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Front Pages

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The current issue is the first of the eighth volume of the *Athens Journal of Law (AJL),* published by the *Business and Law Division of ATINER*.

Gregory T. Papanikos
President
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Athens Institute for Education and Research

A World Association of Academics and Researchers

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- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **13 June 2022**

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2-5 May 2022, Athens, Greece

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Athens Journal of Law - Volume 8, Issue 1, January 2022 – Pages 9-30

Work and Employment for the Heritage: System Analysis of an Economic Asset for an Innovative Welfare Model

By Ivan Drogo Inglese & Roberta Caragnano[±]*

In this essay, which starts from the current scenario triggered by the COVID-19 pandemic and from the impact it has had on various sectors, the Authors lay the foundations for the study of a welfare of the heritage to accompany the cultural welfare through the creation of a model of integrated management of the same (heritage) both in aspects related to the enhancement and in those inherent in the process of cultural innovation, aiming attention at an international audience. A welfare that bets on the creation of "ecosystems" of welfare of the heritage able to connect to European clusters for a participatory management of the same, in the renewed scenario of economic recovery where the combination of culture and employment is central. All is analysed and contextualised in the welfare dimension/view. This essay, according to a definitive methodological approach in the opening paragraphs, reviews the value of culture and heritage in the European scenario - including a focus on the National Recovery and Resilience Plan - along with the themes of sustainable development and cultural indicators 2030, passing through the analysis of cultural activators and circular business models. In the second part, the effects of the pandemic on cultural employment are analysed, as well as scenarios of new professionalism in the job market in the sectors of heritage and culture, without neglecting the focus on the relationship between tourism and culture. According to a circular path, which is connected to the incipit of the essay that at the beginning refers to the Assembly of "Gli Stati Generali del Patrimonio Italiano" (The General States of the Italian Heritage), the Authors outline the perspectives de iure condendo also related to the workshop activities of the Assembly and to the need to iitiate among stakeholders (public and private) a continuous and participatory confrontation in order to promote, on the one hand, a new and sustainabe entrepreneurship of cultural heritage, and on the other hand, structural policies aimed at creating employment.

Keywords: *Cultural heritage; Welfare; Employment; Economic asset.*

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Introduction

This essay is inscribed in the current economic, regulatory and sociological framework and, starting from the effects of the pandemic crisis (triggered by COVID-19) and the new needs of the population, it carefully looks at the health and well-being prism, its different facets and the centrality of culture and heritage as economic assets. Everything is analysed and contextualised in the dimension of wellness. The concept of wellness, therefore, is enriched with content, becoming a broad category that goes beyond the mere measurement of income, and that represents a dimension of individuals', States' and society's health in general, and businesses in line with the most advanced experiences, including those overseas[2], which propose a «shift of emphasis from the measurement of economic production to the measurement of people's well-being[3]».

It is in this scenario that cultural welfare that generates wellness arises, as noted by the World Health Organization (hereinafter - WHO) in the 2019 research, *What is the evidence on the role of the arts in improving health and well-being?* [4]. In this case, according to the WHO[5], cultural welfare, meant as the ability of cultural experiences to influence the behavior of individuals, has positive effects on the same (individuals) both for the prevention of diseases (such as autism spectrum disorders, cardiovascular disease, Parkinson's disease) and for health promotion, treatment and management of certain diseases that may occur throughout life. In practice, therefore, artistic-cultural activities have healthy effects on both mental and physical health, and they are also evaluated with economic indicators.

In the vision of the authors of this essay, "heritage welfare" flanks cultural welfare and enriches it in a new and broader vision, which is not only a support to social welfare services – in order to guarantee assistance for fragile categories (elderly and disabled) as in the traditional concept (of cultural welfare) sustained by Pier Luigi Sacco[6] - but which is projected into a new meaning of culture and heritage (both material and immaterial) as an element and "domain" that - to use the terminology and declination of the ESW Report (Equal and Sustainable Well-being) - aims at well-being.

The aim of this essay is, therefore, twofold: on the one hand, to lay the foundations for an innovative line of research, namely the one of the welfare of heritage according to the above-mentioned definition, and on the other hand, to activate internships that, through the creation of a model of integrated management of the same (heritage) both in aspects related to the enhancement and in those

[2]In the Report, *How are Canadians really doing?* Canadian Index of Wellbeing, October 2012, in which the impact of crises on the quality of life of individuals is examined, the conclusion is reached, in light of the data, that there is a need to promote a better quality of life and to that end public policies must have a significant impact on well-being.
[3]Stiglitz, Sen, Fitoussi (2009).
[4]OMS (2019).
[5]In the above-mentioned research, The WHO has mapped, in an interdisciplinary manner, over 3,000 studies in the last 20 years between English and Russian academic literature and analysed the link between the arts and health.
[6]Sacco (2017).

inherent in the process of cultural innovation, aim to catch the attention of an international audience.

In this renewed concept, "Gli Stati Generali del Patrimonio Italiano" (The General States of the Italian Heritage), an initiative of Assopatrimonio[7], with the support of public and private Institutions, Universities, Foundations and other stakeholders, aims to analyse the state of the art of our heritage, and also to initiate a survey and concretise actions and proposals, contributing to the definition of welfare of the heritage that generates wealth, employment and work for younger generations and local communities.

Findings/Results

Problem Definition and Methodological Approach: The Basis for a New Welfare Model

The health crisis caused by Covid-19 has led to an economic "contagion" (resulting from the non-self-sufficiency of Countries and Companies in an increasingly globalised context) that, with a domino effect, has overwhelmed the economies of States.

In September 2019, in the Report *A world at risk, Annual report on global preparedness for health emergencies Global Preparedness Monitoring Board*[8], the result of a joint study by the World Bank and the World Health Organization, estimated - in a first ideal comparison - an economic effect, in the event of a pandemic, with a fluctuation ranging between 2.2 and 4.8 percent of GDP.

In 2018, a study by Victoria Fan[9] et al. highlighted the economic cost of a possible pandemic and estimated at «up to $500 billion per year (i.e., 0.6 percent of world income) the total value of the losses of an extended pandemic influenza, including not only the direct costs due to increased mortality and disruption of operations in many sectors, but also the lost income due to the subsequent reduction in the size of the labor force and productivity, as well as reduced demand due to restrictions on the mobility of people[10]». As noted also by Italian scholars, «this is a much greater impact than that of Sars, which affected economically mainly China and Hong Kong (-3 and -4.75 percent of GDP respectively in the second quarter after the epidemic), with lesser effects only in Canada and Singapore, and in any case limited to a single quarter (Marcus Keogh-Brown and Richard Smith 2008)[11]».

[7]"Gli Stati Generali del Patrimonio Italiano" is an initiative promoted by Assopatrimonio, under the patronage of CNEL (Consiglio Nazionale dell'Economia e del Lavoro / National Council of Economy and Work). The first Assembly was held in Rome on May 20, 2021, at the Villa Lubin venue.

[8]GPMB (2019). See the following link: http://apps.who.int/gpmb/assets/annual_report/GPMB annualreport_2019.pdf.

[9]Fan, Jamison & Summers (2018).

[10]Amighini (2020).

[11]Amighini (2020).

Forecasts, to name but a few, that for several years had been enriching the economic literature fearing a risk that was much closer than previously thought.

However, it was inevitable that the pandemic would have a strong backlash on employment. In the latest *ILO note Covid-19 and the world of work: 7th edition* of January 25, 2021, the massive impact on job markets in 2020 is confirmed, bringing with it not only a decrease in work hours but also a worrisome increase in inactivity relative to unemployment. According to the latest estimates in the year 2020, 8.8 percent of hours worked globally were lost compared to the fourth quarter of the previous year (i.e. 2019) with a corresponding loss of 255 million full-time jobs; overall, according to the data still, the losses in worked hours were about four times greater than during the 2009 financial crisis.

The result is the change in the global scenario caused by the pandemic, with effects on the global job market and employment as well as on the policies implemented by international and community Institutions, States and local welfare systems. The latter have had to deal with the emergency by adapting - and redefining in the course of the work - their own structures in order to meet the needs and requirements of families and workers, given the complexity of the phenomenon which is increasingly multidimensional and complex in nature.

A shock that for many Countries, including Italy, has made it necessary to initiate, or accelerate, processes aimed at remodeling and redefining the system of social policies with the provision of actions and tools capable of offering personalised services based on the different needs and requirements of the population in order to overcome the traditional concept of social welfare.

In this sense, and from a sociological point of view, the dualistic State-Market model, and in particular the Mediterranean welfare model, which has already been in crisis for years, has seen its course accelerated in a progressive shift from welfare state to welfare mix where the redefinition of the role of the public subject is central. Ascoli, in this regard, argues that the future of welfare models should tend to the search for paths and tools that can cope with the new problems related to overcoming the dualism state/market because in a perspective of welfare mix or welfare society «it is necessary to go towards forms of "co-planning" and "co-assessment" of social interventions on the territory in which the different actors (public and third sector) are able to build networks of social protection and promotion of welfare otherwise inconceivable[12]».

The post-covid challenge passes through a renewal of welfare in the direction of a community and cultural welfare[13] but also of a "welfare of the heritage", as clarified in the Introduction to this essay.

[12]Ascoli & Pasquinelli (1993); Costa (2009).

[13]Caragnano (2021). During the first phase of the emergency, the Cariplo Foundation and LombardiaSociale.it - which launched a study on, *The future of community welfare projects*, supported through the Welfare In Action program - highlighted the need for a community approach to welfare that is both generative and constantly evolving. If, on the one hand, the pandemic crisis has "distanced" people to protect themselves from contagion, on the other hand it has strengthened the sense of community identity, activating the network of volunteers, cooperatives, consortia, associations, the Third Sector, but also informal groups of citizens, who, as a result of the problem of home isolation for COVID, have made themselves available for the distribution of basic necessities.

To enter into the merits of the *quaestio*, cultural welfare is meant, in the common meaning, «a new integrated model of promotion of welfare and health of individuals and communities, through practices based on visual arts, performing arts and cultural heritage[14]» and that rests its roots on the recognition, also reiterated by the WHO (on the point see § 1), the effectiveness of specific cultural, artistic and creative activities on the health of individuals.

This welfare model is based on a salutogenic approach - according to Aaron Antonovsky's theory[15] - whereby it is much more important to pay attention to resources and people's ability to "create health" rather than focusing on diseases and risks. Hence the development, over the years, of a series of cultural policies that presume a systemic relationship between the institutional systems of health, social policies and those of arts and culture, as shown by European experiences, such as the one of the United Kingdom[16], but also Italian, if we think of the case of the Autonomous Province of Bolzano.

The pandemic crisis, as emerges from the cited WHO Report, «brings into play social cohesion, the biopsychosocial health of communities in a profound sense and it is urgent to work on a new idea of welfare in which the Arts and Culture can make a significant contribution to the recovery of the Country. Involving public and private actors and stakeholders, working in a multidisciplinary, multi-level and cross-sector perspective, to ensure social impact and nurture policies[17]».

From here the need and opportunity to think about new models of integrated and holistic welfare through the creation of a lab project / internship to meet the world of culture, art, heritage, professions and investments that also do not neglect cultural performance in the context of urban regeneration processes as well as the redesign and management of spaces for youth resocialization; all considering heritage as something that generates employment.

This is a facet of welfare that exceeds even the traditional vision of cultural welfare and that arises, precisely in the direction of the creation of "ecosystems" of Welfare of heritage that can connect to European clusters to activate a participatory management of heritage, in the renewed scenario that looks to economic recovery and where the combination of culture and employment is central.

A new current of welfare (of the heritage, precisely) that is in the furrow of nesting between the first and second welfare[18] in which the changes taking place are not framed by the traditional categories and for which «it is necessary to pay attention and promote a second intertwining, *so to speak* lateral, between the

[14]See Cicerchia, Rossi Ghiglione & Seia (2020).
[15]Antonovsky (1979); Lindström & Eriksson (2005).
[16]Bungay & Clift (2010); Mental Health Foundation (2009) The United Kingdom with its Arts on prescriptive (AoP) program represents one of the most significant experiences.
[17]Thus, in *Quali sono le evidenze sul ruolo delle arti nel miglioramento della salute e del benessere? Una scoping review*, Italian language publication of the WHO report (2019). Italian translation by CCW-Cultural Welfare Center in collaboration with DORS Regione Piemonte-Regional Documentation Center for Health Promotion, Medicina a Misura di Donna Foundation, SCT Centre - Social Community Theatre Centre.
[18]Maino (2015) at 33-34.

second welfare and the environmental and socio-cultural dimensions. To which it is more than likely that many others will have to be added in the future[19]».

The assumption is that the development of well-being, autonomy and equity passes through dimensions linked to the culture, in the broadest sense, but also from overcoming the digital divide and in a new vision of *empowerment* in which the places of culture also become places of welfare[20]. It is in this vision of cultural heritage becoming the driving force of redesign and regeneration of spaces, with impacts on local welfare by creating synergies with third sector organizations and other public, private or institutional, that stands the interesting experience of the Cultural Workshops of Catania. This project has allowed access to the architectural complex of "il Monastero dei Benedettini di San Nicolò l'Arena/the Benedictine Monastery of San Nicolò l'Arena[21]" (and it has made accessible, available and "understandable" to an increasing number of people the cultural heritage both for what concerns the educational and social function "involving the communities of reference in the processes of design and cultural production, as an act of awareness and participation[22]".

In the context of European policies, heritage is also the object of attention in the *Piano Nazionale di Ripresa e Resilienza / National Recovery and Resilience Plan* (hereinafter NRRP), presented by Italy to the European Commission and which represents an instrument with which Italy intends to carry out a series of investments and strategic reforms for the use of Next Generation EU funds.

As stated in the incipit of the same (Plan), in the general aims, «Our Country has a unique heritage to protect: a natural and cultural ecosystem of inestimable value, which represents a distinctive element of present and future economic development[23]» and in Mission 1 - which aims to give a decisive boost to the relaunch of competitiveness and productivity of the Country System - a series of actions and interventions are planned to remove architectural and sensory barriers in museums, libraries and archives, and to promote a culture of accessibility of the Italian cultural heritage. The need to enhance the cultural and touristic heritage is also highlighted in order to promote the Italy at an international level.

[19]See Maino & Ferrera (2019).

[20]Bandera (2019); Grossi & Ravagnan (2013); Novy (2018); Cavalli (2016).

[21]The complex today is home to the Department of Humanities of the University of Catania and it is a UNESCO World Heritage Site. The project shared with *Officine Culturali* was born from a proposal of the University, owner of the property and objectively unable to activate inclusive services of use and social communication of scientific research. Therefore, with the agreement of 2010 signed with the former Faculty of Arts and updated in 2012 directly with the University of Catania, *Officine Culturali* was entrusted with the enhancement of one of the most important cultural sites in Catania, namely the Benedictine Monastery.

[22]Mannino (2016).

[23]Thus in the Presidency of the Council of Ministers, National Plan for Recovery and Resi. #NEXTGENERATIOITALIA. *Italia Domani*, at 20.

Discussion

Sustainable Heritage Development and 2030 Cultural Indicators

The need for policies aimed at sustainable development for the protection and promotion of cultural heritage is one of the themes at the heart of the *2030 Agenda for Sustainable Development*, the action program for people, prosperity and the planet signed in September 2015 by the Governments of the 193 UN member Countries, which incorporates 17 *Sustainable Development Goals (SDGs)* within a broader program of action for a total of 169 *targets* or goals.

In Goal 11, *Making cities and human settlements inclusive, safe, resilient and sustainable*, Target 11.4 envisages, in fact, strengthening efforts to protect and safeguard the world's cultural and natural heritage. Sustainability that is also linked to tourism (which is also sustainable) for a rediscovery of heritage, according to a broad vision that also aims to promote integrated policies for dignified work and lasting economic growth and full and productive employment. All through the use of development indicators that can bring together the objectives of the 2030 Agenda and actions already implemented. In this regard, it is worth noting, for example, the *Culture for Development Indicators (CDIs)* as tools for measuring the contribution of culture to development processes, the start of which was in the 2005 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions[24] and which considers culture as a fundamental element for sustainability.

In detail, the document shows that «Each indicator is calculated through a complex analysis. For example, the indicator "Sustainability of the Heritage" is divided into 46 items, which can be joined to 3 key components:

- Existence and development of national and international registries and related enrollments;
- Activities aimed at heritage protection, conservation, preservation and management, in tune with actions for stakeholder engagement and sustainability of assets;
- Strategies adopted to raise awareness and build support for heritage preservation and revitalization.

From the three identified areas, we can see the importance given to the relationship between heritage and society, no longer relegated to a secondary need but considered of equal importance to physical conservation. This link with society is also expressed in the protection of knowledge and traditional crafts, cultural and economic resources at the same time to the attention of objectives 8 and 12 [SDGs objectives], also devoted to the promotion of culture and local products through sustainable public policies that generate employment[25]. Likewise, the most recent

[24]Approved on October 20, 2005 by the XXIII General Conference of UNESCO. Ratified by Italy on February 19, 2007 with Law n. 19. Entered into force upon the 40th ratification, March 18, 2007.
[25]Avanza (2016).

UNESCO report, "*Culture 2030 Indicators*" (CI)[26] of 2019, in which thematic indicators are illustrated with the aim of measuring and monitoring the contribution of culture to sustainable development.

If, on the one hand culture indeed represents a separate sector in its own, on the other hand, there is no denying its transversal nature with respect to the objectives of the 2030 Agenda and, therefore, its ability to penetrate local development plans, to facilitate processes, and to intervene in development policies to provide a methodological and analytical approach, both for the enhancement of existing sectors and for future planning. On this point, the Report specifies that the goal /target of the Cultural Indicators is to «propose evidence-based approaches with the aim of providing tools and guidelines for interpreting the cultural phenomenon as an element of great value in addressing global challenges - from climate change to increased employment, social inclusion, etc. - and in ensuring the well-being of communities».

In the Report, related to each indicator there is a technical sheet in which the sources for obtaining data and instructions of a method for constructing the indicator itself are also indicated; for the quantitative indicator "Cultural employment", which is of interest for the themes dealt with in this paper, for example, UNESCO provides the formula for calculation based on the methodology adopted by the UNESCO Statistical Institute (UIS), while for the qualitative indicator "Governance of culture", UNESCO proposes a checklist through which to monitor aspects such as the presence of ministries or statistical offices responsible for collecting data on culture, often with reference to what is established by UNESCO Conventions[27].

Indeed, the four cross-cutting dimensions of culture, which rework / revise the 17 goals and indicators of economic development of the 2030 Agenda, can be summarised as follows

1) *Environment & Resilience*» (with reference to SDGs 2, 6, 9, 11, 12, 13, 14, 15 and 16) highlights the role of Culture for environmentally sustainable development;
2) *Prosperity & Livelihood*» (SDGs 8, 10 and 11) questions the role in strategies aimed at inclusion/integration of goods and services, work, participation and communities;
3) *Knowledge & Skills* (SDGs 4, 8, 9, 12, 13) focuses on the importance of soft and hard skills that exist or need to be enhanced in the cultural sector in order to trigger, facilitate and develop processes of empowerment and capacity building;
4) *Inclusion & Participation*» (SDGs 9, 10, 11, 16) focuses on the possibilities for people to participate in cultural life. This last dimension also explores the ways in which cultural practices convey values that promote social inclusion[28].

[26]The Report is available at https://unesdoc.unesco.org/ark:/48223/pf0000371562. See also United Nations Organization (2005); UNESCO (2019); UNESCO (2014); UNESCO (2009).
[27]Montalto (2021).
[28]Gasca (2020).

With regard to the goals of the aforementioned Agenda 2030 Jasper Visser[29] developed, in 2018, a study in which he highlighted the actions (and related targets) put in place by museums to achieve the Sustainable Development Indicators.

From this study more than fifty targets emerged that museums can invest in to achieve their sustainability goals. Each target was identified on the basis of a number of indicators: green indicates areas in which museums are almost "pathfinders", meaning that they are working towards the achievement of sustainability goals; blue indicates targets that require the collaboration of an external body in order to achieve the goals; and red indicates targets for which internal change is necessary (in order to achieve the goals).

From this reading, therefore, it's pointed out how necessary and fundamental it is that both cultural attractions and cultural organizations take on an active and proactive role both for sustainable development and for the achievement of objectives, also in the awareness of their strategic role for local communities and society as a whole.

On this basis, the binomial culture and sustainable development begins to assert itself in the Italian legal doctrine[30] as the fourth/ IV pillar of sustainable development together with the environment, economic development and social solidarity, in a vision that allows to look at the protection of heritage and the economic-legal aspects in an integrated way.

Circular Economy: Cultural Activators and Circular Business Models

The themes/topics of sustainable development, environmental sustainability and circular economy also involve cultural heritage with respect to the management models of the same and to the effects/consequences that climate change has on assets[31]; in Italy, one of the most emblematic cases is Venice[32]. These are all

[29]Visser is a consultant for the strategic development of community process communication, digital transformation and managerial management of cultural and civic organizations whose activities can be found at the following link https://themuseumofthefuture.com/about/

[30]Videtta (2018).

[31]See UNESCO (2020c) To manage this threat already in 2006, the World Heritage Committee adopted the report "Predicting and Managing the Effects of Climate Change on World Heritage", and a "Strategy to Help States Parties to the Convention Implement Appropriate Management Responses". Also in 2006, the General Assembly of the States Parties to the 1972 Convention adopted a Policy Document on the Impact of Climate Change on World Heritage Sites and strongly recommended its implementation, dissemination and promotion".

[32]Biscontin & Driussi (2020); Breil (2014); Breil, Gambarelli & Nunes (2005). Over the years several interventions have been put in place in order to protect the city of Venice and its cultural heritage from the continuous flooding of the Venetian lagoon; the best known/most famous/big-name has been the MOSE system (Modulo Sperimentale Elettromeccanico) that provides mobile barriers to close the lagoon to the sea in case of risk due to exceptional tides. Lastly, in *Venezia2021 Programma di ricerca scientifica per una laguna "regolata" /Venezia2021, a scientific research program for a "regulated" lagoon*, coordinated by CORILA (Consorzio per il coordinamento delle ricerche inerenti al sistema lagunare di Venezia / Consortium for the coordination of research on the Venice lagoon system), an association between Ca' Foscari University of Venice, IUAV University of Venice, University of Padua, the National Research Council and the National Institute of Oceanography and Experimental Geophysics, various study and monitoring interventions are

aspects that have fueled an intense European debate and nurtured various initiatives[33].

In this scenario multiple resolutions and initiatives are placed such as the Resolution of the Council of the European Union adopted on November 21, 2019 on the cultural dimension of sustainable development and the European projects that followed, such as "CLIC - Circular models Leveraging Investments in Cultural heritage adaptive reuse" funded under the "Horizon 2020" Program[34]. A project launched in December 2017, coordinated by IRISS - Istituto di Ricerca su Innovazione e Servizi per lo Sviluppo of the Consiglio Nazionale delle Ricerche (CNR) joined by 15 partners including research institutions, local government organizations, businesses and local authorities from 10 European Countries - which all sees cultural heritage as a «field of experimentation for innovative models of financing, business and governance able to promote and enable the reuse of cultural heritage in European cities and cultural landscapes, in the perspective of circular economy as a model of sustainable development[35]».

