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LA PUBLIC TRUST DOCTRINE: DALLE ORIGINI ALLA CLIMATE CHANGE LITIGATION

Abstract La *public trust doctrine* (PTD) è una teoria giuridica, dalle radici assai antiche, che è stata elaborata nell'esperienza nordamericana e che è oggetto di un interesse crescente come strumento di tutela delle risorse ambientali. Il presente contributo, concentrandosi, in particolare, sugli Stati Uniti, intende quindi offrire un'analisi dei tentativi di espandere l'applicazione della PTD per ricomprendervi un numero sempre più ampio di *natural resources*. Lo studio vuole, infine, valutare la rilevanza della PTD nell'ambito della *climate change litigation* mediante un esame di alcuni casi giudiziari significativi negli USA e in altri ordinamenti.

Keywords public trust doctrine – ambiente – climate change litigation

1. Introduzione

Le radici del discorso che si andrà a fare in questo breve contributo affondano nella cosiddetta 'questione ambientale' e, in particolare, nelle difficoltà di tutelare l'ambiente e le risorse naturali, che potrebbero essere considerate dei *commons*, ossia dei beni disponibili a tutti in libero accesso, ma, proprio per questo, esposti al rischio di sovrasfruttamento ed esauribilità se ogni individuo persegue il proprio interesse personale[1]. Ecco, pur tralasciando la trattazione di queste tematiche da un

[1] Questa situazione è stata descritta con la potente e dibattuta espressione 'tragedia dei beni comuni' (G. Hardin, *The Tragedy of the Commons*, in *Science*, 162(3859), 1968, 1243 ss.; traduzione in italiano *La tragedia dei beni comuni*, a cura di L. Coccoli, disponibile al link http://archiviomarini.sp.unipi.it/511/1/hardin.pdf).

punto di vista generale[2], si può convenire che l'individuazione di soluzioni efficaci per salvaguardare questi beni comuni e permetterne un uso sostenibile rappresenta una delle problematiche più dibattute tra decisori politici e studiosi di varie discipline[3].

In questa discussione si inserisce, la cosiddetta *public trust doctrine* (PTD), una particolare teoria giuridica nata negli Stati Uniti – ma poi diffusasi anche in altri Paesi –, che gli interpreti, soprattutto a partire dalla fondamentale opera di Joseph Sax[4], hanno cercato di estendere dalla tradizionale e limitata applicazione alle acque navigabili e alle terre sommerse sotto di esse anche a diverse altre risorse naturali, tra cui l'atmosfera.

In un'accezione forse un po' semplicistica, la PTD si fonda sull'idea che alcune risorse naturali non possano essere gestite in modo equo o efficace dai privati. Al contrario, questi beni devono essere affidati al governo, che è tenuto a regolarne l'uso e a proteggerli da un consumo eccessivo per conto dei cittadini presenti e futuri[5].

Come peraltro suggerisce già il nome della stessa *doctrine*, per comprendere la PTD è utile richiamare lo schema base dell'istituto giuridico del trust. Nel trust, un

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Per quanto riguarda l'inquinamento, "non si tratta di sottrarre qualcosa al bene comune, ma di introdurvi qualcosa — nelle acque, scarichi, rifiuti chimici e radioattivi (...); nell'aria, fumi pericolosi e nocivi (...)". Il costo di scaricare sostanze nei beni comuni è certamente minore del costo di trattarle prima di immetterle nell'ambiente (G. Hardin, *The Tragedy*, cit., 1245; Traduzione, 5).

Sulla riconducibilità dei cambiamenti climatici nello schema della tragedia dei beni comuni si vedano: M.S. Sooros, *The Endangered Atmosphere: Preserving a Global Commons*, Columbia, 1997, 260 s.; S. Barrett, *Choices in the climate commons*, in *Science*, 362(6420), 2018, 1217; J. Paavola, *Climate change: the ultimate 'tragedy of the commons'?*, Sustainability Research Institute Paper No. 24, University of Leeds, March 2011, disponibile al link https://www.see.leeds.ac.uk/fileadmin/Documents/research/sri/workingpapers/SRIPs-24_01.pdf; S. Ansari – F. Wijen –

B. Gray, *Constructing a Climate Change Logic: An Institutional Perspective on the "Tragedy of the Commons"*, in *Organ. Sci.*, 24(4), 2013, 1014 ss.

[2] La letteratura sul punto è sconfinata. Si vedano, oltre al citato saggio di Hardin: G. Hardin, *Denial and Disguise*, in J. Baden – G. Hardin (eds.), *Managing the Commons*, New York, 1977, 45 ss.; G. Hardin, *Political Requirements for Preserving Our Common Heritage*, in H.P. Brokaw (ed.), *Wildlife and America*, Washington, 1978, 310 ss.; E. Ostrom, *Governing the commons. The Evolution of Institutions for Collective Action*, Cambridge, 1990; E. Ostrom, *Coping with tragedies of the commons*, in *Annu. Rev. Polit. Sci.*, 2, 1999, 493 ss.; E. Ostrom, *The Challenge of Common-Pool Resources*, in *Environ. Sci. Policy Sustain. Dev.*, 50(4), 2008, 8 ss.; T. Dietz *et al.*, *The Drama of the Commons*, in E. Ostrom *et al.* (eds.), *The Drama of the Commons*, Washington, 2002, 3 ss.; W. Ophuls, *Ecology and the Politics of Scarcity. Prologue to a Political Theory of the Steady State*, San Francisco, 1977; W. Ophuls, *Leviathan or Oblivion*, in H.E. Daly (ed.), *Toward a Steady State Economy*, San Francisco, 1973, 215 ss.; T. De Moor, *From common pastures to global commons: a historical perspective on interdisciplinary approaches to commons*, in *Nat. Sci. Soc.*, 19(4), 2011, 422 ss.; U. Mattei, *Beni comuni. Un manifesto*, Roma-Bari, 2011; S. Nespor, *Tragedie e commedie nel nuovo mondo dei beni comuni*, in *Riv. giur. amb.*, 6, 2013, 665 ss.; Sia consentito anche un rimando a: S. Fanetti, *Ambiente e beni comuni. Contenimento del consumo di suolo e riflessi sulla proprietà privata in un'ottica di diritto comparato*, Milano, 2019, 129 ss.

[3] R.D. Sagarin – M. Turnipseed, *The Public Trust Doctrine: Where Ecology Meets Natural Resources Management*, in *Annu. Rev. Environ. Resour.*, 37, 2012, 474.

[4] J.L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, in *Mich. L. Rev.*, 68(3), 1970, 471 ss.

[5] R.D. Sagarin – M. Turnipseed, *op. cit.*, 473.

soggetto, definito disponente o *settlor*, trasferisce alcuni beni, che rappresentano il cosiddetto *corpus* del trust, a un altro soggetto, definito gestore o *trustee*; il *trustee* detiene e amministra il *corpus* per i beneficiari del trust. In base alla PTD, il *trustee* è il governo, il beneficiario è il 'pubblico' – ossia i cittadini attuali e futuri – e il *corpus* del trust è la risorsa che deve essere conservata dal governo[6].

Secondo Sax, l'obbligazione fiduciaria imporrebbe al governo tre fondamentali limitazioni: le risorse in trust non solo devono essere utilizzate per una finalità pubblica, ma devono anche essere disponibili all'uso da parte dei cittadini; i beni non possono essere alienati, nemmeno a fronte di un giusto ed equo corrispettivo; le risorse devono essere mantenute per assicurare particolari tipi di usi, come la navigazione, la ricreazione o la pesca[7]. La PTD si fonda, pertanto, su due idee chiave: la prima è che determinate risorse sono estremamente importanti per i cittadini e, pertanto, meritano di essere protette dal governo[8]. Alcune risorse in *public trust*, come le acque navigabili, hanno un'utilità significativa per il commercio e l'economia. Altre risorse, ad esempio un parco nazionale, svolgono, invece, essenziali funzioni ecologiche e ricreative e quindi hanno un'utilità ambientale intrinseca, che comprende il godimento personale che ciascuno potrebbe trarre dalla risorsa[9]. Il secondo assunto della PTD è che, a causa dell'importanza della risorsa, al governo è precluso privatizzarla: essa deve essere mantenuta in uso pubblico.

Da un punto di vista filosofico, la PTD è senz'altro attraente perché fornisce un quadro per strutturare la relazione tra i cittadini, attuali e futuri, i governi che eleggono, le risorse naturali e i servizi che forniscono[10]. Sul piano del diritto, la *doctrine* ha una potenzialità enorme come base giuridica della tutela di essenziali beni ambientali, potendosi tendenzialmente applicare sia a risorse con un chiaro valore monetario (come i pesci) sia ad altre 'a valore diffuso' (come gli ecosistemi intatti), nonché adattare per la protezione tanto di *commons* su scala locale, quanto di *global commons* (quali, ad esempio, l'atmosfera e il clima)[11]. Proprio su queste basi,

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[6] Sul punto: J. Arnold – A. Jacoby, *Examining the Public Trust Doctrine's Role in Conserving Natural Resources on Louisiana's Public Lands*, in *Tul. Envtl. L.J.*, 29(2), 2017, 195; T. Fox, *Natural Resource Damages: The New Frontier of Environmental Litigation*, in *S. Tex. L. Rev.*, 34(3), 1993, 522; M.C. Wood, *Atmospheric Trust Litigation: Securing a Constitutional Right to a Stable Climate System*, in *Colo. Nat. Resources, Energy & Envtl. L. Rev.*, 29(2), 2018, 322 s.; M.D. Jr. Smith, *A Blast from the Past: The Public Trust Doctrine and Its Growing Threat to Water Rights*, in *Envtl. L.*, 46(3), 2016, 470.

[7] J.L. Sax, *The Public Trust*, cit., 477.
Sul punto anche: P. Kameri-Mbote, *The use of the Public Trust Doctrine in Environmental Law*, in *Law. Environ. Dev. J.*, 3(2), 2007, 199.

[8] M.D. Jr. Smith, *op. cit.*, 470.

[9] *Ibidem*.
Sul punto anche: H. Sun, *Toward a New Social-Political Theory of the Public Trust Doctrine,* in *Vt. L. Rev.*, 35(3), 2011, 573 s.

[10] R.D. Sagarin – M. Turnipseed, *op. cit.*, 474.

[11] J. Arnold – A. Jacoby, *op. cit.*, 196; R.D. Sagarin – M. Turnipseed, *op. cit.*, 474.

nell'ambito della *climate change litigation*, si assiste al fiorire di azioni, fondate sulla PTD, in cui i ricorrenti intendono far valere l'obbligazione dei governi di ridurre le emissioni di gas serra o, più in generale, di contrastare i cambiamenti climatici[12].

2. *Alle radici della* public trust doctrine

La PTD affonderebbe le sue radici addirittura nel diritto romano[13] e, in particolare, nel celebre *Corpus iuris Iustinianeum*, dove alcune fondamentali risorse naturali (l'aria, l'acqua corrente, il mare e i lidi del mare) venivano definite *res communes omnium*, ossia cose che per legge naturale sono comuni a tutti[14]. Questa 'affermazione', che probabilmente, più che descrivere il reale status giuridico di questi beni durante l'Impero Romano[15], rifletteva quel processo di 'idealizzazione' del diritto romano portato avanti da Giustiniano[16], fu poi ripresa, essenzialmente alla lettera, in Spagna nel XIII secolo dalla *Ley de las Siete Partidas*[17] e qualche secolo dopo dalla *Recopilación de Leyes de los Reynos de las Indias*[18], divenendo, inoltre, parte del diritto consuetudinario di molte nazioni europee nel Medioevo[19].

Quanto all'Inghilterra, si deve soprattutto agli scritti di Bracton di metà del XIII secolo l'ingresso delle *res communes omnium* nel bagaglio concettuale del *common law* inglese[20]. In particolare, nel fondamentale *De Legibus et Consuetudinibus*

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[12] A. Panizio, *Public Trust Doctrine in Comparative Environmental Law*, FEU research paper no. 7/2020, Universität Bremen, 35, disponibile al link https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/feu/FEU/Arbeitspapiere_FEU/FEU_AP7_Public_Trust_Doctrine_in_Comparative_Environmental_Law.pdf.

[13] J.L. Sax, *The Public Trust*, cit., 475.

[14] Il riferimento alle *res communes omnium* è rinvenibile in un frammento del giurista classico Elio Marciano, poi "inserito dai compilatori giustinianei sia nel Digesto (1.8.2.1) che nelle Istituzioni (2.1.1)" (A. Dani, *Il concetto giuridico di "beni comuni" tra passato e presente*, in *Historia et ius (www.historiaetius.eu)*, 6, 2014, paper 7, 7).

In particolare, in I. 2, 1, 1 si legge: "*Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. Nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis abstineat, quia non sunt iuris gentium, sicut et mare*".

[15] R.J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources Law: Questioning the Public Trust Doctrine*, in *Iowa L. Rev.*, 71, 1986, 634.

In effetti, le risorse marine e costiere sfruttabili erano generalmente in proprietà privata o venivano concesse in affitto a dei monopoli (P. Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, in *Sea Grant L.J.*, 1, 1976, 33).

[16] A tal proposito, le Istituzioni giustinianee erano pensate come un'opera didattica (e quindi destinata agli studenti di diritto dell'Impero) e il Digesto era una sorta di 'patchwork', non necessariamente coerente, tra le opere dei più insigni giuristi romani (R.J. Lazarus, *Changing Conceptions*, cit., 634; P. Deveney, *op. cit.*, 25 s.; P. Kameri-Mbote, *op. cit.*, 197).

[17] Si tratta di un 'codice' promulgato da Alfonso X il Saggio nel 1265 per il regno di Castiglia, al fine di adottare un *corpus* normativo unitario in luogo della caotica varietà giuridica al tempo in vigore.

[18] La *Recopilación de Leyes de los Reynos de las Indias* è una raccolta di norme destinata a regolare i possedimenti spagnoli in America e nelle Filippine. Essa fu realizzata da León Pinelo e Juan de Solórzano Pereira e approvata da Carlo II di Spagna nel 1680.

[19] R.J. Lazarus, *Changing Conceptions*, cit., 634.

[20] P. Deveney, *op. cit.*, 25.

Angliae[21] si può leggere: "*(b)y natural law these are common to all: running water, air, the sea, and the shores of the sea, as though accessories of the sea. No one therefore is forbidden access to the seashore (…)*"[22]. Ancora una volta, però, sorgono dubbi sul fatto che queste enunciazioni corrispondessero al diritto concretamente applicato all'epoca[23]. Una effettiva conferma dei diritti della collettività sulle risorse costiere si verificò, secondo Lazarus, solo a partire dal XVI secolo quando la Corona, cercando uno strumento per incrementare i suoi possedimenti, resuscitò quegli antichi diritti per rivendicare la proprietà delle zone costiere fino al limite di alta marea, nonostante le precedenti concessioni reali di litorali ai privati; così, sebbene in un certo senso il *common law* inglese riconoscesse diritti alla collettività nell'area costiera, questi erano, in fondo, diritti controllati dal sovrano: quest'ultimo quindi avrebbe potuto trasferire tali risorse in mani private[24]. In ogni caso, forse il vero precursore nel vecchio continente di quella che sarà la PTD americana potrebbe essere Lord Mathew Hale (1609-1676), illustre giurista e *Chief Justice* del *King's Bench*, il quale scrisse il *De Jure Maris*, pubblicato solo nel 1787, oltre un secolo dopo la sua morte[25]. In quest'opera l'autore, pur ammettendo la possibilità che il suolo delle aree costiere possa essere in proprietà privata, riconosce che i sudditi abbiano uno *jus publicum*, ossia un diritto di navigazione, che grava sul proprietario: quest'ultimo deve astenersi da eventuali molestie che possano compromettere o limitare l'esercizio di tale diritto; il re, in quanto titolare dello *jus regium* (ossia il diritto reale di regolamentare/gestire le risorse per il benessere dei sudditi) deve garantire che i porti e le vie d'acqua siano accessibili senza ostacoli[26].

3. *L'affermazione della* public trust doctrine *negli USA: le decisioni delle Corti Supreme statali e della Corte Suprema degli Stati Uniti nel XIX secolo*

Sulla scorta di questi autorevoli antecedenti trasportati attraverso l'Atlantico[27], l'idea del *common law* inglese secondo cui il 'pubblico' conserva certi diritti inviolabili su (alcune) risorse naturali e il re – sostituito, dopo l'indipendenza, dagli Stati nella versione 'americana' della PTD – deve amministrare tali beni a beneficio

[21] Henrici (Henry) de Bracton, *De Legibus et Consuetudinibus Angliae*, prima ed. a stampa, London, 1569. Per una traduzione in inglese: H. Bracton, *On the Laws and Customs of England* (tradotto da S.E. Thorne), Cambridge (MA-US), 1968.
[22] H. Bracton, *On the Laws*, cit., 39 s.
[23] P. Kameri-Mbote, *op. cit.*, 198.
[24] R.J. Lazarus, *Changing Conceptions*, cit., 635.
[25] M. Hale, *A Treatise in Three Parts (Pars Prima. De Jure Maris Et Bracchiorum Ejusdem)*, in F. Hargrave (ed.), *A collection of tracts relative to the law of England: from manuscripts, now first edited*, Dublin, 1787.
[26] M. Hale, *op. cit.*, 22 ss.
Sul punto: W. Taylor, *Seashore and the People*, in *Cornell L.Q.*, 10(3), 1925, 307 ss.; L.L. Butler – M. Livingston, *Virginia Tidal and Coastal Law*, Charlottesville, 1988, 120 ss.; P. Deveney, *op. cit.*, 44 ss.
[27] M.C. Blumm – M.C. Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law*, third edition, Durham (NC-USA), 2021, 57.

della collettività pian piano si è fatta strada negli Stati Uniti, in primo luogo attraverso alcune decisioni giudiziarie chiave[28], sia a livello statale che federale. Nello specifico, la PTD venne originariamente utilizzata per proteggere una triade di diritti pubblici – pesca, navigazione e commercio – nelle acque navigabili degli Stati Uniti, che includevano i fiumi, i Grandi Laghi e le acque costiere[29].

La prima manifestazione della PTD viene comunemente ricondotta ad un caso dell'inizio del XIX secolo, *Carson v. Blazer* (1810), deciso dalla Corte Suprema della Pennsylvania[30]. Nella controversia Carson, proprietario rivierasco, agì in giudizio rivendicando un diritto esclusivo di pesca nelle acque del fiume Susquehanna antistanti la sua proprietà e richiedendo contestualmente il risarcimento del danno per il pesce 'sottratto' dalla parte convenuta; la Corte, osservando che il fiume in questione era navigabile, chiarì come non vi fosse alcun diritto esclusivo, essendo il diritto di pesca conferito allo Stato ed esercitabile da tutti[31]. Ciò che è implicito in questa decisione è che, mentre lo Stato detiene la titolarità giuridica sulla risorsa, il beneficiario è la collettività nel suo insieme[32].

