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Front Pages

MIHAELA ELVIRA PĂTRĂUȘ & TUDOR DUMITRU VIDREAN-CĂPUȘAN

European Union Fundamental Rights Reflected in Tax Procedures. The Key for Tax Harmonisation inside The European Union?

ROBERT SMITH & MARK PERRY

Is an “Open Innovation” Policy Viable in Southeast Asia? - A Legal Perspective

ROBERTA CARAGNANO

Labour Law: New Workplaces in the Metaverse and Opportunities for Cultural and Heritage Professions

AGOSTINA LATINO

The Right to Dress in International Law as a Right in itself and as a Parameter on the Ridge between Freedom of Expression and Prohibition of Discrimination

EMMANUEL K NARTEY

Neurological Aspect of Ethics and Integrity: A Fundamental Compound Element of Law and Tax Compliance

SIMONE CAPONETTI

Jobs, Green Deal and Sustainability

PRADEEP KUMAR SINGH

Consumer Protection in India through Criminalisation of Consumer Grievances

Athens Journal of Law

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<u>Front Pages</u>	i-viii
<u>European Union Fundamental Rights Reflected in Tax Procedures. The Key for Tax Harmonisation inside The European Union?</u>	173
<i>Mihaela Elvira Pătrăuș & Tudor Dumitru Vidrean-Căpușan</i>	
<u>Is an “Open Innovation” Policy Viable in Southeast Asia? - A Legal Perspective</u>	187
<i>Robert Smith & Mark Perry</i>	
<u>Labour Law: New Workplaces in the Metaverse and Opportunities for Cultural and Heritage Professions</u>	211
<i>Roberta Caragnano</i>	
<u>The Right to Dress in International Law as a Right in itself and as a Parameter on the Ridge between Freedom of Expression and Prohibition of Discrimination</u>	229
<i>Agostina Latino</i>	
<u>Neurological Aspect of Ethics and Integrity: A Fundamental Compound Element of Law and Tax Compliance</u>	245
<i>Emmanuel K Nartey</i>	
<u>Jobs, Green Deal and Sustainability</u>	275
<i>Simone Caponetti</i>	
<u>Consumer Protection in India through Criminalisation of Consumer Grievances</u>	301
<i>Pradeep Kumar Singh</i>	

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The current issue is the second of the ninth volume of the *Athens Journal of Law (AJL)*, published by the [Business and Law Division](#) of ATINER.

Gregory T. Papanikos
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European Union Fundamental Rights Reflected in Tax Procedures. The Key for Tax Harmonisation inside The European Union?

*By Mihaela Elvira Pătrăuș[±] &
Tudor Dumitru Vidrean - Căpușan**

Although it has an internal market with the aim of obtaining full tax harmonisation, the European Union is still struggling to provide a common standard for 27 different tax systems. Because there are almost no European Union tax procedural regulations, after the entry into force of the Lisbon Treaty, the fundamental rights of the EU have begun to play an increasingly active role inside the European Union. Therefore, the European Union Court of Justice is ever more often required to deliver decisions related to the compatibility between national tax procedures and the rights guaranteed by the EU Charter of Fundamental Rights. The present article aims to make a presentation of the most important decision delivered by the Court of Luxembourg and to analyse the way in which these decisions can support the European project of tax harmonisation.

Keywords: Tax; Harmonisation; Procedures; Fundamental rights; EU Charter

Introduction

The European Union is a unique construction in the history of international relations. As is well known, the EU was created in the aftermath of the Second World War with the aim to reconstruct Europe¹. The idea was to develop an economic union between the countries of Europe that would be used as a tool for the social, military, and political union of the European continent².

Being an economic project, the EU was confronted with taxation problems from the beginning. The Treaty of Rome provided the legal framework for the first success of the taxation harmonisation in the history of the EU. The Treaty of Rome called for the Member States to eliminate all custom duties within 10 years³.

By 1968, this objective was already achieved and there were no more custom duties that affected the intracommunity trade between Member States. The custom union of the EU was completed by the end of the 1980`s when the first EU

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¹Dinan (2001) at 11-12.

²Gillingham (1995) at 21-22.

³Vanke (2007) at 456-460.

Custom Duties Code was adopted. Furthermore, following the adoption of the White Paper in 1985, the objective of the EU was extended to the completion of the internal market⁴. 31 December 1992 was the deadline set for a definitive regime for the VAT in the European Union. Unfortunately, this objective was only partially achieved due to lack of political support⁵.

At this point in time, the EU shares competences with the members in applying the most important indirect tax: VAT. In the area of direct taxes, the EU has limited competences and its actions are provided by the ECJ's decision (see for example: *Schumaker*⁶ case) which focusses on defending the fundamental freedoms of the EU Member States⁷.

From the procedural point of view, the competences of the EU are limited as well. For example, we can offer Directive 24/2010/EU which provides the legal framework for assistance between Member States to recover tax revenues. The lack of regulations in this field provides a free hand for the fundamental rights enshrined in the Charter for the Fundamental Rights inside the EU. This Charter was adopted as a political document during the Nice Council of 2001 and has become a legal document since the entry into force of the Lisbon Treaty (1 December 2009)⁸.

The Charter became an influential document in the life of the EU and a good indicator is the growing number of cases before the ECJ related to the Charter. Because of the lack of provision of tax procedure regulations, the Charter is a good instrument that can be used for providing a minimum standard of procedural rights for the taxpayers in the area of taxation. In the following, we are going to present some of the latest ECJ decisions connected to our topic and will try to understand if the reflection of EU fundamental rights in tax procedures can be used as a foundation for tax harmonisation.

Literature Review

The Role of EU Charter of Fundamental Rights and its connection to Taxation

At its roots, the EU was only a community based on a strong economic cooperation between its Member States to ensure the recovery of the European economies after the Second World War. At that time, there was no legal perspective for the European Community. Only after the White Paper of 1985, the need for a supranational legal tie appeared⁹. After the Nice Summit of 2001, a political document was adopted, which for the first time, proclaimed the

⁴Lodge (1986) at 209-210.

⁵De la Feria (2015).

⁶ECJ, decision C-279/93.

⁷Kaye (1996) at 110.

⁸Endt (2017) at 4-5.

⁹Glasner (1986) at 450-451

preoccupation of the European Union in relation to the fundamental rights of its citizens.

Until the entry into force of the Lisbon Treaty, the Charter was only a political document with no legal force. After the Lisbon Treaty, however, the Charter became an official treaty of the European Union with compulsory legal force. The main role of the Charter was to guarantee the application of fundamental rights relating to the European Union citizens.

As is known, the area of taxation is of key importance for the European Union. The European Union has an exclusive competence in custom duties and shared competence in VAT and excise duties¹⁰.

In the area of direct taxation, however, there is no EU competence because of Member States' reluctance to transfer their competences to a European level¹¹. Accordingly, there are no European Union tax code procedures, the procedure rules being the exclusive competence of the Member States. In this context, the EU Charter plays the decisive role in protecting European taxpayers' rights when they fall under tax procedures across the Member States¹².

Accordingly, the European Union Court of Justice case law becomes an important instrument for explaining the application and interpretation of fundamental rights and in developing the harmonisation process in taxation procedures. As a preliminary conclusion, it can be noticed that there is a strong link between the EU Charter and tax procedures within the European Union and special focus should be given to this relationship to determine the magnitude of the European harmonisation process.

According to art. 5 par. (1) of the Charter, the Charter applies only in the case when Member States are in a process of applying the EU law. We consider this an important point in the ECJ case law established in the cases of *Wachauf*¹³ and *ERT*¹⁴. Although both cases are non-tax cases, in both cases the Court underlined the fact that Member States have the obligation to abide by EU general law principles, while all national measures must be in accordance with EU law principles when the EU legal order is applicable.

Consequently, the case law related to art. 5 par. 1 of the Charter has broadened considerably. From the case law of the ECJ, it can be noticed that the fundamental rights will apply not only in the cases when directives, regulations and decisions are implemented, but also in the cases where national measures implement the EU law. In the following, we will present some of the most important ECJ cases in the relationship between fundamental rights and tax procedures.

¹⁰De la Feria (2009) at 1-5.

¹¹Van Thiel (2008) at 145.

¹²Weber (2006) at 586.

¹³ECJ decision C-5/88.

¹⁴ECJ decision C-260/89.

Fransson¹⁵ Case: The First Interaction between Fundamental Rights and Taxation

The case concerned a Swedish fisherman, Mr Åkerberg Fransson, who was accused of serious tax offences by providing false information in his tax returns for 2004 and 2005, underpaying income tax, value added tax (VAT) and employer contributions. Of the underpayment for 2004 of 319,143 Swedish kronor (SEK), an amount of SEK 60,000 (around €7,000) concerned VAT; of the underpayment for 2005 (SEK 307,633), an amount of SEK 87,550 (around €11,200) concerned VAT.

In 2007, Mr Åkerberg Fransson was ordered to pay additional assessments and to also pay punitive tax surcharges for 2004 and 2005: €1,250 for underpaying income tax, €1,800 for underpaying employer contributions and €1,025 for underpaying VAT. Mr Åkerberg Fransson did not challenge these surcharges, which thus became final. Meanwhile, criminal proceedings before the Haparanda District Court were brought against him, “based on the same acts of providing false information” as the tax surcharge.

That Court stayed the proceedings and referred several questions to the Court of Justice asking, inter alia, (1) whether the bringing of criminal proceedings after a decision imposing a tax surcharge in respect of “the same act of providing false information” would come under the *ne bis in idem* principle laid down in art. 4 of Protocol No.7 ECHR and art. 50 of the Charter of Fundamental Rights; and (2) whether the Swedish rule that “there must be clear support in the ECHR or the case law of the European Court of Human Rights” in order for a national court to be able to set aside national provisions that could infringe the rights set out in the ECHR, and therefore also the Charter, would run counter to the primacy and direct effect of EU law.

It is relevant to emphasise the fact that the only connections of the case with the EU was only the VAT debt, besides the fact that Mr. Fransson was asked to pay income tax and contribution taxes. It is important to mention the fact that the VAT Directive does not contain any provision related to the problems where there is accusation of tax fraud. Because of this the decision, that was about to be delivered by the Court, it would be a landmark decision related to harmonisation of tax procedures in the European Union by using fundamental rights.

Reiterating the existing body of case law on the scope of applying EU fundamental rights “as general principles of EU law”, it first observed that the “definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to art. 51 of the Charter which ... have to be taken into consideration for the purpose of interpreting it.” Where national legislation falls “within the scope” of Union law, this “entails applicability of the fundamental rights guaranteed by the Charter.” By contrast, the Court does not have the jurisdiction to rule on “a legal situation” or on any of the provisions of the Charter where that situation does not come within the scope of EU law, because the provisions of the Charter cannot themselves “form the basis for such jurisdiction.”

¹⁵ECJ decision C-617/10.

The Court considered the case of Mr Åkerberg Fransson to fall within the scope of the Charter. It construed the necessary link with EU law from three sources: (1) the provisions of VAT Council Directives 77/388 and 2006/11; (2) art. 4(3) TEU, obliging every Member State “to take all legislative and administrative measures appropriate” for ensuring the collection of VAT due on its territory; and (3) art. 325 TFEU, requiring Member States to “counter illegal activities affecting the financial interests of the EU.”

The Court emphasised that VAT forms part of the system of the European Union’s own resources, which provided “a direct link between the collection of VAT revenue in compliance with the European Union law applicable, and the availability to the European Union budget of the corresponding VAT resources.” For these reasons, both the tax surcharges imposed on Mr Fransson as well as the criminal proceedings brought against him “constitute implementation ... of European Union law” for the purposes of art. 51(1) of the Charter.

As for the cumulation of criminal and administrative proceedings and the scope of the *ne bis in idem* principle of art. 50 of the Charter, the Court found that the latter “does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties.” The Court considered that to ensure that all VAT revenue is collected, and the financial interests of the European Union are protected, “the Member States have freedom to choose the applicable penalties,” which may be administrative or criminal in nature, “or a combination of the two.”

The Court added that only if the tax penalty is criminal in nature for the purposes of art. 50 of the Charter would this “[preclude] criminal proceedings in respect of the same act from being brought against the same person” and went on to examine whether that was the case. To that end, it reiterated the *Engel* criteria, which it had already adopted in the *Bonda* judgment: (1) the national legal characterization of the offence; (2) the very nature of the offence; (3) the degree of severity of the penalty liable to be incurred.

Remarkably, the Court refrained from reaching any conclusions on the application of these criteria in the present case, and instead held that it “is for the national court to determine” whether there was indeed a breach of the *ne bis in idem* principle. Finally, as regards the requirement under Swedish law that there must be “clear evidence” in the case law of the ECtHR or the Court of Justice for a Swedish judge to be able to set aside any provision in national law that runs counter to a fundamental right as guaranteed by the ECHR or the Charter, the judgment is conclusive.

The Court first pointed out that it could not rule on the compatibility of the national provision with ECHR rights, “whilst fundamental rights recognised by the ECHR constitute general principles of the European Union’s law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR. The latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law.”

As far as Charter rights are concerned, however, the Court emphasised its case law requiring the judiciary in the Member States to give full effect to provisions of EU law, and to disapply provisions of national law where necessary to this end. The conclusion followed that:

“European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with the cooperation of the Court of Justice, whether that provision is compatible with the Charter.”

The importance of the case is related to the following guidelines ¹⁶. First, the Court points out that the phase “implementation of the EU” is going to be interpreted in a very broad sense. The essence of the Court decision is the fact that the fundamental rights guaranteed by the Charter will be applied to tax procedures, whether there are direct taxes or indirect taxes involved. Member States will have the obligation to take into consideration the fundamental rights of the EU in every tax procedure.

Secondly, the importance of the *Fransson* case is attached also to the relationship between the tax and criminal procedures and to the principle *ne bis in idem*. Because of the application of art. 325 TFEU, the EU and the Member States have the obligation to prevent and combat against any problem that may endanger the financial security of EU budget.

Because of this objective, in many situations in the financial life of the EU there are many situations where tax issues are tackled by both procedures: tax and criminal. Accordingly, the *Fransson* case, based on the rights guaranteed by the Charter, explains the distinctions that should be made between tax sanctions and criminal sanctions. As can be noticed from the decision, the Court clarified that financial sanctions can be considered as criminal sanctions.

This will have influence over the criminal procedures because in situations where financial sanctions are considered, criminal sanctions will generate the closure of the criminal procedures. Furthermore, the *Fransson* case has influence the connection between fundamental rights and tax procedures.

Methodology/Material and Methods

The Development of Taxation Harmonisation Process under Direct Influence of the EU Charter Fundamental Rights

Clearly, the combination between fundamental rights and taxation produced good results for the harmonisation process inside the European Union. No other European affairs areas recorded such progress such as taxation, especially related

¹⁶Peeters (2018) at 182-185.

to procedural rules and rights. Previous cases proved that this significant progress happened because of the influence of the fundamental rights after entry into force of the Charter (1 December).

To prove the aim of our article, which is based on qualitative research, we would like to continue to expose the way in which fundamental rights and taxation produced important rules and rights for taxpayers all over the EU, becoming a role model for the harmonisation process in all areas of competences of the EU.

Next, we will present a series of ECJ decisions of immense impact over the development of tax procedural rules inside the European Union, which indicate the future of the European harmonisation process. We suggest that the outcome of these decisions can be used for the conclusions of our article.

Fundamental Rights and Unlawfully Obtained Evidence in Tax and Criminal Procedures

The continuation of the *Fransson* case is the decision that the Court delivered on 17 December 2015 in the case *WebMindLicense*¹⁷. Again, the role of the fundamental rights derived from the Charter was necessary to referee in a case where tax and criminal procedures were involved. *WebMindLicense* is a Hungarian-based affair that involved the question of transfer from the criminal procedure to the tax procedure.

WebMindLicense (WML) is a Hungarian company in the field of erotic services provisions. The company transferred its headquarters to Madeira (Portugal) and kept an office in Budapest (Hungary). The reason for this was that, in Madeira, the VAT rate was only 5%, whereas in Hungary the VAT rate was 27%.

The Hungarian criminal authorities opened a criminal procedure against WML on charges related to tax evasion. The Hungarian authorities had access to the company's emails and tax records and, therefore, put the company's representatives' telephones under surveillance. The evidence obtained in the criminal procedure was transferred to the Hungarian authorities. The Hungarian authorities used this evidence and issued a tax decision through which they imposed additional VAT surcharges.

The Hungarian Supreme Tax Court made a preliminary ruling referenced under art. 267 of the TFUE to determine the lawfulness of evidence between procedures related to art. 7, art. 47 and art. 52 of the Charter. The Court realised an extensive analysis of the fundamental rights role and applicability, even making references to the values set by the European Court of Human Rights in its case law of interpreting the European Convention for Human Rights.

The main conclusion of the EU Court was that there was no EU law issue that two procedures are running parallel in connection with the same facts. This is an important explanation on the part of the Court, after the essential decision in the *Fransson* case. The two procedures culminated by applying different types of sanctions. But the uniqueness of the decision was elevated by the fact that the Court decided that it was unlawful to have a transfer of evidence from one

¹⁷ECJ decision C-419/14.

procedure to another in the situation where the legality of obtained evidence did not fall under the scrutiny of a judge.

The decision in *WML* case is a landmark case because it ends the practice developed in many Member States of no control over evidence transfer between procedures. Through this decision, we may understand that the EU Court has set the standard of a fair trial and of the principal al legality in the case where two procedures – a tax one and a criminal one – that run in parallel.

The *Dzivev*¹⁸ case is strongly connected with the principles developed in the *WML* case because it sets another important standard in tax and criminal procedures at the European level. The problem discussed in the *Dzivev* case is related to the influence over criminal procedures due to tax evasion accusations to exclude illegally obtained evidence, because of the lack of competence of national authorities, in the situation where that evidence is the only opportunity to prove that the offenses in question were committed.

The facts in the *Dzivev* case are related to the circumstance that the Bulgarian tax authorities made an accusation of tax evasion against several Bulgarian citizens. The national authorities said that there was a VAT fraud, and the action was justified by art. 325 TFEU (protection of EU financial interests). To obtain evidence, the national authorities intercepted electronic communications

While criminal procedure was pending, the Bulgarian criminal court decided that the authorization for the interception of electronic communications was given by a noncompetent authority. Therefore, a preliminary ruling was opened, and the Court was asked if the Charter permitted the exclusion of criminal evidence which was illegally obtained, when that evidence was the only opportunity to prove tax evasion accusations against the financial interests of the European Union.

By its 17 January 2019 decision, the Court began by stating that the protection of European Union financial interests was a common obligation for both EU and Member State institutions. But this goal could not overcome the values protected by the Charter. Accordingly, Member States must protect the fundamental rights of EU citizens at any cost.

The interpretation of the EU Court was that, when evidence is illegally obtained, it should be automatically excluded from any EU procedure because the Charter values are to be respected. As a conclusion, it is clear that another standard was set in the process of tax harmonisation inside the European Union by using the values of the Charter. Ultimately, the ECJ decisions such as *WML* and *Dzivev* can be considered an unwritten procedural code for tax and criminal procedures that run parallelly and are directly connected to EU financial interests.

The Right to Defence and Tax Procedures

In light of the previously presented decisions, another question may arise; What is happening when taxpayers do not have access to all relevant information? Does the taxpayer have a right to prepare its defence before national tax authorities? The answer to these question lies in the principle of the right to defence. Like all

¹⁸ECJ decision C-310/16.

other fundamental rights, the right to defence must be interpreted in a broader manner with all its multiple meanings. Of course, because of a lack of tax procedures, the meanings have been explained by the EU Court decisions.

The first important case is *Soprope*¹⁹, where the Court explained that, in tax procedures, Member States should provide a sufficient time framework for taxpayers to have time to prepare and to display their explanations. The Court emphasised that in the absence of guaranteed taxpayer fundamental rights in European tax procedures, their rights are infringed. This decision provided a new framework in the relationship between Member States and taxpayers because it provides that the defence should be of quality, not only of quantity.

The next important decision is *Ispas*²⁰, where the Court emphasised another component of the fundamental right to defence. Here, the focus was on the right to access to the administrative file during administrative procedures. The access to the administrative file is highly important because it underlines the fact taxpayers must have the possibility to consult and be aware of all public and non – public information used by Member State administrative authorities.

The importance of the decision in connection with the that delivered in *WebMindLincses* is notable. The right to have access to the administrative file provides the possibility for the taxpayer to have communication with non-public information, such as evidence transfer between procedures, and to prepare a quality defence. Surely, through these decisions, another standard for all European tax procedures has been set from the point of view of fundamental rights: the right to access to the administrative file. The fact that fundamental rights work in tax procedures is an indicator that this can be a path for tax harmonisation in the European Union firstly with the EU Court decisions.

Furthermore, another key decision is the *CF*²¹ decision, where the Court declared that the sanction giving access to the administrative file is the nullity of the whole administrative procedure. By this decision, the Court underlined the importance of this fundamental right in tax procedures. Moreover, the Court also explained the role of the national courts who have the obligation to exercise control over the national administrations to ensure the applicability of the fundamental rights in the procedures.

In conclusion, it is apparent that Member States should pay considerable attention to the right of defence in relation to tax procedures. The right to defence has become an important tool for the harmonisation of tax procedures inside the European Union.

Findings and Results

Another key element of the tax harmonisation inside the European Union is related to GDPR protection rules. GDPR rules have an important aspect because they stipulate the rules related to tax information transfer between Member States.

¹⁹ECJ decision C-349/07.

²⁰ECJ decision C-298/16.

²¹ECJ, decision C-430/19.

The first important case is the *Sabou*²² case. It is important to stress that the *Sabou* case happened before the entry into force of the Charter. The EU legal rules used by the Court to solve this case were the general principle of defence and the Mutual Assistance Directive (77/799/CEE)²³.

In the *Sabou* case, a Czech resident was the subject of a tax investigation from Czech tax authorities. The Czech tax authorities requested information from several Member States to confirm the nature and extent of Mr. Sabou's business and the verity of its tax statements. Mr. Sabou considered that his fundamental rights (the right to defence) were infringed upon because he was not informed in advanced about the information exchange procedure, while he was not involved in the procedure.

The Court decided that the national tax authorities' action was lawful because the exchange procedure was not a public procedure, and that the information was necessary only for domestic decisions within the tax authority. It is important to point out that the *Sabou* case was based on facts that occurred before the entry into force of the Charter and the Court did not have the instruments available at that moment.

The next important case is of Romanian origin, the *Bara*²⁴ case. *Bara* has influenced decisively the relationship between data protection rules and tax procedure inside the European Union. According to Romanian legislation prior to 2015, contributions to the National Health Fund were the responsibility of the Health Ministry through the National Chamber for Health Contributions. It is important to specify that, according to Romanian legislation at that time, the contributions were considered budgetary debts.

For enforcement procedures, the National Chamber requested and obtained access to the data base of the national tax authorities. By using this personalised data, the National Chamber issued a tax decision retroactively. The Cluj Court of Appeal demanded a preliminary ruling to determine if this personal data transfer between two national public bodies, necessary for tax purposes, was a legal one from the viewpoint of personal data, whilst the purpose (of the transfer) was a tax one.

The Court started its analyses indicating that the collection and the use of personal data should be made only for legal purposes. The Court recalled that tax collection can be considered a legal purpose. Because of this purpose, the collection and the use of personal data can be made only through legal venues. Therefore, the Court upheld the view that, to abide to the rules of the protection of personal data, the transfer conducted by the Romanian public institution to impose tax debts should have been approved by a normative regulation (law of the Parliament, ordinance of the government, minister order) and published in the official journal for accessibility to all interested parties.

Because the protocol concluded by the Romanian authorities did not meet these standards, it was deemed that all tax decisions issued were null and void

²²ECJ, decision C-276/12

²³Chauouche & Haslehner (2017) at 179-180.

²⁴ECJ decision C-201/14.

because data protection rules of the taxpayers were infringed. From our point of view, we consider that this decision of the European court plays a very important role in the process in which fundamental rights are reflected in tax procedures. Subsequently, this decision set an important rule for European tax procedures in their harmonisation process.

Last but not least, we will refer to the decision delivered by the Court in the *Berlioz*²⁵ case. This case was the result of the necessity to interpret Directive 2011/16/EU and art. 47 of the Charter. The particulars occurred when a taxpayer from Luxembourg rejected the request of the French tax authorities to deliver information about a French taxpayer. In this context, the French tax authority asked the Luxembourg tax authority to impose a penalty upon the Luxembourg taxpayer because of his behaviour.

The Luxembourg taxpayer challenged the penalty before a court of law. The national court requested a preliminary ruling to interpret Directive 2011/16/EU (the directive that regulates the exchange of tax information between Member States) and of art. 47 of the Charter (the right to have access to a court of law). The problem was whether the court of law from the addressee Member States has the leeway to analyse the substance of the exchange request or only to analyse the form of the request. Furthermore, the ECJ was asked to examine the depth of the of taxpayer right to have access to the information that was exchanged between Member States.

The Court decided that to fully respect art. 47 of the Charter, the court of law from the addressee Member State has the leeway to examine not only the form of the exchange request, but also its substance²⁶. If the national court of law decided that the principle of proportionality in the exchange of information is not respected, it is at liberty to annul the penalty. Regarding taxpayer access, as in the *Sabou* case, the Court decided that it was sufficient to provide access only to general information, because tax confidentiality was still effective.

Unquestionably, the importance of this decision is reflected in the obligation to harmonise tax procedures that must come under the full control of a court of law. Furthermore, this decision also defined the role of the taxpayer and his/her fundamental rights in the situation of European tax exchange information between Member States. In conclusion, it is evident that in the situation of the European tax exchange system, the fundamental rights of the EU provided full harmonisation.

Conclusions

As noticed, taxation problems played a key role in the process of European unification and harmonisation. Although taxation is a sensitive area because of the rule of unanimity, European harmonisation is most advanced in taxation for two reasons: the involvement of the European Union Court of Justice and the role of the European Charter of Fundamental Rights.

²⁵ECJ decision C-682/15.

²⁶Pantazatou (2018) at 145–149.

An important conclusion that must be underscored is the fact that after the entry into force of the Charter (1 December 2009), the number of preliminary rulings related to taxation concerns and fundamental rights increased and proved to be the basis for the advancement of the European common rules in the realm of taxation. The combination between taxation and fundamental rights is surely a success for the European process of harmonisation and can be used as an instrument for harmonisation in other sensible European domains (politics, military, social, etc.).

Furthermore, we believe that it is important to underline the role played by the European Union Court of Justice in the successful combination between taxation and fundamental rights in the European harmonisation process. The Court cleverly used its competences as a “negative integration” to fill in the gaps of the “positive integration.” In the future, we trust that the fundamental rights interpreted by the Court of Justice can be a powerful tool for the advancement of the European harmonisation process.

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Is an “Open Innovation” Policy Viable in Southeast Asia? - A Legal Perspective

By Robert Smith* & Mark Perry[±]

In recent years, particularly in Europe, increasing attention is being paid to managing Intellectual Property (IP) competitive effects. Europe achieves greater innovation output with IP overall whilst also implementing the globally harmonised IP laws. The performance differences in innovation output are due to many variables. However, the EU has focussed on three policy goals: “open innovation”, “open science”, and “open to the world”, aiming to foster access to knowledge for advancement as well as overcoming innovation barriers while retaining alignment with harmonised international IP frameworks. Whilst it is still premature to draw conclusions about the effectiveness of the EU approach, it is possible to hypothesise whether such an approach is a viable option in Asia. In this case, the focus will be on the eleven countries of the Southeast Asia region with their various levels of development, from least developed (Cambodia, Laos, Myanmar and Timor-Leste) to highly developed (Singapore). The paper describes the concept of the EU “open innovation” policy, its drivers and its legal basis. From these examples, a framework will be developed against which to test its viability in Southeast Asia. Analysis shows that each of the ten ASEAN member states, including Singapore, is a net importer of patents rather than a developer. Nonetheless, it is considered that the IP ecosystems in Malaysia, Singapore, Thailand and Vietnam are sufficiently robust to at least consider a trial of the Open Innovation, Open Science and Open to the World concepts as being tested in the European Union.

Keywords: “Open Innovation”; European Union; Association of Southeast Asian Nations; Intellectual Property legislation

Introduction

The concept of open innovation was first articulated by Chesbrough in a paper published in the MIT Sloan Management Review.¹ He observed that companies were increasingly “harnessing external ideas while leveraging their in-house R&D outside their current operations”.² It is the sourcing of technology and innovation in the broader research and innovation community “beyond a specific

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¹Chesbrough, Vanhaverbeke, Bakici & Lopez (2003) at 35-41.

²Ibid, at 41.

industry, discipline or type of collaborative partner”.³ Challenges associated with a new approach to innovation include issues associated with people, competition, intellectual property, and connection or reach issues.⁴ Ensuring the proper IP safeguards are in place is critical.

“The fact that the term “open” is usually thought of as cost-free creates confusion; however, in contrast to open source, for example, open innovation typically implies the payment of licence fees as well as other financial arrangements. In this context, therefore, open does not mean free”.⁵

“Thus, “free software” is a matter of liberty, not price. To understand the concept, **you should think of “free” as in “free speech,” not as in “free beer”**.”⁶

Open innovation requires both value creation and value capture to enable collaborative risk-sharing.⁷ The two operate simultaneously: “value creation by the partners working in collaboration, co-creating knowledge to boost innovation output, and value capture under conditions that enable each partner of the collaboration to capture a share of the economic value in common”.⁸

While open innovation is becoming more pervasive, it is most noticeable in academic publishing, with an increasing number of open access journals and even open-access books being published to provide “ready access to ideas”.⁹ Rather than dispute whether or not a journal should be called predatory, Papanikos suggests that the test for any journal is whether readers access the papers and researchers submit papers.¹⁰ Open-access journals have been found to create more open innovation than closed-access journals.¹¹ It increased in response to the digital transformation, with the “increased moderating effects of references on the correlation between collective intelligence and open innovation”.¹² Open access in patents “is a much more fraught area, and it is considered that many battles will be fought before it is a widespread phenomenon”.¹³

This article is part of a larger research project focussing on how Southeast Asian nations can improve their innovation potential based on lessons learned from the nine Western European nations, eight of whom are in the European

³Strategic Direction (2007) at 35.

⁴Ibid.

⁵Organisation for Economic Co-operation and Development (2008) at 9.

⁶GNU Operating System (2022).

⁷European Association of Research and Technology Organisations (2020).

⁸Ibid, at 2.

⁹Smith & Perry (2022) at 509.

¹⁰Papanikos (2022) at 260.

¹¹Yun, Liu, Jeong, Kim & Kim (2022).

¹²Ibid, at 16.

¹³Smith & Perry (2022) at 509.

Union (EU).¹⁴ Specifically, the paper focuses on three policy goals of the EU, namely: “open innovation”, “open science”, and “open to the world”.¹⁵

The literature review is a brief introduction to Open Innovation research with the legal opportunities and constraints left for the later analysis. The analysis will focus initially on the Open Innovation policies of the EU and the associated legal framework, as well as lessons learned. It will then focus on the countries of Southeast Asia to ascertain the benefits and pitfalls associated with the promotion of Open innovation in their jurisdictions bearing in mind that there is no overarching legal entity as is the case with the European Union.

Literature Review

A study by the Organisation for Economic Cooperation and Development in 2008 found that companies saw the theft of Intellectual property as the most significant risk to global innovation networks.¹⁶ It found that¹⁷:

1. For global innovation networks to be effective, they require that the economy has appropriate structural policies in place, such as labour market and competition policies, public infrastructure for innovation together, with a highly skilled workforce;
2. Universities and public research organisations need to play a significant role as a source of essential knowledge and as potential development partners;
3. Potential for knowledge flows and integration across borders depends on how well the system is developed;
4. Intellectual property sharing may require different kinds of management tools in both the research organisation and the commercial organisations;
5. “People must be able to work in networks and across borders, sectors and at the interface of converging technologies”;¹⁸
6. “Much public support for innovation still focuses on R&D and technological innovation and less on non-technological innovation or other forms of user-driven innovation”;¹⁹
7. “National [research and development] programmes need to be more open while ensuring benefits via reciprocity and cost-sharing agreements” and
8. “Building a strong knowledge base is necessary to develop next-generation innovation policies and best practices”.²⁰

¹⁴EU members: Austria, Belgium, France, Germany, Liechtenstein, Luxembourg, Monaco, Netherlands plus non-EU member: Switzerland

¹⁵European Commission, Directorate-General for Research and Innovation (2016).

¹⁶Organisation for Economic Co-operation and Development (2008) at 11.

¹⁷Ibid, at 12-13.

¹⁸Ibid, at 12.

¹⁹Ibid.

²⁰Ibid, at 13.

Curley²¹ argued in 2015 that Open Innovation had already evolved into Open Innovation 2.0. He identified what he called *Quadruple Helix Innovation*, “where government, industry, academia and civil participants work together to co-create the future and drive structural changes far beyond the scope of what any one organisation or person could do alone. When all participants commit to a significant change [...] by collaborating together everyone can move faster, share risk and pool resources”.²² This reflects Linus’ Law that “given enough eyeballs, all bugs are shallow” in software development.²³

Ji et al. analysed open innovation network frameworks from the perspective of patent citation networks, with driver assistance systems (DAS) as the research case.²⁴ They found that the flow of knowledge that “exists between different types of firms significantly facilitates the [Open Innovation] network”.²⁵ The geographic proximities of firms improved the formation of networks.²⁶ Their research confirmed that “small firms are more active in OI strategies, as they hope to rapidly increase their capabilities and quickly bridge funding gaps by marketing their technologies, while the flexible organisational structure within them also indirectly promotes the above behaviour”.²⁷ This is in contrast to the earlier OECD study which found that “[l]arger firms innovate more openly than small firms. Innovation survey data indicate that large companies are four times more likely than small and medium-sized enterprises (SMEs) to collaborate on innovation”.²⁸

The move from closed to open innovation requires a paradigm change in the diffusion of innovations within open innovation ecosystems.²⁹ This has resulted in a shift in focus from firm-centric innovation to platform-centric innovation; and a shift in focus from physical goods to digital goods and services.³⁰ Several models have been developed for implementing innovation.³¹ For instance, Arvaniti et al. have developed a nine-step model:³²

- Step 1 – show an interest in working with open innovation
- Step 2 – arrange capital for the associated expenses
- Step 3 – pinpoint projects to be pursued and filter them until the final projects are selected
- Step 4 – track the right partners for each project
- Step 5 – create a communication channel between partners

²¹Curley (2015).

