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Preface

EMIL TRIGOLO

Editor-in-Chief

Dear Readers,

Nearly nine years ago, the *Trento Student Law Review* was founded on a simple but ambitious idea: to create a forum capable of combining academic rigour with practical relevance, while encouraging open and well-informed discussion on the most pressing questions of contemporary law. We are therefore pleased to present the first issue of Volume 8.

This issue has seen a significant increase in submissions, once again confirming the interest that the Review continues to attract among both first-time and more experienced authors.

The six articles collected in this issue – one in Italian and five in English – reflect an engagement with legal writing that crosses not only different fields of law, but also different periods and legal traditions, ranging from Roman law to artificial intelligence. The latter, in particular, is an area in relation to which no legal or academic actor can afford to remain passive. In the volumes ahead, the Review, too, will have to define its own position on the use of AI, locating it realistically between uncritical permissiveness and, conversely, short-sighted intolerance.

Taken together, these contributions do not seek to impose a single thematic trajectory. Their value lies, rather, in the variety of the questions they raise: from tax law and the legal consequences of maternity to Roman legal tradition, EU digital regulation, international law, AI governance, and criminal justice. What holds them together is not a shared subject matter, but a common editorial premise: that legal scholarship remains meaningful when

it moves across contexts without losing rigour, sensitivity, and attention to concrete legal problems.

I would also like to express my sincere gratitude to Rossella Borella, who preceded me as Editor-in-Chief. The continuity that the Review has been able to preserve, despite a largely renewed editorial team and the transition to a new Board, owes much to the seriousness and generosity with which she accompanied this passage. Her work left us not only a solid editorial structure, but also a calm and collaborative environment in which taking up this responsibility was far less difficult than it could have been.

If there is a common thread running through these six contributions, despite their evident differences in subject matter, method, and geographical scope, it may be found in a shared resistance to oversimplification. Each article, in its own way, brings legal analysis back into contact with the complexity of facts, the reality of lived experience, and the limits of power, whether public or private. It is perhaps here that a Review such as ours continues to find its purpose: not in offering easy answers, but in preserving, with seriousness and intellectual curiosity, a space for critical reflection.

It is in this spirit that I wish all our readers an engaging and rewarding reading experience. I also hope that this issue will offer not only material for study, but further reasons to believe that law, when it remains attentive to its human dimension, continues to be an essential tool for understanding and orientation.

Emil Trigolo
Editor-in-Chief

Prefazione

EMIL TRIGOLO

Direttore

Care lettrici e cari lettori,

Quasi nove anni fa, la *Trento Student Law Review* nasceva da un'idea semplice ma ambiziosa: creare uno spazio capace di coniugare rigore accademico e rilevanza pratica, favorendo al tempo stesso un confronto aperto e informato sulle questioni più urgenti del diritto contemporaneo. Siamo quindi lieti di presentare il primo numero del Volume 8.

Questo numero ha registrato un significativo aumento delle proposte ricevute, confermando ancora una volta l'interesse che la Rivista continua a suscitare tanto tra autori alle prime esperienze di scrittura accademica quanto tra autori più esperti.

I sei articoli presenti in questo numero – uno in italiano e gli altri cinque in inglese – testimoniano l'interesse degli Autori ad una scrittura che spazia non solo *ratione materiae* ma anche temporalmente, con contributi che vanno dal diritto romano all'intelligenza artificiale. Tema quest'ultimo davanti al quale la nostra Rivista – come qualsiasi altro operatore giuridico ed ancor prima accademico – non può rimanere inerte, dovendo dai prossimi volumi anch'essa prendere posizione sull'utilizzo dell'IA, sapendosi collocare realisticamente tra i due relativi estremi della permissività o al contrario della miope intolleranza.

Considerati nel loro insieme, questi contributi non cercano di imporre un'unica traiettoria tematica. Il loro valore risiede nella varietà delle questioni affrontate: dal diritto tributario e dalle ricadute giuridiche della maternità alla tradizione romanistica, dalla regolazione digitale europea al diritto internazionale, dalla governance dell'intelligenza artificiale alla giustizia penale. A tenerli insieme non è un oggetto comune, ma una medesima

premessa editoriale: l'idea che la ricerca giuridica resti significativa quando sa attraversare contesti diversi senza perdere rigore, sensibilità e attenzione per i problemi concreti del diritto.

Desidero inoltre rivolgere un sincero ringraziamento a Rossella Borella, che mi ha preceduto nel ruolo di Direttrice. La continuità che la Rivista è riuscita a conservare, nonostante il profondo rinnovamento della redazione e il passaggio a un nuovo Direttivo, deve molto alla serietà e alla generosità con cui ha accompagnato questa transizione. Il suo lavoro ci ha lasciato una struttura editoriale solida e anche un ambiente sereno e collaborativo, nel quale assumere questa responsabilità è stato molto meno difficile di quanto avrebbe potuto essere.

Se c'è un filo che lega questi sei lavori, pur così diversi per oggetto, metodo e orizzonte geografico, è forse questo: la diffidenza verso ogni semplificazione eccessiva del diritto. In ciascuno dei contributi raccolti in questo numero riaffiora, in forme diverse, la stessa esigenza di riportare il discorso giuridico a contatto con la complessità dei fatti, con la concretezza delle persone e con i limiti del potere, pubblico o privato che sia. Ed è probabilmente qui che una rivista come la nostra trova ancora il suo senso più pieno: non nel proporre risposte facili, ma nel tenere aperto, con serietà e curiosità, uno spazio di riflessione critica.

Con questo spirito, auguro a tutte e a tutti una buona lettura e spero che anche questo numero riesca a offrire non soltanto spunti di studio, ma anche qualche ragione in più per continuare a credere che il diritto, quando non rinuncia alla sua misura umana, resti uno strumento decisivo di comprensione e di orientamento.

Emil Trigolo
Direttore

Child penalty e diritto tributario

L'incidenza della maternità sulla gestione aziendale e sugli oneri probatori in materia fiscale

ANTONIO BORGHETTI*

Abstract: Nelle realtà economiche di minori dimensioni caratterizzate da una struttura organizzativa e strumentale esigua, l'attività di accertamento tributario non può prescindere dalla valutazione delle condizioni di salute della titolare, con particolare riferimento alla gravidanza e alla maternità, quali fatti oggettivi e impeditivi della capacità produttiva. È scientificamente e giuridicamente riconosciuto che la gestazione e la cura della prole necessitano di tempo ed energie vitali, determinando una situazione di anomalo svolgimento dell'attività economica rispetto ai modelli statistici consolidati. In tale contesto, il venir meno dell'apporto lavorativo diretto della professionista non può essere neutralizzato dal personale dipendente, la cui prestazione è "qualitativamente diversa" e priva della medesima efficienza operativa. Questa "diseconomia di sostituzione" incide direttamente sulla marginalità d'impresa, giustificando una contrazione del reddito imponibile che non può essere sbrigativamente qualificata come comportamento antieconomico o evasivo. Lo standard probatorio deve dunque farsi rigoroso, imponendo all'Amministrazione Finanziaria di superare la soglia della "certezza" ed evitando congetture dall'incerta tenuta logica basate su automatismi induttivi. Solo l'adesione rigorosa al principio di effettività della capacità contributiva può prevenire intollerabili discriminazioni contrarie ai fondamentali principi di cui agli artt. 3, 31 e 53 della Costituzione.

Parole chiave: Redditi di impresa; Accertamento analitico-induttivo; Presunzioni; Incidenza gravidanza e maternità; Onere e standard della prova.

Abstract: In small-scale economic entities, characterized by limited organizational and instrumental structures, tax assessment activities cannot overlook the evaluation of the owner's health conditions, with specific reference to pregnancy and maternity as objective facts impeding productive capacity. It is scientifically and legally recognized that gestation and childcare drain vital time and energy, leading to a "non-normal" conduct of business compared to consolidated statistical models. In this context, the loss of the professional's direct labor cannot be neutralized by hired staff, whose performance is "qualitatively different" and lacks the same operational efficiency. This "substitution diseconomy" directly impacts business margins, justifying a contraction in taxable income that cannot be hastily qualified as anti-economic or evasive behavior. Consequently, the standard of proof must become more rigorous, requiring the Tax Administration to exceed a threshold of "certainty" and avoiding conjectures with uncertain logical consistency based on inductive automatisms. Only a strict adherence to the principle of effective ability to pay can prevent intolerable discrimination contrary to the fundamental principles set out in Articles 3, 31, and 53 of the Italian Constitution.

Keywords: Business income; Analytical-inductive assessment; Presumptions; Impact of pregnancy and maternity; Burden and standard of proof.

Sommario: 1. Note introduttive. – 2. Il caso affrontato dalla Corte trentina. – 3. I principi esaminati (e quelli desumibili) dalle tre pronunce sottoposte a scrutinio. – 4. Onere della prova e relativo standard (minimo). – 5. Considerazioni conclusive.

1. Note introduttive

La ricerca svolta si focalizza su tre accertamenti di carattere analitico-induttivo ex art. 39 co. 1 lett. d) del d.P.R. 29 settembre 1973, n. 600 eseguiti, per tre annualità consecutive, su una contribuente imprenditrice individuale che, nel medesimo periodo, ha dato alla luce due figli. Detta metodologia accertativa, come noto, pur non disconoscendo formalmente ed in tutte le sue componenti la rilevanza giuridica delle scritture contabili, si fonda su ragionamenti spiccatamente presuntivi, il cui fondamento logico è da ricondurre alle medie di settore osservate su contribuenti in normale esercizio dell'attività, insomma all'*id quod plerumque accidit*. Le tre sentenze¹ qui commentate della Corte di Giustizia Tributaria di primo grado di Trento si inseriscono, dandone ulteriore vigore, in quel nutrito filone giurisprudenziale che riconosce gli effetti inevitabili della maternità e della gravidanza in ambito aziendale e professionale cui sono soggette imprenditrici e libere professioniste. Tali effetti, lungi dall'essere marginali ovvero minimali, incidono direttamente sulla capacità produttiva o comunque sull'efficienza e sulla capacità produttiva esprimibile e quindi,

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¹ Il riferimento è alle sentenze della Corte di giustizia tributaria di primo grado di Trento, 7 ottobre 2024, n. 588/2/2024 (dep. 24 dicembre 2024), relativa al periodo d'imposta 2016; 20 dicembre 2024, n. 180/1/2025 (dep. 30 aprile 2025), relativa al periodo d'imposta 2017; e 3 ottobre 2025, n. 307/2/2025 (dep. 14 ottobre 2025).

in ultimo, sul reddito imponibile generabile così come stabilito dalla Commissione Tributaria Provinciale di Avellino nella sentenza n. 120/2001 secondo cui: “[...] non è pertanto concepibile che la lavoratrice in proprio non debba godere, ai fini fiscali, nemmeno del presupposto di una riduzione della propria capacità contributiva, relativa alla certa diminuzione delle prestazioni di lavoro, ai fini della individuazione del reddito tassabile”.

Tali eventi non possono, soprattutto in presenza di accertamenti analitico-induttivi o di accertamenti appiattiti sulla valenza probatoria delle medie di settore – seppur rielaborate dall’Amministrazione – non essere considerati al fine di ponderare ed adattare correttamente alla realtà aziendale i *performance standard* individuati come *benchmark*. Gli studi di settore nel passato e gli Indici Sintetici di Affidabilità fiscale (ISA) oggi, sono strumenti statistici che, grazie alla digitalizzazione delle dichiarazioni reddituali, rappresentano un’importante fonte di dati per tipologia di attività e settore merceologico, altresì valorizzando le modalità organizzative e la localizzazione geografica delle singole attività, aspetto importante in un Paese caratterizzato da rilevanti diseguaglianze territoriali. Esse quindi ben possono essere, per le attività di minori dimensioni e quindi per le piccole e piccolissime imprese che caratterizzano il tessuto imprenditoriale domestico, un validissimo strumento di selezione dei contribuenti da attenzionare: qui però l’utilità di tali strumenti si deve arrestare lasciando il passo ad un approccio *case by case*.

Sotto il profilo strettamente giuridico tale orientamento trova il suo fondamento primario nel principio di capacità contributiva sancito dall’art. 53 della Costituzione, il quale impone che il prelievo fiscale sia sempre ancorato a una ricchezza effettiva e mai presunta in modo astratto o irragionevole. Ignorare la contrazione della produttività derivante dalla gestazione e dal successivo puerperio significherebbe, infatti, sottoporre a tassazione un reddito meramente teorico, violando contestualmente anche il principio di uguaglianza sostanziale ex art. 3 della Costituzione, poiché si tratterebbe, in modo identico, situazioni fattuali profondamente diversificate.

In sede di accertamento analitico-induttivo, l'Amministrazione Finanziaria sovente ricorre a presunzioni semplici che, *ex lege*, debbono essere gravi, precise e concordanti ai sensi dell'art. 2729 c.c.; tuttavia, la presenza di uno stato di gravidanza o di una maternità in corso agisce come un elemento di rottura del nesso causale tra le medie statistiche di settore ed i ricavi effettivamente conseguibili. È di solare evidenza che il rallentamento fisiologico è determinato non solo dall'astensione obbligatoria o facoltativa dal lavoro, ma anche da una ridotta capacità di *networking*, di mobilità territoriale e di gestione proattiva del portafoglio clienti. Fiscalmente, ciò si traduce in uno scostamento rispetto agli Indici Sintetici di Affidabilità (ISA) – o ai precedenti Studi di settore – che non può essere sbrigativamente etichettato come sintomo di evasione e di occultamento di componenti positivi. In tale direzione, la Commissione tributaria regionale del Lazio nella sentenza n. 221/2010 afferma come: “la possibilità di accertare il reddito sulla base degli studi di settore non impedisce al contribuente di provare l'inattendibilità del risultato e la presenza di elementi di fatto che inducono a ritenere 'eccentrica' la situazione del contribuente rispetto a quella considerata statisticamente prevalente dagli studi di settore”.

La giurisprudenza di merito, opportunamente sollecitata da una lettura costituzionalmente orientata delle norme tributarie, riconosce quindi che la maternità costituisce una “giusta causa” di scostamento, idonea a disinnescare la valenza probatoria del mero dato numerico ed astratto. Tale approccio, davanti a peculiari condizioni di salute dei contribuenti, impone in capo all'Ufficio un onere della prova rafforzato che non può limitarsi alla sterile contrapposizione tra il dichiarato e il parametro *standard* ma deve dimostrare come, nonostante l'evento biologico e le sue ripercussioni organizzative, la contribuente sia stata comunque in grado di mantenere livelli di efficienza paragonabili a quelli della media dei contribuenti non soggetti a tali condizioni. Appare opportuno richiamare il corretto governo di detti principi spiegato dalla C.T.P. di Lecco nella sentenza n. 24/2015 (che richiama Cass. 8706/14) secondo cui: “rientra nella comune esperienza che i bambini molto piccoli impongono cure parentali che riducono il tempo e le energie che la madre può dedicare

all'attività lavorativa". Ne consegue che, il reddito imponibile non può essere determinato in vitro, ignorando la dimensione umana e biologica del contribuente, poiché una tassazione che prescindendo dalla realtà fenomenica della vita femminile finirebbe per trasformare il tributo in una sanzione impropria sulla genitorialità, in aperto contrasto con la tutela della famiglia e della donna lavoratrice garantita dagli artt. 31 e 37 della Carta Costituzionale. L'adattamento dei *benchmark* alla realtà aziendale non è dunque una concessione equitativa, ma un obbligo metodologico per garantire la correttezza dell'azione amministrativa e l'effettività del procedimento e del giusto processo tributario.

A completamento di tale disamina non può sottacersi un ulteriore profilo di criticità di natura squisitamente economico-aziendale avente riflessi immediati sulla determinazione della base imponibile e sull'affidabilità fiscale *prima facie* intesa: il mutamento della struttura dei costi derivante dalla, ove operata, necessaria sostituzione dell'apporto lavorativo diretto della titolare con le prestazioni rese da personale dipendente o da collaboratori esterni. Tale dinamica sostitutiva, imposta dalle contingenze biologiche e dalla tutela della salute, non si configura mai come un'operazione "a saldo zero" sul piano della redditività netta. Infatti, mentre l'attività prestata personalmente dall'imprenditrice (o dalla professionista) rappresenta un valore aggiunto intrinseco che non genera un costo d'esercizio esplicito nel conto economico, il ricorso a figure vicarie per sopperire ai periodi di assenza o di forzata contrazione dei ritmi lavorativi introduce oneri certi, legati alle correlate e conseguenti retribuzioni, ai contributi previdenziali ed ai premi assicurativi. Ne deriva un'inevitabile erosione dei margini di profitto e un conseguente scivolamento della redditività operativa, poiché la medesima unità di ricavo, che con tale meccanismo sostitutivo può anche rimanere costante e non ridursi nel breve termine, viene – a tutto concedere – generata a fronte di un costo di produzione sensibilmente superiore rispetto all'ordinario *standard*.

Sotto il profilo giuridico-tributario, ignorare tale alterazione del rapporto tra costi e ricavi significa misconoscere la reale configurazione del reddito d'impresa e delle sue componenti: tale categoria reddituale viene per definizione determinata in un valore differenziale e non una

grandezza lorda. L'applicazione di medie di settore che presuppongono un apporto costante e diretto del titolare risulterebbe, pertanto, distorto in presenza di una struttura organizzativa che debba farsi carico di (sopperire a temporanei) "costi di supplenza" per garantire la continuità operativa ed aziendale. Peraltro, occorre considerare l'effetto di insostituibilità, nelle piccole realtà, dell'apporto del (o della) titolare come evidenziato dalla C.T.P. di Savona nella sentenza n. 12/2010: "è sicuramente qualitativamente diversa l'attività svolta dal titolare rispetto a quella del dipendente, che può sì adjuvare, ma ha certo obiettivi ed interessi diversi da quelli dell'esercente l'impresa".

Tali costi non solo riducono la marginalità ma modificano radicalmente gli indici di produttività del capitale umano, rendendo i *benchmark standards* del tutto (temporalmente) inadeguati a (i) riflettere la capacità contributiva effettiva ed anche a (ii) fungere da strumento-indice di situazioni fiscalmente patologiche da selezionare ed attenzionare per mezzo di approfondimenti istruttori.

2. Il caso affrontato dalla Corte trentina

La presente ricerca si concentra quindi su tre² sovrapponibili pronunce emesse dalla Corte di giustizia tributaria di primo grado di Trento, confermativa di quanto emerso ed accertato dalle più attente analisi sociologiche, in particolare, evidenziando come la maternità comporti una penalizzazione economica per le donne, a differenza degli uomini, per i quali l'aumento del numero di figli si traduce, statisticamente, in una maggiore partecipazione al lavoro ed in un incremento salariale: "Mentre

² Per un primo commento congiunto alle pronunce relative ai periodi d'imposta 2016 e 2017, vedi A. Borghetti, *No alle penalizzazioni nell'accertamento per le donne che fanno figli* (Blast, June 19, 2025), disponibile al seguente link <https://www.blastonline.it/p/no-alle-penalizzazioni-nellaccertamento> (consultato il 18 marzo 2026).

per gli uomini al crescere del numero di figli aumentano non solo la partecipazione al mercato del lavoro ma anche lo stipendio medio, per le donne al crescere delle stesse condizioni i due diminuiscono”³.

Il caso di specie, relativo ad un accertamento tributario di tipo analitico-induttivo involgente più annualità, ha interessato un’imprenditrice individuale senza dipendenti fissi che, nell’arco di un triennio (2016 - 2018) ha affrontato positivamente due gravidanze; nel corso del quarto anno (2019), non riuscendo più a conciliare lavoro e famiglia, nel prisma del *work-life balance* ha privilegiato tale secondo aspetto ed ha ceduto, per mezzo di cessione di ramo d’azienda, l’attività di somministrazione di alimenti e bevande da poco avviata (2013). Tale dismissione non può essere letta come un mero epilogo economico, bensì come l’estrinsecazione di un diritto soggettivo alla rimodulazione degli assetti esistenziali, laddove il recesso dal mercato produttivo diviene lo strumento per la tutela di preminenti valori costituzionali legati alla genitorialità.

Sotto il profilo del diritto d’impresa, la cessione del ramo di azienda rappresenta la cristallizzazione dell’aver generato un valore positivo ed aggiuntivo, *rectius* un avviamento commerciale, che pertanto non può essere sbrigativamente retroproiettato per desumere una presunta e mai dimostrata opacità fiscale degli esercizi precedenti, specialmente in un contesto, come quello del caso *de quo*, di radicale mutamento della capacità operativa della titolare. È proprio tale atto di cessione di ramo d’azienda che, attenzionato dall’Amministrazione finanziaria, ha indotto quest’ultima, sulla base dell’elevato valore dell’avviamento (*goodwill*)⁴ dichiarato in atto, a presumere la sussistenza di omessi ricavi nei tre anni

³ A. Minello, *Non è un paese per madri*, Laterza, 2022, p. 37. Si vedano anche M.N. De Luca, *Stipendi e diritti, pensioni e potere – Otto scalini per colmare il gender gap*, in *La Repubblica*, 8 marzo 2024; L. Fontana, *Donne e lavoro – Quattro proposte per cambiare*, in *Corriere della Sera*, 8 marzo 2024; E. Fornero, *Senza lavoro non c’è indipendenza*, in *La Stampa*, 8 marzo 2024; D. Hamau, *Carriera e stipendio per le donne con figli – 10 anni di zavorra*, in *La Repubblica*, 6 marzo 2024; R. Troili, *Madri in fuga dal lavoro: le dimissioni dopo un figlio – Italia maglia nera nella UE*, in *Il Messaggero*, 22 febbraio 2024.

⁴ Con riferimento all’utilizzo, in avanti (*carry forward*) o all’indietro (*carry back*), del dato

precedenti (2016-2018), applicando per analogia (inversa) l'art. 2, co. 4 del d.P.R. 460/1996. Come noto, il valore dell'avviamento rappresenta il plusvalore dell'impresa rispetto all'atomistica considerazione del differenziale tra le attività e le passività aziendali: rappresenta, in estrema sintesi, il costo-opportunità che l'acquirente è disponibile a pagare per ottenere la proprietà di un'azienda in funzionamento.

Il ricorso a tale meccanismo palesa una criticità metodologica insanabile di non scarso rilievo in quanto pretende di inferire l'esistenza di componenti positive di reddito occultate muovendo da un dato patrimoniale statico, il prezzo di cessione, senza considerare che il *goodwill* dichiarato in atto riflette spesso il valore della posizione commerciale consolidata negli anni di piena attività (2014-2015) con proiezione sulle potenzialità future. L'Ufficio, ignorando la netta cesura rappresentata dall'evento biologico della maternità, o meglio delle maternità, ha operato per un triennio una traslazione logica che viola il principio della ragione-volezza in aperto contrasto con i canoni di precisione e concordanza richiesti dall'art. 2729 c.c. ed oggi dal novellato art. 7 co. 5-bis del codice di rito tributario.

Nonostante le difese spiegate dalla contribuente nelle fasi procedurali, l'Amministrazione ha ommesso, negli atti accertativi, di valutare e considerare che, antecedentemente alla prima maternità, e quindi nel biennio 2014-2015, l'imprenditrice aveva sempre dichiarato un reddito co-stantemente al di sopra delle medie di settore e che, solo a decorrere dall'anno ove è avvenuta la prima maternità (2016), v'è stata una (com-prensibile e giustificabile) contrazione reddituale. È di solare evidenza che, nell'economia di un'impresa individuale priva di una struttura dipendente fissa, la coincidenza tra la figura fisica della titolare e l'organismo produttivo sia pressoché assoluta; ne deriva che ogni limitazione della mobilità, riduzione della disponibilità temporale o contrazione dell'efficienza fisica derivante dal puerperio si riflette simmetricamente

«certo» relativo all'avviamento dichiarato in atto, si veda il condivisibile commento di F. Gallio e G. Caldesi Valeri, *Cessione di ramo d'azienda: insufficienti i redditi successivi al trasferimento per valutare l'avviamento*, in *Il fisco*, 2018, 43, p. 4192 ss.

sulla capacità di generare reddito imponibile. Negare rilievo a tale evidenza in sede di accertamento significa applicare uno *standard* probatorio astratto ad un contribuente che, per ragioni costituzionalmente protette, non si trova in una condizione di ordinaria efficienza, per l'effetto violando il nesso di causalità sotteso tra la presunzione statistica e la realtà fenomenica della vita professionale femminile.

Altresì, occorre evidenziare che nel triennio accertato (2016 - 2018) l'impresa individuale ha sempre registrato redditi imponibili positivi, escludendo quindi *ab origine* l'applicabilità del teorema accertativo del comportamento antieconomico dell'imprenditore⁵, peraltro complessivamente insussistente avendo avuto riguardo all'intero ciclo aziendale, dall'inizio attività alla successiva dismissione e quindi valorizzazione. Il comportamento antieconomico dell'imprenditore costituisce una presunzione elaborata dalla giurisprudenza tributaria in forza della quale l'Amministrazione finanziaria può disconoscere la deducibilità di costi o l'attendibilità dei ricavi dichiarati qualora la condotta del contribuente si riveli palesemente contraria ai canoni di razionalità economica; ne sono esempi l'ingiustificata e sistematica vendita sottocosto, la sopportazione di costi sproporzionati o l'assenza di marginalità; pur tuttavia, nella dinamica delle imprese, al contrario, potrebbero sussistere delle valide ragioni economiche che, nel medio periodo, possono giustificare l'impostazione di politiche aziendali *prima facie* contrarie alla logica.

La sussistenza di un risultato d'esercizio positivo, ancorché eroso dalle contingenze personali, preclude in radice la legittimità di una contestazione basata sull'antieconomicità, giacché l'ordinamento tributario non impone (*rectius* non può imporre) al contribuente un dovere di massimizzazione del profitto "a prescindere" dalle circostanze umane e biologiche. La scelta di mantenere in vita l'attività, pur accettando margini di guadagno ridotti in attesa di una futura alienazione, costituisce una strategia gestionale prudente e razionale che non può essere sanzionata attraverso

⁵ In termini, A. Borgoglio, *Basta un reddito anche esiguo per bloccare l'accertamento da antieconomicità*, in *Il fisco*, 2023, 1, p. 86 ss.

la ricostruzione induttiva dei ricavi, restando il sindacato dell'Amministrazione Finanziaria limitato alla verifica della veridicità contabile-fiscale e non alla valutazione del merito delle (discrezionali) scelte di vita dell'imprenditrice.

La ri-determinazione del reddito d'impresa eseguita e perpetrata per un triennio dai verificatori, nella sostanza, è avvenuta avallando le risultanze contabili riferite ai (soli) componenti negativi dai quali, per mezzo di presuntivi parametri di ricarico, vengono desunti i (presunti) "veri" componenti positivi, tra i quali, per differenza rispetto a quelli dichiarati, quelli omessi ed accertati.

Questo meccanismo di rideterminazione "a tavolino" della redditività operativa presuppone che ogni acquisto di materia prima si traduca in una vendita secondo coefficienti di ricarico costanti e immutabili. Tale approccio ignora colpevolmente i maggiori sfridi, l'invenduto e la deperibilità delle scorte derivanti da una gestione necessariamente frammentata dai ritmi della maternità e dalla mancata gestione diretta; pretendere di desumere i "veri" ricavi tramite un mero calcolo matematico, senza considerare l'impossibilità di una presenza fisica costante e diretta, trasforma l'accertamento in una sanzione impropria sulla condizione esistenziale della contribuente.

Nella verifica, peraltro, non v'è cenno della considerazione forfettaria dei costi di esercizio a deconto dei maggiori ricavi accertati così come, al contrario, richiesto dalla contribuente in sede procedimentale e processuale e consentito, perlomeno, a decorrere dalla pronuncia della C. cost. 10/2023 e da ultimo dal principio di diritto della Suprema Corte di Cassazione nella sentenza n. 19574/2025 dove si afferma che: "In tema di accertamento dei redditi con il metodo analitico-induttivo, a seguito della sentenza della Corte costituzionale n. 10 del 2023, il contribuente imprenditore può sempre opporre la prova presuntiva contraria, eccependo una incidenza percentuale forfettaria di costi di produzione, che vanno quindi detratti dall'ammontare dei maggiori ricavi presunti". L'approdo giurisprudenziale e dottrinale richiamato sottolinea con forza che il riconoscimento della deducibilità dei costi, anche su base forfettaria, rappresenta il

presidio minimo per garantire l'effettività del principio di capacità contributiva sancito dall'art. 53 Cost. Una pretesa fiscale che colpisca "al lordo" i maggiori componenti positivi accertati, senza scomputare gli oneri necessari alla loro produzione, risulterebbe intrinsecamente espropriativa.

In definitiva, la pronuncia della Corte trentina riafferma che la verità cede il passo davanti a presunzioni basate su meri automatismi statistici che, nel caso della donna imprenditrice, finirebbero per discriminare l'accesso e la permanenza nel mercato in ragione della funzione sociale della genitorialità.

3. I principi esaminati (e quelli desumibili) dalle tre pronunce sottoposte a scrutinio

Le sentenze esaminate, pur non richiamando i principi cardine della nostra Carta fondamentale a tutela della famiglia (art. 29), della maternità (art. 31) e della donna impegnata nel lavoro (art. 37), rilevano come la riduzione del reddito, nel caso di specie, non appaia sintomo di evasione ma quale conseguenza di una diversa organizzazione aziendale necessitata dall'evento materno.

Sotto il profilo della tecnica contabile, tale transizione segna il passaggio da un modello basato sull'apporto diretto del titolare – il cui valore aggiunto non genera un costo d'esercizio esplicito bensì è parte del margine tassabile – a un modello di "sostituzione onerosa". In tale contesto, l'attività dell'imprenditrice, che in precedenza confluiva integralmente nel risultato d'esercizio, viene parzialmente delegata (dipendenti o collaboratori). Giuridicamente, ciò comporta una mutazione della struttura del profitto: il reddito non diminuisce per un'occultazione di ricavi, ma per l'emersione di costi vivi, necessari e documentati, che si pongono come baluardo logico contro ogni presunzione di evasione, riconducendo lo scostamento dai *benchmark* ad una precisa e (soprattutto) insindacabile scelta di sopravvivenza aziendale. Scelta peraltro vincente avuto riguardo al fatto che, salvaguardando l'impresa durante tale fase della vita e "sop-

portando" direttamente le criticità conseguenti alla sua temporanea minore redditività, la contribuente è dipoi riuscita a cedere l'impresa e quindi a valorizzare quanto nel tempo impostato.

La Corte trentina ha ritenuto ragionevole e degno di rilevanza pregnante l'effetto sostitutivo derivante dalla carenza, in dette fasi della vita, dell'apporto lavorativo dell'imprenditrice con i costi sostenuti per lavoratori dipendenti e collaboratori, di cui l'azienda, prima di tali eventi, era sprovvista. L'impresa ha quindi potuto, grazie a tale scelta imprenditoriale, mantenere stabili i componenti positivi di reddito ma, al contempo, ha gravato di maggiori costi il conto economico. Da ciò è derivata non una evasione ma una (mera) riduzione della marginalità dell'impresa che, data la ridotta struttura ed organizzazione, si è trasfusa inevitabilmente sul reddito individuale dichiarato. Nella prima sentenza esaminata, riferita al periodo di imposta 2016 ove venne accolto integralmente il ricorso introduttivo della contribuente, fu precisato con parole inequivocabili l'incidenza dell'evento materno. La corte ha in merito affermato: "Va poi tenuto conto di quanto riferito dalla titolare della struttura produttiva in ordine all'impegno familiare sopravvenuto con la nascita di due figli in tempi ravvicinati, uno il [...] e il secondo in [...]. Questi ultimi eventi hanno certamente condizionato l'impegno lavorativo della [...] presso il locale che in precedenza poteva disporre della sua costante presenza lavorativa. La nascita dei figli ha sicuramente costretto la titolare ad avvalersi della collaborazione di personale dipendente e a sostenere i relativi costi, con la conseguente limitazione dei redditi conseguiti".

Tale dinamica evidenzia come il reddito d'impresa, anche nelle realtà micro-organizzate, non sia una grandezza astratta, ma il prodotto di un delicato equilibrio tra efficienza aziendale ed equilibri personali-familiari. La decisione di mantenere inalterato il volume d'affari attraverso l'assunzione di personale vicario, lungi dal configurarsi come un'anomalia, testimonia una resilienza imprenditoriale, tipica delle Piccole e medie imprese (PMI) che connotano il nostro tessuto imprenditoriale, che l'Amministrazione Finanziaria avrebbe dovuto valorizzare anziché sanzionare. La riduzione della marginalità operativa è l'effetto matematico di un in-

nalzamento del “punto di pareggio” (*break-even point*), determinato dal costo della supplenza lavorativa: pretendere che il margine resti costante in presenza di un aggravio di costi per il personale significa ignorare i basilari principi dell’economia aziendale e del diritto tributario sostanziale.

In questi termini, giustappunto per valorizzare gli effetti economici del diverso interesse individuale di chi materialmente svolge il lavoro, la pronuncia relativa al periodo di imposta 2017, che accolse parzialmente il ricorso introduttivo andando a rideterminare giudizialmente la pretesa in ossequio al (non condivisibile) potere sostitutivo del Giudice tributario, censurò, anch’essa, la scarsa considerazione di tale aspetto: “Il titolare di un’azienda svolge il proprio lavoro ben oltre le ore canoniche stabilite dall’orario di lavoro dei dipendenti. [...] Come già indicato poc’anzi, la mancata presenza della sig.ra [...] ha sicuramente causato minori ricavi perché il personale esterno, rispettando il normale orario sindacale, non può consentire le medesime ore di servizio della contribuente de qua”.

Ecco allora che, soprattutto davanti ad accertamenti di carattere induttivo o analitico-induttivo, è fondamentale evidenziare che detti eventi della vita condizionano, necessariamente, l’impegno determinante e finanche insostituibile della titolare, tanto da incidere sulla sua capacità di generare redditi in misura paragonabile a quelli ante-gravidanze; impegno, che è diretta ed immediata conseguenza del margine d’impresa e quindi ed infine, del relativo reddito (o perdita).

In questa prospettiva, l’apporto della titolare non deve essere inteso come una variabile indipendente, bensì come, per le piccole realtà, il fattore di produzione primario sino a poter giungere, qualora non compreso, all’ossimorica figura dell’imprenditrice individuale senza imprenditrice. La realtà fenomenica del corpo dell’imprenditrice, in fase di gravidanza e puerperio, diviene un elemento oggettivo di limitazione del prelievo fiscale, poiché la capacità contributiva ex art. 53 Cost. deve essere non solo effettiva e attuale, ma anche parametrata alla reale possibilità di produzione del ricavo in condizioni di parità di fattori produttivi.

Anche la sentenza relativa al periodo di imposta 2018 ha sottolineato le peculiarità *supra* descritte: “risultando omessa ogni valutazione degli elementi di fatto sicuramente esistenti ed idonei ad incidere sulla

determinazione del reddito tassabile. Il riferimento è alla stagionalità dell'attività di gestione del [...] e alla nascita di due figli (uno nel [...] e l'altro nell'[...]), che ha ridotto per la ricorrente l'attività personale di ristorazione costringendola a proseguire nella gestione avvalendosi di personale dipendente”.

Queste riflessioni della Corte, operate in diverse composizioni, evidenziano il paradosso in cui è caduta l'azione accertatrice: l'Ufficio, nel focalizzarsi esclusivamente sul dato numerico dei ricavi ha omesso di considerare la “qualità” della gestione: oltre ai costi monetari, anche costi di coordinamento e potenziali inefficienze operative che deprimono inevitabilmente l'utile netto da sottoporre ad imposizione. Se la gestione prosegue grazie a terzi, la stabilità dei ricavi lordi è la prova della trasparenza della contribuente che non ha cessato l'attività né occultato componenti positivi, ma ha semplicemente accettato (temporaneamente) un minor guadagno personale e tutelato il valore dell'azienda.

Il soppesamento delle particolari condizioni della contribuente è quindi rispettoso del consolidato orientamento giurisprudenziale in base al quale i Giudici, ricorrendo ad una vera e propria indagine anche sociologica dell'imprenditrice in maternità, hanno sovente dato prova di correttamente cogliere le conseguenze organizzative di determinati eventi nelle realtà di minori dimensioni⁶; conseguenze simili, se non più accentuate, possono estendersi altresì alle donne esercenti arti e professioni, ivi potendosi peraltro espandere, non fosse altro che per l'*intuitus personae* che caratterizza molteplici professioni intellettuali. Per le libere professioniste, in particolare, la componente dell'*intuitus personae* rende la sostituzione ancor più complessa e onerosa: la delega a collaboratori esterni, pur

⁶ Si vedano C.T.R. Marche, 18 gennaio 2019, n. 37/2/2019; C.T.R. Lombardia, 28 gennaio 2016, n. 563/13/2016; C.T.P. Lecco, 15 gennaio 2015, n. 24/1/2015; C.T.R. Sardegna, 14 gennaio 2015, n. 9/8/2015; C.T.R. Lombardia, 23 gennaio 2014, n. 417/49/2014; C.T.P. Bari, 25 luglio 2011, n. 123/12/2011; C.T.R. Lazio, 30 settembre 2010, n. 221/22/2010; C.T.P. Taranto, 7 luglio 2010, n. 306/1/2009; C.T.P. Savona, 9 febbraio 2010, n. 12/2/2010; C.T.R. Toscana, 25 settembre 2009, n. 64/8/2009; C.T.R. Sicilia, 26 gennaio 2009, n. 29/19/2009; C.T.R. Abruzzo, 9 gennaio 2009, n. 1/9/2009; C.T.P. Treviso, 28 marzo 2007, n. 16/5/2007; C.T.P. Avellino, 19 novembre 2001, n. 120/3/2001.

permettendo la continuità dello studio, comporta spesso una rinegoziazione dei compensi o una ripartizione dei margini che erode la base imponibile della titolare. Non si tratta anche qui, si badi, di un comportamento antieconomico ma dell'unica via percorribile per preservare il valore dell'avviamento professionale in attesa del (successivo) rientro a "pieno regime".

Tale indagine sociologica e fattuale riconosce che l'impresa non è suscettibile in un algoritmo, ma un organismo vivente che risente delle vicende umane dei suoi protagonisti.

La citata giurisprudenza conferma che l'onere della prova, in presenza di eventi così macroscopici e documentati, impone all'Ufficio di attivarsi preventivamente per adattare i propri parametri di ricarica ad una realtà che ha subito un impattante *shock* organizzativo.

Sotto altro profilo, la Corte chiamata a giudicare sull'annualità 2018, censurando il contegno serbato dal giudicante con riferimento al periodo di imposta 2017, ritiene di non avere elementi per potersi spendere in un adeguamento-correttivo delle ricostruzioni operate dagli accertatori: "Il riconoscimento di una percentuale, pur ridotta, dei maggiori ricavi accertati non sembra trovare fondamento negli atti e neppure in possibili argomentazioni logiche o presuntive, dotate dei caratteri normativamente richiesti". Tale censura evidenzia la necessità di un approccio che non sia meramente ragionieristico, ma informato ai principi del giusto processo tributario governato da un Giudice terzo ed imparziale rispetto alle parti. In assenza di una puntuale confutazione della "diseconomia da maternità", l'accertamento basato sulla sola valorizzazione dell'avviamento in sede di cessione decade dinanzi alla prova contraria di una gestione che ha comunque garantito un (i) immediato reddito positivo ed un (ii) postergato reddito *una tantum* rinveniente dalla cessione del ramo d'azienda.

4. Onere della prova e relativo standard (minimo)

La necessità di un vaglio rigoroso circa l'impatto della maternità sulla gestione dell'impresa trova oggi il proprio fulcro dogmatico nell'applicazione della nuova regola di giudizio di cui all'art. 7, co. 5-bis, d.lgs. 546/1992; l'innesto di tale norma, ad opera della l. 31 agosto 2022, n. 130, ha infatti eliso il necessitato richiamo in materia tributaria dell'art. 2697 del codice civile. Il profluvio di aggettivi utilizzati dal legislatore è infatti inequivoco nell'evidenziare lo *standard* minimo di prova necessario a suffragare una pretesa impositiva: "Il [...] annulla l'atto impositivo se la prova della sua fondatezza manca o è contraddittoria o se è comunque insufficiente a dimostrare, in modo circostanziato e puntuale, comunque in coerenza con la normativa tributaria sostanziale, le ragioni oggettive su cui si fondano la pretesa impositiva e l'irrogazione delle sanzioni".

Merita quindi attenzione un passaggio che incide significativamente sulle statuizioni relative alle tre annualità e sul convincimento del Giudice occupatosi dell'annualità 2018: "Pare più aderente alle risultanze istruttorie, con applicazione dei principi che regolano il riparto dell'onere probatorio in campo tributario riconoscere le carenze in ambito impositivo con le conseguenze sulla illegittimità dell'atto impugnato". Con tale affermazione la Corte, che con analogo tenore censurò il contegno dell'Ufficio nella pronuncia relativa al periodo di imposta 2016⁷, facendo proprio l'insegnamento alloriano a mente del quale "a nessun atto la pubblica amministrazione [può] accingersi, senza aver procurato a sé stessa la prova

⁷ Per l'anno 2016, infatti, la Corte si esprime nei seguenti termini: «Osserva la Corte che, secondo i principi in tema di riparto dell'onere probatorio in materia tributaria, grava sull'ufficio accertatore la prova dell'esistenza dei presupposti del fondamento della maggiore pretesa fiscale. Tale prova è certamente libera, nel senso che è ammessa quella per presunzioni, ma deve essere caratterizzata da un certo rigore senza essere contrastata da elementi che ne diminuiscono la valenza dimostrativa. [...] Non si può sottacere, infine, che la ricostruzione di maggiori ricavi e redditi da parte dell'ufficio non è frutto di un rigoroso calcolo basato su dati reali, costituendo piuttosto una determinazione priva di riscontro effettivo».

dei fatti che determinano la sua potestà di dar vita a quell'atto"⁸, dà concreta applicazione alla nuova regola di giudizio ex art. 7 co. 5-bis del d.lgs. 546/1992⁹. Disposizione che non innova, in rapporto all'adattato art. 2697 c.c., il riparto dell'onere della prova, ma certamente incide sullo "standard di prova"¹⁰ ovvero sulla soglia di certezza richiesta per ritenere provato un fatto: trattasi della regola finale del fatto incerto, che consente di decidere evitando il *non liquet*¹¹. Nel contesto dell'accertamento analitico-induttivo, che si fonda anche su elementi inferenziali, la prova dell'evasione

⁸ E. Allorio, *Diritto processuale tributario* (5^a ed., Unione Tipografico-Editrice Torinese, 1969), p. 393. Tale monito alloriano, lungi dal rappresentare un reperto di archeologia giuridica, assume oggi una rinnovata centralità nel dialogo tra fisco e contribuente. Esso rafforza il paradigma per cui l'atto impositivo non trae legittimità dalla fede privilegiata dell'organo accertatore, ma dalla sua capacità di resistere al vaglio del contraddittorio processuale attraverso prove che siano, *ab origine*, dotate di una forza persuasiva autonoma.

⁹ V. A. Comelli, *Poteri delle corti di giustizia tributaria di primo e secondo grado*, in *Comm. proc. trib.* (a cura di C. Consolo e C. Glendi), 5^a ed., Milano, 2023, p. 178. Si vedano anche G. Mercuri, *Onere della prova: dal contributo di Allorio alla recente riforma del processo tributario*, in *Riv. dir. fin. sc. fin.*, 2022, 3, p. 375; S. Muleo, *Le "nuove" regole sulla prova nel processo tributario*, in *Giustizia Insieme*, disponibile al link <https://www.giustiziainsieme.it/it/diritto-tributario/2451-le-nuove-regole-sulla-prova-nel-processo-tributario> (consultato il 22 marzo 2026); S. Donatelli, *L'onere della prova nella riforma del processo tributario*, in *Rass. trib.*, 2023, 1, p. 25; A. Lovisolo, *Sull'onere della prova e sulla prova testimoniale nel processo tributario: prime osservazioni in merito alle recenti modifiche ed integrazioni apportate all'art. 7 d.lgs. n. 546 del 1992*, in *Dir. prat. trib.*, 2023, 1, p. 43 ss.; G. Moschetti, *Il comma 5-bis dell'art. 7 d.lgs. n. 546/1992: un quadro istruttorio per ora solo abbozzato, tra riaffermato principio dispositivo e diritto pretorio acquisitivo*, in *Riv. tel. dir. trib.*, 2023, 1. Per i lavori monografici, ante riforma, per tutti, C. Corrado Oliva, *L'onere della prova nel processo tributario* (CEDAM, 2^a ed., 2012). Si segnalano altresì le monografie post riforma di N. Sartori, *I limiti probatori nel processo tributario* (Giappichelli, 2023) e A. Marcheselli, *La prova nel nuovo processo tributario* (Giuffrè, 2024).

¹⁰ J. Ferrer Beltrán, *Prova senza convincimento. Standard di prova e giusto processo* (Giappichelli, 2025). Inoltre, D. Deotto, A. Gaeta e L. Lovecchio, *L'onere della prova nel rapporto tributario* (Il Sole 24 Ore, 2023).

¹¹ Emblematiche le parole del Maestro C. Glendi, *La novissima stagione della giustizia tributaria riformata*, in *GT – Giur. trib.*, 2022, 10, p. 760: «Una vera e propria "bomba" è

non può (quindi più) prescindere da un rigoroso rispetto dei principi probatori, soprattutto alla luce dell'intervento legislativo operato con l'art. 6 della l. 130/2022.