In a similar manner/Similarly, as emerges from the research, the reuse of heritage from the perspective of regeneration can become a cultural attractor such as to enable the development of circular business models. «If, on the one hand, mass fruition "consumes" the great cultural attractions, on the other hand, most of the existing cultural heritage is far from urban regeneration processes and represents a liability in the development of social and cultural capital. In a logic of circular economy, a transition is developing from a polarised vision (cultural asset to be preserved) to a vision of cultural infrastructure (capital to be enhanced and reproduced). In this vision, the cultural capital is the driver of a regeneration process on an urban or metropolitan scale in which the transverse interconnections between the productive cycles of adaptive reuse of the available heritage, both in the adaptation and in the management phase, configure a circular process of multidimensional production of value[36]».

This vision that is also at the root of European choices and policies, as per the aims and guidelines for 2014-2020 of the Creative Europe Framework Programme (divided into two sub-programmes: Culture and MEDIA), which has put in place a series of actions to support transnational policy cooperation in order to promote innovation, policy development, audience building and new business models for the competitiveness of the sector, with an investment of € 1.46 billion.

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planned. In particular in *Tematica 5. Cambiamento climatico e strategie di adattamento per la salvaguardia del patrimonio culturale di Venezia e la sua laguna*, / *Topic 5. Climate change and adaptation strategies for the safeguard of the cultural heritage of Venice and its lagoon*, articulated in three specific strands of study, it is expected the development of a series of «procedures for intervention and maintenance of architectural elements and historical materials, which will allow to define and implement a periodic monitoring control of the historical, artistic and cultural heritage present in the lagoon» (see Topic 5 available at the following link http://venezia2021.corila.it/tematiche/tematica-5/).

[33]A key document is ICOMOS, Future of Our Pasts: Engaging Cultural Heritage in Climate Action, edited by ICOMOS and presented in Baku in July 2019 during the 43rd World Heritage Committee.

[34]The project can be found at https://www.clicproject.eu.

[35]Daldanise, Gravagnuolo, Oppido, Ragozino, Cerreta & Esposito De Vita (2019) at 1352.

[36]Daldanise, Gravagnuolo, Oppido, Ragozino, Cerreta & Esposito De Vita (2019) at 1349.

Heritage and Culture in the Time of Covid-19: The Impact on Employment

Heritage and culture are primary economic assets and they must be the core of the National strategy political agenda for the recovery of the Country system and it's the main task of the Institutions to put in place actions and forward-looking investments that, starting from the enhancement and enjoyment of the assets, bring to an economic recovery and employment especially for the younger generations, according to a vision of sustainable well-being with a multi-level approach.

This is the basic assumption on which we develop our thought and a path that can promote sustainable, inclusive and lasting economic growth according to the European vision - also in the light of Agenda 2030, and a full and productive employment and dignified work for all on the assumption that in recent decades the impact of crises and the resulting social disruption have highlighted, on the one hand, critical issues and, on the other, the need to aim at sustainable well-being.

The historical period that we are experiencing due to the Covid-19 pandemic has not spared the world of culture tout court and heritage, which are engines of the economy.

Culture represents a fundamental component of common living and it's considered an essential value of society as well as a daily expression of our citizenship. This strong belief is also reiterated in parliamentary acts and, among them, in the Resolution of the 7th Permanent Commission (Public Education, Cultural Heritage, Scientific Research, Entertainment and Sport) approved on December 13, 2017 (Doc. XXIV no. 89) which, in committing the Government to develop an overall strategy in view of the European Year of Cultural Heritage (2018) - on the assumption that Italy possesses an enormous potential in this sector - highlighted how "Culture, in addition to its social value and intercultural dialogue, is increasingly recognised as a driving economic segment of a strategic nature, especially in our Country, for the development of *per capita* wealth, welfare and overall national GDP. In Italy, the cultural sector has proven to be one of the sectors with the greatest prospects for growth[37]".

UNESCO itself in the survey *Impact of Covid-19 on World Heritage Sites and the Tourism Sector*[38] published a map of the consequences of the pandemic in the 167 Countries where there are World Heritage sites and the data shows that «19 States have totally closed their sites (71%), 17 have left their sites open to the public (10%) while 31 (19%) have implemented a partial closure. The impact on local communities is sensitive if we only consider the close link between World Heritage sites and the economy related to cultural tourism». Losses have been estimated around 300-450 billion dollars with a strong negative impact on SME / small and medium-sized businesses.

UNESCO, in its report *Museums around the world in the face of COVID-19*[39] pointed out that about 90% of the world's museums were closed due to the pandemic and that the remaining 10% may not be able to sustain recovery due to

[37]See in Senate document at http://www.senato.it/leg/17/BGT/Testi/Allegati/00000280.pdf
[38]UNESCO (2020a).
[39]UNESCO (2020b).

economic difficulties. Similarly, in Europe, according to NEMO (Network of European Museum Organizations)[40], the daily loss of museum revenues due to the suspension of visits is significant, and must be added to these the charitable contributions and sponsorships for public and private museums. These are all elements that put the financial sustainability of museums at risk, especially smaller ones. This is no different for sites of archaeological interest.

Federculture's XVI Annual Report [41], in addition to noting the negative impact of Covid-19, highlights the significant reduction in public resources for the cultural sector. From 2000 to 2018, public spending on culture fell by one billion euros, from 6.7 billion in 2000 to 5.7 billion in 2018.

However, the crisis has shown the Italian criticalities in this, as in other sectors, and has forced shared reflections and a new lymph from the institutions.

In a recent document sent on April 8, 2021 by ISTAT, *Esame del disegno di legge n. 2144 (Conversione in legge del decreto-legge 22 marzo 2021, n. 41, recante misure urgenti in materia di sostegno alle imprese e agli operatori economici, di lavoro, salute e servizi territoriali, connesse all'emergenza da COVID-19)*, it is recorded that the health emergency has led to «a decrease of 187,000 employed in tourism and 33,000 in culture; in percentage terms, this is a drop of 11.3% and 5.2% respectively (decidedly higher values than the -2.0% recorded on total employment). About half of the employment lost between 2019 and 2020 (-456 thousand people) was in these sectors[42].

In the X Symbola Report "Io sono Cultura[43]", presented on April 15, 2021, the great impact of the pandemic on the cultural supply chain is evident, due above all to the lockdowns that resulted in the closure of art and culture venues. In detail, the Report also contains a part of analysis on the state of the art of the sector in the pre-pandemic period from which it emerges that if on the one hand in 2019 the core and creative driven segments had produced an added value of about 91 billion euros, with a growth of 1 percent over the previous year, on the other hand the historical and artistic heritage remained at the bottom of the list with its 3 billion euros of added value (See *Cosenza 2021*). In the overall Italian scenario, this segment represents 0.2 percent of the total Italian economy and it employs 58,000 people; a figure that should also be read in the light of the positive results of the 2018-2019 period, which saw growth in the sector, with a consequent increase in added value of 2.8 percent, and an increase in employment of 4 percent. Figures,

[40]Network of European Museum Organizations (NEMO). NEMO was founded in 1992 as an independent network of national museum organizations and it represents the museum community of Council of European member states.

[41]Federculture (2020).

[42]Thus in the document ISTAT, Examination of Bill No. 2144 (Conversion into law of Decree-Law No. 41 of March 22, 2021, on urgent measures in support of businesses and economic operators, labor, health and territorial services, related to the emergency from COVID-19), Commissions 5a (Economic Planning, Budget) and 6a (Finance and Treasury) Senate of the Republic, April 8, 2021.

[43]The Report is promoted by Fondazione Symbola, Fondazione Cariplo, Unioncamere, Regione Marche, Istituto per il Credito Sportivo, with the partnership of Fondazione Fitzcarraldo and Centro Studi delle Camere di Commercio Guglielmo Tagliacarne, under the patronage of the Ministry of Culture, and it can be consulted on the Fondazione Symbola website at the following link https:// www.symbola.net

however, lower for heritage than for other sectors such as the creative industries. In broad terms, the report also highlights three critical aspects: the fragmentation among the various cultural subsectors, which implies the need to create a system; the presence of widespread forms of precariousness that often risk translating into undeclared work; the lack of adequate strategic skills in the digital and managerial spheres.

On this basis, it is essential to have a shared strategy among stakeholders to put in place a sort of Marshall Plan of the heritage that has as its reference the values and objectives of the Framework Convention of the Council of Europe on the value of cultural heritage for society (made in Faro on October 27, 2005 and ratified by Italy with October 1, 2020's law, no. 133) in which knowledge and use of heritage are recognised as central elements of the right of citizens to participate in cultural life, as defined in the Universal Declaration of Human Rights, and the role of heritage in the creation of work and employment is reaffirmed.

The encouragement to States is on the one hand to promote a greater synergy of skills among all public, institutional and private actors involved, and on the other to put in place measures that preserve cultural heritage and its sustainable use with the aim of human development and quality of life.

Economy of Culture and Heritage: The Effects on Employment, Employability and Proposals

Given the above, there is a close connection between the economy of culture/heritage and employment, which must be strengthened and enhanced from a systemic perspective.

This combination must be one of the drivers of the post-Covid recovery, recognizing the role of heritage as a strategic lever for development, necessarily linked to the territories and able to feed a production chain based on protection, preservation and enhancement according to innovative business strategies that are also inextricably linked to the tourism sector.

The OECD in the *Shock cultura: COVID-19 e settori culturali e creativi*, of September 7, 2020, reiterates the need to put in place policies for the recovery and revitalization of local economies that leverage the economic and social impact generated by culture.

As shown by the above-mentioned studies, in fact, there is a real underestimation of cultural employment that most often is not present in the official statistics of the States for various/several reasons. It comes to notice from the cited OECD report, that "when estimating cultural employment, it is difficult to determine what percentage of certain economic activities and professions is truly cultural. For this reason, activities and occupations that are only partially cultural are often excluded from official cultural employment statistics. In addition, labor force surveys include only a respondent's main paid job and do not capture the secondary employment or volunteer employment that is present in the CCS[44]".

[44]Read Note: Adapted from Eurostat, Culture Statistics, Cultural Employment, https://ec.europa.eu/eurostat/statisticsexplained/index.php/Culture_statistics_-_cultural_employmentb and in *OECD*,

It follows that, in the overall analysis of the workforce of the cultural and creative sectors, an important aspect is the presence of atypical forms of work, more than in other sectors, with the presence of several workers organised in micro enterprises or self-employed professionals, freelancers, for whom there are no public supports such as income support tools in case of economic shocks. A situation that became evident during the pandemic period. Often, in fact, workers employed in these sectors carry out the work activity not in a principal way and they have "combined" contracts with subordinate work contracts, for example part-time, and as such being the activity in question "secondary" with respect to the principal one, which implies that they escape official statistics.

Another specific aspect of jobs in the cultural sector is the presence of specific business models with different governance if we consider that in the sector/branch we go from non-profit realities to public and private institutions such as museums and libraries, to large realities, such as Netflix.

Above all, then, the relationship between tangible and intangible assets, often expression of their intangible nature.

Given these premises, the need emerges to put in place not only systemic actions for the sector and concrete and immediate income support for individual workers (as happened in several Italian regions, in the pandemic period) and companies, including small ones and not only institutions, but especially to design interventions at the legislative level.

It is essential to set up a system of specific policies in order to guarantee social protection, career development and updating of workers' skill in the cultural, heritage and tourism sectors, both to guarantee continuous training (long life learning) and to develop up-to-date models for the certification of skills (see the following paragraph).

The New Professionalism of the Job Market in the Heritage and Culture Sectors: Reference Scenario

Our job market must be able to meet the challenges of a 4.0 economy and it must identify new professional skills and competencies, find out the most of young talents, focus on the transferability and certification of skills acquired in formal and non-formal contexts. All this is possible by providing actions and measures that look carefully and proactively at the «transitional labor markets» [45] in a job scenario that constantly mutates. But there's more: a side of the doctrine argues that it is scientifically proven that «the sudden obsolescence of technical-professional skills, the emergence of new trades and the changing skill profiles needed to control technology confirm the crucial role played by skills development in a modern system of protections»[46].

We need to implement the Commission's call to «work closely with Cedefop to better estimate and anticipate future skills needs and better match them to job

Culture Shock: COVID-19 and the Cultural and Creative Sectors, September 7, 2020. CCS stands for cultural and creative sectors.

[45]Schmid (2011).

[46]Casano (2017).

market supply[47]». The cultural employment sector is most affected by this, noting that it is suffering and it needs new blood.

In this scenario, it is necessary to act at the national level (between the institutions in charge) to improve the understanding and comparability of the different qualifications among the various Member States and also to evaluate the proposal to revise and further develop the EQF (European Qualifications Framework[48] going through cooperation between member states and all stakeholders.

As well as in other sectors [49] also in culture it is essential to proceed to an analysis of national systems of professional qualifications in order to propose an adaptation of them to meet the changing needs of the new emerging professions also in the direction of the organization, on an annual basis, of a «"European Skills Forum" to allow the relevant authorities, educational institutions, professionals, students, employers and workers to exchange best practices regarding prediction, development and validation of skills[50]».

One of the perspectives could be the realization of a Knowledge and Innovation Community (KICs[51]) for cultural heritage and culture, bringing together the main stakeholders from the world of institutions, public authorities, research, organizations that daily strive for the promotion, preservation, protection and enhancement of heritage.

In the renewed scenario that looks towards economic recovery, the younger generations must be educated to understand that heritage can represent an extraordinary entrepreneurial and professional opportunity and that its valorization is equivalent to improving well-being and sociality. A path that also aims to create synergies with the world of education and universities for the activation of targeted courses to train young people with specific professional profiles in the fields of cultural heritage, territorial economy, territorial marketing, art history and tourism.

In this regard, the role of universities is central in order to design courses (undergraduate and postgraduate) that take into account the new needs of the job market in the cultural heritage sector.

In the Research *Competencies for Cultural Heritage*[52] of the Foundation School Cultural Heritage Activities – born/originated from the participation of the

[47]European Parliament (2017).

[48]In the Recommendation of the European Parliament and of the Council on the establishment of a European Qualifications Framework (EQF) for lifelong learning (in Official Journal of the European Union 2008/C 111/01) regarding the establishment of the EQP, Member States are invited «to relate their national qualifications systems to the respective EQF levels and, where appropriate, by developing national qualifications frameworks in accordance with national legislation and practice».

[49]Caragnano & Danese (2018).

[50]European Parliament (2017) cit. Paragraph 155.

[51]Knowledge and Innovation Communities (KICs), introduced by a European regulation in 2008, are the main operational tool of the European Institute of Technology (EIT), created with the aim of contributing to competitiveness and sustainable economic growth by strengthening the capacities of the EU and its Member States to fully integrate the "knowledge triangle".

[52]For further discussion read the research, *Skills for Cultural Heritage*, December 2020, at https://www.fondazionescuolapatrimonio.it/wp-content/uploads/2021/02/RapportoFinale_CompetenzePatrimonioCulturale.pdf

aforementioned Foundation in the Project *Charter Cultural heritage* action to refine training, education and roles funded under Erasmus+ and having the aim of defining and building, at European level, a strategy for cultural heritage professions - several interesting aspects emerge such as, on the one hand, the difficulty of measuring the job market in the cultural heritage sector, also due to a difficulty of statistical sources [53], on the other hand, the lack of a unitary framework of reference of both the occupational and the training capital of the sector. In light of the research, a database was therefore created, among other things, to correlate the professional profiles and roles surveyed with the related activities and training paths.

It follows that it is strategically important to start a process of rebirth able to offer the new generations a renewed and innovative cultural planning and project management skills aimed at the management of new integrated services for culture by promoting wide-ranging actions to create strategies on audience development and /or new cultural business models, improving the skills of cultural operators and national structural policies to compete in the global scenario, also using the great potential of technology.

Conclusion - Final Comments and *de iure condendo* perspectives

As anticipated in the opening paragraphs, this essay aims, on the one hand, to promote the study of the research strand of the welfare of the heritage and, on the other, to support and monitor the work of the Assembly of "Gli Stati Generali del Patrimonio Italiano" (The States General of the Italian Heritage), which will take place on May 20, 2021, and which represents a laboratory and an opportunity for reflection and study on the state of the art of our historical, cultural and artistic heritage.

Behind this there is the concept of heritage as an engine of economic development, which also finds its foundation in European policies (as discussed in detail in §4) and which must become the fil rouge of Italian strategic planning.

This is all the more true in an historical moment such as the current one, in which investments for recovery are at the center of the political agenda and of the aforementioned National Recovery and Resilience Plan presented to the European Commission as part of the Next Generation EU (750 billion euro European program for the relaunch of an EU economy overwhelmed by the pandemic crisis), and which sees Italy as the main character in a project of reforms to increase the sustainability of our economy and make it more "resilient" to the changes that are looming in the years of recovery from the Covid crisis.

In 2020 the MiBAC has already started strengthening the specific interventions, such as the Strategic Plan "Major Projects Cultural Heritage" «which aims to boost the competitiveness of the Country with interventions and investments on assets and sites of great interest and national importance for which it is necessary and urgent to implement organic projects of protection, redevelopment,

[53] See Bodo, Cabasino, Pintaldi & Spada (2009); Cabasino (2014); ISFOL (2016).

enhancement and cultural promotion, in order to increase the supply and demand for use/cultural fruition[54]".

This plan, launched step-by-step from August to December 2020, brings together culture and tourism and provides funding of 25 million euros which, added to 103,630,501 euros already allocated (precisely in August 2020) for other projects reach the total value of 128,630,501 euros.

Other projects have also been launched on the digitalization front and with innovative investments; for example, with Hevolus Innovation (an international company, specialised in research and development of innovative business models for a phygital customer experience) an experimentation, unique in Italy, is being conducted for the fruition of historical and artistic heritage, and from the partnership was also implemented the project of the HoloMuseum of Castel del Monte (in collaboration with Infratel Italia and Microsoft Italia), to enhance culture, the use of digital and in order to offer visitors innovative fruition experiences while expanding the (cultural) offer and relaunching tourism.

Therefore, a broad vision with the basis of work and employment is central and strategic; a vision that points to an innovative management and international scope of heritage to define strategies for the design of structural policies to support and enhance the heritage in a vision "new", detached from the obsolete dynamics and approaches.

In this scenario, "Gli Stati Generali del Patrimonio Italiano" represent an assembly structured in several Commissions (Academies and Universities, Cinema, Economy-Finance-Investments, Europe, Events, Technological Innovation, Work and Employment, Landscape and Territory, Real Estate, Professions, Restoration, Tourism) with the aim of deepening with an consistent, multidisciplinary and transversal approach - and a participatory method - the specificities/details/ peculiarity related to the heritage, in order to reach a systematic cognitive survey of the sector.

Among its various goals, it is particularly interesting because it is in line with the innovative vision mentioned in § 3, to set up an *ad hoc* fund, *Il fondo del patrimonio d'Italia*/The Italian Heritage Fund, which could represent an input for the start of a series of actions and investments, including international ones, in the Italian heritage. All this without forgetting the central role of fundraising, patronage and sponsorship in favor of Italian heritage.

The model is a new governance of the heritage that networks and allows the dialogue between the different "souls" of the actors of the cultural heritage, both public and private, but also universities and banking foundations, already actively involved in cultural projects, and that ensures a strategic convergence for an integrated management of the different projects.

To cite some examples in this regard, in 2021 only the Cariplo Foundation has allocated 140 million euros for Arts and Culture, also to identify new forms and versions of cultural participation as well as management and demand organization, reaffirming the central role of culture as a «vital element for the social and economic growth of the community, identifying strategic assets necessary for the

[54]See MIC, General Secretariat, Strategic Plan for Major Cultural Heritage Projects https://programmazionestrategica.beniculturali.it/piano-strategico-grandi-progetti-beni-culturali/

restart of places and activities: the proximity, for a renewed involvement of the public and creativity for the rethinking of the production and organization of cultural initiatives[55]".

On the public front, the Cassa Depositi e Prestiti is strategically involved in promoting and supporting projects to valorise Italy's tangible (historical, artistic, archival and real estate) and intangible cultural heritage and its excellence in the world, as well as supporting the spread of the values of the business culture of Italy's industrial history.

The States General of the Italian Heritage/Gli Stati Generali del Patrimonio Italiano (also in the shape of a platform for debate for the network of interdisciplinary experts involved) have a methodological approach that starts from the detailed analysis of the requests of the heritage actors, from the intersection between sectors, supply chains and needs of the territories in order to grasp the specific contribution of each activity to the formation of the added value and of the employment of the sector too.

A shared path between the stakeholders and the "actors" of the system/ apparatus for the search of a new collective identity that is configured as a "Journey of knowledge" based on the exploration of places, social and cultural contexts, the animus of man, who lives in a unique historical period in which it is essential to pool knowledge and culture at a time when we are learning from the present.

A project that aims to initiate a continuous, open and shared confrontation (with many voices) on the topics of interest and lead to the definition of a "Strategic Plan of Italian Heritage" containing proposals for policy, promotion, development and enhancement of Italian heritage, shared and supported by the bodies and organizations operating in the sector, and that can be, at the same time, a participatory proposal to be submitted to the Institutions, primarily the Ministries, responsible for planning, regulating and supporting the heritage sector.

In this context, it is also important to promote and encourage a new and sustainable entrepreneurship of cultural heritage for an economic revitalization that aims to create employment and employability policies, simplyfing and stimulating public-private partnerships and the integration of companies in the sector, while also easing the exchange and transferability of the best practices.

[55] Fondazione Symbola (2021).

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Corporate Criminal Liability in India

*By Pradeep Kumar Singh**

In 21st Century, crimes committed by corporate bodies are creating more serious challenge for criminal justice system. Some vested interests which are controlling affairs of corporate bodies misuse the corporate body for commission of criminal acts to maximise profit. Corporate body is conferred with legal personality for regulation of its functions but it does not have physical body and mind of its own, thereby, problem arises for holding corporate body as criminal, and further, in imposition of criminal liability. Corporate criminal activities badly affect environment, health, safety and infra-structure development. Corporate entities are involved in corruption, forgery, money laundering, foreign exchange violations, money laundering, tax evasions, benami property transactions and other economic offences. Proper formulation of criminal justice actions and effective enforcement of corporate criminal liabilities are modern criminal justice requirements. Corporate bodies are business entities; economic wellbeing of society, prosperity of citizenry and development of nation depend on freedom of trade, amicable business environment and least regulation of corporate entities. Hereby, in determination and imposition of corporate criminal liability for betterment of society, it is necessary to make balance between to take stern actions to tackle corporate crimes and to take care to not hamper legitimate activities of corporate bodies. Law relating to corporate criminal liability in India will be analysed in this paper.

