), the upshot seems a general deficiency of all the types of justice, mitigated only while the rulers, by means of contrived decency or political choice, approximate the just arrangement of the correspondent correct constitution[275].

This conclusion has direct consequences on the impact of populist ideas on constitutional and criminal law. If the principal core of populism is the strict adherence to the people's will, my stance here is that, as I tried to highlight above[276], a certain degree of populism appears intrinsic in both realms of public law. There is no such thing as a sheer contrast between the populist invocation of the people's will as a basis for power and the normative foundation of democratic legitimacy: on the contrary, they are two faces of the same coin - that is, popular sovereignty[277]. Given the considered framework of constitutional and criminal law, is the Aristotelian view on democracy able to help us with the modern conundrum of populism? And if so, how? The answer, in my opinion, lies in the above-mentioned summary of this defiant form of government. If the ruler's will (that is, the people) strives to ensure the best for the majoritarian class, then the rest of society (the out-groups) seems left behind in the distribution of power, of offices and in the participation in the decision-making process (for what concerns distributive justice), and in the fair adjudication of

275. See note 143.

276. See notes 234, 235, 236, 266, 267, 268.

277. Cfr. Mark Tushnet, *Varieties of Populis*m, 20 German L.J. 382, 383 (2019), that links the "very foundations of democratic constitutionalism" to a sort of populism; Massimo Donini, *Populismo penale e ruolo del giurista*, Sistema penale 14 (2020), available at https://www.sistemapenale.it/pdf_contenuti/1599384043_donini-2020b-populismo-penale-ruolo-del-giurista.pdf (last visited April 10, 2023), that sees the conflict between populism and constitutionalism as a mostly apparent one; Gaetano Insolera, *Il buio oltre la siepe. La difesa delle garanzie nell'epoca dei populismi*, 1 La Giustizia penale 59 (2019), who highlights the 'close relationship' between populism and democracy.

judicial cases (for what pertains to rectificatory justice). In Aristotelian terms, they are not part of the constitution[278].

As a consequence, there seems to be a gap between *popular* sovereignty and *democratic* sovereignty in the modern sense[279]. A democratic regime does not entail a mere majoritarian dictatorship but requires the involvement of minorities and oppositions in every constitutional process (e.g., legislative procedures, elections, referenda, etc.). At the same time, a democratic criminal justice system does not aim to the annihilation of the defendant, nor to the satisfaction of the victim, but to ascertain personal responsibilities during a fair procedure and, after that, it seeks the amendment of the guilty. It is precisely when the people invoke a sovereign dominion over those very freedoms and rights at the basis of liberal democracy that populism starts to threaten the democratic order[280]. Therefore, the mentioned gap between popular and democratic sovereignty has to be filled, and this is the role of the rule of law[281].

Aristotle highlights this point as the distinctive hallmark between the correct polity and its deviant version of democracy. The law represents the moment of the composition of the different social interests. Therefore, the first remedy to populism seems constitutional in nature and consists in exploiting the "counter-majority institutions of liberal democracy"[282]. Multiple mechanisms help to shield constitutional order and criminal justice from majoritarian subversion. For

278. See text to notes 178 and 179.

279. Massimo Donini, *Populismo e ragione pubblica. Il post-illuminismo penale tra lex e ius* at 54 (Mucchi Editore 2019) (emphasis added); see also Donini, *Populismo penale e ruolo del giurista* at 3 (cited in note 277).

280. See Valentina Pazé, *Il populismo come antitesi della democrazia*, 7 Teoria politica. Annali 113 (2017); see also Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism and (liberal) democracy: a framework for analysis*, in Cas Mudde and Cristóbal Rovira Kaltwasser (eds.), *Populism in Europe and the Americas: Threat or Corrective for Democracy* at 16-26 (Cambridge University Press 2012).

281. Cfr. *id.* at 112-113; see also Donini, *Populismo penale e ruolo del giurista* at 16 ff. (cited in note 277); Renzo Orlandi and Bruna Capparelli, *Il contrasto alla corruzione come strumento di lotta politica*, 3 Revista Brasileira de direito processual penal 1125 (2020).

282. Enrico Amati, *L'enigma penale. L'affermazione politica dei populismi nelle democrazie liberali* at 291 (Giappichelli 2020).

this account, it might be useful to use the example of the Italian legal system.

Concerning the constitutional order, it is worth considering, as suggested by some scholars, the strict observance of doctrines of unconstitutional amendments to the fundamental charter followed by the Italian Constitutional Court[283]. Multiple rules of Italian constitutional law set up eternity clauses that etch the borders of legitimate constitutional amendments. In the first instance, Article 139 of the Italian Constitution prohibits the modification of the Republican form of government, thus preventing any constitutional change that would run counter the radical choice made by the general referendum of June 2nd, 1946, which opted in favor of the Republic and rejected monarchy; the XII transitional and final disposition forbids the reorganization, under any form whatsoever, of the dissolved Fascist party, establishing an exception to the right to join or form a party to avoid that, after the fall of the fascist regime, it could be reinstated by reconstituting the organization that was at its head[284]; the Implicit Limitation Doctrine underpinned by the Italian Constitutional Court recognizes as illegitimate the amendment of those very principles that, although not directly listed among those not subject to the procedure of constitutional modification, nonetheless lie at the heart of the Italian democratic Constitution.[285] These principles are to be found on a case-by-case assessment, as they are not explicitly stated: however among those expressly recognized thus far the Court has included popular sovereignty (art. 1 Cost.), the equality of citizens before the law (art. 3 Cost.), the unity and indivisibility of the Republic (art. 5 Cost.), the secularism of the State (artt. 7, 19 Cost.), the unity of the constitutional jurisdiction, the right to judicial protection in any state and degree of judgment (artt. 24 -113 Cost.), the autonomy and independence of the judiciary (art. 101 Cost.), and the inviolable rights of

283. See Pietro Faraguna, *Populism and Constitutional Amendments*, in Delledonne, Martinico, Monti and Pacini (eds.) *Italian Populism and Constitutional Law* at 106-108 (cited in note 236).

284. See Costantino Mortati, *Problemi di diritto pubblico nell'attuale esperienza costituzionale repubblicana* at 71-81 (Giuffrè 1972).

285. See Michele Di Bari, *Unconstitutional Constitutional Amendments. Comparative considerations on the recent case law*, 1 Diritto pubblico comparato ed europeo 3, 3-4 (2022).

the individual, especially those enumerated in part I of the Constitution (artt. 2 and 13 Cost. ff).[286] Accordingly, a limit imposed by logic seems to be found even in that very rule that disciplines the procedure of constitutional amendment itself (Article 138): as a matter of fact, it would be easy to eschew the burdensome constitutional amendment procedure if the quorum and the other limits could be manipulated (conceivably downwards) through constitutional reform as well.[287] Therefore, it cannot be denied that the Court is competent to judge on the conformity of constitutional revision laws and other constitutional laws also with regard to the supreme principles of the constitutional order. If this were not the case, it would lead to the absurdity of considering the system of jurisdictional guarantees of the Constitution as defective or ineffective precisely in relation to its most valuable norms[288]. In sum, the Constitution appears capable of defending itself - through the aforesaid mechanisms, prescribed by law or through the interpretation of the judge of the laws - from forms of interpolation aimed at suppressing those very democratic freedoms that the constituents wanted to subtract even to the majority principle.

Another device employable to counter majoritarian supremacy may be found in the existence of procedural mechanisms aimed at the deceleration of processes of constitutional reform[289]. In this regard,

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286. See Franco Gallo, *La revisione costituzionale ed i suoi limiti*, 2 Ricerche giuridiche 463, 468-469 (2013), available at https://edizionicafoscari.unive.it/media/pdf/article/ricerche-giuridiche/2013/2/art-10.14277-2281-6100-Ri-2-2-13-2.pdf (last visited April 10, 2023).

287. See, e.g., Augusto Barbera and Carlo Fusaro, *Corso di diritto costituzionale* at 121 (Il Mulino 2012). According to the mentioned article, "laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such a request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members."

288. See Di Bari, *Unconstitutional Constitutional Amendments*, at 3-4 (cited in note 285).

289. See Faraguna, *Populism and Constitutional Amendments* at 106-108 (cited in note 283).

it is worth noticing that the freedom of the parliamentary mandate given to representatives in Italy operates in a twofold way: towards the electors and the party as well. Article 67 of the Constitution[290] allows the representation of the Nation *per se* and, at the same time, pursues the correct functioning of the assembly[291]. It can be inferred that, under the current Constitution, the recourse to punitive instruments like forfeitures (adopted, for example, in Article 160 of the Constitution of Portugal of 1976) or pecuniary sanctions prescribed by internal rules of parties or parliamentary groups for the representative who adheres to a different party after the election should be banned[292]. Even private agreements signed by members of the ruling parties might be considered an indirect restraint on public bodies[293]. The result, in terms of judicial protection, is clear: an amendment of the free mandate rule of article 67 would infringe one of the essential parameters of the republican form of State (liberty of the member of parliament to express opinions and to cast votes in the performance of his function (art. 68 Cost.), therefore resulting in an unconstitutional reform[294]. This constitutional protection prevents members of parliament from being "captured" by their party, safeguards their freedom of conscience, opinion, and vote, and may prevent the parliament from transforming itself into the mere sounding board of the majority.

Another point of friction between constitutional law and populism is the role of bicameralism[295]. Bicameralism is a wise doctrine.

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290. On this particular disposition, see generally Fabiana Maresca, *Libertà di mandato e disciplina dei gruppi parlamentari*, in Umberto Ronga and Claudio Cantone (eds.), *La partecipazione democratica in Italia. Modello, prassi, prospettive* at 75 ff. (Editoriale Scientifica 2021).

291. See Luigi Principato, *Popolo, Nazione e libero mandato: la sovranità popolare come limite, non già come potere*, 1 Questione Giustizia 189, 197 (2019).

292. See *ibid.*

293. See *ibid.*; cfr. on this point Michele Carducci, *Le dimensioni di interferenza del "contratto" di governo e l'art. 67 Cost.*, in 13 Federalismi.it (June 13, 2018), available at https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=36452&dpath=document&dfile=13062018124205.pdf&content=Le%2Bdimensioni%2Bdi%2Binterferenza%2Bdel%2B%27contratto%27%2Bdi%2Bgoverno%2Be%2Bl%27art%2E%2B67%2BCost%2E%2B%2D%2Bstato%2B%2D%2Bdottrina%2B%2D%2B (last visited April 10, 2023).

294. See *ibid.*

295. See Faraguna, *Populism and Constitutional Amendments* at 106-108(cited in note 283).

Attempts to create a "second chamber reform has been on the political agenda for centuries" in many countries[296]. The historical goal is to modify the "elitarian" second chamber, as the high chamber is traditionally conceived (see for instance the House of Lords in the UK), in favor of one centered on the representation of territories.[297] The case of Italy seems not different: from a Senate made up of members appointed for life by the King under the first constitution (the *Albertine Statute* of 1848)[298], the Senate came to apply the principle of perfect bicameralism under the Constitution of 1948, founded on two elective chambers, equally representative and endowed with the same powers[299]. However perfect bicameralism has been a matter of contention in modern times: the failed attempt to amend the Italian Senate's composition in 2016, demonstrates it[300]. The project, aimed at reforming the high chamber from a directly elected to an indirectly elected one, whose members would have been representatives of regions, with limited veto powers, has been largely impaired by populist agendas[301]. As noted in doctrine, populist forces at the time may have

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296. Meg Russell, *Foreword: Bicameralism in an age of populism*, in Richard Albert, Antonia Baraggia and Cristina Fasone (eds.), *Constitutional Reform of National Legislatures. Bicameralism under Pressure* at ix-x (Cheltenham, 2019).

297. Maria Romaniello, *Bicameralism. Multiple theoretical roots in diverging practices*, in Albert, Baraggia and Fasone (eds.), *Constitutional Reform of National Legislatures* at 16 ff. (cited in note 296)

298. See, e.g., *La storia del Senato* (senato.it), available at https://www.senato.it/istituzione/il-senato-nel-sistema-bicamerale/la-storia-del-senato (last visited April 10, 2023). The King could choose senators, without number limit, from 21 categories listed by the Statute, including, i.e.,, the Archbishops and Bishops of the State, deputies after three legislatures or six years of exercise, the Ministers of State, the Ambassadors, the First Presidents and the Presidents of the Magistrate of Cassation and of the Chamber of Accounts, the Advocate General to the Magistrate of Cassation, the Officers and the General Intendants, the Counsellors of State, the members of the Royal Academy of Sciences, or those who, due to their wealth, paid a certain amount of annual taxes, as well as those who had illustrated the country''with eminent services and merits'. It is worth mentioning, however, that the Government always sought to ensure the support of the Senate as well as the lower Chamber, resorting to the appointment of a large number of senators in favour of it (the so-called "infornate").

299. See *ibid.*

300. See Russell, *Foreword: Bicameralism in an age of populism* at xvi-xvii (cited in note 296).

301. See Carlo Fusaro, *Constitutional Change and Upper Houses: The Italian Case* (The Constitution Unit Blog, August 10, 2018), available at https://constitution-unit.

shifted the attention of the audience to other problems, such as immigration and unemployment, thus making the referendum appear as a sort of "meddling" of the Constitution undertaken by the leading political party[302]. The decision was therefore transformed into an evaluation of the then Prime Minister and his Cabinet (in this sense, fostered by the Prime Minister himself, who declared to deem the referendum as a confidence vote), with negative results for them[303]. It is evident then that "(w)hen brought to public attention, second chambers, as bodies that serve to constrain elected politicians, may appear surprisingly suited to the current anti-political mood"[304].

The supranational legal boundaries might also be put to good use[305]. The reference here is to the so-called multilevel protection of rights. European states enjoy a fundamental rights protection system built upon at least three frameworks of rights and courts: at the national level, at the EU level, and at the conventional level[306]. In this multi-pronged approach, every framework possesses a specific charter of fundamental rights (respectively the Constitution, the Charter of Fundamental Rights of the EU - CFREU, and the ECHR) and a supreme court tasked with the interpretation and application of those rights (Constitutional Courts and/or ordinary judges, the CJEU and the ECtHR)[307]. Italy partakes in this multilevel system. Therefore, fundamental rights must adhere not only to the euro-unitary layout but also to the characterization received from the ECHR, from international standards, and under the domestic law (this is the paramount principle of equivalence, provided for by art. 53 CFREU)[308]. This con-

com/2018/08/10/constitutional-change-and-upper-houses-the-italian-case/ (last visited April 10, 2023).

302. See *ibid.*

303. See *ibid.*

304. Russell, *Foreword: Bicameralism in an age of populism* at xvi-xvii (cited in note 296).

305. See Faraguna, *Populism and Constitutional Amendments* at 106-108 (cited in note 283).

306. See, e.g., Aida Torres Pérez, *Multilevel Protection of Rights in Europe Get access Arrow*, in Conflicts of Rights in the European Union: A Theory of Supranational Adjudication at 27-38 (Oxford University Press 2009).

307. See *ibid.*

308. See, e.g., Marcello Daniele, *La triangolazione delle garanzie processuali fra diritto dell'Unione Europea, CEDU e sistemi nazionali*, Diritto penale contemporaneo

ceivably would hamper the attempt to modify the legislation in a way incompatible with human rights, thanks to the multiple supranational norms and to the various options of judicial review provided.

Given the above, it is safe to assume the presence of analogous constraints in the criminal domain, such as substantive constitutional principles of criminal law, such as the principles of proportionality, legality, non-retroactivity, offensiveness, guilt, individualization, and progressiveness of the sanctioning treatment, and the prohibition of analogy[309].

Concerning criminal legislation, it is paramount to appeal to the judiciary to scrutinize the legitimacy of the repressive apparatus, asking the interpreter to rectify the most flagrant normative manipulations, by means of a constitutionally and conventionally oriented interpretation, or by activating the control of the legitimacy of the superior (national and/or European) courts[310]. This irreplaceable work must be accompanied "with an operation of a cultural type, capable of claiming the maturity of our democracy with respect to populist pressures, bringing the idea of a relationship between the state and an instrumental society back to the center of public discourse to the authentic care of the interests of the latter; a relationship free from authoritarian contamination that reflects outdated ideologies and in any case not compatible with the contemporary constitutional order"[311]. This holds true especially in those cases where a specific minority seems the real target of a criminal sanction. This result is strikingly evident in areas where, in fact, there are already several interventions of the

- Rivista trimestrale at 50-51 (n. 4, 2016), available at https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/daniele_4_16.pdf (last visited April 10, 2023).

309. See Daniela Falcinelli, *Dal diritto penale "emozionale" al diritto penale "etico"*, in Stefano Anastasia, Manuel Anselmi and Daniela Falcinelli (eds.), *Populismo penale: una prospettiva italiana* at 97-98 (Wolters-Kluwer 2020).

310. See Stefano Zirulia, *Il diritto penale nel "Decreto Lamorgese": nuove disposizioni, vecchie politiche criminali*, Diritto penale e processo 579 (2021); see also Insolera, *Il buio oltre la siepe. La difesa delle garanzie nell'epoca dei populismi* at 62 (cited in note 277); Amati, *Insorgenze populiste e produzione del penale* at 47-50 (cited in note 258).

311. *Id.*; see also Insolera, *Il buio oltre la siepe. La difesa delle garanzie nell'epoca dei populismi* at 61 (cited in note 277), who stresses the importance of judicial alphabetisation of people for what concerns civil rights and democratic institutions; Massimo Nobili, *Principio di legalità e processo penale (in ricordo di Franco Bricola)*, Rivista italiana di diritto e procedura penale 660 (1995).

Constitutional Court aimed at protecting the weakest individuals: the reference here is to inmates and immigrants[312]. In both cases, populist legislation may arise from a widespread perception of danger and hatred, to respond to the emergency of the moment, often in defiance of constitutional rights[313].

The penitentiary legislation is a particular testing ground for the maintenance of the rule of law, since the function and scope of criminal punishment seem the ones in which the populist justice is most openly manifested, intermingling the executive phase of the condemnation with an antithetic plan of revenge[314]. The idea underpinning such a populist path to reform maintains that serving the sentence - especially for serious crimes - does not suffice, since the defense of the community from crime weighs more than the protection of the constitutional rights of those who have severely breached the criminal law.[315] Therefore, it is commonplace among populist legislators to craft, particularly harsh punishments and to tighten the grip on prison benefits to fulfill this task[316].

This belief has been stigmatized by the Italian Constitutional Court and the Strasbourg Court (the European Court of Human Rights) on

312. See Gaetano Silvestri, *Corte costituzionale, sovranità popolare e "tirannia della maggioranza"*, 1 Questione Giustizia 22, 25 (2019).

313. See *ibid*.

314. See Amodio, *A furor di popolo. La giustizia vendicativa gialloverde* at 109 (cited in note 258).

315. See Silvestri, *Corte costituzionale, sovranità popolare e "tirannia della maggioranza"* at 25-26 (cited in note 312).

316. A striking example of this trend, in the Italian recent legislation, is the so-called "Corrupt-Sweeper" Law (9 January 2019, n. 3), which extended, by means of its art. 1, paragraph 6, modified the 4-*bis*, paragraph 1, of the law of 26 July 1975, n. 354, including among the crimes 'impeding' the suspension of the execution pursuant to art. 656, paragraph 5, of the Code of Criminal Procedure, certain crimes against the public administration, and in particular those envisaged "in Articles 314, first paragraph, 317, 318, 319, 319-*bis*, 319-*ter*, 319-*quater*, first paragraph, 320, 321, 322, 322-*bis* (...)". For these and other comments on that piece of legislation, Vittorio Manes, *L'estensione dell'art. 4-bis ord. penit. ai reati contro la p.a.: profili di illegittimità costituzionale*, Diritto penale contemporaneo 105 ff. (n. 2, 2019), available at https://www.penalecontemporaneo.it/upload/7442-manes2019a.pdf (last visited April 10, 2023).

In any case, it should be mentioned that the recent Decree-Law n. 162/2022 has now expunged the crimes against the Public Administration from the catalogue of those 'impedimental' offences.

multiple occasions[317]. The Italian judge of the laws relied on the principle of the re-educational function of the criminal punishment (art. 27, third paragraph, Cost.), while the second resorted on the prohibition of torture (art. 3 ECHR)[318]. In fact, those very principles are impaired by those prison conditions and treatments offensive to the dignity of the human person and therefore possible causes of increased hostility of the prisoner towards society and the laws that govern it[319]. It is worth mentioning, on the issue of the prohibition of inhuman and degrading treatment, the decision of the Strasbourg Court in *Torregiani* (2013), which declared prison overcrowding as incompatible with the above-mentioned conventional rights, and ruling n. 279 of 2013 of the Constitutional Court, which declared the unconstitutionality of limitations placed upon public utility work[320].

Regarding the immigration framework, another perceived "elite" is the massive crowd of asylum seekers and economic migrants in search of better living conditions throughout Europe and Italy[321]. According to the populist narrative, the immigrant, no matter if regular or not, poses a threat to order and safety[322]. As a consequence, the mere provision to foreigners of social protection measures prescribed by the Italian law for citizens is labeled as an "injustice" *per se*[323]- hence the request to exclude non-Italians from social benefits or, at least, the provision of more stringent requirements[324].

Another common feature of populist criminal law seems directed towards anti-immigrant policies[325]. The phenomenon of discrimination may be direct or indirect, with the first including express limitations or prohibitions, while the second advocates the request of

317. See Silvestri, *Corte costituzionale, sovranità popolare e "tirannia della maggioranza"* at 26 ff. (cited in note 312).

318. See *ibid.*

319. See *ibid.*

320. See *ibid.*

321. See *ibid.*

322. See *ibid.*

323. See *ibid.*

324. See *ibid.*

325. See Adelmo Manna, *Il fumo della pipa (il c.d. populismo politico e la reazione dell'Accademia e dell'Avvocatura)*, 2 Archivio penale 1 ff. (2018).

impossible or very harsh pre-conditions[326]. However, from the point of view of constitutional legitimacy, the result is the same, that is, the unconstitutionality of the scrutinized norm[327].

There are multiple examples of this feature. In the criminal law field, probably the most striking and explicative case is the declaration of constitutional illegitimacy of the so-called "aggravating circumstance of illegal immigration" (*clandestinità*) provided for in article 61 of the Italian criminal code (Const. Court no. 249/2010), found in flagrant violation of the principle of equality and offensiveness, since it "automatically and in advance (formulated) a judgment of dangerousness of the person responsible, which must be the result of a particular assessment, to be carried out on a case-by-case basis, with regard to the concrete objective circumstances and personal subjective characteristics"[328].