L'accertamento analitico-induttivo, proprio per la sua natura inferenziale, è quello che maggiormente risente di questo innalzamento dell'asticella probatoria. Laddove il ragionamento dell'Ufficio si fonda su concatenazioni logiche, la novella impone che ogni "anello" della catena sia verificato e non frutto di mere supposizioni. La prova dell'evasione deve quindi essere particolarmente rigorosa poiché in presenza di elementi di fatto discordanti o di alternative giustificazioni razionali (quale, per l'appunto, lo shock produttivo derivante dalla maternità), la presunzione semplice dell'Ufficio degrada irrimediabilmente, non potendo più essere considerata né grave né precisa. Il lessico selezionato dal legislatore del PNRR, anche solo ai fini di una riflessione sistematica, ha portato autorevole dottrina a ragionare, in ambito tributario sulla "presunzione di onestà" del contribuente¹² sottolineando la fortissima assonanza di termini¹³ tra la novella e l'art. 530 co. 2 c.p.p. Questa forte convergenza lessicale tra ordinamento penale e tributario non è casuale e riflette l'esigenza di ancorare la sanzione fiscale (sovente conseguente alla ripresa a tassazione) al canone dell'oltre ogni ragionevole dubbio. Se nel processo penale

stata di bel nuovo innescata con l'aggiunta del comma 5-bis all'art. 7 del d.lgs. n. 546/1992 ad opera dell'art. 6 della legge in esame». Da ultimo, Id., *La regola (pre)finale al non liquet nel novissimo processo tributario riformato*, in *Dir. prat. trib.*, 2025, 4, p. 1223 ss.

¹² A. Giovannini, *Sulla presunzione di onestà del contribuente e sulle prove*, in *Riv. trim. dir. trib.*, 2023, I, p. 32 ss.; Id., *La presunzione di onestà e la fondatezza del credito impositivo "oltre ogni ragionevole dubbio"*, in *Giustizia Insieme*, 14 marzo 2023. Tale concetto, peraltro, si rinviene anche negli *Orientamenti per un modello di Codice europeo del contribuente*, ove è previsto che «I contribuenti possono attendersi: di essere considerati onesti [...]».

¹³ A. Viotto, *Prime riflessioni sulla riforma dell'onere della prova nel giudizio tributario*, in *Rass. trib.*, 2023, 2; A. Giovannini, *L'onere della prova nell'accertamento analitico-induttivo*, in *L'onere della prova* (a cura di F. Anelli, A. Briguglio, A. Chizzini, M. De Poli, E. Gragnoli, M. Orlandi e L. Tosi), Milano, 2024, p. 1220; G. Melis, *L'onere della prova nel diritto tributario dopo la legge n. 130 del 2022 e il d.lgs. n. 219 del 2023*, in *Dir. prat. trib.*, 2024, 5, p. 1682 ss.; V. Ficari, *Modifiche normative ed onere della prova tra procedimento e processo tributario*, in *Riv. dir. trib.*, 2023, 1, p. 603 ss.

l'insufficienza o la contraddittorietà della prova conducono all'assoluzione, nel processo tributario riformato esse devono condurre, simmetricamente, all'annullamento dell'avviso di accertamento. La "presunzione di onestà" opera dunque come un *bias* positivo a favore del contribuente, imponendo all'Amministrazione un sovrappiù di diligenza istruttoria che non può essere surrogato da coefficienti di ricarico o medie di settore astratte *a fortiori* considerando i numerosi e penetranti poteri di controllo ed indagine ad essa riservati. In definitiva, "la prova del fatto posto a fondamento del diritto si potrà considerare decisiva solo se supererà una soglia molto alta [e ad ogni buon conto, più elevata del passato] di attendibilità ricostruttiva, che non deve lasciare margini apprezzabili di dubbio"¹⁴.

La soglia di attendibilità richiesta deve essere elevata proprio perché mirante a sradicare la prassi caratterizzata da accertamenti "standardizzati" quindi imponendo ai verificatori un'istruttoria sartoriale che tenga conto delle specificità del contribuente e del settore economico di riferimento.

La nuova disposizione normativa, come noto, è stata oggetto di critiche da parte della dottrina¹⁵ non tanto per il contenuto sostanziale,

¹⁴ V. anche A. Giovannini, *L'onere della prova nell'accertamento analitico-induttivo*, cit. alla nt. 13, p. 1220.

¹⁵ Tra gli altri, A. Giovannini, *La presunzione di onestà e la fondatezza del credito impositivo "oltre ogni ragionevole dubbio"*, in *Giustizia Insieme*, 14 marzo 2023, che così, emblematicamente, saluta in chiaroscuro la novella: «Non è un bel diritto quello che si legge nel comma 5-bis dell'art. 7, d.lgs. n. 546 del 1992, introdotto dalla legge n. 130 del 2022. Eppure, ciò nonostante, qualcosa di importante la norma riesce a dirlo. La prima indicazione è una conferma della regola sulla ripartizione dell'onere della prova per cui i fatti costitutivi del credito impositivo devono essere provati dall'amministrazione. L'altra attiene al grado di robustezza che l'apparato probatorio deve possedere affinché il giudice possa ritenere fondata la pretesa dell'amministrazione medesima»; con la canonica verve che lo contraddistingue, forti sono anche le parole del Maestro C. Glendi, *La novissima stagione della giustizia tributaria riformata*, in *GT – Giur. trib.*, 2022, 10, p. 760: «Una vera e propria "bomba" è stata di bel nuovo innescata con l'aggiunta del comma 5-bis all'art. 7 del d.lgs. n. 546/1992 ad opera dell'art. 6 della legge in esame. In prima

quanto per il linguaggio ridondante e parzialmente impreciso oltre che per il metodo seguito nella sua elaborazione; tuttavia, contrariamente all'impressione *prima facie* volta a qualificarlo come un intervento improvvisato, pare invece che la meditazione parlamentare abbia avuto, per rimanere in argomento, una "gestazione" ben più lunga del noto *blitz*¹⁶ dell'agosto 2022, potendosi rinvenire nei lavori parlamentari disegni di legge di analogo tenore sin dal 2019¹⁷.

Il passaggio dal "blitz" legislativo alla meditata attuazione tecnica dimostra che la riforma dell'art. 7 non è un incidente di percorso, ma l'apporto necessario di un'evoluzione che mira a ricondurre l'agire impositivo entro gli alvei del giusto procedimento e del giusto processo.

In definitiva la Corte di Trento, applicando correttamente questi principi, ha colto come nel caso di specie la prova dell'Amministrazione

battuta, al lettore non necessariamente "culto" ma pur solo non proprio a digiuno della materia, questa disposizione appare una sorta di "guazzabuglio di parole" frutto palese d'incultura giuridica in cui convergono, con stupefacente libertà, confusioni concettuali di primordiali nozioni oramai sedimentate a livello teorico, come sono quelle di "prova", "motivazione" e "giudizio", "decisione di merito" o di "annullamento di atti", di "oggetto della domanda" o di "motivi" o "ragioni" e, ancora, di "mancanza", "contraddittorietà" o "insufficienza" di motivazione e/o di prova. E, tuttavia, pur non smentendosi tutti questi appena accennati e facilmente incrementabili rilievi critici in ordine alla formulazione di così mal congegnate disposizioni, resta pur sempre il fatto che il dato normativo ormai c'è e di esso non può non tenersi conto, in quanto, pur grossolana espressione di una *voluntas legis* che dev'essere comunque scandagliata e compresa».

¹⁶ Il riferimento, per tutti, è alla, per il resto condivisibile, completa ed autorevole, ricostruzione di G. Vanz, *Genesi, struttura e ricadute sull'interpretazione della nuova disposizione sull'onere della prova nel processo tributario*, in *Riv. tel. dir. trib.*, 2025.

¹⁷ Il riferimento è al disegno di legge S. 1536, volto a introdurre, nello Statuto e non nel codice di rito tributario, un nuovo comma 4-bis all'art. 7, del seguente tenore: «4-bis. L'atto impositivo deve essere annullato se la prova della sua fondatezza manca o è contraddittoria o se è comunque insufficiente a dimostrare, in modo circostanziato e puntuale, le ragioni oggettive su cui si fonda la pretesa impositiva e l'irrogazione delle sanzioni. [...]».

fosse “evanescente” a fronte di un fatto oggettivo ed impeditivo come la maternità.

5. *Considerazioni conclusive*

La Corte trentina, a parere di chi scrive, ha correttamente applicato il diritto tributario vigente opponendosi a impostazioni svalutative che, di fatto, si traducono in una forma di discriminazione per tipologia di reddito prodotto, dei diritti e della dignità delle lavoratrici autonome, spesso penalizzate rispetto alle lavoratrici subordinate le quali, in forza di specifiche previsioni normative, possono *ex lege* godere di ampi periodi di (i) astensione (ii) remunerata dal lavoro con (iii) garanzia di conservazione del posto. In tale asimmetria di tutele, gli interventi della Corte di Trento si ergono a presidio di una “parità delle armi” che non è solo processuale, ma sociale. Se l’ordinamento giuslavoristico protegge la dipendente dal rischio di espulsione dal mercato del lavoro, il diritto tributario ha il dovere di proteggere l’imprenditrice dal rischio di una tassazione “espropriativa” che colpisca una ricchezza virtuale e meramente figurativa derivante da elaborazioni algoritmiche.

La Corte di merito ha inoltre fatto proprio il mutato orientamento della Suprema Corte, la quale, nella prima fase “di rigetto” della regola di giudizio introdotta con l’art. 6 della l. 130/2022 nel codice di rito tributario, ne stabiliva una sorta di equivalenza con l’art. 2697 c.c. disponendo che “[...] la nuova formulazione legislativa, nel prevedere che “L’amministrazione prova in giudizio [...]” non stabilisce un onere probatorio diverso o più gravoso rispetto ai principi già vigenti in materia, ma è coerente con le ulteriori modifiche legislative in tema di prova, che assegnano all’istruttoria dibattimentale un ruolo centrale”¹⁸. Questa “centralità dell’istruttoria” deve essere letta come un invito a rifuggire dalle semplificazioni istruttorie che troppo spesso hanno caratterizzato l’azione degli Uffici e le valutazioni di taluni Giudici tributari. Se l’accertamento analitico-induttivo muove da basi inferenziali, la nuova regola di giudizio impone che

¹⁸ Cass., n. 31898/2022.

tali inferenze siano sottoposte a un vaglio di resistenza rigoroso. Non è più sufficiente che l'Ufficio alleggi uno scostamento statistico per invertire l'onere probatorio: occorre che tale scostamento sia depurato da ogni variabile esterna razionalmente giustificabile. In assenza di tale sforzo analitico, la pretesa tributaria resta monca, priva di quella "fondatezza intrinseca" che la novella legislativa pone come preconditione per la legittimità dell'atto impositivo e la sostenibilità della pretesa fiscale. I giudici di legittimità infatti, nelle pronunce più recenti, hanno inteso porre l'accento sulla natura a loro dire sostanziale e non processuale, della norma affermando che essa "[...] si applica ai giudizi introdotti successivamente al 16 settembre 2022, data di entrata in vigore della legge predetta (Cass. n. 20816 del 25/07/2024; n. 16493 del 13/06/2024)"¹⁹. Ciò comporta, anzitutto, che l'interrogativo del Giudice di legittimità in ordine all'efficacia temporale della novella non può che avere quale presupposto logico l'acclarata modificazione normativa rispetto al pregresso assetto normativo. Se nulla fosse cambiato e quindi se la novella fosse una mera trasposizione dell'art. 2697 c.c. in ambito tributario, la Suprema Corte non si sarebbe certo posta il cennato problema di applicazione temporale. La natura "sostanziale" della norma sulla prova, implicitamente ammessa dai Giudici di legittimità attraverso il dibattito sulla sua efficacia temporale, sposta l'asse della controversia dalla mera forma alla sostanza del diritto. Se lo *standard* probatorio è mutato, ciò significa che l'Amministrazione non può più limitarsi a "proporre" una ricostruzione verosimile, ma deve "dimostrare" una verità materiale che superi il vaglio della logica e della coerenza aziendale. Nel caso dell'imprenditrice di Trento, la pretesa di desumere omessi ricavi dal valore di cessione dell'azienda (avviamento) si scontrava con un dato di fatto – le due gravidanze – che rompeva lo schema logico dell'Ufficio, rendendo la tesi erariale non solo

¹⁹ Così Cass., n. 3072/2025; v. anche, in tal senso, la relazione orale della Consigliera Milena Balsamo al convegno «La prova nel diritto tributario», organizzato nell'ambito de «I venerdì di diritto e pratica tributaria» dalla Fondazione Antonio e Victor Uckmar presso l'Universitas Mercatorum, il 24 ottobre 2025 (atti del convegno in corso di pubblicazione).

temporalmente inefficace, ma logicamente insufficiente a superare la soglia di certezza oggi richiesta. Inoltre, ne segue che, perlomeno a decorrere dai giudizi incardinati successivamente alla gemmazione del comma 5-bis, si sia aperta una breccia nel settore tributario ove ragionare, a fronte di poteri e strumenti (si pensi all'IA) sempre più ampi dell'Amministrazione, dell'applicazione del principio dell'oltre ogni ragionevole dubbio (*beyond reasonable doubt*) di derivazione penalistica, in luogo del "più probabile che non" (*preponderance of the evidence*) di derivazione civilistica²⁰. Tale evoluzione verso l'intermedia "*clear and convincing evidence*" appare ancor più necessaria in un'epoca di imperante "automazione dell'accertamento". Gli strumenti di Intelligenza Artificiale a disposizione dell'Amministrazione Finanziaria, pur nella loro efficacia predittiva, tendono a deumanizzare il rapporto d'imposta, appiattendolo le specificità biografiche del contribuente su medie asettiche. Sul punto, già la risalente C.T.P. di Savona (sent. 12/2010) chiarì che l'apparente (immediata) antieconomicità della gestione può essere giustificata dal "sopportare un temporaneo andamento gestionale negativo per mantenere l'attività, con la prospettiva di ripresa allorquando, dopo i primi anni di vita dei figli, la loro maggiore autonomia può consentire alla madre la maggiore disponibilità lavorativa".

Concludendo, le sentenze in commento non rappresentano un *unicum* isolato, ma recepiscono, dal punto di vista sostanziale, gli approdi cui sono in precedenza giunti altri Giudici tributari e dal punto di vista processuale gli esiti di una stagione di riforme che mette al centro l'onere della prova e la motivazione degli atti. La "presunzione di onestà" del contribuente, lungi dall'essere una mera declamazione teorica, trova in

²⁰ Si vedano, in particolare, L. Tosi, *La nuova norma sull'onere della prova nel processo tributario*, in *Riv. trim. dir. trib. – Tax News*, 20 dicembre 2024; F. Gallo, *Brevi considerazioni in materia di onere della prova nel processo tributario dopo la riforma della giustizia tributaria e dello statuto dei diritti del contribuente*, in *Riv. trim. dir. trib. – Tax News*, 12 dicembre 2024; A. Viotto, *Prime riflessioni sulla riforma dell'onere della prova nel giudizio tributario*, in *Rass. trib.*, 2023, 2, p. 336; M. Golisano, *Riflessioni in ordine all'impatto del nuovo comma 5-bis dell'art. 7 d.lgs. n. 546/1992 in riferimento alle imposte indirette*, in *Riv. tel. dir. trib.*, 15 giugno 2023.

queste pronunce la sua applicazione pratica: se la contribuente offre una giustificazione razionale, documentata e costituzionalmente orientata della propria flessione reddituale, l'Ufficio che non è stato in grado di soddisfare il proprio *onus probandi* perde il diritto di presumere l'esistenza di materia imponibile.

Roman Law in the 20th Century

From the Crisis to the Recovery of the Western Legal Tradition

LUDOVICA LOT*

Abstract: In this work I am going to discuss the role that Roman law has played within the academic environment throughout the 20th century. My analysis will focus primarily on the Italian and German scene, two nations that have tragically seen the rise of totalitarian regimes at the beginnings of the 1920s. Given the almost opposite attitudes in respect of Roman law in those two dictatorships, I will attempt to give an explanation over why the outcome was so different in two political situations that were not so distant ideologically wise. In order to do this, I am going to take into account different elements that have characterized these two experiences such as the law, the authors of the time and other societal aspects. Lastly, my work will provide an overview of the changes that arrived in Europe after the end of WWII and how Roman law principles still were involved, even if only marginally, in the establishment of the European Union and the re-creation of a common European legal tradition. The purpose of this article is to describe the role that Roman law has played throughout the last century and how easy it is for dictatorships to even invoke Roman law to support a propagandistic construction.

Keywords: Roman law; Crisis of Roman Law; Fascism; Nazism, Western and European legal tradition.

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0. Introduction

Roman law is the architrave of the European legal tradition. From its creation onwards, Roman law has played a crucial role in the development of the civil law systems, with its influence extending also to the common law area. After the fall of the Roman Empire, the *ius commune*, a term that represents an “European Common law”, began to develop from the core of the *Corpus Iuris Civilis*. Later on, this legal system also embraced the authoritative legal texts of the Catholic Church. Even though local laws were still applied, as they were retained to be part of the *ius proprium*, the study of Roman law was something very common and that was part of the knowledge not only of jurists, but of all well-educated people. The application of Roman law continued to be important, since it was considered superior to the ordinary local rules. This was because it provided more advanced and sophisticated rules than the ones that were generally

used by local tribes, which, instead, were based on rudimentary customary practices¹. In this sense, Roman law also played a subsidiary role when those rules showed *lacunae* in some fields. Thus, the *ius commune* remained for centuries the primary focus of legal education at universities and the central topic of scholarly discourse on private law. Additionally, it was a widely discussed subject among the academics of different fields of study, like poets and artists.

During the 20th century Roman law started to assume a very different role as a propagandistic tool. On one hand, Fascism viewed Rome and its Empire as a model to emulate. Many measures were adopted by the regime in the name and as legacy of the Roman Empire. These type of initiatives were very distorted and, most of the time, the connection between the present and the past was forced, artificial and, practically, non-existent. By contrast, Nazism took a very strong hostile stance towards Roman law, which came to be seen as the legal and cultural expression of the liberal State of the 19th century and the product of a legal order that was no longer purely German. The hatred of the Nazi regime towards Roman law was strongly linked to the proliferation of racial theories, which lacked any type of accurate legal basis. It also started to be assumed that classical and post-classical Roman law were corrupted by “oriental influences”.

The purpose of this article is to provide the basis for a reflection on the relationship between law, history and ideology within the events that have occurred during the first part of the 20th century. The work is divided into three parts: the first two examine the differing approaches and contexts of the two far-right regimes with respect to Roman law and offer a

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¹ Edgar Bodenheimer, *The Influence of Roman Law on Early Medieval Culture*, 3(1) *Hastings International and Comparative Law Review* 9, 16 (1979).

comparative analysis of the two. The final chapter examines Roman law within European legal culture after World War II and within the European Union, as well as the various forms of influence and inspiration it may provide for the modern supranational legal order.

My intent is to build a path which explores how the use of propaganda can blend easily into the law and the tradition of a nation; secondly, to understand whether the retrieval of Roman law principles still makes sense in a completely different historical and juridical context.

As for the methods applied to this study, this article not only analyzes the individual situations and circumstances involving the role of Roman law but also tries to investigate the elements of differentiation between the two regimes, as well as underline the causes that have led to divergent situations. The analysis is based on historical and legal sources with a particular focus, at least in the first two chapters, on the ideological interpretation of Roman law. The historical-juridical dimension tries to provide a sort of continuation between events that, even though completely different from one another, are part of the same shared history and are still related to our present.

1. *Chapter I*

1.1. *Overview*

It is crucial to highlight that when we are referring to the relationship between Roman law and a totalitarian regime², like Fascism, we are not simply alluding to the application of Roman law within the regime's legal system. Roman law did not affect society through legislative power

² When referring to a "totalitarian regime" within this article, I will be alluding to the definition provided by the Enciclopedia Italiana in its two versions, the first one being redacted by Giovanni Gentile, and the other by Mussolini under the heading "Fascism": «partito che governa totalitariamente una nazione» (see *Enciclopedia Italiana*, vol. XIV, pp. 847–51). The first section of the entry, titled *Doctrine* and signed by Mussolini, is divided into two parts: *Fundamental Ideas* (pp. 847–8) and *Political and Social Doctrine* (pp. 848–51), the first of which is attributed by many to Gentile.

nor was it involved in the judicial system or applied to dispute resolution between individuals.

Nevertheless, the relationship between Roman law and the regime involved culture, ideology or, more generally, all that Roman law symbolized from both a historical and political perspective. Elvira Migliario and Gianni Santucci in the book they edited, *Noi figli di Roma*³, indicated the “reconstruction” of the Roman Empire put into place by Fascism as a “mythopoetic action”: a fusion of myth and the idea of purposeful action⁴. Indeed, Mussolini consistently pointed to Rome as a myth and a part of the “Italian” past that, with all its principles, needed to be taken as a model for the modern Italian population. One of Fascism’s core desires was to impose itself as the new manifestation of Rome and its direct descendant, utilizing propaganda as the main strategy to convey this message⁵. But what were the reasons behind this longing?

The first step of this complicated and troubled story can be traced back to the publication of the article *Passato e Avvenire* by Mussolini in the journal *Popolo d’Italia* on the 21st of April 1922⁶:

«Roma è il nostro punto di partenza e di riferimento; è il nostro simbolo o se si vuole il nostro Mito. Noi sogniamo l’Italia romana cioè saggia e forte disciplinata e imperiale. Molto di quel che fu lo spirito immortale di Roma risorge nel Fascismo: romano è il

³ Giovanni Santucci, Elvira Migliario, «*Noi figli di Roma*». *Fascismo e mito della romanità* at 11 (Le Monnier 2022).

⁴ *Ibid.*

⁵ *Id.* at 14.

⁶ Benito Mussolini, *Passato e avvenire*, *Il Popolo d’Italia* (1922), available at <https://bibliotecafascista.blogspot.com/2012/03/passato-e-avvenire.html> (last visited March 29, 2026).

Littorio romana è la nostra organizzazione di combattimento romano è il nostro orgoglio e il nostro coraggio: «Civis romanus sum»⁷.

It's possible to observe that Rome is evoked with a very nostalgic tone and that Mussolini was longing for its reconstruction under Fascism. The regime sought legitimation by underpinning continuity traits with the past, both political and institutional. Different aspects of the State were touched and modified to please Mussolini's view of restoration and to recall the greatness of the empire. However, Roman law were and formulated in a very confused manner, as they were trying to create the ideal shape that the Italian modern State was supposed to assume. Because of this, the ideological construction of the Fascist state relied heavily on the adoption of propagandistic measures. Just to name a few, the choice to adopt the fasces as a symbol of Mussolini's power, the quadrumviri leading the March on Rome and the assumption of the title "Dux" by Mussolini following that event, the creation of new celebrations, like the "Christmas of Rome" on the 21st of April. These and many others are just a few examples of the provisions adopted by the regime that primarily had a political-symbolic nature⁸. Other interventions aimed at creating a strong Roman-Empire-inspired cultural substrate that pervaded architectural forms and the educational system.

1.2. Retrieving "Romanità"

1.2.1. *The Reconstruction of the Third Rome in Its Many Facets*

Italy's restoration of Rome covered different aspects, such as architecture, culture, law and its society. The starting point was indeed the latter, which at the time was mainly composed of farmers, not really the

⁷ Benito Mussolini, *Discorso del bivacco* (Camera dei deputati del Regno d'Italia, January 3, 1925), available at <https://www.perlaretorica.it/reto/benito-mussolini-discorso-del-bivacco-16-novembre-1922/> (last visited March 29, 2026).

⁸ See also Migliaro and Santucci, *Noi Figli di Roma* at 14 (cited in note 3).

image of a strong population of warriors that Mussolini wanted to promote. Fascism aimed to directly modify and influence the Italian lifestyle, especially with regard to the male population. The intention was for Italian men to identify with the figures of the *agricola* and the *miles*, depictions of discipline, order and masculine power, with them being a positive reinforcement of respect and tradition⁹. Those roles, that had been objects of mystification and protagonists of incredible stories, started to be transformed and used to promote the fundamental principles of family, war commitment and socio-political attitude.

In the meantime, the Fascist government was engaged in the promotion of new cultural centers. The most important in the field of Roman law studies was the Istituto Nazionale di Studi Romani. Led by Pietro Fedele and Luigi Federzoni, founded in 1925 and established to analyze the «*senso storico della funzione esercitata da Roma nel mondo nello svolgersi della civiltà*»¹⁰, it would quickly become a place of meeting and discussion for scholars, politicians and many other figures that shared the desire to spread the myth of Rome. This was supported by other types of special events, such as the “*Mostra Augustea*”, organized in honor of Augustus’ bimillenary in 1937, which proposed an analogy between the Principate of Augustus and Fascism. Many important scholars participated in this event, among them Salvatore Riccobono, one of the most prominent scholars within the Roman law field at the time¹¹.

The urbanistic renewal was also a fundamental part of this plan of reconstruction: according to Vittorio Vidotto in his book “*Roma Contemporanea*”, the so-called “*sventramenti*” were a part of the rebirth of Rome

⁹ *Id.* at 202.

¹⁰ Donatello Aramini, *Nel segno di Roma. Politica e cultura nell'Istituto di studi romani* at 40-42 (Laterza 2016).

¹¹ See Salvatore Riccobono, *La fusione del ius civile e del ius praetorium in unico ordinamento*, 16(4) *Archiv für Rechts- und Wirtschaftsphilosophie* 503, at 503 (1922/1923); *La formazione di un ius novum nel periodo imperiale*, *Atti del I Congresso di Studi Romani* (Roma 1929).

and they included the creation of new public spaces for its citizens¹². Only the vestige of antiquity should have been preserved. Mussolini wanted to maintain exclusively the architecture that was able to represent his own idea of Romanity. Everything that had been erected after the fall of the Roman Empire, except for a few Christian Temples, was deemed to be an improper alteration of the glorious ancient image of the Roman Empire and a representation of a period of political decadence¹³. This was retained to be a sort of liberation of antiquity's places: all the medieval buildings were destroyed to save the imperial forum and the ancient monuments. What characterized those actions was the mix of the need for a new, functional and modern urbanistic plan and the desire to celebrate the regime through the creation of monuments and ceremonial spaces. The climax of those projects was the inauguration of the *Via dell'Impero*, in 1932, which would later become the main theatre of Fascist parades¹⁴.

Lastly, the regime had the urgency to combine Roman law and Fascist law, trying to show a sort of continuity between the two. The most striking outcome of this process of "Romanization of the law" was the reform implemented with Legislative Decree No. 1089 of May 17, 1928, and Consolidated Law No. 2 of September of the same year. This law reformed the structure and nature of the parliamentary assembly by giving it a "plebiscite character."¹⁵ The previous law of 17th January 1926 provided

¹² Bruno Bonomo, Charles Davoine and Cécile Troadec, *Reconstruire Rome: la restauration comme politique urbaine, de l'Antiquité à nos jours* (Publications de l'École française de Rome 2024).

¹³ Salsano, Fernando, *Il rinnovamento urbano nella Roma fascista* at 231 in B. Bonomo, *Reconstruire Rome* (Publications de l'École française de Rome 2024) 227, 231 available at <https://doi.org/10.4000/1279y> (last visited March 29, 2003).

¹⁴ Alessandra Tarquini, *Il mito di Roma nella cultura e nella politica del regime fascista: dalla diffusione del fascio littorio alla costruzione di una nuova città (1922-1943)*, 95 *Cahiers de la Méditerranée* 139, 143 (2017).

¹⁵ See also Santucci, Migliario, «*Noi figli di Roma*» at 23 (cited in note 3).

a Unique Text and a uninominal college¹⁶. The newest one instead supplied a unique national college and a single list of 400 deputies that leaving the electorate with only two options: approval or rejection. Two “plebiscites” were held in 1929 and 1934¹⁷. This was the only case in Europe of the modification of national elections into plebiscites, which historically had another function¹⁸. Given its evident Latin etymology, the use of this expression facilitated Fascist validation within the normative and statutory frameworks.

1.2.2. Corporativism

Another important experience in Fascist history was corporativism. Corporativism was essentially a political, economic and social system inspired firstly by the Christian experience at the end of the 12th century in which diverse groups called “corporations” played a vital role in the organization of society and in the decision-making over crucial aspects of the economic and political sides. Corporations were composed of merchants and artisans and aimed at the reduction of internal competition, the control of production, prices, sales and the supervision of professional training¹⁹. This system ensured quality production, fair remuneration, and

¹⁶ The unicameral system, adopted by the Fascist regime in Italy, consists of a parliament with a single legislative chamber. In practice, this system eliminates the distinction between the Chamber of Deputies and the Senate of the Kingdom, simplifying legislation and concentrating power in the hands of a single assembly, subject to government control, information available at <https://anpi-lissone.overblog.com/article-14472952.html> (last visited March 29, 2026).

¹⁷ Carlo Buttafuochi, *Mandato Camera per la Legislature XVIII del Regno (20.04.1929 - 19.01.1934)*, available at http://dati.camera.it/ocd/legislatura.rdf/regno_28 (last visited February 18, 2026).

¹⁸ In ancient Rome, a *plebiscitum* was a resolution passed by the *Concilium Plebis* (Plebeian Council), an assembly composed exclusively of plebeians.

¹⁹ Rolf Petri, *Sulle origini del corporativismo*, 8 *Studi di Storia* 13, 34-35 (Edizioni Ca' Foscari 2019).

controlled access to the profession, but also created a local monopoly that benefited guild members²⁰.

According to De Robertis²¹, the primary point of diversification between the Fascist and Roman corporativism lies in the fact that the latter is the result of decadence, described as the attempt to get together to overcome difficulties. It must be noted how in ancient Rome physical work was seen as a degrading activity which was to be performed only by the slaves²². The original Roman *collegia* were composed of individuals who performed the same activity and pursued a common economic interest by forming alliances that sometimes acted like cartels²³. This was a way to come together and to face struggles through alliances. Meanwhile, Fascist corporativism was presented as an exaltation of individualism²⁴.

Looking into the details, Fascist corporatism was the result of three different past experiences that merged together. The first one emerged after WWI and indicated corporativism as a form of revolutionary syndicalism. It campaigned for allowing the workers to have their own control over the production and having the possibility to participate directly in the economic policy. The second position came from Alfredo Rocco's theory, who derived his vision on corporativism from economic nationalism²⁵. Rocco supported a form of state-controlled trade unionism aimed at surmounting internal class conflict through a corporative economic system centered on coordination and national unity. The third and final

²⁰ *Id.* at 35.

²¹ Francesco Maria De Robertis, *Corporativismo Romano e Corporativismo Fascista* (Il Diritto del Lavoro 1934).

²² Antonio Cavalli, *Il fenomeno associativo dai "collegia" antichi alle "corporazioni medioevali"*, 66 *Rivista Internazionale di Scienze Sociali e Discipline Ausiliarie* 149, 151 (1914).

²³ Koenraad Verboven, *Introduction: professional collegia: guilds or social clubs?*, 41 *Ancient Society* 187, 189 (2011).

²⁴ Massimo Miglietta, Gianni Santucci, Università degli studi di Trento. Dipartimento di scienze giuridiche, *Diritto romano e regimi totalitari nel '900 europeo. Atti del Seminario internazionale (Trento, 20-21 ottobre 2006)* at 26 (Quaderni del Dipartimento di Scienze Giuridiche, Università di Trento ed. 2009).

²⁵ Piero Barucci, Piero Bini and Lucilla Conigliello, *Le sirene del corporativismo e l'isolamento dei dissidenti durante il fascismo* at 45 (Firenze University Press 1st ed.2021).

stance was connected to the Italian-Catholic moderate tradition in economic thought, which criticized economic individualism but emphasized social solidarity based on personal relations rather than state coercion²⁶. The actual gap between the theoretical formulation and the implementation under Mussolini is then so wide that finding a single ideological influence is quite difficult²⁷.

Yet, this experience can be considered as one of the weakest points of the measures adopted by the regime and it allowed the jurists to take divergent positions on it, at least in theory²⁸. This was because after the agreement of the Fascist government with Confindustria of 1925, which eliminated all the non-Fascist unions and strengthened the employers authority, the result obtained was paradoxical²⁹: even if Fascist unions had gained a monopoly, they lost real influence in factories, where it was gained by the employers. This made the corporative system authoritarian and state-controlled, but with limited influence on workers³⁰.

Yet, Fascism didn't miss the chance to vastly promote the connection between the Roman *collegia* and Fascist corporativism: the 1930s saw a proliferation of studies on the different forms of labor associations in ancient Rome. Most of the time, this research involved many scholars who had never even covered this topic before. Guarnieri-Ventimiglia for example, who lacked formal expertise in Roman law, found himself trying to associate Roman corporativism to the Fascist one, even though those two experiences should not be confused³¹. He attempted to convey the idea that Fascist corporativism was able to surpass the Roman experience thanks to the dialogue between the State and corporations. Yet, from a

²⁶*Ibid.*

²⁷ *Id.* at 46.

²⁸ *Id.* at 26.

²⁹ Natascia Ridolfi, Ada Di Nucci, *Il Corporativismo: un paradosso della politica economica dello stato fascista*, 19 Pecunia 61, 64 (2014).

³⁰ *Id.* at 65.

³¹ Miglietta and Santucci, *Diritto romano e regimi totalitari nel '900 europeo* at 27 (cited in note 24).

purely political perspective, the discussion of the real differences is missing.

The connection with the Roman empire was once again remarked at the Mostra Augustea della Romanità in 1937-1938, where the *collegia* were presented as the predecessors of modern corporations and a parallelism was traced between Mussolini and Augustus. Just as the second one had utilized the *collegia* for the benefit of the State, Mussolini, through the trade union law³², organized the corporations and led them through the class struggle that characterized the industrialized States at that time³³.

1.2.3. Roman Law as a Way to Justify Racism

The racial issue was one of the main concerns at the basis of the Fascist and Nazi's ideologies and experiences. The discussion over race in Italy happened within the context of an "anthropological revolution" that aimed to produce a "new type of Italian". This new citizen model would be spiritually connected to its ancient Roman roots and, at the same time, would completely break the relation with the bourgeois individual³⁴. In order to conduct this reform, two "preparatory" steps were taken. The first one was Mussolini's speech on the 25th of October 1938 to the Consiglio nazionale del Partito Fascista and the second was the anniversary of the Milizia volontaria per la sicurezza nazionale on the 1st of February of

³² The Trade Union Law of the 3rd April 1926, enacted by the Fascist regime, had as its main objective the control and suppression of trade union freedom, institutionalizing the Fascist syndicate as the sole representative body of workers and prohibiting strikes and lockouts, information available at <https://www.collettiva.it/rubriche/buonamemoria/quando-il-fascismo-cancello-la-liberta-sindacale-h733we75> (last visited March 29, 2026).

³³ Thomas Morard and Simone Ciambelli, *I collegia romani e il corporativismo fascista: scavare a Ostia ai tempi di EUR42* at 2 (paper presented at Incontri SAET - Tradizione dell'antico. Da Roma al Mare. Politica, archeologia, urbanistica (1900-1945), May 20, 2021).

³⁴ Paola Salvatori, *Razza romana* at 278 (Electa 2012).

the same year³⁵. Both of these settings of ideological radicalization represented the perfect opportunity for Mussolini to address the regime's new racial policy.

The latter event was about the adoption of the new "passo romano di parata" as the official march for the Italian army³⁶. Mussolini stated that this was the step meant to "fight the lazy rubbish of humanity"³⁷ and to rebuild another aspect of the connection to the strong Roman army which, by utilizing this type of step and posture/approach, was able to defeat the populations of the Gauls. This type of martial conduct within the army was actually unknown to the martial mentality of the Romans. From a political point of view, it was an imposition of principle of composure and martial rigor that was opposed to the decaying bourgeoisie values. It also indicated the need to power up the physical structure of the Italian population. In other words, it was the annihilation of the part of population that, according to Mussolini, contaminated the Italian race³⁸.

The speech to the Consiglio nazionale del Partito Fascista was instead centered around the substitution of the third person, in official correspondence and public relations, with the second person, both singular and plural. This shift would have represented a sign of opposition against the ceremonious manners of the bourgeoisie and its lifestyle. The speech to the Consiglio nazionale del Partito Fascista was exploited by Mussolini as the perfect context to talk about the new racial policy of the regime. The anti-semitic laws were published in 1938 alongside the "Manifesto degli scienziati razzisti", and, as a form of propaganda, the ancient Romans were depicted as a model: according to Mussolini, they were "razzisti all'inverso simile"³⁹. This is openly in contrast with many declarations

³⁵ *Id.* at 278.

³⁶ Andrea Giardina and André Vauchez, *Il Mito di Roma: da Carlo Magno a Mussolini* at 260, (Laterza 1st ed. 2016).

³⁷ Benito Mussolini, *Opera Omnia*, Vol. XXIX, (La Fenice 1959) at 52-53.

³⁸ Giardina and Vauchez, *Il Mito di Roma: da Carlo Magno a Mussolini* at 267

³⁹ *Opera*, Vol. XXIX, 1959 at 190 (cited in note 37).

done by Mussolini on the same topic, in which instead the Romans were cheered for their capacity to integrate the stranger populations⁴⁰.

A parallelism was thus traced between the Romans and the modern Italians as representatives of stability and the sense of State, in addition to their rootedness in the land. The Jews, on the contrary, were like the Carthaginians, a symbol of individualism, nomadism and restlessness. Romans have never pursued persecutions of race like the modern States of the 20th century and even if prejudice against strangers were present, it was not a barrier to the social ascent⁴¹. Many foreigners at the time covered important positions within the army or had been adopted by noble families. Furthermore, marriages between different “races” were never prohibited in Rome and many were the emperors born in the provinces, like Adrian. This can be compared to the very “racist” behavior of the Greek population, that instead saw all the non-Greek as barbarians, unlike the Romans that tended to distinguish between “Roman citizen” and “not Roman citizen”⁴².

But with the Jews it was different. Through their culture and the religion, they have always kept a rigorous exclusivism that has made them be perceived as something extraneous from Roman society. Many were the disorders that the Jews populations caused within the Palestine regions due to religious matters, as Jewish life was operated within three layers of law: the common law, which was the local Roman law applicable to everyone, the Jewry, which were special regulations created by local Roman authorities especially for the Jews and the Jewish Law, an internal Jewish law which was applied only when allowed by the Roman authorities⁴³. The public authorities imposed punishment and limitations against them, but ancient Romans have never arrived at grave persecutions nor

⁴⁰ Giardina and Vauchez, *Il Mito di Roma* at 267 (cited in note 38).

⁴¹ Paola Salvatori, *Razza romana* at 279 (cited in note 34).

⁴² Giovanna Errede, *Il mito dell'appartenenza. Politeia greca e civitas romana a confronto*, 6(1) *Materialismo Storico* 165, 206 (2019).

⁴³ Amnon Linder, *The Legal Status of the Jews in the Roman Empire* in *The Cambridge History of Judaism* 128, 131-132 (Steven T. Katz ed., Cambridge University Press 2008).

exterminations. The repression of the Jewish revolts was firm, but not different from the ones committed against other rebel communities. It makes sense to talk about “judeopathy”⁴⁴, a sort of resentment against a community that doesn’t want to be included in a bigger one that is open to embrace it. In conclusion, racial policies are a complete antithesis to Roman culture, the one of a population that used to celebrate its origins of migrants with the arrival of Enea.

1.3. *The Civil Code*

1.3.1. *The Italian Studies, the Third Way Between France and Germany*

The juridic field was not excluded from this reprise of Romanity: Roman law was considered to be incredibly important from a scientific and legal point of view. Through its figures in the scientific, educational, and academic spheres, Italy established a distinct field of study with its own representatives. The legal codification at the beginning of the 1930s was authoritarian and hierarchical, or in other words, Roman. This implied the involvement of Roman law scholars in the work of codification. This process had thus increased the role of Roman law at the Italian universities and created an important scientific dedication by several scholars to the study of Roman law.

The Italian legal model started to depart from the German and the French one. In Germany interpolationism started to develop under the influence of the German Roman law doctrine. The idea behind it was the reconstruction of the original texts of the Roman jurists before the intervention upon them by the Justinian compilers. The leaders of the movement, such as Lenel, Grandewitz, Pernice and Eisele, saw in them both

⁴⁴ The term “judeopathy” is utilized by Andrea Giardina in his work *“Il mito di Roma: da Carlo Magno a Mussolini”*. In accordance with the interpretation given by Francesco Torchiani (see F. Torchiani, *Il fascismo e l’idea di Roma: note sulla recente storiografia*, 74(1) *Il politico* 201, 2009), it refers to “una sofferenza da contatto provocata da una comunità indisponibile all’integrazione su una maggioranza disposta a integrare”.

great technical achievement and the representation of a pure and uncorrupted Romanity, not altered by oriental or Byzantine influences. This was obtained through the work of the Historical School (*Historische Rechtsschule*) and the Pandect-science (*Pandektistik*).

France was instead the symbol of the first massive and most important codification, namely the *Code Civil* of 1804⁴⁵. Critics moved against both the models adopted by France and Germany, primarily for the improper recall to the greatness of Roman law that the two have dared to use. Particularly, a strong blame was directed towards the liberal and bourgeoisie's ideals that the French code represented⁴⁶. In the journal *Foro Italiano*, the new fascist civil code is described as the first real Italian code that completely departs from the first Italian code of 1865. The 1865 code was flawed and described as liberal, individualistic and based on the Napoleonic Code, which made it unsuitable to truly reflect the Italian political, spiritual and racial identity⁴⁷. These ideas would later bring about the new codification of civil law in Italy eventually completed in 1942, and presenting a strong structural and functional connection to its ancient Roman matrix⁴⁸. Ultimately, the new civil code was portrayed as a synthesis of Fascist ideology, Roman law, and medieval Italian legal scholarship, forming the basis of a renewed national legal order⁴⁹.

The reprisal of civil law reflected this idea of hierarchy into the organizations of private relationships, family and enterprises. It must be said that two main figures from ancient Rome were used in the Italian Civil Code as legal concepts meant to influence the political asset and pervade the juristic spectrum, both in the civil and criminal field of law. Those figures are the *pater familias* and the *civis romanus*. They clearly reflect the idea of Mussolini himself, the father of five legitimate children (but many

⁴⁵ There had been a precedent codification attempt in Prussia, namely the *Allgemeines Landrecht* of 1794 that pursued the project of legal unification aimed at promoting the state identity of Prussia.

⁴⁶ As it will be discussed later, this resentment was already present in Nazis Germany

⁴⁷ Antonio Putzolo, *Panorama del codice civile fascista*, 66 *Il Foro Italiano* 41, 43 (1941).

⁴⁸ Migliaro and Santucci, *Noi Figli di Roma* at 206 (cited in note 3).

⁴⁹ Antonio Putzolo, *Panorama del codice civile fascista* at 43 (cited in note 47).

others were born outside of his marriage), a masculine figure who is fertile and authoritarian. These were the features that would be passed onto his heirs, like the award-winning Bruno⁵⁰.

1.3.2. *The Pater Familias*

The two previously mentioned figures became partially weaker. The *pater familias* used to have extensive powers in ancient Rome, and the typical family in Italy during Fascism attempted to get back to this prototype. In Roman law, the *pater familias* was a man, freeborn and citizen, who didn't have any direct masculine ascendant in line or had been emancipated from whoever had over him the *patria potestas*. The *pater familias* was, therefore, *sui iuris*. He had three main powers: the *patria potestas* over his children and grandchildren, the *manus maritalis* over his wife and daughters in law and the *dominica potestas* over his slaves and the properties of the family⁵¹. The Italian norms created a favorable position for men, but the real *pater familias* was only a relish of the past gone by ages and his last real traces can only be found at the time of the Ancién régime, in what the French defined as the *puissance paternelle*⁵². The concept of "Patria Potestà" introduced by the article 220 of the Italian Civil code presented, instead, the right, and not the power, of the father to obtain obedience and reverence from his children. According to article 131 of the Italian Civil code, the father was in effect the head of the family in the Italian legal order but the tones that characterized the ancient *potestas* were limited to coercive measures applied for correctional aims⁵³.

⁵⁰ Bruno, Mussolini's third child, received many honors for his military service, like the gold medal for the aeronautical value.

⁵¹ See Paul J. du Plessis, *Borkowski's Textbook on Roman Law* (Oxford University Press, 2020 1st ed. 2010). The *manus* happened only in the marriages *cum manu*.

⁵² The authority of the family at the time was a matter of public order: theorists of political absolutism agreed in defining the paternal function as a magistracy that received its power from God through the intermediary of the king.

⁵³ Migliaro and Santucci, *Noi Figli di Roma* at 206 (cited in note 3).

The code of 1942 legibly expressed the superiority of the male figure, but small changes were already introduced after WWI, like the abolition of the marital authorization. This was a norm imposing women to ask the head of the family for the possibility to appear in court or to obtain the completion of acts of patrimonial disposition and that was not recovered in the code of 1942. The newly adopted concept of “*buon padre di famiglia*” pointed instead to a more standardized behavior of general decency. Surely in Roman law the reference was to the *pater* because it was the most common figure in society to take part in public life. Nevertheless, when women started to have their own capacity, it was obvious that the “good father” rules were also applicable to them as a manner to indicate universal decorum⁵⁴. Still, it is important to remark that in this new code women were relegated to the position of mothers and were heavily excluded from the possibility to work. There were in fact many legislative measures adopted at the time to prevent women from being hired by listing the exclusive professions that could be exercised by them. They had the sole purpose to take care of their children and husband, and were not destined to take a part into public life and the world of work.

1.3.3. *The Civis and the “Relazione al Re”*

The second Roman model that was (mis)used by the regime was the one of the *civis*. Indeed, citizenship was one of the cornerstones of Roman law and ancient Rome. Rome was, like other political structures of antiquity, organized to grant some rights and a specific legal status only to its citizens, thus creating a difference between the ones born within the

⁵⁴ In his paper *Fascismo, guerra, Resistenza Le scelte delle donne*, Alberto Pantaloni explains the political action of the regime was characterized by a paternalistic protection that aim at the relegation of the woman to the exclusive role of mother. This strategy was influenced not only by the political scene, but also by the catholic church’s belief and was fomented even more by the economic and military exigencies that the Regime needed to fulfill. Even if were many the initiatives of the Regime to promote the role of the women within society (like the “*fasci femminili*”, the “*massaie rurali*” ...) the final goal was to reinforce the public consent, and this association were always cautious to not promote any emancipationist impulses.

walls of the city and the ones that were not. A pivotal change was represented by the enactment of the *Constitutio Antoniniana* in AD 212 that granted Roman citizenship to (almost) all the inhabitants of the empire.