Keywords: *Criminal Justice System, Corporate crime, Corporate criminal liability, Natural person, Social wellbeing, Strict liability*

Introduction

Social wellbeing is primary concern of all countries throughout the world; crime and criminality particularly socio-economic crimes create serious threat for the state and public at large needed to be effectively tackled. Corporate Crime is one specific kind of socio-economic crime committed by corporate body which is now posing a serious and graver challenge for social wellbeing in 21st century. Corporate bodies are more organised in which expert and professional persons are appointed, thereby, to identify and detect the criminal acts are completely difficult pursuit. Traditionally in criminal justice system it is considered that the crime can be committed by natural person and criminal liability can be imposed on him as only natural persons have body and mind necessary for crime commission, committal for trial and infliction of punishment while corporate body does not have body and mind. But such a concept of criminal liability poses a serious threat for societal protection and wellbeing. Public at large have no much information

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regarding corporate crimes because of this reason they are not cognizant about alarming problems caused by corporate crime commission and serious impacts thereof. Reaction against corporate crime and labelling effect against corporate crime are completely non-existent. Still traditional crimes create more alarming situation for common mass and such criminal acts are taken as real crimes. Further, common members of society consider that corporate bodies perform business, manufacturing, marketing and construction activities which are legitimate activities; in some cases, such corporate bodies may have broken some regulatory rules but these are usually not taken as criminal acts but only as skilful business activities. Generally criminal acts committed by corporate entities are dealt under administrative and civil law; criminal laws are not used or exceptionally used. Traditional consideration that crime is violation of criminal law is not satisfied as corporate crimes are usually dealt under law other than criminal law. Primary and best criteria to determine nature of criminal act is impact of over society at large; on this criterion corporate crime is most serious criminal act posing serious challenge for societal existence, wellbeing of members of society and public exchequer. On this criterion corporate crime is serious crimes. Corporate crime was defined by Marshall B Clinard and Peter C. Yeager:

> A corporate crime is any act committed by corporations that is punished by the state, regardless of whether it is punished under administrative, civil, or criminal law. This broadens the definition of crime beyond the criminal law, which is the only governmental action for ordinary offenders. A corporation cannot be jailed, although it may be fined, and thus the major penalty of imprisonment used to control individual law violators is not available in case of corporations per se.[2]

Marshall B Clinard and Peter C Yeager cleared that corporate crime is a kind of white-collar crime, but it is of particular type.[3] In broader perspective white collar crime includes occupational and organisational crime both. Occupational crime term is used to denote criminal acts committed by person of respectability in course of his occupation, thereby, it refers to individual criminality committed in course of occupation; in restricted sense white collar crime term refers to such occupational crimes. Corporate crime is organisational crime and it refers to crime committed in collective, aggregate and organised manner for profit of incorporated body. Person acting in corporation may commit corporate crime (organisational crime) for which liabilities may be imposed on corporate body and doer of act or white-collar crime (occupational crime) for which liability may be imposed on doer of act only. When doer of act is working on behalf of corporate body, his act is not only his act but of corporate body also and for its corporate criminal liability may be imposed. But when such doer of act even though he is employee of corporate body has acted for his personal benefit then it will not be corporate crime and for such act occupational liability is imposed only on such employee.

Reality of crime problem has compelled to change the traditional concept of criminal liability and now corporate criminality liability is major measure to tackle

[2]Marshall &Yeager (2006) at 16.
[3]Ibid, at 17.

effectively economic crimes[4] and to protect the wellbeing of society. Whenever corporate criminal liability term is used, it refers to criminal liability of corporate body for criminal acts committed by its officers in capacity of officer of corporate body. Geis and DiMento observed about need of imposition of corporate criminal liability:

> The barriers to corporate criminal liability were toppled in piecemeal fashion for a variety of reasons. Perhaps the most significant were, first, that corporations were more readily identifiable than the human malefactors within them who might have been responsible for the illegality, and the second, the enormous power being accumulated by the corporate world seemed to demand that some legal doctrine be applied to restrain its free free-wheeling and destructive acts.[5]

Edwin H. Sutherland studied larger and established corporate bodies on which basis he gave his opinion about crime commission that crime is also committed by person of respectability and social status and such crimes are more dangerous and harmful than traditional crimes. Sutherland gave name to such crimes as White Collar Crimes which is taken as occupational crimes; occupational crime is taken as committed by individual professional in performance of his occupation. Corporate crime is organised crime committed in organised manner by corporate body. Sutherland's study was actually about corporate crime as he studied corporate bodies, acts committed by superior executives in corporations and its harmful impact over wellbeing of public exchequer. Marshall B. Clinard and Peter C. Yeager observe:

> Sutherland carried out the first empirical study in the field, *White Collar Crime* (1949), which should have been entitled *Corporate Crime*, examined the illegal behaviour of 70 of the 200 largest nonfinancial corporations. In the years since Sutherland's work, however, only limited follow-up research has been done. Relatively few articles have appeared, and they have dealt largely with antitrust violations and have been rather narrow in scope.[6]

David A. Frenkel and Yoram Lurie point out that there is a tight conceptual connection between the notions of moral responsibility and punishment.

> It does not make sense to seek and punish a corporation for actions it was not responsible for. Subsequently, even if a corporation is indeed morally responsible for its actions and culpability has been established, the question: "what type of punishment does a corporation deserve?" still remains an open question.

In their paper they examine and analyse the current legal situation with respect to corporate criminal culpability in several countries, and hence suggest a

[4]Economic crimes are also called as financial crimes. Economic crimes are committed mainly committed to obtain undue advantage and always motivated with greed. Economic crimes cause serious damage to national security, public exchequer and public wellbeing. It may also be committed against individual person.
[5]Geis & DiMento (2002) at 343.
[6]Marshall & Yeager (2006) at 13.

way of resolving the legal, ethical, and social problems associated with corporate culpability.[7]

Clement Labi and Willy Tadjudge state that persons acting in legal life are not only natural persons. Alongside the latter, there are also legal persons, even though they are constituted by natural persons. In absolute terms, the legal person is fictitious, since it is set up by natural persons who act in its name and on its behalf on a daily basis.

> Curiously, while personal liability is completely based on the individual, the law has made provisions to limit the liability of the shareholders to their contribution to the share capital. Such a configuration of the pattern of liability is problematic and may lead corporate directors to take unethical decisions: in fact, regardless of what the law states, they are very skilled at minimising their legal exposure. There is therefore a kind of systematic, organised and planned irresponsibility in corporate governance. Legislators should review the liability regime in legal persons, and even more so in corporations, notably by taking corporate culture seriously. Even in the corporate context, steps could be taken to ensure that those who act are subject to the legal regime of individual liability but because of the dynamics of corporate life, the task appears, unfortunately, Sisyphean.[8]

Major problem arises in imposition of corporate criminal liability that whether criminal liability has to be imposed on corporate body or it has to be imposed on person taking decision and operating corporate body or on both. Indian criminal justice system has established and express law for imposition of liability on both, the corporation and persons taking decision and operating corporate body. Section 11 of Indian penal Code clearly provides for non-differentiation between natural and legal person for criminal liability. Section 11 Indian Penal Code is wider enough to even impose liability on group of persons who have not got their group incorporated; hereby, in Indian law criminal liability may be imposed against legal corporate bodies and also against illegal corporate bodies such as criminal gangs, terrorist groups and unlawful assemblies.

This paper will deal with corporate criminal liability in reference to criminal acts committed by legal corporate bodies only.

Impact of Corporate Crime

Generally corporate crime is not in focus of study and concern of academicians, bureaucrats, law enforcement agency, adjudicatory body, legislature and ultimately of common mass. Crime with violence which is usually put in category of street crime creates fear of victimisation in common mass and considered as real crime and all the crime tackling policies are focused to such crimes with violence. Corporate crime is one important aspect of white collar crime which is put in category of suite crime which does not create fear of victimisation and it is generally committed by deceit. Corporate crime has never been considered as

[7]Frenkel & Lurie (2002).
[8]Labi & Tadjudge (2020) at 77.

criminal acts, only recently some academicians put emphasis that it should not only be taken as criminal act but it should be taken as serious challenge for threat for wellbeing of public at large, nation and ultimately of whole world. Common public considers that corporate body only does business activities and it has no body and mind necessary for crime commission, thereby, corporate body cannot commit crime. Common mass does not aware that crime committed corporations are more dangerous, alarming and harmful. Corporate bodies have control over resources, they can hire educated and expert persons, use modes of communications and particular environment and convictions may be created that corporate bodies only do business acts and they cannot commit crime. Marshall B. Clinard and Peter C. Yeager observe:

> The giant corporations possess such awesome aggregates of wealth and such vast social and political powers that their operations vitally influence the lives of virtually everyone, from cradle to grave. The work lives, and hence the health and safety, of the large part of the population are controlled directly or indirectly by the major corporations. These giants greatly affect prices and thus inflationary trends, the quality of goods, and the rate of unemployment. They can and do manipulate public opinion through the increasingly effective use of mass media, and they noticeably affect the environment…[9]

Corporate crimes are much destructive for health, safety and security of public at large caused by greed of persons operating the corporate bodies. Economic offences committed by corporate bodies affect the whole economy of country and in some cases even of whole world too. Corporate bodies participate in infra-structure development and welfare activities, thereby, crimes committed by them affect the very life of common citizenry. Financial condition of nation is challenged by commission of Corruption, money laundering, tax evasions, non-observance of business ethics, and scams committed by corporate bodies. Production of sub-standard goods and providing of deficient services create serious threat for life and health of public at large. Corporate bodies have larger resources, expert persons and opportunity for criminal act commission which cause graver threat not only for one country but also to world at large. Proper and effective enforcement of corporate criminal liability is compelling need of modern criminal justice system. Corporate criminal liability is legal person's liability. Legal person term is usually used to refer legitimate corporate entities established according to provisions of law indulged in legitimate business pursuits. Society depends on corporate bodies and their business activities for proper societal functioning, catering of needs of societal members, jobs and economic prosperity of citizenry. Some activities of business entities are graver criminal activities seriously damaging the wellbeing of country and citizenry needed to be effectively tackled. In taking actions always proper care has to be taken that liability imposed should not be such which may adversely affect corporate functioning and erode the corporate business environment ultimately to society itself. Need is to make balance in taking effective

[9] *Ibid* at 3-4.

actions against guilty corporate entities and responsible corporate officials and at the same time to encourage proper corporate business activities.

Corporate crimes are not simple criminal activities as in case of traditional crimes; traditional crime is committed against individual, only by legal fiction it is considered as committed against society; state represent the society, thereby committed against state but corporate crimes are directly committed against society, public at large, and public exchequer. Whenever corporate crime is committed, it causes serious and graver consequences over public at large. Corporate bodies may make collusion and eliminate competition and oust competitive pricing for the products, thereby more money may be charged on consumers. Where corporate body issues false and misleading statements regarding its assets and it may lead to defraud common investors, who have invested their small savings. Tax evasion is defrauding with public exchequer on which whole developmental process depends. Scam commission and corrupting public servants create corruption conducive criminogenic environment which affect sobriety and civility ultimately whole developmental process of country is affected. Hoarding of essential commodities affect the supply of necessary things for life of common public. Production and supply of substandard, spurious and adulterated drugs and food materials affect health of common mass and may cause death of thousands and thousands of persons. Non-observance of pollution prevention rules and use of unsafe manufacturing process in manufacturing units may affect completely environment which may cause health hazards, injuries and deaths of countless persons besides completely damaging the environment ultimately the whole nature.

Causes of Corporate Crime

Corporate bodies are business organisations run by natural persons who have all the characteristics of sober and civilized persons even after that it is reality of corporate functioning that various corporate bodies deviate from the normal business practices and commit violations of law enacted to regulate business activities and cause serious damage to public at large and nation ultimately to world at large. In such situation it becomes compelling to identify causes of corporate crime commission. Analysis of causation of corporate crime commission is crucial for enactment of law and imposition on corporate criminal liability for effective tackling of economic crimes committed by corporate bodies. Anomie Theory and Strain Theory developed by Robert Merton taken together with Differential Association Theory given by Edwin H Sutherland provide explanation for crime commission by persons controlling the affairs of corporate bodies which is also taken as crime commission by corporate body itself. In modern era whether it is legal person or natural person, everyone is undergoing strain and stress due to goal and legitimate means disparity; legitimate means available are not sufficient to satisfy goals (desires which have taken shape of passion). The realisation of financial success purportedly is open to all, but actually opportunities this goal is not distributed equally within social structure. This disparity between goal and

means creates strain.[10] Corporate entities are established with certain objectives, thereby, corporate entities are always goal oriented.[11] For corporate bodies also there is disparity between corporate goals and legitimate corporate means. Every corporate body has financial goals which may be broadly taken as profitability, competitiveness and market share expansion. Financial success is always connected with corporate success. Even when corporate body is successful and well established, it has to be continued in competition, augment profits and expand its market share. When goal cannot be achieved by legitimate means then strain compel corporate body to achieve it by adopting illegitimate means. Strain is not only inter-organisational but also intra-organisational.[12] Inter-organisational strain is competition with other corporate bodies for maximisation of profit and expansion of market share. Intra-organisational strain arises due to competitions of sub-units within the corporate body and it creates internal performance pressure and ultimate consequence is practicing illegality.

Only strain due to disparity between corporate goal and means is not sufficient for corporate crime commission but it is necessary that natural persons acting on behalf of corporate body have mental preparedness for corporate crime commission and specialisation in illegitimate techniques for this purpose. Edwin H Sutherland extended his Differential Association Theory to explain white collar crime also and according to which white collar crime is also a learnt behaviour which is learnt in communication with the persons who are already practicing it. Edwin H Sutherland opined that white collar has its genesis in the same general process as other criminal behaviour, namely differential association.[13] Corporate officials having corporate strain learn corporate crime commission from the corporate officials already indulged in corporate crime commission; such learning may be through direct or indirect communication. In such learning corporate official learns and develops drive and rationalisation for corporate crime, and then learns techniques of commission of such acts. Edwin H Sutherland observed:

> Businessmen are not only in contact with definitions which are favourable to white collar crime but they are also isolated from and protected against definitions which are unfavourable to such crime.[14]

Greed and acquisitiveness are main causes of corporate crimes. Now persons in modern industrialised and urbanised society have insatiable greed and obsession to have possession of physical commodities. Honest means may not be sufficient to satisfy such insatiable greed and acquisitiveness for physical commodities. Working through particularly productions and business activities through corporate bodies are distinctive features of capitalist society. Dutch criminologist William A. Bonger gave opinion about crime committed by richer person. Bonger[15]opined

[10]Merton (1964) at 218.
[11]Finney & Lesieur (1982) at 269.
[12]*Ibid*, at 271-272.
[13]Sutherland (1949) at 234.
[14]*Id* at 247.
[15]Bonger (1916).

that capitalism give rise to egoism (selfishness increases) and altruism comes to an end; in capitalism egoism grows on cost of altruism. Bonger opined that in capitalism class of person and person becomes selfish and has jealousy. Due to misery working class commits crime and similarly bourgeoisie due to capitalism have avarice and commit crime. Altruism is major check over criminality; it has become weaker, thereby, egoism and resultant greed and jealousy have created conducive environment of corporate crime. Due to the increase in egoism and decrease in altruism, person's bond with society becomes weaker. When attachment with society and societal members is stronger, crime particularly which may cause serious damage cannot be committed but when such bond is weaker than person for attaining his goal to become richer may commit any kind of criminal act. Travis Hirschi gave Control Theory to explain the crime causation and he opined that delinquent acts result when an individual's bond to society is weak or broken.[16] Stronger bond to society and member of society create conducive situation for a person to behave in conformist behaviour. Bond of person with society contains four inter-related components – attachments, commitments, involvements and beliefs. In these components main component is attachment to society and fellow societal members.

Public reaction is major check against crime and criminality, thereby, its presence and absence are one main cause of crime and criminality. Public consciousness regarding harmful act determines enactment of penal law for prescribing punishment and dealing with effectively to protect the citizenry. Common citizenry does not have adequate information about harmful acts committed by corporate bodies and its serious impacts; common person only consider that business and production acts are committed by corporate bodies. Further, citizenry also consider corporate bodies have no body and mind, thereby, they can never commit crime. Generally, corporate crime is not committed directly against individual. Common public only take it that if any illegality is committed it may be officials of corporate bodies, and further, even such a case it may be only a simple tax evasion or irregular business activities which may be tackled by administrative, civil or administrative regulation. Such absence of public reaction affects criminal justice actions against serious corporate criminality. Due to absence of public reaction against corporate crime reputation of corporate body and persons responsible to run corporate bodies is not affected. Further, law enforcement agencies have no public pressure for taking actions under criminal law against the corporate bodies; action may not be taken at all or if taken, it may be under civil, administrative or taxation laws and it may be shown that for actions have been taken against corporate body. In such situations corporate body and persons responsible for operating it may have conducive crime committing environment and even after that do not have fear of criminal liability and loss of reputation.

[16] Hirschi (1969) at 16.

Corporate Criminal Liability in India

Harmful acts committed by corporate bodies are either not covered by provisions contained in criminal law or in some cases when such acts are declared crimes under criminal law, in almost cases acts are also covered under civil, taxation or administrative law. In all such situations normally actions against such harmful acts are taken under law other than criminal law. On the basis of harmful impact of harmful acts committed by corporate bodies, it has always to be treated as criminal acts regardless whether acts are committed in violation of criminal law or actions are taken under provisions of criminal law or actions are taken under some other law. Corporate bodies are provided with legal personality and various permissions under the provisions of law for benefit of society at large, thereby corporate bodies cannot be permitted to commit acts dangerous for society itself. Corporate bodies commit crime due to economic causation; their objective of crime commission is maximisation of profit at any cost, and consequences of their crime commission is greater economic loss to society, nation and ultimately to world at large. On the basis of economic causation, economic goal and economic consequences, corporate crimes are put in category of economic crimes. Such dangerous and serious corporate harmful acts to protect the society can only be tackled by effective imposition of criminal liability.

Corporate bodies are operated and business activities are conducted by experienced and expert professionals in planned and organised manner by use of modern know-how; thereby collection of evidences to prove intention or knowledge in reference to crime commission is very difficult. At the same time for tackling problem of economic crime and to protect the society it is necessary that corporations and its human agency involved in corporate crime must be penalised. For this purpose, strict liability rule is prescribed according to which on proving of commission of act prohibited by law, presence of mental element is presumed. Further, for imposition of corporate criminal liability besides strict liability, law also provides absolute liability and imputed liability rules. Corporate criminal laws on proving of prohibited act commission (*actus reus*) shift the burden of proof from prosecution to alleged corporate entity, and further, provide the presumption clause regarding culpable mental element (*mens rea*). In some cases, presumption applied for mental element is rebuttal presumption and, in some cases, conclusive presumption. Where presumption applied is rebuttal, nature of corporate criminal liability is strict liability and where presumption is conclusive presumption, nature of corporate liability is absolute liability. Sometimes confusion is raised that in case of corporate crime mental element is not requisite element but it has to be cleared that corporate crime is also one sort of crime, thereby, mental element is necessary; only difference is that it does not need to be proved through adducing evidences but presumed.

Corporate entities perform business activities through agencies of natural persons; in such situation problem arises in affixing criminal liability that whether criminal liability has to be imposed on natural person only or it has to be imposed on corporate body only or it has to be imposed on both. Corporate bodies have no mind and physical body, thereby naturally harmful criminal acts can be committed

by natural person. To impose criminal liability on corporate body it has to be decided that crime was committed by natural person then on establishing relations of crime and natural person with corporate body, criminal liability can be imposed on corporate body. Corporate crime commission is depending on crime commission by natural person acting as human agency of corporate body. Corporate body works through mind and body of the persons who perform the work for it. But the mind of any person working for corporate body cannot be taken as mind of corporate body, according to standard procedure used for corporate functioning it is considered that corporate body run under 'controlling and willing mind' of person having control of such corporate body. Thereby, when such persons controlling the affairs of corporate body have *mens rea* or knowledge, it is attributable to corporate body; corporate body, natural person committing the criminal acts and persons controlling the affairs of corporate body may be held criminally liable. In larger corporate bodies usually, excuses are taken by higher positioned persons that affairs of corporate body are decentralised and employee has committed criminal act on his own and only he has to be penalised. To avoid corporate criminal liability generally attempts are made to show that acts are committed by employee but he was not authorised to take decision on behalf of corporate body. For imposition of corporate criminal liability, a major issue has to be decided that whether crime was committed by employee concern in his individual capacity, in such situation only will be criminally liable or crime is committed by him as employee of corporate body and for its criminal liability will be imposed on doer of crime, person controlling the affairs of corporate body and also the corporate body. When doer of crime has committed crime in capacity of employee of corporate body, imputed liability is imposed on person controlling the affairs of corporate body and corporate body. It is a kind of constructive liability rule and a sort of vicarious liability rule. General rule of criminal liability is well established that a person who has committed crime, only he is liable and he is liable for his own criminal act. But imputed liability rule is exception; on crime commission by employee in reference to affairs of corporate body, it is considered that crime is also committed by corporate body. In case of *Standard Chartered Bank v. Director of Enforcement*[17] Supreme Court settled the law that a company can be prosecuted and convicted for even that offence for which minimum sentence of imprisonment is prescribed. A corporate body cannot avoid liability on the ground that punishment prescribed for offence is imprisonment and it has no body. When for any offence imprisonment and fine both are prescribed punishment, corporate entity will be inflicted with fine only. Natural persons liable for corporate crime may be punished with punishments prescribed by penal provisions. In *Iridium India Telecom Ltd. v. Motorola Inc.*[18] Supreme Court decided that corporate criminality can be imposed even for that offence for which *mens rea* is essential requisite. Court decided that attribution and imputation rule of applicable, thereby, criminal intent of the 'alter ego' of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation. In *Sunil Bharati Mittal v. Central Bureau of*

[17]AIR 2005 SC 2622
[18]AIR 2011 SC 20

Investigation[19] Supreme Court reiterated Iridium case decision regarding attribution and imputation means 'alter ego'; whenever person controlling the affairs of corporate body have *mens rea* and have done criminal act, it is attributed that company was also actuated with *mens rea* and it is imputed that company itself committed the criminal act. In *Sunil Bharati Mittal Case* Supreme Court observed:

> No doubt, a corporate entity is an artificial person which acts through its officers, directors, managing director, chairman etc. If such a company commits an offence involving *mens rea*, it would be normally the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is cardinal principle of criminal jurisprudence that there is no vicarious liability unless statute specifically provides so.[20]

In *Sunil Bharati Mittal Case* Supreme Court decided that in India vicarious liability rule is not applicable for imposition of criminal liability unless by specific and express provision of law vicarious liability has been imposed for crime commission. For application of strict liability, absolute liability and imputed liability rules, it is necessary to establish relationship between natural person doing the harmful act and corporate body. In this regard 'controlling and wilful mind' test is used but it may not be appropriate in all the situations, therefore, some more tests are used like benefit test and due diligence test. When act committed by employee is beneficial for corporate body and further benefit is also entertained by such corporate body knowingly that it was criminal act. In this regard it is pertinent to identify whether corporate body has envisaged due diligence mechanism to avoid crime commission; presence or absence of due diligence mechanism is crucial criterion. When due diligence mechanism is effectively available in the corporate body and it is identified that some employee of corporate body committed some criminal act, corporate body has to take action against such guilty person. In case no action is taken, clearly indicative that corporate body has taken benefit of crime commission and in such situation, crime will be treated as committed by corporate body itself, for its corporate criminal liability may be imposed. Some legislation may be analysed to identify corporate criminal liability legal regime in India.

Indian Penal Code (hereinafter referred as IPC) was enacted more than 160 years ago in 1860 AD, and further, it mainly deals with traditional crime but even after that IPC is developed and enlightened legislation which in addition to imposition of criminal liability on natural person also provides sufficient provisions to impose criminal liability on corporate bodies. Section 2 IPC declares that every person whoever commits violations of provisions of IPC shall have criminal liability. Section 11 IPC explains that who may be taken as person; for crime commission such persons according to Section 2 IPC criminal liability may be imposed. Provisions contained in Section 11 IPC provides '*The word 'person' includes any company or association, or body of persons, whether incorporated or*

[19] AIR 2015 SC 923
[20] *Id* at 941

not', thereby, it clears that besides natural person legitimate corporate body and also criminal enterprise are person on whom criminal liability may be imposed. Thus, in IPC criminal liability is imposable on natural person, legal person and also on illegal criminal person (here term illegal criminal person is used to refer to criminal gangs). Sometimes confusion arises that Section 11 IPC only talks about legal person but proper analysis may show that Section 11 IPC is very progressive and wider provision which provides for natural person, legal person and also criminal Gangs. Criminal law in India since 1860 AD with enactment of IPC provides for corporate criminal liability.