On the procedural level, in turn, the criminal trial must adhere to its adversarial system, to the presumption of innocence, to the right to defense, to the right to a lawful proceeding[329]. In this field, constitutional jurisprudence has developed - in line with the cultural and legal orientation mentioned earlier - the great theme of the rights of prisoners, assisting their claims with judicial protection[330]. For instance, in judgment n. 341 of 2006 on the rights of prison workers, and in judgment n. 135 of 2013 on the effectiveness of the decisions of the

326. See Silvestri, *Corte costituzionale, sovranità popolare e "tirannia della maggioranza"* at 27 (cited in note 312).

327. See *ibid.*

328. Corte costituzionale, July 8, 2010 no. 249.

329. For an overview of these pivotal safeguards in the Italian criminal procedure, see generally Renzo Orlandi, *The Italian Path to Reform: Italy's Adversarial Model of Criminal Procedure*, 5 Italian Law Review 565, 565 ff. (2019), available at https://theitalianlawjournal.it/data/uploads/5-italj-2-2019/565-orlandi.pdf (last visited April 10, 2023); Luca Lupária and Mitja Gialuz, *Italian Criminal Procedure: Thirty Years after the Great Reform*, 1 Roma Tre Law Review 26, 33 ff. (2019), available at https://theitalianlawjournal.it/data/uploads/5-italj-2-2019/565-orlandi.pdf (last visited April 10, 2023); Luca Lupária and Mitja Gialuz, *Italian criminal procedure: thirty years after the great reform* available at https://romatrepress.uniroma3.it/wp-content/uploads/2020/01/Italian-criminal-procedure-thirty-years-after-the-great-reform.pdf (last visited April 10, 2023).

330. See Silvestri, *Corte costituzionale, sovranità popolare e "tirannia della maggioranza"* at 26-27 (cited in note 312).

supervisory judge on the appeals of prisoners,[331] the Court stressed the need to strike a just balance between the needs of social defense and the protection of fundamental rights but excluded that, in doing so, the latter could be undermined in their hard-cores.[332] This interpretation stifles those balancing operations aimed at attributing excessive weight to the former: in those cases, the apparent "proportionality" seems driven more by short-lived exigencies than by the values underlying modern constitutionalism."[333] On top of that, the *Torregiani* ruling of the ECtHR operated as a landmark judgment even on the procedural level, since the Italian lawmaker, urged by the Strasbourg decision to enhance the prisoners' rights' protection, amended the penitentiary law introducing article 35-*bis* O.P. (*Ordinamento penitenziario*), which provides now a jurisdictional complaint with which detained and interned persons can assert the protection of their rights before a judge.

Above all, the separation of powers must be preserved[334], "so as to avoid undue encroachment between the different spheres of public activity"[335]. In fact, since the attack on the traditional checks and balances system has been the primary objective of modern populism, the tutelage of constitutional democracy should build up an "anti-concentration principle" in order to make it harder to destroy or diminish the separation of powers.[336] This might include institutional arrangements such as, for example, electoral laws which favor the fragmentation of power among different parties;[337] an independence-oriented organization of the judiciary branch;[338] the adoption of "horizontal accountability institutions" to oversee in a politically independent fashion those interests which are pivotal for the functioning of a

331. See *ibid.*

332. See *ibid.*

333. *Ibid.*

334. See generally Donini, *Populismo penale e ruolo del giurista* at 13 (cited in note 277), who notices that the division of powers (executive, legislative, judiciary) seems now endangered.

335. Nicola Selvaggi, *Populism and Criminal Justice in Italy* at 307 (cited in note 236).

336. Stephen Gardbaum, *The Counter-Playbook: Resisting the Populist Assault on Separation of Powers*, 59 Columbia Journal of Transnational Law 1, 6 (2020).

337. See *id.* at 34-46.

338. See *id.* at 46-51.

constitutional democracy but are also keen on exploitation by populist forces (such as monetary policies, public officials' responsibilities, corruption cases, electoral procedures);[339] the implementation of pluralism and independence-driven media laws[340].

However, even with these countermeasures in place, it should not be surprising that populism still is present in today's countries. As I tried to highlight above, populism seems like the second face of the same coin of a democratic regime. Therefore, in a certain sense, it is entirely physiological that in a democracy the will of the people can be exploited in order to circumvent or divert those rules by which it is filtered. This is precisely the risk that Aristotle foreshadowed.[341] In this vein, the countermeasures indicated here can only identify an external barrier to demagogic subversion. A true overcoming of this phenomenon can only take place in the face of a long work on the ethical and cultural level which[342], allowing the citizen to truly introject democratic values, can allow everyone, on an individual and collective level, to aim for the common benefit - that is, to achieve our supreme good.

7. *Conclusions*

This article aimed at evaluating the frame of general, distributive, and corrective justice within the democratic constitution. The pattern of universal justice evidences the tendency to reach a broken arrangement since this sort of justice is at least biased under a democratic regime (in the Aristotelian sense). Concerning the two particular kinds of justice, the same trend is highlighted in the distributive type by the importance given to the purpose of the constitution, in accordance with which the partition of goods takes place. Consequently, these wrongful backgrounds spoil even the delivery of corrective justice. The application of this arrangement in modern democracies leads to interesting results when confronted with the multi-faceted

339. *Id.* at 51-53.
340. See *id.* at 53-56.
341. See par. 4.
342. See note 311.

phenomenon of populism. Whereas the purported will of the majority endangers the democratic processes - or, in the criminal field, the fair trial and the constitutional facets of the sanctioning system - it is the respect of the rule of law in all of its manifestations (ordinary, constitutional, supranational law) that ensures the preservation of fundamental rights, rights of minorities and, in general, those constitutional rights which allow the involvement of the individual in the polity. In this framework, the most immediate and effective protection seems to be the judicial review and the interpretation of the law, since it calls into question the conformity of the norm (the product of the majority) with those constitutional values which cannot be overcome.

This is non-exhaustive, but the article should have provided an account of how the Aristotelian assessment of democracy still remains today. The rule of the majority should not violate the rule of law, which in a democratic order is set forth to safeguard the public processes (constitutional or criminal) from partisan abuses. Whereas this happens, the constitutional regime realizes an unjust allocation of power, and the criminal justice surrenders to vindictive aspirations, therefore, as a result, the pluralistic liberal-democratic regime decays into the broken form of government envisaged by Aristotle.

Content Moderation: How the EU and the U.S. Approach Striking a Balance between Protecting Free Speech and Protecting Public Interest

Rrita Rexhepi*

Abstract: The topic of content moderation is becoming increasingly relevant, as we are in an era of acute politicization and social media are now used to achieve political goals . This means that regulation is necessary to preserve democratic standards and simultaneously encourage a healthy online environment. This article aims at analyzing and comparing how content sharing is regulated respectively in the EU and U.S. and at identifying the benefits and shortcomings of both methods. It does so by using information from government agencies, social media companies, and specific cases which reflect the policies in both regions. It is evident that while both the U.S. and the EU have taken steps to regulate online content, there are significant differences. The EU chooses a more centralized approach and values the protection of users and public interest, whilst the U.S. adopts a more decentralized approach and tends to opt for the protection of free speech. Lack of transparency, over-removal, under-removal, and vague social media standards are the difficulties that both the EU and the U.S. face in regulating online content. This article recommends potential answers to these problems, including regulating platform transparency, increasing accountability, and establishing oversight bodies. Moreover, platforms are encouraged to invest in their content moderation policies by using higher-level means of finding and removing harmful content.

Keywords: content moderation; internet governance; censorship; Section 230; Digital Services Act.

1. *Introduction*

The tension between the fundamental right of free speech and the responsibility to protect public interest has become increasingly relevant in the field of digital communication, prompting both the EU and the U.S. to grapple with finding a balance between the two principles in their respective frameworks. The need for content moderation has become significant due to the rapid growth of the internet and the increasing amount of information shared online. Content moderation refers to the process of reviewing and regulating user-generated content on social media platforms followed by the removal of posts that are viewed as harmful or go against Community Standards[1]. This may include graphic, sexual, or violent content, as well as disinformation released or circulated by political figures. Considering the sheer volume of content generated by billions of users daily, and the ease with which it can be disseminated, the need for effective moderation has become essential to ensure a safe and trustworthy online environment. In recent years, tech companies have begun to take the issue more seriously. For instance, Facebook has launched an oversight board, dubbed often as Facebook's "supreme court", which is entrusted with reviewing specific content decisions made by moderators[2].

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1. See Jennifer Grygiel and Nina Brown, *Are social media companies motivated to be good corporate citizens? Examination of the connection between corporate social responsibility and social media safety*, 43(5) Telecommunications Policy, 445–460 (2019).

2. *Independent judgment. transparency. legitimacy. Oversight Board*, available at https://www.oversightboard.com/.

Issues relating to content moderation have proven to be problematic for the European Union, which recognizes freedom of expression as a right protected by the Charter of Fundamental Rights (hereinafter: CFREU) under Article 11[3], while also claiming a responsibility to protect the public interest against hate speech[4], and disinformation[5]. The EU has not adopted any strict limit to the use of the term "public interest" but has established it as a potential ground for the restriction of one of the fundamental freedoms guaranteed by EU law[6]. In *Omega* (C-36/02), the ECJ held that public interest can be used by Member States to justify restrictions to the free movement of goods under the public policy exception provided in Article 36 of the Treaty on the Functioning of the European Union (TFEU)[7], which reads that the provisions of the previous Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security. Although the European Union does not employ a precise definition of public interest, it may be frequently found in its legislative acts. For instance, the General Data Protection Regulation (GDPR), which aims to protect users from the unlawful processing of data, affirms that controllers may process data if it is necessary for the performance

3. Art. 11, Charter of Fundamental Rights of the European Union, 7 June 2016, C 202/405, available at https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

4. Council of the European Union, *Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law*, November 28th, 2018, 913/JHA, available at https://eur-lex.europa.eu/eli/dec_framw/2008/913/oj.

5. See European commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling Online Disinformation: A European Approach*, COM/2018/236 (April 26, 2018), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236. See also European Commission, *European Democracy Action Plan* (2020), available at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan_en.

6. Alexander J. Belohlavek, *Public Policy and Public Interest in International Law and EU Law,* 3 Czech Yearbook of International Law: Public Policy and Ordre Public, 117-147 (2012).

7. C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH contro Oberbürgermeisterin der Bundesstadt Bonn*, ECR 2004 I-09609

of a task carried out in the public interest[8]. This exemption is, however, subject to safeguards to ensure that processing is indeed necessary and proportionate to the public interest it relates to. After the COVID-19 outbreak, the European Data Protection Board adopted a set of guidelines that permitted controllers to process health data for scientific research based on public interest, stating that the EDPB considers that the fight against COVID-19 has been recognized by the EU and most of its Member States as an important public interest, which may require urgent action in the field of scientific research[9]. By using the terms "important public interest" and "urgent action", the EDPB highlights the use of assessing necessity and proportionality to balance personal interest and public interest.

While legislators found it less difficult to reach a consensus on relaxing certain protections (such as those on data processing) for public health, regulating free speech presents a more challenging task. This, inasmuch as what may be considered harmful speech to some, may be viewed as protected speech by others. The subjective nature of deciding where the limits of free speech lie have also proven to be a difficulty for content moderators. This is subsequently compounded by the fact that online platforms have global reach and must navigate the differences in cultural, legal, and political norms present in several countries.

An additional problem for the EU is regulating tech companies often based outside the region. These companies are subject to their home country's laws, which may not align with EU regulations and standards. The EU has recognized the need to effectively regulate these companies to ensure that they are taking the necessary measures to protect the public interest and promote responsible content moderation practices, and has attempted to address these challenges through regulations such as the e-Commerce Directive, the Digital Services Act (DSA), and the Audiovisual Media Services Directive (AVMSD), which aim to provide a framework for content moderation while

8. Art. 6, *Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/European Commission, (General Data Protection Regulation)* April 27 2016, no. 679.

9. Art. 63 par. 7, *Guidelines for COVID 19 health data processing*, April 21 2020, no. 3.

balancing the protection of freedom of expression. These acts will be discussed ahead.

Content moderation has also become a relevant issue in the United States, especially post-Covid-19. Government efforts to regulate content moderation have mostly been conducted at the State level, although there have been talks about reforming Section 230 of The Communications Decency Act passed by Congress in 1996, which holds that companies are not liable for the content published on their platforms[10]. Similar to the CFREU, the U.S. Constitution also protects freedom of speech in its First Amendment. This protection is deeply ingrained in American constitutional culture and is seen as a cornerstone of democratic values, which results in any act attempting to reduce the threshold being met with some degree of scrutiny[11]. It is important to note, however, that private corporations are not bound by this and can remove any content, which has led to debates about the role of private companies in regulating speech online[12]. However, most mainstream sites (Facebook, Twitter, YouTube) have developed their own policies regarding content moderation, usually employing fact-checker programs to combat misinformation[13]. The Cambridge Analytica scandal[14], and foreign intervention in elections online, including the alleged use of Russian bots in campaigning and spreading disinformation[15], have further highlighted the need for effective content moderation for platforms.

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10. Communications Decency Act, S.314(1995), available at https://www.congress.gov/bill/104th-congress/senate-bill/314.

11. Robert Allen Sedler, *An essay on freedom of speech: The United States versus the rest of the world*, 2 Mich. St. L. Rev. 377 (2006).

12. The First Amendment only applies to government action and Independence of platforms in regulating the content they allow is guaranteed by Section 230 of The Communications Decency Act.

13. See Facebook, *About Facebook Ads: Ad targeting options* available at https://www.facebook.com/business/help/2593586717571940?id=673052479947730 and Google, *Choose where your ads appear on YouTube* available at https://support.google.com/youtube/answer/9229632?hl=en.

14. Antonio Peruzzi, Fabiana Zollo, Walter Quattrocchi and Antonio Scala, *How news may affect markets' complex structure: The case of Cambridge Analytica*, 20(10) Entropy 765 (2018).

15. Darin E. W. Johnson, *Russian election interference and race-baiting*, 9(2) Columbia Journal of Race and Law 191-213 (2019).

Despite the fact that the U.S. places significant importance on personal freedoms, it has also enacted laws aimed at protecting the public interest, even when such measures have entailed a degree of personal cost. One of the most important (and arguably most controversial) of such legislation is the PATRIOT Act of 2001, which was adopted after the 9/11 attacks to increase counterterrorism efforts and defend public security. Some of the provisions of the PATRIOT Act, such as the authorization of "roving wiretaps"[16], were believed to be infringing upon privacy, but national security concerns were so high that they trumped certain privacy protections[17]. Regarding free speech, in particular, the Supreme Court, in the landmark decision of Brandenburg v. Ohio, held that speech that is directed to inciting or producing imminent lawless action and is likely to incite or produce such action is unlawful and cannot be protected by the First Amendment[18]. In other words, speech that incites or brings about violence does not fall under the First Amendment and is not considered free speech. More recently, in 2021, the COVID-19 Consumer Protection Act was passed and made any disinformation regarding the virus unlawful[19]. It is evident, then, that there are situations in which the U.S. government is willing to restrict freedoms to protect the public and national interest.

2. *The European Union: A Toolbox for Content Moderation*

The EU has been involved in attempting to regulate different aspects of online content, initially through the e-Commerce Directive which was adopted in 2000. The e-Commerce Directive established a legal framework for online service providers and their responsibilities for the content they host but, due to its status as a directive, gave space for Member States to expand on the rules as they pleased,

16. Roving wiretaps are wiretaps that follow specific surveillance targets across private communications, instead of specific devices.

17. John T. Soma, M. M. Nichols, Stephen D. Rynerson, Lance A. Maish, Jon David Rogers, *Balance of Privacy vs. Security: A Historical Perspective of the USA PATRIOT Act*, 31 U.B.C. Law Review, 285 (2005).

18. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

19. *COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act*, Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401.

thereby affecting the internal market[20]. The e-Commerce Directive did not explicitly refer to online platform regulation, although it did stipulate that platforms can be held liable for hosting illegal content under Article 14, provided that the platform had knowledge of the illegal activity and did not act to disable or remove it. Nevertheless, the e-Commerce Directive (ECD) did not establish any monitoring or control obligations for platforms to root out unlawful content. In fact, Article 15(1) of the ECD explicitly provides that Member States shall not impose a general obligation on providers, when providing the services covered (by Articles 12, 13, and 14), to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity[21].

ECJ case law demonstrates that Article 14 of the ECD was indeed used to hold platforms liable for the hosting of illegal content. A prominent example is Glawischnig-Piesczek v Facebook Ireland Ltd, in which the CJEU insisted that Facebook can be ordered to remove illegal/defamatory content posted by users, even if the users reside outside of the EU[22]. The case concerned Austrian politician Eva Glawischnig-Piesczek, who had solicited Facebook to remove a defamatory user comment about her, a request Facebook dismissed. The ECJ first held that Facebook's hosting services fell under Article 14 of the ECD. The court also held that article 15 of the ECD, which asserted no obligation for providers to monitor the content they host, does not preclude national courts from ordering them to take down content if it is unlawful or "equivalent"[23]. The case raised questions about platform liability. when it comes to user-generated content and

20. European Parliament and Council of the European Union, *Directive of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)*, OJ L, 178, 1-16 (2000), available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031 (last visited April 6, 2023).

21. See *ibid*.

22. C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, ECLI:EU:C:2019:821..

23. The court described "equivalent content" as "information conveying a message the content of which remains essentially unchanged and therefore diverges very little from the content which gave rise to the finding of illegality".

the legitimacy of a national order triggering the removal of content globally[24].

In 2010, along with the ECD, the EU also adopted the Audiovisual Media Services Directive. The AVMSD, while regulating broadcasting, television, and radio, also provides rules for video-sharing platforms, such as YouTube, to protect users from harmful content[25]. Specifically, Article 28b requires platforms to protect the public from content whose dissemination is criminal in EU law, such as terrorism, child pornography, or offenses concerning racism or xenophobia[26]. Regulation 2021/784 on online terrorist content requires hosting services to remove any terrorist content within one hour of getting a "removal order" from a designated national authority[27]. This indicates that the platforms are not themselves required to search for terrorist content but must rapidly remove any such material when detected by competent authorities.

However, the most comprehensive act adopted by the EU regarding content moderation is the 2022 Digital Services Act, a regulation that modernized the rules governing online platforms under the e-Commerce Directive[28]. The DSA, which will be applied to all regulated entities later in 2024[29], intends to regulate the sharing of "illegal

24. Luc von Danwitz Danwitz, *The Contribution of EU Law to the Regulation of Online Speech*, 27 Michigan Technology Law Review, 167 (2020), available at https://www.congress.gov/bill/116th-congress/house-bill/133/text#toc-H6A24A7F9B-1B04FF2AEF09C41F028FC12 (last visited April 04, 2023).

25. European Parliament and Council of the European Union, *Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)*, OJ L 95/1 (March 10, 2010).

26. European Commission, *Communication from the Commission Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive*, C/2020/4322 OJ C 223/3 (July 7, 2020).

27. European Parliament and Council of the European Union, *Regulation on addressing the dissemination of terrorist content online*, Regulation (EU) 2021/784 OJ L 172/79 (April 29, 2021).

28. European Parliament and Council of the European Union, *Regulation on a Single Market For Digital Services and amending Directive 2000/31/EC,* Regulation (EU) 2022/2065 L 277/1 (October 27, 2022).

29. Due to its status as a regulation, the DSA is self-executing and directly applicable to all EU member states. It was entered into force in November 2022 but its

content, online disinformation or other societal risks"[30]. Under the DSA, platforms will be required to implement stronger measures to prevent the dissemination of illegal content, such as hate speech, terrorist propaganda, and child abuse material, which were previously dealt with by specific instruments[31]. As per the DSA, online platforms will not be held liable for the content hosted if the platform does not have actual knowledge of the illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content[32].

While the DSA has yet to fully apply, the aforementioned Article 6 of the DSA is identical to Article 14 of the previous e-Commerce Directive. Attempting to create a healthier and safer online environment for users, the DSA is a significant development in the regulation of the digital economy and while the impact it will have on online platforms, which operate within the EU, is yet to be seen, it is sure to be notable. To begin with, the DSA provides that intermediary services will not lose their liability exemption if they carry out voluntary initiatives aimed at investigating, detecting, or removing unlawful content in good faith and a diligent manner[33]. This is a guarantee to the platforms that, for as long as they comply with said standards and have their own practices for detecting unlawful content, they will not be subject to legal action or fines, as well as an incentive for them to demonstrate they are acting with due diligence and good faith to address these issues and maintain their liability exemption.

Under the DSA, platforms operating in the EU have to designate a point of contact for direct communication with authorities in the

full application will start in February 2024 (European Commission, Digital Services Act Package).

30. European Parliament and Council of the European Union, *Regulation on a Single Market For Digital Services* (cited in note 28).

31. See Caroline Cauffman and Catalina Goanta, *A new order: The Digital Services Act and consumer protection*, 12(4) European Journal of Risk Regulation, 758-774 (2021).

32. European Parliament and Council of the European Union, *Regulation on a Single Market For Digital Services* (cited in note 28).

33. Art. 7, *Regulation on a Single Market For Digital Services* (cited in note 28).

Member States to increase cooperation and transparency[34]. Discussing increasing transparency, Article 14 of the DSA provides that intermediary services must make their content moderation policies and procedures in their terms and conditions of use. This article is followed by Article 15, which obliges providers to release annual public reports on any content moderation they engaged in, including the number of national orders and complaints received, the number of notices submitted and processed, any content moderation conducted at their own initiative and any use of automated means of moderation. In addition, very large online platforms[35] must include the human resources dedicated to content moderation and the qualifications of the persons involved and indicators of the accuracy of automated means of moderation[36]. The DSA also aims to harmonize notice and action procedures, which the previous ECD did not do[37], by obliging hosting providers to put in place user-friendly mechanisms to allow "any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content."[38]. The providers must respond to these reports without delay and provide the reporting user with a statement explaining the grounds for their decision[39]. This is intended to create a more streamlined and transparent process for addressing unlawful content. The DSA also requires certain platforms to establish out-of-court dispute settlement bodies, which would help resolve disputes arising out of content moderation practices and enforce the terms and conditions[40]. Similarly, even though the ECD encouraged creating out-of-court mechanisms to solve disputes, it did not explicitly require platforms to establish such bodies, unlike the DSA. On that account, the DSA

34. Art. 11, *Regulation on a Single Market For Digital Services* (cited in note 28)..

35. Under Article 33, "very large online platform" applies to any platform that has a number of average monthly active recipients of the service in the Union equal to or higher than 45 million.