There is a fascinating document that explores the chanting of the *Civitas Romana* and its link to the civil code which is the “*Relazione al Re*” by Dino Grandi⁵⁵. The document begins by specifying how the term ‘*Codice civile*’ does not originate from the designation used during the French Revolution which is, in fact, described in those passages as ‘improper’. Grandi continues stating that legal naturalism and liberal individualism are not part of the Italian tradition and neither belong to the Italian race. According to Grandi the Italian tradition has always been characterized by the strong presence of the Roman State and the hierarchical discipline of the Roman Catholic Church. This code therefore was not the code of the *citoyen*, rather the code of the Italian fascist citizen who directly and actively participated in the actions aimed at the common good and at increasing the power of the Italian nation⁵⁶.

The *civis*, who was an active member of Roman society, is a central figure in Grandi’s text. The parallelism traced between the post-revolutionary French citizen, in contrast to the legendary and invincible figure of the *civis*, becomes particularly evident. To Grandi the Italian *Codice civile* was neither the code of the bourgeoisie nor the code that provides rights to the citizens, since in the view of the autarchic civil code the individual cannot be conceptualized as separated from the state.

The main connection of the codes to Roman law quoted by Grandi lies in the reference to the *Institutiones* of the Roman jurist Gaius. The legal content found in the *Institutiones* was seen as pure and uncorrupted by later influences such as those of Emperor Justinian. Moreover, the *Institutiones* had not served as the direct model for the French codifiers and were not central to the Pandectist tradition. As a result, this heritage was suitable as a foundation for an authentically Italian legal identity. Gaius’s definition refers to a *codex civile* that was intended specifically for use in

⁵⁵ This is a written relation presented by Dino Grandi to the King for the approval of the civil code.

⁵⁶ Migliaro and Santucci, *Noi Figli di Roma* at 210 (cited in note 3).

Rome itself and it was considered the true law of the Roman *civitas*, applicable only to those born within the city walls. Lastly, the Civil code recalls the division of private law that was provided by the Roman tradition, mainly based on the scheme offered by Gaius through the division into three main subjects, namely family (*familiae*), successions (*actiones*), property and obligations (*res*).

This exaggerated nationalistic politics and the oversimplified genealogy intended to offer a blatant and tenacious message: the *ius* of the *cives* was the law of the Italian population, meant for them only. The story of this legacy begins with the Roman *civitas*, continues through the Digest studies in the Italian universities, is shaped by the practical experience of jurists, and endures into modern times⁵⁷.

The denomination “Codice civile”, according to Grandi, reaffirms a continuative and uninterrupted tradition which is at the same time Roman and Italian. Roman law was capable of shaping and adapting in accordance to the exigencies of the era in which it was applied. Grandi’s work arrives at the disparagement of the model of Roman law developed by the French civil code and the Pandectistic school, neither of which represent the true Roman law of the Italian State. The law of the Codice Civile was supposed to be the correct one, due to his hierarchical and self-sufficient qualities that could also be seen as universal.

Yet, by the end of this study, it becomes clear that, despite all the references to the greatness of Roman law, none of it is truly preserved in the civil code. Although Grandi tried to support this idea, it had no influence on the final version of the code. The concept of *status civitatis* was entirely disconnected from its original meaning in Roman law⁵⁸.

⁵⁷ *Id.* at 212.

⁵⁸ In Roman law, this was the primary distinction between Roman and non-Roman citizens.

2. Chapter II

2.1. Overview

After discussing the Italian situation, the focus now shifts on Germany. The German system came from a very important tradition of studies in the field of Roman law. The research that had been conducted by German scholars during the 19th century was considered to be the most advanced and influential in the field of Roman law scholarship at the time. This result must be attributed mainly to the work of the Historical School (*Historische Schule*) and the Pandect-science (*Pandektenwissenschaft*). The publication of the BGB on the 1st January 1900 was indeed possible thanks to their doctrinal contributions as it would later become one of the most influential civil codes worldwide. Yet, the situation started to change gradually as the Nazi party began to acquire more and more power. The first public attack occurred at the Hofbräuhaus in Munich on the 25th February 1920 with the publication of the party's program of which the point 19 stated: "19. Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht"⁵⁹.

This point appears completely different if compared to the other twenty-four. The program had as principal themes more concrete "problems", such as the defense of the German population and its nation, the problem of the "strangers" and socialist vision contraposed to the solidarity of the folk's community.

The reason behind the choice to include such a demand can probably be explained by looking at the program of the socialist party of the previous year: the leader of the party at the time, Rudolf von Sebottendorf, was part of a secret antisemitic league called the "Germanorder" created in 1912. The previous socialist plan contained already arguments in favor of a "Deutsches Germanrecht", a term that can be translated as a "German common law" and was meant to replace Roman law, which was con-

⁵⁹ Nationalsozialistische Deutsche Arbeiterpartei (NSDAP), *Das 25-Punkte-Programm der NSDAP*, point 19 (1920).

ceived as an expression of capitalism and Judaism. In the Nazis' eyes, Roman law was totally impermeable to the needs of German society since its Judaic and capitalistic influences led to an inevitable individualistic corruption. This is the main ground on which the Nazis' campaign against Roman law moved on.

2.2. *German Law and the Abandonment of Roman Law*

2.2.1. *The Arguments Against Roman Law*

The program of the third Reich was very clear on this matter; German law should have been returned to the German people. Everything else that had been absorbed in 2000 years of history and that could have been put under the label of "Roman law" was to be eradicated. The concept of *Volk*, meaning community, is central to the Nazis' experience as that was characterized most of all, and certainly more than Fascism, by the "problem of the race". This theory was first issued by Oswald Spengler in the two volumes of his *Der Untergang des Abendlandes* between 1918 and 1923. The ideology was then reprised by the Nazi author Helmut Nicolai in the 1930s. Within this framework, society was conceived as a group in which people are united by blood. The German population, in particular, was supposed to share a pure Nordic blood that defined the so-called "Aryan race". The Aryan race has the inherent capacity to create values and principles that the State was tasked to implement. This thesis profoundly influenced the legal field, particularly after the publication of the theories by Helmut Nicolai called the "Legal theory of the German race"⁶⁰. At that time in Germany a huge theoretical construction among the scholars regarded the conflict between the *Recht*, conceived as the principles of justice rooted in the German people, and *Gesetz*, the positive law produced by the liberal state⁶¹.

⁶⁰ Helmut Nicolai, *Rasse und Recht: Vortrag auf dem Deutschen Juristentag des Bundes Nationalsozialistischer Deutscher Juristen am 2*, (R. Hobbing, 1933).

⁶¹ Lawrence Preuss, *Germanic Law versus Roman Law in National Socialist Legal Theory*, 16 *Journal of Comparative Legislation and International Law* 275 (1934).

According to Nicolai's thesis, law was something intrinsic to human nature and that could directly influence the behavior of a person among the others into society. One of the most far-reaching implications of this view was that every race had its own legal system with its own different rules. Nicolai affirmed that mixed races, like Jews, were unable to take a just decision and distinguish what is good from what is bad⁶². According to him, only the pure breeds can truly know the law.

But this theory also specified something very interesting about Roman law: the Romans at the very beginning, were a Nordic and pure population. The problem arose when the "ancient Romans" decided to descend towards Italy and to mix with the inferior Mediterranean populations. This blending of blood caused a dilution of the pure Nordic elements⁶³. But to Nicolai the real catastrophe that struck on Roman culture was the influx of the oriental races, particularly the Jews and the Syrians, which started to rule over the population thanks to their wealth. Due to this, the Roman empire soon became a soulless state ruling over a community that was no longer truly Roman⁶⁴. The Great Roman Empire in this moment ceased to exist and the legal chaos of this situation was crystallized in the *Corpus Iuris Civilis*. To Nicolai this law, that does not derive from the *Volkstum*, is solely based on reason. The jurists transformed the legal norms into theoretical rules that were applied mechanically to each circumstance. German law, by contrast, had never been submitted to those corrupted laws and was still qualified to respond to the needs of its society through pure practical application⁶⁵.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Helmut Nicolai, *Die rassengesetzliche Rechtslehre: Grundzüge einer nationalsozialistischen Rechtsphilosophie* at 7, (Eher, 1932).

⁶⁵ Preuss, *Germanic Law versus Roman Law in National Socialist Legal Theory* at 274 (cited in note 61).

The *individualistische Ordnung*⁶⁶, which derived from the corrupted Roman law, continued to exist even after the fall of the “Jewified, commercial world-empire”⁶⁷. The rise of the positivistic school during the 19th century is in fact an outcome of the impact of those corrupted laws on German law. The positivistic law is abstract and mechanical, it corresponds to a command imposed from above that ignores the exigencies of the community. Yet this critique raised an inherent tension: if both liberal and National Socialist law appeared as commands imposed externally, how could the latter claim legitimacy?

The difference which legitimized Nazi law laid within the legal validity: Nazi law had a genuine popular foundation, meaning that it was the duty of the legislator to investigate the attitude of society, a living organism, and from that basis determine the content and direction of the law. Social conscience was capable of discerning right from wrong, but it required detailed guidance to address the technical, administrative and procedural aspects inherent in a modern state⁶⁸. Everything that was not formulated by the National Socialist Party, which was the one and only interpreter of the community spirit, was classified as non-German and “*volksfremd*”. On the other hand, the reprimand within the State of the *soziale Ordnung*, the law based on the principles of German law and representing the “social law”, was essential to avoid the same tragic fate of the Roman empire⁶⁹.

At the same time, the publication of the BGB on the 1st of January 1900 signaled the beginning of a deep crisis for the Pandectistic. Roman

⁶⁶ The *individualistische Ordnung* stand for a term that was used in the Nazi ideology to indicate the individualist tendencies that belonged to the “socialist state” and it was opposed to the *soziale Ordnung*, which instead put in the center the common good of the society. For more information, see Tommaso Beggio, *Un commento alla proposta di riforma degli studi romanistici di Paul Koschaker in un documento di Ulrich von Lübtow*, 46 Index 593 (2018).

⁶⁷ Tommaso Beggio, *Un commento alla proposta di riforma degli studi romanistici di Paul Koschaker in un documento di Ulrich von Lübtow*, 46 Index 593 (2018).

⁶⁸ Preuss, *Germanic Law versus Roman Law in National Socialist Legal Theory* at 276 (cited in note 61).

⁶⁹ Beggio, *Un commento alla proposta di riforma* at 593 (cited in note 67).

law started to be perceived as lacking the practical relevance in daily life that used to characterize its study throughout the 19th century⁷⁰. This pushed many scholars to focus on more historical aspects of Roman law, leading to the creation of the so-called “*Historisierung*”. This trend was already initiated at the end of the 19th century by four big scholars, namely Gradenwitz, Lenel, Eisele and Pernice, who founded the *Interpolationenforschung*⁷¹. Parallel developments included the introduction in German universities of a new course on *Antike Rechtsgeschichte* by Wegner, which aimed to promote a comparative study of the legal systems of the ancient world from a juridical and historical perspective. So, already in those years it was evident that Roman law was losing its primacy in the academic scene, but certainly it was not disappearing⁷².

This profound hate that later arose against Roman law led to the adoption of a reform of the legal studies in German universities inspired by Karl August Eckhardt, a prominent legal historian and member of the Nazi party⁷³. The reform entered into force in 1935 and provided for many changes regarding the teaching of Roman law in the universities, in primis with the reduction of the hours dedicated to this subject and the abolition of the preparatory course of private roman law (*Geschichte und System des römischen Privatrechts*), that was preliminary to the study of the BGB⁷⁴. Then, other mandatory classes were substituted by the new course, *Antike Rechtsgeschichte*, which gained both the favor of the student and the regime, likely because its title avoided any explicit reference to Roman law. But the most important measure that has signed the complete ostracization of Roman law in the academies was the choice to remove the mandatory exam at the end of the Roman law courses. Through these reforms

⁷⁰ *Id.* at 593.

⁷¹ For more information, see Gradenwitz, *Riccobono e gli sviluppi della critica interpolazionistica*, (Martin Avenarius et al. ed., Mohr Siebeck 2018).

⁷² Beggio, *Un commento alla proposta di riforma* at 593 (cited in note 67).

⁷³ *Id.* at 598.

⁷⁴ *Ibid.*

the students were not only pushed to move away from the subject, but were effectively led to regard it with suspicion, if not outright contempt⁷⁵.

2.2.2. Carl Schmitt's Position on Roman Law

Carl Schmitt was a conservative legal, constitutional and political theorist and is considered one of the most important critics of liberalism, parliamentary democracy and liberal cosmopolitanism. His work is seen as very controversial primarily because of his intellectual support and active involvement within the regime to such an extent that he can be considered the *Kronjurist* of *Nationalsozialismus*⁷⁶. Schmitt joined the Nazi party in 1933. In the following period he aligned himself closely to the position of the regime in the respect of Roman law. He recognized Roman law as a foreign element that had infected the pure German law and that stood in opposition to the authentic juridical spirit of his nation.

The philosopher aimed at the purification of Nazi legal science from the "foreign" concepts as stated in his works, such as *Staat, Bewegung, Volk* of 1933, where he advocated the breaking of Christian and Roman models⁷⁷. This position appears to be a clear contradiction if compared to his earlier intellectual trajectory. Before his accession to the party, Schmitt admired the Roman imaginary promoted by Fascism and would even describe himself as a "Roman". Thus, Schmitt originally believed that Roman public law should have covered a crucial role by influencing the development of modern juridical concepts. This was more evident particularly in his work *Die Diktatur* (1921), where he compared the Roman institute of *iustitium* with the English martial law⁷⁸. Schmitt was also

⁷⁵ *Id.* at 599.

⁷⁶ Filippo Ruschi, *Carl Schmitt e il nazismo: ascesa e caduta del Kronjurist*, 9 *Jura Gentium* 124 (2012).

⁷⁷ Ville Suuronen, *Mobilizing the Western Tradition for Present Politics: Carl Schmitt's Polemical Uses of Roman Law, 1923–1945*, 47 *History of European Ideas*, 748 (2021).

⁷⁸ Luigi Garofalo, *Carl Schmitt: From Enemy to Friend of Roman Law*, 1 *Saggi* 12 (2020).

very connected to the Catholic tradition, so his conversion of thought and rejection of the Christian values in the mid-1920s appears surprising⁷⁹.

After 1933, Schmitt reframed his critique. He insisted that his campaign was not against all Roman law, but only against a specific form of its reception⁸⁰. According to him, the true *Volksrecht* lived in the thought of the “greatest jurists of classical Roman law”⁸¹. This aligns with the opposition created by the regime against the “Jewish” science of Roman law towards the last years of the 1930s. Only the law of the post-classical period, a definition that in itself recalls something decaying, was spoiled and corrupted. This was the law that had been assimilated in Germany starting from the second half of the 15th century and which represented a “*Rechtswissenschaft*”, meaning a juridical codified language that is not alive and that, alongside liberal constitutionalism, embodied the major invasion of foreign laws within Germany. The Nazi jurist’s task was then to identify non-German legal elements and to attempt an overcome of this entire framework⁸².

Over time, this foreign influence had also fostered a spiritual habit and a specific juridical way of thinking in the German – culture that, according to the author, needed to be corrected in order to realign the German

⁷⁹ Suuronen, *Mobilizing the Western Tradition for Present Politics* at 750 (cited in note 77).

⁸⁰ *Id.* at 759.

⁸¹ Carl Schmitt, *Aufgabe und Notwendigkeit des deutschen Rechtsstandes*, 182 (1936). This was a wide-spread narrative among Nazi lawyers and also propagated by Schmitt’s patron Hans Frank. See, Johann Chapoutot, *The Law of Blood – Thinking and acting as a Nazi*, 53 (Belknap Press, 2018); Johann Chapoutot, *The Denaturalization of Nordic Law: Germanic Law and the Reception of Roman Law*, in *The Roman Law and the Idea of Europe* 113, (Kaius Tuori and Heta Björklund, Bloomsbury Academic 2019).

⁸² The reception of Roman law in Germany was preceded by an ideological foundation according to which Roman law was the natural law of the Holy Roman Empire, that was seen as the direct successor of the Roman Empire. The widespread study of Canon law, which incorporated many Roman legal elements, further familiarized scholars with Roman concepts and by the 14th century numerous handbooks and glossaries were spreading the legal terminology of Roman law. See Charles S. Lbngier, *Reception of Roman Law in Germany*, 14(7) Michigan Law Review 562 (1916).

people with the “blood and soil”⁸³ ideology⁸⁴. In his view, this stood in stark contrast to the “law and norm” orientation attributed to Jewish culture, portrayed as a tradition shaped by the absence of a state and marked by a tendency toward abstract legal reasoning. The rise of National Socialism in 1933 was seen by Schmitt as a liberation from the “foreign sickness”, as the party would have been the only possible guarantor of the true German legal identity. Schmitt declared that Nazism would have been able to revive the glory of the *Volksrecht* that had been once realized by the ancient Romans. In an interesting passage by Schmitt: “The great times of legal science are by no means democratic ones nor times defined by the rule of law (*rechtsstaatliche*) in the sense of the liberal concept of democracy or rule of law (Rechtsstaat). To the authority of the famous Roman Juris consultus equipped with the *jus respondendi* belongs the authority of the Roman Cesar Augustus, the *auctoritas Divi Augusti*” (Dig. 2, 49) [sic]⁸⁵.

Although not explicitly stated, it is possible to comprehend the intention of Schmitt to underline how both the golden eras of the Roman empire and the flourishing days of Nazis Germany had been realized by a firm and strong ruler. This was also the reason behind the incredible success of the Historical school and Savigny during the 19th century: they had filled the void that was generated between the fall of monarchy and the victory of the national liberal movement. Nevertheless, Savigny didn’t provide a law “useful” to the everyday practice of German society, but one asserved to the education of the bourgeoisie. This lack of genuine political unity might have, in the author's view, contributed to Germany's

⁸³ “The blood and Soil” ideology was a philosophy that was promoted by the Nazi party and that represented the dream of a purified social order, for more information, see Keith R. Swaney, *An Ideological War of 'Blood and Soil' and Its Effect on the Agricultur Agricultural Propaganda and Propaganda and Policy of the Nazi Policy of the Nazi Party* (1929-1939).

⁸⁴ Suuronen, *Mobilizing the Western Tradition for Present Politics* at 758 and 761 (cited in note 77).

⁸⁵ Carl Schmitt, *Die geschichtliche Lage*, 15–6 (Duncker & Humblot 9th ed., 1996).

susceptibility to liberalism, which he believed was driven by Jewish and Freemasonic influences.

Schmitt's anti-Roman discourse served two purposes: firstly, by distancing him from the historical imaginary of Rome, Schmitt is also detaching himself from the fascist model that he used to praise and secondly, it enabled him to openly criticize other scholars of his time, particularly Romanists, like F. Schulz and his work *Prinzipien des Römischen Rechts* (1934), that will be discussed later. This aligns with Schmitt's celebration of Jewish scholar's expulsions from Germany and his fierce support of the aryanization of Germany public life through the process of Gleichschaltung⁸⁶.

2.3. Roman Law Scholars and the Regimes, Between Schulz and Koschaker

2.3.1. The Situation Inside the University

The crisis of Roman law under National Socialism had profound repercussions within German universities. The regime was aware that, in order to influence the population's ideology, the role of cultural centers was decisive. A series of measures adopted throughout the 1930s were intended to expel Jewish scholars from administrative positions and, for those who tried to remain in Germany, working conditions became every day more difficult. Moreover, this systematic assault involved the journals and the newspapers. For example, from the editorial committee of the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, the most relevant Roman law journal at the time, the two Jewish Roman law scholars Rabel and Levy were banished. Germany thus lost many of its most brilliant minds in the field of Roman law during those years either through dismissal or forced emigration. Those who remained had only a

⁸⁶ The Nazi term *Gleichschaltung* means "uniformization" and indicates the process of Nazification by which Adolf Hitler established a system of totalitarian control and coordination over all aspects of German society "from the economy and trade associations to the media, culture and education" (see <https://en.wikipedia.org/wiki/Gleichschaltung>, last visited March 29, 2026).

few options. One possibility was to openly oppose the Regime which would have definitely resulted in dismissal, deportation or worse. A second viable strategy consisted in pursuing Roman law topics seemingly irrelevant to the regime. This last choice, and perhaps the most hypocritical, involved the adoption of efforts to somehow “bend” the principles of Roman law in order to make them more compatible with the Nazi official doctrine.

A notable example of this latter scenario is Max Kaser’s publication, whose views were similar to those of Schulz. Kaser⁸⁷ was a Roman legal scholar under the Regime who attempted to prove that Roman law was not inherently individualistic. Kaser referred to pivotal concepts within the National Socialist discourse, like “*Gemeinschaftsordnung*” (community order) or “*Führertum*” (leadership)⁸⁸, especially in his work *Römisches Recht als Gemeinschaftsordnung*, published in 1939. Kaser tried to adapt Roman law concepts to the terminology of the regime and its principles of race, population and law. He argued that the intrinsic nature of Roman law satisfied the concept of community that was so central for the regime. In this perspective, it was the duty of Nazism to preserve the purity of Roman law and to revive its ancient values that Pandectistic science altered in its attempt to conceal Roman law with the practical needs of society at that time.

2.3.2. Fritz Schulz

Born in 1879 in the Silesian region, Schulz’s mother had Jewish origins, but his entire family converted to Protestantism. Schulz had a very important academic career during which he published several seminal works. In many of his publications he adopted a strong technical rigor to

⁸⁷ For more information on Max Kaser, see Paul du Plessis and Tommaso Beggio, *The teaching of Roman law in the 20th century: challenges and perspectives* (2024).

⁸⁸ Ulrike Babusiaux, «*Rechtsschichten*». *Ursprung, Kontext und Weiterwirken eines Begriffs im Werk Max Kaser*, 91 *Quaderni della facoltà di Giurisprudenza* 60 (Università di Trento, 2024).

the Roman law topics he addressed. His political contribution was significant too, as he had actively participated in the political developments of the Weimar Republic. His academic career reached its apex in 1931 when he obtained the chair of Roman law professor at the University of Berlin, the most coveted position for any German Roman law scholar in that period. Nevertheless, his years in the Capital city would be cut short after the advent of Nazism in 1933: the measures adopted to remove people of Jewish origins from public administration positions, added to his status of political opponent, led at first to his “relegation” to a minor university as the one in Frankfurt am Main in 1934 and later to his forced and premature retirement in 1935. He would then take the last ship to the UK before the start of WWII, where he remained until his death after facing many difficult years characterized by economic difficulties and professional displacement.

Among his major works *Prinzipien des römischen Rechts* (Principles of Roman Law), is an academic response to the intellectual climate of early National Socialism. At that time Schulz was regarded as one of the most prominent Roman law scholars in all of Germany and this work had been considered one of the few publications that tried to oppose the ideology of the regime. It was published in 1934 and is based on a series of lectures that the scholar intended to give at the Friedrich-Wilhelms-Universität zu Berlin the year before in the summer term, just several months after the Nazis party took the power and the *Machtergreifung* of the 30th January⁸⁹. This would be the first of three books, but it remains the only one that has been published in Germany. The others were published later during his exile in Oxford: the first one being *History of Roman Legal Science*, that came out in 1946, and *Classical Roman Law* of 1951⁹⁰. The second book was originally written in German but, ultimately, the released version was a translation of the German one.

⁸⁹ Renato Sedano Onofri, *Roman Law as Pamphlet: Fritz Schulz and the Prinzipien des römischen Rechts between Caesar and Hitler*, 3 *Revista Brasileira de Estudos Políticos*, 32 (2022).

⁹⁰ *Ibid.*

In Tuori's words, the Principles can be read as an implicit rebuttal to the regime's pursued eradication of the European heritage that had granted equality, tradition and the rule of law⁹¹. Schulz's principles appear to be counterpoints to the Nazis legal policies⁹². There are eleven principles illustrated in this work, namely: law and principles, isolation, tradition, nation, liberty, authority, good faith, humanity, fidelity and security. I will focus only on some of them, specifically the ones that I retain more fitting for the purpose of this article as they underline the contrast with Nazism legal ideology.

A first point regarded as a "stand" against the regime can be found in the preface of the book. Schulz dedicated his work to his wife Martha, something that usually would be retained to be a loving gesture but, in this context, might be interpreted differently, given the Jewish origins of the woman. But how could one of the most prominent Roman law scholars in Europe name a book about Roman law "Principles"? It is well known that the Romans didn't reason according to principles, rather, they used to analyze case by case the different legal situations and from there derive the general rule. The author explains that this choice was made out of his desire to describe the most characterizing aspects of Roman legal experience⁹³.

In the second chapter entitled *Statute and Law*, Schulz rejects the depiction of the Roman state as a cold "legislative machine". Even if it was not the main source of law, Schulz believed that the *leges* were an expression of the democratic will that was granted through popular assemblies. The production of law during the Republican and the classical periods was the result of a genuine casuistic approach to the legal problems generated by the ongoing discussion between the jurists and the magistrates. The Romans would prefer to cease the security of the law rather than the flexibility guaranteed by the case law⁹⁴. In addition, customary law was

⁹¹ Kaius Tuori, *Empire of Law: Nazis Germany, Exile Scholars and the Battle for the Future of Europe* at 39 (Cambridge University Press, 2020).

⁹² *Ibid.*

⁹³ *Id.* at 40.

⁹⁴ *Ibid.*

an important part of the substrate of the legal order with the *mos* and *mores* that denoted the age-old customary origin of the legal principles⁹⁵. The contrast with Nazis concepts relates to the idea that the regime had of the law. The law was supposed to be a direct representation of the society's needs, something that should have deviated completely from the law of the Liberal state, namely the "*Gesetzesstaat*" (the state of laws), that in this context is merely interpreted as an order imposed from the outside characterized by very formal administrative procedures lacking any sort of popular basis.

Another theme is the so-called isolation of the jurists, or *Isolierung*⁹⁶, a legal concept that according to Schulz impacted German law during the 20th century⁹⁷. According to Tuori, Schulz sought the law as an independent tool completely detached from the economic and political condition of the state⁹⁸. This approach directly conflicted with the National Socialist understanding of the jurist, who needed to be an interpreter of his own time, whose highest source of law was the will of the Führer. Schulz explains how Nazism subordinated law to political objectives. Meanwhile, in the Roman legal world there was an exclusion from the legal analysis of the social and economic contexts, meaning that the legal rules were secluded from the social function they served. Some fields of Roman society were regulated by the above-mentioned *officium*, which represented social norms that were retained to have the same binding legal force as law. Whatever happened within the *domus* or the marriage, for example, was completely personal and was not to be touched by any type of legal regulation. This contrasts with Schmitt and Nicolai's visions, which instead portrayed Roman society as guided solely by moral considerations rather than practical, economic or legal factors.

⁹⁵ Arthur Schiller, *Custom in Classical Roman Law*, 24 Virginia Law Review 271 (1938).

⁹⁶ The term *Isolierung* was introduced by Savigny and then later reprised by Schulz, it indicates the status of the jurist as detached from politics, religion and society. For more information, see du Plessis and Beggio, *The teaching of Roman law in the 20th century* (cited in note 87).

⁹⁷ Onofri, *Roman Law as Pamphlet* at 41 (cited in note 89).

⁹⁸ Tuori, *Empire of Law* at 47 (cited in note 91).

Another discussed concept was the nation. It is important to specify that it is improper to talk about a “Roman state” or a “Roman nation”, as those are modern terminologies and they do not depict the Roman political nor juridical systems. As mentioned above, German law was theorized to be rooted in racial and unified communities that share both blood and cultural bonds. Contrarily, Roman law contemplated a universalistic empire united by a unique law that was enforced upon all the italic municipalities regardless of the origins. Schulz explains that a state is born in the moment in which a community begins to take part in its political and cultural destiny⁹⁹. Being Roman was not something defined by the place of birth nor the composition of the blood. It was determined by the sense of belonging that was based on other factors, like common citizenship, material benefits, language and cultural life. If on one hand to Nazism the ethnic status was crucial, on the other the Romans were open to the possibility of accepting “*alienes*” or people from the lowest ranks (like the manumitted slaves) as citizens in accordance with merits, like education or participation in public life. The idea of a community that shares a common bond based on blood is something completely extraneous to Roman culture¹⁰⁰.

To conclude this brief analysis, I would like to discuss the principle of liberty. According to Tuori, Schulz presented Roman freedom as non-dominance¹⁰¹. This extended to both the public and private sphere, clearly opposing the Nazis’ view, where the existence of the individual was completely negated within the State. This principle goes hand in hand with the one of authority, described as the capacity of the State to exercise its power vis-à-vis its citizens and, if necessary, limit their freedoms. The concept of *libertas* in Roman law had a constitutional value, as the author stated: “The individual was not free when he was a slave, a whole nation was not free when at its head was an absolute monarch or when it was subject to a foreign yoke”¹⁰².

⁹⁹ Onofri, *Roman Law as Pamphlet* at 47 (cited in note 89).

¹⁰⁰ *Ibid.*

¹⁰¹ Tuori, *Empire of Law* at 51 (cited in note 91).

¹⁰² Fritzl Schulz, *Principles of Roman Law* at 41 (Oxford University Press, 1936).

Tuori reports this freedom as having a legal value and not a factual one, as “it depended on the formal freedom possessed not only by the citizens, but equally “free” cities and communities”¹⁰³. Areas like marriage and domicile were left completely outside the scope of State’s powers. Without explicitly addressing contemporary politics, Schulz’s account implicitly challenges a regime that subsumed the individual entirely within the state¹⁰⁴. The Nazis’ notion of freedom rejected the individual. Jurists like Schmitt defined the Nuremberg laws as an expression of freedom. This is absolutely deviated, as they placed to its core the protection and elevation of the German race which can never be equal to the foreign ones¹⁰⁵. Schulz’s reconstruction of Roman legal principles, by contrast, re-affirmed a tradition in which law, liberty, and authority were balanced within a framework resistant to ideological absolutism.

2.3.3. Paul Koschaker

Paul Koschaker¹⁰⁶ was born the same year as Schulz, but he followed a markedly different academic trajectory. Koschaker obtained the chair at the University of Leipzig in 1915, at the time the most important law faculty in the entire Germany, where he specialized in the study of cuneiform law. He mastered several ancient languages and entered into contact with many influential scholars and philologists of his time. Just like Schulz, he eventually reached the chair of Roman law and German civil law professor at the Friedrich-Wilhelms-Universität in Berlin in 1936, but his experience would be severely compromised by the provisions adopted by the regime against Roman law in those years. Koschaker didn't hesitate to accept the office even if just a few months earlier his own

¹⁰³ Tuori, *Empire of Law* at 50 (cited in note 91).

¹⁰⁴ *Id.* at 51.

¹⁰⁵ *Ibid.*

¹⁰⁶ For more information on Koschaker, see *Translatio iudicii* (1905); *Babylonischassyrisches Burgschaftsrecht* (1911); *The scope and methods of history of Assyrio-Babylonian law*, ecc. (1913); *Rechtsvergleichende Studien zur Gesetzgebung Hammurapis* (1917); *Fratriarchat, Hausgemeinschaft und Mutterrecht in Keilschriftrechten* (1933).

colleague and friend Ernest Rabel was removed from that same position and expelled from the direction of the editorial team of the *Zeitschrift der Savigny-Stiftung* due to his Jewish origins. It is questionable whether Koschaker took advantage of the situation to gain from the loss of other fellow scholars that occupied relevant positions. Yet, any evaluation must be situated within the broader context of the academic system in Germany at the time. The regime had created a very tense atmosphere in the academic scene, as all the universities and scientific journals faced an in-depth “*Nazifizierung*”.

Yet, Paul Koschaker never really felt at ease at the University of Berlin and lamented immensely the disinterest shown towards Roman law by both the institutions and the students. At the very beginning the Romanist was filled with hope and assumed his new position as a sort of mission¹⁰⁷. He wanted to transform Berlin into the new center for its current studies through the creation of the Seminar für Rechtsgeschichte des Alten Orients¹⁰⁸. At the same time he wished to restore Roman law from the isolation it had been pushed into the previous years. None of these dreams were to be realized, leaving Koschaker in deep desolation and resignation.

Testimonies from contemporaries reveal his profound disillusionment. The Italian Scholar Antonio Guarino personally participated in a Koschaker’s course. He would later describe the discomfort that the Austrian Roman scholar was experiencing¹⁰⁹. Guarino stated: «Koschaker svolgeva i suoi corsi solo, o quasi, per noi fedelissimi e presentiva il giorno in cui il diritto romano non avrebbe più avuto, nei paesi tedeschi, né discepoli né docenti»¹¹⁰. Even if certain concessions were granted to him, like the possibility of holding a seminar regarding oriental laws and the promise to have his own assistant, the regime never really accepted him and tried in multiple ways to move him away from Berlin. Rather than a

¹⁰⁷ Beggio, *Un commento alla proposta di riforma* at 599 (cited in note 67).

¹⁰⁸ *Ibid.*

¹⁰⁹ *Id.* at 600.

¹¹⁰ Antonio Guarino, *Cinquant’anni dalla «Krise»*, 34 Labeo, 276 (1993).

direct political purge, his marginalization resulted from cumulative administrative and institutional pressures that left him feeling unsupported. Nevertheless, it would be Koschaker's own decision to determine his distancing from Berlin. He decided to present his request to be transferred to a more undisturbed facility to the *Reichsministerium für Wissenschaft, Erziehung und Volksbildung*. In 1941 he was relocated to the law faculty of Tübingen.

A significant moment in his intellectual engagement with the crisis of Roman law occurred in December of 1937 when Koschaker was invited to hold a conference at the *Akademie für Deutsches Recht* by Hans Frank, at the time the *Reichskommissar für die Gleichschaltung der Justiz*, thus one of the most prominent figures of Nazis Germany¹¹¹. The topic that Koschaker decided to address at the Akademie was the crisis of Roman law.

Acknowledging this topic before an audience closely aligned with National Socialist legal policy was a delicate undertaking. The content of the conference would be then reported in his publication *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, released in 1938. This work can't be professed by any chance as a direct condemnation of the regime, since at the time this type of attitude would have entailed grave personal consequences. What Koschaker reported as the reasons behind the crisis of Roman law had nothing to do with the regime's anti-Roman policies, with point 19 of the party's program or the Eckhart reform of 1935¹¹². Instead, one of the first cracks of Roman law was identified in the new approach adopted by the scholars at the end of the 19th century, namely the *Historisierung*¹¹³. Notably, Koschaker aligned himself with a line of thought inspired by the school founded by L. Mitteis¹¹⁴. This

¹¹¹ Beggio, *Un commento alla proposta di riforma* at 599 (cited in note 67).

¹¹² Tommaso Beggio, *Paul Koschaker and the Path to "Europa und das römische Recht"*, 6 *Legal Roots* (2017).

¹¹³ See above, Chapter II, § 2.2.1.

¹¹⁴ For more information, see Tommaso Beggio, *Alla "scuola di Ludwig Mitteis": gli studi papirologici e i nuovi orizzonti metodologici della romanistica di inizio Novecento* in *Lo studio*

new approach aimed to shift the focus toward various ancient cultures that predated Roman law, with particular emphasis on the legal traditions of the Middle East.

In 1941 Koschaker finally left the University of Berlin and accepted a position in Tübingen. His permanence into the city, even if constellated at the very beginning by many accomplishments, such as the appointment as Dean of the Faculty of Law in 1946 and the “*Emeritierung*” received in the same year, was still difficult for the scholar. The author likely used this opportunity to reflect more personally and broadly on the role of Roman law within German academia. A first potential part of this reasoning can be found in the proposal for the reform of the teaching of Roman law within the Universities in Germany, entitled “*Die Reform des romanistischen Rechtsstudiums in Deutschland: Ein Denkschrift*”, a text of 1941. The work reported some of the concepts he had already expressed in *Die Krise*. Koschaker’s reform program centered on two main objectives. Firstly, the restoration of the dignity of Roman law by making it a “living discipline” again. This process was called by the author “*Aktualisierung*” and would have left behind the historical content in favor of the adoption of an analytical clarity and systematical legal thinking of the Roman jurists. Methodologically there was an appeal to the “Return to Savigny”, taking Savigny’s focus on the internal development of the law that should have been filtered through the lens of modern legal science to bring Roman law to its technical excellence.

By praising the positive aspects of Roman legal science that could be reprised in modern times, Koschaker tended to neglect the substantive values that might justify its endurance in time. He strongly criticised Interpolationism, which he accused of being responsible for the transformation of the Roman jurist into a historian-philologist. Roman law destiny should not have been marginalized in universities, it could have contin-

dei papiri nei rivolgimenti metodologici della romanistica tra il 1860 e il 1960 (Christian Baldus et al. ed., Quaderni della Facoltà di Giurisprudenza dell’Università degli Studi di Trento 87, 2024).

ued to exist alongside the new course dedicated, more generally, to ancient laws and possibly be connected to the future legal system of the new Europe.

Koschaker was not proposing the great return of the Pandectistic, the introduction of external elements in German law and, certainly, he did not harbor the illusion of returning Roman law to the status it had in the previous century¹¹⁵. His true desire was the possibility for Roman law to gain once again a key position in pedagogical studies to influence the organizational and systematic juridical thought of the young students, not only to better understand the current law, but also to understand its possible development in a more European aspect¹¹⁶. It is possible to argue that the devastating delusion that the scholar had experienced in Berlin, the place where he was supposed to enjoy the climax of his career, brought him to have a more detached and colder outlook over the new existence of Roman law. Koschaker was then feeling the urgency, as the most important Roman law professor at the time, to bring out most of what survived of the Roman legal heritage.

The reform envisioned by the scholar would have been structured as followed: “*Grundzüge des römischen Privatrechts als Einführung in das europäische Rechtsdenken*”, that would have not substituted but would have gone alongside “*Privatrechtsgeschichte der Neuzeit*”. The latter course would have been introduced in the third semester and would have provided an expansion of the historical-juridical knowledge of the students. This and the course of «*1 stündige Übung ‘Lektüre und Erklärung einfacher Quellen-stellen’*», introduced during the fourth semester, would have been mandatory, unlike the course of “*Römische Rechtsgeschichte*”, which could have been an alternative to the course of “*Antike Rechtsgeschichte*”¹¹⁷. Thus, Koschaker designed an optional course about the exegesis of the pandects that the students could have taken to delve deeper into the Roman law

¹¹⁵ Beggio, *Un commento alla proposta di riforma* at 607 (cited in note 67).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

sources¹¹⁸. The scholar also pushed for the reintroduction of the mandatory exam at the end of the courses. Thus, this proposal was received by the Reichsminister für Wissenschaft, Erziehung und Volksbildung and then it was sent to the Deans of the Law faculties across Germany¹¹⁹. They were meant to discuss if the suggestion was actually viable, and even if it obtained some positive feedback, nothing was ever done.

2.4. *Differences with Italy*

The preceding analysis allows for a comparative assessment of the role played by Roman law within the Fascist regime in Italy and the National Socialist regime in Germany. Both systems are classified as totalitarian regimes, which share some structural features: the presence of a charismatic leader and the masses, the identification and persecution of a certain type of “enemy” (either a political opponent, as in the case of Fascism, or an entire ethnicity, as in Nazi Germany), the suppression of political pluralism and civic freedoms and the persuasive use of propaganda. Italy and Germany were devastated by WWI, with social tensions increasing in Italy and Germany being humiliated by the peace treaties imposed by France. Those countries were searching for some kind of comeback, as the aim of the regimes was to exploit the outcast to emerge in a system that rewarded individuals for their loyalty and that equally rejected the ideas and principles of the liberal state. Yet, despite these similarities, the two regimes adopted markedly different attitudes toward Roman law.

To understand the reasons behind those two opposing outcomes, it is necessary to look at the origins of the hatred for Roman law in Germany. The individualistic nature of Roman law was emphasized mostly by the Germanists who wanted to delegitimize the Pandect-science, liable for excluding the “true German law” from private law. This rejection of German law happened firstly in 19th century Germany, which quickly moved

¹¹⁸ *Id.* at 608.

¹¹⁹ *Ibid.*

from a still almost feudal system to a modern industrialized country eventually united only in 1871, and later with the enactment of the BGB. All the critiques against the Pandect-science, that was not just a legal movement but represented a specific ideology and culture, were often mainly instrumental and lacked any type of accurate legal basis. Some German law scholars, to give more strength to their stances against the individualistic order apparently created by the Pandect-science, started to support the racial theories. This is the way that led Roman law to become a symbolic target in broader debates over national identity, modernity, and liberalism.

Italy rejected the individualistic nature of the legal system as well, but the Italian Roman law scholars have never seen Roman law as something that had to be excluded from their legal system. Instead, they attempted to adapt it to the legal ideology of the regime. Some legal ideas like Betti's *negozio giuridico* were reconcilable with the needs of fascism and corporativism¹²⁰. The Roman Empire was used, therefore, as a symbol of the greatness of Italy. The revival of Roman law was carried out primarily from a historical perspective. As stated by Gianni Santucci, the Italian Roman scholars were "*giuristi che nella ricerca storica celebravano l'importanza dell'eredità del diritto romano*"¹²¹. The Italian Roman law scholars were also accepted by Fascism, as they found themselves very close to the regime that allowed them to actively participate in political life and to promote activist culture. Fascism used the Roman law scholars and experts to gain legitimation and, on the other way around, the intellectuals were gaining a central role in the Italian cultural direction. Some of them, as discussed in the previous chapter, obtained political recognition while the majority was engaged in cultural initiatives.

This is certainly a crucial difference from the Nazis regime, which instead opted for the adoption of measures to limit the role of Roman law

¹²⁰ Tommaso Beggio, *Funzione sociale e meritevolezza del diritto privato*, 1 Storia metodo cultura nella scienza giuridica 371 (2022).

¹²¹ Gianni Santucci, *Eccessi della critica interpolazionistica e crisi del diritto romano: Uno sguardo alle tendenze metodologiche nella romanistica degli anni Trenta* at 522, (Editoriale Scientifica, 2022).

within the academic scene. Roman law was a tool for propaganda which stood for the representation of the liberal state. It was something that had to be completely eradicated and marginalized. Italian Roman scholars, on the other hand, used Roman law as a tool to support the anti-liberal view, like in the case of Betti, who referred to the Roman Empire on multiple occasions as the perfect example of domination through violence. So, in Italy a very clear message needed to pass: Italians were the heirs of the Roman Empire and they should have embraced that past, that represented the eternity of the power of the Italic population. Fascism changed Roman law values without taking into consideration concrete historical data, with the “mito della romanità” becoming just a tool to promote strong images of command and authority.

The major characteristic of Roman law is the fact that it refers to a very vast and broad topic that contains within itself so many different experiences. This means that, for the purpose of propaganda, it was very easy for the two regimes to pick whatever argument they preferred and to use it to legitimize or delegitimize any type of topic they needed to. The hate of Germany for an individualistic law, unable to satisfy the exigencies of a pure race, is directly connected to this particular type of construction. If Roman law had stopped to be pure and had begun to be unfit for the German population, it was because of the influences of external and inferior races. If Roman law needed to be reprised and put at the center of a narrative focused on the authority, the Empire and the conquest, it was because that was the law of the true Italians, the heirs to a superior tradition. Those constructions are distorted, lack any type of scientific evidence and exist with the sole purpose of satisfying a political goal. This is a very important factor on which we should reflect the way governments can bend history and tradition so easily to make them fit into a reality that they idealize.

3. Chapter III

3.1. Overview

This concluding chapter turns to the revival of Roman law and the crucial role it played in the development of the European legal tradition of modern days. The fundamental part is to understand how Roman law was then used as a unifying intellectual and normative framework in Europe and the extent to which its legacy remains embedded in the European Union. From a historical perspective, Roman law was always present within the European legal system, as the study of the subject started around the 12th century. Five centuries after its enactment, Justinian's Digest became the most important legal source throughout Europe. The surviving portions of the *Corpus Iuris Civilis* that are known today derive from a Codex discovered in Pisa¹²². The recovery and dissemination of the code was a very slow process that took place over half of the 12th century.

The Digest was divided into three parts, *Vetus* (1–24.2), *Infortiatum* (24.3–38), and *Novum* (39–50). The complete Digest would be eventually supplemented by the *Institutiones* and the first nine books of the code, but it was primarily the Digest that offered a rich and rigorous legal tradition. The leading law school at the time was in Pavia: there, the jurists used for the first time the glosses to interpret the text. Yet, Bologna was the true birthplace of systematic study of the *Corpus Iuris Civilis*.

The turning point came with Irnerius, an Italian scholar who turned the teaching of the subject from practical training to an academic discipline. He introduced the marginal glosses over entire passages and this method became the hallmark for the glossators, a group of Bologna-based legal scholars. The Glossators regarded Justinian's text as perfect, almost sacred, and were firmly convinced that all possible legal problems could

¹²² Peter Stein, *Roman Law in European History* at 43 (Cambridge University Press, 1999).

have been solved through the close interpretation of the *Corpus Iuris Civilis*¹²³. Irnerius was then succeeded by many important scholars that, despite having different methods, were able to innovate the studies of their predecessors. The last successor of this dynasty was Accursius, who compiled over 96.000 glosses into the *Glossa Ordinaria*, the definitive commentary on Roman law for centuries. The maxim came to be accepted that “What the Gloss does not recognize, the Court does not recognize”¹²⁴.

During this time, the Church sought to consolidate its institutional authority that would have encompassed the entire Europe, where every member of the clergy would have been ultimately obliged to report to the pope¹²⁵. However, Canon law lacked the structured and authoritative corpus that the civil law had in the Justinian’s *Corpus Iuris Civilis*. It consisted in a disorganized collection of biblical excerpts, Church council decisions, papal decretals, and Church Fathers’ writings. A decisive step towards systematization was the enactment of Gratian’s work: the *Concordantia discordantium canonum* (later known as the *Decretum*). Gratian’s text was able to provide commentaries and explanations to conceal the contradictory statements of Church law. Given the utilized approach, the *Decretum* had a suitable nature for the glossarial method¹²⁶. Thus, also within Canon law, Roman law started to be seen as a valuable auxiliary source. An example is the *Decretals of Gregory IX* that contained eleven legal rules that mostly originated from Justinian’s *Digest* or other Roman sources. Through this process, Roman law became an indispensable auxiliary source for Canon law, contributing to the emergence of a shared Roman-canonical procedural framework¹²⁷.

By the 13th century, Europe was characterized by a dual legal landscape. On one hand, the ancient Roman law system was partly administered by the church and at the same time taught in a universal language

¹²³ Stein, *Roman Law in European History* at 49 (cited in note 123).

¹²⁴ *Ibid.*

¹²⁵ William B. Ewald, *The Roman Foundations of European Law*, 29(2) *Penn Law Journal* (1994).

