TRENTO STUDENT LAW REVIEW

Vol. 1, No. 2 | October 2019

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

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Layout Nicolò Orlich
Cover Associazione Acropoli

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VOL. 1 OCTOBER 2019 NO. 2

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Introduction

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As we navigate our daily lives as global citizens, we constantly grapple with issues that affect us as individuals and as members of larger communities – families, places of employment, scholarly societies, social groups, geographical regions, nations, etc. Legal systems across the globe endeavor to address complex societal issues that balance the rights of individuals and the goals of broader communities. The five articles in this issue of the *Trento Student Law Review* encapsulate this theme: harmonizing individual rights with community dynamics.

The article *"Taming" Legal Privileges: An Analysis of the U.S. and Italian Law* takes a comparative approach, analyzing the differences in how civil and common law jurisdictions – the United States and Italy, in particular – treat and regulate the shield of attorney-client privilege. This article highlights the role of confidentiality protections in providing an individual client the ability to speak freely with counsel, but situates the attorney-client relationship within the broader context of corporate dealings and cross-border alliances.

The reality of the collision of individual and community politics and a free press comes to life in the article *Defamation Actions as Weapons Against Political Speech in Europe*. The author examines the intersection of defamation law and freedom of speech in the context of political dialogue across America and Europe. At issue are the rights of individuals (even those in the public eye) to be protected from slander or libel, the rights of authors, journalists, and publishers to exercise

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freedom of speech, and the societal benefits of public discourse about pivotal and complex political issues.

Multi-national agreements are the focus of the article entitled *The Problem of Reservations to Human Rights Treaties: A New Challenge to the Traditional Concept of International Law*, specifically with regard to individual states' reservations attached to human rights treaties. The author highlights how the goal of human rights treaties to protect individuals can be undermined by sovereign states' strict adherence to foreign policy platforms when negotiating and entering into agreements with other nations.

The article *The History and Practice of Substantive Due Process: A Question of Legitimacy* provides background on a perceived paradigmatic shift in an "economic-and-property-rights-based approach" to the concept of substantive due process to "one that is dedicated to safeguarding individual liberties". Through the lens of civil rights cases, this article explores different approaches to building consensus in judicial decision-making.

Finally, in the article *WESE©: A Teaching and Learning Experience on Sustainability*, the author recounts an innovative, experiential, educational adventure in which one professor and twelve students walked the Via degli Dei (Way of the Gods), a historical route between Bologna and Florence, while learning about "sustainability". In doing so, the author explores how effective environmental sustainability necessitates a balance among personal choices, group dynamics, and institutional priorities.

This medley of articles furthers the mission of the *Trento Student Law Review* to foster the exchange of knowledge among law students, professors, and practitioners on a global level. As individuals, members of diverse communities, and global citizens, we can foster collaborative and inclusive dialogue about the foregoing complex legal challenges.

"Taming" Legal Privileges: An Analysis of the U.S. and Italian Law

Riccardo Loschi*

Abstract: Legal privilege guarantees that clients can frankly and openly communicate with their attorneys without running the risk that confidential information is disclosed and used against them. Knowing how to preserve and exercise privilege rights in different jurisdictions is of utmost importance for companies and professionals, especially if operating globally. As demonstrated by recent scandals in the United States and judgments in the European Union, complex privilege issues arise very frequently both in litigation and in the day-to-day business. While legal privilege is recognized in almost every jurisdiction, civil and common law jurisdictions approach and regulate privilege in significantly different ways. This paper compares the legal framework of the United States and Italy through the analysis of case law and decisions. The purpose of this work is twofold: on one hand, to highlight differences and similarities in the U.S. and Italian legal privilege regulation, with a focus on the corporate and cross-border context; on the other, to investigate the different assumptions underlying privilege doctrines, and improve the management of privilege issues in practice.

Keywords: Legal professional privilege; *segreto professionale*; comparative law; United States; Italy.

1. *Introduction*

Legal privilege guarantees that clients can frankly and openly communicate with their attorneys without running the risk that confidential information is disclosed and used against them. Recent scandals involving politicians and their attorneys[1], as well as rulings of the European Court of Justice (ECJ) on corporate[2] and finance[3] related

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1. See Jan Wolfe, *Factbox: Does Attorney-Client Privilege Apply to Trump Lawyer Raid?* (Reuters, April 10, 2018), available at https://www.reuters.com/article/us-usa-trump-russia-privilege-factbox/factbox-does-attorney-client-privilege-apply-to-trump-lawyer-raid-idUSKBN1HH2U7 (last visited October 31, 2019); Randall D. Eliason, *Trump Claims 'Attorney-Client Privilege Is Dead.' Here's Why He's Wrong* (Washington Post, April 10, 2018), available at https://www.washingtonpost.com/opinions/trump-claims-attorney-client-privilege-is-dead-heres-why-hes-wrong/2018/04/10/dac1f63c-3ceb-11e8-974f-aacd97698cef_story.html (last visited October 31, 2019).

2. See Philippe Coen, *Legal Privilege: An Overview of EU and National Case Law*, foreword to the e-Competitions Bulletin special issue on legal privilege (March 22, 2018); C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, ECR 2010 I-8301.

3. See, for example, C-15/16, *Baumeister* (2018), where the ECJ clarified that national competent authorities may not disclose confidential information they have received (except for the cases listed in the MiFID I – now MiFID II – directive), due to the obligation of professional secrecy imposed upon them.

matters, have put legal privilege back in the spotlight. As complex issues of privilege frequently arise in day-to-day business and litigation, both in national and cross-border contexts, knowing how to preserve confidentiality of communication and information is critical for companies, professionals and private subjects.

Almost every jurisdiction recognizes clients' basic right to prevent disclosure of relevant information shared with attorneys[4]. The views on the nature of privilege rights are however not unanimous, and the scope and definition of attorney-client privilege differ from jurisdiction to jurisdiction[5]. These differences mainly depend on how each legal system regulates the taking of evidence in proceedings. The more "intrusive" the power of a counterparty or court to search for and request specific documents, the more often privilege is invoked, and the more the law of privilege is shaped and developed[6]. Correspondingly, the breadth of attorney-client privilege is often narrower in civil law systems than in common law jurisdictions, where the scope of disclosure is broader and privilege defenses are numerous[7].

In the interstate and cross-border context, courts resort to conflict of laws principles to determine the law regulating privilege[8] and rarely

4. For an overview on the scope of legal privilege in various jurisdictions, see Annabelle Möckesch, *Attorney-Client Privilege in International Arbitration* para. 1.2 et seq. (Oxford University Press 2017).

5. An example of definition of attorney-client privilege is "the client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney". *Black's Law Dictionary*, "Attorney-client privilege" (Thomson Reuters 11th ed. 2018).

6. See, for example, Gary B. Born, *International Commercial Arbitration* 2736–2737 (Kluwer Law International 2nd ed. 2014).

7. For instance, civil law systems such as Italy (see section 3.2 below), France (see, for example, Cour de cassation, 1e civ., November 3, 2016, No. 15-20.495) and Switzerland (see, among others, Federal Criminal Court, September 4, 2017, BE.2017.2) typically exclude from the scope of attorney-client privilege communications with in-house counsels. In Germany, the issue is still disputed, although recent decisions have established that legal privilege does not apply to internal investigations conducted by in-house counsels (see, for example, Bundesverfassungsgericht, 2 BvR 1405/17, 2 BvR 1780/17, 2 BvR 1562/17, 2 BvR 1287/17, 2 BvR 1583/17, June 27, 2018). See also Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* 811 et seq. (Kluwer Law 2012).

8. This applies to the vast majority of common law (for example the United States, England and Australia) and civil law jurisdictions (for example Italy, Switzerland

define its nature[9]. Such assessment, however, largely depends on whether national laws characterize privilege as intrinsically substantial or procedural[10]. While this has generally led courts to apply either the *lex loci* or the *lex fori*, different applicable provisions and judicial approaches have produced disparate outcomes even within the same jurisdiction[11].

This paper addresses some of the most relevant privilege-related issues by comparing the legal framework of a common law jurisdiction, the United States, and of a civil law jurisdiction, Italy. The U.S. and Italian legal privilege doctrines reflect different relationships between two conflicting principles underlying legal privilege, that is, the search for truth in proceedings and the protection of a party's right to confidentiality (more correctly: to freely communicate with her counsel)[12].

Inspired by the search for "substantive" truth by means of adversarial litigation[13], legal privilege plays a significant role in the United

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and Germany). See Möckesch, *Attorney-Client Privilege* para. 8.18–8.20 (cited in note 4).

9. Among the few judgments on the defining the nature of privilege, see Lord Scott's opinion in *Three Rivers District Council v. Governor and Company of the Bank of England* (No. 6), UKHL 48 (2004), 1 AC 610, 646 (2005), that considers the discussion as to the nature of privilege sterile. Legal privilege assumes substantial connotation when a party invokes it to object to the production of documents during inspections, procedural connotation when a party relies on it to refuse to answer certain questions. See also *Daniels Corporation International Pty v. Australian Competition and Consumer Commission*, 213 CLR 543, 552 (2002), stating that privilege is a rule of substantive law and not merely a rule of evidence because it is not confined to the process of discovery and inspection.

10. See section 5 below.

11. See Diana Kuitkowski, *The Law Applicable to Privilege Claims in International Arbitration*, 32 Journal of International Arbitration 65, 72–74 (2015).

12. On the balance of principles, see Ronald Dworkin, *Taking Rights Seriously* 93–97 (Harvard University Press 1977); Giorgio Pino, *Teoria e pratica del bilanciamento: Tra libertà di manifestazione del pensiero e tutela dell'identità personale*, 8 Danno e responsabilità 577, 577–578 (2003).

13. See Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding: Their Justified Divergence in Some Particular Cases*, 18 Law and Philosophy 497, 502–503 (1999), citing Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 Yale Law Journal 207, 218 (1944), who defines the divergence between "substantial" and "legal" truth as follows: "In case a fact is disputed, the judicial decision which determines that the fact has occurred ... 'creates'

States. Legislation and case law thoroughly regulate the various aspects of legal privilege and allow the court or one of the parties to request broad disclosure of documents. U.S. legal privilege normally attaches to (i) all communications between in-house or external counsel and their clients that are made for the purpose of obtaining advice or assistance (attorney-client privilege), and (ii) all documents that are prepared in anticipation of litigation (work-product privilege).

In Italy, litigation proceedings are characterized by the search for "legal", rather than "substantive", truth[14]. This results in a narrower scope of legal privilege, so that the need for a comprehensive set of rules is not as strong as in common law jurisdictions. However, while scholars have sometimes argued that a privilege doctrine hardly exists in Italy[15], Italian law specifically regulates privilege rights and their exercise, including through deontological, criminal and civil procedural law provisions[16].

This paper examines privilege rights under U.S. and Italian law in order to (i) highlight the main features of legal privilege and its underlying rationales, (ii) analyze certain limitations applying to the corporate context (that is, corporate employees and in-house counsels), and (iii) discuss if and to what extent foreign legal privileges are recognized and protected.

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legally the fact [formal legal truth] and consequently constitutes the applicability of the general rule of law referring to the fact. In the sphere of law the fact 'exists,' even if in the sphere of nature the fact has not occurred".

14. See, for example, Francesco Cavalla, *Retorica processo verità: Principi di filosofia forense*, preface, 11–13 (FrancoAngeli 2nd ed. 2007). See also Giulio Ubertis, *La ricerca della verità giudiziale,* in Giulio Ubertis (ed.), *La conoscenza del fatto nel processo penale*, 10–12 (Giuffrè 1992), who considers the definition of truth and true sentence proposed by Alfred Tarski, *The Semantic Conception of Truth: And the Foundations of Semantics*, 4 Philosophy and Phenomenological Research 341, 341–375 (1944), as the preferable one to guide courts in evaluating facts that will form the basis of their decision.

15. See, for example, Angelo Dondi, *Spunti in tema di "*legal ethics*" come etica della difesa in giudizio,* 49 Rivista trimestrale di diritto e procedura civile 261, 262 (1995).

16. See section 2.2 below.

2. *Scope and Purpose of U.S. and Italian Legal Privilege*

2.1. *The U.S. Legal Framework*

The general rule under U.S. law is that a company cannot be compelled to disclose privileged material to government authorities, civil plaintiffs, or any others, unless exceptions apply or a waiver exists. In order to avoid compulsory disclosure, a party may resort to a number of privilege doctrines. The two core privileges concerning legal information and documents under U.S. law are the attorney-client privilege and the work product doctrine. While attorney-client privilege applies to communications between counsel and their clients seeking legal advice, the work product doctrine attaches to documents prepared by or for a client in anticipation of legal proceedings[17].

2.1.1. *Attorney-Client Privilege*

The attorney-client privilege promotes open communication between attorneys who have been admitted to the bar of a federal court and their clients. It protects communications between them from compelled disclosure if these communications were intended to be, and have in fact been kept, confidential and were made to obtain or provide legal assistance[18].

More specifically, in assessing whether a particular communication exchanged between client and attorney is covered by privilege,

17. U.S. law provides also for other, lesser-known, privileges aimed at protecting specific types of materials from disclosure (for example, self-critical analysis carried out in the context of internal investigations) regardless of whether they involve lawyers. This is the case, for instance, of the bank examination privilege, according to which bank regulators may refuse to disclose information concerning past or ongoing examinations. See, for example, *Tice v. American Airlines, Inc.*, 192 F.R.D. 270 (N.D. Ill. 2000); *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), affirmed, 479 F.2d 920 (D.C. Cir. 1973).

18. *Brennan Center for Justice v. United States Department of Justice*, 697 F.3d 184, 207 (2nd Cir. 2012). See also *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 71 (2010). However, the "reasonable belief" to be dealing with a licensed attorney – which is, a subject acting like an attorney – enables the client to invoke attorney-client privilege. See *Anwar v. Fairfield Greenwich Ltd.*, 982 F. Supp. 2d 260, 265 (S.D.N.Y. 2013); *Gucci America, Inc. v. Guess?, Inc.*, 2011 WL 9375, *5 (S.D.N.Y.).

courts must establish whether it "was generated for the purpose of obtaining or providing legal advice as opposed to business advice"[19]. It follows that attorney-client privilege does not cover business-related communications[20]. Moreover, while attorney-client privilege attaches to communication regarding facts[21], clients cannot refuse to answer questions concerning facts – if compelled to do so – simply because these are incorporated into communications with their counsel[22].

The attorney-client privilege attaches to the client, who is solely entitled to invoke it[23]. By contrast, attorneys and agents[24] have the duty to keep privileged information confidential, unless they obtain their client's permission[25]. Communications exchanged with third parties, not retained as counsel's agents, may also benefit from attorney-client privilege if the third party's work is necessary to enable the communications between the client, the counsel, and/or the agent (such as a translator)[26]. In all other cases, the presence of a third party generally breaks the attorney-client privilege.

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19. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014). There are no "magic words" to turn a business-related communication into a legal advice. Moreover, merely copying an attorney on a business communication or labeling a document "privileged" does not make it privileged.

20. *In re County of Erie,* 473 F.3d 413, 419 (2nd Cir. 2007).

21. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

22. See *Hoffman v. Outback Steakhouse of Florida, Inc.*, 251 F.R.D. 603, 609–610 (D. Colo. 2008), where the court held that the defendants had to respond to questions concerning facts, despite these were incorporated into privileged communications.

23. *In re Application of Sarrio, S.A.*, 119 F.3d 143, 147 (2nd Cir. 1997).

24. Clients and counsel sometimes retain third-parties experts specialized in certain aspects of internal investigations (for example, forensic accountants or engineers). Since these experts work closely with counsel, communications involving clients or counsel and agents can also be privileged if the agent's work (i) is under the direction of legal counsel (*United States v. Kovel*, 296 F.2d 918, 920–923 (2nd Cir. 1961); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 325–30 (S.D.N.Y. 2003); *Gucci America, Inc.*, 271 F.R.D. at 71); (ii) is relevant for providing legal advice (*Cavallaro v. United States*, 284 F.3d 236, 247 (1st Cir. 2002); see also *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002)); and (iii) is directly supervised by the counsel (*Cavallaro*, 284 F.3d at 247; *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d at 325–330).

25. See *Swidler & Berlin v. United States*, 524 U.S. 399, 410–11 (1998); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2nd Cir. 1967).

26. *United States v. Ackert*, 169 F.3d 136, 139 (2nd Cir. 1999).

The application of the attorney-client privilege is subject to limitations. One of the main exceptions to the non-disclosure of privileged communication is the so-called crime-fraud exception. This exception applies where (i) "the client communication or attorney work product in question was itself in furtherance of the crime or fraud" and (ii) there is "probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity"[27]. If these requirements are met, the client will not be entitled to invoke the attorney-client privilege with respect to "client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct"[28]. Other limitations exist at the corporate level, where the attorney-client privilege for communication exchanged within a company is construed narrowly[29] and covers only specific types of communication[30].

2.1.2. *Work Product Doctrine*

Attorney-client privilege may not apply to materials created by attorneys in the anticipation of civil, criminal or other proceedings. To preserve the confidentiality of these materials, clients may rely on the work product doctrine, which protects a party from compelling disclosure.

The Federal Rules of Civil Procedure (FRCP) provide for compelling discovery of any communication or document "that is relevant to any party's claim or defense and proportional to the needs of the case", unless it is "privileged"[31]. Pursuant to Rule 26(b)(3), a party may not disclose "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)"[32]. In determining whether to apply the privilege, courts should therefore assess whether: (i) clients and attorneys

27. *In re Grand Jury Subpoenas Dated March 2, 2015*, 628 Fed. Appx 13, 14 (2nd Cir. 2015) (citations omitted).

28. *Ibidem*.

29. *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1126 (9th Cir. 2012).

30. Other peculiar company-related cases – which is, in-house counsels and corporate employees – will be discussed in section 3 below.

31. See FRCP 26(b)(1).

32. FRCP 26(b)(3).

prepared the material specifically because they foresaw an incoming litigation ("because of" test); (ii) materials constitute opinion work product[33]; and, if they do not, (iii) the plaintiff has demonstrated that there exists a substantial need for the disclosure of that material[34].

The practical application of the above-mentioned requirements raises a number of questions. In fact, assessing what should be considered as prepared in the anticipation of litigation, or what material constitutes the result of the attorney's opinion, is not always straightforward. As a general rule, work product doctrine does not protect pre-existing records of materials created by the client which subsequently become relevant in the context of litigation[35]. Nevertheless, the work product doctrine may apply to those records containing a "selection and compilation" of documents, even where the documents themselves do not fall within the scope of privilege. According to case law, such is the case when the creation of a record has involved and required the work, skills and opinion of an attorney[36]. The burden of proving that the above-mentioned requirements are met rests on the party asserting the work product privilege, who is also required to persuade the court that the disclosure of the records or compilation of documents would reveal the attorney's opinions[37].

2.2. *The Italian Legal Framework*

Under Italian law, legal privilege (*segreto professionale*) extends to attorney-client communications and work product by lawyers, including preparatory or internal documents, and protects the

33. The "opinion work product" doctrine includes any documents concerning counsel's opinions and/or judgments on a specific matter. The doctrine does not cover facts or discussions of legal theories. Fact work product is instead discoverable only in case the materials are critical to present a case and the party cannot otherwise obtain them (or their equivalent) without undue hardship. See *Holmgren v. State Farm Mutal Automobile Insurance Co.*, 976 F.2d 573, 577 (9th Cir. 1992); FRCP 26(b)(3).

34. See, for example, *Datel Holdings Ltd. v. Microsoft Corp.*, 2011 WL 866993, *6–7 (N.D. Cal. 2011); FRCP 26(b)(3).

35. *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 384–385 (2nd Cir. 2003).

36. *Sporck v. Peil*, 759 F.2d 312, 316–317 (3d Cir. 1985).

37. *Id.* at 317; *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d at 386–387.

confidentiality of all the information exchanged between, by, or to lawyers in the context of a professional relationship. Legal privilege is expressly provided for by the Lawyer's Code of Ethics ("LCE")[38] and Law of December 31, 2012, no. 247 regulating the profession of lawyer in Italy ("Law 247/2012"), while the Criminal Code ("CP"), the Code of Criminal Procedure ("CPP"), and the Code of Civil Procedure ("CPC") regulate the exercise of privilege rights.

2.2.1. *Criminal and Deontological Provisions*

Italian legal privilege applies only to "qualified professionals" as defined in article 200 CPP[39]. The list includes attorneys who are members of the Italian bar (*avvocati*). Pursuant to article 200 CPP and article 6(3) Law 247/2012, attorneys have the duty not to disclose the confidential subject matter of their professional service and the right to abstain from testimony regarding any information acquired in connection with their activities[40].

The Lawyer's Code of Ethics (LCE), in accordance with article 200 CPP and Law 247/2012, imposes on lawyers a duty to respect professional secrecy. Relevant provisions stipulate that legal privilege is both a right and a duty of attorneys and covers all the information acquired from the client in the context of litigation or otherwise[41]. A lawyer must assure the rigorous observance of privilege and the utmost discretion regarding information received as part of the

38. The Lawyer's Code of Ethics (approved by the National Bar Council on January 31, 2014) provides for binding principles and rules of conduct that attorneys must at all times follow in fulfilling their professional responsibilities.

39. The scope of article 200 CPP is narrowly construed: the aforementioned list of professionals cannot be extended to include similar figures since, by virtue of article 200(1)(d) CPP, the right to claim professional secrecy can only be established by law. See Paolo Tonini, *Manuale di procedura penale* 297–298 (Giuffrè 16th ed. 2015).

40. Article 200 CPP and article 6(3) Law 247/2012 are closely linked to article 51(1) LCE, pursuant to which, if a lawyer becomes a witness, he shall "refrain, unless in exceptional cases, from testifying as person of interest or witness about circumstances of which he has obtained information in the course of his professional activity or which are related to any representation in which he has been engaged". See Alessandro Diddi, *Profili processuali della nuova disciplina dell'ordinamento forense*, 3 Processo penale e giustizia 91, 93–94 (2013).

41. Articles 13 and 28(1) LCE; article 6 Law 247/2012.

representation and legal advice provided to the client[42]. A lawyer is, however, allowed to disregard the duty of confidentiality in specific cases, such as when the disclosure of information would prevent the commission of a crime[43]. The duty of confidentiality also applies to a lawyer's employees and third parties occasionally working with a lawyer on specific cases[44].

Pursuant to article 622 CP, the violation of this duty can lead to criminal sanctions if the disclosure damages the client or a third party[45]. From a professional responsibility standpoint, where an attorney violates his duty to respect professional secrecy, the National Legal Council[46] may issue pecuniary and disciplinary sanctions, including suspending the attorney from the exercise of the legal profession from one to three years[47].

Contrary to the approach under U.S. law, the Italian legal privilege mainly protects attorneys and their offices, while clients may not themselves invoke privilege to prevent searches or seizures at their premises[48]. Specific provisions protect attorneys' offices from searches, inspections, or seizures. These include article 103 CPP, which prohibits inspections and searches at a lawyer's office unless the lawyer or one of her associates has been indicted. In this case, the scope of searches and inspections must be limited to the search of evidence

42. Article 13 LCE; article 6(1) Law 247/2012.

43. Article 28(4) LCE; article 200(1) CPP. See also Diddi, *Profili processuali* at 95–97 (cited in note 40).

44. Article 28(3) LCE; article 6(2) Law 247/2012.

45. See Article 622 CP: "anyone disclosing confidential information he or she acquired knowledge of due to his or her ... profession, without cause or to gain profit for him or herself or for others, is punished, if such disclosure causes damage". See also Tonini, *Manuale* at 301 (cited in note 39).

46. The National Bar Council is a public institution which carries out, amongst others, administrative and disciplinary activities relating to the legal profession. It is established under the auspices of the Minister for Justice and consists of lawyers elected by fellow members of the bar, with one representative from each appeal court district.

47. Article 28(5) LCE; article 6(4) Law 247/2012. See also article 51(4) LCE: "The breach of duties under the previous sub-sections [that is, lawyer becoming a witness] entails the disciplinary sanction of censure".

48. In case of searches or seizures at the clients' premises, clients may still be able to avoid the disclosure of privileged documents stored therein if the attorney is present and objects to the seizure of such documents.

specifically identified in advance, and only documents constituting the – or part of – the *corpus delicti* may be seized[49].

It is, however, unclear whether these provisions on legal privilege extend to documents and items relating to proceedings (in which the attorney appeared as defense counsel) other than that in which the search has been ordered. No unanimous position on this issue has been reached in the Italian case law. In one case, the Supreme Court held that no privilege applies to correspondence kept in the attorney's office if the search or seizure order concerns proceedings in which the client is not involved[50]. In a different judgment, the Supreme Court held that the attorney representing a company can invoke privilege against searches or seizures at the company's premises if the company is involved in different proceedings (including civil or out-of-court proceedings)[51]. In both judgments the Court has, however, consistently held that if different proceedings were to be or had been commenced against the attorney's client, such seized correspondence may not be used against her in those proceedings[52].

2.2.2. *Privilege and Evidence in Italian Civil Litigation*

In Italian civil litigation, issues of privilege relating to evidence and discovery may arise with regard to orders for production of documents (article 210 CPC), orders for inspection of persons or things (article 118 CPC), and the right to refrain from giving testimony (article 249 CPC).

49. See article 103(1) and (2) CPP.

50. See Cassazione penale, January 22, 1991, n. 195, in 32 Cassazione penale 1537 (1992).

51. See Cassazione penale, April 17, 2001, n. 8963, in 43 Cassazione penale 1968 (2003).

52. The Supreme Court of Cassation's decision does not take into consideration, however, that the seizure of communication may still result harmful to the attorney's client. This may be the case, for example, if the document seized contains sensitive information that may give rise to client's civil or criminal liability and such information – but not the document itself – are used against him. Moreover, to the author's knowledge no Supreme Court's judgment has clarified whether, in case a company's representative is indicted but the company is not involved in any related proceedings, privilege would apply also to communications searched or seized at the company's premises if these were exchanged between the company and the attorney.