36. Art. 42, *Regulation on a Single Market For Digital Services* (cited in note 28)..

37. See Sebastian Felix Schwemer, *Digital Services Act: A reform of the e-Commerce Directive and much more*, prepared for A Savin, Research Handbook on EU Internet Law (2022), available at https://ssrn.com/abstract=4213014 or http://dx.doi.org/10.2139/ssrn.4213014 (last revised October 13, 2022).

38. Art. 16, *Regulation on a Single Market For Digital Services* (cited in note 28)..

39. *Id.* art. 17.

40. *Id.* art. 2 §1.

establishes formal requirements for content moderation, notice and action procedures, dispute settlements, and complaint procedures, as well as aims to enhance platform transparency when it comes to the restrictive measures employed.

The DSA recognizes the need to take into consideration fundamental freedoms stating in its preamble that the restrictions should not be arbitrary or discriminatory and that providers of very large online platforms should "pay due regard to freedom of expression and of information, including media freedom and pluralism.". It emphasizes that very large online platforms should be proportionate in their measures and avoid unnecessary restrictions on the use of their service, considering the potential negative effects on those fundamental rights. While the DSA does not specifically refer to balancing free speech with the public interest, its emphasis on fundamental freedoms and proportionality indicates a recognition of the need to balance these competing interests.

In addition to these regulations and directives, the EU has also taken measures to deal with disinformation and fake news, mainly through soft law instruments. The Code of Practice on Disinformation, adopted in 2018 and strengthened in 2022, is a voluntary framework for firms to fight disinformation[41]. This was adopted after the Facebook-Cambridge Analytica scandal, in which consulting firm Cambridge Analytica harvested unauthorized personal data from Facebook users in order to influence political outcomes. The scandal resulted in mass scrutiny regarding Facebook's data policy and the EU proposal for the Code specifically referred to it: "The recent Facebook/Cambridge Analytica revelations demonstrated exactly how personal data can be exploited in electoral contexts, and are a timely reminder that more is needed to secure resilient democratic processes."[42] The Code of Practice asserts that social media companies should enhance transparency regarding political advertisements, as well as calls for platforms to work with fact-checkers and to proactively remove fake accounts

41. European Commission, *The 2022 Code of Practice on Disinformation* (June 16, 2022), available at https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation.

42. European Commission, *Tackling online disinformation: Commission proposes an EU-wide Code of Practice*, Press release (Brussels April 26, 2018), available at http://europa.eu/rapid/press-release_IP-18-3370_en.htm.

used to spread disinformation[43]. While it is not a legally binding act, it has been signed by Google, Facebook, and Twitter among others. To fight disinformation, the EU has also launched the European Digital Observatory, a group consisting of fact-checkers and media literacy experts meant to analyze and understand disinformation trends on online platforms, identify practices to counter the spread of disinformation and work with policymakers[44]. The European Digital Observatory was proposed by the European Commission in its 2020 Democracy Action Plan, which set out to address the broader challenges facing democracy in the digital age[45].

Another soft law instrument regarding content moderation is the Code of Conduct on countering illegal hate speech online, drawn up in 2016. Signed by several companies like Facebook, TikTok, Twitter, and YouTube, the Code of Conduct is a commitment by IT companies to review any report of hate speech on their platform and remove or disable such content[46]. In its preambulatory clauses, the Code of Conduct also stresses the importance of protecting free expression, stating that the IT Companies and the European Commission also emphasize the need to defend the right to freedom of expression as well as that the spread of illegal hate speech online not only negatively affects the groups or individuals that it targets, but also those who speak out for freedom, tolerance, and non-discrimination in our open societies. This implies that, while the EU recognizes the importance of freedom of expression, hate speech comes at the expense of open and democratic discourse and therefore cannot be protected under the guise of free speech[47]. These instruments have played a crucial role in shaping content moderation practices within the EU. The Union

43. See European Commission, *The 2022 Code of Practice on Disinformation* (cited in note 41), Chapter III on political advertisements and Chapter VII on fact-checkers.

44. European Commission, *Communication* (cited in note 6).

45. See *id.*

46. European Commission, *Code of Conduct on Countering Illegal Hate Speech Online* (2016), available at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en

47. Similarly, the Code of Practice on Disinformation specifically refers to the need of finding a balance between free speech and freedom from harm, its preamble reading that the parties are mindful of the fundamental right to freedom of expression, freedom of information, and privacy, and of the delicate balance that must be

pushes platforms to take a proactive approach in removing harmful content to protect the public interest, which has led to most providers developing their own moderation policies to detect and remove all such content. While the EU attempts to balance free speech and protecting users and public interest, its comprehensive guidelines suggest that they prioritize defending users from harmful content in order to create a healthy online environment, as well as promote a culture of accountability and transparency in content moderation. However, this approach may fall short when it comes to stimulating innovation, as newer companies may be discouraged by the over-regulation, and social networks may begin to over-moderate, which means removing content that is not harmful, in order to avoid potential retribution[48].

3. *United States: a Liberal Approach to Content Moderation*

While the EU aims to actively regulate content moderation, the U.S. approach is more hands-free and noninterventionist, largely based on the First Amendment of the Constitution, which protects free speech from any Congress legislation[49]. It is important to note that the First Amendment only refers to acts that restrict free speech made by the State. This means that social media platforms, which are private actors, are allowed to restrict speech as they please because they are not bound by the First Amendment. That said, this is becoming more controversial, especially in relation to potential social media political bias. Content moderation policies are also further affected by Section 230 of the Communications Decency Act, passed in 1996, which protects online platforms as intermediaries that cannot be held liable for posts made by users[50]. In other words, Section 230 grants immunity to sites that host harmful content, even if the site has moderation policies of its own.

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struck between protecting fundamental rights and taking effective action to limit the spread and impact of otherwise lawful content.

48. See Michal Lavi, *Do Platforms Kill?*, 43(2) Harvard Journal of Law & Public Policy, 477 (2020).

49. 1st Amendment, Constitution of the United States (1791).

50. Section 230, CDA. 47 U.S.C. § 230 (1996).

The federally enacted CDA allows for free expression online by protecting companies from unforeseeable legal problems, but this has been challenged through some state-level laws, which seek to hold platforms accountable for the content posted by their users. In 2021, Texas introduced a bill, which would allow some social media users to sue social media platforms if their posts get taken down, or if their accounts get deleted based on their political views[51]. This "censorship law" was quite controversial and was blocked by a federal judge in Texas through an injunction, as it was seen as violating the platform's First Amendment[52]. The case was later contested by the Court of Appeals for the Fifth Circuit, where the preliminary injunction was lifted, although it was subsequently reinstated by the Supreme Court until a further ruling by the Fifth Circuit, in which the judge denied the injunction arguing that platforms are not newspapers, and their censorship is not speech"[53]. Even though the impact of the law on social media platforms is uncertain, as there have been no actual cases on its application so far, its legality may still be questioned on the basis of it contradicting Section 230, which allows social media platforms to moderate content as they see fit. Similar legislation has come into effect in Florida, which passed a law that prohibits platforms from suspending or banning accounts of political candidates during an election[54]. It also allows Florida citizens to sue Big Tech if they are treated unfairly, although it does not provide a definition for what exactly constitutes unfair treatment[55]. A challenge to State level legislation arises in the balancing test established in Pike v. Bruce Church in 1970. The case involved an Arizona statute challenged as it placed an undue burden on interstate commerce, which is protected under the Commerce Clause of the Constitution. The Supreme Court held that State laws, which excessively burden out-of-state businesses or individuals, may be struck down as unconstitutional, thus establishing the "Pike balancing test"[56]. In the context of content moderation,

51. Texas House Bill 20, Tex. H.B. 20, 87th Leg., Reg. Sess. (. 2021).

52. Leslie Y. Garfield Tenzer and Hayley Margulis, *A 180 on Section 230: State Efforts to Erode Social Media Immunity*, 49 Pepp. L. Rev. (2022).

53. *Ibid*.

54. Florida Senate Bill 7072, Fla. Stat. § 106.115(2) (2021).

55. See *id.*

56. *Pike v. Bruce Church*, 397 U.S. 137 (1970).

this means that, if multiple states have their own specific laws on how platforms should moderate content, it could become an unreasonable burden for platforms to stay up-to-date and consistently apply multiple different standards of moderation.

The U.S. Supreme Court has often given precedence to the protection of speech when faced with cases related to content moderation. One of the first landmark cases which affected this area was Reno v. American Civil Liberties Union in 1997, in which the Supreme Court ruled that certain portions of the Communications Decency Act (CDA) are unconstitutional restrictions of free speech[57]. The CDA criminalized online speech that is classified as "indecent" and could be viewed by minors in an effort to protect children[58], but the court ruled that freedom of expression outweighs the benefits of such censorship on social media. The Court found the CDA's overly broad nature put an unconstitutional burden on adults and that protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults[59].

In 2015, the Supreme Court in Elonis v. United States held that threats made on social media need to be judged upon whether there was proof of *intent* to threaten rather than if the comment was reasonably perceived as a threat[60]. The case concerned threatening messages made by U.S. citizen Elonis on Facebook. When initially on trial, Elonis had argued that the State was required to prove an intent to communicate a "true threat" which was rejected by the district court that held the threshold at any communication that could reasonably be perceived as a threat[61]. When the case reached the Supreme Court, the debate surrounded whether the term "threat" included an intent to convey harm. The Court ruled that it does, and any lack thereof is a restriction on freedom of speech, ergo unconstitutional. The ruling upheld the importance of protected speech and clarified a higher standard for convicting individuals making threatening messages. This case was decided in the rapidly changing landscape of online communication and became a landmark case regarding online speech. In

57. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).
58. Communications Decency Act (CDA), 47 USC § 230 (1996).
59. *Reno*, 521 U.S. 844 (1997) (cited in note 57).
60. *Elonis v. United States*, 575 U.S. 723 (2015).
61. See *ibid.*

2017, the Court reinforced its commitment to protecting free speech in Packingham v. North Carolina, where it was ruled that a North Carolina statute barring sex offenders from using social media is unconstitutional and consists of a violation of free speech[62]. Specifically, the Court held that the First Amendment also includes online communication given its significance as a platform for public discourse and a source of information. The fact that courts have repeatedly ruled in favor of free speech, even when that speech is controversial or offensive, is evidence of how crucial this value is in American society and how embedded it is in its legal system.

Nonetheless, there has been another direction taken by the United States with regard to the protection of free speech, which focuses on the platforms themselves. While the Supreme Court in cases like Elonis and Peckingham has stressed the importance of safeguarding free speech in the digital era, lower courts have been defending the free speech rights of private platforms. For instance, in Prager Univ. v. Google, a California federal court ruled that YouTube did not violate Prager University's free speech right by restricting its prominently right-wing content, as YouTube is a private company[63]. Soon after, the Court of Appeals affirmed the decision and held that claims alleging censorship and denial of equal protection were meritless because the providers were not state actors[64]. Likewise, in Freedom Watch v. Google, et al., in which conservative activists claimed that multiple online platforms were violating their First Amendment rights by censoring their accounts, a Washington D.C. appeals court dismissed the case on the basis that private entities have no responsibility to respect free speech[65]. It is clear that Section 230 and the Constitution grant platforms broad discretion in regulating content, in addition to protecting them from liability for the content they host, but there is still pressure from users and lawmakers that prompt them to uphold certain policies.

Even though Congress is constitutionally prohibited from passing legislation that violates the First Amendment, and therefore cannot

62. *Packingham v. North Carolina*, 582 U.S. (2017).
63. *Prager University v. Google LLC*, U.S. Dist. (2018)
64. *Prager University v. Google LLC*, 951 F3d 991 (9th Cir 2020)
65. *Freedom Watch v Google LLC et al.*, 2018 WL 4738803 (D.D.C. Sept. 28, 2018).

act when it comes to restricting harmful speech, there have been some congressional hearings in which they investigated content moderation policies on social media platforms. In 2018, Mark Zuckerberg was called to testify in a joint Congressional hearing after the allegations that the company had allowed political consulting firm Cambridge Analytica to access millions of users' data without their consent, to target them with political ads[66]. During the hearing, he was also questioned about Facebook's content moderation policies, especially concerning the spread of fake news and hate speech on the platform, and acknowledged the importance of investing in moderation technology[67]. Additionally, two years later, in a Senate Committee of the Judiciary, Zuckerberg called for Congress to reform Section 230, in order to involve the government in privacy policies and to regulate the role of social media in elections[68]. In July 2019, a House Judiciary Committee hearing examined the influence of companies like Facebook, Google, and Twitter, focusing on how these companies moderate political speech[69].

Talks of censorship have been rapidly escalating as a result of political unrest within the country. In 2021, social media platforms including Twitter and Facebook banned President Trump in the wake of the January 6th Capitol riot[70]. These actions triggered more debate

66. See Edward Lee, *Moderating Content Moderation: Framework for Nonpartisanship in Online Governance*, 70 American University Law Review, 913 (2021).

67. U.S. Senate Committee on the Judiciary, *Facebook Social Media Privacy, and the Use and Abuse of Data*. 115th Cong., 2nd sess. Senate Hearing 115-683 (April 10, 2018), available at https://www.congress.gov/event/115th-congress/senate-event/LC64510/text?s=1&r=59 (last revised April 9, 2023).

68. U.S. Senate Committee on the Judiciary, *Breaking the news: Censorship, suppression, and the 2020 election* (November 17, 2020),available at https://www.judiciary.senate.gov/committee-activity/hearings/breaking-the-news-censorship-suppression-and-the-2020-election (last revised April 9, 2023).

69. U.S. House Committee on the Judiciary. Subcommittee on Antitrust, Commercial, and Administrative Law, *Online platforms and market power, part 1: the free and diverse press*, 116th Cong., 2nd sess. (June 11, 2019), available at https://www.congress.gov/event/116th-congress/house-event/109616.

70. See Facebook Newsroom, *In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit* (June 4, 2021), available at https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump/ and Twitter, *Permanent suspension of @realDonaldTrump* (January 8, 2021), available at https://blog.twitter.com/en_us/topics/company/2020/

about the power of social networks in regulating political speech and where its limits should lie. In 2022, Elon Musk purchased Twitter and reinstated many right-wing accounts, including ones that had been banned for hate speech, after having criticized the site for suppressing and censoring conservative viewpoints, and for being politically biased[71]. These events were then discussed in the 2023 hearing on Government Interference and social media Bias, in which former Twitter personnel testified on Twitter's content moderation policies[72].

As outlined in the last paragraphs, the EU tends to focus more on terrorism, hate speech, and other 'harmful' material, while the U.S., especially post-2016 election, tends to center the conversation around political speech and platform transparency. Placing fundamental importance on free speech allows for social media to position themselves as public forums of important discussions adopting different perspectives and ideas. It also allows for more innovation, with newer platforms adopting their own moderation policies depending on the content they host. Overall, the US approach to content moderation prioritizes free speech over other concerns. This approach largely provides platforms with freedom and flexibility, but it also places a burden on content moderation, especially as the platforms grow, and it becomes more difficult to monitor every post.

4. *Key Issues in Content Moderation*

Regardless of which approach is more effective, there are still significant disadvantages to both methods of overseeing content moderation. This section will attempt to outline the key problems that platforms face in regulating online content in a globalized and

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suspension#:~:text=After%20close%20review%20of%20recent,of%20further%20incitement%20of%20violence.

71. See The Guardian, *Elon Musk offers 'general amnesty' to suspended Twitter accounts* (November 24, 2022), available at https://www.theguardian.com/technology/2022/nov/24/elon-musk-offers-general-amnesty-to-suspended-twitter-accounts.

72. U.S. House House Committee on Oversight and Accountability, *Protecting Speech from Government Interference and Social Media Bias, Part 1: Twitter's Role in Suppressing the Biden Laptop Story*, 118th Cong., 1st sess. (February 8, 2023), available at https://www.congress.gov/event/118th-congress/house-event/115286?s=1&r=9.

interconnected world, as well as the challenges that arise from the lack of clear guidelines and the subjective nature of moderation policies across different platforms.

The EU itself has yet to narrow down exactly what constitutes "illegal content", with the only definition being "information which is not in compliance with EU or Member States Law"[73]. However, different member states have different practices and fragmented legislation becomes problematic for companies that already have to comply with an array of legal and regulatory standards. For instance, Germany gives social media platforms twenty-four hours to remove "obviously illegal" hate speech after being notified and seven days if its legal status is more problematic to determine through its Network Enforcement Act (NetzDG)[74]. This was echoed in the French 'Avia Law', which, however, was struck down by the French constitutional court holding that the deadline was too short, and the decision could pose an unnecessary or disproportionate risk to free expression[75]. Similar to the NetzDG, Austrian law provides platforms twenty-four hours upon notification to remove 'clearly' illegal content, but it also requires higher attention given to user rights and more sophisticated complaint management procedures[76]. This creates a situation where platforms may struggle to comply with different requirements across different countries. Furthermore, member states may have different standards concerning the substantive content of what is allowed to be shared. The German Network Enforcement Act imposes strict regulations on hate speech and specifically targets social media[77]. In contrast, although all EU member states have some level of hate speech regulation, countries like Poland and Hungary do not have specific laws regarding hate speech; instead, they include it in their respective criminal codes and may be more permissive on what kind of content

73. See Article 3(h), *Regulation on a Single Market For Digital Services* (cited in note 28).

74. Network Enforcement Act, NetzDG, Bundesgesetzblatt Jahrgang 2017 Teil I Nr. 58 (2017).

75. Judit Bayer, *Procedural rights as safeguard for human rights in platform regulation*, Policy & Internet, 14 755-771 (2022)

76. See *id.*

77. See Rebecca Zipursky, *Nuts about Netz: The Network Enforcement Act and Freedom of Expression*, 42 Fordham International Law Journal, 1325-1368 (2019).

is allowed[78]. This might lead to inconsistent moderation, with some content being allowed to remain, while other similar content has to be removed, based on the country in which it is posted from.

Platforms may also decide to err on the side of caution to avoid being sanctioned, and begin to remove content that, in truth, is not harmful or "illegal". This may lead to over-removal of content, that does not violate policy but is controversial, leading to a chilling effect on free speech and freedom of expression[79]. In fact, the line between content moderation and censorship is becoming increasingly blurred and platforms are becoming no strangers to accusations of suppression or arbitrary content removal. In 2016, Facebook suspended editors and executives of two major Palestinian news publications, that covered daily news in the West Bank[80]. The editors claimed they had not violated community guidelines and were given no explanation for the suspensions. Facebook later reversed the decision claiming that it had been a mistake, although the journalists suspected it was a result of an agreement made by Facebook and the Israeli government to regulate content inciting violence[81]. The reference is to an informal agreement made by the two parties to crack down on incitements, preceded by dissatisfaction from the government and even a "Facebook bill" proposed by the Knesset, which would have granted broad authority to officials seeking court orders to compel Facebook

78. See Uladzislau Belavusau, *Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant? (Czech Republic, Hungary and Poland)*, 47 Israel Law Review 27 (2014).

79. See Amélie Heldt, *Borderline speech: caught in a free speech limbo?* (Leibniz Institute for Media Research, Hans-Bredow-Institut, Hamburg, Germany).

80. See Sophia Hyatt *Facebook 'blocks accounts' of Palestinian journalists*, (Al Jazeera, 2016), available at https://www.aljazeera.com/news/2016/9/25/facebook-blocks-accounts-of-palestinian-journalists.

81. This wasn't the only time Facebook was accused of political censorship. In 2016, a user uploaded a video following the aftermath of a police shooting in the U.S, which did not violate community standards, but was taken down regardless and later blamed on a glitch (see The Washington Post, *Why the Philando Castile police-shooting video disappeared from Facebook then came back*, 2016) Similarly, in 2017, Twitter suspended the account of Egyptian journalist Wael Abess who used his account to document situations of human rights abuse, without providing a reason for the suspension (see The Guardian, *Twitter under fire after suspending Egyptian journalist Wael Abbas*, 2018).

to remove content[82]. This agreement could have had unintended consequences, specifically resulting in censorship or over-restriction on pro-Palestinian speech. Although it cannot be said that every situation of censorship results from concern about regulatory penalties, it is clear that social media platforms have often had to deal with situations where the line between harmful and necessary content is unclear, and have penalized users that, though sharing controversial material, did not violate any guidelines.

The Digital Services Act applies to all platforms that offer services to EU citizens, even if the platform itself is based outside of the Union (which is the case with most major platforms including Facebook, Twitter, and YouTube)[83]. However, platforms also have to deal with contradictory legislation of other countries which mean to regulate content differently. For instance, Chinese law is highly strict on regulatory requirements for censorship, requirements, which may directly conflict with the DSA and their speech protection standards[84]. If platforms decide to comply with the DSA free speech laws by not censoring certain content, they may face penalties from China, which operates under a cyber sovereignty policy seeking to restrict foreign content[85]. A further potential problem is platforms that operate in the EU but are based in regions lacking effective cooperation mechanisms with the EU, suggesting that, while the DSA applies to them as well, it is more difficult to enforce it. Examples of this are social network sites operating from China or Russia, such as WeChat and VKontakte that are monitored by their governments[86]. This is to underline that legislative regulations can be very problematic for social media platforms, which in turn might have an easier time regulating content on

82. Sarah Koslov, *Incitement and the Geopolitical Influence of Facebook Content Moderation*, 4 Georgetown Law Technology Review, 183 (2019).

83. European Parliament and Council of the European Union, *Regulation on a Single Market For Digital Services* (cited in note 28).

84. National People's Congress of the People's Republic of China, *Cybersecurity Law of the People's Republic of China (2016)*, available at https://digichina.stanford.edu/work/translation-cybersecurity-law-of-the-peoples-republic-of-china-effective-june-1-2017/.

85. See *id.*

86. See Callum J. Harvey and Christopher L. Moore, *The client net state: Trajectories of state control over cyberspace*, *15 Policy & Internet 133* (2022), available at https://doi.org/10.1002/poi3.334.

their own guidelines, potentially even achieving more effective results. A 2018 research analysis concluded that the automated means of moderation used by platforms were more effective in identifying and removing hate speech than a group of human coders[87]. However, the scope of this article was limited to hate speech and more research is needed to fully examine the effectiveness of self-regulation.