Corruption is a major problem affecting the whole society. For effective check on corruption, corporate criminal liability is one of the important requisites. Prevention of Corruption Act 1988 has been completely amended and changed in 2018 to make the law effective to deal with corruption. If in any corruption case giver of undue benefit is commercial organisation, third proviso to Section 8 (1) of Prevention of Corruption Act prescribes only fine as punishment imposable on such commercial organisation. Corporate criminal liability is imposed on commercial organisation when any person associated with such corporate body gives undue benefit to public servant. In Section commercial organisation is defined in Section 9 (3) of the Act that it refers to corporate body incorporated in India doing business in India or outside, corporate body incorporated outside India carrying on business wholly or partly in India, and partnership firms or association of persons formed in India doing business in India or outside India or such firm or association formed outside India doing business wholly or partly in India. Commercial organisation will have responsibility only when such person comes under ambit of person associated to commercial organisation. Person associated to commercial organisation is that person who performs services for or on behalf of commercial organisation[21]; Explanation 2 to Section 9 directs that for deciding such relation between natural person who gave undue benefit to public servant and commercial organisation all the relevant circumstances shall be taken into consideration. Commercial organisation may take defence to avoid criminal liability that such organisation has adequate procedure to prevent the associated person from doing such kind of criminal act of giving undue benefit.[22] Whenever commercial organisation is found involved in giving undue benefit to public servant Section 10 imposes imputed liability on director, manager, secretary or other responsible officer subject to proving of consent or connivance for such act. all the natural person involved in giving of undue benefit are liable for punishment for term of imprisonment and fine both while corporate body is liable for fine only.

Prohibition of Benami Property Transaction Act 1988 is crucial legislation to deal with problem of benami property and thereby to effectively tackle corruption in India. In Section 62 of the Act for commission of any act relating to benami property by company corporate criminal liability is imposed on company, and further, imputed liability is imposed on every person in-charge and controlling the conduct of business of the company. Such natural person may avoid his liability

[21]Prevention of Corruption Act, 1988, Section 9 (3) (c)

[22]Prevention of Corruption Act, 1988, Proviso to Section 9 (1)

by adducing evidences that he had no knowledge of such contravention relating to benami property. On proving of involvement of company in benami property transaction Section 62 (3) of the Act provides that on proving of consent or connivance or negligence the director, manager, secretary shall also be deemed to be guilty. In Section 56 (1) Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015 similar provisions are provided for imposition of corporate criminal liability under which for commission of offence by company criminal liability is imposed on company and persons controlling the business of company at the time of commission of offence. Similarly, on commission of acts relating to money-laundering Section 70 of Prevention of Money-Laundering Act 2002 imposes corporate criminal liabilities on company and persons controlling the affairs of company. Due diligence criterion is always important in corporate criminal liability, it is identifiable in every legislation imposing corporate criminal liability on corporate bodies and officers of such corporate bodies. In every provision imposing corporate criminal liability on corporate body and its officers deeming provisions are provided through which legal fiction are created ultimately by which presumption are made regarding participation in commission of criminal acts, thereby, strict and absolute liabilities are imposed on corporate body and its officers. In *Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*[23] Supreme Court observed:

> We have referred to the aforesaid authorities to highlight that the company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate […]. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under Section 138. Thus statutory intendment is absolutely plain.
>
> As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own significance.

Female sex determination in womb, foeticide and infanticide are major challenges for criminal justice system, to check such problems some penal statutes are enacted and criminal liabilities are imposed. Corporate criminal liabilities are imposed on hospitals, persons working in hospitals and persons controlling the affairs of hospitals. Section 22 of Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994 (PCPNDT Act) declares giving advertisement for pre-natal sex determination as an offence and in case of commission of offence imposes liability on advertising company, hospital and medical practitioner. Whenever any clinic is indulged or permitted to use it for sex determination, it is liable for punishment.[24] Section 3-A of Act imposes restriction on manufactures and dealers not to supply any ultra-sound machine or scanner or any equipment which may be used in sex detection unless hospital or other

[23]AIR 2012 SC 2795

[24]Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994, Section 23.

institution is registered under the PCPNDT Act. Whenever provisions of PCPNDT Act are violated, Section 26 of PCPNDT Act provides for imposition of criminal liability on medical practitioner, other employees of clinic, and corporate criminal liability on the clinic, other corporate bodies and person responsible for affairs of the clinic. For imposition of liability presumption clauses are provided in form of deeming provision. Transplant of Human Organ Act 1994 (THO Act) is crucial legislation to tackle the problem of commercialisation of organ transplant. Advertising company, hospital or any other person giving advertisement for supply of human organ are liable and criminal liability is imposed u/s 19 THO Act. Section 21 expressly specifies that hospital is a corporate body and for illegal organ removal and transplant corporate criminal liabilities are imposed on corporate body and persons regulating affairs of corporate body. For imposition of punishment on hospital and officers of such hospitals deeming provisions, thereby, presumption clauses are applicable. When officers of hospital prove that they had no knowledge or they exercised due diligence to prevent commission of such offence, they may not be liable. Similar provisions for imposition of corporate criminal liability are provided in Section 34 of Drugs and Cosmetics Act 1940, u/s 9 of Drugs and Magic Remedies (Objectionable Advertisements) Act 1954, Section 10 of Essential Commodities Act 1955, Section 14 of Protection of Civil rights Act 1955, Section 33 Arms Act 1959, Section 7 of Indecent Representation of Women (Prohibition) Act 1986 and Section 42 of Foreign Exchange Management Act 1999.

Generally, evidences are not available or very few evidences are available in all the socio-economic crimes. Corporate crime is one major area of socio-economic crimes. Socio-economic crimes particularly corporate crime is much serious challenge for individual, social and national wellbeing, therefore to tackle the problem presumption clauses are provided, legal fictions are created by prescription of deeming provisions which implicitly shift the burden of proof from prosecution to accused. In addition to above express provisions for shifting of burden of proof are also provided in various enactments. Section 8 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 provides that when any person is found property more than his known sources or illegally acquired and notice is given, it will be burden of proof of such person that property is not of such kind. In Section 10 C of Essential Commodities Act 1955 provisions are given expressly prescribing for rebuttal presumption regarding culpable mental state in any prosecution under this Act. Section 14 of Essential Commodities Act express provisions for shifting burden on proof to accused is provided that on prosecution of any person for violation of order under Section 3 of Act, such person will have burden of proof that he has permit or licence for the alleged act.

Corporate crimes are completely different from traditional crimes. Traditional crimes are visible; usually create reactive emotions in common members of society. Further, in traditional crimes clues and evidences are properly available which may be collected by common investigating agencies and evidences may be produced by common prosecution agency. Corporate crimes are not visible, committed with business garbing, thereby social reaction against corporate crime is completely absent which affects information availability regarding crime

commission, branding and stigmatisation of corporate body and natural person working for such corporate body. Corporate crimes pose serious challenge for members of society, society, nation and even whole world; such criminality is needed to be tackled at any cost. For tackling corporate crime in India criminal liability is prescribed but major problem in this regard is clues and evidences are not available. In such situation traditional criminal law rules are modified, strict, absolute and imputed liability rules are prescribed; presumption clauses, shifting of burden of proof and deeming provisions are provided.

Concluding Remarks

In present era of industrialised business oriented market based society, it is not possible for a natural person to do various acts individually particularly manufacturing, service providing, marketing and other business activities; now natural persons form corporate body to perform such business activities. Works performed by corporate bodies affect the individuals, society and nation, thereby, need is felt to regulate the activities of and works of corporate body. For regulation of activities of corporate bodies are declared as legal person. Most effective measure for regulation of behaviour of any person is criminal justice system. All the actions of corporate bodies and its employees which cause serious impacts over public at large, society and nation are declared as crime and criminal liability is imposed. Corporate crimes are much dangerous criminal activities committed by corporate bodies and natural persons controlling the corporate bodies causing serious consequences for public health, development of nation and financial wellbeing of whole country, even whole world is affected by such corporate crime commission. Corporate bodies are formed for doing the business, thereby, it has financial goal of earning profits. For earning profit market share expansion is necessary requirement and it also forms the corporate goal. Legitimate means available may not be sufficient to achieve the goal; such situation creates adaptation. Strain caused induces persons controlling the affairs of corporate body to learn use of illegitimate means to achieve the goal, thereby, strain becomes major causation for learning the techniques to commit corporate crime.

For effective dealing of any crime problem, it is necessary that common citizenry and criminal, both, should consider that the act committed is crime and it is wrongful. When public consider act as criminal act, only then it will react and cooperate with law enforcement agencies. A person committing delinquent activities can only be reformed, when he will take himself as wrongdoer. Corporate criminal acts are considered by public and person controlling the affairs of corporate body as business acts performed in skilled way. Need is to change the whole such notion and for it not only such acts be declared as crime but also effective punishment has to be inflicted. All the measures have to be taken for branding of such acts as criminal acts.

It is evident that the corporate crimes cause serious impacts over public at large not only within the country but also beyond the country. For tackling problem of economic crime and to protect the society it is necessary that corporations and its

human agency involved in corporate crime must be penalised. But at the same time corporate entities are indispensable for the society; corporate entities perform business, manufacturing, marketing, transportation, banking, service providing, infra-structure development and welfare activities. Proper functioning of corporate bodies ensures employment availability and economic prosperity of the citizenry and country. In such situation a very strict penal action against corporate entities may also adversely affect the society need is to make balance in the penal actions. Criminal liability has to be imposed; in this reference on guilty natural person responsible for crime commission, whether he himself committed or controlling the operations of corporate entities, severe punishments including corporal and monetary punishments have to imposed by which such persons having potentiality and mentality to commit himself and also to use corporate body for crime commission at the cost of wellbeing of society should have a lesson. Criminal liability has also to be taken against corporate body in such manner that corporate activities has to be effectively and properly regulated and at the same time corporate legitimate activities have not to be affected. Corporate entities do not have physical body, thereby corporal punishment cannot be imposed. Generally, in almost cases liabilities imposed on corporate entities are monetary and usually fine is imposed which is considered by common persons as lenient punishment. Fine does not create labelling effect. Two pronged actions have to be envisaged in criminal laws dealing with corporate crimes, firstly, strict and stern corporal punishment besides monetary punishment against doer of criminal act and person controlling the affairs of corporate body, and secondly, monetary punishment against corporate body. Some other actions may also be used against corporate body to tackle corporate crime like closure of business till due observance of legal regulations which may cause fear of loss of business, and publicizing of name on proving of crime commission which may cause fear of loss of reputation and goodwill.

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Platform Contracts: Legal Framework and User Protection

*By Maria Luisa Chiarella**

Digital platforms are a very important economic reality, also in consideration of the epidemiological emergency which has increased online daily transactions. When we talk about digital markets, we refer to the transformation of the markets, induced by the exploitation and use of new technologies, in which digital contracts are an increasingly widespread phenomenon. This paper aims to give some hints about such issue and its legal framework. There are different elements to be considered: contract requirements, weaker party protection, sharing economy and some issue about the so-called "zero price economy". In short, the paper summarises some profiles of legal relevance of such topical and wide subject.

Keywords: *Digital single market; Platform contracts; Sharing economy; Weaker party protection; Zero price economy.*

Introduction

Digital platforms are a very important economic reality, also in consideration of the epidemiological emergency which has increased online daily transactions.

The use of IT platforms allows companies to raise their profit exponentially. For this reason, it is useful to investigate the issue of corporate bargaining with regard to user protection profiles. If digital platforms represent a constant element in the daily lives of most European consumers and have the great merit of facilitating access to goods and services, as well as the creation of the digital single market, the users/consumers may find themselves disarmed and lacking clear and sufficient tools to protect their position[2].

It is a relatively recent reality; we talk about platform economy and digital platform and also about collaborative economy[3].

What are these concepts referring to? Platform economy is a business model that gives life to a virtual market in which supply and demand for goods and services meet thanks to digital platforms[4]. In turn, this last expression indicates all those services whose purpose is to encourage

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[2]El Sabi (2021); Foltran (2019).

[3]Pascuzzi (2020) at 20 et seq.

[4]See inter alia: Quarta & Smorto (2020) at 178 et seq.

interaction between users and to facilitate the exchange of content, goods and services[5].

A related concept is that of a collaborative economy: it defines a new organisational and business model based on the use of digital platforms to connect people who want to benefit from various utility in a direct, simple way and with minimal intermediation.

In all case it is necessary the creation of an account within the platform in order to be able to access and conclude contracts.

The phenomenon requires the use of the Internet and the presence of a digital infrastructure created in order to make information, data and economic offers available to third parties through the creation of a non-physical digital market.

When we talk about digital markets, we refer to the transformation of the markets induced by the exploitation and use of digital technologies.

In this context, if we consider the professional side, we see how the productive organisation of the company, the communication strategies, the relationship with consumers and the role of information have changed. This latter has big importance in a double sense: both for the company that aims to spread its offers and for consumers' awareness and protection. Furthermore, the role of data and the importance of data accumulation are crucial since they are aimed at creating a position of power in the market and reducing competition.

We may think of firms such as Amazon, eBay, Booking and so on. Such economic realities increase on a daily basis with huge impact in terms of numbers of users and economic income.

When we talk of "online markets" the EU definition is given by Dir. 2019/2161 (so-called "Omnibus directive") approved with the aim of updating an already consolidated regulatory framework which was obsolete in light of the last technological innovations[6]. At recital 25, it provides that "*the definition of 'online marketplace' should be updated and rendered more technologically neutral in order to cover new technologies. It is therefore appropriate to refer, instead of to a 'website', to software, including a website, part of a website or an application, operated by or on behalf of the trader, in accordance with the notion of an 'online interface' as provided by Regulation (EU) 2017/2394 and Regulation (EU) 2018/302 of the European Parliament and of the Council*». Thus, a new definition of online marketplace is given by Art. 4, par. 1, let. e): «*a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers*" [point (17)]; this definition includes all those services, managed by or on behalf of a professional, which use software to allow consumers to negotiate at a distance with other professionals or consumers and the

[5]Foltran (2019) at 163.

[6]The Directive, approved on 27 November 2019 and entered into force on 7 January 2020, reforms the European legislative framework for the protection of economic interests of consumers. This regulatory intervention is part of the package of measures presented by the Commission on 11 April 2018, under the name of "New deal for consumers".

professional, who provides an online marketplace, is called "online marketplace provider" [point (18)][7].

In this perspective new definitions are also included by Omnibus directive in Art. 2 of Dir. 2011/83 (Consumer Rights Directive): "goods" [point (3)], "personal data" [point (4a)], "digital content" [point (11)], "digital service" [point (16)], "functionality" [point (20)] and "interoperability" [point (21)][8].

In this field we have to bear in mind also the Directive (EU) 2019/770, relating to certain aspects of contracts for the supply of digital content and digital services, which has created a new taxonomy by introducing a distinction (and related discipline) between: 1) "digital content" (e.g. computer programmes, applications, video files, etc.); 2) "digital services" (e.g. cloud computing) and 3) "goods that incorporate digital elements" (we can think of a smartphone with a standard pre-installed application)[9].

Contracts and Digital Markets: The Role of Information

There are two different profiles of incidence for contract law: the contract stipulated by the user with the platform and the contract stipulated between the users (seller and buyer) concerning the exchange of goods or services[10]. Distance contracts with the relative peculiarities are here to be taken in consideration. In both cases the problem is establishing whether or not the user is a professional so that the *lex specialis* - given by the Consumer code – can find application.

As for contracts concerning the services of the information society, the Italian normative references are the Legislative Decree 9 April 2003, n. 70 (implementing Directive 2000/31/EC on electronic commerce) and the Italian Consumer code[11].

Big relevance is given to the obligations of the titular including the obligation to provide information (Articles 7/12 of the Legislative Decree 9 April 2003, n. 70 implementing Directive 2000/31/EC), while the legislation of the Consumer code has been taken into consideration whenever there is a *B2C* (*business-to-consumer*) relationship. In this case, there are pre-contractual information duties (Article 49 of the Italian Consumer code); contract form requirements (Art. 51) and the withdrawal right (Art. 52)[12]. These provisions are aimed at rebalancing the positions of contracting parties.

When we talk of information, we have also to keep in mind the innovations introduced by Omnibus directive. Consumers must be informed *"in a concise, simple and understandable form"* (recital no. 20, Omnibus Directive). At Article 3, par. 7, it includes a specific provision (Art. 11 *bis*) in

[7]Speziale (2020) at 447.
[8]Speziale (2020) at 447.
[9]El Sabi (2021).
[10]Quarta & Smorto (2020) at 182 et seq.
[11]Legislative Decree 6 September 2005, n. 206.
[12]Quarta & Smorto (2020) at 186-187.

the Annex I of the Directive 2005/29/CE on unfair commercial practices, considering as a commercial practice which is in all circumstances considered unfair: *Providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results.*

The reform introduces a ban on hidden advertising which comes alongside the one provided, for editorial content, by art. 11, Annex I.

Secondly, Art. 23 *bis*, Annex I, forbids the so-called online secondary ticketing. It is about reselling to consumers of event tickets that the professional has previously purchased, using automated tools in order to circumvent the technical limits set by the primary seller.

Furthermore, Arts. 23 *ter* and 23 *quater*, Annex I, deal with reviews on the web. The entrepreneur is required to adopt "*Reasonable and proportionate measures*" to verify that product reviews are submitted by who actually used or purchased it (Art. 23 *ter*). The new Art. 23 *quater* also prohibits the commercial practice consisting in sending false reviews or false likes on social media or however in providing false information to promote products. The provision also admits the possibility that a third party is responsible for committing the offense by the professional, and not the professional himself[13].

In the context of information duties, among the others, we can consider Amazon case, decided by the European Court of Justice with the judgment of 10 July 2019 (case C-649/17).

Amazon was sued before the German courts by the Federal Union of Consumer Organisations and Associations who maintained that it did not respect its legal obligation to provide consumers, with efficient means, information about how to enter into contract with it; in particular, it did not disclose to consumer, in a clear and comprehensible manner, its telephone and fax numbers. The Federal Union alleged that the Amazon call back service did not satisfy the law information requirements, since consumers had to take a number of steps in order to enter into contact with an interlocutor of that company[14].

Thus, in this decision the Court dealt with the content of the disclosure requirements. The results of the Courts interpretation were that an e-commerce platform such as Amazon is not obliged in all cases to make a telephone number available to consumers before the conclusion of a contract.

The Court pointed out that the Directive 2011/83/EU (*Consumer Rights Directive* of 25 October 2011) seeks to ensure a high level of consumer protection by guaranteeing their information and their safety in transactions with traders trying the right balance between a high level of consumer protection and the competitiveness of enterprises as enshrined in the Charter of Fundamental Rights of European Union (Arts. 16, 38).

According to the Court, an unconditional obligation imposed on traders to provide consumers, in all circumstances, with a telephone number or to establish a

[13] Speziale (2020) at 446.

[14] German law requires traders, before concluding a distance or off-premises contract with consumers, to provide their telephone number in all circumstances in the same way as the provisions of Art. 49 let. c) of the Italian Consumer Code.

telephone or fax line, or to create a new email address to allow consumers to contact them appears to be disproportionate.

The Omnibus directive is in line with such judgment: in fact, at recital 27, it provides "[…] *The information requirements for providers of online marketplaces should be proportionate. Those requirements need to strike a balance between a high level of consumer protection and the competitiveness of providers of online marketplaces* […]". The directive does not oblige traders to establish a telephone or fax line or to create a new email address to allow consumers to contact them in all circumstances. It is not necessary that a telephone line or a fax number is activated, there may be alternative means of communication as long as the information relating to these means is accessible to the consumer in a clear and understandable way.

1) Unfair Clauses in Online Agreements

Another relevant profile in this discussion is that of unfair clauses within the digital contract. In platform contracts the acceptance of the contract terms of use can be done by clicking (i.e. by checking the box inserted on the site) or by using the service itself. In the presence of unfair clauses, such as unilateral withdrawal from the contract, which rules are in force? For b2b (*business-to-business*) or c2c (*consumer-to-consumer*) contracts, Art. 1341 of the Italian Civil code which provides for formal protection, subordinating the validity of the unfair clauses to their written approval.

In fact, in *inter pares* contracts, Italian civil code opts for a "formal" protection in order to ensure that the clause is consciously accepted and in order to overcome the information asymmetry resulting from the unilateral provision of the same clause; it was therefore not intended to limit the autonomy of the parties *a priori* around the choice of the content of the contract, but only to ensure the existence of a conscious consent by the party accepting the contract[15].

What about digital contracts?

When an electronic contract contains unfair clauses, how can Art. 1341 of the Italian Civil code find room[16]? In this context, on the one hand, the jurisprudence maintains that for the validity of the unfair clause present in a digital contract it is necessary to specifically approve it by means of an electronic signature[17]. In e-commerce agreements, formal approval is considered necessary so that the clause must be specifically signed by the buyer (or the subject adhering to the contract, who is the weaker contractual party).

Therefore, according to this interpretation, for the validity of an unfair clause contained in an online contractual form, the mere click of approval of

[15]Cerdonio Chiaromonte (2018) at 404 at 405.
[16]*Ibid.*
[17]See, among the others, Trib. Catanzaro, 30 April 2012, in *Ilcaso.it*; Giudice di Pace of Trapani, 14 October 2019; Giudice di Pace of Giarre, 21 October 2019, in *DeJure*.

the contractual text is not sufficient, it is instead necessary to specifically sign the same clause through digital signature.

According to another orientation instead, the electronic signature is not necessary because it is too sophisticated and it would risk paralyzing the development of market on an international level; so a specific box is enough to tick because this is equivalent to a specific approval of the unfair clause[18].

If the contract is b2c we have the application of the Italian Consumer code: the presence of unfair clauses is banned by Art. 33 and following.[19] Thus, for the validity of the clause it is necessary to prove in court that it has been individually negotiated (Art. 34 Consumer code).

The latest European regulatory intervention is the Omnibus Directive: it requires EU countries to introduce effective, proportionate and dissuasive measures against traders who break the rules on unfair contract terms based on a set of parameters.

These criteria include: the nature, gravity, scale and duration of the infringement; any action taken by the trader to mitigate or remedy the damage suffered by consumers; any previous infringements by the trader; penalties imposed on the trader for the same infringement in other EU countries in cross-border cases where information about these penalties is available through the mechanism set up by Regulation (EU) 2017/2394. Under the Omnibus directive, EU countries must be able to impose effective, proportionate and dissuasive penalties where, in connection with coordinated actions under Regulation (EU) 2017/2394, they identify major cross-border infringements affecting consumers in several EU countries. Fines are very high: they can reach 4% of a trader's turnover or € 2 million where information about the trader's turnover is unavailable.

Jus Poenitendi and Account Deactivation

From the point of view of the European institutions, alongside the disclosure obligations for professionals, the right of withdrawal assumes a strategic role for the implementation of the digital single market. The consumer's right of withdrawal allows the titular to repent and exit the contract, playing a role of fundamental importance as a tool for consumer protection.