Pursuant to articles 118 and 210 CPC, upon request of a party to the proceedings the court may order the other party or a third party to produce a document or other evidence or consent to the inspection of their person or an object in their possession, if (i) this is necessary for the ascertainment of the facts of the case, and (ii) the enforcement of the order does not result in a breach of one of the duties of secrecy set forth by articles 200 and 201 CPP[53]. Additionally, article 249 CPC states that the provisions of the Code of Criminal Procedure applicable to the hearing of witnesses (including article 200 CPP) also apply to civil proceedings. As a result of the interplay between articles 210, 118, and 249 CPC and article 200 CPP, a party to a proceeding or a third party, called to testify or ordered to produce a specific document or to consent to an inspection, may refuse to do so on the basis of privilege[54].

It should, however, be noted that in Italian civil litigation the existing rules on privilege are rarely enforced. The power granted by Italian law to judges constitutes an exceptional power to compel evidence during proceedings, derogating from the general rules of evidence[55]. Indeed, the Supreme Court considers orders for document production as an "evidentiary tool of last resort, which may be used only to obtain evidence that may not be obtained elsewhere"[56]. Accordingly, numerous judgments of lower courts have clarified that a party may not resort to articles 118 and 210 as a mean to overcome its evidentiary deficiencies[57]. Furthermore, Italian courts do not grant requests for

53. Cassazione civile, June 20, 2011, n. 13533. Pursuant to article 118(2) and (3) CPC, the court may draw adverse inferences against a party or condemn it to pay a fine varying from Euro 250 to Euro 1,500 if it refuses to comply with an order of inspection without cause.

54. See Crisanto Mandrioli and Antonio Carratta, 1 *Diritto processuale civile* 288–290 and 298–299 (Giappichelli 26th ed. 2017); Claudio Consolo (ed.), *Codice di procedura civile commentato* 1451 and 2563 (Wolters Kluwer 5th ed. 2013); Paolo Cendon (ed.), *Commentario al codice di procedura civile* 974–975 and 1268–1269 (Giuffrè 2012).

55. See Cassazione civile, March 14, 1988, n. 2435; Cassazione civile, April 13, 1989, n. 1774.

56. Cassazione civile, February 23, 2010, n. 4375, in 61 Giustizia Civile 1049 (2011). See also Cassazione civile, March 15, 2016, n. 5091, in 81 Responsabilità civile e previdenza 1250 (2016).

57. See, for example, Tribunale di Verona, 3rd civil division, March 12, 2018; Tribunale di Torino, 6th civil division, November 4, 2016, n. 5266; Tribunale di Messina, 2nd civil division, March 15, 2003, in 35 Giurisprudenza di merito 2182 (2003).

the production of categories of documents or "any and all" documents relating to a defined legal relationship or other specific topic or request. Instead, discovery is granted only in relation to specific documents identified in advance as relevant and material to the dispute[58]. If a party to the proceedings fails to produce any document requested by the court, the court may only infer that such document is adverse to the interests of that party[59].

3. *Legal Privilege and Companies*

3.1. *In-house Counsels and Employees in the United States*

In the United States, it is "well settled" that the attorney-client privilege covers communications between the corporation and its in-house counsels on the basis of the same principles regulating privilege between client and outside counsel[60]. Thus, communications exchanged with in-house counsels will be covered by privilege as long as the client exchanged them for the purpose of obtaining legal advice[61]. This implies that communications will not be covered by privilege simply because an attorney is a party to them. Issues may therefore arise should the attorney write or receive communications while acting in a capacity other than that of in-house counsel (the so-called dual hat scenario). This may occur, for instance, where a lawyer also works as a manager of the company. In such cases, privilege does not extend to all communications exchanged between the lawyer and the company, but is limited to those addressed to her as the in-house

58. See Cassazione civile, April 16, 1997, n. 3260. See also Cassazione civile, December 20, 2007, n. 26943.

59. See Consolo, *Codice di procedura civile* at 2441 (cited in note 54); see also Tribunale di Roma, 8th civil division, June 3, 2017, n. 11240.

60. One of the first cases to recognize corporations' privileges is *Radiant Burners, Inc. v. American Gas Association*, 320 F.2d 314 (7th Cir. 1963). In that case, the Seventh Circuit also observed that the nature and scope of the privilege would have to be developed on a case-by-case basis. See also *Hertzog, Calamari & Gleason v. Prudential Insurance*, 850 F. Supp. 255 (S.D.N.Y. 1994); *United States v. Mobil Corp.*, 149 F.R.D. 533 (N.D. Tex. 1993).

61. *Upjohn Co.*, 449 U.S. at 395.

counsel, provided that all requirements set forth by U.S. law are met[62]. As discussed below, complexity increases when communications are exchanged between the client and in-house counsels working under different jurisdictions[63], because communications between client and in-house counsel might not be considered privileged (as is the case, for instance, in Italy, Switzerland or China)[64].

More specifically, attorney-client privilege attaches to communications between counsels and employees of the company only if certain requirements are met: (i) the requested legal advice is to be provided on the basis of the information disclosed in the communication; (ii) the information must concern a matter within the scope of the employee's duties; and (iii) the employee is aware that the information was provided or requested for the purpose of securing legal advice for the company[65]. Before interviewing employees, the company should give its employees a so-called Upjohn warning (also known as "corporate Miranda"), informing them, among other things, that the attorney interviewing them is the company's counsel and the employee should keep the conversation confidential[66]. Company employees should also be aware that where information concerns company-related matters, the privilege attaches to the company and, therefore, the company's directors and representatives are the only empowered to disclose such information[67].

The privileged treatment of communications concerning the company and its former employees is disputed. According to one view, satisfying *Upjohn* requirements should suffice to extend privilege to those communications exchanged with former employees, especially if cumulated with appropriate warnings as to the fact that the counsel,

62. See, for example, *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 474–475 (N.D. Tex. 2004) (applying Texas law).

63. In *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994), the court expressly recognized that the definition of the scope of in-house privilege "is complicated", especially in case of cross border issues.

64. See section 5 below.

65. See *Upjohn Co.*, 449 U.S. at 394–395.

66. See *id.* at 383; *United States v. Stein*, 463 F. Supp. 2d 459, 460 (S.D.N.Y. 2006).

67. *Commodity Futures Trading Commission v. Weintraub,* 471 U.S. 343, 348–349 (1985); *United States v. Wells Fargo Bank, N.A.*, 2015 WL 3999074, *2 (S.D.N.Y.).

and not the employee, represents the company[68]. Case law is, however, not entirely consistent. According to some rulings, communications with former employees are not privileged[69] because former employees "share no identity of interest in the outcome of the litigation" and "it is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit"[70]. To the contrary, it can be suggested that even where communications with former employees are not covered by the attorney-client privilege, privilege can still be invoked on a different basis. For instance, communications might still be privileged if: (i) the work product doctrine's requirements are met[71]; (ii) "the former employee retains a present connection or agency relationship with the client corporation"[72]; or (iii) the present-day communication concerns a confidential matter that was uniquely within the knowledge of the former employee when she worked for the client corporation[73].

3.2. *In-house Counsels and Employees in Italy*

Italy does not grant privilege rights to corporate employees. Contrary to U.S. attorney-client privilege, Italian privilege attaches to attorneys who are members to the bar. Therefore, employees and the companies they work for cannot invoke privilege. This does not mean, however, that employees can freely use or spread confidential communications acquired while they worked for the company. Employees or former employees who disclose sensitive information relating to

68. *In re Allen*, 106 F.3d 582, 605–606 (4th Cir. 1997); *United States v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 40–41 (D. Conn. 1999).

69. *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 304–305 (E.D. Mich. 2000).

70. *Clark Equipment Co. v. Lift Parts Manufacturing Co.*, 1985 WL 2917, *5 (N.D. Ill.).

71. See section 2.1.2 above.

72. *Infosystems, Inc.*, 197 F.R.D. at 306.

73. See *Valassis v. Samelson*, 143 F.R.D. 118, 123 (E.D. Mich. 1992); *Peralta*, 190 F.R.D. at 40; *City of New York v. Coastal Oil New York, Inc.*, 2000 WL 145748, *2 (S.D.N.Y.).

their former employer to the advantage of themselves or third parties are still liable pursuant to article 622 CP[74].

Privilege does also not apply to in-house counsels, albeit for different reasons. Before the implementation of Law 247/2012, in-house counsels did not enjoy any of the legal privilege rights applicable to members of the bar. This was because employees were not allowed membership in the Italian bar[75]. Today, Article 2(6) of Law 247/2012 provides that attorneys and employers (individuals or companies) may "create work relationships ... for the purpose of providing out-of-court legal assistance in the exclusive interest of the employer"[76]. Although Law 247/2012 does not grant legal privilege rights to in-house counsels, doubts may arise as to whether privilege may apply to this third, hybrid, category of counsel – that is, attorneys who are members of the bar and work for an employer on non-judicial matters[77]. In its reading of the provisions of Law 247/2012, the Italian Bar Association (IBA) recently opined that they do not, by any means, aim to assimilate in-house counsels to attorneys, so that only the latter remain entitled to legal privilege rights[78]. The *trenchant* approach of the IBA appears to be inspired by, and supportive of, certain rulings of the ECJ, such

74. See Cassazione penale, October 26, 2010, n. 44840, in 136 Il Foro italiano 286 (2011). The scope of article 622 CP is broad and not limited to the professionals listed in article 200 CPP, but extends to "anyone" who disclose confidential information obtained in the exercise of his profession at his or third-parties advantage and to the (potential) detriment of the subject who provided such information. See Roberto Garofoli, 2 *Manuale di diritto penale* 712 and 714 (NelDiritto 11th ed. 2015).

75. See, for example, Consiglio di Stato, April 23, 2002, n. 2199, in 127 Il Foro italiano 482 (2002).

76. Article 2(6) Law 247/2012.

77. The issue has been raised, among others, by the Bar Council (*Consiglio dell'Ordine degli Avvocati*) of Bologna. See Consiglio Nazionale Forense - Commissione consultiva, *Parere 10 marzo 2017*, available at https://www.consiglionazionaleforense.it/pareri-di-rilievo (last visited October 31, 2019).

78. See *ibidem*. Arguably, the interpretation proffered by the IBA does not adequately addresses certain uncertainties arising from the wording of article 2(6) Law 247/2012, including the relationship between the second period ("out-of-court legal assistance ... is reserved to avvocati (which is, attorneys admitted to the bar)") and the third one ("It is nevertheless permitted the creation of work relationships ... for the purpose of providing out-of-court legal assistance in the exclusive interest of the employer").

as *Akzo Nobel*[79]. In that case, Akzo Nobel Chemicals and its subsidiary Akcros Chemicals challenged two European Commission decisions which held that certain communications between Akzo Nobel's managing director and Akcros's in-house counsels were not covered by privilege. The Court rejected the annulment claim on the grounds that professional privilege is subject to two cumulative conditions. Firstly, privilege applies to all communication exchanged between the client and the lawyer "for the purpose of the client's rights of defense". Secondly, "the exchange must emanate from 'independent lawyers', that is to say 'lawyers who are not bound to the client by a relationship of employment'"[80]. The Court further clarified the concept of independence between lawyer and client, and observed that the independence of lawyers should be determined both positively, "by reference to professional ethical obligations", and negatively, "by the absence of an employment relationship"[81]. For this reason, in-house lawyers do not – and cannot – enjoy "the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client"[82].

With respect to communications concerning out-of-court matters exchanged between corporations and their attorneys working as in-house counsels in Italy, attorneys are therefore not different from in-house counsels and, as such, communications are not covered

79. C-550/07 P, *Akzo Nobel*. In Italy, the *Akzo Nobel* case has been endorsed by Italian Council of State; see Consiglio di Stato, June 24, 2010, n. 4016; TAR Lazio, September 9, 2012, n. 7467, in 61 Rivista di diritto industriale 597 (2012).

80. C-550/07 P, *Akzo Nobel* at para. 41. The Court confirmed the principles set out in the leading case C-155/79, *AM & S Europe Ltd. v. Commission*, ECR 1982 1575.

81. C-550/07 P, *Akzo Nobel* at para. 45. See also Mario Siragusa, *A Selection of Recent Developments in EU Competition Law*, Concorrenza e mercato 7, 60–61 (2011).

82. C-550/07 P, *Akzo Nobel* at para. 45. Moreover, the Court noted that that interpretation does not violate the principle of equal treatment because the in-house lawyer is in fundamentally different position from external lawyers and legal privilege is not "at all the subject-matter of the regulation" (*ibidem* at para. 52–58). However, scholars have argued that under article 6 of the European Convention on Human Rights privilege also constitute a fundamental personal right of the client that, consequently, is legally enforceable before the court. See Taru Spronken and Jan Fermon, *Protection of Attorney-Client Privilege in Europe*, 27 Penn State International Law Review 439, 444 (2008).

by privilege[83]. It is, instead, unclear whether privilege may apply to communications concerning judicial matters on which the attorney employed by the company is assisting the company in her capacity as *outside* counsel. While an affirmative answer can be justified by looking at the subject-matter of the communication, it can be argued that privilege should not apply to those communication either. In fact, the ECJ's judgment in *Akzo Nobel* predominantly examined the "degree of independence" that a counsel should enjoy in order to invoke privilege, rather than the subject matter of the communication. Therefore, as long as the attorney is somehow employed by the company, a proper degree of independence, including with respect to communication relating to judicial matters, can hardly be met[84].

4. *Waiver of Legal Privilege*

4.1. *Waiver of Privileges in the United States*

A party may inadvertently or intentionally waive the privilege attaching to certain documents in a number of ways. A party may also disclose privileged material to third parties bearing a common interest, without waiving the privilege attaching to it. Below, three cases are considered in which legal privilege can be waived, namely (i) accidental disclosure, (ii) purposeful disclosure, and (iii) the so-called common interest privilege.

83. Conversely, pursuant to articles 19 and 23 Law 247/2012, lawyers employed by (i) a public administration or (ii) by a state-owned or a state-controlled entity are to be considered as external s and, as such, fully enjoy legal privilege rights. See Rolando Dalla Riva, *L'avvocato dipendente di ente pubblico, segreto d'ufficio e segreto professionale: Le novità della legge 247 del 2012*, 18 Il lavoro nelle pubbliche amministrazioni 977, 992–993 (2015).

84. The scope of the *Akzo Nobel* decision is limited to the legal privilege under EU law (specifically, to the case of investigations under EU law) and does not specifically address the privilege regimes of the EU's Member States. To determine the applicable legal privilege regime to communications exchanged within the EU, in-house counsel must therefore assess both EU and the relevant Member State's legal framework applicable to the case.

4.1.1. *Accidental Disclosure*

Accidental disclosure of documents does not always cause a party to waive the privilege attaching thereto. For instance, the Federal Rules of Evidence (FRE) address the accidental disclosure of documents in the context of communication between a party and government agencies. Pursuant to section 502(b) FRE, a party who inadvertently discloses information "in a federal proceeding or to a federal office or agency" does not waive its privilege if "(1) the disclosure was inadvertent; (2) the holder of the privilege took reasonable steps to prevent disclosure; and (3) the holder promptly took steps to rectify the error"[85].

Less predictable are the consequences of accidental disclosure of privileged communication occurring among private parties. Pursuant to article 501 FRE, privilege claims or defenses in civil cases are governed by state laws applicable to the dispute. Whether accidental disclosure amounts to a waiver of privilege is therefore to be assessed on a case-by-case basis, by the competent state court and according to the applicable state law[86]. Given the legal uncertainties affecting this scenario, parties often preventively enter into so called claw-back agreements, so that either party is entitled to claw back documents once these have been inadvertently disclosed.

4.1.2. *Purposeful Disclosure*

A party might choose to intentionally disclose privileged information for a number of reasons. In the context of governmental

85. *Bayliss v. New Jersey State Police*, 622 Fed. Appx. 182, 186 (3d Cir. 2015).

86. See, for example, *Kanter v. Superior Court*, 253 Cal. Rptr. 810 (Ct. App. 1988), concerning accidental disclosure of documents by a lawyer who subsequently claimed privilege on those documents. In in order to decide that accidental disclosure did amount to waiver of privilege, the court considered whether: (i) the precautions taken to prevent inadvertent disclosure were reasonable; (ii) the rectification of the error occurred timely; (iii) the disclosure was limited in scope and extent; (iv) the issues of fairness and privilege protection were outbalanced by the negligence with which privilege had been guarded; and (v) there existed special circumstances which could have justified an error in the disclosure of documents (for example, accelerated or compelled discovery). See also *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985).

investigation, for example, a party may do so to provide the government with exculpatory facts or obtain credit for cooperating with the government's investigation. Purposeful disclosure carries implications for the disclosing party in the vast majority of U.S. jurisdictions.

One notable consequence is that the party may not limit its disclosure to a single document or communication. Once a piece of otherwise privileged information has been voluntarily disclosed, the party may be required to disclose a number of additional documents pertaining or relating to it[87]. Such disclosure obligations associated with intentional disclosure may extend to future civil litigation as well[88]. As observed in *Re Keeper of the Records*, "it is well accepted that waivers by implication can sometimes extend beyond the matter actually revealed"[89]. Thus, the specific scope of the waiver triggered by partial disclosure will be determined by the court's discretion, and a party may be compelled to disclose more information than what originally planned[90].

4.1.3. *Common Interest privilege*

A peculiar form of waiver is the so-called common-interest privilege. This doctrine allows a party to agree to share with one or more parties a confidential document concerning a matter of common

87. Unlike under English law, where a party is allowed to disclose only certain privileged information, most U.S. state laws do not recognize selective waiver of privilege. See *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2nd Cir. 2000). The Eighth Circuit has acknowledged the possibility of "selective disclosure". According to this theory, litigants can voluntarily disclose materials to the government and, at the same time, preserve their privilege in the civil litigation context. See also *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978). So far, however, other circuits have rejected the "selective disclosure" theory. See, for example, *In re Pacific Pictures Corp.*, 679 F.3d at 1127.

88. See *id.* at 1128; see also *In re John Doe Corp.*, 675 F.2d 482, 489 (2nd Cir. 1982).

89. *In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 23–24 (1st Cir. 2003).

90. *Ibidem* ("Such waivers are almost invariably premised on fairness concerns"). See also *In re Subpoena Duces Tecum Served on Willkie Farr & Gallagher*, 1997 WL 118369, *3–4 (S.D.N.Y.).

interest and to agree to keep such information confidential without waiving the privilege[91].

In principle, the "common interest" (i) must be a legal interest, not a business or commercial interest[92]; (ii) must be shared by all the parties; and (iii) must concern information whose disclosure is "reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted"[93]. A common interest agreement can be entered into in any situation, and is not limited to the existence of actual litigation[94]. Further, the common interest privilege doctrine applies even if the parties involved are not aligned on all issues underlying the confidential information or have conflicting interests relating to that specific information[95]. Pursuant to section 76 of the Restatement of the Law Governing Lawyers, it is in fact sufficient that the communications exchanged relate to the matter the parties have in common[96].

4.2. *Waiver of Privilege in Italy*

Italian law does not expressly contemplate the waiver of legal privilege because, as mentioned above, the disclosure of privileged communication is considered an exceptional and last resort measure[97]. Absent specific provisions and case law, the existence of a waiver can however be derived from a systematic interpretation of articles 622 and 50 CP. As mentioned, article 622 CP punishes anyone who discloses confidential information without cause or to gain a profit, while article 50 CP provides that anyone infringing a right with the consent of the person entitled to dispose of such right, does not commit a criminal offense. Thus, attorneys will not be liable for disclosing privileged information as far as the client consented to the disclosure.

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91. For instance, if one (or many) plaintiff(s) is (are) suing multiple defendants for similar actions based on the same core events, and the defendants want to pursue a similar, joint defense, they may seek to enter into a common interest agreement.

92. *Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 964-965 (N.D. Ill. 2010).

93. Restatement (Third) of the Law Governing Lawyers § 76 (2000); see *Oxy Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, 891 (2004).

94. *United States v. United Technologies Corp.*, 979 F. Supp. 108 (D. Conn. 1997).

95. *Eisenberg v. Gagnon*, 766 F.2d 770, 787–88 (3rd Cir. 1985); *Meza v. H Muehlstein & Co.*, 176 Cal. App. 4th 969, 982 (2009).

96. See Restatement (Third) of the Law Governing Lawyers § 76 (2000).

97. See section 2.2.2 above.

Even where no consent exists, an attorney can – or must – disclose privileged communication or documents without incurring in disciplinary or criminal liability where the disclosure: (i) is beneficial for the defense of the client; (ii) would prevent the client from committing serious crimes[98]; (iii) is necessary to prove facts in a dispute between the lawyer and the client; or (iv) concerns information that the lawyer is legally bound to provide to competent judicial authorities[99]. In practice, implicit or explicit waiver of privilege may occur in several ways. For example, the privilege may be waived when the attorney does not claim it at the time of the documents' request or seizure, voluntarily submits the documents to the court, or consents to the seizure of the documents.

While no U.S.-style common interest doctrine exists, parties can share privileged information among themselves in order to pursue common interests or to agree on common defense strategies. At the same time, however, the disclosure of privileged information should always be subject to the parties' understanding – to be preferably set out in writing – that the information will be kept confidential.

Waiver of privilege can also be limited to specific documents. Consent under article 50 CP is subject to strict construction, meaning that consent does not extend beyond what has been explicitly consented to[100]. It can be noted, however, that partial or limited waiver in a civil litigation context may expose the client to a compelling disclosure order by the court, especially where the piece of information that has been disclosed indicates the existence of additional undisclosed information relevant to the case.

98. See article 28(4) LCE and article 200(1) CPP. According to Alessandro Diddi, *Testimonianza e segreti professionali* 140–144 (Cedam 2012), although attorneys have the duty to inform the competent authorities in case this could prevent the commission of crimes (see, for example, article 364 CP and article 41 Legislative Decree 231/2007), this does not mean that article 200 CPP ceases to apply. Once an attorney has informed the authorities, he might still refuse to testify in the related proceedings.

99. See article 200 CPP. See also Tonini, *Manuale* at 301–302 (cited in note 39).

100. See Ferrando Mantovani, *Diritto penale* 257 (Cedam 8th ed. 2013).

5. *The Interstate and Cross-Border Context*

5.1. *United States*

When a privileged communication or relationship touches multiple jurisdictions, U.S. courts are required to conduct a choice-of-law analysis to determine which substantive law should apply[101]. To determine whether privilege issues involve multiple jurisdictions, federal courts are consistent in applying the so-called touch base approach. Pursuant to this approach, U.S. courts must proceed on a case-by-case basis and apply the Federal Rules where communications "touch base" in the United States, that is, there exists more than a mere "incidental connection with the United States"[102]. Conversely, privilege on purely foreign communication will be governed by the provisions of the relevant foreign jurisdiction[103].

The characterization of privilege as "substantial" has a significant impact on the courts' determination of the applicable privilege law. U.S. law attaches great importance to the "substantial interest" that a state may have in applying privilege to certain communication[104], and requires courts to apply a number of parameters when assessing the law applicable to privilege. Pursuant to section 139 of the Second

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101. In *Berg Chilling Systems, Inc. v. Hull Corp.,* 435 F.3d 455, 462 (3rd Cir. 2006), Judge Alito observed that the conflict of laws can be material or apparent. An apparent or "false" conflict arise where the application of laws of different jurisdictions would bring to the same outcome.

102. *VLT Corp. v. Unitrode Corp.*, 194 F.R.D. 8, 16 (D. Mass. 2000).

103. *Golden Trade, S.r.l. v. Lee Apparel Co.*, 143 F.R.D. 514 (S.D.N.Y. 1992); *Gucci America, Inc.*, 271 F.R.D. at 65. The same applies to conflict-of-laws issues arising from communications exchanged between corporate employees' and foreign in-house lawyers. According to scholars, U.S. privilege should apply to communications between employees and foreign lawyers where the foreign jurisdiction "recognizes a privilege comparable to the United States' attorney–client privilege" or the issue at stake "pertains to American law issues or proceedings". See Todd Presnell, *Privilege Issues for In-House Lawyers – Foreign and Domestic – in U.S. Litigation*, IADC Committee Newsletter, January 2016, 3, available at https://www.iadclaw.org/securedocument.aspx?file=1/19/Corporate_Counsel_January_2016.pdf (last visited October 31, 2019).

104. See Restatement (Second) of Conflict of Laws § 139, comment c) (1971), pursuant to which the law regulating privilege is the law of the forum, which is the law of the state that has a substantial interest in determining whether evidence of the communication should be privileged.

Restatement, U.S. courts are required to consider as admissible communications which: (i) are not privileged under the *lex loci* having the most significant connection to them, even though they would be privileged under the *lex fori*, unless this would conflict with a "strong public policy" of the forum; or (ii) are privileged under the *lex loci* having the most significant connection to them, even where they are not privileged under the *lex forum*, unless special reasons exist not to give effect to the law of the forum[105]. Courts must therefore determine which is "the law of the country that has the 'predominant' or 'the most direct and compelling interest' in whether those communications should remain confidential"[106]. Courts' analyses must focus on a number of factors, including the place in which the communication occurred, the location of the attorney and/or the client, the location where the attorney-client relationship was entered into or centered, and the seat of the proceedings[107].

When assessing the law applicable to privilege, federal courts have reached disparate outcomes[108]. Some rulings have confirmed the application of the *lex causae*, while others have considered privilege as subject to the *lex fori*, without characterizing privilege as substantive or procedural[109]. So far, only few courts have justified their decision to apply the *lex causae* to privilege based on its alleged substantial nature[110]. In most of these cases, courts have emphasized the need for

105. See Restatement (Second) of Conflict of Laws § 139 (1971).

106. *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.,* 208 F.R.D. 92, 98 (S.D.N.Y. 2002).

107. See Restatement (Second) of Conflict of Laws § 139, comment e) (1971); *Astra*, 208 F.R.D. at 98. See also *In re Rivastigmine Patent Litigation*, 237 F.R.D. 69, 76 (S.D.N.Y. 2006), where the court held that communications that are not privileged in a certain jurisdiction will be admissible in the United States, even if U.S. privilege would apply to those communications.

108. See Möckesch, *Attorney-Client Privilege* para. 8.21 et seq. (cited in note 4).

109. See, for example, *Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1328 (9th Cir. 1995); *CSX Transportation, Inc. v. Lexington Insurance Co.*, 187 F.R.D. 555, 559 (N.D. Ill. 1999); *Elliott Associates, L.P. v. The Republic of Peru*, 176 F.R.D. 93, 96 (S.D.N.Y. 1997).