Because most legal systems give significant discretion to platforms to decide their moderation policies[88], users and platforms often do not have clear guidelines regarding what is considered inappropriate or unacceptable behavior on the legal level. This can and does lead to discrepancies and confusion in moderation practices. Different platforms have different standards, and many of them have recently suffered accusations of bias and censorship. For instance, the U.S. takes a strong emphasis on protecting free speech, which may lead to platforms hesitating to remove controversial or harmful content for fear of being accused of censorship. YouTube has been criticized for not removing videos spreading conspiracy theories and proliferating misinformation through their algorithm[89]. On the other hand, there is the risk of over-censorship, where platforms may remove content that is not essentially harmful to avoid controversy. In 2021, YouTube was also accused of being too aggressive and of removing content that did not violate its policy, while trying to crack down on COVID and political misinformation[90]. This is where the idea of balancing the opposing interests comes into play. Platforms often have to make decisions on a case-by-case basis, to ensure that freedom of speech is being protected while removing harmful content. Whichever they choose can

87. Thomas Davidson, Dana Warmsley, Michael Macy and Ingmar Weber, *Automated Hate Speech Detection and the Problem of Offensive Language*, 1703 Cornell University (2017), available at https://doi.org/10.48550/arXiv.1703.04009.

88. The U.S. protects platforms through the First Amendment and Section 230, while the EU's Article 7 of the DSA allows platforms to take voluntary measures to strike down unlawful content.

89. See Mark Ledwich and Anna Zaitsev, *Algorithmic extremism: Examining YouTube's rabbit hole of radicalization*, 25 First Monday (2020), available at https://doi.org/10.5210/fm.v25i3.10419.

90. See Caroline Anders, *YouTube yanked public meeting videos over covid misinformation. Now it's backtracking* (The Washington Post, August 7, 2021), available at https://www.washingtonpost.com/technology/2021/08/07/youtube-covid-misinformation-city-council/.

lead to criticism because there is no 'perfect' solution. They are left to choose between human-based or automated methods of moderation or some degree of combination between the two. Automated moderation refers to algorithms and machine technologies being trained to filter harmful material and remove it upon detection. However, while this might be more efficient, algorithmic machines are designed to reflect society and can often exhibit bias by promoting existing societal stereotypes[91]. An example of algorithmic bias is when, in 2018, Amazon came under fire for using recruiting machine technology that penalized job applications including words like "women" and "female", which led to fewer women qualifying for the later stages of the application process[92]. Another concern is the issue of over-removal. AI cannot make contextual decisions when it is unclear if a post is violating a rule[93]. For instance, in situations of satirical content, it is difficult for AI to recognize that the post is not violating community standards. On the other hand, using automated means of moderation can be a faster and more efficient way of removing the most harmful content, as well as loosening the burden on human moderators, who are exposed to disturbing content and can face long-term emotional and psychological effects[94]. Additionally, firms with fewer resources cannot afford to pay human moderators and AI becomes the more suitable path for this job. Ultimately, while automated content moderation has its drawbacks, platforms can benefit from it for as long as they have some level of human oversight to ensure impartiality (similar to Facebook's Oversight Board).

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91. See Céline Castets-Renard, *Algorithmic content moderation on social media in EU law: Illusion of perfect enforcement*, University of Illinois Journal of Law, Technology & Policy 283 (2020).

92. See Colin Clemente JJones, *Systematizing Discrimination: AI Vendors & Title VII Enforcement*, 171 University of Pennsylvania Law Review, 235 (2022).

93. See Robert Gorwa, Reuben Binns, and Christian Katzenbach, *Algorithmic content moderation: Technical and political challenges in the automation of platform governance,* Big Data and Society (2020).

94. See Miriah Steiger, Timis Bharucha, Sukrit Venkatagiri, Martin J. Riedl and Matthew Lease, *The Psychological Well-Being of Content Moderators: The Emotional Labor of Commercial Moderation and Avenues for Improving Support,* Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems. Association for Computing Machinery (2021).

Most major platforms demonstrate similar rules or community guidelines regarding how they moderate their content. Facebook's Community Standards cover six categories of unacceptable content along with rationales for each policy, with Twitter and YouTube using approximately the same principles[95]. However, platforms also have internal and more exhaustive rules that moderators use to make decisions, often not accessible to the public[96]. Social media companies have faced criticism for not being transparent in their decision-making processes and their moderation policies and users have called to increase trust by making this information public[97]. Moreover, platforms have begun to use third-party fact-checkers to look for disinformation, a practice that, while useful for identifying misinformation, has been criticized because these organizations can be partisan and exhibit bias in the content they choose to flag as inaccurate[98]. Increased transparency about moderation policies and employed means (algorithms, fact-checkers, etc.) should then be used by platforms if only to build trust with their user base.

A wider platform discretion model raises another important issue to be considered. As Kyle Langvardt points out in his article, "Regulating Online Content Moderation", the largest social platforms are owned by few corporations, leaving the moderation of online speech to become the responsibility of a small number of oligarchs[99]. This means that where there are no regulatory limitations, moderation becomes influenced by market, public, and government pressures[100]. Therefore, there is a risk that moderation practices may not align with the interests of the public and may even go against the users' rights to free expression. It could also lead to dominant platforms having the ability to shape all public discourse by suppressing oppositional viewpoints. Once again, it is apparent that mechanisms enforcing platform

95. See Karanjot Gill, *Regulating Platforms' Invisible Hand: Content Moderation Policies and Progress*, 21(2) Wake Forest J. Bus. & Intell. Prop. L. 171 (2022).

96. See *id.*

97. See Evelyn Douek, *Governing online speech: From "posts-as-trumps" to proportionality and probability*, 121(3) Columbia Law Review, 759 (2021).

98. See Petter Bae Brandtzaeg and Asbjørn Følstad, *Trust and distrust in online fact-checking services*, 60(9) Communications of the ACM, 65 (2017).

99. See Kyle Langvardt, *Regulating Online Content Moderation*, 106(5) Georgetown Law Journal, 1353(2018).

100. See *id.*

transparency are of key importance to increasing public accountability. Social media may also be used by governments themselves to incite violent movements, as was the case with the Rohingya genocide in Myanmar. In fact, over one hundred Facebook accounts were used to spread hate speech against the Rohingya Muslims, some of which enjoyed over a million followers and massive engagement[101]. These posts were written entirely in Burmese, but, in 2017, when the genocide was at its peak, Facebook only had five Burmese-speaking content moderators[102]. This added to the fact that Myanmar is composed of different languages and dialects, resulted in a large amount of content being left up even if it visibly violated Facebook's guidelines. The platform belatedly began to act against these accounts in 2018, after facing negative media reactions[103]. By 2018, over 10,000 Rohingya Muslims were killed in the genocide and over 700,000 had been displaced[104].

The lack of clear standards and guidelines for content moderation, both by the state and by the platform itself, can also contribute to political polarization and extremism, as users may feel that their speech is being treated unfairly and, because of flawed algorithms, it will not be exposed to opposing viewpoints[105]. In the U.S., some critics have pushed for legislation that mandates accountability and transparency of the social networks in their moderation policies, instead of relying on Section 230 as a shield[106]. Due to the lack of regulatory pressure for

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101. Richard Ashby Wilson and Molly K. Land, *Hate speech on social media: Content moderation in context*, 52 Conn. L. Rev, 1029-1076 (2021).

102. See Rebecca J. Hamilton, *Platform-Enabled Crimes: Pluralizing Accountability When Social Media Companies Enable Perpetrators to Commit Atrocities*, 47 Yale Journal of International Law, 121 (2022).

103. See *id.*

104. United Nations Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (Aug 27, 2018), available at https://digitallibrary.un.org/record/1643079?ln=en.

105. See Pablo Barberá, *Social media, echo chambers, and political polarization*, (Cambridge University Press 2020).

106. For instance, Senator Blumenthal has called for §230 reform because it is used "to defend keeping the bad stuff there" (Press Release at https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-on-big-techs-legal-immunities-reform-is-coming). Additionally, Senator Josh Hawley has stated that §230 has been used to "shield the Nation's largest and most powerful technology corporations from any legal consequences" (Press Release at https://www.hawley.senate.gov/hawley-files-gonzalez-v-google-amicus-brief-supreme-court-challenging-big-techs-section-230).

transparency of platforms' policies, it is difficult for users to know the point at which something is considered unacceptable, and incomprehensible to punish them by citing policies they weren't told of. As previously mentioned, platforms are not obligated to protect free speech and, therefore, are able to make arbitrary decisions, even if it results in negative feedback.

5. *Looking Ahead: the Future of Content Moderation*

While the EU places a greater emphasis on regulating harmful content and the U.S. supports the protection of speech, both attitudes seem to have their shortcomings, which has made content moderation a challenging issue for social media platforms. Over-removal, under-removal, and biases are all issues that might become more prevalent if the current approach remains, especially as social media platforms continue to grow. The consequences of this can be grave, especially in cases of terrorist content or hate speech, as was seen in the aforementioned Rohingya incident in 2017. Human-based moderation has its difficulties too. Humans are also prone to bias and error, albeit they are also able to apply contextual knowledge to their evaluation. Moreover, the amount of content that is generated is too great for such moderation to be scalable. Accommodating space for harmful content to subsist poses a threat to users and society and there should be some level of safeguarding to make sure this does not occur.

Many recommendations have been made to address these challenges. Increasing platform transparency is of utmost importance to ensure a safer online environment. Platforms should disclose what their exact moderation policies are, as well as the decision-making process, when necessary. Castets-Renard suggests that the EU set more stringent rules, requiring moderators to inform users why their content was removed on a case-by-case basis upon request[107]. Additionally, platforms need to be explicit when defining "harmful" content, since vagueness increases confusion and leads to distrust

107. See Céline Castets-Renard, *Algorithmic content moderation on social media in EU law: illusion of perfect enforcement*, 2 University of Illinois Journal of Law, Technology & Policy 283 (2020).

from users and the rest of the public. Governments may also enact legislation mandating due process, including appeal or counterclaim procedures where users can contest a decision made by the platform and have it revisited by the moderation team[108]. Additionally, they may provide training and support for platforms, to ensure that their moderators have the necessary knowledge regarding how to identify harmful content. Governments can also share information and data with platforms to aid them in identifying such content, particularly in areas like terrorism and disinformation.

While Section 230 of the Communications Decency Act currently protects platforms as intermediaries, instead of as publishers of the content they host, there have been many discussions on potential reforms. Most of these suggestions consist in limiting the scope of §230 to address challenges like cyber stalking or nonconsensual sexual content[109]. Platforms should also not be able to use §230 to invoke immunity for harmful content that they knowingly solicited or actively disregarded. Another suggestion is for the U.S. government itself to enact legislation requiring large social media sites based in the U.S. to establish independent oversight bodies (similar to Facebook's Oversight Board), to supervise and be responsible for upholding or reversing decisions that have been appealed[110]. This approach would maintain the country's commitment to free speech while also ensuring that social media platforms are accountable for their moderation practices and are more transparent in their decision-making processes.

Platforms can likewise act to improve the state of content moderation, for instance, by investing in improved AI and other algorithmic means which can detect harmful content proactively and remove it. AI is not errorless, however, it can be trained to identify harmful content and then supervised through audits or reviews to make sure that there

108. See Karanjot Gill, *Regulation platforms' invisible hand: content moderation policies and process*, 21(2) Wake Forest Journal of Business and Intellectual Property Law 171 (2022).

109. See Andrew P. Bolson, *Flawed but fixable: Section 230 of the Communications Decency Act at 20*, 50 Washington University Journal of Law & Policy, 97(2016).

110. See Trent Scheurman, *Comparing social media content regulation in the US and the EU: How the US can move forward with Section 230 to bolster social media users' freedom of expression*, 23 San Diego International Law Journal 413 (2022).

haven't been any missteps[111]. This is also when an oversight committee would be of use, as they could assess decisions made by algorithmic means, without having to be subject to so much disturbing content that is made public. Analogously, they could invest in training courses for their human moderators that ensure partiality and partisanship. Specifically, platforms should invest in moderators, who know less commonly spoken languages as these posts may go unnoticed due to the lack of moderators that can understand them. AI also falls short when referring to moderating content that requires context-specific information, like political or social situations. Ideally, there would be a 'mixed' system of both human moderators and automation to ensure accuracy[112].

Platforms can also encourage user participation by allowing them to flag or report harmful posts that are then reviewed, increasing the speed and efficacy of content moderation. They can work with specific organizations or individuals who are knowledgeable about moderation practices and have a strong understanding of the context behind posts being made, giving them the role of "trusted partner" and enabling them to monitor and flag problematic content[113]. A further recommendation, made by Evelyn Douek, is an approach focusing on proportionality and probability[114]. The suggestion is that moderating content should be done by weighing the harms and benefits of speech on a broader scale and a systemic basis, rather than looking solely at the individual post as an isolated event[115]. This would entail considering the context and potential implications of each post and using that to decide whether the potential harms outweigh the benefits of protecting speech. In other words, the decision should be made based on

111. See Yifat Nahmias and Maayan Perel, *The oversight of content moderation by AI: Impact assessments and their limitations* 58(1) Harv. J. on Legis. 145 (2021).

112. See Therese Enarsson, Lena Enqvist and Markus Naarttijärvi, *Approaching the human in the loop–legal perspectives on hybrid human/algorithmic decision-making in three contexts*, 31(1) Information & Communications Technology Law 123 (2022).

113. See Richard A. Wilson and Molly K. Land, *Hate speech on social media: Content moderation in context*, 52 Connecticut Law Review 1029 (2021).

114. See Evelyn Douek, *Governing online speech: From "posts-as-trumps" to proportionality and probability,* 121(3) Columbia Law Review 759(2021).

115. See *ibid.*

the likelihood that the post will cause harm, and how great that harm may be, rather than on the content of the post itself.

Overall, the goal of content moderation should be to find a balance between protecting society while also upholding the principles of free speech to promote a healthy online community. However, this can only be achieved through collaboration and cooperation between the public, the platforms, and the government.

6. *Conclusion*

The differences in the EU and U.S. approaches reflect the ones in values, caused by their unique historical and political backgrounds. The EU is more active in regulating harmful content, having passed the comprehensive Digital Services Act (DSA) governing online platforms, which aims to regulate the sharing of illegal content, online disinformation, or other societal risks. Along with numerous soft law instruments, the DSA has shaped the way content moderation is conducted within the EU and has fostered a culture of giving precedence to the safety of users, instead of enhancing free speech. While the DSA holds platforms liable if they do not remove harmful content that they are aware of, the U.S. grants them liability under the framework of Section 230 of the Communications Decency Act. The U.S. approach is more hands-free and places fundamental importance on free speech. The U.S. also highlights the fact that platforms are not bound to the 1st Amendment, which protects free speech, and have a certain level of sovereignty when deciding their moderation practices. However, this approach has been criticized, especially considering media monopolies and political censorship[116].

Issues stem from both the regulatory and the more liberal American model. The EU's regulatory approach poses problems due to fragmented legislation between the member states, leading to inconsistent moderation policies[117]. Furthermore, it upsurges a risk of

116. See Jonathan A. Obar and Anne Oeldorf-Hirsch, *The biggest lie on the Internet: ignoring the privacy policies and terms of service policies of social networking services*, 23(1) Information, Communication & Society, 128 (2020).

117. See Céline Castets-Renard, *Algorithmic content moderation on social media in EU law: illusion of perfect enforcement*, 2 University of Illinois Journal of Law,

over-removal as platforms may begin to censor content that is not harmful solely to avoid potential fines[118]. The regulations established by the EU may also contradict those made by other countries, such as China, making it difficult for consistent moderation due to contradictory regulations. On the other hand, the U.S. model is characterized by unclear standards and guidelines, leading to confusion for both platforms and users. Additionally, social media platforms may result in under-removal to avoid accusations of censorship or biases. In the absence of clear regulations, platforms decide on their moderation policies by themselves, which often leaves users in the dark, due to a lack of platform transparency on their practices and methods[119]. The responsibility of content moderation falls on a small number of corporations, which presents an issue of potential monopolization[120].

To address these challenges, many reform proposals have been presented by scholars and policymakers. An increase in platform transparency is vital for a healthier online environment, as well as providing processes that allow users to appeal to or question moderation practices. This would ensure social media platforms' accountability for their moderation practices and transparency in their decision-making processes. Larger platforms should also invest in improved AI and in moderators' training to ensure effectiveness. In the U.S., protection of speech can still be ensured with legislation mandating platform Oversight Boards that monitor moderation practices.

Ultimately, the issue of content moderation is sensitive and is only gaining more significance in contemporary society. Social media networks have become forums and mediums of important conversation, and the responsibility to regulate it is too great for platforms to be left to deal with it alone. Collaboration between society, platforms, and governments is crucial for adopting a healthier online environment.

Technology & Policy 283(2020).

118. See Amélie Heldt, *Borderline speech: caught in a free speech limbo? Leibniz Institute for Media Research*, Hans-Bredow-Institut, Hamburg, Germany (2020).

119. See Edward Lee, *Moderating Content Moderation: Framework for Nonpartisanship in Online Governanc*e, 70(3) American University Law Review 913 (2021).

120. See Kyle Langvardt, *Regulating Online Content Moderation,* 106(5) Georgetown Law Journal 1353 (2018).

Recovery of Fiscal State Aid in Tax Ruling Cases and Principles of Legitimate Expectations and Legal Certainty

Amil Jafarguliyev*

Abstract: This paper will shed a light on the application of legitimate expectations and legal certainty principles against recovery orders in tax ruling cases. Between 2014 and 2022, the European Commission's investigations and the decisions following these investigations in some member states' tax ruling practices caused a massive boom in European Union State Aid law literature. Apple, Fiat, and Starbucks cases are among the main scenarios in that storyline. Recoveries of fiscal state aid were ordered as unpaid taxes for up to ten years in the past in these cases. To illustrate, the recovery order was 13 billion euros for Apple and around 20-30 million euros for Fiat and Starbucks decisions. Most interestingly, pleading general principles of European Union law such as legitimate expectations and legal certainty principles against recovery orders did not succeed in opposing the estimations. Therefore, this paper will try to address the application of legitimate expectations and legal certainty principles against recovery orders. The main focus will be how these principles should be applied when it deals with the novel and unpredictable interpretations of European Union State Aid rules. To this end, the clear examples from the Apple, Fiat, and Starbucks tax ruling cases will be drawn. This paper will argue that legitimate expectations and legal certainty principles should not be applied in a restrictive way.

Keywords: EU State Aid Law; Legitimate Expectations; Legal Certainty; General Principles of EU Law; Tax Rulings.

1. *Introduction*

This paper will focus on how the general principles of European Union ('EU') Law, such as legitimate expectations and legal certainty principles were interpreted in tax ruling cases.

In 2014, the European Commission ('EC') began to concentrate on the compatibility of tax rulings granted by some Member States with EU State Aid law. The EC ordered the recovery of unlawfully granted fiscal state aid in sheerly excessive amounts as unpaid tax advantages including Fiat, Starbucks, and Apple decisions. The ECJ recently put an end to the EC's previous practice on tax ruling cases with its landmark Fiat judgment dated the 8th of November 2022 (Joined Cases C-885/19 P and C-898/19 P). However, the ECJ's seminal judgment did not bring any clarity on the use of general principles against the EC's recovery order since the judgment mainly dealt with establishing an error of law in the determination of the reference framework.

Taking into account that general principles, such as legitimate expectations and legal certainty, are one of the few available ways to counter recovery orders, it is important to analyze how these principles were interpreted by both the EC and General Court ('GC') in cases in question. As it will be further discussed, in case of novel and unpredictable interpretation of EU State Aid rules, stringent application of these principles can have detrimental effects on the activities

of undertakings conducting business in Europe. General principles of any given law have always been the starting point of their interpretation and the strong basis of litigation strategy in case of disputes for undertakings. That is why it is important not to render their application in a stringent way in order not to deprive undertakings of effective legal protection. This becomes an even more sensitive issue, especially in unpredictable scenarios.

This paper will shed a light on how legitimate expectations and legal certainty principles were applied both by the EC and the GC in Apple, Fiat, and Starbucks cases. This will be done throughout three chapters. First, the recovery order and its purpose will be scrutinized before turning to the recovery orders in cases at hand. Secondly, I will examine the legitimate expectations principle and possible novel and unpredictable interpretations of state aid rules. Thirdly, the legal certainty principle and retroactive application of novel and unpredictable interpretations of state aid rules will be investigated.

The paper will address whether there is a stringent application of legitimate expectations and legal certainty principles in tax ruling cases at hand or not. Because such undermining interpretation can potentially lessen the whole significance of the general principles in question leading to detrimental effects on the legal and economic sphere in the EU. That is why, this paper's purpose is to build better prospects for pleading legitimate expectations and legal certainty principles against recovery orders. These will be done by using and analyzing the treaty provisions of EU law, the CJEU case law, the EC's decisions, the EC's soft law, and the different views of scholars in the legal doctrine.

2. *Recovery of State Aid and Difficulties of Recovering Fiscal Aid*

2.1. *Understanding the Recovery of Aid and its Purpose*

The EC has exclusive competence to assess the compatibility of an aid measure with the internal market according to article 108(2)

of the TFEU[1]. This assessment is subject to review by the GC and the ECJ[2]. Therefore, member states ('MS') shall not put their proposed aid measures into effect until the EC has adopted a decision on the compatibility of the measure in question. This is called a "standstill obligation"[3] for MS and its breach will consequently bring about finding aid measures illegal (unlawful) by the EC.

Finding an aid measure illegal will naturally lead to some consequences. A recovery order is one of them. Recovery of state aid means removing the undue advantage that is granted to undertakings so that market conditions before the illegal aid could be restored. Although EC's this power is not described in TFEU, it is recognized by the ECJ[4]. EC's this competence (subject to 10 years limitation period) is also depicted in the secondary legislation. It is provided by the Procedure Regulation that, when negative decisions are adopted in cases of unlawful aid, the member state concerned will take all needed measures to recover the aid from the beneficiary pursuant to the EC decision[5]. It should be stated in light of article 288 of TFEU that EC decisions are binding. Therefore, following EC's recovery decision, it is for the national courts of MS to give effect to that decision and enforce it[6] as there are no EU law provisions governing this matter[7].

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1. C-354/90, *Saumon* (1991) ECLI:EU:C:1991:440, paragraph 14. See also European commission, *Communication C/2019/5396 - Notice on the recovery of unlawful and incompatible State aid* (2019) OJ C 247 at paragraph 11.

2. *Id.* at 11. See, e.g.,C-275/10, *Residex,* 2011 ECLI:EU:C:2011:814.