Un caso ancora più significativo nel percorso di consolidamento della PTD è rappresentato da *Arnold v. Mundy*, deciso nel 1821[33]. La disputa si originò quando, nel 1818, Benjamin Mundy condusse un gruppo di barche lungo il fiume Raritan per raccogliere le ostriche in un tratto che era adiacente al terreno di proprietà di Robert Arnold, un agricoltore che asseriva di allevare le ostriche e di aver delimitato l'area allo scopo; Arnold, dunque, intentò una causa e Mundy si difese sostenendo che, poiché il fiume era navigabile, poteva esercitare i diritti di raccolta. Nella decisione, il *Chief Justice* Andrew Kirkpatrick sottolineò che i fiumi navigabili, i porti, le baie, le coste del mare, includendo sia le acque che le terre sommerse, utilizzati per il passaggio, la navigazione, la pesca, l'uccellagione, il sostentamento e tutti gli altri usi delle acque e delle risorse che in esse si trovano, sono comuni a tutti i cittadini e ciascuno ha il diritto di goderne secondo le sue necessità, rimanendo soggetti solo alle norme che ne regolano l'uso. La proprietà di questi beni spetta al sovrano (cioè allo Stato) e gli è conferita non per uso proprio, ma per l'uso dei cittadini, ossia per il loro godimento diretto e immediato[34]. Lo stesso potere sovrano, pertanto, non può concedere un diritto assoluto sulle acque dello Stato, privando con ciò tutti i cittadini del loro comune diritto[35]. La sentenza sembra dunque suggerire che i

[28] R.J. Lazarus, *Changing Conceptions*, cit., 636.
[29] R.D. Sagarin – M. Turnipseed, *op. cit.*, 475.
[30] *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810).
[31] *Id.* at 477: "*the owner of land on the banks of the Susquehanna, has no exclusive right to fish in the river immediately in front of his lands, but that the right to fisheries in that river is vested in the state, and open to all (…)*".
[32] T. Fox, *op. cit.*, 525.
[33] *Arnold v. Mundy*, 6 N.J.L. 1 (1821).
[34] *Id.* at 76-77.
[35] *Id.* at 78.

cittadini siano titolari di determinati diritti di accesso alle risorse idriche, diritti che non possono essere preclusi mediante l'alienazione ai privati da parte dello Stato[36]. Questa sentenza (*Arnold v. Mundy*) pronunciata da una Corte Suprema statale si rivelò particolarmente influente anche sul livello federale[37] visto che su di essa si basò quella che probabilmente rappresenta la prima decisione della Corte Suprema degli Stati Uniti a riconoscere la *public trust doctrine*[38], ossia *Martin v. Waddel's Lessee* del 1842[39]. La sentenza, che ancora una volta concerneva una disputa relativa alla raccolta delle ostriche, stabilì che le rive, i fiumi, le baie, i bracci del mare e la terra sotto di loro costituivano beni amministrati dallo stato in qualità di fiduciario a favore della collettività, per essere liberamente utilizzati da tutti per la navigazione e la pesca[40].

I limiti per lo Stato di alienare le risorse in trust vennero ribaditi con forza dalla Corte Suprema nella sentenza *Illinois Central Railroad Co. v. Illinois* del 1892[41], che secondo Sax, in ciò suffragato da ampia dottrina e da copiosa giurisprudenza, rappresenta il caso di PTD più 'celebrato' nel diritto americano[42]. Partiamo dai fatti all'origine della controversia[43]: nel 1869 il legislatore dell'Illinois approvò il *Lake Front Act*, con cui, veniva concessa un'ampia area del porto di Chicago, delle acque e del fondale del lago Michigan alla *Illinois Central Railroad*[44]. Nel 1873, il legislatore, pentitosi della sua eccessiva generosità, abrogò la concessione del 1869[45]; dieci anni dopo, nel 1883, l'*attorney general* dello Stato agì contro la ferrovia, sostenendo che i

[36] R.J. Lazarus, *Changing Conceptions*, cit., 637 (n. 28).
Si vedano anche: H. Sun, *op. cit.*, 595; M.C. Blumm – Z.A. Schwartz, *The Public Trust Doctrine Fifty Years After Sax and Some Thoughts on Its Future*, in *Pub. Land & Resources L. Rev.*, 44, 2021, 9; D. Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, in *N.Y.U. Env't L.J.*, 16, 2008, 714; D.M. Carboni, *Rising Tides: Reaching the High-Water Mark of New Jersey's Public Trust Doctrine*, in *Rutgers L.J.*, 43(1), 2011, 101.
[37] M.C. Blumm – M.C. Wood, *The Public Trust*, cit., 57.
[38] T. Fox, *op. cit.*, 528.
[39] *Martin v. Waddell's Lessee*, 41 US 367 (1842).
In effetti, questa sentenza, oltre ad attingere a piene mani da Hale (*Id.* at 412-13, 417-18), seguì il ragionamento di Kirkpatrick in *Arnold*, considerandolo "*unquestionably entitled to great weight*" (*Id.* at 418).
Sul punto: M.C. Blumm – Z.A. Schwartz, *op. cit.*, 9 s.; H.C. Dunning, *Sovereignty and Water Resources*, in *J. Contemp. Water Res. Ed.*, 105(1), 1996, 43.
[40] *Martin*, 41 U.S. at 416.
Sul punto: H. Sun, *op. cit.*, 571; M. O'Loughlin, *Understanding the Public Trust Doctrine through Due Process*, in *B.C. L. Rev.*, 58(4), 2017, 1334.
[41] *Illinois Central Railroad v. Illinois*, 146 US 387 (1892).
Sul punto: J.B. Ruhl – J. Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, in *Southeastern Envtl. L.J.*, 15(1), 2006, 225.
[42] J.L. Sax, *The Public Trust*, cit., 489.
[43] Una puntuale disamina è offerta da: J.D. Kearney – T.W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, in *U. Chi. L. Rev.*, 71(3), 2004, 799 ss.
[44] La concessione includeva tutta la terra sottostante il lago Michigan per un miglio dalla costa e si estendeva per un miglio lungo il quartiere centrale degli affari di Chicago: più di mille acri di valore incalcolabile, che comprendevano praticamente l'intero *commercial waterfront* della città (J.L. Sax, *op. cit.*, 489).
[45] J.L. Sax, *The Public Trust*, cit., 489.

lavori di costruzione di moli e infrastrutture (nel frattempo proseguiti) erano su terreni sommersi di proprietà dello Stato. *Illinois Central Railroad* si difese sostenendo la validità della concessione contenuta nella legge del 1869. La controversia giunse alla Corte Suprema nel 1892, che si pronunciò a favore dello Stato dell'Illinois.

La sentenza si dilunga ampiamente sulla natura speciale del diritto dello Stato sulle terre sottostanti le acque navigabili[46] – del tutto diverso rispetto a quello sulle terre destinate alla vendita –, affermando chiaramente che: "la titolarità delle terre sotto le acque navigabili del lago Michigan è detenuta dallo Stato in trust per il popolo dello Stato affinché questo possa godere del diritto di navigazione delle acque, esercitare il commercio su di esse e avere la libertà di pescare, senza l'ostruzione o l'ingerenza di soggetti privati (…)"[47]. Ciò non significa che l'uso di queste risorse sia congelato nel tempo[48]: ad esempio, l'esercizio del diritto di navigazione potrebbe essere facilitato dalla costruzione di moli e banchine e quindi, a tal fine, lo Stato può concedere lotti di terre sommerse ai privati[49]. Quello che lo Stato non può fare è, invece, una cessione su larga scala che si concretizzerebbe in un'abdicazione del controllo dello Stato sulle terre sottostanti le acque navigabili di un intero porto, di una baia, di un mare o di un lago; questa abdicazione sarebbe in contraddizione con il dovere fiduciario dello Stato di governare tali risorse affinché i cittadini possano utilizzarle[50]. La sentenza, dunque, oltre a far emergere alcuni concetti chiave – 1. lo Stato detiene in trust determinate risorse per il bene comune; 2. i cittadini hanno il diritto alla protezione di queste risorse[51] – articola, secondo Sax, un principio che diverrà centrale nel contenzioso sulla PTD: quando uno Stato è fiduciario di una risorsa disponibile in libero uso per tutti i cittadini, le corti mostrano una netta diffidenza verso qualsiasi decisione volta a restringere gli utilizzi della risorsa nell'interesse dei privati[52].

4. *L'evoluzione della* public trust doctrine *e la sua estensione alle risorse ambientali in generale: uno sguardo agli USA e oltre*

Come già evidenziato e come le sentenze appena analizzate mostrano inequivocabilmente, la PTD si è affermata con riferimento a ben limitate risorse (le acque navigabili e i relativi letti/fondali[53]) e per la preservazione di specifici usi

[46] R.J. Lazarus, *Changing Conceptions*, cit., 638.
[47] Traduzione da *Il. Cent.,* 146 U.S. at 452.
[48] D. Takacs, *op. cit.*, 714.
[49] *Il. Cent.,* 146 U.S. at 452.
[50] *Id.* at 452-453.
[51] D. Takacs, *op. cit.*, 715.
[52] J.L. Sax, *The Public Trust*, cit., 490.
[53] Sul punto: R.J. Lazarus, *Changing Conceptions*, cit., 638.

(navigazione, commercio e pesca); pertanto, volendo utilizzare una distinzione molto cara anche alla dottrina italiana, la PTD era, almeno inizialmente, impiegata per proteggere il 'valore d'uso' di quei beni e non, invece, per tutelarne il 'valore di esistenza'[54].

Se, dunque, è vero che la PTD abbia inizialmente riguardato una sfera del tutto peculiare, bisogna però riconoscere che la *doctrine* non è rimasta confinata in quest'ambito[55]. Nel corso della storia degli Stati Uniti, alcuni giudici innovatori hanno cercato di estendere la PTD per applicarla a un'ampia gamma di risorse, naturali e artificiali[56], comprese le strade cittadine e la loro sottosuperficie – destinata a sottoservizi (fognature, linee del gas, cavi dell'elettricità…) e alla realizzazione di metropolitane[57]. È innegabile che il ruolo fondamentale giocato dalle corti statali e federali nel corso della lunga storia della PTD abbia determinato sviluppi diseguali, con un'applicazione assai differenziata a tutela di risorse e interessi eterogenei; tanto è vero c'è chi ritiene che oggi vi siano ben cinquantuno versioni di PTD – inclusa l'incarnazione federale – negli Stati Uniti[58].

In ogni caso, la 'svolta ecologista' della PTD si ebbe solo a partire dagli anni sessanta del XX secolo, quando, di fronte alle crescenti preoccupazioni del popolo americano per il progressivo e insostenibile degrado ambientale, giudici e legislatori (statali e federali) iniziarono a utilizzare la PTD al fine di tutelare numerose risorse naturali (affluenti non navigabili, acque sotterranee, uccelli migratori, terre demaniali…), non solo per permetterne l'uso, ma anche per salvaguardarne i valori naturalistici, estetici e ricreativi[59].

Un contributo essenziale a questa svolta cruciale per la PTD è sicuramente attribuibile al pensiero di Joseph Sax, scolpito nel notissimo articolo "*The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*" comparso sulla *Michigan Law Review* nel 1970[60]. All'alba di quella che Lazarus definisce "*the heyday*

[54] A. Somma, *Il risarcimento del danno ambientale nelle esperienze tedesca e nordamericana: Geschäftsführung ohne Auftrag e public trust doctrine*, in *Riv. giur. amb.*, 5, 1999, 607.
In estrema sintesi, il valore d'esistenza "nasce dall'utilità che gli individui possono riconoscere alla semplice esistenza di un bene ambientale anche se non ne saranno mai, in uno dei modi possibili, 'consumatori'" (M. Franzini, *L'economia dell'ambiente tra facili pregiudizi e difficili problemi*, in *Meridiana*, 37, 2000, 76).
Per uno sguardo alla dottrina nordamericana sul tema: L.D. Wood, *Requiring Polluters to Pay for Aquatic Natural Resources Destroyed by Oil Pollution*, in *Nat. Resources Law.*, 8(4), 1976, 602 ss.
[55] R.J. Lazarus, *Changing Conceptions*, cit., 640.
[56] R.D. Sagarin – M. Turnipseed, *op. cit.*, 478.
[57] M. Selvin, *The Public Trust Doctrine in American Law and Economic Policy*, in *Wis. L. Rev.*, 1980, 1417 s.
[58] Sul punto: R.K. Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, in *Penn. St. Envtl. L. Rev.*, 16, 2007, 4 ss.; R.D. Sagarin – M. Turnipseed, *op. cit.*, 478.
[59] R.D. Sagarin – M. Turnipseed, *op. cit.*, 478.
[60] *Supra*, nota 4.

of the modem environmental era"[61], Sax essenzialmente sgancia la PTD dai tradizionali ormeggi dei corpi idrici[62] e la rianima, in quanto dotata dell'ampiezza e del contenuto sostanziale necessari per affrontare i problemi di gestione e tutela delle risorse ambientali[63], fornendo ai cittadini un mezzo per 'sfidare' le azioni o le inazioni del governo[64]. In effetti, a giudizio di Sax, la PTD possiede (almeno potenzialmente) tre caratteristiche che la rendono idonea ad offrire un'efficace base giuridica per la tutela dell'ambiente: il conferimento ai cittadini nel loro complesso di un diritto (1), che può essere fatto valere nei confronti del governo (2) e la cui sostanza è in armonia con le preoccupazioni ambientali (3)[65]. A sostegno di questa tesi, l'articolo descrive l'operatività della teoria nel corso dell'ultimo secolo, evidenziando come in determinate circostanze le corti abbiano invocato la PTD per mettere in discussione la legittimità degli atti del governo che rappresentavano una minaccia per le risorse fiduciarie e, in particolare, per l'accesso dei cittadini a tali risorse[66]. La PTD 'coprirebbe', tra l'altro, anche l'aria e il mare[67] e potrebbe essere impiegata negli sforzi per combattere l'inquinamento, il sovrasfruttamento delle risorse minerarie, l'uso eccessivo di pesticidi e la distruzione degli habitat delle zone umide[68].

La visione di Sax, sebbene controversa[69], ha avuto una notevole influenza sulla giurisprudenza successiva e ha influenzato numerosi interventi legislativi sul piano federale e statale. Quanto ai casi giudiziari, alcune pronunce hanno allargato i confini della PTD per proteggere ulteriori usi legati all'acqua come il nuoto e attività ricreative simili, il godimento estetico di fiumi e laghi e la conservazione della flora e della fauna originarie delle risorse in trust[70].

Emblematico in questo senso è il noto caso *Mono Lake*, deciso nel 1983 dalla Corte Suprema della California[71]. La questione si riferiva a deviazioni delle acque del

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[61] R.J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, in *Nw. U. L. Rev.*, 87, 1993, 788.

[62] C.M. Rose, *Joseph Sax and the Idea of the Public Trust*, in *Ecology L.Q.*, 25(3), 1998, 352.

[63] J.L. Sax, *The Public Trust*, cit., 474.

[64] M.C. Blumm – Z.A. Schwartz, *op. cit.*, 16.

[65] J.L. Sax, *The Public Trust*, cit., 474.
Se il fiduciario (vale a dire il governo) viola i propri doveri fiduciari, i beneficiari possono dunque agire in giudizio in applicazione dei principi della *trust law* (così: M. Cenini, *The CERCLA Model: Past, Present and Future*, in B. Pozzo – V. Jacometti (eds.), *Environmental Loss and Damage in a Comparative Law Perspective*, Cambridge, 2021, 259).

[66] J.L. Sax, *The Public Trust*, cit., 491 ss.
Per una sintesi sul punto: R.J. Lazarus, *Changing Conceptions*, cit., 642.

[67] J.L. Sax, *Defending the Environment: A Strategy for Citizen Action*, New York, 1971, 165.

[68] J.L. Sax, *The Public Trust*, cit., 556.

[69] C.M. Rose, *op. cit.*, 352.

[70] J.M. Coumes, *Look to Windward: The Michigan Environmental Protection Act and the Case for Atmospheric Trust Litigation in the Mitten State*, in *Mich. J. Envtl. & Admin. L.*, 10(1), 2020, 281.
L'autore fa riferimento a: *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984).

[71] *National Audubon Society v. Superior Court of Alpine County (Mono lake)*, 658 P.2d 709 (Cal. 1983).

Mono Lake, gestite dal *Los Angeles Department of Water and Power's*. Tali operazioni portarono al dimezzamento del volume del lago e alla riduzione di un terzo della sua superficie, aumentando la salinità dell'acqua e causando inoltre, secondo i ricorrenti, danni alle specie di uccelli e alla biodiversità in generale – in particolare alle popolazioni di gamberetti –[72]. Nell'azione, intentata da ambientalisti e diverse organizzazioni, guidate dalla *National Audubon Society*, si sosteneva che le sponde, il fondale e le acque del Mono Lake fossero risorse in trust pubblico e come tali da tutelare[73]. La Corte Suprema della California, accogliendo le tesi dei ricorrenti, affermò che, sebbene un certo quantitativo di deviazioni fosse consentito, ciò non poteva influire negativamente sulla biodiversità del Mono Lake e sul suo valore come trust pubblico; di conseguenza, la Corte Suprema richiese di limitare le deviazioni o qualsiasi altro uso che potesse incidere sulla risorsa "per quanto possibile"[74]. La sentenza è interessante anzitutto perché, riguardando le acque non navigabili, estende la portata della dottrina oltre il 'classico' delle acque navigabili[75]. Tuttavia, l'elemento forse più significativo è la sottolineatura della Corte sulla non 'staticità' della PTD, che può andare oltre la *comfort zone* 'navigazione, commercio e pesca', essendo abbastanza flessibile per abbracciare mutevoli esigenze pubbliche e, nello specifico, valori ecologici ed estetici e usi ricreativi[76].

Più recenti sviluppi, come vedremo, hanno poi cercato di estendere il concetto di *public trust* al di fuori del suo ambito tradizionale (quello 'acquatico') per coprire ulteriori risorse, come l'atmosfera[77], rendendo così la PTD centrale nel contesto del contenzioso sui cambiamenti climatici[78].

Bisogna riconoscere, comunque, come negli USA la PTD abbia permeato non solo dottrina e giurisprudenza, ma anche l'ambito legislativo. A tal riguardo, un significativo esempio a livello statale è rappresentato dal *Michigan Environmental*

[72] *Id.* at 711.
[73] *Id.* at 712.
[74] *Id.*
Sul punto: A. Panizio, *op. cit.*, 33.
[75] M.C. Blumm – T. Schwartz, *Mono lake and the evolving public trust in western water*, in Ariz. L. Rev., 37(3), 1995, 707.
Come nota Panizio, tale espansione è stata una conseguenza dell'ampio ragionamento della Corte: le acque non navigabili sono tutelate nella misura in cui il loro deterioramento potrebbe interessare le acque navigabili, oggetto di un trust statale (A. Panizio, *op. cit.*, 34).
[76] *Mono Lake*, 658 P.2d at 719.
Sul punto: M.C. Blumm – Z.A. Schwartz, *op. cit.*, 28.
[77] J.M. Coumes, *op. cit.*, 281.
[78] M. Cenini, *op. cit.*, 261.