110. In a number of cases, U.S. state courts have favored admissibility and therefore applied the less restrictive rule between the forum state and the state with the most significant relationship with the communication. See, for example, *Major v. Commonwealth*, 275 S.W.3d 706, 714 (Ky. 2009) (citing Restatement (Second) of Conflict of Laws § 139); *People v. Allen*, 784 N.E.2d 393 (Il. App. 2003) (applying a less

effective protection of the interest of law of the country most interested in the preservation of confidentiality, by regarding communications as privileged as long as their disclosure would have undermined this interest. An example in this respect is the case *In Re Payment Card Interchange Fee*, where the U.S. District Court for the Eastern District of New York ruled that certain confidential documents prepared by the European Commission in the context of its competition investigations cannot be discovered in US antitrust litigation[111]. The District Court reached the decision after applying a so-called five-parts test, which is used when a court is to balance international comity[112] against discovery requests[113]. This test considers a number of factors, including the country of origin of the information and to what extent the disclosure would undermine foreign-sovereign interests (and *vice versa*)[114]. After careful evaluation of these parameters, District Judge John Gleeson concluded that privilege should apply to the documents due to the Commission's "strong and legitimate reasons to protect confidentiality", which include (i) the "encouragement of third parties

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restrictive rule); *Kos v. State*, 15 S.W.3d 633 (Tex. App. 2000) (same); *State v. Eldrenkamp*, 541 N.W.2d 877, 881–882 (Iowa 1995) (same). Such approach is made possible by the broad legal concepts set forth by the applicable rules (for example, "strong public policy", and "special reasons").

111. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* No. 05-MD-1720, slip op. at 19 (E.D.N.Y., August 27, 2010).

112. International comity has been defined as the "deference to foreign government actors that is not required by international law but is incorporated in domestic law principles". This principle may come into play where the rules of a foreign sovereign nation are affected by the rules of the nation where the matter is being heard, and requires that the rules of the foreign nation be considered. In applying this principle, federal courts have held that U.S. courts should not engage in actions that may "cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures". See *Ings v. Ferguson,* 282 F.3d 149, 152 (2nd Cir. 1960); *Daimler AG v. Bauman,* 134 S. Ct. 746, 763 (2014). For a detailed analysis of the international comity principle and the criticalities affecting its application in the U.S., see William S. Dodge, *International Comity in American Law*, 115 Columbia Law Review 2071 (2015).

113. See Siragusa, *A Selection of Recent Developments* at 62–63 (cited in note 81).

114. Other factors include the importance of the requested information to the U.S. litigation, the specificity of the request, and the possibility to secure that information through different means. In applying the "five-steps" test, the court followed the principle affirmed *In Re Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007).

to cooperate with the Commission's investigations"; (ii) the "frustration of the Commission's interests [that would derive] from a judgment in favor of the disclosure"; and (iii) the fact that the disclosure would "requir[e] the European Commission to turn over the fruits of its own labors in the service of the plaintiffs' American case"[115].

5.2. *Italy*

Italian law does not expressly grant privilege rights to foreign lawyers. Article 200 CPP merely lists, among the subjects enjoying privilege rights, the category of "*avvocati*", i.e. members of the Italian bar, without clearly specifying whether foreign lawyers fall within the scope of the provision. None of the other provisions on criminal and civil procedure touches upon the issue. It is also unclear whether foreign lawyers may rely on the Italian Lawyer's Code of Ethics to invoke privilege rights. Although the LCE provides that foreign lawyers are subject to the same ethical rules applicable to Italian lawyers when operating in Italy[116], it does not extend the same duty to information obtained by the lawyer while working abroad. These uncertainties mainly depend on the characterization of Italian privilege as "procedural" and should be addressed by applying civil and criminal procedure's general rules and principles.

According to the Supreme Court, ethical duties imposed on, and privilege rights attributed to, foreign professionals by their home

115. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* slip op. at 19–21. Other examples in this respect concern the applicability of privilege to communication exchanged between the company and in-house counsels residing in foreign jurisdictions. In these cases, U.S. courts have held that where the law of foreign states relevant to the dispute does not recognize communications exchanged with in-house lawyers as privilege, privilege should not apply regardless of what prescribed under U.S. law. See, for example, *In re Rivastigmine*, 237 F.R.D. at 76 (describing how Swiss law does not privilege communications with in-house counsel). See also *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479 (S.D.N.Y. 2013), where the court found that there was no privilege because "there are cognizable distinctions between a 'lawyer' and an 'in-house counsel' in Chinese law".

116. See article 3(3) LCE. Foreign lawyers might be subject to both the ethical rules of their home country and to the Italian ones. This is the case, for example, of Italian lawyers exercising their functions abroad, which are subject to a double ethical standard. See Remo Danovi, *Il nuovo codice deontologico forense: Commentario* 89–90 (Giuffrè 2014).

jurisdictions may apply in Italy if certain requirements are met. With respect to the refusal to testify on privileged information, the Supreme Court in 2005 affirmed that privilege can be invoked by foreign professionals if: (i) they obtain the information in the exercise of their functions during activities carried out abroad; (ii) they are authorized to exercise their profession in their home country; and (iii) there exist agreements between their home country and Italy for the mutual recognition of the relevant professional title[117]. With respect to the acquisition of privileged documents, the Supreme Court in 2010 affirmed that the professionals listed by article 200 CPP are the only entitled to invoke privilege and that the list cannot be extended to foreign professionals – specifically, accountants – regardless of whether they are registered or authorized to exercise their profession[118]. The Supreme Court further stated that allegedly privileged communications acquired in the United Kingdom by an Italian public prosecutor should be admitted by Italian courts unless the acquisition methods are found to be against "public order" or "morality"[119].

Arguably, these Supreme Court rulings should also apply to foreign attorneys; being based on general principles of law, they are not limited to specific professionals, but can rather extend to categories of professionals comparable to those mentioned in article 200 CPP. These rulings should therefore also apply to foreign attorneys from countries with which Italy has entered into agreements for the mutual recognition of professional titles (such as the other member states of

117. Cassazione penale, May 1, 2005, n. 7387, in 132 Rivista penale 470 (2006). The case concerned private investigators. The private investigator was qualified under the law of Switzerland and, pursuant to international agreements between Italy (EU) and Switzerland, his professional title is recognized under Italian law. See also Cecilia Sanna, *Gli operatori economici ticinesi e la reciprocità in Italia dei diritti offerti dall'Accordo sulla libera circolazione delle persone*, 28 Rivista italiana di diritto pubblico comunitario 289, 297 (2018).

118. Cassazione penale, February 25, 2010, n. 15208, in 137 Rivista penale 808 (2011). The case involved UK-based registered and unregistered accountants which, according to applicable law, could not have benefitted from privilege rights but should have instead reported the content of the communications to the competent authorities.

119. *Ibidem*.

the European Union)[120]. They could also apply where the disclosure of the information would expose foreign attorneys to civil, criminal or disciplinary liability in their home country[121].

6. *Concluding Remarks*

The attention devoted by United States legislation and courts to legal privilege issues stands at odds with the minimal regulation of the same issues under Italian law. While, as noted, this difference is mainly attributable to the rationales inspiring U.S. and Italian privilege doctrines, the application of the former does not necessarily afford greater protection than the latter.

In the United States, legal privilege enables a party or the court to request or order the disclosure of information that would otherwise be impossible to obtain. In response, U.S. law has developed an equal – if not greater – number of protections and precautions to safeguard the confidentiality of specific sensitive information. The result of the interplay between these *desiderata* is a complex legal framework, where the disclosure-oriented landscape is studded with limitations and exceptions. By contrast, in Italy the scope of legal privilege is

120. Article 2.3.1 of the Code of Conduct for European Lawyers provides that "[t]he lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State". The Code of Conduct for European Lawyers sets forth the core principles shared by all European bar associations and applies to all intra-EU issues relating to the lawyers' deontological duties. See Remo Danovi, *Ordinamento forense e deontologia* 217 (Giuffrè 13th ed. 2018). It follows that preventing a foreign attorney admitted to one of the EU Member State's bar to invoke privilege rights that would otherwise be entitled to invoke in his or her Member State with respect to communications exchanged or information obtained in the exercise of his or her profession would frustrate his or her duty of confidentiality. The exercise of privilege rights by lawyers is regulated by the codes of civil and criminal procedure which, pursuant to article 12 of Law 218/1995 on Italian private international law, shall govern any proceedings taking place in Italy. Absent any EU law providing otherwise, it can be argued that the same provisions applying to Italian lawyers also applies to foreign lawyers involved in civil, criminal proceedings or searches, inspections and seizures.

121. See Cassazione penale, May 1, 2005, n. 7387. The Supreme Court affirmed *obiter dictum* that the refusal to testify on information covered by privilege and acquired abroad was further justified by the fact that, had the foreign private investigator consented to testify in Italy, he would have incurred in disciplinary sanctions in his home country.

narrower in civil litigation, where courts' power to compel disclosure is limited, and that of the parties almost non-existent. This approach protects clients from systematic disclosure of documents and consequently reduces the volume of regulation. The scope of privilege is instead broader in the criminal litigation context, where inspections, searches and seizures are more frequent and may undermine a party's right to confidentiality.

Significantly different is also the approach to privilege issues in the cross-border context. While the U.S. law characterization of privilege as "substantial" requires courts to determine the applicable privilege law by looking also at the interests of the law of the state, Italian courts recognize and enforce privilege rights insofar as the acquisition of privileged information does not conflict with the parties' fundamental procedural rights. With respect to the relevance of legal privilege in the corporate context, in the United States legal privilege is a client's right and consequently also attaches to communications exchanged between the company and its in-house counsels. Conversely, internal communications are not protected in Italy, where privilege is construed as a prerogative of attorneys'[122].

Ultimately, it is hoped that a comparative approach to legal privilege doctrines will develop in the future. After all, the United States and Italy exemplify only one of many settings in which the interplay between broad legal concepts, on one side, and the lack of specific provisions and case law, on the other, may lead to unexpected outcomes should privilege-related disputes arise in cross-border transactions. These could, in turn, undermine legal certainty and the predictability of transnational businesses[123]. A more in-depth understanding of legal privilege, as well as its scope and limitations, may therefore help companies and professionals "tame the beast" by spotting potential criticalities upfront and adopt all necessary measures to preserve the confidentiality of documents and communications.

122. On the concept of truth and the lawyers' exercise of their right not to disclose the "substantive" truth, see Roberto Giovanni Aloisio, *L'avvocato tra verità e segreto*, 26 La nuova giurisprudenza civile commentata 497 (2010).

123. See Angelo Dondi, *Segreti ed etica dell'avvocatura: Rilievi minimi in tema di* law of lawyering *e* attorney-client privilege, 63 Rivista trimestrale di diritto e procedura civile 651, 651–654 (2009), who observes that "despite the scarcity of research on the issue, the laws governing attorney-client privilege [in Italy] is critical for the reform [and innovation] of the rules on civil procedure".

Defamation Actions as Weapons against Political Speech in Europe

Allen E. Shoenberger*

Abstract: In its 1964 decision, *New York Times Co. v. Sullivan*, the United States Supreme Court held that, in order for defamation against a public official to be found, "actual malice" had to be established – that is, "that the statement was made ... with knowledge that it was false or with reckless disregard of whether it was false or not". The clear and readily applicabile actual malice standard from *Sullivan* stands in contrast to the vaguer standards of analysis embodied in the jurisprudence of the European Court of Human Rights (ECtHR). This article aims to show certain limitations of that ECtHR jurisprudence by considering some of its most notable decisions on civil and criminal defamation. It suggests that, had a standard similar to Sullivan been applied, these cases would have been decided differently, ensuring better protection of the freedoms of authors and publishers.

Keywords: Defamation; *New York Times Co. v. Sullivan*; actual malice; European Court of Human Rights; proportionality.

1. *Introduction*

Defamation lawsuits involving public officials or public figures are difficult to win in the United States. One of the heaviest burdens on plaintiffs stems from the United States Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*[1]. Under the "actual malice" standard established in that decision, a plaintiff must prove that the allegedly libelous factual statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not"[2].

Internationally, the actual malice standard places the United States is a unique position regarding defamation lawsuits. As a justice of the High Court of Australia remarked years ago, "Most countries employ a balancing test of one sort or another, but the United States is extreme"[3]. This extremity is embodied in the clear and readily applicable requirement from *New York Times Co. v. Sullivan*.

As such, the actual malice standard stands in contrast to the vaguer standards of analysis embodied in the jurisprudence of the European Court of Human Rights (ECtHR) applying article 10 of the European Convention on Human Rights (ECHR). Over many years, the ECtHR

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1. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

2. *New York Times Co. v. Sullivan*, 376 U.S. at 280.

3. This paraphrases a quote by a justice of the High Court of Australia who toured Chicago more than a decade ago. It remains a good summary. See Michael Kirby (Justice of the High Court of Australia), *The High Court of Australia and the Supreme Court of the United States: A Centenary Reflection*, 31 University of Western Australia Law Review 171, 195 (2003): "Most Australians, and most Australian judges (although not the Australian media) consider that the balance struck by United States judicial authority on [the] subject [of protections for free expression] is somewhat extreme", citing *Dow Jones Inc. v. Gutnick*, HCA 56 (2002) as an example of the difference between the two legal systems.

has decided many defamation cases involving criticism of public officials about their public actions. These include criminal prosecutions of reporters, editors, and newspapers. By considering some of this jurisprudence, this article aims to show certain of its limitations as compared to *New York Times Co. v. Sullivan*.

2. New York Times Co. v. Sullivan

In order to fully understand the differences between ECtHR and U.S. case law on defamation lawsuits involving public officials or public figures, it is necessary to first understand the Supreme Court's decision in *New York Times Co. v. Sullivan*.

Sullivan concerned the publication in *The New York Times* of a full-page "editorial" advertisement under the headline *Heed Their Rising Voices*, paid for by various civil rights activists supporting Martin Luther King Jr.'s campaign. The advertisement sought financial support on behalf of the African American right-to-vote movement and student movement. A Commissioner of the City of Montgomery, Alabama, L.B. Sullivan, brought a civil libel lawsuit against *The New York Times* as well as African American and Alabama clergymen whose names appeared in the advertisement[4].

The suit alleged various inaccuracies in the publication, such as the number of times King had been arrested (four, not seven)[5], the allegation that "truckloads of police ... ringed the Alabama State College Campus after [a] demonstration on the [Alabama] State Capitol steps"[6] (whereas police "had been 'deployed near' the campus, but had not actually 'ringed' it"[7]), and the claim that the dining hall of many protesting students "was padlocked in an attempt to starve them into submission"[8] (while in reality only a few students had been barred from entry[9]).

4. *New York Times Co. v. Sullivan*, 376 U.S. at 256–258.
5. *Id.* at 258–259.
6. *Id.* at 257.
7. *Id.* at 289.
8. *Id.* at 257.
9. *Id.* at 259.

While the plaintiff Commissioner was not named in the advertisement, he claimed that the reference to police referred to him as Commissioner of Public Affairs with responsibility for supervision of, *inter alia*, the Police Department, and thus the statements in the advertisement were made "of and concerning" him[10]. Both the governor of Alabama and the plaintiff Commissioner requested a retraction, but *The New York Times* only published a retraction regarding the governor. In response to the Commissioner's request, the *Times* wrote him a letter asking why he thought he was implicated by the advertisement. There was no response to this letter[11].

The jury was instructed that the statements were libelous *per se* – that is, the jurors did not have to decide on their truthfulness – and that liability could be found if they were published and "of and concerning the plaintiff"[12], as "falsity and malice [were] presumed, general damages [did not] need [to] be alleged or proved, but [were] presumed" and while "[a]n award of punitive damages ... apparently require[d] proof of actual malice under Alabama law ... the judge ... refused to charge, however, that the jury must be convinced of malice, in the sense of actual intent to harm or gross negligence and recklessness"[13].

The jury returned a verdict in favor of the Commissioner, awarding $500,000 in damages even though no attempt had been made to demonstrate actual pecuniary harm. Approximately 394 copies of the edition of the *Times* containing the advertisement were circulated in Alabama, about 35 of which in Montgomery County[14]. A second jury in another case also returned a verdict of $500,000 against the *The New York Times*[15]. The Supreme Court of Alabama affirmed the award; it found actual malice based on failure by the *Times* to publish a retraction regarding the plaintiff, even though the newspaper's own files demonstrated that some of the allegations were untrue[16].

10. *Id.* at 256. To establish common law libel, the plaintiff was required to allege that (i) something was published, (ii) it was of and concerning him, (iii) it was false, and (iv) it tended to lower his reputation. *Ibidem*.

11. *Id.* at 261.

12. *Id.* at 262.

13. *Id.* at 262 (quotation marks and citations omitted).

14. *Id.* at 260 fn. 3.

15. *Id.* at 278 fn. 18. Four other lawsuits had been filed against the *Times* by other Montgomery City Commissioners and by the Governor of Alabama. *Ibidem*.

16. *Id.* at 263–264.

The United States Supreme Court found that the constitutional protections of freedom of speech and of the press were applicable[17]. Quoting its decision in *Beauharnais v. Illinois*[18], it observed that it "retain[ed] and exercise[d] authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel; for public men are, as it were, public property, and discussion cannot be denied, and the right, as well as the duty, of criticism must not be stifled"[19].

The court went on to state: "We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks of government and public officials"[20]. It noted that "[t]he present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection"[21].

Most importantly, the court found that such protection was not forfeited by the falsity of some of the factual statements, unless the plaintiff could establish that "the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not"[22]. Thus, holding that the state court's decision violated the First Amendment, the Supreme Court announced a rule requiring that, for defamation against a public official[23] to be established, actual malice had to be demonstrated.

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17. *Id.* at 264. The court rejected an argument that an earlier decision, *Valentine v. Chrestensen*, 316 U.S. 52 (1942), regarding commercial speech, applied, because the court found that the "advertisement" at issue in *Sullivan* was not a commercial advertisement but a protest against official action.

18. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

19. *New York Times Co. v. Sullivan*, 376 U.S. at 268 (quotation marks and citations omitted).

20. *Id.* at 270.

21. *Id.* at 271.

22. *Id.* at 279–280. Three justices would have gone further than requiring actual malice, advocating absolute immunity for the press when it criticizes public officials fulfulling their public duties. See *id.* at 295 (concurring opinion of Justices Black and Douglas) and 298 (concurring opinion of Justices Goldberg and Douglas).

23. Later expanded to cover public figures including "limited public figures". *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

The practical reality is that this actual malice standard is very difficult to meet in the real world. When applying the new standard in *Sullivan*, the court found no duty on the part of the publisher to search through its records to ensure the accuracy of the specific factual statements made in the advertisement.

3. *Article 10 ECHR*

ECtHR jurisprudence mandates that actions in defamation must comply with the requirements of article 10 of the European Convention on Human Rights (ECHR), which states that:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

When applying article 10 ECHR, a court must consider, in order, (i) whether there was an interference with the applicant's right to freedom of expression, (ii) whether such interference was justified as being prescribed by law, (iii) whether it pursued one or more of the legitimate aims set out in paragraph 2 of article 10 ECHR, and, finally, (iv) whether it was necessary to achieve those aims in a democratic

society. When examining (iv), the court must consider proportionality and the justification provided for sanctioning the statement at issue[24].

4. *A Typical Case of Civil Defamation Suit against the Press*

A recent ECtHR case showing how a defamation suit was employed by a public figure against the press and other critics is *Falzon v. Malta*[25]. The case started with offensive emails regarding Michael Falzon, the deputy leader of the Malta Labour Party (MLP)[26]. Falzon identified the emails as threatening[27], but a journalist described them in an article as innocuous[28]. Another journalist also published an article describing these emails as "trivial and unimportant", and criticizing Falzon for involving police forces in the MLP's internal squabbles[29].

Libel proceedings were brought against the applicant, who authored one of the articles, and the newspaper editor[30]. The Court of Magistrates entered judgments against both the applicant and the editor, awarding damages of 2,500 euros and 1,000 euros against each respectively, along with costs. The Court of Appeal affirmed the judgment, finding that the applicant's assumptions could not be considered fair comment, made in good faith and balanced[31]. The editor's testimony before the Court of Appeal that a speech given in Parliament by Falzon suggested that the police was pressured into investigating the matter was deemed inadequate justification.

Subsequently, the applicant commenced proceedings in a civil court complaining that the judgements in the libel proceedings

24. See, for example, *Pedersen and Baadsgaard v. Denmark (No. 2)*, 42 EHRR 486 (2006).

25. *Falzon v. Malta*, ECHR 259 (2018).

26. *Id.* para. 7.

27. *Id.* para. 8.

28. *Ibidem.* That journalist later described the emails as innocent in a published article. *Id.* para. 9.

29. *Id.* para. 10.

30. *Id.* para. 12. The court found that the applicant had failed to prove that Falzon had manipulated and offended the police department for his own political gain. *Id.* para. 12.

31. *Id.* para. 21.

constituted a breach of article 10 ECHR[32]. The claim was dismissed, as was an appeal to the Constitutional Court[33].

The ECtHR held that the libel proceedings violated article 10 ECHR. The court first considered whether the libel suit was an interference with the plaintiff's right to free to expression, concluding that this was the case[34]. The court then turned to to examine whether the interference was necessary in a democratic society[35]. The court distinguished between matters involving private life and matters involving public life[36], more deference being due to matters not implicating private life. In this case, the matter was not related to private life, but public affairs. The court found that inadequate deference was paid to the right to comment on public life, particularly considering the preeminent role of the press in a state following the principles of the rule of law[37]. The press, the court noted, must play its role as public watchdog, particularly when disseminating information about matters of public interest[38].

Moreover, the court found that many of the factual statements were true. These included that an email had been sent and that "there was a certain ease in filing the complaint directly with the [Commissioner of Police] instead of at the local police station, and that there was a certain familiarity between them – enough for them to be on first name terms, as noted in the article"[39].

The court did also distinguish between value judgments and statements of facts. The Constitutional Court had found that the opinionated piece contained declarations presented as fact which had not been proved, and factual assertions in the form of a question which had not reflected real facts[40]. The ECtHR, however, found that the "opening paragraphs of the article contained an implied comparison of the claimant's actions with the plot of the film there mentioned,

32. *Id.* para. 22.
33. *Id.* para. 29.
34. *Id.* para. 50. This issue was uncontested.
35. *Id.* para. 52.
36. *Id.* para. 58.
37. *Id.* para. 53.
38. *Ibidem*.
39. *Id.* para. 59, 63.
40. *Id.* para. 61.

thus constituting a value judgement"[41]; and that, "[f]urthermore, the impugned expressions, although sarcastic, remained within the acceptable degree of stylistic exaggeration employed to express the applicant's value judgement"[42].

The ECtHR went on to note: "[T]he Court's case law has shown a broad and liberal interpretation of 'value judgments' when it comes to journalistic freedom on matters of public interest, particularly concerning politicians ... In the Court's view, by using a style which may have involved a certain degree of provocation, it is plausible that the applicant was raising awareness as to the possibility of any abuse being perpetrated by the deputy leader of the party in opposition, and that he was calling for action by the minister in charge"[43].

The court observed that the proportionality of an interference with article 10 ECHR "may depend on whether there exists a sufficient faculty basis for the impugned statement, since even a value judgement without any factual basis to support it may be excessive"[44]. In the instant case the court found the factual basis at issue in the deputy leader's own speech, which he made in public[45].

The court further noted that without any concrete finding of an effect upon Falzon's private life, the order by the domestic court awarding damages of 2,500 euros (as well as costs of 6,340 euros[46]) could have a chilling effect[47]. This would have been compounded by the fact that the case took, from the beginning to the end, over eleven years[48].

In contrast to the decision in *Falzon*, in the United States under the *Sullivan* doctrine such a case would likely have been disposed of by a decision on a preliminary motion for failure to demonstrate that the speech involved contained factual matter that the publisher knew or should have known was false. Nothing in *Falzon* comes even close to such a showing.

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41. *Id.* para. 62.
42. *Ibidem.*
43. *Id.* para. 64–65.
44. *Id.* para. 65.
45. *Ibidem.*
46. *Id.* para. 72, 75.
47. *Ibidem.*
48. The speech by the deputy leader was delivered on May 6, 2007, and the libel suit was filed on July 17, 2007. The ECtHR delivered its judgment on March 20, 2018. *Id.*

5. *Criminal Libel Prosecutions*

In an earlier criminal libel decision, *Cumpănă and Mazăre v. Romania*[49], the ECtHR applied more expansive legal analysis from that in *Falzon*, to require (i) that the conviction was "prescribed by law", (ii) pursued a legitimate aim (protection of the rights of another), and finally (iii) that the interference was "necessary in a democratic society"[50]. Moreover, the Court examined the specific sanctions applied in the case and "the accompanying prohibitions imposed", finding that they "were manifestly disproportionate in their nature and severity"[51].

The events in *Cumpănă* began with the publishing of an article, written by two journalists, on the awarding of public contract for the towing of improperly parked cars in the city of Constanța. The towing company, Vindalex, was given unilateral authority to decide which cars were improperly parked – "in other words, to treat citizens and their property with contempt", according to the article[52]. Statutorily required procedures for the awarding of the contract were not followed. The statute required a prior decision by the local city council with a two-thirds majority authorizing the contract, and before this was signed it had to be reviewed by a local council's specialist committee. None of this was done. The article stated that "the former deputy mayor ... received backhanders from the partner company and bribed subordinates, including [Ms. R.M.], or forced them to break the law"[53]. It went on to state that Vindalex made considerable profits, but never demonstrated that it had adequate means to impound illegally parked vehicles, which explained why large numbers of privately owned vehicles had been damaged. The newspaper article was based on an unreleased audit report which was confidential at the time; the report, later made public, confirmed that the contract was awarded illegally[54],

49. *Cumpănă and Mazăre v. Romania*, 41 EHRR 200 (2005).

50. *Id.* para. 85, 87.

51. *Id.* para. 120.

52. *Id.* para. 20.

53. *Ibidem.* The council had gone through this process several times before, so they could not claim of ignorance of the law. *Id.* para. 97.

54. *Id.* para. 108.

but contained no allegations of bribery or dishonesty[55]. Revealing it as a source in the judicial proceedings could have led to sanctions for the authors and/or their sources[56]. That may explain why the defendants submitted no evidence in their behalf in the first several levels of judicial proceedings.