3. Consolidated version of the Treaty on the Functioning of the European Union, (2007) OJ C 115/47, article 108(3).

4. C-70/72, *European Commission, v. Germany,* 1973 ECR 813, at 13.

5. Council of the European Union, *Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification)*, OJ L 248, 24.9.2015, article 16(1).

6. Kelyn Bacon, *European Union Law of State Aid* at 6 (Oxford Competition Law 3rd ed. 2017).

7. Krzysztof Jaros and Nicolai Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid,* 3(4) European State Aid Law Quarterly 573, 573 (2004).

As it is also stipulated by the ECJ, recovery is the logical consequence of finding state aid incompatible with the internal market[8]. This interpretation makes an obvious sense as it stems from the use of the word "abolish" in article 108(2) TFEU. Therefore, the purpose of recovery is to restore the situation that used to exist in the competitive structure of the internal market prior to illegally granted aid[9]. Additionally, recovery decisions must also include interest from the date of payment to the date of repayment[10]. Recovering the aid amount itself and adding interest to it serves to remove all the advantages aid beneficiaries enjoyed from the date it was put at their disposal until it is paid back[11].

Thus, it is essential to understand that a recovery decision is neither punishment nor a penalty, and it should not be used like any of these. The purpose of aid recovery is to remove the distortive effects on the competition, establish the status quo ante, and go back to the economic equilibrium that used to exist before unlawful aid. That is why recovery must be limited to the financial advantage arising from the aid[12] since it is not equivalent to imposing a fine. However, the recovery order can be punitive if it runs well above the multi-million-euro mark to ten years back as a result of the retroactive application of new law[13]. We will get back to this point later.

After establishing the purpose and sensitive nature of recovery of state aid, we are now turning to see what happened in the cases of Apple, Starbucks, and Fiat.

2.2. *Recovery Order in Recent Tax Ruling Cases*

At the beginning of 2014, the EC started inquiries into the tax ruling practices of six MS, including Luxembourg, Ireland, the Netherlands,

8. C-310/99, *Italy v. EC,* 2002 ECLI:EU:C:2002:143, at 98.

9. European commission, *Notice on the recovery of unlawful and incompatible State aid* at 16 (cited in note 1).

10. C-480/98, *Magefesa*, ECR 2000 I-8717, at 36-40.

11. European commission, *Notice on the recovery of unlawful and incompatible State aid* at 16 (cited in note 1).

12. Bacon, *European Union Law of State Aid* at 6 (cited in note 6).

13. Liza Lovdahl-Gormsen, *European state aid and tax rulings* at 63 (Edward Elgar Publishing 1st ed. 2019).

the United Kingdom, Cyprus, and Malta. Speaking of tax rulings, they are individual decisions in different formats adopted by national tax authorities. They entail a procedural tool of national fiscal policy that allows authorities to fix the application or interpretation of fiscal rules to the envisaged necessities of tax contributors[14].

In the same year, the EC opened formal investigations against Ireland (for granting Apple incompatible State aid), Luxembourg (for providing Fiat with unlawful tax benefits), and the Netherlands (for providing Starbucks with illegal tax breaks)[15]. These investigations mainly dealt with the transfer pricing rulings of tax authorities of mentioned member states. In these investigations, the EC took the direction that any tax ruling doing more than interpreting the general tax scheme can potentially qualify as state aid[16]. Now we will consider all these three cases respectively.

In 2015, the EC concluded its investigations against Luxembourg stating that the country breached its standstill obligation since the tax ruling for Fiat constituted state aid under Article 107 of TFEU. Thus, the country was required to recover the unlawful and incompatible aid from Fiat[17]. Following the recovery decision, an action for annulment was brought before the GC by Luxembourg and Fiat. However, the GC dismissed the appeals and upheld the EC's decision[18]. Ireland (C-898/19 P) and Fiat (C-885/19 P) therefore brought two separate appeals against that judgment before the ECJ. As it is already mentioned, the ECJ set aside the GC's judgment and annulled the EC's decision in its judgment in 2022.

Turning to the Starbucks case, the EC found that an advance pricing arrangement between the Netherlands tax authorities and Starbucks constituted an incompatible aid in 2015. Therefore, the EC

14. Pieter Van Cleynenbreugel, *Recovering Unlawful Advantages in the Context of EU State Aid Tax Ruling Investigations*, 1 Market and Competition Law Review 1 15, 18 (2017).

15. Nina Hrushko, *Tax in the World of Antitrust Enforcement: European Commission's State Aid Investigations into EU Member States' Tax Rulings*, 43(1) Brooklyn Journal of International Law 327, 338 (2017).

16. See *ibid*.

17. State aid which Luxembourg granted to Fiat (2014/C ex 2014/NN) see European Commission, *Decision 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat*, OJ 2016 L 351, at 1.

18. T-755/15 and T-759/15, *Fiat* ECLI:EU:T:2019:670.

ordered the recovery of the fiscal state aid[19]. The Netherlands and Starbucks applied annulment actions. They mainly argued whether the measure in question is selective or not. Subsequently, the GC annulled the EC's decision[20].

When it came to investigations against Ireland, the EC concluded that the measure in question constituted state aid which was incompatible, thus, recovery was ordered. According to the EC's calculations, Apple had received from Ireland 13 billion euros in unlawful tax advantages which should be recovered[21]. Ireland also joined Apple to seek annulment before the GC[22]. Eventually, this decision was annulled by the GC as it found that EC failed in showing the requisite legal standard that there was an advantage for fulfilling the requirements of Article 107(1) TFEU[23].

As it is witnessed, the EC ordered recoveries in sheerly excessive amounts in unpaid taxes for up to ten years into the past, which were around 20-30 million euros in Fiat and Starbucks decisions[24], and approximately 13 billion euros in Apple decision. Therefore, those decisions drew significant attention from the media and caused a sudden boom in legal literature. The U.S. Department of the Treasury also condemned these tax ruling cases in its White Paper (August 24, 2016).

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19. State aid SA.38374 implemented by the Netherlands to Starbucks (2014/C ex 2014 NN) see European Commission, *Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks*, OJ 2017 L 83 at 38.

20. T-760/15 and T-636/16, *Starbucks* (2019) ECLI:EU:T:2019:669.

21. European Commission, *Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP), implemented by Ireland to Apple* C/2016/5605, OJ 2016 L 187 (2017).

22. The reasons why Ireland and other countries rejected receiving huge amounts of money and joined appeal actions together with aid beneficiaries will further be discussed.

23. T-778/16 and T-892/16 2020, *Ireland and Apple v. European Commission,* ECLI:EU:T:2020:338.

24. Hrushko, *Tax in the World of Antitrust Enforcement: European Commission's State Aid Investigations into EU Member States' Tax Rulings* at 341 (cited in note 15).

2.3. *Recovery of Fiscal Aid and Arising Issues*

Recovery of any type of aid brings about numerous issues. The situation can be more complicated in tax ruling cases given the complex nature of the arm's length principle ('ALP') (which serves to ensure that taxes are correctly imposed where conflict of interests can occur)[25]. Nonetheless, the unlawfully granted aid should be identified, the obligation of recovery should be based, and the taxpayer's rights and the state's obligations should be clarified while ordering the recovery of fiscal state aid[26]. To this extent, the main difficulties were related to the amount of the quantum in tax rulings cases in question. According to the Notice on Recovery (para. 66) it is the EC's role to quantify the aid to be recovered. Following this, it is also mentioned that if that is not possible, the EC describes the methodology by which the MS has to identify the beneficiaries and determine the amount of recovery.

Therefore, the EC's position in its Fiat decision can be considered justified as in paragraphs 363 and 367, this is clearly mentioned, and it provided Luxembourg with a methodology to recover an alleged aid measure (methodology in recital 311 should especially be mentioned). The GC in its turn did not accept an appeal on this argument[27].

One of the mainly used arguments against the recovery orders is the impossibility. However, in none of these three cases, it was brought into action. It is not surprising as the ECJ rejected this ground where the aid had to be recovered from huge numbers, even thousands, of small undertakings which have been granted tax exemptions[28]. Impossibility ground is likely to be successful where MS can show that the company is liquidated and has no recoverable assets[29].

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25. Dimitrios Kyriazis, *Tax rulings and State aid: musings on recovery*, in Leigh Hancher and Juan Jorge Piernas López (eds.), *Research Handbook on European State Aid Law Edward* at 317 (Elgar Publishing 2nd ed. 2021).

26. Alexandre Maitrot de la Motte, *The Recovery of the Illegal Fiscal State Aids: Tax Less to Tax More*, 26 European Commission, Tax Review 60, 77 (2017).

27. T-755/15 and T-759/15 2019, *Luxemburg v. European Commission* and *Fiat Chrysler Finance Europe v. European Commission* (cited in note 18).

28. C-75/97 1999, *Kingdom of Belgium v. Commission of the European Communities*, ECR I-3671, at 90.

29. Bacon, *European Union Law of State Aid* at 18 (cited in note 6).

Moreover, a recovery order of fiscal aid will potentially lead to numerous procedural[30] and administrative issues[31] before the national courts. They will not be further discussed in this work due to its purposes.

2.4. *Recovery of Fiscal Aid and General Principles of EU Law*

On the other hand, the cases at hand provoke fresh debates on the general principles of EU law.

Article 6(3) of the TEU entails that general principles are to be located at the same level as Union treaties. That is why it is accepted that they have constitutional value[32]. In light of this provision, general principles of EU law are binding, and their character cannot be undermined.

Article 16(1) of Procedure Regulation provides that the aid will not be recovered if this would be contrary to the general principles of EU law. Paragraph 32 of the Notice on Recovery enshrines that among them principles of "legitimate expectations" and "legal certainty" are invoked frequently in the context of the implementation of the recovery obligation.

Those principles should also be understood within the framework of tax rulings in national laws. A tax ruling ensures more predictable and specific guidance on how national tax provisions will be applied with regard to given undertaking[33]. This role of tax rulings serves to achieve legal certainty. It should also be stated that the adoption of any tax ruling entails institutionalized dialogue between tax authorities and undertakings. The outcome of such dialogue can legitimately create an expectation from the undertakings' perspective. After the tax ruling, undertakings will expect that specific tax law provisions will be applied in a way defined in the ruling itself with regard to them[34]. Although in the case of conflict, EU state aid law provisions will prevail

30. An obvious one could be combining the limitation periods which are not the same under EU state aid law and under national tax laws.

31. Jaros and Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid* (cited in note 7).

32. Bucura Catalina Mihaescu, *Recovery of Unfaithful Aid and the Role of the National Courts*, in *State Aid Law of the European Union* at 389 (Oxford University Press 2016).

33. Van Cleynenbreugel, *Recovering Unlawful Advantages in the Context of EU State Aid Tax Ruling Investigations* at 20 (cited in note 14).

34. See *ibid*.

(because of primacy and effectiveness) over these legal effects of tax rulings under national law. Nevertheless, what is being mentioned in this paragraph should be kept in mind.

In the EU state aid law, principles of legal certainty and legitimate expectations are subject to restrictive interpretation[35]. EC depicted on the Notice on Recovery (para. 33) that generic claims on the alleged infringement of EU general principles cannot be accepted. This is justified in protecting the effectiveness of EU state aid control.

Claims against recovery on these grounds almost never succeed. From this perspective, the cases at hand are extremely insightful since there were several issues that were expected to make successful arguments against recovery on general principles. However, in all of them, the EC did not accept those arguments. The ones, which have been annulled by the GC, do not elaborate more on the general principles but discussions will extend to the GC's Fiat decision.

Both principles will now be discussed in separate chapters, and it will be argued why they should not be applied stringently.

3. *Principle of Legitimate Expectations as a Defense against Recovery*

3.1. *Understanding Legitimate Expectations as a General Principle of EU Law in State Aid Field*

The legitimate expectations principle is a part of the EU constitutional and administrative law[36]. In general, legitimate expectations will exist where it derives from the legal situation that the addressee relied on, that reliance being reasonable and proportionate[37]. However, its application in the EU state aid law is slightly different. Since the recovery is considered the logical consequence of finding an aid

35. Claudia Saavedra Pinto, *The Narrow Meaning of the Legitimate Expectation Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations*, 15(2) European State Aid Law Quarterly 270, 274 (2016).

36. Herwig C.H. Hofmann, Gerard C. Rowe and Alexander Türk, *Administrative Law and Policy of the European Union* at 172 (Oxford University Press 2011).

37. Paul Craig, *EU Administrative Law* at 777 (Oxford University Press 2nd ed. 2012).

measure illegal, it cannot be considered disproportionate to the objective of the TFEU[38].

In EU state aid law, the following criteria should be fulfilled to establish legitimate expectations: (1) precise, unconditional, and consistent assurances by the EU authorities, (2) assurances should be reasonable, and (3) the assurances given should comply with the applicable rules[39]. Among these conditions, especially the first one is problematic.

Notice on Recovery (para. 39) provides any person can enjoy legitimate expectations if they received precise, unconditional, and consistent assurances from the EU institutions. Therefore, it is not derived from the context of this document that these assurances can only be given by the EC itself. Scholars who analyzed the ECJ case law on the matter, go on to correctly emphasize that precise assurances expanded to include reliance on past EC decisions as well as the CJEU judgments which do not even concern beneficiaries or their situations directly[40]. In addition, how assurance is given to the party enjoying legitimate expectations is not relevant in this regard[41]. However, the situation was different in the EC's tax ruling decisions. For example, EC mentioned in its Fiat decision that the expectation must arise from previous EC action in the form of precise assurances for a claim of legitimate expectations to succeed[42]. This position was also upheld by the GC which will be further discussed in this paper.

It is for the recipient undertaking to invoke claims on the existence of exceptional circumstances according to which it had entertained legitimate expectations[43]. (Exceptional circumstances mentioned

38. C-142/87 1990, *Kingdom of Belgium v. Commission of the European Communities* ECLI:EU:C:1990:125, at 66.

39. Bacon, *European Union Law of State Aid* at 38 (cited in note 6).

40. Lovdahl-Gormsen, *European state aid and tax rulings* at 71-72 (cited in note 13).

41. C-537/08 2010, *Kahla Thüringen Porzellan GmbH v. European Commission*, ECLI:EU:C:2010: 769, at 63.

42. Cases T-755/15 and T-759/15 2019, *Luxemburg v. European Commission and Fiat Chrysler Finance Europe v. European Commission* (cited in note 18).

43. Jaros and Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid* at 576 (cited in note 7).

here are the subject of case-by-case analysis)[44]. That is the reason why the EC did not find arguments admissible on the grounds of legitimate expectations both in the Fiat decision and Starbucks decision. Even though it was a member state (Luxembourg) in Fiat[45] and the interested party (the Dutch Association of Tax Advisors) in Starbucks decision[46], the EC continued to analyze the matter and rejected claims.

The legitimate expectations principle has also a connection with the principle of good faith[47]. An important point is that the legitimate expectations principle is not entailing legal rules that shall remain unchanged. In that relevant authorities have a margin of discretion within which they can alter policies[48]. Nevertheless, showing to act in a good faith can potentially protect aid beneficiaries from unforeseeable changes in legal order. The same will not apply where changes were foreseeable. For this reason, the courts assess foreseeability. Meaning that the market participant, who is a prudent and well-informed one, could have foreseen the alterations made by EU institutions[49]. On this matter, more will be elaborated while discussing legal certainty.

3.2. *Diligent Businessman Benchmark versus Fore*See*ability of Illegality of Aid Measure*

As mentioned, using legitimate expectations as a defense against recovery is not easy. Conditions for this defense are established in the case EC v. Germany by the ECJ[50]. This test is called "diligent businessman benchmark" in the doctrine. According to this, aid must have been granted in compliance with the procedure in Article 108 TFEU and a diligent businessman should normally be able to determine

44. European commission, *Notice on the recovery of unlawful and incompatible State aid* at 39 (cited in note 1).

45. Cases T-755/15 and T-759/15 2019, *Luxemburg v. European Commission and Fiat Chrysler Finance Europe v. European Commission* (cited in note 18).

46. C-502/2017, *Starbucks* at para 439 (cited in note 19).

47. C-T-115/94, *Opel Austria GmbH v. Council* (1997) ECLI: EU:T:1997:3 at 93.

48. C-52/81, *Offene Handelsgesellschaft v. Eu*ropean Commission, (1982) ECLI:EU:C:1982:369 at 27.

49. Lovdahl-Gormsen, *European state aid and tax rulings* at 69 (cited in note 13).

50. C-5/89, *European Commission, v. Germany* (1990) ECLI:EU:C:1990:320.

whether that procedure has been followed or not[51]. Exceptional circumstances have to exist for exceptions from this rule (which is a matter of case-by-case approach)[52]. Now this has been a settled case law as the benchmark commonly applied in the practice. And it applies to big multinationals and small & medium size undertakings without prejudice[53]. In other words, diligent undertakings are under "duty"[54] to make sure that aid is granted lawfully before receiving it.

However, the diligent businessman benchmark is being applied very strictly which leaves almost no space for the protection of the expectations stemming from the unlawfully granted aid[55]. According to the Notice on Recovery, if a standstill obligation is breached, MS cannot invoke legitimate expectations against recovery[56]. The same applies to the aid beneficiary as well, unless exceptional circumstances apply[57]. That is how this was applied by the EC in its decision against Apple saying that otherwise would render treaty provisions ineffective[58].

Some argue that the strict application of the diligent businessman benchmark can only be considered accurate when there is no doubt about the aid character of the measure in question[59]. The others make a comparison with the investment treaty law and show the drastic difference that legitimate expectations are one of the most successful claims in that field[60]. The logical conclusion derived from this analysis was that stringent application of the legitimate expectations principle

51. See *id.* at 14-16.

52. See *ibid*.

53. Pinto, *The Narrow Meaning of the Legitimate Expectation Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations* at 274 (cited in note 35).

54. See *ibid*.

55. See *ibid*.

56. European commission, *Notice on the recovery of unlawful and incompatible State aid* at 40 (cited in note 1).

57. See *id.* at 41.

58. European Commission, *Decision (EU) 2017/1283* at 442 (cited in note 21).

59. Jaros and Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid* at 578 (cited in note 7).

60. Pinto, *The Narrow Meaning of the Legitimate Expectation Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations* at 276 (cited in note 35).

leaves limited scope for exceptions since any illegally granted aid is considered to distort competition in EU state aid law[61].

From another author's standpoint, with whom we strongly agree, the EC and the CJEU should consider how easily the alleged aid beneficiary could have identified that aid was being granted in order not to render the legitimate expectations defense against recovery utterly meaningless in cases of illegal aid[62]. It has to be mentioned to this end that novel interpretation of state aid rules constitutes a significant threat to the legitimate expectations of aid beneficiaries. Especially, in some complex transactions state aid elements can be invisible or very difficult to detect[63]. Transfer pricing agreements in three cases which are our discussion points are obviously considered as complex transactions. Therefore, it will now be assessed whether we are dealing with novel and unpredictable interpretations of state aid rules or not.

3.3. *Legitimate Expectations versus EC's Novel and Unpredictable Interpretation of State Aid Rules*

The main purpose of this section is to show that the EC's interpretation of Article 107(1) TFUE in cases at hand is novel and unpredicted, thus, a diligent businessman could not foresee it. For this purpose, it will not be argued whether the EC was right to interpret Article 107(1) in this particular way. It will be argued that it was not right to reject arguments claiming this novelty interpretation contrary to general principles. The main reference point will be the Fiat case since the EC's position there was upheld by the GC.

In the Fiat decision, the EC disregarded claims on legitimate expectations that Luxembourg did not receive assurances from the EC but from the CCG and the OECD's Forum on Harmful Tax Practices[64]. Although the novel interpretation argument was raised on the principle of legal certainty by Luxembourg, the novelty of interpretation

61. See *id.* at 278.

62. Dimitrios, *Tax rulings and State aid: musings on recovery* at 324 (cited in note 25).

63. Jaros, Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid* at 578 (cited in note 7).

64. European Commission, *Decision (EU) 2016/2326* at 358 (cited in note 17).

will first be analyzed in this section and the legal certainty principle itself will be later considered in the final chapter of this work.

The EC did not accept that its interpretation in question should be considered as leading to unpredictability and novelty, by stating:

There were no previous decisions by the EC that caused uncertainty on the fact that tax rulings pose state aid[65].

There is an express reference in the Notice on Direct Business Taxation to the tax rulings and the circumstances according to which they could be considered granting of state aid[66].

ALP has been applied in its past decision-making practice to find alleged measures constituting state aid, and that finding[67] had been approved[68] by the ECJ[69].

The first one will not be argued, however, this paper will strongly disagree on the second and third points. Let us start with the third limb.

It was in *Forum 187* case[70] for the first time that ALP is used for purposes of calculating transfer pricing by the EU. Though neither in the EC's decision nor in the ECJ's judgment there is an explicit mention of ALP in *Forum 187*. Therefore, some authors are rightfully arguing whether *Forum 187* is a clear legal authority for the ALP or not[71]. Being not dependent on this, in *Forum 187*, the cost-plus method is used in a recommended way by the OECD, "implying that reference is to be made to the OECD Model Convention and Guidelines."[72]. Thus, the ALP applied in *Forum 187*, which is implied by the EC in the third limb above, is the OECD ALP. Therefore, according to the EC decision and the ECJ's judgment in *Forum 187*: undertakings were deemed to enjoy legitimate expectations that if the ALP were applied to tax

65. See *id.* at 361.

66. See *ibid.*

67. European Commission, *Decision 2003/757 of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium*, OJ 2003 L 282 at 25.

68. Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 ASBL v. EC,* ECLI:EU:C2006, at 416.

69. See *id.* at 362.

70. European Commission, *Decision 2003/757* (cited in note 67) and Cases C-182/03 and C-217/03 (cited in note 69).

71. Lovdahl-Gormsen, *European State Aid and Tax ruling* at 78 (cited in note 13).

72. See *ibid.*

rulings, it would be done in line with *Forum 187* based on the OECD Guidelines[73].

However, ALP is applied in a different way in discussed tax ruling cases. One author, who sought to establish the nub of the EC's legal argumentation, correctly indicates: the analysis of tax ruling is done under the EU law-derived ALP that is supposedly based on *Forum 187*[74]. That is to say, there is a disparity between the ALP applied by the EC in these tax ruling cases and the one in the OECD Transfer Pricing Guidelines[75]. The EC itself accepts its departure from the OECD ALP and replaces it with its own[76]. This is enough to show that the EC's interpretation of ALP has changed since *Forum 187,* thus interpretation of tax rulings in question as a state aid within Article 107(1) via EU law-derived ALP has to be considered as a novelty[77].