Protection Act (MEPA) del 1970[79], alla cui redazione contribuì lo stesso Sax[80]. Il MEPA fornisce a qualsiasi persona la legittimazione ad agire in giudizio "per la protezione dell'aria, dell'acqua e di altre risorse naturali e del *public trust* su queste risorse dall'inquinamento, dal deterioramento o dalla distruzione"[81]. Occorre evidenziare come il MEPA dia applicazione alla Costituzione del Michigan del 1963 e, in particolare, all'art. IV, sez. 52, secondo cui: "*The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction*"[82]. Sebbene questa disposizione costituzionale non pare rappresenti un diretto riconoscimento della PTD, essa è stata utilizzata in sede giudiziaria per supportare la PTD stessa[83].

Ci sono poi altri Stati con disposizioni costituzionali che più evidentemente si ispirano alla *public trust doctrine*[84]. Uno dei casi più citati è quello dalla Costituzione dell'Alaska[85], il cui art. VIII, sez. 3, prevede: "*Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use*"[86]. Viene dunque stabilito che le risorse naturali – pesci, fauna selvatica e acque – devono essere

[79] Act 127 of 1970 "*Michigan Environmental Protection Act*" (v. Act 451, Public Acts of 1994, Part 17, *Natural Resources and Environmental Protection Act*, MCL 324.1701-1706).

[80] Sul MEPA in generale e sul ruolo di Sax nella sua stesura: R.L. Conner, *Michigan Environmental Protection Act*, in *U. Mich. J. L. Reform*, 4, 1970, 358 ss.; D.K. Slone, *The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980's*, in *Ecology L.Q.*, 1985, 12(2), 271 ss; M. Cenini, *op. cit.*, 261.

[81] "*The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction*" (v. Section 1701(1), MCL 324.1701(1)).
Sull'interpretazione data dalle corti a questa disposizione: J.L. Matthews, *Unlocking the courthouse doors: removal of the "special harm" standing requirement under SEQRA*, in *Alb. L. Rev.*, 65(2), 2001, 451.

[82] J.M. Coumes, *op. cit.*, 287.

[83] Si veda, ad esempio, *People* ex rel. *MacMullan v. Babock*, 196 N.W.2d 489, 497 (Mich. Ct. App. 1972): "*The importance of this trust is recognized by the People of Michigan in our Constitution (…)*". Sul punto: R.K. Craig, *op. cit.*, 68.

[84] Sul punto: M. O'Loughlin, *op. cit.*, 1337; F. Fracchia, *Amministrazione, ambiente e dovere: Stati Uniti e Italia a confronto*, in D. De Carolis – E. Ferrari – A. Police (cur.), *Ambiente, attività amministrativa e codificazione. Atti del primo Colloquio di diritto dell'ambiente, Teramo, 29-30 aprile 2005*, Milano, 2006, 136 s.

[85] Questo riconoscimento appare oltremodo significativo perché inserito nella Costituzione dell'Alaska che è stata adottata nel 1956.

[86] Altre due disposizioni importanti dal punto di vista della PTD sono l'art. VIII, sez. 15 ("*No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State*" [emendato nel 1972]) e l'art. VIII, sez. 17 ("*Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation*").

gestite dallo Stato in trust a beneficio del popolo nel suo insieme e non a vantaggio del governo, delle società o dei privati[87].

Probabilmente il riconoscimento più esplicito della PTD è però quello rinvenibile nella Costituzione della Pennsylvania del 1967, all'art. 1, sez. 27 (emendata nel 1971): "*The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people*". La parola '*shall*' sembra chiaramente indicare il carattere *self-executing* di questa disposizione, stabilendo un dovere inderogabile dello Stato di proteggere le risorse in *public trust*, indipendentemente dalla legislazione esistente[88]. Tuttavia, poco dopo l'approvazione dell'emendamento costituzionale, nel caso *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*[89], in cui il governo aveva invocato la sez. 27 per bloccare, a causa dei suoi impatti ambientali e paesaggistici, la costruzione da parte di una società privata di una torre di osservazione vicino al campo di battaglia di Gettysburg, la Corte Suprema della Pennsylvania si spaccò sulla questione dell'auto-esecutività. Se la *dissenting opinion* sostenne questa tesi[90], la Corte, in un'*opinion* sottoscritta da due soli giudici, argomentò che la disposizione non fosse auto-esecutiva, ma richiedesse una legge 'di attuazione': il governo non era dunque legittimato, nell'esercizio dei suoi doveri di *trustee*, ad agire contro i privati sulla base della sez. 27. Il timore dei giudici era che il governo potesse utilizzare in modo arbitrario e iniquo questa disposizione contenente espressioni piuttosto vaghe come "valori naturali, paesaggistici, storici ed estetici" e altre come "aria pulita" e "acqua pura" che avrebbero richiesto definizioni tecnicamente più precise. In assenza di una legge 'chiarificatrice', l'esercizio di questi poteri 'indefiniti' avrebbe rappresentato una minaccia per i proprietari, impossibilitati a comprendere cosa avrebbero potuto concretamente fare con la loro proprietà[91].

La sez. 27 dell'art. 1 della Costituzione della Pennsylvania è stata successivamente al centro della nota e più recente sentenza della Corte Suprema statale del 2013 nel

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[87] Sul punto: G. Harrison, *Alaska's Constitution. A Citizen's Guide*, Fifth Edition, Alaska Legislative Affairs Agency, 2013, 132; M.E. Peloso – M.R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, in *Stan. Envtl. L.*, 30, 2011, 96.

[88] J.C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II - Environmental Rights and Public Trust*, in *Dick. L. Rev.*, 104(1), 1999, 116 s.

[89] *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973).

[90] "*(...) the amendment creates a public trust. The 'natural, scenic, historic and aesthetic values of the environment' are the trust res; the Commonwealth, through its executive branch, is the trustee; the people of this Commonwealth are the trust beneficiaries. The amendment thus installs the common law public trust doctrine as a constitutional right to environmental protection susceptible to enforcement by an action in equity*" (*Id.* at 596).

[91] *Id.* at 593.

Sul punto: D. Takacs, *op. cit.*, 753 s.; *Robinson Twp.*, 83 A.3d at 964 n.52.

caso *Robinson Township v. Commonwealth*[92]. Con questa decisione la Corte ha stabilito che diverse parti della Legge statale 13 del 2012, finalizzata a facilitare lo sfruttamento del gas naturale della *Marcellus Shale*, erano incostituzionali, proprio perché in contrasto con la sez. 27. La sentenza è interessante sotto diversi profili: anzitutto, si tratta del primo caso in cui la sez. 27 viene utilizzata per dichiarare l'incostituzionalità di una legge[93]. In secondo luogo, viene chiarita la natura *self-executing* della disposizione[94]: gli obblighi dello Stato come fiduciario di conservare e mantenere le risorse naturali in trust a beneficio dei cittadini, comprese le generazioni future, creano un corrispettivo diritto in capo ai cittadini di agire per far rispettare tali obblighi[95]. A tal proposito, gli obblighi dello Stato come *trustee* sono essenzialmente due: in primis, lo Stato deve astenersi dal permettere o dall'incoraggiare il degrado, la diminuzione o l'esaurimento delle risorse naturali, indipendentemente dal fatto che tale degrado, diminuzione o esaurimento si verifichino attraverso un'azione diretta dello Stato oppure indirettamente, ad esempio, a causa del fallimento dello Stato nel frenare le azioni dei privati[96]; il secondo dovere è quello di proteggere l'ambiente attraverso l'azione legislativa[97]. Infine, dalla decisione emerge la portata della seconda e della terza clausola della sez. 27, ossia quali sono le risorse naturali comprese nella "*common property of all the people, including generations yet to come*" su cui lo Stato esercita il proprio dovere di *trustee*. I redattori della sezione, non avendo apposto alcun limite all'espressione *public natural resources*, hanno, di fatto, suggerito che questa può coprire aspetti relativamente ampi dell'ambiente e, soprattutto, che non è statica, essendo suscettibile di cambiamenti nel tempo per adattarsi, ad esempio, alle nuove preoccupazioni che possono sorgere. Così, secondo la Corte, allo stato attuale il concetto di risorse naturali pubbliche include non solo le terre demaniali, i corsi d'acqua e le riserve minerarie, ma anche altre risorse di interesse pubblico che non sono oggetto di proprietà privata, come l'aria ambiente, le acque superficiali e sotterranee, la flora e la fauna selvatica (compresi i pesci)[98].

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[92] *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013).
[93] J.C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, in *Envtl. L.*, 45(2), 2015, 479.
[94] *Robinson Twp.*, 83 A.3d at 964 n.52, 974.
Si veda anche: J.C. Dernbach – J.R. May – K.T. Kristl, *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, in *Rutgers U. L. Rev.*, 67(5), 2015, 1178.
[95] *Robinson Twp.*, 83 A.3d at 974.
Quanto ai diritti dei cittadini, la sentenza si focalizza anche su un altro aspetto, in passato piuttosto trascurato: la sezione 27 è inclusa ella Dichiarazione dei diritti della Pennsylvania e quindi i diritti ambientali nella sezione 27 sono "*on par with, and enforceable to the same extent as, any other right reserved to the people in Article I*" (*Id.* at 953-954).
Sul punto: J.C. Dernbach, *The Potential Meanings*, cit., 479.
[96] *Robinson Twp.*, 83 A.3d at 957.
[97] *Id.* at 958.
[98] *Id.* at 954-955.
Sul punto: A. Panizio, *op. cit.*, 46.

Passando velocemente al piano federale, va evidenziato come siano numerosi gli esempi di leggi in cui il *PTD language* si è insinuato[99]. Questo fenomeno, secondo Sagarin e Turnipseed, si manifesta essenzialmente in due modi: (a) affermando in modo ampio ed enfatico la finalità della legge, o (b) stabilendo l'autorità e la responsabilità del governo federale di richiedere il risarcimento per il danno causato alle risorse naturali[100]. La prima prospettiva è facilmente riscontrabile nel preambolo del *National Environmental Policy Act* (NEPA) del 1969[101], dove viene stabilito che è dovere del governo "*fulfill the responsibilities of each generation as trustee of the environment for succeeding generations*"[102]. Sebbene questo riconoscimento legislativo sia spesso trascurato[103], autorevole dottrina ritiene che il NEPA, imponendo il dovere di preservare l'ambiente per le generazioni future, sia una codificazione diretta e completa della PTD[104]. Come esempi del secondo approccio si possono invece citare il *Clean Water Act Amendments* del 1977, il *Comprehensive Environmental Response, Compensation, and Liability Act* del 1980 (CERCLA) e l'*Oil Pollution Act* del 1990[105]: in queste leggi il Congresso ha ripetutamente fatto riferimento all'idea di 'amministrazione fiduciaria' per descrivere il dovere del governo di valutare i danni alle risorse naturali e agire per il loro recupero[106].

Uscendo dagli USA, si è detto che la PTD ha 'cittadinanza' anche in altri Paesi[107]. A tal proposito si possono proporre un paio di esempi che danno l'idea della potenzialità della *doctrine* anche al di fuori del contesto statunitense.

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[99] M. O'Loughlin, *op. cit.*, 1337; R.D. Sagarin – M. Turnipseed, *op. cit.*, 485.

[100] R.D. Sagarin – M. Turnipseed, *op. cit.*, 485.

[101] *National Environmental Policy Act of 1969*, 42 U.S.C. § 4321 *et seq*.

Il NEPA, definito come il "*basic national charter for protection of the environment*" (*Ilioulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006)), richiede alle agenzie federali di integrare i valori ambientali nei loro processi decisionali considerando gli impatti ambientali delle loro principali azioni proposte. Allo scopo, la legge prevede, per la prima volta a livello mondiale, lo strumento della valutazione di impatto ambientale.

[102] 42 U.S.C. § 4331 (b)(1).

[103] M.C. Blumm – L.S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, in *Envtl. L.*, 45(2), 2015, 429.

[104] S.D. Baer, *The Public Trust Doctrine-A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, in *B. C. Envtl. Aff. L. Rev.*, 15(2), 1988, 399.

[105] R.D. Sagarin – M. Turnipseed, *op. cit.*, 485.

[106] *Ibidem*.

Per un approfondimento sul CERCLA: M. Cenini, *op. cit.*, 258 ss.

[107] Per farsi un'idea sulla diffusione della PTD nel mondo si veda la mappa allegata all'articolo di Sagarin e Turnipseed (R.D. Sagarin – M. Turnipseed, *op. cit.*, C-1). Si tratta essenzialmente Paesi di *common law* o 'sistemi misti' rispetto ai quali il *common law* ha esercitato un'ampia influenza. Sul concetto di *mixed legal systems*, si rimanda a V.V. Palmer, *Mixed Legal Systems-The Origin of the Species*, in *Tul. Eur. & Civ. L.F.*, 28, 2013, 103 ss.

Invero c'è chi evidenzia, forse con eccessivo entusiasmo, che la PTD esiste in tutti gli ordinamenti giuridici nel mondo (M.C. Blumm – M.C. Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, in *Am. U. L. Rev.*, 67(1), 2017, 22), rappresentando "*the Law's DNA*" (G. Torres – N. Bellinger, *The Public Trust: The Law's DNA*, in *Wake Forest J. L. & Pol'y*, 4(2), 2014, 281 ss.).

Così, in India, la PTD è stata richiamata più volte dalla Corte Suprema a partire dalla decisione del caso *M.C. Mehta v. Kamal Nath et al.* (1997)[108], in cui viene chiaramente affermato che "*Our legal system - based on English Common Law - includes the public trust doctrine as part of its jurisprudence. The state is the trustee of all natural resources which are in nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership*"[109]. Nella sentenza, oltre a evidenziare che la PTD è parte integrante del sistema legale indiano, si sottolinea dunque che certe risorse naturali hanno una così grande importanza per il popolo nel suo insieme da non potere essere oggetto di proprietà privata; riconoscere che queste risorse sono in *public trust* rappresenta un'affermazione della responsabilità dello Stato di conservare le stesse, in quanto destinate all'uso e al godimento pubblico[110]. Conseguentemente, la PTD consente ai cittadini di mettere in discussione la gestione delle risorse naturali da parte dello Stato e, in questo senso, è uno strumento ulteriore per proteggere l'ambiente dalle inadempienze degli organi pubblici[111].

Anche nelle Filippine la PTD è stata riconosciuta da una famosa sentenza della Corte Suprema *Oposa v. Factoran* (1993)[112], che ha collocato la PTD nell'ambito del diritto costituzionale a un ambiente salubre[113]. In Uganda, le corti hanno utilizzato la PTD per bloccare la conversione delle foreste in campi per la coltivazione della canna da zucchero, mentre in Kenya la PTD è stata evocata dai giudici per imporre al governo di predisporre adeguati impianti di trattamento delle acque reflue[114]. In Sud Africa, invece, la PTD è stata incorporata in una serie di leggi[115], in cui il governo viene identificato come *trustee* delle risorse naturali[116].

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[108] *M.C. Mehta v. Kamal Nath and Others* (1997 1 SCC 388).

[109] *Id.*, para. 34.

[110] G.N. Gill, *Judicial Craftsmanship: Evolving Environmental Tortious Dimensions in India*, in *Ann. dir. comp.*, 2021, 78.

[111] J. Razzaque, *Application of Public Trust Doctrine in Indian Environmental Cases*, in *J. Environ. Law*, 13(2), 2001, 229.
È importante ricordare che in India l'articolo 21 della Costituzione stabilisce: "Nessuna persona può essere privata della vita o della libertà personale se non secondo la procedura stabilita dalla legge". Questo diritto alla vita è stato interpretato estensivamente includendo il diritto a un ambiente pulito, sicuro, non inquinato e salubre (G.N. Gill, *op. cit.*, 66; J. Razzaque, *op. cit.*, 229). I cittadini possono contestare direttamente le violazioni di questi diritti, la cui protezione è stata rafforzata giudiziariamente dal riconoscimento della PTD (D. Takacs, *op. cit.*, 735).

[112] *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (1993).

[113] R.D. Sagarin – M. Turnipseed, *op. cit.*, 482.

[114] *Ibidem*.

[115] Si vedano: *National Environmental Management Act*, 1998; *National Water Act*, 1998; *Integrated Coastal Management Act*, 2008.

[116] R.D. Sagarin – M. Turnipseed, *op. cit.*, 482.

5. La public trust doctrine *nel contesto della* climate change litigation

Nell'ambito del 'processo estensivo' della PTD, in anni recenti la *doctrine* ha iniziato ad essere utilizzata per affrontare una delle urgenze ambientali più pressanti, quella dei cambiamenti climatici[117]. A partire dal 2011, sono state dunque intentate numerose cause fondate, almeno in parte, sulla PTD; molte di queste azioni sono parte di una campagna globale l'*Atmospheric Trust Litigation* (ATL)[118], collegata allo studio legale non-profit *Our Children's Trust* (OCT)[119]. Invocando la PTD, i ricorrenti intendono quindi far valere il dovere, a carico dei governi[120], di ridurre le emissioni di carbonio o, in generale, di combattere il cambiamento climatico[121].

Lo schema di base dell'ATL può essere riassunto in maniera embrionale in quattro affermazioni: (1) l'aria e l'atmosfera, insieme ad altre risorse naturali vitali, sono in *public trust*; (2) le generazioni presenti e future sono beneficiarie del PT; (3) il governo ha un dovere fiduciario di protezione contro il 'deterioramento sostanziale' dell'aria, dell'atmosfera e del sistema clima, che equivale a un obbligo (positivo) di ristabilire l'equilibrio climatico; e (4) i tribunali hanno il dovere di far rispettare questa obbligazione fiduciaria[122].

Il vantaggio dell'impostazione dell'ATL risiede nel fatto che essa non si fonda su una legge o un regolamento, per loro natura mutevoli ed esposti a visioni contingenti e diversificate sul problema del cambiamento climatico; in effetti, come dimostra la triste vicenda del repentino cambio di rotta di Trump sul tema del riscaldamento globale[123] – cancellazione o modifica sostanziale di quasi tutte le politiche climatiche basate sul *Clean Air Act*, uscita degli USA dall'accordo di Parigi… – [124], leggi e regolamenti sono vulnerabili ai 'capricci' del legislativo e dell'esecutivo, con mutamenti anche significativi a seconda della 'sensibilità' politica di chi comanda[125]. Se, invece, i doveri di contrastare i cambiamenti climatici

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Per un approfondimento: M.C. Blumm – R.D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, in *U.C. Davis L. Rev.*, 45(3), 2012, 788 ss.