According to the ECtHR, prescription by law means that the offense has to have been specifically identified in domestic law. In *Cumpănă* the offences complained of were insult and defamation[57]. The ECtHR found that the domestic courts had adequately described the alleged offences as "prescribed by law", particularly with reference to Ms. R.M., who was a city council official at the time of the events, and a judge on the date of the publication[58]. She had complained that a cartoon accompanying the article had depicted her as a woman in a miniskirt, on the arm of a man with a bag full of money and with certain intimate parts emphasized[59].

With respect to the legitimate aim test, the court found that the article "mainly contained information about the management of public funds by local elected representatives and public officials and ... certain irregularities allegedly committed in the signing of a partnership contract"[60]. These were held to be matters of general interest to the public, which was entitled to receive information about it[61]. The court noted, however, that the article was couched in "virulent terms, as demonstrated by the use of forceful expressions such as 'scam' and 'series of offences' ... 'intentional breach of [the law]', 'backhanders' ... and 'bribed'"[62]. As a result of this evaluation, and considering the distinction between facts and value judgments, the ECtHR decided that it was appropriate to sanction the author of the articles.

The court went on to consider whether or not the particular sanctions applied were justifiable. This consideration was pursuant to the doctrine of proportionality. Besides an order to pay Ms. R.M. for

55. *Ibidem.*
56. *Id.* para. 106.
57. *Id.* para. 25.
58. *Id.* para. 86.
59. *Id.* para. 25.
60. *Id.* para. 94.
61. *Id.* para. 96.
62. *Id.* para. 97.

non-pecuniary damage (a little over 2,000 euros), the applicants had been sentenced to seven months' immediate imprisonment, as well as prohibited from exercising certain civil rights and from working as journalists for one year[63].

The ECtHR stated that prison sentences for journalists exercising journalistic freedom of expression would only be appropriate in exceptional circumstance, "notably when other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence"[64]. In the instant case, no justification for a prison sentence was found, as the facts concerned a debate on matters of legitimate public interest[65]. The Court similarly found that the sanctions of deprivation of civil rights and prohibition from working as a journalist for a year were excessive[66]. Recognizing that "the press must be able to perform the role of a public watchdog in a democratic society"[67], it observed that "the criminal sanction and the accompanying prohibitions imposed ... were manifestly disproportionate in their nature and severity to the legitimate aim pursued by the applicants' conviction for insult and defamation"[68]. In line with its reasoning, however, the ECtHR declined to order reimbursement of the sum that the national courts required to be paid to Ms. R.M. for non-pecuniary damage[69].

Prosecution for libel in Europe stands in sharp contrast to the United States. With the assistance of the Supreme Court's decision in *Ashton v. Kentucky*[70], issued only two years after *Sullivan*, the criminal

63. *Id.* para. 112.
64. *Id.* para. 115
65. *Id.* para. 116.
66. *Id.* para. 117–118.
67. *Id.* para. 119.
68. *Id.* para. 120.
69. *Id.* para. 129. The court declined to award any costs for failure of the applicants to document their costs. *Id.* para. 134. The court also concluded that no non-pecuniary damages would be awarded, finding that the decision in the case was sufficient satisfaction. *Id.* para. 121. For a somewhat similar case see *Dalban v. Romania*, ECHR 6 (1999). In *Dalban*, the ECtHR awarded non-pecuniary damages of 20,000 French francs for a violation of article 10 ECHR in connection with a criminal libel sentence although the defendant had passed away and was effectively exonerated by post-death domestic court findings.
70. *Ashton v. Kentucky*, 384 U.S. 195 (1966).

version of libel law has largely passed into desuetude in the United States. In *Ashton*, the Supreme Court held that Kentucky's common law criminal libel law was so indefinite and uncertain that it could not be enforced as a penal offense consistently with the First Amendment of the U.S. Constitution[71].

6. *Proportionality and Necessity in a Democratic Society*

The crux of ECtHR defamation decisions frequently turns upon considerations of proportionality in assessing whether the concerns of acceding States and their national courts are adequately justified as necessary in a democratic society.

6.1. *Proinsias de Rossa*

In this respect, the ECtHR decision in *Independent News and Media and Independent Newspapers (Ireland) Ltd. v. Ireland*[72] is particularly disturbing; it resulted in a judgment of 300,000 Irish pounds against a newspaper, the *Sunday Independent*, for raising a matter clearly of public concern.

On December 13, 1992 an article was published in the *Sunday Independent*, written by a well-known journalist and entitled *Throwing Good Money at Jobs is Dishonest*. The article commented, *inter alia*, on a recently discovered letter (dated September 1986) to the Central Committee of the Communist Party of the Soviet Union. The letter had been signed by two persons, one of whom was Proinsias de Rossa, a very well-known politician. The letter referred to "special activities" that had previously met shortfalls in the funding of the Workers' Party, a political party of which Mr. de Rossa had been leader. At the time of publication, Mr. de Rossa was the leader of another political party (the Democratic Left) and a member of parliament. Moreover,

71. For a more complete discussion of criminal libel speech see Allen E. Shoenberger, *Connecticut Yankee Speech in Europe's Court: An Alternative Vision of Constitutional Defamation Law to* New York Times Co. v. Sullivan*?*, 28 Quinnipiac Law Review 431 (2010).

72. *Independent News and Media Plc. and Independent Newspapers (Ireland) Ltd. v. Ireland*, ECHR 402 (2005).

he was engaged in post-election negotiations about his party's participation in government.

The reference to "special activities" in the newspaper article was to armed robberies and forgery of currency used to fund the Workers' Party in the very recent past. Mr. de Rossa was allegedly aware of what was going on. According to the article, "Mr. de Rossa's political friends in the Soviet Union were no better than gangsters. They ran labour camps. They were anti-Semitic"[73].

Two trials against the first applicant produced no decision. The third trial ended with a jury verdict for Mr. de Rossa in the amount of 300,000 Irish pounds[74].

The only matter raised on appeal was the award[75]. The ECtHR examined whether the jury's verdict was disproportionate and necessary in a democratic society[76]. The 300,000 pound verdict was measured against historical awards in Ireland. Counsel for the government argued that "[e]ven applying the applicants' defective test, the present award was not exceptionally high" compared to libel awards in certain precedents.

The ECtHR pointed out that Irish law included a requirement of proportionality. That aspect was considered by the Irish Supreme Court, which took into account a number of relevant factors, including the gravity of the libel, the effect on Mr. de Rossa (a leader of a political party) and on his negotiations to form a government at the time of publication, the extent of the publication, the conduct of the first applicant newspaper and the consequent necessity for Mr. de Rossa to endure three long and difficult trials. Having assessed these factors, the Supreme Court concluded that the jury would have been justified in going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation. While 300,000 Irish pounds was a substantial sum, it noted that the libel was serious and grave, with an imputation that Mr. de Rossa was involved in or tolerated serious crime and personally supported anti-Semitism and

73. *Id.* para. 12.

74. *Id.* para. 19. This substantial verdict brings to mind the $500,000 award originally ordered against *The New York Times* in *New York Times Co. v. Sullivan* (see section 2).

75. *Id.* para 20.

76. *Id.* para. 110.

violent Communist oppression. "Bearing in mind that a fundamental principle of the law of compensatory damages is that the award must always be reasonable and fair and bear a due correspondence with the injury suffered and not be disproportionate thereto", the Supreme Court was not satisfied that the present jury award went beyond what a reasonable jury applying the law to all the relevant considerations could reasonably have awarded. It therefore considered the verdict "not disproportionate to the injury suffered by the Respondent"[77]. By a vote of six to one, the ECtHR accordingly found no violation of article 10 ECHR[78].

Under *New York Times Co. v. Sullivan*, this award could not have been awarded for the alleged defamation, because the plaintiff would have been required to prove that the publisher knew or should have known that the allegations about tolerating serious crime and so forth were untrue[79].

6.2. *Danish Police Officers*

In another defamation case, *Pedersen and Baadsgaard v. Denmark*[80], the ECtHR, in a Grand Chamber proceeding (with seventeen judges presiding) and by a vote of nine to eight, sustained a finding of criminal defamation and associated penalties despite the fact that the television programs involved resulted in retrial and acquittal of an individual who had previously been convicted and served more than a decade in prison. The ECtHR stated: "[T]he Court must determine whether the reasons adduced by the national authorities to justify the interference were 'relevant and sufficient' and whether the measure taken was 'proportionate to the legitimate aims pursued'"[81]. The narrow vote of the ECtHR reprises the three-to-two decision by the

77. *Id.* para. 129.

78. *Id.* para. 132.

79. The actual malice required by the Supreme Court in *Sullivan* is almost impossible to prove and none of the facts recounted in the instant case hint that such knowledge existed or that there was any reckless disregard for the facts. The underlying document, the letter to the Central Committee of the Communist Party of the Soviet Union, is arguably quite shocking.

80. *Pedersen and Baadsgaard v. Denmark*, ECHR 12 (2004).

81. *Id.* para. 70.

Danish Supreme Court affirming the convictions and increasing the criminal sentences.

The case started with the airing of two television programs, one entitled *Convicted of Murder*, and the second, *The Blind Eye of the Police*. Television journalists had examined 4,000 pages of reports about a person (X) who supposedly murdered his wife between 11:30 am and 1:00 pm on a particular day. The journalists interviewed a taxi driver who maintained to them that he had followed X and X's son in a car during that period of time. However, the police report of the taxi driver contained no such information. The taxi driver had never seen the written report of his statement. This was not in accordance with proper police procedure, and thus he expressed surprise when the journalists (nine years later) showed him the report without any such information. The investigation revealed many instances in which police statements had not been reviewed by witnesses[82].

Each program began with a statement of the premises on which it had been prepared. "We shall show that a scandalously bad police investigation, in which the question of guilt was prejudged right from the start, and which ignored significant witnesses and concentrated on dubious ones, led to X being sentenced to twelve years' imprisonment for the murder of his wife"[83].

The most serious references to the police superintendent were contained in a series of rhetorical questions. In one such instance, the pictures of two police officers – the named chief superintendent and the chief inspector of the flying squad – were shown on the screen simultaneously and parallel with this question: "Was it [the named chief superintendent] who decided that the report should not be included in the case file? Or did he and the chief inspector of the flying squad conceal the witness's statement from the defense, the judges and the jury?"[84].

With respect to proportionality, the ECtHR stated: "In the instant case, the applicant journalists were each sentenced to twenty day-fines of 400 Danish kroner (DKK), amounting to DKK 8,000 (equivalent

82. *Id.* para. 25. An inquiry conducted by the Regional State Prosecutor found that this non-compliance was not limited to the case involving Mr. X and that no reference to this non-compliance occurred in Mr. X's case.

83. *Id.* para. 11.

84. *Id.* para. 21.

to approximately 1,078 euros (EUR)) and ordered to pay compensation to the estate of the deceased chief superintendent of DKK 100,000 (equivalent to approximately EUR 13,469). The Court does not find these penalties excessive in the circumstances or to be of such a kind as to have a 'chilling effect' on the exercise of media freedom ... Having regard to the foregoing, the Court considers that the conviction of the applicants and the sentences imposed on them were not disproportionate to the legitimate aim pursued, and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient. The interference with the applicants' exercise of their right to freedom of expression could therefore reasonably be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others"[85].

While the criminal sentence did not rise to the level of the *Independent News* 300,000 pound verdict, the sentence was still substantial. Given the finding of the first court, the City Court, that the defendants had reason to believe the statements were true, it is clear that under the *New York Times Co v. Sullivan* decision, neither a finding of defamation, nor any criminal sentence, would have been permissible. The single-judge majorities in both the Danish Supreme Court and the ECtHR highlight how fragile the proportionality test may be in practice. By the narrowest of margins, the court found the penalty appropriate; the chilling effect is rather apparent.

6.3. *The King of Spain*

The ECtHR has decided multiple cases involving heads of state. For example, in a 2011 decision concerning the King of Spain, the ECtHR ultimately held that criminal libel prosecution could not be classified as necessary in a democratic society.

In the case in point[86], a criminal action was brought against an individual – actually a spokesperson for a parliamentary group – for

85. *Id.* para. 93–94.

86. *Otegi Mondragon v. Spain*, ECHR 4 (2011). For the facts of the case see *id.* para. 6–10: "At a press conference ... the applicant, as spokesperson for the [Basque] Sozialista Abertzaleak parliamentary group, outlined his group's political response to the situation concerning the newspaper *Euskaldunon Egunkaria* [which had been ordered closed by the authorities on account of alleged links with the terrorist organization

"serious insult" against the King, pursuant to articles 490(3) and 208 of the Spanish Criminal Code[87].

The applicant was found not guilty by the Basque Country High Court of Justice, although the court observed that the remarks had been "clearly offensive, improper, unjust, ignominious and divorced from reality"[88]. The High Court viewed the criticism as "of a constitutional institution ... made in a public, political and institutional setting ... therefore unconnected to the innermost core of individual dignity protected by law from any interference by third parties"[89].

On appeal to the Supreme Court on points of law, the lower court's judgment was set aside. The Supreme Court "sentenced the applicant to one year's imprisonment, suspended his right to stand for election for the duration of the sentence and ordered the payment of costs and expenses"[90].

An *amparo* appeal to the Constitutional Court was declared inadmissible as manifestly devoid of constitutional content[91].

ETA]. Replying to a journalist he said, with reference to the King's visit to the Basque Country [on the same day], that 'it [was] pathetic', adding that it was 'a genuine political disgrace' for the President of the Autonomous Community of the Basque Country to be inaugurating [an electric power] project with Juan Carlos of Bourbon and that 'their picture [was] worth a thousand words'. He went on to say that inaugurating a project with the King of the Spaniards, who was the Supreme Head of the Civil Guard (*Guardia Civil*) and the Commander-in-Chief of the Spanish armed forces, was 'absolutely pitiful'. Speaking about the police operation against the newspaper *Euskaldunon Egunkaria*, he added that the King was in charge of those who had tortured the persons detained in connection with the operation. He spoke in the following terms: 'How is it possible for them to have their picture taken today in Bilbao with the King of Spain, when the King is the Commander-in-Chief of the Spanish army, in other words the person who is in charge of the torturers, who defends torture and imposes his monarchical regime on our people through torture and violence?'. *Id.* para. 10.

87. *Id.* para. 11.

88. *Id.* para. 13.

89. *Id.* para. 14.

90. *Id.* para. 15–16.

91. "The Constitutional Court noted at the outset that the right to freedom of expression did not encompass a right to proffer insults. It pointed out in that connection that the Constitution did not prohibit the use of hurtful expressions in all circumstances. However, freedom of expression did not protect vexatious expressions which, regardless of their veracity, were offensive and ignominious and were not pertinent for the purpose of conveying the opinions or information in question. The Constitutional Court considered that the weighing of the competing rights at stake

The ECtHR considered that the interference at issue was "prescribed by law" within the meaning of article 10(2) ECHR and was invoked to protect the reputation of the King of Spain. Singling out the King of Spain as head of state, however, was deemed improper, since in its case law "the Court ha[d] already stated that providing increased protection by means of a special law on insults will not, as a rule, be in keeping with the spirit of the Convention"[92].

The court then moved on to the issue of whether the criminal conviction was "necessary in a democratic society". The court recognized that "[t]here is little scope under Article 10 paragraph 2 for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest ... [T]he limits of acceptable criticism are wider as regards a politician as such than as regards a private individual"[93]. By contrast, "[t]he Supreme Court ... considered that the impugned remarks had directly targeted the King in person and the institution he embodied and furthermore it considered them overstepping the limits of permissible criticism"[94]. In that connection, the court noted that the applicant was speaking in his capacity as an elected representative and spokesperson for parliamentary group, so that his comments were a form of political expression[95]. In this regard, the Court stated that it "[could not] but emphasize that freedom of expression is all the more important when it comes to conveying ideas which offend, shock or challenge the established order"[96].

As to proportionality, the court found nothing in the case to justify the imposition of such a prison sentence, which "by its very nature, [would] inevitably have a chilling effect, notwithstanding the fact that

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had been carried out in an appropriate manner by the Supreme Court, as the latter had concluded that the impugned remarks had been disproportionate ... In the Constitutional Court's view, there was no denying the ignominious, vexatious and derogatory nature of the impugned remarks, even when directed against a public figure. That finding was all the more valid with regard to the King, who, by virtue of Article 56 § 3 of the Constitution, was 'not liable' and was a 'symbol of the unity and permanence of the State' ... occup[ying] a neutral position in political debate". *Id.* para. 20–21.

92. *Id.* para. 55.
93. *Id.* para. 50.
94. *Id.* para. 52.
95. *Id.* para. 51.
96. *Id.* para. 56.

enforcement of the applicant's sentence was stayed"[97]. The remarks did not concern the private life of the King or his personal honour, nor amounted to a gratuitous personal attack, but were made "in a public and political context unconnected to the innermost core of individual dignity"[98]. The words employed were provocative, even though when considering the respect for reputation of others, a degree of exaggeration or even provocation is permitted[99]. The remarks, however, did not advocate violence, nor were they considered hate speech[100]. Moreover, they "were made orally during a press conference, so that the applicant had no possibility of reformulating, refining or retracting them before they were made public"[101].

The conviction, being disproportionate to the aim pursued, was not necessary in a democratic society, and therefore amounted to a violation of article 10 ECHR[102].

Even though the applicant was vindicated, it should be noted that more than eight years passed between the initiation of criminal proceedings and the exoneration before the ECtHR. The court's recognition of the chilling effect of the prosecution, moreover, should not be ignored, for both the applicant and other journalists were likely impacted.

6.4. *Jean-Marie Le Pen*

A different outcome was reached by the ECtHR in two criminal cases – consolidated before the court – concerning Mr. Le Pen, then president of the National Front (*Front National*), and originated, respectively, by a book published in August 1998 and an article published in November 1999[103].

97. *Id.* para. 60.
98. *Id.* para. 57 (quotation marks omitted).
99. *Id.* para. 54.
100. *Ibidem*.
101. *Ibidem*.
102. *Id.* para. 61.
103. *Lindon, Otchakovsky-Laurens and July v. France*, ECHR 836 (2007).

In the first case[104], the author and the chairman of the publishing house were sentenced by the Paris Criminal Court to pay a fine of 15,000 French francs (equivalent to approximately 2,300 euros) and damages amounting to 25,000 French francs (3,800 euros) to each of the civil parties, namely, the Front National and Mr. Le Pen. In the second case, before the same court and connected to an article concerning the convictions in the previous case, the author was found guilty of criminal defamation and sentenced similarly to the first and second applicant[105].

The novel, a piece of fiction albeit based upon real events, portray both the National Front and Mr. Le Pen throughout. Offending remarks are made by fictional characters, illustrating Le Pen as the "chief of a gang of killers" and "a vampire who thrives on the bitterness of his electorate and the blood of his enemies", using the death of a victim "to transform other lost youths into puppets who will have their lives and deaths manipulated by this ruthless puppeteer"[106].

The Paris Criminal Court found "of no consequence that the crime of 'Ronald Blistier' is not real, because the author's intention is not to write a satire about an impossible event but, on the contrary, to make the reader believe that, given Jean-Marie Le Pen's ideology, such a scenario is quite plausible and that he would be accountable for it"[107]. The court found the text "capable of harming the honour and reputation

104. For the facts of the case see *id.* para. 10–13 and 18: "The first applicant is the author of a book presented as a novel under the title *Le Procès de Jean-Marie Le Pen* ("Jean-Marie Le Pen on Trial"), published in August 1998 ... The novel recounts the trial of a *Front National* militant, Ronald Blistier, who, while putting up posters for his party with other militants, commits the cold-blooded murder of a young man of North African descent and admits that it was a racist crime ... The novel is based on real events and in particular the murders, in 1995, of Brahim Bouaram, a young Moroccan who was thrown into the Seine by skinheads during a Front National march, and of Ibrahim Ali, a young Frenchman of Comorian origin who was killed in Marseilles by militants of the same party. Those militants were convicted in June 1998 after a trial in the Assize Court during which Front National leaders, Mr Le Pen included, declared that the case was no more than a provocation and a put-up job through which the party's enemies sought to harm it". *Id.* para. 10–11.

105. Note that both a fine and a civil judgment were assessed in these cases, although both cases were criminal ones. This is not unusual in a civil law country; it is rare to combine both awards in in Anglo-American jurisprudence.

106. *Id.* para. 14.

107. *Ibidem*.

of the civil parties" and the precision of the offending facts "sufficient to constitute defamation against the civil parties and ... susceptible of proof"[108]. The conviction was sustained in the appellate court[109], and the subsequent appeal was dismissed by the Court of Cassation.

After deciding that the case was admissible, the ECtHR court addressed whether the norm was "prescribed by law". At issue was not the existence of statutory provisions on defamation, but whether these could be applied to "a work of fiction when the individual who claims to have been defamed is referred to in a clear manner"[110]. The French government argued that while case law was scant, a judgment of the Paris Court of Appeal of March 8, 1897 supported the prosecution[111]. The ECtHR concurred, on account of fact that the applicants, "being professionals in the field of publishing" should have "apprise[d] themselves of the relevant legal provisions and case-law in such matters, even if it meant taking specialized legal advice"[112].

The court then found that the prosecution pursued one of the legitimate aims of article 10(2) ECHR, namely the protection of "the reputation of rights of others"[113], that is, Mr. Le Pen and the National Front.

The court then went on to consider whether the prosecution could have been considered necessary in a democratic society and to verify that the criteria applied by the Paris Court of Appeal complied with article 10 ECHR. It observed that "novelists – like other creators

108. *Ibidem*.

109. *Id.* para. 25. The appellate court held that "[t]he polemical aim of a text cannot absolve it from all regulation of expression, especially when, far from being based merely on an academic debate, its line of argument is built around reference to precise facts. There was therefore an obligation to carry out a meaningful investigation before making particularly serious accusations such as incitement to commit murder, and to avoid offensive expressions such as those describing Mr Le Pen as the 'chief of a gang of killers' or as a vampire. The defence of good faith cannot be admitted". *Ibidem*.

110. *Id.* para. 42.

111. *Id.* para. 29. This constitutes a rather extreme example of how far the European legal system has shifted from the civil law stem of jurisprudence towards the Anglo-American system of justice in which case law, not just statutory law, has consequences. See Allen E. Shoenberger, *Change in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Preecedent into the Civil Law System*, 55 Loyola Law Review (New Orleans) 5 (2009).

112. *Id.* para. 42.

113. *Id.* para. 44.

– and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, 'duties and responsibilities'"[114].

The court acknowledged that "the limits of acceptable criticism are wider as regards a politician – or a political party – such as Mr. Le Pen and the *Front National* – as such, than as regards a private individual. This is particularly true in the present case as Mr. Le Pen, a leading politician, is known for the virulence of his speech and his extremist views, on account of which he has been convicted a number of times on charges of incitement to racial hatred, trivialising crimes against humanity, making allowances for atrocities, apologia for war crimes, proffering insults against public figures and making offensive remarks. As a result, he has exposed himself to harsh criticism and must therefore display a particularly high degree of tolerance in this context"[115].

Nevertheless, the court considered that "the [Paris] Court of Appeal made a reasonable assessment of the facts in finding that to liken an individual, though he be a politician, to the 'chief of a gang of killers', to assert that a murder, even one committed by a fictional character, was 'advocated' by him, and to describe him as a 'vampire who thrives on the bitterness of his electorate, but sometimes also on their blood', 'oversteps the permissible limits in such matters'"[116].

Lastly, the court considered whether the conviction of a crime and the associated penalty were proportionated to the offence, and determined both were. In that regard "the amount of the fine imposed on the applicants was moderate [and] the same finding has to be made as regards the damages they were ordered jointly and severally to pay to each of the civil parties"[117].

Four Judges dissented from this decision of the court, stating inter alia: "[W]e believe that it is excessive and inaccurate to claim that the novel in question constitutes an appeal to violence or hatred. The work

114. *Id.* para. 51.
115. *Id.* para. 56.
116. *Id.* para. 57.
117. *Id.* para. 59.

criticises a politician who is himself inclined to make comments of such a nature, as shown by the convictions pronounced against him. In the present case, the expressions 'the chief of a gang of killers' and 'a vampire who thrives on the bitterness of his electorate, but sometimes also on their blood' cannot be taken literally; their intention is to convey the message that this politician, through his discourse, encourages his followers to engage in acts of extreme violence, especially against minorities, as [an actual] case itself showed. In this sense, these expressions are also value judgments which have an established factual basis"[118].

7. *Concluding Remarks*

Review of these decisions of the European Court of Human Rights suggests that the *New York Times Co. v. Sullivan* "actual malice" rule may promote free speech more effectively than the actual application of the European Convention of Fundamental Rights. Even when the ECtHR stepped in to recognize violations of the freedom of speech, several years had passed after the facts, during which those sanctioned and likely far more individuals were negatively impacted.

From that perspective, it is hard to support the idea that criticism of a sitting public official should subject an author, newspaper, or television statement to costly defamation actions. Under the *Sullivan* rules, most such actions would be stopped at an early stage on a motion to dismiss or motion for summary judgment. Under the protective umbrella of *New York Times Co. v. Sullivan*, more vibrant political speech, even if excessive, can receive substantial protection.

118. *Lindon, Otchakovsky-Laurens and July v. France*, ECHR 836 (2007), joint partly dissenting opinion by Judges Rozakis, Bratza, Tulkens, and Šikuta. In addition, the dissenting judges not only rejected the idea that the sentence was symbolic and complained about the lack of review of the proportionality of the sanction; they raised the question of whether it was consistent in the twenty-first century to punish damage to reputation under outdated statutes. The dissent cited a recommendation by the Parliamentary Assembly of the Council of Europe, observing that "The media legislation in some [west European] countries is outdated (for instance the French press law dates back to 1881) and although restrictive provisions are no longer applied in practice, they provide a suitable excuse for new democracies not willing to democratise their own media legislation". *Ibidem*.

By contrast, a primary problem with ECtHR jurisprudence is the application of rather vague balancing tests, such as proportionality, which are only performed years after the publication. Delay means substantial chilling of the willingness of writers and publishers to criticize entrenched public officials. In such a context, the risk that major political figures may increasingly employ governmental instruments, even using the threat or actuality of criminal prosecutions, should not be underestimated.