Turning to the second limb, the Notice on Direct Business Taxation[78] was published in 1998. Even though administrative rulings were mentioned as measures that can amount to state aid in this document, the barrage of fiscal state aid investigations in the first decade of the 2000s mainly focused on selective tax schemes and not on the tax rulings of individual companies[79].

In 2014, the EC published a Draft of the Notice on Notion of State Aid[80] ('Draft'). Although the Draft contained a separate section on tax

73. Liza Lovdahl Gormsen and Clement Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax*, 8(7) Journal of European Competition Law & Practice 423, 431 (2017).

74. Kyriazis, *Tax rulings and State Aid* at 325 (cited in note 25).

75. Lovdahl-Gormsen and Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law* at 431 (cited in note 73).

76. European Commission, *Decision (EU) 2016/2326*, para. 228 (cited in note 17).

77. Arguing that ALP derived from Forum 187 non-explicitly will not prove this argument wrong. In either way, the Commission's interpretation of tax ruling as state aid by means of ALP will be novel approach in the absence of previous decision-making practice.

78. European Commission, *Notice on the application of the State aid rules to measures relating to direct business taxation*, C-384/03 OJ 1998.

79. Dimitrios A. Kyriazis, *From Soft Law to Soft Law through Hard Law: The EC's Approach to the State Aid Assessment of Tax Rulings,* 15(3) Eur St Aid LQ 428 2016), at 429.

80. European Commission, *Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union,* C/2016/2946 OJ C 262

settlements and tax rulings, it did not contain a specific statement to the effect that a departure from the ALP can confer a selective advantage[81]. In the Draft, we can just find a mere mention of *Forum 187* in one footnote and ALP is not mentioned at all.

In 2016, the final version of the Notice on Notion of State Aid ('Final Notice') was published by the EC[82]. We already know what happened between 2014 and 2016[83] - investigations took place against tax rulings of MS and Fiat, Starbucks, and Apple cases were decided. Final Notice entailed several brand-new issues than Draft. In Final Notice, extensive analysis of *Forum 187*, presentation of new legal principle - ALP, entire paragraph on the discussion of OECD soft-law instruments[84], and assertion that transfer prices departing from a reliable approximation of a market-based outcome established by tax rulings can lead to state aid, appeared[85]. The EC mainly relied on its Fiat and Starbucks decisions (by using them as footnotes) to support these points and put massive effort into the analysis of *Forum 187* as an established case law on EU law derived ALP[86].

Turning to the reason why tax ruling cases in question are the only reference point of the EC in introducing new legal tools in the Final Notice, a few things should be mentioned. Because there are not any legally binding EU law provisions nor case law establishes that ALP must be applied in all 28 MS[87]. It is not a harmonized legal tool. Even if one were persuaded that *Forum 187* endorsed the ALP, it can only be the OECD ALP[88]. Also, *Forum 187* is different from the tax ruling cases in question since companies were taxed on a completely national basis in *Forum 187*[89].

(2014).

81. Kyriazis, *From Soft Law to Soft Law through Hard Law* at 430 (cited in note 79).

82. European Commission, *Notice on the notion of State aid* (cited in note 80).

83. See paragraph 1.

84. In Draft there is no explicit reference to this extend.

85. Kyriazis, *From Soft Law to Soft Law through Hard Law* at 430-431 (cited in note 79).

86. See *ibid.*

87. Lovdahl-Gormsen and Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law* at 430 (cited in note 73).

88. Lovdahl-Gormsen, *European State Aid and tax ruling* at 78-79 (cited in note 13).

89. See *ibid.*

Even if *Forum 187* would be accepted as an established case law on ALP, the EC's mentioned approach in the early 2000s is drastically different from what happened in 2014 onwards.

Even though *Forum 187* would be considered an established case law on the application of ALP, there is more to consider. It is mentioned that the barrage of the EC's fiscal state aid investigations in the first decade of the 2000s mainly focused on selective tax schemes and not on the tax rulings of individual companies. This barrage has obviously changed in 2014 and onwards as in tax ruling cases in question.

The way the EC interpreted and applied ALP in tax schemes investigation in the former period was manifested as an air of exploration and superficiality[90]. By borrowing the words of L. Lovdahl-Gormsen, in the latter period the EC "embarked on an aggressive application of the (ALP) as if it were an exact science which produces a precise result on which economic advantage can be determined"[91].

These arguments are persuasive enough to establish that the EC's approach has changed, firstly from the beginning of the 2000s to the 2010s, then even from 2014 to 2016. The interpretation of *Forum 187* as establishing EU law derived ALP was not even foreseeable to the EC itself when it published its Draft, 18 months earlier rendering Fiat and Starbucks decisions[92]. Then, how could it be expected or even demanded that the alleged beneficiaries of the illegally granted state aid could have foreseen this interpretation already in 2006 after the Forum 187 case[93]?

3.4 *Concluding Discussions on the Use of Legitimate Expectations Principle as a Defense against Recovery*

Having the novel interpretation of state aid rules and its unpredictability in recent tax rulings cases established, we can stress that the general principles of EU law under consideration are being treated in a stringent way by both the EC and the GC.

90. Lovdahl-Gormsen and Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law* at 431 (cited in note 73).

91. See *ibid.*

92. Kyriazis, *Tax rulings and State aid: musings on recovery* at 323 (cited in note 25).

93. See *ibid.*

Depriving aid beneficiaries of invoking claims on legitimate expectations just because MS breached the standstill clause[94], lessens the whole significance of this defense. Since general principles derive from MS' democratic traditions, the EC decision-making practice and the EU courts' judgments are not fully in accordance with the current legal framework if the functionality of those principles is undermined[95]. For example, when it is translated from French, legitimate expectations means "protection of confidence" *(protection de la confiance légitime)*[96]. Therefore, stringent application of the legitimate expectation principle will leave little or no space for diligent businessmen's confidence. It cannot also be considered functional not letting diligent businessmen rely on their confidence when it was not even possible for them to foresee there was a state aid at stake. Unpredictable novel interpretations of state aid rules, such as in these tax rulings cases, should potentially let diligent businessmen rely on their legitimate expectations.

In the cases at hand, the main problem for this seems to be the assurance issues. Although, the EC says there is not its previous action in the form of precise assurances that tax rulings will not amount to state aid, undertakings assured by the *Forum 187* case suggest that, if the ALP were applied, it would be applied in line with *Forum 187* and it would be the OECD ALP rather than the EC ALP. Also, in some situations, novel interpretations can let legitimate expectations arise even in the absence of assurances. For example, in France Télécom case[97], the EC accepted that novel interpretations of State aid could

94. As we discussed, this is enshrined in the Notice on Recovery. Nonetheless, according to the ECJ, the Commission's soft law including its communication documents are not capable of imposing indented obligations on the MS, therefore are not legally binding. See C-526/14 *Tadej Kotnik and Others v. Državni zbor Republike Slovenije* ECLI:EU:C:2016:570, at 44.

95. Pinto, *The Narrow Meaning of the Legitimate Expectation Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations* at 285 (cited in note 35).

96. Xavier Groussot, *Creation, Development and Impact of the General Principles of Community Law: towards a Jus Commune Europaeum?* at 58 (Lund University Faculty of Law 2005).

97. European Commission, *Decision 2006/621/EC of 2 August 2004 on the State Aid implemented by France for France Télécom*, OJ 2006 L 257.

give rise to legitimate expectations under EU law without the need for an assurance[98].

4. *Principle of Legal Certainty as a Defense against Recovery Order*

4.1. *Understanding the Legal Certainty Principle as a General Principle of EU Law in State Aid Field*

The legal certainty principle entails legal norms must be clear and applied in a foreseeable and consistent manner. This principle contains that the precise content of law has to be known to the subjects to whom it is applied, allowing them to plan their conduct accordingly[99]. The legal certainty principle is also confirmed by the ECJ as requiring "rules must be clear and precise and, on the other, that their application must be foreseeable by those subject to them."[100].

It is also elaborated by the ECJ that the legal certainty principle requires EU law provisions to enable addressees to know the precise extent of the obligations imposed on them[101]. And it is not just addressed to legislative bodies but also administrative structures while adopting administrative acts[102]. It is also asserted by the ECJ with regards to vague rules, legal certainty demands them to be interpreted in favor of the addressee[103].

Some scholars consider legal certainty as a legal tool that exists to prevent the EC from acting in an arbitrary manner[104]. Indeed, it is also mentioned by the EC in Recovery Notice that legal rules are required

98. Lovdahl-Gormsen and Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law* at 429 (cited in note 73).

99. Takis Tridimas, *The General Principles of EU Law* at 242 (Oxford University Press 2006).

100. C-201/*08 Plantanol GmbH & Co. KG v. Hauptzollamt Darmstadt* ECLI:EU-:C:2009:539, at 46.

101. C-345/06 Heinrich ECLI:EU:C:2009:140, para 44.

102. Case T-43/02 Jungbunzlauer AG *v.* European Commission, ECLI:EU-:T:2006:270, para 72.

103. Case 169/80 Administration des Douanes *v.* Gondrand Frères ECLI:EU-:C:1981:171, at 17 et seq.

104. Gormsen, *European state aid and tax rulings* at 65 (cited in note 13).

to be in a predictable manner enabling the interested parties to ascertain their positions in legal situations regulated by the EU law[105].

It has already been mentioned how the purpose of tax rulings is to create legal certainty for individual undertakings which in its turn leads to legitimate expectations. It is also established by the ECJ that legal certainty is even more prominent when the measure in question is able to create financial consequences[106]. Therefore, its role should even be more prominent in advanced pricing agreements. Those had great importance for MS to attract investment and to reassure investors that their rights and property will be protected. Because uncertainty in a complex area like taxation can have detrimental effects on economic activity[107].

Legal certainty is recognized by the Venice Commission among the six essential elements that form the rule of law[108]. In light of Article 2 of TEU, the rule of law is one of the core values that the EU is founded on. The rule of law is legally binding as it is also enshrined in the EU Charter of Fundamental Rights ('EUCFR'). Therefore, it should be respected both by MS and EU institutions, doing otherwise can possibly activate Article 7 TEU.

Rule of law is one of the main issues of contemporary EU law, as some MS (like Poland, Hungary, Czech Republic and etc.) frequently challenge it. In the seminal so-called "Budget Conditionality Cases"[109], there are important insights into the rule of law. Commenting on them, some scholars derive conclusions that the ECJ confirmed rule of law's operational functionality as a founding principle by vesting it with an obligational nature[110].

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105. Recovery Notice para 34.

106. C-94/05 *Emsland-Stärke GmbH v. Landwirtschaftskammer Hannover,* ECLI:EU:C:2006:185.

107. Lovdahl-Gormsen and Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law* at 425 (cited in note 75).

108. European Commission for Democracy through Law (Venice EC), *Report on the Rule of Law*, adopted by the Venice European Commission, at its 86th Plenary Session (Venice March 25-26, 2011), at 41-51.

109. C-156/21, *Hungary v. Parliament and Council* and C-157/21, *Poland v. Parliament and Council*.

110. Xavier Groussot, Anna Zemskova and Katarina Bungerfeldt, *Foundational Principles and the Rule of Law in the European Union: how to adjudicate in a rule of law crisis and why solidarity is essential*, 5(1) Nordic Journal of Eur L. 18 (2022).

What is established is that going against the legal certainty and undermining its constitutional value means doing the same against the rule of law.

4.2. *Legal Certainty and Retroactive Effects of Recovery Orders in the Recent Tax Ruling Cases*

In state aid law, legal certainty is usually used against the temporal effects of a recovery decision. It is invoked by the alleged aid beneficiaries in illegal state aid procedure that recovery order leads to the retroactivity in that there is a new rule qualifying an aid measure as a state aid which leaves the undertaking in an uncertain situation[111].

Luxembourg and Ireland have done the same when they were seeking annulment before the GC. They have also mentioned that especially in cases like theirs where the recovery order can cause serious economic risks and parties were acting in good faith. We will get back to these two points later. However, the GC went on to reject these claims. The GC was just content itself with basically stating that the recovery order does not establish retroactive interpretation since it is the logical consequence of finding an aid measure illegally granted and serving to establish the previous situation used to exist in the market[112].

However, the use of the legal certainty principle cannot be excluded against the retroactivity of the recovery order, especially when EC endorses a novel interpretation of State aid[113]. The same cannot even be the case, just saying that recovery is the logical consequence of finding alleged measures illegal in cases dealing with novel and unpredictable interpretations of state aid as we have already established.

Above all, it is established by the ECJ that legal certainty precludes a rule from being applied retroactively[114]. This makes obvious sense since it is applied both in criminal and administrative laws, inasmuch as the retroactive interpretation of legal norms can have a negative impact on the rights and legal interests of the parties concerned[115]. Under

111. Jaros and Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid* at 31 (cited in note 7).

112. T-755/15, *Fiat* (cited in note 18).

113. Lovdahl-Gormsen, *European state aid and tax rulings* at 69 (cited in note 13).

114. C-98/78, *Racke,* ECR 1979, at 15.

115. Lovdahl-Gormsen, *European state aid and tax rulings* at 69 (cited in note 13).

the legal certainty, the same applies to the benefits too since they can only be withdrawn prospectively.

The ECJ has also recognized that the substantive regulations of EU law should be interpreted as applicable to circumstances that existed before their implementation only if it is unambiguous from their phrasing, purpose, or overall structure that they must be given such effect[116]. It is also indicated that legal certainty requires any factual situation to be assessed according to the existing legal rules at the time when the situation was obtained, thus, the new law will only be valid for the future[117].

By no means, this paper is trying to say that the legal certainty principle should block the future legislative or administrative process of the EU. Nonetheless, it is trying to state that the effects of this norm-creation process must not be retroactive. Especially, in situations like the cases at hand. Therefore, like other aspects of EU law, a novel interpretation and application of State aid should always be forward-looking[118].

One author states that EU institutions have the duty to perform their duties in a predictable manner, thus, their interpretation and application of the law should not be detrimental to undertakings[119]. This paper agrees with this statement and considers that first the EC while adopting recovery order on the basis of novel interpretation, and then the GC while upholding that novel interpretation and applying recovery retroactively, should have applied the Racke test[120]. This test forbids the retrospective application of legal norms, but there may be exceptions where overriding considerations require it and the legitimate expectations of the affected parties are duly recognized[121]. This means that public interest can only retroactively prevail when there is no significant individual interest. Therefore, it has to be stated that the EC should have applied the Racke test before ordering recovery stemming from a novel interpretation contrary to the aid beneficiaries' legal and

116. C-303/13, *European Commission, v. Jorgen Andersen*, EU:C:2015:647 at 50 (2015).

117. C-89/14 *A2A* EU:C:2015:537 2015, at 36-43

118. Lovdahl-Gormsen, *European state aid and tax rulings* at 82 (cited in note 13).

119. See *ibid.*

120. C-98/78, *Racke* at 119 (cited in note 114).

121. See *ibid.* para 20.

economic situation. That is why it should be considered that the legal certainty principle is being stringently applied in the absence of the application of this test.

4.3. *Concluding Assessment of Legal Certainty Principle in Tax Ruling Cases*

After rejecting arguments on retroactive application of recovery, GC also rejected Luxembourg's argument that the EC's decision would have led to serious economic repercussions or caused serious difficulties for it and for other MS. The GC went on to answer this in the following way: recovery of the aid at issue cannot have such negative effects on Luxembourg's economy, since the amount recovered will be allocated to its public finances[122]. This line of reasoning can heavily be argued. One should not think about this in the short term as the GC thought but in a long-term effect on the economy. Taking the Apple scenario as an example, if the EC decision would have been upheld by the GC, that could have irreparably damaged Ireland's reputation as an investment hub for foreign companies, in particular U.S. multinational corporations[123]. That is why, in all three scenarios at hand, MS went on to appeal EC decisions instead of being happy with the money that they could have gained through recovery orders. The GC did not even analyze arguments on retroactivity that parties were acting in good faith, thus, recovery should not be applied.

This paper will now consider that argument. It is true that sometimes governments may grant an illegal tax advantage (maybe for electoral purposes) knowing that they can possibly get it back as an amount recovered with interest[124]. If this is the case, then, legitimate expectations of aid beneficiaries must prevail. As it leaves them in a worse situation while MS gets even enrichment because of interests to be paid. One should ask why would all these MS seek annulment before the GC if they were acting in bad faith? It is obvious that they were not. None of them could have predicted this unforeseen novel approach. Notwithstanding, they were "fighting" for the integrity of

122. See *id* at 415.
123. Hrushko, *Tax in the World of Antitrust Enforcement,* at 352 (cited in note 15).
124. Alexandre, *The Recovery of the Illegal Fiscal State Aids* at 88 (cited in note 26).

their national tax systems. Because the decisions were made by the EC encroach on the fiscal sovereignty of MS. Some even say that the EC attempts to do harmonization through the back door and this is dangerous for the EU[125]. Which is not legally correct either. The tax reform has to be carried through the legislative process by adopting prospectively applied tax laws instead of utilizing state aid rules to bypass this legislative process[126]. That is why, some rightfully point out that the EC tries to achieve its policy objectives in the field of taxation by using its powers under state aid control contrary to the legal certainty principle[127].

Moreover, none of those undertakings acknowledged the risk of the investigations on alleged state aid by the EC in their audited financial statements[128]. Before the EC initiated its investigations, neither internal review nor third-party review and audit conducted by tax and audit professionals revealed any indication that the tax treatment of the affected firms could potentially fall under State aid rules[129]. It should be considered that all those audits and reviews are to follow tax law rules and companies pay a lot of money for them to comply with tax rules. If the EC can anytime change the direction of its assessments and apply them retroactively to ten years back, then, it will be burdensome on undertakings to diligently follow those rules[130]. This can only pave to uncertainty and confusion for the undertakings doing business in the EU, as they no longer can have confidence in the tax rulings adopted by MS that they operate in[131].

As the paper has already established the novelty of the state aid law interpretation in cases at hand, this means the EC imposes the rules after the facts. That is why recovery is inconsistent with the rule of law in these tax ruling cases. This paper is not arguing whether this interpretation was wrong or right as it is mentioned. Nonetheless, it

125. Hrushko, *Tax in the World of Antitrust Enforcement* at 331 (cited in note 15).

126. See *ibid*.

127. Lovdahl-Gormsen, *European state aid and tax rulings* at 83 (cited in note 13).

128. U.S. Department of the Treasury, *White Paper on the European EC's Recent State Aid Investigations of Transfer Pricing Rulings* (US 2016) at 15.

129. See *ibid*.

130. Hrushko, *Tax in the World of Antitrust Enforcement* at 344-346 (cited in note 15).

131. U.S. Department of the Treasury, *White Paper on the European EC's Recent State Aid Investigations of Transfer Pricing Rulings* at 17 (cited in note 129).

tries to state that the EC should have allowed MS and aid beneficiaries a reasonable transitional period to adjust their tax affairs or not to order recovery if it decides to adopt a new interpretation of Article 107 TFEU[132]. And it should have been done in a foreseen manner and not just only towards the selective number of multinational undertakings.

5. *Conclusion*

To culminate, this paper considers that there is a stringent application of the principles of legitimate expectations and legal certainty in analyzed tax ruling cases. Abolishing or leaving no room for aid beneficiaries to invoke these principles against recovery of illegally granted aid, lessens or one might say breaches these general principles of EU law. It has to be mentioned that such an application undermines the whole significance and functionality of the general principles in question leading to detrimental effects on the legal and economic sphere in the EU.

It should have been considered how the alleged aid beneficiaries could have predicted this novel interpretation instead of rendering the legitimate expectations' defense against recovery meaningless. Applying a diligent businessman benchmark in such a restrictive way can only be accurate where there are no doubts regarding the aid character of the measure at issue. When novel and unpredictable interpretations of state aid rules are at stake, exceptions (existence of exceptional circumstances) should not be narrowly interpreted. Underlying factors such as novelty and unpredictability of interpretation, whether parties acting in good faith, the existence of previously given assurances, complexity of the alleged aid measure in question should also be considered before such interpretations.

When it comes to pleading the legal certainty principle against recovery orders, the paper went on to conclude that the application of a novel interpretation of state aid rules should be forward-looking and be done in a foreseen manner. Doing otherwise might breach the legal certainty and the rule of law. Especially in cases where rules are imposed after the facts like in these three cases. When the recovery

132. See *id* at 62.

running well above the multi-million-euro mark is ordered against the selective number of multinational undertakings after novel and unpredictable interpretation of state aid rules, one might rightfully say that recovery serves as a punishment in such a case.

It has to be stated as the final remarks that there is a need for further clarification from CJEU on how to plead these principles against recovery orders. Because the current approach towards the diligent businessman benchmark and retroactive application of novel interpretations is not consistent in cases where possibilities are limited for aid beneficiaries to make sure if an alleged measure is legally granted.

The Right to use Land in China: an Instrument of Economic Development?

Camilla Mantese*

Abstract: This article aims to give an in-depth review of land use rights in China, comparing the similarities and differences between land use rights in China and in the Western World, with an eye specifically on Italy. From a historical perspective, we will try to understand how the entire system evolved to the point in which it is today. We will discuss land leasing as a form for cities and local governments to have a steady source of revenue genuinely within their control and the process of land conversion. We will analyze how the land use system became a sort of zoning arrangement for China. We will see what is the role of the courts in this delicate system, that balances socialist ideals and capitalistic needs, through some decisions on different aspects of the right to use land. We will try, even though it is most surely impossible, to give a complete analysis of the matter through the lenses of the comparative jurist. We will touch on some economic and financial aspects of the land use right.

Keywords: China; Private law; Right to use land; Right of property; Legal comparison

1. *Introduction*

Real rights are always extremely fascinating because they are strictly connected to the economic history of a country, and they tend to be particularly important in developing ones. However, their importance does not diminish during the industrialization process. They are simply reformed in order to be better suited for answering the needs of the changing society.

In this article, the focus will be on the right to use land in China. This agrarian right, always mistreated under Italian law - and Western law in general - is of paramount relevance in China, where the communist ideology, which became the basis for the society and for the economy after the revolution, does not allow individuals - either citizens or non-citizens - to own land.

At first, a chronological thread will be followed: we will start by analyzing the right of property under the imperial epoch up until the time of the revolution, leading to the need to distinguish the right to own property from the right to use land.

We will then focus on the essential characteristics of the right to use land in China, by looking at important jurisprudence precedents and at the different laws that discipline the matter, with an eye specifically on the newly approved Chinese Civil Code.