[117] J. Regalia, *The Public Trust Doctrine and the Climate Crisis: Panacea or Platitude?*, in *Mich. J. Envtl. & Admin. L.*, 11(1), 2021, 8.

[118] M. Rosso Grossman, *Climate Change and the Individual*, in *Am. J. Comp. L.*, 66(S1), 2018, 351.

[119] https://www.ourchildrenstrust.org/.

[120] Negli USA questo genere di azioni è stato rivolto tanto agli Stati quanto al governo federale.

[121] A. Panizio, *op. cit.*, 35.

[122] M.C. Blumm – M.C. Wood, *"No Ordinary Lawsuit"*, cit., 23.

[123] Prima della sua elezione alla presidenza, Donald Trump ha definito i cambiamenti climatici come una bufala "creata da e per i cinesi al fine di rendere la produzione USA non competitiva". Così: D. Trump (@realDonaldTrump), twitter (Nov. 6, 2012, 2:15 PM), https://twitter.com/realDonaldTrump/status/265895292191248385.

[124] Sul punto: N. Richardson, *The Rise and Fall of Clean Air Act Climate Policy*, in *Mich. J. Envtl. & Admin. L.*, 10(1), 2020, 126 ss.

[125] M.C. Blumm – M.C. Wood, *"No Ordinary Lawsuit"*, cit., 24.

derivano direttamente dalla natura stessa del trust e dai diritti dei beneficiari, essi non possono essere alla mercé della discrezionalità politica. In altre parole, se si conclude che l'atmosfera è un bene in *public trust*, i governi, come fiduciari, hanno il dovere di proteggerla e possono, quindi, essere citati in giudizio in caso di inadempienza[126].

Come veniva già sottolineato dai primi commentatori di queste iniziative, il problema è appunto questo 'se', ossia stabilire se l'atmosfera sia una valida candidata per la PTD[127]. In effetti, anche nelle giurisdizioni più progressiste, le argomentazioni della PTD sono state utilizzate in modo discontinuo a sostegno delle richieste di protezione ambientale[128], anche in riferimento alle più classiche risorse acquatiche[129]. Dichiarare l'atmosfera una risorsa in PT – e affermare i doveri che ne conseguono – richiede dei giudici pronti a innovare[130].

Un secondo ostacolo dipende dal fatto che nelle azioni ATL il riconoscimento dell'atmosfera come bene in *public trust* è il presupposto necessario perché le corti impongano degli obblighi consequenziali in capo al soggetto pubblico. Per una questione, quella dei cambiamenti climatici, che, soprattutto negli Stati Uniti, è ancora purtroppo politicamente controversa e dibattuta, alcuni giudici potrebbero intendere la concessione di questi rimedi come un superamento del proprio ruolo istituzionale, con un'invasione della sfera 'politica' e, pertanto, una compromissione del principio della divisione dei poteri[131].

A questa *political question doctrine* si accompagna poi il tema della legittimazione ad agire (*standing*)[132]. Negli USA, a livello federale, per valutare se vi sia legittimazione ai sensi dell'articolo III della Costituzione, la giurisprudenza segue il test articolato in *Lujan v. Defenders of Wildlife*[133], che prevede la contemporanea presenza di tre presupposti: la concretezza e l'attualità della lesione lamentata (*injury in fact*), l'esistenza di un nesso causale tra la lesione e la condotta contestata (*causation*), la verosimile probabilità che la lesione possa essere riparata attraverso una decisione

[126] A. Panizio, *op. cit.*, 35; M.C. Blumm – M.C. Wood, *"No Ordinary Lawsuit"*, cit., 24.

[127] Sul punto: C. Evans, *Atmospheric Trust Litigation*, in *West Coast Environmental Law Blog*, 13.6.2011, disponibile al link https://www.wcel.org/blog/atmospheric-trust-litigation.

[128] *Ibidem*.

[129] J. Regalia, *op. cit.*, 15 ss.

[130] C. Evans, *op. cit.*

[131] Sul punto: C. Evans, *op. cit.*; M. Rosso Grossman, *op. cit.*, 357.
A questa obiezione la Prof. Wood, vera ispiratrice dell'ATL, ha risposto: "*If the world could rewind several years of time, that criticism would carry far more weight. But after two futile international climate treaty negotiations in the past five years and the refusal of most polluting nations to pass meaningful domestic legislation, climate crisis screams out for a reality check*" (M.C. Wood, *Atmospheric Trust Litigation Across the World*, in C. Sampford – K. Coghill – T. Smith (eds.), *Fiduciary Duty and the Atmospheric Trust*, Farnham – Burlington (VT-USA), 2012, 150); peccato che, come vedremo, le corti non siano sempre state di quest'avviso.

[132] M.C. Blumm – M.C. Wood, *"No Ordinary Lawsuit"*, cit., 30.

[133] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

favorevole (*redressability*)[134]. Ovviamente a livello statale i requisiti della legittimazione processuale possono variare, sebbene circa la metà degli Stati abbia adottato le condizioni previste in *Lujan*[135].

Tutto ciò spiega perché le azioni costruite da *Our Children's Trust* sulla PTD e rivolte agli Stati, al governo federale e alle rispettive agenzie, non abbiano avuto un grande successo a livello processuale. Ciò ha portato la OCT ad evolvere la propria strategia giudiziaria, invocando la *due process clause* e la *equal protection clause* oppure, in alcuni casi, anche violazioni della legislazione ambientale degli Stati stessi[136]. A questo proposito, bisogna evidenziare che nel caso dove si è registrata la più significativa vittoria di OCT (*Kain v. Department of Environmental Protection of Massachusetts*[137]) l'azione non si fondava sulla PTD, ma su una legge dello Stato, il *Global Warming Solutions Act* del 2008, che obbligava il Dipartimento a ridurre le emissioni di gas serra[138].

A questo punto può essere utile accennare brevemente ad alcune cause, basate sulla PTD, che non si sono concluse favorevolmente per i motivi a cui si è appena fatto riferimento. Una prima sentenza significativa è quella emessa dalla Corte Suprema dell'Oregon nell'ottobre 2020 in *Chernaik v. Brown*[139]. Nell'azione, i ricorrenti sostenevano che lo Stato avesse violato il proprio dovere di fiduciario non avendo protetto le risorse naturali dell'Oregon dal deterioramento dovuto alle emissioni di gas serra; in tal senso si richiedeva di dichiarare che una serie di risorse naturali, inclusa l'atmosfera, fossero in PT e di ingiungere allo Stato di contabilizzare le emissioni annue dell'Oregon e di predisporre e attuare un piano di riduzione della CO_2. Riguardo alla portata della PTD, la Corte Suprema, basandosi su propri autorevoli precedenti, ha affermato che essa comprende sia le acque navigabili che le terre sommerse e sommergibili dello Stato. Pur concordando sul fatto che la dottrina "può essere modificata per riflettere i cambiamenti nelle esigenze della società"[140], la Corte ha respinto il 'test espansivo' proposto nell'azione per determinare quali risorse dovrebbero essere protette in PT; il superamento di tale test, strutturato secondo due domande – (1) si tratta di una risorsa che non è facile da mantenere o migliorare? e (2) si tratta di una risorsa di grande valore per la

[134] Sul punto: F. Scalia, *La giustizia climatica*, in *federalismi.it*, 10, 2021, 277; A. Christiansen, *Up in the Air: A Fifty-State Survey of Atmospheric Trust Litigation Brought by Our Children's Trust*, in *Utah L. Rev.*, 3, 2020, 876 s.; M. Juhn, *Taking a Stand: Climate Change Litigants and the Viability of Constitutional Claims*, in *Fordham L. Rev.*, 89(6), 2021, 2746 s.
[135] A. Christiansen, *op. cit.*, 876.
[136] *Ibidem*, 867, 896.
[137] *Kain v. Department of Environmental Protection of Massachusetts*, 474 Mass. 278 (Mass. 2016).
[138] Per una trattazione più specifica del caso: M. Rosso Grossman, *op. cit.*, 366; A. Christiansen, *op. cit.*, 886 s.
[139] *Chernaik v. Brown*, 367 Or. 143 (Or. 2020).
[140] *Id.* at 156.

collettività per usi come il commercio, la navigazione, la caccia e la pesca? –, avrebbe dovuto portare, secondo i ricorrenti, all'inserimento dell'atmosfera tra le risorse in PT[141]. I giudici non hanno, tuttavia, condiviso questa impostazione perché, nei fatti, il test così formulato non avrebbe determinato alcuna limitazione alla possibile estensione della PT, ben potendo qualsiasi risorsa naturale soddisfare entrambe le condizioni[142]. La Corte si è quindi rifiutata di espandere la PTD per coprire ulteriori risorse naturali, tra cui l'atmosfera[143].

Passando al tema della legittimazione ad agire, tra le numerose decisioni che hanno toccato la questione può essere citata una sentenza dell'*Arizona Court of Appeals* del 2013 (*Butler v. Brewer*[144]). L'azione, rivolta contro la governatrice dello Stato, nonché contro l'*Arizona Department of Environmental Quality* e il suo direttore, si fondava sull'assunto che l'atmosfera fosse una risorsa in PTD e che, pertanto, lo Stato dell'Arizona era obbligato ad assumere provvedimenti idonei a ridurre i gas serra e combattere il cambiamento climatico. In appello, invero, la *Court of Appeals* non si è pronunciata sulla questione dell'appartenenza dell'atmosfera al PT. Il rigetto della domanda è stato motivato con la mancata individuazione da parte dei ricorrenti di una previsione costituzionale o legislativa violata dall'azione o dall'inerzia dello Stato. Un'ulteriore ragione addotta dalla Corte è che il legislatore aveva stabilito che la regolamentazione dei gas serra rimanesse nella sua sfera di competenza, piuttosto che in quella di un'agenzia amministrativa (A.R.S. 49-191[145]). Butler non aveva contestato la costituzionalità di questa disposizione legislativa, né identificato una base su cui questa potesse essere ritenuta incostituzionale; di

[141] *Id.* at 165.
Peraltro, secondo i ricorrenti, l'atmosfera sarebbe nei fatti intricatamente legata ad altri beni fiduciari, come l'acqua (*Id.*).
[142] *Id.* at 165-166.
[143] *Id.* at 169-70.
In un'interessante passaggio della sentenza è stato inoltre affermato che "*(p)laintiffs' suggestion of a wholesale importation of generalized private trust principles to govern the state's obligations under the public trust doctrine could result in a fundamental restructuring of the public trust doctrine and impose broad new obligations on the state, beyond the recognized duty that the state has to protect public trust resources for the benefit of the public's use of navigable waterways for navigation, recreation, commerce, and fisheries*" (*Id.* at 168).
É bene citare pure la *dissenting opinion* del *Chief Justice* Walters, secondo cui anche il potere giudiziario deve giocare un ruolo nell'affrontare e prevenire i danni dei cambiamenti climatici; a suo giudizio la Corte "*can and should issue a declaration that the state has an affirmative fiduciary duty to act reasonably to prevent substantial impairment of public trust resources*" (*Id.* at 170).
Sulla decisione si vedano: L Spitz – E.M. Peñalver, *Nature's Personhood and Property's Virtues*, in *Harv. Envtl. L. Rev.*, 45(1), 2021, 96 (n. 160); http://climatecasechart.com/case/chernaik-v-kitzhaber/.
[144] *Butler v. Brewer*, 1 CA-CV 12-0347 (Ariz. Ct. App. Mar. 14, 2013).
[145] A.R.S. 49-191: "*A. Notwithstanding any other law, a state agency established under this title or title 41 shall not adopt or enforce a state or regional program to regulate the emission of greenhouse gas for the purposes of addressing changes in atmospheric temperature without express legislative authorization*".

conseguenza la Corte era impossibilitata ad accordare il rimedio richiesto dai ricorrenti, che quindi difettavano di *standing*[146].

Infine, rispetto alla *political question doctrine*, un caso emblematico è rappresentato da *Kanuk v. Alaska*[147]. In *Kanuk*, un gruppo di giovani sosteneva che lo Stato avesse violato i suoi doveri di *trustee* ai sensi dell'articolo VIII della Costituzione dell'Alaska (a cui si è già accennato), non riuscendo a proteggere l'atmosfera dai cambiamenti climatici e, conseguentemente, a garantire un futuro ai ricorrenti e ai bambini dell'Alaska[148]. Pertanto si richiedeva alla Corte, sulla base della Costituzione dell'Alaska e della PTD, di stabilire standard per le emissioni di anidride carbonica e di ordinare allo Stato di intraprendere azioni per soddisfarli. Nella sua decisione, la Corte Suprema dell'Alaska, dopo aver riconosciuto la legittimazione ad agire dei ricorrenti[149], ha valutato se le richieste in discussione fossero di natura politica e, quindi, non 'giustiziabili', concludendo che, in effetti, alcune di queste lo erano[150]. Nello specifico, sulla base del quadro costituzionale-legislativo e dei precedenti giudiziari, la decisione della Corte, del settembre 2014, sembra suggerire che in Alaska il dovere fiduciario dello Stato si estenda anche all'atmosfera e che quindi i cittadini dell'Alaska possano vantare un conseguente diritto all'atmosfera[151]. Tuttavia, almeno al momento, si tratterebbe in ogni caso di un 'diritto senza rimedio'[152]: stabilire standard per le emissioni di anidride carbonica e ordinare allo Stato di intraprendere azioni per soddisfarli necessiterebbe, infatti, di un'indagine scientifica e di una valutazione politica che non spetta alla Corte, ma al legislatore o all'esecutivo[153].

Agli scarsi successi (giudiziari) dell'ATL a livello statale si accompagnano risultati non migliori a livello federale. La prima causa presentata con il supporto di OCT davanti ai giudici federali fu, nel 2012, *Alec L. v. Jackson* (in seguito ridenominata

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[146] Si vedano: J.W. Donald, *Climate change legal theories: the atmospheric public trust doctrine moves another step forward*, 29.4.2013, disponibile al link https://www.lexology.com/library/detail.aspx?g=96dd9be3-846b-4e71-8d82-1d754b87be6b; A. Christiansen, *op. cit.*, 883; http://climatecasechart.com/case/butler-v-brewer/.

[147] *Kanuk v. State of Alaska, Department of Natural Resources*, 335 P.3d 1088 (Alaska 2014).

[148] B.J Preston, *The Evolving Role of Environmental Rights in Climate Change Litigation*, in *Chin. J. Environ. Law.*,2(2), 2018, 137.

[149] *Kanuk*, 335 P.3d at 1092-1094.

Per un'analisi della sentenza sul punto concernente lo '*standing*' (e i suoi requisiti): J. Regalia, *op. cit.*, 16 s.

[150] *Kanuk*, 335 P.3d at 1096-1103.

[151] A.P. Murray, *Alaska's Atmospheric Public Trust: A Right Without a Remedy?*, in *EcoPerspectives Blog (Vt. J. Envtl. L.)*, 20.10.2014, http://vjel.vermontlaw.edu/alaskas-atmospheric-public-trust-right-withoutremedy/.

La Corte, in realtà, si limita a ritenere 'giustiziabile' la richiesta di pronuncia di accertamento diretta a considerare l'atmosfera come una risorsa rientrante nel *public trust* (*Kanuk*, 335 P.3d at 1099), sebbene anche questa domanda venga poi respinta 'su basi prudenziali' ("*The Claims For Declaratory Relief, Though Justiciable Under The Political Question Doctrine, Should Nonetheless Have Been Dismissed On Prudential Grounds*", *Id.* at 1100-1103).

[152] A.P. Murray, *op. cit.*

[153] *Id.* at 1099.

Alec L. v. McCarthy)[154]. L'azione si arenò sulla questione se la PTD potesse essere applicata al governo federale[155]. In appello, la *D.C. Circuit Court of Appeals*, citando un recente precedente della Corte Suprema, concluse che la PTD non poteva essere applicata al governo federale e respinse il caso: "*(t)he Supreme Court in PPL Montana (…) repeatedly referred to "the" public trust doctrine and directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation*"[156].

Il secondo caso ATL discusso a livello federale è il ben conosciuto *Juliana v. United States*. La vicenda giudiziaria, assai intricata, si è sviluppata a partire dal 2015, quando ventuno giovani statunitensi hanno citato presso la *U.S. District Court of Oregon* gli Stati Uniti, il Presidente Obama, vari funzionari, dipartimenti e agenzie federali[157], sostenendo che il governo federale sapesse da decenni che l'utilizzo dei combustibili fossili fosse dannoso per il sistema climatico, ma che, ciò nonostante, avesse consentito lo sfruttamento e l'uso di tali combustibili, determinando un significativo aumento delle concentrazioni di CO_2 nell'atmosfera[158]. I ricorrenti hanno richiesto alla Corte, tra l'altro, di accertare che i loro diritti erano stati violati e di emettere un'ordinanza che ingiungesse la cessazione della violazione e richiedesse la preparazione di un piano per ridurre le emissioni di CO_2[159]. A fondamento della loro azione, i giovani hanno fatto riferimento a diversi argomenti[160]: la *public trust doctrine* è, infatti, affiancata da una serie di motivazioni che traggono spunto direttamente dal testo della Costituzione degli Stati Uniti[161]. Entrando un po' più nello specifico, viene affermato, in primis, che la conoscenza degli effetti delle emissioni e l'incapacità del governo di regolare la questione costituisca una violazione della *Due Process Clause* del V emendamento, dal momento che ciò determina, per i ricorrenti, una privazione dei loro diritti fondamentali alla vita, alla libertà e alla proprietà[162]. In secondo luogo, si sostiene

[154] Sul punto: K. Couch, *After Juliana: A Proposal for the Next Atmospheric Trust Litigation Strategy*, in *Wm. & Mary Envtl. L. & Pol'y Rev.*, 45(1), 2020, 228 s.
[155] R.S. Abate, *Atmospheric Trust Litigation: Foundation for a Constitutional Right to a Stable Climate System?*, in *Geo. Wash. J. Energy & Envtl. L.*, 10(1), 2019, 36.
[156] *Alec L. v. McCarthy*, 561 Fed. Appx. 7, 8 (D.C. Cir. 2014).
[157] *Complaint for Declaratory and Injunctive Relief, Juliana v. United States (Juliana Complaint)*, disponibile al link http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2015/20150812_docket-615-cv-1517_complaint-2.pdf.
[158] *Id* at. 130.
Sul punto, tra gli altri: M. Rosso Grossman, *op. cit.*, 363; M. Juhn, *op. cit.*, 2751.
[159] *Juliana Complaint*, *prayer for relief.*
[160] J. Regalia, *op. cit.*, 12; R.S. Abate, *op. cit.*, 36.
[161] F. Gallarati, *Il contenzioso climatico di tono costituzionale: studio comparato sull'invocazione delle costituzioni nazionali nei contenziosi climatici*, in *BioLaw*, 2, 2022, 171.
Per un approfondimento: M. Juhn, *op. cit.*, 2753; F. Fontanarosa, *Climate Change Damages: Una analisi comparativa del diritto al clima tra ipotesi di responsabilità e fattispecie risarcitorie*, in *Cardozo El. L.B.*, 26(2), 2020, 17 ss.
[162] *Juliana Complaint* at 280.

che gli atti del governo violino il principio di *equal protection* contenuto nel V e nel XIV emendamento[163]: la scelta politica *de facto* del governo di favorire gli influenti e radicati interessi 'di corto respiro' legati alle fonti fossili discrimina i ricorrenti e le generazioni future in modo sproporzionato[164]. In terzo luogo, i ricorrenti ritengono che il diritto a un sistema climatico stabile è un diritto inalienabile e fondamentale, nonché un diritto implicito, ricavabile dal IX emendamento[165]. Da ultimo, i ricorrenti affermano che, secondo la PTD, il governo è *sovereign trustee* delle risorse naturali degli Stati Uniti d'America, le quali sono essenziali per il benessere dei cittadini; di conseguenza, il governo ha il dovere di astenersi dal compromettere, in maniera sostanziale, tali risorse[166]. Al contrario, le azioni dei convenuti hanno contravvenuto al dovere fiduciario di mantenere l'atmosfera e altre risorse naturali nel trust. A tal proposito, i convenuti hanno alienato porzioni sostanziali dell'atmosfera a favore degli interessi di soggetti privati permettendo che questi ultimi trattassero questa risorsa essenziale come una discarica per le loro emissioni. Di conseguenza, essi hanno tradito il proprio dovere fiduciario di gestire l'atmosfera nel migliore interesse dei beneficiari presenti e futuri del trust[167].