²²Ibid, at 12.

²³Raymond (2000).

²⁴Ji, Yu, Sun & Zhang (2020).

²⁵Ibid, at 9.

²⁶Ibid.

²⁷Ibid.

²⁸Organisation for Economic Co-operation and Development (2008) at 10.

²⁹Xiong, Lim, Tan, Zhao & Yu (2022) at 1757.

³⁰Ibid, at 1760-1761.

³¹See for instance: Xiong, Lim, Tan, Zhao & Yu (2022). and Arvaniti, Dima, Stylios & Papadakis (2022).

³²Arvaniti, Dima, Stylios & Papadakis (2022) at 5.

- Step 6 – undertake negotiations for all pertinent partners
- Step 7 – organise the partnership
- Step 8 – project management
- Step 9 – evaluate project outcomes and their adoption

They provide a salutary warning: “transforming a firm that has a closed R&D to an open innovation concept can be a long and arduous multistep process, as many things must be considered in order to have a successful result”.³³

Whether or not a company will eventually proceed down the path of open innovation, the law firm Gilbert+Tobin has prepared a list of the critical actions an organisation should undertake to position themselves for the possible eventuality of going down the path to open innovation.³⁴

- a) Identify all of the different categories of products that the company offers³⁵ and the IP links to each of those categories;
- b) Determine whether all of the registerable IP has maximum protection under the relevant legislation;
- c) If IP is created by employees, determine whether the IP is vested in the employees, the organisation or both; and
- d) Determine whether the organisation has control over access to its confidential information, including know-how and trade secrets. Further, determine whether robust confidentiality provisions cover its employment and third-party contracts.

Open innovation is facilitated by open access to research findings. This has led to the development of the open-access movement in academic publications. One such initiative is the *Budapest Open Access Initiative* which was supported by the Open Society Institute founded by George Soros.³⁶ The initiative aims “to achieve open access to scholarly journal literature”.³⁷

In August 2022, the United States announced updated policy guidance on access to peer-reviewed publications. By the end of 2025, all federal agencies must put in place policies and procedures that provide access to anyone anywhere to freely access peer-reviewed publications as soon as they are published, as well as access to data, that is an output of agency funded research.³⁸ Barbour comments that:³⁹

Open access matters for both the public and academics, as the fast-moving emergency of the COVID-19 pandemic amply demonstrated. Even academics at well-funded universities can mostly only access journals their universities subscribe to – and no institution can afford to subscribe to everything published. Last year,

³³Ibid, at 10.

³⁴Gilbert + Tobin (2022) at 3.

³⁵For instance: brands, different types of software and product lines.

³⁶Open Society Institute (2002).

³⁷Ibid.

³⁸Barbour (2022).

³⁹Ibid.

estimates suggest some 2 million research articles were published. People outside a university – in a small company, a college, a GP practice, a newsroom, or citizen scientists – have to pay for access.

Butler-Adam has identified an impediment to publication in open-access journals in that:⁴⁰

Researchers still have a deeply ingrained preference for publishing in the high-impact, high-profile scholarly journals produced by prominent publishers. This is driven by prestige. If academics have the money to pay the exorbitant author fees, they publish in these journals. These academics' own universities must then pay again to access research that was conducted using institutional resources and taxpayers' money.

It is claimed that whilst university research is usually publicly funded, a university can spend millions of dollars to allow access to published information in peer-reviewed academic journals.⁴¹ Wingfield and Millar argue that even with open-access model impacts academics in poorer countries as open-access publishers often charge the researcher significant fees to publish their article.⁴²

Methodology

This research focuses on how the open innovation initiative of the European Union might be transferred to the Southeast Asia economies. It used the documentary research concept where reputable contemporary sources are analysed to understand legal implications associated with the implementation of open innovation into the EU and the possibility of introducing it into Southeast Asia.

Open Innovation in the European Union

Open Innovation, Open Science, Open to the World

In 2021 the World Intellectual Property Organization (WIPO) reported that the most innovative countries are mainly from Europe.⁴³ In passing, it should be noted that the European Union, in its annual Innovation Scoreboard,⁴⁴ measures innovation within its member states using different parameters and scoring methods from WIPO.⁴⁵ The EU uses a score, and WIPO uses a ranking.

⁴⁰Butler-Adam (2015).

⁴¹Wilson (2017).

⁴²Wingfield & Millar (2019).

⁴³Barbour (2022).

⁴⁴European Commission, Directorate-General for Research and Innovation et al. (2022).

⁴⁵World Intellectual Property Organization (2021).

To achieve even greater innovation output, the EU has focussed on three policy goals: “open innovation”, “open science”, and “open to the world”,⁴⁶ aiming to foster access to knowledge for advancement and overcoming innovation barriers while retaining alignment with harmonised IP frameworks.⁴⁷

Chesbrough et al. developed a charter for open innovation policies in Europe.⁴⁸ They identified five critical areas for development: education and human capital development; financing open innovation: the innovation chain; adopting a balanced approach to intellectual property; promoting cooperation and competition; and expanding open government.⁴⁹ In particular, “governments should clarify the ownership of IP and provide the institutional and legal support for its purchase and exchange”.⁵⁰ The report made the following key observations and recommendations concerning what they considered the then existing (2011) legal impediments to a robust IP open innovation system in the EU:⁵¹

- a) A patent granted by the European Patent Office (EPO) signals “some embedded value”, which assists the patent holder when seeking to licence the technology or seek external funding. “The EPO approach also prevents companies becoming easily blocked (in developing or producing new products) by poor quality patent families owned by other companies or non-practising entities (e.g. patent trolls)”;⁵²
- b) The EU system is “the most expensive and complex in the world due to its high level of fragmentation and translation requirements”.⁵³ Patents, once granted, must be enforced by the jurisdictions in which the patent applies. Patents must be “translated, validated, and renewed on a yearly basis”.⁵⁴ At the time, the EU was making progress on a uniform patent system.
- c) There is a need to align the incentives of researchers and industry. At the time of the Report:

a patent application will be rejected in Europe if the invention has become publicly available before the application was filed. This includes selling the invention, giving a lecture about it, showing it to an investor without a non-disclosure agreement (NDA), or publishing it in a scientific journal.⁵⁵

- d) “From a public policy point of view, unused patents represent a large untapped source of knowledge that could create new companies and economic growth if there were an efficient way to 'activate' these unused patents in other companies”.⁵⁶

⁴⁶European Commission, Directorate-General for Research and Innovation. (2016).

⁴⁷Margoni (2019).

⁴⁸Chesbrough, Vanhaverbeke, Bakici & Lopez (2011).

⁴⁹*ibid*, at 4.

⁵⁰*Ibid*, at 14.

⁵¹*Ibid*, at 14-19.

⁵²*Ibid*.

⁵³*Ibid*, at 15.

⁵⁴*Ibid*.

⁵⁵*Ibid*, at 17.

⁵⁶*Ibid*.

- e) Current IP transfer provisions can be quite complex when multiple parties are involved. The process requires "collaborative IP rules based on good practices", while the current rules had not been adapted to complex forms of collaboration;⁵⁷
- f) There is a need for streamlining the process, and hence the costs, whereby intermediaries provide platforms that link companies with problem solvers;
- g) Regulators must think beyond patents as "trademarks, copyrights, trade secrets and industrial design rights are important in the discussion of an open innovation policy".⁵⁸

In 2016 the European Political Strategy Centre issued a strategic note on how innovation requires a balanced regulatory approach.⁵⁹ They considered that two elements define innovation. Firstly it must have novelty in that it is "a new idea in relation to something that is established".⁶⁰ Secondly, "a technical novelty or a new approach can only be regarded as innovative if it brings societal and social benefits".⁶¹ In other words, "an innovation is to be understood as a process through which the novelty has to win social recognition and acceptance over time".⁶² To foster an innovative regulatory framework, they proposed several possible approaches, including:⁶³

- a) In the case of emerging technologies, there may be a role for *experimental legislation* such as that developed in several EU member states in the regulation of self-drive vehicles. For instance, Finland, France and the Netherlands adopted a legal framework, whilst Germany and Sweden opted for the introduction of special exemptions from existing legislation;
- b) *Mutual recognition* and *country-of-origin provisions* can drive innovation through competition in the marketplace. Mutual recognition ensures that any product sold in one EU country can be sold in another. On the other hand, in the country of original principle, entities in one state can trade in the other states on the basis of their home regulations;
- c) The *test of alternatives* in which rather than an applicant submitting a clearly defined request for authorisation, the applicant must test alternatives and report on alternative solutions;
- d) Legislation should *focus on outcomes*;
- e) The right for companies to *challenge regulatory requirements* provided that can demonstrate they can surpass the standard or they can comply with a different approach; and

⁵⁷Ibid, at 18.

⁵⁸Ibid, at 19.

⁵⁹European Political Strategy Centre (2016).

⁶⁰Ibid, at 2.

⁶¹Ibid.

⁶²Ibid.

⁶³Ibid, at 8-9.

- f) “When little is known about a situation, a temporary legislative measure can be a better option than no legislative action”.⁶⁴

Modelling of the Open Innovation model found that it is susceptible to many risks:⁶⁵

- a) Misalignment of objectives between innovation and the strategic direction of the organisation;
- b) Unrealistic expectations of the utility and market potential of the innovation;
- c) Deficit of suitable human resources;
- d) Insufficient integration of the parties within the innovation network;
- e) Ineffective internal communication;
- f) Ineffective communication with partners;
- g) Inappropriate or underdeveloped Key Performance Indicators;
- h) Lack of funding;
- i) Poor management of the intellectual property produced by both the organisation and its partners;
- j) No markets at the time the innovation is ready for launch; and
- k) Superior technology developed by a competitor.

The European Associations of Research and Technology Organisations (EARTO) considered that a stable EU regulatory and policy framework must recognise the crucial role IP plays in fostering the co-creation of knowledge.⁶⁶ In addition, there should be a balance between open science and open innovation based on intellectual property rights (IPRs) and should be “promoted hand in hand”.⁶⁷

Despite these initiatives, a number of researchers consider that it is still premature to determine the effectiveness of the EU approach.⁶⁸

Legal Analysis

In May 2021, a Decision by the Council of the European Union established Horizon Europe - the Framework Programme for Research and Innovation.⁶⁹ The aim of the Regulation is, “for the duration of the MFF 2021-2027, sets out the rules for participation and dissemination concerning indirect actions under the Programme and determines the framework governing Union support for R&I activities for the same duration.”⁷⁰

The general objective of the Programme is to deliver scientific, technological, economic and societal impact from the Union's investments in R&I so as to strengthen

⁶⁴Ibid, at 9.

⁶⁵Banu, Dumitrescu, Purcărea & Isărescu (2016) at 1026.

⁶⁶European Association of Research and Technology Organisations (2020) at 9.

⁶⁷Ibid, at 10.

⁶⁸Guibault (2020); Guibault & Margoni (2015); Margoni, Caso, Ducato, Guarda, & Moscon (2016).

⁶⁹Council Decision (EU) 2021/764, art 1.

⁷⁰Ibid.

the scientific and technological bases of the Union and foster the competitiveness of the Union in all Member States, including in its industry, to deliver on the Union strategic priorities and to contribute to the realisation of Union objectives and policies, to tackle global challenges, including the SDGs by following the principles of the 2030 Agenda and the Paris Agreement, and to strengthen the ERA. The Programme shall thus maximise Union added value by focusing on objectives and activities that cannot be effectively realised by Member States acting alone but in cooperation.⁷¹

In brief, its specific objectives are to:

- a. Develop, promote and advance scientific excellence;
- b. Generate knowledge;
- c. Foster all forms of innovation; and
- d. Optimise the Programme's delivery.⁷²

It was structured into three pillars: Pillar I: “Excellent Science”, Pillar II: “Global Challenges and European Industrial Competitiveness”, and Pillar III: “Innovative Europe”.⁷³

The Regulation also established the European Innovation Council (EIC) as a centrally managed one-stop shop for the “Innovation Europe” Pillar.⁷⁴ Its focus is breakthrough and disruptive innovation, with a particular target being market-creating innovation.⁷⁵ Nevertheless, it should support all types of innovation, including incremental innovation. The EIC must be open to all types of innovators.⁷⁶

The Programme is to: “encourage open science as an approach to the scientific process based on cooperative work and diffusing knowledge”, ensure “open access to scientific publications resulting from research funded under the Programme”, and ensure “open access to research data, including those underlying scientific publications, in accordance with the principle *as open as possible, as closed as necessary*”.⁷⁷ The remainder of the articles cover the program's operation, including the selection of projects and provision of funding.

Annex II notes that:

Throughout Europe, efforts are still needed to develop ecosystems where researchers, innovators, industries and governments can easily interact. Innovation ecosystems, in fact, still do not work optimally due to a number of reasons, such as:

- (a) interaction among innovation players is still hampered by organisational, regulatory and cultural barriers between them;

⁷¹Ibid, art 3(1).

⁷²Ibid, art 3(2).

⁷³Ibid, art 4(1).

⁷⁴Ibid, art 9(1).

⁷⁵Ibid.

⁷⁶Ibid, art 9(2).

⁷⁷Ibid, art 14(1).

- (b) efforts to strengthen innovation ecosystems shall benefit from coordination and a clear focus on specific objectives and impact.⁷⁸

Furthermore, it provides Guidance to the European Institute of Innovation and Technology (EIT) on how to implement the programme activities within EIT.⁷⁹ Key impact pathway indicators for short-term, medium-term and longer-time monitoring are also outlined.⁸⁰

The enabling Regulations⁸¹ included much of the similar text as used in the Decision.⁸² Both were promulgated in the *Official Journal of the European Union* on 12 May 2021 to apply from 1 January 2021.

In May 2022, the European Commission publicised “The Innovation Principle”, namely:

EU policy and legislation should be developed, implemented and assessed in view of encouraging innovations that help realise the EU's environmental, social and economic objectives, and to anticipate and harness future technological advances.

- Specific objectives are: Improving the design of existing and future EU regulations to enhance their impact on encouraging beneficial innovation.
- Steer the development of innovative solutions addressing new and complex challenges in a way that embeds EU values and protects Europeans.
- Achieve an optimal balance between predictability of the regulatory environment and adaptability to scientific and technological progress.
- What is it, and why do we need it?⁸³

The principle aims to “ensure that EU legislation is analysed and designed so as to encourage innovation to deliver social, environmental and economic benefits and to help protecting Europeans”.⁸⁴

The key issue to resolve is whether the Open Innovation concept is applicable to ASEAN member states or to the organisation as a whole.

⁷⁸Ibid, Annex II s 1.

⁷⁹Ibid, Annex II.

⁸⁰Ibid, Annex V.

⁸¹Regulation (EU) 2021/695.

⁸²Council Decision (EU) 2021/764.

⁸³European Commission (2022).

⁸⁴Ibid.

Potential for Introduction of Open Innovation to Southeast Asia

Intellectual Property Rights Protection within the Southeast Asian Nations

All eleven Southeast Asian nations are members of the World Intellectual Property Organization (WIPO)⁸⁵, whilst all but Timor Leste are members of the World Trade Organization.⁸⁶ Timor Leste is in the accession stage.⁸⁷

Once a nation becomes a member of the World Trade Organization, it also becomes a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁸⁸ Under TRIPS, members can meet their obligations without acceding to any other Intellectual Property treaties.⁸⁹ Nevertheless, the ten ASEAN member states are contracting parties to several World Intellectual Property Organization (WIPO) treaties.⁹⁰

A number of the ASEAN economies assemble manufactured goods such as motor vehicles and electronics for external corporate entities. Many of these goods are then exported to third countries. For instance, manufacturers such as Toyota, Isuzu, Honda, Mitsubishi, Nissan and Ford export from Thailand to global motor vehicle markets.⁹¹ Intellectual property remains with the external corporate entities and must be protected in the country of assembly.

In 1996 ASEAN established the Working Group on Intellectual Property Cooperation (AWGIPC).⁹² The 2016-2025 IPR Action Plan includes four strategic goals, namely:⁹³ development of a more robust ASEAN IP System by institutional of strengthening the staff in IP offices of member states and improving their IP infrastructure; developing regional IP platforms and infrastructure to contribute to enhancing the role of ASEAN; develop an inclusive ASEAN IP ecosystem; and develop regional mechanisms which promote asset creation and commercialisation, particularly enhancing the fields of *geographical indications and traditional knowledge*.⁹⁴ Smith, Smith and Perry discuss in detail the implementation of Plurilateral Free Trade Agreements on the Intellectual Property Protection of ASEAN Members and how the parties have agreed to work together to improve IP systems in ASEAN through cooperation, training and institutional support.⁹⁵

⁸⁵World Intellectual Property Organization (2022b).

⁸⁶*World Trade Organization: Members and Observers* (2019).

⁸⁷World Trade Organization. (2022).

⁸⁸Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended on 23 January 2017).

⁸⁹*Ibid*, art 1(1).

⁹⁰Smith, Smith & Perry (2023).

⁹¹Australian Trade and Investment Commission (2022).

⁹²ASEAN Secretariat (2021).

⁹³The ASEAN Intellectual Property Rights Action Plan 2016-2025: Meeting the Challenges of “One Vision, One Identity, One Community” through Intellectual Property (2016).

⁹⁴Italics added by the authors.

⁹⁵Smith, Smith & Perry (2023).

Innovation Potential

The Global Innovation Index (GII) developed by the World Intellectual Property Organization (WIPO) is an indicator of the current status of innovation potential. As seen from the data shown in Table 1, there is quite a range of GIIs between the ASEAN member states. No data is available for Timor Leste. Essentially, the members sit in one of four bands:

- a) Excellent GII – Singapore
- b) Very good GII – Malaysia, Thailand and Vietnam
- c) Fair to Good GII – Philippines and Indonesia
- d) Low GII – Brunei Darussalam, Cambodia, Lao PDR and Myanmar

Table 1. *Global Innovation Indices of ASEAN Members 2015-2022*

Country	Global Innovation Index							
	2015 ⁹⁶	2016 ⁹⁷	2017 ⁹⁸	2018 ⁹⁹	2019 ¹⁰⁰	2020 ¹⁰¹	2021 ¹⁰²	2022 ¹⁰³
Brunei Darussalam	-	-	71	67	71	71	82	92
Cambodia	91	95	101	98	98	110	109	97
Indonesia	97	88	87	85	85	85	87	75
Lao PDR	-	-	-	-	-	113	117	112
Malaysia	32	35	37	35	35	33	36	36
Myanmar	138	-	-	-	-	129	127	116
Philippines	83	74	73	73	54	50	51	59
Singapore	7	6	7	5	8	8	8	7
Thailand	55	52	51	44	43	44	43	43
Vietnam	52	59	47	45	42	42	44	48

Source: WIPO with analysis by authors

Legal Analysis

From the outset, it is essential to recognise that ASEAN is an association, not a union. The European Union is a legal entity with the competencies of its members specified in various EU treaties. The countries of Southeast Asia are in an association (ASEAN) where the Charter is explicit that members must not interfere in the internal affairs of other members.¹⁰⁴

The ASEAN member states have recognised the importance of the development and protection of intellectual property, as can be seen from their

⁹⁶Cornell University, INSEAD & WIPO (2015).

⁹⁷Cornell University, INSEAD & WIPO (2016).

⁹⁸Cornell University, INSEAD & WIPO (2017).

⁹⁹Cornell University, INSEAD & WIPO (2018).

¹⁰⁰Cornell University, INSEAD & WIPO (2019).

¹⁰¹Cornell University, INSEAD & WIPO. (2020).

¹⁰²World Intellectual Property Organization (2021).

¹⁰³World Intellectual Property Organization (2022a).

¹⁰⁴Charter of the Association of Southeast Asian Nations (2007).

membership in a significant number of patent and trade mark treaties, as presented in Table 2. In addition, each member state has an extensive patent and trade-mark legislation portfolio.¹⁰⁵ Analysis by Smith et al. found that “much of the legislation has been promulgated following ASEAN members' accession to bilateral and plurilateral free trade agreements”.¹⁰⁶

Fowler argues that whilst a harmonised and integrated transnational IP enforcement system “may seem a bridge too far”, establishing a regional IP administration should be considered to protect and enforce IP on an ASEAN-wide basis.¹⁰⁷

Table 2. ASEAN Member State Membership of International Patent and Mark Treaties (as of 30 November 2022)

Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
<i>World Intellectual Property Convention</i> ¹⁰⁸									
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Paris Convention for the Protection of Industrial Property</i> ¹⁰⁹									
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	-	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Hague Agreement Concerning the International Registration of Industrial Designs</i> ¹¹⁰									
<input type="checkbox"/>	<input type="checkbox"/>	-	-	-	-	-	<input type="checkbox"/>	-	<input type="checkbox"/>
Geneva Act (1999) ¹¹¹ [of the Hague Agreement Concerning the International Registration of Industrial Designs]									
<input type="checkbox"/>	<input type="checkbox"/>	-	-	-	-	-	<input type="checkbox"/>	-	<input type="checkbox"/>
<i>Patent Cooperation Treaty (PCT)</i> ¹¹²									
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	-	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Madrid Protocol Concerning the International Registration of Marks</i> ¹¹³									
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	-	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i> ¹¹⁴									

¹⁰⁵Smith, Smith & Perry (2023).

¹⁰⁶Ibid.

¹⁰⁷Fowler (2021).

¹⁰⁸Convention Establishing the World Intellectual Property Organization (as amended on September 28, 1979).

¹⁰⁹Paris Convention for the Protection of Industrial Property (as amended on September 28, 1979).

¹¹⁰The Hague Act (1960).

¹¹¹Geneva Act (1999).

¹¹²Patent Cooperation Treaty (PCT) (as modified on October 3, 2001).

¹¹³Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (as amended to 12 November 2007).

Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Source: WIPO (2022)¹¹⁵ and authors.

Discussion

Patent Registrations

At the outset, it is essential to understand the significant differences in the level of innovation sophistication between the Western European and Southeast Asian economies. Tables 3 and 4 provide an overview of IP registrations from 2011 to 2020 for the Western European and Southeast Asian economies, respectively.

Table 3. *Western European Economies - IP Registrations 2011 to 2020*

Country	Patent Grants (2011-2020)		Patents in Force (2020)	Trademark Registrations (2011-2020)		Designs in Industrial Design Registrations	
	Resident	Non-Resident		Resident	Non-Resident	Resident	Non-Resident
Austria	22,373	1,639	159,581	156,702	61,363	28,117	3,113
Belgium	17,380	1,519	209,751	155,309	0	14,601	0
France	171,324	15,569	674,334	546,625	33,332	79,629	41,578
Germany	269,283	47,758	834,734	2,027,976	185,220	605,229	85,996
Liechtenstein	1,525	0	0 ¹¹⁶	1,247	15,148	67	1,469
Luxembourg	3,390	1,663	165,249	49,427	0	6,182	0
Monaco	152	54	109,213	14,934	78,373	293	12,733
Netherlands	43,263	3,017	212,855	331,947	0	36,445	0
Switzerland	39,679	1,987	250,143	332,549	520,612	37,905	78,985

Source: WIPO database updated to November 2021¹¹⁷ with analysis by the authors.

¹¹⁴Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended on 23 January 2017).

¹¹⁵WIPO (2021).

¹¹⁶This value appears to be erroneous.

¹¹⁷World Intellectual Property Organization. (2022b).

What is clear from the data in Table 2 is that the leading Western Europe economies are significant generators of patents, as can be seen by the ratio between resident and non-resident patents. They are also generators of registered industrial designs. The number of patents in force as of 2020 is in the six digits except for Liechtenstein.

Turning to the data of ASEAN members in Table 3, the trend is quite different. All major economies, including Singapore, one of the top ten economies on the Global Innovation Index, register significantly more non-resident patents than resident patents. The major manufacturing economies, namely Indonesia, Thailand and Vietnam, generate more industrial designs than are registered by non-residents. Again Singapore is an outlier where the number of non-resident industrial designs is around six times greater than resident designs.

Table 4. *Southeast Asian Economies - IP Registrations 2011 to 2020*

Country	Patent Grants (2011-2020)		Patents in Force (2020)	Trademark Registrations (2011-2020)		Designs in Industrial Design Registrations	
	Resident	Non-Resident		Resident	Non-Resident	Resident	Non-Resident
Brunei Darussalam	14	147	652	868	19,335	1	738
Cambodia	0	279	0 ¹¹⁸	8,580	50,083	72	315
Indonesia	2,150	25,724	59,394	254,201	169,477	12,924	8,744
PDR Lao	0	27	574	1,147	24,902	0	0
Malaysia	4,554	33,487	31,975	108,757	187,756	5,322	10,694
Myanmar	0	0	0	8,429	6,446	0	0
Philippines	292	20,066	25,715	139,421	205,193	6,992	5,802
Singapore	3,889	54,164	46,640	79,874	362,697	5,724	37,010
Thailand	1,054	20,035	17,306	149,174	174,279	19,039	10,931
Timor Leste	0	0	0	0	0	0	0
Vietnam	958	17,409	12,625	256,796	245,493	11,465	8,968

Source: WIPO database updated to November 2021¹¹⁹ with analysis by the authors.

1.1

In brief, the Western European economies are developers and exporters of IP, whilst ASEAN economies are importers of IP. It is easier for the developers of IP to be part of an Open Innovation ecosystem. This does not preclude the “importers” of IP from also being part of an Open Innovation system. It is just more complex as the parties would probably not be close geographically to interact on a regular basis. The internet assists, but it is not a panacea. Face-to-face interaction is highly desirable.

Open Science

To investigate the open access to information, the authors analysed the SCImago database to ascertain the number of journals indexed in Scopus.¹²⁰ The

¹¹⁸This value appears to be erroneous.

¹¹⁹World Intellectual Property Organization. (2022b).

split between the total number of Scopus-indexed journals and the number of indexed journals listed as Open Access is provided in Table 5 (Western Europe) and Table 6 (ASEAN). The data must be treated with caution as it refers to the place of publication and not the country of origin of the journal. This applies particularly to France, Germany, Netherlands, Singapore and Switzerland, all major publishing centres. Also, the quality of the publications has not been considered. The test has been a simple “yes” or “no”. Nonetheless, the data shows that the open-access publication model is gaining traction in both regions.

Table 5. *Western European Economies – Publications Accepted in Scopus*

Country	Publications	
	Total	Open Access
Austria	93	31
Belgium	145	21
France	563	137
Germany	1,545	320
Liechtenstein	-	-
Luxembourg	3	1
Monaco	-	-
Netherlands	1,971	299
Switzerland	755	336

Table 6. *Southeast Asian Economies – Publications Accepted in Scopus*

Country	Publications	
	Total	Open Access
Brunei Darussalam	1	1
Cambodia	-	-
Indonesia	97	76
Lao PDR	-	-
Malaysia	109	55
Myanmar	-	-
Philippines	24	6
Singapore	172	30
Thailand	70	20
Timor Leste	-	-
Vietnam	2	1

Source of Tables 5+6: SCImago database updated to April 2022 with analysis by the authors.

An interesting case study is that of Indonesia, which is claimed to be a world leader in the number of open-access research journals published.¹²¹ Analysis in a 2020 report found that Indonesia had published 1,717 open-access articles ahead of the United Kingdom and Brazil.¹²² In 2019 the government mandated that research publications be open access so that the public can access and use the research results. Finally, the authors of the report concluded that:

¹²⁰SCImago. (2022).

¹²¹Irawan, Priadi, Muharlisiani, Onie & Rusnalasari (2020).

¹²²Ibid.

The government needs to reduce and even stop the dependence on foreign instruments in assessing the quality of local journals or research, especially if Indonesia already has that instrument. To replace them, the government can use the journal management standard set by international organisations such as COPE [...] The Indonesian government should [avoid] non-inclusive standards such as Scopus and Web of Science. In science communication, exclusivity is one thing that should be avoided.¹²³

Barriers to Open Innovation, Open Science and Open to the World in ASEAN the Economies

There are several conditions precedent for an economy to be part of an open innovation ecosystem, particularly one involving international partners. These are addressed in the following paragraphs.

Membership of International Intellectual Property Treaties: All 11 Southeast Asian nations are members of WIPO, and all except Timor-Leste are members of the WTO. Such membership assists in developing robust IP frameworks and allows members to participate in global registration of certain IP rather than needing to apply country by country.

Excellent to a Very Good Global Innovation Index: Singapore, with a GII consistently in the top 10, stands out among Southeast Asian nations. Malaysia, Thailand and Vietnam are consistently in the top 50 nations. Indonesia and the Philippines are lower, with the remaining four, Brunei Darussalam, Cambodia, Lao PDR, and Myanmar, tending to hover at the lower end of the scale.

Strong domestic IP protection and enforcement regime: The regime in Singapore is robust, while those of the remainder of the economies range from reasonably strong to weak. All ASEAN members see the importance of such a regime and have enacted most of the needed legislation. Enforcement needs improvement across most members except Singapore, where compliance is very high. Capacity development is assisted through cooperation and assistance clauses in Free Trade Agreements with their key trading partners.¹²⁴

Strong Manufacturing Sector or a Strong Knowledge Economy: Only Singapore can claim to have a strong knowledge economy, as can be seen from its status as being regularly in the top ten countries on the WIPO Global Innovation Index (GII). The other economies would need to leverage off a robust manufacturing sector or a mix thereof. At this stage, Malaysia, Thailand and Vietnam would also appear to meet this condition.

Open Science: This is particularly hard to measure. Generally, researchers are free to publish in a journal of their choosing. As noted above, the Indonesian government is encouraging the publication of research in open-access journals. At the same time, the number of open-access journals is increasing.

1.2

¹²³Ibid.

¹²⁴See for instance: Smith, Smith & Perry (2023).

1.3 Conclusion

The “Open Innovation, Open Science, and Open to the World” paradigm, as being tested in the European Union, appears to be a viable concept that could also be trialled in Southeast Asia. Unlike in the European Union, it would not be possible to trial it as an activity of ASEAN. Rather, it would have to be tested out by individual members. Interestingly all the Southeast Asian nations are importers rather than intellectual property developers. This will make the development of an open innovation ecosystem more challenging, but it is considered that this disadvantage could be readily addressed.

The “Open Innovation Open Science and Open to the World” paradigm would be viable in Singapore and probably viable in Malaysia, Thailand and Vietnam. The key is to convince the governments to provide a rigorous legislative platform and the various partners to see the advantages to be achieved from the open innovation ecosystem, and create nuanced frameworks that can fit in with the international IP protection regimes.

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Labour Law: New Workplaces in the Metaverse and Opportunities for Cultural and Heritage Professions

*By Roberta Caragnano**

The authoress will analyse the impact that the metaverse has and will have on the labour market, with a focus on the employment relationship, in the scenario of transitional (labour) markets that face several issues closely related to technology and digital. Microsoft's investment of nearly \$70 billion in 2022 on the metaverse, along with investments by Google and Epic Games and large groups such as Gucci, Nike and Walmart - to name a few - represent the tip of the iceberg of a process that is already well underway and in which we are all involved. On the one hand, the interaction of different elements of cyberspace – used to generate immersive experiences in augmented reality through the combination of physical and digital aspects of life, three-dimensional technology, the Internet of Things, and personal avatars – may represent a form of welfare. On the other hand, the legal issues are different both with respect to aspects that are more typical of digital/technology platform property law (to give an immediate example) and with respect to the issue of blockchain-supported platforms and the impact of the metaverse on the "workplace," which we are specifically interested in. It is necessary to delve into the different issues that arise in the Italian legal system. Such issues include both the status of the worker with the applicable discipline (whether framed under the discipline of transnational posting or falling under the discipline of the relationship with elements of internationality set forth in the Regulation (ec) no 593/2008 of the European Parliament and of the Council of 17 June 2008 of the Rome Convention on the law applicable to contractual obligations (Rome I)) and labour control. Moreover, issues related to the protections provided in the Italian Workers' Statute (Statuto dei Lavoratori), not excluding psychosocial risks, must also be investigated. Another issue to focus on is contractual distancing. The status of the worker in the Metaverse is that of one who sits at a virtual desk in front of a virtual keyboard and screen for completely virtual work performance. Likewise, effects of social dumping arise in light of a possible labour crowdsourcing problem in Countries where labour costs are low. On the labour front, the questions that will arise are: what employment regulations and contracts will have to be applied to such professional activities? And what kind of new job profiles will emerge? Lastly, ethical questions also surface regarding the system of rules as well as the algorithms that will have to administer the labour market in a scenario in which human and artificial intelligence will have to coexist and contaminate each other. Further enquiry will be presented on the need to manage human capital and its strictly related impact on human resources to avoid social inequalities and discrimination.

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Finally, the impact on new job profiles and opportunities for cultural and heritage professions will be analysed.

Keywords: *Labour law; Labour market; Metaverse; Health & safety; Heritage professions.*

Introduction - Background and Problem Location: Metaverse and Labour Market Impact

Today, the scenario of transitional labour markets faces several issues closely related to the world of technology and digital. This scenario imposes a study that is not only and solely concerned with high-tech but embraces a number of aspects inherent to the direct and indirect impact on labour and job performance.

Microsoft's investment on the metaverse of nearly \$70 billion in 2022, along with investments by Google and Epic Games and large groups such as Gucci, Nike, Walmart - to name a few - represent the tip of the iceberg of a process that is already well underway and in which we are all involved. Suffice it to say, Facebook itself has changed its name to "Meta," and today the virtual reality of the metaverse is being used in marketing (including experiential marketing), education, engineering and manufacturing, real estate, etc.

On one hand, the interaction of different elements of cyberspace to generate immersive augmented reality experiences through the combination of physical and digital aspects of life, three-dimensional technology, the Internet of Things, and personal avatars may represent a form of well-being. On the other hand, the legal issues are different both with respect to more typical aspects of platform property law (to cite a more immediate example) and with respect to the issue of blockchain-supported platforms and the impact of the metaverse on the workplace.