The *jus poenitendi* is based on the asymmetry of bargaining power that characterises the relations between professionals and consumers and is aimed at creating a balance between the asymmetrical contractual positions of parties. Although over time several directives have been adopted in this field in European Law and the new techniques of commercialisation have modified the market itself, the *jus poenitendi* has not changed in its structure and function[20]. It is a consumer fundamental right, unrenounceable[21], *ad nutum*[22] and free. It results in the

[18]Trib. Naples, 13 March 2018, n. 2508.
[19]Chiarella (2016) at 68 et seq.
[20]Patti (2012).
[21]This derives from the imperative rules set up to protect the consumer within internal market.
[22]This means that such withdrawal does not require any preconditions.

termination of the contract and determines the obligation for the consumer to return the goods and for the professional to reimburse the price.

With the acknowledgement of withdrawal right, the consumer is not protected from the point of view of the content of the contract, but form that of his free and informed consent. In this perspective, the "*pacta sunt servanda*" principle does not undergo a derogation in consumer contracts: the *jus poenitendi* has the purpose of guaranteeing freedom of choice of the consumer and, ultimately, his contractual autonomy. The principle is still in force, but only after the so-called cooling – off period[23].

The *jus poenitendi*, the duty to disclosure, the formal requirements, on the one hand, and the control over the content of the contract, on the other hand, represent the fundamental cornerstones of consumer law, offering specific rules also for the platform contracts[24].

Recently the Omnibus Directive has modified Art. 9 of Dir. 2011/83, on the right of withdrawal, adding a paragraph 1 *bis* which allows EU member States to extend the withdrawal period, normally of fourteen days, to thirty days, in the case of contracts stipulated with aggressive marketing techniques.

With the purpose to modernise some EU provisions on consumer protection, Art. 4 of Omnibus Directive has partly amended the letters a) and m) of Art. 16 of the CRD (*Consumer Rights Directive* - 2011/83), on the exceptions to the right of withdrawal. In this context, the obligation for professionals to obtain prior express consent is also accompanied by the acceptance of the fact that consumer will lose the right of withdrawal once the contract has been executed, if the consumer is obliged to pay a price to the professional.

Furthermore, Art. 16, par. 2, has also been modified: member states may derogate from the exceptions to the right of withdrawal of paragraph 1, lets. a), b), c) and e), for contracts that have been concluded following unsolicited visits or organised excursions. National legal systems may, therefore, exceptionally, extend the right of withdrawal and/or admit it, where normally excluded[25].

The Omnibus directive clarifies that the necessity of consumer consent before the expiration of the cooling-off period works for all for services, including digital services, provided for a fee[26].

In the practice, online selling of goods or services is different from platform service itself (e.g. eBay, Amazon, Booking and so on): in the latter case, the withdrawal is generally exercised by the user informally, abandoning the use of the service or deleting the account[27]. No other fulfilment is required.

In this regard, another interesting issue is that of private accounts deactivation by the titular of the platform. It is very relevant for its effects on the market: Italian

[23]Patti (2012) at 1009.
[24]El Sabi (2021).
[25]Speziale (2020) at 446.
[26]See Recitals 37-38 of Directive 2019/2161.
[27]Quarta & Smorto (2020) at 193 et seq.

courts have judged the deactivation of the account as a tool for governing the market, able to compromise the positioning and the image of the companies[28].

For this reason, a debate raised in order to individuate the case in which the deactivation of private accounts is licit[29]. According to a first approach, the titular of the platform can cancel private accounts only in case of serious and important breach of contract and only if this faculty is allowed by a specific clause. Furthermore, since this clause contains the power of a unilateral withdrawal and, as such, is an "unfair clause", it needs distinct approval by the user[30]. According to a second interpretation, since the deactivation of private accounts is expression of the right of withdrawal of the platform titular, it needs not only a specific approval by the user (according to Art. 1342, co. 2, c.c.), but also a judicial decision[31]. The issue will be examined again in next paragraph.

Regulation (UE) 1150/2019

Now we have to consider the subject of online intermediation services. The merchant ("commercial user") needs the intermediary (platform) to promote (in the "telematic windows") his products and to reach interested parties and customers[32].

The EU Regulation 1150/2019of 20 June 2019 (which promotes fairness and transparency for business users of online brokerage services) is relevant in this field because it regulates *business-to -business* relationship, i.e. between the platforms and those who offer their services[33]. The Regulation aims to offer a system of safeguards for professionals who use online intermediation services and to avoid the risk of unfair agreements and abuse of bargaining power. As it is pointed out by Art. 1, in fact, the purpose of the Regulation is «*to contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities*».

The need for protection arises in all those cases in which the terms of use of the service have not been individually negotiated with specific reference to the use, termination and suspension of online intermediation services[34].

The Regulation applies only to the relationships between online platforms (including search engines) and commercial users, i.e. those subjects who act in the

[28]See in argument Trib. Messina, 7 July 2010, in *Altalex.com* and Trib. Catanzaro, 30 April 2012, in *Ilcaso.it*. Furthermore see: Quarta & Smorto (2020) at 195.
[29]Quarta & Smorto (2020) at 194-195.
[30]Trib. Messina, 7 July 2010, in *Altalex.com.*
[31]Trib. Catanzaro, 30 April 2012, in *Ilcaso.it*.
[32]Quarta & Smorto (2020) at 195 et seq.
[33]Foltran (2019) at 174 et seq.
[34]Quarta & Smorto (2020) at 196.

context of their entrepreneurial activity excluding consumers (who instead operate for personal purposes) and sharing economy platforms[35].

Business users must have their place of establishment or residence in the Union and, through online intermediation services or online search engines, offer goods or services to consumers located in the Union, irrespective of the place of establishment or residence of the providers of those services and irrespective of the law otherwise applicable (Art. 1, par. 2)[36].

By online intermediation services the Regulation means online platforms that allow commercial users to offer goods and services with the aim of facilitating the initiation of the direct transaction with users. It is important to underline that while the application of the Regulation to online payment services or to online advertising tools or online advertising exchange is excluded (Art. 1, par. 3), for the purpose of submitting an intermediary service to the Regulation it is not necessary that the entire transaction is carried out inside the platform, but it is sufficient that the platform is the virtual place through which the transaction is initiated, although some steps of the transaction may take place outside of it (Art. 2, point 2, let. b).

Art. 3 of the Regulation contains *Terms and conditions*: these are unilaterally arranged by the providers of the online intermediation services and have: to be drafted in plain and intelligible language (par. 1, let. a); to be easily available online (let. b); to set out the grounds for decisions to suspend or terminate or impose any other kind of restriction upon, in whole or in part, the provision of their online intermediation services to business users (let. c).

Restriction, suspension and termination are analytically governed by Art. 4, which in any case requires the service provider to communicate on a durable medium, prior to or at the time of the restriction, the decision to suspend or terminate the service.

In the event that the deactivation is definitive, the decision and its motivation must be made known with at least thirty days' notice from its effective application (Art. 4, par. 2).

Following the service provider's communication, the right for the commercial user to lodge a complaint is ruled by par. 3, clarifying the reasons and facts in support of his eventual contestation of the decision adopted by the platform.

The obligation to provide a period of notice does not apply if there is a regulatory obligation to cease the service (Art. 4, par. 4, let. a), the withdrawal is justified by imperative reasons under national law (Art. 4, par. 4, let. b) or there is the possibility for the platform operator to demonstrate that the user has repeatedly violated the terms and conditions of service (Art. 4, par. 4, let. c).

According to Art. 4, last paragraph, moreover, the service provider is not even required to provide a justification of the reasons for withdrawal or termination of the contract "*where it is subject to a legal or regulatory*

[35]Foltran (2019) at 168.

[36]The Regulation does not apply «to online payment services or to online advertising tools or online advertising exchanges, which are not provided with the aim of the facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers» (Art. 1, par. 3).

obligation not to provide the specific facts or circumstances or the reference to the applicable ground or grounds, or where a provider of online intermediation services can demonstrate that the business user concerned has repeatedly infringed the applicable terms and conditions, resulting in termination of the provision of the whole of the online intermediation services in question".

The choices in the "positioning" of the products, the way to sort the results of a search contribute to increase or decrease the turnover or revenue. For this reason, the Regulation provides rules valid for both online platforms and search engines. In both cases, the choice of positioning the professional's offer or his website is capable of affecting the knowledge of the professional's activities and also on the consumer's choices[37]. Art. 5 of the Regulation establishes that the parameters that determine the positioning and the reasons must be set out in the terms of use of the platform that offers the brokerage service (par. 1); similarly, search engine providers must offer these elements in an easily and publicly accessible and updated description, written in simple and understandable language (par. 2). Furthermore, information - of the possibility of influencing the positioning against payment of a consideration - must be given (par. 3).

The Regulation provides for specific contractual clauses that the terms of use of the platforms must contain in order to ensure that the relationship with the professional is conducted in good faith and fairness (Art. 8). These include the clause by which the platform undertakes not to impose retroactive changes to the terms of use (let. a); the one that indicates to the professional the conditions for terminating the contract (let. b) and, finally, the clause relating to technical and contractual access to the information that the professional provides to the platform and which is kept by the latter even upon expiry of the contract (let. c).

Article 9 governs access to data: it provides that within the contracts there is a description about the possibility or not to access personal data or other data that are provided or generated both by consumers and by the commercial user and, in the event that access is possible, the categories of data concerned and the conditions of access. This information must be provided both regarding any access to such data by the intermediary service provider and if access is allowed to the commercial user of the platform (par. 1). In addition, the Regulation indicates that specific information must also be provided on the possibility of access by the commercial user to the data in aggregate form (par. 2, let. c) as well as whether or not the sharing of data with third parties is envisaged and, if such sharing is not necessary for the functioning of the platform, the purpose it intends to satisfy and the possibility or not by the commercial user to oppose it (par. 2, let. d).

Lastly, importance is given to the need for the online platform to establish internal complaint-handling system (Art. 11). The system must be easily accessible, free of charge and must ensure a decision within a reasonable time. The characteristics of this system are specified in terms of treatable issues (concerning alleged non-performance by commercial users, technological problems of the platforms or behaviour and measures adopted by the supplier) and the ways in which they must be resolved (rapidity, effectiveness, transparency and fairness).

[37]Quarta & Smorto (2020) at 197.

Art. 12 provides for the possibility of mediation in the event that the dispute has not been resolved by the internal complaint-handling system.

The Distinction Business – Consumer

Anyone can participate in the production system which works thanks to the platform, so it is not easy to understand whether the person providing the service is a professional or not[38]. Anyone (not only professional merchant) can sell goods or services online through digital platform, just as anyone can rent a room (even he is not a hotel keeper) since everyone can participate in the production and distribution chain[39].

Nowadays we discuss about the crisis of the distinction *Business – Consumer*. For this reason, the expression "*prosumer*" has been coined to explain the hybrid nature of modern market actors[40]. It expresses a crisis of the traditional categories of *professional* and *consumer* existing even within contemporary digital system. The professional nature of the operator affects the applicability of the Consumer code and is crucial also to establish who is required to fulfil the administrative burdens set by law to carry out certain activities[41].

In this regard, we may reflect on the fact that the role of platforms is not always related to an instrumental or ancillary role with respect to the main object of the transaction: in fact, it is frequent the case in which the same platform directly offers goods and services in competition with those offered by professional users, assuming the position of a negotiating party[42].

In this regard, we have the Communication of the European Commission of 2 June 2016 *A European agenda for the collaborative economy* which has the objective to distinguish commercial activities from occasional ones. For this purpose, it introduces some professionalism indicators: attendance, turnover, profit, salaries, etc.

Some questions for determining whether the platform should be held responsible for the underlying service are: is the final price set by the platform? Are there terms of use unilaterally set to regulate the offline relationship between those who provide the service and those who receive it? Are the assets owned by the platform? Various other elements depending on the case, from time to time, are under consideration[43].

Furthermore, according to the recital 27 of the Omnibus Directive "*Providers of online marketplaces should inform consumers whether the third*

[38]Azzarri (2021).
[39]Quarta & Smorto (2020) at 202.
[40]Foltran (2019) at 164.
[41]Quarta & Smorto (2020) at 203; Foltran (2019) at 170. See in argument among the others: ECJ, 4 October 2018, C-105/17 in *Diritto e Giustizia*, 4 October 2018.
[42]Foltran (2019) at 164. An example of this genre of activity is given by Uber taxi.
[43]As exemplary cases, in this field, we can consider two decisions of the European Court of Justice: Uber taxi case (ECJ, 20 December 2017, Case C-434/15) and Airbnb Case (ECJ, 19 December 2019, Case C-390/18).

party offering goods, services or digital content is a trader or non-trader, based on the declaration made to them by the third party. When the third party offering the goods, services or digital content declares its status to be that of a non-trader, providers of online marketplaces should provide a short statement to the effect that the consumer rights stemming from Union consumer protection law do not apply to the contract concluded. Furthermore, consumers should be informed of how obligations related to the contract are shared between third parties offering the goods, services or digital content and providers of online marketplaces. The information should be provided in a clear and comprehensible manner and not merely in the standard terms and conditions or similar contractual documents […]". This is a very important provision from the point of view of consumer protection.

The goal of making consumer rights more effective is balanced by the provision which consider also the interests of businesses. In this perspective, "*the information to be provided about the responsibility for ensuring consumer rights depends* [as recital n. 27 continues] *on the contractual arrangements between the providers of online marketplaces and the relevant third-party traders. The provider of the online marketplace could indicate that a third-party trader is solely responsible for ensuring consumer rights, or describe its own specific responsibilities where that provider assumes responsibility for certain aspects of the contract, for example, delivery or the exercise of the right of withdrawal"*[44].

The "Payment" through Personal Data

Another relevant issue is given by law relationships in the so-called "zero price economy". Nowadays in digital platform and online agreements, there is a tendency to recognise an economic value to personal information, preferences and other content generated by users-consumers, which can be transferred to third parties. We talk about "propertisation" of personal data, which are no longer seen only as a representation of the person, but also as a "good" endowed with a value and therefore exchangeable with other merchandise or services[45].

In this perspective the Omnibus directive introduces the express qualification of the transfer of personal data as price in the contract for the supply of digital content or services (Art. 3, par. 1). In this way, the common practice of exchanging digital content or service against personal data is introduced into law, although such phenomenon is generally perceived by the user in terms of gratuitousness.

The Omnibus directive allows the users - of contracts for corresponding services supply of digital content or services - to "pay" with their personal data. It adds a paragraph 1a to Art. 3 of Dir. 2011/83/EU (*Consumer Rights Directive*) and so it extends the scope of application to those contracts for the supply of digital content and digital services that do not require the payment of the price by the consumer, but rather the payment through personal data [the only exception is given by the fact that "«*the personal data provided by the consumer are*

[44]In argument, see Speziale (2020) at 447.

[45]Ricciuto (2018) at 689 et seq.; Ricciuto (2020); Alvisi (2019) at 675 et seq.

exclusively processed by the trader for the purpose of supplying the digital content (….) or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose"].

The last decisions - relevant in this field - come from Italy; they concern both consumer rights and data protection. In 2021 Italian judges have confirmed the condemnation of Facebook by Italian Competition Authority (AGCM) for not informing properly users about its collection and use of data.

We have a first judgment given by Lazio Regional Administrative Tribunal (10 January of this year)[46] confirmed by the decision of the Italian Council of State (29 March 2021) for violations of the Consumer code in the context of processing and sharing of users' data with third parties for commercial purposes[47].

In particular, the Council of State upheld the decision of the Administrative Tribunal and rejected Facebook's appeals. According to the judgment of Italian Council of State, Facebook had misled users to register to the Facebook platform, since it did not inform them that their data would be used for commercial purposes.

According to the judges, the exploitation of the personal data (that the users has made available in order to be able to use the services, offered as 'free of charge') by the titular of a social network (in this case, Facebook) is an "unfair commercial practice", because of the data transmission to third parties for commercial purposes.

The core of the sentence is given by the presence of a forced consent to the processing of data and by the lack of complete information suitable for making it clear that, in the face of the advantages connected to the service, the automatic profiling of the customer is carried out, together with the acquisition of the personal data, by an indefinite number of operators for indefinite commercial purposes[48].

As first, in this case the provision of consent was required in order to access the service, so there is a compression of personal freedom, although such limitation is compensated by the ability to access the service.

Furthermore, Facebook did not inform properly the user with clarity and immediacy about the collection and use, for remunerative purposes, of the user's data and, consequently, of its commercial intent, aimed at monetizing the same. The information provided to users has been considered generic and incomplete without adequately distinguishing between, on the one hand, the use of data functional to the personalisation of the service with the aim of

[46]See T.A.R. Lazio, Rome 10 January 2021, n. 260, in *DeJure* [see the comment of Solinas (2021) at 320 et seq.].

[47]Cons. Stato, 29 March 2021, n. 2631, in *DeJure.* In argument, see Ricciuto & Solinas (2021), at 1 et seq.; Carnovale (2021) at 1 seq.

[48]This was already pointed out by the European Data Protection Supervisor in the decision n. 4 of 2017: "presenting services as 'free' is 'deceptive' and blinds consumers to the actual costs which they will experience 'downstream' and distorts decision making, thereby harming both consumers and competition".

facilitating socialisation with other users, and on the other, the use of data to carry out targeted advertising campaigns.

In the motivation, the Court explains that the communication to third parties of the personal data implements the phenomenon of "propertisation": since it invests situations governed not only by the GDPR, it must not be related exclusively to *privacy* rules, in order not to reduce the "multilevel protection" guaranteed to individuals.

Thus, the case - concerning the exp loitation of personal data in the context of an online service - fell under the realm of *consumer* law, in addition to personal data protection law and to the General Data Protection Regulation [Regulation (EU) 2016/679].

These judicial statements open the way to the possibility of considering the choice of the subjects to allow the processing of their personal data also as an exercise of economic freedom and not only in the perspective of the protection of personality rights. The issue is placed in the context of exchange contracts: personal data can be considered as contractual price with the applicability of rules, such as that on unfair commercial practices, which find their rationale in the protection of the consumer's consent for optimal market competition.

In conclusion, this peculiar genre of economic freedom must be considered alongside the protection of the individual's own personality in the context of online platform contracts.

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Syrian Refugees in Brazil: Protection of Human Rights and their Developments

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This study will present the issue of Syrian refugees in Brazil, whose immigration event occurs because of the terrible conditions offered in their native country, which makes these individuals seek refuge in other countries, seeking, in addition to a better condition, a life that is worthy. It is understood that the concept of dignified life goes against what is advocated by the Brazilian Federal Constitution, as well as fundamental rights, and even more related to the dignity of the human person. Thus, this article will bring an analysis of the context of this event, which has been happening quite frequently, making Brazil one of the countries that most welcome immigrants in the world. However, one factor draws attention in the middle of this process, as the Covid-19 pandemic has been following the population for more than a year, which makes border controls more rigid. In addition, Brazil, with its native population, is already experiencing various social problems, such as hunger, unemployment, poor distribution of income and gold, which makes us rethink whether the rights and dealings with these refugees are truly effective, in order to welcome and help in the development of a dignified life. The research will have its principle bibliographic reviews, in books, journals and articles referring to the area, in order to bring different standards that can be worked in society and contribute to the scientific community. It is evident that a dignified life is only possible if the guarantees, freedom, equity, and other principles, such as the dignity of the human person, provided by the Federal Constitution are observed. with its native population, is already experiencing various social problems, such as hunger, unemployment, poor distribution of income and gold, which makes us rethink whether the rights and dealings with these refugees are being truly effective, in order to welcome and help in the development of a dignified life. The research will have its principle bibliographic reviews, in books, journals and articles referring to the area, in order to bring different standards that can be worked in society and contribute to the scientific community. It is evident that a dignified life is only possible if the guarantees, freedom, equity, and other principles, such as the dignity of the human person, provided by the Federal Constitution are observed. with its native population, is already experiencing various social problems, such as hunger, unemployment, poor distribution of income and gold, which makes us rethink whether the rights and dealings with these refugees are being truly effective, in order to welcome and help in the development of a dignified life. The research will have its principle bibliographic reviews, in books, journals and articles referring to the area, in order to bring different standards that can be worked in society and contribute to the scientific

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Keywords: *Refugees; Syria; Human rights; Dignity of human person; Warranties.*

Introduction

The conflicts in Syria have been going on since 2011, when the dictatorial regime of Bashar Al Assad, who confirmed its permanence after the death of his father, and opponents of the regime clashed over divergent political positions.

According to Ramos[2], the direct causes for this revolt were: “corruption, nepotism, embezzlement, illicit enrichment, influence peddling, vote buying, forgery of contracts and other documents, tax evasion, embezzlement public funds”. Another point mentioned by this author is the economic issue, “underdevelopment, poverty and injustice: poor distribution of wealth; monopolisation of public budgets for projects without repercussions on development” and with this insecurity it also generates some discomfort due to economic stagnation.

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[2] Ramos (2013) at 32

The issue of Syrian immigration to Brazil is already beginning to be a tiring one. Upon arrival, they face many difficulties with the border, bureaucracy with documentation and legalisation, added to the language barrier. Safety, health and education are basic guarantees that are often neglected by Syrians, violating not only internal norms but also the protection of human rights.

In view of the problems presented in relation to the issue of immigration from Syria and the problems the country is going through, it is intended to answer the following issue: What are the consequences of the violation of human rights in the face of Syrian refugees in Brazil?

However, some hypotheses are raised, as, to resolve the issue of Syrian refugees, the government needs to implement social inclusion programs, professional monitoring since the arrival of the immigrant in Brazil, guarantee housing, security, good infrastructure, health and education quality public, an intensive language course, professional courses, among other welcoming and sensitive behaviours, to ensure the dignity of the human person.

Based on this, the main objective of this research is to analyse the public and protection policies for refugees and their codified rights guaranteed by the host country and by international law. However, to do so, it will be necessary to trace the causes that generated the war in Syria, verifying the consequences of this exodus from the conflicts, analysing why some Syrians chose Brazil as a refuge. From this, it is intended to list the main problems regarding the arrival of Brazil, checking if there is the application of the refugee statute or violation of essential rights, demonstrating, in addition to the ways in relation to reception, if Brazil is flawed in public policies insertion, and in this context, what can be improved.

This research is justified by the fact that the situation of refugees is something that has a lot of impact. After all, leaving your country of origin, with a culture you are already used to and a language that is easy, your own comfort zone, is not easy. When it comes to Syrian immigrants, the situation is even more emergency, as it is analysed that there has been a war since 2011, which has already resulted in the death of many Syrian residents, a trauma for the many children victims of this inhumane confrontation. Brazil has been one of the countries that has hosted thousands of refugees since the war began, and has given a humanitarian lesson when it comes to receiving immigrants, how easy it is to get visas for refugees from Syria, assistance to those in need and their social inclusion.

The methodology adopted in this research is a literature review based on books, scientific articles and journals relevant to the area chosen for the work, through research and reading, whose purpose will be to bring different patterns that can serve as an example and to be worked on in society. For this, articles and magazines will be used, in order to bring up to date issues and new approaches, however books will also be used, to bring a historical concept to the approached theme. The study will have a deductive character, since it is a literature review, requiring the crossing of all research that is carried out on the subject.

Conflicts in Syria

The conflicts in Syria, which have grown exponentially year after year since 2011, are causing widespread civil war, generating disastrous humanitarian effects, forcing the exodus of citizens to countries that welcome them and provide the bare minimum for a decent life.