Ciò che rende il caso *Juliana* così commentato è senza dubbio la decisione assunta, nel novembre 2016, da Ann Aiken, giudice della *U.S. District Court of Oregon*[168]. Rigettando la richiesta dei convenuti di dichiarare inammissibile l'azione (*motion to dismiss*), la giudice ha riconosciuto l'esistenza di un diritto fondamentale a un sistema climatico "*capable of sustaining human life*"[169], protetto in forza della *due process clause* e della *equal protection clause* della Costituzione degli Stati Uniti[170]. Ai fini che qui interessano, tuttavia, è importante evidenziare che, tra le argomentazioni alla base della decisione, trova spazio anche la PTD. In primo luogo, sebbene tra le righe emerga ampiamente come l'atmosfera possa essere considerata una risorsa in PT, la giudice non ritiene sia comunque necessario stabilirlo in questa fase del procedimento in quanto la richiesta dei ricorrenti si basava anche su violazioni della PTD in connessione con il mare territoriale, rispetto a cui la Corte Suprema ha affermato più volte l'applicazione della PTD[171]. La Corte ha anche respinto la tesi secondo cui la PTD non si applica al governo

[163] *Id* at. 292.
[164] *Id* at. 298.
[165] *Id* at. 303-304.
[166] *Id* at. 309.
[167] *Id* at. 310.
[168] *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).
[169] "*I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society*" (*Id* at. 1250).
[170] *Id* at. 1248-1252.
Sul punto: M.C. Blumm – M.C. Wood, *"No Ordinary Lawsuit"*, cit., 7 s.; F. Gallarati, *op. cit.*, 171.
[171] *Id.* at 1255-1256.

federale: il governo federale, infatti, come gli Stati, detiene beni – come minimo i mari territoriali – in trust per il popolo[172]. In terzo luogo, secondo la giudice, le rivendicazioni di PT riguardano attributi intrinseci della sovranità: il PT impone al governo l'obbligo di tutelare il *corpus* del trust, obbligo che non può essere eliminato per legge. Quindi le pretese in PT possono essere fatte valere anche in presenza di leggi che 'incidono' sulla materia (in questo caso il *Clean Air Act* e il *Clean Water Act*)[173].

Questa 'vittoria' è stata però di breve durata. Nel gennaio 2020, la decisione della *District Court* è stata, infatti, ribaltata dalla *Ninth Circuit Court of Appeals*[174], che ha evidenziato il difetto di legittimazione dei ricorrenti, in quanto non sarebbe stato soddisfatto il requisito della *redressability*[175]. Invocando la separazione dei poteri, la corte ha ritenuto che ordinare l'adozione delle misure richieste da *Juliana* e dagli altri giovani per eliminare gradualmente le emissioni di combustibili fossili e ridurre l'eccesso di CO_2 non fosse di competenza del potere giudiziario, dal momento che ciò richiederebbe necessariamente una serie di decisioni politiche complesse, che sono affidate alla 'saggezza' e alla discrezionalità del potere esecutivo e di quello legislativo[176]. Inoltre, la Corte ha ritenuto di non poter concedere la dichiarazione richiesta dai ricorrenti con cui accertare la violazione della Costituzione da parte del governo; una simile dichiarazione determinerebbe unicamente un 'sollievo psichico' e non ripararebbe sufficientemente i danni derivanti dai cambiamenti climatici, lamentati dai ricorrenti[177].

Al netto dell'esito della vicenda giudiziaria in sé, l'importanza di *Juliana* sta comunque anche nell'enorme influenza esercitata a livello globale, essendo stata di ispirazione per cause analoghe in altri ordinamenti[178]; in molte di queste azioni la PTD appare come un argomento centrale[179].

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[172] *Id.* at 1256-1259.

[173] *Id.* at 1259-1260.

La questione è efficacemente riassunta da Spitz e Peñalver: "*public trust claims were uniquely linked to the fundamental attributes of sovereignty and thus not displaced by statutory law*" (L Spitz – E.M. Peñalver, *op. cit.*, 95).

Per un approfondimento sulle argomentazioni della Corte: L Spitz – E.M. Peñalver, *op. cit.*, 95; M.C. Blumm – M.C. Wood, *"No Ordinary Lawsuit"*, cit., 42 ss.

[174] *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

[175] *Id.* at 1169-1173.

[176] *Id.* at 1171-1172.

[177] *Id.* at 1170.

Per un commento alla decisione: M.C Wood, *"On the Eve of Destruction": Courts Confronting the Climate Emergency*, in *Ind. L.J.*, 97(1), 2022, 273 ss; K. Couch, *op. cit.*, 231 s.

[178] F. Gallarati, *op. cit.*, 165.

[179] G. Corsi, *A bottom-up approach to climate governance: the new wave of climate change litigation*, ICCG Reflection No. 57, October 2017, 7, disponibile al link https://www.sipotra.it/wp-content/uploads/2017/11/A-bottom-up-approach-to-climate-governance-the-new-wave-of-climate-change-litigation.pdf.

In Canada, ad esempio, nel caso *La Rose v. Her Majesty the Queen*, un gruppo di quindici bambini e giovani, supportato da OCT, ha intentato, nel 2019, una causa sostenendo che il Canada emette e contribuisce all'emissione di gas serra incompatibili con un clima stabile, andando così a compromettere fondamentali risorse in *public trust*: le acque navigabili, le coste e il mare territoriale, l'aria (inclusa l'atmosfera) e il permafrost. A fondamento dell'azione, accanto ai diritti sanciti dalle Sezioni 7[180] e 15[181] della Carta canadese dei diritti e delle libertà, i ricorrenti richiamano dunque anche la *public trust doctrine*[182]. La controversia è attualmente pendente davanti alla *Federal Court of Appeal*, dopo la decisione assunta in prima istanza[183], in cui il giudice Michael D. Manson, nel dichiarare l'inammissibilità dell'azione, ha respinto la tesi fondata sulla PTD affermando perentoriamente che: "*(…) the public trust doctrine is a concept that Canadian Courts have consistently failed to recognize. It does not exist in Canadian law*"[184].

Un altro interessante caso di contenzioso climatico in cui entra in gioco la PTD è senza dubbio *Pandey v. India*. In *Pandey*[185], la ricorrente, una bambina di nove anni, rilevava come l'India fosse il terzo più grande emettitore nazionale di gas serra (dietro Cina e Stati Uniti) e tra i paesi maggiormente esposti agli impatti negativi dei cambiamenti climatici; pertanto, richiedeva al *National Green Tribunal of India* di ordinare al governo nazionale di intraprendere una serie di misure, tra cui l'inclusione dei cambiamenti climatici nell'ambito delle valutazioni di impatto ambientale e la predisposizione di un inventario nazionale delle emissioni di gas a

[180] Sez. 7: "Ogni persona ha il diritto alla vita, libertà e sicurezza personale e il diritto a non esserne privata, se non quando debbono essere rispettati i principi fondamentali della giustizia".

[181] Sez. 15: "(1) Ogni individuo è uguale davanti alla legge e ha diritto ad avere la stessa protezione e gli stessi benefici dalla legge senza discriminazioni e, in particolare, senza discriminazioni basate su razza, nazionalità o origine etnica, colore della pelle, religione, sesso, età o disabilità mentale o fisica. (2) La sottosezione 1 non esclude alcuna legge, programma o attività che ha per oggetto il miglioramento delle condizioni di individui o gruppi di individui svantaggiati, compresi quelli che sono svantaggiati a causa della razza, nazionalità o origine etnica, colore della pelle, religione, sesso, età o disabilità mentale o fisica".
Per una traduzione della Carta canadese dei diritti e delle libertà: https://opencanada.blob.core.windows.net/opengovprod/resources/d9863367-5111-453c-9ac2-402bc93fb012/italian_v4f_canadian_charter.pdf.

[182] Nell'azione si chiede di dichiarare che la condotta del governo viola la Carta canadese dei diritti e delle libertà e la *Public Trust Doctrine* e di ordinare al governo di predisporre e attuare un *Climate Recovery Plan* volto a ridurre le emissioni di gas serra del Canada e a decarbonizzare il sistema energetico del Paese.
Sul punto: F. Gallarati, *op. cit.*, 171 s.

[183] Federal Court of Ottawa, *Cecilia La Rose v. Her Majesty the Queen*, T-1750-19, judgment of 27 October 2020, 2020 FC 1008.

[184] *Id.* at 93.
In effetti, in Canada, la PTD è stata discussa in ben poche cause e, comunque, in nessuna di queste è stata accettata da una Corte. Si veda: https://onlineacademiccommunity.uvic.ca/climatechangelitigation/the-public-trust-doctrine-in-canada/. Per un approfondimento sulla PTD in Canada: A. Lund, *Canadian Approaches to America's Public Trust Doctrine: Classic Trusts, Fiduciary Duties & Substantive Review*, in *J. Environ. Law Practice*, 23(2), 2012, p. 135 ss.

[185] *Ridhima Pandey v. Union of India*, Application No 187/2017 (*Pandey application*).

effetto serra[186]. Tra le motivazioni addotte a fondamento della sua pretesa, *Pandey* invocava, tra l'altro, gli impegni assunti dall'India ai sensi dell'accordo di Parigi, l'obbligo dello Stato di proteggere e migliorare l'ambiente (previsto dall'articolo 48A della Costituzione) e la *public trust doctrine*. Rispetto alla PTD, nel ricorso si sosteneva lo Stato fosse il *trustee* delle risorse naturali essenziali per la sopravvivenza e il benessere umano e, come tale, fosse vincolato dal dovere fiduciario di mitigare i cambiamenti climatici per proteggere tali risorse a beneficio della generazione presente e delle generazioni future[187]. Nel 2019, l'istanza di Pandey è stata poi respinta con una scarna pronuncia di due pagine[188], dove il Tribunale si limita a far presente che i cambiamenti climatici sono già contemplati nel procedimento di valutazione di impatto ambientale ai sensi dell'*Environment Protection Act* del 1986; pertanto, riprendendo le parole dei giudici, "non c'è motivo di presumere che l'accordo di Parigi e altri accordi internazionali non si riflettano nelle politiche del governo indiano o non siano presi in considerazione nella concessione delle autorizzazioni ambientali"[189].

6. Conclusioni

Più di cinquant'anni fa Sax scriveva: "*(o)f all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems*"[190]. Questa profezia non si è avverata o, almeno, non ancora[191].

A molti studiosi, soprattutto nordamericani, la *public trust doctrine* appare come la 'panacea' per la risoluzione dei problemi ambientali e per la tutela di fondamentali risorse naturali[192]; in effetti, essa potrebbe rappresentare un potente strumento nelle mani dei giudici, specie in un contesto, quello statunitense, caratterizzato da una legislazione ambientale 'a fisarmonica', con passi in avanti e frequenti marce indietro[193]. Tra le migliaia di articoli che hanno analizzato la PTD sotto diverse angolazioni, molti di questi hanno quindi teorizzato un'estensione della *doctrine* quasi sconfinata, applicandola a qualsiasi cosa, dal suolo all'atmosfera[194]. Non tutti

[186] Si vedano: B.J Preston, *op. cit.*, 143 s.; http://climatecasechart.com/non-us-case/pandey-v-india/.
[187] *Pandey application* at 3.
[188] National Green Tribunal, *Ridhima Pandey v. Union of India*, Original Application No 187/ 2017, January 15, 2019.
[189] *Id.* at 2.
[190] J.L. Sax, *The Public Trust*, cit., 474.
[191] J.B. Ruhl – J. Salzman, *op. cit.*, 223 s.
[192] J. Regalia, *op. cit.*, 1 ss.
[193] D. Amirante, *La reformette dell'ambiente in Italia e le ambizioni del costituzionalismo ambientale*, in *Dir. pubbl. comp. eur.*, 2, 2022, VII.
[194] J. Regalia, *op. cit.*, 5.

i giuristi hanno concordato con questa entusiastica adesione alla visione di Sax e, anzi, alcuni hanno criticato e, talvolta, ridicolizzato l'espansione della PTD al di fuori del tradizionale ambito delle acque navigabili e delle terre sommerse sotto di esse[195].

Anche la giurisprudenza, a livello statale e federale, si è rivelata piuttosto ondivaga. A fronte di qualche celebrato caso di successo, in numerose occasioni le Corti hanno continuato a riferirsi alle tradizionali risorse tutelate dalla *doctrine* e alle sue finalità 'utilitaristiche', rifiutandosi di ampliarne la portata oppure limitandosi a qualche cauta apertura[196]. A tal riguardo è stato affermato che "*the public trust doctrine is talked about more than it is used*"[197] o, in maniera più elegante, che "*the public trust doctrine remains a formidable theme of natural resource law, if perhaps more rhetorically than legally charged*"[198].

Questo tema emerge chiaramente nell'ambito della *climate change litigation*, dove le Corti hanno spesso negato che l'atmosfera fosse una risorsa in *public trust*, respingendo, su questa base, diversi ricorsi. Invero, come può ricavarsi dalla pronuncia della giudice Aiken in *Juliana*, la questione dell'appartenenza dell'atmosfera al PTD potrebbe essere in qualche modo 'bypassata' considerando che i cambiamenti climatici incidono su altri beni (come il mare territoriale), che sono riconosciuti in trust e, come tali, oggetto di un dovere fiduciario di protezione da parte del governo. Rimangono, tuttavia, sul tappeto altre problematiche, prima fra tutte quella della *political question doctrine*, dietro cui i giudici americani si sono molte volte trincerati, ritenendo di non poter intervenire su scelte politiche in materia di cambiamenti climatici, di competenza dei poteri esecutivo e legislativo. Queste difficoltà hanno portato, nell'ambito dell'ATL, a rivedere la strategia giudiziaria: dai primi ricorsi fondati quasi unicamente sulla PTD si è passati ad azioni contenenti ampi riferimenti a principi costituzionali (e, in qualche caso, anche a disposizioni legislative)[199]. Tuttavia, a parte che non è affatto detto che ciò sia sufficiente a superare la 'questione politica', a questo punto viene spontaneo chiedersi quale sia l'utilità della PTD nel contenzioso climatico. Il rischio è, infatti, che essa diventi un (inutile) orpello a (forse) più solide argomentazioni[200].

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[195] R.D. Sagarin – M. Turnipseed, *op. cit.*, 479.
A tal proposito secondo Cohen: "*One rather significant change in the doctrine over time has been its journey from the sea, up navigable streams, to unnavigable streams, its leap to inland ponds, and then like our amphibian ancestors its eventual emergence from the water and march across the land. This change in the doctrine is fundamental, radical, and illegitimate*" (L.R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, in *Cal. W. L. Rev.*, 29(1), 1992, 256).
[196] J.B. Ruhl – J. Salzman, *op. cit.*, 228 s.
[197] J. Regalia, *op. cit.*, 15.
[198] E. Ryan, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, in *Envtl. L.*, 31(2), 2001, 490.
[199] A. Christiansen, *op. cit.*, 867.
[200] J. Regalia, *op. cit.*, 37.

Molti di questi dubbi e perplessità circondano anche le azioni ATL al di fuori degli Stati Uniti. Sebbene in questo caso sia ancora prematuro sbilanciarsi sulle reali potenzialità della PTD, gli esiti, al momento, non paiono particolarmente esaltanti.

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CARLO ALBERTO GIUSTI[1]
FILIPPO LUIGI GIAMBRONE[2]

THE DATA PROTECTION FRAMEWORK IN GERMANY FOR THE OPERATION OF EVALUATION PLATFORMS ON THE INTERNET ON THE BASIS OF THE GDPR (GENERAL DATA PROTECTION REGULATION)

Abstract (english)

Although the <<spickmich>> ruling of the German Federal Supreme Court provides guidance on the process of evaluating reputational rating platforms, the balance between personality law and freedom of communication will always depend on the design of the platform in individual cases.[3]

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[1] The article has been carried out under the scientific direction of Prof. Carloalberto Giusti, ordinary Professor of comparative law and Rector at Link Campus Univeristy. The viewpoints are shared by the Authors and the Article was jointly composed. However, §§ 1, 2, and 3 are to be attributed specifically to Carloalberto Giusti; §§ 4, 5 and 6 specifically to Filippo Luigi Giambrone.