Microsoft itself is experimenting with projects that can combine the mixed reality of Microsoft Mesh (a platform that allows people to connect with a holographic presence, share space, and collaborate from anywhere in the world; a demonstration video can be viewed in the following link <https://learn.microsoft.com/it-it/mesh/overview> with Microsoft Teams technologies, enabling participation in virtual meetings. The goal is to create a more interactive and collaborative work experience for remote workers while supporting remote users and hosting immersive virtual meetings to increase productivity.

In 2021, Microsoft, in its first step toward merging the physical and digital work worlds, has begun implementing a plan to allow workers to appear as avatars in its Teams collaborative software. Additionally, the Hilton Hotel Group, for example, is resorting to such technology to train staff for guest management.

By resorting to technology, it will be possible to give human features to artificial intelligence (AI) so as to transform chatbots typical of current websites into real interactions with "front office info points" guided by AI agents.

However, this all raises several issues both on the status of the workers (seconded or not) with their applicable disciplines and on labour control. There are also issues related to the protections provided in the Workers' Statute, acknowledging psycho-social risks.

Moreover, legal questions also arise regarding applicable law. For example, in the case of a platform: Is it the applicable internet law or the law of the EU Member State where the company owning the platform is based, or the law of the State where the server is located? What happens in the case of shared platforms?

Then there is also the question of the security of personal data that companies collect as well as that of their workers¹.

On the labour front, what employment regulations and contracts will there be to apply to such professional activities?

Finally, ethical questions also arise about the system of rules, as well as algorithms, that will be needed to govern the labour market in a scenario where natural and artificial intelligence will necessarily coexist and co-contaminate. Such ethical questions include how human capital will be managed while forfending social inequalities and discrimination.

Labour law, at this time, is governed by a national "physical" legal system in different States, subject to international standards and EU law.

Findings/Results

Early Trials of the Metaverse in the Workplace

Currently, experiments of the metaverse in real workplaces are scarce.

To facilitate the interaction and make it usable in the metaverse, Meta Quest Pro was launched in workplaces; a range of visors dedicated to the world of professionals, such as designers and contact creators.

In this direction and to experience real 3D virtual realities, large groups are taking action with significant investments to start more and more concrete and real experiments in the workplace. It will certainly be interesting to monitor the results. In 2023, Zoom will interface with Horizon Workrooms to have avatars equipped with "legs" to unify the side-by-side of real and immersive space.

In Italy, some companies are starting much more simple experiments. In the Veneto region, a company near Verona has announced that it will cease travels for company meetings. They will replace the physical presence of employees with avatars, moving and interacting in various ways in the virtual meeting, the main goal being to reduce environmental impact.

Crédit Agricole, moreover, is experimenting job interviews with avatars in the metaverse with the ability to interact with other people present.

PwC Hong Kong purchased a 3D virtual world (created by Animoca Brands) in December 2021 to create a 3.0 web consulting hub; the goal is to enable the growth of a new generation of professional services, particularly those related to accounting and taxation in the metaverse.

In the United States, virtual military training is currently being experimented. The company Red 6 is developing technology that allows a fighter pilot to operate much more realistically than a conventional flight simulator. To date, there are already advanced systems in the military world, such as the high-tech helmet on

¹Heller (2020).

the new F-35 fighter aircraft, equipped with an augmented reality display that shows telemetry data and target information, as well as footage taken around the aircraft. Additional investments are being funded in increasingly advanced military systems.

Academia is also at work studying the effects of working in virtual reality over the long term compared to the same activities in the real world. Eighteen employees (volunteers) from a few European universities (including Germany, Slovenia, and the United Kingdom) were asked to spend five 8-hour days in the virtual classroom, after which they repeated the same test by physically returning to the university lecture halls.

The results were not inspiring, considering two participants dropped out after a few hours, suffering nausea, anxiety and migraine. Others experienced a range of stressors such as frustration (42 percent) and eye fatigue (48 percent). There was also an objective drop in productivity of 20 percent measured between a week spent in the metaverse and a week spent in real life.

Overall, this study helps lay the groundwork for future research on the metaverse, highlighting current shortcomings and identifying opportunities to improve the virtual reality work experience.

Also in Academia, one dissertation has already been discussed in the metaverse at the University of Turin; one student used an avatar of himself to illustrate his paper to professors.

Discussion

Europe's Position on Work Relationship and Workplace: Legal Implications of the Metaverse

Given the above premises, it is clear that the topic of the metaverse raises several legal issues that imply a paradigm shift, not only of the new approach of daily life both for citizens and business, but also in the diverse world of law: From the role of digital platforms up to privacy with immediate impact, issues that affect labour law and employment law.

Clearly, labour law as it stands today, is regulated by national legal systems in the different States, without prejudice to international standards and EU law.

At the European level, institutions have been observing the topic of work and digital platform. In 2019, the European Parliament published a draft report². Concurrently, the ILO's Global Commission on the Future of Work has also called for the establishment of a Universal Labour Guarantee, applicable to all workers (ILO, *Work for a Brighter Future - Global Commission on the Future of Work*, 2019) although progress on this strategy has been relatively modest thus far.

More recently, in April 2021, the European Commission published its first draft Proposal for a Regulation on Artificial Intelligence (hence: AI Act)³ having the aim of ensuring consistency between existing Union legislation applicable to

²European Parliament (2019).

³European Commission (2021).

sectors where artificial intelligence systems are growing, particularly high-risk sectors⁴.

The document opens in Sect. 2 with the scenario of EU labour law influencing the development of AI systems used on employees. It addresses the possible consequences expected for those who provide AI systems (i.e. suppliers). It particularly covers the areas where EU labour law and AI overlap by analysing it from the employer's side.

Overall, the draft's perspective is an attempt to analyse and propose hypotheses and solutions for both organising work and managing workers. The process will undoubtedly generate an impact on both the EU and national labour law systems.

The text devotes considerable attention to the issue of discrimination prevention among Member States' legislations. It also considers EU law on occupational health and safety, envisaging harmonious solutions of the law.

The topic of metaverse and the impact on the employment relationship and workplaces cannot be separated from the other macro-topic of digital platforms, also at the attention of the European Commission. On December 9, 2021, it launched a legislative proposal, on the one hand, with the objective of reforming and improving the conditions of workers and, on the other hand, of supporting the sustainable growth of platforms and ensuring their legal certainty. Central in this regard is the proposed hypothesis of a directive that could focus attention on the employment status of platform workers and propose new rights for individuals, managed through algorithmic technology.

However, this does not exclude the possibility of envisaging, hypothesising and proposing a part of the analysis of the employment relationship through Artificial Intelligence, even the most problematic aspects with regard to the role of the traceability of work on platforms.

Labour Relations in the Metaverse: What Regulatory Patterns

It is now clear that the world of the metaverse generates a series of legally relevant relationships and working relationships established through digital platforms⁵ and with avatars. They, however, are and/or will be dissimilar to the traditional normative patterns of contractual institutions.

This is particularly true regarding new work patterns, such as ICT-based mobile work and digitally enabled forms of self-employment. Such new work patterns are taking hold around the world alongside non-traditional or non-standard forms of work which, as such, are not fully subsumed under the regime of full-time, permanent employment within the framework of a salaried and bilateral work relationship⁶.

Back to the present day, then, with even more specific variables, the theme of digital nomads will continue to be increasingly immersed in a decentralised digital

⁴Todolí-Signes (2021), who may be the first already in the near future to experience its effects; Wood (2021); Kullmann & Cefaliello (2021).

⁵ILO (2021); Graham, Hjorth & Lehdonvirta (2017).

⁶Pabollet et al. (2019); Stephany (2021); ILO (2016).

workspace. In this scenario, workers may be itinerant and geographically disconnected from each other and from the company for which they work.

Focus Italy: Categories of Employment and Labour

Italian law has a very structured discipline of worker protections (just think of the provisions contained in the Statute of Workers). There is a plethora of issues regarding the type of contract, legal issues and the emerging scenarios. This is similar to what happened years ago with the sharing economy and the phenomenon of "Uber". Precisely regarding the type of work, consider the possibility of multinationals increasing surveillance on the avatar worker by disguising self-employment⁷.

This would imply an improper classification of workers which would open the door to a nuanced scenario in which a variety of legal schemes could take hold. Perhaps they could even occur somewhere between employment and self-employment. Not only is the locality of work service performance virtual (a digital platform), but so is that of the provider.

The issues, in fact, could be far-reaching. If the case in the metaverse has many elements of contact with remote working (also regarding the discipline of surveillance), it also appears to be framed as a mode of performance of work whose choice would be voluntary. Conversely, it is not inconceivable that the Legislature could hypothesise the introduction of a new intermediate category of classification of labour relations, without prejudice to the division between the two broad categories of self-employment and salaried⁸.

In the aforementioned hypothesis about the aim of safeguarding workers, avatars operating in the grey area between autonomy and subordination, for example, some regulatory institutions on subordinate employment could be applied to such avatar workers if three specific characteristics are met: personality of the performance, continuity of the performance and hetero-organisation.

Hence the importance of defining the qualification of the contract type, since this also affects the termination of the employment relationship: Consider what happened regarding riders⁹.

The issue, then, is to be prepared in law by assuming a possible regulatory vacuum.

If to this end, then, the payment of wages in cryptocurrency, yet another feature of the metaverse, were to be added, the problem on the applicable law will become even more concrete. There will also be more confusion on the employment status of the worker and his/her protection, on the qualification and regulation of labour relations, as well as the difficulties of the current body of law to adapt and shape itself with respect to completely innovative cases. On this point, it should be noted that the use of cryptocurrencies as a method of remuneration for one's contracts and, in particular, the use of one's own cryptocurrency (with its blockchain) created specifically for this purpose could be a practical solution.

⁷Tullini (2020); Bozzao (2022).

⁸Ballestrero (2020).

⁹Carrà (2022).

Worker Secondment or Contract with Elements of Internationality?

A first topic of attention from a legal and doctrinal point of view concerns the applicable law and contractual distancing in the case of an avatar working in a metaverse, virtual workspace at a virtual desk with a keyboard and screen. The employee carries out work in completely virtual activity ¹⁰.

Returning to the employment relationship, then, there is the question of which rules apply in the Rome I Convention (which replaced the 1980 *Rome Convention on the law applicable to contractual obligations*): The rules on transnational posting or the rules on contracts with elements of internationality?

The transnationalisation of labour relations, in fact, raises the question of the law applicable to the relationship itself. There are two hypotheses. In one, the metaverse workplace with a virtual avatar could be framed in the case of transnational posting, given that the performance of the avatar employee is configured as a temporary (seconded) provision of services by a company established in a country other than that of the performance itself. This prerequisites the need to resolve the question of the national law applicable to the employment relationship of workers under transnational posting by finding a discipline compatible with the Rome I Convention. In the other hypothesis, the posted discipline that could be disqualified is not clearly defined: It may be abusive or fraudulent, or perhaps does not meet all the conditions. Consequently, the general rules for disciplines of the Rome I Convention would apply.

It follows that from the standpoint of the potential problem of social dumping, such as from labour crowdsourcing¹¹, and in terms of applicable law, there are looming issues that deserve attention from the EU and national legislatures necessitating structured legislation.

Just as happened during the pandemic with smart working (years before, that issue had arisen with respect to telecommuting), this may have a direct impact on reducing business costs. Conversely, it may represent a fertile ground for access to an outsourced workforce in States where wages are much lower and, consequently, where there is weak labour and worker protection. A problem of labour crowdsourcing in countries where wages are lower cannot be ruled out.

The "Control" of the Worker: Surveillance

The digital transformation of work resulting from increasingly invasive technology, entails an increase in the opportunities for remote control of workers¹². Notably, if each new technology facilitates communications while also improving their quality, there is no shortage of critical issues. Work in the metaverse precisely affects the discipline of controls¹³, similar to what happened with agile work. The problem that arises is, therefore, the balancing of opposing interests.

¹⁰Dhondt, Oeij & Pot (2021); Baldwin (2020); Pizzoferrato (2021); Mainardi (2020).

¹¹Donini (2015).

¹²Zoli (2016); Ricci (2016); Forlivesi (2017); Rocchini (2019).

¹³Zuboff (2019); Spinelli (2018); Bellavista (2019); Ingraio (2021).

The discipline that would find application in Italy is Article 4 of the Workers' Statute and the general prohibition of remote control of workers' activities to respect and guarantee their personality, moral freedom and dignity, in conjunction with other norms of the system¹⁴. These include the provisions of the Code for the Protection of Personal Data (as amended by Decree No. 101/2018). In addition, recalling that Art. 114 precisely notes the prerogatives of Art. 4 of the Workers' Statute, Art. 115 of the same (Code) makes reference to teleworking, agile work and domestic work. It conditions the employer's obligation to guarantee respect for employee personality and moral freedom, while the employee is obliged to maintain the necessary confidentiality for everything related to family life.

The reference, now, is to agile work, considering that to date the metaverse has many elements of contact with the mode of smart working. Therefore, it is believed that the cases being analysed are similar.

It follows that also for work in the metaverse it will be necessary to focus on:

1. Exercise of employer powers in accordance with legal limits, albeit through digital tools and digital workers (avatars);
2. Limitation of working time and disconnection. On this point, it should be noted that the regulation of agile work stipulates that it may be carried out in compliance with the maximum daily and weekly duration limits provided for¹⁵; for convenience, reference can be made to the temporal correlation with normal working hours. It follows that an initial issue to reflect upon is not only that of doctrine and jurisprudence, but also with the Legislature, the reconciliation of the system of operation of the metaverse work model with the regulatory paradigm on remote control.

The application of Article 4 of the Workers' Statute *prima facie*, in fact, appears to be out of date due to the way the norm is formulated. Hence, applying the current regulatory framework of controls to these innovative and changing forms of remote work, and in the metaverse mode, is anything but easy. It appears difficult to identify a dividing line between the area of remote controls susceptible to prior authorisation and that of monitoring work technologies that, for justified business reasons, are exempt from constraints and considered legitimate *ex se*.

Given these premises, the question must be asked whether or not it is necessary to consider a new lineage of the Workers' Statute. Isn't it time to re-think the Workers' Statute, a project that has remained unfinished¹⁶?

¹⁴For a literature review on the latest changes in the discipline by Art. 23 of Legislative Decree No. 151, September 14, 2015, and subsequently by Art. 5, paragraph 2, Legislative Decree No. 185, September 24 (2016) see: Sartori (2020); Bellavista (2016); Del Punta (2016); Maresca (2021); Proia (2022); Lambertucci (2016).

¹⁵Bavaro (2018); Levi (2019).

¹⁶See Biagi & Tiraboschi (1997-1998).

Health and Safety in the Workplace

There may be advantages of the possibility of sharing a room with both colleagues and an avatar present, such as bringing together senior managers and operational staff to forge links. To date, however, this has been impossible through a screen. Still, sharing a room may also give rise to problems regarding health and safety aspects, without prejudice to the effects inherent in the organisational structure, which will be examined later.

First, it will be necessary to assess the relationship is and the effects are in cases where, in one workplace, there are both individuals and avatars. In the case, for example, of a plant with in-person workers and avatar workers, what happens if they encounter each other and injuries occur?

For the moment, we can consider as a model already tested with concerts that have been started in the mixed mode. In such typologies, however, it is not clear if they can be assimilated to workplaces tout court. Therefore, with respect to the current knowledge regarding the impact of the metaverse on workplaces, from a labour law perspective, it seems arduous to make long-term predictions considering both the unstoppable technological evolution of the devices and the countless fields of application.

To date, the use of avatars has been experimented on with respect to multidisciplinary prevention projects in the workplace. One such example is “Albo” of the Department of Law and Political, Economic and Social Sciences at the University of Eastern Piedmont. Albo decided to analyse all the critical issues related to worker safety by recreating different types of work environments by taking advantage of virtual reality and avatars to make Simulation videos in which dangerous situations are shown.

However, from an ergonomic point of view, working in the metaverse may have elements of advantage over current smart working. In the aforementioned latter case, it is true that there is a prevailing element of flexibility-allowing workers to move from their home location to the office, from the café to other places. At the same time, this may also have negative effects from an ergonomic point of view, compared to working at a workstation that complies with a whole series of requirements in line with the provisions of the Occupational Health and Safety Consolidation Act (for example, of poor posture).

The advent of VR and AR technologies will allow the avatar worker, for example, to use different virtual screens, arranged in exactly the way he or she prefers, as well as to have a virtual keyboard to be called upon as needed, with alerts and notifications turned on or off as needed. One will be immersed in a kind of limitless office as within fully immersive VR environments such as those offered by Oculus Quest 2.

There is also the concern of people's psychological safety that could be strengthened or consolidated in virtual environments. Understandably, it would be good to consider whether the use of such technology could be in the first place on a voluntary basis (along the lines of when it happened previously with traditional smart working). Then, leaders could consider the use of such technology as an accompanying tool, which in any case would not replace the relationships that are

created between people in a traditional work environment. The issue of health and safety is central to workplaces in the metaverse both because of the implications related to new cases of work-related stress, depression and anxiety (which could be caused or exacerbated by remote work, noting that the metaverse is essentially an extension of remote work) and because of the premise of VR sickness i.e., the feeling of nausea that arises from overly prolonged exposure to virtual reality.

Hence, in Italy, the advisability exists of also evaluating an update of the provisions of the Consolidated Occupational Health and Safety Act (Legislative Decree No. 81 of April 9, 2008, and ss.mm.ii).

Conclusion

How Personnel Management in the Company is changing: Selection and Training Processes

Personnel management will be significantly impacted in employment relationship management, assessment, and in the reward phase. Besides that, it will also be significantly impacted in the phase preceding and preparatory to recruitment selection, as well as in overall assessment, reskilling and upskilling activities.

On the one hand, recruiting companies will have to convert to technology companies with platform-based approaches to online recruitment and selection and perhaps acquire or merge with traditional recruiting companies operating in high-volume markets. On the other hand, the HR areas of companies will have to equip themselves first and foremost to strengthen their areas/divisions and to train staff on the use of the metaverse. This will come through retraining of corporate resources as well as through the use of professionals (including external ones) to provide training in an area in which new professional figures will emerge as specialised designers and engineers.

This scenario will tend toward systems in which companies will increasingly seek talent (from anywhere in the world) and will have to adopt much more flexible labour policies to retain and hire new professionals, including outsourced ones.

The aspect of employee training in the metaverse, though, could have significant positive implications. Notably, the same (training) through an immersive mode can be more effective than through an e-learning mode. It thusly impacts on the fruition of training content even for the harder forms of training, such as the acquisition of skills (using, for example, the tool of 360-degree viewers) to bridge gaps.

This aspect is of interest, for example, in professions such as the medical professions not only for continuing education profiles, but also for the performance of activities. Think, for example, of surgical residents from anywhere in the world who could/will stand alongside a major heart surgeon while performing an operation.

All this will affect policies as well as the provision of professional profiles, e.g., ambassadors with the task of organising meetings with experts in the field and updating teams on new developments.

Not only that, but companies' policies will need to be adjusted with respect to the automation of processes to adapt to new business models as well. On the more specific front of human resource management, policies will need to be adjusted by identifying algorithms capable of bringing together aspects related to human intelligence with those of artificial intelligence (AI) both in relation to the selection of candidates and to their evaluations, including in career plans. Ethical questions arise in the background about the system of rules as well as algorithms¹⁷ that will have to govern the labour market in a scenario where natural intelligence and that artificial intelligence will inescapably coexist and co-contaminate, and about how human capital will have to be managed.

Algorithms¹⁸, therefore, alongside the protection and privacy of workers' data, (which will not be analysed here), will face the challenge of building ethically sustainable models both to preserve human uniqueness and characteristics, and to avoid discrimination¹⁹.

Hence, it follows that there is an immense investment by both governments and institutions as well as companies, in particular R&D areas/divisions to govern change and social responsibility, always having the protection and welfare of employees as an objective.

Regarding career plans, avatar workers should be guaranteed by specific contractual clauses, such as to allowing career advancement and growth in the company in a coordinated manner without creating discrimination. Noting that the metaverse will change the business models of companies, the effects will also be on organisational models and management tools and may also affect the inherent part of platforms and software to be used for payroll payment, for example in cryptocurrencies. If one considers that a company based in one State may have employees, avatar workers located in several parts of the world, and according to the current regulations should be subject to multiple social security and taxation regimes, it is clear that the provision of a single system/platform that can act as a Single Registry could represent a simplification, compared to the current management. This is without prejudice to the fact that there is still a problem related to the fiscal and taxation aspects of labour law as well, which should be addressed in a unified way and shared by the States, perhaps with a sort of so-called "cloaking" discipline.

On the hierarchies front, the advent of the metaverse should result in a reduction of those abovementioned aspects. Several studies²⁰ show that the potentially equality of team members interacting in a virtual environment is such that it provides individuals with a less pervasive presence than in real life. Efficiency grows in relation to the construction and determination of goals and leads to an increased sense of motivation. It follows that virtual environments

¹⁷Adams-Prassl (2020); Jarrahi, Newlands, Lee, Kinder & Sutherland (2021).

¹⁸De Stefano & Aloisi (2020); Dagnino (2019).

¹⁹Kullmann (2019); Prince & Schwarcz (2020); World Economic Forum (2018).

²⁰Watson-Manheim, Chudoba & Crowston (2012); Ducheneaut, Moore & Nickell (2007).

can serve as mitigators and/or levellers of hierarchies, with the effect of consequently promoting social and professional interactions that are inherently characterised by equality, openness, and the absence of predetermined positions.

Besides that, space-sharing or rather more democracy in terms of space and physical presence could reduce distances (for example, the division of rooms reserved for management, usually on other floors where board meetings are held; the physical distance between headquarters and operations; also the separation of production departments from sorting centres and so on) and improve corporate culture.

New Job Profiles and Opportunities for Cultural and Heritage Professions

As anticipated in the opening paragraphs, this essay aims to promote the study of the research strand of the welfare of the heritage, and to support and monitor the work of the Assembly of “Gli Stati Generali del Patrimonio Italiano” (The States General of the Italian Heritage), taking place on May 20, 2021. The Assembly 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 lies 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 truer in an historical moment such as the current one, in which investments for recovery are at the centre 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). The Plan views Italy as the main character in a project of reforms to increase the sustainability of its 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 already started strengthening specific interventions, such as the Strategic Plan “Major Projects Cultural Heritage” whose aim is to boost the competitiveness of Italy with interventions and investments on assets and sites of great interest and national importance. These are necessary and urgent for implementing organic projects of protection, redevelopment, enhancement and cultural promotion, in order to increase the supply and demand for use/cultural fruition²¹.

This Plan, launched step-by-step from August to December 2020, brings culture and tourism together 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 digitalisation front and with innovative investments. For example, unique in Italy with Hevolus Innovation

²¹See MIC, General Secretariat, Strategic Plan for Major Cultural Heritage Projects.

(an international company, specialising in research and development of innovative business models for a phygital customer experience) experimentation is being conducted to attain historical and artistic heritage. This partnership also generated the implementation of the project for the HoloMuseum of Castel del Monte (in collaboration with Infratel Italia and Microsoft Italia) to enhance culture, the use of digital, and to offer visitors fruitful innovative experiences while expanding the (cultural) opportunities and relaunching tourism.

Therefore, a broad vision based on 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 anew, 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) The aim is to intensify the specificities/details/peculiarity related to the heritage, in order to reach a systematic cognitive survey of the sector, with a consistent, multidisciplinary and transversal approach as well as a participatory method.

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 is accomplished bearing in mind the central role of fundraising, patronage and sponsorship in favour of Italian heritage.

The model is a new governance of heritage that networks and allows the dialogue between the different souls and minds of the players in the cultural heritage, both public and private. Universities and banking foundations are also already actively involved in cultural projects, ensuring a strategic convergence for an integrated management of the different projects.

To cite some examples in this regard, in 2021 the Cariplo Foundation alone has allocated 140 million euros for Arts and Culture. The moneys go towards identifying new forms and versions of cultural participation as well as management and the demand for organisation. This reaffirms the central role of culture as a vital element for the social and economic growth of the community, identifying strategic assets necessary for the restart of sites and activities: the proximity, for a renewed involvement of the public and creativity for the rethinking of the production and organisation of cultural initiatives²².

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

²²Fondazione Symbola (2021).

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 the needs of the territories in order to grasp the specific contribution of each activity in the formation of the added value and of the employment of the sector as well.

A shared path between the stakeholders and the actors of the system/apparatus for the search of a new collective identity is configured as a “Journey of knowledge” based on the exploration of places, social and cultural contexts, the animus of man living 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.

This is a project that aims to initiate a continuous, open and shared front (with many voices) on the topics of interest and to lead to the definition of a “Strategic Plan of Italian Heritage” containing proposals for policy, promotion, development and enhancement of Italian heritage. This vanguard is shared and supported by the bodies and organisations operating in the sector that can make, 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 economic revitalisation that aims to create employment and employability policies, simplifying and stimulating public-private partnerships and the integration of companies in the sector, while also easing the exchange and transferability of best practices.

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The Right to Dress in International Law as a Right in itself and as a Parameter on the Ridge between Freedom of Expression and Prohibition of Discrimination

By Agostina Latino*

The right to clothing is part of the panoply of human rights recognised by international law and is part of the broader right to an adequate standard of living guaranteed by the 1948 Universal Declaration of Human Rights. However, in the transition from abstract normative predictions to the identification of the concrete content of this guarantee placed to protect the human person (both in its function of mere protection of the body from the elements, but also, and perhaps above all, to communicate and obtain information on their social position), it is as if its exact substance dissipates. This article proposes, first of all, a diachronic reconstruction of the right to clothing in international instruments and in the practice of the bodies in charge of monitoring them. Secondly, it focuses on how this right is closely connected to freedom of expression in relation to the prohibition of discrimination on the basis of the clothing worn - especially if indicative of belonging to a group, inter alia ethnic, religious, or social. It concludes with brief critical notes and reconstructive insights into these two delineations of the right to clothing.

Keywords: *Right to Clothing; Freedom of Expression; Discrimination*

Introduction

The right to clothing is part of the panoply of human rights recognised by international law and is part of the broader right to an adequate standard of living guaranteed by the 1948 Universal Declaration of Human Rights which, in Article 25, states: ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, *clothing*, housing and medical care and necessary social services [...]’.¹

Furthermore, the connection between dignity and clothing is rooted as far back as the Bible: The shame for their own nakedness felt by Adam and Eve, and

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¹*Italics added by the authoress.*

the gift of clothes given to them by God² may be recalled by way of example in Exodus³, and Proverbs⁴.

Indeed, if the lemma 'clothing' is always present in the doctrinal studies on the international instruments that contemplate this guarantee in the framework of a dignified standard of living, it is as if the right to adequate clothing dissipates in the analytical exegesis of the provisions in question⁵. Actually, though, almost all of the scientific literature concentrates its studies on other profiles of the 'sufficient standard of living' such as, in particular, the right to food, housing and health. This oblivion to clothing is disconcerting, given the obvious importance that clothing has for human well-being. In its triple declination, attire is a necessary element, firstly, for the protection *tout court* of each individual (*i.e.* for its protective function against climatic and environmental conditions)⁶, secondly to the social sphere (precisely because what one wears is one of the most obvious markers of extreme poverty and hence of the lack of a dignified life)⁷, and finally, for specific guarantees depending on the context (think, most recently, of individual protection devices in the pandemic scenario)⁸.

In this paper, the right to dress will be examined from a legal perspective both as a right in itself in the international legal order, and as a right closely connected to freedom of expression in relation to the prohibition of discrimination based on attire – especially if indicative of belonging to an ethnic, religious, social, etc. group. In the conclusions, brief critical notes and reconstructive insights into these two strands of the right to clothing will be drawn.

The (Neglected) Right to Clothing in International Law

As already mentioned, the right to clothing has been present in the catalogue of human rights since the Universal Declaration of 1948, a real starting point in the history of human rights in the context of the international legal system which, from that moment, began precisely to recognise, promote and protect human persons beyond their connection or otherwise to a State entity. In the supra-State scenario, the right to clothing is also recognised by Art. 11.1 of the 1966 International Covenant on Economic, Social and Cultural Rights, according to which: “The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, *clothing* and housing, and to the continuous improvement of living conditions

²“For the man and his wife the Lord God made leather garments, with which he clothed them” – Genesis 3:21.

³“And make holy robes for Aaron your brother, so that he may be clothed with glory and dignity” - Exodus 28:2; " And for Aaron's sons you are to make coats, and bands, and head-dresses, so that they may be clothed with glory and dignity" - Exodus 28:40.

⁴“She is clothed with strength and dignity” - Proverbs 31:25.

⁵James (2008).

⁶Hartmann (1949).

⁷Kaiser (1990).

⁸Graham (2022).

[...].”⁹ Indeed, during the formative debates influencing the drafting of this International Covenant, “clothing was considered imperative”¹⁰.

Thus, Article 25 of the Universal Declaration and Article 11 of the Covenant of '66, one soft, the other hard law, trace what can be considered the genetic code of the welfare state and of the entire human rights political agenda aimed at ensuring an adequate standard of living for each human person.

This approach has been consistently taken in subsequent instruments concerning the rights to be guaranteed to particularly vulnerable categories of individuals. Suffice it to recall Article 27.3 of the 1989 United Nations Convention on the Rights of the Child, which *maintains*: “States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, *clothing* and housing”.¹¹ Or even Article 28.1 of the Convention on the Rights of Persons with Disabilities of 2006 according to which: “States Parties recognise the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, *clothing* and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realisation of this right without discrimination on the basis of disability”¹². Again, the International Labour Organisation's Social Policy (Objectives and Basic Standards) Convention C117 of 1962 provides in Article 5.2 that “In ascertaining the minimum standards of living, account shall be taken of such essential family needs of the workers as food and its nutritive value, housing, *clothing*, medical care and education”¹³.

As can be seen from this rapid overview, the right to clothing in international law is framed in the broader sphere of the adequate standard of living whose individual elements, although presented one after the other as the links of a chain, should rather be understood as spokes of a wheel converging towards the centre, with equal dignity and importance. However, the right to clothing is instead almost completely ignored: The few authors who have dealt with the issue, all of them just really fleetingly, limit themselves to stigmatising how an analysis of the practice of the Reports of the Committee on Economic, Social and Cultural Rights (hereinafter CESCR) reveals “[t]he impression [...] that clothing is not a matter in which the State may exercise a great deal of control, nor one that the Committee feels is of great importance”¹⁴, or anchor the right to clothing to the peculiar conditions of certain categories of individuals. Relevant in this regard are refugees, for whom “appropriate clothing’ translates to clothes suitable for the climate and the work they do in the host State, as long as such clothes do not stigmatise them as foreigners, as this could encourage discrimination”¹⁵, in order to reduce their

⁹*Italics added by the authoress.*

¹⁰Saul, Kinley & Mowbray (2014).

¹¹*Italics added by the authoress.*

¹²*Italics added by the authoress.*

¹³*Italics added by the authoress.*

¹⁴Craven (1995).

¹⁵Hathaway (2005).

“occupational accidents”¹⁶ or otherwise to ensure them “a decent living for themselves and their families”¹⁷. Regarding the disabled, clothing is viewed as such that they can “function fully and effectively in society.”¹⁸ The elderly must be guaranteed “the access to adequate and appropriate clothing.”¹⁹ As for minors, the Committee on the Rights of the Child emphasises in its responses to the Reports of States Parties, such as Tanzania, Haiti, Mozambique, Uganda, that rights must “provide adequate clothing to homeless children and to orphans living in government institutions”²⁰.

However, it is not made clear what specific obligations fall upon the State party to the Conventions that include the right to dress, nor how the right to adequate clothing is to be articulated, *i.e.* whether it should be concretely translated in terms of norms, policies and actions. Put another way: beyond the emphasis sometimes used to underline the importance of the right to clothing within the framework of human rights basics, this guarantee seems to consist of a mere rhetorical exercise, although it is evident that it is not enough to enunciate it in order for it to take on urgency and be immediately applicable.

Thus, some authors, with concern for the practice of the CESCR, state that in fact, clothing was only brought up in the early sessions “as if the committee was itself trying to work out what the content and meaning of the right might be in practice.”²¹ Consequently, the supposedly equal place of the right to clothing “within the context of securing an adequate standard of living under Article 11 is somewhat belied by the practice towards the right to clothing”²².

Nor does the explanation put forward by the *Icelandic Human Rights Centre* seem convincing. According to this, “because of the variations in cultural clothing needs and wants, the right to adequate clothing is probably the least elaborated of all the components of an adequate standard of living”²³. In the writer's opinion, this interpretation cannot be shared because even housing, health or food are also differently defined on the basis of cultural, economic, or environmental variables. Nevertheless, this has not prevented their detailed and analytical elaboration in international law.

The legal parameter that could be used to give concreteness to a vapid right is that of necessity in the real and determined situation. Undoubtedly, clothing is closely connected to the physical and psychological well-being of the individual, since clothes unsuitable for the climatic and environmental conditions could even lead to exacerbating consequences. Therefore, the matter of the right to adequate clothing will have to be assessed on a case-by-case basis. More simply stated: it will not be one-size-fits-all, but will have to be tailor-made, *i.e.* calibrated to each individual and actual peculiar situation.

¹⁶CESCR (2000).

¹⁷CESCR (2016).

¹⁸CESCR (1994).

¹⁹CESCR (1995)

²⁰*see* <https://www.ohchr.org>

²¹Saul, Kinley & Mowbray (2014) at 925.

²²Saul, Kinley & Mowbray (2014) at 924.

²³Icelandic Human Rights Centre (2008).