¹²⁶ Stein, *Roman Law in European History* at 46 (cited in note 123).

¹²⁷ Antoni Dębiński, *Church and Roman Law* at 89 (Wydawnictwo KUL, 2010).

within the universities. On the other, a multiplicity of different feudal laws and local customs continued to be applied by temporal courts. The passage was then simple: Roman law moved out of the universities and entered the courts of the secular rulers¹²⁸. Both the civilists and the canonists were very aware of the need to obtain a developed legal procedure from the texts. This was not just an academic exercise that involved the generation of glossators that followed Irnerius. Bulgarus articulated foundational procedural principles, like the relationship between the judge, the defendant and the plaintiff and the placement of the burden of proof over the latter. Bassianus established that a judgement should have been rendered on the basis of judicial impartiality, not a personal opinion¹²⁹. The involvement of the ecclesiastic courts was crucial for the development of a common procedure. In the 12th century the proliferation of manuals, initially solely based on Roman law, started to increase and, at the same time, canon law expanded through papal decretals, leading to the evolution of the Roman-canonical procedure. Civil law was thus adopted within the Holy Roman Empire because of its formal authority and technical superiority, as it offered an universal legal grammar for the interpretation and the gaps in local law¹³⁰.

This worked particularly well as the subjects began flocking into the emperor's courts. This model was followed then by the German princes that also established their own Roman courts. This led Roman law being taught in Germany as a genuine subsidiary source of the law, if there was the need to write a new institute or interpret a statute, everything was done by the lawyers trained in the universities that stuck firmly to Roman law. These reasons, alongside the *Aktenversendung*, a practice by which the most difficult cases were sent to the best trained Roman law professors to be decided, led to the quick expansion and reception of Roman law in Germany¹³¹. Moreover, since the professors had no expertise in the law of the provinces, they applied the principles of Roman law,

¹²⁸ Ewald, *The Roman Foundations of European Law* at 3 (cited in note 125).

¹²⁹ Stein, *Roman Law in European History* at 58 (cited in note 123)

¹³⁰ *Id.* at 63.

¹³¹ Ewald, *The Roman Foundations of European Law* at 3 (cited in note 125).

starting the advancement of the *ius commune* that would then become a common law for the entire continental Europe. So, the *ius commune* was a fundamental part of the development of civil law, the system of all the modern European states.

3.2. *Building the Idea of Europe*

3.2.1. *From the Roman Empire to the European Union*

Drawing a direct comparison between the European Union and the Roman Empire would be anachronistic and erroneous. Nevertheless, one may wonder whether the EU could partly derive inspiration from the cultural and judicial heritage that the universalist Roman judicial-political order was able to create and establish in the entire old continent. Gerard Delanty expresses the so-called “dilemma of the European identity”. On one side there are some universal values, which are seen as part of the western culture and are not exclusive to the European one, that lead to a common but weak sense of identity. On the other, there are numerous cultural specificities which are potentially exclusive and resistant to diversity. The challenge lies in reconciling inclusiveness with meaningful collective belonging.

In his article *Hadrian's cosmopolitanism and Nazi legal policy*, Tuori talks about the idealization, during the 1930s, of cosmopolitanism, with the emperor described as capable of pacifying the conflicts and to promote culture and balance within society. The Roman experience was the first one to create a centrally governed state that comprehended many different areas¹³² and this multi-tiered system allowed the integration of different cultures without eliminating their local identity¹³³. This is definitely

¹³² Kaius Tuori, *Hadrian's cosmopolitanism and Nazi legal policy*, 4 *Classical Receptions Journal* 471 (2017).

¹³³ Gary Marks, *Europe and Its Empires: From Rome to the European Union*, 50(1) *Journal of Common Market Studies* 1, 7 (2012).

the big goal of European integration¹³⁴. The governors were the ones in charge of imposing direct rules and maintaining order but were given instructions to always respect local customs and operate in accordance with the *lex provinciae*¹³⁵. The Empire had also organized an extraordinary bureaucracy that comprehended detailed public land records and a tax collection mechanism across the entire Empire. Everything would then fall apart after the collapse of Rome, leaving the local communities isolated and self-sufficient¹³⁶. This period of peace, that culminated during the “Golden Age” of the Pax Romana, was considered a solid basis for the development of an European unity.

Moreover, the construction of the idea of Europe was strengthened even more with the rise of the Byzantine Empire that blended the Oriental heritage with the European one, enriching its culture with values that have existed for thousands of years¹³⁷. Thus, the religious factor has also constituted a decisive role in the formation of the idea of Europe as the spread of Christianity, which increased the universally applicable values and created a sort of sense of separateness with the other existing religions¹³⁸.

If compared to the type of accommodation pursued by the European Union, it is possible to see the clear attempt to reconcile scale with community diversity using states as building blocks. The European states have been separated for a long time, have entered into multiple conflicts against each other and, most of all, are formed by centralized governments which makes it difficult for them to be assimilated under a higher authority. The consensus-driven approach of the EU that has centralized control employs different means like minimal taxation and redistribution,

¹³⁴ Ivan Milotić, *New Frontiers: Law and Society in the Roman World* at 64 (Edinburgh University Press, 2013).

¹³⁵ Marks, *Europe and Its Empires: From Rome to the European Union* at 8 (cited in note 133).

¹³⁶ *Id.* at 9.

¹³⁷ Milotić, *New Frontiers: Law and Society in the Roman World* at 64 (cited in note 134).

¹³⁸ *Id.* at 65

legislation via directives and decision-making by unanimity and supermajority just to name a few. This structure, like the Roman Empire, sets up a multi-layered governance which strengthens integration while respecting national autonomy and identity. The European Union is not an Empire in a strict sense¹³⁹: in some ways, it can be even considered the opposite of an Empire, since it doesn't have a central authority and it operates through multiple presidents and multilevel governance. Thus, it doesn't have any type of coercive power, which instead relies in the hands of the Member states upon laws.

In his paper, Marks examines the concept of assimilation as a central dynamic of imperial and supranational integration. This term refers to the encouragement of the community to adopt a dual identity based on voluntary integration. The whole procedure is based on a pressure between an Empire open to newcomers and cohesive communities, which are very wary and tied to internal norms and identity. Roman citizenship was something composed of values that went beyond social and cultural identifiers like race, language and religion. Just like Rome, the Union has pursued forms of "assimilation lite", meaning non-coercive and characterized by dual identity integration¹⁴⁰. The true aim in both cases is not assimilation *per se*, but a byproduct of a broader political and legal integration. After WWII, the European countries saw each other as strangers and enemies as a common European identity didn't exist. European political culture started to emerge, however, there was still a lack of unified cultural or emotional base. Still, these days, just a small percentage of the population (about 10%) feels European first or exclusively European¹⁴¹. European public opinion plays a crucial role, and the expansion of cross-border experiences could help to adopt a dual national-European identity.

¹³⁹ Marks, *Europe and Its Empires: From Rome to the European Union* at 7 (cited in note 133).

¹⁴⁰ *Id.* at 14.

¹⁴¹ *Id.* at 15.

3.2.2. Koschaker's Role in European History

After WWII, Koschaker decided to reinvent and reinterpret his work by focusing on a new narrative regarding the position that Roman law should have played in Europe. After the crisis that had characterized the subject in the previous years, this scholar tried to find to Roman law a new meaning and dignity by recalling its great significance from a historical, legal and cultural European perspective¹⁴². Before scrutinizing the core substance of Koschaker's masterpiece *Europa und das römische Recht*, it is necessary to underline that the content of his last work was not new to the ideas of the author. In fact, already within *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, Koschaker mentioned the great role of prominence that Roman law should have had and discussed the position of Roman law as a unitary basis for Europe¹⁴³. Koschaker's goal in this work was the attempt to save Roman law from the condition in which the study field was rotting at the time and to revive the «Ferment» for the «*Wiederbelebung einer europäischen Privatrechtswissenschaft*»¹⁴⁴. This is a very controversial passage of *Die Krise*, as Koschaker tied the destiny of Roman law to the future of the new Europe which was destined to be led, as it was supposed to at that time, by Germany¹⁴⁵. This shows how, already in 1937, the author was envisaging a renewed central position for Roman law, that was identified as the main legal foundation of Europe. This was intended to be extremely crucial especially in the light of a common European private law system.

¹⁴² Kaius Tuori and Heta Björklund, *Roman Law and the Idea of Europe* at 162 (Bloomsbury Academic, 2019).

¹⁴³ *Ibid.*

¹⁴⁴ P. Koschaker, *Denkschrift* at 6. The *Denkschrift* was one of Koschaker's unpublished documents preserved within the archives of the Universitätsarchiv in Tübingen. The document appears in: T. Beggio, *Un commento alla proposta di riforma* at 601 (cited in note 67).

¹⁴⁵ *Id.* at 606.

In *Europa und das römische Recht*, published after the end of WWII in 1947, Koschaker's words are described as a sort of "warning cry" towards his colleagues. The author attempted to tell them that Roman law should have been placed at the center of the recovery and reconstruction of Europe¹⁴⁶. The *Ius commune* should have been the first step to lay down the basis for a renewed European legal culture and legal system. Despite the title, Koschaker didn't focus on the development of Rome nor its standing from a legal point of view. Indeed, he centres on Roman law emerging from the *Corpus Iuris Civilis*. It was the work of the glossators and commentators that had permitted the creation of a dogmatic structure of the law. Their tradition, according to Koschaker, would then continue through the Pandetistic. The depiction of the continuity of Roman law is not correct and, mostly, is hyper idealized. But this argument perfectly fits the two points that Koschaker wanted to achieve: *in primis* it reaffirmed the importance of the Roman legal tradition across Europe, offering one of the earliest comprehensive accounts of its reception as a pan-European phenomenon and secondly it advocated for a dogmatic approach to Roman law studies, effectively proposing a programmatic framework for future legal scholarship.

A major point also discussed by Koschaker is the shift from *Justinianrecht* to the *Professorenrecht* that happened in the 19th century¹⁴⁷. This more theoretical form of lawmaking developed by the Historical school and later the Pandectistics is identified by Koschaker also as one of the most important causes of the crisis of Roman law as discussed in the previous chapter, since this shift broke the bond between theory and legal practice. This moment is individuated in time with the publication of the BGB. A return to the *Justianrecht* would have consolidated, according to Koschaker, to a reconnection between legal history and modern legislation. He proposed a comparative historical analysis of jurisprudence's societal role across eras: from ancient Rome to continental Europe and the

¹⁴⁶ Tommaso Beggio, *Paul Koschaker Rediscovering the Roman Foundations of European Legal Tradition* at 237, (Universitätsverlag Winter 2nd ed., 2018).

¹⁴⁷ *Id.* at 239.

Anglo-American world. This analysis led Koschaker to champion *Juristenrecht* as a foundation for restoring a *ius commune europaeum*, a shared European legal framework rooted in Roman law¹⁴⁸. To contribute to the systematic and dogmatic reconstruction of European private law, Koschaker advocated for a comparative method that would have developed both horizontally (comparison of the modern legal systems) and historically (a comparison with the ancient ones)¹⁴⁹. This would have permitted Roman law to remain a central point for the common foundation of European legal systems.

Koschaker's work can be considered the basis of the modern comparative legal history, as for him the legal research should have served contemporary legal systems through the extraction of the principles of the past that could still be applicable. The conception of relative natural law, a new method discovered by Koschaker and introduced into this work, was used to idealize the construction of Roman law to uncover common principles shared across European traditions. This work has established the basis for transnational legal discourse that also included the Anglo-American tradition. Their shared transnational perspective underscores Roman law not just as a legal heritage, but as a cultural and moral framework vital to rebuilding a unified and principled Europe. The practical and symbolic significance that the author gave to Roman law shows the true primordial need that Europe was searching for at the time: stability. The continuity of Roman law chanted by Koschaker promotes eternal values and principles of a unified cultural tradition that not even war could break. It was fundamental for Europe to restart its shared tradition.

This work has left a substantial legacy to many authors in the second half of the 20th century, that were left, once again, scared, confused and unable to find a new way to approach Roman law. Underlining once again the historical, legal and cultural value of the subject and became, somehow, the manifesto for the romanists and legal historians of the time. Relevant will be the behavior adopted by Calasso that decided to spread

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

in Italy Koschaker's ideas. This will be the main topic of his book *Introduzione al diritto commune* of 1951 and a translation that will be published after *Europa und das römische Recht*. Even if the Italian author was quite skeptical about Koschker's crystallized view of legal development in Europe during the Middle Ages, he certainly recognized the genius of the German author and shared greatly the value that he gave to the tradition of the *ius commune*. Koschaker is the pioneer of comparative legal history, his works and commitment have brought a lot to the development and improvement of the comparative legal doctrine and continues to do so. Even today it serves as a reference point for anyone seeking an alternative interpretation of European legal history.

3.2.3. *The Emergence of the European Narrative After WWII*

Koschaker's portrayal of Roman law as a cohesive and adaptable foundation for Europe after WWII is extremely idealized and biased. His reconstruction is the result of the personal experiences that have been characterised by the endless pursuit, as seen in the previous chapter, of a solid restoration of Roman law's relevance. This objective inevitably influenced both the tone and the structure of his historical narrative. Thus, it has been pointed out how Koschaker's reconstruction of Roman law was strictly intertwined to the German tradition since it has been closely connected to the story of the Holy Roman Empire and Germany¹⁵⁰. By doing so, Koschker has effectively failed to take into consideration the past cultural context of the Eastern Countries and has overestimated the continuity and linearity of the reception of Roman law. However, those facts shall not undermine in any way the importance of Koschaker's thesis. His work has played a pivotal role in restoring once again the centrality of Roman law within the European narrative. Roman law, as a matter of fact, was and still is capable of influencing the modern legal system in many different ways through its legal science, jurisprudence and dogmatic concepts¹⁵¹.

¹⁵⁰ *Id.* at 250.

¹⁵¹ *Ibid.*

Koschaker's work surely had an impact in the influence of the re-definition of Europe in the rediscovery of its identity. The ideas portrayed in this work are just a reflection of the common European sentiment that was being developed in those same years across the continent¹⁵². The impact of his thesis can be observed in the positions adopted by subsequent scholars like Calasso and Coing. The first one, being moved by Koschaker's declarations, has embraced the European spirit and beliefs that were supposed to "be the basis for a scientific programme in order to send a cultural message that would inspire a European legal unity"¹⁵³. The latter would instead play a role in European legal history through the foundation of the Max Planck Institute for European History in Frankfurt in 1964. Coing's approach focused more on the role of the *ius commune* rather than the one of Roman law in a strict sense, as he aimed at the rise of a new *ius commune europeum* through the historical and comparative study of sources¹⁵⁴. To sum up, even though Koschaker's portrayal of Roman law has been faulty and, at times, imprecise, it has been surely a crucial point to provide a perspective on the reconstruction of Roman law over its core values and principles.

3.3. *The Principles of Roman Law in European Law*

3.3.1. *European Law and the Ius Commune*

The European movement and institutions, during the 20th century, have been described as attempting to form a new *ius commune* from the European private law perspective. This characterization, however, requires careful qualification. A major difference between EU law and the *ius commune*, according to Peter Stein, is the fact that the latter was adopted voluntarily because of its well established and recognized intellectual and technical superiority. Meanwhile European laws are usually

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Id.* at 251.

imposed “from above” to preserve the sake of uniformity¹⁵⁵. European law is mainly described as overly bureaucratic, something that could increase the distance between European legislation and the citizens.

The flexible rules and the principles created in the Roman law tradition, like the *ius naturale*¹⁵⁶, served as a moderating force against rigid law¹⁵⁷. At first glance, European law seems to be breaching Roman concepts like contractual liberty, legal dualism and favoring the vigilant party. A closer examination, however, reveals enduring continuities, like the ever-lasting bond consolidated by shared values like *bona fides* (good faith) and *aequitas* (equity)¹⁵⁸. A more tangible example is EU consumer law: its principal aim is to protect the weaker party in contracts by correcting the structural imbalances of bargaining power. Although the regulatory technique differs markedly from that of classical Roman law, the underlying normative objective resonates with Roman ideals of justice. The problem here stands within the strict positive approach that overregulates and alienates citizens. According to the Consumer Survey 2018, 2019 only 45,5% of the population understand their rights, meaning that the majority are unable to properly exercise them due to their lack of knowledge¹⁵⁹.

Over-regulation in consumer protection and over-reliance on legal protections can result in reduced public vigilance and in a decline of legal awareness. This generates mistrust within the public institutions that, according to Ivančik, could be corrected through the revival of *ius naturale* principles like the *bona fide*, applied case by case. This approach might restore a measure of flexibility and ethical orientation to private law, but

¹⁵⁵ Ján Ivančik, *Roman Principles – Foundations of the European Legal Culture and Their Position in the Changing World* at 62 (Vilnius University Press 2020).

¹⁵⁶ Jus naturale refers to natural law, a philosophical system of legal and moral principles that are purported to be based on human nature’s fundamental ideas of right and wrong rather than on legislation or result of a judicial proceeding.

¹⁵⁷ Ivančik, *Roman Principles – Foundations of the European Legal Culture and Their Position in the Changing World* at 62 (cited in note 155).

¹⁵⁸ *Id.* at 63.

¹⁵⁹ *Ibid.*

it would also lead to the reduction of legal certainty. Mandatory protections like product liability remain essential, but caution and consumer responsibility, that align with principles built on the ancient Roman law rules of *vigilatibus iura scripta sunt*, the laws are written for those that take care of their rights, should not be abandoned.

In addition, a deep reminiscence of Roman law can still be found in the modern principles of private law. The Roman jurists created between the 4th century BC and the 4th century AD a legal culture rooted in reason and fair justice. Roman law remains the basis of modern legal education and identity. It is possible, therefore, to outline a “catalogue” of core legal ideas shared across the European legal systems that constitute the pillars of the core of European Private law, like *persona*, *dominium*, *obligation*, *contract* and *inheritance*¹⁶⁰. Still, many concepts developed by Roman jurists, like the classical division between public and private law cannot be considered relevant in modern times. The complexity of global and digital economies requires frequent and deep state intervention into what were traditionally private legal spheres, blurring the line between public and private law far beyond Ulpian’s framework.

In the words of Stain, European Union law can be somehow described as a renewal of a cultural legal unity which once covered the whole continent. The new interest in the “civilian tradition” has focused its researches over the development of the legal doctrines from Justinian’s code to the modern codes, highlighting the legal notions created by Roman law that, to a certain extent, still survive to these days and have changed to adapt to the current needs¹⁶¹.

3.3.2. Roman Law Within the Findings of the ECJ

The European Court of Justice represents the main judicial body of the Union and has existed since its very beginning. The court possesses

¹⁶⁰ Tommaso dalla Massara, *New Europe—Old Values? Reform and Perseverance: Can Roman Legal Tradition Play a Role of Identity Factor Towards a New Europe?* at 4 (Springer 2016).

¹⁶¹ Stein, *Roman Law in European History* at 130 (cited in note 122).

many duties among which ensure the uniform interpretation and application of European law in the Member States. The case law of the Court has played a pivotal role in the influence of the legislation at both national and European level. Even if at first community laws were seen as part of International European Public law and their primary aims were mainly economical. At some point the institutions realized that, in order to secure the proper functioning of the internal market, it was necessary to intervene within the relations of the private subjects¹⁶². This led to a shift of focus over the rules that regulated the rapports between private individuals. In 1989 and 1994 a proposal was advanced by parliament: a new European *ius commune* that would have taken the form of a common private law codification. The venture was attempted by the Lando Commission that issued the Principles of European Contract Law. However, the ambitious project of an effective European Civil Code was never concluded. Even if this request is still pending, the pursuit of the unification of private law at European level has assumed different forms, one of which, still not much explored to these days, is the contribution of ECJ case law¹⁶³.

In the civil law systems case law is not properly considered a real source of law, although it has a certain impact over the formulation of legal rules. In the context of the Union, the decisions of the ECJ play an important role mostly because of the incomplete nature of the European treaties and the fragmentary character of secondary legislation. The Union is a relatively young system that needs to compensate for the nonuniformity of its legislative provisions through the implementation of the so-called “legal values” and general principles that mainly derive from the content of the European treaties and the common constitutional tradition of the Member States. The ECJ has to clarify, through the preliminary rulings, the context and the content of unclear European measures. Many of the court’s legal maxims, included within the delivered judgements, contain ancient legal rules of the old Roman-Canonical *ius commune*, generally

¹⁶² Francisco J. Andrés Santos, *Roman Law in Today’s European Legal System*, 12 *European Review of Private Law* 347 (2004).

¹⁶³ *Id.* at 348.

written in Latin. Furthermore, they present a sum of a valuable rule or experience applicable to the decided case when there is no explicit rule available. An example are the expressions “*audiatur et altera pars*” and “*ne bis in idem*”. Those legal maxims are regarded as two of the most important principles of the judicial proceedings, namely that both parties must be heard at trial and is not possible to proceed twice on the same subject¹⁶⁴.

These rules per se do not provide any type of information regarding the outcome of the case. Their aim is to synthesize a legal concept and to identify the law in force within the European Union. This involves examining how EU courts apply the law in practice, especially in light of gaps in legislation and the current limitations of political and institutional efforts to unify European law¹⁶⁵. Santos analyzes three possible ways to understand the role of the maxims in ECJ jurisprudence. Firstly, they can be intended as an expression of the Advocate General and judges' wills to prove their ability and knowledge in the civil law tradition or they can be supposed to be enunciations of the general principles of Community and national law applicable in specific cases. If we sustain this type of interpretation, it would be implied that there is no special meaning behind the use of these rules¹⁶⁶. The author of this article does not retain that the first scenario is actually viable since, as it is underlined by Santos himself, the inclusion of the maxims would depend on personal knowledge of the jurists and, furthermore, their task would be limited to simple ornaments to decorate the outcome of the decision¹⁶⁷. Moreover, this theory doesn't explain the vast use of these maxims nor clarifies their application in cases to express a general provision essential to the harmonization of European law in the court perspective.

The second possible explanation, more valid in my opinion, applies the principles in contemplation of general principles to supplement or interpret the European legal order in accordance with the articles 19 TEU, 217 and 288 TFEU. Those articles express respectively the capacity of the

¹⁶⁴ *Id.* at 351.

¹⁶⁵ *Id.* at 352.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Id.* at 353.

ECJ to ensure the uniform application and interpretation of European law into the MSs and the legal capacity and legislative power of the Union. The court has a high discretion in identification and selection of the applicable principles, given that they are not inconsistent with Union law. The principles can generally be divided into three categories: principles universal and common to every legal order, principles of International Public law and the principles of European Union law. The latter can be derived from different sources, as stated in art 6(3) of the TEU: “3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”¹⁶⁸.

Since it would be practically impossible to scatter each MSs legal tradition, it is obvious for the court to draw from their shared legal history. The *ius commune* embraces the common spirit of many rules in the different legal systems and through its simple formulation can provide clear and effective judicial solutions¹⁶⁹. In this case the fact that the rules are delivered in Latin is a purely stylistic choice to fill the gaps of positive law, for they could be written in any other language. But it is impossible to deny that, at least in part, the spirit of the *ius commune* is still living in the current modern European legal system. The judges and the Advocate General express their desire to reconnect with the Roman-Canon law tradition, a tradition that somehow embodies a “*corpus iuris*” common to all the European civil traditions. The basic institutional structures of the MSs have not changed in the last three centuries, allowing the *ius commune* to be a potential base for the construction of European legal unity.

A practical example can be the Klomp case, where the ECJ referred directly to Roman law to support the continuity of the legal system. This was derived from the *lex specialis derogat legi generali* rule, formulated by medieval jurists, not Roman ones. However, similar reasoning is found in Roman legal texts such as Digest 1.5.24 and especially Digest 50.17.80,

¹⁶⁸ Art. 6(3), *Treaty on European Union* (TEU).

¹⁶⁹ Andrés Santos, *Roman Law in Today’s European Legal System* at 351 (cited in note 162).

which prioritizes specific laws over general ones¹⁷⁰. It is unsurprising that the Advocates General refer to Roman law maxims in matters of private law, given the shared foundations of continental Europe's civil law systems in Roman legal tradition. These references often encompass a range of private law principles, from foundational rules of contract law such as *pacta sunt servanda* to core doctrines concerning ownership rights¹⁷¹.

4. Conclusions

To conclude, this work highlights the enduring and seminal role played by Roman law as a foundational basis for modern legal systems throughout the 20th century. This contribution wants to demonstrate how Roman legal principles, whether embraced or rejected, significantly shaped various political facets of both Fascism and Nazism. Fascism has always seen Roman law as a model and an inspiring ideal, something that needed to be achieved and that should have been pursued within the modern legal system that was considered its direct successor. Nazism, on the contrary, rejected Roman law and everything that it symbolically stood for. From my analysis, I conclude that the way in which Roman law was made part of the propagandistic message reveals much about the relationship of the two regimes with their past and their own intentions. Italy was trying to become what the Roman Empire was, looking at its “glorious” past that needed to be revived, while Germany was ready to destroy and forget everything that had been part of the history of the previous decades. Roman law has proven once again its flexibility, the way in which it could be adapted in each context, either in a good or in a negative way. Roman law is the core of the Western legal tradition, it has been used as a tool for reconstruction, but also as propaganda. Power rests with the people who decide what to see of Roman law, how it should be used and interpreted. But it is impossible to deny the importance of Roman law

¹⁷⁰ Ondrej Blažo, Róbert Brtko and Matúš Nemeč, *Roman Law in the Legal Order of the European Union: Embellishment or a Genuine Source of Law?* at 162.

¹⁷¹ *Id.* at 163.

and its principles, how still nowadays in a completely different and revolutionary legal context such as the European Union, they are still present and are capable of influencing the current enactment of legislation. Roman law has regained its relevance after the fall of the two regimes, on a continent that was devastated and with its nations that were now more distant than ever. The essence of our common legal tradition, that still is considered part of the general principles of the European Union, was retrieved and used as a fresh starting point.

Chat Control and the Repercussions of Mandatory Communication Detection

Reconciling the EU Child Sexual Abuse Regulation Proposal (2022/0155) with Fundamental Rights, Privacy and Cybersecurity Standards

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Abstract: This article examines the European Union's proposed Child Sexual Abuse Regulation (commonly referred to as "Chat Control") and the legal and technical challenges arising from its transition from voluntary to mandatory detection of online child sexual abuse material (CSAM). The study situates the proposal within the broader EU regulatory framework governing electronic communications, including the shift introduced by Directive (EU) 2018/1972 and the interim derogation established by Regulation (EU) 2021/1232, later extended by Regulation (EU) 2024/1307. While the proposal seeks to harmonise Member States' approaches and strengthen the fight against online child abuse, it presupposes the availability of reliable detection technologies and introduces extensive monitoring obligations for providers of hosting and interpersonal communication services. The article analyses the technical mechanisms likely to be used to comply with detection orders, including perceptual hashing, artificial-intelligence classifiers, and client-side scanning, highlighting their operational limitations, susceptibility to evasion or manipulation, and significant rates of false positives when applied at large scale. Particular attention is given to the interaction between these detection measures and widely deployed security technologies such as end-to-end encryption, as well as to the cybersecurity risks created by large-scale processing and storage of sensitive data. The paper argues that the proposed

framework raises substantial concerns regarding data security, transparency, procedural safeguards, and the proportionality of large-scale monitoring of private communications. Although combating online child sexual abuse represents a compelling public interest objective, the current proposal risks introducing systemic vulnerabilities and intrusive surveillance infrastructures without sufficiently addressing the technological and cybersecurity challenges involved. The article concludes that any durable EU regulatory framework should integrate rigorous safeguards, transparency, technological viability, and strong protection of secure communications.

Keywords: EU Proposal 2022/0155; Child Sexual Abuse Material; Scanning Technologies; Cybersecurity; End-to-end Cryptography.

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1. Introduction

The EU defines online child abuse and exploitation as “all acts of a sexually exploitative nature carried out against a child¹ that have, at some stage, a connection to the online environment”². Child sexual abuse materials, commonly referred to as CSAMs,³ encompass any materials depicting such abuse.

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¹ “A child is defined in this context as any natural person younger than 18 years old.” Office of the United Nations High Commissioner for Human Rights (OHCHR), Convention on the Rights of the Child art. 1 (November 20, 1989), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (last visited March 18, 2026).

² General Secretariat of the Council, *Operational Action Plan 2022: Child Sexual Exploitation*, Doc. No. 13589/21, pt. 2.1 (November 13, 2021).

³ European Commission, Press Release, *Fighting Child Sexual Abuse: Commission Proposes New Rules to Protect Children* (May 11, 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2976 (last visited December 15, 2025).

According to the press conference held by the European Commission in May 2022, the COVID-19 pandemic has exacerbated the issue of the presence of pictures and videos depicting child pornography⁴. The EU has identified this problem as severe⁵, mostly because despite its previous dedication to combat Child Sexual Abuse, the European Union territories remained the primary global fulcrum for hosting this content, as sixty-two percent of all known CSAM can be traced back to an EU country⁶.

Until 2021, online platforms were implementing a self-regulatory policy voluntarily enacted by them, but it quickly became clear that this method repeatedly resulted in inefficiency, also because it had to work in synergy with the national legal framework of reference emanated by single EU Member States.

In light of CJEU's recognition that combating serious crime may justify limited interferences with privacy and data-protection rights⁷, the European Union adopted Regulation 2021/1232 as an interim measure, which entered into force in 2021.

⁴ European Commission, Press Release, *Fighting Child Sexual Abuse: Commission Proposes New Rules to Protect Children* (May 11, 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2976 (last visited December 15, 2025); Europol, *Exploiting Isolation: Offenders and Victims of Online Child Sexual Abuse During the COVID-19 Pandemic* 5, 17 (2020), available at <https://www.europol.europa.eu/publications-events/publications/exploiting-isolation-offenders-and-victims-of-online-child-sexual-abuse-during-covid-19-pandemic> (last visited December 15, 2025).

⁵ Consolidated Version of the Treaty on the Functioning of the European Union art. 83, June 7, 2016, 2016 O.J. (C 202) 47 ("The sexual exploitation of children is considered a serious crime").

⁶ Internet Watch Foundation, *Europe Remains "Global Hub" for Hosting of Online Child Sexual Abuse Material*, available at <https://www.iwf.org.uk/news-media/news/europe-remains-global-hub-for-hosting-of-online-child-sexual-abuse-material/> (last visited March 14, 2026).

⁷ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine & Natural Resources*, ECLI:EU:C:2014:238.

Given the temporary nature of the measure, in 2022 the new Child Abuse Protection Regulation⁸ (also known as “Chat Control”) was presented. A vigorous debate sparked among the Member States regarding the threats that this Regulation poses to the GDPR regulation⁹ and to the cybersecurity of the Union, delaying the implementation of the new regulation and leaving no other choice but to extend the effects of the Interim Regulations until April 2028.

The Child Abuse Protection Regulation’s aim is to render aspects of the previous regulation permanent, while enforcing mandatory screening measures for service providers, potentially taking down protections that were put in place to safeguard the privacy and security of users online.

This article analyses this Regulation proposal and the challenges that it poses. In particular, the author wishes to highlight how this legislation, however noble in its purpose, assumes as given aspects such as the existence of safe scanning technologies, while disregarding major cybersecurity compliance risks.

2. CSAM Detection

2.1. Voluntary Detection – Legal Framework Preceding 2020

In these past years, providers of electronic communication services have been able to voluntarily report CSAM to authorities in order to prevent or counter child sexual abuse online. This established practice is based on scanning online content, such as images, text and traffic data of

⁸ European Commission, *Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules to Prevent and Combat Child Sexual Abuse*, COM(2022) 209 final (2022).

⁹ Regulation (EU) 2016/679 (General Data Protection Regulation), 2016 O.J. (L 119) 1.

communications, sometimes using historical data, and with the use of technologies such as hashing technology¹⁰ and artificial intelligence¹¹.

These voluntary detection practices essentially consisted of detecting, removing or reporting CSAM from the aforementioned platforms.

Unfortunately, this policy has proven not to be adequate in order to stop the dissemination of such materials. This is due in part, because the level of involvement of providers varies greatly due to the voluntary nature of their practices to combat child sexual abuse: some internet service providers take no action at all, while others engage in low-quality reporting of CSAM or content with a low level of relevance to child sexual abuse¹².

This is troublesome since sexual predators frequently interact on open platforms, not just the dark web¹³.

The overall situation was also aggravated by the lack of harmonization among Member States, which were individually trying to regulate the subject. This increased fragmentation of the legal background also influenced online service providers who, given the intrinsic cross-border

¹⁰ The purpose of hashing is to identify different copies of the same digital file. First, an algorithm is used to assign a unique string of characters, called a “hash,” to the digital file, and that hash is stored in a hash database. A second digital file is then put through the same hashing process, and the resulting hash is compared with the one already stored in the hash database to determine whether the files match exactly. European Union Intellectual Property Office (EUIPO), “Hashing,” *Anti-Counterfeiting and Anti-Piracy Technology Guide*, available at <https://euipo.europa.eu/anti-counterfeiting-and-anti-piracy-technology-guide/technologies-digital-media/hashing> (last visited March 14, 2026).

¹¹ Regulation (EU) 2021/1232 of the European Parliament and of the Council of July 14, 2021, 2021 O.J. (L 274) 41, recital 7 (addressing the use of technologies by providers of number-independent interpersonal communications services for the purpose of combating online child sexual abuse).

¹² Leonore ten Hulsen, *Digital Fixes and Techno-Solutionism: The EU’s Tech-Based Battle Against Child Sexual Abuse*, 16 *NEW J. EUR. CRIM. L.* 154 (2025).

¹³ INHOPE, *Webinar: How Predators Online Hide in Plain Sight* (2024), available at <https://inhope.org/articles/webinar-recap-how-predators-online-hide-in-plain-sight> (last visited March 18, 2026).

nature of the provision of online services, struggled with compliance and unequal conditions, as well as took advantage of possible loopholes¹⁴.

Consequently, the European Union opted to regulate the matter at the Union level. As a result, Directive (EU) 2018/1972¹⁵ was adopted and entered into force at the end of 2020, modifying the definition of “publicly available electronic communications services” contained in Directive 2002/58/EC¹⁶. By expanding this definition to include certain online communication services, the reform brought internet service providers within the scope of Articles 5(1) and 6(1) of the ePrivacy Directive¹⁷, thereby rendering their voluntary CSAM reporting practices unlawful¹⁸. This led to concerns among internet service providers about repercussions, with Facebook threatening to stop its voluntary proactive scanning if the Regulation entered into force¹⁹, and a general paroxysm of preoccupation among other countries.

Due to these preoccupations, along with the ongoing intention of contrasting child abuse, the EU enacted Regulation 2021/1232 as an interim regulation.

2.2. *Legalized Control - Interim Regulation (EU) 2021/1232*

Interim Regulation 2021/1232 provided for a temporary derogation from certain provisions of Directive 2002/58/EC to allow for the processing of personal data by internet service providers for detecting and

¹⁴ European Commission, *Proposal for a Regulation Laying Down Rules to Prevent and Combat Child Sexual Abuse*, COM (2022) 209 final, Introductory Memorandum § 2 (2022) (“Proportionality”).

¹⁵ Directive (EU) 2018/1972 (European Electronic Communications Code), 2018 O.J. (L 321) 36.

¹⁶ Directive 2002/58/EC (ePrivacy Directive), 2002 O.J. (L 201) 37.

¹⁷ *Id.*

¹⁸ Recital 9 of Regulation (EU) 2021/1232; Directive (EU) 2018/1972; Directive 2002/58/EC.

¹⁹ Gabriel JX Dance and Adam Satariano, *E.U. Privacy Rule Would Rein in the Hunt for Online Child Sexual Abuse* (N.Y. Times, December 4, 2020).

removing CSAM from their services, pending the enactment of a long-term EU legal framework against child sexual abuse²⁰.

In fact, the interim Regulation allows internet service providers to use technologies to detect, report, and remove CSAM without breaching the confidentiality obligations of the ePrivacy Directive.

Given the temporary nature of this Regulation, Member States started discussing a less intrusive and more privacy and cybersecurity-oriented permanent legislation; accordingly, the European Union chose to implement the Regulation that went into effect in 2021 until 2024.

Thus, in 2022 the Child Abuse Protection Regulation²¹ (commonly known as "Chat Control") was presented. A dispute arose among Member States and legal associations²² about the threats that this law poses to the GDPR and the Union's cybersecurity, consequently postponing the implementation of this new regulation.

Extensive criticism from *inter alia* the European Parliament Research Service, NGOs, the European Data Protection Board, the European Data Protection Supervisor, the European Commission Regulatory Scrutiny Board, and the Legal Service of the Council of the European Union was expressed. Above all, even the European Data Protection Supervisor has expressed its concerns about this extension²³. It argues that the interim

²⁰ Regulation (EU) 2021/1232, recital 10.

²¹ Proposal Regulation 2022/0155.

²² European Digital Rights, *Fight Chat Control: Reports on the Standpoint of EU Member States on the Chat Control Proposal (2023)*, <https://edri.org/our-work/chat-control-what-is-actually-going-on/> (last visited April 12, 2026).

²³ European Parliamentary Research Service (EPRS), *Complementary Impact Assessment of the Proposal for a Regulation Laying Down Rules to Prevent and Combat Child Sexual Abuse*, DOI: 10.2861/016876. (last visited December 18, 2025); Ella Jakubowska, "Leaked Opinion of the Commission Sets off Alarm Bells for Mass Surveillance of Private Communications" (European Digital Rights, EDRI), available at: <https://edri.org/our-work/leaked-opinion-of-the-commission-sets-off-alarm-bells-for-mass-surveillance-of-private-communications/> (last visited December 18, 2025); Daniel Boffey, *EU Lawyers Say Plan to Scan Private Messages for Child Abuse May Be Unlawful* (The Guardian, May 8, 2023), available at:

Regulation does not properly protect individuals' right to privacy and data protection, and the confidentiality of their communications.

For these reasons, the EU ultimately adopted Regulation (EU) 2024/1307 on 29 April 2024, amending the interim Regulation (EU) 2021/1232. It initially extended the Regulation's application until April 2026²⁴, and subsequently until April 2028²⁵, while pursuing a more appropriate long-term solution in the interim.

<https://www.theguardian.com/world/2023/may/08/eu-lawyers-plan-to-scan-private-messages-child-abuse-may-be-unlawful-chat-controls-regulation> (last visited December 18, 2025); EDPB-EDPS, *Joint Opinion 04/2022 on the Proposal for a Regulation Laying Down Rules to Prevent and Combat Child Sexual Abuse* (2022, available at: https://www.edpb.europa.eu/our-work-tools/our-documents/edpb-edps-joint-opinion/edpb-edps-joint-opinion-042022-proposal_en (last visited December 18, 2025)); European Commission Regulatory Scrutiny Board, *Opinion—Impact Assessment/Regulation on Detection, Removal, and Reporting of Child Sexual Abuse Online, and Establishing the EU Centre to Prevent and Counter Sexual Abuse* (2022), available at: https://cdn.netzpolitik.org/wp-upload/2022/03/2022_03_Impact_Assessment_LEAK.pdf (last visited December 18, 2025); Council Legal Service, *Opinion of the Legal Service—Proposal for a Regulation Laying Down Rules to Prevent and Combat Child Sexual Abuse—Detection Orders in Interpersonal Communications* (Council of the European Union 2023) 8787/23, available at: <https://www.bitsoffreedom.nl/wp-content/uploads/2023/05/20230426-opinion-legal-services-on-csar-proposal.pdf> (last access December 18, 2025).

²⁴ *European Digital Rights, Fight Chat Control: Reports on the Standpoint of EU Member States on the Chat Control Proposal* (2023), <https://edri.org/our-work/chat-control-what-is-actually-going-on/> (last visited April 12, 2026).

²⁵ *European Commission, Proposal for a Regulation Amending Regulation (EU) 2021/1232 as Regards the Extension of Its Period of Application*, COM(2025) 797 final (2025), [https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2025\)797&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2025)797&lang=en) (last visited March 19, 2026).

2.3. *Mandatory Detection - Proposal for a Regulation to Prevent and Combat Child Sexual Abuse, Number 2022/0155*

Proposal number 2022/0155²⁶ in its intentions aims at giving targeted measures proportional to the risk of a misuse of a given service for online child sexual abuse and grooming²⁷.

In theory, the proposed Regulation seeks to comply with the underlying requirement of fairly balancing the various conflicting fundamental rights at stake that underlies that restriction, taking into account the specific context of combating online child sexual abuse and the importance of the public interest at stake while justifying its measures as removing obstacles from the internal market under article 114 of the TFEU²⁸.

In practicality, the proposal consists of introducing an obligation on providers of hosting services and providers of interpersonal communication services to detect and report online child sexual abuse²⁹, while imposing also other obligations, such as creating risk assessments to identify, analyze and assess the risk of use of their services for the purpose of online child material detection³⁰.

Although the proposed Regulation purports to resolve the compliance issues arising from the 2020 framework, it largely reiterates the same mechanisms that were temporarily authorised under the Interim Regulation.

3. *Analysis of the Chat Control Regulation Proposal*

The first approach the proposed Regulation takes to prevent and reduce child sexual abuse is to impose a monitoring obligation on internet

²⁶ *Child Abuse Protection Regulation* (commonly known as “Chat Control”).

²⁷ *Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) 2021/1232*.

²⁸ *Commission Proposal for a Regulation 2022/0155, supra note 14, at Introductory Memorandum pt. 2 (“Legal basis”)* (citing TFEU art. 114).

²⁹ *Commission Proposal for a Regulation 2022/0155, supra note 14, at art. 1*.

³⁰ *Commission Proposal for a Regulation 2022/0155, supra note 14, at recital 14, art. 3 (“Risk Assessment”)*.

service providers regarding CSAM, as outlined in Article 7. This entails that EU Member States can issue detection orders to internet service providers that require these companies to “take measures” to detect CSAM on their services³¹.

The first issue encountered is the widespread applicability of these provisions: by definition the proposed rules only apply to providers of online services which have proven to be vulnerable to misuse for the purpose of dissemination of child sexual abuse material or solicitation of children, principally by reason of their technical features³²: nowadays, this term might cover all major communication platforms. In general, these would include encrypted and non-encrypted social media platforms and instant messaging apps like WhatsApp, Snapchat, and Messenger³³.

By imposing this obligation, the Regulation requires service providers to assess the vulnerability of their platforms to the dissemination of child sexual abuse material. However, carrying out such assessments would likely require providers to identify or verify the age of their users more systematically, potentially raising concerns regarding compliance with GDPR principles³⁴.

Moreover, the detection of data is allowed solely in communications involving a minor. This will require the use of age verification systems, which nowadays rely on biometric processing and/or profiling³⁵.

³¹ Commission Proposal for a Regulation 2022/0155, *supra* note 14, at § 2, art. 7

³² Commission Proposal for a Regulation 2022/0155, *supra* note 14, at Introductory Memorandum pt. 2 (“Proportionality”).

³³ See Desara Dushi, *Does the End Justify the Means? The European Commission’s Proposed Regulation Laying Down Rules to Prevent and Combat Child Sexual Abuse*, 32 *International Journal of Law and Information Technology* (2024), available at <https://academic.oup.com/ijlit/article/doi/10.1093/ijlit/eaee027/7887512?guestAccessKey=y=> (last visited April 12, 2026)

³⁴ Regulation (EU) 2016/679, recital 38 (“Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data”).

³⁵ CNIL, *Online Age Verification: Balancing Privacy and the Protection of Minors*, available at <https://www.cnil.fr/en/online-age-verification-balancing-privacy-and-protection-minors> (last visited March 18, 2026).

Thus, the implications of this proposed Regulation are essentially twofold: on the one hand, it raises the question of which technologies media companies would be required to use to scan private communications; on the other hand, it concerns the potential risks arising from a failure to ensure adequate data security.

3.1. *End-to-End Cryptography, Scanning Technologies and False Positives*

The first issue concerns the technological means that providers are expected to deploy for detecting CSAM.

While the Regulation claims to promote innovation, proportionality, and technological neutrality by refraining from prescribing an exhaustive list of mandatory mitigation measures, this purported flexibility effectively authorises providers to select any detection technology so long as the regulatory requirements are nominally met: this allows them a degree of flexibility to design and implement measures tailored to the risk identified and the characteristics of the services they provide and the manners in which those services are used.

For the purpose of giving a more straightforward answer, providers are not required to use any specific technology, as long as the requirements set are met³⁶.

Such an open-ended approach has been criticized by scholars, who warn that the absence of defined standards invites inconsistent interpretations and potential misuse of surveillance tools, thereby heightening cybersecurity and privacy risks³⁷. In particular, according to the EDRI open

³⁶ *Proposal for a Regulation*, supra note 14, art. 10(2).

³⁷ “Passing this legislation undermines the thoughtful and incisive work that European researchers have provided in cybersecurity and privacy, including contributions to the development of global encryption standards. Such undermining will weaken the environment for security and privacy work in Europe, lowering our ability to build a secure digital society”, European Digital Rights (EDRI), *Joint Statement of Scientists and Researchers on EU’s Proposed Child Sexual Abuse Regulation* (2023), available at <https://edri.org/wp-content/uploads/2023/07/Open-Letter-CSA-Scientific-community.pdf> (last visited March 18, 2026).

academia letter “the effectiveness of the law relies on the existence of effective scanning technologies. Unfortunately, the scanning technologies that currently exist and that are on the horizon are deeply flawed. These flaws mean that scanning is doomed to be ineffective. Moreover, integrating scanning at a large scale on apps running in user devices, and particularly in a global context, creates side-effects that can be extremely harmful for everyone online, and which could make the Internet and the digital society less safe for everybody”³⁸.

De facto, any generalised monitoring obligation inevitably interferes with encryption, as the detection of CSAM within interpersonal communications presupposes widespread access to content.³⁹

It is worrisome that the Regulation would erode the confidentiality guarantees of end-to-end encryption⁴⁰ (E2EE), a technology widely used by communication services such as WhatsApp⁴¹ to ensure that only intended recipients can decrypt messages, given that the Regulation will serve as a mandatory basis for indiscriminate interception of content communications. To further explain this concept, encryption is the scrambling of plaintext messages, turning them into unreadable code that can only be deciphered by those who have the secret key. End-to-end encryption is one of the most commonly used technologies to secure and send information across the internet. Hardware embedded into phones or phone applications allow for the random locks and keys that make E2EE only

³⁸ Ibid.