[2] Dr. Filippo Luigi Giambrone, Phd Student at Aldo Moro University; Based on the "Spick-mich" decision of the BGH of 23.06.2009 (Az: VI ZR 196/08, Fs: NJW 2009, 2888), the authors deal also in their contribution with evaluation portals on the Internet in which the performance of certain professional groups is evaluated. To this end, they explain the system of these platforms, in particular the "Spick-me" portal, which is available for the evaluation of teachers, and their potential for conflict. Then the special features of online publication compared to the evaluation by means of printed products such as e.B school newspapers are discussed, in particular the findability of information in the portals via search engines.
In this connection, the authors present the exact functioning of the teacher evaluation via the above-mentioned portal before devoting themselves in detail to the decision in which the BGH rejected a teacher's right to erasure or injunctive relief. This right to erasure pursuant to § 35 (2) sentence 2 no. 1 BDSG is examined by the authors of the contribution. In this context, the admissibility of the storage of the data is examined, starting with the applicability of the BDSG with regard to the media privilege of § 41 BDSG. The authors come to the conclusion that in the present case, in contrast to § 28 BDSG, it is a commercial data processing within the meaning of § 29 sec. 1 BDSG and then weigh the personal rights of the plaintiff teacher against the freedom of expression of the users from Art. 5 sec. 1 sentence 1 GG and the freedom of broadcasting of the platform operators from Art. 5 sec. 1 sentence 2 Alt. 2 GG. As a result, it is found that the freedom of communication in this case outweighs the right of personality. Thereafter, the claim for injunctive relief examined by the BGH from §§ 823 para. 2, 1004 BGB analogous to V.m § 4 para. 1 BDSG is addressed and a similar case of a platform in France is shown. The authors draw also some general conclusions from the decision of the BGH with regard of the legal limits of evaluation platforms and finally address the legal protection according to § 34 BDSG. Finally, they draw the conclusion that the decision of the BGH is groundbreaking, but a consideration must be made in individual cases.

[3] 1. The collection, storage and transmission of personal data, even without the consent of the data subjects in the context of an evaluation forum on the Internet (www.spickmich.de), may not always be justified by

The judgement in question can ultimately be understood as a "yes" to the assessment of teachers' reputational rating platforms in Germany, however, in each individual case, in order to asses the admissibility of those specific platforms, a weighting of the interests at stake is necessary.
In its ruling, the German Federal Court (BGH) clearly stressed that in order to guarantee full freedom of expression, representing a key legal asset of German ordering, certain restrictions concerning the protection of personal rights must be taken into account. In the final analysis, the standard of fundamental rights set out in the European Charter of Fundamental Rights with regard to the possibilities for implementation should be applied and the design of the balancing of interests under Article 85 of the General Data Protection Regulation should be examined. One of the main reasons is to ensure a uniform standard of fundamental rights within the European Union and its Member States. The national courts of the Member States must comply with the case law of the Court of Justice in order to ensure uniformity with European law. With regard to the General Data Protection Regulation (DSGVO), as in the case of other regulations, the uniform application of the fees relating to fundamental rights is to be preferred, since it is a binding regulation and not a directive. An amendment to the Treaty of Lisbon, with a consequent shift of competences with regard to the regulation of personal data or privacy to the European Union in accordance with the principle of subsidiarity, closely linked to the principle of proportionality, would ensure uniformity with European fundamental rights, given that its action, even if not in an area of exclusive competence, is considered in this area to be more effective than that undertaken at national, regional or local level. In addition, the Google c/CNIL case is examined, which concerns the question of the so-called territoriality of de-indexing. The issue being examined relates in particular to where the action of the search engine should be limited and what implications the new GDPR can have. The solution proposed by the Advocate General excludes the possibility of worldwide de-indexation, however, by reason of the place referred to in Article 3, the extraterritorial application of the GDPR could determine the possibility of a worldwide de-indexation or geographical blockage, where in the balance between fundamental rights, and in particular between the right to the

the media privilege enshrined in § 41 BDSG for the press sector, but nevertheless in accordance with § 29 para. 1 no. 1 and 2 BDSG, if the evaluations only concern the social sphere of the evaluated persons, without presenting an abusive criticism, an insult to formality or an attack on human dignity, and otherwise there is no interest worthy of protection on the part of the evaluated.
2. § 29 BDSG must be interpreted in conformity with the Constitution, so that the provision takes due account of the fundamental right to freedom of expression.
3. The admissibility of the transmission of data to requesting users must be assessed on the basis of an overall balance between the personality rights of the evaluated persons and the interest in information of the person to whom the data is transmitted via the Internet. In doing so, the legitimate interests of the evaluated parties must be compared with the interests of the retriever in the knowledge of the data and the person who transmitted the data in their disclosure. The type, content and significance of the disputed data must be measured against the tasks and purposes served by storage and transmission.

protection of personal data and privacy and the legitimate interest of the public in accessing sought-after information, assuming that it is the first to prevail>>.

Introduction

Online forums, review platforms, online guest books and similar rating platforms give visitors an easy way to express their personal opinions on a wide range of topics. More specifically, this can be about the exercise of criticisms of restaurants or inns, hotels or corresponding holiday destinations, but also of assessments by employers, teachers or doctors. In this publication, the case law of the Supreme Court in Germany and Austria is discussed with regard to the doctor evaluation and teacher evaluation platforms. How are entries such as <<empathy of a stone>> or <<extreme unkindness>> or further <<Arrogance>>. Are the complaints made by the doctors concerned subject to a scrupulous review so that the personal rights that can be traced back to the rated doctors are adequately protected?
Furthermore, it can be pointed out here that evaluation portals have become more and more important. Apart from whether they are doctors, hotels, teachers, restaurants or employers, there is an evaluation platform for almost every industry, which performs the following functions. On the one hand, they can help consumers to find out about new offers. How are entries such as <<empathy of a stone>> or <<extreme unkindness>> or further <<Arrogance>>. Are the complaints made by the doctors concerned subject to a scrupulous review so that the personal rights that can be traced back to the rated doctors are adequately protected? Furthermore, it can be pointed out here that evaluation portals have become more and more important. Apart from whether they are doctors, hotels, teachers, restaurants or employers, there is an evaluation platform for almost every industry, which performs the following functions. On the one hand, they can help consumers to find out about new offers.
On the other hand, they are also a cost-effective advertising tool for rated people, because good reviews lead to new customers as if on their own. As a result, negative assessments have exactly the opposite effect. How are such situations to be decided on Jameda[4] or spickmick under the European General Data Protection Regulation?

[4] The admissibility of the collection, storage and transmission of personal data within the framework of a doctor search and doctor evaluation portal on the Internet (www.jameda.de) if the portal operator leaves his position as a "neutral" information intermediary. 1. The determination of a "legitimate interest" in the exclusion of the commercial collection or storage of personal data within the meaning of § 29 para. 1 sentence 1 no. 1 BDSG requires a balancing of the interest of the person concerned in the protection of his data and the importance that the disclosure and use of the data has for him with the interests of the users (here: the doctor search and doctor evaluation portal "jameda.de"), for the purposes of which the storage

The decisions taken on Jameda and spickmich are elaborated and subject to an examination of the GDPR. The question also arises on the basis of the existing evaluation portals, which legal problems regarding personality and data protection can arise in the area of tension with the freedoms of communication. It is obvious that in the future many professions will have to undergo more online evaluation. As an example, portals from the USA can be cited, which serve as a model, where it has been used for a long time, in this way[5]. For example, both literature and the public have dealt with evaluation platforms, because the latter have dealt with the courts several times. On 23.06.2009, the Federal Court of Justice had already dismissed the appeal brought by a teacher from Nordrein Westfalen, who objected to her assessment on the website www.spickmich.[6] Even university professors have so far been unsuccessful in their complaints against the evaluation of their courses on the side of www.meinprof.de have not been successful. In April 2008, the Berlin Data Protection Supervisor imposed a fine against the operators of the site for violating data protection regulations in order to prevent this circumstance in the future[7]. This master's thesis aims to make admissibility requirements and legal limits of personal evaluation portals clearer on the basis of the line of the case law already passed[8]. On the contrary, it must be stated that the GDPR creates new European uniform law, so that all courts in the EU must apply the same law. At most, different practice may occur here. Rather, the question is looking to the

takes place, taking into account the objective value system of fundamental rights. In doing so.m, a balance must be struck between the right of the person concerned to informational self-determination under Article 2.1 in conjunction with Article 1.1 of the Basic Law, Article 8.1 ecHR on the one hand and the right of the operator and the interests of the users of the Internet portal to freedom of communication under Article 5.1 of the Basic Law, Article 10.1 of the ECHR on the other. (para.13)

2. If the operator of a doctor search and doctor evaluation portal stores personal data about doctors and makes them available for retrieval, the storage of the doctors' personal data is generally permissible and a claim for deletion according to § 35 para. 2 sentence 2 no. 1 BDSG is therefore not given (Festhaltung BGH, 23 September 2014, VI ZR 358/13, NJW 2015, 489). (para.14)

3. If the operator of the doctor search and doctor evaluation portal displays in the free profile of an individual doctor – in a crossbar highlighted in grey and marked with "advertisement" – a reference to competing doctors of the same specialty in the immediate vicinity who have booked a so-called "premium package" with him, the data of the doctors – stored and evaluated without or against their will – will be used as an advertising platform for the paying competitors. In addition, if paying "Premium" customers do not display advertising advertisements in their visually and content-specifically designed profile without this being sufficiently disclosed there, the operator leaves its position as a "neutral" information intermediary, because through this type of advertising it provides individual doctors with hidden advantages.

[5] Die AOK plant zum Beispiel bis 2010 einen Arzt- Navigator zur Ärztebewertung.

[6] BGH, Zulässigkeit von Lehrerbewertungen im Internet, Urteil vom 23.06.2009 – VI ZR 196/08, Neue Juristische Wochenschrift, 2888 (2009) (Ger.); Oberlandesgericht (OLG) Köln, Urteil vom 03. Juli 2008 -15 U 43/08, MMR 2008, 672 (2008); Oberlandesgericht (OLG) Köln, Urteil vom 03. Juli 2008 -15 U 43/08, K&R 2008, 540 (2008); LG Köln, K&R 2008, 188- BeckRS 2008, 04451.

[7] Vgl. Pressemitt. Des Berliner Beauftragten für Datenschutz und Informationsfreiheit v. 22.4.2008, abrufbar unter http://www.datenschutz-berlin.de/content/nachrichten/pressemitteilungen/22-04-2008.

[8] Gounalikis/ Klein, *Zulässigkeit von personenbezogenen Bewertungsplattformen- Die „Spickmich" Entscheidung des BGH vom 23.6.2009*, NJW, 567 (2010).

future, namely how courts should now assess the business model of evaluation portals and whether the EU's competence[9] with regard to digitalisation[10] should perhaps be more reflected in the light of current incentives.

1. Case law on teacher evaluations on the Internet <<spickmich>>

a) The facts of the case

The platform spickmick. de had been created as a student portal, which included, among other things, a section <<my school >>. There, it was given the opportunity to evaluate aspects such as the equipment of the school, the school building, but also factors such as the party factor and the flirtfactor[11]. In addition, the names of teachers who worked and taught at the school could be entered on the corresponding page under the menu item Teacher's Room. However, these functions can only be claimed if students register with an appropriate e-mail address, their school location and a user name. As a result, a user profile is activated by assounocing a password to the user name and sending it to the specified e-mail address. Once logged in, the user can design his profile at will, contact other users and interact with each other through messages. Teacher profiles with surnames and subjects can therefore be created and viewed via the available teacher's room function. With one click you reached the bottom, on which both the clear name and the subjects of the respective teacher were depicted. In addition, criteria were recorded in a rating module, as cited as an example <<cool and funny>>, or << motivated>>. Using the recorded evaluation criteria, grades of 1 to 6 of the grade scores common in the school sector could be assigned to the corresponding teacher.For an average of four individual ratings allocated, an overall score was formed from the corresponding average. Gradings relating exclusively to grades 1 and 6 were taken and discarded and were not included in the overall assessment. The teachers were given a button on this page << Something is not true here>>, which could inform the operators about irregularities or abnormalities via the users. The evaluation result eventually resulted in a certificate and could also be printed out. If no revaluation is made within the next 12 months, the previously allocated and registered assessments with the accompanying quotations have been cancelled. In the case under which a certificate was recorded under the name of a

[9] Cfr. A.F.URICCHIO, *Equilibrio finanziario e prospettive di riforma della finanza locale tra fiscalità di prossimità e neocentralismo*, in AA.VV., Per un Nuovo Ordinamento Tributario. Contributi Coordinati da Victor Uckmar in Occasione dei Novant'anni di Diritto e Pratica Tributaria, Cedam.
[10] Cfr. CARLOALBERTO GIUSTI, *La gestione delle sopravvenienze contrattuali, rinegoziazione e intervento giudiziale*, 2018.
[11] Jahnel, *Meinungsäußerungsfreiheit und Datenschutz am Beispiel von Onlineplattformen,* in, 1, S&R, 1, 35 (2015).

teacher, who German the information of the school where she was teaching, in which she was rated with a grade average of 4.3 on the basis of four pupil assessments[12]. The quotes or comments made were not made public. The applicant challenged that conduct on the part of the defendant and requested that the defendants be punished for the deletion and failure to publish their names, school and subjects taught in connection with the overall and individual assessment by grades 1 to 6 in the categories referred to on the spickmich.de website, as well as the citation and the function of testimony.

(b) The case-law handed down in relation to the case spickmich.de

A teacher who was assessed at www.spickmich.de with a grade of 4.3, however, went against her assessment in the injunction proceedings. Subsequently, in the main proceedings, it again tried to seek the cancellation or omission of the name, school, subjects and their evaluation on the portal's website and thus to assert it. Both LG and OLG came to the conclusion that the teacher's right of personality and related data protection provisions were not violated by the assessment option[13]. This orientation of the case-law was confirmed by the BGH by judgment of 23.6.2009. The Sixth Civil Senate had decided on the substance that the teacher concerned was not entitled to erasure of her data or to refrain from publication. As regards the balance between the applicant's right to informational self-determination, freedom of communication must be given greater weight. The teacher concerned had now appealed against the BGH ruling[14]. However, it has yet to be noted in the case itself that although the teacher had called the Constitutional Court to clarify the question, it did not take up the appeal[15].

c) The facts of the case

Claim for cancellation under Section 35 II No. 1 of the Federal Data protection Act

[12] Jahnel, *supra*, in, 1, S&R,1, 35 (2015).
[13] Landesgericht (LG) (regional court) Köln, 02.05.2008- 84 O 33/08, K&R, 188, (2008); Landesgericht (LG) (regional court) Köln, 02.05.2008- 84 O 33/08, BeckRS, 04451(2008); Oberlandesgerichtshof (OLG) Köln, Urteil vom 03.Juli 2008- 15 U 43/08, Zeitschrift für IT-Recht und Recht der Digitalisierung (MMR), 672 (2008); Oberlandesgerichtshof (OLG) Köln, Urteil vom 03.Juli 2008- 15 U 43/08, K&R, 540 (2008); Gounalikis/ Klein, *Zulässigkeit von personenbezogenen Bewertungsplattformen- Die „Spickmich" Entscheidung des BGH vom 23.6.2009*, NJW 2010, 568 ff.
[14] Bundesgerichtshof (BGH), *Lehrerbewertung im Internetforum „spickmich" ist zulässig*, in Neue Juristische Wochenschrift (NJW) , 2888, 2891ff. (2009).
[15] Bundesverfassungsgerichtshof (BVerfG) (German Federal Constitutional Court), Kammerbeschluss ohne Begründung vom 16.08.2010 - I BvR 1750/09, 91 Fachzeitschrift jusIT, 1, 188 (2010).

The teacher took legal action and claimed that her profile had been deleted. Within the meaning of Section 35 II 2 No. 1 of the German Data Code (BDSG), such a claim exists if the storage of the relevant data is inadmissible. The name, school and teaching subjects are corresponding to personal data section 3 I of the German Data Protection Act (BDSG) as details of personal and factual circumstances of the teacher concerned. The following individual assessments are also to be classified as value judgments under the concept of personal data. The collection, processing and use of personal data for the transmission is only permitted within the meaning of Section 4 I of the German Federal Data Protection Act (BDSG) if the consent of the data subject or a legal authorisation has been obtained. Since the consent of the teacher concerned was obviously not available, the admissibility of the storage can only result from Section 28 et seq. of the German Data Protection Act (BDSG).

1.a) Media Privilege of Section 41 of the Federal Data Protection Act

Telemedia are covered by the media privilege of Section 41 of the Federal Data Protection Act only if they can be subsumed under the press term. This so-called media privilege exempts press companies from the strict requirements of data protection law when collecting, processing and using data for their own journalistic and editorial purposes and thereby grants freedom of the press under Article 5 I 2 GG[16]. However, the correct application of Section 41 of the German Federal Data Act (BDSG) presupposes that the data is collected for its own journalistic and editorial purposes. On the website www.spickmick.de, the ratings collected are presented as an average grade. An average is thus calculated, but no editorial processing is carried out by the platform operators, since the submitted evaluations are sufficient for the preparation of text contributions. The survey is only aimed at disclosing the reproduction of an average value without journalistic editorial design, which is why the media privilege is not applied to evaluation portals and thus excludes.

1.b) Demarcation between Sections 28 and Section 29 of the Federal Data Protection Act

[16] Walz, in: Simitis, *Bundesdatenschutzgesetz*, 8.Auflage 2014, § 41 Rdnr. 9; Gola/ Schomeurs, *Bundesdatenschutzgesetz*, 9. Auflage 2007, § 41 Rdnr. 4.

With regard to the spickmich case, the Court of Appeal had decided on the admissibility of the assessments on the basis of Paragraph 28 I of the German Federal Data Code (BDSG). This is applicable when personal data is collected and transmitted for its own business purposes. The data processing must be a mere tool for fulfilling an actual business purpose, such as collecting customer data for the purpose of fulfilling a sales contract. Paragraph 29 of the BDSG, on the other hand, presupposes the collection of data for transmission purposes. Data processing embodies the social interest[17]. The collection of the individual reviews on the www.spickmich.de is used for the transmission to the registered users to satisfy their interest in information and does not pursue any further purpose. It should not serve any further interest, such as contacting the persons concerned. It is thus apparent that Section 29 of the BDSG is decisive. The rating system on www. Spickmick.de is designed for a certain duration and is geared towards a refuting data collection and transmission, so that this is a business-like data processing in accordance with Section 29 I of the German Data Code (BDSG)[18].