In addition, we will analyze more in depth some economic issues, such as how the local administrations sell the right to own land to private parties in order to finance public services and how they have managed to create new municipally owned state land through the process of land conversion.

2. *History of the Land Policy System*

2.1. *The Land Policy System in the Imperial Age*

During the imperial age, the law regarding property was quite primitive. Historically, Chinese emperors had a much stronger position in society than their Western sovereign counterparts. There were no strong vassals in Imperial China who could limit the possibilities of power of the monarch, thus creating a balance of power[1]. Because of this, the Chinese emperors could confiscate and redistribute land with much less difficulty than Western governments could. The government vested the ultimate ownership of land and redistributed large amounts of land with the change of ruling dynasties[2]. Landlords only had economic power and no judicial power over their land[3]. As a consequence of this, notions of property rights were weak. This does not mean that property law did not exist in Imperial China[4], but rather that the law was not a strong protector of property rights.

The establishment of the People's Republic of China brought many fundamental changes to the country, among which some of the most important were the changes in land ownership.

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1. See Alsen Jonas, *An Introduction to Chinese Property Law,* 20(1) Maryland Journal of International Law 5 (1996).

2. See *id.,* at 6.

3. See Liu Wei and Lui Shouying, *Evolution of the Land Between 1921 and 2021* english translation of 经济日报 at 2 (Economic Daily 2021).

4. China had a long history of private property rights in land, unlike many developing countries that have maintained forms of customary land tenure that tend to hinder development. Some colonial powers, as in Latin America and Australia, have actually managed to successfully displace the indigenous communal land system with a private property system in the form of freehold tenure. Many others allowed the customary system to operate in rural areas in order to pacify the indigenous people while implanting private property in the form of freehold or leasehold in the urban cores. To pave the way for economic development, many colonial governments took the opportunity offered by the constitutional change of forthcoming independence to carry out land reforms to replace customary land tenure, which was believed to hinder incentive. For a detailed overview see Lawrence Wai Chung Lai, *Land use rights reform in China: Some theoretical issues*, 12(4) Land Use Policy (1995).

2.2. *The Land Policy System before 1949*

Before 1949, private land ownership existed, and land transactions were quite frequent[5]. The establishment of private property rights in China even pre-dated the emergence of the English freehold system, even though it was quite rudimentary.

In the 1930s, a Land Reform in the old revolutionary base areas was carried out with the least possible social disruption. This Land Reform allowed middle and rich peasants to keep part of their land holdings, whereas expropriated landlords were allocated sufficient land to make a living. Yet, directly after the Second World War, Land Reform took a more radical turn.

2.3. *The Land Policy System after 1949*

In 1949, during the period of national economic recovery, the Common Program of the Chinese People's Political Consultative Conference and the Land Reform Law of the People's Republic of China of 1950 called for the abolition of land ownership by the exploitative landlord class and the implementation of peasants' land ownership to liberate rural productive forces, develop agricultural production, and create a path for PRC's industrialization[6].

For this reason, a land reform was launched. It aimed to reduce social inequality by confiscating land from the rich and then redistributing it to the poor. In this way, the farmers' dream of "land to the tillers" was achieved[7].

By 1958, all urban land was state-owned whereas farmland was collectively owned[8] with a few exceptions. Farmers organized themselves into producers' cooperatives - later the people's communes

5. See Chengri Ding, *Land policy reform in China: assessment and prospects*, 20(2) Land Use Policy 109, 110 (2003).

6. See Wei and Shouying, *Evolution of the Land Between 1921 and 2021* at 5 (cited in note 2).

7. See Liu and Yang, *China's land use policy under change* at 1 (cited in note 3).

8. China's Rural Land Contract Law and Property Law defined collective ownership as "land collectively" owned by peasants in rural areas that is fundamental to the basic rural operation system' and 'the collective owner of collective land, in accordance with the law, is entitled to possess, utilize, dispose and obtain profits from the collective land'. The "peasant collective", as the subject of land ownership, had three

- and pooled their land and tilled together. This type of land ownership structure remains to the present day.

The state would allocate the land to state-owned enterprises free of charge for an indefinite period. The constitution banned land transactions. The land was not considered a commodity and had no value.

State-owned enterprises were established using state revenue, and they were required to return their economic profits to the state. The state and local governments decided what and how much these enterprises would have to produce. The state-owned enterprises did not have their own identities as independent economic bodies. This was one of the main reasons for economic deficiency[9].

Through land acquisition[10], collectively owned land in rural areas was converted to state-owned land. The state did not pay market prices to acquire land from peasants. Instead, it provided a compensation package that included job opportunities for farmers, housing compensation, and compensation for the loss of crops. In this package, the State also granted urban residency licenses. Although peasants were not paid market prices, they were willing to give their land to the state. This was because, by doing so, they would be granted a city residency license making them eligible for social welfare such as medical insurance, retirement plans, access to high-quality schools, and subsidized agricultural goods that were not previously available to peasants[11].

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levels: the village peasant collective, the intravillage peasant collective and the township peasant collective.

9. Under the planned economy, land value and land income were hidden in the overall profits of the state-owned enterprises. When these state-owned enterprises were allowed to keep a percentage of their profits, they would virtually keep land rents. Because land rents varied across space due to locational and/or access advantages, this implied that some enterprises might have larger profits than others. See Gregory M. Stein, *Acquiring land use rights in today's China: a snapshot from on the ground,* 24(1) UCLA Pacific Basin Law Journal (2006).

10. Land acquisition is a process through which the central government can acquire private (or in this case, collectively owned) land by paying a price that is normally lower than the market price.

11. Urban residents had a higher standard of living than rural residents and the residents of large cities had an even higher standard of living than small city residents. Rural-urban migration was tightly controlled by the Chinese government through the Hukou system, which greatly limited labor mobility. Thus, when farmers were granted urban residency they were happy to give their land to the government and

The state and local governments were responsible for the administration of land allocation[12].

The fact that the state owned the land made it easy for the governments to acquire land to accommodate the land needed for economic development. The governments often substituted land for capital to overcome the poor cash flow. Consequently, many projects occupied more land than they needed.

The enterprises were either state or collectively owned. Because of this, the land-use rights granted to them were not separable from land ownership. Transactions between them were prohibited by the law[13].

2.4. *The Land Policy Reform after 1978*

This centrally planned, state-run economy was not leading to economic prosperity. Thus, a reform was needed. In 1978, the CPC Central Committee brought a new chapter of rural reforms. The administrative system of people's communes in the countryside was abolished[14]. Rural land was distributed among farmers according to their family size, and each family bore the sole responsibility for tilling the land. The reform was based on the principle of "paying enough to the state, leaving enough to the collective, and the rest is their own"[15]. Peasants were granted the right to use contracted land[16].

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even considered themselves fortunate when they were chosen to do so. See Ding, *Land policy reform in China: assessment and prospects* (cited in note 5).

12. There were plans that laid out specific goals for economic growth measured by industrial outputs. After examining existing capacities, the governments decided where capacity should expand and how much was needed to achieve economic development goals. Since the land did not have much value and did not affect the equation of total project costs, land input was the last factor to be considered. See Ding, *Land policy reform in China: assessment and prospects* (cited in note 5).

13. The law also provided that state or collectively owned enterprises had to return the land if unused. In reality, there was no incentive for them to do so, nor were they penalized for not returning the land to the state. Because of all of these reasons, the land was almost never returned. As a consequence, land transactions and land markets did not exist in China for nearly half a decade.

14. See Jonas, *An Introduction to Chinese Property Law* at 21 (cited in note 1).

15. See Liu Wei and Lui Shouying, *Evolution of the Land Between 1921 and 2021* at 7 (cited in note 2).

16. In the State Coucil of 2004 it was said that "land contract rights are a special type of property usage right. The legislation on the matter clearly states that

The new system has three main advantages: first of all, the separation of land ownership and the right to use it makes the farmers independent, thus arousing enthusiasm and promoting farm production[17]; secondly, the principle of "more pay for more work" can finally be realized; thirdly, this new system helps to promote the transformation from a self-sufficient natural economy to a commodity economy[18]. This land policy reform ended China's decades-long political isolation from the West. After the reform, direct foreign investment and the number of joint ventures increased exponentially. The demand for land increased. This challenged the land-use tenure system. The old land allocation system also conflicted with the ultimate goal of improving economic efficiency.

In the early 1980s, China established special economic development zones (SEDZs) along its east-coast areas to attract foreign investment. In these zones, businesses and enterprises enjoy special privileges including tax exemption and the "land-use rights system"[19].

The land use rights system, similar to the land leasehold system in Hong Kong, was first developed to accommodate the needs of foreign direct investments, as it allowed foreign investors to access land by leasing them land for a certain period. Investors paid up-front land-use rights fees and rents[20]. This early reform in the land tenure system

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contracting farmers are entitled, in accordance with the relevant law, to use and obtain profits from the contracted land, to transfer the land contract rights, and to organize the production, operation, and disposal of products. If contracted land is expropriated by law, the contractor has the right to receive appropriate compensation. Within the statutory period of the contract, no organization or individual shall interfere in farmers' production and management autonomy, the contracted land shall not be unlawfully adjusted or claimed, the wishes of farmers shall not be contravened by forcing the transferral of the contracted land and farmers shall be protected from illegal encroachment on contracted land".

17. See Wei and Shouying, *Evolution of the Land Between 1921 and 2021* at 7 (cited in note 2).

18. This is a consequence of the fact that the improvement of farmers' productivity has reduced the number of laborers needed in agriculture. Thus these laborers were able to move into the industry sector and the service sector, consequently stimulating the development of small enterprises and of the tertiary sector in rural areas.

19. See Jonas, *An Introduction to Chinese Property Law* at 45 (cited in note 1).

20. Neither the Chinese nor the foreign investors were pleased with the system which required the foreign investors to pay an annual rent, because the fee was specified by law, without any regard to changes in the conditions of the real estate market.

marked a new era of land policy in modern Chinese history. For the first time, land-use rights and land ownership were separable.

The most significant changes to land policy occurred in the late 1980s. The bureau of land administration was established in 1986 and was responsible for land allocation and acquisition, monitoring of land development, comprehensive land-use plans, and implementation of land laws.

In a clear attempt to develop the land market in China, the Land Administration Law was passed in 1986. It allowed private organizations and individuals to access state-owned land. The Law had been criticized as unconstitutional because the 1982 constitution had banned any transferring of land-use rights. Thus, the Constitution was amended in 1988 to resolve the constitutional challenges.

The separation between land-use rights, land ownership, and the state's remaining ownership of land ensured the avoidance of political turmoil and helped to promote land market development. The socialist principles were respected: it was not the property of the land that could be sold to individuals and therefore privatized, but the rights to use the (state-owned) land.

The State Council promulgated "The Provisional Regulation on the Granting and Transferring of the Land Rights over State-Owned Land in Cities and Towns" in 1991. As a consequence, land users were allowed to transfer, rent, and mortgage land-use rights. Since then, land-use rights have spread throughout the country.

According to the 1991 regulations of the State Council, there are two kinds of land transactions. One is the sale of land-use rights and the other is the transfer of land-use rights. The former defines the "first" level land market, where a local government sells land-use rights to buyers for a fixed period. The transfer of land-use rights defines the "second" level of the land market.

Land use rights in the first-level land market are now mainly sold through an auction. The main reason for this decision is that private negotiations have been fertile ground for corruption in the past.

The state intends to control land markets through its monopolization of the first level of land markets (or its monopolization of land supply).

The introduction of the land-use rights system in China has had a remarkably positive impact on land development, government

finance, real estate and housing development, infrastructure provision, and urban growth. Land markets began to emerge and land prices started to rationalize land-use allocation and land use.

The land-use rights system helps to improve land-use efficiency. Before the land-use system reforms, 3-5 percent of industrial land in cities was unused and 40 percent was used inefficiently[21]. Since the adoption of a series of land policy reforms, collective enterprises have returned unused land to the governments and there has been a decline in the amount of vacant urban land.

In 1991, the central government extended the land-use rights system, which had previously been granted only to SEDZs, to virtually the entire country. This resulted in a diversification of investments geographically and partly explained the drop in land prices in 1993. The adoption of the land-use rights system has enabled local governments to launch large-scale infrastructure provisions, particularly in cities along coastal areas.

There are, unfortunately, numerous problems arising from land reforms. These include the "over-supply of land and loss of control of land markets, widespread hidden or invisible land markets, over-designated special land development districts that have caused repeated construction, bribery and corruption, increasing social conflicts, and the violation of land laws and land-use plans"[22].

Although the state prohibits the entry of land allocated free of charge into land markets, many units still illegally participate in land markets by renting and transferring land-use rights. It is very profitable for people to bribe government officials to obtain land-use rights at low prices and then to resell these rights to developers at high prices. Corruption continues to be a serious issue.

Many social conflicts can emerge with land reforms. Two conflicts are particularly relevant in the case of China: one is the conflict between urban governments and peasants and the other is the conflict among peasants. The conflict between urban governments and peasants happens mainly in two cases. In the first case, it is related to the fact that granting an urban residency is no longer appealing to

21. See Ding, *Land policy reform in China: assessment and prospects* at 109 (cited in note 5).

22. See *ibid.*

peasants[23]. Moving and living in a city is less difficult now than before. But finding a decent job has become increasingly more difficult. In the second case, conflict is associated with the compensation packages farmers receive for their land-use rights. These compensation packages do not match the kind of profits that farmers can make if they develop the land themselves. Because of this, farmers reluctantly sell their land-use rights to the governments and social conflict arises when the governments expropriate their land to acquire it.

The latter type of social injustice arises when the law prohibits land development on quality farmland. Farmers would quickly realize that if they were to develop the land themselves, they might generate profits 200-300 times higher than the net profits they receive from farming. Without income transfers and/or a spatially differentiated tax rate system, farmers in quality farmlands will be economically disadvantaged, compared to farmers whose land is not restricted for land development.

3. *The Right of Property*

In order to first understand what land use rights in China are, we have to define the right of property. Indeed, we cannot talk about land use rights without talking about property and the changes in property law policies.

It is known that "China is a communist country with a "socialist" market economy"[24]. In Marx's theory, private property regarding the means of production is banned, and for this reason it should be State property. After the communist revolution of 1949, all private property was abolished, and all the land was state-owned. The 1982 Constitution expressly forbids private property of land. It was only with the

23. With the deepening of socio-economic reforms, social welfare programs such as medical insurance, pension, and retirement homes in cities that used to be accessible primarily to urban residents have now been restructured and are now available to all people, regardless of where they live. Unlike before, living in the city does not necessarily mean a better life. Thus, urban residency is no longer desired by peasants. See Ding, *Land policy reform in China: assessment and prospects* at 109-120 (cited in note 5).

24. See Jonas, *An Introduction to Chinese Property Law* at 3 (cited in note 1).

1988 constitutional reform, that amended the fourth paragraph of article 10 of the Constitution[25] into "no organization or individual may appropriate, buy, sell, or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law" that the right to own land was finally separated from the right to use the land[26]. This helped tremendously the Chinese economic system, especially regarding government finance, real estate and housing development, infrastructure provision, and urban growth.

The right of property can be divided into personal property and real property. China's statutory law divides the personal property[27] into state property, collective property, and individual or private entity property[28]. Many Chinese scholars criticize this doctrinal division, thinking that it is anachronistic[29].

The public ownership is divided between the state and the collectives, and this property is sacred and inviolable[30]. The state-owned sector, or the part of the public sector owned by the people as a whole, is the leading force in the national economy. Heavy industry and so-called "strategic industries," such as weaponry, telecommunications, and mass media are reserved areas of the state. The private sector is allowed to act in certain fields of the light industry and the service sector but is only to be seen as a complement to the state-owned sector[31]. Articles 9[32] and 10[33] of the Constitution number which goods are owned by the state and which are owned by the collectives.

25. Art. 10, Constitution of the People's Republic of China.

26. See Yhenhuan Yuan, *Land Use Rights in China*, 3 Cornell Real Estate Journal 73 (2004).

27. Personal property is defined as all movable property, except for property that has become a part of real property, such as a door or a fence.

28. See Chapter V, Chinese Civil Code.

29. See Fei Anling, *I regimi proprietari in Cina: la nuova legge sui diritti reali*, 3 Riviste Web 641 (Il Mulino 2007).

30. See art. 12, Constitution of the People's Republic of China.

31. See Jonas, *An Introduction to Chinese Property Law* at 29 (cited in note 1).

32. See art. 9, Constitution of the People's Republic of China.

33. See art 10, Constitution of the People's Republic of China.

Collective ownership has its legal basis in Article 8 of the Constitution[34]. Regulation on the matter is lacking, and this tends to be a problem for collective enterprises, as their legal status is uncertain.

As for private entity property, it played a role of little importance in pre-reform China. All land and means of production were owned by the State or the collectives.

Real property rights in China can be divided into three groups: ownership rights, usufructuary rights, and security rights.

Ownership rights are protected under article 266[35] of the civil code which gives the owner the right to possess, utilize, dispose of, and obtain profits from the real property.

The owner of a usufructuary right has the right to possess, utilize and obtain profits from the real properties owned by others. There are several types of usufructuary rights, which include the right to land contractual management, the right to use construction land, and the right to use residential housing land and easements. In this essay, we will focus on the right to use construction land[36] and on the right to use residential housing land[37].

4. *The Right to use Land*

Private ownership of land is not possible in China. When this socialist principle hindered too much the economic and social growth of the nation, a constitutional reform was adopted in order to distinguish between land use rights and land ownership. Because of this,

34. See art. 8, Constitution of the People's Republic of China.

35. See art. 266, Chinese Civil Code.

36. The right to use construction land is only with regard to State-owned land, and the owner of the right is able to build buildings and their accessory facilities. This is in addition to being able to possess, utilize and obtain profits from the land This right may be established by means of assignment or transfer, but transfer is limited. The ownership of the buildings will change together with the land. As a protection of the right, the term of the right shall be automatically renewed upon expiration. If it has to be taken back, compensation shall be given.

37. The owner of the right to use residential housing land can possess and utilize such land as collectively owned, and can build residential houses and their accessory facilities. The Law of Land Administration and other regulations will apply to the attainment, exercise and assignment of the right to the use of residential land.

land use rights could be subject to a process of privatization, which improved economic growth[38].

4.1. *Legislation on Land Use*

The earliest comprehensive piece of legislation on land use is the Land Administration Law of 1987. This law was revised, and the new formulation came into effect on January 1, 2020[39]. It requires government bodies at all levels to formulate land use plans so that cultivated land is not converted into other uses without proper approval and justification. They are required to follow the guiding principles of the central government and to use the land rationally and economically.

Land administration authorities of local governments are in charge of land administration within their regions. Together with other relevant departments, they must prepare statistics so that the central government can supervise the implementation of the State policy.

To regulate real estate markets, there are currently two pieces of legislation in China: the State Council Regulations and the Urban Real Estate Law, both adopted in 1994. The most important aspect of any real estate transaction in China is obtaining land use rights, without which, the aboveground structures will be of very little value. There are two ways to secure land use rights: by grants and by allocation.

The main difference between the two methods is the intended use of the land. Land use rights may be allocated for different uses, such as for state establishments or military purposes; urban infrastructure or

38. See Zhenhuan Yuan, *Land Use Rights in China* at 73 (cited in note 26).

39. See Art. 45 and 63, Land Administration Law of the People's Republic of China (December 29, 1987). The revised Land Law allows "collective land for for-profit construction" in a rural area to be transferred to others or leased out by landowners. These transactions must be approved by a villagers' committee or village meeting. The previous Land Administration Law prohibited such rural construction land from entering the market. Meanwhile, after obtaining the "land-use right" for such land as provided for under Chinese law, the user can further transfer the right. (Art. 63.) Conversion into state-owned land by the government, which was required by the previous Law as the prerequisite for the rural construction land to enter the market, is no longer required under the new Law (Art. 45). The revised Law specifies that the rural land may be expropriated for the purposes of military or diplomacy; infrastructure construction organized by the government; the government's public welfare undertakings; and the alleviation of poverty and relocation of the poor.

public facilities; projects related to energy, communications or water conservancy, and others selectively supported by the State or other purposes as provided by laws, administrative regulations, and rules.

Under the Urban Real Estate Law, land use rights can be allocated by local governments only for State-supported projects and public works. The ones obtained by way of allocation are not restricted to a specific term, unlike those obtained through grants. An important restriction on the land use rights obtained through allocation is that such land use rights cannot be transferred by the owners without a particular procedure, which involves the obtaining of an appropriate approval. In return for grants of land use rights, users must pay the State a granting fee[40]. In addition, to obtain land use rights by grants, land users must follow urban development plans and all the local government approval procedures. The Urban Real Estate Law specifies that land use rights may be granted through auction, bidding, or agreement between the parties concerned. These methods tend to be preferred over the method of agreement between parties mainly because there were concerns linked to corruption. The government is concerned that the land use rights fee may not be correctly assessed if the matter is left to private parties to determine. Therefore, the Urban Real Estate Law sets a minimum land use rights fee[41]. After the approval process, the land user and the land administration department of the local government must enter into a contract in writing[42]. Such a contract gives both parties the right to compensation in case of a breach[43]. Like any other legal document, a contract for granting land use rights may be modified upon the mutual agreement of the parties involved.

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40. See Urban Real Estate Administration Law of the People's Republic of China (30 August 2007). If the land involved belongs to Collectives, the land must be first requisitioned by the State and converted into State-owned land before rights can be granted to private land users.

41. See *ibid*. It is stipulated that where land use grant fees are determined through agreement between private parties, the fee must not be lower than the prescribed lowest price in State provisions.

42. See art. 348, Chinese Civil Code.

43. For instance, after the local government and the land user conclude a contract and the land user has paid the fee, if the local government fails to provide the land under the contract, the land user is entitled to the withdrawal from the contract, the reimbursement of fee, and compensation.

The administrative departments of big cities, such as Beijing, Shanghai, Shenzhen, and Guangzhou, have designed standard contract forms for the transfer of land use rights or real estate. Nevertheless, these forms are sometimes criticized as very rudimentary and incapable of protecting the interest of purchasers.

Local governments are prohibited from usurping land use rights before the contract expires[44].

The Urban Real Estate Law requires that a contract for granting land use rights specify the maximum number of years for use of the land, which is prescribed by the State Council according to the intended use[45].

Only land use rights obtained by grants are freely transferable in the secondary market, whereas there is a multitude of restrictions applied when transferring land use rights obtained by allocation.

The authority to approve the transfer of land use rights gives some government bodies immense power. Government bodies deal with most of the approvals at the county level, even though they can only grant approvals for land up to a certain size[46].