The Problem of Reservations to Human Rights Treaties: A New Challenge to the Traditional Concept of International Law

Livia Solaro*

Abstract: This article aims at analyzing the evolution of the debate regarding the issues that arise when States make reservations to human rights treaties, whose ultimate goal is inevitably compromised by any form of limitation to their content. This kind of treaties are in fact meant to protect individuals, while traditional international treaties (as envisaged by the Vienna Convention on the Law of Treaties) simply regulate the relationships among sovereign States. Through the analysis of the different approaches of several scholars, and in particular in the light of the Human Rights Committee's General Comment No. 24, the article tries to compare the criteria that could be put in place in order to answer to the question of whether reservations should be deemed admissible in the first place, which should be the limitations, and who are the subjects best suited to carry on such evaluations and establish the consequences of invalid reservations.

Keywords: Human rights; international law; General Comment No. 24; Human Rights Committee; legal reservations.

1. *Introduction*

The debate over the relation between reservations and human rights treaties can and should be viewed in the light of how this kind of conventions influences and challenges the traditional international legal system[1]. The Human Rights Committee's General Comment No. 24, in addressing the matter of reservations to the International Covenant on Civil and Political Rights (ICCPR)[2], has indeed proved rather controversial. It is possible to identify three main issues in the analysis of this specific legal matter: whether reservations to human rights treaties can be accepted, who should in principle be competent to assess their admissibility and what should be the consequences of inadmissible reservations.

A necessary premise of such an analysis is undoubtedly the recognition of the peculiarities of human rights treaties, whose specific historical and philosophical implications cannot be ignored: many authors have indeed recognized a "special character"[3], a sort of "declaratory and objective nature"[4] that makes such treaties more similar to pledges than to contracts among states[5]. Establishing a system of *erga*

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1. See generally Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press 2012).

2. *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, International Covenant on Civil and Political Rights (CCPR) General Comment No. 24, UN Human Rights Committee, 1382nd meeting (November 2, 1994), UN Doc. CCPR/C/21/Rev.1/Add.6.

3. Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran, *International Human Rights Law* 98 (Oxford University Press 2nd ed. 2013).

4. *Id.* at 100. See Olivier De Schutter, *International Human Rights Law* 118 (Cambridge University Press 2nd ed. 2014); European Commission of Human Rights, app. no. 788/60, *Austria v. Italy* (1961).

5. See generally Lea Brilmayer, *From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements*, 77 British Yearbook of International Law 163 (2006).

omnes obligations not bound by reciprocity[6], these *sui generis* treaties have even been considered "morally declaratory"[7], thus beyond states' consent. To some extent this special character is recognized by positive international law (for example through the prohibition of retaliation in case of breaches)[8], but the issue of reservations still appears rather controversial[9].

2. *Admissibility of Reservations*

In its General Comment No. 24, the Human Rights Committee recognizes both the benefits and the risks deriving from the acceptance of reservations to the Covenant. On the one hand, the possibility to ratify only part of the content might encourage more states to join the treaty[10]; on the other, multiple or ambiguous reservations might determine a loss of effectiveness of the agreement and, consequently, prove detrimental to legal certainty – as it could become impossible to establish the obligations of each state[11]. Nonetheless, the appreciation of the essential role played by reservations in human rights treaties can already be found in the 1951 advisory opinion on the Genocide Convention by the International Court of Justice (ICJ)[12]. In that instance, the traditional approach to reservations – under which they had to be accepted by all the contracting parties – was deemed not flexible enough for the universal ambitions of human rights agreements. The Court therefore claimed that reserving states could be considered parties even if their reservations had been objected to, although the compatibility of said reservations was to be assessed with regard to "the object and purpose"[13] of the Convention.

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6. See Moeckli, Shah, and Sivakumaran, *International Human Rights Law* at 99 (cited in note 3); De Schutter, *International Human Rights Law* at 113 (cited in note 4); CCPR General Comment No. 24 para. 17 (cited in note 2).

7. Brilmayer, *From 'Contract' to 'Pledge'* at 171 (cited in note 5).

8. See Vienna Convention on the Law of Treaties art. 60(5).

9. See Andrea Gioia, *Manuale di diritto internazionale* 65 (Giuffrè 5th ed. 2015).

10. See CCPR General Comment No. 24 para. 4 (cited in note 2).

11. See *id.* para. 12.

12. International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion, 1951 ICJ Reports 15.

13. *Id.*

It appears evident, however, that the risks of reservations to this kind of treaties are noteworthy. More than one scholar has indeed pointed out that states might decide to ratify said conventions solely for the reputational advantages this is going to grant them, "free riding"[14] human rights whilst frustrating their goals through reservations[15]. The hazard of creating a "two-speed protection" of human rights should also be considered, as well as the chance that controversial reservations might undermine the authority of the treaty, as in the case of the numerous and extended reservations to the Convention on the Elimination of All Forms of Discrimination against Women[16].

Nevertheless, it must be kept in mind that through reservations states can ratify human rights conventions whilst protecting their own cultural and religious traditions[17], or whilst in the process of adapting domestic legislation to international standards of protection[18]. Indeed, human rights treaties rarely expressly exclude reservations (even though they might include some specific limitations to them)[19]. In addition, it has been observed that reservations normally concern minor issues[20], and that no general prohibition can be inferred from states' practice[21]. It is therefore reasonable to consider them as a "necessary evil"[22] that allows a compromise between the need for wide

14. Moeckli, Shah, and Sivakumaran, *International Human Rights Law* at 106 (cited in note 3)

15. See Brilmayer, *From 'Contract' to 'Pledge'* at 191–192 (cited in note 5); Rhona K.M. Smith, *Textbook on International Human Rights* 165 (Oxford University Press 7th ed. 2016).

16. See *Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women*, Meeting of States Parties to the Convention on the Elimination of All Forms of Discrimination against Women, 16th meeting (June 28, 2010), UN Doc. CEDAW/SP/2010/2.

17. See Smith, *Textbook on International Human Rights* at 164 (cited in note 15).

18. See Catherine J. Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 International & Comparative Law Quarterly 390, 390 (1997).

19. See Manfred Nowak, *Introduction to the International Human Rights Regime* 56 (Martinus Nijhoff 2003).

20. See Ineta Ziemele and Lasma Liede, *Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6*, 24 European Journal of International Law 1135, 1139 (2013).

21. See *id.*

22. Smith, *Textbook on International Human Rights* at 165 (cited in note 15).

ratification and the integrity of the treaty itself (although their eventual elimination should remain the final goal)[23].

3. *Criteria of Admission*

Evidently, even considering reservations admissible, not all them should be allowed: the ICJ's criterion of compatibility with the "object and purpose" of the treaty is central in this respect and has been incorporated in article 19(c) of the Vienna Convention on the Law of Treaties (VCLT). The Human Rights Committee in the General Comment No. 24, though, took one step further by claiming that "[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant"[24]. This clearly clashes with the regime established by the Vienna Convention, whereby the admissibility of a reservation is assessed by the other states parties through objections; however, in the General Comment No. 24 such regime is deemed "inappropriate to address the problem of reservations to human rights treaties"[25]. The system implemented by the Vienna Convention has in fact been accused by some scholars of lacking clarity and thus being unsuited for human rights treaties[26]: illustrative of this problem are the United States reservations to the ICCPR, that have been objected by eleven states, all of whom expressly stated that their objections did not preclude the entry into force of the Covenant in their relations with the United States[27]. De facto, state objections usually either have a merely political significance (with almost no concrete effects)[28], or base any practical consequence on reciprocity, which does not characterize human

23. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 799 (Oxford University Press 3rd ed. 2013); Smith, *Textbook on International Human Rights* at 165 (cited in note 15).

24. CCPR General Comment No. 24 para. 18 (cited in note 2).

25. *Id.* para. 17.

26. See Moeckli, Shah, and Sivakumaran, *International Human Rights Law* at 108 (cited in note 3). See generally Konstantin Korkelia, *New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights*, 13 European Journal of International Law 437 (2002).

27. See Redgwell, *Reservations to Treaties* at 394, 406 (cited in note 18).

28. See Gioia, *Manuale* at 64 (cited in note 9).

rights treaties[29]. Nevertheless, the VCLT does not make any distinction between these conventions and other kinds of agreements, and it has even been argued that in its drafting the role of human rights bodies was not envisaged at all[30]; moreover, it has been noted that this regime mainly regulates the relations between the reserving and the objecting state[31], and only with regard to permissible reservations[32], hence leaving many aspects of the matter uncovered. In addition, it must be noted that states tend to be reluctant to object other parties' reservations to human rights treaties, for they have no direct interest and incentive to do so[33]: in this respect, the competence of monitoring bodies offers the guarantee that, in case of questionable reservations, the main concern is going to be the protection of human rights ("*in dubio pro libertate et dignitate*")[34].

The General Comment No. 24 has nevertheless met quite an opposition in the international legal panorama: particularly significant were the observations of France, the United Kingdom and the United States, which underlined how the ICCPR did not confer this kind of competence to the Committee and that therefore its acts were not to be considered legally binding[35]. Moreover, in his 1995 report on reservations, Special Rapporteur Alain Pellet could find no common basis for the provision of a special regime for human rights conventions, as the VCLT was deemed appropriate for all treaties (and in fact the majority of them explicitly referred to it)[36]. However, in its 2011 *Guide to*

29. See Korkelia, *New Challenges to the Regime of Reservations* at 439 (cited in note 26); CCPR General Comment No. 24 para. 17 (cited in note 2).

30. See Ziemele and Liede, *Reservations to Human Rights Treaties* at 1144 (cited in note 20).

31. See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 American Journal of International Law 531, 532 (2002).

32. See Ziemele and Liede, *Reservations to Human Rights Treaties* at 1140 (cited in note 20).

33. See Moeckli, Shah, and Sivakumaran, *International Human Rights Law* at 108 (cited in note 3); De Schutter, *International Human Rights Law* at 131 (cited in note 4).

34. See Nowak, *Introduction to the International Human Rights Regime* at 35 (cited in note 19).

35. See *Report of the Human Rights Committee to the General Assembly*, 51st session (September 16, 1996), UN Doc. A/51/40, 117–119; *Report of the Human Rights Committee to the General Assembly*, 50th session (October 3, 1995), UN Doc. A/50/40, 131–139.

36. See Redgwell, *Reservations to Treaties* at 391 (cited in note 18); Alain Pellet, *First Report on the Law and Practice Relating to Reservations to Treaties: Preliminary*

Practice on Reservations to Treaties, the International Law Commission recognized the competence of monitoring bodies (alongside states parties and dispute settlement bodies) over the permissibility of reservations – but at the same time it specified that the legal force of their findings should not exceed the powers given to them by the treaty itself[37]. In fact, one of the main issues with the General Comment No. 24 was precisely the fact that the Committee based its competence on the functional necessity of it, rather than on any legal basis[38]. As a final consideration, it can be argued that if the treaty does not establish any monitoring body, a precisely regulated system of states' control is nevertheless more desirable than the regime established by the VCLT: an excellent example is that of the International Convention on the Elimination of All Forms of Racial Discrimination, wherein a majority of two-thirds of the states parties is required to declare a reservation inadmissible. In conclusion, as in human rights treaties we witness an "axiological" rather than a "consensual" approach to reservations, a clearly establish mechanism of validity assessment is undoubtedly fundamental[39].

4. *Consequences of Inadmissible Reservations*

In yet another crucial passage, the Committee proceeded in claiming that "[t]he normal consequence of an unacceptable reservation is ... that the Covenant will be operative for the reserving party without benefit of the reservation"[40]. This observation too was met with strong opposition[41], since in the international legal panorama there

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Report, International Law Commission, 47th session (May 2–July 21, 1995), UN Doc. A/CN.4/470.

37. See *Report of the International Law Commission to the General Assembly*, 63rd session (April 26–June 3 and July 4–August 12, 2011), UN Doc. A/66/10, 37–38.

38. See Korkelia, *New Challenges to the Regime of Reservations* at 459 (cited in note 26).

39. See Moeckli, Shah, and Sivakumaran, *International Human Rights Law* at 108 (cited in note 3).

40. CCPR General Comment No. 24 para. 18 (cited in note 2).

41. See *Report of the Human Rights Committee to the General Assembly*, 51st session (September 16, 1996), UN Doc. A/51/40, 119; *Report of the Human Rights Committee*

is no consensus over what the effects of invalid reservations should be: some believe that the reserving state should not be considered party to the treaty anymore, while others affirm that the invalid reservation should simply be severed[42]. To make matter worse, there is no established custom on such matter, and treaties do not address it either[43]. Nevertheless, the Inter-American Court of Human Rights and the European Court of Human Rights have adopted the so-called severability approach[44], as can be observed in the *Belilos*[45] and *Loizidou*[46] cases. Both these rulings, however, have been accused of lacking explanation regarding the rationale behind this type of approach: in the *Belilos* case, for example, it was succinctly affirmed that Switzerland's reservation to article 6 of the European Convention on Human Rights was of a "general character", and therefore in violation of article 64 (now article 57) thereof. In the *Loizidou* case, moreover, the Court declared invalid (and consequently severed) Turkey's reservation to article 1 of Protocol 1 to the Convention, plainly disregarding several statements made by the same state that clearly indicated that said reservation was fundamental to its consent to be bound by the treaty. In these instances, the judges underlined the constitutional nature of the Convention and its fundamental role in the light of European public order: considerations that, in some observers' opinion, lead the Court to bend the limits of states' consent in order to strengthen the protection of human rights[47]. The Human Rights Committee, nevertheless, has recalled such jurisprudence to defend its own position – although a parallel does not appear completely convincing, because these two courts are in fact both judicial bodies established for regional treaties

to the General Assembly, 50th session (October 3, 1995), UN Doc. A/50/40, 134–135, 138–139.

42. See generally Roberto Baratta, *Should Invalid Reservations to Human Rights Treaties Be Disregarded?*, 11 European Journal of International Law 413 (2000).

43. See Ziemele and Liede, *Reservations to Human Rights Treaties* at 1142 (cited in note 20).

44. See Goodman, *Human Rights Treaties* at 532 (cited in note 31).

45. *Belilos v. Switzerland*, 10 EHRR 466 (1988).

46. *Loizidou v. Turkey (preliminary objections)*, 20 EHRR 99 (1995).

47. See generally Roslyn Moloney, *Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent*, 5 Melbourne Journal of International Law 155 (2004).

that have acquired a sort of "constitutional character"[48] over time, unlike the Human Rights Committee.

The severability approach undoubtedly challenges the principle of state consent, since it leads to situations where a state is bound by a provision it explicitly wanted to avo*id.* However, it has been correctly noted that it is possible to distinguish between "critical" and "accessory" reservations, only the former being fundamental to a state's consent: therefore, there might be situations in which a state's intention to be bound by the treaty overrides its concern with the effects of the reservation (in fact a bona fide state clearly does not want to enter an invalid reservation)[49]. Ryan Goodman has also underlined how under many circumstances considering a state no longer a party to the treaty might be detrimental for its overall interests – as in the case of newly established democracies trying to reach internal stability[50]. The "transaction costs" of exiting and re-entering a treaty without the invalid reservation must not be underestimated either[51], while considering a state still bound always leaves the possibility for the state itself to withdraw from the treaty if it wants to[52]. From a different point of view, noteworthy is also "the increasing importance of being seen to adhere to human rights treaties"[53]: leaving to the states the burden of withdrawing might actually push them to remain parties. From what has been said, it appears evident that the state's intention (at the time it ratified the treaty)[54] should be regarded as the key criterion to establish whether a reservation can be severed, as has been recognized by the International Law Commission[55] as well as several authors[56].

48. Ziemele and Liede, *Reservations to Human Rights Treaties* at 1136 (cited in note 20).

49. See Goodman, *Human Rights Treaties* at 555 (cited in note 31).

50. See *id.*

51. See *id.*; De Schutter, *International Human Rights Law* at 142 (cited in note 4).

52. See Goodman, *Human Rights Treaties* at 538 (cited in note 31); Korkelia, *New Challenges to the Regime of Reservations* at 465 (cited in note 26).

53. Redgwell, *Reservations to Treaties* at 407–408 (cited in note 18).

54. See Goodman, *Human Rights Treaties* at 539 (cited in note 31).

55. See *Report of the International Law Commission to the General Assembly*, 63rd session (April 26–June 3 and July 4–August 12, 2011), UN Doc. A/66/10, 43–44.

56. See, for example, Goodman, *Human Rights Treaties* at 531 (cited in note 31).

This criterion is also implicitly recognized in the General Comment No. 24 (the "normal" consequence being severability)[57], although in the *Trinidad* case[58] the Committee has been accused of not being impartial in the establishment of such intention, as it directly applied the severability approach[59]. In fact, before the events of the case, Trinidad and Tobago had denounced and re-acceded the Optional Protocol to the International Covenant on Civil and Political Rights, with the addition of a reservation to article 1 – therefore excluding the Committee's competence over individual communications. The Committee found such reservation inadmissible – perfectly in line with what it had established in its General Comment No. 24 ("[B]ecause the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant"[60]). However, it blatantly ignored that the operation carried out by Trinidad and Tobago, as well as the motivation adduced, had made it quite clear that such reservation was fundamental to the state's consent; instead, the Committee applied the severability approach, therefore considering the state bound by the Covenant and the Optional Protocol without the reservation[61]. The *Trinidad* case indeed shows how the *sine qua non* condition of the severability approach is the implementation of a precise system for assessing the validity of reservations[62]. It goes without saying that without the states' cooperation the system will not work – as can be observed considering

57. See Korkelia, *New Challenges to the Regime of Reservations* at 460 (cited in note 26).

58. *Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 845/1999 (Kennedy v. Trinidad and Tobago),* Human Rights Committee, 67th session (October 18–November 5, 1999), UN Doc. CCPR/C/67/D/845/1999.

59. See Joseph and Castan, *The International Covenant on Civil and Political Rights* at 818 (cited in note 23).

60. CCPR General Comment No. 24 para. 13 (cited in note 2).

61. See generally Francisco Forrest Martin et al., *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis* (Cambridge University Press 2011).

62. See Redgwell, *Reservations to Treaties* at 408 (cited in note 18).

the refusal by the United States to withdraw those reservations to the ICCPR that the Committee has declared invalid[63].

5. *Conclusion*

In conclusion, it is argued that reservations to human rights treaties should be accepted, but only after an admissibility assessment system has established their permissibility. In fact, although they inevitably create a gap in the protection of individuals, reservations also introduce an element of flexibility that allows states to catch up with the international standards of protection of human rights (through the adoption or the modification of national legislation), therefore eventually leading to an overall improvement in the implementation of said treaties[64]. Nevertheless, although permissible, reservations should still be viewed as a necessary evil, and the ultimate goal should remain their eventual elimination (after they have depleted their function as a bridge between states and a universal and shared level of protection of human rights). It is here argued that the most appropriate actors to carry out such incumbency appear to be the monitoring bodies: the system implemented in the VCLT, in fact, proves unsuited to be applied to human rights treaties, as it heavily relies on States to take action – while they will most likely not interfere with each other's reservations on such matters. The competence of these monitoring bodies should be carefully outlined from the beginning or through successive amendments to the specific convention, in order to avoid accusations of impartiality. However, in the absence of such bodies, a system of states' votes could be implemented. Should a reservation be found invalid, the State will be considered bound by the treaty without the benefit of said reservation, unless it is assessed that it was fundamental to its consent (therefore taking into consideration whether the reservation was "critical" or "accessory"). These conclusions should be read in the light of the fact that, although States are still the

63. See Nowak, *Introduction to the International Human Rights Regime* at 58 (cited in note 19).

64. See generally Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 Cardozo Law Review 1095 (2000); Darren J. O'Byrne, *Human Rights: An Introduction* (Pearson 2003).

protagonists of the international legal system, its fulcrum appears to be slowly shifting "from the protection of sovereigns to the protection of people"[65]. This determines a loss of simplicity[66] but, as Reisman put it, "[i]f complexity of decision is the price for increased human dignity on the planet, it is worth it"[67].

65. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 American Journal of International Law 866, 872 (1990).

66. See Christopher Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 European Journal of International Law 447, 470 (1993).

67. Reisman, *Sovereignty and Human Rights* at 876 (cited in note 65).

The History and Practice of Substantive Due Process: A Question of Legitimacy

James Marmaduke*

Abstract: While the concept of substantive due process can be found in judicial decision-making prior to the Civil War, in the 1960s it became and has remained a lightning rod among the juristic community. Controversy abounds over issues regarding substantive due process ranging from the applicability and reliability of the doctrine to its cogency and legitimacy. Many scholars attribute the skepticism toward the concept of substantive due process to be the result of a paradigm shift in the middle of the 20th century when this concept transitioned from an economic-and-property rights-based approach to one that is dedicated to safeguarding individual liberties. This skepticism is also rooted in concerns about political or legal ideological preferences from the Supreme Court in cases involving individual liberties. Regardless of the genesis of these concerns, any decisions grounded upon substantive due process will likely become the subject of heated controversy. Therefore, it is prudent to explore alternative options that are available to provide a textual anchor for the protection of individual liberties in important civil rights cases. Many legal scholars contend that other options do exist. For example, the Fourteenth Amendment's Privileges or Immunities Clause would, in many cases, permit the Court to reach a verdict equivalent to what would have been possible under substantive due process, but with an additional veneer of legitimacy by cementing the voting public as the locus of power at the expense of further constraining judges. These and other creative alternate approaches may help build consensus in decision making.

Keywords: Due process; fourteenth amendment; individual rights; natural rights; Warren Court.

1. *Introduction*[**]

Due process of law ensures that every individual is treated fairly by the United States legal system. It was established by two separate amendments to the federal Constitution over three-quarters of a century[1]. The Due Process Clause appeared for the first time in the Fifth Amendment, which was ratified in 1791. It applied only to the federal government. Later, the Fourteenth Amendment, ratified in 1868, made the Due Process Clause binding upon the states. The Due Process Clauses of the Constitution inarguably are cornerstones of American liberty, nearly unsurpassed in their daily relevance to all citizens.

Historically, due process was derived from the Magna Carta as a purely procedural guarantee. Over time, however, the doctrine of due process developed a duplicity in its application, evolving into two distinct forms: procedural due process and substantive due process[2]. Procedural due process governs all governmental processes and delineates exactly what steps must occur in order for an individual to be deprived of life, liberty or property as punishment for crimes[3]. This procedural bulwark requires the government to abide by preordained processes "in order to safeguard the individual against the power of the state"[4].

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** At the outset, I would like to thank Dr. Karu Hangawatte for his advice during the drafting of this essay. His guidance was instrumental throughout the writing and revising process.

1. See Linda R. Monk, *The Words We Live By: Your Annotated Guide to the Constitution* 170 (Stonesong 2003).
2. See Edward White, *The Constitution and the New Deal* 244 (Harvard 2006).
3. See U.S. Const. Amend. XIV § 1.
4. Monk, *The Words We Live by* at 170 (cited in note 1).

Substantive due process, on the other hand, is a paradigm shift in terms of the evolution of the concept of procedural due process. Surpassing any limited procedural connotation, substantive due process "also protects certain rights unrelated to procedure" including the right to contract freely, the right to work, the right to privacy and the right to possess a firearm in the home for self-defense[5]. In the 1997 case *Washington v. Glucksberg*, Chief Justice William H. Rehnquist's majority opinion defined substantive due process as the idea that "the Due Process Clause guarantees more than fair process, and the 'liberty it protects includes more than the absence of physical restraint'"[6]. Through the lens of substantive due process, the law at issue in a particular case is examined by the Supreme Court in order to "determine whether it violates fundamental rights not specifically mentioned in the Constitution"[7].

Chief Justice Earl Warren, who served from 1953 through 1969, oversaw the groundwork for many of these changes and defended them passionately through fierce jurisprudence promoting substantive due process. Using a modern iteration of natural law, the Court implied that several expansive provisions of the Constitution were applicable to the ages, thereby giving judges license to correct breaches of civil liberty when such liberty is infringed upon by the State.

The division of due process into separate procedural and substantive components has been met with heated controversy. Substantive due process has its origins in property and economic-based rights, but has blossomed in the modern era as a bastion of defense for personal and individual liberties. This shift towards individual rights can be traced to an emphasis on an enlightenment notion of natural law jurisprudence that has taken root in the modern era. Such a watershed deviation from historical practice, through substantive due process, has allowed the judiciary to become the arbiter of all manner of civil rights not contemplated in the Constitution.

Using words that guarantee only that certain procedures must be followed before particular liberties can be taken away, the Court has

5. See Ryan Strasser, *Substantive Due Process* (LII/Legal Information Institute, June 26, 2017), available at https://www.law.cornell.edu/wex/substantive_due_process (last visited October 31, 2019).

6. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

7. Monk, *The Words We Live by* at 170 (cited in note 1).

expanded and enumerated not only exactly which rights are included in the in the rights protected by due process, but has also delineated certain rights so sacrosanct that no process, including the democratic process itself, suffices to abridge them. Under this new model, the Court has ruled on and struck down state and federal restrictions on everything from limitations on homosexual conduct and abortion regulations, to allowances of excessive punitive damages and firearm control regulations. The fact that even a "casual user" of words would understand that these concepts are not addressed by a promise of *procedure* scarcely requires acknowledgement[8].

As a result of this jurisprudential shift, the Court soon became viewed as increasingly political. Some members of the public and press vociferously decried the Court as partisan, unwilling to maintain judicial neutrality. An examination of modern media, including the most recent Supreme Court confirmation hearings, confirms the view that judicial discretion and humility are under a microscope. Not only the public, but legal professionals as well, have become increasingly wary of the Court taking an expansive reading of Constitutional provisions. Concern that personal preferences may become a part of judicial decisions is widespread and, by extension, so is concern that the republication notion of majority rule will become further eroded.

However, this should not be construed to imply that when judges rule on issues of modern importance using the expansive provisions of the Constitution they do violence to the document. In fact, quite the opposite is true. The only caveat is that the text must be permitted to retain its rightful primacy. In light of this, the Privileges or Immunities Clause of the Fourteenth Amendment presents a historically and textually honest mechanism for acknowledging protected individual rights and freedoms. Of equal importance, the use of this clause protects the liberties of the people while refraining from impinging upon the democratic process by needlessly exalting judges at the expense of the plain meaning of the text.

8. See *McDonald v. Chicago*, 561 U.S. 742, 811 (2010).

2. Natural Law

The task of coaxing these unenumerated Constitutional rights from the terse text of the aging document is incredibly complex and represents some of the most delicate work deliberated upon by the Court. To this end, the philosophical concept of natural law is deeply intertwined with the idea of substantive due process, and has on occasion "and with varying degrees of importance, escaped the confines of theory to influence directly the standards created and applied by officials"[9]. Natural law embodies the concept that certain immutable principles exist which supersede human-made law and, at a high level of abstraction, command that human beings are always to be treated as ends "and never as means only"[10].