An example may help to clarify the legal answer proposed here to the question “what clothing is appropriate and thus in line with the dictates of international instruments?” One paper refers to the pandemic of podoconiosis, or endemic elephantiasis, *i.e.* the chronic debilitating swelling of the foot and lower leg caused by long-term exposure to irritating volcanic clay soils in the highland regions of Africa, Central America and India²⁴. Those affected by podoconiosis “experience disablement, stigma and discrimination, and mental distress, contributing to greater impoverishment and a reduced quality of life”²⁵. The paper considers the human rights violations that cause, and are caused by, elephantiasis in Ethiopia, precisely because of the lack of primary goods such as, precisely, appropriate footwear. It postulates that “while identifying rights violations is key to characterising the scale and nature of the problem, identifying duties is critical to eliminating podoconiosis”²⁶. To this end, the authors reconstruct “the duties of the Ethiopian government, the international community, and those sourcing Ethiopian agricultural products in relation to promoting shoe-wearing, providing adequate health care, and improving health literacy”²⁷. This case is therefore paradigmatic of the thesis argued here: The right to clothing is not to be assessed through abstract hypotheses but, on the contrary, through the subsumption of concrete cases into general theoretical forecasts so that current and concrete risks caused by its inadequacy can be effectively and efficiently averted.

In even more recent times, the CoViD-19 pandemic has emphasised the lack of Personal Protective Equipment (hereinafter PPE): bottlenecks and failures in the distribution of such devices have been addressed in practice and doctrine from the perspective of 'other' rights, ignoring what PPE essentially are, *i.e.* (part of) clothing. Thus for example, the High Court judgement in Lesotho “found the government's failure to provide PPE to doctors to be unconstitutional and in violation of the right to life and ordered that it remedy this dereliction by providing the necessary safety equipment”²⁸. For its part, the International Commission of Jurists encapsulates PPE as a matter of the right to health and observes that “failure to provide PPE is a clear violation of the rights to health and conditions of work of health workers themselves and also may constitute a broader threat to the rights to health of all people”²⁹. It is undeniable that the lack of PPE is a piece of the larger puzzle that facilitated the exacerbation of Sars-CoV-2. It is also undeniable that it can be linked, as Amnesty international does³⁰, to the right to health. Given both the nature of the context as well as the robustness of the legal and enforcement apparatus of the right to health both in domestic and international legal systems, it is nevertheless true that this contributes to marginalising the right to clothing, depriving it even more of a preceptive scope. In other words: A sort of paradoxical and circular mechanism is set in motion whereby little (if any) attention is paid to

²⁴Shahvisi, Meskele & Davey (2018).

²⁵*Ibid.*

²⁶*Ibid.*

²⁷*Ibid.*

²⁸Lesotho Medical Association and another v. Minister of Health and other (2020).

²⁹International Commission of Jurists (2020) at 93.

³⁰Amnesty International (2020).

the right to dress because it has a vague and ill-defined normative content. However, if a circumstance arises requiring its application, far from 'taking advantage' of it to give colour, meaning and poignancy to its content, they look for links with other guarantees with clearer and more identifiable contours, thus removing from the centrality of the stage of individual rights this guarantee relegated more and more to the role of accidental and superfluous .

It is also undeniable that the right to clothing presents interconnections with other fundamental guarantees of the human person: In addition to the right to health, the right to clothing has been linked, for example, to the right to housing, since having "largely failed to maintain an independent status, being either overlooked or effectively subsumed within the right to shelter generally and the right to housing specifically"³¹.

Moreover, especially from an ancillary perspective, the denial of the full enjoyment of the right to clothing can be an instrumental prerequisite for the violation of other fundamental rights. One need only think, for example, of the right not to be subjected to cruel, inhuman or degrading treatment, as well as the right not to be a victim of torture, rights that have risen to the rank of *ius cogens* norms: If an individual is denied access to adequate clothing (think of particularly essential clothing, such as underwear), he or she may be rendered particularly vulnerable and humiliated in his or her human dignity, especially in situations of diminished personal freedom, such as in detention contexts, in prisons, in health care facilities in the event of forced hospitalisation. The removal of clothing, therefore, constitutes an abuse that contributes exponentially to aggravating the state of mental suffering, including post-traumatic stress disorder. Such results are demonstrated in the forcing of prisoners to strip naked and parade in front of guards (even of a different gender) or to wear women's underwear in the case of male prisoners. Indeed, the functionality of the right to clothing can be argued in an inverted scheme, that is, downstream, as an element to be taken into account in the event that the enjoyment of other (*soi-disant* much more relevant) rights, such as the right to health, is compromised. Conversely, upstream, as a prodrome: e.g. with regard to clothing as an indispensable factor of social inclusion, not being able to make use of appropriate clothing can de facto inhibit the right to education (e.g. for lack of an appropriate school uniform), the right to work (for professions for which a strict dress code or uniform are enforced), the right to privacy. (The inability to wear clean and decent clothes, for example, exposes one's social conditions).

This attitude, which constitutes a sort of paradoxical self-fulfilling prophecy, is short-sighted: It risks perpetuating the unpreparedness of the subjects on whom rests the obligation to provide. If the 'direct' normative content of the right to clothing continues to be unclear, it will be evoked tangentially and always ancillary to other much more structured guarantees of the human person. It holds the risk that, in the event that a violation, however functional, cannot be proven, any form of protection that ensures the right to clothing in itself will fail.

It would therefore be advisable, to strengthen this right, giving it the solidity it deserves, either through the appointment of a Special Rapporteur or an *ad hoc*

³¹Saul, Kinley & and Mowbray (2014) at 924.

General Comment by the CESCR, as a first step towards bridging the gap between the right to clothing and the other basic guarantees of the human person, rights that can also rely on specialised UN agencies (such as the Food and Agriculture Organisation and the World Health Organisation) for their effective implementation. In this way, the fundamental obligation of each State party to realise, “as a matter of priority”³², the “minimum essential levels of each of the rights”³³ provided in the CESCR praxis could also be implemented regarding the right to clothing. Thus, even the right to clothing, having as its objective the provision of a minimum level of social protection for all³⁴ should be guaranteed to everyone at its core as an “non-derogable foundation”³⁵, *i.e.* as a kind of baseline below which the realisation of the rights of the International Covenant on Economic, Social and Cultural Rights must not fall³⁶. Conversely, failure to meet the core obligation, understood as a minimum threshold, would constitute a *prima facie* breach of the State's obligations³⁷ as a violation of the “corresponding core rights”³⁸, unless the State demonstrates that it has made every effort to prioritise its resources in order to fulfil this obligation.³⁹

Clothing: Emblem of Freedom of Expression or Factor of Discrimination?

As mentioned in the previous paragraph, the precise legal content of the right to dress is somewhat vague both in international instruments, which merely proclaim it, and in the studies of the doctrine, which in turn makes little effort to find criteria and parameters to give a more concrete and objective meaning to this right. Accordingly, the approach is different when clothing is framed under the perspective lens of freedom of expression, since there is no doubt that freedom of dress is a characteristic, and indeed the most evident trait of personal identity: “among the rights that form the irretrievable heritage of the human person [...] the Constitution also recognises and guarantees the right to personal identity. This is [...] the right to be oneself, understood as respect for the image of participating in associated life [...] with the ideological, religious, moral and social convictions that differentiate, and at the same time qualify, the individual. Personal identity therefore constitutes an asset in itself, regardless of a person's personal and social status, merits and flaws, so that everyone is recognised as having the right to have his or her individuality preserved”⁴⁰.

Borrowing the conclusions of Barthes' studies⁴¹, it can therefore be stated that, in this perspective, clothing from 'attire' becomes 'costume': what one wears is

³²CESCR, 1990.

³³Robertson (1994) at 701.

³⁴Blumel (2004) at 976; Leijten (2015) at 36.

³⁵Odello & Seatzu (2013) at 65.

³⁶McGraw (2010) at 154.

³⁷Bilchitz (2014) at 729.

³⁸Müller (2009) at 581.

³⁹Shields (2017).

⁴⁰Italian Constitutional Court, 1994, §5.1, the authoress translation

⁴¹Barthes (1957).

therefore not exclusively the result of a choice based on personal taste or contingent factors, but also represents a sort of implicit declaration of belonging to a group characterised by a common religious belief, political opinion, or cultural matrix⁴². Regarding clothes as a symbol of adherence to a cult, it is sufficient to reflect on the veil of Muslim women or Catholic nuns, the male headgear of the Taliban or Tuareg, the turban of Sikh Indians or the kippah of Jews. Again, with regard to clothing as an expression of political opinions, the stereotypes linking clothing to militancy are well known: in the 1960s, in Europe in general, and Italy in particular, the eskimo and jeans of the left, the leather jacket and sunglasses of the right, or, in the present day, the keffiyeh, symbol of the struggle of the Palestinian people, used as a scarf. Finally, under the third profile, the semantic power of fashion expresses the cultural reference: a Scotsman reveals his clan through the tartan, a French peasant girl indicates her village by her cap or bonnet, an individual wearing tribal clothes affirms his belonging to an indigenous group.

In this anthropopoietic dimension of clothing, its legal framework shifts: The protective and covering role of clothing gives way to its non-verbal communicative function. Thus, it becomes an instrument of identity subsumed under rights – often intertwined – such as the right to freely profess one's religious faith, political belief or thought tout court, belonging to an ethnic group, rights that are counterbalanced by the prohibition of discrimination.

In particular, in the international legal order, religious freedom is guaranteed by both soft and hard law norms, both universal and regional in character: *Inter alia*, among the most relevant instruments are, in chronological order, the Universal Declaration of Human Rights of 1948⁴³, the European Convention on Human Rights (ECHR) of 1950⁴⁴, the International Covenant of Economic, Social and Cultural Rights of 1966⁴⁵, the International Covenant on Civil and Political Rights of 1966⁴⁶, the American Convention on Human Rights of 1969⁴⁷, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981, the African Charter on Human and Peoples' Rights of 1981⁴⁸, the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms of 1995⁴⁹, the Arab Charter on Human Rights of 2004⁵⁰, and the Association of South-East Asian Nations Declaration on Human Rights of 2012⁵¹.

This complex legal apparatus absolutely protects both the inner and intimate dimension of this freedom, ostensibly *forum internum*, as well as its external dimension, *i.e.* the right to manifest one's beliefs, ostensibly *forum externum*. It contains the possible limitations that this right may suffer in the event that the

⁴² Ramachandran (2006).

⁴³ Article 18.

⁴⁴ Article 9.

⁴⁵ Article 18.

⁴⁶ Article 18.

⁴⁷ Article 2.

⁴⁸ Article 8.

⁴⁹ Article 10.

⁵⁰ Article 30.

⁵¹ Article 22.

'manifestation' of one's beliefs or religion interferes with the rights of others or constitutes a threat to society. The right to choose clothing ascribable to a religious orientation is by definition part of the *forum externum* so that only if it violates rules of public order, morality or public security may it be restricted. For example, the full veil (burqa or niqab) worn in a public place may be prohibited because, by completely covering the face, it makes it impossible to identify the wearer.

It is obviously not possible, given the scope of this article, to carry out an exhaustive examination of the practice on the subject. It seems, however, appropriate to consider, by way of example, a number of rulings by the Strasbourg and Luxembourg Courts, operating respectively within the framework of the European Convention on Human Rights and the European Union legal system, rulings that are extremely emblematic. In fact, the European Court of Human Rights (ECtHR) has in several cases upheld the ban on wearing the Islamic headscarf imposed from time to time on university students because it would discriminate against colleagues who do not wear it⁵²; on a teacher because the chador represents a powerful external symbol capable of influencing young pupils and is therefore detrimental to the principle of denominational neutrality of state schools⁵³; on a social worker in a healthcare facility wherein there is a risk of influencing patients in a state of psychological fragility and dependence, while violating the principle of '*neutralité de la puissance publique*'⁵⁴.

Most recently, the Court of Justice of the European Union (CJEU) also had the opportunity to express its opinion with two identical judgments, both rendered on 14 March 2017, in response to references for a preliminary ruling raised by the Belgian and French Courts of Cassation, respectively, on the possibility of employers dismissing an employee as a result of her refusal not to wear an incomplete, abbreviated headscarf. The underlying issue is that of the compatibility of the actions of employers with the requirements of non-discrimination protected by European Union law and in particular with Directive 2000/78/EC⁵⁵ on equal treatment in the workplace, also with reference to cases of discrimination on religious grounds. In the first case, on 12 June 2006, G4S Secure Solutions NV (G4S), a private company based in Belgium, had dismissed Samira Achbita, a receptionist since February 2003, because she had informed the company of her intention to start wearing a headscarf at work. G4S employees were subject to an unwritten rule, from the day after Ms Achbita's declaration of intent, a written prohibition to display religious and philosophical symbols in the workplace. The Court denied that the dismissal constituted direct discrimination as the company's rule prohibited wearing visible signs of a political, philosophical or religious nature in the workplace tout court and not specifically those attributable to the Islamic faith⁵⁶.

⁵²*Sahin v. Turkey* (2005).

⁵³*Dahlab v. Switzerland* (2001).

⁵⁴*Ebrahimian v. France* (2016).

⁵⁵<https://ec.europa.eu/social/main.jsp?catId=166&langId=en>

⁵⁶*Samira Achbita and Centrum voor gelijkheid vankansen en voor racismebestrijding v. G4S Secure Solutions NV*.

The second case stems from the fact that on 22 June 2009, Micropole SA, a private company based in France, had dismissed Asma Bougnaoui, a design engineer for the company since 15 July 2008, because she wanted to continue wearing a veil while providing services to customers. In its dismissal letter, Micropole SA had emphasised that employees had to respect a policy of 'neutrality' in the presence of customers. The Court made it clear that an undertaking's internal rule prohibiting the visible wearing of any political, philosophical or religious sign does not constitute direct discrimination. Nevertheless, in the absence of such a rule, an employer's willingness to allow for a client's wish that its services no longer be provided by an employee wearing an Islamic headscarf cannot constitute a requirement for the performance of work that would exclude the existence of discrimination⁵⁷. Thus, from a legal point of view, the Court has stated that employers are not free to pander to their clients' prejudices. In fact, by ruling that company policies can prevent religious symbols on grounds of neutrality, it has provided them with an expedient that supports and precisely endorses these prejudices.

Brief Critical Concluding Remarks

As illustrated, the right to clothing, within the framework of the international legal system, is relevant both as a right to clothing in itself, and as a right to express one's convictions, especially those related to the professed cult, through the choice of the clothes one wears.

Firstly, the critical points we have noted concern the exact content of such a right. In other words, while there is no one who denies the indispensable nature of adequate clothing in order for a dignified standard of living to be attained, there are no studies that translate and break down this right by identifying its individual elements. The idea put forward here is that the right to clothing may be considered as not infringed by the State on which it falls burdened to the extent that the latter has ensured those on its territory (thus not exclusively its own citizens, but also other categories of individuals, such as refugees); clothing that is not *a priori* determined, *i.e.* the same outfit for all, but which is calibrated according to the needs determined on the basis of three parameters, closely interconnected *ratione materiae*: through the search for high-performance clothing solutions, suitable for protection from the weather or other external dangers, *ratione loci*: on the basis of the objective conditions of the territory, *ratione personarum*: *i.e.* in the light of the personal qualities of each individual, among which are, *inter alia*, age, sex, religious beliefs, health conditions, etc.

Secondly, we have noted how clothing can represent a way of professing one's faith and how, in this perspective, clothing forms the subject of a right attributable to religious freedom. Of this freedom, safeguarded in various supranational sources, the right to clothing shares the same limits, as it is subject to the same restrictions as freedom of worship, constituting an expression in the

⁵⁷ *Asma Bougnaoui and Association de defence des droits de l'homme (ASSH) v. Micropole SA*.

assumed *forum externum*, with particular regard to safety reasons⁵⁸. Among the arguments put forward by the Institutions concerned with verifying the compatibility of self-determination in the choice of clothing, along with the rights of others who may be offended by these choices, are those that hinge on the need to protect the right to non-discrimination. Alas, such a right not to be discriminated against in the practice of the ECtHR indicates an unacceptable inversion of perspective examined from the point of view not of those wearing such clothing but of those who may complain about it, about coming into contact with it. In other words, in the balancing act between individual and collective needs, the consideration of the impact on the conscience of others of the expressive potential of the religious symbol – *a priori* and apodictically considered in a negative sense – still prevails. In this way, a substantial caution emerges in recognising the legitimacy of individuals to manifest their religious beliefs in public. Apparently, especially in relation to the growing pluralism of societies, the ostensible externalisation of one's religious affiliation collides with the peculiar characteristics of systems that make secularity and neutrality of *vivre ensemble* the cornerstone of supreme State values. Denying the possibility of sporting patently religious garments in the name of a neutrality prevailing in a hypothetical paradigm of values as hierarchically superordinate to self-determination seems to only place an *erga omnes* prohibition. In reality, it translates into a limitation proper to and almost exclusive of identifiable religions (especially and prevalently Islam). Of such, the rule may be formally the same for everyone, but in practice it will only place a ban on certain workers. In other words, the pattern that Jean-Étienne-Marie Portalis denounced two centuries ago is perpetuated, whereby everyone is free to sleep under the bridges of the Seine, but in reality, only the vagabonds of Paris do so. Put differently, the ECtHR seems to have failed the so-called proportionality test on the basis of which, firstly, the impact of the provision on the right in question must be assessed by asking whether, in light of proportionality *stricto sensu*, the State could have intervened in a less restrictive measure of the right in question. Secondly, the reasons for the interference must be justified by an imperative social need. Finally, it must be assessed whether or not the compression of the right was proportional to the value of the other protected interests (so-called balancing test).

Therefore, in the name of neutrality, the prohibition of wearing clothing that is strongly and unequivocally related to a specific cult should be limited to cases where the individual is a representative of the State, such as a military judge because it would undermine his/her position of equanimity; such as a teacher because it would compromise the secular nature of teaching; such as a medical or care professional insofar as choices related to the right to health could be in conflict with the dictates of the professed creed. In all other cases, it would be more correct and transparent to base the choice on establishing the balance between the freedom to display clothing blatantly marked by religious choices and its limitation in the name of the right not to be disturbed by the religious convictions of others, on the basis of a principle of reciprocity that takes into due consideration the principle of concrete offensiveness of the conduct. The right to identity *sub specie religionis* with particular regard to clothing should therefore be allowed in

⁵⁸*Ex plurimis, Phull v. France; El Morsli v. France; Belacaemi and Oussar v. Belgium.*

the case where the religious group to which one belongs accepts the atypical and contrary choices of others, while it could be denied where it manifests a fundamentalist and intolerant religious nature.

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Neurological Aspect of Ethics and Integrity: A Fundamental Compound Element of Law and Tax Compliance

By Emmanuel K Nartey*

This article examines the ethics and integrity approach to modelling the law and tax compliance process and investigates different factors that influence legal and governance systems in society. It explores the foundations of human decision-making and behaviours, or how to overcome the undesirable deficiencies in legal and governance systems. The approach of this article is carefully designed to briefly demonstrate how ethics and integrity in the law and tax compliance could lead to effective legal and governance systems. Therefore, ethics and integrity can be thought of as the infinite member of all legal rules and governance systems. Hence, it is, necessarily, in respect of societal conduct and obedience to the law. I conceive that the law and tax compliance does not stand alone. The extension of the law and tax compliance is ethics and integrity, or the extended part of moral conduct in society. Therefore, this article builds on existing knowledge by approaching the principle of ethics and integrity in the law and tax compliance as a duty of life, which is an obligation that ensures the compound elements of societal needs are fulfilled through virtue and accountability.

Keywords: Cognition, Ethics, Integrity, Virtue, Tax Law, Decision Making, Human Behaviour

Introduction

The study of economic psychology is not only for psychologists.¹ However, the main parts of the study of psychology include developmental, cognitive, social and experimental levels.² The developmental part is attributed to childhood behaviours, for example, what do children know about income, exchange, financial institutions, and when and how do they learn these things growing up? Cognitive is connected to how people make an economic decision, what they consider when making an economic decision, and what they forgo. The social aspect consists of how much are people's economic decisions influenced by other people's values; an example would someone be prepared to purchase a good that is environmentally friendly but costs 10% more than its competitor? The experimental aspect simply

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¹Kirchler (2007).

²Cronbach (1957).

requires asking the question, would someone be more likely to evade tax in a computer simulation or game if the chances of detection were 1 in 10 and the size of fine 5 times the amount evaded or where the chances of detection were 1 to 20 and the size of fine 20 times the amount evaded? These few questions give an example of how ethics and integrity can help us understand economic decisions and tax evasion. Examining tax evasion as part of mental life, that tax evasion and tax avoidance behaviour is part of everyday life, then the study of taxation simply becomes an important part of tax and ethics and integrity study.

Though, it must be acknowledged that moving the study of tax evasion and tax avoidance into the sphere of ethics and integrity, as an interdisciplinary approach to address the issue of tax compliance will be an intellectual challenge for both scholars and professionals. Nonetheless, incorporating the notion of ethics and integrity that economists and policymakers should believe in as a single motive for tax evasion and avoidance, is an interesting avenue that needs to be explored further. Likewise, it will be equally misleading to economists, psychologists and policymakers should build on models of behaviour without recourse to traditional economics theory without the presence of ethics and integrity. However, it can also be problematic to examine the incommensurability of theories, that are associated with psychology³ because economics uses different languages without sharing the meaning with another discipline.⁴ This makes universal communication difficult. The option is to adopt a more proactive approach to the study of human behaviour and tax evasion/avoidance. Therefore, the body of disciplines must support the issue of contemporary understanding of human behaviour that encourages and facilitates the integration of all aspects of human decision-making. Our understanding of human behaviour and the educational aspect of decision-making must be instructed on the discourse of ethics and integrity. Therefore, we must demystify the various approaches to the study of human decision-making and tax compliance to build a template for the spirit of ethics and integrity. The wisdom of antiquity and ancient Greek should guide the template.

Extensive research has shown that economists are of the assumption that human rationality has been misled and misunderstood.⁵ Lea, Tarpy and Webley⁶ in their observations contest that the preoccupation of psychologists with rationality is defective, while Rachlin demonstrated that any behaviour that is constant and predictable can be seen as the result of an individual trying to maximise their gain.⁷ From the outset, it could be clear in this observation that an individual might behave in a way that will lead them to maximise their utility, but what is not obvious is how to understand the psychological instruments that underly their behaviour. Though, recent development in the field of economics has shown that there is a move away from the traditional approach. There is less discourse on ethics and

³Schneider (1987).

⁴Klamer, McCloskey & Sollow (1988).

⁵Lewis, Webley & Furnham (1955).

⁶Lea, Tarpy & Wembley (1987).

⁷Rachlin (1989).

integrity in this area of study. Simon⁸ and Katona⁹ contributed to the development of behavioural economics and its psychological aspect. Clearly, this development means that the traditional approach to studying economics does not conform to the reality of human behaviour and decision-making. A possible explanation could be that human behaviour is not as rational, as the orthodox economists have predicted, though the story does not end there. Partly, because human behaviours and decision-making are influenced by other people, and their views about their attitude and behaviour determine their moral and legal compliance

Therefore, the question here is whether the law and tax compliance possess or lack integrity? Or what role can integrity play in determining the meaning and effectiveness of the law and tax compliance? The answer to these questions should not be based on the examination of the characteristics of the law and tax compliance as dependent on virtue. Meaning the validity of the assessment of the law and tax compliance should not be identical to the standard applied to action that is performed under a set of moral rules, which is seen as morally justified or unjustified. However, the acquisition of moral integrity, on the other hand, may be seen as a desirable outcome, compared to those that are performed under morally right action or an action that is based on what is moral rights.¹⁰ For example, the action or conduct that is accepted in such a society, such as observing the truth, and being trustworthy may be seen as desirable, however, when it is examined in line with integrity it may fall below the standard required to achieve in-depth moral integrity.

In essence, the lack of integrity is the root cause of heinous crimes. Therefore, this article examines the role of ethics and integrity in the law and tax compliance. The lack of effective analysis of ethics and integrity in the tax system may have led to tax evasion and tax avoidance. Therefore, this article reviews the relationship between ethics and integrity, and their determinants of tax evasion and tax avoidance. It also examines the evidence that human behaviour is influenced by rational thinking, decision making and affective factors. It moves on to explore how the intersection of cognitive and affective aspects of tax compliance, the notion of tax evasion, before concluding with a recommendation for policymakers and future research in the field of taxation. This research will contribute to the development of literature on the factors that determine tax compliance and behaviour of other agents. This will promote a better understanding of the factors that affect taxpayers' behaviour and professional agents' decision-making. This is partly because the article focuses on the interplay of cognition and affect, by drawing upon the theory of ethics and integrity, law and tax compliance.

⁸Simon (1986).

⁹Katona (1975).

¹⁰Taylor & Gaita (1981).

Ethics

The principle of ethics can be traced back to the ancient Greek “ethos”.¹¹ The original meaning of the word is associated with a place of living, but also it encompasses habits, customs and conventions. Cicero translated the Greek term into the Latin “mores”, meaning ethos and customs. Through this, modern thoughts of morality came into existence.¹² Modern philosophers such as Kant categorised ethics as a principle to deal with the question “What I should do”?¹³ In the contemporary world, most people think of ethics in the form of normative ethics. For instance, they may contemplate it in the form of moral principles in psychology, an experiment involving human behaviour, or even ethnology. However, whether normative ethics is divided into its particles or forms, the basic objective of ethics has been the same ever since the term was first coined in the Greek “ethos”.

In line with the Greek concept of ethics, their philosophy focused on virtue as a way of life. By approaching the philosophy of ethics this way, they were able to explain patterns of behaviour or attribute dispositions to certain conducts as they emerged, whether right or wrong. In this way, the Greeks saw virtue as rightful conduct, and therefore a man who lived by virtue was deemed to be a fair and just man. The transformation of the Greek ‘virtue’ to the principle of ethics in the modern world is one that requires careful attention.¹⁴ Other authors have tried to deconstruct ethics into a form of utilitarianism or into the technicalities of metaethics.¹⁵ However, none has arrived at a tangible conclusion. All facts point to the foundation of the Greek theories, and only by referring to these classical theories are we able to offer a better understanding of ethics in its ancient and contemporary meanings.

Observing the Greek approach to ethics, three distinctive points emerge. The first is that Greek philosophers were concerned with living the virtue, and what it meant to be a good person. This is what they referred to as *eudaimonia* (a state of the mind), as opposed to what was right or wrong in its narrow sense. The second is broader in scope and covers the issue of motives for morality or the fundamental reasons behind a person's quest to do good. This question proved problematic for Kantians and the utilitarians to solve. It is problematic in the sense that observing people's behaviours is different from actions that are based on conduct or other characteristics. One cannot try to understand someone's action, even though one can speculate as to why this course of action occurred.¹⁶ Similarly, one cannot examine these actions without paying attention to the motives of the person. Therefore, one could draw a conclusion by saying the motive was connected with the person's character more than the theoretical proves in modern society. In these distinctive characteristics, ethics could only be beneficial if seen as an independent

¹¹Sattler (1947).

¹²Galloway (2021).

¹³Walsh & Fuller (2007).

¹⁴Striker (1987).

¹⁵Brandt (1992).

¹⁶Miller (2014).

element of morality. Perhaps this is the point Aristotle was trying to make in his discourse on this topic.

According to the Greeks then, there were three kinds of disposition in a person, and two of them complemented each other. The first two became what they called 'excess' and 'deficiency', and the last was what they referred to as 'virtue'.¹⁷ The Greeks saw all these dispositions as a compound element of the whole but they all opposed each other at the same time. The upper state contradicted the middle and in the end they all conflicted with each other. What does this mean in the modern term? All dispositions are equal to one and at the same time, they are relatively less to the greater parts. So when we take the middle part as excessive relative to the deficiency, the deficiency will be relative to the action and both may become a passion and an action. For example, for a brave person who acts in a cowardly manner, their cowardice will be relative to their passion and actions. This disposition formulates the cause-and-effect approach in our understanding of ethics in ancient Greece and the modern world.

Moving on, for contemporary thinkers and scholars to conceptualise this idea requires closer attention to the development of the Greek concept of ethics. In essence, the assessment of the ancient Greek theories on ethics goes beyond the classic views of Plato and Aristotle. Moving past Plato and Aristotle will help to demystify how the principle of ethics informs the conduct of ancient Greece and modern society. It will also help us to draw a clear distinction between what needs to be understood or learned to advance legal knowledge in the modern world.¹⁸ For the modern scholar, it is vital to understand the way ancient Greeks viewed ethics as fundamental to their process of constructing laws as a guiding rule for all persons. It will lead them to the inevitable question of moral justification or the basis of all moral rules in society.

Therefore, asking the philosophical question of the law and tax compliance should be the starting point for all thinkers and scholars who seek an explanation for the obedience of the law from different perspectives. They must resort to the question, what is virtue? What does it mean to live a good life or what is a life of the good? While asking this question might not necessarily lead to the ultimate answers, it is a starting point. It will help them to complete the puzzle or to understand where the central problem of the law and tax compliance is. The contention here is that one should pay close attention to the examination of the objectivity or the relativity of morality and tax compliance in society. In relation to the points I have made thus far, when we observe the concept of ethics, there is a clear correlation between the modern approach to ethics and the classical good life. However, complexities exist in the development and historical understanding of what ethics means in the law and tax compliance. Therefore, trying to bridge this complication in the historical development of ethics might help build a good connection between ethics and the concept of the law and compliance in modern civilisation.

¹⁷Ross (1956).

¹⁸Vasiliou (2008).

The language in the Greek ethical discourse focuses on the concept of life, such as at the beginning of Socrates' discussion in *Gorgias* (472C-D).¹⁹ Socrates' discourse is about happiness, and how can we live happily? This discourse ignited the good life concept in ancient Greece. Every Greek philosopher who came after Socrates became of the view that happiness was a state of living, which was the object desire of every person. This view can be arbitrary in its theory and practice. Partly this is because it is difficult to predict the happiness of every person, let alone determine the contentment of their life. This means the person does not wish for another life except the one which has been granted to them by their environment. However, these great thinkers saw happiness as the ultimate goal of action for every person. Therefore, everything else became insignificant in this sense.

I will concur with the Greek philosophers that happiness could be the main goal of every person, but what happiness could mean to everyone may differ. This might explain the main reason why modern writers have struggled to contemplate the Greek concept of ethics in modern writing. Life for the modern person encompasses a variety of things, not just living to satisfy happiness. The modern person might live with a desire to achieve their goals or a desire to be successful. So, in these simplistic terms, happiness in a modern person could be explained by a quest to achieve consistent desire in all adventures. Without contemplating the object of desire, how can one be morally or ethically sound in this adventure? This is a tragedy for the modern thinker and scholar. I shall in this endeavour say that it is difficult to conceptualise the Greek concept of happiness as the ultimate goal of every person. It is difficult to see how the actions of a person in ancient Greece could affect their life and how they should live meaningfully as the Stoics advocated.²⁰

One cannot contemplate everything for the sake of happiness. However, if this should be the case, then is like telling every single person on this planet to become whatever they want. This is the same as saying if you want to be happy, you should be happy. Now, this is hardly a point that I can reconcile in this article. However, what I can say is that if happiness is the ultimate goal according to the Greeks, then it must encompass all things. This means happiness must be a pattern of life or must be seen as a life to live. Perhaps this might be the reason why the Greeks saw happiness as the good life and happiness as the attainment of the good. Therefore, when it is said that happiness is the main objective of all conduct, what is essentially being said is that happiness is: '(a) that there is a general answer to the question 'What sort of life can count as a good life for humans?' (b) that every human desires to live a good life, and (c) that we do or should plan all our actions in such a way that they lead or contribute to such a life.'²¹

If we can conceptualise this, we can say ethics could be the desire of every person in society. Hence a good life becomes the desire of everyone. In this interpretation, we could assume that everyone should be taught and should know what is meant by the good life. If this knowledge is attributed to the average person, then we can say everyone knows what is a good life, thus, this good life

¹⁹Hardy & Rudebusch (2014).

²⁰White (1979).

²¹Striker (1987).

becomes the ultimate defining purpose of his or her conduct in society. For the ancient Greeks, this knowledge element is important. Its significance can be observed as the ultimate aim of ethics, the defining rule of society.²² Will this hold water, though? The answer to this question requires careful observation. For instance, it is possible that the average person in society does not desire the good life. Let' us also look at people who engage in a stream forms of other practices. These people may not desire what the ordinary person may want or even they may not contemplate the good life. If we attempt to answer this question in the orthodox path of this theory, we could say such a person is deluded, and may have wrong desires or ideas of what is acceptable in society. How can this be true though, when perhaps these individuals' ethics is not an important aspect of their life.

Take, for instance, Socrates, Epicurus, and the Stoics, these philosophers saw the good life as the ultimate goal and achievement in human conduct.²³ Therefore, whether this is in the contemplation of the person or not, it is important to know this principle so that the person can understand the composition of happiness or the consequence of living an unhappy life. In this sense, the observation of the good life rests on the distinction between right and wrong perception. According to these philosophers, if a person lives a life contrary to the good life, the person suffers a disposition. Perhaps the underlying thoughts of Socrates, Epicurus, and the Stoics may pose a difficult question for the modern philosopher to comprehend. However, if this is the case, then they may have to engage themselves in Greek philosophy on the path of Aristotle. Following this path allow them to adopt the restricted interpretation of the good life, as suggested by Aristotle.²⁴ Regardless of whichever way we aim to balance this argument, there exists a reputable presumption that there is an end to every desire and conduct. This means there is an end to what is called happiness or the good life. If the end call for everything to be neutral and none exists, then the biggest task for ethics is to find what this end is and what happiness encompasses and how we reach this path in terms of law and the application of tax policy.

Therefore, the point I strongly wish to emphasise here is the following, that the good life gave birth to virtue, and virtue and morality gave birth to ethics. In this conception, ethics should be originally understood in Greek methodology, partly because it explains the various aspects of our contemporary thoughts on ethics and even the continued developments and explanations of the many aspects of our moral principles in the present day. This could be observed as the truth of the matter, and I could add that understanding and correlating ethics to present-day conduct will enable society to be conscious of their conduct and the modes of expressing the action in the face of legal rules and obligations. Therefore, to light the expression of ethics in the contemporary world to dogma is to misunderstand the principal methods and procedures of humans' thoughts and obedience to the law.

²²Rist (2002).

²³Long (2006)..

²⁴Sellars (2018).