1.c) Section 29 I BDSG

Both the name and the school and the teaching subjects of the teacher could be seen from the school hompage. They thus arise from generally accessible sources within the meaning of Section 29 I 1 No. 2 of the Federal Data Protection Act (BDSG). The storage of personal evaluations is permitted within the meaning of Section 29 (1) No.1 of the Federal Data Protection Act (BDSG), provided that no legitimate interest of the person concerned is violated[19]. This leads to a balance between the protection to be granted of the right to informational self-determination of the assessor under Art.2 sec. 1 in conjunction with Article 1 sec. 1 GG and the right to freedom of communication under Article 5 sec. 1 GG[20]. As regards the element of legitimate interests, despite the lack of enshrinement in the wording of the provision, a balance must be made between the interests of the responsible body and those of the person concerned[21]. The objective value of fundamental rights achieves indirect

[17] Ehmann, in: Simits (Hrsg), Bundesdatenschutzgesetz, 8. Auflage 2014, § 29 Rdnr. 15; Gola/ Schomerus, Bundesdatenschutzgesetz, § 28 Rdnr 4, §29 Rdnr 2.
[18] Gounalikis/ Klein, *Zulässigkeit von personenbezogenen Bewertungsplattformen- Die „Spickmich" Entscheidung des BGH vom 23.6.2009*, NJW, 567 (2010)
[19] Cfr. A.F. Uricchio/ J. Radwanowicz-Wanczewska, *Respecting an Individual's Subsistence Minimum in Administrative Enforcement Proceedings*, 2 Rocznik Teologii Katolickiej, XVII (2018).
[20] Jahnel, *Meinungsäußerungsfreiheit und Datenschutz am Beispiel von Onlineplattformen*, 1, S&R, 36, (2015).
[21] Ehmann, *DS-GVO, § 29 Rdnrn.* 159; Gola/Schomeurs, *DS-GVO, § 29 Rdnr.10*.

third-party effect through the burglary point of this balancing of interests. Teacher evaluations represent value judgments that affect the social sphere, but not the privacy of the respective rated person[22]. They constitute a part of the social reality which cannot be allocated exclusively to the person concerned. The informational right of the teacher concerned by the publication of personal data is confimised with the freedom of expression of the users under Article 5 I 1 GG and the freedom of broadcasting of the platform operators under Art. 5 I 2 Alt. 2 GG[23]. It is necessary to differentiate at this point: the naming of names, subjects and schools are factual assertions that are accessible to proof. Claims of fact fall within the scope of Article 5 I 1 GG if they constitute or mix with an opinion formation. This is true of the above information, because only on the basis of names, schools and subjects can users find and evaluate the teacher via the school function[24]. The evaluations expressed can be subsumed under Art. 5 I 1 GG[25]. These are protected value judgments. Even if the criteria are factual, there are dominant elements. Thus, the right of personality of the assessed teacher is opposed to freedom of expression under Article 5 I 1 GG. In doing so, the conflicting legal positions must be assessed in the context of a comprehensive balance of goods and interests. For this purpose, it is necessary, firstly, to explore the abstract value of the lagal positions opposite each other and, furthermore, the concrete intensity of intervention. The right to informational self-determination cannot be granted without restrictions[26]. The individual develops his personality within the social community[27] and must endure restrictions on his right to informational self-determination if these are due to sufficient reasons of the common good, which appear to be decisive in an overall balance[28].

With regard to the freedom of expression of Article 5 I 1 GG, the barriers referred to in Article 5 II GG are applicable. With regard to the assessment to be carried out, it is important to determine which sphere of personality protection is affected. The evaluations by appropriate subject-related criteria such as << good teaching>>,

[22] Vgl. dazu grdl. BVerfGE 7, 198 (204 ff) = NJW 1985, 257; Herdegen, in: Maunz/Dürig, GG, Losebl. (Stand: Jan.2009) Art. 1 III Rdnrn. 59 ff; Gounalakis/Rhode (o.Fußn. 12), Rdnr. 189.

[23] So auch v. Coellen

[24] Cfr. Ballhausen/ Roggenkamp, *Personenbezogene Bewertungsplattformen*, K&R, 403, 405 (2008).

[25] Bundesverfassungsgerichtshof (BVerfGE) (German Federal Constitutional Court), Beschluss vom 22. Juni 1982 – 1 BvR 1376/79 –, BVerfGE 61, 1-13; BVerfGE 61, 1 (8), NJW 1983, 1415; BVerfGE 113, 29 (46), NJW 2005, 1917; BVerfGE 118. 168 (184), NJW 2007, 2464.

[26] Gounalikis/ Klein, *Zulässigkeit von personenbezogenen Bewertungsplattformen- Die „Spickmich" Entscheidung des BGH vom 23.6.2009*, NJW, 569, 569-71, (2010).

[27]Cfr. A.F. Uricchio, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.

[28] Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court), 22.06.1982 - 1 BvR 1376/79, Neue Juristische Wochenschrift (NJW), 419 (1984); BVerfG, 09.03.1988 - 1 BvL 49/86, Neue Juristische Wochenschrift, 2031 (1988); BGH, 23.06.2009 - VI ZR 196/0, Neue Juristische Wochenschrift, 2888, 2891(2009).

<<fair examination>> and <<well prepared>> reflect the quality of the professional performance of the assessment object and thus concern the so-called social sphere. The evaluation categories listed, such as cool and witty or human, on the other hand, clearly affect the person of the rated teacher. It highlights the characteristics of the teacher, which are not only reflected in the professional practice of the assessor. However, it must be noted at this point that especially in the case of teachers, their attitude towards a class is always also characterized by a personal component. Teachers set role models for their students. During everyday school life, teachers also share conscious personal characteristics through their behaviour[29].At this point, it must be concluded that, due to the specificites of school activity, such mixed criteria only cover the social sphere[30].Because the assessment of professional qualities according to the norm affects the social sphere and because the fundamental right of freedom of expression also includes statements in its area of protection in which facts and opinions are mixed, the court decided that the information needs of pupils, parents and teachers, satisfied by the website, were higher and thus reinforced <<basically a legitimate interest in information about the professional appearance of the teacher>>. In the end, the specific technical design of the platform was also important with regard to this assessment, in addition to the low significance and the quality of the data: the user concept was limited to information about a particular school and multiple registrations were prevented. The relevant data could not be accessed via a search engine or within the website by entering the name. Impairment of this sphere is permitted if there is a corresponding interest in information from the public[31]. There is a fundamental interest in information regarding the quality of teaching, apart from the actual significance of such an assessment system, at least for parents, pupils and teachers. An assessment can help the exchange of views among pupils and help parents to provide guidance. The corresponding teachers subject to evaluation will thus receive feedback on the opinion of your students regarding their appearance and acceptance of the latter, thus enabling their dialogue with them to be improved[32].Furthermore, inspection and access to the submitted reviews at spickmich is not limited to this area of interest, but anyone can register by entering an email address. The BGH did not consider this fact to be important. On the

[29] Gounalikis/ Klein, *Zulässigkeit von personenbezogenen Bewertungsplattformen- Die „Spickmich" Entscheidung des BGH vom 23.6.2009,* NJW, 569 (2010).
[30] So auch Bundesgerichtshof (BGH)(German Federal Court), Urteil vom 23. 6. 2009 – VI ZR 196/08, Neue Juristische Wochenschrift 2009, 2888, 2892 (2009) (Germ).
[31]For a better understanding of the effectiveness of the European Convention on Human Rights in Italy Cfr. A.F. Uricchio, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.
[32] Bundesgerichtshof (BGH), Zulässigkeit von Lehrerbewertungen im Internet Urteil vom 23.06.2009 - VI ZR 196/08, Neue Juristische Wochenschrift, 2888,2893 (2009).

contrary, he believes that the overly overwhelming barriers to access, namely the knowledge of the teacher's name and school, are sufficient as a filter. It should also be noted that a teacher's assessment is not accessible and accessible by simply entering the name on the page or from a search engine. Teachers who are employed in the public sector and interact with their pupils on a daily basis must be prepared to monitor and assess their behaviour[33].

An illegal intervention in their social sphere would only be affirmed if it would lead to stigmatisation or social exclusion or pillory[34].This is not the case for poor ratings, but users can see the lack of objectivity of the teacher rating system. The absolute limits to be observed and absolute with regard to the evaluation on an online portal are certainly permeated if there is an inappropriate criticism of insult, formal insult or violation of human dignity in the concrete evaluation[35]. Thus, the right of personality would be affected in its human dignity and would be subject to an unlawful infringement without further consideration[36]. The rating of the teacher concerned at 4.3 does not belong to any of these categories. There is no other way to the contrary from the anonymity of the assessments. The Internet is characterized by the anonymity of its use. If the expressor satisfactorily confronted with the circumstance of assigning a value judgment to their person, there would be no free intellectual debate. Such restrictions conflict with the meaning of Article 5 I GG of the liberal-democratic basic order. Furthermore, with regard to the granting of the protection of assessments as value judgments, it is not decisive that the evaluation system does not ensure a meaningful evaluation of teaching. Freedom of expression is not subject to the limits of value judgments that can be objectified in terms of content. To prevent defamation, the operators have set up a button on the spickmich page <<something is wrong here>> to prevent such grievances. In conclusion, the right to personality predominate in the balance of freedoms of communication. The data collection and storage by the evaluation portal does not conflict with the legitimate interests of teachers, so that storage is

[33] Vgl. Palandt/Sprau, BGB- Kommentar, § 823 Rdnr. 96 (2004)

[34] Bundesgerichtshof (BGH) (German Federal Court), 12.07.1984- VII ZR 123/83, Neue Juristische Wochenschrift (NJW-RR), 2888, 2892(2009); Bundesgerichtshof (BGH) (German Federal Court), 21.11.2006-VI ZR 259/05, Neue Juristische Wochenschrift-RR, 619, 620 (2007); Bundesgerichtshof (BGH) (German Federal Court, Urteil vom 07. Dezember 2004- VI ZR 212/03- 161 Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ), 266, 269 (Ger.); Bundesgerichtshof (BGH) (German Federal Court), Dez. 7, 2004, Neue Juristische Wochenschrift, 592 (2005).

[35] Bundesgerichtshof (BGH)(German Federal Court), 12.07.1984- VII ZR 123/83, Neue Juristische Wochenschrift, 2888, 2893 (2009); Gounalikis/ Klein, *Zulässigkeit von personenbezogenen Bewertungsplattformen- Die „Spickmich" Entscheidung des BGH vom 23.6.2009*, Neue Juristische Wochenschrift, 569 (2010).

[36] Bundesgerichtshof (BGH) (German Federal Court), Zulässigkeit von Lehrerbewertungen im Internet Urteil vom 23.06.2009 - VI ZR 196/08, Neue Juristische Wochenschrift, 2888, 2893 (2009); Staufer, *Die unfaire Professorenbewertung*, Jura, 549, 551 (2009).

to be regarded as permissible[37]. A claim for deletion under Section 35 II 2 No. 1 of the Federal Data Protection Act must be rejected. In the press release on the judgment, however, the BGH emphasizes that the balance must take place for each case. Depending on the design of the evaluation portal, cases are also possible in which the protection of personality can predominate[38]. Even if this BGH decision is ultimately to be classified as a yes to teacher evaluation platforms, a balance of interests must be made in Germany in each case when assessing the admissibility of specific evaluation platforms[39].

1d) **Claim for injunctive relief under Sections 823 II, 1004 of the German Civil Code (BGB) analogously in conjunction with 4 I BDSG**

The Federal Court of Justice has also reviewed any claim to refrain from publishing the data by transmitting it to users pursuant to Sections 823 II, 1004 of the Civil Code analogous to section 4 I of the Federal Data Protection Act. Section 4 I of the Federal Data Protection Act could be violated as a protection law if neither consent to the transfer of data nor a statutory legal authorisation is given. In particular, the transmission must be assessed separately from collection and storage. The admissibility of the transmission must be checked in accordance with Section 29 II of the Federal Data Protection Act. The user who calls the reviews must have made a legitimate interest in the knowledge of the data credible and there would have to be no legitimate interest on the part of the data subject in the sense of Section 29 II 1 No 1.2 Federal Data Protection Act. The first requirement is already opposed to the functioning of the Internet evaluation portal[40]. It is worth noting at this point the anonymous evaluation, which conflicts with the presentation of a legitimate interest. If Section 29 II 1 No.1 of the Federal Data Protection Act were to be applied literally, the transfer of data would be inadmissible[41].The establishment of an evaluation system is complicated if each assessment requires the consent of the party concerned. Critical or negative reviews would almost never be allowed. Both Paragraph 29 II 1 No. 1 lit.a and Section 29 II 4 of the BDSG must be interpreted in

[37] For a better understanding of the effectiveness of the European Convention on Human Rights in Italy Cfr. A.F. Uricchio, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.

[38] Bundesgerichtshof (BGH)(German Federal Court), 12.07.1984- VII ZR 123/83, Neue Juristische Wochenschrift, 2888, 2893 (2009).

[39] Jahnel, *Meinungsäußerungsfreiheit und Datenschutz am Beispiel von Onlineplattformen*, 1, S&R, 37 (2015)

[40] Gounalikis/ Klein, *Zulässigkeit von personenbezogenen Bewertungsplattformen- Die „Spickmich" Entscheidung des BGH vom 23.6.2009*, Neue Juristische Wochenschrift, 569 (2010).

[41] Schilde Stenzel, *Lehrevaluation oder Prangerseite im Internet – www-meinprof-de- Eine datenschutzrechtliche Bewertung*, RDV, 104, 107 (2006).

accordance with Article 5 of the Foundamental Law[42]. In the overall analysis, it is ultimately necessary to determine whether the resulting protection of personality requires a restriction of freedom of expression and information and whether the teacher concerned has a worthy interest in excluding the transmission. The personal right[43] of the respective teacher runs counter to the information interest of the portal user. For the purposes of the Federal Court of Justice, the registration requirement for a predominance of the information interest, the low significance of the assessments given, which affect the teacher only in her social sphere, and the admissibility of the data collection. The transfer of data is thus permitted in accordance with Section 29 II of the German Data Code (BDSG); a claim under Sections 823 II, 1004 of the German Civil Code (BGB) analogous to Section 4 I of the BdSG must be rejected.

2.<<meinprof.de>>

The internet portal meinprof.de is similar to that of spickmich.de. This is an Internet forum which since 2005 has enabled students to submit assessments to lecturers and other teachers, subject to prior registration. The available evaluation criteria can be summarized as follows: fairness, support, material, comprehensibility, fun, interest, ratio note/effort. The grading is based on the grade scale 1 to 5. Students will also be given the opportunity to comment on the lecturers as well as on the courses they have attended. It takes 5 course evaluations in order to publish an average evaluation of the course attended. In this respect, two decisions of The German courts have been issued: in the first case, the following entry in the platform could be retrieved:<< In the first semester hardly any material mediation, in the specialisation semester it gets better; Psychopath and he lives out this extensively with his students; really the last of this guy! This statement was considered by the department of first instance to be an inadmissible criticism of insults. The LG Berlin disagreed and narrowly rejected the existence of insult criticism with a reference to the so-called terrorist daughter verdict. This judgment was based on the following facts: the plaintiff of the RAF terrorist Meinhof, defended herself against the name terrorist daughter in a dispute with a

[42] Bundesgerichtshof (BGH), German Federal Court), Zulässigkeit von Lehrerbewertungen im Internet Urteil vom 23.06.2009 - VI ZR 196/08, Neue Juristische Wochenschrift (NJW), 2888, 2893 (2009)(Ger.); so auch Ballhausen/ Roggenkamp, *Personenbezogene Bewertungsplattformen*, K &K, 403,408, (2008) ; unentschieden Ploog, CR 2007, 668,669, (2007); Gounalikis/ Klein, *Zulässigkeit von personenbezogenen Bewertungsplattformen- Die „Spickmich" Entscheidung des BGH vom 23.6.2009*, NJW, 569 (2010).

[43] For a better understanding of the effectiveness of the European Convention on Human Rights in Italy Cfr. A.F. Uricchio, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.

newspaper publisher. The BGH rejected the existence of an insult criticism and drew a balance between the general right of personality and the right to freedom of expression[44], which gave priority to the latter right[45]. In another case, comments such as << his ignorance he usually tries to hide by blah >> and << But nice slightly confused examiner>> not qualified as an insult critique. In both court judgments, an infringement of the German BDSG was also rejected. The LG (Regional Court) Berlin relied on Paragraph 29(1) No.2 of the German Data Code (BDSG) and assumed that the latter paragraphs were privileged, since in its view the professor evaluations are freely accessible data. The LG Regensburg also stated as a statement of reasons that there was no interest on the protection of the applicant in the non-publication in accordance with Paragraph 29(1) of The 1 St. 1 BDSG, since the applicant's courses were open to the public.

2.1 Interim results

The judgment of the Federal Court of Justice reveals general limits on the admissibility of personal evaluation portals, which are applicable regardless of the individual portal design. The evaluation of the services of groups of persons constitutes a value judgment protected by Article 5 I 1 GG. A comparison of the right of personality to the assessed in the form of his right to informational self-determination with the freedom of expression of the users is made[46]. By carrying out the evaluation on an online portal, one generally does not violate the right of personality if the professional activity is given to an evaluation on the basis of objective criteria. Concerns are generally raised by those Internet sites where the rating objects are specifically subject to defamation, as in the case of recently existing portals www.rottenneighbor.com and www.dontdatehim.com on which neighbours or ex-friends have been assessed. An evaluation system must be considered inadmissible whenever it is inherent in a formal insult, an attack on human dignity or an insult to the rated[47].As far as the individual assessment is concerned, the BGH has measured the admissibility of the individual in accordance with data protection regulations. The collection and storage of data must be strictly differentiated from the transfer to the users. Paragraph 29 I of the BDSG must be

[44] For a better understanding of the effectiveness of the European Convention on Human Rights in Italy Cfr. A.F. Uricchio, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.

[45] Bundesgerichtshof (BGH), Urteil vom 05. Dezember 2006 – VI ZR 45/05 –,Entscheidungen des Bundesgerichtshofes in Zivilsachen.

[46] Vgl. Steffen/ Rozek/Coelin, Recht als Medium der Staatlichkeit, Festschrift für Herbert Bethge zum 70. Geburtstag, Schriften zum Öffentlichen Recht, Vol. 1130, 271, 279 (2009).

[47] Gounalikis/ Klein, *Zulässigkeit von personenbezogenen Bewertungsplattformen- Die „Spickmich" Entscheidung des BGH vom 23.6.2009*, NJW, 570 (2010).

inferred whether there is an conflicting interest of the assessor worthy of protection, and in doing so, weigh up the variants of freedom of communication and the right of personality. As a result of the assessment that only the social sphere has been tackled, freedom of communication usually prevails. However, if the evaluation criteria burden the intimate or privacy of the assessor, for example by evaluating, as initially on spickmich.de, whether it is sexy, the balance in favour of the right of personality may be unnecessary. Absolute limits are also in this case insult, insult or violation of human dignity[48], which can be disregarded especially when using a free text comment function. However, if the assessor is given false statements about the citation function, such statements as false statements of fact do not fall within the scope of freedom of expression. With regard to the transmission of the data, it is necessary to examine whether there is an interest in information in the knowledge of the assessment.[49]

Pursuant to Section 34 of the Federal Data Protection Act, the data subject is allowed to request information about the data stored about him or her, the potential recipients and the purpose of the storage. With regard to an unlawful assessment, the person concerned is entitled to a claim for cancellation in accordance with Section 35 II 2 No.1 of the Federal Data Protection Act. Furthermore, he is granted an injunction pursuant to Sections 823 II, 1004 of the German Civil Code (BGB) analogously with Section 4 I of the German BdSG. Subsidiary, a claim under Sections 823 I, 1004 of the German Civil Code (BGB) can be considered analogously to Art. 1 I, 2 I GG for violation of the general right of personality. Due to the anonymity of the assessments, in most cases no action is taken against the perpetrator[50]. The data subject can only assert his claims with the operator of the platform. The liability of the operators in accordance with Section 7 II 2 TMG must be affirmed if they would not be responsible due to the liability privilege of S. 10 TMG, but reasonable control possibilities existed in concrete terms. Evaluation platforms are information and communication services within the meaning of the TMG. The liability privilege pursuant to Section 10 TMG only encomvarates the criminal and damages liability of the service provider, but not

[48] For a better understanding of the effectiveness of the European Convention on Human Rights in Italy Cfr. A.F. Uricchio, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.