Historically, the Framers of the Constitution took significant cues from the Magna Carta of 1215, through which King John of England promised to act in accordance with the law, as well as the development of the principle of legality (the rule of law) in the 17th Century through the English Bill of Rights of 1689. The concept of due process, emanating primarily from the Magna Carta as well as from the *Commentaries on the Laws of England* by Sir William Blackstone, influenced the demands of the American colonies in the months and years leading up to the American Revolution. The founding documents include the Due Process Clause as a principle to establish legal fairness and place limits on governmental power.

The concept of the principle of legality, often under the guise of substantive due process or "natural justice", has been burdened as the "source of legal standards for international law [including the Nuremberg Trials], centuries of development in the English common law, and certain aspects of United States Constitutional law"[11]. The writings of natural law philosophers such as John Locke, Montesquieu, and St. Thomas Aquinas had a "great influence on the framers of

9. Dennis M. Patterson, *A Companion to Philosophy of Law and Legal Theory* 228 (Blackwell 2008).

10. Robert P. George, *Natural Law*, 52 American Journal of Jurisprudence 55, 57 (2007).

11. Patterson, *A Companion to Philosophy of Law and Legal Theory* at 228 (cited in note 9).

the American Constitution"[12]. Many modern natural law theorists frequently followed in the same footsteps as the Framers, "self-consciously writing in the tradition of Aquinas"[13]. Renowned scholar John Finnis continued Aquinas' argument, stating that under the prescriptions of natural law humans have an obligation to obey only *just* laws: "laws which are unjust are not 'laws' in the fullest sense of the term"[14].

Natural law principles were indisputably intertwined in the philosophy of the Framers. This ideology remained deeply embedded and influential throughout the development of the United States legal system. These immutable principles of natural rights were so critical to the founding of the United States of America that only during the pre-revolutionary period were they questioned, and even then only in application to the preservation of property rights. After the revolution against Colonial rule, the philosophical underpinnings of natural law were enshrined in the Constitution by the Framers. Once the Constitution was ratified and became binding upon the states, the courts began the ongoing deliberation considering the crucial conception of natural law under a legal analysis.

A critical juncture in American jurisprudence was handed down in *Calder v. Bull* (1798) in which Justice Samuel Chase held that an act of the legislature "contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority"[15]. While Justice Chase's opinion is a clear invocation of higher legal principles than merely what a statute mandates, he was met with some disagreement among his peers. However, Chase's ruling has nonetheless become a cornerstone in modern U.S. case law[16]. This judicial rift proved to be somewhat prophetic, with Justice Chase and his colleague Justice James Iredell disagreeing as to whether

12. Gabriel A. Almond, *Political Science: The History of the Discipline*, in Robert E. Goodin and Hans-Dieter Klingemann (eds.), *A New Handbook of Political Science*, 60 (Oxford University Press 1998).

13. Patterson, *A Companion to Philosophy of Law and Legal Theory* at 230 (cited in note 9).

14. *Ibidem.*

15. *Calder v. Bull*, 3 U.S. 386, 388 (1798).

16. See Douglas S. Mock, *Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny*, dissertation for the Boston University Graduate School of Arts and Sciences, 4 (2017), available at https://open.bu.edu/handle/2144/27403 (last visited October 31, 2019).

"extra-constitutional considerations", or anything other than the codified law relevant to that particular case could be considered[17]. Chase and Iredell both agreed with the unanimous Court that the issue had been decided correctly, but differed only on precisely which sources could be drawn upon in order to reach a verdict[18].

Calder v. Bull resulted in a pivotal precedent. A legislative act not worthy of the title "law" does not have to be considered as such by the judiciary: this paved the way for a paradigm shift which "arguably lent a textual basis for the sort of jurisprudence that ... Justice Chase had advocated in *Calder*"[19].

Following in the mold of cases such as these, natural law has continued to be a visceral force in the modern era. This influence can be seen both in the judiciary through prominent figures such as Justices Neil Gorsuch and Clarence Thomas, as well as through extra-judicial figures – such as Martin Luther King Jr. – who have had a nearly equal impact on the legal fabric of the United States[20]. Due to the combination of proponents of natural law ideology remaining relevant in the modern era, in conjunction with the textual basis, a natural rights philosophy has infused the Due Process Clause with substantive content, creating a proverbial wall of separation. As a result, courts routinely rule that the government "may not interfere with personal and private decisions"[21].

3. *The Concept of Substantive Due Process*

Substantive due process, which began as an extension of the original Due Process Clause, now has come to be one of the primary tools for the judiciary as it renders opinions fundamental to the furthering of "modern liberty", which should embody "the evolving standards

17. See *id.* at 44.

18. See *Calder*, 3 U.S. at 388.

19. Mock, *Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny* at 106 (cited in note 16).

20. See Mattei I. Radu, *Incompatible Theories: Natural Law and Substantive Due Process*, 54 Villanova Law Review 247 (2009).

21. Mock, *Natural Law in American Jurisprudence* at 190 (cited in note 16).

of decency that mark the progress of a maturing society"[22]. Up until the middle to the late 19th century, the Due Process Clause was only understood and applied in the sense of procedural protection "against detention or incarceration without the benefit of some official legal proceeding[23].

Through a substantive interpretation of the Due Process Clause, beginning primarily in the late 19th century, the Court has found implicit rights guaranteed across a panoply of fields including the protection of property, protection from excessive punitive damages, the right to same-sex marriage, the right to an abortion, the right to contract freely, the right to contraception and many more[24]. In many ways, the modern iteration of this ideology can be traced to Justice Field in 1867, who was a lifelong advocate of natural law and sought to imbue certain "immutable principles" of natural law and the God-given rights of the individual into the Constitution[25].

British jurist William Blackstone, whose writings were a significant influence on the intentions of the Framers, was a scholar of natural law and believed that an individual's reputation was inherent in the right to personal security and by extension encapsulated within the right to due process[26]. In a continuation of this line of reasoning, Justice Potter Steward claimed that if a state makes any charge that could potentially cause serious harm to an individual's standing within the community, then "due process would accord an opportunity to refute the charge"[27]. Justice Field, expounding upon the same vein of thought, concluded in the *Test Oath* cases that the inalienable rights all men possess extend beyond simply life, liberty, and the pursuit of happiness, and include that "in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law"[28]. Field pressed his

22. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

23. White, *The Constitution and the New Deal* at 241 (cited in note 2).

24. See *Trop*, 356 U.S. at 101.

25. See Carl B. Swisher, *Stephen J. Field: Craftsmen of the Law* 413 (Brookings Institution 1930).

26. See William Blackstone, *Commentaries on the Laws of England* (Beacon 1962).

27. David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* 543 (University of Chicago 1994).

28. *Bradwell v. State of Illinois*, 83 U.S. (16 Wall.) 130 (1873).

ideas further, cementing the idea of sub-textual rights implicit in the Constitution, writing that any legislation which purports to abridge or restrict any of the aforementioned rights "is punishment, and can in no other [way] [be] defined"[29].

With the Court espousing views such as these, a sphere of "individual private activity" became recognized. These activities were not to be encroached upon by the state or federal government[30]. Such views were largely unrelated to the Fourteenth Amendment, which contains the Due Process Clause in the second sentence. This clause, comprising a mere seventeen of the 529 words that spell out the amendment in full, has become the "handiest constitutional tool in the judicial kit bag and a constitutional provision deployed in court more often than any other – more often, perhaps, than all others combined"[31]. The relatively innocuous sentence reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"[32]. However, the original draft of the Fourteenth Amendment lacked a due process clause altogether and simply read: "Congress shall have power to... secure to all citizens ... the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property"[33].

A substantive reading of the Due Process Clause grants the federal judiciary immense powers to define, quantify, and protect not only rights unenumerated within the Constitution but also to bring the Constitution into the present day by permitting the Courts to address issues of modern relevance[34]. The judicial separation between procedural and substantive due process can be said to mark the beginning of the modern selective incorporation of the Bill of Rights provisions

29. *Ibid.*

30. See White, *The Constitution and The New Deal* at 241 (cited in note 2).

31. Akhil Reed Amar, *America's Constitution: A Biography* 385 (Random House 2005).

32. U.S. Const. Amend. XIV § 1.

33. Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 51 (1914).

34. See Amar, *America's Constitution* at 385 (cited in note 31).

through the 14th Amendment Due Process Clause that is applicable to the states[35]. It is in no small part due to the increasing presence of substantive due process that the modern societal notion of the "living constitution" was born.

According to New York University Professor of Law Burt Neuborne, some of the most important clauses of the Constitution do not have a single objective meaning. Therefore, disagreements regarding the best modern reading of the Constitution are to be expected, and perhaps to an extent even fostered[36]. Accordingly, the role of interpretation falls to judges, and after more than two centuries of American democracy, there remains no consensus on the correct method for synthesizing meaning from the Constitution's terse text[37]. By comparison, while the doctrine of substantive due process may not manifest itself in daily trial court hearings, it has the potential to become increasingly more relevant to the evolving fabric of our national judiciary through the continued enumeration of previously unrecognized, constitutionally-defended freedoms. This sentiment was expressed by the primary author of the 14th Amendment, Ohio Representative John Bingham, who stated in a lecture: "Nothing can be clearer than this, that under the representative system the rights of the minority are as sacred and inviolable as the rights of the majority"[38].

4. *Lineage of Substantive Due Process Case Law*

Judges in cases as deplored as *Dred Scott v. Sanford*, to the now renounced Lochner era, even to the civil rights victory of *Obergefell v. Hodges*, have relied on substantive due process to render their decisions. This doctrine remains a forceful component in the highest

35. See White, *The Constitution and the New Deal* at 245 (cited in note 2).

36. See Burt Neuborne, *Madison's Music: On Reading the First Amendment* 149 (New Press 2015).

37. *Ibid.*

38. Hon. John A. Bingham, *Speech of Hon. John A. Bingham*, 9 Belmont Chronicle (Sept. 16, 1869), available at https://chroniclingamerica.loc.gov/lccn/sn85026241/1869-09-16/ed-1/seq-1/ (last visited October 31, 2019).

levels of American jurisprudence[39]. By 1868, there existed a "recognizable form of substantive due process" which had been argued and to some degree accepted "by a large majority of the courts that had considered the issue"[40].

Many would argue, including current Chief Justice John G. Roberts, that the now infamous 1857 *Dred Scott v. Sanford* decision marks the birth of substantive due process[41]. This particular case centered on a slave who had been moved by his owner to a new territory, one that did not recognize slavery as a result of the Missouri Compromise[42]. In the 7-2 majority opinion, Chief Justice Roger Taney argued that with respect to the Missouri Compromise, the jurisdiction Congress had over the territory did not grant them the license to make laws which conflicted with existing constitutional limitations[43].

The Court concluded that, pursuant to the Fifth Amendment's Due Process Clause, "a law that deprives someone of property because he has brought it into a particular place could hardly be dignified with the name of due process of law"[44]. While Taney's argument was superficially sagacious, it was internally vulnerable[45]. In the process of defending the right to have property transported from one United States territory to another, irrespective of the differing legislation governing the states and territories, the rights inherent in the due process clause were liberated from the realm of the defined procedural guarantees and expanded to include both substantive and tangible rights. According to the reasoning of the Taney Court, due process of law was "satisfied by fugitive-slave hearings presided over by a financially

39. See Roald Y. Mykkeltvedt, *The Nationalization of the Bill of Rights: Fourteenth Amendment Due Process and the Procedural Rights* 19 (Associated Faculty Press 1983).

40. Ryan C. Williams, *The One and Only Substantive Due Process Clause,* 120 *Yale Law Journal* 408, 2010.

41. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (U.S. June 26, 2015) (Roberts dissenting).

42. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

43. See Cass Sunstein, *Constitutional Myth-Making: Lessons from the Dred Scott Case*, Occasional Paper No. 37 (University of Chicago Law 1996), available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1006&context=occasional_papers (last visited October 31, 2019).

44. *Dred Scott*, 60 U.S.

45. See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* 264 (University of Chicago Press 1997).

biased adjudicator ... but violated by free-soil laws like the Northwest Ordinance"[46].

Although *Dred Scott* is now recognized as a massive oversight in the Court's jurisprudence, the decision is less well-remembered for being the result of flawed legal reasoning[47]. Taney's distorted understanding of the Constitution and his insistence upon a substantive guarantee wholly divorced from the text of the document sent a freed man back to slavery. Thankfully, the decision was temporary with respect to the rights of former slaves. Unfortunately, however, the underlying justification continued to impact judicial reasoning[48]. The *Dred Scott* decision displays jurisprudence uniquely entwined with the idea of substantive due process and a product of the federally applicable Fifth Amendment. The Fourteenth Amendment, from which modern substantive due process derives its state governing power, was directly influenced by *Dred Scott* and opens with language that, in no uncertain terms, repudiates Taney and his decision[49].

Roughly fifty years later, *Lochner v. New York* (1905) cited the due process clause of the Fourteenth Amendment to rule that the Bakeshop Act was unconstitutional. The Bakeshop Act prohibited employers from allowing an employee to work in a "biscuit, bread, or cake bakery or confectionery establishment" for longer than 10 hours in a single day or longer than 60 hours in a work week[50]. Through use of a substantive interpretation of the due process clauses, the Court ruled that an individual has an inherent right to contract freely. This decision was met with ardent reproach from its beginning. Justice Harlan declared the majority opinion to be facially wrong because "the hour law fell within the police power"[51]. The Lochner decision demonstrates the danger that can accompany the implementation of

46. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 306 (Yale 2008).

47. See Currie, *The Constitution in the Supreme Court: The First Hundred Years* at 264 (cited in note 45).

48. See Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* 145 (Basic Books 2015).

49. See U.S. Const. Amend. XIV, § 1.

50. See *Lochner v. New York*, 198 U.S. 45 (1905).

51. Victoria Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 California Law Review 751, 753 (June 2009).

the substantive due process doctrine, as this case gave rise to the much discredited "Lochner Era" of the Supreme Court's jurisprudence[52].

During this roughly 30-year period, the Court repeatedly struck down labor laws passed by the government. In fact, according to Steven Emanuel, between the turn of the century through the generally accepted passing of the era in 1937, the Supreme Court held 159 separate statutes to be in violation of the Constitution under the Fourteenth Amendment[53]. Regardless of the reproachful eye of history, there is no evidence in *Lochner* that the judges in the case were motivated by anything other "than a sincere motive to protect liberty or even equality"[54]. Despite this optimistic view of the judges' intentions, *Lochner* stands as an example of the proclivity of the Court to "impos[e] its own values on legislative decisions through substantive due process"[55].

Contrary to a certain amount of public political opinion, the usage of substantive due process is not a partisan tool to serve the purposes of the liberal agenda. The above *Lochner* case has been widely considered to be explicitly in favor of conservative economic practices by enshrining the freedom of contract under the umbrella of constitutionally consecrated individual freedoms. In a more liberal light, Justice Oliver Wendell Holmes, who served on the Supreme Court from 1902 to 1932, has been quoted as saying that due process may be put forth in aid of what is sanctioned by morality or greatly and immediately necessary to the public welfare[56]. In *BMW v. Gore,* the Court again employed the doctrine to reach an opinion that was regarded as a thundering victory for those in the conservative camp[57].

BMW v. Gore centered on a BMW vehicle that had been slightly damaged during production or shipping, then repainted and sold as new. In the midst of the suit, evidence revealed that the practice of

52. See Steven Emanuel, *Emanuel Law Outlines: Constitutional Law* (Wolters Kluwer 2014).

53. See Emanuel, *Emanuel Law Outlines* (cited in note 52).

54. Nourse, 97 California Law Review at 756 (cited in note 51).

55. Monk, *The Words We Live by* at 216 (cited in note 1).

56. See *Are Fit to Rule Says Roosevelt*, 45 Webster City Freeman (March 26, 1912), available at https://chroniclingamerica.loc.gov/lccn/sn85050913/1912-03-26/ed-1/seq-7/ (last visited October 31, 2019).

57. See Bruce Allen Murphy, *Scalia A Court of One,* 411 (Simon & Schuster 2015).

repairing slight damages to a vehicle was commonplace. Policy dictated that if damage to the vehicle did not amount to 3% or more of the net cost, then the damage was repaired and the vehicle marketed as new. After Mr. Gore sued for damages in his home state of Alabama, a jury sided in favor of his suit and handed down $4,000 in compensatory damages as an approximation of the lost value of the vehicle. Additionally, the jury assessed $4 million in punitive damages to BMW of North America, Inc., although the Supreme Court of Alabama later reduced this to $2 million. The exorbitant sum was justified by the state court by referencing the long history of BMW continuing the practice and numerous vehicles affected by the policy. In this case, some judges questioned if the exceptionally large punitive damages were in violation of the Due Process Clause of the Constitution. The Supreme Court emphasized there was no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable" that would be applicable in all scenarios[58]. Even so, the Court concluded that the "grossly excessive award" imposed in the *Gore* case was indisputably outside the realm of the constitutionally tolerable[59]. The significance of this case is apparent as it underscores the legal reasoning of the Court. Not only does the Fourteenth Amendment guarantee substantive freedom from excessive punitive damages for individuals, but BMW as a corporation was entitled to the same substantive guarantees granted to individuals.

5. *Modern Era (Warren Court)*

Despite these examples, implementation of substantive due process is not unilaterally held in contempt. Substantive due process has seen multiple iterations throughout its existence, transitioning from an almost exclusive focus on economic rights and property rights, to embracing the rights of individuals, minorities, and those disaffected in society[60]. Perhaps the most significant shift in the implementation

58. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

59. *Ibidem.*

60. See Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 Washington and Lee Law Review 5, 5 (1993).

of substantive due process rights came as a result of the Warren Court (1953–1969), which brought the Court into the Progressive Era and has become nearly synonymous with the protection of "racial and religious minorities, refashioning the law of democracy, and solicitude for First Amendment values and for the rights of the criminally accused and the poor"[61]. This evolution in jurisprudence was based on two primary concepts. First, that the Constitution is a living document, fluid in its evolution and adaptation to the needs of a developing culture. Secondly, the "reemergence of the discourse of rights" as a more pronounced method of determining the constitutional needs of a society[62].

The emergence of the discourse of rights is a reflection of the evolving societal nature of natural law. In cases decided before the Warren Court, Thomist views underpinning previous natural law jurisprudence were largely disregarded. Instead, a progressing society pushed for changes widely believed to capture the spirit of the Constitution. As a result, two major shifts in jurisprudence emerged in the later 20th century. First and foremost, prior to the Warren Court, originalism – the belief that a judge should interpret the words of the Constitution faithful to the meaning those words had when the Constitution was adopted – was considered to be orthodoxy[63]. However, beginning in the 1960s and flourishing in the 1970s the notion of the living Constitution began to take hold in academia and then in the judiciary. This philosophy promotes the alternative notion that the Constitution can adapt its meaning, if necessary, to meet the needs of an evolving society. Secondly, pre-Warren Court legalese generally considered a natural rights or natural law based philosophy to be staunchly conservative and unyielding to changing societal values. Despite this, in the 1970s, natural law began a shift towards a philosophy emphasizing individual natural rights and autonomy[64].

However, this conception of natural rights was a far-removed concept from what the Framers of the Constitution would have considered to be natural law philosophy. There is clearly nothing inherently

61. Ryan C. Williams, *The Paths to Griswold*, 89 Notre Dame Law Review 2155, 2155 (2014).

62. Horwitz, 50 Washington and Lee Law Review at 5 (cited in note 61).

63. See *id.* at 6.

64. See *id.* at 8.

wrong with change. Political discourse in society is necessary in order for society to progress, this is how new laws are passed, previous wrongs are corrected, and change is enacted for the betterment of the population. It is important to note the relevance of this discourse to the *political* climate however, which is and should remain rightfully distinct from the judiciary[65]. This distinction has been blurred over time, as the views of the society change that the Supreme Court's interpretation of certain provisions of the Constitution evolve in concert to some degree. During the era of the Warren Court the views of society were becoming considerably more progressive and moving in a certain amount of harmony. Likewise, the Court appeared to base an increasing number of decisions on reasoning that was "philosophical, political, and intuitive", rather than legal in the conventional sense[66].

It is in part due to this development that certain decisions rendered under this model, while respected judicially and entitled to respect under the principle of stare decisis, have historically been seen to carry less legitimacy with the public and carry the perception of partisanship[67]. This phenomenon has become apparent to individuals in varied echelons of society, from political scientists to justices of the High Court.

A case argued in 2010 before the District Court for Northern California concerning the right of homosexual individuals to marry illustrates this phenomenon. The presiding judge asked the attorney: "[I]sn't the danger, perhaps not to you and perhaps not to your clients, but the danger to the position you are taking, is not that you're going to lose this case, either here or at the Court of Appeals or at the Supreme Court, but that you might win it"[68]? This commentary underscores the gravity of the judiciary interjecting itself in an area of law long left to the legislature. The judge was worried (and with the vision of

65. See U.S. Const. art. III § 2.

66. See Mark V. Tushnet, *The Warren Court in Historical and Political Perspective* 40–42 (UVA Press 1995).

67. See Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit* (University of Chicago Law School, May 15, 2013), available at www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit (last visited October 31, 2019).

68. Transcript of Record, *Perry v. Schwarzenegger*, No C 09-2292-VRW, *309 (N.D. Cal. June 16, 2010).

hindsight, one can conclude rightfully so) that if the judiciary compelled the country to unilaterally recognize same-sex marriage, then the policy would never carry the legitimacy that it would if the legislature, through the will of *The People,* had brought about such a result.

By the time the Supreme Court finalized the matter in 2015, many states had already chosen to embrace same-sex marriage as their own. However, a significant number of states had not reached the same decision, although in all likelihood it was only a matter of time until such a right was recognized nationally. The distinction here between a policy result coming about through judicial fiat and a policy result coming about through elected representatives remains of the utmost importance. It is true that regardless of how the decision had come about on a national level there would inevitably be dissenters, just as there were within those states that had already sanctioned same-sex marriage. But when the matter is settled through the legislature, through the process set forth by the Constitution, then those on the losing side can rest knowing that at least they were able to voice their concerns democratically. The same cannot be said for policy-making through the judiciary as a proxy legislature. As Justice Ginsburg has opined, when nine lawyers in robes settle an issue that has not historically been a matter for the courts, the decision carries noticeably less legitimacy than it would have had it been the result of a majority of the electorate bringing such policy into existence[69].

This concern is not to be construed to say that the courts, or in particular the Supreme Court, are not cognizant of (and receptive to) public opinion. Such concerns are only aimed at preserving legitimacy in the eyes of those who find fault with the judgment of the Court. According to some researchers, at particular points throughout recent judicial history, there has been a statistically significant correlation between public opinion and the rulings of the court on cases of exaggerated public interest[70]. Over a half-century-long period, political scientists studied opinions handed down from the Court for which there existed polling data indicating what the preferred outcome

69. See Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade* (cited in note 67).

70. See Thomas R. Marshall, *Public Opinion and the Supreme Court* 192 (Unwin Hyman 1989).

would have been for the public[71]. Within these studies, political scientist Thomas Marshall found 146 separate cases that could be used as accurate data points. From this sample, he was able to conclude that approximately 65 percent of the rulings from the Court coalesced remarkably well with the prevailing public opinion at the time[72]. As an example of this phenomenon, in 1972 *Roe v. Wade* was supported by 63 percent of men and 64 percent of women across party lines (68 percent of Republicans and 59 percent of Democrats) although this included both hard and soft rationales for abortion[73].

In a significant number of the most groundbreaking rulings of the Warren Court (and those of subsequent Courts), the doctrine of substantive due process was called into service in order to justify the decision of the majority in a plethora of cases, setting the stage for many of the more famous rulings from the 1970s. Although the economic and property rights based conceptions of the substantive interpretation of the clause essentially fizzled out around the end of the early 20th century, the jurisprudence of the Warren Court formally sanctioned the imbuement of the due process clause with substantive content. However, the crux of the chronological and jurisprudential shift was focusing the thrust of the substantive content on civil rights and individual liberties[74]. This interpretation became an accepted part of U.S. constitutional law throughout much of the judiciary and the legal academy alike[75]. During this period, the Warren Court amassed more power than the judiciary had ever known previously, and this power, in conjunction with the paradigm shift in jurisprudential approach cemented a shift in U.S. constitutional law and individual rights, the effects of which are still being seen clearly to this day. The full implications of this shift may not be fully realized for decades to come.

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71. See Linda Greenhouse, *Public Opinion & the Supreme Court: The Puzzling Case of Abortion*, 141 Daedalus: Journal of the American Academy of Arts and Sciences 69, 69-82.

72. See Marshall, *Public Opinion* at 192 (cited in note 70).

73. See George Gallup, *Abortion Seen Up to Woman, Doctor* (The Washington Post, August 25, 1972). See Linda Greenhouse, *Becoming Justice Blackmun* 91 (Times Books 2005).

74. See Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, John M. Olin Program in Law and Economics Working Paper No. 267, 3 (2005).

75. See *id.* at 4.

Representing the continued influence of the Warren Court jurisprudence is the recently controversial, yet still widely celebrated, line of landmark civil rights cases culminating in the nation-wide legalization of same-sex marriage[76]. In these decisions, the Court applied the doctrine of substantive due process, operating under the guiding principles of natural law to hold that laws motivated by moral disapproval of a disaffected class cannot be in harmony with the values set forth by the Constitution[77]. This line of cases began primarily with the 1996 case *Romer v. Evans,* in which the Supreme Court invalidated an amendment to Colorado's state constitution. It was held that the amendment, which barred the conferring of protected status on individuals or couples on the basis of non-heteronormative sexual conduct, did not satisfy the requirements of the federal Constitution[78]. However, in this particular well-known case, the Court justified its ruling under the Equal Protection Clause, refraining from reliance on substantive due process[79]. *Romer v. Evans* then served to lay the groundwork for the 2003 case *Lawrence v. Texas*. In *Lawrence*, the Court struck down a Texas statute criminalizing homosexual sodomy, this time invoking a substantive interpretation of the due process clause as the primary rationale for its decision[80].