Integrity

The forms and substance of integrity can be defined and explained but what can we truly say about a person? What is the composition of a person with integrity? Can integrity be applied to the functional structures of society or even an organisation? Can we say integrity exists in this society or we must act according to integrity? Perhaps the odd question is where does integrity come from and how is it defined?²⁵ To answer these questions, we need to first separate ethics from integrity. This separateness can be put into at least eight concepts according to Huberts.²⁶ This distinction is illustrated by these 'keyword wholeness and coherence; professional responsibility; moral reflection; value(s) like incorruptibility, laws and rules; moral values and norms; and exemplary behaviour.' Montefiore and Vines (1999) on the hand demystify integrity in line with the Latin conception of *integras*, meaning 'intact, whole, harmony, with integrity as "wholeness" or completeness, as consistency and coherence of principles and values.'²⁷ Montefiore and Vines' definition of integrity is derived from the ancient Greek concept of integrity. In their view, integrity means completeness or the wholeness of all things.²⁸ Integrity in its form and substance of wholeness can be attributed to the law and tax compliance in the sense that nothing is further or inferior to obedience to the law. Therefore, if nothing is further or inferior to the obedience of the law, then we can unite all principles to say they are fundamental components of the defined truth of greater obedience. For there are thousands of rules and principles to be observed, but I shall illustrate the forms and substance of these thousands of rules that neither their enforcement nor prosecution leads to the total obedience of rules. Hence, if society and scholars will be free to contemplate the law and tax compliance, we must be free from intellectual handicap and self-imprisonment and focus purely and wholly on the integration of the compound principles to the governing rules. Approaching the issue in this manner, we can concur with Montefiore and Vines' definition of integrity.

Dobel's writing looks at other dimensions of integrity, such as values.²⁹ Accordingly, value underlines the principle of integrity as argued by Dobel. Thus value in this sense can be attributed to 'incorruptibility; honesty; impartiality; accountability' and a code of conduct in society. If you then conceptualise this point here, it is perfectly adequate to conclude that this view conforms to integrity as part of the doctrine of virtue in ancient Greece.³⁰ Therefore, integrity means acting in accordance with the principle of virtue as the conceptual parameter of the short and long arms of the law and tax compliance. Therefore, a reputable presumption that can be deduced here means we can infer that to achieve integrity through virtue, we must drown ourselves in wisdom, honesty, good faith, justice,

²⁵Huberts (2018).

²⁶*Ibid.*

²⁷*Ibid.*

²⁸Montefiore & Vines (2005).

²⁹Dobel (2016).

³⁰Devettere (2002).

determination, courage and self-control.³¹ What does it mean in a practical sense? It means integrity is the completeness of a thing not being said and not being done. It is the wholeness or responsibility of one action in truth and honesty. One must therefore be a person of integrity if they act adequately, responsibly and honestly, taking into consideration all relevant factors.³²

Integrity in its simple term can define as a composition of moral values in society. By this definition, we can broaden the conception of integrity to cover honesty, fairness, consistency, and predictability.³³ When we stratified these principles philosophically, we can therefore come to the realisation that individual actions and behaviours are guided by them. Therefore, the denominator for understanding and assessing the integrity of individual conduct is by examining whether they possess these principles in their actions and behaviours. I thus, leave room for an objective debate and deduce that integrity imposes duties and obligations on a person to act in accordance with the rules and laws of societies. These duties and obligations also extend to interpersonal treatment and relationships.

However, the remains the question, of what is the link between integrity and morality. The answer to this question is observed in the definition of integrity itself. This is partly because integrity is an important aspect of the association of essential moral values, norms and rules that need a specific understanding of what is meant by moral value, or what rules are. In this approach, we can deduce the link between integrity and morality as the composition of ethics, morals and morality.³⁴ Even though there is a concession on both conception of right or wrong or good and evil, there has been no distinctive explanation of the terms trustworthy. Specifically in the area of philosophy and the study of ethics.³⁵ For the sake of clarification on this difference, I shall conclude that integrity is part of the building blocks of ethics and morals. Therefore, both are correlated and both reflect the principle of what is right or what is wrong in a person's conduct.³⁶ Integrity is part of ethics and morals, therefore establishing a complex strand of human conduct.³⁷ However, for us to understand the scope and content of integrity, we must stream our perceptions of this principle in line with decisions, policies and laws.

Streaming helps to distinguish the metaphor of integrity from moral quality in a person's conduct. Whether a person decides to commit an act or simply live a careless life could be a matter of moral values and the norm for that process.³⁸ Thus, integrity turns a person from behaviour that is not consistent with values and norms and living according to the concept of general good and precepts. Therefore, in order to find the true deception in personal conduct and attitude, we must turn back upon this self-governing principle to impose duties on cultures and attitudes in society. The present-day value of integrity in conduct and behaviour is not to be discounted, but its perfection is to be condensed into our societal conduct. In this

³¹Becker & Talsma (2015).

³²Karssing (2001).

³³Caldwell (2018).

³⁴Huberts (2014).

³⁵Thompson (1985).

³⁶Thompson (2000).

³⁷*Ibid.*

³⁸Audi & Murphy (2006).

view, integrity may have the value and meaning we need to give effect to the law and tax compliance in the 21st century, where persons' duties and obligations are questionable. By rightful conduct then, integrity may supply knowledge indispensable to the law and tax compliance. If permeated by a sort of principles optimism concerning the ultimate's knowledge and obedience to the law.

In this understanding, I am of the view that integrity is about the ethics of conduct and the behaviour of a person in society. I will observe that integrity is relevant in our understanding of obedience to the law or, as a matter of fact, tax prosecution and enforcement. To further clarified this point, integrity should be treated distinctively from ethics. This is partly because integrity is not an alternative to ethics in law and tax compliance. Ethics is a much wide concept and its reflection compasses all aspects of governance and the judicial systems.³⁹ Therefore, it is possible to deduce that the concept of integrity is incorporated into all these approaches and the development of these theories.⁴⁰ When we thus incorporate integrity in all approaches and development, we will arrive at the conclusion that the state of obedience to law follows the moral codes of society or culture.

Neurological Aspect of Ethics and Integrity

The brain and its complex system are the most unique part of the human body.⁴¹ It is a three-pound organ that occupies the centre of all intelligence, is interpreter of the senses, the initiator of body movement, and the controller of behaviour.⁴² The brain can be found lying in the bony shell, covered by a protective fluid. The brain is also the core part of human existence and helps define our qualities as human beings. In other words, it is the crown of the human body.

When we look at the brain, the first thing we need to start thinking about is a committee of experts. The brain is constructed like a committee of experts, all working together to achieve a collective goal. However, each part has its own specialities. These specialities can be divided into three main basic units such as; the forebrain, the midbrain, and the hindbrain. The hindbrain consists of the upper part of the spinal cord, the brain stem, and a wrinkled ball of tissue called the cerebellum.⁴³ The brain uses the hindbrain part to control the activities that are very important to the body, such as respiration and heart rate. This means the cerebellum part of the brain coordinates movement in the body and also helps in the development process of rote movements. For example, when you do Judo or play football you are activating the cerebellum.⁴⁴ The uppermost of our brainstem is what is referred to as the midbrain, this part control some of our reflex actions and plays a specific role in the control of our visual movement and other voluntary parts of the body. The forebrain is the biggest and most highly developed of the

³⁹Lewis & Gilman (2005).

⁴⁰Menzel (2016).

⁴¹Vanderha & Gould (2002).

⁴²Frackowiak & al. (2004).

⁴³Fischl et al. (2002).

⁴⁴Duvernoy (2012).

human brain; it encompasses the cerebrum and is located under the structure of the brain. However, when we talk about the brain, most people only see the cerebrum of the brain. Partly because it is located at the top part of the brain and is the source of intellectual activities. It also stores our memories, allows us to plan, and enables us to imagine and think. It allows us to recognise things, such as friends, reading, and engaging in playful activities.

However, for some unknown reason, in the study of the brain, almost all of the signals in the brain to the body and vice-versa are intersected on them to and from the brain. A possible implication of this is that the right cerebral hemisphere controls the left side and the left hemisphere controls the right side. This means if one side of the brain is damaged, the opposite side of the body is affected. A typical example is a stroke in the right hemisphere of the brain that leaves the left arm and leg paralysed. When we try to dissect the brain, it is clear that each cerebral can be split into different sections, or what is called the lobes, each of these is specialised in different functions. If you want to investigate how each lobe works and its speciality, you will need to study the whole cerebral hemisphere, beginning with the two frontal lobes that are directly located underneath the forehead. For example, when you plan your programme, you use imagination, this visualization helps you plan for the future, or you use logical reasoning to construct your argument, these two lobes are what help you to plan.⁴⁵ This happens because the front lobes act as a short-term storage site, which allows a specific idea to be stored in the mind while other ideas are considered. At the back of each frontal lobe is a motor area that helps to control voluntary movement and the left frontal lobe known as Broca's area allows thoughts to be transformed into words.⁴⁶

Take for instance a trip to a restaurant where you had a good meal, and the aroma and the texture of the food were the best you ever had. You were able to experience these feelings because two sections behind your frontal lobes called the parietal lobes helped you to process this information.⁴⁷ The front parts of these lobes, just behind the motor areas, are the primary sensory areas that help the dissection of the information. What is essentially being said here is that, in the process of information, these areas receive information about the food, such as taste, temperature, touch, and movement from the rest of the body. This information is decoded and translated into the physical world, which generates the experience and emotional feeling you observed when eating the food. Though, in addition to this, reading and arithmetic are also included in the function of the repertoire of each parietal lobe. Let's look at another scenario, when you look at words or images on the web or on the wall, two areas at the back of your brain at work. These lobes, called occipital lobes, process pictures from the eyes and connect the information with pictures stored in memory. Now, damage to the occipital lobes can cause blindness.

When we examine the cerebral hemispheres, we will notice the temporal lobes located under the front of the visual area and nest under the parietal and

⁴⁵Halstead (1947).

⁴⁶Damasio & Anderson (2003).

⁴⁷Stuss & Knight (2013).

frontal lobes.⁴⁸ When you listen to music, your brain will therefore respond through the activity of these lobes. Hence at the highest level of the temporal lobe is an area in charge of receiving information through the ears. Each temporal lobe plays a crucial role in forming and retrieving memories, including those associated with music. The other parts of this lobe are integrated with memories and sensations of taste, sight, and touch. Now, this is a computerised view of the brain system in the matter and how information is fed and processed in the brain. However, what I am concerned about here is not the feed and process in the brain but rather the foundation of this development. For instance, why did you take the decision to eat at that particular restaurant? Where did that decision originate from? How did it develop and translate into physical decisions?

So is the activity of the brain, solely based on survival and reproduction? The surprising character of the study of the brain from the fact that what we do think, do not think, and possibly cannot be the constructions of long, undirected evolutionary processes. Partly because some of these blocks of our brain activities may have come about due to the survival pressure of the environment we are born in and evolution, that to say the human brain can psychologically adapt to the environment and enhanced its development or can be destroyed by the environmental conditions. Whiles other patterns of the brain may naturally develop due to neutral changes and willingness to explore its evolutionary purpose.⁴⁹ So can be said for human behaviour and decision making. Environmental factors can either condition the individual to be trustworthy and obedient to the law or can have a detrimental effect on the person's ability to contribute to the general good of society.⁵⁰ Therefore, enhancing the human brain in its intuitive decision-making come from determining whether the environment has rules that can guide the individual in a such endeavour or a rule that allow the person's judgment to represent virtue or a desire to perform good action.

The whole evolutionary purpose of the brain depends on the environment and the condition created by our exploration of the physical world. The outcome is that our possible thoughts and actions are at the full reach of our cognition. This means they only need to serve the reproduction success of our progenitors, which has a limited view of understanding brain development and performance. Therefore, we could observe that the resulting survival pressure means a disinterest in what is good for the general population, meaning the brain activity result in the promotion of self-interest and individual needs. Accordingly, the brain is not able to judge whether something is universal good or not, without serving its interest first. This point requires further clarification. The impossibility of the brain detecting the universal good might be suggested to be the main reason why ethics and integrity were developed as guiding principles in antiquity and ancient Greek.⁵¹ Therefore, we can assume that the brain is a human internal part or sense, meaning it depends on existing factors in the environment for an adequate construction of behaviour and decision-making process. Consequently, there is a big difference between a

⁴⁸Squire & Zola-Morgan (1991).

⁴⁹Adler (2013).

⁵⁰Rutter (2005).

⁵¹Dihle (2022).

brain that is conditioned with virtue and one that is conditioned with survival instincts. In this sense, unlike the concept of survival, the attainable position here is to guide the brain from self-interest to rational thought and decision-making. This will help the brain to judge whether behaviour or decision is one of virtue and it cannot simply achieve this through the basic cognition process. Thus, an intersection principle is required to construct brain activities in line with virtue. So that the faculties of the individual may have a better understanding of the universal good of society.

Therefore, this narrow view is what scientists have used to explain brain activities, but, the function of the brain goes beyond what is called survival and reproduction. The main reason is that the brain cannot possibly be just that, because our thoughts and action do not necessarily tell us how to develop the right intuition to survive in the world. And this means that there might be other things that are missing in this demission. So, if we view the brain activity 2000 years ago as a machine that is a condition to be survival and reproduction then it is possible to say that the many aspects of the neural function are simply made for this possibility. Therefore, the conditioning of the brain in the principle of ethics and integrity, as an imposing of virtue becomes an effective theory to pursue. However, even, this explanation is limited, as the brain activity is made up of a picture of both the physical and unphysical world out there. In other words, it is possible to say that the brain operates on two distinctive levels but yet they are related and depend on each other.⁵² This can also be said in the relationship between ethics and integrity and law here. Our major concern is not the function of the brain, but how the function of the brain influences human behaviour and decision-making. Being ethics and integrity or not, the fundamental point is that the brain plays a significant role in the cultivating of ethics and integrity in individual behaviour. Therefore, it is possible to conceive that there is a correlation between the different dimensions of brain activity to human behaviours and obedience to the law.

When we observe the activities of the brain, we notice that our perceptual experience reinforces the differences that existed between the physical element of the brain and the mental aspect of the brain.⁵³ For instance, although our experiences may move around our bodies, they do not seem to be present in a specific location in the body. Our experience also has a kind of distinctive character that is attributed to it, for example, the feeling of being an independent body. So, the effortlessness of perceptions and actions illustrates their oddness if you try to dissect the translation of it in the physical world. Specifically, when we try to examine the consequence of perception in the physical world. A viable way to understand it is, when you want to see, you simply open your eyes. We hear, smell, breathe, move, taste, envy, and love without any effort. This effortless characteristic of the brain is something that cannot be explained by a simple analysis of the activity of the physical brain. Of course, this analysis and its acceptance in the mainstream study of the function of the brain are questionable due to the physical origin of our mental life, both conscious and unconscious.

⁵²Greenfield (2002).

⁵³Gray (1990).

Cognitive is concerned with the processes and representations of the mind, however, this cannot be observed directly. The question is how do we try to understand cognition and its role in our ethics and integrity? How can we understand the things that cannot be counted or measured, while remaining scientific? This is the problem one faces when we seek to define and explain the unexplainable paradigm. Thoughts follow the same metaphor. Cognition also follows the same patterns, though, psychologists have tried to give a detailed examination of cognition and how it affects behaviour.⁵⁴ They are yet to provide a conclusive answer to how these behaviours emerge. Take, for example, the examination of the correlation between cognition and behaviour is well recognised in the field of psychology, but, it seems that they are only able to verify how and why these behaviours occur when they insert something into the internal part of the brain in order to produce the observed behaviour. The main reason is that psychologists are not able to explain the unobservable, so they have to theoretical constructs the mental processes and structures.⁵⁵ This of course is just the tip of the iceberg. The main challenge of psychologists has been to go beyond this point of observation to find out why certain things occur and under what sequence they occur. Nonetheless, the work that has been done in this area requires a recommendation because it helps to explain the mental structures and processes of the brain. It also shows how they give rise to observed behaviour and how they can predict behaviours that are yet to be studied through experiments.

The Observation of Ethics and Integrity in Decision Making

The rationality of human behaviour in economics means different things to different people. The notion of rationality in economics itself is problematic. Simon⁵⁶ explains this by differentiating substantive and procedural rationality. Substantive rationality, according to Simon, is the widest-used concept among economists and this is related to the achievement of a given objective within the parameters imposed by rules and regulations, or the conditions and constraints affecting individual decision-making, such as cost and time factors. Within these parameters, an individual rationally seeks self-interest and maximises utility. Procedural rationality is related to the internal environment. This internal environment determines the individual's ability to reason and acknowledge the difficulties surrounding the situations and cognitive capacity.⁵⁷ In relation to the development of cognitive and decision-making, experimental economics has supported the theory of rationality and affirmed aspects of procedural rationality in more formal models, such as Kahneman and Tversky.⁵⁸ However, this will be discussed further in this study. The outline here is to give the reader a brief history of the development of behavioural economics.

⁵⁴Braisby & Gellatly (2005).

⁵⁵Gardner (1987).

⁵⁶Simon (1986).

⁵⁷Simon (1977).

⁵⁸Kahneman & Tversky (1979).

Katona's work focuses on measuring subjective expectations.⁵⁹ The model clarified the internal environment of the economic mind and how to predict economic outcomes from the economic antecedent. In Katona's view, people have simple and persuasive expectations, people can choose to buy cars, and other commodities, when they feel it is an appropriate time to do so. Especially when their desire of acquiring a particular product is close to their feelings. Katona's work and other behavioural economist theories that seek to find an explanation for the underlying connection between traditional economics measurement, the economic mind and actual behaviour have helped clarify the role human emotions and decision-making play in economic activities. According to Katona, therefore, human decision-making is influenced by many factors and human emotion is one of them. If so, be the case, then the guiding principle for these emotional factors becomes paramount important in the quest to guide individual actions. What then is the relationship between human decision-making and the ethics and integrity of a person? It seems that the relationship between the two is closely connected, to some extent, to the relations between ethics and integrity and rule of law. That is ethics and integrity have an important component in addressing the deficiency in human emotions and decision-making. This means, in part, that component of ethics and integrity in human decision-making is neither casually nor contingently related to the punishment attached to breaking the law or tax policy.

In the field of economics, the analysis of the factors that contribute to economic prediction has been expanded beyond the traditional view, in particular by Duesenberry,⁶⁰ Leibenstein⁶¹ and Scitovsky.⁶² Duesenberry and the Austrian School of Economists (von Mises)⁶³ focused on the internal environment of economic decision-making; their theory views people as active participants in the economy instead of passive bystander of economic forces. In examining human behaviour, Duesenberry's study focused on the role of habits, which buyers do not often consider when deciding to purchase a good/product. In this understanding, it was clear that the decision of buying a particular product in some sense was already made. Duesenberry also seems to conclude that income constraints are not objective facts in the purchaser's decision, but rest on the views of them the buyer and their relative position to other people's incomes and expenditures. The work of Duesenberry follows the work of other social psychology and sociology on the perception of equity, reference groups, social comparisons and relative deprivation.⁶⁴

Leibenstein's work is also in an agreement with interpersonal relationships, but is specifically focused on the notion of "inertia and x-efficiency". Both address the notion of "non-optimal behaviour".⁶⁵ In approaching the issue of economics in non-optimal behaviour, Leibenstein found that people within the orthodox economic units of the organisation and household do not react to domestic changes

⁵⁹Katona (1975).

⁶⁰Duesenberry (1949).

⁶¹Leibenstein (1976b).

⁶²Scitovsky (1976).

⁶³von Mises (1978).

⁶⁴Stouffer et al. (1949).

⁶⁵Leibenstein (1976a).

until the need for change becomes imminent. What this means is that often there is an inertia and sluggishness in people's decision-making. Though according to an economic decision, within an organisation, judgement is dependent upon negotiation and constrained by the nature of the business environment, jobs, and occupation, and the structure of the organisation itself. What is essentially being said here is that, within the structure of the organisation, not everyone is equal, your position in the organisation depends on your rank. Following this pattern in the study, Leibenstein acknowledges the cognitive element in decision making and recommends that future research is required to focus on the degree of 's-efficiency' by which it can explain the difference between maximal effectiveness and actual effectiveness.

Scitovsky work look at the issues surrounding the static nature of aspiration and motivation implied in economic theory. Scitovsky found that motivation is variable. The author's work seems to draw inspiration from animal and experimental psychology⁶⁶, economic motivation studies in terms of the need of individuals for optimal arousal (a plateau between sluggishness and catastrophic overarousal) stimulation and the spur of curiosity. Taken together, we must conceive those human behaviours are not strictly distinguished from economic activities and compliance, economic activities and compliance = human behaviour/ decision making. Otherwise, the notion of tax evasion and tax avoidance would become a new fashionable collective practice that can be filtered into the totality of economic activities without any parameters. So, what is the function of ethics and integrity in economic activities? The human quest to seek wealth and maximise utility is a fundamental challenge that should be addressed in the theoretical and practice realm of obedience to the law. That is to say, we must seek to define an aspect of human decision-making in relation to ethics and integrity, as opposed to economic and political needs which are concerned with the means to societal ends. Directly in terms of reducing lack of compliance or obedience to the law, improving compliance as human beings define their life and moral values.

Also, research has shown that decision-making is a consequence of human behaviour (Toplak et al.⁶⁷ and Strough et al.⁶⁸) and understanding how human behaviour influences decision-making will be an important point in designing an effective policy and law.⁶⁹ Moving on, this part of the chapter will assess cognitive biases and the heuristics approach to rational thinking and decision making. It will explore a specific insight that can be relevant in understanding ethics and integrity, which will influence human behaviour for societal and compliance purposes (benefits).

What can we conclude about the role of ethics and integrity in cognitive biases? First, to avoid cognitive biases in human decision-making, the individual must have dignity simply in virtue. Even though an individual may acquire ethics and integrity in his or her behaviour, they can only exhibit the requisite potential in conduct and attitude toward phenomena. Secondly, the acquisition of ethics and

⁶⁶Hebb (1955) and Berlyne (1960).

⁶⁷Toplak, West & Stanovich (2011).

⁶⁸Strough, Karns & Schlosnagle (2011).

⁶⁹Feige et al. (1994)..

integrity help mitigate cognitive biases in decision-making. Therefore, even though individuals may possess cognitive biases, their ethics and integrity cannot be violated. This suggests that when it comes to human decision making there is a value of ethics and integrity, unlike cognitive biases. It may be assumed that ethics and integrity are something which gives individual value and confidence in decision making.

So, what is meant by a cognitive bias and why is it important in decision making? Cognitive bias is very important in decision-making because there is a reputable presumption that there is a systematic bias in the results of human decisions, as a consequence of one or more heuristics ‘rules of thumb’ or ‘inference mechanisms.’⁷⁰ For instance, if someone finds himself or herself in the same city at night time, looking for a restaurant, a fast heuristic could be to go to a restaurant that is most famous. Contrary to this judgement, a significant detail of heuristics could encompass a search for information on a different restaurant in the vicinity and comparing their rates, reviews, distance and prices before arriving at a decision. Therefore, the person who finds himself or herself in the same city centre must act in a manner that will not involve the loss of their ethics and integrity. What is essentially being said here is that each individual in the conditioning of their decision-making can exercise control over cognitive biases. In this understanding, the value of ethics and integrity is different from cognitive biases in the important aspect of human decision-making. It is possible to conceptualise that ethics and integrity override certain biases in a person’s decision-making in the same sense that one has to give meaning to an outcome.

This decision may involve a number of heuristics, including attribute substitution of one form or another⁷¹. A possible explanation for this could be that when humans are confronted with a difficult choice, too often people will result to the easiest option (Schwartz 2010). This is because normally they are unaware of the substitute that is available to them. For example, an employer who has hired a candidate for a job role in the organisation, when confronted with the question “how likely is it that this candidate could fit in the department? May choose the easier route by asking a question, how good was the interview? When one observes the answer of the employer it is possible to conclude that the answer is mediated by a heuristic when an individual attempt to examine a specific situation that requires a judgment object by replacing it with another object. This object is known as the heuristic attribute that comes more readily to the human mind⁷².

The Conception of Ethics and Integrity in Human Behaviour and Criminal Finances Act 2017

The influence exerted on people through societal norms and habits determines how they behave and what outcomes are expected from their conduct.⁷³ This

⁷⁰Thaler & Sunstein (2008).

⁷¹Gilovich, Griffin & Kahneman (2002).

⁷²Kahneman & Frederick (2002).

⁷³Biglan (2015).

societal force has been noted in the economic decision-making by people,⁷⁴ and the outcome of this trial has major implications on how to develop rules and laws that could have the potential to change human behaviour or attitudes towards norms and reducing non-obedience.⁷⁵ This outcome provides a useful foundation to understand the relative size and nature of non-compliance. Therefore, the understanding of human behaviour can be applied in many different ways, when one seeks to develop an effective tax law and compliance system. Therefore, ethics and integrity help deal with the interaction between human behaviour and the law. Let us say ethics and integrity deal with the bottom-up phenomenon, which is particularly lacking in the application of the law and tax policy.⁷⁶

This means the way data is gathered for compliance purposes can be called into question. Therefore, the notion of a lack of obedience to the law may not serve a meaningful purpose if one is to seek to influence and change behaviours. For example, under the Criminal Finances Act 2017, punishment for tax evasion has been meted out for a variety of reasons. This corresponds to the idea of retribution as a common justification for tough punishment. This also follows the idea of incapacitation, or of preventing crime by keeping people in prison. Theoretically, this is a deterrence, but the idea that suffering punishment will deter an offender from reoffending in tax compliance is flawed. Also, when one glances at the 2017-18 UK tax gap by HMRC, it shows a different composition of tax behaviour. This composition is rooted in behaviour rather than criminal conduct.

Again, when one takes a close look at the HMRC Report, the formal definition of criminal conduct makes it very difficult to distinguish between compliance and non-compliance and moral judgment. What might be clear though, is that moral judgment and decision-making might be appropriate tools to evaluate the rationale behind the tax gap and cases of non-compliance in the UK. It is possible to say that the tax gap is caused by human behaviour and moral judgement. So, if tax policy targets this human behaviour and the moral element of decision making, it might lead to a positive impact on tax compliance, which could go beyond criminal conduct and the realms of tax evasion and avoidance. This is possible through the power of reciprocity. With regards to reciprocity, Chaudhuri⁷⁷ argued that past laboratory experiments analysing public games recognised reciprocity as an important driver of behaviour and condition cooperation as a relatively stable type of social preference. In essence, what this means is that individuals, corporate entities, tax enforcement authorities and enforcement officers might conditionally be cooperative if they expect their peers to cooperate. On the other hand, they will not cooperate if they expect others to be uncooperative.

Of course, this is a laboratory experiment, though, the behaviour may correspond with tax evasion and avoidance. Hence, it is very worrying for someone to claim that to criminalise tax behaviour is an appropriate way to achieve effective compliance. In this analysis, we can assume in the conception of all matters that, the contemplation and implementation of ethics and integrity in the

⁷⁴Slovic, Finucane, Peters & MacGregor (2002).

⁷⁵Christie & Holzner (2006).

⁷⁶Goodin (2005).

⁷⁷Chaudhuri (2011).

tax system may resolve all issues. A streamlining of behaviours may occur, leading to an effective tax compliance system. Therefore, criminalisation is only necessary when there is a lack of ethics and integrity in the tax system.⁷⁸ Therefore, the question then arises, how can we assume that the object of a person's behaviour is one that is not committed under ethics and integrity? Our first point of examining the issue here is to look at ethics and integrity in human behaviours.

The motivation to conceal economic activity from the tax enforcement authority might be derived from the taxpayers' rational thinking and decision-making.⁷⁹ This mirrors Baron's illustrations of rational thinking and decision-making.⁸⁰ Therefore, rational thinking and decision-making are what create irrational behaviour that is predictable in the tax system.⁸¹ This view could render the Criminal Finance Act 2017 redundant. This is because a pattern in human behaviour is a result of a lack of ethics and integrity, not criminal conduct. Also, the notion of a cognitive bias is the underlining theory of the majority of beliefs and human behaviour that are detrimental for the tax authority and policymakers or create difficulties for people if they are required to make a moral decision. These beliefs and difficulties lead them to evade tax or avoid paying their fair share of the tax burden. Partly because it allows them to make mistakes that are systematic and well planned, rather than random, leading to undesirable outcomes such as tax evasion or tax avoidance.

The rationalisation of human behaviour and decision-making is what leads to a positive or negative outcome,⁸² therefore, influencing the decision to comply with tax policy or not. Hence, the positive outcome could result in tax compliance, while the negative outcome might lead to tax evasion or avoidance. Though, how this is manifested in the general theory of tax compliance and policy, it is something that is lacking behind the modern approach to tax theory. Even though, there is an estimated number of reliable information on H.M. Revenue and Customs⁸³ and from other scholars,⁸⁴ who have agreed that tax evasion and avoidance are important components of economic activity, none have attempted to address the role of rational human behaviour and decision-making in tax malpractice. Therefore, the thought of making the Criminal Finance Act 2017 a better tool for punishing tax offenders might be very dangerous. Even though that is one of its functions, and insofar as it can do so better without violating the basic premise that legitimates its use that it is a proportional, and respectful response to wrongful action then it should be reformed. I shall reject this proposition in this article, and support the idea of developing more ethics and integrity in the tax system.

For instance, the common mental element for both criminal evasion and facilitation is dishonesty. The new corporate offences have focused much attention

⁷⁸Bourton (2021).

⁷⁹Hastie & Dawes (2010).

⁸⁰Baron & Spranca,(1997).

⁸¹Ritsatos (2014).

⁸²Isen & Means (1983).

⁸³H.M. Revenue and Customs 2009-10 Accounts: Consolidated Resource Accounts - Trust Statement - Report by the Comptroller and Auditor General (2010)

⁸⁴Schneider & Enste (2000).

on this requirement. For example, what might constitute dishonesty in a complex offshore financial services group which intentionally pursues aggressive tax planning for the benefit of its customers? Clients have also asked whether dishonest facilitation captures situations where an associated person turns a blind eye to evasion. Historically under criminal law, the test for dishonesty was a two-stage assessment. The conduct had to be dishonest by the standards of an ordinary, reasonable individual and the evader or facilitator must know their conduct is dishonest by those standards (i.e. the test in *R v Ghosh* [1982]).⁸⁵ While it was a high threshold, the test had been applied without undue difficulty by juries on a daily basis, for example, in theft cases. This is unsurprising few would argue they did not know stealing was dishonest by the standards of the ordinary individual.

However, the recent case of *Ivey v Genting Casinos* [2017]⁸⁶ overruled this test. Now, the test is the same as in civil law albeit proven to the criminal standard. The conduct must be dishonest by the standards of the ordinary individual (knowing the facts the evader or facilitator did). Whether or not the evader or facilitator viewed their conduct as dishonest is irrelevant. The Supreme Court's decision may heighten concerns of corporate conduct being found criminal where the public view of acceptable activities differs substantially from professional market practice. This criminal test can of course capture situations where an employee 'buries their head in the sand' provided a jury believed their conduct was so severe it amounted to dishonesty. The severity of an employee's conduct may be impacted by whether there was a legal duty to act (for example, to submit a Suspicious Activity Report). The key points for firms to bear in mind are that first, the question of dishonesty will be significantly less important in cases where there is a confession or a whistle-blower at the evasion or facilitation stage. Secondly, where dishonesty is at issue, the firm does not have a special ability to see into the mind of its associated persons. That role is reserved for the court and jury who may make a different assessment of dishonesty from those involved at the time all the more so given the Supreme Court's latest judgment. Given how important the meaning of dishonesty is in assessing the breadth of the offences, it is unfortunate that the examples given by HMRC in its guidance are rather obvious and do not address the problem.

Therefore, for the purpose of this article, dishonesty is associated with rational thinking and behaviour, which is defined as the process that individuals take to arrive at a preferable decision or the method of choosing a beneficial choice that is compatible with their emotional outcomes.⁸⁷ In general, it seems that individual decision-making regarding tax compliance may be influenced by emotions, social networks and influences.⁸⁸ This influence can be related to the concept of an associate person in the Bribery Act 2010 and Criminal Finances Act 2017. As with the Bribery Act, the Criminal Finances Act imposes liability on a firm for its failure to prevent the actions of an 'associated person'. A person is associated with a relevant body if they provide services for or on behalf of it.

⁸⁵ *R v Ghosh* [1982] EWCA Crim 2.

⁸⁶ *Ivey v Genting Casinos Ltd t/a Crockfords* [2017] UKSC 67.

⁸⁷ Buchanan & Tollison (1984).

⁸⁸ Bommer, Gratto, Gravander & Tuttle (1987)..

Importantly, only the facilitator needs to be an associated person; the tax evader does not have to be. An associated person can be either an individual or a corporate. This correlates with the influence of emotions, social networks and society. It means that these influences form a core aspect of the law. Therefore, the success of the law rest on the notion of an associate person here. So, it is the environment that influences our behaviour and decision making and tax compliance.

The HMRC guidance is rather primitive than the conclusion. HMRC might only be preserving the character of an early stage in tax compliance and the historical development of something new, but certainly, the criminal aspect of this act is less exciting. We can say that if the law in its certainty and fact does not address the criminal intention of behaviour or conduct, it is possible to move this behaviour and conduct to the settings of ethics and integrity. By understanding the primitive of behaviour and conduct we are likely to instil ethics and integrity in the conception of financial crimes and certain the Bribery Act 2010 and Criminal Finances Act 2017. Ethics and integrity in this setting may strike a balance between promoting the interest of the taxpayer and HMRC, as well as restoring the willingness of the individual to engage with the tax system. This approach is somehow intertwined with the Greek philosophy of promoting good, therefore, this good must be balanced against the reduction of behaviour or conduct that is not good.⁸⁹ Accordingly, we will be building a link between the attribution of ethics and integrity and the legitimacy of compromise in the tax system. therefore, for the current tax compliance mechanism to function well ethics and integrity must exhibit all parts of the essential principle of tax law and policy.