³⁹ Leonore Ten Hulsen, *Digital Fixes and Techno-Solutionism*, supra note 12, 154–75.

⁴⁰ “It is a means to protect individuals, civil society, critical infrastructures, media and journalists, industry, and governments by ensuring the privacy, confidentiality, data integrity and availability of communications and personal data; it is evident that all parties benefit from encryption technology.” Council of the European Union, *Resolution on Encryption* (2020), available at <https://data.consilium.europa.eu/doc/document/ST-13084-2020-REV-1/en/pdf> (last visited March 18, 2026)

⁴¹ WhatsApp, *FAQ on Encryption*, available at https://faq.whatsapp.com/820124435853543/?helpref=uf_share (last visited March 18, 2026).

work on the devices involved in the conversation⁴². By design, E2EE protects users from eavesdropping and unauthorised access, including by service providers themselves.

These characteristics are the reasons why critics fear that the Regulation implicitly requires the dismantling of these safeguards, on the grounds that encryption purportedly offers excessively robust protection⁴³.

Some deemed this type of protection granted to the user far too safe. In fact, with this proposal it is understood how the EU is asking to dismantle these safeguards⁴⁴: there is a growing risk to public safety as criminals, and in this regard CSAM, are drawn to the use of E2EE apps that are technically impossible to access.

Furthermore, this technology also provides users with a sense of security, as their data stays safe during transmission, and neither third parties nor the provider itself can access it.

⁴² Robert E. Endeley, *End-to-End Encryption in Messaging Services and National Security—Case of WhatsApp Messenger*, 9 *Journal of Information Security* 95, 95–99 (2018).

⁴³ “End-to-end encryption is designed so that only the sender and recipient can view the content of a message or other communication. Encryption is the only tool we have to protect our data in the digital realm; all other tools have been proven to be compromised. The use of link encryption (from user to service provider and from service provider to user) with decryption in the middle as used in the mobile telephone system is not an acceptable solution in the current threat environment. It is obvious that end-to-end encryption makes it impossible to implement scanning for known or new content and detection of grooming at the service provider. In order to remedy this, a set of techniques called “Client-Side Scanning” (CSS) has been suggested as a way to access encrypted communications without breaking the encryption. Such tools would reportedly work by scanning content on the user’s device before it has been encrypted or after it has been decrypted, then reporting whenever illicit material is found. One may equate this to adding video cameras in our homes to listen to every conversation and send reports when we talk about illicit topics”, European Digital Rights (EDRi), *Joint Statement of Scientists and Researchers on EU’s Proposed Child Sexual Abuse Regulation* (cited in note 37).

⁴⁴ *Id.* (“Governments and secret services, on the other hand, are asking encrypted messaging services like WhatsApp to allow them access to their users’ data.”)

One notable example that also addresses user trust is the Skype case in the USA. The Microsoft Corporation service users believed that Skype offered a full end-to-end encryption feature. In 2013, however, thanks to Edward Snowden's disclosures, it was revealed that the platform contained a backdoor to the system: this revelation led to a protest of Skype users and an eventual loss of credibility of the application. In a response regarding the US government's position in seeking an encryption backdoor, Senator Wyden said that, "the US government does not need the approval of its secret surveillance court to ask a tech company to build an encryption backdoor"⁴⁵.

The author fears that the EU proposal risks replicating this dynamic by compelling providers to guarantee effective CSAM detection⁴⁶ and minimise false positives while simultaneously ensuring service security⁴⁷: a combination that, in practice, pressures them to implement *de facto* backdoors or equivalent access mechanisms.

Moreover, current scanning technologies further demonstrate the tension between detection and data protection.

Experts have noted that, at present, scanning for CSAM is only feasible through a type of virus scanner within a chat application, which detects and reports any CSAM⁴⁸. Scanning technologies for detecting child

⁴⁵ Z. Whittaker, *US Says It Doesn't Need Secret Court's Approval to Ask for Encryption Backdoors* (2017), available at <https://www.zdnet.com/article/us-says-it-does-not-need-courts-to-approve-encryption-backdoors/> (last visited April 12, 2026)

⁴⁶ *Proposal for a Regulation*, supra note 14, recital 28.

⁴⁷ Regulation (EU) 2016/679, art. 32 ("Taking into account the state of the art, the costs of implementation, and the nature, scope, context, and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia: (1) pseudonymization and encryption of personal data; (2) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services; (3) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident").

⁴⁸ See Hal Abelson et al., *Bugs in Our Pockets: The Risks of Client-Side Scanning* (2021),

sexual abuse material (CSAM) rely on an integrated set of perceptual hashing,⁴⁹ machine-learning classifiers⁵⁰, and behavioral analysis to identify both known illegal content and high-risk interactions.

To be more specific in addressing the preoccupations, we must highlight how recent debates have centered on client-side scanning (CSS), a technique enabling the on-device analysis of content before encryption. In practice, CSS is embedded directly into messaging applications so that every image a user intends to send is matched on the device itself against a database of CSAM fingerprints (hashes). The analysis occurs prior to any data being uploaded to an encrypted platform. If a threshold number of images corresponds to hashes contained in the CSAM database, the system automatically informs the competent authorities; otherwise, no information leaves the user's device. CSS, therefore, functions as a built-in scanning mechanism comparing outgoing content with CSAM hash databases and reporting suspected matches once predefined criteria are met⁵¹.

available at https://www.researchgate.net/publication/355233857_Bugs_in_our_Pockets_The_Risks_of_Client-Side_Scanning (last visited 12 April, 2026)

⁴⁹ See Leon Twenning, Harald Baier and Thomas Göbel, *Using Perceptual Hashing for Targeted Content Scanning*, par. 3.1 (“Perceptual hashing is an approximate matching technique for comparing the similarity of objects. In this work, the focus is on the perceptual similarity of pictures (images). Perceptual similarity means that a human presented with two images would judge them as being the same or similar. Because images are often modified slightly during their use (e.g., compressed to reduce bandwidth and storage before being uploaded to a digital service), they cannot be identified by cryptographic hashes or other exact matching techniques. In such scenarios, perceptual hashing can be used effectively for approximate matching”) (Bundeswehr University, Munich, Germany, available at https://www.researchgate.net/publication/374838370_Using_Perceptual_Hashing_for_Targeted_Content_Scanning (last visited March 18, 2026).

⁵⁰ M. Pereira, R. Dodhia, H. Anderson and R. Brown, *Metadata-Based Detection of Child Sexual Abuse Material*, 21 IEEE Transactions on Dependable and Secure Computing 3153, 3153–64 (2024).

⁵¹ Abelson et al., *Bugs in Our Pockets* (cited in note 48); Internet Society, *Fact Sheet: Client-Side Scanning* (2020), available at <https://www.internetsociety.org/resources/doc/2020/fact-sheet-client-side-scanning/> (last visited April 9, 2026).

In this regard, it could be argued that CSS allows authorities to investigate serious crimes without the need for centralized backdoors and therefore avoids weakening end-to-end encryption. However, despite this claim, the technology still enables continuous surveillance of user devices and exposes personal data to third parties, including law-enforcement bodies, at the precise moment when content is analysed on the device. In bypassing encryption at this pre-transmission stage, CSS compromises user privacy and introduces a persistent monitoring layer into everyday communications. Effective implementation would also require the technology to be mandated and installed by default on all new devices and software updates, thereby normalising pervasive, system-level scanning.

Challenging CSS on fundamental-rights grounds proves difficult because the sensitive nature of CSAM prevents users from accessing or reviewing the material that triggered the alert. This structural opacity means that individuals cannot verify whether a detection was accurate or whether the technology's scope has silently expanded beyond CSAM detection. Such limitations severely undermine transparency, accountability, and avenues for redress. The lack of user oversight allows authorities to justify actions on potentially false or unreviewable grounds, leaving citizens unable to contest erroneous or abusive determinations⁵². Ultimately, CSS introduces an intrusive, surveillance-enabling architecture whose operation is shielded from meaningful public scrutiny, raising profound concerns regarding proportionality, legality, and democratic oversight.

Technical accuracy remains another critical limitation. Hash-based systems such as PhotoDNA⁵³ enable highly accurate matching of previ-

⁵² Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine & Natural Resources*, ECLI:EU:C:2014:238 (invalidating the Data Retention Directive because it entailed broad, indiscriminate interference without safeguards).

⁵³ Testimony of Hany Farid, PhotoDNA developer, before the House Committee on Energy and Commerce, *Fostering a Healthier Internet to Protect Consumers* (October

ously identified CSAM, while newer AI models assess imagery and language patterns to detect novel material or grooming behaviors. CSAM detection systems have, in general, proven effective, while grooming detection still faces challenges. In this regard, even detection systems claiming 90% accuracy would generate millions of false positives when applied to the enormous volume of daily communications within the EU. Such an error rate is particularly problematic given the gravity of the allegations involved and the legal consequences that may follow. False positives may result from misinterpretation of benign family images, medical photographs, or ambiguous text, and evidence indicates that these errors disproportionately affect marginalised linguistic or cultural groups whose communication patterns differ from those represented in training datasets⁵⁴.

To be more precise, while image-based detection often has a 100% accuracy for known CSAM, grooming-detection models remain far less reliable, as they misclassify approximately one in ten flagged interactions⁵⁵.

16, 2019) (“There are claims that PhotoDNA has a false positive rate of 1 in 50 billion; but it is proprietary, thus these claims cannot be independently verified”), Available at: [[https://www.congress.gov/116/meeting/house/110075/witnesses/HHRG-116-IF16-Wstate-FaridH-](https://www.congress.gov/116/meeting/house/110075/witnesses/HHRG-116-IF16-Wstate-FaridH-20191016.pdf)

20191016.pdf](<https://www.congress.gov/116/meeting/house/110075/witnesses/HHRG-116-IF16-Wstate-FaridH-20191016.pdf>) (last visit December 18, 2025).

⁵⁴ See Desara Dushi, *Does the End Justify the Means? The European Commission’s Proposed Regulation Laying Down Rules to Prevent and Combat Child Sexual Abuse*, 32 *International Journal of Law and Information Technology* (2024), available at <https://researchportal.vub.be/en/publications/does-the-end-justify-the-means-the-european-commissions-proposed-/> (last visited March 18, 2026).

⁵⁵ Hany Farid, PhotoDNA Developer, Testimony before the House Committee on Energy and Commerce, *Fostering a Healthier Internet to Protect Consumers* (October 16, 2019), available at <https://www.congress.gov/116/meeting/house/110075/witnesses/HHRG-116-IF16-Wstate-FaridH-20191016.pdf> (last visited April 1, 2026).

This argument is further aggravated by the fact that these errors trigger human review⁵⁶. While this human-review requirement may seem a welcome safeguard, it also raises serious challenges.

Firstly, because the material in question is extremely sensitive and typically cannot be disclosed to users, the process remains largely opaque: users would rarely, if ever, have the ability to examine the content attributed to them, contest wrongful flagging, or to verify whether human reviewers acted correctly.

Secondly, given the scale of communications and the potentially vast volume of flagged items, the human workload could become enormous, raising concerns regarding practical feasibility, delays, or superficial review.

Finally, even well-trained reviewers may still diverge in their judgments, especially when evaluating borderline cases such as reclaimed slurs, sarcastic remarks, culturally specific communication styles, or politically ambiguous statements. These variations, often shaped by linguistic and cultural differences, risk embedding systemic biases into human moderation processes⁵⁷.

⁵⁶ Proposal Regulation 2022/0155 (COD), recital 28 (“With a view to constantly assess the performance of the detection technologies and ensure that they are sufficiently reliable, as well as to identify false positives and avoid, to the extent possible, erroneous reporting to the EU Centre, providers should ensure human oversight and, where necessary, human intervention, adapted to the type of detection technologies and the type of online child sexual abuse at issue. Such oversight should include regular assessment of the rates of false negatives and positives generated by the technologies, based on an analysis of anonymised representative data samples. In particular where the detection of the solicitation of children in publicly available interpersonal communications is concerned, service providers should ensure regular, specific and detailed human oversight and human verification of conversations identified by the technologies as involving potential solicitation of children.”). See also Proposal Regulation 2022/0155, art. 10(4)(c) (cited in note 14).

⁵⁷ See Maarten Sap, Dallas Card, Saadia Gabriel, Yejin Choi and Noah A. Smith, “The Risk of Racial Bias in Hate Speech Detection,” in *Proceedings of the 57th Annual Meeting of the Association for Computational Linguistics* 1668, 1668–78 (Association for Computational Linguistics 2019); see also Vinay Koshy, Frederick Choi, Yi-Shyuan

Despite these concerns, supporters of the Regulation maintain that scanning is indispensable to counter the increasing misuse of encrypted and anonymized services, such as VPNs and proxy servers, by perpetrators seeking to evade detection⁵⁸.

The debate, therefore, highlights a fundamental dilemma: while technological tools may assist in combating child sexual abuse, their current form introduces severe risks of systemic surveillance, mass data collection, inaccurate reporting, and erosion of digital security, all of which challenge the proportionality and legality of the proposed framework.

3.2. *Safekeeping of Data and Cybersecurity Issues*

Safekeeping the vast quantities of data generated through CSAM detection orders raises an additional set of profound legal, technical, and cybersecurity concerns, particularly given that the Regulation remains insufficiently clear, precise, and complete in defining the risks associated with such intrusive data processing. This ambiguity is itself problematic: under the EU Charter of fundamental rights⁵⁹, any interference with the rights to privacy and data protection must be provided for by law, meaning that individuals must be able to foresee with reasonable certainty under which circumstances their data may be accessed, processed, retained, or disclosed.

Chiang, Hari Sundaram, Eshwar Chandrasekharan and Karrie Karahalios, “Venire: A Machine Learning-Guided Panel Review System for Community Content Moderation,” 9 *Proceedings of the ACM on Human-Computer Interaction* 1, 1–35 (2024).

⁵⁸ Europol, *European Union Serious and Organised Crime Threat Assessment (SOCTA 2021*, no. 6), available at https://www.europol.europa.eu/cms/sites/default/files/documents/socta2021_1.pdf (last visited April 12, 2026)

⁵⁹ Charter of Fundamental Rights of the European Union, art. 52(1) (“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”).

In its current form, however, the Regulation leaves significant ambiguity regarding the nature of the data to be stored, the security guarantees expected from providers, and the safeguards to prevent misuse or secondary processing. The obligation to screen all interpersonal communications through automated systems, irrespective of whether any wrongdoing is suspected, effectively amounts to systematic access to vast amounts of personal information. This constitutes an interference with Articles 7 and 8 of the EU Charter⁶⁰ regardless of how the resulting data is subsequently used⁶¹, and whether weakening or circumventing end-to-end encryption (E2EE) may be required for detection further amplifies the risks. Weakening E2EE not only facilitates state-level access but also exposes communication infrastructures to exploitation by malicious actors, thereby introducing a real possibility of disproportionate surveillance practices⁶².

These tensions become even more complex within the EU's multi-level legal framework, where criminal-procedural rules may vary significantly between Member States but are nonetheless bound by the minimum standards of fairness set out at the European level⁶³. Data obtained through detection orders could be used in criminal proceedings, raising difficult questions regarding the reliability of CSAM-related evidence, the

⁶⁰ Charter of Fundamental Rights of the European Union, arts. 7, 8 (“Everyone has the right to respect for his or her private and family life, home and communications”; “Everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. Compliance with these rules shall be subject to control by an independent authority”).

⁶¹ Council of the European Union, Legal Service, *Opinion of the Legal Service on the Proposal for a Regulation Laying Down Rules to Prevent and Combat Child Sexual Abuse*, Doc. 8787/23 (April 26, 2023).

⁶² *Open Letter from Security and Privacy Researchers in Relation to the Online Safety Bill* (2023), available at <https://haddadi.github.io/UKOSBOpenletter.pdf> (last visited April 12, 2026).

⁶³ Roberto Kostoris, *Handbook of European Criminal Procedure* at 67–98 (Springer 2018).

chain of custody, and the ability of defendants to meaningfully challenge the material relied upon against them. Despite the invasive nature of such surveillance, EU principles on the exclusion of unlawfully obtained evidence⁶⁴ are not consistently robust enough to prevent courts from admitting detection-order data collected in violation of privacy and data-protection norms. The absence of clear EU-wide guidelines on disclosure obligations⁶⁵, particularly regarding whether and how a defendant may access or contest the data that triggered the detection, further undermines procedural guarantees and risks creating fragmented standards among Member States. This lack of foreseeability threatens the rule of law requirement for strict legal safeguards and effective judicial oversight when it comes to interferences with fundamental rights.

Beyond legal uncertainty, the technological tools used for CSAM detection introduce their own vulnerabilities.

Research into perceptual-hashing and client-side scanning tools shows that these systems face serious technical weaknesses, including evasion, hash-collision, and data-leakage attacks⁶⁶. Skilled users can edit images or their metadata in ways that bypass detection altogether, undermining the system's ability to identify the very offenders it is meant to capture. Hash-collision attacks make it possible to generate harmless images that share the same hash as known CSAM, allowing attackers to overwhelm detection systems with false alerts. Such overloads can effectively create denial-of-service situations, drain enforcement resources, and diminish the overall reliability of CSAM-monitoring infrastructures. Even more troubling is the risk that fabricated collisions could be used to

⁶⁴ Charter of Fundamental Rights of the European Union, arts. 47 (right to an effective remedy and to a fair trial), 48 (presumption of innocence and right of defence), 52(1) (scope and interpretation; limits on Charter rights, proportionality and necessity).

⁶⁵ Isadora Neroni Rezende, *The Proposed Regulation to Fight Online Child Sexual Abuse: An Appraisal of Privacy, Data Protection and Criminal Justice Issues*, 38 *International Review of Law, Computers & Technology* 369, 369–90 (2024).

⁶⁶ Leon Twenning, Harald Baier and Thomas Göbel, *Using Perceptual Hashing for Targeted Content Scanning*, in *IFIP Advances in Information and Communication Technology*, vol. 687 (Springer 2023).

frame individuals by producing false “matches” that falsely signal possession or distribution of CSAM, potentially subjecting innocent users to invasive scrutiny or criminal investigation.

Data-leakage attacks present another layer of harm: by reversing perceptual hashes, attackers may reconstruct blurred or partial versions of the original images⁶⁷. This threatens not only the privacy of the children depicted but also the privacy of ordinary users whose benign content is scanned and hashed. The presence of these vulnerabilities shows that large-scale CSAM-detection systems inherently generate and concentrate highly sensitive data, which must then be protected against compromise, expanding the attack surface available to malicious actors.

Compounding these risks is the lack of transparency surrounding many of the technologies, policies, and operational practices behind such systems. Companies and law enforcement bodies might withhold technical information out of concern that disclosure might help offenders adapt. While this rationale is understandable, it also limits public debate, restricts independent research, and undermines users’ trust in both service providers and public authorities. Without meaningful transparency, oversight, and external auditing, it becomes difficult to determine whether these systems operate lawfully, whether they introduce disproportionate risks, or whether they can realistically balance child protection with cybersecurity and fundamental rights guarantees.

Ultimately, a Perceptual Hashing and Client-Side Scanning (PHTCS) framework capable of supporting effective enforcement while respecting democratic principles can only be realised through mutual trust, rigorous research, strong procedural safeguards, and a legal architecture that sets out clear, predictable, and rights-compatible standards for data security, access, and accountability.

⁶⁷ *Ibid.*

4. Conclusion

In conclusion, while the protection of minors online constitutes a fundamental obligation, the tools adopted to achieve this objective must not compromise the essential rights to privacy, data protection, and secure communications. Given the limitations of current scanning technologies and the legislative uncertainties surrounding their deployment, any future framework should establish clear operational boundaries, meaningful human oversight, robust safeguards for data security, and strict limits on data retention⁶⁸.

At the same time, the large-scale deployment of CSAM detection infrastructures raises broader structural concerns. Systems initially designed to detect child sexual abuse material could, with limited technical modification, be repurposed for wider monitoring purposes⁶⁹. The particularly sensitive nature of child protection risks facilitating the gradual normalisation of intrusive surveillance practices, potentially undermining the guarantees of confidentiality, integrity, and security that technologies such as end-to-end encryption are designed to protect⁷⁰.

⁶⁸ *Ekimdzhev and Others v. Bulgaria*, ECHR 70078/12 (2022) (holding that Bulgarian legislation on secret surveillance and communications-data retention violated Article 8 ECHR because it failed to meet the “quality-of-law” standard, lacking clarity, precision, adequate safeguards, and strict necessity requirements, and emphasizing that any system allowing state access to communications data must clearly define its scope, the categories of persons who may be targeted, the conditions and duration of retention, and independent oversight to prevent arbitrary or mass surveillance). See also C-623/17, *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* (2020) (holding that national laws requiring general and indiscriminate retention or transmission of traffic and location data to security or intelligence agencies for national-security purposes fall within the scope of Directive 2002/58/EC and are incompatible with arts. 7, 8, and 52(1) of the Charter of Fundamental Rights of the European Union, and confirming that metadata is subject to strong EU fundamental-rights protection and that bulk, untargeted data-collection regimes exceed the permissible limits of interference with privacy and data protection).

⁶⁹ *Id.* at 52

⁷⁰ Art. 21, para. 1, EU dir. 14 December 2022, no. 2555 (“Member States shall ensure that

The urgency of addressing online child sexual abuse is undeniable, as in February 2024, the UN Special Rapporteur on the sale and sexual exploitation of children warned of the rapidly escalating scale and sophistication of online abuse, calling for concrete, coordinated action from states worldwide⁷¹.

These warnings, while they underscore the gravity of the problem, they also reinforce the need for solutions that truly enhance child protection without eroding the fundamental rights and digital security upon which individuals and democratic societies rely. In fact, effective child protection cannot be achieved through measures that introduce systemic cybersecurity vulnerabilities or enable disproportionate access to private communications.

A sustainable regulatory response must therefore protect children without eroding the fundamental rights and digital security on which democratic societies depend.

essential and important entities take appropriate and proportionate technical, operational and organisational measures to manage the risks posed to the security of network and information systems which those entities use for their operations or for the provision of their services, and to prevent or minimise the impact of incidents on recipients of their services and on other services.”). See also art. 21, para. 2, lett. h, EU dir. 14 December 2022, no. 2555 (explicitly mentioning encryption or cryptographic protections as a means to secure sensitive information).

⁷¹ OHCHR, *UN Expert Alarmed by New Emerging Exploitative Practices of Online Child Sexual Abuse* (2024), available at <https://www.ohchr.org/sites/default/files/documents/issues/children/sr/cfis/existing-emerging/subm-existing-emerging-sexually-cso-suojellaan-lapsia-ry.pdf> (last visited April 12, 2026).

Borrowed Tools

International Law and the Making of Sovereignty in East Timor

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Abstract: This article uses East Timor to ask a simple question with hard answers: what can international law actually do for peoples seeking independence? The paper follows Timor's path from Portuguese rule through Indonesia's occupation to UN administration and statehood, and argues that law mattered in three different ways. First, the ICJ's East Timor case (Portugal v Australia, 1995) affirmed self-determination and permanent sovereignty over natural resources (PSNR), even as Monetary Gold rules kept the Court from deciding the merits. Second, a UN sequence, UNAMET, INTERFET, UNTAET, turned principle into practice by creating security, institutions and a constitution under Sérgio Vieira de Mello. Third, the paper shows the cost of success: transitional rule can enable self-government while temporarily constraining it, a sovereignty paradox that East Timor mitigated through early "Timorization" of authority. A comparative section reads Western Sahara and Palestine through the same lens: rights are named, but credible pathways (consultation under protection, time-bound administration with real local agency) are missing. The conclusion offers conditions, not a template, for when law moves from declaration to implementation: layered legitimacy, benchmarked security, and early transfer to elected institutions. In short, international law does not confer sovereignty; used well, it can be a tool to scaffold it.

Keywords: East Timor; Self-determination; Permanent sovereignty over natural resources (PSNR); UNTAET; State recognition.

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1. *Introduction*

East Timor's struggle for independence is one of the most complex decolonization processes of the late twentieth century. Its history is marked by successive layers of foreign intervention: from Portuguese colonialism beginning in the sixteenth century to Indonesia's invasion and occupation in 1975, and later the United Nations' transitional administration under UNTAET¹. Each of these moments reveals the ambivalent role of international law as both an instrument of domination and a mechanism of liberation.

This paper examines East Timor's decolonial trajectory through three different yet connected dimensions: the colonial and post-colonial historical background; the intervention of the International Court of Justice in *Portugal v. Australia* (1995) concerning East Timor's natural resources²; and the United Nations Transitional Administration in East

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¹ See *East Timor Country Profile*. (BBC News, June 5, 2023), available at <https://www.bbc.com/news/world-asia-pacific-14919009> (last visited October 13, 2025).

² See I.C.J., 1991 no. 84, *Case concerning East Timor (Portugal v. Australia)*, available at <https://www.icj-cij.org/case/84> (last visited October 13, 2025).

Timor (UNTAET) under Brazilian diplomat Sérgio Vieira de Mello's leadership³. Building on this analysis, the paper engages ongoing debates about contemporary decolonial efforts – most notably Western Sahara and Palestine – arguing that the international community possesses legal and institutional tools that can guide local paths to sovereignty while centering local authority and culture.

This paper argues that East Timor's experience reveals international law's ambivalence in decolonization: the same legal tools that enable self-determination can simultaneously limit it. Through *Portugal v. Australia's* affirmation of PSNR, the UN's sequenced transitional administration, and comparative readings of Western Sahara and Palestine, this article argues that international law does not confer sovereignty but, under specific conditions, can structure it, always at the cost of temporarily limiting the very autonomy it purports to create.

This article uses a mixed doctrinal and process-tracing case-study of East Timor. Doctrinal analysis reconstructs the content and effects of relevant legal norms, such as self-determination, permanent sovereignty over natural resources (PSNR), and UN peace-operations mandates, through close reading of primary sources (ICJ, *Portugal v Australia*; UNGA/UNSC resolutions; UNTAET regulations and reports) and secondary scholarship on recognition and peacebuilding. Process tracing links these norms to sequential institutional choices (from UNAMET to INTERFET, then UNTAET and finally independence), identifying mechanisms by which international law moved from principle (adjudication) to practice (administration). The approach is interpretivist-attentive to discourse (e.g., how legal language framed sovereignty claims) but grounded in documentary evidence. Limitations include case-selection (a “most-likely” case) and generalizability; these are mitigated by explicit mechanism-based claims and transparency about sources. Translations from Portuguese are the author's unless otherwise noted.

³ See *United Nations Transitional Administration in East Timor* (United Nations Peacekeeping), available at <https://peacekeeping.un.org/fr/mission/past/etimor/etimor.htm> (last visited October 13, 2025).

This analysis proceeds from Third World Approaches to International Law (TWAIL), which interrogates how international law, despite its claims to universality, emerged from and continues to reproduce colonial power relations. Following Luis Eslava's attention to law's "everyday operation"⁴, this paper examines not only high-level ICJ jurisprudence but also the mundane regulatory work of UNTAET that institutionalized sovereignty's conditions. This dual pattern reveals how international law's promise of freedom often becomes a technology of governance.

To bridge doctrinal and policy literatures, the paper uses a processual framework: from norms to process and finally administration. *Norms* name the right (self-determination; PSNR); *process* converts principle into collective choice under a security envelope; *administration* institutionalizes outcomes through time-bound, locally owned governance. The comparative chapters on Western Sahara and Palestine operate as a stress test: where any link fails, normative consensus, credible sequencing, or locally legitimated administration, self-determination is affirmed in principle but deferred in practice. The aim is not a template but a set of conditions under which law plausibly moves from declaration to implementation.

2. Historical Background

East Timor first became a topic on the international global agenda in 1960 when the United Nations added it to the list of Non-Self-Governing Territories⁵. At that time, it was administered by Portugal, alongside other colonies such as Angola, Mozambique, and Macau. Fourteen years

⁴ See Luis, Eslava and Sundaya, Pahuja, *Beyond the Post-Colonial: TWAIL and the Everyday Life of International Law* at 195-221, 45(2) *Journal of Law and Politics in Africa, Asia and Latin America - Verfassung und Recht in Übersee (VRÜ)*, (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2034228 (last visited October 13, 2025).

⁵ See *East-Timor, UNTAET (Background)*, (United Nations Peacekeeping), available at <https://peacekeeping.un.org/fr/mission/past/etimor/UntaetB.htm> (last visited October 13, 2025).

later, in 1974, the Carnation Revolution overthrew Portugal's dictatorship⁶. The new government sought to establish a provisional government in East Timor (Timor-Leste in Portuguese), but the sudden opening of political space triggered a civil war between factions advocating independence and those favoring integration with Indonesia.

Fearing the emergence of a communist state on its borders amid the Cold War, Indonesia invaded East Timor in December 1975, annexing it as its 27th province the following year⁷. The territory was then annexed by Indonesia and it was, effectively, its 27th province from 1976 to 1999. The only countries to officially recognize this were Indonesia and Australia. The United Nations acted on the issue, namely through the General Assembly's Resolution 3485 (1975), calling for the respect for the territorial integrity of Timor⁸. The Security Council (UNSC), furthermore, put forth UNSC Resolution 389 (1976) requesting that Indonesia withdraw its forces from East Timor⁹, however the country refused to do so.

The stalemate persisted for more than two decades. In 1998, weakened by the Asian Financial Crisis¹⁰, Indonesia proposed limited autonomy for East Timor but agreed to respect the results of a UN-supervised consultation on independence. The UN Security Council, via Resolution 1246 (1999) established the United Nations Mission in East Timor (UNAMET) to organize the referendum and monitor implementation of

⁶ See *Id.*

⁷ See Rourke, Alison, *East Timor: Indonesia's Invasion and the Long Road to Independence*, The Guardian (August 29, 2025), available at <https://www.theguardian.com/world/2019/aug/30/east-timor-indonesias-invasion-and-the-long-road-to-independence> (last visited October 13, 2025).

⁸ See United Nations General Assembly Resolution 3485 (1976), available at <https://digitallibrary.un.org/record/189768?v=pdf> (last visited October 13, 2025).

⁹ See United Nations Security Council Resolution 389 (UN Digital Library, 1976), available at <https://digitallibrary.un.org/record/280254> (last visited October 13, 2025).

¹⁰ See Yehezkiel, Vito, *Revisiting the Past: Analyzing Indonesia's 1998 Monetary Crisis*. Modern Diplomacy (June 19, 2024), available at <https://modern diplomacy.eu/2024/06/19/revisiting-the-past-analyzing-indonesias-1998-monetary-crisis/> (last visited October 13, 2025).

its outcome¹¹. Shortly thereafter, UN Security Council Resolution 1272 (1999)¹² created the United Nations Transitional Administration in East Timor (UNTAET), granting the UN full executive, legislative, and judicial authority during the transition to independence.

UNTAET, under the leadership of Brazilian diplomat Sérgio Vieira de Mello, combined peacekeeping, State-building, and humanitarian governance. It is widely regarded as a milestone in UN peace operations, marking the advent of a fourth generation of missions focused on peacebuilding¹³. Kai Michael Kenkel, when referring to this fourth generation of Peacekeeping Operations, claims that:

“An extreme form of peacebuilding is the transitional administration, wherein the exercise of sovereignty over a given territory is effectively transferred to a UN peace operation and all executive, legislative, and judicial authority temporarily rests with the head of the UN mission. To date only two such administrations have been set up, the United Nations Interim Administration Mission in Kosovo (UNMIK) and the United Nations Transitional Administration in East Timor (UNTAET). Both were established in 1999; UNTAET was transformed into a political mission after Timorese independence and UNMIK continues with reduced tasks at the time of writing”¹⁴.

UNTAET, however, was not without criticism. Not all of the mission's means and objectives were unanimous and, even though it can be regarded as a success by the international community through the United

¹¹ See United Nations Security Council Resolution 1246 (1999), available at <https://digitallibrary.un.org/record/1494150?v=pdf> (last visited October 13, 2025).

¹² See United Nations Security Council Resolution 1272 (1999), available at [https://docs.un.org/en/S/RES/1272\(1999\)](https://docs.un.org/en/S/RES/1272(1999)) (last visited October 13, 2025).

¹³ See Kenkel, Kai Michael, *Five Generations of Peace Operations: From the Thin Blue Line to Painting a Country Blue*. Rev. Bras. Polít. Int. 56 (1): 122-143 (2013), available at <https://www.scielo.br/rbpi/a/mTGNK7hRXJBmJvmQmdQCZrh/?lang=en&format=pdf> (last visited October 13, 2025).

¹⁴ See id, p.133.

Nations, not all is perfect, as the next section expands in detail. The business of State-building is demanding, and externally induced coherence can override local norms. Dal Poz argues that:

“UNTAET has later been criticised for several reasons, including: firstly, its adoption of ‘ground zero’ approach that regarded Timor-Leste as terra nullius - a blank space with no existing political actors or institutions, [...] interpreted its statebuilding mandate as a merely ‘technical exercise’ and followed a model based on the Western Weberian paradigm, creating new national political institutions which ignored existing socio-political practices, such as traditional adat law”¹⁵.

Under UNTAET, Sérgio Vieira de Mello also steered negotiations with Australia on the Timor Sea, culminating in the 2001 Timor Sea Arrangement and, at independence, the Timor Sea Treaty (2002), which created a Joint Petroleum Development Area and a revenue-sharing regime superseding the Timor Gap Treaty¹⁶. The resource has been used to mitigate internal tensions and de Mello was politically able to negotiate and partition the revenues that come from it to guarantee the political peace necessary to Statebuilding.

Yet the stabilizing effect of hydrocarbon income is conditional and fragile. Timor-Leste later sought to institutionalize national factions management via a Petroleum Fund (2005)¹⁷, but exposure to price volatility and exhaustibility means that declines in oil revenues could reopen latent

¹⁵ A, Dal Poz, ‘Buying Peace’ in *Timor-Leste: Another UN-success Story?*, 2(2) *Peace Human Rights Governance* 185-219, p. 191-192, (2018).

¹⁶ See *Timor Sea Treaty* (Australian Government Department of Foreign Affairs and Trade, May 10, 2002), available at <https://www.info.dfat.gov.au/info/treaties/treaties.nsf/AllDocIDs/A8A223D015C50F8CCA256BC70008A0E2> (last visited October 19, 2025).

¹⁷ See *Petroleum Fund Law* (Government of Timor-Leste August 3, 2005), available at https://timor-leste.gov.tl/wp-content/uploads/2010/03/Law_2005_9_petro-leum_fund_law_.pdf (last visited October 19, 2025).

social cleavages and hurt the political settlement¹⁸. Resource governance can buy time for institution-building, but it is not a substitute for broad-based legitimacy and diversified economic capacity¹⁹.

Furthermore, resource governance illustrates the compound nature of international legal constraints on development. Even as PSNR affirmed Timor's right to its oil wealth, the terms of that sovereignty were shaped by: (1) interim arrangements negotiated under Australian pressure; (2) "good governance" conditionalities from international financial institutions; (3) emerging environmental obligations; and (4) investor protections. While each of these obligations is individually defensible, they collectively narrow the space for autonomous decision-making.

The issue of exploitation of natural resources in the Timor region was addressed by the International Court of Justice before Timorese independence – without a conclusion on merit, as will be explored in the next chapter. Even when courts can't reach the merits, international law still shapes behavior. Duties of non-recognition and non-assistance, which are tied to self-determination, as an *erga omnes* obligation, and to people-centered resource sovereignty, narrow the space for exploitative bargains and signal that interim deals should be provisional, transparent, and revisable by the future sovereign. In practice, that expressive guidance bolstered the UN's sequencing and helped align external support with locally owned state-building. In the discussion on Permanent Sovereignty over National Resources, *Portugal v. Australia* marks a turning point by anchoring said principle on self-determination and the peoples, not on States themselves.

¹⁸ See Michael L. Ross, *The Oil Curse*, Princeton (2012), available at https://timor-leste.gov.tl/wp-content/uploads/2010/03/Law_2005_9_petroleum_fund_law_.pdf (last visited October 19, 2025).

¹⁹ See Kenkel, Kai Michael, *Five Generations of Peace Operations: From the Thin Blue Line to Painting a Country Blue*. *Rev. Bras. Polít. Int.* 56 (1): 122-143 (2013), p. 209-210, available at <https://www.scielo.br/j/rbpi/a/mTGnk7hRXjBmJvMqmdQCZrh/?lang=en&format=pdf> (last visited October 13, 2025).

The evolution of PSNR from a decolonial right (1962 UNGA Resolution 1803²⁰) to a conditional obligation (post-Stockholm 1972²¹) is traceable in Timor's trajectory. While *Portugal v. Australia* affirmed resource sovereignty, UNTAET's administration and post-independence governance operated under international oversight that qualified that sovereignty with transparency requirements, anti-corruption measures, and petroleum fund regulations – all externally validated. PSNR thus remained formal while its exercise became conditional.

UNTAET, after stabilizing the country and establishing key state institutions, allowed East Timor to hold presidential elections in 2002, which granted Xanana Gusmão his first presidential term²². A follow-up mission, the United Nations Mission of Support in East Timor (UNMISET), oversaw the transfer of authority until its conclusion in 2005.

Through this sequence of interventions, international law evolved from an instrument of colonial oversight to a mechanism of postcolonial reconstruction, transforming East Timor from a non-self-governing territory into a sovereign state.

Presently, East Timor occupies a meaningful place in Southeast Asia's political and economic landscape. Since independence in 2002, it has held competitive elections and witnessed peaceful transfers of power, consolidating core democratic practices²³. It is also on a formal path to become the 11th member of ASEAN²⁴, a bloc that, taken together, ranks among the world's largest economies and most populous regions – fifth

²⁰ See United Nations General Assembly Resolution 1.803 (December 14, 1962), available at https://legal.un.org/avl/ha/ga/ga_1803/ga_1803.html (last visited February 7, 2026).

²¹ See *Report on the United Nations Conference on the Human Environment*. (June 1972), available at <https://docs.un.org/en/A/CONF.48/14/Rev.1> (last visited October 25, 2025).

²² See *Gusmão Wins First-Ever Presidency in a Landslide*. (UN News, April 17, 2002), available at <https://news.un.org/en/story/2002/04/32652> (last visited October 13, 2025).

²³ See *Timor Leste*. (Freedom House), available at <https://freedomhouse.org/country/timor-leste> (last visited October 18, 2025).

²⁴ See Derek, Grossman, *Timor-Leste Adds a New Wrinkle to US-China Competition*, *Foreign Policy* (October 16, 2025), available at <https://foreignpolicy.com/2025/10/16/timor-leste-asean-us-china-competition-south-china-sea/> (last visited October 18, 2025).

in GPD and third in population²⁵. Accession would anchor Timor-Leste within a major regional market and institutional framework, reinforcing its shift from Non-Self-Governing Territory to recognized statehood with growing regional integration.

In conclusion, East Timor has moved not only from dependency to sovereignty, but toward meaningful participation in one of the world's most consequential regional organizations.

3. *International Law and the Limits of Decolonization*

This present-day trajectory was shaped by earlier legal battles over status and resources. Before UN administration and eventual independence, East Timor's claims were tested at the International Court of Justice. In 1995, the International Court of Justice (ICJ) heard the case *East Timor (Portugal v. Australia)*²⁶, in which Portugal accused Australia of infringing East Timor's right to freely dispose of its natural resources. Portugal claimed that Australia had unlawfully concluded the 1989 Timor Gap Treaty with Indonesia²⁷ – then occupying East Timor – to explore and exploit the oil and gas reserves of the territories that, under international law, belonged to the East Timorese people.

Portugal argued²⁸ that by negotiating and implementing the Treaty, Australia had violated:

²⁵ See *ASEAN Market Profile*, HKTC Research (March 24, 2024), available at <https://research.hktdc.com/en/article/Mzk5MzcxNjEz> (last visited October 18, 2025).

²⁶ See I.C.J., 1991 no. 84, *Case concerning East Timor (Portugal v. Australia)*, available at <https://www.icj-cij.org/case/84> (last visited October 13, 2025).

²⁷ See *1989 Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia* (National University of Singapore Center for International Law, December 11, 1989), available at <https://cil.nus.edu.sg/database/cil/1989-treaty-between-australia-and-the-republic-of-indonesia-on-the-zone-of-cooperation-in-an-area-between-the-indonesian-province-of-east-timor-and-northern-australia/> (last visited October 13, 2025).

²⁸ See ICJ, June 30, 1995, *East Timor (Portugal v. Australia)* at p.12, available at <https://www.icj-cij.org/sites/default/files/case-related/84/084-19950630-JUD-01-00-EN.pdf> (last visited September 27, 2025).

- I. the right of the East Timorese people to self-determination and permanent sovereignty over their natural resources (PSNR);
- II. the rights of Portugal as the still-recognized administering power; and
- III. relevant UN Security Council Resolutions 384 and 389, which had affirmed East Timor's territorial integrity and called for Indonesia's withdrawal.

Australia's procedural claims were that, in summation, the Court lacked jurisdiction over the case, since Portugal was not a legitimate party of the procedures as it held no juridical claim on the matter. Furthermore, it claimed that, according to the Monetary Gold Principle²⁹, the Court had no jurisdiction because of the possible effects of the judgment on a third party, Indonesia, that had not accepted the Court's jurisdiction³⁰. It is noteworthy, however, that although technically sound, Australia's representation in the ICJ does not even try to argue that the rights of East-Timor are *not* being violated, maintaining a purely legal-procedural argumentation.

The ICJ's refusal to adjudicate rested on the Monetary Gold doctrine, drawn from *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States of America)* (1954)³¹. The rule is simple but powerful: the Court cannot adjudicate a dispute if doing so would require

²⁹ See ICJ, June 15, 1954, *Monetary Gold Removed From Rome in 1943 (Italy v. France, UK and USA)*, at p. 19 see "The Court finds that the jurisdiction conferred upon it by the common agreement of France, the United Kingdom, the United States of America and Italy does not, in the absence of the consent of Albania, authorize it to adjudicate upon the first Submission in the Application of the Italian Government", available at <https://www.icj-cij.org/sites/default/files/case-related/19/019-19540615-JUD-01-00-EN.pdf> (last visited September 26, 2025).

³⁰ See Kenkel, Kai Michael, *Five Generations of Peace Operations: From the Thin Blue Line to Painting a Country Blue*. Rev. Bras. Polit. Int. 56 (1): 122-143 (2013), available at <https://www.scielo.br/j/rbpi/a/mTGnK7hRXJBmJvmQmdQCZrh/?lang=en&format=pdf> (last visited October 13, 2025), p.12.

³¹ See I.C.J., 1991 no. 84, *Case concerning East Timor (Portugal v. Australia)*, available at <https://www.icj-cij.org/case/84> (last visited October 13, 2025).

it to determine the legal responsibility or rights of an absent third State that has not consented to the Court's jurisdiction when those third-party interests form the "very subject-matter" of the decision. In *East Timor*, Portugal's claims could not be resolved without first pronouncing on Indonesia's conduct and entitlement to conclude the Timor Gap arrangements; Indonesia was not before the Court, so the case was barred.

The principle is not absolute: in *Certain Phosphate Lands in Nauru* (1992)³², the Court allowed a case to proceed where a third State's interests were implicated but not indispensable. The line, then, turns on indispensability: when a merits decision necessarily entails attributing wrongful conduct or deciding rights of a non-consenting State, Monetary Gold blocks jurisdiction, channeling the dispute to political and administrative forums instead of adjudication.

This procedural barrier exposed a deeper structural problem: international law's State-centric architecture makes adjudication of colonial wrongs nearly impossible when the occupying power refuses jurisdiction. *Monetary Gold* thus functions as a doctrine of imperial immunity, ensuring that the most serious violations, that is, those requiring determinations about non-consenting third States, remain beyond the Court's reach. The ICJ could name the right but could not remedy the wrong. Portugal's only recourse was to shift strategy from adjudication to administration, from courts to Security Council resolutions - a move that foreshadowed the institutional sequencing (from UNAMET to INTERFET and finally UNTAET) that would eventually operationalize self-determination.

The Court, in light of all this, ultimately upheld this procedural objection, ruling that it "*cannot, in this case, exercise the jurisdiction it has [...]*

³² See *Certain Phosphate Lands in Nauru* (Nauru v Australia) (Preliminary Objections) (1992) ICJ Rep 240, paras 50–55 (last visited October 15, 2025).

because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent"³³.

Despite this outcome, the *East Timor* case remains legally and politically significant. The Court explicitly reaffirmed the *erga omnes* character of the right to self-determination: a right owed to the international community as a whole, not merely to the parties before it. PSNR, while not independently declared *erga omnes*, was anchored to self-determination in a way that gave it derivative normative force. That is, if a people's right to self-determination is opposable to all States, then agreements that dispose of that people's resources without their consent cannot be treated as purely bilateral matters.

This move had consequences beyond the courtroom itself. Even without a merits decision, the judgment signaled that the Timor Gap Treaty's legitimacy was conditional, that resource arrangements negotiated over the heads of a non-self-governing people carried a legal shadow. The case kept East Timor visible on the international agenda at a moment when political attention had largely moved on. Furthermore, it reinforced Portugal's standing as administering power, which would prove critical when diplomatic conditions shifted after Indonesia's President fell in 1998³⁴. In this sense, *Portugal v. Australia* functioned less as adjudication and more as strategic positioning, as it created normative pressure that, while insufficient on its own, shaped the political terrain on which UNAMET, INTERFET, and UNTAET would later operate.

While the ICJ could not enforce the right, Portugal's use of the Court demonstrated that international adjudication can serve decolonization

³³ *Timor Sea Treaty* (Australian Government Department of Foreign Affairs and Trade, May 10, 2002) at p.106, available at <https://www.info.dfat.gov.au/info/treaties/treaties.nsf/AllDocIDs/A8A223D015C50F8CCA256BC70008A0E2> (last visited October 19, 2025).

³⁴ See *Indonesians Overthrow President Shuharto*, Global Nonviolent Action Database (1998), available at <https://nvdatabase.swarthmore.edu/content/indonesians-overthrow-president-suharto-1998> (last visited March 19, 2026).

even when it fails on jurisdiction by naming obligations, constraining justifications for inaction, and keeping legal claims alive for the institutional moments that follow.