Building upon precedent set in the *Lawrence v. Texas* case, the Court ruled in *Obergefell v. Hodges* that same-sex couples had the federally protected right to marry under the Due Process Clause of the Fourteenth Amendment. The opening sentences of the case outline the most modern understanding of the rights inherent in the substantive due process doctrine. Justice Anthony Kennedy opined that "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution"[81]. The Court held that under the due process and equal protection clauses of the Fourteenth Amendment, the right to marry was a natural right bestowed upon all individuals regardless of sexual orientation and that to nullify this without due process of law was a violation of the

76. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (U.S. June 26, 2015).
77. See *Lawrence v. Texas*, 539 U.S. 558 (2003).
78. *Romer v. Evans*, 517 U.S. 620 (1996).
79. *Ibidem.*
80. *Lawrence*, 539 U.S. at 558.
81. *Obergefell*, 135 S. Ct. at 2598.

Constitution. The Court linked these two clauses in the opinion, stating they are "connected in a profound way" in spite of the fact that their provisions are independent of one another[82].

Kennedy continued to state that rights secured in the liberty guarantee of due process and those established through equal protection may originate through differing avenues, yet in some cases "each may be instructive as to the meaning and reach of the other"[83]. Depending on the particular facts of the case at hand, the Court's opinion continues to illustrate how one clause might offer a fuller insight into the scope of the right under scrutiny, irrespective of the fact that the right could be identified in either[84]. Furthermore, the *Obergefell* opinion makes clear that the rights of those individuals seeking fundamental liberty from the state or federal government, or those persons who claim protections guaranteed to all individuals, are inextricably linked by the Fourteenth Amendment. These individuals can embrace the knowledge that deliverance is available.

The aforementioned cases represent the continued impact of Warren Court jurisprudence, identifying fundamental rights infringed upon by the states and securing liberty for citizens. While the precise genesis of the judicial recognition of substantive content in the Due Process Clause is debated, supporters were noted as early as in the 1800s. Experts accept that by the middle of the 19th century "the Court was certainly considering and applying substantive due process concerns"[85]. However, it was not until the 20th century that the focus on economic or property rights was cast by the wayside in favor of a pronounced focus on personal freedom and the autonomy of the individual[86]. Several scholars have referred to this modern conception as the "new morality", exemplified not only by the line of cases that culminated in *Obergefell* but also by *Roe v. Wade* and its progeny, upholding the right of a woman to make her own choice regarding the termination of a pregnancy[87].

82. See *ibidem*.
83. *Ibidem*.
84. See *ibidem*.
85. Mock, *Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny* at 190 (cited in note 16).
86. See *ibidem*.
87. See *ibidem*.

6. *Criticism: Substantive Due Process Overreach*

As much as substantive due process has allowed social rights in society to progress with spectacular bursts of speed, the doctrine remains at the center of heated debate and at times vitriolic criticism. Once allegations of bias or partisanship are thoroughly dismissed, one can consider the arguments against the doctrine solely on their merits. The question of the doctrine's validity is a matter of constitutional interpretation, inquiring as to whether the judiciary can create justice at times when it deems that none is specified. Further stemming from this initial objection are questions regarding the powers constitutionally allotted to the judiciary, limits and boundaries on what the Court can do, and implications for the erosion of constitutionally consecrated governmental structure. Justice Byron White positioned himself at the vanguard of this debate in his dissent in *Moore v. City of East Cleveland*, emphasizing the importance of bearing in mind that "the substantive content of the [Due Process] Clause is suggested neither by its language nor by pre-constitutional history" and such content, which is present in the modern iteration of the Due Process Clause, "is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments"[88]. It is clear from this that the doctrine of substantive due process is a recent institution, and not one particularly steeped in the historical traditions of the United States Constitution.

It bears mentioning that even without the historical analysis, the doctrine of substantive due process is on tenuous grounds based on ordinary principles of statutory interpretation. A case could be made that the meaning of the word "liberty" in the context of Section I of the Fourteenth Amendment can be satisfactorily and correctly resolved by appealing to the canon *noscitur a sociis*, otherwise known as the associated-words canon[89]. The words of the Amendment, "life, liberty, or property," cannot be taken in isolation from one another. Instead, they ought to be properly understood cohesively. Under the substantive model of due process, the words "life" and "property"

88. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

89. See Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (Thomson/West 2012).

are not treated in the novel manner that the word "liberty" is. If it is acknowledged that the former two words simply refer to rights that can be taken away by the government, provided proper procedure is followed, then it seems that the *noscitur a sociis* canon would counsel that their meaning, at the most abstract and general level, should be considered instructive as to the meaning of the latter term[90].

By application of this canon, on a procedural reading, the paraphrased amendment appears to state that an individual subject to the laws of the United States may not be executed, imprisoned, or fined unless that individual has been given the full and fair process of law. Clearly, executions, fines, and imprisonment are related ideas and bear on one another's plain meaning. These are all also clearly addressing different types of punishment that may not be inflicted on an individual unless a prerequisite condition has been satisfied. In contrast, the substantive reading of the clause would cause one to have to interpret the same paraphrased amendment to mean that an individual subject to the laws of the United States may not be executed, fined, denied the right to an abortion, denied the right to homosexual marriage, prevented from having a firearm in the house, or have any other unspecified rights infringed upon unless that individual has been given the full and fair process of law. It is evident that in the procedural context the plain meaning of the words allows them to cohere. The substantive reading of the clause introduces a confusing, unstable and uncertain cacophony of terms.

Those critical of substantive due process are cautious that judges unconstrained by the guiding text of the Constitution may result in the judiciary acting as a "second legislature", writing their own policy preferences into law by means of judicial opinions[91]. In *Bowers v. Hardwick,* a 1986 case that upheld a Georgia statute classifying homosexual intercourse as illegal sodomy, Justice Byron White once more expressed his agreement with this worry. In his majority opinion, he warned that "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made Constitutional law

90. *Ibidem*.

91. See Lino Graglia, *Our Constitution Faces Death By Due Process*, Wall Street Journal (May 24, 2005), available at https://www.wsj.com/articles/SB111689283311341216 (last visited October 31, 2019).

having little or no cognizable roots in the language or design of the Constitution"[92].

Furthermore, Justice Curtis, while dissenting in the abhorrent *Dred Scott* case, stated that when the Constitution is no longer interpreted according to objective rules which govern the interpretation of laws then the Constitution is robbed of substantive meaning[93]. Once the words of the Constitution as they were written are no longer the binding law of the land, this country is governed not by laws but by men "who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean"[94]. The Founding Fathers warned of such a slippery slope, including Thomas Jefferson who vociferously argued that judges could become inflated with power and "twist and shape ... [the Constitution] ... as an artist shapes a ball of wax"[95].

7. *Abortion Trifecta*

Only with solemn reverence will the Court overrule a previous judgment, strictly adhering to the principles of stare decisis[96]. Latin for "let the decision stand", stare decisis stands as a fundamental tenet of the judiciary. Stare decisis provides structural support for law and gives the necessary precedential value to Court decisions. However, because of this rigidity, the potential exists to give way to a domino effect of spiraling jurisprudence based in preexisting case law and value judgments as opposed to strict textual adherence[97]. Regarding multiple aspects of the Constitution, judicial practice and academia are inching towards a plateau where constitutional law practices cease to improve. Legal scholars pontificate on the jurisprudence of the Court and scrutinize "every nuance of the latest Supreme Court case,

92. *Bowers v. Hardwick*, 478 U.S. 186, 194–95 (1986).
93. *Dred Scott v. Sanford*, 60 U.S. 393, 621 (1856).
94. *Ibidem*.
95. Graglia, *Our Constitution Faces Death By Due Process* (cited in note 91).
96. See Jeffrey A. Segal and Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices,* 40 American Journal of Political Science 971 (November 1996).
97. *Ibidem*.

but seem unconcerned about the Amendment's text, unaware of its history, and at times oblivious or hostile to the common sense of common people"[98].

The trifecta of abortion rights cases stands as a clear testimony to the peril that is axiomatically inseparable from "legislation" through judicial fiat. Beginning in 1973, the right to an abortion was first recognized in *Roe v. Wade*, then reiterated and modified by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and finally reaffirmed in a renewed specificity through *Whole Woman's Health v. Hellerstedt*.

Given that *Roe v. Wade* stands as the genesis of current abortion laws, it seems fitting to begin the analysis there. The Court, based on the Due Process Clause of the Fourteenth Amendment, determined that a fundamental right to privacy necessarily included the right to an abortion. It reached this result by subsuming the right of physicians to both conduct their medical practice as they see fit as well as to be free from governmental restrictions absent a compelling state interest within the scope of the broader right to privacy[99]. In the decision, the Court balanced the compelling interest of the state in the health of the woman and the potential life of the fetus. To accomplish this, only those abortions performed prior to the approximate end of the first trimester of pregnancy were legalized, as well as those unfortunate instances where the fetus had no chance at a "meaningful life outside of the mother's womb"[100].

Associate Justice Rehnquist (later appointed Chief Justice), was extremely critical of the Court's invocation of due process rights as a structural basis for the legal reasoning. Rehnquist succinctly remarked in his dissent that the majority opinion had accomplished the "seemingly impossible feat of leaving this area of law more confused than it found it"[101]. Significantly, the criticism here is not directed at the social or political outcome of the decision, but rather focused on the mechanism by which the decision was reached. The policy outcome of the decision is irrelevant – the avenue by which the policy was determined stands at the crux of the debate. Rehnquist continued to castigate the

98. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harvard Law Review 757 (1994).

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

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

101. *Ibidem*.

majority opinion for what he, as well as many others, saw as a blatant departure from the guidance of the Constitution, suggesting that the arbitrary nature of the trimester framework "partakes more of judicial legislation than it does a determination of the intent of the drafters of the Fourteenth Amendment"[102].

Respected scholar of constitutional law Raoul Berger delved deeply into the drafting and legislative history surrounding the genesis of the Fourteenth Amendment. He did not find evidence that the Framers were trying to convey any sort of sub-textual Pandora's box of inherent rights and were instead "almost constantly pre-occupied with the plight of the former slaves", and little proof of anything further[103].

The resounding focal point of this criticism centers on the Court's involvement in molding the meaning of Constitutional clauses to comport with particular moral issues of the present and future[104]. Some constitutional scholars question cases where the right at issue is not an "express, implied, or enacted entitlement or part of America's lived Constitution[105]. For, if the right question does not fall into any of these categories, "then in what way, precisely, is it a genuinely *constitutional* right?"[106]. This question is one that the majority in *Roe* neglected to highlight or even address in their landmark opinion[107]. Constitutional scholars such as Justice Harry Blackmun, who authored the *Roe* opinion, neglected to quote so much as a single line of the specific text of the Constitution upon which he claimed that the majority opinion was justified[108].

Nearly twenty years later the trimester-based test of *Roe* was nullified, while the underlying principle remained intact through the equally divisive *Planned Parenthood v. Casey*. The Court held that the trimester framework was inconsistent with respect to the state's compelling interest in the life of the child. Therefore, the Court adopted

102. *Ibidem*.

103. See Karen J. Lewis, *Examination of Congressional Intention in Use of the Word "Person" in the Fourteenth Amendment: Abortion Considerations*, Congressional Research Service (Library of Congress 1981).

104. See Akhil Reed Amar, *America's Unwritten Constitution. The Precedents and Principles We Live By* 122 (Basic Books 2012).

105. *Id.* at 123.

106. *Ibidem*.

107. See *Roe*, 410 U.S. at 113.

108. Amar, *America's Unwritten Constitution* at 123 (cited in note 104).

the standard of the "undue burden" as the line of demarcation dictating when the state could or could not intervene in the right of a woman to obtain an abortion[109]. In their affirmation of the central *principle* of *Roe,* the court by extension reaffirmed the existence of an implicit and substantive guarantee to the right to privacy within the Fourteenth Amendment. *Planned Parenthood v. Casey* and cases of similar precedential tone deepened the sentiment expressed by Chief Justice Rehnquist, among others, that while "considerations in favor of stare decisis are at their acme in cases involving property and contract rights ... the opposite is true in cases such as ... [*Payne v. Tennessee*]"[110].

While *Casey* did not further inflame the issue of substantive due process, the judicially created "undue burden" test solved one problem while creating another. The line at which a burden became "undue" was not described in any particular detail. This omission left the Court with the duty of being the final arbiter to determine if any given burden was unreasonable. Chief Justice Rehnquist again voiced profound worry that the Court, through a questionably legitimate attempt at amelioration, had taken license upon itself by way of *Roe v. Wade* and was gravely overstepping its Constitutional boundaries[111].

The dissenting opinion, joined by Justices Scalia, Thomas, and White, declared the majority's result an "unjustified Constitutional compromise" which left the Court to rule on all types of abortion regulations "despite the fact that it lacks the power to do so under the Constitution"[112]. To the originalist (meaning an individual who believes that judges should interpret the Constitution as close to its original *public* meaning as possible), which three of the four dissenting Justices were, analysis of the historical record provided the most damning evidence. This record indicated that when the Fourteenth Amendment was ratified in 1868, a minimum "28 of the then-37 States and 8 Territories had statutes banning or limiting abortion"[113]. Clearly, any implicit right to an abortion through a substantive guarantee to

109. See *Planned Parenthood of Southeastern PA.*, 505 U.S. at 833.

110. J.A. Segal and H.J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices* (cited in note 96).

111. See *Planned Parenthood of Southeastern PA.*, 505 U.S. at 833.

112. *Ibidem*.

113. *Roe,* 410 U.S. at 113.

privacy by way of the Due Process Clause was entirely foreign to those who drafted the language of the amendment[114].

Unsurprisingly, the inherent ambiguity of the "undue burden" standard came before the Court in *Whole Woman's Health v. Hellerstedt*. In this case, a Texas statute was challenged which mandated that abortion centers needed to adhere to the standards of an ambulatory surgical center. Doctors were required to have admitting privileges at a hospital no further than thirty miles from the abortion center where they practiced. These provisions were challenged as creating an undue burden on the right of a woman to have an abortion[115]. The Court ruled in favor of Whole Woman's Health, striking down both provisions and by extension ruling them to be in violation of the Constitution through the substantive right to privacy asserted in *Roe v. Wade*[116]. The lack of nearby abortion clinics for many women in Texas resulted in what the Court deemed to be unreasonable transit times, which placed considerable obstacles in way of a woman attempting to receive care at an abortion clinic[117]. Amazingly, these three landmark cases and many others accompanying them stem from two words of a single sentence in the Fourteenth Amendment[118].

When Justice Harry Blackmun authored the opinion in *Roe v. Wade,* he clearly did not make a historical discovery of something implicitly promised in the words of the Fourteenth Amendment that no judge or constitutional scholar had yet noticed[119]. Regardless of an individual's political feelings on the matter, the issue of abortion legalization was at that moment plucked from the sphere of public debate and forced into the realm of constitutionally consecrated rights, to be firmly cemented in place by the doctrine of stare decisis, and destined to guide the Court in future cases. Chief Justice Roberts took a resigned and pragmatic stance to judicial opinions of this nature, encouraging those who agreed with the political outcome of the decision to celebrate that

114. See *Planned Parenthood of Southeastern PA.*, 505 U.S. at 833.
115. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (June 27, 2016).
116. *Ibidem*.
117. *Ibidem*.
118. See Graglia, *Our Constitution Faces Death By Due Process* (cited in note 88).
119. *Ibidem*.

victory, but not to celebrate the Constitution, as "it had nothing to do with it"[120].

8. *Privileges and Immunities Clause*

Save for *Dred Scott v. Sanford*, as well as a couple of lesser-known rulings such as *Wynehamer v. The People*, any precedents in American jurisprudence predating the Civil War that may be utilized to mark the dawn of judicially-oriented reconstruction of the procedural due process ideology are challenging to discover[121]. Due to the fact that the historically traditional procedural understanding of the Fifth Amendment due process clause was so ubiquitously accepted, attempting to reason that the inclusion of the Due Process Clause in the later Fourteenth Amendment would in any significant way impair the authority of state governments is challenging[122]. Akhil Amar, Sterling Professor of Law at Yale University, noted that in a variety of cases, particularly *Griswold v. Connecticut*, reliance on the due process clause seems "quite unpromising"[123]. At the heart of Professor Amar's criticism is, appropriately, the text[124], as a cursory reading of the clause itself reveals that the state may, in fact, with impunity, deprive individuals of life, liberty, or property, provided the prerequisite procedures have been followed[125]. Notably, at no point in the *Griswold* opinion does the Court identify procedural error in the law that banned the use of contraceptives among married individuals. It is readily apparent that "the Court's real objection to the law was not procedural but substantive"[126].

Professor Amar laments Justice Harlan's *Griswold v. Connecticut* opinion, noting the particularly dubious bedrock of substantive due process. Furthermore, Professor Amar pointedly identifies Justice

120. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (June 26, 2015) (Roberts dissenting).

121. See Frank R. Strong, *Substantive Due Process of Law: A Dichotomy of Sense and Nonsense* 39 (Carolina Academic 1987).

122. See Roald Y. Mykkeltvedt, *The Nationalization of the Bill of Rights: Fourteenth Amendment Due Process and the Procedural Rights* 20 (Associated Faculty 1983).

123. Amar, *America's Unwritten Constitution* at 118 (cited in note 104).

124. See *ibidem*.

125. See *ibidem*.

126. *Id.* at 119.

Harlan's omission of the adjacent and noticeably more applicable clause of the Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"[127]. The *Griswold* case is yet another example of the many Warren Court cases which brought substantive due process into the modern era[128]. Centered around a Connecticut statute that prohibited the use of contraceptives by married couples, the Court struck down the statute by using the Fourteenth Amendment's due process clause[129]. Justice Harlan's decision to forego the privileges or immunities clause was reasonable when considering the numerous civil rights cases that relied on the due process clause compared to the remarkably few decisions that invoked the privileges or immunities clause. The overriding goal of course, in situations such as *Griswold*, must take into account the continuity of jurisprudential bedrock[130].

However, as Professor Amar opines, a mere history of basing civil rights cases on the overburdened due process clause is not sufficient justification for continuing to do so, nor is it reason to ignore issues of such pressing magnitude. Indeed, Professor Amar continues to explain that the ultimate responsibility of the Court is "not to thoughtlessly exalt the case law but to thoughtfully expound the Constitution"[131]. Concededly, this approach does risk limiting the arguments surrounding substantive due process on their merits to the textualist methodology of Constitutional interpretation. However, Amar's rejoinder to this apparent limitation counters that textualism only "presupposes that the specific Constitutional words ultimately enacted were generally chosen with care. Otherwise, why bother reading closely?"[132].

An additional example to support these points can be found in the 2010 landmark case *McDonald v. Chicago,* which is the judicial refinement and extension of the *District of Columbia v. Heller* decision.

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127. *Id.* at 118.

128. See Philip B. Kurland, *The Supreme Court and the Constitution: Essays in Constitutional Law from the Supreme Court Review* 263 (University of Chicago 1971).

129. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

130. See Amar, *America's Unwritten Constitution* at 118 (cited in note 104).

131. *Ibidem*.

132. William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 Mich. L. Rev. 487 (2007).

However, *McDonald* mirrors some key aspects of the legal reasoning of *Griswold*, including Professor Amar's perceived flaw[133]. In context, *District of Columbia v. Heller* struck down elements of a statute that banned handguns and required trigger locks on other firearms as a violation of the federally applicable Second Amendment[134]. *McDonald v. Chicago* addressed the right of gun ownership for individuals across the country, finding that the Fourteenth Amendment did indeed incorporate the Second Amendment against the states through the due process clause[135]. Justice Clarence Thomas, demonstrating his intrepid commitment to textualism as the fundamental anchor to the rule of law, joined only select parts of the majority opinion[136]. Although he agreed with the judgment, that the core right of the Second Amendment was incorporated against the states, he filed a separate concurring opinion to elucidate his jurisprudence and further criticize the legal reasoning employed by the Court[137].

Justice Thomas studied the wording and meaning of the Fourteenth Amendment at the time of its ratification, as well as works from the First Continental Congress pertinent to the ratification of the Second Amendment. He also examined the writings of Sir William Blackstone and the Magna Carta of 1215. This information revealed crucial details about the Framers of both the Constitution itself as well as the Fourteenth Amendment at the time that these provisions were drafted and ratified[138]. A significant portion of his research was devoted to the distinction between the oft referenced due process clause and the textually adjacent yet meaningfully distinct privileges or immunities clause. Such an analysis revealed that the words "privileges" and "immunities" were commonly understood to be synonymous with "rights". Therefore, despite the very limited reading given to the privileges or immunities clause in the 1873 *Slaughter-House* cases, Thomas argued that this clause would be a significantly more appropriate source of the judgment in *McDonald* than the beleaguered due process clause[139].

133. See *McDonald v. Chicago*, 561 U.S. 742 (2010).
134. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
135. Murphy, *Scalia A Court of One* at 411 (cited in note 57).
136. See *McDonald*, 561 U.S. at 742.
137. *Ibidem*.
138. *Ibidem*.
139. *Ibidem*.

The dissenters in the *Slaughter-House* cases, as well as its detractors today, do not hesitate to argue that the opinion was too broad, particularly to the extent that the privileges or immunities clause was very nearly written out of the Constitution for all practical intents and purposes. Likewise, Justice Thomas is undaunted at legal precedents hindering the process of working past previous erroneous decisions in order to have a more "legitimate source of unenumerated social rights"[140]. Historical analysis into the potential depth of the privileges or immunities clause leads many scholars to believe the clause offers an objective and inherent advantage over the due process clause in terms of establishing the legitimacy of Constitutionally consecrated social rights[141].

9. *Conclusion*

Substantive due process resides at the heart of many of the Supreme Court's most important civil rights cases and is woven into many of its most controversial opinions[142]. A pervasive presence, it infiltrates and influences judicial processes and opinions regarded as everything from triumphs of social justice to those so reprehensible they are dismissed as aberrations in the history of the Court. The impact of substantive due process on American jurisprudence cannot be underestimated. As Justice David Souter explains, in the Constitution's text, many of the clauses provide expansive guarantees that require judicial interpretation. Such clauses include freedom from unreasonable searches and seizures, equal protection of the laws, and of course the right to due process of law[143]. These clauses are both unique and challenging insofar as they "cannot be applied like the requirement for 30-year-old senators; they call for more elaborate reasoning to show why very general language applies in some cases but not in others, and

140. Currie, *The Constitution in the Supreme Court* at 345 (cited in note 45).

141. See Amar, *America's Unwritten Constitution* at 118 (cited in note 104).

142. See Laura Inglis, *Substantive Due Process: Continuation of Vested Rights?*, 52 American Journal of Legal History 459 (October 2012).

143. See Murphy, *Scalia A Court of One* at 415 (cited in note 57).

over time the various examples turn into rules that the Constitution does not mention"[144].

Those opposed to expanding the substantive reach of due process rights argue that as a consequence of the perceived fraying of the Court's impartial legitimacy through substantive rulings, principals of natural law should only be viewed in the context of the role of the judiciary[145]. Furthermore, there should be great reticence to expand "the substantive reach of [the due process clause], particularly if it requires redefining the category of rights deemed to be *fundamental*"[146].

Across the last two and a half centuries, natural rights and natural law philosophy have profoundly impacted the Supreme Court's jurisprudence, particularly "in the aftermath of the Constitution's Fourteenth Amendment", and have undergone a second blossoming through the landmark decisions of the Warren Court[147]. These decisions, spreading across the political and ideological spectrum, represent a jurisprudence that transcends partisanship[148]. While Justice Thomas has attempted to influence legal thinkers and judges alike to allow natural law to infuse the privileges or immunities clause with substantive content, he has been largely alone in this endeavor[149]. In accordance with contemporary legal thought, the Fourteenth Amendment's Due Process Clause has continued to be the avenue through which judges have most frequently protected "individual rights and liberties"[150].

It seems to scarcely require acknowledgment that it is infeasible for a constitution meant to protect the liberty of its people to directly enumerate each and every freedom that the sovereign people retain. It would certainly be a noble objective, but it remains a Sisyphean task nonetheless. This truth necessitates that a constitution be written in language that is expansive and can respond to problems presented to future generations. However, even language that is expansive has

144. *Ibidem*.

145. See *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986).

146. *Ibidem* (emphasis added).

147. See Mock, *Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny* at 184 (cited in note 16).

148. *Ibidem*.

149. See *id*. at 191.

150. *Ibidem*.

limits. The emergence of substantive due process as a knee-jerk reaction to resolving civil rights cases in favor of further liberty is a sterling example of the danger inherent in making judicial textual adherence secondary to the policy outcome.

When judges give primacy to the due process clause in resolving issues of substantive liberty rather than the privileges or immunities clause, they commit two grave errors. First, exalting the due process clause as a font of unenumerated individual rights leaves the country at sea in terms of what can be expected from Fourteenth Amendment jurisprudence. Furthermore, doing so saps the power from the people, acting through their representatives, to debate democratically, persuade their fellow citizens, and reach their own results. Secondly, but quite relatedly, appealing almost exclusively to the due process clause grants judges extraordinary power that does not rightfully belong to them under the Constitution's text or structure to create substantive rules of policy for citizens.

Addressing issues of substantive liberty through the appropriate constitutional provision, the privileges or immunities clause, is by far the superior approach. Centering this clause at the heart of questions regarding fundamental protected liberties not only allows these freedoms to be legitimately ascertained, but it simultaneously ameliorates the problems presented by substantive due process. The textual constraints of the privileges or immunities clause allow for precepts of natural law to still provide a guiding lodestar. That being said, such constraints bind judges. By extension, these trammels allow issues outside the scope of the Constitution's text to be resolved in the only legitimate way possible – through the people, at both the state and federal level, mobilizing themselves and their fellow citizens at the ballot box.

WESE©: A Teaching and Learning Experience on Sustainability

Nicola Lugaresi, Laura Barbasetti di Prun, Gaia Lentini, and Emanuele Sartori*

Abstract: Walk, Experience, Share, and Enjoy. WESE is the acronym of an experimental teaching method. Over six days, twelve students and I walk the *Via degli Dei* ("Way of the Gods"), crossing the Apennines with our backpacks. This is a course about sustainability, but confined to neither development nor institutional decisions: sustainability, in WESE, also refers to personal choices in everyday life. The goals, therefore, are numerous: introducing students to environmental law (by showing them the environment and its scars), discussing and living sustainability (through group dynamics), rethinking academic relationships and goals (forgetting roles and forming a little, open, community). The article does not aim at providing a short "how-to" guide, even though it shows the path that led to the creation of the method and to its first implementation. It aims at sharing an academic experience that can help in understanding sustainability through a different route, involving not just "skills" but also the ability to connect with others, to live in the territory, and to "feel".