The only viable way out would be refuge in places that make security, protection of human rights and dignity possible. When analysing the trajectory of an immigrant, we realise the complexity that resides in the decision to migrate. Deciding to live in a country with a language, culture, lifestyle and worldview, among other various difficulties, to escape from a war that causes the terror of so many deaths and destruction. Brazil has struggled with the resources available to receive refugees in the best way, with complete security and full protection of their rights.

> With the increase in the flow in Brazil, the government adopted measures to facilitate the entry of these immigrants into the territory and their insertion into Brazilian society. In September 2013, CONARE published Resolution No. 17, which authorised Brazilian diplomatic missions to issue a special visa to people affected by the conflict in Syria, in light of serious human rights violations[3].

But in Brazil there are still many problems to be solved, such as better methods of inserting refugees into society, bureaucracy at the borders, as well as the lack of Portuguese language, contempt of local inhabitants as to their origin, troubled displacement, violence and prejudices suffered, in addition to poor hygiene, such as the lack of potable water and open sewers in many refugee camps, as Andrade[4] says.

The first immigrants who arrived in Brazil were called settlers, and as they had some ease with trade, they migrated to centres and started to work in new lands, the author also says that during the beginning of the conflict in 2011 until 2013, the rate of refugees obtained an increase from 17 to 261, reaching 2,730 refugees in Brazil by the year 2013, according to the National Refugee Committee[5].

Brazil has made a great effort to ensure the protection of refugees, expanding its measures, focusing on legislation for the protection of refugees, public assistance measures, thus becoming pioneers at the international level to be concerned with regulations for the protection of immigrants.

According to UNHCR[6], Brazil is one of the countries that most welcome immigrants, with a total of 35,790 asylum seekers and refugees, about 30.61% of the total of displaced Syrians in the year 2015.

Faced with all the tragedy of Syrian refugees, an analysis is indispensable, regarding the protection guaranteed by the 1951 Refugee Statute, the 1967 protocol and the ANCUR Statute, which was insufficient in terms of its effective

[3]Getirana & Lima (2018) at 422.
[4]Andrade (2011) at 127-129.
[5]Lacerda. Silva & Nunes (2015) at 105.
[6]UNHCR (2015) at 57-63.

public policies. According to Andrade[7], human rights is the prism, the foundation for the protection of refugees, but without forgetting the atypical situation that is forced immigration, in which the relevance of the status of refugees and signed treaties is fundamental. in favour of their protection.

It is understood that there is no possibility of protecting refugees without preserving the protection of human rights, especially the issue of Syria, which, due to its complications, end up generating a coerced exodus, not allowing so many choices for those who, for now, are politically persecuted or affected by the consequences of war in nearby regions. A practical application of this right is necessary, as only guaranteeing the right in theory will not really help, but with the implementation of services that provide benefits to refugees in the social sphere, it will ensure that they can enjoy some of the rights guaranteed by the constitution, human rights, and the Refugee Statute.

For an effective integration of refugees in Brazil, it is necessary to learn the Portuguese language, employment, access to public services, realisation of citizen's rights, good coexistence with the surrounding community and involvement with politics, as well as self-improvement with vocational courses, curriculum improvement and guidelines focused on the labour market are attempts at inclusion. As well as public bodies whose function is to register refugees for work vacancies, see Getirana & Lima[8].

With the context of the pandemic, new challenges arise regarding the protection of these refugees and the constant struggle to find refuge in countries. Due to the growing continuation of violence in Syria, there is a significant displacement of Syrians in a situation of forced immigration, and while the scenario is still unstable, the numbers could increase, but UNHCR estimates that the displacement has already exceeded 80 million in the first half of 2020, being considered the country with the second highest number of internal displacements[9].

With over 6 million Syrian IDPs in the year 2020, the total number of Syrian refugees accounted for around 612,382,693. UNHCR predicts that the 2021 scenario will be different, with significant drops in the number of new displacements, due to restrictions due to COVID-19, such as the closing of borders in many countries[10].

Statute of Refugees

In order to expand the protection of refugees, the UN, in 1967, drafted the Protocol on the Status of Refugees, expanding the provisions of the 1951 United Nations Convention on the Status of Refugees, offering protection to all refugees and not only to those from World War II.

The 1951 Statute defined in its article 1 that the concept of refugee is understood as being the person who, due to well-founded fears of persecution due

[7]Andrade (2011) at 129.
[8]Getirana & Lima (2018) at 422-426.
[9]UNHCR (2020).
[10]UNHCR (2021).

to his race, religion, nationality, association with a certain social group or political opinion, is if outside their country of origin and who, due to such fears, cannot or does not want to return to their place of origin (UN, 1951).

In this sense:

> Art. 1: Paragraph 1 For the purposes of this Convention, the term "refugee" shall apply to any person: c) Who, as a result of events occurring before January 1, 1951, and fearing persecution for reasons of race, religion, nationality, social group or opinions political, if he is outside the country of his nationality and that he cannot or, because of that fear, does not want to avail himself of the protection of that country, or that, if he has no nationality and is outside the country in which he had his habitual residence as a result of such events, he cannot or, due to such fear, does not want to return to it. Paragraph 2. For the purposes of this Convention, the words "events occurring before January 1, 1951", of article 1, section A, may be understood in the sense of or a) Events occurring before January 1, 1951 in Europe. b) Events occurring before January 1, 1951 in Europe or elsewhere.

According to the Refugee Statute, put into force by the Vienna Convention in 1951:

> [r]efugee is any person who, out of well-founded fear of persecution for reasons of race, religion, nationality, belonging to a particular social group or political opinion, is outside their country of nationality and is unable, or due to such fear, it cannot avail itself of the protection of such a country; or that, having no nationality and being outside the country of their habitual residence, they are unable, or due to such fear, cannot return to the country.

In this sense, it can be said that the Syrian population is part of the refugees, who are victims of atrocities, due to the conflicts existing in their country, making that beyond the question of human dignity, there is not even religious freedom, because those who are against the government are persecuted.

Brazil is one of the pioneers in relation to human rights on the Refugee Statute, and the Brazilian refugee law No. 9,474/97 created the National Committee for Refugees[11], the main body that assists refugees, including documents, freedom of movement within the territory and other rights.[12]

For this reason, the country leads the ranking of refugees from Syria, as this population believes that a better quality of life, work and dignified life will be possible, as well as protected rights.

> Human dignity is a seismograph that indicates what constitutes a democratic legal order - that is, precisely the rights that citizens of a political community have to grant themselves so that they can respect each other as members of a voluntary association of free and equal persons. Only the guarantee of these human rights confers the status of citizens who, as subjects of equal rights, have the right to be respected in their human dignity[13].

[11]CONARE.
[12]UNHCR (2015).
[13]Habermas (2012) at 37.

In line with Art. 1, paragraphs 4, 5 and 6 of the 1951 Convention, art. 3 of Law 9,474/1997, provides for situations in which the benefit of refugee status will not be granted:

> Art. 3. Individuals who: I – already enjoy protection or assistance from a United Nations body or institution other than the United Nations High Commission for Refugees – UNHCR; II – are resident in the national territory and have rights and obligations related to the condition of Brazilian national; III – have committed a crime against peace, war crime, crime against humanity, heinous crime, participated in terrorist acts or drug trafficking; IV – are found guilty of acts contrary to the purposes and principles of the United Nations.[14]

For Barreto, regarding the necessary documentation:

> Upon arriving in Brazil and requesting refuge, there is no documentation, any type of paper, proving that the minor has some kinship with the asylum seeker. These children were saved from military attacks and managed to reach Brazil. Thus, it constitutes a device of great legal intelligence by allowing them to be considered dependents, receive a family reunion and enjoy the refugee status in the same condition as the refugee holders[15].

Also, according to the same author:

> The regime imposed by Brazilian law makes the procedure for recognizing refugee status a technical-legal issue, which is debated in due legal process. The institute for the international protection of refugees has a humanitarian nature and should not be a simple instrument of a state's foreign policy, migration policy, or criminal policy. Its scope must reflect a fair, efficient, rigorous and technical process of recognition, or not, of refugee status.[16]

The Brazilian law in its article 10, further states that:

> Art. 10. The request, presented under the conditions set out in the previous articles, will suspend any administrative or criminal proceeding for irregular entry, brought against the petitioner and people from his family group who accompany him. § 1 If the refugee status is recognised, the procedure will be filed, provided that it is demonstrated that the corresponding offense was determined by the same facts that justified said recognition. § 2 For the purposes of the provisions of the previous paragraph, the asylum request and the decision on the same must be communicated to the Federal Police, which will transmit them to the body where the administrative or criminal procedure is processed[17].

On the entry of refugee women as, Soares mentions that:

[14]Law No. 9,474, of July 22, 1997.
[15]Barreto (2010) at 157.
[16]Barreto (2010) at 56.
[17]Law No. 9,474, of July 22, 1997.

> Female applicants may, depending on the case, need medical and psychological support; moreover, in cases where they have suffered some type of sexual abuse and violence, these women should be heard by female employees, as a way of facilitating the gathering of information. Applicants with mental disorders require different analysis techniques, medical advice and indication, if proven incapacity, of a legal representative.[18]

In this way, it can be said that there is a positivisation of rights in relation to refugees before the legal system, however the law is not being able to guarantee access and enjoyment to this entire population, having seen all the structural and social problems of the nation itself, such as unemployment, hunger and others. There is a good intention, mainly for the creation of the instrument that is the Refugee Statute, but the problems are so many that they can make this refugee population feel helpless in some aspect, not for lack of legislation, but for effective public policies.

It is observed that these were not effective even in the field of health, given the scenario of the pandemic observed, where the population did not have access to beds, oxygen and medicines in the necessary amount, causing many to die for lack of assistance. The same scenario in relation to income distribution, which made the country sink even further into the issue of unemployment and hunger, due to the pandemic, as many companies closed, and what was already bad, got even worse.

Finally, considering the issue and recognition of human rights presented by the Refugee Statute, and the affirmation of these rights in the legal system, it is necessary that there is a real realisation and protection of these.

Dignity of Human Person

The human person is characterised by his uniqueness, and this is linked to the question of freedom. Being in a relationship of equality with others, the human person starts to face obstacles contrary to his thoughts, an oppression brought by the weight that evolution of society brings to the world.

> "Freedoms are born only from a will, they only last as long as the will to maintain them remains. Human rights cannot be understood as fruits brought by the State, but are created as manifestations and freedoms arise, that is, this is a burden that individuals are responsible for bringing to society."[19]

According to Alexy[20] and Torres[21]. human dignity has its secular cradle in philosophy. It thus constitutes, in the first place, a value, which is an axiological concept, linked to the idea of good, fair, virtuous. In this condition, it stands alongside other core values for the Law, such as justice, security and solidarity

[18]Soares (2012) at 167.
[19]Bénoit (1985) at 21.
[20]Alexy(2008).
[21]Torres (2005).

Philosophy following evolution shows that there was a clear conceptualisation of what human dignity is, even legally speaking, its definition as a form of protection is very difficult to obtain. According to Barroso[22]. This difficulty is due to the vague and imprecise contours brought about by its porosity and ambiguity, characterizing it as polysemic. Dignity in this matter is closely linked to the quality of it to physical integrity, property, life and others.

> "Although the classification effort is indisputable and commendable - because it enables the systematisation and highlights the different rights identified as such - evolution has shown the continuous feeding of this category with new rights that scientific elaboration, mainly processed by the action of jurisprudence and doctrine, comes inserting into its context. The adoption of the flexible position, given the generalisation of this field, makes, in our view, the shelter of new rights that, naturally, scientific reflection will identify and bring to the subsequent sanction in positive law."[23]

The notion of human dignity varies over time, suffering from the impacts brought about by its change as society changes and melds itself to the new imposed standards. Taking into account the historical concept, human dignity has undergone major changes in recent decades, being mentioned in several international documents, Constitutions, laws, processes and others. However, this does not diminish the fact of its difficulty in legal use. All over the world, it has been used to defend many causes, such as hate crimes, euthanasia, suicide, and even religious issues, which is the main instrument of this study.

Mello[24] says that principle is, by definition, the nuclear command of a system, its true foundation, a fundamental disposition that radiates over different norms composing the spirit and serving as a criterion for its exact understanding and intelligence, precisely because it defines logic and rationality of the normative system, in which it gives the tone and gives it a harmonic sense.

Nunes[25] discusses the fact that the dignity of the human person is an achievement that the human being has achieved over time, derived from an ethical-legal reason against the cruelty and atrocities practiced by humans themselves, some against others, in its historical trajectory.

The identification of human dignity as a legal principle has consequences with regard to its content, normative structure, application and its constitutional role. In this way, principles are legal norms that enshrine values without demonstrating specific behaviours. The application in the legal field is different from the rules, and they branch out into rules that condition their scope and meaning. However, it is possible to systematise the modalities of dignity effectiveness, into three categories, being them direct, interpretive and negative.

Despite the above, Szaniawski[26] states that the idea that every human being has dignity is prior to the right, and therefore does not need to be legally recognised

[22]Barroro (2000) at 296.
[23]Bittar (2003) at 17.
[24]Mello (1986) at 230.
[25]Nunes (2002) at 40.
[26]Szaniawski (2005).

in order to exist. Its existence and effectiveness do not require legitimacy, through express recognition by the legal system. However, given the importance of dignity, as a basic principle that underlies the Democratic Rule of Law, it has long been recognised by the legal system of civilised and democratic peoples, as a fundamental legal principle, as a unifying value of other rights fundamental, inserted in the Constitutions, as a fundamental juridical principle.

Direct effectiveness has a real character and focuses on the similarity of a rule, that is, despite appearing vague, every principle will have a nucleus. Interpretative, on the other hand, means that its values and aggregated rules condition the judicial reach of the norms. Finally, the denial implies the suspension of the application of any norm that is in disagreement with the constitutional principles.

Based on this, human dignity is part of fundamental rights, but it cannot be confused with these, as dignity itself is not a fundamental right, due to its weighting with the competition between rights. Although it is characterised as one, it does not have an absolute character, because although it has its value, it can be sacrificed in favour of other social and individual values. Finally, dignity applies in relations between the individual and the State and in private relations.

Freedom of Expression

According to the Federal Constitution, the expression of thought is free, and anonymity is prohibited. This shows that within the laws, imposed by the Federal Constitution of our country, we have the full right to express opinions, beliefs and others, in this way, we are guaranteed the right to dissent. In addition, you also have the right to abstain, that is, not to express about matters, to remain silent, and it is not legal before the law to force the individual to express their opinions.

Second Coulanges(1971), the awareness of freedom as a power of self-determination necessary for the dignity of the human being is contemporary with the liberal ideological conceptions of the eighteenth century, marked by the affirmation of the bourgeoisie against the absolutism of the monarchy at that time. It is noteworthy that freedom for the Greeks was solely the prerogative given to citizens to participate in political decisions and in this differed from classical liberalism.

These ideological conceptions only conferred formal rights of freedom, if they were not opposed to the State, verifying the intangibility of this power, being almost absolute, opposing the character of guardianship that it should have. At this time, several criticisms were imposed on this approach, mainly for not paying attention to the real needs of individuals within society. In this context, figures appeared who presented themselves against this liberal movement, highlighting great figures such as Karl Marx and Friederich Engels, the so-called socialists. On the other hand, the church decided to set its doctrine in repudiation of socialist ideas, promoting protection for the poorest and not the bourgeoisie.

> Freedom, as to its content, is characterised by the fact that there is no submission to others, the fact that it is not under the control of third parties, and that it does not suffer from any impositional restrictions, whether from the State or from another individual. There is, therefore, an unmistakable connotation of restriction directed at everyone in society, ensuring the individual to exercise his/her self-determination.[27]

Tue right of expression enables the exposure of beliefs, ideologies, opinions, emotions, being explained by the most diverse platforms, given the technological nature of the current scenario. The protection given to the right of expression enables the dissemination of thinking, with a wide variety of content and messages, as these cannot be restricted, as they are protected by freedom of expression and it has several types that they are complementary to each other.

According to Michelman[28], with the widespread use of new technologies, undue blocking and exaggerated or illegal control of information directly affect freedom of expression. In this context, we can say that if the virtual world is a representation of the real world, and the internet has become a means of propagating the most diverse types of expressions, it is also necessary to protect their rights, necessary for the maintenance and preservation of the environment.

In the same way that the ease of access to information for a large portion of the population implies several rights that must be protected, there is also the need to suppress these rights, given the problems observed in relation to religious, racial and sexual hate crimes , being an important point to create limits so that everyone can exercise the right of citizenship.

Thus, it can be said that there is an argument in favour of freedom of expression, that is, if there is any doubt about its legitimacy, it should be privileged. In other words, if there are complaints about individual due to an act of a third party that has hurt their concepts and ideological thoughts and they feel harmed, it is up to this party to prove the intent or guilt before the courts. rights.

Freedom of expression is one of the characteristics of current democratic societies, and is even considered a thermometer of the democratic regime. However, it should be noted that such rights are not judged if they are violated with the same appreciation as other causes, therefore, it is necessary to recognise and develop freedom of expression

However, there must be an understanding that freedom of expression is a right of all citizens, and that the State, more specifically the legal bodies, offer protection for such rights not to be harmed. Freedom of expression in the face of discriminatory speeches are subject to the application of the Law, thus allowing the peaceful coexistence of everyday life and multicultural societies. Such freedoms also apply to refugees, who, upon being welcomed by the country, enjoy the same conditions, granting them the right of citizenship.

[27]Burdeau (1972).
[28]Michelman (2007) at 51.

Religious Freedom

It is evident that as important as the fundamental right to freedom of expression, we have the fundamental right to religious freedom, whose constitutional achievement constitutes the true consecration of maturity of a people. This is also provided for by the Federal Constitution, being inviolable the right to freedom of belief, religious cults, as well as the protection of places where they are celebrated.

In a semantic concept, freedom is associated with the absence of limitations, especially the legal one. Berlin[29] states that there are two types of freedom, negative freedom understood by the absence of external limits, and positive freedom, as the possibility of the subject being supported by the State or by society in a given issue.

Based on this, it is possible to affirm that freedom consists in the possibility of conscious coordination of the means necessary to achieve personal happiness. In this way, it is brought into harmony with the conscience of each one, with the agent's interest, therefore, everything that comes to impede that possibility of coordination of the means is contrary to freedom

> "Mankind's primitive religion arose primarily from a fear of future events; and it is easy to conceive what ideas of unseen and unknown powers men naturally entertain when they are under the yoke of dark apprehensions of all kinds. This shows that religion was necessary given the need of human beings to find the reasons for their fears and anxieties, and somehow to have support in an entity so that their requests were met, thus causing a certain conformation in the face of the events that afflicting him and also applying to future situations."[30]

The freedom to choose one's religion, the freedom to adhere to any religious sect, the freedom (or the right) to change religion, but also includes the freedom not to adhere to any religion, as well as the freedom of disbelief, the freedom of to be an atheist and to express agnosticism. But does not understand the freedom to hinder the free exercise of any religion

Religious freedom does not only consist in the State imposing any religion on anyone or preventing anyone from professing a certain belief. It also consists, on the one hand, in the State allowing or enabling those who follow a certain religion to fulfil the duties that flow from it (in matters of worship, family or education, for example) in reasonable terms. On the other hand (and without any contradiction), in the State not imposing or not guaranteeing with the laws the fulfillment of these duties.

According to the United Nations convention of Human Rights, everyone has the right to freedom of thought, conscience and religion; this right implies the freedom to change religion or belief, as well as the freedom to manifest one's religion or belief, alone or in common, both in public and in private, through teaching, practice, worship and rites.

[29]Berlin (2002).
[30]Hume (2005).

It is noteworthy that for many religious freedom ends up being confused with freedom of conscience, but the latter has broader dimensions, assuming concepts that have no direct relationship with the religious option, belief or worship. Already the first, according to Bobbio[31], consists of the right to profess any religion or not to profess any.

It is up to the State not to impose beliefs or prevent them from professing and participating in its services, but rather to protect the most diverse so that they can express themselves and fulfil their duties. Therefore, we can say that all individuals have the right to express themselves in any way they want, with the exception of exaggerations that can also be judged.

Finally, this religious freedom becomes very important for Syrian refugees, who are persecuted by different religions and the imposition of a belief in their country. This, in addition to the reasons for a dignified life, makes them see in other countries an opportunity to change their lives, and get real freedom. It is noteworthy that Brazil is not totally free of problems, but in relation to religious conflicts, wars and other persecutions, there is a smaller reality when compared to other countries, making this the destination of choice for these refugees.

Public Policies for Syrian Refugees

Law 13445/2017 establishes the guidelines for public policies for emigrants and can be highlighted in its article 3, item XXI - promotion of academic recognition and professional practice in Brazil and in item X - right to public education, discrimination on grounds of nationality and immigration status is prohibited. Therefore, it can be highlighted that education and work are the main forms of insertion in society and a way to promote the dignified development of human beings.

However, for Pereira[32], public policies are a form of behavioural regulation, that is, they go beyond the role of governments, in other words, they are used as a form of regulation, intervention and incentive.

Pursuant to Law 13,445/2017 in its article 3, XI, some institutions such as the University of São Paulo have promoted the insertion and inclusion of the refugee community. These offer courses in Portuguese, geography and others. In addition, there are institutions that welcome children and babies, through volunteer work, offering painting programs.

Another institution that promotes the issue of public policies through education is UNICAMP, and CONARE itself, when presenting the necessary documentation, may request a vacancy.

Brazil currently has one of the most modern legislation on migration and has advanced in terms of supporting pillars for the full integration of the individual migrant into Brazilian society, as it ensures full access to services and rights.

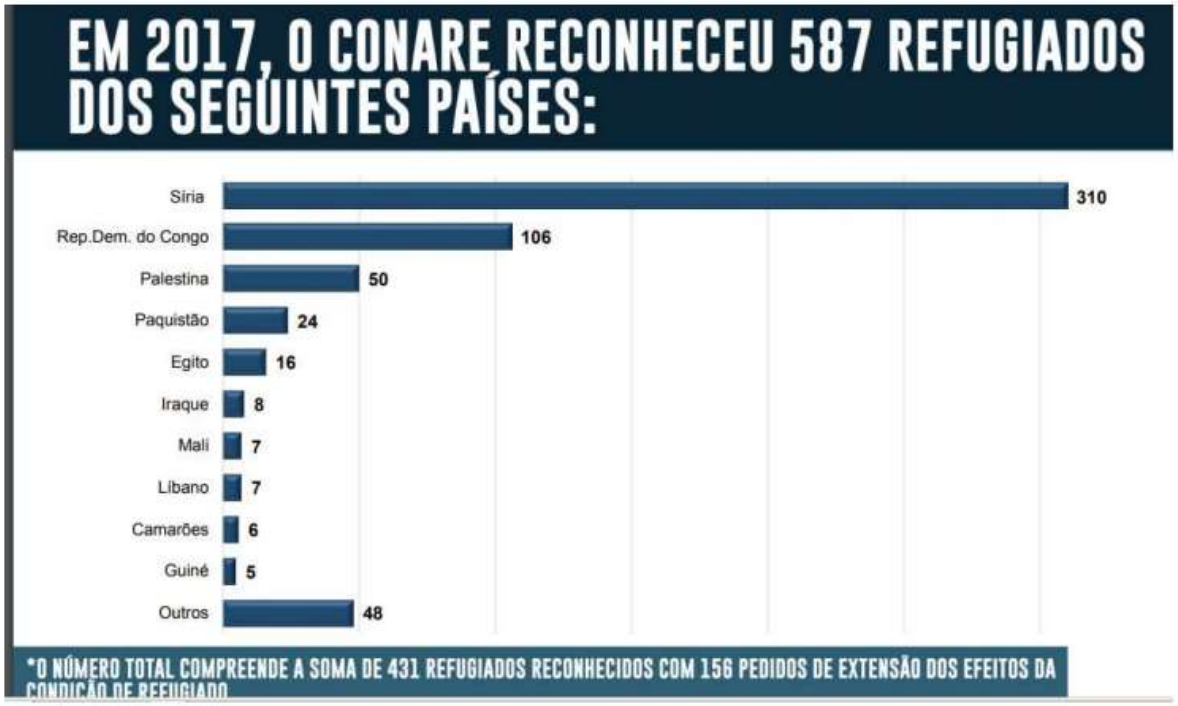
Nowadays, in order to obtain refugee status, it is necessary for the refugee to be framed in global guidelines defined by UNHCR. However, in Brazil, with Law

[31]Bobbio (2004).
[32]Pereira (2005).