Of course, one could say well the law is a deterrent mechanism,⁹⁰ this position is plausible. However, there also exists a valid argument in the conception and creation of law, it has never stopped crimes or eradicated them in society. Take, for instance, ethics and virtue according to Greek sophist, Cicero, they were of the view this principle allowed rational order to take place in society.⁹¹ Therefore, this rational order help balance the common good against individuals' interest. When we observe the building blocks of the Greek understanding of ethics and virtue, the comparison becomes eminent in our view of the current discourse. In this comparison ethics and integrity in its conception are reflected in the laws of society, human behaviour, social structure and governance. When we relate this to the modern tax system, it is perfectly adequate and logical to recommend that the tax system should be dependent on ethics and integrity. However, this point may not sound attractive to the concept of the Marxist social elite (business owners), whose main focus is serving the interest of capitalism.

Even though there is a comparable understanding of the Marxist social elite concept, I will contest that there is a line between ethics and integrity and serving the self-interest of capitalism.⁹² Therefore, the conflict between the Marxist social elite point may no longer be necessary if we could include ethics and integrity in

⁸⁹Dixon (2010).

⁹⁰Rothe & Schoultz (2014).

⁹¹Corey (2002).

⁹²Goldstein (2012).

the building blocks of capitalism.⁹³ By this conceptual parameter, whether an individual is inherently good or not by the insertion of ethics and integrity in the tax system we will promote justice by deeds, instead of serving the inherent selfishness and self-interest of society. Therefore, the tax system must be built on principles of ethics and integrity, which are inherently the laws of justice.⁹⁴ Meaning it will help the individual to contemplate their action or conduct and keep self behaviours under control. However, I do accept that some critics may question how dichotomous these points are, or whether in practice the tax system can function dependent on ethics and integrity. Of course, this question is plausible, individual behaviours may vary to some extent, however, ethics and integrity may bind all together.

In addition, difficult cases such as franchisees or referral partners (where there is a financially incentivised referral agreement) are not difficult to imagine. Firms can, however, take some comfort from the fact that the more remote the associated person, the less it will be reasonable to have prevention procedures in place to stop them from facilitating evasion. Also, the territorial scope of the foreign tax evasion offence is limited by a dual criminality requirement. Both the tax evasion and the related facilitation must be offences under both the relevant foreign law and English law. This problem could eventually limit the scope and application of the act. This means compliance is reduced and enforcement is limited. In practice, section 46 offence of the Financial Crime Act 2017 will therefore not have been committed where conduct is only a crime in the foreign jurisdiction by virtue of it having more onerous tax laws than the UK. Similarly, there cannot be a UK prosecution for conduct in a foreign country which is legal there but would have amounted to tax evasion if committed in the UK. This means that countries, where reckless or negligent tax evasion is a crime, will not be caught by the section 46 offence. Where the UK's facilitation laws are broader than the foreign jurisdiction, no offence will have been committed. The only defence to the section 45 and 46 offences is that a relevant body had in place such prevention procedures as it was 'reasonable in all the circumstances to expect it to have. Alternatively, a relevant body may argue that it would not have been reasonable for the relevant body to have had any prevention procedures in place (this is unlikely to arise often).

A note of caution is due here since human emotions, social networks and influences are what constitute the societal force. It is possible, therefore, that other cognitive biases have a strong connection to social clues,⁹⁵ which are other components of ethics and integrity. The social clue is caused by bandwagon bias.⁹⁶ Having said that, it is also not clear how the contribution extent of social clues is connected to bias, which is the result of people's need to relate to their peers or access other people's information as a source of knowledge to make a decision.⁹⁷ The bandwagon bias creates a space for people to follow what everyone else is doing, whether it is expressed earlier by others or through a strong societal influence

⁹³Laclau (2012).

⁹⁴Freedman & Vella (2011).

⁹⁵Obermaier, Koch & Baden (2015).

⁹⁶Nadeau, Cloutier & Guay (1993).

⁹⁷Obermaier, Koch & Baden (2015).

on the consistent behaviour of a group of people. It is fairly obvious that bandwagon can take many forms. That is, a bandwagon can manifest itself in terms of human behaviour and decision-making. If this account is correct, then a person of ethics and integrity could be less influenced by social clues. In this sense, the person may possess the faculty to distinguish between tax evasion, tax avoidance and compliance.⁹⁸ However, the difficult question, is whether a person of ethics and integrity will seek a gap in the tax law or policy to avoid paying their fair share of taxes. The answer to this question can be observed in the primitive of ethics and integrity. Therefore, a person of ethics and integrity may simply stay true to virtue and no restriction may impose or interfere with principles. I shall concur with the ancient Greek and illustrate a person of ethics and integrity could not qualify as a criminal or moral breaker. On this consideration, the possibility arises that ethics and integrity will not coincide, and may not conflict with the law, therefore the person's behaviour is one of virtue. A taxpayer with ethics and integrity may not embrace corruption or criminal conduct if only they are true to their virtues and values.

Understanding how human behaviour influences their decision-making and processes is an important aspect of designing an effective and efficient tax compliance system. This is because the taxpayer may generally not evaluate risky prospects using the objective probability of events. In practical terms, this means that taxpayers might make a decision using the subjective probability that can be separated from the objective probability.⁹⁹ A possible explanation of this might be that a decision to evade or avoid tax cannot be calculated as a simple individualistic gamble.¹⁰⁰ Therefore, the examination of tax evasion and avoidance within the parameter of values could not predict human behaviour and decision-making. This means that an empirical study is required to predict the levels of tax evasion and avoidance, which is consistent with rational thinking and the principle of ethics and integrity in law. Therefore, through the principles of ethics and integrity, the defect in human behaviour and the tax system is revealed, whereby enforcement is rendered incapable of resolving the issues of tax evasion and tax avoidance. We must instruct the tax system to place ethics and integrity within its compliance and enforcement methods so that the purpose and objective of the tax system can be known to the taxpayer. This compound element is what the ancient Greeks used as the guiding eye of behaviours.

However, approaching the discourse in this manner helped the development of significant points on ethics and integrity in ancient Greece. Plato's presentation stresses the importance of happiness on the basis of virtue. Therefore, according to Plato, a wealthy person may be happier than a poor person. In the same vein, he stipulated that some people may be happy if their conduct is not constrained by laws while others' behaviour was subjected to the law. In this vein, thus, a wealthy person will be much happier if they have a privileged position to break the law. Could this help explain tax avoidance? This point is problematic. Perhaps in modern terms, it could be conceived that this is the point Plato was trying to make.

⁹⁸Amara & Khlif (2018)..

⁹⁹Kahneman & Tversky (1979) at 278.

¹⁰⁰Baldry (1986).

If this point is commended in philosophical discourse, happiness may turn the individual from consideration of virtue to cherishing notions that are based on self-satisfaction. Thus, the poor may march on in their discontent with virtue and unlimited painful suffering, while those who are wealthy live on a principle of self-concern and distortion of the greater good. The Greeks also found this point problematic in its explanation and form. In this understanding, therefore, if ethics and integrity are able to permeate the behaviour of the wealthy individuals by a sort of societal principle the ultimate form of legal governance shall be achieved.

Conclusion

In conclusion, whichever course we take we must arrive at a variance that gives effect to the greater good. Or a variance which can be considered as virtue and controlled under legal principles and policies. I shall endeavour to comment that this position must or should have existed in the conception of tax laws and policy. If we find this concept in tax law and policy, we can, therefore, say that a pragmatic solution for tax compliance is reached and the tax system is immune and insulated from misconduct. This is partly because ethics and integrity are the barriers between tax evasion and tax avoidance. It ensures that taxpayers are bound by ethics and integrity principles, to prevent the possibility of influence behaviour or the burden of individual self-interest at the expense of the tax system. What is essentially being said here is that ethics and integrity ensure justice to all people and serve as a guiding principle against bad behaviours.

Therefore, trying to cheat the tax system is not that hard to comprehend if one looks at some of the parameters of the current tax system. However, the problem is not the parameter, but, it is the failure of not recognising that the current tax system has created an incentive-caused bias scenario. How do you know incentive is a contributory part of tax evasion and tax avoidance? You will know because a tax system that follows an aggressive tax plan creates reactive behaviour that is strong and fast enough to overshadow the rational mind of the taxpayer. And of course, that is a very dangerous precedent to set in the tax system. I do not think the future of the tax system should follow, such a conception, as a matter of fact, the system will be better without it. In the rationalisation of one system, it is one thing about doing something dumb and there is another thing about doing it again. The flaw of the system is its failed synchronicity and its misconception of taxpayers' attitudes toward compliance. However, the effort of tax compliance and enforcement is not to be discounted in any way, but its superficiality needs to be condemned. The present approach may have value as a means, but it is wholly inadequate as an end, for it cannot help the tax system to achieve compliance that is indispensable to ethics and integrity. Therefore, the universalisation of ethics and integrity is a compliance opportunity for the tax system and must be supported and encouraged in the current tax system. Also, further study is required to examine some of the points raised in this study. For example, there is a need to assess what factors affect the decisions of agents and tax authorities. Is there a correlation between individual tax decision and the decision of tax authorities and

agents/professionals? Having said that this study has laid a foundation for future research to focus, but it is also important that tax policy and authorities use the findings in this study to develop a different approach in examining tax evasion and compliance.

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Jobs, Green Deal and Sustainability

*By Simone Caponetti**

This paper aims to analyse the European Green Deal with reference to the effects it will have on the labour market. After describing this strategic plan for the period 2019-2024, the Author states that in order to have a just, green and equitable change, a multilevel approach must be pursued that takes into account equal opportunities and digital skills, professional mobility, the creation of new jobs and support for social enterprises, the promotion of gender equality, inclusion and equality, support for fair and decent work, as well as social protection. Important aid will result not only from the involvement of people in the green transaction process, but also from the support of the trade unions which, more than anyone else, can help to obtain the maximum profit from the merger between the environment and jobs.

Keywords: *European Green Deal; Labour; Sustainability; Green transition; Green Jobs; Union role; Labour law market*

The EU Strategic Agenda 2019-2024 according to von der Leyen: A New Paradigm?

On 20 June 2019, the European Council adopted the new strategic agenda for 2019-2024, singling out four main priorities on which to focus its actions. These dealt with protecting citizens and their freedoms; developing a strong and responsive economic base; building a green, fair, and social Europe with zero climate impact; and, last but not least, promoting European values and interests on the world stage¹.

This strategy does not clash with the content of the 2030 Agenda, since in both cases the content is diffuse and transversal to the various priorities already established. Indeed, the various Sustainable Development Goals (SDGs) included

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¹While Europe is focusing on its promotion activities, Japan is already talking about Society 5.0 with regard to the Internet of Things and the social impact of these new technologies, Realising Society 5.0, JAPANGOV, Society 5.0, which the Japanese government is aiming at realising, is a society where, through the Internet of Things (IoT), all human beings and things are connected, and a huge amount of information is accumulated in the virtual space (on the net) by means of sensors stretched in real space. Artificial intelligence analyses this big data, and the analysis results are fed back to human beings in various forms in real space». See, Ouchi (2018). The interdisciplinary literature on the subject is now extensive; there is no need to recall titles and authors. See also Tagliapietra (2019).

in the 2030 Agenda are explicitly taken as a fundamental reference and could be considered as suitable support for the latter strategy².

The framework of European strategies was further defined on 16 July 2019, when the new President of the European Commission, Ursula von der Leyen, presented the political guidelines for the 2019-2024 mandate, as detailed in the publication: "A more ambitious Union - my programme for Europe"³. This programme can be summarised in six points⁴:

- Delivering a European Green Deal;
- Encouraging an economy that works for the people;
- Preparing Europe for the Digital Age;
- Protecting the European way of life;
- Imposing (in a positive sense) European strength;
- Giving a new impetus to European democracy.

Particular emphasis is placed on the first point in the programme, the European Green Deal⁵. The President herself described it as the most pressing challenge among all the priorities. Dealing with the health of the planet, it brings with it the highest responsibility, yet also provides one of the greatest opportunities of our time. Its ambition is to transform Europe into the first climate neutral continent by 2050.

Regarding the issue at hand, the document also states that, although Europe takes pride in its economy and endeavours to make it stronger, it must be borne in mind that it is not the people who should serve the economy, but the economy that should increasingly serve the people. What has been lacking in recent years is precisely the social dimension of the economy and its reconciliation with the market. Efforts should therefore be made to steer the European Semester towards these goals to ensure that the economies of individual European countries move towards the sustainable development objectives⁶.

In material terms, each European Commissioner will implement the new strategy, adopting a proposal launched by ASVIS⁷, each ensuring the achievement of the UN Sustainable Development Goals in their respective policy area. The

²Indeed, the EESC notes in its opinion of 26 September 2019 that 'the EU's strategic agenda for 2019-2024 should have been based on the SDGs'. The opinion can be consulted at <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52019IE1561&from=EN>

³The completed document was published on 9 October 2019 at <https://op.europa.eu/en/publication-detail/-/publication/43a17056-ebf1-11e9-9c4e-01aa75ed71a1>.

⁴These can be further explored at https://ec.europa.eu/info/strategy/priorities-2019-2024_it

⁵For further details and implications see Asaro & Fisicaro (2020).

⁶Ursula von der Leyen - 16 July 2019, opening address at the plenary session of the European Parliament, <https://op.europa.eu/en/publication-detail/-/publication/62e534f4-62c1-11ea-b735-01aa75ed71a1/language-en/format-PDF/source-search>

⁷This can be read in https://asvis.it/public/asvis2/files/CSCCommissioneuropeaASviS190911__1_.pdf

College as a whole, on the other hand, will be responsible for the overall implementation of the goals⁸.

The European Green Deal: A Focus for Reflection

On 11 December 2019, the new Commission presented the European Green Deal as the first key act opening the political mandate, suggesting the extent to which this issue lies at the heart of the current political bodies⁹.

Neither English nor any other language dictionaries provide a complete definition of “green deal”: Whilst we know that the adjective “green” is currently considered ecological, sustainable, and zero-emission (green economy, green growth, green jobs, green bonds, go-green industries, etc.), the noun “deal” – meaning agreement, contract, political pact/programme – is almost as familiar, at least since the 1930’s, when American President F. D. Roosevelt launched his “New Deal” (“new course, new direction”). That is, his economic policy programme aimed at halting the Great Depression in the United States and at the same time laying the foundations for a new economic order that would allow for a fairer distribution of wealth and greater stability. Precisely in order to fully preserve the meaning of “momentum towards a better future,” with reference to the quality of life inherent in the famous Rooseveltian expression, the linguists at European institutions have decided, in some cases, to leave the English phrase “Green Deal” in various versions (as in the case of Italy), instead of translating it, as in the case of Spanish (Un Pacto Verde Europeo) or French (Un Pacte Vert pour l'Europe) or, to a lesser extent, German (Ein Europäischer Grüner Deal) translations.

Von der Leyen's green plan is based on three pillars. The first, called the Just Transition Mechanism, benefits from a dedicated fund and aims to mitigate the economic and social consequences of the green transition for the regions most dependent on fossil fuels (thus pulling Poland into the Green Deal “bandwagon”). The second is InvestEU, the successor programme to the Juncker plan, which will

⁸Which can be read at https://ec.europa.eu/commission/commissioners/sites/comm-cwt2019/files/commissioner_mission_letters/mission-letter-paologentiloni_en.pdf

⁹The expression “Green Deal” was coined by the Pulitzer Prize-winning American journalist Thomas Friedman (A warning from the garden, The New York Times), but there is also a United Nations report that, back in 2009, called for a “Global Green Deal”. It was the American Democrats, led by the young congresswoman Alexandria Ocasio-Cortez, who first presented Congress (February 2019) with a “plan” of economic reforms, based on the report of the United Nations advisory body Intergovernmental Panel on Climate Change, which analyses the possible consequences of a 1.5 degree increase in global temperatures. Although the Green Deal was defeated in the Senate by the Republicans, once it was presented in the United States, it went around the world. In March 2019, in the United Kingdom, the Green Party, together with Labour, presented a draft bill for a Green Deal of its own and, under the impetus of the Paris Agreement and the wave of Greta Thurnberg's Fridays for Future, many countries started to think seriously about it. As has the new European Commission, which on 11 December 2019 presented the ‘European Green Pact’, a veritable ‘Marshall plan for the climate’ which, together with the long-term strategy to 2050, to be approved in the coming months, should put the European Union on course for complete decarbonisation. This is a coordinated action on several fronts, involving commitments at both European and national level, which will be supported by a vast investment plan, but which will have to be negotiated in its many aspects.

support investments in the EU from 2021 to 2027, at least a third of which will be for combating climate change. The third pillar is the intervention of the European Investment Bank (EIB) which, from 2021, will no longer support the use of fossil fuels and aims to double its investment in green projects from the current 25 % to 50 %, consequently becoming the European climate bank¹⁰.

Although not forming a true part of an actual pillar, the work within the Green Deal will be a driving force. Unquestionably, the main objective of the Green Deal is to protect, conserve and improve the EU's natural capital and thereby protect the health and well-being of its citizens from environmental threats and their effects. Additionally, it aims to strengthen the social economy, augment the employment rate in individual countries, and promote fair and decent working conditions, building upon the so-called green transition.

Much criticism has been levelled at the announcement of a 1 trillion Euro investment. It should be made clear, however, that this is not money that the EU will allot directly out of pocket (this currently amounts to €7.5 billion), but an overall calculation that aims to stimulate public and private investment for this amount¹¹. This is in addition to existing funding and the so-called leverage effect. Private investment will be crucial to the success of the European Green Deal.

EESC study on the economy "we need" for fair, decent and sustainable work

On 23 January 2020, with its opinion piece entitled "The sustainable economy we need"¹², the European Economic and Social Committee (EESC) supplemented the framework of systemic measures that Europe should adopt with innovative considerations and proposals, by focusing on the criticism of the rules of finance and of GDP as the preferred indicator¹³. The commentary aimed at outlining the foundations of a European economy of well-being that would be sustainable and

¹⁰See EIB Investment Survey 2022. European Union Overview. In this survey, EIB analyses the share of EU firms seeing the transition to stricter climate standards and regulations as a risk or an opportunity remained fairly balanced (each around 30%), with nearly 40% of EU firms continuing to expect no impact from the transition. About 90% of EU firms have already taken action in this respect, with the aim to reduce greenhouse gas emissions. About 57% of firms are making investments in energy efficiency, 64% in waste minimisation and recycling and 32% in new, less polluting business areas and technologies. In 2021 alone, around 40% of firms invested in energy efficiency. Around 57% of EU firms see themselves as affected by physical climate change risks, with only a third having taken action to build resilience against these risks. While 20% of firms invested in or developed solutions to reduce or avoid exposure, 14% invested in or developed an adaptation strategy. About 53% of EU firms have already invested in climate change more broadly, and more than half plan to invest over the next three years. Compared to the United States, the European Union continues to forge ahead, both in terms of the share of firms that have invested and the share of firms planning, over the next three years, to invest in tackling climate change. EIBIS 2022 overview presents the results of the survey run in 2022. Questions in the survey might point to "last financial year" (2021) or expectations for the current year (2022).

¹¹Could, in this contest, re-update the problem exposed by Joerges (2010).

¹²The document in question can be read at <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52019IE2316&from=IT>

¹³This was already studied by Manfrin (2010).

inclusive, through which the adoption of a European ecological and social pact will give substance to the EU's commitment to the 2030 Agenda.

Based on an in-depth economic and social analysis of labour issues, the EESC has noted that marginal productivity gains have benefited the shareholders of large companies rather than workers. This has called into question the social contract, increased the inequalities, and undermined public confidence in public administrations. It may also be argued that a continuous demand for increased labour productivity has led to important criticalities. An exclusive focus on increasing labour productivity, without due attention to its environmental and social implications, could drive smaller firms out of business, increasing unemployment and exacerbating inequalities.

The “commercialisation” of life, which has undermined the social fabric of citizens, has also been decisive here. The characterisation of citizens primarily as individual consumers has burdened them with the responsibility for their choices without offering them affordable and accessible alternatives. The commercialisation of social life and the reinforcement of unbridled individualism have undermined the social fabric and contributed to political instability in Europe.

According to this study, strengthening social solidarity will also have beneficial effects on democracy. The fears of citizens regarding the climate crisis, social injustice, and financial malfeasance are now manifesting themselves in new and more pressing forms, as shown by the school climate strikes and other societal movements on this issue.

The study then moves on to indications of principle, recognising that the welfare economy should be capable of achieving the SDGs while ensuring prosperity. This should be achieved even under conditions of low or no growth associated with the economic recession or secular stagnation that many states are facing or are set to face, especially since the current global pandemic. One of the objectives that should be pursued to achieve fair, sustainable and decent work is precisely that of reforming the nature and quality of work. It is therefore necessary to transform investments and consider how to achieve lasting prosperity. It will not be possible to reorganise businesses and work without transforming investment, which is the basis of any lasting prosperity.

The bottom line is that there is currently no comprehensive and concrete review of the EU's monetary and budgetary rules¹⁴ to ensure that they are consistent with the objective of enabling the transition to a sustainable economy, including a review of current EU structures. The aim is to develop ideas and strategies to end the “growth dependency” of the EU economy¹⁵.

The EESC thus makes a strong plea to the EU and the Member States to raise awareness in their policy choices to reverse these imbalances.

¹⁴Reference should be made to Caponetti (2018). See also Joerges & Glinski (2014); Scharpf (2010).

¹⁵See the studies of Dyson (2014) and Rodrik (2011).

...and in Italy? The economy amid pandemic, work and Green Deal

Faced with the pandemic crisis now griping the whole of Europe and beyond, the European Commission has developed an initial assessment for the European Semester with a detailed analysis document relating to each country, including Italy¹⁶. As regards the labour sector, the recommendations made to Italy for the European Semester (2020 stability programme)¹⁷ are to provide adequate replacement incomes and access to the social protection system, especially for atypical workers; to mitigate the impact of the crisis on employment, including through flexible working arrangements and active employment support; and to strengthen distance learning and the upgrading of skills, including digital ones¹⁸.

Given the impact of the COVID-19 pandemic and its consequences, Europe has signalled to Italy that social safety nets should be strengthened to ensure adequate replacement incomes, irrespective of the employment status of workers, particularly those facing gaps in access to social protection¹⁹. Strengthening income support and replacement income is particularly relevant for atypical workers and people in vulnerable situations. The provision of services for social inclusion in the labour market would also be crucial, as would, in line with the promotion of a sustainable and inclusive approach, the integration of women and young people into the labour market.

Additional important steps Europe is asking of Italy include: providing liquidity to the real economy and investment in green and digital transition; ensuring the effective implementation of measures aimed at providing liquidity to the real economy, in particular to small and medium-sized enterprises, innovative companies and the self-employed, avoiding payment delays; frontloading mature public investment projects and fostering private investment to support economic recovery; focusing investments on green and digital transition, in particular on clean and efficient energy production and use, research and innovation, sustainable public transport, waste and water management and an enhanced digital infrastructure to ensure the provision of essential services. Green transition investments will be particularly relevant in supporting recovery and increasing future resilience. Italy is highly vulnerable to extreme weather phenomena and hydro-geological disasters, including droughts and forest fires. For this reason, Italy's transformation into a climate-neutral economy will require substantial public and private investment over an extended period.

¹⁶This is the Communication of 26 February 2020 which can be read in <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=COM:2019:150:FIN&qid=1551777809333&from=IT>

¹⁷Reference is to European Commission 20 May 2020 - COM(2020) 512 final and European Council 20 July 2020.

¹⁸See, Garofalo, Tiraboschi, Fili & Seghezzi (2020).

¹⁹In this respect, COM(2020) 241 final of 16 June 2020, reporting on the impact of demographic change, highlighted the impacts also on the world of work and skills, indicating in the Recovery and Resilience Facility in response to the very serious pandemic due to COVID-19, large-scale financial support with the aim of making the economies of Member States more resilient and better prepared for the future, in particular with regard to demographic change. The Communication can be read at <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52020DC0241&qid=1594562540840&from=EN>.

Green Deal investments are also key to reducing the human health impact of air pollution in Italian cities, particularly in the Po River Basin. Infrastructure deficits in water and waste management, particularly in southern regions, generate environmental and health impacts that result in considerable costs and lost revenue for the Italian economy. Resilience to climate change is important for all infrastructures, including health infrastructures, and requires adaptation strategies towards this end. Addressing the challenges associated with the environment, hydrological risks, climate action, the circular economy and industrial transformation offer an opportunity to improve productivity while avoiding unsustainable practices. Therefore, investing in these types of projects could help create new jobs and support post-crisis recovery.

Relaunching the European Pillar of Social Rights through the Green Deal

In order to implement the fair and inclusive transition, indicated in the Green Deal as a fundamental principle, the European Commission²⁰ relaunched the twenty points of the European Pillar of Social Rights already proclaimed jointly by the European Parliament, the Council, and the European Commission on 17 November 2017²¹. This positions an action plan to implement the pillar, starting 2021. The actions address several of the SDGs detailed in the 2030 Agenda not already directly considered in the Green Deal. In the communication, the Commission emphasises the interrelationship between the Green Deal and the implementation of the social rights pillar, making it the main reference of the new European strategy for sustainable development²².

Indeed, taking the European pillar of social rights into account could be key to effective implementation of these new strategies. This is precisely what is needed to ensure that the transition to climate neutrality, digitalisation, and new employment is socially fair and just²³.

²⁰Through COM(2020) 14 final, 14 January 2020, Un'Europa sociale forte per le giuste transizioni. Consult at https://eur-lex.europa.eu/resource.html?uri=cellar:e8c76c67-37a0-11ea-ba6e-01aa75ed71a1.0012.02/DOC_1&format=PDF

²¹This can be found at https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_it. For a more detailed discussion: Sartori & Corti (2019); Giubboni (2018).

²²For more information on sustainable development in relation to the issue at hand, see Battisti (2018). See also COM(2020) 14 final, which relaunched the social rights pillar and also outlined guidelines for labour policies in a coherent framework that integrates the Green Deal investment plan and the Fair Transition Fund.

²³A just transition means that addressing both the employment and distributional effects of a shift to a net-zero economy should be seen as an integral part of the climate policy framework (e.g. the Fit for 55 package) and not only as supplementary corrective measures. These issues span many dimensions such as the distributional effects of decarbonisation policies, jobs losses and employment transitions, the protection of basic social rights and the inclusion of citizens and organised civil society in decision-making. See European Economic and Social Committee Opinion on Social dialogue within the green transition (Exploratory opinion requested by the Czech Presidency), NAT/864, 21 September 2022.

The European pillar of social rights could be a valuable tool in making the daily lives of citizens fairer, whether students, employees, jobseekers or pensioners, whether urban or rural, irrespective of gender, race, or ethnic origin, religion or belief, disability, age, or sexual orientation. The pillar aims to improve equal opportunities and employment for all and to ensure fair labour conditions, social protection, and inclusion.

Clearly, at the heart of these principles lies a commitment to placing people at the centre²⁴, regardless of the changes, leaving no one behind²⁵. To this end, the contribution of every nation state will be required. Operationally, an action plan from 2021 will be presented, that will make the rights and principles protected in the pillar a reality²⁶. The European Semester for economic policy coordination will undoubtedly act as a reminder and will continue to record progress towards achieving the pillar's objectives. Obviously, the Semester will need to integrate the UN Sustainable Development Goals, so that sustainability and the well-being of citizens are at the heart of European economic policy and governance, honing macroeconomic stability, productivity, equity and environmental sustainability. The structure of taxation should also support employment and growth, while complying with climate, environmental and social objectives. Inequitable taxation, including at the global level, would undermine the ability of countries to meet the needs of their economies and populations.

The Green Deal should be seen by national governments as a strategy for growth. This is a time of great change. Climate change and environmental degradation will force us to adapt the economy, industry, the way we travel and

²⁴For further details see Gabrielli (2016) and Gabrielli (2015).

²⁵Recently, the European Council, in its Conclusions of 24 October 2019 on "The Welfare Economy", highlighted that at the heart of the Welfare Economy are the interconnections between the European Pillar of Social Rights and the 2030 Agenda, emphasising their mutual relations for the benefit of citizens and economic development, while calling for their implementation in national and EU policies.

²⁶In the EU Legislative Priorities for 2023 and 2024 Joint Declaration of the European Parliament, the Council of the European Union and the European Commission, the three Institutions agree to give the utmost priority, in 2023, and until the end of the parliamentary term in 2024, to the following policy objectives on the economy that works for people. In the Declaration it reads that "we will increase efforts to boost competitiveness, secure growth and create employment opportunities for European citizens. We will focus in particular on young people and the development of relevant skills. We will remove the obstacles and burdens holding back our small companies. We will act to put forward an SMEs Relief package and to support and relieve businesses, including through easier access to capital and data, fast and innovative payment solutions, and streamlined rules on insolvency. We will continue prioritising the implementation of the European Pillar of Social Rights and the Porto Summit declaration, and take further measures to ensure that the social dimension is taken into consideration in all our actions, including the right to disconnect and the elimination of the gender pay gap. We will work towards a swift agreement on the co-ordination of social security systems to support labour mobility, as well as on deposit insurance, sustainable corporate governance, anti-money laundering, and on a ban on products made with forced labour. We will give due attention to the review of EU economic governance to ensure it functions to support the EU and Member State economies and work to strengthen the capital markets and the role of the euro, including the digital euro, and complete the banking union. We will endeavour to achieve progress on the global tax reform. To support sustainable development globally, we will work towards swift agreement on the generalised scheme of tariff preferences, and a reformed customs code".

work, what we buy and what we eat towards an alternative course. The beneficial effects will not be long in coming, as this strategy is expected to create new businesses and jobs over the next decade, generating new and increased investment. However, it will also be important to focus on the centrality of people in the digital economy of both today and tomorrow, in accordance with the principles protected in the European pillar of social rights²⁷. The forecast is that in the next five years, artificial intelligence and robotics alone will generate almost 60 million new jobs worldwide, while many occupations will change or cease to exist²⁸. While it is true that the new technologies will eliminate jobs that are by now out of date, they have the merit of creating new job opportunities and making it possible to work with more flexibility. The problem, if anything, is to ensure that the new jobs are quality ones, and that people have the right skills to perform them²⁹. The digital economy cannot be based on the legal and social norms of the 20th century³⁰, and perhaps it is time to rethink social protection systems, in some cases guaranteeing them and, finally, adapting them to taxation rules so that everyone contributes fairly³¹.

Another factor to be considered when dealing with the European pillar of social rights is the demographic and urban change that is taking place in Europe. Due to ageing and urbanisation, many rural areas in Europe are experiencing a decline in population, and the gap between cities and rural areas is growing and can no longer be ignored³². Today we are living longer and healthier lives, thanks to advances in medicine and public health³³. As a result, new needs are emerging (care of the elderly, for example), but also new opportunities (the whole field of home and other care work, as another example). The 'silver' economy and the care economy undoubtedly offer many new jobs that must be taken into account, while at the same time enabling older people to remain active and receiving the care they need³⁴.

²⁷For an economy that takes account of social rights, see: <https://ec.europa.eu/transparency/regdoc/rep/1/2020/IT/COM-2020-14-F1-IT-MAIN-PART-1.PDF>

²⁸For an analysis of the issue of employment and unemployment due to artificial intelligence and Industry 4.0, refer to Caponetti (2018a).

²⁹Guarisco & Sacchi (2017).

³⁰Fray & Osborne (2013); Ichino (2017); Hadfield (2016).

³¹See Pessi (2013); Tiraboschi (2020); Lucifora & Origo (2017).

³²Factors noted as incisive by Tiraboschi (2020) states that these factors are widely understandable concerns, at least in a country like ours [Italy], characterised not only by consistent geographical and territorial differences, but also by rather differentiated conditions of access to welfare services or benefits provided by companies to their employees depending on the culture and size of the company, the type of employment and work, or the characteristics of the production or product sector of reference. See also, Caruso (2016); Zilio Grandi (2017).

³³Such are also the claims by Battisti (2020).

³⁴See Battisti (2020).

Criticism of the European Pillar of Social Rights. The issue of Effectiveness

Even after the proclamation of the pillar, however, there is still a strong need for regulatory legislation. The lack of the necessary balance continues to be felt in the relationship between collective social rights (right to strike, contractual autonomy) on the one hand, and the four fundamental European freedoms (goods, services, capital and persons) on the other hand, as well as the rules and procedures of the monetary union.

It is also essential to bear in mind that the seriousness of the current problems is due to the Euro crisis. The manner in which the Euro was bailed out is decisively irresponsible³⁵. Indeed, the policy put in place for this bailout constitutes the greatest threat to the European social model that has ever occurred in the 60-year history of European integration. Those Member States that have been particularly hard hit by the crisis have had to undergo drastic reform programmes, including severe austerity policies and labour market reforms³⁶. This is the case for states who have cut social benefits, where the system of collective agreements has been dismantled, or where public sector wages and minimum wages have been frozen or reduced³⁷. These measures have had catastrophic consequences on the socio-economic situation in countries that were already in crisis. It was precisely these countries that also had to contend with very high unemployment, a steeply rising poverty rate and serious economic problems. The remaining elements of the Eurozone's economic and fiscal policy construct, reformed in the wake of the crisis, are also socially unbalanced.

The new procedures, which include sanctions, are aimed solely at consolidating budgets and increasing competitiveness. The problem, therefore, is not only a deficit in the protection of social rights in EU member states, but also the violation of these rights by European policy itself.

In its current version, the pillar overlooks two central problems: First, the cuts in social benefits and the erosion of the collective rights for working men and women in the Eurozone Member States, especially in the countries under Troika supervision. Second, the conflict between collective social rights and ECJ case law with respect to fundamental freedoms.

A document that adheres to generalities while holding no binding force will not be able to counter the attack on the foundations of the European social model carried out by fundamental freedoms, competition rules, the European balanced budget, the Troika, and the deficit procedures, since these instruments are binding and can be implemented by means of legal action or sanctions. After all, collective social rights are already explicitly protected by binding European law – specifically

³⁵In this sense, we recommend the insights offered by Georges (2015); Giubboni (2015).