Keywords: Sustainability; teaching; learning; walking; method.

1. *Introduction: An Open Invitation*[**]

A few years ago, I decided to experiment with a new type of class to introduce students to the study of environmental law. I wanted my course to be different. Since this paper derives from that experience, I want it to be different as well, both in style and contents, conveying the spirit of the initiative. This is why the reader will find very few, if any, references. This is a paper about building a teaching method first, a law course afterwards, and testing both "on the road". Please read it with an open mind, imagining yourself walking with my students and me. I hope this will help the reader perceive what my students and I share, experience and enjoy.

I have taught this elective, called "Sustainability on the Road", for the last three years at the Faculty of Law of the University of Trento. I created this course following my (hopefully educated) intuition on what teaching might be, trying to step out of my comfort zone. My main focus was, of course, on teaching. At the same time, however, I focused on walking (and sweating) together and on group interaction while living environmental, academic and personal sustainability.

This paper is, and is not, a "how-to" guide. It is not, as the method requires a very personal approach, based on passion, attitude, and a pinch of madness – anyone has their own. Since, however, the course requires steps, efforts and choices, this paper may help you in saving time and avoiding mistakes that I have made, should you decide to try something similar. I hope my experience will inspire you to find your "way". Believe me, it will be rewarding – and fun.

As you will see, the article includes a paragraph written by three students who took part in the first edition of the course. Their contribution is essential, for four reasons. Firstly, the entire course is based on "us", not "me and them": leaving students' voices out would

have betrayed the spirit of the initiative, and I wanted to share with them not only the trek and the course but also what would follow. Secondly, as objective as I may be, I could not express what they have really grasped from the experience. Thirdly, I needed feedbacks: going beyond traditional academic evaluation systems allowed me to understand how much of what I wanted to convey was really absorbed by them. Lastly, I thought that contributions by students would have substantially enriched the paper: they could have perceived something that I had missed and they could have expressed it with a freshness – spontaneity, not naivety – that I may have lost. That turned out to be the case.

2. *WESE, and a Different Course*

When I decided to organize a course on sustainable development, I wanted it to be participative and joyful, outdoor and diverse, based on sensations and feelings. Moreover, being rather skeptical about the enduring value of the concept of sustainable development[1], I was looking for a different teaching perspective. Hence the method, and its four strictly intertwined elements: walking, experiencing, sharing, and enjoying it all.

Firstly, I wanted the course to involve walking, which is good for your body and spirit. It allows you to see things at the right pace, immersing yourself in the environment. If a picture is worth a thousand words, a walking immersion is worth a thousand pictures. In this environment, walking helps to create a close group of people. My goal was to have my group, myself included, not just strolling, but trekking, sweating; effort and fatigue add to the experience.

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** This article stems from an oral presentation at the annual workshop of the IUCN Academy of Environmental Law's Teaching and Capacity Building Committee (University of Strathclyde, Glasgow, July 3, 2018). Nicola Lugaresi wrote paragraphs 1–5 and 7; Laura Barbasetti di Prun wrote subparagraph 6.1; Gaia Lentini wrote subparagraph 6.2; Emanuele Sartori wrote subparagraph 6.3.

1. See Nicola Lugaresi, *The Unbearable Tiredness of Sustainable Development (At Different Levels, Lately)* in Robert V. Percival, Jolene Lin, and William Piermattei (eds.), *Global Environmental Law at a Crossroads* 195–210 (Edward Elgar 2014).

Secondly, I wanted the course to involve experience, which helps not only to understand and to remember what sustainability really is, but also to practice it in everyday and professional life. I wanted my students to experience a different way to learn, study, and consider environmental issues; to be in a class, even outside of a classroom; to interact with companions and people along the road. I wanted my group to sense sustainable tourism, empathy, feelings, sensations, and emotions; to live it all, saving memories.

Thirdly, I wanted my students to share, which is the key to create a group and have it become a community. Sharing trails and words, thoughts and sweat, food and ideas, knowledge and doubts, moods and laughs. Sharing not among "colleagues"[2] anymore, but among friends, buddies. Sharing among ourselves, knocking down barriers between professors and students, making us realize that, despite our different roles, duties and responsibilities, we are not on opposite sides within the educational process. In fact, hierarchy should have no citizenship in academia. Sharing instead of often-toxic competition in the pursuit of often deceiving, empty, unproven "excellence". In short, supportive, collaborative, sustainable academia.

Lastly, I wanted the course to be enjoyable. Enjoyment improves not only mood, but teaching and learning as well. An unwritten rule says that if the professors enjoy themselves, the students enjoy themselves too, remembering and absorbing more. Also, spending six "formal" days together, 24/7, would have been absurd and gloomily tough. I was looking for a different, light, enjoyable toughness.

I also felt that I needed a name for the course and an acronym for the teaching method that I was going to empirically create. I wanted them to be striking and evocative, in order to make the course attractive to the students and acceptable to the faculty where I teach. I chose the name "Sustainability on the Road"[3] and the acronym WESE[4] (Walk, Experience, Share, and Enjoy). Both worked just fine.

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2. The word *collega* ("colleague") can be used in Italian to refer to a university student in relation to his or her peers. It could be argued that this word should not be used in the context of student relationships.

3. The Italian course name is actually "Sostenibilità in cammino", a more literal translation of which could have been either "Sustainability on the Way" or "Walking Sustainability". I found a touch of Kerouac to be nice, even though we were going to walk through woods and hills and not to drive on highways and backroads.

4. I later found out that, in Afrikaans, *wese* means "being", "creature", "essence" (see https://en.wiktionary.org/wiki/wese; last visited October 31, 2019). I liked that.

3. *How, Where, and Why*

The idea for the course dawned on me while walking on my own the *Via degli Dei* ("Way of the Gods")[5], a five-day (on average), eighty-mile hiking trail from Bologna to Florence, across the Apennines. Not an epiphany, maybe, but sudden awareness that the land I was walking through for my personal enjoyment could have been a great stage for a teaching project.

I have stated above the importance of seeing, walking, feeling. One needs, however, a suitable environment to interact with, full of visual sparks, stories, issues, and people. The Way of the Gods delivered, and still delivers these elements. Under an environmental perspective, food for thought is everywhere along the way. The route connects two rich cities in northern-central Italy. It crosses their outskirts, presenting urban environmental issues where social factors are evident and relevant. From Bologna, the starting point, the outskirts merge with the Apennines through porticoes and a big park: sixty miles of trails, woods, hills, fields, and villages. The path then enters Florence, more abruptly, again with streets and outskirts.

Along the path, a number of environmental topics can be considered while walking, seeing the places, and interacting with local people. The "itinerant class" can discuss sustainable tourism, gasoline-free ways of enjoying the environment (such as trekking and mountain biking), and the so-called right to roam. They can discuss the sharing economy and its sustainability: B&Bs and Airbnbs, farm holidays, family restaurants, associations and co-ops, and how they impact local welfare. They can discuss social sustainability, considering history and traditions, how the little towns that went through difficult times in the last decades of the past century have found new nourishment from the Way of the Gods itself. They can discuss transportation and communication routes, be they environment-friendly (for example, trekking trails and country cart tracks) or not (for instance, high-speed rails and highways), and their relationship with the economic and social dimension of sustainability. They can discuss water, as the path follows or crosses rivers, artificial lakes, sluice gates

5. More on the Way of the Gods at www.infosasso.it/it/ita-via-degli-dei (last visited October 31, 2019).

and creeks (some of them dried up). They can discuss energy as they see solar farms, solar panels on roofs, little wind turbines, wind farms atop mountains, and other mountains where wind farm projects have been withdrawn due to residents' protests. They can discuss mining activities and their impact on the landscape, running into quarries and the results of their environmental restoration. They can discuss waste as they come upon landfills, illegal dumps, and recycling sites, observing how (or whether) the trekking trail is respected and maintained. They can discuss the landscape, the woods, the protected areas and the agricultural fields they walk on, as well as the identities of the territories and their communities. Most importantly, they can talk with, and listen to, the residents they meet, trying to understand what sustainable development means for them, what are their needs, hopes and dreams, eventually rethinking the concepts of NIMBY, NIABY, BANANA, YIOBY[6] and other smart acronyms.

This is a perfect location for a law course. The environment crossed by the Way of the Gods is neither the Grand Canyon nor the Dolomites; it is not unspoiled, but a harsher beauty to sense and enjoy, and as such it offers plenty of sustainability issues.

There is more, however: timespan, hardship, people. On average, the Way of the Gods is a five-day trekking. Considering the expenses, teaching and time needed to create a group, five to seven days is the right duration: the group has enough time to detox from the daily routine and attitudes, and fully live a different experience. Walking only a section of a longer trail would not give the same feeling of "wholeness". The Way of the Gods is not exceedingly hard to complete (about 10,000 people walk it every year), but it is tough (not everyone succeeds). It requires preparation and some physical effort, through which the group learns that working hard is the right way to achieve things of value ("No pain, no gain"). Lastly, people living in the Apennines are great workers, welcoming to guests and custodians of interesting stories and traditions. The walking microcosm bowl that often

6. NIMBY ("Not in My Back Yard"), NIABY ("Not in Anybody's Back Yard") and BANANA ("Build Absolutely Nothing Anywhere Near Anything") are common. YIOBY can have two different, diametrically opposed, meanings: "Yes, In Our Back Yard" or "Yes, In Others' Back Yard".

keeps trekkers prisoners of themselves, and separated from the local communities along the way, is likely to collapse – as it did for us.

In these terms, the difference between a WESE course and a traditional classroom course is huge. There are fewer words, cases, and laws. The theoretical part is reduced, due to time constraints and tiredness, and divided into sections matching what the group sees along the trail. However, according to my perception and my students' feedback over three years, the essence of both environmental law and sustainability is more deeply grasped and assimilated. The difference in learning emerges not only while walking together. In fact, we do have two traditional lectures: an introductory lesson before the departure, and a final lesson once back in Trento. I have found that both these lectures acquire strength because of this experience. The former not only provides a framework, but also helps students enter the appropriate learning mood. The latter not only wraps up the course, but also reconnects notions and memories. In both, group dynamics add to the teaching and learning results.

Let us take wind energy as an example. On the second day of class, I and my students walk through a wind farm on Mount Galletto. We hear the sound of the turbines and see how the landscape is affected. On the third day, we climb Mount of Cucchi, and on the following day, Mount Gazzaro. Differently from Mount Galletto, there are no wind farms there; yet, there could have been, had local communities not challenged administrative decisions authorizing their construction. Students will consult the relevant legal documents, but, before and/or after that, they can see the untouched, wooded summits. They can easily imagine what could have happened and how the landscape, the territory, and the *Via degli Dei* itself could have changed. They can talk with the residents of those areas. They can see other small turbines here and there. They can think about wind power under a different perspective, considering all the public interests concerned, beyond abstract principles. They can challenge mainstream thinking. As a consequence, they can discuss this all from the inside.

4. *Preparation and Choices*

The course requires not only the preparation required by any academic lesson, but also additional and potentially challenging administrative work and choices.

Bureaucracy includes requests for authorizations, funding, insurance and the search for lodging. Regarding funding, I ask the students for a sum covering only about forty percent of their expenses (train, lodging, food). I do this for two reasons: on the one side, I do not want to exclude anyone for financial reasons; on the other side, I consider fair that students who benefit from this experience cover a reasonable percentage of the costs.

Lessons are divided into four phases: an opening, traditional lesson before leaving; short references provided while walking in front of "cues" (such as a dried-up creek, a wind farm, or a protected area); a daily wrap-up before dinner; a final lesson when back to the classroom. The introductory lesson has two goals: discussing sustainability, public interests, and environmental law principles and structure; preparing students on what to look for on the trail, in order to make them active participants. Teachings along the trail are based on what we see and experience, starting from students' thoughts and knowledge. Naturally, in case we move slower than planned, we may have to cut short, so as not to arrive at our destination after dark. Similarly, the wrap-up at the end of each hiking stage may be shortened due to hunger (twelve students can be quite ravenous). The final lesson is aimed at combining the inputs gathered during the trail, answering questions and savoring memories of the experience that we shared.

The "diversity criterion" also applies to the choice of study materials. No textbooks nor legal articles; the only book I have chosen to employ in the course is *Il sentiero degli dei* ("The Path of the Gods") by Wu Ming 2[7]. This book tells the story of a man walking the Way of the Gods, meeting people, listening to their stories, learning about the history of the territory. It is not a legal textbook; however, it reports

7. Wu Ming 2, *Il sentiero degli dei* (Ediciclo 2010). Wu Ming 2 is the pseudonym of a member of Wu Ming, a collective of writers based in Bologna (see https://www.wumingfoundation.com/giap/what-is-the-wu-ming-foundation/; last visited October 31, 2019). *Wu ming* (无名) means "anonymous" in Chinese.

various events with environmental, social and legal implications, pointing out the role of politics, residents, and local committees. In my opinion, *Il sentiero degli dei* is a really well-written and thought-provoking text which can help readers to see the trail and the territory under a different light. In the first edition of the course, I had the opportunity to invite the author to meet us. He joined our group for dinner on the first day; he told us more and answered our questions, turning his non-legal book into a real experience.

Maybe unsurprisingly, the most difficult choices concern students, especially what number of students may apply to enrol and how they are to be selected. I think that, for a course like this, the most suitable number of participants is between six and twelve. Considering the preparatory work, the administrative aspects, and also the hardship of rejecting very motivated students, I chose twelve, the highest end.

Regarding the students' selection, I do not rely on quantitative criteria such as the GPA, the number of exams taken or the date of application. While this makes the selection process a bit harder, I want to give all applicants a chance on the basis of more sensible and qualitative requirements. Accordingly, I have decided to base the selection of students upon their motivation, subject to a twofold evaluation. Firstly, I ask each applicant to write a motivation letter answering two questions ("Why did you apply?"; "What do you expect from the group and what do you intend to contribute to the group?"). The motivation letters are assessed by two students who have attended the course in previous years. Secondly, I consider the behaviour of each applicant "before" the motivation letter; even before students formally apply by sending their motivation letters, I take into consideration my correspondence with them, starting from the very first emails in which they ask for information. In this way I can assess the students' care in writing (and reading my emails), attitude, curiosity, and initiative. From the first call of interest, I look for attention, care and proactivity. Assessing motivation when it is explicitly asked for can be tricky; doing so when motivation is not explicitly asked for is more likely to lead to genuine results.

Physical suitability is a prerequisite. I ask applicants to send me an email stating that they have contacted their doctor and that they have no significant health issues (particularly cardiocirculatory and respiratory ones). I provide students with a checklist of what to bring and

what not to bring, as well as some advice aimed at preventing problems (for example on training and on the choice of backpack; shoes and socks). I tell them about the trail and its difficulties (stages of sixteen miles on average, with an elevation difference of more than half a mile in both ascent and descent). I trust their judgment regarding their own fitness. Nonetheless, issues such as tiredness, blisters and muscle pain can naturally arise. On shorter stages, this is usually not a problem, and we strive not to leave anyone behind. On two, longer, stages, we may however find ourselves in a crucial situation as we may not want to risk arriving at our destination in the dark. While no particular issues arise if the concerned student concludes that it is better for himself or herself to skip that stage (with the potential for a growing opportunity should the rest of the group not mind and decide to support him or her anyway), the same is not true in case the concerned student has no intention to skip that stage but the group is worried about the likely delay in arriving at the destination. The easiest way out would be a decision of mine – which, however, I prefer not to make. Students are adults, they are in a group, and they know the values that inspired the course; they have to find a way out by discussing among themselves. In fact there is no right or wrong choice, and they have to learn to understand others' motives and practice empathy.

This kind of situation happened once, and was not easy to resolve. Indeed, the discussion was rather harsh. I was about to take a decision for the students, but I eventually chose not to. In the end, a solution was found, even though for some time afterwards there was some bad blood in the group. I later asked myself whether I should have intervened. I am convinced I should not have. I realized this had been a chance to grow, facing difficulties instead of relying on an "authority" instructing on what to do. It had been a test of the cohesion of the group, a mean to understand more about ourselves and what we were really doing there. I still think it enriched our experience.

On a final note, I should consider the grading system. At the University of Trento, courses are classified by the number of credits awarded upon successful completion. While courses awarding six credits or more involve a grading, "Sustainability on the Road" is a two-credit course and therefore is non-graded. Credits are awarded not on the basis of a final test, but by a general evaluation of the students' approach, dedication, behavior, and attitude. In a way, however, upon

departure I already know that the awarding of credits will be approved for all students. In fact, from the very first mile I want concerns about credits, grades, or assessments to be out of the way. What my students are going to do must be motivated by their interest, curiosity, desire to learn, will to interact. I want a course free from utilitarian considerations.

5. *Students*

The "diversity rule" also applies to participants. I look for "different students". I expect a lot from them, and I try to give them a lot. I look neither for the best ones under traditional academic criteria, nor for athletes. It is immaterial that they have previously attended environmental law courses or other courses that I teach. My ideal student is curious, empathetic, open-minded, unselfish, joyful and a bit of a dreamer. I ask them to have a positive attitude, to consider the needs of the other members of the group, and to help me in building the course.

Once the selection is over, I look for some volunteers for administrative work, such as collecting deposits from companions, contacting and paying lodgings, and requesting university offices for authorizations, insurance schedules or refunds. I then divide the students in six pairs, entrusting each pair with responsibility for one stage of the trek, providing for both hiking logistics and references to *Il sentiero degli dei*. I want to promote the students' independence, so as to prevent any possible laziness, sloppiness or opportunistic behavior and to form a team of (part-time) leaders, involving and engaging everyone. A further goal is their self-sufficiency. Even if something happens to me on the trail, I want the group to safely complete the trekking and go on with the course, building together a common knowledge.

Just before starting the course, I provide participants with a set of ten guidelines:

1. Stay safe on the trail: form a single file facing cars while on the road; drink often; avoid stupid things (no "killfies", please). Goal: to survive.
2. Consider the different levels the course is dealing with: teaching sustainability; living sustainability; revisiting academic relationships; interacting with people; reflecting on life. Goal: to expand perspectives and horizons.
3. Think as a group first: help each other; do not leave anyone behind; find solutions together. Goal: to avoid toxic selfishness.
4. Be a leader when needed: take the lead on the trail; lift the mood of the group in moments of crisis; be proactive. Goal: to reach "shared leadership" in the group.
5. Open yourself: talk and smile to companions, residents and other people we meet; watch, listen and smell. Goal: to discover.
6. Express yourself: let your thoughts out; make proposals; if you feel bad, if there is something wrong, let it out; if you feel good or if you are having a nice thought, say it. Goal: to share.
7. Detox: limit the use of the Internet (stimuli are in the woods), social networks (your network is the group), selfies (your "yourself" is you), pictures (your eyes are the ones with pupils and corneas) Goal: to enjoy the moment.
8. Step out of your comfort zone: challenge yourself; try new things; do not confine yourself; do not be afraid to be original and bizarre; think out of the box; escape conformism; be yourself. Goal: feel free to live fully.
9. Enjoy yourself: savor the places, the people, the feelings; be generous with others and with yourself and enjoy that too. Goal: to feel good.
10. Find your tenth rule by yourself.

While I realize that this list could look like a tourist booklet or a mindfulness seminar guide, and make me seem like some sort of guru rather than a university professor, it has actually proven to be very useful for my students. I am not a guru; I think that professors, even university professors, even law professors can go beyond laws, credits, and methodologies. We deal with young adults; they can relate with passions and feelings, and so should we. Stepping out of the comfort zone applies to us as well.

6. *Students' Views*

6.1. *Living the WESE Method: Empowered Relationship between Students*

When I decided to enrol in this course, I assumed that my personal motivations were different from those of anyone else.

Eventually, however, I realized with great surprise that the companions I had just met shared the same reasons which had pushed me to take this path. In fact, we all felt the lack of interpersonal relationships between students, as well as between students and professors, which in my opinion is a loss compared to an effective learning method involving discussing topics from different points of view.

This feeling arises from the way courses are organized in our university; many are attended by hundreds of students, only some by small groups, and among them only few include group work.

Moreover, some complain about competition between students, based more on rote learning than on the ability to contextualize and re-elaborate the study contents.

It was this perceived need for sharing and necessity of a more practical approach in our studies to lead our group on this adventure.

The group was made up of different people with different attitudes and different prior knowledge.

Some members of the group had attended environmental law classes, whereas others had not. Some of us had better organizational skills, while others stronger leadership abilities. Some students were experts at hiking, on plants and nature, while for others this was the first time they had worn a pair of hiking boots, let alone being able to distinguish rosemary from sage.

The professor was definitely a member of the group and did not impose his decisions over ours only by virtue of his institutional role. We ended up respecting one another for what we are as individuals.

These conditions gave us a chance to analyze everything we encountered from different points of view, and allowed us to develop new solutions that we would most likely never had been able to reach individually.

This experience changed the group from the first day we started walking, turning it into a unique, living organism which took care of

every single part, leaving no one behind as it usually happens at university, but, on the contrary, encouraging everyone to have confidence in their own abilities.

6.2. *Studying Environmental Issues Firsthand: Revisiting the Professor-Student Relationship*

This was an unusual experience. I had spent five years of university life sitting on a chair, reading and underlining words in a textbook. Standing in the middle of a green WESE classroom was a little confusing. However, it did not take long to get used to it and it soon became clear how being there was fundamental for a better, shared understanding of each environmental issue we came across on our journey. A mere reading of textbooks and judgements, or even just a quick look at a picture, would not have been enough to let us focus on every single detail of each issue. Sustainability is a concept which needs to be lived and felt to be understood. The simple written description of the damages brought by by a twenty-two-minute-gain railway running through the basement of Mount Adone did not help. Directly seeing the damages was way more impactful. Eighty-one watercourses, thirty-seven water sources, thirty wells and five aqueducts dried up; all of this for a twenty-two-minute gain on the way between Bologna and Florence. What did those numbers mean? Nothing, when written on paper. Only in a WESE "classroom" was it possible to understand if this gain had been sustainable or not (and it turned out not to have been).

Regarding the effects of the WESE method on a sustainable relationship between students, enough has been said in the previous paragraph.

Let us focus here on a sustainable professor-student relationship. Students are used to see their teacher come into a traditional classroom talking for ninety minutes or two hours and leaving once the lesson has finished. We only meet him or her at the end of the course, when the exam comes. We usually do not relate with teachers, unless for guidance with our theses. The WESE method, instead, made it possible for us to see a professor in a completely different way: he was one of us, he saw our efforts and struggles and shared his with us. The professor-student relationship was revisited under every aspect.

Last but not least, this particular course on the Way of the Gods motivated us to keep on studying to reach our life goals. Finding motivation in what we do every single day – waking up, attending lectures, studying, going to bed – is hard. Our daily routine is tiring, it dries out our souls. Sometimes our future seems anything but bright. This trail was able to give us an opportunity to recharge and to feel free from the burden of our textbooks for a week. Most importantly, the professor had the chance to teach us a life lesson. Some signs that can be found on the Way were words of wisdom: "Never give up when you are tired, give up only when you are done"; "When your legs are tired, walk with your heart"; keep on working hard, because "[t]he best view comes after the hardest climb".

6.3. *To Walk for the Walking's Sake*

The climb; is not this the way life is represented and imposed on us today? Climbing toward professional success, social stability, a better grade, a better job, a "better us".

The Way of the Gods gave twelve young different individuals the intriguing and refreshing feeling of struggling and working hard for no reason at all but the climb itself.

Walking ten hours a day uphill and downhill, under the scorching sun or at the mercy of the storm, not to get a result, but for the sake of walking, made us appreciate the authenticity and the joy of the relationship with nature – not only with the splendid nature surrounding us, but also our own nature.

If the shadow of the thicker vegetation and the coolness of the damp soil relieved us of our fatigue and invited us to conversation and exchanges of ideas, the steep climbs and the majesty of the highest views caught us off guard and aroused spontaneous and religious silences.

Meditation and sharing, introspection and communication; this is exactly what the Way of the Gods, and its protagonist, nature, meant to all of us.

At the time when we decided to enroll in Prof. Lugaresi's course, our student life was divided into semesters, study sessions, exams; our learning activity was based on books and evaluated through grades.

Innovative classes, such as "Sustainability on the Road", in which students learn not only from books, but also from shared experiences; where people, not numbers, make the difference; where the rhythm is not given by the school bell but by the sound of boots stepping on the ground, could be the revolution that today's school system needs in order to produce not just better, but also happier individuals.

In fact, it is when the fragility and the rush of today's life confront the ineluctability of nature that we truly understand how useless the climb is: that there is no victory, only existence.

7. *Conclusion*

To be honest, when I first proposed this course I was not sure of its possible outcome; this made things far more interesting. The method itself, WESE, was just outlined: it has been refined over the past three years.

To be brutally honest, I did not mind much, and was not afraid, to put forward a proposal that was only sketched. I did not know of anything similar (though maybe there is), and anyway I wanted to create, not just replicate, something. I knew I would have found a balance through experience.

The teaching part about environmental law and sustainability is relevant, but not my main concern. For sure, I want to show through shared experience what "real sustainability" ("living sustainability" or "civic sustainability") is, beyond rhetoric and worn-out statements. I want students to feel sustainability and live sustainability, more than reading about it.

My main focus is beyond teaching sustainability: there are two different, main aspects I want to explore with my students.

The first aspect concerns "sustainable" academic relationships: among students, and between professors and students; the value of cooperation, instead of competition; the importance of the group; the satisfaction, and – why not – the happiness of doing something with others and for others. A safe zone free of numbers, credits, grades, bell curves, where every student can get to the top (literally on the top too); help others, and be helped, getting there.

The second aspect concerns students as human beings. Seeing them smiling, being happy, forming a group, becoming leaders, discovering other values, interacting with residents was a great reward. Should any problems have arisen, we would have collaborated to overcome them.

I personally find this quote, attributed to William Arthur Ward, very inspiring: "The mediocre teacher tells. The good teacher explains. The superior teacher demonstrates. The great teacher inspires". I wanted to give my students something to remember and reflect on; to inspire them and to be inspired by them.

Con il contributo finanziario di:

UNIVERSITÀ DEGLI STUDI
DI TRENTO

Opera Universitaria di Trento

ISSN 2612-4874