4. *International Law as a Decolonization Tool*

While the ICJ could not enforce self-determination or Permanent Sovereignty over Natural Resources (PSNR) in *Portugal v Australia*³⁵, the trajectory from UNAMET to UNTAET shows the ambivalence of international law. On the one hand, law can entrench power: procedural doctrines (notably Monetary Gold) left the exploitation of East Timor's offshore resources largely unaddressed at the merits stage. On the other, law can enable liberation: the Security Council's decisions and UN administration made possible Timor's passage from Indonesian province to sovereign state by sequencing from consultation to security and finally administration.

Operationalization, however, must be defined with precision, as it is here that the sovereignty paradox becomes most sensitive.

First, process design: UNAMET provided a legitimate act of collective choice under international supervision; INTERFET created a security envelope for de-escalation and humanitarian access; UNTAET then exercised temporary executive, legislative, and judicial authority, but with sunset logic built in: a public roadmap to elections and constitutional deliberation. This sequencing distinguished Timor from open-ended trusteeships: each phase had defined exit criteria tied to institutional capacity rather than abstract readiness – whatever this could mean.

³⁵ See First established by UNGA Res. 1803/1962, the principle has since then evolved to include both rights and duties regarding the exploration of natural resources. It is, nonetheless, an important tool in the ever evolving debate on decolonization, sovereignty and forms of neocolonialism. United Nations General Assembly Resolution 1803 (December 14, 1962) available at https://legal.un.org/avl/ha/ga_1803/ga_1803.html (last visited October 14, 2025).

Second, institutional architecture: UNTAET promulgated core regulations (UNTAET Regulation 1999/1 on authority³⁶, 2000/11 on organization³⁷, 2000/15 on cabinet structure³⁸) that created functioning legal and administrative systems. These regulations seeded a national police force (UNTAET Regulation 2000/10³⁹), rehabilitated courts (2000/11⁴⁰), established a civil service (2000/22⁴¹), and supported a constituent assembly (2001/2⁴²). Each step translated to practice abstract rights into administrative capacity, building the architecture of an effective statehood.

Third, and most critically, local agency through Timorization: what began as a slogan became practice through: (a) the National Consultative Council (NCC, July 1999), later replaced by the National Council (NC, December 2000), which gave Timorese representatives formal advisory and then legislative roles; (b) rapid recruitment of national Timorese staff across UNTAET departments –by mid-2001, over 90% of public administration positions were held by Timorese nationals⁴³; (c) the East Timor Transitional Administration (ETTA, 2000), which created four Timorese-led ministries that operated alongside UNTAET's governance; and (d)

³⁶ See *UNTAET Regulation No. 1999/1* (November 27, 1999), available at <https://peacekeeping.un.org/mission/past/etimor/untaetR/etreg1.htm> (last visited February 7, 2026).

³⁷ See *UNTAET Regulation No. 2000/11* (March 6, 2000), available at <https://peacekeeping.un.org/mission/past/etimor/untaetR/Reg11.pdf> (last visited February 7, 2026).

³⁸ See *UNTAET Regulation No. 2000/15* (June 6, 2000), available at <https://peacekeeping.un.org/mission/past/etimor/untaetR/Reg0015E.pdf> (last visited February 7, 2026).

³⁹ See *UNTAET Regulation No. 2000/10* (March 6, 2000), available at <https://peacekeeping.un.org/mission/past/etimor/untaetR/Reg0010E.pdf> (last visited February 7, 2000).

⁴⁰ See *UNTAET Regulation No. 2000/11* (March 6, 2000), available at <https://peacekeeping.un.org/mission/past/etimor/untaetR/Reg11.pdf> (last visited February 7, 2026).

⁴¹ See *UNTAET Regulation No. 2000/22* (July 4, 2000), available at <https://peacekeeping.un.org/en/mission/past/etimor/untaetR/Reg2200E.pdf> (last visited February 7, 2026).

⁴² See *UNTAET Regulation No. 2001/2*. United Nations (September 19, 2001), available at <https://peacekeeping.un.org/mission/past/etimor/untaetR/2001-28.pdf> (last visited February 7, 2026).

⁴³ See *Report of the Secretary-General on the United Nations Transitional Administration in East Timor* (United Nations Security Council October 18, 2001), available at <https://docs.un.org/en/S/2001/983> (last visited February 7, 2026).

early budgetary transparency through the Trust Fund for East Timor and public reporting requirements that, while externally mandated, were co-designed with Timorese officials.

This is where Sérgio Vieira de Mello's leadership proved decisive. Rather than treating Timorization as a late-stage handover, he accelerated it as an ongoing process from UNTAET's inception. His approach paired international capacity, including the use of force to secure positive peace, with local decision-making power, reducing both the reality and the perception of "benevolent colonialism". However, even this progressive administration could not escape the sovereignty paradox: the very metrics of "readiness" for transfer, State capacity, rule of law, fiscal responsibility, were defined by external actors. The benchmarks for removing scaffolding were set by those who built it.

This operationalization of international law therefore exposes its ambivalence. Trusteeship and transitional administrations often risk reproducing hierarchies, which critics call "benevolent colonialism" or "neocolonialism"⁴⁴, when the local agency is marginal. East Timor partially mitigated this through progressive "Timorization" of institutions and the early handoff to elected authorities, yet the sovereignty paradox remained: the same legal tools that enable self-determination can constrain it while external actors govern in the interim.

UNTAET's relative success came not from avoiding the sovereignty paradox but from managing it through early, measurable transfers of authority paired with transparent, predictable and stable timelines for exit. This, in any case, raises an uncomfortable question: if international administration can only be successful when it self-abolishes quickly, what does this say about the broader project of international trusteeship? The

⁴⁴ The former President of Ghana was the one of the first ones defining neocolonialism as: "The essence of neo-colonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside." Kwame, Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism*, London: Panaf p.4 (2004).

answer East Timor suggests is that temporary constraint may be acceptable when paired with genuine local co-governance. Open-ended tutelage that defers meaningful power transfer never is.

Permanent Sovereignty over Natural Resources was likewise implemented, not merely asserted. Under UNTAET and immediately post-independence, Timor negotiated interim maritime arrangements with Australia that created a joint development zone and a revenue-sharing regime, providing predictable rents to underwrite core state functions. The later establishment of a Petroleum Fund sought to smooth volatility and convert finite resource income into intertemporal public goods. These tools show law's political economy aspect: resource governance can buy time for institution-building, but it is not a substitute for diversified capacity or broad-based legitimacy.

By putting these elements together, the mission in East Timor shows three complementary modalities of law in decolonization: (1) normative affirmation (self-determination and PSNR as guiding principles); (2) procedural signaling (ICJ jurisprudence that shapes expectations even without coercive effect); and (3) administrative implementation (UN mandates that build the scaffolding of the State). Each modality has limits, but their interplay made independence legally intelligible and practically achievable.

With principles affirmed and institutions built, the remaining question, which was central to East Timor and to decolonization more broadly, is how sovereignty endures once international scaffolding is removed.

5. East Timor as an Example for the Future

The arc of East Timor – from colony to Non-Self Governing Territory to full statehood – is a prime example of how international law, even with its shortcomings, can be articulated to guarantee sovereignty. Today,

the United Nations recognizes 17 Non-Self-Governing Territories⁴⁵: out of those, the cases of Western Sahara and Palestine are noteworthy.

5.1. *Western Sahara: When Process Collapses*

Western Sahara's trajectory reveals what happens when normative affirmation exists without credible process and the parallels are not coincidental. Both territories were European colonial possessions listed as Non-Self-Governing Territories by the General Assembly. Both saw decolonization interrupted by a neighboring State's territorial claim – Indonesia in 1975, Morocco in the same year. In both cases, the ICJ was called upon to pronounce on the legal status of the territory and affirmed self-determination as the governing principle. Both involved resource-rich territories where the occupying power's economic interests created structural incentives against withdrawal. And in both, the international community affirmed the right but struggled to operationalize it. What separates the two cases, then, is not the normative framework but the institutional pathway: where East Timor's sequence from consultation to security to administration moved from principle to practice, Western Sahara's process stalled at consultation and never advanced.

Western Sahara, like East Timor, was a European colonial possession – administered by Spain until 1976⁴⁶. While under Moroccan occupation, the International Court of Justice was called upon to decide:

“I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)? If the answer to the first question is in the negative,

⁴⁵ See *Non-Self Governing Territories*. United Nations Decolonization, available at <https://www.un.org/dppa/decolonization/en/nsgt> (last visited October 18, 2025).

⁴⁶ See *United Nations Mission for the Referendum in Western Sahara*. UN Peacekeeping, available at <https://minurso.unmissions.org/background> (last visited October 18, 2025).

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?"⁴⁷.

In regard to question I, the Court decided that no, the territory was not *terra nullius* and therefore for question II, that:

“any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court did not find any legal ties of such a nature as might affect the application of the General Assembly’s 1960 resolution 1514 (XV) – containing the Declaration on the Granting of Independence to Colonial Countries and Peoples – in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory”⁴⁸.

In this Advisory Opinion, the Court determined that Western Sahara was not *terra nullius* at the time of Spanish colonization and, crucially, that neither Morocco nor Mauritania possessed legal ties of territorial sovereignty that would affect the application of General Assembly Resolution 1514⁴⁹ containing the Declaration on the Granting of Independence to Colonial Countries and Peoples. The Court emphasized that decolonization must proceed through “the free and genuine expression of the will of the peoples of the territory”.

⁴⁷ *Western Sahara Advisory Opinion*. International Court of Justice p. 14 (1976), available at <https://www.icj-cij.org/sites/default/files/case-related/61/061-19751016-ADV-01-00-EN.pdf> (last visited October 18, 2025).

⁴⁸ *Western Sahara*, International Court of Justice (Overview), available at <https://www.icj-cij.org/case/61> (last visited October 18, 2025).

⁴⁹ See *Declaration on the Granting of Independence to Colonial Countries and Peoples*. UNGA Res. 1514 (XV) (14 December 1960), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-granting-independence-colonial-countries-and-peoples> (last visited February 8, 2026).

However, this normative clarity proved insufficient. Within weeks of the ICJ Opinion, Morocco organized the Green March⁵⁰, deploying 350,000 civilians into Western Sahara to create facts on the ground that would predetermine any referendum outcome. This massive settlement strategy transformed the question from legal principle to political reality: how could a "free and genuine expression" occur when the electorate itself had been fundamentally altered by forced demographic change?

The United Nations Mission for the Referendum in Western Sahara (MINURSO), established in 1991⁵¹, was designed to operationalize self-determination through an internationally supervised referendum. MINURSO, unfortunately, has become one of the UN's longest-running missions without fulfilling its mandate. The referendum, perpetually in preparation, has never occurred. Disputes over voter eligibility, precisely those individuals settled during the Green March, have paralyzed the process. Unlike UNAMET's clear mandate and rapid execution (established in June 1999, referendum held in August 1999), MINURSO has operated for over three decades in a state of indefinite preparation that substitutes procedure for progress.

The structural difference from East Timor is evident: MINURSO lacks enforcement capacity. While INTERFET provided a robust security guarantee backed by military force to ensure the consultation could proceed without violent disruption, MINURSO operates purely as a monitoring mission. It can observe but cannot create the protected space necessary for genuine collective choice. Morocco, with tacit or explicit support from

⁵⁰ See Hsain, Ilahiane, *Remembering the Green March at Fifty: Faith, Sound and the Art of Nation-Making* (Morocco World News November 3, 2025), available at <https://www.morocoworldnews.com/2025/11/266336/remembering-the-green-march-at-fifty-faith-sound-and-the-art-of-nation-making/> (last visited February 7, 2025).

⁵¹ See *United Nations Mission for the Referendum in Western Sahara*. (UN Peacekeeping), available at <https://minurso.unmissions.org/background> (last visited February 8, 2026).

great powers – including longstanding French backing and the US' recognition of Moroccan sovereignty in 2020 as part of the Abraham Accords⁵² – has no incentive to permit a process it might lose.

Furthermore, Western Sahara illustrates the resource dimension of blocked decolonization. The territory's phosphate deposits and potential offshore oil reserves create powerful economic incentives for Morocco to maintain control⁵³. Unlike East Timor's interim Timor Sea arrangements, which were explicitly provisional and subject to renegotiation post-independence (indeed, renegotiated in 2018), Morocco's exploitation of Western Saharan phosphates through State-owned OCP Group⁵⁴ operates as permanent sovereignty rather than transitional management. Resources that should, under PSNR principles, belong to the Sahrawi people, are being extracted, processed, and exported under Moroccan control with profits accruing to Rabat rather than being held in trust for the territory's future sovereign.

What Western Sahara reveals, therefore, is the fragility of the from norms to process and finally administration pathway when the process element collapses. Self-determination is affirmed, by the ICJ, by UN resolutions, by international law doctrine, but remains unrealized because no credible mechanism exists to translate norms into institutional reality. The "act of collective choice" that anchored East Timor's legitimacy is indefinitely deferred. MINURSO continues to exist, but its existence has become

⁵² See *Recognizing the Sovereignty of the Kingdom of Morocco Over the Western Sahara*. Federal Register (United States Government December 15, 2020), available at <https://www.federalregister.gov/documents/2020/12/15/2020-27738/recognizing-the-sovereignty-of-the-kingdom-of-morocco-over-the-western-sahara> (last visited February 8, 2026).

⁵³ See Alex, Kasprak *The Desert Rock that Feeds the World*. (The Atlantic November 29, 2016), available at <https://www.theatlantic.com/science/archive/2016/11/the-desert-rock-that-feeds-the-world/508853/> (last visited February 8, 2026).

⁵⁴ See Ziyad, Chaouki, *Morocco's Phosphate Diplomacy is Reshaping Africa's Agricultural Future* (London School of Economics, June 18, 2025), available at <https://blogs.lse.ac.uk/africaatlse/2025/06/18/moroccos-phosphate-diplomacy-is-reshaping-africas-agricultural-future/> (last visited February 8, 2025).

a substitute for action rather than a pathway to it, an indefinite peacekeeping operation that freezes the conflict without resolving it. The contrast with UNTAET could not be starker: where UNTAET was designed for self-abolition through measurable transfers of authority, MINURSO's very longevity signals failure, as each year of operation marks another year that self-determination remains merely normative rather than practical. Therefore, Western Sahara and East Timor started from nearly identical normative positions. What made the difference was not law's content but its institutional follow-through.

5.2. *Palestine: Issues Across All Dimensions*

Palestine magnifies these tensions while adding layers of complexity that distinguish it from both East Timor and Western Sahara. Here, the breakdown occurs not only in the process but across all three dimensions of the framework.

Unlike East Timor and Western Sahara, where the legal characterization was relatively clear (respectively, decolonization from Indonesian occupation and Spanish colonial withdrawal), Palestine exists in a state of juridical multiplication. Is this a matter of decolonization from British Mandatory rule never completed? Belligerent occupation under the Fourth Geneva Convention? Disputed territory subject to negotiated borders? A *sui generis* situation requiring unique legal frameworks?

The ICJ's 2004 Wall Advisory Opinion⁵⁵ characterized the construction of the separation barrier in the Occupied Palestinian Territory as contrary to international law and emphasized third-State duties not to recognize or assist the illegal situation. Yet, unlike the Court's clarity in East Timor (affirming PSNR and self-determination) or Western Sahara (rejecting Moroccan and Mauritanian sovereignty claims), the Wall Opinion operated within an already-fragmented legal landscape shaped by UN

⁵⁵ See for example, recently the General Assembly approved a resolution affirming the right of Palestinians to self-determination. UNGA Res. 79/163 (December 17, 2024), available at <https://docs.un.org/en/A/RES/79/163> (last visited October 18, 2025).

Security Council resolutions, the Oslo Accords⁵⁶, customary international humanitarian law, and competing narratives of rights and security. However, as in Western Sahara, the principles have outpaced the process: there is no agreed procedure for a decisive act of collective choice, no durable security guarantee to make such a process viable, and recognition politics remain divided despite partial diplomatic upgrades. The institutional landscape including split authorities, periodic conflict, and fragmented territorial control further impedes translating entitlement into administration.

This normative multiplication matters because it creates interpretive space for indefinite, perpetual deferral. Where multiple legal frameworks overlap – occupation law, self-determination, negotiated agreements, security exceptions – actors can invoke whichever framework best serves their interests at any given moment. The effect is to render self-determination perpetually imprisoned: not denied in principle, but always subject to other considerations that prevent its realization in practice.

The process dimension reveals an even deeper fracture. There is no agreed sequencing analogous to East Timor's from UNAMET to INTERFET and finally UNTAET pathway. The Oslo Accords (1993-1995)⁵⁷ established a step-by-step approach: interim self-government leading to final status negotiations. This process, however, collapsed. What was designed as transition calcified into permanence: "interim" arrangements are now over three decades old, with no agreement on what a decisive act of collective choice would look like, who would participate, what territory it would encompass, or what options would be presented. The "peace process" itself became a structure of governance rather than a pathway to sovereignty, creating what Karma Nabulsi has termed "prolonged

⁵⁶ See *Declaration of Principles on Interim Self-Government Arrangements*. (United States Institute of Peace, September 13, 1993), available at https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/oslo_09131993.pdf (last visited February 8, 2026).

⁵⁷ See *ibid.*

temporariness": a status designed as transitional but maintained indefinitely⁵⁸.

Adding to this idea, there is no security guarantee that would make genuine consultation viable. The international presence consists of monitors and observers but no enforcement mechanism comparable to INTERFET. Periodic escalations of violence, such as the Second Intifada, Gaza conflicts in 2008-09, 2012, 2014, 2021, 2023-24⁵⁹, punctuate rather than interrupt a structural condition of insecurity. Unlike East Timor, where INTERFET's robust mandate created a protected space for UNAMET to operate, any Palestinian consultation would occur under conditions where one party maintains overwhelming military superiority and has demonstrated willingness to use force to prevent outcomes it opposes. The asymmetry is not merely political but existential: collective choice cannot be "free and genuine" when conducted under occupation.

The administration dimension is perhaps most fractured. Unlike UNTAET's unified transitional authority with clear sunset clauses and progressive Timorization, Palestinian governance is multiply divided. The Palestinian Authority exercises limited civil control in areas of the West Bank classified as Areas A and B under Oslo⁶⁰, but Israel retains security control throughout and exclusive control in Area C (comprising over 60% of West Bank territory). Hamas governs Gaza independently since 2007, creating parallel Palestinian administrations with no unified

⁵⁸ See Yutaka, Arai-Takahashi, *Unearthing the Problematic Terrain of Prolonged Occupation* (Israel Law Review 52, no. 2 2019): 125–67, <https://doi.org/10.1017/S0021223719000037>, available at <https://www.cambridge.org/core/journals/israel-law-review/article/abs/unearthing-the-problematic-terrain-of-prolonged-occupation/1E1827215C67E045155ED2FED54F3F1B> (last visited February 8, 2026).

⁵⁹ See Ali, Adam, *Palestinian Intifada: How Israel Orchestrated a Bloody Takeover* (Al Jazeera, September 28, 2020), available at <https://www.aljazeera.com/news/2020/9/28/palestinian-intifada-20-years-later-israeli-occupation-continues> (last visited February 8, 2026).

⁶⁰ See *Declaration of Principles on Interim Self-Government Arrangements*. (United States Institute of Peace, September 13, 1993), available at https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/oslo_09131993.pdf (last visited February 8, 2026).

structure⁶¹. Israeli military occupation provides the overarching framework within which both Palestinian entities operate, but this occupation has no sunset clause, no benchmarks for transfer of authority, no pathway to self-abolition.

This administrative fragmentation has deep effects for resource sovereignty. Water provides the clearest example: the Mountain Aquifer underlying the West Bank is subject to Israeli control under Oslo's "interim" arrangements, with Palestinian extraction limited to pre-1967 levels despite population growth⁶². Israel extracts approximately 73% of the aquifer's water, selling a portion back to Palestinians at market rates. Unlike Timor's Petroleum Fund, which converted oil revenues into national assets under Timorese control (albeit with externally influenced management), Palestinian water remains under Israeli administration with no mechanism for transfer. The "interim" nature of these arrangements has become permanent in practice, illustrating how resource control can predetermine sovereignty outcomes: when water, land, and economic activity are structured around one party's permanent access, "final status negotiations" must bargain within constraints that have already been established.

Settlement expansion intensifies this structural predetermination. Unlike Western Sahara's Green March, which was a somewhat discrete event, Israeli settlements constitute an ongoing process of territorial transformation. Over 700,000 settlers now live in the West Bank and East Jerusalem, integrated into Israel through infrastructure, services, and legal

⁶¹ See *What is Hamas? A Simple Guide to the Armed Palestinian Group* (Al Jazeera, October 8, 2023), available at <https://www.aljazeera.com/news/2023/10/8/what-is-the-group-hamas-a-simple-guide-to-the-palestinian-group> (last visited February 8, 2026).

⁶² See Simone, Klawitter, *Water resources at stake: The Mountain Aquifer beneath the occupied West Bank, Palestinian Territories* (United Nations Development Programme), available at <https://hdr.undp.org/system/files/documents/simoneklawitterwaterresource-satstake.pdf> (last visited February 8, 2026).

status that presume permanence⁶³. These settlements create material facts that any future "agreement" must accommodate, progressively narrowing the territorial basis for Palestinian sovereignty. The effect is to make the question not whether Palestinians have a right to self-determination – this was clearly affirmed repeatedly in international law – but what territory that self-determination could possibly apply to after decades of settlement construction.

East Timor's experience makes the contrast distinct. There, the norms to process to administration process worked because each stage was activated before territorial facts could overtake legal entitlements. Consultation occurred while the political window was open, security forces were deployed before the situation solidified into a conflict without off-ramps and administration operated under sunset clauses that prevented entrenchment. Palestine inverts this logic at every stage: norms are affirmed but multiply into competing frameworks, process was initiated but converted into a permanent governance structure, and administration remains fragmented between occupying and occupied authorities with no mechanism for transfer. Where East Timor demonstrates that international law can create an architecture of sovereignty under the right conditions, Palestine reveals what happens when those conditions are not merely absent but actively foreclosed.

6. Conclusion

East Timor's trajectory from colonization to statehood reveals international law's constitutive ambivalence in decolonization. The ICJ's *Portugal v. Australia* judgment affirmed self-determination and PSNR while exposing how Monetary Gold functions as a doctrine of imperial immunity, as the Court could name the right but not remedy the wrong. By contrast, the UN's sequenced architecture of UNAMET, INTERFET,

⁶³ See Shaimaa, Khalil, *Israel Approves 19 New Settlements in the West Bank*. (BBC December 22, 2025), available at <https://www.bbc.com/news/articles/cqjg18xe0wwo> (last visited February 8, 2026).

UNTAET, translated principle into governance through institutions, constitutional design, and progressive Timorization that by mid-2001 placed over 90% of public administration in Timorese hands.

This success, however, reveals a sovereignty paradox: the same legal tools that enabled self-rule also constrained it while external actors governed. Even "successful" decolonization required accepting temporary submission to international administration, with benchmarks for transfer defined by those providing the scaffolding. International law did not confer sovereignty, rather it structured conditions under which sovereignty could be claimed.

Western Sahara and Palestine sharpen this lesson. Where the process collapses despite normative affirmation, like the example of MINURSO's three-decade failure and Morocco's demographic predetermination, self-determination remains declaratory. Where administration fragments, such as the case of Palestine's PA/Hamas division, "interim" arrangements calcified into permanence, resource sovereignty becomes structurally compromised and law becomes indefinite deferral.

The difference is not a legal recognition but the structural alignment of four conditions: layered legitimacy (domestic, regional, great power); protected consultation preventing violent foreclosure; time-bound administration designed for self-abolition; and resource safeguards preserving future sovereignty. East Timor briefly met these conditions; Western Sahara and Palestine do not.

This reveals that international law's effectiveness in decolonization depends heavily on political economy, not doctrine alone. The sovereignty paradox cannot be eliminated, only managed through institutional design that prioritizes its own obsolescence. The question for contemporary struggles is not whether to use international legal scaffolding but how to design it for rapid removal, ensuring it supports rather than supplants local agency.

East Timor demonstrates that international law can work as a tool for decolonization when transitional administration is designed to abolish itself. Western Sahara and Palestine reveal the inferior alternative: moni-

toring becomes permanent, procedural preparation replaces decisive action, and international law's promise of sovereignty confronts the political and economic interests invested in its postponement.

Transparency on Paper, Black Box in Practice

Voice Assistants, the GDPR and the AI Act

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Abstract: This work examines the European Union's regulatory framework on transparency, focusing in particular on the dimension of explainability, with specific reference to voice assistants. It analyzes the main legal sources governing this aspect, namely the General Data Protection Regulation and the Artificial Intelligence Act, with the aim of clarifying the scope and content of transparency and explainability obligations under both regulations. It investigates how these requirements operate in practice by applying the legal framework to a specific category of AI-based consumer devices: voice assistants. In this context, Amazon Alexa is used as a case study to determine the applicable legal regime and to assess how transparency obligations are translated into real-world interactions between users and AI systems. The analysis then considers Alexa+, the latest version of the technology, whose enhanced functionalities and increased autonomy raise some regulatory questions. In particular, the work explores whether its features could lead to its classification as a high-risk AI system under the AI Act, triggering stricter obligations.

Keywords: Transparency; Explainability; Voice Assistants; GDPR; AI Act.

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1. Introduction

“*Designed to protect your privacy*”. This is how Amazon titles its informative page¹ on Alexa’s privacy standards, Amazon’s most popular voice assistant. The voice assistant, which works on a variety of devices – the best-known being part of Amazon’s smart speakers’ family, Echo – is quite representative of one of the most popular applications of Internet of Things (IoT): voice assistants.

Like many other voice assistants, Alexa can perform various functions: it can turn your TV on, help you write down your grocery list, read the news, and play music². It can even learn to recognize your voice, in order to offer you a personalized experience³.

To do this, Alexa collects lots of data: like all Artificial Intelligence (AI) applications, voice assistants need data, not only to work, but also to

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¹ See *Alexa Privacy Hub* (Amazon.com), available at <https://www.amazon.com/Alexa-Privacy-Hub/b?ie=UTF8&node=19149155011> (last visited March 17, 2026).

² See *Features for the Original Alexa* (Amazon.com), available at <https://www.amazon.com/b?ie=UTF8&node=21576558011> (last visited March 17, 2026).

³ See *Alexa Profiles* (Amazon.com), available at https://www.amazon.com/alexa-profiles/b?ie=UTF8&node=23804562011&ref=pe_alxhub_aucc_en_us_IC_HP_16_HUB_PROF (last visited March 17, 2026).

improve. And with a great collection of information (especially with personal data, such as voice recordings), come great privacy concerns. Alexa has been on the market for around a decade, yet it is often at the center of debates, news reports, and even court cases⁴ concerning privacy issues. Amazon itself had to set up a page called “Separating fact from fiction when it comes to Alexa privacy”⁵. The intent was to reassure users that statements such as “Alexa is listening to your personal conversations” are false, whilst others – “I can see and delete everything Alexa heard me say”⁶ – are indeed true.

As with many IoT devices, privacy concerns surrounding voice assistants arise from their characterizing lack of transparency. As the *Transparency in the consumer Internet of Things*⁷ report underlines, “there is limited visibility over the nature of data processing that occurs in the consumer IoT”. This is due to the ‘black-box phenomenon’, which is caused

⁴ See Natasha Singer, *Amazon to Pay \$25 Million to Settle Children’s Privacy Charges* (The New York Times, May 31, 2023), available at <https://www.nytimes.com/2023/05/31/technology/amazon-25-million-childrens-privacy.html> (last visited March 17, 2026).

⁵ See *Separating Fact from Fiction When It Comes to Alexa Privacy* (Amazon.com), available at <https://www.amazon.com/b/?node=23608567011> (last visited March 19, 2026).

⁶ Reading this statement in the EU on March 20, 2025, is a bizarre experience, considering the unfortunate update that U.S. Alexa users received just a couple of days earlier. See Sharon Harding, *Everything You Say to Your Echo Will Soon Be Sent to Amazon, and You Can’t Opt Out* (Wired, March 17, 2025), available at <https://www.wired.com/story/everything-you-say-to-your-echo-will-be-sent-to-amazon-starting-march-28/> (last visited March 19, 2026).

⁷ See Anna Ida Hudig, Chris Norval and Jatinder Singh, *Transparency in the Consumer Internet of Things: Data Rights and Data Flows* at 3 (Information Commissioner’s Office 2023), available at https://iot-transparency.org/Transparency%20in%20the%20consumer%20Internet%20of%20Things_files/iot-transparency.pdf (last visited March 19, 2026).

both by the intrinsic nature of AI itself, and conversely, by the unwillingness of companies to disclose details on their data processing, for reasons ranging from protecting reputation to preserving trade secrecy⁸.

Against this background, this paper will focus on the relationship between the European Union legal framework for transparency and voice assistants, especially in the light of the General Data Protection Regulation⁹ (GDPR) and of the EU's recent Artificial Intelligence Act¹⁰. The pages that follow will try to provide an answer to the following questions:

- i. What is the current transparency framework for voice assistants in the European Union?
- ii. How does the AI Act influence the explainability dimension of transparency?
- iii. What challenges are associated with transparency in voice assistants, and how does the AI Act address these challenges?

In order to answer these questions, together with the general analysis of the legal framework (Section 2), this work presents a case study regarding Amazon's Alexa (Section 3). Alexa was chosen as a reference system because of its popularity, the amount of literature addressing it¹¹, the debates it has sparked in the last decade, and the characteristics of the recently announced Alexa+, which will be at the center of the last paragraph of this paper (Section 4).

⁸ This paper will not touch upon the theme. However, for an analysis, see Guido Noto La Diega, *Internet of Things and the Law: Legal Strategies for Consumer-Centric Smart Technologies* at 264–69 (Routledge 2023).

⁹ See EU reg. 27 April 2016, no. 679 (General Data Protection Regulation, GDPR); EU dir. 24 October 1995, no. 46.

¹⁰ See Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

¹¹ See also Noto La Diega, *Internet of Things and the Law* (cited in note 8).

2. The EU Framework for Transparency

2.1. Transparency Under the GDPR

Provided that the territorial scope requirement¹² is respected, the GDPR is particularly fit for data collected and processed by voice assistants¹³. Indeed, together with personal data provided by the user through, for example, the setting up of an account, voice assistants collect and process voice recordings, which not only are personal data *per se*¹⁴, but may also contain personal data.

Transparency is one of the key principles of the EU's GDPR, applied mostly in providing data subjects with information to ensure fair processing of their personal data, in the way data controllers communicate with individuals regarding their rights under the GDPR, and in the

¹² In order for the GDPR to be applicable to a specific processing of personal data, it must fall under the cases under art. 3 GDPR, which describes the territorial scope of application of the regulation. Indeed, the GDPR applies not only to establishments in the EU, but also has an extraterritorial scope, being applicable to data processing operations conducted by non-EU establishments when it is related to the offer of goods or services or the monitoring of the behaviour of data subjects in the EU. It also applies extraterritorially where Member State law applies by virtue of public international law.

¹³ In addition to the GDPR, certain aspects of voice assistants may also fall within the scope of the e-Privacy Directive, as voice assistants are software services operating through physical devices which constitute "terminal equipment" under the e-Privacy framework. In particular, according to art. 5(3), consent is required to store or gain access to information not necessary to execute users' request, while processing users' data to execute users' requests falls under one of the exceptions. For a more complete analysis, see European Data Protection Board, *Guidelines 02/2021 on Virtual Voice Assistants*, Version 2.0, available at https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-022021-virtual-voice-assistants_en (last visited May 9, 2026). However, since this work focuses primarily on transparency and explainability obligations, the analysis will mainly concentrate on the GDPR and the AI Act.

¹⁴ See Eoghan Furey and Juanita Blue, *Alexa, Emotions, Privacy and GDPR* (Proceedings of the 32nd International BCS Human Computer Interaction Conference, 2018).

methods data controllers use to enable individuals to exercise those rights¹⁵.

While the regulation does not define transparency explicitly, as underlined by the Article 29 Working Party *Guidelines on transparency under Regulation 2016/679*¹⁶, Recital 39 of the GDPR can be of help in clarifying the meaning and effect of the principle in the context of data processing. It states that “It should be transparent to natural persons that personal data concerning them are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed”, further characterizing the principle of transparency by requiring that information and communications be “easily accessible and easy to understand” and in “clear and plain language”. Notably, Recital 39 also includes in the principle of informing data subjects about the identity of the data controller, the purposes of processing, and other relevant details to ensure fair and transparent treatment of their data, as well as their right to access their personal information.

Under the GDPR, the principle of transparency finds its best expression in Article 12, which mandates the requirements for “transparent information, communication and modalities for the exercise of the rights of the data subject”¹⁷. The Article must be read in conjunction with Articles 13 and 14 as regards the provision of information related to the collection of personal data and with Articles 15 to 22 and 34 for communications to the data subject on the processing of their personal data, which must respect the criteria set out in article 12.

Requirements set out in Article 12 mandate, among other things, that information and/or communications be concise, transparent, intelligible and easily accessible (Article 12.1) and that clear and plain language be used, especially when providing information to children (Article 12.1).

Articles 13 lists “information to be provided where personal data are collected from the data subject”, while Article 14 regards “information

¹⁵ See Article 29 Working Party, *Guidelines on Transparency Under Regulation 2016/679* (2018).

¹⁶ See *id.*

¹⁷ See art. 12, EU reg. 27 April 2016, no. 679 (GDPR).

to be provided where personal data have not been obtained from the data subject". Article 15 also concerns transparency, as it provides for "right of access by the data subject" to their data. Transparency is also mentioned in Article 34, on the "communication of a personal data breach to the data subject", and in Article 22 on "automated individual decision-making, including profiling", which will be extensively analyzed in paragraph 2.3.a.

2.2. Explainability

"Explainability"¹⁸ of AI models is often characterized in the legal domain as a "right to an explanation"¹⁹ with reference to algorithmic decision making. As noted by Wachter, Mittelstadt and Floridi²⁰, this "right to an explanation" can encompass different dimensions. Indeed, the "explanation" may refer both to explanations of the system's *overall functionality* (such as logic, criteria, and models used) as well as details regarding *specific decisions* (such as the rationale and individual factors considered)²¹. A further distinction must be made on the basis of when explanations are given: either before (*ex ante*), focusing only on overall functionality since

¹⁸ Explainable AI is one of the most current topics in AI research. For a technical overview, see Rudresh Dwivedi, et al., *Explainable AI (XAI): Core Ideas, Techniques, and Solutions*, 55 ACM Computing Surveys 194:1 (2023); Andreas Holzinger, et al., *Explainable AI Methods—A Brief Overview*, in *XXAI—Beyond Explainable AI* 13 (Andreas Holzinger et al. eds., 2022); Plamen P. Angelov, Eduardo A. Soares, Richard Jiang, Nicholas I. Arnold and Peter M. Atkinson, *Explainable Artificial Intelligence: An Analytical Review*, 11(5) Wiley Interdisciplinary Reviews: Data Mining and Knowledge Discovery (2021).

¹⁹ In this work, "explainability" and "right to an explanation" are used with the sole distinction of the connotation of "right to an explanation" as, indeed, a right, while "explainability" simply refers to "the concept that a machine learning model and its output can be explained in a way that 'makes sense' to a human being at an acceptable level." See *Explainable AI* (C3 AI), available at <https://c3.ai/glossary/machine-learning/explainability>.

²⁰ See Sandra Wachter, Brent Mittelstadt and Luciano Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, 7 International Data Privacy Law 76, 82 (2017).

²¹ See id.

the specific decision rationale isn't yet known, or after (*ex post*) a decision is made, potentially covering both the overall functionality and the rationale for the specific decision²².

In the EU context, the right to an explanation is encompassed, at least to a certain extent, both in the AI Act and in the GDPR.

2.3. *The Right to an Explanation and the GDPR*

The existence (and the exact extent) of a right to explanation in the GDPR has long been a matter of debate. Literature has been divided, with scholars affirming (or refuting) the existence of the right to an explanation in the GDPR within two main legal bases: Articles 13, 14 and 15 GDPR (information to be provided for the collection of personal data and the right of access) and Article 22 (on automated individual decision-making, including profiling)²³.

While for the purposes of this paper we will offer a brief overview of both points of view in order to underline the unclear nature of the right to explanation in the GDPR, it must be highlighted that judgments such as the Dutch cases of *Uber and Ola*²⁴ seem to point towards the existence of a right to explanation in the GDPR²⁵.

²² See *id.*

²³ This paper follows the division made in Ljubiša Metikoš and Jef Ausloos, *The Right to an Explanation in Practice: Insights from Case Law for the GDPR and the AI Act*, 17 Law, Innovation and Technology (2025), distinguishing between two main methodologies.

²⁴ See Gerechtshof Amsterdam, April 4, 2023, no. 200.295.742/01.

²⁵ See generally Raphaël Gellert, Marvin van Bekkum and Frederik Zuiderveen Borgesius, *The Ola and Uber Judgments: For the First Time a Court Recognises a GDPR Right to an Explanation for Algorithmic Decision-Making* (EU Law Analysis, 2021), available at <https://eulawanalysis.blogspot.com/2021/04/the-ola-uber-judgments-for-first-time.html> (last visited March 18, 2026); Damian Clifford, Jake Goldenfein, Aitor Jimenez and Megan Richardson, *A Right of Social Dialogue on Automated Decision-Making: From Workers' Right to Autonomous Right*, 2023 Technology and Regulation 1; Metikoš and Ausloos, *The Right to an Explanation in Practice* (cited in note 23).

2.3.1. Article 22 GDPR

In particular, positions affirming the existence of a right to explanation under Article 22 GDPR are based upon a series of different readings of the Article.

Article 22 establishes a data subject's "*right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her*"²⁶ (paragraph 1), with the three exceptions (paragraph 2) of necessity for contract fulfillment between the data subject and controller (letter a), authorization under EU or Member State law with safeguards for the data subject (letter b) and explicit consent of the data subject (letter c). Additionally, in situations where automated decision-making is necessary for contract fulfillment or based on explicit consent, the data controller must put in place measures to protect the rights, freedoms, and legitimate interests of the data subject including at least the right to human intervention by the controller, the ability for the data subject to express their viewpoint, and the option to challenge the decision (paragraph 3). Finally, a ban (with exceptions) is established for decisions based on what the GDPR defines as "special categories of personal data" (paragraph 4).

The explicit mention of the right to explanation is, on the other hand, present in Recital 71 of the GDPR which enlists "the right [...] to obtain an explanation of the decision reached" among the "suitable safeguards" to which automated individual decision-making should be subject.

Arguments favoring the existence of a right to explanation under Article 22 can rely on the European Commission's recognition of the crucial role that recitals play in interpreting EU act provisions²⁷. In this view,

²⁶ See art. 22, para. 1, EU reg. 27 April 2016, no. 679 (emphasis added).

²⁷ See Roberto Baratta, *Complexity of EU Law in the Domestic Implementing Process*, 19th Quality of Legislation Seminar, *EU Legislative Drafting: Views from Those Applying EU Law in the Member States* (2014), cited in Guido Noto La Diega, *Against the Dehumanisation of Decision-Making*, 9 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 3 (2018).

the mention of the right to an explanation in a recital can be leveraged to interpret Article 22 in a way that reflects the broader objectives of the GDPR, specifically to enhance the protection of data subjects' rights, thus pushing for an interpretation that includes the right to an explanation as a part of Article 22²⁸.

However, the contrary can be argued, also considering that the explicit right to explanation present in some of the drafts of the GDPR was ultimately moved to Recital 71²⁹. Indeed, Wachter, Mittelstadt, and Floridi are of the opinion that “the omission of a right to explanation from Article 22 appears to be intentional”³⁰, considering both the historical evolution of the provision in drafts and negotiations and that “the safeguards specified in recital 71 are almost identical to those in Article 22(3)” except for the inclusion of a right to explanation.

Other approaches³¹, either argue that recitals must guide the interpretation of Article 22 GDPR in conjunction with Articles 13, 14, and 15³²; or connect the right to explanation to an effective exercise of the right to contest automated decisions contained in Article 22(3)³³; or link Article 22

²⁸ See Noto La Diega, *Internet of Things and the Law* at 23 (cited in note 8).

²⁹ See Wachter, Mittelstadt and Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation* at 81–82 (cited in note 20).

³⁰ See *id.*

³¹ The approaches that follow can be found in the literature review in Metikoš and Ausloos, *The Right to an Explanation in Practice* at 7 (cited in note 23).

³² See Gianclaudio Malgieri and Giovanni Comandé, *Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation*, 7 *International Data Privacy Law* 243 (2017).

³³ See Metikoš and Ausloos, *The Right to an Explanation in Practice* at 7 (cited in note 23), referring to Ljubiša Metikoš, *Explaining and Contesting Judicial Profiling Systems*, *Technology and Regulation* 188 (2024); Marco Almada, *Human Intervention in Automated Decision-Making: Toward the Construction of Contestable Systems*, in *Proceedings of the Seventeenth International Conference on Artificial Intelligence and Law* (2019); Emre Bayamhoğlu, *The Right to Contest Automated Decisions Under the General Data Protection Regulation: Beyond the So-Called “Right to Explanation”*, 16 *Regulation and Governance* 1058 (2021); Claudio Sarra, *Put Dialectics into the Machine: Protection Against Automatic Decision-Making Through a Deeper Understanding of Contestability by Design*, 20 *Global*

with fundamental rights such as the right to an effective remedy and a fair trial, underscoring the importance of AI transparency in protecting these rights³⁴.

2.3.2. Articles 13, 14 and 15 GDPR

Arguments interpreting Articles 13, 14 and 15 GDPR as establishing a right to explanation rely on the fact that the three articles mention the obligation to provide “meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject” in the case of “automated decision-making, including profiling, referred to in Article 22(1) and (4)”. This formulation is regarded by many authors as a right to an explanation³⁵, but this is not uncontested. Notably, Wachter, Mittelstadt, and Floridi, despite not denying completely the validity of a right to explainability as per these articles, underline that they seem to require only an *ex-ante* explanation of the functioning of the system³⁶.

It is important to underline that, in both cases we have analyzed, the right to an explanation as outlined by the GDPR is considerably limited. Indeed, even if we acknowledge its existence, this right is only applicable if the specific case falls under the provisions of Article 22 of the GDPR, which represents a particularly difficult test requiring that a “decision” is “based solely on automated processing” and that it produces “legal effects” or similarly affects the data subject.

Jurist 1 (2020). This is also echoed in Article 29 Working Party, *Guidelines on Transparency Under Regulation 2016/679* (cited in note 15).

³⁴ See C-817/19, *Ligue des droits humains ASBL v Conseil des ministres*, ECLI:EU:C:2022:491, para. 194.

³⁵ Among others, see Andrew D. Selbst and Julia Powles, *Meaningful Information and the Right to Explanation*, 7 *International Data Privacy Law* 233 (2017); Bryce Goodman and Seth Flaxman, *European Union Regulations on Algorithmic Decision-Making and a “Right to Explanation”*, 38 *AI Magazine* 50 (2017).

³⁶ See Wachter, Mittelstadt and Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation* at 82–84 (cited in note 20).

2.4. *Transparency, Explainability and the AI Act*

Transparency and explainability are fundamentally important within the framework of the EU's AI Act, which integrates these concepts in various ways through its risk-based approach.

For systems classified as “high-risk”³⁷, transparency and explainability are present in various provisions, and framed by the AI Act as objectives to be achieved primarily by providing users with relevant documentation and instructions for using the AI system, rather than by mandating specific transparency-by-design models or compulsory use of explainable AI tools³⁸. This is perfectly reflected in Article 11, which, together with Annex IV, mandates technical documentation for high-risk systems. It includes, among other information on the functioning of the system, “the design specifications of the system, namely the *general logic* of the AI system and of the algorithms; the key design choices including the rationale and assumptions made, including with regard to persons or groups of persons in respect of whom, the system is intended to be used”³⁹. As Panigutti and others notice, it is likely that the term “general logic” refers to the core principles guiding a system’s decision-making, with technical documentation unlikely to explain specific outcomes or decisions⁴⁰, and thus being classified, in the terms of Wachter, Mittelstadt, and Floridi⁴¹, as an *ex-ante, overall functionality* kind of explanation. Article 13 explicitly addresses transparency, by stating that “high-risk AI systems

³⁷ For the purposes of this paper, we will not dive deeply into the classification rules in the AI Act. The chapter of reference for high-risk systems in the AI Act is Chapter III.

³⁸ See Cecilia Panigutti, et al., *The Role of Explainable AI in the Context of the AI Act*, in *Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency* 1144 (June 12–15, 2023).

³⁹ See Annex IV(2)(b), AI Act (emphasis added).

⁴⁰ See Panigutti, et al., *The Role of Explainable AI in the Context of the AI Act* at 1144 (cited in note 38).

⁴¹ As discussed in paragraph 2.1, with reference to Wachter, Mittelstadt and Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation* (cited in note 20).

shall be designed and developed in such a way as to ensure that their operation is sufficiently transparent to enable deployers to interpret a system's output and use it appropriately" and mandating the content of instructions for the use of high-risk systems to be provided. Also, Article 14 establishes that "high-risk AI systems shall be designed and developed in such a way, including with appropriate human-machine interface tools, that they can be effectively overseen by natural persons during the period in which they are in use". It also ensures that operators for human oversight are in a position fit to exercise effective oversight through the "checklist" set forth in paragraph 4. These elements somehow imply a certain level of transparency (e.g. the human oversight operator must be able to "properly understand the relevant capacities and limitations of the high-risk AI system[...]"), as per paragraph 4, letter a)⁴².

As regards the ex-post, case-specific right to an explanation, the AI Act seems to be less ambiguous than the GDPR⁴³, establishing, in Article 86, that an individual affected by decisions taken "on the basis of the output from a high-risk AI system [...], which produces legal effects or similarly significantly affects that person in a way that they consider to have an adverse impact on their health, safety or fundamental rights shall have the right to obtain from the deployer clear and meaningful explanations of the role of the AI system in the decision-making procedure and the main elements of the decision taken", with a possibility of exceptions established by "Union or national law in compliance with Union law".

Transparency requirements for the so-called "limited risk" systems are contained in Article 50, and mostly address the need to make users

⁴² See Panigutti, et al., *The Role of Explainable AI in the Context of the AI Act* at 1144 (cited in note 38).