³⁶Di Majo (2015), text available at: <http://www.edizioniesi.it/dperonline/data/uploads/articoli/dima-jo-quo-vadis.pdf>, asserts, agreeably, that "the economic crisis has stimulated the production of a law 'parallel' to the Lisbon Treaty, characterised by a series of austerity policies that, connected to the consequences of the sovereign debt crisis, represent a terrible mix that, in front of a trend of increasing social spending, of the prolongation of the average life, of the low fertility and of the decrease of the population of working age, worsens the problem of the sustainability of the welfare state, concretising in a fall of prescriptiveness of fundamental rights".

³⁷Examples are given by Busch, Hermann, Hinrichs & Schulten (2013); Rasnača (2017).

by the European Charter of Fundamental Rights. Yet these protections have so far not prevented the EU from circumventing or even directly infringing upon these fundamental social rights.

For a more effective protection of social rights in the EU, further concrete and targeted measures would be needed. Firstly, the basic relationship between social rights on the one hand and the fundamental freedoms of the European single market on the other should be properly balanced through a limitation of fundamental freedoms by secondary legislation. Secondly, social rights could be protected and extended in a much more targeted way by setting concrete European minimum standards for various social benefits.

States would be allowed to deviate from the standards only upwards. For example, minimum replacement rates could be introduced for state benefits such as unemployment benefits or pensions. Similarly, indications regarding the guarantee of a minimum level of care are also conceivable. Depending on their economic capacity, Member States could be divided into groups with different replacement rates, but these should be subject to upward adjustment in the long run³⁸.

Finally, no possible solution to another important problem is proposed in the pillar. In the long run, the Commission aspires to establish binding rights of individuals vis-à-vis Member States. At the European level, this would obligate the Member States to implementing principles that they can, to a large extent, agree with. However, no European policies that would enable them to bear the economic burden of such implementation are envisaged. At the same time, the straitjacket constituted by the budgetary provisions of the monetary union forces them to strictly limit their spending.

Given these considerations, the best path towards a green, fair and just transformation is that of a multi-level operational structure³⁹. The author will explore these arguments in the paragraphs below.

Jobs, Equal Opportunities and E-Skills: The Crux of Education

One of Europe's recommendations to Member States is to focus on training, in order to better manage the increasing job turnover and new flexible working models. Specifically, Europe views the constant need to learn as the solution to these problems. Indeed, the skills acquired make it possible to take advantage of a rapidly changing labour market, while also being prepared to meet the challenge of the changes required by the Green Deal⁴⁰.

The point is not trivial, considering that too many young people today lack basic and digital skills, and too few have the opportunity to catch up after graduating

³⁸See Busch (2005); Dyson (2013); Dawson & De Witte (2013).

³⁹Alahuhta (2012).

⁴⁰In fact, it is estimated that half of the current workforce will need to update their skills within the next five years, for more details see: Mosso & Ghio (2020). See also, Arnaud & Schminke (2012).

school⁴¹. Only one in 10 adults participates in training and a million vacancies for ICT specialists are inhibiting investment in digital transformation⁴².

Education and training are thus crucial to achieving the skills required by the labour market. Member States should therefore adopt inclusive, high quality national education and training systems from an early age, supporting those who take responsibility for their own lifelong development throughout their careers through lifelong learning pathways. Alternatively, skills and experience gained in the workplace, through internships, volunteering, or any other informal context, if recognised and valued, could certainly be an important asset and opportunity for job seekers.

In a fluctuating and changing labour market, it is therefore essential that everyone has a broad range of key competences that provide a solid basis for adapting to changing needs. It is no coincidence that in 2018, Europe set out the eight European key competences, which are designed to ensure the full development of individuals.

The topic is of particular interest if one relates it to certain regions or to the difficulties employers have in finding qualified workers, especially in small and medium-sized enterprises (SMEs), the backbone of our economy. The creation of appropriate educational pathways to acquire the relevant skills will be even more necessary in areas where the green and digital transition will take place⁴³.

According to an operational and pragmatic logic, professional education, training and apprenticeships can promote the employability of both young people and adults and respond to the changing needs of businesses. In terms of costs, the EU suggests that this investment, made with a view to retraining and improving skill levels, should be borne by the public sector, employers and the individuals concerned.

While no problems arise for the involvement of the public sector and the people involved, there may be reluctance on the part of employers. It is important to keep in mind that quality education and training can break the vicious circle of poor performance, a valuable argument to get practitioners and employers involved.

With regard to digital expertise, the Digital Europe Programme will support the development of digital expertise with appropriate instruments, including economic instruments, to enable the deployment of these technologies throughout the economy and to strengthen the e-skills of education providers. To support the actions of Member States, the Commission has updated the Digital Education Action Plan to reinforce the digital competences of both young people and adults to ensure that all educational organisations are ready for the digital age.

⁴¹Colombo (2019). The problem also applies to teachers' e-skills, see at Capogna, Coccozza & Cianfriglia (2017); Anderson (2001); Bocconi, Balanskat, Kampylis & Punie (2013); Capogna (2016).

⁴²In fact, a European study states that more than 50% of companies that recruited or tried to recruit ICT specialists in 2018 reported difficulties in filling vacancies. This study can be found in more detail at https://ec.europa.eu/eures/public/it/news-articles/-/asset_publisher/L2ZVYxNxK11W/content/the-top-ict-skills-in-demand-by-companies-tod-1?inheritRedirect=false&_101_INSTANCE_L2ZVYxNxK11W_backLabelKey=news.articles.back.to.list&_101_INSTANCE_L2ZVYxNxK11W_showAssetFooter=true

⁴³Pitzalis (2016).

Supporting Professional Mobility

Almost all citizens endeavour to find jobs or to move from one job to another. In some countries, this is possible due to a strong network or to the citizen's own proven track record, while in others it is much more difficult. The reasons for this can be many, such as not having enough or useful information about job opportunities, not being able to find a job that matches their skills and experience, or personal and family difficulties. Public and/or private employment services should support not only the unemployed, but also those at risk for losing their jobs due to outdated skills, or those who wish to develop new ones.

The investment plan for a sustainable Europe, or the European Green Deal investment plan, contributes in its operational lines to financing the transition that Europe is facing, including the aspects mentioned above. The transition to a greener economy is likely to have a greater impact in some regions and sectors than in others. An integral part of the plan is a mechanism for a just transition, including a dedicated fund that will support the regions most affected by the transition, helping to ensure that no one is left behind.

The EU's commitment to ensuring that environmental sustainability goes hand in hand with social sustainability seems clear. Green investments will develop new economic activities and create new jobs, secure affordable energy, and enhance the acquisition of new skills. The Modernisation Fund will also enable a just transition in carbon-dependent regions by supporting re-employment, retraining, and upskilling of workers, education, job search, and start-ups.

Precisely to show solidarity with and support for redundant or self-employed workers, the EU has opened the possibility of using the European Globalisation Adjustment Fund in these situations, so that these workers are not kept on the margins of the labour market⁴⁴.

Creating New Jobs. Social Economy Contributions by SMEs and Social Enterprises

Although the European economy is generally growing, labour markets are uneven with high unemployment Member States and low unemployment Member States.

One of Europe's greatest challenges has always been to create the conditions for a social market economy that can create more and better jobs for all in the years to come⁴⁵. This requires a sound and well-considered industrial strategy, firmly anchored in the single market, enabling all companies to innovate and develop new technologies, promoting circularity and creating new markets. Addressing the social and employment aspects is indeed a very important part of the strategy that Europe cannot preclude when the aim is to reap the greatest possible benefits from industrial transformation.

What the Commission has proposed is a specific strategy for small and medium-sized enterprises (SMEs) to be implemented during 2020 and in the years to come. The strategy targets SMEs since they account for 85% of new jobs

⁴⁴See Daley (2017); Goodstein, Butterfield & Neale (2016).

⁴⁵Cullen, Parboteeah & Victor (2003).

created in the last five years. Promoting innovation, securing funding, and cutting red tape for SMEs is vital for job creation in Europe.

The European Regional Development Fund, the European Social Fund Plus and the Cohesion Fund will continue to play a crucial role in supporting social cohesion in Member States, urban and rural regions, and will help keep pace with the green and digital transformation taking place.

Noteworthy in this respect is the Commission's proposal for the next Multiannual Financial Framework (MFF), which sets the total allocation for a cohesion policy for the period 2021-2027 at EUR 373 billion in current rates. The European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund will also contribute to territorial cohesion. The Commission's proposal also foresees an InvestEU programme, which is expected to mobilise EUR 650 billion of investment, including EUR 50 billion for social infrastructure projects and social investment in education and skills, social entrepreneurship, and microfinance. InvestEU will also test partnership and new business and financing models to improve social outcomes, unlocking the potential of investor and philanthropic capital.

According to the European estimation, an important part of job creation will come from the social economy and its operators. Social enterprises and organisations generate commitment, initiatives and results in local communities, bringing citizens closer to the labour market⁴⁶. It is no secret that the social economy offers innovative solutions in education, healthcare, energy transition, housing and social services⁴⁷. The social economy is also a potential pioneer in local 'green pacts', establishing alliances in the areas that enable citizens and businesses to participate in the climate transition. Moreover, as of 2021⁴⁸, the Commission proposes the launch of an action plan for the social economy sector aimed at encouraging social investment and innovation and promoting the potential of social enterprises in creating jobs⁴⁹, including for those on the margins of the labour market⁵⁰. Referring to the latter, socially responsible public procurement could, for example, ensure that existing funds are spent in such a way

⁴⁶See Mezzano (2019).

⁴⁷See Giovannini (2018); Luchena (2020); Coletta (2014).

⁴⁸The EU will reduce its net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels, as agreed in the EU Climate Law. On 14 July 2021, the Commission presented proposals to deliver these targets and make the European Green Deal a reality.

⁴⁹These proposals will have an impact across the entire value chains in sectors such as energy and transport, and construction and renovation, helping create sustainable, local and wellpaid jobs across Europe. Investments in a low carbon economy will boost the green recovery following the COVID-19 crisis. The electrification of the economy and the greater use of renewable energy are expected to generate higher employment in these sectors. Increasing the energy efficiency of buildings will create jobs in construction, with local labour in higher demand. The proposals facilitate growing sales of clean new vehicles and cleaner transport fuels, providing major opportunities for the European car industry.

⁵⁰In the Joint Declaration on EU Legislative Priorities for 2023 and 2024 – Working document (December 2022), are evident the Proposal for a Regulation on prohibiting products made with forced labour on the Union market; the Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 and the Proposal for a Regulation on the coordination of social security systems.

that supports inclusion by providing employment opportunities for people with disabilities or those at risk of poverty⁵¹.

The Promotion of Gender Equality, Inclusion and Equality of People with Disabilities or those from Third-world Countries

It is noted among many that one of the strengths on which the EU was built is its diversity: that of peoples, cultures and traditions. But for this potential to not boomerang for Europe itself, these diversities must be levelled out, if at all possible, through targeted state intervention so that those who share the same aspirations have the same opportunities to realise them.

To this end, Europe needs to strengthen its commitment to inclusion and equality in all its dimensions, regardless of gender, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Equality is high on the political agenda of the European Commission, which for the first time has a portfolio and a new working group to participate in policies to develop substantial equality.

The situation for women is of major concern⁵². Women are on the margins of the labour market and many of them contribute to low levels of employment, which is detrimental to the economy and to women themselves. Despite having higher levels of education, women have shorter and more fragmented careers than men, often due to family care and responsibilities. Their careers are slower or intermittent and their incomes or pensions lower, yet their life expectancy is longer. In some sectors, women are under-represented and often do not hold senior roles or positions. This is also the case in digital professions, where less than one in five ICT specialists are women⁵³. At retirement, women's pensions are on average only two-thirds of those of men, and the pay gap is even greater⁵⁴. Combating stereotypes in the work world is crucial to ensuring that women progress steadily in their careers and obtain fair wage. The Commission has proposed a new European strategy for gender equality to help close the gender pay gap, including through compulsory measures on pay transparency and the gender pension gap, in

⁵¹On the contribution of green procurement, see Clarizia (2016); Feliziani (2017); Mauri (2018).

⁵²With particular reference to the remuneration aspect, see Battisti (2019). See also the Opinion of European Economic and Social Committee, Eco/584, "Gender-based investments in national recovery and resilience plans (Own-initiative opinion)". The EESC points out that most of the national recovery and resilience plans (NRRPs) have been drawn up by the Member States without an *ex-ante* assessment of the impact of individual investments in terms of removing gender inequalities and making it easier for women to access and stay in the labour market. Very few Member States have taken a strategic approach with specific, cross-cutting measures and reforms to the six investment strands under the NRRP. The methodology adopted by the European Commission is based on an impact assessment of how effective the measures implemented are. To this end, the EESC recommends that the Commission adopt comparable specific indicators at the evaluation stage to measure improvements in equal pay, access to the labour market, the reconciliation of work and care time, and in promoting of women's self-entrepreneurship.

⁵³See also the 2018 European Union study, at https://ec.europa.eu/eures/public/it/news-articles/-/asset_publisher/L2ZVYxNxK11W/content/the-top-ict-skills-in-demand-by-companies-tod-1?inheritRedirect=false&_101_INSTANCE_L2ZVYxNxK11W_backLabelKey=news.articles.back.to.list&_101_INSTANCE_L2ZVYxNxK11W_showAssetFooter=true

⁵⁴On which see Peruzzi, Gottardi, Conley, Healy & Mikołajczyk (2018); Day (2012); Bloom & Michel (2002).

order to promote women's access to the labour market and increase their numbers in senior positions in companies and organisations⁵⁵. But much remains to be done.

Another important piece of Europe's vision is the obligation of the economy to serve people with disabilities. The European Accessibility Act will provide an opportunity to develop accessible products and services. Technology, combined with the removal of architectural barriers, can offer great opportunities for people with disabilities to meet their needs and ambitions. Despite constant warnings, however, people with disabilities continue to face adversities in accessing education and training, employment, social protection systems and healthcare in some European states. They also face difficulties in participating actively in the political or cultural arenas of their communities. The Commission will pursue the implementation of the UN Convention on the Rights of Persons with Disabilities and plans to present an enhanced strategy in the course of 2021, based on the results of the ongoing evaluation of the European Disability Strategy 2010-2020⁵⁶.

With reference to the pervasive issue of migration, there is a need for inclusion also with regard to third-world nationals. This can be done through faster and more effective integration pathways for these individuals who, it should be noted, often contribute to the labour market and economic performance of society. Many Member States could make better use of this population's skills and qualifications and promote their access to inclusive and quality education and training. Here again, the Commission, following the Green Deal and based on the 2016 Action Plan on Integration, intends to strengthen support for integration measures implemented by Member States and other key stakeholders, such as local and regional authorities, civil society organisations, and social partners⁵⁷.

⁵⁵ Neale (2020).

⁵⁶ In March 2021, the European Commission published the strategy for the rights of persons with disabilities that embraces the period from 2021 to 2030. It aims to ensure that all people with disabilities: can fully exercise their human rights; have equal opportunities and equal access to participate in society and the economy; can decide where, how and with whom to live; can move freely in the EU; are no longer victims of discrimination. The strategy will bring about positive changes in the lives of people with disabilities, for example: the proposal for a European Disability Charter to be extended to all EU countries by the end of 2023, which will facilitate free movement, making it easier access to services anywhere in the EU; the establishment of a European resource centre (AccessibleEU) to allow European countries to work together in order to improve accessibility for people with disabilities. This strategy represents the framework for EU actions aimed at creating a more equal society, and includes sharing concrete ways to ensure that people with disabilities can assert their rights.

⁵⁷ Alvesson (2016).

Fair and Decent Work

Working does not simply mean earning a living, but also having social relationships and holding a place in society, as well as opportunities for personal and professional development. However, this can only be achieved if one enjoys fair and decent working conditions. Fair and decent working conditions are derived, first and foremost, from fair pay. All workers in Europe should have a fair minimum wage that allows them to live in dignity. This does not mean setting the same minimum wage for every worker in the EU. Minimum wages should be set in accordance with national traditions, income or contribution policies, through legislation or collective agreements. Collective bargaining seems to be the most appropriate way to adapt to the needs of the particular territory and the sectors in concern⁵⁸.

Furthermore, fair and decent work is further derived from the contractual model and the working conditions embedded within it⁵⁹. New forms of work are developing rapidly, spurred mainly by digital technology, contributing to growth and employment, promoting innovative services, offering flexibility and opportunities to employees and the self-employed as well as customers and businesses, but can also lead to new forms of precariousness⁶⁰. To build confidence in the digital transformation and realise its full potential, new business models need clearer rules that prevent abuse, maintain high standards of health and safety, and ensure better social security coverage and decent working conditions. Technological innovation must go hand in hand with social innovation. Indeed, it is in fact difficult to imagine a high-tech model that is completely detached from a human reference model that considers fairness and dignity in the workplace⁶¹. In particular, the sustainable growth of the digital platform economy makes it necessary to improve the working conditions in this sector⁶². A more far-reaching intervention at the European level would be appropriate, such as a new Digital Services Act to improve liability and safety rules for digital platforms, services and products, defining the boundaries of the digital single market. This should also cover digital platform work to address priority issues and generate possible solutions⁶³, such as job position, working conditions and access to social protection of platform workers, access to representation and collective bargaining, as well as cross-border aspects of this type of work. New work patterns constantly evolving, the rise of online and mobile work, human-machine interfaces, worker monitoring, recruitment and management by algorithms, to name just a few, can lead to increased productivity, which is key to overall improved living standards, but

⁵⁸See Judge, Piccolo, Podsakoff, Shaw & Rich (2010).

⁵⁹See Case (2001).

⁶⁰Nandedkar & Brown (2018).

⁶¹For challenges to the founding values of Western civilisations related to the digital economy, starting with democracy, T. Bussemer, C. Krell, H. Meyer, *Social Democratic Values in the Digital Society Challenges of the Fourth Industrial Revolution*, Friedrich Ebert Stiftung, no. 10, 2016.

⁶²Tsai & Huang (2008); Victor & Cullen (1987).

⁶³On the underlying problems, see, without claiming to be exhaustive, Valenduc & Vendramin (2016); Degryse (2016).

should evolve in such a way as to avoid new patterns of discrimination or exclusion or new risks to the physical and mental wellbeing of workers⁶⁴.

In operational terms, a fair and decent work model could be achieved with the help of social dialogue and consultation. Fair working conditions start with a strong social dialogue: workers and employers (or trade union representatives of both) can find common solutions that best meet everyone's needs. It is very important to have strong and representative trade unions that are involved at an early stage in policy-making at both national and European level. Social dialogue is also effective for companies, especially during restructuring or major business changes. As companies increasingly operate across borders, full use should be made of existing instruments to involve workers and European Work Councils to promote a culture of information and consultation with workers⁶⁵. This is not insignificant when one considers that millions of businesses, especially SMEs, operate across borders and benefit from the single market, which over time has become a key driver for growth and jobs. EU policies and rules are thus designed to ensure fair competition between businesses, protect worker rights and avoid social dumping. At the operational level, the recently established European Labour Authority (ELA) could well be the body that links and moderates the various requirements.

Social Protection between Social Assistance and Healthcare

In order to provide a high level of social protection, Member States should build on strong solidarity. What is lamented in some geographical areas of Europe is the lack of subsidies to support those who lose their jobs due to external events. However, in the author's opinion, these subsidies should go far beyond a mere economic figure and should instead be based on policies to promote retraining and reintegration into the labour market. At European level, the Commission is advocating a European unemployment benefit reinsurance scheme to protect citizens and reduce the pressure on public finances during external shocks⁶⁶.

Consequently, social protection standards will also have to be adapted to the new realities of the work world, namely to the new vulnerabilities and new expectations of citizens, agile and/or fragile workers being one such example. We have also to deal with the fact that in several Member States, some self-employed and atypical workers do not have adequate social protection. The implementation of the various European recommendations on access to social protection will undoubtedly serve as a reminder that everyone is protected during unemployment, illness, old age, disability or in the event of a workplace accident, regardless of their employment status⁶⁷.

The argument that is being made applies not only to labour issues, but also to those concerning health. The underprivileged populations tend to have lifespans

⁶⁴The issue has been addressed in the literature. Refer to Caponetti (2018b).

⁶⁵On this theme see the studies by Guarriello (2005).

⁶⁶This issue has already been addressed in Anibaldi & Caponetti (2019).

⁶⁷Turato (2012). With reference to the pension system, see Signorini (2020).

ten years shorter than the well-off⁶⁸. Promoting healthy lifestyles, better preventive risk measures and patient-centred healthcare can ensure affordable, good quality care for all.

Developing social protection systems anchored in the EU values and principles of universality, solidarity and equity will require the development of new and integrated models of health and social care⁶⁹. This could make the most of cost-effective innovations that address real public health needs. A patient-centred approach would contribute to better outcomes, such as reduced waiting times and easy access to care⁷⁰.

A more complex issue is that of pensions: In many cases they are undeniably the main source of income for Europeans. However, Europe is pushing hard to extend the retirement age, linking increased longevity to extended working years. Yet, this does not take into account the general health of citizens (and working conditions) that must be improved in order to make this feasible. If this were to be the European project, then Europe itself should take steps to pay greater attention to the needs of older workers in the workplace, stimulating member states to implement active ageing or co-working pathways between older people and new recruits, with a view to a generational parity. This could help maintain the sustainability of pension systems that are now in default and to strengthen occupational and third-pillar pensions. A further necessary step would be to

⁶⁸A new study carried out in the UK shows a 10-year gap between the life expectancy of the better-off and the poorer classes. In other words, the poor are destined to die 10 years younger than the rich, according to the study by researchers at Imperial College London, published in the *Lancet Public Health*. The work shines a spotlight in particular on the 'pink quotas' of British society, because the analysis shows that the life expectancy of the poorest women has decreased since 2011 and this trend is defined by the authors as "deeply worrying". The study, funded by the Wellcome Trust, analysed data from the Office for National Statistics on all deaths recorded in England between 2001 and 2016 - a total of 7.65 million deaths. The results show that the gap in life expectancy between the richest and poorest sections of the population has increased for the fairer sex from 6.1 years in 2001 to 7.9 years in 2016 and from 9 to 9.7 years for men. In the most deprived communities, life expectancy for women in 2016 was 78.8 years, compared to 86.7 years for the wealthiest group. For men it was 74 years among the poorest, compared to 83.8 years among the richest. A more recent study 'Socioeconomic Inequalities in Disability-free Life Expectancy in Older People from England and the United States: A Cross-national Population-Based Study', published in the *Journal of Gerontology* by an international team of scientists led by Paola Zaninotto of the Department of epidemiology and public health at University College London, analysed data from 10,754 and 14,803 adults aged 50 and over from the Longitudinal Study of Aging (ELSA - UK) and the US Health and Retirement Study (HRS) respectively. The researchers began by examining life expectancy in the UK and US without disabilities, such as being able to get out of bed or cook for oneself, and the extent to which socioeconomic factors play a role. The data was collected starting in 2002 and the two study samples were followed for 10 years, until 2013. This is how the researchers found that "Socioeconomic inequalities in disability-free life expectancy were similar across all ages in England and the United States, but the largest socioeconomic advantage in both countries and across all age groups was wealth." The results show that "By age 50, the richest men in England and the US lived for an additional 31 'healthy' years compared with around 22-23 years for those in the poorest wealth groups. Women in the richest groups in the US and England lived about 33 more "healthy" years compared to 24.6 in England and 24 in the US in the poorest groups.

⁶⁹Recently Botrugno (2020).

⁷⁰On which see Battisti (2019).

implement specific care. Ensuring access to quality and affordable long-term care would be key to sustaining a dignified life in old age, while seizing the employment opportunities offered by the care economy. This should then be translated into the European strategies contained in the "Green Paper on Ageing" that the EU is currently drafting, designed to launch a debate on the long-term effects of population ageing, particularly on care and pensions, and on how to promote active ageing.

Conclusion

The European Green Deal marks the debut of a new EU growth strategy. It supports its transition towards an equitable and prosperous society, capable of responding to the challenges related to climate change and environmental degradation by improving the quality of life of present and future generations.

Although the investment plan⁷¹ contributes to the achievement of the sustainable development goals and to the transition towards a climate-neutral economy, in line with the commitment expressed in the communication on the European Green Deal, much still needs to be done on a concrete level. The years 2021-22 have been those destined to materialize the foundations of the European Green Deal, but there are still many member countries that have not implemented - in their national policies - the sustainable development objectives as the fulcrum, the benchmark of the defined financial policies and interventions of the Union.

The litmus test of a "Just Transition" must be the efficiency in dealing with the adaptation challenges of businesses, employees and citizens. The transition must encourage, for instance, restructuring of business activities, upskilling and reskilling of employees and avoidance of energy and mobility poverty, with a view to ensuring that no one is left behind. Special attention must be given to the degree to which the individuals, whose jobs will disappear or be downgraded or otherwise threatened, are engaged, assured of a useful, fulfilling and secure future in good quality employment, and assisted in developing themselves to enable them to fill these roles.

The scale of the challenge cannot be underestimated. It will entail the development of well thought-out, integrated mediums and long-term economic and social objectives. It will embrace a position toward ensuring productivity and inclusion with due regard to specificities of different Member States. It will involve social partners at national, regional and local levels in all stages of policy making, including through social dialogue and collective bargaining, where appropriate. These necessitate the deliberate, conscious redirection of resources at national and central levels towards the areas and regions affected. Apart from incentivising new investment with grants, loans and the provision of expertise, and helping the operation of MSMEs, start-ups will be helped through capital participation, while new public enterprises will also be created. Besides the commitment of public resources, it will be necessary to optimise the flexibility of state aid rules and even to suspend them in some circumstances.

⁷¹The investment plan took place with the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 10 January 2020, with the document COM(2020)21 final.

The participation and engagement of the public and all stakeholders is crucial to the success of the European Green Deal. Recent political events have shown that the boldest policies work only if citizens have been fully involved in their formulation.

If we want to ensure the success of the Green Deal and bring about lasting changes, the Commission must heed the demands of citizens, who are and should remain the drivers of the transition⁷². After all, the European Climate Pact aims to inform, inspire and foster cooperation between people and organisations ranging from national, regional and local authorities to businesses, unions, civil society organisations, educational institutions, research and innovation organisations, as well as consumer groups and individuals. In fact, the Pact encourages people and organisations to commit to concrete actions, designed to reduce their greenhouse gas emissions and/or adapt to the inevitable impacts of climate change.

Unquestionably, the Commission and the Member States will have to ensure that policies and legislation are applied correctly and produce tangible and measurable results. The review of the implementation of environmental policies will be essential to document the situation in each Member State step by step.

On the labour law front, trade union participation in the implementation of the European Green Deal is further food for thought.

We welcome the strong and ambitious climate policy framework adopted by the European Commission. It has been set up within European Green Deal, supported by the corresponding reforms. We still must also underline that, in spite of all the positive declarations, its social dimension is still underdeveloped. The social dimension of the European Green Deal remains primarily in the hands of the EU Member States and national social partners, as they are best-placed to understand the situation and propose measures at the local, regional and national levels. However, the social and employment-related challenges of the green transition span many dimensions, such as job loss and employment transitions, the reskilling and upskilling of the workforce, distributional effects of decarbonisation policies, and the protection of social rights and citizen participation. Therefore, coordinated action and measures at the EU level are necessary to accompany and support the national initiative. If not well addressed at an appropriate level, climate mitigation measures are likely to increase and exacerbate social inequalities.

In Italy, the first steps are moving in this direction. Proof of this is the unitary document of CGIL, CISL and UIL of 18 December 2020 on “A Just Transition for work, personal well-being, social justice, and the protection of the planet. For a green transition of the economy.” It is a text of a programmatic type, through which the three large confederations express their position about investments financed by the EU to face the economic and social crisis triggered by the pandemic through the green transition. However, considering how delicate the issue of ecological transition is for the workers' organization, this document is at least indicative of the existence of a new sensitivity, as are the first experiences of collective bargaining on these issues.

⁷²Happened with COM(2020)80 final.

It is likely that similar initiatives will burgeon in the next few years, both in sector and company bargaining. This will be accompanied by the creation, by collective autonomy, of professional figures able to play a specific role in the green transition of the activities of enterprise. From the considerations made in these pages, it is possible to test some reflections on future developments in labour law.

With all this in mind, the adoption of adaptation and mitigation measures at national and supranational levels, as well as combating the climate crisis, should support the affirmation of an alternative model of economic development. Implementation requires immense public investments and a direction shared with the union, based on the dignity of work and a more acceptable balance with the natural world.

Will this become reality? Or will it be a "green sauce" review of the theories of flexicurity and transitional labour markets? In any case, the attempt to overcome, at the concept level, the historic contrast between labour and the environment, allow us to start, albeit here, with only a few ideas: a reflection on the theory of the relationship between the environment and labour, and how much labour law can derive, in positive terms, from this relationship.

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Consumer Protection in India through Criminalisation of Consumer Grievances

*By Pradeep Kumar Singh**

Every person is consumer in one or other way; even a person who is seller in one transaction, in another transaction he is consumer. Consumer grievances now days have become very serious and rate is also alarming which with passing time are becoming more graver challenge. In such situations now consumer grievances do not remain only a matter to be remedied under civil justice dispensation system but for effective tackling need is to under criminal justice system. In case of consumer grievances two pronged actions are required, for providing justice to individual injured consumer there should be civil remedy and to provide justice to consumers collective, thereby, to society there should be providing of criminal justice. Preventive measures are most effective measures for consumer protection which can be attained by criminalisation of consumer grievances. Prescription and infliction of punishment creates deterrence in potential wrongdoers, thereby, they get lesson for future behaviour. In India sufficient penal provisions are provided for criminalisation of consumer grievances; criminal justice system through effective enforcement and infliction of punishment may tackle the problem of consumer grievances and attain the goal of consumer protection. This paper will analyse Indian laws to find out use of measure of criminalisation of consumer grievances for consumer protection.

Keywords: *Adulteration; Consumer; Consumerism; Consumer grievance; Criminal Justice System; Deterrence; False property mark; Preventive measure; Spurious*

Introduction

Criminal justice system is evolved and developed by the society for protection of society and members of society. Whenever any unwanted act poses graver problem by infliction of serious impacts to the interests of common citizenry, criminal justice is used to tackle the problem. But criminal justice application functions through criminalisation of activities against which it is used, thereby, in private and personal inter-actions of individuals criminal justice system is not used like in case of supply of goods and services on payment of considerations but matter is tried to be dealt under civil law. Criminal law defines unwanted act as crime and prescribes punishments. Use of criminal procedure in the proceeding and dealing of alleged person by formal criminal instrumentalities and ultimately infliction of punishment causes branding of person as criminal.

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In personal interactions of individuals which do not affect society at large but to individual, generally, criminal justice system is not used. Such precautions of avoiding use of criminal justice system involvement are observed in business transactions and related aspects. Branding of business concerns and bad reputation attached thereon may affect the business and ultimately economy of the country. Further, person affected in business transaction is in need of return of his money, or providing to him goods without defect and services without deficiency, and compensation for loss incurred and harm suffered, and thereby, appropriate law applicable may be civil law, forum available be civil forum and procedure used be civil procedure.

Sometimes bad business practices impacts are not limited to individual but also seriously affect the society at large; in such situation need arise to create deterrence, give lesson to potential wrongdoers and ultimately prevent future wrongdoings. Deterrence creation, lesson giving, and prevention of wrongdoings can only be achieved by use of criminal justice system. For effective dealing with such civil wrongs, proper and effective measure is to use the civil and criminal law both. Consumer grievances are civil wrongs committed by business concerns in supply of goods or services which are primarily dealt by civil forum under civil law. Increasing rate and aggravated nature of consumer grievances which not only seriously affect the consumer but also the society at large require use of criminal justice system along with civil justice dispensation system. The Consumer Protection Act 2019 (hereinafter referred to as CPA 2019) is important, crucial and beneficial legislation enacted to provide proper and effective remedies to consumers. For a longer period need was felt to make Consumer Protection Act, 1986 (hereinafter referred to as CPA 1986) more effective and suiting to modern market practices. Ultimately, CPA 1986 was repealed and CPA 2019 was enacted. Before enactment of Consumer Protection Act, consumer grievances were mainly dealt under Law of Torts, in which disposal of case was much delayed, pursuing of case was expensive, and remedy available was not so effective. Consumer Protection Act emphasises on speedy and effective justice available without incurring expenses. Section 100 of CPA 2019 explicitly provides that remedies under this Act are in addition to and not in derogation of remedies available under any other law, therefore, on his case covered by CPA and Law of Tort any other law covering the case, aggrieved consumer has options available to file his complaint under CPA 2019 or Law of Torts or any other law covering the case.

Consumer is not a simple purchaser, now every person is consumer in one way or other; every consumer citizen, thereby, consumer collectively form the consumer citizenry. Consumer is defined in Section 2(7) of CPA 2019 which includes four persons in its ambit, first is purchaser of goods, second is user of goods with the permission of purchaser of goods, third is hirer of services, and fourth is person who avail services with permission of hirer of services. Definitions of consumer in Section 2(7) and service in Section 2(42) expressly settle that a person can be a consumer when goods or services are obtained by payment of considerations which may have been paid or promised or partly paid and partly promised, thereby, consumer sale may be cash sale or credit sale. Only purchase of goods or services may be sufficient means consideration is paid, it is completely

immaterial that what means of purchase was used; even purchase of goods or hiring of services may be through offline or online by electronic means or teleshopping or direct selling or multilevel marketing. Further, a person can be consumer when goods or services are obtained for final consumption; if any person has obtained goods or services even after payment of consideration but for commercial purpose, such person shall not be consumer; Explanation (a) to Section 2(7) of CPA 2019 creates one exception for use of goods for profit when purchaser is using such purchased goods for earning his livelihood by means of self-employment; in such case sale will not be treated as trade sale but it shall be consumer sale and such person shall be consumer.

In welfare state policy considerations country has solemn responsibility to protect its citizenry which is now consumer by citizenry by enactment and enforcement of appropriate legal regime based on effective justice concept. When civil justice system use is not sufficient for protection of consumers and redressal of consumer grievances, need is to use criminal justice system also to teach lesson, create deterrence, and prevent the committing of act causing consumer grievances. Consumer grievances are increasing continuously, and further, its impacts are also aggravating day by day in both references to nature and extent. Furthermore, in consumer dispute one party, consumer, is weaker in comparison to the other party, goods or service provider. In such situations only civil justice dispensation system concerned with compensating the consumer cannot be effective measure to tackle the problem of consumer grievances but need is to use criminal justice system too. Criminal justice system use may create deterrence to potential violators of consumer interests, thereby, ultimately consumer grievances may be dealt with in effective manner.