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44. There are some exceptional circumstances in which this is permissible. Local government bodies have the authority to withdraw the grant of land use rights if: (i) land use unit is dissolved or has moved away; (ii) land is vacant for 2 consecutive years even after approval; (iii) land is used in a way inconsistent with the approved scope; (iv) public roads, railways, airports, mining areas, etc., have been abandoned upon due verification and approval. In case of special circumstances relating to public good, the State may redeem the land and pay appropriate compensation to the land user. For comprehensive analysis see Yuan, *Land Use Rights in China* (cited in note 26).

45. See art. 12, Interim Regulations of the PRC concerning the Assignment and Transfer of the Rights to the Use of State-owned Land in the Urban Areas, n. 55 (May 19, 1990).

46. See Yuan, *Land Use Rights in China* at 73-77 (cited in note 26). To get around this limitation, applicants started subdividing large land use plans into a number of sub-plans. They treated each sub-plan as a separate plan for approval, so that the local government would have the authority to approve. The central government was concerned with this devious practice. On 22nd July 1989, the State Council issued a notice on the authority to approve land use rights. This notice prohibited land users from subdividing their land use plans and emphasized that government bodies should follow the spirit of the Land Administration Law. This limited corruption and reigned in local government practices.

4.2. *Land Use Transactions*

Individuals can obtain the right to use land from the state. The land-use right is a "usufructuary right" that allows the right-holder, the usufructuary, to legally possess, use, and benefit from property owned by another[47].

The 1988 amendment to the Constitution is a significant step in the process that brought to the possibility for people to own the right to use land. Until 1988, the land use system had not been established on a leasehold basis. In the past, most Chinese enterprises were assigned free property for use. Because of this, there is currently a dual land use system. On the one hand, new private investors have to pay for the use of the required site. On the other, old owners who are already in possession of the rights to use still control the land obtained free from the State[48]. Both owners may transfer their rights to other parties under certain conditions.

In urban areas, the state grants land-use rights to land users. For doing so, land users pay the state granting fees for a certain number of years. Under the current rules prescribed by the State Council, land may be used for residential purposes for up to seventy years; for industrial purposes for fifty years; for education, science, culture, public health, and physical education purposes for fifty years; and for commercial, tourist, and recreational purposes for forty years[49].

According to the 2007 Property Rights Law[50], when the term for the right to use the land for residential purposes expires, it will be automatically renewed. The law is not clear, however, in stating whether

47. See art. 324, Chinese Civil Code.

48. The State is entitled to claim part of the profits from the owners of the land use rights that have been allocated for free. Despite this, the lack of binding legal provisions that would force the State to make these claims has exempted the owners from having to give part of the profits to the State.

49. See art. 12, Interim Regulations of the PRC (cited in note 45).

50. See Property Law of the People's Republic of China, no. 62 (March 16, 2007). The provisions of the Property Rights Law were inglobated into the new civil code. This did not change the matter in a significant way; in particular, it remains impossible for (private) organizations and individuals to acquire land as property: in this way companies and investors are still forced to acquire land use rights for their production facilities, etc.

the state would charge another granting fee at the time of renewal or how the fee would be determined.

Land-use rights may also be allocated for government purposes or military use, and urban infrastructure or public utilities use. If this is the case, the land users pay no fee, only compensation or resettlement expenses[51].

Individuals can privately own real estate, including residential houses and apartments, although not the land on which the houses and apartments are situated. When an individual buys a house, he will acquire a right of property regarding the house and a right to use the land regarding the site on which the house rests. Land users may transfer their rights to others through sale, exchange, or gift[52]. Additionally, the real estate property may be transferred, mortgaged, or leased.

When real estate is transferred, land-use rights and home ownership are transferred simultaneously[53]. Restrictions on the sale of real property are established by law[54]. There are particular situations under which the transfer of real property is prohibited, including when the granted land-use rights were obtained by means that fail to meet the conditions of a proper grant or the property has not been properly registered, and certificates of ownership have not been obtained[55].

In the transferring of real estate, including the land-use rights and the homeownership, the new owner obtains the land-use rights only for the period equivalent to the original assigned term minus the number of years the original owner has used the land[56].

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51. See Laney Zhang, *China: Real Property Law* at 3 (The Law Library of Congress Global Legal Research Center 2014).

52. See art. 19, Interim Regulations of the PRC (cited in note 45).

53. See Laney, *China: Real Property Law* at 4 (cited in note 51).

54. For example, if the transfer of the land-use rights is priced substantially lower than the market price, the government has the preemptive right to purchase the rights.

55. See Laney, *China: Real Property Law* at 4 (cited in note 51).

56. The land user who has acquired the right to the use of the land by means of the transfer thereof shall have a term of use which is the remainder of the term specified in the contract for assigning the right to the use of the land minus the number of the years in which the original land user has used the land. See Art. 22, Interim Regulations of the PRC (cited in note 45)..

4.3. *The Registration Process*

China has adopted a system of registering both land use rights as well as ownership of property. The State Land Administration Bureau is the regulatory authority responsible for the overall administration of the State's land: all the land has to be registered and recorded by it. In turn, the Bureau issues a land registration certificate for entitlement of any specific use. No rights can be acquired from the primary market or further traded on the secondary market unless the site has been granted such a certificate. To obtain these rights, land users need to apply to the Bureau for approval, making the Bureau play the most significant role in regulating land use activity in both the primary and secondary market.

5. *Local Governments as Land Entrepreneurs*

The Government has benefited substantially from these land policy reforms. In regions without strong industrial bases, revenue from the sale of land-use rights has become an important mean to support municipal governments, allowing them to fund infrastructure and provide public services.

Land leasing has been a key element of China's fiscal decentralization. In China, the central government retains all tax policy authority over local governments; municipalities cannot change tax rates, nor can they introduce new taxes of their design or eliminate dysfunctional local taxes. Land leasing was an attempt by municipalities to gain control over a revenue source genuinely within their control.

Local governments have recognized the possibility of financing infrastructure investment through asset sales. As a general rule, however, asset sales of this kind have been viewed as a temporary financing expedient, made possible by the government's decision to exit certain activities like the provision of public housing or the operation of economic enterprises that compete with the private sector.

Fiscal experts have warned that cities are at risk of becoming dependent upon asset sales as a significant source of capital financing. The sale of municipally owned land may be a partial exception because it can sustain infrastructure finance for a longer period. In countries

where all urban land is owned by the public sector, "land is by far the most valuable asset on the municipal balance sheet"[57].

5.1. *Land Leasing*

The actual process for the local government's sale of a land use right, like so many other procedures in Chinese law, derives from a combination of written law and actual practice[58].

Originally, municipalities transferred land rights to developers primarily through private negotiation. In the mid-1990s, a review by the Ministry of Land and Resources found that more than 95 percent of all transfers had taken this form. The problem is that private negotiations with developers provide a fertile ground for corruption, with a consequent revenue loss to the government. In 2002 the central authorities promulgated a new circular, instructing municipalities to conduct all land leasing through public bidding at auction.

The procedure is now an auction-based one: the local government will initiate the sale process by deciding on the requirements and specifications for a tract, it will ask the Department of Land Administration, which will establish a minimum price for the land use right, to evaluate the property's value[59]. And, finally, will publicize these requirements and specifications making the relevant documents available to prospective bidders. Bidders then will submit sealed bids. Each bid from a developer is solely a price bid, as the local government already has established all the specifications in advance.

57. See George E. Peterson, *Land Leasing and Land Sale as an Infrastructure-Financing Option*, World Bank Policy Research Working Paper n. 4043 at 2 (2006).

58. See Stein, *Acquiring Land Use Rights In Today's China* (cited in note 9).

59. The calculation of "minimum price" that the Department of Land Administration undertakes can be a complex one. The floor price should reflect some base value for the land use right itself. But if the government plans to undertake the additional costly tasks of relocating current residents and demolishing existing structures, it will pass the costs of these activities along to the bidders in the form of a higher minimum price. In some cases, the government also factors in a third component, reflecting certain infrastructure costs that the redevelopment of the land will necessitate. The price of a land use right is a function of the total buildable area that can be constructed on the land. If that number changes as the building evolves, the price is adjusted accordingly. See Stein, *Acquiring Land Use Rights In Today's China* (cited in note 9).

The local government does not have to choose the highest bidder but it will consider the reputation, experience, and skill of each of them, to ensure that the winning one can complete the project successfully[60].

Land leasing in China involves the up-front sale of long-term occupancy and development rights. The practice was introduced on an experimental basis in 1987 in Shenzhen and other coastal cities, as part of the de facto decentralization of China's fiscal system. Up to that time, public authorities allocated land administratively and land use was free.

From the beginning, land leasing was tied to infrastructure investment. This practice provided a potentially large source of income for the municipalities, whose revenues were to be invested primarily in infrastructure systems, further enhancing cities' competitive position for economic growth.

In 1988, China's constitution was amended to permit land leasing while retaining public ownership of land. In 1990, the State Council formally affirmed land leasing as public policy. By 1992, Shanghai and Beijing had adopted land leasing as a local practice, and the practice began to spread. Likewise with many of China's economic development and fiscal reforms, the practice of land leasing moved from coastal experimental cities to Shanghai and the capital, and then to the rest of the country.

Land that is "sold" and approved for development can be reclaimed by the government if it is not developed within a specified period.

The importance of land-leasing revenues to cities' fiscal capacity and infrastructure investment has turned municipal governments into some sort of land-market entrepreneurs. Municipalities try to acquire as much land as possible, as cheaply as possible, then either sell it at market rates, use it as collateral for infrastructure loans, or provide it at below-market rates to strategic -mostly foreign- investors for industrial development[61].

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60. Prospective bidders with good personal relationships with high profile members of the local government are widely perceived to be enjoying an unfair advantage. In some extreme cases even the specifications have seemed to have been drafted with a particular prospective bidder in mind.

61. Municipalities acquire land in various ways. They can move municipal state-owned enterprises from central locations to the urban outskirts, where the

The possibility of profiting from the sale of land use rights creates enormous tensions for local governments. Municipal planning bodies may have devised long-term land use programs that restrict certain types of developments in specified areas. At the same time, these municipal governments must glimpse enormous revenue-raising possibilities from the sale of prime, restricted land to a developer who wishes to use it in a way that might not comport with the overall land use plan.

5.2. *Land Conversion*

Municipally owned land is not a static asset but can be created in different ways, such as by expanding the urban area into the rural-urban fringe; in this case, the process is called "land conversion". In particular, the law that regulates land conversion is the Land Administration Law, promulgated in 1998[62]. The law stipulated that "the right to use of land collectively owned by peasants shall not be transferred, retransferred or leased for non-agricultural construction", and it retained the provision that "rural collective economic organizations may jointly organize enterprises with other units and individuals in the form of equity participation of land use rights and joint operations"[63].

China has made the largest-scale commitment to converting land assets into infrastructure. Many cities in China have financed half or more of their very high urban infrastructure investment levels directly from land leasing.

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companies have better transportation access but land is cheaper, then sell the vacated land to developers. This re-location is part of a broad rationalization of land use created by land pricing. They can expand the urbanized area by acquiring land from rural communes and converting it to urban use, through the so-called "land conversion". Perhaps the most novel form of freeing up land for resale involves moving city hall and all of the municipality's administrative buildings to a new location, outside the urban center, then auctioning off the vacated central land to developers. See Peterson, *Land leasing and land sale as an infrastructure-financing option* (cited in note 57).

62. See Garnaut Ross et al., *China's 40 years of reform and development 1978-2018* at 433 (Australian National University Press 2018).

63. See Land Administration Law of the People's Republic of China (December 29, 1987), revised and adopted at the Fourth Session of the Standing Committee of the Ninth National People's Congress of the People's Republic of China, 29 August 1998.

6. *The Land Use Right System as Land Control*

The Chinese land use right system functions similarly to a sort of zoning arrangement[64]. When the government announces the availability of land, it also places limits on the uses allowed[65].

The establishment and transfer of land use rights is not the only method of land use control in China, but it is one component of a more complex system.

7. *Courts' Decisions on the Matter of Land Use Rights*

The Courts have dealt with the matter of land use rights on many different occasions. One of the most important judicial cases regards the expiration of land use rights in many residential areas in the city of Wenzhou. The local government had asked the citizens to pay for the renewal of land use rights. Many conflicts arose because of the differences regarding the dates on which the various land use rights would expire, as well as the differences regarding the cost of the renewal and payment methods.

The central government has since declared that the desire of the Chinese citizens to have long-term protection of their land use rights had to be supported[66].

Many other cases deal with expropriation: for example, the Supreme Court has issued a decision in which it says that those who have lost the right to use land have no right to request compensation for expropriation[67].

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64. Zoning is a particular method of urban planning in which the government will divide an area into smaller areas, called "zones". Every one of these zones will be devoted to particular activities. The zones can either be defined for a single use (such as residential use, or commercial use) or they can be devoted to multiple uses (for example, a zone that is both residential and commercial).

65. See Stein, Acquiring *Land Use Rights in Today's China* at 47 (cited in note 9).

66. Ivan Cardillo, *Dieci questioni e casi esemplari di diritto costituzionale cinese del 2016* (Istituto di Diritto Cinese, October 18, 2017), available at https://dirittocinese.com/2017/10/10/dieci-questioni-e-casi-esemplari-di-diritto-costituzionale-cinese-del-2016/

67. See Judicial Committee of the Supreme People's Court, 1368th Session, October 24, 2005. In this particular case, the parties had invested all the land use rights

8. *Land Use Rights under Italian Law*

The notion of land use rights in Italian law mainly derives from Roman law[68].

Nevertheless, the Italian civil code of 1865 did not contain any provisions regarding land use rights. In the first groundworks of the civil code of 1942, we do not find the right to use land. However, the legislator will later introduce in the text provisions regarding it, this change can be attributed to the influence exerted by the German and Swiss models.

Nowadays we find references to land use rights in Italy both in the civil code and in many other laws but still, this right has no constitutional basis: this is one of the main differences between the Italian right to use land and the Chinese one, which has a constitutional basis in article 10 of the Constitution.

When we talk about land use rights in the Italian legislative system, we can distinguish between two different rights: the so-called "*proprietà superficiaria*",[69] which is the right to own an already-existing building (but not the land on which the building stands) and the "*concessione ad aedificandum*"[70] of a future building to a different person from the owner of the land, that will later acquire the land.

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involved in the case into a different company and then transferred some shares. The parties have later lost the right to use the land involved. The administrative organ had decided to expropriate and compensate the parties that had the right to use the land. The company to which the shares had previously been transferred was not compensated. Under this circumstance, the administrative organ issued a notice to the parties to withdraw the right to use the state-owned construction land, which did not infringe on their legitimate rights and interests).

68. In particular, the word "*superficies*" was used regarding everything connected to the ground. In the first stages of Roman law development, after a building was erected, it could not be perceived to be disconnected from the ground. This changed approaching the classical period. In fact, in this period, we can find provisions regarding the granting of a right to use the land to build edifices: this was first defined as *locationes-conductiones*. See Mario Talamanca, *Istituzioni di Diritto Romano* (Giuffrè 2015).

69. See art. 952(2), Civil Code of the Republic of Italy.

70. See *id.* at art. 952(1).

The first category is similar to the right to use residential land present in Chinese legislation, while the second one is analogous to the right to use the land for construction purposes[71].

The granting of the *ius aedificandi* is quite frequent when it comes to bathing establishments and gas stations on highways.

Under Italian law, the *ius aedificandi* will be absolute and unconditional in the relations between the right holder and other people, whereas it will be considered a sort of "lessened right" if we analyze the relations between the right holder and the public administration. This dual nature derives from the dual nature of the act used to create the right, which contains on one hand an act of concession and on the other a private law contract.

The provisions on land use rights in the Italian legislation are articles 953[72] and 954[73] of the Italian Civil Code.

Article 953 of the Italian Civil Code provides that the landowner will become the owner of the edifice after the right to use the land expires. This rule can be derogated because it doesn't concern state interests. If the parties do not make further arrangements, derogating this rule, the building will become the property of the party who is the owner of the land at the moment in which the right to use the land will expire.

Article 954, paragraph 1 of the Italian Civil Code provides that the extinction of the right to use the land will result in the extinction of the real rights that had been imposed on the land by the so-called "*superficiario*"[74].

Any leasing agreements concerning the building will expire in the same year in which the land use rights will expire.[75]

The destruction of the building will not impact the *ius aedificandi* whatsoever[76]. However, the right-holder will have to rebuild the edifice in no more than 20 years, otherwise, the *ius aedificandum* right will decay.

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71. Chapter XII, Chinese Civil Code.
72. See art. 953, Civil Code of the Republic of Italy.
73. See *id.* at art. 954.
74. Holder of the right to use the land.
75. Those agreements will have to be stipulated in the specific forms of the *atto pubblico* or of the *scrittura privata* in order for them to be enforceable.
76. See art. 954(3), Civil Code of the Republic of Italy.

This is very similar to what happens in China; the most important difference is that the term for re-building is much more stringent under Chinese legislation.

In conclusion, land use rights are quite similar in Italy and China. The main difference is the importance that is given to the legal institute. Under Chinese law, the importance of land use rights is paramount, which is a direct consequence of the fact that no individual, whether citizen or non-citizen, can own the land in China. Land can only be owned collectively by all the citizens or by the State.

In Italy, the situation is quite different: land in Italy can be owned both by the State and by the people. As a consequence, the legal institute of the right to use land is much less important. It is mainly only used in the rare cases of specific types of land that can only be owned by the state. Cases in which the land use right is created by two parties through a contract are much less frequent.

9. *Conclusions*

Land use rights in China are supremely important. In fact, we may say that they are the reason for which China was able to transform its economy into one of the leading economies of the world. The importance of China in the world is directly correlated to the changing policies regarding land use rights.

Before the communist revolution in China, people could own land, this was later forbidden under the communist revolution during which private property of land was abolished:and could only be owned either by the State or by the Collectives. This land reform, however, did not lead to prosperity; another reform was needed. At the same time, the central government could not legalize the private ownership of land, because this was something that was in contrast with the basis of socialism. Thus, they decided to use a ploy: they did not legalize the private ownership of land, but they distinguished between the right of property and the right to use land. The first one could not be held by an individual, whereas the second could. This reshaped the whole economy; China no longer had a socialist economy, but rather an economy that could be described as a "socialism with Chinese characteristics".

After this reform, China was able to create a real estate market in which it was not the property of the land that was sold and purchased, but the land use right. Through this reform, China was able to enrich its citizens and become a more developed country[77]. Through land policy reforms, China was able to reach its dream of being a nation of moderate prosperity[78].

The importance of the right to use land under Chinese law is beyond doubt. However, perhaps because of a Western preconception, we tend not to talk about this legal institute and its importance in China. Many jurists may not even know that no individual can own land in the People's Republic of China. If they do know it, surely they don't know all of its peculiarities. There might be many different reasons that concur to explain this phenomenon: first of all, land use rights tend to be quite unimportant in most of the Western World; secondly, this might be due to the different ideological basis of the economy in China and in the Western World. China has a socialist economy, which means that no one but the Chinese citizens as an entity can own land. In the Western World, the economy is a capitalistic one. Nonetheless, this approach is not the wisest: China is set to become the biggest economy of the world - even now it is the leading economy of the world - and one of the reasons for its economic takeover is to be attributed to the land use policy reforms that have been implemented throughout the years.

Another reason in favor of studying the Chinese legal system is that the country of China is profoundly different from Italy, or any other Western country and its legal system is quite distant from our

77. Through land leasing the local governments were able to broaden their revenue, and they later used these funds to better the infrastructure system.

78. On the 100th anniversary of the founding of the Communist Party of China, President Xi Jinping solemnly declared to the world that we have realized the first centenary goal of building a moderately prosperous society in all respects, and we are now marching in confident strides toward the second centenary goal of building China into a great modern socialist country in all respects. The idea of a moderately prosperous nation is strictly connected to the need to reduce poverty. On another occasion, Yu Weiping, the Vice Minister of Finance said: "China achieved its goal of poverty reduction in the new era as scheduled at the end of 2020". See State Council Information Office of the People's Republic of China, *Poverty Alleviation: China's Experience and Contribution* (2021), available at http://pk.china-embassy.gov.cn/eng/zt/2356800/202104/P020210911658013307874.pdf.

own. In the past, the legal comparison with the Chinese legal system or with Chinese legal institutes was considered to be an "extreme legal comparison". We no longer use this term, but the extreme difference between our legal system and the Chinese one remains unchanged. This should not be considered a reason to oppose the study or the legal comparison of Chinese legal institutes or of the Chinese legal system as a whole. On the contrary, this should be considered a great reason in favor of it. After all, this diversity of legal institutes can be helpful to emancipate us from the prejudices, ideas, and notions of the legal system of our own country, which would inevitably shape our legal studying in the case in which the legal system studied was one similar to our own.

When we study Chinese law or even when we expand our understanding in other branches, different from the legal ones, but still linked to cultures far away from our own, we have to detach ourselves from the previously held information, due to the fact that the things studied will be extremely different from our basis of knowledge. We will start learning while being in the state of a "*tabula rasa*". Later, through a comparative approach, it will be possible to compare the different legal institutes, to see what are the differences and similarities. In doing so we will have to cling to the previously gained knowledge. This is actually the usual comparative approach, but it is an approach that is very difficult to sustain in cases in which the legal institutes compared are very similar to our own. It is much easier to maintain this type of approach if the legal institutes to be compared are quite different.

This is not exactly the case for the legal comparison of the institute of land use right in Italy and China, since this institute tends to be quite similar in the two countries, at least in regard to the juridical aspect. Nevertheless, the difference in regard to the importance given to it in the two countries, which is tied to the historical matrix of this right, enables us to detach ourselves from the previously held knowledge of Italian law and allows us to analyze the Chinese perspective almost from scratch.

Moreover, the fact that we find in Chinese law legal institutes that cannot be found under Italian law - and vice versa - helps us examine the different solutions that can be applied to the same problem, or to a very similar problem, happening in both countries. This is not to say

that the Chinese legal institutes would surely be able to survive inside the Italian legal system - legal transplants tend to be quite problematic, especially when made between countries with contrasting legal traditions - but surely this opens a space for discussion that gets seldom opened.

On another hand, the legal comparison with the Chinese legal system gives us the possibility to compare just for the pleasure of comparing, just to enrich our knowledge, without any utilitarian motive.

UNIVERSITÀ DEGLI STUDI
DI TRENTO

Opera Universitaria di Trento

ISSN 2612-4874