⁴³ For a more complete comparison between art. 86 AIA and the GDPR framework, see, among others, Krystyna Nizioł, *The Right to Obtain an Explanation of the Decision-Making Procedure in an Individual Case Under Article 86(1) of the Artificial Intelligence Act—Selected Problems*, 4 *Studia Prawnicze KUL* 77 (2025). For an analysis of the interplay between arts. 15(1)(h) and 22 GDPR and art. 86 AIA, see Blendi Sheremeti, *Can the AI Act Fill the GDPR's Black Box? A Comparative Analysis of Articles 15(1)(h) and 22 of the GDPR and Article 86 of the AI Act on the Right of Access in AI Decision-Making* (Sept. 12, 2025) (SSRN), available at <https://ssrn.com/abstract=6697239>.

aware that they are interacting with an AI system, or viewing AI-generated content.⁴⁴ Providers must indeed design systems that interact directly with natural persons in a way in which concerned users are informed of interacting with an AI system, except when it is apparent or if the AI is employed for certain legal purposes, such as crime detection. Additionally, AI systems (including general-purpose AI systems) that produce synthetic content, such as deepfakes, must label their outputs as artificially generated. Furthermore, deployers must disclose when AI is used for emotion recognition or biometric categorization, except when used for certain legal purposes, such as crime detection. Additional rules and exceptions are provided for deep fakes or informative text.

Finally, for general purpose AI systems⁴⁵, in addition to the requirements that are applicable, when appropriate, as per Article 50, the AI Act establishes some transparency requirements, mostly in terms of technical documentation, as established by Article 53 and Annex XI, without, however mentioning the “general logic” mentioned in Annex IV, and thus being clearly less inclined towards explainability.

3. *Transparency in Alexa: A Case Study*

After this legal overview on the transparency framework that can potentially be applicable to IoT devices, including smart speakers featuring voice assistants, it is now time to move to our case study: Amazon’s Alexa.

The analysis that follows will consider first a more general dimension of transparency, then the more specific dimension of explainability, starting from the GDPR framework. After this, the potential impact of the AI Act in this framework will be addressed. These first two points exclude

⁴⁴ For a complete analysis of art. 50, see Thomas Gils, *A Detailed Analysis of Article 50 of the EU’s Artificial Intelligence Act*, in *The EU Artificial Intelligence (AI) Act: A Commentary* 776 (C.N. Pehlivan, N. Forgó and P. Valcke eds., 2025).

⁴⁵ For the purposes of this paper, we will not dive deeply into the classification rules in the AI Act. The chapter of reference for general-purpose AI systems in the AI Act is Chapter V.

from their analysis Alexa+, which will be at the center of a final paragraph addressing speculations on the most recent models and the implications for the transparency legal framework.

3.1. *The GDPR Framework*

Transparency concerns in Amazon’s Alexa are far from being something recent⁴⁶, yet, after a decade they are far from being solved. A large portion of these issues finds their origin in what Noto La Diega defines as the “contractual quagmire” of the legal documentation referring to the system. The analysis conducted by the author⁴⁷ on Amazon Alexa’s legal documentation and especially on its privacy notice underlines the misalignment with the principle of transparency and, more in general, with provisions contained in Articles 12, 13 and 14 of the GDPR. Indeed, Amazon’s privacy notice is quite generic, disclosing only the “types” of information gathered (distinguishing between data provided by users, automatic information, and data from unspecified other sources), providing “examples” for each category⁴⁸. Additionally, it does not feature an exhaustive list of purposes for data collection and processing, but simply examples, often formulated in a quite generic manner.

⁴⁶ Among the many newspaper articles on the matter, see Dorian Lynskey, *Alexa, Are You Invading My Privacy? – The Dark Side of Our Voice Assistants* (The Guardian, October 9, 2019), available at <https://www.theguardian.com/technology/2019/oct/09/alexa-are-you-invading-my-privacy-the-dark-side-of-our-voice-assistants> (last visited March 26, 2026).

⁴⁷ The analysis is contained in Noto La Diega, *Internet of Things and the Law* (cited in note 8).

⁴⁸ As Noto La Diega’s analysis was performed on UK legal documentation two years ago, it was necessary to compare it to an EU country. For this paper, the Italian version was used: *Informativa sulla Privacy* (Amazon.it), available at <https://www.amazon.it/gp/help/customer/display.html?nodeId=GX7NJQ4ZB8MHFRNJ> (last visited October 18, 2025). As regards the aspects taken into account here, Noto La Diega’s considerations remain valid.

There is a specific webpage⁴⁹ especially dedicated to “Alexa, Echo Devices, and Your Privacy”, where aspects such as personalization (which seems to imply profiling, also considering the privacy policy⁵⁰) and the use of recordings for training of Amazon’s models are briefly explained. However, the overall documentation seems quite generic as to the exact extent of the collection and processing of data collected by Alexa.

Noto La Diega’s “experiment” on the right to access was not any luckier from the point of view of transparency. After the submission of a subject access request, the right to access was granted by Amazon only to a limited part of his personal data, presented in the form of “hundreds of obscure spreadsheets, without any explanation and in a format that is hard to decipher”⁵¹, and, notably, lacking the data subject’s “digital twin” profile, construed through inferences made on the user’s data in order to predict their behavior⁵².

With regard to the dimension of explainability, all the hypotheses we have discussed in paragraph 2.3 require the conditions envisioned in Article 22(1) or 22(4) in order to try to argue for a right to an explanation (both *ex ante* and *ex post*; both on the overall functioning and on the specific decision), Therefore, using this methodology to attempt to look inside Alexa’s black box is unlikely to produce any results. This is true especially considering that, in order to trigger Article 22, Alexa’s “decisions” would not only need to be “based solely on automated processing”, but also produce “legal effects” on the data subject or “similarly significantly affecting him or her” – a scenario which seems quite far from the actual capabilities that Alexa, even in the smart home integrations, has had up until now.

From this point of view, while GDPR’s transparency rights that should be granted under Articles 12, 13, 14 and 15 seem to be not fully

⁴⁹ *Alexa, Dispositivi Echo e la tua privacy* (Amazon.it), available at <https://www.amazon.it/gp/help/customer/display.html?nodeId=GVP69FUJ48X9DK8V&ie=UTF8>.

⁵⁰ Noto La Diega, *Internet of Things and the Law* at 262 (cited in note 8).

⁵¹ See *id.* at 261.

⁵² See *id.* at 262.

respected in practice, in the case of explainability and the right to an explanation, the GDPR seems not to be the right tool to open Alexa's black box.

3.2. *The AI Act Framework*

Trying to understand the risk level of Alexa under the AI Act is not an easy task. With scarce literature addressing the topic and the AI Act being currently only partially implemented, certainty about the classification of systems as complex as Alexa is something difficult to achieve.

Considering Article 6 paragraph 1 and 2, in conjunction with Annex III and Alexa's features (excluding Alexa+, that will be dealt with in the following paragraph), it would be quite difficult to classify Alexa as a high-risk system under the AI Act framework. Thus, we cannot rely on the transparency requirements for high-risk systems that we have described in paragraph 2.4.

Conversely, the classification of Alexa as one of the limited-risk AI systems subject to the transparency requirements of Article 50 is almost intuitive, as it constitutes a clear example of an AI system "intended to interact directly with natural persons"⁵³. As discussed previously, this means that the system "designed and developed in such a way that the natural persons concerned are informed that they are interacting with an AI system, unless this is obvious from the point of view of a natural person who is reasonably well-informed, observant and circumspect, taking into account the circumstances and the context of use"⁵⁴. One could also safely hypothesize that the case of Alexa may constitute an "obvious" instance of an AI system, however this is yet to be confirmed.

Finally, Alexa's language model also seems to fit under the umbrella of general-purpose AI models⁵⁵. Article 3(63) defines a general-purpose AI model as "an AI model, including where such an AI model is

⁵³ See art. 50, para. 1, AI Act.

⁵⁴ See *id.*

⁵⁵ It is important to remind that the classification of a system as a general-purpose AI system and its classification in one of the AI Act's risk levels are not mutually exclusive.

trained with a large amount of data using self-supervision at scale, that displays significant generality and is capable of competently performing a wide range of distinct tasks regardless of the way the model is placed on the market and that can be integrated into a variety of downstream systems or applications, except AI models that are used for research, development or prototyping activities before they are placed on the market". Alexa seems to adhere to this definition, meaning that the technical documentation required by Article 53 and detailed in Annex XI could be required if this classification is correct. This would have an impact on the explainability dimension, as specified in paragraph 2.4, even if not as deep as a potential classification as a high-risk system.

4. Future Challenges and Opportunities: Alexa+ and the Next Generation of Voice Assistants

At the end of February 2025, Amazon officially announced Alexa+, a "next-generation assistant powered by generative AI"⁵⁶. Alexa+ features improved, including more natural conversational capabilities, enhanced smart home features, more personalization and even some "agentic" capabilities⁵⁷.

While it is safe to say that the new features of Alexa+ would not be enough to trigger Article 22 GDPR, the situation might be different for the AI Act.

Indeed, while we are still lacking precise technical information, it seems that Alexa+ is able to "understand user's tone [...] and adapt its response accordingly"⁵⁸. If this was the case, while this would probably

⁵⁶ Panos Panay, *Introducing Alexa+, the Next Generation of Alexa* (Amazon News, February 26, 2025), available at <https://www.aboutamazon.com/news/devices/new-alexa-generative-artificial-intelligence> (last visited March 19, 2026).

⁵⁷ See *id.*

⁵⁸ Lisa Eadicicco, *Amazon's Alexa Is Getting a Major Upgrade for the AI Chatbot Era* (CNN, February 26, 2025), available at <https://edition.cnn.com/2025/02/26/business/amazon-alexa-plus/index.html> (last visited March 19, 2026).

not have an impact on Alexa's inability to trigger Article 22 GDPR⁵⁹, one can safely argue that this "understanding of the user's tone" can be classified as emotion recognition⁶⁰, which would place Alexa among high-risk systems in the AI Act. Indeed, Article 6(2) AI Act classifies as high-risk systems contained in Annex III, which includes, under point 1(c) "AI systems intended to be used for emotion recognition"⁶¹. Article 3(39) AI Act defines an emotion recognition system as "an AI system for the purpose of identifying or inferring emotions or intentions of natural persons on the

⁵⁹ See also Ayça Atabey, Burkhard Schafer and Lachlan Urquhart, *How Do You Solve a Problem Like Alexa?*, Jusletter IT 185, 187 (March 2023), available at <https://www.research.ed.ac.uk/en/publications/how-do-you-solve-a-problem-like-alexa/> (last visited March 19, 2026).

⁶⁰ See Noto La Diega, *Internet of Things and the Law* (cited in note 8) (noting that Amazon was granted a patent in 2018 for "Indirect feedback systems and methods," thus having "a monopoly on a technology that allows the company to detect users' physical, emotional, and behavioral states"; however, emotion recognition seems to be systematically implemented only in Alexa+). See also Jenny Kennedy and Yolande Strengers, *Alexa's Got a Hunch: The Human Decisions Behind Programming Emotion-Sensing and Caregiving into Digital Assistants*, in *Everyday Automation* 92–93 (Routledge 2022) (mentioning a "frustration mode," where Alexa will apologise if she detects a user becoming frustrated with ineffective request responses, implemented in Alexa in 2019; this feature would only represent a limited instance of such a technology, difficult to qualify exactly as "emotion recognition"; moreover, in the absence of any official sources addressing this feature, it seems to resemble more of a rumor or a project under development rather than a fully implemented feature).

⁶¹ While explaining the general rules for classification under the AI Act is outside the scope of this work, it might be useful to explore the possibility of the exceptions under art. 6(3), which excludes from the high-risk classifications those systems that do not pose a significant risk of harm to the health, safety or fundamental rights of natural persons. The fact that the system performs personalization already excludes the application of this exception, as specified in the last subparagraph of art. 6(3). Additionally, none of the conditions listed in art. 6(3)(a)–(d) seems to be appropriate for the case of Alexa+. Furthermore, the agentic capabilities of the system point towards a level of risk that is difficult to disregard.

basis of their biometric data”⁶². As recalled by the EDPB with reference to Article 4(14) GDPR⁶³, “voice data is inherently biometric personal data”⁶⁴, thus it seems probable that if Alexa+ features this kind of capability, it will be classified as a high-risk system. Of course, ultimately this classification depends on the actual features presented by Alexa+ and on their technical details.

From a transparency perspective, this would mean that the technical requirements of Article 11 and Annex IV would apply, along with the *ex ante* right to an explanation of the overall functioning of the system established by Articles 13 and 14. For what concerns the *ex post* specific right to an explanation established by Article 86, it would still be an improbable occurrence in the case of Alexa+. However, the enhanced “agency” capabilities of Alexa+, coupled with the fact that the formulation of Article 86 seems to suggest that it depends on each individual to determine whether they are significantly affected by a decision encompassed by Article 86, potentially offer more opportunities than Article 22 of the GDPR.

5. Conclusions

This work focused on the transparency legal framework applicable to voice assistant powered IoT devices, using Amazon’s Alexa as a case study.

⁶² While the AI Act does not provide an exact definition of emotion, recital 18 states: “The notion refers to emotions or intentions such as happiness, sadness, anger, surprise, disgust, embarrassment, excitement, shame, contempt, satisfaction and amusement.”

⁶³ See also recital 14 of the AI Act (“The notion of ‘biometric data’ used in this Regulation should be interpreted in light of the notion of biometric data as defined in Article 4, point (14) of Regulation (EU) 2016/679, Article 3, point (18) of Regulation (EU) 2018/1725 and Article 3, point (13) of Directive (EU) 2016/680. Biometric data can allow for the authentication, identification or categorisation of natural persons and for the recognition of emotions of natural persons.”).

⁶⁴ European Data Protection Board, *Guidelines 02/2021 on Virtual Voice Assistants*, Version 2.0 (cited in note 13).

In Section 2, we analyzed the current framework on transparency in the GDPR and the AI Act, with particular attention to “the debate on the right to an explanation” and to how explainability is integrated into the AI Act.

Section 3 focused on the Alexa case study, presenting transparency challenges that have been widely analyzed in literature, also in light of the applicable GDPR framework, and on the right to an explanation, concluding that the GDPR does not properly grant this right in the case of Alexa (paragraph 3.1). Paragraph 3.2 analyzed the impact of the AI Act on the transparency dimension, attempting to categorize Amazon’s Alexa and concluding that it is likely to fit into the “limited risk systems” and “general purpose AI systems categories”, and thus it is subject to their transparency requirements.

Finally, Section 4 focused on the new generation of voice assistants, using Alexa+ as an example, defining the applicable legal framework and hypothesizing its classification as an “high-risk system”, based on the possibility it recognizes emotions and defining the implications of this classification on transparency.

What seems to be evident from this framework is that in the context of voice assistants, although transparency requirements seem to be clearly established by relevant regulations, they are, first of all, not necessarily fully respected in practice (even by tech giants such as Amazon), and secondly, able to establish only a limited framework for the right to an explanation. While the AI Act seems to show some improvements in respect to a right to an explanation, both *ex-ante* and *ex-post*, these improvements are mostly limited to high-risk systems. It follows that the degree to which we will be able to open voice assistants’ black boxes in the future will largely depend on how they are classified according to the AI Act. The hope is that transparency will not merely remain on paper but will also allow us to look into voice assistants’ black boxes in practice.

A Legal Appraisal of the Application of the Principle of Humanity in the Criminal Justice System of Cameroon

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Abstract: This article appraises the application of the principle of humanity in the criminal justice system of Cameroon. This principle prohibits torture and inhuman or degrading punishment, promotes the rehabilitation and resocialisation of offenders, and protects the rights of victims. It does not prevent punishment but rather shapes it to be fairer, ensuring that the criminal justice system maintains its legitimacy. In essence, it ensures that justice is served in a humane manner that aligns with proportionality. Cameroon has ratified several international and regional normative frameworks demanding that suspects be treated with dignity and informed of their rights. At the national level, this principle is enshrined in the Constitution, the Criminal Procedure Code and the Penal Code, guaranteeing rights like freedom from torture and humane treatment for suspects. Through the use of relevant primary sources of data collection such as the constitution, court cases, statutes, conventions and secondary sources of data collection such as journal articles, reviews, academic books and compiled statistics, this article establishes that the practical application of this principle faces major challenges. Some of which include; continuous widespread allegations of torture and inhuman or degrading punishment and treatment, inhumane prison conditions, limited resources to meet international rehabilitation standards, and insufficient mechanisms to guarantee compensation for victims of crimes. This leads to significant gaps between legal provisions and reality, despite international commitments and domestic laws. Ultimately, the article advocates principally for a review of the legal and judicial safeguards, for

instance to provide death penalty procedural safeguards, amend Section 277-3 of the Penal Code so that the penalties for the offence of torture are proportionate to the gravity of the acts. It is also argued that the State needs to allocate enough resources especially financial and infrastructural to curb the deplorable prison conditions.

Keywords: Principle of humanity; Cameroonian criminal justice; Prohibition of torture; Rehabilitation of offenders; Victims' rights.

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1. *Introduction*

The principle of humanity in the criminal justice system is a fundamental axiom requiring that both criminal and legal relationships including investigation, prosecution and punishment must be based on respect for human dignity and the protection of basic rights¹. It acts as a fundamental limit on the State's power to punish², requiring that penalties respect human dignity, prohibit torture and avoid degrading treatment. This serves as a moral baseline, ensuring that legal processes respect human dignity without promoting impunity, but rather aligning with proportional sanctions. Consequently, torture, degrading punishment, and excessive sentences are prohibited, favouring rehabilitation. It acts as a barrier against death penalty, life imprisonment, and very long punishments³.

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¹ Marcelo Ignacio Ovalle Bazán "La dignidad humana como límite al ius puniendi", *La jurisprudencia del tribunal constitucional de Chile*. *Dikaion*, vol.28, at 35-68. (2019) available at <http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0120-89422019000100035&lng=en&nrm=iso>. ISSN 0120-8942. <https://doi.org/10.5294/dika.2019.28.1.2> (Last visited 22 September 2025).

² (ius puniendi) It forces criminal systems to avoid "brutalizing" offenders, emphasizing that punishments should not strip individuals of their inherent value.

³ It forces criminal law to focus on rehabilitation rather than mere retribution, limiting harsh measures like the death penalty or excessive imprisonment.

Humanitarian action and international law promote the prevention and alleviation of human suffering and protect life and dignity wherever found⁴. Philosophically, particularly in Kantian ethics, it means treating all individuals, including oneself, as ends in themselves and never merely as means, recognising their inherent dignity and autonomy⁵. The State, in its power to enforce laws, must still respect the supreme value of the human personality, guiding the entire justice process from arrest to imprisonment and emphasising the need for a fair and humane system that protects fundamental rights⁶.

This principle in the Cameroonian criminal justice system is enshrined in the Constitution by Law No. 96/06 of January 18, 1996, revising the Constitution of June 2, 1972, as amended by Law No. 2008/001 of April 14, 2008⁷, affirming the right to life, physical and moral integrity, and protection from torture, cruel, or degrading treatment⁸. It ensures that individuals are treated humanely in all circumstances, a right supported by international human rights treaties to which Cameroon is bound. Cameroon has signed and ratified several international human rights instruments prohibiting torture and other ill-treatment, including the Universal Declaration on Human Rights (1948)⁹, the International Covenant on Civil

⁴ See Reidy Aisling, *Prohibition of torture, implementation of Article 3 of the European Convention on Human Rights*, at 11-19 (Guide. Transl., Chelidze, L., Bokhashvili, B., Mamukelashvili, T. Council of Europe., Human rights handbooks, No. 6, 2003).

⁵ See José Luis De La Cuesta, "The principle of humanity in penal law", *International Review of Penal Law*, Vol 82, at 458 (2011).

⁶ Human Rights are fundamental rights of every person. These rights are enshrined in Human Rights Instruments ratified by Cameroon and expressly acknowledged in the Preamble of the Cameroon Constitution of 18th of January 1996.

⁷ Gildas Pefela Nyugha, "Constitutional and statutory safeguards for fair trial and justice under Cameroonian legal system: A legal appraisal", *International Journal of Law, Justice and Jurisprudence*, 2(1), at 83(2022).

⁸The preamble provides that «every person has the right to life, physical and moral integrity and to humane treatment in every circumstance. That under no circumstances shall someone be subject to torture, inhumane and degrading treatment». Article 65 of this Constitution is to the effect that the preamble is an integral part of the constitution.

⁹ Hereinafter referred to as the UDHR.

and Political Rights (1966)¹⁰, the International Covenant on Economic, Social and Cultural Rights (1966)¹¹, the African Charter on Human and Peoples' Rights (1981)¹², the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)¹³, the Optional Protocol on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)¹⁴, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by General Assembly Resolution 40/34 (1985)¹⁵ and several other legal instruments.

By virtue of the Constitution of Cameroon, the country operates a monist legal system where ratified treaties and international agreements override national laws¹⁶. As such, these international human rights instruments, once ratified, become operational in the country without the need for an instrument of domestication and also allow for the international instruments to take prominence where there is a conflict of laws¹⁷. Cameroon has taken further measures at the domestic level to implement this principle through its Penal Code¹⁸, Criminal Procedure Code¹⁹, courts and other institutions²⁰. For instance, Section 122 of the CPC embodies the

¹⁰ Hereinafter referred to as the ICCPR.

¹¹ Hereinafter referred to as the ICESCR.

¹² Hereinafter referred to as the African Charter.

¹³ Hereinafter referred to as the CAT.

¹⁴ Hereinafter referred to as the OPCAT.

¹⁵ The UN 1985 Declaration.

¹⁶ Article 45.

¹⁷ See Smith Naseri Edumebong, "Victims of Torture and the Search for Legal Redress in Cameroon", at 36 (LLM Diss in Human Rights and Democratisation in Africa, Centre for Human Rights, University of Pretoria, 2023).

¹⁸ Hereinafter referred to as PC.

¹⁹ Hereinafter referred to as CPC.

²⁰ See for example: *Le Réseau Camerounais des organisations des droits de l'Homme* (ONG RECODH), the Centre for Human Rights and Democracy in Africa (CHRDA), the Trauma Centre Cameroon (TCC), *L'Organisation Mondiale Contre la Torture* (OMCT), the International Rehabilitation Council for Torture victims (IRCT) and *L'institution Nationale des Droits de l'Homme du Cameroun* (CDHC).

principle of humanity, requiring immediate notification of rights, humane treatment during arrest, and the presumption of innocence.

Despite these strong legal and institutional frameworks, human rights violations by law enforcement within the system - particularly regarding fair trials and cruel treatment - continue to occur, highlighting a gap between law and practice. This article therefore examines the application of the principle of humanity under the Cameroonian criminal justice system at three main levels; the prohibition of torture and all inhuman or degrading punishments or treatments, the focus on rehabilitation and resocialisation, especially in case of imprisonment, and the protection of victims of crimes.

2. Prohibition of Torture and of Any Inhuman or Degrading Punishment and Treatment

The prohibition of torture and of any inhuman or degrading punishment and treatment is undoubtedly the first practical corollary to the affirmation of the principle of humanity both in the definition of specific offences and in the execution of sentences. This prohibition is recognised internationally, not only in the UDHR²¹ and in the ICCPR²², but in the totality of international human rights texts and instruments like the African

²¹ UDHR, *supra* note 7, art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

²² ICCPR, *supra* note 8, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”).

Charter²³. The most detailed regulation of the prohibition of torture is provided for in the CAT²⁴. Article 1 of the CAT states that:

“For the purposes of this Convention the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions”.

Today, this represents the *locus classicus* definition for torture, which has been used by international tribunals, regional judicial and quasi-judicial bodies, as well as by academics. This has been so despite the article itself stating that it is to be referred to the Convention at issue, i.e., CAT. In the case of *Prosecutor v. Furundzija*²⁵, the International Criminal Tribunal for the Former Yugoslavia noted, while referring to previous judgements of the International Criminal Tribunal for Rwanda, that the CAT definition of torture represents a consensus representative of customary international law²⁶.

This research, therefore, considers Article 1 of the CAT as the basis of the definition of torture. Stating the prohibition of torture at the constitutional level is fundamental to ensure that it does not take place within

²³ African Charter, *supra* note 10, art. 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”)

²⁴ See Reidy Aisling, *Collection of main international legal acts in the field of human rights*, at 5 (First part. Public Defender’s Library, 2001).

²⁵ Case No.: IT-95-17/1-T ICTY (10 December 1998) at para 160.

²⁶ Smith Naseri Edumebong, *supra* note 17, at 6.

the jurisdiction of a Member State²⁷. The constitutional definition of torture is the basis of defining torture as established in the criminal law²⁸, within the framework of which it should be interpreted and, as a hierarchically supreme normative act, be consistent and not contradict.

The government of Cameroon has made significant efforts and demonstrated commitment to put an end to torture and other serious human rights violations over the last two decades. These efforts are reflected in the country's commitment to procedural guarantees to combat prolonged pre-trial detention, to increase the number of courts and legal personnel, to address prison overcrowding, and to improve detention conditions.

Cameroon has equally ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), the African Union Convention on the Prevention and Fight against Terrorism (1999) and has acceded to the African Union Convention on the Protection of and Assistance to Displaced Persons in Africa (2009)²⁹.

As for the national level, Cameroon amended the Penal Code (PC) in 2016 to reinforce the criminalisation of certain serious violations, such as female genital mutilation, breast ironing, sexual harassment, forced and early marriages, trafficking in persons, and torture. In 2017, it adopted Law No. 2017/012 of July 12, 2017, known as the Code of Military Justice, which gives competence to military courts to try cases of serious war crimes, crimes against humanity and genocide. Cameroon also set up a commission for compensation as part of the Supreme Court in 2016 and established the Ad Hoc Inter-Ministerial Committee for the Management of Urgent Refugee Situations in Cameroon³⁰. As a result of this political

²⁷ Aisling, *supra* note 4, at 52.

²⁸ PC, *supra* note 18, § 277-3(5).

²⁹ Joint Submission to the 4th Cycle of the UN Human Rights Council's Universal Periodic Review, Cameroon: Torture, Detention, and the Fight Against Terrorism, UPR 2023 Submission 3 (2023).

³⁰ See *Id*

will, serious human rights violations such as the open and generalised infliction of intense pain (as from burning, crushing, or wounding) to punish, coerce, or afford sadistic pleasure, have reduced drastically in Cameroon.

However, Cameroonian authorities are continuously seen to tacitly operate accounts of torture and abuse. Unfortunately, there are numerous arbitrary arrests and detentions incommunicado and torture in detention facilities in the country³¹. Special services and units act as a parallel system in practicing torture in Cameroon. It is on the basis of Law No. 2014/028 of December 23, 2014, concerning the repression of acts of terrorism, that the Cameroonian authorities have established a second system allowing them to circumvent the fundamental guarantees recognised in the CPC. Numerous cases of individuals being abducted and tortured by unidentified persons claiming to be from the intelligence services and other special units of the Cameroonian police, gendarmerie and army are constantly recorded³². Between 2018 and 2024 at least twenty cases of individuals subjected to abduction, incommunicado detention and torture by state military and general intelligence services. In no fewer than five cases, the victims were arrested by SEMIL (Military Security), they were tortured and subsequently handed over to the BIR (The Rapid Intervention Battalion) or the SED (State Secretariat for Defence).

The Human Rights Committee raised its concern in 2017 regarding allegations of numerous cases of torture and cruel, inhuman or degrading treatment perpetrated in the detention facilities of the Rapid Intervention

³¹ Amnesty International, "Cameroon: Rampant atrocities amid Anglophone regions must be stopped and investigated July 4, 2023, available <https://www.amnesty.org/en/latest/news/2023/07/cameroon-rampant-atrocities-amid-anglophoneregions-must-be-stopped/> (Last visited July 10, 2025).

³² Rapport de la société civile à l'examen de l'Etat du Cameroun par le Comité des nations unies contre la torture au cours de sa 81e session, en application à l'article 19 de la Convention, "CAMEROUN: Un État, deux systèmes parallèles. Contradictions dans la prévention et la lutte contre la torture, les autres peines ou traitements cruels, inhumains ou dégradants", at 28 (2024), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCAT%2FCSS%2FCMR%2F60284&Lang=en (Last visited 15 February 2026).

Brigade and the Directorate General of External Research, as well as the existence of secret detention centres operating outside any oversight. In this regard, the Committee reminded the State of its duty to prohibit and suppress secret detention or unofficial places of detention³³. These concerns were also raised by the Committee against Torture in 2017, which noted widespread use of torture in secret detention centres and called on the State to end the practice of incommunicado detention and ensure that no one is detained in a secret or unregistered location, including unregistered military detention centres³⁴.

Recently for instance, the Bar Association's Rights Commission condemned the circumstances surrounding the tragic death on December 1, 2025, of Anicet Georges Ekane, President of the African Movement for New Independence and Democracy, one of Cameroon's opposition political party³⁵. According to the Commission, the President was illegally arrested and detained for thirty-eight days constituting an unacceptable violation of the deceased's rights to a fair trial, liberty and security, and human dignity, as enshrined in international and legal basis for arrest and detention and prohibit abusive police custody³⁶. The Commission also faulted the government for violation of the right to health of the deceased

³³ See *Id.*

³⁴ See *Id.*

³⁵ Available at <https://theguardianpostcameroon.com/post/6270/fr/homebar-associations-rights-commission-condemns-circumstances-surrounding-anicet-ekanes-death-homehome> (Last visited January 13, 2026).

³⁶ There were glaring elements surrounding the arrest and detention of the deceased that highlights the likelihood of serious human rights violations. The first being, what the Commission said is illegal arrest of Ekane in Douala by unidentified individuals without a warrant. Ekane was then taken away in a vehicle and driven to the Central Judicial Investigation Service (SED) premises in Yaoundé. He was reported to have only been notified of reasons for his arrest on the 29th of October 2025 during his hearing, accused of incitement to revolt, hostility against the homeland, and calls for insurrection. Without any previous case file establishing the facts under which he was being prosecuted and allowing the deceased to defend himself, the Bar said the President was kept in custody until he died 38 days later as claimed in a statement issued thereafter by the Ministry of Defense.

and violation of his right to access to lawyers. It urges the government to conduct an independent, prompt and transparent investigation into the exact causes of Anicet Ekane's death and the conditions of his police custody³⁷.

2.1. Importance of the Specific Part of Criminal Law

The commitments stemming from the signing and ratification of international human rights instruments, oblige States to criminalise and punish the acts constituting torture and other internationally prohibited treatments in domestic law. To this effect, the preamble of the Cameroonian Constitution declares the right of everybody to "life, to physical and moral integrity and to humane treatment in all circumstances. Under no circumstances shall any person be subjected to torture, to cruel, inhumane or degrading treatment"³⁸. Despite being a preambular provision³⁹, it is important to note that the Constitution provides that its 'preamble shall be part and parcel of this Constitution'⁴⁰. The inclusion of this provision can be seen as an attempt to fulfill its obligation under Article 2(1) of the CAT, which Cameroon ratified in 1986. The preamble of the Cameroon Constitution considers human dignity as inviolable, and it is protected by the State. The presented constitutional norm is imperative, which makes dignity an absolute right.

This right is enforced, inter alia, by the provision of Section 277-3(5) of the PC of Cameroon. It defines torture as:

"any act by which acute pain or suffering, either physical, mental or psychological, is intentionally inflicted to a person by a public servant, a traditional leader or any other person acting in the

³⁷ The commission referred the government to the provision at the preamble of the Constitution of Cameroon; Article 9 of the UDHR; Article 9 of the ICCPR which was ratified by Cameroon on June, 27, 1984; Article 6 of the African Charter ratified by Cameroon on December 29, 1987 and Articles 119 and 121 of CPC.

³⁸ Law No. 96/06 of 18 January 1996 to amend the Constitution of 2 June 1972

³⁹ Cameroon Constitution, preamble, para 5 (12).

⁴⁰ Cameroon const Article 65.

course of duties either at his own instigation or with his express or implied consent, in order to obtain information or confessions from that person or from another, to punish her for an act that she or any other person has committed, or is presumed to have committed, to intimidate or overawe her or any other person, or for any other motive based on any discrimination".

The word "torture" as so defined does not apply to pain or suffering resulting from legitimate punishments, inherent to or caused by them.

In implementing its obligation under Articles 4 and 7 of the CAT, read together with Article 2 of the ICCPR, Cameroon has incorporated the right to freedom from torture within its PC. Torture is defined in the PC, similar to that provided in Article 1 of the CAT, and just like the CAT, refers to "*severe pain or suffering*"; *the PC does not provide what could be considered to be within the threshold for "acute pain or suffering"*. However, the CAT Committee has adopted very liberal definitions for the term within their decisions to show the inviolability and non-derogable nature of the right⁴¹.

Adopting the wording of Article 2(2) of the CAT, the PC further provides that there shall not be any exceptional circumstances where torture is allowed, including during a state of war or threat of war, internal political stability or state of exception⁴². Obedience to the order of a superior or a public authority does not constitute a justification for torture. The perpetrator of torture is therefore criminally liable⁴³. In line with this and in order to uphold its international commitments, Cameroon has through Circular Letter No. 190256/DV/MINDEF/1 of January 18, 2019 of the Minister of Defence, (communicated by Note No. 153/MRP/GN/244 of January 23, 2019 of the Secretary of State to the Minister of Defence in charge of the National Gendarmerie), reminded the Defence and Security Forces of

⁴¹ Reidy Aisling, at 52-53(cited in note 4). See also Article 2(2) of the CAT.

⁴² PC, *supra* note 18, § 277-3(6).

⁴³ See *Id.* § 277-3(7).

the absolute prohibition of torture and warned that any public official who acts contrary shall be held personally liable⁴⁴.

Section 277-3 of the PC disciplines extensively the criminalisation of torture. It prescribes life imprisonment, where torture leads to the death of the victim⁴⁵. In the case where an act of torture causes a permanent deprivation of the use of all or part of a limb, organ or sense, the penalty is imprisonment from ten to twenty years⁴⁶. Furthermore, the penalty shall be imprisonment from five to ten years with a fine of 100,000 CFAF to 1,000,000 CFAF where torture leads to illness or incapacity to work for more than thirty days⁴⁷. Finally, the penalty shall be imprisonment from two to five years with a fine of from 50,000 CFAF to 200,000 CFAF where torture leads to illness or incapacity to work of up to 30 days, pain or mental or psychological injury⁴⁸.

From the above, the author takes note of the preamble of the Constitution, under which torture and ill-treatment are prohibited and is of the view that Section 277-3 of the PC contains a definition of torture compatible with that of Article 1 of the CAT. The author remains concerned however about the fact that, under the scale of penalties provided for in Section 277-3 of the PC, the penalty for acts of torture not causing the death of the victim, permanent deprivation of the use of all or part of a limb, organ or sense, or illness or incapacity to work of more than thirty

⁴⁴ Committee against Torture, "Sixth periodic report submitted by Cameroon under article 19 of the Convention pursuant to the simplified reporting procedure, due in 2021", (CAT/C/CMR/6), para 6, at 3 (2022).

⁴⁵ PC, *supra* note 16, § 277-3(1).

⁴⁶ *Id.* § 277-3(2).

⁴⁷ *Id.* § 277-3(3).

⁴⁸ See *Id.* § 277-3(4).

days⁴⁹, can in breach of Article 4 (2) of the CAT⁵⁰ under which acts of torture are to be made punishable by appropriate penalties which take into account their grave nature be as little as two years imprisonment⁵¹.

Unfortunately, it can be seen that in many cases, including that of Mr. Ibrahim Bello⁵², the perpetrators received lenient sentences, sometimes even suspended, in contrast with the provisions of the CAT. This case concerned a 16-year-old who lost both legs and a left arm due to severe torture while in detention, which should have resulted in a sentence of ten to twenty years of imprisonment, as stipulated in Article 277-3 (2) of the PC. In a judgment of 6 May 2020, the Mbam and Inoubou High Court found the two police officers guilty of torture and grievous harm. In the case, Police Inspector Joseph Désiré Sack received a prison sentence of four years, whereas Judicial Police Officer Joël Cyrille Bikouo Nzie was given three years suspended jail term. Both were ordered to pay the sum of CFAF 50,000,000 to the victim as damages.⁵³ Mr. Ibrahim Bello died two years later due to the inadequacy of the reparation and rehabilitation measures. He never received the compensation awarded by the court. The

⁴⁹ Regarding this last provision, the CAT had already recommended its revision during the 5th review of Cameroon in 2017 in order to make the penalty proportionate to the gravity of the crime of torture. As it stands, it favours a criminal liability for perpetrators of torture, which does not sufficiently deter them.

⁵⁰ CAT, *supra* note 11, art. 4(2) (“Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”).

⁵¹ In Cameroon, torture is defined by a combination of its Constitution and PC, but is often interpreted narrowly by the law, with a lack of comprehensive provisions covering all acts that constitute torture under international standards. While the Constitution prohibits torture as a cruel, inhuman, or degrading treatment, the PC criminalises it primarily when used to elicit a confession or information. Concerns remain that the law may not adequately punish torture and that mitigating circumstances could lead to reduced penalties.

⁵² The People v. Ibrahim BELLO, Mbam and Inoubou High Court Judgment of May 6, 2020, cited in Committee Against Torture, Sixth Periodic Report, *supra* note 42, ¶ 10, at 4. See also the B.B.L.W. case of Feb. 6, 2019, Garoua Military Court (the perpetrator was sentenced to only one year in prison while the victim died from injuries caused by the whippings he received).

⁵³ See *Id.*

court, in this case, failed to sentence the individuals in line with the provisions of Article 277-3(2) PC. This case is an indication of impunity that exists within the Defence and Security Forces in Cameroon. Surprisingly, this decision was appealed by the State of Cameroon through the state counsel office requesting the court to reduce the damages ordered in the case.

In the same vein of inadequate sanctions, the Yaoundé Military Tribunal sentenced Lazare Leroy to thirty months in prison for acts of torture inflicted on Moussa Moupain in a cell at the Central Service of Judicial Research of the Gendarmerie in Yaoundé in March 2016. The victim later died due to these acts of torture. The State of Cameroon was required to pay the sum of CFAF 10,000,000 as damages to the rightful claimants of the deceased⁵⁴.

Although several cases of torture have been prosecuted, the two examples above paint a rather bleak picture of the prosecution of torture in Cameroon. As shown in several of these cases, torture led to the death of the victim and, in other circumstances, to the loss of limbs. Despite that, the sentences are not even remotely close to those provided for in the PC. In other cases, suspended sentences were handed down, all of which show a failure of the obligation, not only to prosecute and punish acts of torture properly, but also to provide adequate redress to the victims of torture⁵⁵.

⁵⁴ *The People v. D.M. Lazare Leroy* -Military Tribunal Yaoundé Judgement of 20 September 2018 cited in CAT/C/CMR/6 (n 202) para 22. See also the Cyrille TCHOUMI case of December 6, 2021, demonstrates the lack of severity attributed to penalties for acts of torture. Indeed, Mr. TCHOUMI was tortured with a machete by five police officers at the Ngoussou police station in Yaoundé, but they were sentenced to only one to three months in prison by the Yaoundé Court of First Instance.

⁵⁵ Smith Naseri Edumebong, *supra* note 17, at 40.

The author further remains concerned about the possible reduction, in accordance with Sections 90⁵⁶ and 91⁵⁷ of the PC, of the penalties for torture acts to as little as one year's imprisonment upon a judicial finding of mitigating circumstances. Cameroon should amend Section 277-3 of the PC to ensure that the crime of torture is made punishable, in accordance with Article 4 (2) of the CAT, by appropriate penalties which take into account its grave nature. It should also amend Sections 90 and 91 of the PC to ensure that, in cases of torture, there can be no finding of mitigating circumstances that could lead to reduced penalties or inadequate to the seriousness of the offence.

It should be emphasised that the CAT mandates the imprescriptibility of acts of torture, given the ongoing nature of the effects of this crime and in order to avoid any obstacle to reparations for victims⁵⁸. However, the provisions applicable to the statute of limitations in Cameroonian law stipulate that, in matters of felonies, prosecution is barred after ten years from the day after the crime was committed, while misdemeanours are barred after three years⁵⁹. Thus, acts of torture are likely to be covered by the statute of limitations, in open violation of the CAT.

2.2. Impact on the Field of Punishment

The prohibition of torture and other inhuman or degrading treatment also causes a significant impact in the field of punishment. Article 1

⁵⁶ The benefit of mitigating circumstances may be given, for reasons to be recorded in the judgment, save where they are by law expressly excluded.

⁵⁷ (1) Upon a finding of mitigating circumstances in favour of any person convicted of felony, the sentence may be reduced to not less than 10 (ten) years' loss of liberty if the offence be punishable with death, to not less than 5 (five) years if it be punishable with loss of liberty for life, and to not less than 1 (one) year in any other case. (2) Where the penalty is reduced under the last subsection to 10 (ten) years or less the court may add a fine of up to CFAF 2 000 000 (two million).

⁵⁸ Committee Against Torture, General Comment No. 3, Implementation of Article 14 by States Parties, ¶ 40 (2012).

⁵⁹ Article 65(2) of Law No. 2005/007 of July 27, 2005, establishing the CPC.

of the CAT excludes from the scope of torture those "pain or suffering arising only from, inherent in or incidental to lawful sanctions". Nevertheless, legality should not be a way to legitimise any penalty, which is exclusively directed to cause suffering or humiliation; these will not fall outside the scope of international prohibition if they amount to cruel, inhuman or degrading treatment. This study focuses on criminal punishment such as death penalty, life imprisonment or indeed long terms of imprisonment and an inhuman or degrading prison system.

2.2.1. *Death Penalty*

Death penalty, which is also known as capital punishment, is a criminal punishment that takes the defendant's life as the penalty for the crime committed⁶⁰. Despite the global trend directed towards abolition, Cameroon continues to implement capital punishment, sparking intense debate regarding its alignment with international human rights standards and constitutional guarantees⁶¹. There is continuous questioning on its legitimacy in Cameroon as many scholars are in favour of its complete abolishment because it is not only unconstitutional, but cruel, brutal, and inhumane⁶². This is because it violates the right to life, physical integrity and the prohibition of torture or cruel treatment enshrined in the constitution. Accordingly, death penalty has no place in the twenty-first century as leaders across the globe must boldly step forward in favour of its abolition⁶³.

⁶⁰ Cornell Law School, "Capital punishment", at 1(2002), available at https://www.law.cornell.edu/wex/capital_punishment (Last visited January 20, 2025).

⁶¹ Rene Ntoko Ntonga et al., 3.4 *A Legal Appraisal of the Application of the Death Penalty in Cameroon*, at 39 (Studies in Law and Justice 2024), available at <https://www.pioneerpublisher.com/slj/article/view/1017> (Last visited March 15, 2026).

⁶² See Marcellous Nyiawung Nkwetta et al, Vol. 4 Iss 3, "The Legitimacy of Capital Punishment in Cameroon" at 3765, *The International Journal of Law Management & Humanities* (2021).

⁶³ Words of the United Nations Secretary-General Ban Ki-moon during the OHCHR's global panel: "Moving away from the death penalty wrongful convictions", New York, 28 June 2013 © UN Photo/Evan Schneider.

Cameroon is a de facto abolitionist State, with the last execution in the country dating back to 1997 involving death row inmate Antoine Vandi Tize⁶⁴, yet it remains retentionist in practice by frequently imposing death sentences. The PC adopted in 2016⁶⁵ still upholds the death penalty, especially for terrorism-related offences⁶⁶. A de facto moratorium has been in place ever since, but it has never been formalised, and many death sentences continue to be handed down each year with 160 death sentences in one hundred and sixty (compared to ninety-one in 2015 and none in 2014 and 2013)⁶⁷. While no death sentences were reported in 2018⁶⁸ and 2019⁶⁹, this number has steadily risen to one in 2020⁷⁰, and four in 2021⁷¹. At the end of 2021, more than two hundred and fifty people were under sentence of death⁷². As long as the death penalty remains a lawful punishment, the possibility of an execution is a reality⁷³.

The imposition of the death penalty violates the constitutional guarantee of the right to life. Cameroon is party to the ICCPR and its 1st Optional Protocol, but it has not acceded to the 2nd Optional Protocol for

⁶⁴ Amnesty International, Cameroon: Blatant Disregard for Human Rights at 41(16 September 1997).

⁶⁵ Law No. 2016/007 of 12th July 2016 Relating to the PC.

⁶⁶ Cameroon and the Death Penalty - Campaign for the Abolition of the Death Penalty (ADP) [pgaction.org](https://www.pgaction.org) (Last visited 4 February 2025).

⁶⁷ Report for the Universal Periodic Review of Cameroon, available at https://upr-info.org/sites/default/files/documents/201805/ecpm_upr_cameroon_report_summary.pdf (Last visited February 8, 2025).

⁶⁸ Amnesty International, *Global Report: Death Sentences and Executions 2019*, at 11 (2020).

⁶⁹ Amnesty International, *Global Report: Death Sentences and Executions 2020*, at 12(2021).

⁷⁰ Amnesty International, *Global Report: Death Sentences and Executions 2021*, at 54 (2022).

⁷¹ See *Id.*, at 12.

⁷² Report for the Universal Periodic Review of Cameroon, available at <https://upr-info.org/sites/default/files/documents/2018> (Last visited August 12, 2025).

⁷³ Although no one was sentenced to death in 2018 and no execution was carried out, at least 250 individuals remain on death row, available at <https://www.pgaction.org/ilhr/adp/cmr.html> (Last visited September 16, 2025).

abolition of the death penalty⁷⁴. The Constitution of Cameroon sets out that “*every person has the right to life and physical and moral integrity*”⁷⁵, but it says nothing about the death penalty; despite this omission, the punishment can be found in various domestic laws. Legislations in Cameroon, specifically the 2016 PC, 2014 Anti-Terrorism Law and 2017 Military Justice Code maintain the death penalty for major offenses⁷⁶but in most cases,

⁷⁴ Sentenced To Oblivion Fact-Finding Mission On Death Row Cameroon, at 20 (2019), available at <https://www.ecpm.org/app/uploads/2022/08/mission-enquete-cameroun-2019-GB.pdf> (Last visited October 8, 2024).

⁷⁵ Preamble to the Constitution of Cameroon. Article 65 of the Constitution sets out that the preamble is an integral part of the Constitution.