Consumerism and Consumer Grievances

Consumerism term is used to refer varied aspects relating to consumer and consumption. Consumerism in common parlances considered as ideology concerned with accumulation and consumption of goods and services. It is taken as extension of capitalism in which manufacturers and sellers attempt to market the produce with continuous increase and augment profit without any limitations. Consumerism also denotes a new kind of emerging culture in which purchase and consumption of goods and services in market are always a desirable goal of individual in modern society and. In consumerist society it is considered that individual's happiness and wellbeing depend and calculated on the basis of purchasing capacity, purchase, consumption, possession and acquisition. In economic perspective consumerism is considered as main cause to run the market, manufacturing, economy, and determinative for wellbeing of the society. But in legal perspective meaning of consumerism is not taken as profit earning; here consumerism refers to better protection of consumer interests through the legal regime. Whenever any interest is protected through any instrumentality of society, it becomes right; interest protected by law becomes legal right; thereby, in legal references consumerism is better, proper and effective protection of consumer

rights. Main objective of consumerism in legal regime is to effectively protect the consumers against violations of his rights by unscrupulous persons operating in the market, thereby, to redress the problem of consumer grievances. The whole concern of consumerism is effective consumer grievance redressal concern. Consumer grievances may appear to be of an individual but such individual forms the whole citizenry and in such situation his unsatisfactory consumer grievance redressal may cause dissatisfaction of whole citizenry, and further, justice system may also fail in attaining its prime goal to provide justice to each person and to protect weaker against exploitations committed by stronger. Ultimately, failure in consumer grievance redressal badly affects the whole economy.

In *Donoghue v Stevenson*¹ the House Lords and in *Grant v. Australian Knitting Mills Ltd*² the Privy Council ushered a new era for consumer protection by giving verdict that manufacturer owes duty to take care directly towards ultimate consumer and such duty is completely independent from contractual obligations. In *Donoghue v Stevenson* case the court provided remedy to user of goods who did not purchase but used the material with the permission of purchaser, thereby, ambit of protection was widened to include purchaser and user both. Presently, both purchaser and user form the consumer. Major in the legal regime initiative for consumer protection was taken in the United States of America on 15th March 1962 by declaration of right to safety, right to be informed, right to choose and right to be heard as consumer rights. In India for protection of consumer a major step was taken in 1986 by enactment of CPA 1986, which declared six rights and it was comprising all the rights declared in USA in 1962 and two more rights - the Right against unfair Trade Practices and Restrictive Trade Practices, and the Right to Consumer Education. Even before the enactment CPA 1986 many laws were providing protection to consumer as purchaser but there was no specific declaration of consumer rights, available forum and procedure was not effective and proper; CPA 1986 provided provisions in aforesaid regards.

Consumer grievances closely relates to manufacturing process, product specifications, expertise and technicalities of services, business practices, and advertisements. Thereby, with passing time nature and gravity of consumer grievances change; in such situation laws regulating the business practices and affording protection for consumer interests become ineffective, needed to be scrutinised and modified accordingly. In the 21st century the need has been felt for prescription of preventive measures, thereby arising of consumer grievances itself has to be avoided. Preventive measure may be two pronged, administrative actions and penal actions. Most effective preventive measure is to give lesson to potential wrongdoer for his future probable behaviour; potential wrongdoer comprises two persons, one who has committed wrongful act and other who has yet not committed but have mentality prone for committing wrongful act, only need is to have opportunity for it. Criminalisation of wrongful act and infliction of punishments to create deterrence in potential wrongdoers, thereby, ultimately they will not dare to commit wrongful act in the future. CPA 1986 lacked preventive measures; in 2019, CPA1986 was repealed by CPA 2019. CPA 2019 widens

¹(1932) AC 562 (HL).

²(1936) AC 85.

ambit of consumer to include purchaser through online mode and prescribes for online filing of complaints before the consumer grievance redressal forum. Furthermore, CPA 2019 emphasises on prevention of consumer grievances rather than providing measures for actions only after arising of consumer grievances and in this regards the Act establishes administrative body, Consumer Protection Authority, with effective measures for effective administrative actions, provides provisions for product liability, and creates offences with prescription of severe punishments to create deterrence in potential wrongdoers.

Declaration of Serious Consumer Grievances as Crime

Consumer dispute basically in its nature is civil dispute as consumer rights are given to consumer as individual, and further, consumer transaction is one kind of business transaction with one difference that goods or services are obtained by consumer not for obtaining any profit but for final consumption.³ Therefore, generally for consumer grievance redressal civil law, civil forum and civil remedies are provided. In CPA 1986 only civil redressal was provided⁴ but it was identified that only civil measures are not sufficient to deal with the problem in effective manner. By Section 107(1) of CPA 2019 the CPA 1986 was repealed and presently CPA 2019 is in force to protect the consumer interests and to deal with problem of consumer grievances. CPA 2019 provides three pronged actions - civil redressal through filing complaint before consumer forum or through mediation, administrative actions, and criminalisation of consumer grievances.

Criminal law provides ultimate measure to deal with serious problems. Major and effective manner to deal with problem is to prevent it and it is possible effectively by use of criminal justice enforcement measure; by imposition of penal sanctions deterrence is created. Even when a case is decided by civil justice dispensation ultimately for enforcement of order or decree of forum most effective measure used is criminal justice enforcement measure. Chapter VII of CPA 2019 creates some offences for providing justice to consumers and prescribes severe punishments on wrongdoers who commit infringements of consumer interests. In addition to CPA 2019 some other special penal statutes like Food Safety and Standard Act 2006, Drugs and Cosmetics Act, 1940, Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, and general Penal Act Indian Penal

³Consumer obtains goods or services by providing considerations for final consumption. Whenever any person has obtained goods or services for commercial purposes means to obtain profit, the person so obtaining material or services is not consumer and he will not have any protection under CPA 2019. There is one exception in India created by Explanation (a) to Section 2(7) of CPA 2019 that when person obtaining material or services does not make final consumption but uses for further transaction which is for earning his livelihood by self-employment then such person is also taken as consumer. Here person is not obtaining profit but simply earning his livelihood.

⁴In CPA 1986, redressal procedure was civil; as and when consumer grievance was caused, aggrieved person could file complaint before the consumer forum which could provide remedies mentioned in Section 14 (1) of the Act. Procedure applicable, forum and remedies available under Act 1986 were civil. One exception to the aforesaid general situation as being civil in nature was Section 27 of CPA 1986, which provided penal provisions applicable against the person who did not observe order passed by consumer forum.

Code declares serious consumer grievances affecting society at large as offence and prescribe severe punishments to effectively deal with and protect the consumers.

Non-observance of directions of Consumer Protection Authority:

Non observance of directions of Consumer Protection Authority and non-payment of penalty imposed by such Authority is declared as an offence under Section 88 of CPA 2019. Consumer Protection Authority is administrative body established under Section 10 of CPA 2019 by Central Government which by administrative actions prevents the committing of consumer grievances; in earlier Act enacted for consumer protection such body was lacking, thereby, earlier Act was not providing complete measures for consumer grievance redressal. Consumer transactions are technical, consumer goods and services in modern era are produced by use of modern know-how, and seller and traders are socio-economically stronger party in comparison to consumer; in such aforesaid situation as it is in other civil cases it is not possible for consumer to collect evidences and for it one expert investigating agency is needed. In Consumer Protection Authority an investigation wing is established consisting Director-General, Additional Director-General, Joint Director, Deputy Director and Assistant Directors⁵; investigation wing has responsibility to make inquiry and investigation *suo motu* or on direction of Central Government or on receiving information about violation of consumer rights or unfair trade practices or false or misleading advertisements.⁶ Information to Consumer Protection Authority may be given through offline or online.⁷ Investigation wing submits report to Consumer Protection Authority headed by Chief Commissioner and other Commissioners. Investigations are generally made with a view to take administrative actions. During investigation Directors or any officer authorised by him may enter in any premises and may make search there. But for entry and search in any premises such officers must have reasonable ground available for it. When without reasonable ground search and seizure is made by officers, it shall be offence punishable under Section (abbreviated as under section) 93 of the Act and punishment prescribed for it is imprisonment extending up to one year or fine extending up to ten thousand rupees or both. Consumer Protection Authority may file complaint before the Consumer Forum. Further, Consumer Protection Authority has power to take administrative actions and impose penalty on wrong-doer causing consumer grievances.

Section 20 of CPA 2019 empowers Consumer Protection Authority that on the basis of investigation, it may direct for recall or withdrawal of dangerous goods or services, reimbursement of prices of recalled or withdrawn goods or

⁵Section 15 of CPA 2019

⁶Section 17, 18 and 19 of CPA 2019

⁷Section 17 of CPA 2019. Complaint to Consumer Protection Authority may be given in writing or electronic mode in reference to causing consumer grievances which may be relating to violation of consumer rights, unfair trade practices, or false or misleading advertisements.

services to purchasers, and discontinuance of unfair and prejudicial practices.⁸ Consumer Protection Authority may initiate actions even when any individual consumer is not affected or information is not given even after causing of harm as it has power for *suo motu* action. Further, when Consumer Protection Authority, is satisfied by investigation that the advertisement given by manufacturer or advertiser is false or misleading and prejudicial to consumer interest or in contravention of consumer rights, may by order direct to discontinue or modify such advertisement.⁹ In addition to order to discontinue or modify the advertisement Consumer Protection Authority under section 21 (2) CPA 2019 may also impose penalty on manufacturer, advertiser and endorser, for first time contravention penalty imposed may extend up to ten lakh rupees and for every subsequent contravention penalty may extend up to fifty lakh rupees. Endorser of product has brand value which is utilised and it makes major measure to sale substandard goods and services, thereby, endorsers have their own responsibility to have proper information about product in the advertisement and only then have to endorse it. To check the problem of false and misleading advertisement necessity is to take actions against endorsers and it is provided under section 21(1) of CPA 2019 endorser may be directed to discontinue the false or misleading advertisement and under section 21(2) penalty up to 10 lakh rupees for first time contravention and for every subsequent contravention of giving false or misleading advertisement penalty up to 50 lakh rupees may be imposed, and further, for first time contravention prohibition on endorsement for period extending up to one year may be imposed and for every subsequent contravention prohibition on endorsement for period extending up to three years may be imposed. Endorser may be absolved from the responsibility on establishing his due diligence in verifying of veracity of the claims made in the advertisement regarding product or service endorsed by him.¹⁰ Before imposition of penalty opportunity of hearing shall be provided to alleged person. For determination of penalty amount Consumer Protection Authority has to consider population or area impacted by wrongful act, frequency or duration of wrongful act, vulnerability of class of person affected, and gross revenue obtained from sales effected by wrongful act. Order passed by Consumer Protection Authority is appealable; such appeal may be filed before National Commission within thirty days from the date of receipt of such order.¹¹

Consumer Protection Authority has greater responsibility to protect the consumers by taking administrative actions, thereby, prevent the occurrence of consumer grievances. Orders passed by consumer Protection Authority must be respected and observed; persons are considered law abiding, thereby, whenever any order is passed, it is considered that ordered person obey. Further, for ensuring

⁸Chapter VI of CPA 2019 particularly under Section 84 and 85 imposes product liability on manufacturer and service providers respectively that product and services provided must be safe, without defective, according to specifications and warranty provided, and complete instruction be provided regarding usage. In case of non-observance of aforesaid product liability actions may be initiated by filing complaint. Here Consumer Protection Authority is well empowered to take actions particularly as preventive actions.

⁹Section 21(1) of CPA 2019

¹⁰Section 21(5) of CPA 2019.

¹¹Section 24 of CPA 2019.

observance of such orders, non-observance of order is criminalised by declaring it as an offence under Section 88 of CPA 2019. Section 88 CPA 2019 provides that the non-observance of direction of Consumer Protection Authority passed under Sections 20 and 21 of CPA 2019 shall be punished with imprisonment extending up to six months or with fine extending up to twenty lakh rupees or with both. To check the misuse of criminal justice system, Section 92 of the Act clearly specifies that the competent court can take cognisance of the offence only on filing of complaint by Central Consumer Protection Authority.

False and misleading Advertisement

For protection of consumers most essential requisite is to have sufficient information about the goods or services to be purchased. Considering importance of availability of information, it is accepted as consumer right under section 2(9) of CPA 2019. All other consumer rights depend on Right to information. On the basis of various information relating to goods and services, consumer considers and decides about his need and by what material or what services it may be satisfied. Consumer gets information about products from the advertisements provided by manufacturer or service provider. Prevention of consumer grievance may be attained through ensuring of advertisements without any false claim therein and providing true information about product. Under Section 21 of CPA 2019, Consumer Protection Authority is empowered to take action against false and misleading advertisements and in this reference it may impose penalty on manufacturer, advertiser, endorser and publisher; in case penalty is not paid then under section 88 it will also be an offence. For false and misleading advertisement in addition to availability of jurisdiction to consumer Protection Authority such wrongful act is declared as an offence under section 89 of CPA 2019.

Whenever any manufacturer or service provider causes a false or misleading advertisement to be made which is prejudicial to consumer interest, he has committed offence under section 89 of CPA 2019; such offence on commission in first instance is punishable with term of imprisonment extending up to two years and fine extending up to ten lakh rupees, and for every subsequent commission of such offence shall be punishable with term of imprisonment extending up to five years and with fine extending up to fifty lakh rupees. Here it has to be cleared that so far administrative action under Section 21 of the Act for imposition of penalty is concerned, it may be imposed on manufacturer or service provider, advertiser, endorser, and publisher but offence is created under section 89 of the Act and punishment is created for false and misleading advertisement only against manufacturer or service provider. Prescription of punishment, and further, ultimately infliction of punishment may create deterrence and give lesson to consumer goods manufacturer or service provider, as the case may be, thereby, such criminalisation of wrongful act may prevent the consumer grievances and effectively protect the consumer interests. Some vested interest may misuse the criminal justice system by unnecessary moving the court, to check such misuse Section 92 of CPA 2019

clearly provides that the competent court can take cognisance of the offence only on filing of complaint by Central Consumer Protection Authority.

Offences punishable under Sections (abbreviated as under sections) 88 (non-observance of directions of Consumer Protection Authority) and 89 (giving false and misleading advertisement) of CPA 2019 are under section 96 of CPA 2019 declared as compoundable offences on payment of such sum of amount as may be prescribed. On amount payable on compounding ceiling is fixed by second proviso to the Section 96 of the Act that it cannot be more than maximum amount of fine which may be imposed under the Act for offence so compounded. For compounding of offence leave of the court, before which complaint is filed under section 92 of the Act, is necessary. When a person has committed offence under section 88 or 89 and it is compounded as provisions are provided under section 96(1) of the Act and now within three years of compounding in first case he has committed same or similar offence, this later offence shall not be compoundable.¹² When such second offence is committed after expiry of three years period counted from compounding of first offence then second offence shall be taken as fresh offence and accordingly compounding shall be considered.¹³

Medicines have to be used under medical prescription and self-medication has to be discouraged. Use of medicines is not simple thing but it is issue of life saving and side effects may be life endangering. Advertisements of medicines given by manufacturer are only with a view to encourage self-medication. Advertisement of medicine cannot be equated with advertisement of simple materials, thereby, regulated under special statute Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954. Section 3 of the Act imposes complete prohibition on advertisement of drugs for procurement of miscarriage or prevention of conception; improvement of sexual pleasure capacity; diagnosis, cure, prevention or treatment of disease mentioned in the schedule of the Act and in the schedule of the Act various disease like Cancer, Epilepsy, Appendicitis, Leprosy etc are mentioned. Medicines have to be prescribed by medical practitioner; therefore prohibition has been imposed on advertisement by manufacturer and participation of any person in such advertisement. Usually in advertisements false claims are made regarding performance and character of any product. Even when drug does not come under specific enumerated heads under section 3 of the Act, advertisement containing false claim regarding performance and character of medicine is prohibited.¹⁴ Section 5 of the Act imposes complete prohibition on advertisement of magic remedies; magic remedy is defined in Section 2 (c) according to which it is claim for talisman, mantra or other charm possessing miraculous powers for or in diagnosis, cure, mitigation, treatment or prevention of disease of human being or animals. Section 6 of the Act imposes prohibition on import and export of advertisements of advertisements mentioned in Sections 3, 4 and 5 of this Act. Violation of directions under sections 3,4,5 and 6 of the Act is declared as an offence under Section 7 of the Act which shall be on first conviction punishable with imprisonment extending to six months or fine or both and on

¹²Section 96(3) of CPA 2019.

¹³Explanation to Section 96(3) of CPA 2019.

¹⁴Section 4 Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954.

subsequent conviction punishable with imprisonment up to one year or fine or both. Offences punishable under Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 are cognisable offences,¹⁵ thereby, for taking action against persons indulged in prohibited advertisements under the Act need not take any direction from the Judicial Magistrate. In case of *Hamdard Dawakhana v Union of India*¹⁶ the Supreme Court decided that regulation of advertisement under provisions of this Act is not violative to Freedom of Speech and expression guaranteed under Art 19(1)(a) of Constitution of India, such regulation of advertisement relates to regulation of trade and business.

Adulterated or Spurious Goods

Adulterated and spurious materials are dangerous for life and health of the person. In Chapter VI of CPA 2019 product liability is imposed on the product manufacturer, product service provider, and product seller,¹⁷ whenever harm resulted due to defective product complaint for redressal may be filed under the Act¹⁸. Adulterated and spurious material supply in the market is violations of provisions relating to product liability. Acts relating to adulterated and spurious materials supply are declared as offences under sections 90 and 91 of CPA 2019.

Section 90 of CPA 2019 penalises manufacturer, seller, distributor, importer and person storing the adulterated products.¹⁹ Product is defined in Section 2 (33) of the Act accordingly it refers to any article, goods, substance, or raw material which may be in liquid, gaseous or solid state and which is capable of delivery as wholly assembled or as a component part and is produced for trade or commerce. Section 2(33) of CPA 2019 clearly provides that product term does not include human tissue, blood, blood products and organs; whenever any material supplied relates to these things then matter shall not be dealt under CPA 2019, thereby such will be dealt under other relevant Act. Human blood and blood products are used and supplied for medicinal purpose, it is excluded from category product, thereby, in case of grievances in reference this material affected person will not get remedy under this Act, it will affect the aggrieved person and he will be deprived from effective forum, procedure and remedy. According to Section 2(33) Product word used in the Act is inclusive for goods, Goods word is defined in Section 2(21) of the CPA 2019 and it clears that it is referred to every kind of movable property and includes 'food'. In Section 90 'product' word is used in reference to adulterated material and in Section 91 for spurious material 'goods' word is used, thereby, provisions in section 90 and 91 of the Act are also applicable for food. In case of

¹⁵Section 9-A Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954.

¹⁶AIR 1960 SC 554.

¹⁷Section 84, 85 and 86 of CPA 2019.

¹⁸Section 82 and 83 of CPA 2019.

¹⁹Adulterated products are those which contain adulterants and in its turn adulterants are substances which are added in any product but not listed as an ingredient. Adulterant adding makes the product harmful or lower the quality of the product. Explanation to Section 90 of CPA 2019 defines Adulterant that adulterant means any material including extraneous matter which is employed or used for making a product unsafe.

adulterated and spurious food material in addition to Food Safety and Standard Act 2006 case shall be covered also under CPA 2019. When same act amounts to two or more offences under same Act or different Acts, person may be punished for all such offences which are proved but one limitation is given under section 71 Indian Penal Code that punishments inflicted cannot be severe than punishment provided for any one of such offences; suppose one act is committed and it is coming under two definitions, in one punishment prescribed is five years and for other punishment is four years, court may impose punishment for all such offences but it cannot exceed five years which is severe punishment prescribed for both offences, in this case court may impose concurrent running of punishments for offences or it may impose consecutive running of punishment by such way determining that sum of punishments is not exceeding five years in aggregate. In case of spurious food and adulterated food as the act may be punishable under two Acts of CPA 2019 and Food Safety and Standard Act 2006 same aforesaid rule for determination punishment provided by Section 71 Indian Penal Code will be used.

Section 90 of CPA 2019 declares acts of manufacturer, person storing, seller, distributor and importer whether done himself or through some other person in reference to adulterated product as offence. Severity of punishments prescribed for offence relating to adulteration varies according to gravity to injury caused to consumer. When by adulterated material no injury is caused to consumer, offender may be punished with term of imprisonment extending to six months and fine extending to one lakh rupees.²⁰ This situation clears the stern action on part of law to create deterrence in reference to adulteration that even when simply a person produces, stores, and distributes adulterated material, it shall be penal offence. When simple hurt is result of adulteration, offender shall be punished with imprisonment up to one year and fine up to three lakh; and when grievous hurt is resulted to consumer by offence of adulteration, Section 90(1)(c) of CPA 2019 prescribes imprisonment extending to seven years and fine extending to five lakh rupees. Whenever death of consumer is caused by adulterated material then offence of adulteration under section 90(1)(d) of CPA 2019 is punishable with minimum and maximum punishments both that offence shall be punishable with imprisonment which shall not less than seven years but which may extend to life imprisonment and fine which shall not be less than ten lakh rupees; here for fine only minimum punishment is prescribed which is much higher in itself and for determination of maximum limit of fine complete jurisdiction is provided to the court, thereby actual amount of fine imposed may be much higher and deterrent. In case of adulterated products criminalisation of consumer grievances may create effective deterrence and teach lessons to offenders as to effectively prevent the causing of consumer grievances.

Spurious materials are duplication of original material prepared by some other person or manufacturing unit; it is produced by a person but he claims as it is produced by some other person. Spurious material preparation also amounts to intellectual property rights violation. Section 2(43) of CPA 2019 defines spurious goods that spurious goods mean such goods which are falsely claimed to be genuine. Section 91 of CPA 2019 prescribes punishments for acts relating to

²⁰Section 90 (1) (a) CPA 2019.

spurious goods and the provisions under Section 91 prescribe punishments only when such material has caused injury to consumer. Manufacturer, seller, distributor, importer, or person storing spurious material whether himself or through some other person shall be punished when such act causes hurt, grievous hurt or death; in case hurt offence is punishable with imprisonment up to one year and fine up to three lakh, in case of grievous hurt offence is punishable with imprisonment extending to seven years and fine extending to five lakh rupees, and when spurious material causes death of a person the offender is punished with imprisonment not less than seven years but which may extend to life imprisonment and also with fine which shall not less than ten lakh rupees. In Section 90 in reference to adulterated material merely manufacturing, storing, selling, importing and distributing may be sufficient for punishment infliction and in case of injury causing severe punishment is prescribed but in case of spurious material under section 91 punishment is prescribed only when injury is caused.

Adulterated and spurious materials are major causes of consumer grievances, therefore, acts relating to such materials are criminalised and severe punishments are inflicted. To deter wrongdoers, thereby, prevent the consumer grievances in addition to imposition of punishment one more action on conviction that is of closure of business by cancel of license is prescribed. Closure of business is major action, business man has committed offence for getting more profit that is also by wrongful acts and now he has lost his business itself, even not available for mere getting earnings. Sections 90(3) and 91(3) for adulterated material and spurious material respectively provides that in case first conviction licence issued under any Act shall be suspended for a period up to two years and in case of second or subsequent conviction licence is cancelled. Whenever offences relating to adulterated and spurious materials cause grievous hurt or death of consumer, offences are declared as cognisable and non-bailable.²¹

Food Safety and Standard Act, 2006 is a special Act enacted to protect the consumers of food and related materials. This Act provides complete measures needed to take effective actions in reference to violations of food standards and commission of wrongful acts against the person consuming the eatables. For ensuring standards of food and food materials in the market Food Safety and Standard Act, 2006 declares the wrongful acts as offence in Chapter IX of the Act and prescribes punishments of term of imprisonment and fine. Generally, in criminal law compensation is given out of fine imposed on convict or it is paid by the state;²² compensation in criminal law is not directly paid by convict to the victim. But Food safety and Standard Act, 2006 is exception to aforesaid general rule and under Section 65 of the Act direction may be given to person indulged in food adulteration to pay compensation directly to the victim when such victim has suffered injury or victim has died. Section 65 of Food safety and Standard Act, 2006 prescribes compensation amount directly payable to victim shall be – in case of injury not exceeding one lakh rupees, in case of grievous hurt not exceeding three lakh rupees, and in case of death not less than five lakh rupees. Presently in

²¹Sections 90(2) and 91(2) of CPA 2019; such declarations are made for offences relating to adulterated material and spurious materials respectively.

²²Sections 357 and 357-A Code of Criminal Procedure, 1973.

crimes commissions new developments are taking place that legal persons have greater involvements; either companies or other legal persons uses employees and resources. Food safety and Standards Act, 2006 provides provisions for dealing with challenges of crime commission by companies and for this purpose it imposes imputed liability on in-charge of company who is responsible for conduct of business of company. When any offence under this Act is committed, deeming provision is given in Section 66 (1) of the Act that offence shall be taken as committed by company and also by in-charge of conduct of business of company accordingly both shall be punished. But when company is decentralised and different units are established and in such case any unit of company has committed offence then in-charge of such unit shall be liable.²³ When in-charge of company or unit of company, as the case may be, proves that offence was committed without his knowledge or he exercised due diligence to prevent commission of such offence, such officer shall not be liable.²⁴

Indian Penal Code also penalises adulteration and spurious material production particularly food materials and medicines. Section 272 IPC provides that whoever adulterates any article of food or drink as to make such article noxious as food or drink and intending to sell or knowing that it is likely to be sold, his offence is punishable with term of imprisonment extending up to six months or fine up to one thousand rupees or both. In Section 272 IPC selling of material is not needed but only requirement is intentional or with knowledge adulteration of food material. When such noxious material is sold or offered or exposed for sale and person knows or has reason to believe that such material has become noxious, the person under section 273 IPC may be inflicted with term of imprisonment up to six months or fine up to one thousand rupees or both. Drugs have always been available in pure form without any adulteration and also it must not be spurious one because drugs are life-saving materials. Whoever adulterated drugs is liable for punishments under section 274 IPC; whoever sells, offers or exposes for sale such adulterated drugs is liable for punishment under section 275 IPC; and person who sells any drug or medical preparation as a different drug or medicinal preparation is liable for punishment under section 276 IPC, here in this case he is committing cheating by selling different drug and pretending as being some other drug but it has to be cleared that this section does not prescribe provision for spurious drugs in which drug prepared by one is shown as prepared by some other; in all these cases prescribed punishments prescribed under respective sections of IPC are imprisonment extending up to six months or fine up to one thousand rupees or both. When a person uses property marks belonging to other person on his goods to show that goods belong to this other person, it is case of use of false property marks which is elaborated in Section 481 IPC. Use of false property marks is case relating to spurious material, actually goods belong to one person but by use of false property mark he shows that such goods belong to other person, hereby counterfeit goods is prepared and marketed. Section 486 IPC prescribes punishment for sell of goods with such counterfeiting property marks with imprisonment up to one year or fine or both, and Section 487 IPC prescribes

²³First Proviso to Section 66(1) Food Safety and Standards Act, 2006.

²⁴Second Proviso to Section 66(1) Food Safety and Standards Act, 2006.

punishments for making a false mark upon any case package or other receptacle containing the goods with imprisonment extending up to three years or fine or both.

Drugs and Cosmetics Act, 1940 (hereinafter referred to as DCA 1940) is special Act enacted to regulate import, manufacture, distribution and sale of drugs and cosmetics. Drugs manufactured and available in the market and hospital must be pure and up to standard; it is needed to be ensured strictly. Section 9, 9A, 9B, 9C and 9D of DCA 1940 defines misbranded drugs, adulterated drugs, spurious drugs, misbranded cosmetics respectively for the purpose of import and in reference to manufacturing these are defined in Section 17, 17A, 17B, 17C and 17D respectively. Section 10 of CA 1940 empowers Central Government may prohibit any drug or cosmetics which is not of standard, misbranded, spurious or adulterated. Any person who imports adulterated, misbranded, spurious drugs or cosmetics is offence punishable with imprisonment up to three years and fine up to five thousand rupees and on subsequent conviction with imprisonment five years fine up to ten thousands rupees or both.²⁵ When any person imports drug which import is prohibited under Section 10, he is on first conviction liable for imprisonment extending up to six months or fine extending up to five hundred rupees or both and on subsequent conviction liable for imprisonment up to one year or fine up to one thousand rupees or both.²⁶ Whoever manufactures, sells, stocks, exhibits or offers for sale or distribution any misbranded, adulterated, or spurious drugs or cosmetics, he is liable for punishments under section 27 of DCA 1940; when such use is likely to cause death or grievous hurt, convict may be punished with imprisonment not less than five years but which may extend to life imprisonment and fine not less than ten thousand rupees; when drug is not likely to cause death or grievous hurt and it is adulterated drugs convict may be punished with imprisonment not less than one year which may extend up to three years and fine not less than five thousands; when such drug is spurious, convict may be punished with imprisonment not less than three years which may be extended up to five years and fine not less than five thousand rupees.

Offences relating to Weight and Measures

Use of false weight and measures is common and traditional method used by sellers to give lesser quantity of goods to consumer and thereby they obtain undue profit. To check this problem one preventive measure is provided in Section 153 of the Criminal Procedure Code, 1973 which empowers officer in charge of police station that whenever he has reason to believe about keeping false weights, measures, or instruments for weighing, he may without warrant enter in such premises and make search. If in search police officer finds false weight, measures or instruments for weighing, he may seize it and about seizure forthwith inform the jurisdiction Magistrate.

Indian Penal Code (hereinafter referred to as IPC) is general penal law which was enacted in 1860 but even after more than 160 years of its enactment still

²⁵Section 13(1)(a) read with 13(2) (a) of DCA 1940.

²⁶Section 13(1)(a) read with 31 (2)(b) of DCA 1940.

relevant and effective in dealing with crime and criminality. Various provisions contained in IPC criminalise the consumer grievances. Chapter XIII of the IPC declares use or possession or making or selling of false weight or measure as offence. Whenever any person fraudulently uses false instrument for weighing, weight, or measure of length or capacity, his offence is punishable under Section 264 and 265 the IPC with imprisonment extending up to one year or fine or both. Even possession of false weight, instrument for weighing or any measure of length or capacity may be sufficient for infliction of punishment and it is punishable with imprisonment up to one year or fine or both.²⁷ Manufacturers and sellers involved in manufacturing and dealing with false weight, instrument for weighing, or measure for length or capacity are liable for punishments of imprisonment up to one year or fine or both.²⁸

Concluding Remarks

Society is dynamic. It changes with passing time and place, thereby, with passing time new interest may emerge or lesser important interest may become more important. Consumer goods and services creation, production and marketing are directly related to industrialisation, science and technology use, and modern know-how application, thereby, societal dynamism ultimately as consequence of emergence and importance variation of consumer interest is speedier. It is continuous process to identify crucial and important consumer interests to provide legal protection. Legal protection does not remain only to identify consumer interests and declare them as consumer rights but more important is to provide effective forum, procedure and remedy for redressal of consumer grievances. Thereby, legal regime has to be continuously reviewed to identify consumer interest, and availability of effective forum, procedure and remedy. In modern era of information and communication major challenge in consumer grievance redressal is consumer information gap; consumers do not have sufficient information about their rights and justice available to them, and further they do not have information about quality, quantity, and performance of consumer goods and services. If any information about goods and services is available, it comes from manufacturer, service provider and seller who are interested in sell of product rather than to provide proper information to consumer. Sellers and traders mostly use advertisements through mass media to attract the consumers and augment the sell; such advertisements are now source of information to consumers about the products. Advertisements in mass media particularly through electronic, print, and social media have enormous impact on consumers, and further, for such impact persons with brand value are used in the advertisements.

One more major issue in consumer grievances redressal is complexity of goods and services; consumer goods are produced by use of modern science and technology, and consumer services are provided by expert persons by use of modern know-how. In such situation a common consumer himself is completely

²⁷Section 266 of IPC.

²⁸Section 267 of IPC.

unable to know about consumer goods and services, in absence of any impartial information and due to lack of his own capability he has to depend on information provided to him by sellers and traders. Consumer is in need of protection at three stages – pre-purchase stage, purchase stage and post-purchase stage. At pre-purchase stage consumer should get proper and effective information about the product and services, thereby, he has to know that which product or service may satisfy his objective behind the purchase and ultimately he may take decision about purchase. Then after, at purchase stage need is to protect the consumer by ensuring that there should not be use of unfair trade practices and restrictive trade practices. Whenever at aforesaid stages any improper act is committed by seller or product is not of merchantable quality then at post-purchase stage effective forum, procedure and remedy should be available for consumer grievance redressal.

No doubt consumer who has suffered loss has to be compensated and in this regard civil forum, civil procedure and civil remedy may be justice requirement for individual consumer but now in modern era consumer grievances are not individual problem but impacts are graver for society at large, and further, waiting for injury resulting to consumer may not be appropriate method of dealing the problem but need is to avoid occurrence of consumer grievance itself. Such prevention is possible only by criminalisation of consumer grievances and infliction of severe punishments on guilty persons. In CPA 1986, which was repealed in 2019, provisions were provided only to provide civil remedy; it did not provide provisions to prescribe penal remedy but in CPA 2019, presently in force, provisions are provided to inflict punishments for violations of consumer interests; such a shift in law is to recognise efficacy of criminal justice system to effectively deal with consumer grievances and attain the goal of consumer protection. Further, Indian Penal Code, general penal law in India, and some special Acts declare some acts producing consumer grievances as offence and prescribe punishments. Consumer goods producers, sellers, and consumer service providers are capable enough and situations to shift their civil monetary liabilities on consumers itself by increasing consumer goods and services prices, thereby, they may not have any problem in imposition of civil liabilities. Criminal liabilities imposition may affect reputation, goodwill, and stigmatise as criminal, thereby, consumer goods producers, sellers, consumer service providers fear the penal actions ultimately their wrongful activities may be effectively dealt with.

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