9,474 of July 22, 1997, CONARE and the Refugee Statute, the issue of recognition of refugees accelerated, given their urgency in reception, immediately recognizing Syrian immigrants, mainly because of account of the condition in which Syria finds itself. This made Brazil recognised as an example of empathy with Syrian refugees, as it verified the speed in recognizing their condition, making the borders open.

It is in this sense of integrating and welcoming that public policies are necessary and, in the case of Brazil, they occur in an easier way due to the urgency of helping individuals' needs. The data below show that in 2017, Brazil recognised 310 Syrians, this being the largest participation.

Figure 1. *Recognition of refugees*



Source: CONARE (2017)

However, it is observed that from now on, the migration of Syrians decreases, giving way to that from Venezuela, which is going through a serious problem in relation to the government, causing it to obtain from now on more requests for asylum/asylum only than Syria.

However, despite the various insertion policies, the country is suffering a major economic crisis, which makes the issue of social development less, directly affecting this refugee population that depends on these public policies, mainly on incentives, work and education to stay in the country. . In a general context, in addition to the native population that goes through structural problems in Brazil, there are refugees, who, in addition to the fact that they are not in their country and need help, deal with financial and economic instability, which in a way afflicts that portion of the population.

In this way, it can be seen that Brazilian legislation assures the migrant individual legal security for his permanence in the national territory, that is, the effective legal status of an international citizen, upon recognition of the refugee status. There is a concern with the parity between the national and the migrant, aiming at an equal treatment in the search for their insertion in the community.

Conclusions

In view of what has been exposed throughout this work, as well as the presentation of the Refugee Statute and the rights as dignity of the human person, freedom of expression and religious freedom, it is clear that from the reception the refugee starts to enjoy rights as native citizens. However, despite the assertion of rights in the legal system and support, this population is still very unprotected, as policies are not effective.

However, this is a structural problem in the country, as the population itself suffers from the absence of these policies that directly affect the country's development, which, thinking about territory, wealth and population, would have great potential to emerge and become a reference in welcoming these and others, guaranteeing the country's development.

It is noteworthy that from the necessary procedures for receiving refugees, being that this concept has changed - as a refugee is anyone who suffers some type of persecution, religious, ethnic and others, and who needs to leave their country, as their life is at risk - now enjoys the same rights as those seen in the Constitution of our country, as well as human dignity, freedom of expression and religious freedom. The last is the most debated, given the persecution in countries due to the imposition of religions.

In this way, it is observed that the general concept in relation to the reception of the Syrian refugees, it advocates the good faith of Brazil in receiving these people and welcoming them, given all the suffering they have experienced previously, a fact that Brazil is leading the ranking in terms of refugees. However, there is a need for public policies that guarantee the protection of these rights, not only for them, but for the population in general.

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Law No. 13445, May 24, 2017. Refugee Statute

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The Concept of the Patient's Autonomy: From the Vaults of Civil Law

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The concept of patient's rights itself was fairly known before the last four or five decades, and medical malpractice of all kinds made the aggrieved party to seek redress at a court; but no special legislation, apart from rare exceptions, has ever existed to anchor the patient's rights before the late 20th century. In the civil law tradition of the 20th century, especially its earlier decades, doctors could be held criminally or civilly liable for a wide variety of malpractice, including unauthorised medical intervention or divulgation of patient's information, though such provisions did not develop actual rights, were quite general in their nature, and were individually assessed by the courts in each case. Within in the gradual change in the doctrines of medical law, the term "autonomy", shaping the patient's right to decide what medical interventions could or could not be performed upon his body, intervened into the existing legal scholarship, which was later augmented with various issues, such as access to medical records of the patient, refusal of blood transfusion, participation in medical experiments, deciding upon end-of-life situations or relating to various reproductive law considerations, not always permitted by national law. Many of these rights are much older than the concept of patient's autonomy themselves, and have developed in the case law which itself has originated from lawsuits against doctors and hospitals for acts, being nearly obscure in the existing legal doctrine, such as unauthorised medical experiments. The given paper is aimed to discuss the academic development and overall gist of the patient's right to autonomy, as well as some of its early interpretations in civil law doctrine.

Keywords: *patient's rights, medical malpractice, theory of law, medical law, patient autonomy, civil law.*

Introduction

In the civil law doctrine, which is the engine of legal scholarship in Eastern and Central Europe, the concept of patient's autonomy is primordially built upon the relatively recent concept of patient's rights, which are generally represented as a source of positive law[1], which is technically developed upon a Roman law-based concept of the *will of the patient*, presupposing his power and authority to control the process of treatment and the amount of treatment which is administered to the

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[1]Mainly a patient's rights law, i.e. the Latvian Patient's Rights Law of 2009: *Pacientu tiesību likums*, Latvijas Vēstnesis, 205, 30.12.2009

patient, usually including the right to refuse it[2]. The Czech approach to the modern right to autonomy mainly lies in the enlargement of the doctrine of informed consent, which is far not technical, but in the amplification of the patient's role in his treatment. As we may notice, the European legal scholarship is far not uniform in the views of the legal and historical-legal foundation of the right to autonomy – some works directly address this concept to American legal cases or scholarship[3]. However, the bioethical principles are not always compatible with the principles of civil law, as civil law frequently leaves little space for a broad interpretation of legal norms, and the courts hardly ever account bioethical principles to be worthy of consideration while forming the legal position in certain legal proceedings. Moreover, patient's right to autonomy, as a legal category is much older than the actual terms were coined. In civil law, the patient's rights are based upon aged jurisprudence and legal doctrine, which declared that the body integrity of the patient is his inborn, and inalienable right, as the right to life (thus equating them)[4], and the will of the patient is the key element for legitimate doctoral activity, which is illegitimate against, or without the will of the sick, which derives from various old time legal sources from customary law to criminal law[5]. The concept of body integrity in civil law jurisdictions is a transformation of criminal law notions on the *consent of the victim*, which is inapplicable in the course of legitimate treatment activity of the physicians and hospitals, which are, by custom, statute or a legal precedent, entitled to "breach" the body integrity of the patients for the needs of medical (frequently surgical) treatment; however, such are banned against the will of the sick person, but the assessment of the age of consent, the actual situation when the medical intervention took place is up to the court[6]. However, the autonomy of the patient was usually restricted by urgent cases and imperative necessity. For instance, French courts have established that the will of the patient would not matter in case of emergent treatment[7], which was further upheld by Canadian courts in a similar shape, e.g. in the case of *Marshall v. Curry*[8]. In Continental Europe, the courts were quick to recognise the restrictions of the patient's right to autonomy by statutory obligations of the doctors to report the state (i.e. the police or healthcare authorities) concerning the people suffering from dangerous contagious diseases (such as smallpox, syphilis, cholera etc.)[9], or implementing medical treatment against the patient's will or the will of his legal representatives[10].

I suppose that there is no uniform position in legal scholarship concerning the timeline of the patient's autonomy. For instance, in Germany, the terms related to

[2]Mazure (2011) at 28-41

[3]Doležal (2019).

[4]1902 g. 19 novembra, *Po delu doktora meditsyny Petra Modlinskago*, 1902 Senata Kriminālā Kasācijas Departamenta Spr. N. 33, 1902 KKD p. 84, 87-88

[5]Oppenheim (1892).at 20-22

[6]*In Sache des Karl Schulze*, Strafgericht Kanton Basel-Stadt, Urt. v. 14.06.1882,

[7]See. the note in *Dechamps c. Demarche*, Cour d'Appel Liege.

[8]*Marshall v. Curry*, at 271-274

[9]*Preußische Obertribunal*, at 307-308

[10]See, for instance, the 1927 judgment of the Supreme Court of Czechoslovakian Republic: Nejvyšší soud Československé republiky, Rozh. ze dne 18. ledna 1927.

it were coined by courts in the late 1970s and early 1980s, where the courts adjudicated case in respect with a patient's right to insight into his medical records[11]. Later on, the German and German-speaking scholars referred to this concept as a "personality right of the patient" (as an extension of right to privacy – originally it was called "*Persönlichkeitsrecht des Patienten*")[12]. However, the prototype concepts, featuring the patient's right to body integrity could be spotted in German-language legal and forensic literature from the period of 1850-1900, using the same description of the late-20th century concept, though with much older terminology[13]. However, the medical and ethical literature of Germany operated with similar terms (to which I will turn below) back in the mid-19th century[14]. The American and Canadian literature frequently correlates the given concept with medical malpractice litigation featuring "*informed consent*" and the case of Salgo in 1957[15], in spite of the fact that the term "*informed consent*" in the sense of medical law was initially used in 1935 by a French court in relation to an unauthorised medical experiment using a then-novel method of aortography, causing the patient's death[16]. The legal texts by US and Canadian scholars started featuring the word "autonomy" in medical law in the 1970s in a wide variety of patient's rights. One of such early examples featured a discussion on a newly established Natural Death Act in 1977[17]. Through the years, it was related to the right to refuse medical treatment[18], confidentiality of medical records[19], end-of-life decisions for legally incompetent patients, patient's informed consent and the patient's participation in biomedical research[20]. It is quite complicated to determine where patient's autonomy ends, especially upon the consideration of impossibility of, for instance, passive euthanasia (or even right to a dignified death – not involving a lethal drug or a judicially sanctioned life-support turndown), lacking a firm legal basis – otherwise, a similar decision would have to be implemented by the court upon substantial evidence affirming the patient's hopeless state, despite the fact his real will was not precisely known[21]. If we sum

[11]*OLG Bremen*, 31.07.1979 ; *BGH*, 23.11.1982.
[12]Deutsch (1992).
[13]Oppenheim (1892) at 33-38; Grassl (1894) at 443-450.
[14]Braun (1853) at 419-422.
[15]*Salgo v. Leland Board etc. Trustees.*
[16]*Cons. Chavonin c. Dr. L…, Admin. de l'Assistance Publique et Soc. de laboratoires Thorande*; appeal: *L. c. Consorts Chavonin et Cie des produits chimiques de la Sorbonne.*
[17]Steinberg (1977). The term "patient autonomy" in the earlier years was also referred to in the sense of his right to refuse treatment, especially in connection with end-of-life issues, see. Jackson & Younger (1980). Seemingly, the concept (at least its American or Canadian version) was initially strongly tied with issues of passive euthanasia, which became a subject of litigation in the 1970s.
[18]Hasl (1989). Hasl held that the right to autonomy derives from the right to bodily integrity, but is subject to a number of limitations, which were borne in the jurisprudence of the courts, primarily within the balance of the State's interest to preserve life, the private interest, and protecting the interests of the third parties. *Satz v. Perlmutter* (1980).
[19]Loughrey (2005).
[20]See., for instance, Brazier (1987); LoBiondo (1991).
[21]Accord the judgment of the Supreme Court of Justice of the Nation of Argentine in the case of Marcelo Diaz (2015): *D., M.A. s/ Declaración de Incapacidad.* (see the court's justification of approving the decision to terminate life-support).

up all the fragmentons in a monolith, the right to autonomy usually means the patient's right to decide concerning medical treatment, and protest against medical interventions that are undesired. As of the outstanding US legal scholarship, the patient autonomy is be understood as a legal principle of the patient's protection against the encroachment of his legal right to participate in [medical] decisions, which somehow affect his life, and obviously, his health. The principle of autonomy is a weighty counterpart to a paternalistic model of legal-ethical relationships between patients and physicians[22]. The boundaries of this legal interpretation heavily rely upon legislation and jurisprudence of the country, and these may be incompatible with one another depending on the jurisdiction[23].

The Main Body

Each of the rights embracing the right to autonomy is substantially older than the day it was tied to the overarching concept of "right to autonomy". However, did the right to autonomy have any progenitors bearing the same legal context, but probably a different name? Yes, it apparently did. Mostly the right to autonomy is associated with informed consent to treatment, or occasionally medical experiments[24] – and it was historically the first interpretation of it. The issue of consent to medical treatment could occasionally be spotted in the old-time medical books as well:

> "A three-year-old son of a train machinist had a tonsil abscess. I told the [boy's] parents what was the matter, and proposed to cut through the abscess.
> - So, what [do you mean], to cut through [the abscess], right in the [child's] mouth? – asked the mother, widely raising the eyebrows.
> I explained, that the operation was completely harmless.
> - Well, no! I do not have consent for this! – swiftly and decisively told the mother.
> All my persuasions and explanations were in vain. […]
> - I think, it's the God's will for this [for the probable death of the child]. Wouldn't the God desire – it would be useless to cut through [the abscess] – [he] would die anyway. How would he, [being] so weak, survive the operation?" (the boy actually survived the operation and his condition of health gradually improved)."[25]

[22]Pellegrino (1994).

[23]For instance, see an American judgment from the state of Colorado, where an incapacitated person impugned a court order authorizing his guardian, the Morgan County Department of Human Services to execute a "do-not-resuscitate order" on his behalf (judgment of the lower court authorizing the "do-not-resuscitate-order" affirmed, *People ex rel. Yeager*. Such judgments show how much may the "autonomy" bend in different ways, including surrogate decisions on end-of-life issues. Besides, similar procedures do not exist in most of the civil law states and cannot be recognised by the courts on basis of acting civil law, family law or guardianship law. For instance, check my comment upon the characteristics of the patient's "living will" and its possible application in the civil law system: A. A. Lytvynenko (2021b).

[24] Oppenheim (1892) at 33-38.

[25]Veresaiev (1901)

In the 1930s, one Canadian author, MacDonald, speaking on *Marshall v. Curry*, one of the leading Canadian cases on informed consent, claimed that the issue of patient's autonomy (in the shape of consent to medical treatment) was nearly undiscovered in both medical and legal literature, and the authorities (seemingly speaking about the English law) were nearly silent towards this question[26]. It reminds Otto von Gierke's statement on the right to privacy in Roman law, which was either unrecognised, or undesired by the citizens[27]. As he spoke about the particular issue in German law, I conducted an archival search of authorities, contemporary to Gierke, or older than his works, and the result showed that they definitely existed[28]. The same could be claimed about case authorities, which could serve as a precedent to Canadian law in this respect, coming out from France[29], owing to the nature of Canadian legal system combining English common law and French civil law routes. However, materials on the patient's consent could be found in diverse medical and legal literature far before the authorities, cited by *MacDonald* (1933) occurred. Let us review and comment upon some of them.

E. Bouisson discussed the issue of patient's consent in respect with the administration of anaesthetics, such as chloroform, which came into a widespread use among surgeons in the 1840s: "The consent of the patient is necessary; if he refuses, the surgeon should attempt to persuade him, that he [the patient] deprives himself of a considerable advantage [of being etherised]; and if he [the patient] insists on refusal, he [the patient] should never be subjected to etherisation against his [will], unless it is a child"[30]. Administering anaesthetics was novel those days and was experimental to a certain extent, and thus, Bouisson found that it would ethically (and probably, legally as well) correct to ask the patient's consent before using it. The Antiquaille Hospital Case (trial of Guyenot and Gailleton)[31] was one of the early informed consent cases in which the necessity of patient's consent was not only discussed by a court, but also in academic literature[32]. A boy, suffering from ringworm, was experimentally treated by an inoculation of a mucoid plaque, and the method was later described in a scientific journal; the doctors in charge were prosecuted and fined for an unconsented operation, which was apparently dangerous for the patient, made without consent, and entirely in the name of science[33]. One of the defendants, when questioned, spoke about the issue of

[26]As for the case, see *Marshall v. Curry* at 271-274. As for the MacDonald's comment, see Macdonald (1933).
[27]von Gierke,(1895).
[28]Lytvynenko (2021a).
[29]See, for instance, *Demarche c. Dechamps*. Next, a few other judgments could be named: *Chini c. Coconni, Trib. de. Aix*, 22 October 1906, Dall. Per. 1907 II 41, 43; *Bours c. Consorc Prevost*, Trib. de Amiens, 14 Fevr. 1906, Dall. Per. 1907 II 44, 45; *Epoux N c. Docteur Lenormant*, Cour d'Appel de. Paris, 28 Juin 1923, Dall. Per. 1924 II 116, p.p. 116-117; *Vve Seignobos c. Docteur H.*, 31 octobre 1933, Cour de Cass., 1934 Sirey I 11, 11-12.; *Dr X c. Teyssier*, 28 janvier 1942, Cour. de Cass, Cham. civ., Dall. Per. 1942 I 63
[30]Bouisson (1850).
[31]*Min. Publ. c. Guyenot et Gailleton*, Trib. corr. de Lyon.
[32]Martin-Lauzer (1860*);* Boucard (1860).
[33]Trib. corr. de Lyon, 15 dec. 1859, Dall. Per. 1859 II 87, 87-88

patient's consent, finding it illusory: "This [patient's] consent is in reality illusory; the patient of a hospital will always consent to what will be proposed to him, without being able to calculate the consequences; let him confide in the science of the doctor". Mr. Royer, the Imperial Advocate, did not agree with this point of view[34]. Deliberations of the case could be found in Boucard's brochure on the trial, making it practically the first medical-legal source to discuss the patient's autonomy in relation with medical experiments[35]. Many decades after, various French authors paid attention on the judgment itself, as well as on the principle of patient's autonomy, though not calling it directly by the name. For instance, *Rene Demogue* (1932) spoke concerning the liability of physicians, whose acts involving a dangerous medical intervention, were not aimed at curing the patient, but rather "removing a physical imperfection". He said: "*It is still the same if the physician indulges in hazardous* [clinical] *trials, not to cure, but for the purposes of study* [i.e. research]"[36]. This position was already adopted by the courts in cases, where plastic surgeons did unauthorised manipulations on people explicitly for the needs of scientific research, the results of which were published in scientific editions, or photographic exhibitions, and the medical intervention was barely, or completely unjustified from the view of curative goals[37].

The necessity of obtaining the patient's free consent, including the explanation of the gist of the procedures to him also found its place in old time French literature on surgery. One of such earlier monuments could be found in Velpeau's book on clinical surgery, published in 1840. He claimed: "Our duty is to show men [patient] what best [treatment] suits [curing] their ailments, to enlighten them on the dangers to which they expose themselves by not submitting [to treatment] […] They still have the right to do, or not to do, what we advise [them]. It is otherwise with children and madmen, because not having their free will, fearing only [physical] pain, they do not know how to escape the dangers of the future […]"[38]. Guyon upheld this approach in his treatise on clinical surgery, where he discussed the patient's consent and will in respect to surgery as a preparatory stage of the operation, outlining the patient's will and consciousness in the necessity of the operation as an essential element for performing interventions into the patient's body, claiming that it is the doctor's duty to inspire the patient for undergoing the operation, giving him necessary confidence:

> "*When the patient is aware that everything [concerning the future surgery] has been discussed and weighed, that nothing that concerns his interests has been neglected, it is most often not difficult to make him understand the need for the operation…*"[39].

Later on, Guyon proceeds as to the strict obligation of obtaining the patient's consent before performing a surgery:

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[34]Editorial (1859).
[35]Boucard (1860).
[36]Demogue (1932).
[37]*R.... c. P....*, Cour d'appel de Lyon.
[38]Velpeau (1840).
[39]Guyon (1873).

> "*It is indeed essential to obtain the patient's free consent before performing an operation. There can be no exception in this regard except for children whose will must be substituted by the will of the parents, and for the insane whose interests are represented by their families*"[40].

Upon these texts, it seems that French medical science has well recognised the principle of respecting the patient's will and autonomy, not mentioning these terms as such. So, the medical texts, as referred by MacDonald (1933), in fact, definitely had something to say concerning the will of the patient. In German medical literature and books on medical ethics, the term "Wünsch des Kranken" (i.e. "will of the patient") was occasionally spotted in the works of the XIX century, i.e. in Dr. Braun's treatise regarding the liability of physicians in 1853. He discussed the question of conducting surgical operations with a certain degree of lethality, denoting that the mere will of the patient to undergo it should not serve as a mere indication for it. However, in these terms, the will of the patient was discussed in the view of his wish to undergo a certain substantial surgical operation, but not really speaking about his consent to it, as it was already presumed[41]. In the early to mid-XIX century, the legislation of the Prussian states regarding the treatment of the poor citizens on move (as well as the journeymen, craftsmen on the way to their point of destination etc., the following passage as to whether the sick would be able to proceed with his journey: "*In all such cases the patient's own wish is only to be taken into account insofar as the doctor finds it useful*"[42]. This provision was apparently narrow and was not intended to cover the issue of patient's autonomy in a general sense to consent to operations, or to request his medical records, or any similar thing, which is common nowadays.

Another branch of early interpretations of the patient's right to autonomy comes from Eastern and Central Europe. Quite a lot was said about the case of Dr. Modlinskiy (1902), who decided to cut out a tumour on an 18-year-old girl's abdomen without her consent, despite she and her family entered his clinics in order to remove a neck tumour, and the patient died after the laparotomy, which was a very dangerous operation with a high mortality risk at the dawn of the 20th century. Dr. Modlinskiy was prosecuted and was convicted, his final appeal was dismissed by the Criminal Cassational Department of the Russian Governing Senate in November 1902: he was convicted of causing death by negligence while performing legal activity – i.e. conducting his work as a surgeon (Art. 1468 of the

[40] *Ibid*.

[41] Braun (1853).

[42] In original (German): "Der eigne Wunsch des Kranken ist in allen solchen Fällen nur insoweit zu berücksichtigen, als der Urzt dieß thunlich findet". See, for instance,

1) *Verordnung vom 16. Mai 1832, die Behandlung armer, auf der Reise begriffener Kranken betreffend*, Art. 4, Codex Saronicus. Chronologische Sammlung der gesammten praktisch gültigen Königlich Sächfischen Gesetze von den älteften Seiten, vom Jahre 1255 an bis zum Schlusie des Jahres 1840; mit einem alphabetisch syftematischen Repertorium von Dr. jur. Wilhelm Michael Schaffrath. 3 weiter Band enthaltend: die gesammten Gefeße vom 9. März 1818 an bis zum Schlufie des Jahres 1840 / Leipzig, 1842, Bd. 2, S. 466-467
2) *Geseß über das Heimathsrecht und das Armenwesen vom 9ten August 1833*, Repertorium der Gesetz-Sammlung für das Herzogthum Altenburg: auf das Jahr 1833 (Nr.34), Nummer 1 bis Nummer 56 Art. 132 (2) / Alternburg, 1833., S. 161

Criminal Code of 1885)[43]. The surgeon was not claimed to have done the operation recklessly – negligence was affirmed in respect of defendant's failure to obtain the patient's consent. A number of medical and legal books featured discussion on the patient's will and its actual scope. For instance, *Shyriaiev* (1903) discusses the patient's autonomy in the light of the doctor's legal right to exercise his profession, and the patient's consent, upon him, is the pre-requisite to conduct it; at the same time, he addresses much attention on real-life situations, upon which it is either impractical to ask the patient's consent owing to various circumstances, or there may be emergent conditions, under which the doctor acts upon the presumed consent of the patient[44]. The court, in fact, took it into consideration, and Shyriaiev claimed that the case of Dr. Modlinskiy provided a general principle on the will of the patient, and it could be questionable, how could that be applicable under more specific circumstances, and the assessment of the doctor's judgment to act requires a thorough examination of the facts by courts[45]. He also acknowledged, that the doctors could be held liable of battery, acting without authorisation, even if the operation was necessary, though not strictly urgent[46]. He also emphasised that the judgment made a number of physicians to abstain from conducting operations without the patient's consent (real-life situations described by him frequently involved minors), which caused a multitude of deaths (but in fact, all situations described by him were urgent in general)[47]. He concludes: "All of the [aforementioned] indicates, that it is impossible to set up the patient's consent as a circumstance that has got a decisive significance for justifying the doctor's legitimate activity, not speaking of the [allegation], that the physician, if we set the question forth in such a mode, could be compared with an offender, making injuries under some dark motives, and justifying his acts under the request of the victim"[48].