⁷⁶ There are more than twenty-eight (28) capital offences under Cameroon penal law provided in the Penal Code, the Military Justice Code (2017), the 2014 law on terrorism, Section 4 of the 1989 law on toxic and dangerous waste, the 1983 law regulating police authorities within seaports, Section 9 of the 1995 law on radioprotection, etc. They include, for the main: hostility against fatherland (Section 102 of the PC), treason (Section of the 103 (a) PC), espionage (Section103 (b) of the PC), sabotage (Section103 (c) of the PC), secession (Section 111 (2) of the PC), provocation of civil war (S.112 PC), concert against the security of the state (Section 124 (3) of the PC), assault on public servant (Section 156 (5) of the PC), depredation by band in time of war (Section 236 (3) of the PC), capital murder (Section 276 of the PC), aggravated theft with use of force occasioning death or grievous harm (Section 320 (2)), murder of children under 15 years (Section 350 of the PC), murder of ascendants (Section 351 of the PC), aggravated kidnapping occasioning death of minor (Section 354 (2) of the PC), and under the 2014 terrorism law we have: acts of terrorism (Section 2 (1) and Section 2(2)), financing of acts of terrorism (Section 3), laundering of proceeds of terrorism (Section 4), recruitment and training of terrorists (Section 5), military offenses under Law No. 2017/012 of July 12, 2017 laying down the Military Justice Code include: desertion in war time and/or with conspiracy to join the enemy (Section 34 (4)), abstraction of items in zone of operations from wounded, sick or dead service men and violence (Section 51 (2)), treason (Section 61), collusion with the enemy (Section 62), espionage (Section 63), hiring in enemy force (Section 64), and use of aircrafts to cause death of persons per Section 10 of Law No. 2017/013 of July 12, 2017 relating to sanctions on violations of civil aviation security, etc. It should be noted that the criminal law provides for the punishment of attempts (Section 94 of the PC), conspirators (Section 95 of the PC), co-offenders (Section 98 of the PC), accessories (Sections 97 & 98 of the PC) in like manner as the principal offender(s).

this penalty is discretionary rather than mandatory⁷⁷. Judges have the discretion to impose life imprisonment and even less, instead of the death penalty, for many capital offenses, meaning that the death penalty is not automatically compulsory.

The Cameroonian criminal justice system is riddled with many deficiencies that violate the international and often domestic human rights of those who face the death penalty, putting potentially innocent persons at risk of facing death. The death penalty as a form of torture⁷⁸, fails to respect the dignity of the person, causes severe mental and physical suffering and constitutes a violation of the prohibition of torture or cruel, inhuman or degrading treatment⁷⁹.

This criminal justice system lacks essential safeguards for persons facing the death penalty and is deeply affected by corruption, abuse, torture and inadequate assistance of counsel, in violation of international human rights standards⁸⁰. Under Section 417 of the CPC for example, if a person prosecuted before the High Court is charged with a crime that is eligible for the death penalty and has no counsel, “*the Presiding Judge shall of his own motion assign one to him*”⁸¹. However, many people prosecuted for death-eligible offences have their preliminary hearings at police and

⁷⁷ According to Sections 90 and 91 of the PC, the death penalty can be commuted to a 10-year prison sentence if the court grants attenuating circumstances, unless these conditions are formally excluded by the law. On the compulsory imposition of the death penalty: see *infra*, the section on the orders to combat organised crime.

⁷⁸ Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/67/279 (Aug. 9, 2012), <https://undocs.org/A/67/279>.

⁷⁹ See Ernesto Mindez Juan, *The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment*, 20 HUM. RTS. BRIEF, no. 1, 2012, at 1, 1–6.

⁸⁰ Like Articles 6, 9 and 14 of the ICCPR,

⁸¹ *Death Penalty Worldwide, Death Penalty Database, Cameroon*, 2019 available at <http://www.deathpenaltyworldwide.org/countrySearchPost.cfm?> (Last visited December 8, 2024).

gendarmerie stations, where they do not have access to counsel⁸² and where police officers use a pre-established oral process of obtaining consent by which suspects explicitly waive their right to be assisted by counsel during their interrogations⁸³. This process has resulted in reports of torture and abuse during preliminary investigations and interrogations, and the outcomes of this practice are coerced confessions later used as the basis to convict and sentence people to death⁸⁴.

It is therefore regrettable that torture remains widespread in Cameroon, particularly in detention centres, with forced confessions often utilised in legal proceedings, notwithstanding the explicit provision on the inadmissibility of confessions obtained under duress under the CPC⁸⁵. According to Section 315(2) of the CPC, “A confession shall not be admissible in evidence if it is obtained through duress, violence, or intimidation or in exchange of a promise for any benefit whatsoever or by any other means contrary to the free will of the maker of the confession”.

However, the extortion of confessions is prejudicial to the rights of the defence and shall be sanctioned by the nullity of the proceedings⁸⁶. In

⁸² Nestor Toko Monkam, *L'association Droits et Paix, Cameroun rapport alternatif*, at 9-14, (2012), available at https://www.theadvocatesforhumanrights.org/Res/cameroon_hrc_death_penalty_sept_2012%202.pdf (Last visited June 19, 2025).

⁸³ See *Id.* According to this report, in July 2009, Aboubakar Aoudou alias Hassan and others were prosecuted before the Tribunal de Grande Instance in Douala Wouri for acts of robbery and murder. At the preliminary hearing, it is alleged the Judicial Police of Douala used acts of torture to obtain confessions, and that the accused were not informed of their rights to be assisted by counsel. Despite their protests at the hearing, the minutes of the preliminary investigation indicated that they had waived this right. Confessions thus obtained were the basis for the judgment No. 385/CRIM October 19, 2010, which found them guilty of the offenses with which they were charged and was sentenced to death by firing squad.

⁸⁴ See *Id.*

⁸⁵ U.N. ICCPR Human Rights Committee, Consideration of reports submitted by States parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee, Cameroon, para. 17, U.N. Doc. CCPR/C/CMR/CO/4, August. 4, 2010.

⁸⁶ Section 3 of the CPC.

the case *The People of Cameroon v. K.R Kamdem Robert*⁸⁷, Bafoussam Military Tribunal declared null in the proceedings on the grounds that the confessions of the defendant were obtained through duress.

While official statistics on torture-extracted confessions are often unavailable, courts generally apply legal provisions, such as Section 315 CPC, to exclude evidence when torture is proven. However, the effectiveness of this protection is often limited by a heavy reliance on initial confessions and in some contexts, limited judicial inquiry into allegations of torture.

Another violation of death penalty safeguards is that capital crimes are tried or held in the High Courts before a single judge who determines guilt and imposes a sentence, not before a jury. Thus, there is a heightened risk of potential judicial error or bias, which, combined with lengthy trial delays, long adjournments and allegations of pre-trial misconduct, can significantly compromise the fairness of capital proceedings and defendants' rights. This increases the possibility of convicting innocent people to death as was seen in the case of *The People of Cameroon & Mathias Ngwa v. Ambe Lilian Sirri & Ambe Vitalis Niba*⁸⁸. The decision of the High Court of Mezam for convicting the first and second appellants for attempted capital murder punishable under Section 276(1)(a) as read with Section 94(1) of the PC, was dismissed for lack of common design and no community of purpose. The trial court misdirected itself when it held that both appellants had to bear the brunt simply because they were identified. The Appeal Court held that even if they were identified in the mob, their mere presence there did not suffice. Thus, they had to be present and consenting either expressly or implicitly to the act⁸⁹. The Appeal Court further in clarification held that the evidence adduced at the trial was not such that

⁸⁷ Judgement No. 69/00 of 21st September 2020 (Cameroon).

⁸⁸ Suit No. CANWE/14F/ (2018) (Cameroon).

⁸⁹ Judgment No. 5/F/ (2019) (Cameroon).

could have warranted the conviction of the appellants by a reasonable tribunal. Accordingly, the appeal had merit and both appellants were acquitted⁹⁰.

The case of *The People of Cameroon & Emboat Martin Njenile v. Nyabua Asoh Gabriel*⁹¹ is also illustrative as the non-respect of procedural safeguards and international standards almost led to wrongful convictions for capital crimes. In this case, the appellant was committed to stand trial before the High Court of Mezam Division, charged with the offence of capital murder and punishable under Section 276 (1) (a) of the PC for causing the death of his father, Emboat John Asoh by stabbing him after premeditation. On appeal, it was held by Justice Anne Nyajro Povi that the circumstantial evidence relied upon by the learned trial judge was not strong, compelling and unequivocal enough to lead to the irresistible conclusion that the appellant murdered Emboat John Asoh, his father. Thus, in agreement with the counsel for the appellant, it is clear that the trial judge misconstrued the facts and wrongly inferred the appellant's guilt from them. An essential element of the offence charged, to wit, that it was the appellant that caused the death of the deceased, has not been established to our satisfaction. As a consequence, the conviction, sentence, cost and civil award made against the appellant are hereby set aside and the appellant acquitted⁹².

Additionally, the fees paid to court-appointed lawyers are quite low and discourage participation by experienced lawyers. As a result, many capital cases are taken on by lawyers who lack the requisite experience to handle serious offenses like capital murder⁹³. Cameroonian judges seeking to "liquidate an affair" tend to assign cases on the spot to counsels who have no time to read a case file but are immediately responsible for

⁹⁰ Marcellous Nyiawung Nkwetta et al, "The Legitimacy of Capital Punishment in Cameroon" at 3783 (cited in note 62).

⁹¹ Suit No.CANWR/1C/ (2017) (Cameroon).

⁹² Judgment No. 02/F/ (2019) (Cameroon). See also the case of *Laghai Romanus, Eric Tardzenyuy & Christian Wigfon v. The People of Cameroon*, Suit No.CANWR/MA/2C/ (2014) .

⁹³ Death Penalty Worldwide, *supra* note 81.

the defence of the accused at the hearing during which they are appointed⁹⁴. The legal system is fraught with many delays⁹⁵, such that it is not effective in assisting poor citizens to access justice⁹⁶.

The above situation worsens in the context of the fight against terrorism in the vulnerable regions of Cameroon. Many death sentences are being handed down by military courts under the Anti-Terrorism Law, mainly in the fight against Boko Haram in the Far North of the country, including civilians or those outside the scope of this law especially in the context of the Anglophone crisis⁹⁷. For instance, in 2020, three women were sentenced to death after fleeing Boko Haram⁹⁸: not only were they minors, but also pregnant or nursing mothers for some. This new trend towards the use of the death sentence to address a security crisis is extremely worrying.

On September 7, 2021, the Buea Military Court in Cameroon sentenced to death four men who had been found guilty of attacking a school, killing at least eight children. They were convicted for several crimes, in-

⁹⁴ Nestor Toko Monkam, *supra* note 82, at 8.

⁹⁵ Death Penalty Worldwide, *supra* note 81.

⁹⁶ Citing Nchunu Justice Sama, "Providing Legal Aid in Criminal Justice in Cameroon: The Role of Lawyers, in Penal Reform Intl. & Bluhm Legal Clinic of the Northwestern University School of Law, Access to Justice in Africa and Beyond, Making the Rule of Law a Reality", Penal Reform International, at 157 (2007).

⁹⁷ Press Release, Centre for Human Rights and Democracy in Africa (CHRDA) & World Organisation Against Torture (OMCT), Geneva, Buea (Oct. 7, 2021) (for the first time since the beginning of the Anglophone Crisis, four men were sentenced to death after a court found them guilty of a deadly shooting at a school in 2020; the CHRDA and OMCT expressed concern that the death penalty might become a new punitive tool of the Cameroonian authorities to address the crisis, and while encouraging the government to provide redress for serious human rights impairment, rights organisations strongly oppose this sentence).

⁹⁸ Cameroun: trois mineures condamnées à mort pour terrorisme après avoir fui Boko Haram font désormais face à un nouveau procès [Communiqué de presse], available at <https://www.ecpm.org/communiquede-presse-cameroun-troismineures-condamnees-a-mort-pour-terrorisme-apres-avoir-fui-boko-haram-font-desormais-face-a-un-nouveau-proces> (Last visited October 29, 2024).

cluding secession, terrorism, murder, possession of illegal arms, and insurrection. Unfortunately, the trial had been tainted with procedural irregularities. The case was heard by a military court with all defendants heard on the same day, in a 'marathon' session, preventing due consideration of individual cases. Furthermore, the prosecution failed to call any witnesses to the hearing and relied on written statements instead. The absence of third-party corroboration or the opportunity to question the witnesses made the trial based on hearsay evidence alone. Another impediment was language, with the trial conducted in French and translated into English, yet most defendants only fully understood pidgin English. An appeal was lodged which suspended the execution of the sentence however, as of the end of 2021, a date for the appeal hearing was yet to be set⁹⁹.

Several procedural rights are regularly being violated, such as the right to a fair trial, to consular assistance and interpretation for foreigners, to the filing of a pardon petition or the visit by lawyer(s). There have been many cases of torture of death row prisoners, especially of those convicted of terrorism. It is particularly difficult to obtain reliable information on death sentences and conditions of detention on death row because of a lack of transparency by the public authorities on this issue¹⁰⁰. This has an equal impact on the deprivation of liberty for lengthy durations as seen below.

2.2.2. Life Imprisonment or Indeed Long Terms of Imprisonment

The death penalty's inconsistency with the principle of humanity noted above, may also apply to certain forms of deprivation of liberty. The ICCPR contains an explicit provision in favour of rehabilitation, namely Articles 10(3) and 10(1). The former which reads: "*The penitentiary system*

⁹⁹ Amnesty International, *supra* note 31, at 55.

¹⁰⁰ The Cameroonian government does not provide transparent data or statistics on the application of the death penalty, including the number of people sentenced to death and the number of individuals currently remaining on death row, as required by ECOSOC Resolution 1989/64. .

shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation"¹⁰¹. From a systematic perspective, this provision seems endowed with very high potential. Article 10(1) solemnly establishes that all prisoners must be treated in accordance with their inherent dignity. The concept of human dignity is a key one, as it surfaces in the UDHR¹⁰², and it is echoed in the very preamble of the ICCPR¹⁰³.

In this sense, the problem of the inhumane character of life imprisonment has negative psychological and social effects generally linked to long-term imprisonment, which are seriously aggravated when combined with the loss of all hope of eventual release¹⁰⁴. The harsh conditions that often accompany such sentences can make them a sort of slow torture and psychological mutilation and therefore constitute a significant argument proving the incompatibility of these penalties with the principle of humanity. Its radical contradiction to the principle of human dignity derives from its disregard of specific characteristics of a human being and deprivation, of his basic right to a second chance in the society after having served the deserved sentence¹⁰⁵.

In spite of what has been said above, the presence of life imprisonment in Cameroon's legal orders is still considerable, especially taking into account the commutation of death sentence to life imprisonment in

¹⁰¹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

¹⁰² UDHR, *supra* note 7, pmbi., art. 1 ("All human beings are born free and equal in dignity and rights."), arts. 22–23.

¹⁰³ ICCPR, *supra* note 8, pmbi. ("recognition of the inherent dignity . . . is the foundation of freedom, justice and peace in the world"; "these rights derive from the inherent dignity of the human person").

¹⁰⁴ Mauri Di Diego, "Life Imprisonment Without Prospect of Release: Comparative Remarks from a Human-Rights Perspective", *Saggi – DPCE online*, at 2482 (2019), available at https://www.researchgate.net/publication/340023927_Life_Imprisonment_Without_Prospect_of_Release_Comparative_Remarks_from_a_Human-Rights_Perspective (Last visited May 10, 2025)

¹⁰⁵ See *Id* at 2483.

favour of persons initially sentenced to death¹⁰⁶. Life imprisonment is the maximum penalty for felonies such as secession¹⁰⁷, murder¹⁰⁸ and revolution¹⁰⁹.

A life sentence in Cameroon involves forfeiture of rights and assets for the rest of the convict's life. Life imprisonment presents an intolerable threat to the human dignity of the offender because it is a cruel, inhuman and degrading punishment¹¹⁰. At the heart of the prohibition of such penalty lies the concept of proportionality of punishment to the crime¹¹¹. Disproportionate sentences are generally regarded as violations of other human rights¹¹². The indeterminacy of life imprisonment and the potential loss of liberty until the offender dies lend it to criticism that it is a grossly disproportionate and arbitrary sentence¹¹³. Certainty is a crucial element of the rule of law as recognised in the principle of legal certainty¹¹⁴.

It is in the interests of Cameroonian criminal justice to quantify sentences so that a prisoner knows exactly what his punishment is. Life sentences leave the quantification of penalty to death itself; hence they are arbitrary¹¹⁵. Alternatives to life imprisonment, particularly in cases with mitigating circumstances as per Section 91 of the PC, include fixed-term

¹⁰⁶ Decree No. 2020/193 of 15 April 2020 to Commute and Remit Sentences (Cameroon), art. 1(1).

¹⁰⁷ PC, *supra* note 18, § 111.

¹⁰⁸ See *Id.* § 275.

¹⁰⁹ See *Id.* § 114.

¹¹⁰ Dirk Van Zyl Smit, Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective 9 CRIM. L. F. 5, 29 (1999).

¹¹¹ S v Dodo 2001 1 SACR 594 (CC) para. 37 (S. Afr.).

¹¹² Dirk Van Zyl Smit, Taking Life Imprisonment Seriously in National and International Law 198 (2002), <https://www.nottingham.ac.uk/law/people/dirk.van-zyl-smit>.

¹¹³ Dirk Van Zyl Smit & Andrew Ashworth, Disproportionate Sentences as Human Rights Violations, 67 MOD. L. REV. 541, 541 (2004).

¹¹⁴ Dirk Van Zyl Smit, *supra* note 110, at 30.

¹¹⁵ Esther Gumboh, The Penalty of Life Imprisonment under International Criminal Law, 11 AFR. HUM. RTS. L.J. 77, 77 (2011).

imprisonment (often reduced to not less than five years for life-term offences), community service, and reparatory sentences. These options focus on rehabilitation, particularly for minors, through measures like counselling and vocational training.

2.2.3. *Inhuman or Degrading Prison System*

The principle of humanity is not only encountered by considering the very nature of certain penalties, but it must also have an important impact on the prison system, which has to respect the human being and therefore, avoid any inhuman or degrading treatment. Despite some recent attempts by the Cameroonian government to improve prison conditions¹¹⁶, the standard of treatment accorded prisoners within Cameroon's State penitentiaries is reprehensible. There are still existing challenges faced by the prison system of Cameroon in the implementation of international standards within the Cameroonian judicial system. These standards are provided in international treaties¹¹⁷, norms and principles¹¹⁸ as applicable under Article 65 of the Cameroonian Constitution of 1996.

Cameroon is a member of the United Nations and a party to the UN Charter, the Statute of the International Court of Justice, and the UDHR. It is also a member of the African Union and its human rights mechanisms. Consequently, all declarations and principles originating from African forums promoting the better treatment of prisoners are binding on the Cameroonian government. In other words, the careful and effective applications of these standards as secured within international treaties, norms and principles are supposed to create a very good condition for

¹¹⁶ Committee Against Torture, Sixth Periodic Report, *supra* note 44, at 17.

¹¹⁷ Cameroon is a member of the United Nations and the United Nations Charter, the Statute of the International Court of Justice, the UDHR, the ICCPR and the ICESCR.

¹¹⁸ United Nations Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, principle 4 (Dec. 14, 1990). United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173 (Dec. 9, 1988).

persons incarcerated or imprisoned within the Cameroonian judicial system to serve their terms of sentence¹¹⁹. Articles 10(1) and 10(3) of the IC-CPR, as discussed above, provide a comprehensive idea of the standard of treatment to be given to incarcerated persons. Various international recommendations, like, for example, Principle 4 of the United Nations Basic Principles for the Treatment of Prisoners¹²⁰ constitute in this sense an important development of the principle of humanity¹²¹.

Unfortunately for the most part, Cameroon has failed to meet these standards¹²². Cameroonian prisons suffer from chronic overcrowding, a problem widely criticised by several observers (an average occupancy rate of 173%). The prisons in Garoua and Douala have occupancy rates of 372% and 494%, respectively¹²³. This occurs in a context where living conditions are often difficult due to dilapidated infrastructure, poor hygiene, insufficient food, drinking water, and access to medical care. Prison overcrowding is primarily due to the fact that most of them were built during the colonial period, and their capacity is now obsolete. Furthermore, this phenomenon is also attributable to shortcomings in the Cameroonian criminal justice system, characterised by high costs of justice and/or legal aid,

¹¹⁹ Valentine Nde-Fru, "International Law and the Upgrading of the State Penitentiary System: The Case of Cameroon", A Publication of International Centre for Environmental Education and Community Development (ICENECDEV) Supported by the Australian Agency for International Development (AusAID), at 7(2013), available at <https://www.icenecdev.org/Nde-Fru-Penitentiary-Human-Rights.pdf>. (Last visited 10 October 2024).

¹²⁰ See *Id.* principle 4 ("The responsibility of persons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a state's other social objectives and its fundamental responsibilities for promoting the wellbeing and development of all members of society.").

¹²¹ Helen Namondo Linonge, *The Dynamics of Prison Administration and Prison Reform in Cameroon*, 4 CJDHR, no. 1, 2010, at 6, 6–8.

¹²² The Advocates for Human Rights, Cameroon, Sixteenth Session of the Working Group on the Universal Periodic Review, United Nations Human Rights Council 5 (Apr. 22–May 3, 2013).

¹²³ Rapport de la société civile 2024, *supra* note 32, at 44.

staff shortages, endemic corruption that plagues the administration of justice, late trial proceedings and numerous postponements. But above all, the main cause is the propensity of magistrates to choose pre-trial detention over provisional release, making it the rule rather than the exception. As a result, the rate of pre-trial detainees in detention centres is 55.52%¹²⁴.

Defendants and convicts are therefore systematically incarcerated in detention facilities, even though Sections 18, 18-1, 26 and 26-1 of the PC provide for principal penalties and alternatives to imprisonment and their implementation measures. Section 42 of the PC further authorises courts to impose conditions like mandatory employment, vocational training, medical treatment (for addiction), or financial support for families. Decongesting prisons, promoting local development through community service and improving the State's financial health through the payment of fines are all measures provided for by the legislature to combat prison overcrowding. These are rehabilitative alternatives allowing offenders to serve the community rather than face incarceration. They also focus on restoring damage caused by the offence, aligning with restorative justice principles.

However, these measures remain difficult to execute due to the absence of an implementing Decree. Furthermore, numerous observations have been made regarding the failure to respect the time limits for pre-trial detention of defendants in Cameroonian prisons, in violation of the maximum duration of twelve months stipulated in Article 221 of the CPC. Similarly, release orders are often not signed in a timely manner, and this situation leads to the continued detention of prisoners, further exacerbating the problem of prison overcrowding. This occurs despite the existence in the law of disciplinary proceedings against an investigating judge who fails to immediately order the release of the accused upon the expiration of the deadline, unless they are being held for another reason¹²⁵.

¹²⁴ See *Id.*

¹²⁵ See *Id* at 45

Moreover, conditions of detention and treatment of detainees are wanting. Regarding detention conditions, visits conducted in seven Cameroonian prisons in 2022 confirmed the dilapidated, inadequate, and inappropriate nature of the facilities for detainees and prisoners, both in prisons and in police and gendarmerie units. Almost all of the prisons visited do not provide even minimal access to healthy food and acceptable sanitation. More than 50% of detainees and prisoners have no means of sleeping. The penitentiary administration does not provide prisoners with the necessary hygiene supplies. In these facilities, medications intended to be provided free of charge to detainees are sold to them. Corruption and extortion are systematic scourges that plague detention facilities. Detainees without financial means cannot access basic services. The conditions of detention in Cameroonian prisons can therefore constitute inhuman and degrading treatment¹²⁶.

The other striking fact to note concerns the physical abuse and other forms of corporal and psychological punishment to which incarcerated individuals are subjected, sometimes for minor offences such as getting up late or failing to complete their daily chores. In these cases, prison guards take it upon themselves to punish them vehemently. Taken to the infirmary, the medical personnel responsible for documenting the injuries are often another official within the prison administration, a colleague of the perpetrators of said abuse and physical punishment. Since they can be considered both judge and party, the issue of the medical staff's lack of independence and integrity arises¹²⁷.

Several organisations reported¹²⁸ that on May 3, 2021, Jean Louis Tiotso, who was in poor health and awaiting trial for the illegal sale of medication, died in Fombot prison in the Western Region. The prosecutor in the case, Mr. Ombouda, reportedly refused to release him for medical treatment, as permitted by law. According to unconfirmed reports,

¹²⁶ See *Id.* See also Frans Viljoen, *The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities*, 27 *HUM. RTS. Q.* 125, 125–171 (2005).

¹²⁷ *Rapport de la société civile 2024*, *supra* note 32, at 45.

¹²⁸ See *Id.* 46.

Mr. Tiotsop had repeatedly appealed to the courts for medical treatment, but to no avail. The prison administration also reportedly supported his request, but to no avail. Upon the announcement of his death, a riot broke out, setting fire to the Foubot courthouse and resulting in at least one other death.

3. *Principle of Humanity, Rehabilitation and Resocialisation*

The consequences of the principle of humanity for penitentiary treatment are not limited to the prohibition of inhuman or degrading treatment in prison. Punishment must focus on reforming the offenders and facilitating their reintegration into society, rather than inflicting suffering. Rehabilitation involves achieving a specific outcome through a specific program¹²⁹. Resocialisation means reintegration of convicted individuals into society¹³⁰.

This purpose of the punishment implies the transformation of the offender's personality in a way that it no longer violates criminal law and respects the rules of human co-existence¹³¹. Moreover, it aims to gradually integrate the person into society through pedagogy, healthcare and psychotherapy¹³². In line with Article 10(3) of the ICCPR¹³³ (and in the preamble of the Cameroonian Constitution), it is widely accepted that orientation of imprisonment to rehabilitation is a corollary of the principle

¹²⁹ Wilson Wabi Wakai, "The Role of Non-Governmental Organizations in the Rehabilitation and Reintegration of Detainees in Cameroon: Implications on Communities and Prisons", *Commonwealth Law Review Journal*, Annual Volume 10, at 8 (2024).

¹³⁰ BVerfGE 35, 202, 235 (Ger.).

¹³¹ Giorgi Arsoshvili, *Resocialisation of the Offender*, Tbilisi, at 6 (2009).

¹³² Thomas Lüth, *Resozialisierung von Ausländern im Strafvollzug: Gesetzliche Grundlagen der Resozialisierung im Strafvollzug und deren Verwirklichung in der Praxis unter Berücksichtigung von ausländerrechtlichen Beschränkungen* 8 (Diplomarbeit, 2009).

¹³³ ICCPR, *supra* note 8, art. 10(3) ("The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.").

of humanity, at least at the execution level. Article 14 of the CAT also provides for the rehabilitation of victims of torture.

The rehabilitation and resocialisation of former prisoners represent one of the priority areas of the Ministry of Justice in Cameroon¹³⁴. Cameroon has made major steps and developed significant programs for rehabilitation of detainees over the years by applying both national and international standards¹³⁵ like centres where victims of torture can receive care. Cameroon has integrated the provision of these services into the Cardinal Paul Emile LEGER National Centre for Rehabilitation of Persons with Disabilities, which provides care not only for persons with disabilities but also for other vulnerable individuals, including victims of torture. For example, in the case of Ibrahim Bello above, who was a victim of torture, he was provided care by the centre, which implements government policy on rehabilitation and offers psychosocial services¹³⁶.

Penitentiary establishments have been providing education, vocational training and work, as well as other forms of appropriate educational, moral, spiritual, social, healthcare, and sports activities and assistance, and the relationship with prisoners shall aim at their social integration through rehabilitation¹³⁷. Because of the need to instil inmates with skills and entrepreneurial capacities aimed at facilitating their re-insertion into society, the correctional institutions moved away from a punitive approach to rehabilitation¹³⁸. The implementation of rehabilitation

¹³⁴ Decree No. 92/052 of 27 March 1992 which organised the penitentiary system in Cameroon.

¹³⁵ United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), G.A. Res. 70/175, rule 4 (Dec. 17, 2015) (persons deprived of liberty shall be treated with full respect of their rights, and “the purposes of a sentence of imprisonment or similar measures deprivative of a person’s liberty are primarily to protect society against crime and to reduce recidivism, which can be achieved, if the time spent in prison ensures, to the extent possible, the reintegration of these individuals into society after release”).

¹³⁶ Committee Against Torture, Sixth Periodic Report, *supra* note 42, at 22.

¹³⁷ Wilson Wabi Wakai, *supra* note 129, at 6–8.

¹³⁸ See *Id* at 8–9.

programmes in prisons across Cameroon ameliorates the welfare of prisoners and transforms them in ways that ease their reintegration into the community¹³⁹.

Equally, the State gives room for Non-governmental Organisations (NGOs) and other groups like the International Red Cross Committee (CRC)¹⁴⁰, the National Commission for Human Rights and Freedom (NCHRF), judicial professionals such as Lawyers and Jurists to be involved in the welfare of inmates. Social networking is encouraged within the prison's environment among inmates especially during socio-cultural events and it promotes and consolidates unity¹⁴¹. The collective engagements of NGOs¹⁴² and other humanitarian organisations modestly contributed into reducing the challenges that most of the inmates encountered as far as their socio-economic and psychological transformation and resocialisation are concerned.

However, significant challenges remain, such as the lack of necessary infrastructure, the low motivation of beneficiaries, and a pervasive criminal subculture. Addressing these issues requires improving legislation, expanding access to these initiatives, boosting their budgets, and enhancing the involvement of psychologists and social workers.

Moreover, the courts have, in limited cases, prescribed rehabilitation and resocialisation as a form of redress for victims of torture; the case of Ibrahim Bello above is instructive. The fact that only this case has been reported as having been forwarded to the rehabilitation centre¹⁴³ points to the level of unpreparedness of the State in terms of offering rehabilitation services for victims of torture. More so, it is not clear whether these ser-

¹³⁹ Kenneth Lukong & Peter Nde, Prisons and Prisoners' Rights and Obligations: An Overview of the Bamenda Central Prison in Cameroon, 8 AFR. J. SOC. SCI., no. 3, 2017, at 23, 23.

¹⁴⁰ Which visited Bamenda Central Prison in 1992.

¹⁴¹ Gustav Enoh, 59-years' ex-convict interviewed at Nkwen, Bayelle III (Oct. 11, 2016).

¹⁴² Wilson Wabi Wakai, *supra* note 129, at 7-8.

¹⁴³ Committee Against Torture, Sixth Periodic Report, *supra* note 44, at 22-23.

vices are available for persons in detention. Nonetheless, civil society organisations have been instrumental in offering psycho-social services to detainees who are victims of torture while in detention¹⁴⁴.

Concerns are also raised about inappropriate discipline and punishment, forced labour, as well as paltry access to medical treatment¹⁴⁵. Another problem often mentioned is that the prison systems fail to separate prisoners sentenced for serious crimes from those convicted of less serious offences¹⁴⁶. These factors have an impact on the mental and physical health of a prisoner and fail to create an environment conducive to rehabilitation and resocialisation¹⁴⁷.

Furthermore, the lack of State-run rehabilitation services remains a serious problem. The legal provisions do not include any mechanism, body or unit to identify victims of the torture and provide them with these services. The State does not consider the rehabilitation of torture victims as a health development issue. In the absence of a national prevention mechanism, victims are left to fend for themselves or depend on civil society organisations for assistance. Moreover, without resocialisation, torture survivors are often unable to participate in the decision-making processes that are central to democratic development. This cycle creates deep distrust of State institutions already weakened by the protracted conflict, leading victims to favour non-State rehabilitation services. Thus, various humanitarian organisations are working to ensure a minimum

¹⁴⁴ See, e.g., Centre for Human Rights and Democracy in Africa (CHRDA), *From Crisis Response to System Change in Times of COVID-19: Strengthening and Sustaining Civil Society Organizations' Action to Improving the Safety of People Deprived of Liberty and Preventing . . .*, <https://www.chrda.org/from-crisis-response-to-system-change-in-times-of-covid-19-strengthening-and-sustaining-civil-society-organizations-csos-action-to-improving-the-safety-of-people-deprived-of-liberty-and-preventing/> (last visited Sept. 27, 2023); the role of Trauma Centre Cameroon has also been indicated in periodic reports by Cameroon.

¹⁴⁵ See *Id.*

¹⁴⁶ The reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa for Benin, The Gambia, Mali, Cameroon, Namibia, South Africa and Ethiopia, available at <http://www.penalreform.org/> (Last visited September 16, 2025).

¹⁴⁷ Wilson Wabi Wakai, *supra* note 129, at 17–18.

level of these services for victims. Multidisciplinary care is made available to identified victims, including psychological support, medical support, subsistence support and social measures to facilitate their reintegration. While the State of Cameroon allows a wide range of national and international organisations to support victims of torture and inhuman treatment, it must respect its obligations under not only Article 14 of the CAT, but also General Comment No. 3 of the Committee against Torture, General Comment No. 4 of the African Commission on Human Rights and the Basic Principles and Guidelines¹⁴⁸.

Indeed, the State should implement procedures that respect the following principles: adequacy, timeliness, non-discrimination and victim-centeredness. Effective rehabilitation services for torture survivors should include community-based assessments, accessible legal, medical, and psychological services and integration into community-based initiatives, which are a vital component of the socio-economic reconstruction of (post-)conflict societies. These services should also be available in rural areas¹⁴⁹. Unfortunately, these challenges continue to hinder victims' access to their rights and more broadly, their full reintegration into society.

4. *Principle of Humanity and Victims of Crimes*

The principle of humanity is integral to justice for victims of crimes, emphasising respect for their dignity and the right to protection. It is expressed through a commitment to treating victims with compassion and providing them with access to fair, swift and inexpensive redress mechanisms, including restitution for harm suffered.

The principle of humanity traditionally has been focused on the perpetrator of the offence, being one of the most important assumptions aiming at the limitation of the punitive power of the State¹⁵⁰. Nevertheless, the influence of victimology resulted in a broader understanding of this principle. It is no longer possible to ignore the needs of the victims of

¹⁴⁸ Rapport de la société civile 2024, *supra* note 32, at 52.

¹⁴⁹ See *Id* at 53.

¹⁵⁰ De La Cuesta, *supra* note 5, at 473.

crimes, but efforts to understand their situation and to bring them satisfaction are nowadays at the centre of criminal justice¹⁵¹.

Once the limited perspective of the victim as a mere object of crime has been overcome, respect for the principle of humanity in criminal law requires a transformation of victims from oblivion to recognition¹⁵². This entails guaranteeing their rights, giving them a full role in the criminal justice system and putting the principle of their protection at the same level as the prohibition of inhuman and degrading treatment, as well as the orientation of penalties towards rehabilitation and resocialisation¹⁵³.

Any criminal system that extends the principle of humanity also in relation to victims, first of all, must guarantee their rights, a task that goes far beyond the issue of civil responsibility derived from the offence. Victims of crimes must be treated in a humane way and with full recognition and respect of their rights as victims. In particular, their rights to information and truth, access to justice, protection, fair trial, dignity, assistance and information, and most especially compensation for damages.

The concept of victimhood is crucial in Cameroonian criminal procedure, particularly in relation to the commencement and conduct of preliminary inquiries and the potential for victims to claim damages. The victim, as a person who has suffered injury resulting from the commission of a crime, has a right to file a civil claim before a trial court for compensation¹⁵⁴.

However, such a victim can be awarded a civil claim only when an offender is found guilty after a trial by a criminal court¹⁵⁵. A civil claim or

¹⁵¹ See Mueller Gerhard, *Compensation for Victims of Crime: Thoughts before Action*, 49 MINN. L. REV. 1385, 1385 (1965).

¹⁵² PC, *supra* note 18, § 26-1 (entailing the obligation for the offender to indemnify the victim within the period and under the conditions laid down by court, limited to offences punishable with imprisonment for not more than two years or with fine only – thus victims of serious offences warranting imprisonment of more than two years cannot benefit from this provision).

¹⁵³ Antonio Beristain Ipiña, "Protagonismo de las víctimas de hoy y mañana, Evolución en el campo jurídico penal", *prisonal y ético*, Valencia, at 33 et seq (2005).

¹⁵⁴ CPC, *supra* note 19, § 157.

¹⁵⁵ See *Id.* § 395(1)(a).

action¹⁵⁶ may be made alongside a criminal action before the same court so long as they arise from the same offence¹⁵⁷. Anyone who alleges that he suffered injury as a result of the commission of an offence may make an oral or written application for damages in court¹⁵⁸. The civil party seeking damages shall indicate which ones they are claiming before the trial court. The discretion to order damages lies with the trial judge depending on the outcome of the matter.

If at the close of the matter the offender is found guilty of the offence, the court shall sentence the convicted offender to the penalties provided by law and, where applicable, decide on the civil claim¹⁵⁹; as was decided by the Supreme Court of Cameroon Judicial Bench-Common Law Division in the case of *The People & Chief David Esombe Nanyowe v. Ekwalla Ngando Joseph*¹⁶⁰.

Although the CPC further provides a civil award in the form of damages to an individual who has suffered an injury, much is not done by the same court to ensure the immediate execution of this order, as is the case with fines¹⁶¹ and costs¹⁶². It is observed that after compensation has been awarded to the victims, the mechanism for the enforcement of this decision is limited. This problem persists in Cameroon today, even with the availability of some measures of protecting the victims available

¹⁵⁶ See *Id.* § 59(3)

¹⁵⁷ See *Id.* § 61.

¹⁵⁸ 158 PC, *supra* note 18, § 385.

¹⁵⁹ CPC, *supra* note 19, § 391.

¹⁶⁰ Judgment No. 32/COM of Dec. 7, 2023 (Cameroon).

¹⁶¹ CPC, *supra* note 19, § 393(1)(a) (“with the exception of civil awards, fines and costs shall be paid immediately by depositing the said sums of money at the court registry”). *Id.* § 393(1)(b) (“the convict shall, if he fails to pay immediately, serve a term of imprisonment in default of payment in accordance with the provisions of sections 564 and following”).

¹⁶² CPC, *supra* note 17, § 389(4) (“the part of the judgment known the verdict shall indicate the nature of the judgment, the level of the court, and whether the accused is guilty or not, if guilty, it shall state the offence for which he has been found guilty, the relevant sections of the law applied, the sentence pronounced and where necessary, the civil award”). See also CPC § 391.

under Sections 365 and 366 of the PC¹⁶³, Section 571 of the CPC and Law No. 2009/004 of the April 14, 2009, on Legal Aid in Cameroon¹⁶⁴. This is so because in the case where the State is held to be directly liable to pay damages to the victims, there is an assurance that these will be paid, either to the victims or their legal heirs or representatives. These processes have been noted to involve several administrative bottlenecks, which tend to discourage the victims¹⁶⁵. It is true that the law makes provisions for compensation schemes, but it is difficult for victims to enforce their rights. Compensation and damages are most often awarded but do victims actually get compensated? Is there a procedure for compensation accessible to the ordinary man?

The right of the victims to compensation, which should at least cover physical and moral damages, as well as the feeling of helplessness, should not be restricted to the financial level. If the aggression affects the most personal and important rights, an integral compensation must always be sought, including measures of assistance and public aid in order to overcome the victimisation process or syndrome that is personal rehabilitation and social reintegration, as discussed above.

¹⁶³ CPC, *supra* note 17, § [reparation enforcement provision] (this section provides that the convict will remain in prison until full payment to the victim has been made — an open window for the victim to be assisted to ensure that compensation or restitution ordered by the judge is complied with; the unanswered question is how frequently these provisions are applied; what if the convict lacks the financial means; will he remain in prison his entire life; what becomes of the compensatory award if he remains in prison; and what legal alternatives exist to address this situation for the benefit of the victim?).

¹⁶⁴ Legal aid is a system or a mechanism that allows the underprivileged to benefit from total or partial procedural fees like registration fees, bailiff, notary or expert fees. It enables persons with insufficient resources to obtain either court judgments or the enforcement of the same with no prior payment of all or part of the costs which he ought to have paid. It concerns all expenses by the courts, procedures or acts for which it is granted.

¹⁶⁵ Smith Naseri Edumebong, *supra* note 17, at 48.

As a signatory to the CAT, Cameroon has a duty to guarantee, within its legal system that victims of torture are equally compensated¹⁶⁶. Currently, there are no specific legal instruments that guarantee reparation for victims of torture. National legislation does not comply with Article 14 of the CAT. Although Cameroon has signed and ratified the Convention, it has not adopted provisions upon which victims can rely to assert their rights. The law does not guarantee access to effective remedies and reparations for proven victims of torture and ill-treatment. Without such an enforceable right, torture survivors in Cameroon have no specific recourse to obtain redress, or compensation and are, therefore, dependent on the principles of redress set forth in general civil law¹⁶⁷.

The provisions within Section 277-3 PC, as examined above are fines, which are paid not to the victims but to the State. Reference to the relevant dispositions of the PC and CPC, as discussed earlier, equally apply to these categories of victims. Of particular note is the fact that the CAT Committee is against the joinder of civil and criminal actions arising from the same offence, because it limits the ability of the victim to seek redress, especially considering the often-fraught investigation process relating to torture in detention facilities¹⁶⁸.

However, in a bid to protect victims, the law on the enforcement of court decisions provides that a court may order provisional execution on behalf of a civil party, despite any appeal, regarding compensation for damage resulting from injury to the physical integrity of a person, for justified costs and expenses required for emergency care, limited exclusively to transport or transfer, pharmaceutical, medical and hospitalisation

¹⁶⁶ CAT, *supra* note 13, art. 14 (1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.).

¹⁶⁷ Rapport de la société civile 2024, *supra* note 32, at 52.

¹⁶⁸ Committee Against Torture, Sixth Periodic Report, *supra* note 44, at 8.

costs¹⁶⁹. This urgent measure is especially important to the situation of victims of torture who sometimes need urgent care to ameliorate their condition. Additionally, the CPC provides that: “if the court is not yet in a position to assess the quantum of damages due to the civil party, it may, subject to the conditions provided by law, make an award to him which should be enforced notwithstanding any object or appeal”¹⁷⁰. The provision further indicates that such an award shall bear interest in case of non-payment¹⁷¹.

The relative absence of other forms of substantive redress measures, such as guarantees of non-repetition, satisfaction and right to truth and the limited access to rehabilitation, points to the fact that although redress mechanisms are available for victims of torture, they are ineffective to meet international standards¹⁷². Annual statistics on compensation measures are not available¹⁷³.

5. Conclusion

This article has all along appraised the application of the principle of humanity in the criminal justice system of Cameroon. The first corollary of the principle of humanity in criminal law is the prohibition of torture and all inhuman or degrading punishment or treatment. This produces its effects not only on the definition and criminalisation of torture but also causes considerable impact in the field of punishment, putting barriers against death penalty, life imprisonment or indeed long terms of imprisonment, inhuman or degrading prison systems, and maintaining rehabilitation as the main focus of the penitentiary intervention. Respect for the principle of humanity in criminal law should also apply in the field of

¹⁶⁹ Loi No. 92/008 du 14 Août 1992 fixant certaines dispositions relatives à l'exécution des décisions de justice (Cameroon), as amended by Loi No. 97/018 du 7 Août 1997, art. 3(b).

¹⁷⁰ CPC, *supra* note 19, § 392(1).

¹⁷¹ Section 392(2) of the CPC.

¹⁷² Smith Naseri Edumebong, *supra* note 17, at 50. :

¹⁷³ Committee Against Torture, Sixth Periodic Report, *supra* note 44, at 22.

victims of crimes, guaranteeing their rights and giving them a full role in the criminal justice system.

It is obvious from the above analysis that the application of the principle of humanity is fundamentally guaranteed by international human rights treaties ratified by the State. These treaties are subsequently domesticated by virtue of Article 45 of the Constitution and enshrined into national legal instruments, particularly the PC and the CPC. While acknowledging the progress made so far by the State at the strategic, normative, institutional and operational levels in incorporating this principle as an intrinsic condition of the human being in its legal and institutional frameworks, there are still several challenges as demonstrated throughout this research.

Thus, there is an absolute need to review the legal and judicial processes surrounding this principle. The government should *inter alia* introduce a moratorium on executions of death penalty or at least provide death penalty procedural safeguards, explore alternative sentencing options and strengthen the legal safeguards for those facing severe penalties.

A revision of Article 277-3 of the PC is highly recommended so that the penalties for the offence of torture are proportionate to the gravity of the acts and that any act of torture is punishable by a sentence of at least 10 years, in accordance with Article 4(2) of the CAT. The CPC needs to be amended to make acts of torture imprescriptible, so that the perpetrators and accomplices of such acts can be investigated, prosecuted and punished without limitation.

Also, the criminal justice system should guarantee the strict enforcement of the CPC, specifically regarding prohibitions against torture, the right to legal counsel and the requirement of judicial oversight during detention. This includes ensuring the right to physical and moral integrity, preventing inhumane treatment and upholding the presumption of innocence. This requires strict enforcement of the CPC, ensuring judicial independence and combating corruption to protect suspects from torture, illegal detention and inhuman treatment.

Main necessities for a fair criminal justice system include training law enforcement on human rights to ensure lawful, proportional and respectful policing, improving prison conditions to meet international humane standards and guaranteeing prompt, fair trials by independent courts. These measures foster public trust, reduce recidivism and uphold dignity.

Furthermore, faster and more efficient access to justice for victims of torture should be ensured and enable the most disadvantaged victims to access financial legal aid throughout the proceedings. The adoption of national legislation consistent with Article 14, which will guarantee the identification, rehabilitation and resocialisation of victims, respecting the principles of non-discrimination, accessibility, accountability and victim-centeredness should not be left out. State-led mechanisms at the relevant levels to ensure victims have access to holistic reparations need to be established.

Moreover, the government needs to improve material conditions in all places of deprivation of liberty by ensuring that prisoners receive, in a timely manner and free of charge, the medical care and medication required by their condition, have access to nutritious and sufficient food and have adequate sanitary conditions and sufficient ventilation in the cells, taking into account the climatic conditions in the country.

Finally, the State needs to allocate enough resources, especially financial and infrastructural, to curb the deplorable prison conditions which represents a major obstacle in the rehabilitation of the offenders. This will contribute enormously to a fairer and humane criminal justice system in line with the various international law standards applicable in Cameroon.

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