S. Tregubov (1904), one of the doctrinal commentators discussing the issue of patient's consent to medical treatment, observed different approaches to the legality of the doctor's activity, including conducting unconsented operations. As Shyriaiev (1903), he also starts his theory upon the legitimacy of the doctor's acts, as such, coming up with a conclusion that the prerequisites of consent in criminal law are not always technically applicable to the sense of legitimate activity of the physician, and if applied in whole, the doctors would frequently break the law on such occasion. So, his views were the following:

1) Consent should be a result of cognitive decisiveness, and thus, the consented party must be legally competent. Therefore, consent made by a legally incompetent person, or a minor, is void.
2) The legal competence should exist objectively, a mere allegation that the party (i.e. the patient) is competent is not enough.

[43] 1902 g. 19 novembra, *Po dielu doktora meditsyny Pietra Modlinskago*.
[44] Shyriaiev (1903).
[45] *Ibid*, at 18-23
[46] *Ibid*, at 13-14, referring to: *Reichsgericht*, III Strafsenat, Urt. v. 31.05.1894.
[47] *Ibid*, at 23-24
[48] *Ibid*, at 24

3) The consent should be given freely, and a coerced or fraudulently obtained consent is void.
4) The consented party should have some rights upon the thing he refuses;
5) The consent should be given before, or within committing an act, which makes it distinct from forgiveness;
6) The consent should have a definite character – that is, to be applied to certain time and acts, and is void being revoked.

Tregubov argued that the rule of the patient's will seemingly does not end with the operations, which are potentially dangerous to his health, but to merely any medical interventions. He also recalled a case, where a worker opposed to a hand amputation (as a result of a working accident), and the medical society found it would be incorrect to do anything against the patient's will (the event happened in 1885), he comes to the following conclusion:

1) As it follows, the doctor's activity, the lege artis, being itself not an illegal activity – is illegal, in case it violates the interests safeguarded by the legal norm, one of which is closely connected to the doctor's activity, is the everyone's right to freely use one's own personality"
2) So, as it follows [from the aforesaid], the doctor's activity, the lege arties, in case it is conducted upon the will of the patient, is not criminally punished regardless of the results, and reverse, the doctor's activity [conducted] against a clearly expressed will of the patient bears the elements of a criminally-punished offence against freedom of personality"[49].

An anonymous Latvian lawyer named K.V. (1932) discussed the issue of the patient's autonomy, a yet unresolved issue in Latvian criminal law in the First Period of Independence[50], making his conclusions mainly on basis of the 1902 case of Dr. Modlinskiy, which was generally known among early medical law scholarship of Eastern Europe in the first decades of the 20th century. Like *Shyriaiev* (1903), he also attributed his basis of analysis on the bounds of the doctor's right to exercise his profession, whereas the patient's will be the foremost predisposition to conduct it. Here are his conclusions in a concise form:

1) "If there is no obligation to submit to a doctor' prescription, then the doctor's right to perform the operation cannot be recognised without the

[49]Tregubov (1904).

[50]The books reporting the Latvian Senate's judgments on medical malpractice or crimes committed by doctors (i.e. abortions done illegally) do not contain cases in respect with unconsented operations. However, the case report of the trial of Dr. Londenberg (1926) mentions that an allegedly illegal abortion was made upon the pregnant woman's firm consent. However, the case fell apart owing to insufficient evidence, as it was clearly established neither when the abortion took place, nor what was the actual state of health of the mother and the health/life of the fetus. See: 1926 g. 28 sept. spr. *Londenberga* l. Nr. 537, Latvijas Senata Kriminālā Kasācijas Departamenta spriedumu tezu pilnigs kopojums, no. 1919 g. lidz. 1928 g. 31 decembrim (1928) // F. Kamradziuss, p. 306-309; see additionally: 1928 g. 30 marta spr. *Sternbergs* l. Nr. 124, 1919-1928 Kopojums, Lieta No. 592, p. 311.

patient's consent or permission expressed in this way or presumed on sufficient grounds";

2) "By turning to a doctor for help, the patient does not lose the right to get use of his or her personal, natural rights and does not become available to the doctor in full, even though the doctor has acquired the privilege of treatment on the basis of his or her knowledge"[51].
3) Now, concerning the cases of an emergency: "There is no doubt that in such cases, when a patient is in a very difficult condition and unconscious, in the absence of relatives, there will be obstacles to obtaining permission for the operation, which, according to the doctor, is necessary to save his life. In such cases, of course, the doctor may presume the existence of a permit."
4) Concerning the extension of the surgical operation: "…at the time of removal of an operation for which the consent of the patient or his/her relatives was obtained, it turns out that additional surgery is required in another organ or in other amounts, the authorisation shall be presumed"[52].

Concerning Latvian law in this respect, I should denote that K.V. was likely to be right in respect with the fact that unconsented medical interventions were barely, or completely unknown and thus unresolved in Latvian criminal law. What is more, in 1933, the Criminal Code was augmented with Art. 218, punishing an unconsented medical intervention from the side of the doctor[53], but no liability for an unauthorised medical intervention existed priorly to the enactment of the said provisions. A custom search in the funds of Latvian State Historical Archive (mainly upon the funds of the Riga regional court, Riga Chamber of Justice[54] and the Senate of Latvia) revealed that the criminal investigations, lodged mainly upon a complaint the aggrieved party (and frequently, the person joined the proceedings as a civil plaintiff) considered medical negligence (i.e. Art. 219 of the Criminal Code), but the content of the cases revealed that it hardly ever dealt with the question of the patient's will[55], apart from the fact of the necessity to undergo treatment. For instance, a factory worker from Sloka[56], who was suffering from a toothache, decided to undergo dental treatment in the clinics of a stomatologist, who was known not only for cheap services, but for horrible attitude to dental caution, unwilling to sterilise surgical equipment, and was considered to be negligent and careless by his patients. The patient's will to receive the services of the said doctor only brought to the deterioration of his dental health, resulting in an in-patient treatment at a hospital; during the proceedings, brought by the factory

[51]K.V. (1932).
[52]*Ibid.*
[53]Ārsta atbildība pēc 1933.
[54]A "Chamber of justice" (Latvian "Tiesu palata") is a term for an appellate court in the period of First Independence of Latvia (1918-1940). At present time, they are renamed as "Apgabaltiesa", or a "Regional court" in English.
[55]See, for instance, *Kovalenko pret. Dr. Akerman*, (case relating to a complaint of a prisoner, who was suffering from sciatica, against a doctor, who, upon his view, was negligent towards his health condition).
[56]Currently a part of Jurmala.

worker, the doctor died[57]. Another example is the case of Gržibovsky, who was unfortunate for his leg to be overrun by a bus, and the doctors of the hospital twice declined to accept him. When he arrived to another hospital, the doctors suggested that the leg requires amputation, though the patient refused, but was later hospitalised and lost his leg owing to a developing gangrene. The fact of the patient's refusal was mentioned by the defendant's counsel, however the courts found that the development of the gangrene was not a consequence of his refusal, but a consequence in a delay in his medical treatment, which began since plaintiff was refused to admitted to the hospital and thus he prevailed in action against the city[58]. These two cases, as well as similar ones (the funds contained around 20 cases on medical malpractice, including criminal cases on rude hospital negligence and omission to provide medical assistance) tended to demonstrate, that the question of the patient's will was seemingly observed only in the shape his will to obtain treatment, but not his choice of the doctor, or treatment methods, or anything that could shape the patient's autonomy.

Another segment of early interpretations of the right to autonomy goes to the German-speaking literature. The two scholarships I would like to point out are a legal scholar from Basel, *Oppenheim* (1892), probably one of the first ones to deal with the issue of the patient's autonomy, and J. *Grassl*, MD (1894), who had dealt with the problem of defining the responsibility of physicians as such, overviewing the existing case and the outstanding medical practice. Grassl has discussed the responsibility of physicians in general sense, including liability for unconsented medical interventions and medical experiments, underlining the necessity of the patient's consent, citing the case resolved by the German Supreme Court in 1894, as well as a case concerning a man's confinement to a psychiatric asylum on basis of his family's hatred and a superficial medical report. As Oppenheim held earlier, he affirmed that unconsented experiments on patients are impermissible[59]; what is more, both Grassl (1894) and Oppenheim (1892) speak about the legitimacy of such acts upon "common law", though through the years, it is not clear whether they mean it was established by judicial precedent (in fact, Oppenheim reports such decision from the Basel criminal court adjudicated in 1882[60]), or it was really an "unwritten" norm, and only an ethical consideration (i.e. similar to the views of Velpeau (1840) and Guyon (1873) – the former wrote his treatise before the Antiquaille Hospital Case, and nothing indicated that the latter founded his considerations upon the so-called "Antiquaille Hospital case"). L. Oppenheim (1892) connected the patient's will to the issue of consent to medical experiments. Upon his considerations and real-life situations, he observed, he came to the following conclusions:

[57]*Ziberg pret Dr. Adamson*.

[58]1937 g. 25 nov. / 16 dec., Vacslava Gržibovska prasībā pret Rīgas pilsētu v. c. summā Ls 14.097, Senāta Civilā kasācijas departamenta, Pašvaldības Balls, No. 7(01.07.1939); Pašvaldību Darbinieks, Nr. 4 (01.04.1939) (Case No. 10). No other marking or reporting of this case was found in the archives, except from the two given newspapers, which reported court judgments and other news relating to Riga municipality and issues relating to workers and worker rights.

[59]Grassl (1894).

[60]Oppenheim (1892) at 42-45.

1) Many medical experiments were conducted without patient's consent, though it is apparent, that progress in medicine is impossible without experimental ways of treatment.
2) No medical experiments are allowed without the will of the patient – both on people being healthy, ill, or even being sentenced to death. Oppenheim cited a number of real-life situations, where the experimental methods of treatment were both positive and deplorable.
3) Even if these dangerous medical experiments were conducted with the consent of the patient, the doctors were usually punished for bodily harm.

A Belgian advocate named *Tart* (1894) observed the issue of the patient's will to medical interventions, and was also critical in respect with experimental treatment, though did not deny it as completely illegal. "*A doctor never has the right to carry out experiments upon his patient. By* [claiming] *this, I mean that any experimental research for the purposes of curiosity or for scientific interest – is strictly prohibited. The interest in the patient's health is the measure of both is rights and his duties. The doctor's exclusive mission is to try to heal* [the patient]; *any act, which goes beyond this limit becomes immediately illegal, and must be repressed*". He upheld the view that experimental means of treatment could be justifiable, in case they are applied in order to save the patient's life, which is apparently a plausible goal[61]. The aforesaid principle was well applied by the civil court of Seine in the case of Chavonin, and reiterated by the Paris Court of Appeals (1935-1937).

Assessment by the Courts

Occasionally, the gist of the patient's right to body integrity (those days, it was referred to as such) was expounded by courts themselves on basis of general principles of civil and criminal law, as well as by the commenters of the court judgments in official court reports (for instance, in France), which have become "memorials" for further development of medical law. As I will show in the comments and the table of the most notable judgments below, the courts in the civil law systems have developed the maxims for establishing the patient's right to express his will concerning his medical treatment at least not later that the courts in common law systems.

[61]Tart (1894).

Table A. *Below Provides for the most Outstanding Jurisprudential Legacy in the Continental Legal System*

Year	Name of the case	Court	Summary of the case facts	Summary of the judgment
1856	Carl Joachim Christian Bracker, Klager, gegen Dr. Juris Albrecht, mand. nom	Oberappellationsgericht zu Lübeck	A doctor ordered a wet nurse to feed a baby with congenital syphilis, as a result of which the woman and her family contracted the disease. The doctor had not informed the woman that the baby was ill.	The highest court of Lubeck found the doctor liable for professional negligence.
1859	Min. Publ. c. Guyenot et Gailleton	Trib. corr. de Lyon Criminal Court of Lyon	Two doctors treated a minor at the Antiquaille Hospital of Lyon from ringworm. They used an inoculation of syphilis for treatment. However, they conducted the inoculation for the necessity of conducting an experiment, having published the outcome in a scientific article. The procedure was done without the authorisation of the boy's parents.	The doctors were found to be guilty of battery (Art. 319 and 320 of the French Criminal Code), and were fined for their misdemeanour. The court concluded, that even an inoculation without the patient's consent tolls to a battery.
1889-1890	Demarche c. Dechamps Dechamps c. Demarche	Trib. civ. de Liege Cour d'Appel Liege	An infant was brought for a leg curvature correction to the clinics of Dr. Dechamps in Liege. The doctor decided to perform an osteotomy, despite it was seemingly not approved by those-day medical science to be eligible to be conducted to	The trial court upheld the father's claim, but the appellate court has found that nevertheless, the consent from the side of the family was actually given, as the doctor managed to prove it by witness testimony, and in this part, the appeal would succeed. However, the

			minors of his age. The operation was very unsuccessful, which brought to the amputation of the child's foot. Plaintiff, the father, claimed that the operation was unconsented.	doctor was found to be negligent in the care for the child. Since both acts (i.e. negligence and an unconsented medical intervention) were treated by the court as professional negligence (Art. 1382 of the Civil Code), there seemed to be no real difference in the outcome[62].
	g. W. Rep. 1406/94	Reichsgericht	A 7-year-old girl was brought to a hospital, suffering from tubercular suppuration of her tarsal bones. The doctor attempted to stop the progression of the disease by bone resection, but the father opposed the operation, and said he would desire the girl to be released from the hospital. Nevertheless, the operation was performed, the doctor did not succeed in it, and the girl's foot was subsequently amputated.	The doctor was initially acquitted, but the prosecution and the father, as civil plaintiff, appealed. The Reichsgericht found the doctor should be liable under the charge of battery (Art. 223 of the Penal Code), remanding the case. The Court found that after the sane patient's (or his legal representative's) refusal, the doctor's authority to treat expires. The subsequent legal notes disclosed, that the doctor was acquitted when the case was heard before the lower court again[63].
1902	Po delu doctora meditsiny Petra Modlinskago	Criminal Cassational Department of the Russian Governing Senate	A young woman came to a private surgical clinics to get rid of a tumour	The doctor was found to be guilty under Art. 1468 of the Penal Code

[62]The Dechamps case reports may vary in their text. The outcome was extracted from Dall. Per. 1891 II 281.

[63]Extracted from Decisions of the Reichsgericht in Criminal Cases, Vol. 25, p.p. 375 – 384 (Case No. 127). Officially: ERG St. Bd. 25, S. 375, 376-377; 380-384 (Sache No. 127).

			on her neck. During the examination defendant found a bigger tumour in her abdomen, deciding to cut it out as soon as possible, without the girl's, or her parents' consent. The girl died owing to complexifications of the laparotomy.	(causing death within legitimate activity due to negligence). The court also held that the operation was not conducted negligently, as such. The negligence of the doctor lied in the fact of conducting a life-threatening operation without the patient's consent.
1915	Rv I 448/15	Oberster Gerichtshof (Austro-Hungaria)	Plaintiff suffered from knock knees, and applied to a Vienna hospital in order for a surgical correction. However, the operation was not very successful, as plaintiff had bow legs instead of knock knees, despite her general condition became much better, allowing her to work and conduct household duties. Plaintiff blamed the doctors in short, in negligent treatment, and inter alia, in not properly informing her on the consequences of the operation.	The courts of all three instances did not find any negligence from the side of the doctors owing to expert conclusions. Concerning the duty to inform, the Vienna Court of Appeals said, that the general duty of the doctor to inform the patient does exist, but does not include the necessity to warn about all the existing possibilities of negative consequences. The Supreme Court upheld the decisions of the lower courts.
1933-1935	Cons. Chavonin c. Dr. L…, Admin. de l'Assistance Publique et Soc. de laboratoires Thorande (I instance) L. c. Consorts Chavonin et Cie des produits	Trib. civ. de la Seine Cour d'appel de Paris	Two interns were conducting biomedical research in relation to an aortography, and sought for someone who could volunteer for an experiment. A doctor, who treated a patient from a vascular	The both trial and appellate court discovered that there is a direct causal link between the patient's death and the injection of the opaque. The court stressed that experimental treatment with a

	chimiques de la Sorbonne (II instance)		disease a year before, suggested he knows such patient. This patient was about 50 years of age and a factory worker. He was called by the doctor, but the actual aim of his presence was concealed. The interns injected the opaque to him, but the man shortly died thereafter. The consorts sued the doctor and the hospital.	curative goal should be distinguished from medical experiments, conducted for research purposes. The doctor was found to be liable, and he did not strictly deny the facts which brought to the patient's death. He filed an appeal, which was unsuccessful.
1936	3 Ob 984/36	Supreme Court of Austria	Plaintiff applied to the court to produce a copy of her medical record to sue the doctor, who prescribed her pills of which she was poisoned, or the pill manufacturer, as she was treated from poisoning in a sanatorium priorly to the lawsuit, and thought that the medical record would be sufficient evidence for a future action.	The Supreme Court did not grant an order for production of medical records. It held, that medical records are private documents, and cannot be produced for the needs of a private claim. Instead, the court held that plaintiff could ask the chief physician of the sanatorium to testify concerning the necessary details of her medical treatment.
1937	Parties: Bolesław M. przeciwko Uniwersytetu Jagiellońskiego w Krakowie i dr. Mieczysław O. Official name of the case: Sygn. C.II. 885/37	Sąd Najwyższy (Supreme Court of Poland)	A physician and the medical institution were sued by a patient who was treated from psoriasis by a sulphur mustard gas, which caused the treatment to be even longer and more painful.	The court found that the physician is subject for civil liability in such a case, if he does not inform the patient on the course of experimental treatment, and general consent to treatment is not sufficient, the physician is obliged to give

				details concerning such "special" treatment. The facts of the case were not properly established by the Poznan Court of Appeals, and the Sad Najwyższy remanded the case[64].
1969	Min. Publ. c. Fardeau, Slosse et Leclerc	Trib. corr. Bruxelles (Brussels Criminal Court)	In 1967, a man asked the doctors, defendants in the case, to perform a gender reassignment. After a substantial number of consultations, they decided to conduct the operation, changing his sex to a woman, and thus conducting a very unusual operation by the time of the 60s. The patient, however, died due to pulmonary embolism. The criminal case was opened owing to an anonymous report to the law enforcement agencies.	The court decided to acquit the doctors. It was not proven by the prosecution, that the doctors broke the rules of medical art while conducting the operation, or provoked the patient's death. The operation was fully consented, and the patient was well informed about it, and was happy to become a woman[65].
1979	Parties: Alicja M. przeciwko Skarbu Państwa (Zespół Opieki Zdrowotnej dla miasta Częstochowa) Official name of the case: Sygn. IV CR 389/79	Sąd Najwyższy (Supreme Court of Poland)	Plaintiff underwent treatment owing to a cancerous condition of the cervix. In 1975, she claimed to have undergone an operation, which was performed incorrectly. She claimed, that as a	The Supreme Court dismissed the complaint. It upheld the principle, that the doctors have an obligation to inform the patients concerning various complex treatment and disclose the main dangers

[64]Extracted from the Supreme Court of Poland Reports of 1938, copybook 6, Case No. 291, at p. 713 – 715. Officially: Zb. Orz. 1938, z. 6, poz. 291, s. 713

[65]Min. Publ. c. Fardeau, Slosse et Leclerc, Trib. corr. Bruxelles (22 ch.), 27 septembre 1969, Journal des Tribunaux Vol. 1969 (15.11.1969), No. 4676, p. 635, at p. 635-638; 639-641; also reported in Pasicrisie, Vol. 1969, p. III, p.p. 114–128.

			result of negligent operation, she underwent complex urological treatment, and one of her kidneys were removed. Plaintiff claimed that the treatment was incorrect and that the doctors failed to inform her about the foreseeable consequences of the medical treatment she was undergoing, requesting 80.000 PLN damages, resting her claim on Art. 419 of the Civil Code.	coming out of it, but this does not extend to unforeseen or rare consequences. The Court held, that plaintiff should have known what consequences may any anti-cancerous treatment have in its negative side, and plaintiff decided to consent to such surgery, knowing, that it was the only life-saving procedure (as of 1970s) which could save her life. The Court held, that it was unnecessary for the doctor to inform her regarding possibility of developing pyonethrosis, which could bring to the removal of a kidney, as it concluded, that the consequence, which plaintiff faced after the operation, was not usual and frequently known[66].

Conclusions

To sum up the material, provided in the paper upwards, the right to patient's autonomy could be synthesised as his right to be involved in the process of treatment by demonstrating his will, including the patient's right to abstain from subjectively undermanned medical interventions. The earliest concepts of patient's autonomy coming from Europe mainly were connected with legitimate boundaries of medical profession, the will of the patient and unauthorised medical experiments, and the treatises were often connected to resonant court judgments, not being

[66]Extracted from the Supreme Court of Poland Reports, Civil Cases, Year 1980, copybook 4, Case No. 81. Officially: OSNC 1980/4/81

written in abstract. At the same time, the principle of respecting the patient's autonomy and enlightening him in respect with future medical interventions, and proving benefits for the patient, was well established not only in case law, but in medical literature as well, thus being adopted as an ethical principle and a legal prerequisite for legitimate medical activity. The right to autonomy has transformed into a multitude of shapes, but the core principle of respect for the patient's will remains the same in modern medical law, spanning to other rights of the patients, which became more significant in the late 20th and early 21st century, such as access to the patient's medical records or a right refusal of treatment. The latter ones were completely unknown before (i.e. the first cases relating to access to medical documents could be found in 1930s[67], and have spread since the 1960s), and the concept of the patient's will be mainly related to his or her will to undergo treatment or his consent to medical (mainly surgical) interventions. Thus, having researched on the foundations of the right to autonomy in legal and medical literature of the past centuries, it should be concluded, that the will of the patient in its contemporary legal sense was formed in the mid-20th century, and its early prototypes did not really reflect his actual involvement into the process of treatment and decision-making, with an exception of consent to surgery, which was in most cases complex and usually with a certain degree of lethality. Unauthorised medical experiments were very fairly known in case law, but such were repeatedly condemned by both courts and legal scholars, with the *Antiquaille Hospital Case* and *Chavonin* to become the leading legacy on it. At the same time, it would be sound to emphasise, that all the contemporary theory of patients' rights could not exist without the old legacy, which is still under investigated, especially in Continental law.

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