[49] Vgl. Landesgericht (LG) Berlin, Urteil vom 31. Mai 2007- Zeitschrift für IT-Recht und Recht der Digitalisierung (MMR), 668 (2007).

[50] Cfr. A. F. Uricchio/ F. L. Giambrone, *Schlussfolgerungen,* in A.F. Uricchio, F.L.Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* Cacucci editore, 2020.

also the disruptive liability iSv section 1004 (1) sentence 1 BGB, so that the website operator can be held accountable by third parties and is responsible to them[51].

3. Case law in Germany on internet portals with doctor evaluations

The structure of physician evaluation platforms is described below, because this is of particular importance for the subsequent legal assessment. This is followed by a discussion of some of the judges in Germany that have been issued so far on medical evaluation platforms. The last section discusses the admissibility of these internet portals, with a view to the new rules of the General Data Protection Regulation.

(a) General search for a doctor

In Germany, there is no provision for the management of a list of doctors. At Jameda- according to the operator of the platform- the addresses of the doctors come from a leading provider for addressees in the German health sector[52]. The health insurance associations in Germany have the most up-to-date data on the addresses and qualifications of all doctors and psychotherapists established in Germany. Several of these bodies have set up doctor search services that are accessible to patients online, or provide information by telephone[53].

b) Premium packages paid for by doctors

In addition to the free standard fee, both of the doctors' portals listed here offer premium packages for a fee. This will give the appropriate doctor a portrait photo and receive additional additional benefits. Another important difference between standard entry and premium packages is, for example, in the case of the Austrian DocFinder, that when displaying the standard entry of a doctor at the foot of the website, reference is made in a very conspicuous way to other doctors in the area,

[51] Jahnel, *Meinungsäußerungsfreiheit und Datenschutz am Beispiel von Onlineplattformen*, 1 Schule und Recht (S&R), 37 (2015)
[52] www.jameda.de/hilfe/?show=premium (abgefragt am 14.7.2018).
[53] So die Information auf www.kbv.de/html/arztsuche.php (abgefragt am 14.7.2018).

who are among others premium customers of the portal operator of the same name.

c) Doctors performed by patients - Assessments

The third section of the doctor search portals consists of evaluations of patients. Highlighting the limits of admissibility of this part is an important concern of this master's thesis. c.c) Judiciary in Germany The admissibility of the publication of evaluation platforms on the Internet has occupied the courts in Germany for some time. A decision of the Federal Court of Justice (BGH) was already issued in 2014 on the leading platform for medical evaluations in Germany (www.jameda.de).

d) Facts:

The parties dispute the admissibility of the inclusion of a doctor in an evaluation portal against his will. The defendant operates[54] a doctor search and evaluation portal at the internet address www.jameda.de, where information about doctors and providers of other auxiliary professions can be accessed free of charge. The so-called basic data are offered as the defendant's own information. They include academic degree, name, subject area, practical address, other contact details as well as office hours and similar practice-related information, as far as they are available to the defendant. In addition, ratings can be called up, which users have evaluated in the form of a grade scheme and, if necessary, also in the form of free text comments. Such a rating requires prior registration, with an e-mail address to be verified as part of the registration process. The applicant is a resident gynaecologist. In the portal of the complained, he is guided with his academic degree, his name, his subject area and his practical address. In 2012, he underwent an evaluation several times. At the end of January 2012, after the plaintiff became aware that he had been assessed in the defendant's portal, he demanded that she delete his entry completely, most recently by means of a lawyer's letter. The defendant refused. The district court dismissed the action for the deletion of his data published on the website www.jameda.de, for failure to publish his personal

[54] For a deeper understanding regarding federalism Cfr. A.F.URICCHIO, *Italien der Autonomien. sanfte Entwicklung und Föderalismus (zusammenfassung)*, in A.F URICCHIO, F.L. GIAMBRONE, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses*, Cacucci editore, 2020.

and professional data[55] on the said website as well as for the reimbursement of pre-trial attorneys' fees.

d.d) Reasons for the decision:

The collection and publication of doctor's assessments on an internet portal is carried out for the purpose of transmission, so that the admissibility under data protection law must be investigated on the basis of Section 29 of the Federal Data Protection Act; the media privilege does not apply. By including a doctor in a portal for doctor evaluations, the doctor is violated in his right to informational self-determination, moreover, the constitutionally protected right to practice the profession is affected, corresponding assessments must be tolerated even without obtaining the consent of a doctor, as long as there are sufficient possibilities to prevent extensive violations of the law. As in the case of spickmich.de before, this decision of the BGH also focused on a balance of interests between the interests of the portal operator and the interests of the doctor concerned. The storage of the data at issue must be regarded as admissible in accordance with Paragraph 29 of the German Data Code (BDSG). The standard of examination is regulated uniformly by the regulation of section 29 (1) sentence 1 BDSG. Admittedly, it is undisputed that the so-called basic data were taken from generally accessible sources. In a single analysis, the admissibility of their storage would therefore be subject to the sentence , compared to section 29(1) of the sentence. 1 No. 1 BDSG to examine the less stringent provision of Section 29 (1) sentence 1 no. 2 BDSG. However, the circumstances of the dispute require an assessment in connection with the storage of the assessments submitted, since only the joint use of the data fulfils the purpose pursued by the defendant[56].Pursuant to Section 29(1) sentence 1 No.1 of the German Data Protection Act (BDSG), the collection and storage of personal data for the purpose of transmission is permitted if there is no reason to believe that the data subject has a worthy interest in the exclusion of collection or storage. The corresponding concept of the interest in which it is worthy of protection, which is worthy of added value, requires a balance to be weighed up in the interest of the data subject in the protection of his data and the importance disclosed to him by the disclosure and use of the data, with the interest of the users

[55] For a better understanding of the effectiveness of the European Convention on Human Rights in Italy Cfr. A.F. URICCHIO, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.

[56] Vgl. Bundesgerichtshof (BGH), Urteil vom 23. Juni 2009 – VI ZR 196/08 –, Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) 181, 328-345; siehe auch LG Hamburg MMR 2011, 488, 489; Roggenkamp, K&R 2009, 571.

for whose purposes the storage takes place, taking into account the objective order of values of fundamental rights[57]. For this consideration, the principles developed in the judgment of the Recognizing Senate of 23 July 2009 must be consulted. For the benefit of the doctor, the BGH has not only based on the right to informational self-determination, but has also taken into account the constitutionally protected right to the free exercise of the profession. On the other hand, Jameda had to be assessed for the right to freedom of communication resulting from Article 5 of the Foundamental Law in Germany. The defendant operates a doctor search and evaluation portal on the website www.jameda.de, where information about doctors and providers of other medical professions can be accessed free of charge. For the benefit of the doctor, who is cited on the one hand as a resident gynaecologist and, on the other hand, as a plaintiff in the dispute, the BGH confirmed that negative assessments may well constitute a legally significant interference with the right to informational self-determination. Of course, negative reviews of a doctor can even put his professional existence at risk. Nevertheless, the BGH came to the conclusion that a doctor must also accept assessments without his consent. With regard to its reasoning, the Bgh points out that doctors who offer their services to everyone are basically also exposed to public criticism of their services and must also endure them[58]. Such criticism is to be endured as long as the criticism is factual and not personally offensive. The limit is only crossed when there is a risk of stigma, exclusion is to be feared or could have a pillory effect. In this case, the BGH considered it important that Jameda does not take over the medical evaluations unchecked and that the possibility is provided against the publication of unauthorised assessments. All reviews are checked automatically by Jameda. When abnormalities occur, a manual examination follows. In conclusion, it can be stated that the BGH has indicated that evaluation portals may in principle publish third-party assessments without the consent of the persons concerned. Doctors are even complained about the fact that their reviews are freely available on the Internet, and must accept them. However, it is necessary to ensure that the persons concerned are given the opportunity to counter unjustified assessments on a case-by-case basis.

e) Jameda II (BGH 1.3.2016, VI ZR 34/15)

[57] Vgl. BGHZ 181, 328= ZUM 2009, 753 Rn. 26; BGH NJW 1986, 2505, 2506; MDR 1984, 822 f.; VersR 1983, 1140, 1141; Gola/Schomeurs, BDSG, 11 Auf.,§ 29 Rn.11.

[58] For a better understanding of the effectiveness of the European Convention on Human Rights in Italy Cfr. A.F. URICCHIO, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.

In a new case against Jameda, a dentist demanded the deletion of a negative assessment and was able to obtain at least a referral back to the BerG. The plaintiff dentist appears as the owner of a larger practice in which other dentists are employed in addition to him. A rating was announced at Jameda for his person, in which he received the overall score of 4.8. In terms of <<Behandlung>>.<<Aufklärung>> and <<Vertrauensverhältnis>>, the user gave the worst rating. Commenting, the user said he had been careful to look at the review. After the anonymous assessment was published, the rated dentist took action against Jameda and challenged his discretion the unfounded and unsubstantiated assessment. It even questioned whether the user had ever been his patient. In view of this contradiction, Jameda has taken precautions and provisionally blocked the submitted review and contacted the user. The latter answered jam in the affirmative of Jameda's assessment, which was republished in retrospect. Despite the request of the dentist, Jameda has neither disclosed the identity of the dentist nor provided the requested confirmation of the user. After the out-of-court procedure was unsuccessful, the doctor prevailed at first instance. The Regional Court of Cologne followed the dentist's argument and substrated the publication of the individual evaluations with note 6. The OLG Köln had overturned Jameda's conviction at second instance and dismissed the action in its entirety. The BerG had classified the assessments of the dentist as an expression of opinion. The plaintiff dentist claimed the defendant Jameda's website to refrain from distributing an assessment made in a doctor's evaluation portal by a third party. To which the defendant replied: << The grade rating corresponds to freedom of expression and is protected by the law. In his feedback, the user explains which events have led him to give such a grade assessment. Many patients describe their results and experiences in short form and avoid a description of factual statements (even if they correspond to the truth), as these are often unproven.>> As regards the question whether treatment had taken place at all, the court satisfied that the user had to confirm that. In the final term, that declaration could not be further reviewed and, furthermore, it should not be made available to the doctor without obtaining his consent. In the end, the BGH overturned the judgment of the BerG without having itself taken a final decision. The procedure was also referred back to the BerG for re-decision-making[59].

e.e) Reasons for the decision:

[59] So die zutreffende Konklusion von S.Meyer in seiner ausführlichen Entscheidungsbesprechung, jus IT 2016/54, 114 116.

The Court of Appeal considers that the plaintiff is not entitled to refrain from publishing or disseminating the contribution at issue against the defendant. In support of its reasoning, it stated, in essence, that the defendant, who was only in its position as host provider, could only assume liability as an indirect disruptor with regard to the third-party content posted on its website[60]. However, the conditions required for that purpose, according to the blog entry decision of the recognizing Senate, were not met in the pending dispute, since the defendant had complied with the obligation to examine the proceedings which it subsequently took with the measures taken by it and announced against the applicant. In a September 2014 decision, the Senate ruled that doctors are not entitled in principle to not being evaluated or listed at all on appropriate evaluation portals. Unless the content is illegal, such assessments do not violate data protection law or the personal rights of the assessor. In its grounds of judgment, the BGH initially denied whether a review portal would adopt the ratings of its users[61]. Even if the evaluations given are examined before publication, this is not sufficient to identify them with the assessments submitted. Within a review, only a check is carried out on a regular basis as to whether the content is not recognizably illegal or whether a liability risk emerges from the assessments. Insofar as an assessment passes through this examination successfully, it remains with a foreign content, which as such is also clearly noted. However, in any case, a review of the foreign content must be started from the knowledge of a possible personality injury. In doing so, the BGH found that not only factual claims must be examined in the context of a complaint, but also value judgments. In that regard, it is necessary to examine at least one examination as to whether the underlying factual basis is at all true. A doctor does not have to be expected to leave such assessments on his own, which are not based on the reviewer's own knowledge. In doing so, it is primarily necessary to determine the effort with which the provider has to verify, in particular, factual basis for an assessment. In that regard, the BGH states that the specific standard of assessment must be investigated with regard to the circumstances of the relevant case and points out that the examination obligations are subject to strict requirements. Nevertheless, the BGH argued that the operation of an evaluation portal for doctors is a function approved by the legal system and socially desirable. This clearly stated that the provider of a valuation portal must carry out a review of its possibilities, the latter of which must not have an economic

[60] Bundesgerichtshof (BGH), Senatsurteil vom 25.Oktober 2011- VI ZR 93/10, Entscheidungen des Bundesgerichts in Zivilsachen (BGHZ) 191, 219.
[61] Cfr. A.F.Uricchio, *Equilibrio finanziario e prospettive di riforma della finanza locale tra fiscalità di prossimità e neocentralismo*, in AA.VV., Per un Nuovo Ordinamento Tributario. Contributi Coordinati da Victor Uckmar in Occasione dei Novant'anni di Diritto e Pratica Tributaria, Cedam.

or disproportionate effect on the provider. In the specific case, the BGH took offense to the concept of control practised by Jameda because only a formal examination was carried out. For example, defendant Jameda stated << As part of our quality audit, we wrote to the evaluator and asked for confirmation of the assessment, As well as an explanation. The evaluator confirmed the evaluation in great detail. Subsequently, we had no indications that led us to doubt the authenticity of the evaluation. A check of this feedback is always done manually by us, especially background data (e.g. e-mail address) which is sent with the submission of a review, for a possible multiple evaluation. The grade rating corresponds to freedom of expression and is protected by the law[62].>> Thus, even this decision of the BGH - with regard to the referral back to the BerG- has still not brought with it the hoped-for legal certainty regarding the operation of an evaluation portal and the action against individual assessments. It can be concluded that doctors- as well as all other professions must therefore accept the fact that they are judged in public by their patients. It makes sense that this assessment can be carried out anonymously, because otherwise every patient would have to be afraid of being directly prosecuted by his doctor when expressing a critical assessment. In the recent decision, the BGH has again stated that an evaluation portal cannot in any way be persuaded to disclose information about its users and thus to hand them over to judicial claims. In order to ensure that the doctor is not exposed to protection, the case-law requires that a downstream examination of assessments, if they are specifically challenged, be carried out. This obligation to carry out examinations was established in this judgment by the BGH, after the first decision had dealt primarily with the general admissibility of assessments. In the relevant case of Jameda, the Federal Court of Justice thus requires that, if necessary, the discussion with the doctor check whether the user has actually been treated by this doctor, if this is disputed[63]. In its explanatory statement, the BGH assumes that the formulation of the evaluation and the school grades awarded are a value judgment. However, as the BGH correctly assumes, this form of evaluation, which is fundamentally protected by freedom of expression (Art.5 sec. 1 GG), always contains an actual verifiable basis - namely, the fundamental question of whether such treatment has actually ever taken place at the doctor assessed[64]. However, if such contact does not exist, a correspondingly published assessment must be considered as an unlawful attack on the general right of personality of the doctor.

[62] Bundesgerichtshof (BGH), Urteil vom 1.03.2016-VI ZR 34/15, Entscheidungen des Bundesgerichtshofes in Zivilsachen (2016).
[63] So die zutreffende Konklusion von S.Meyer in seiner ausführlichen Entscheidungsbesprechung, 54 jus IT, 114,116 (2016)
[64] Herrmann/ Schwarz, *Kommentar zu BGH, jameda .de II*, 6 Wettbewerb in Recht und Praxis (WRP), (2016).

In this case, the BGH rightly notes, there is no legitimate interest in the publication either by the author or the portal. In other words, no treatment can be evaluated at all. At the end of the day, it's right. Thus, a criticism of insult must first be regarded as such - the evaluator does not, after all, critically deal with a concrete, actual matter, but simply devalues the person concerned without any reason[65]. The BGH further specifies the burden of presentation and proof. The comments made by the BGH on the burden of proof should be highlighted. The Court first of all assumes that the dentist concerned is burdened with evidence for the fact that no treatment has taken place in accordance with the general procedural rules. In the main proceedings, therefore, the doctor affected by an assessment should lead to some kind of negative proof. He should be able to prove that what is described in the evaluation did not occur to him at all. This is a source of debate. As a general rule, the person who expresses facts infringing personal rights must prove their accuracy - and it is not for the person concerned to prove the untruth of the findings made about him. The BGH has handled the problem in a different way. For the fact that there has been a treatment or a customer contact at all, the portal meets a secondary burden of presentation. He is expected to do some research. To this end, the evaluator is asked to describe the alleged cherished contact with the person concerned and even to provide supporting documents , for example by submitting invoices.[66]The Federal Court of Justice has even gone further, passing on this secondary procedural burden to the pre-trial appeal proceedings. The BGH has thus equated the procedural burden of proof of the corresponding portal with the material inspection obligations of the portal in the complaint procedure. It is obvious that the examination and forwarding requirements now required by the BGH must already be observed in the complaint procedure. In the relevant case, the portal had indeed received a feedback during the complaint procedure, which also included some explanations. However, the portal had not forwarded this to the appropriate doctor, but merely pointed out that the author had confirmed the assessment. It was only in the course of the court proceedings that the user's opinion was presented. The BGH has now referred the case back to the OLG Cologne. The aim is to allow the parties to submit additional observations to the audit measures taken by the evaluation portal. The portal is allowed to comment on whether and to what extent the procedure now developed by the BGH from the complaint procedure to the verification procedure has been handled. Otherwise,

[65] For a better understanding of the effectiveness of the European Convention on Human Rights in Italy Cfr. A.F. URICCHIO, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.
[66] Herrmann/ Schwarz, Kommentar zu BGH, jameda .de II, 6 Wettbewerb in Recht und Praxis (WRP) (2016).

the BGH would consider the assertion that no treatment had taken place to be admitted within the meaning of Paragraph 138(3) of the ZPO.

Jameda III (BGH 20.2.2018, VI ZR 30/17)

In this judgment, the BGH was called upon to decide whether the inclusion of a doctor's personal data against her will in an evaluation portal on the Internet was permitted. The applicant was a resident dermatologist and allergist. The defendant operates a doctor search and evaluation portal at the internet address www.jameda.de, where information about doctors and providers of other medical professions can be accessed free of charge. The portal is visited by at least 5 million Internet users each month. In the portal, the doctor was recorded as a non-payer against her will without an image with her academic degree, her name, her subject area and her practice address in the standard entry of the online portal Jameda. When her profile was retrieved on the defendant's portal, the following physicians << were listed under the heading dermatologists in the area>> other doctors with the same subject area and a practice close to the applicant's ordination. In addition to the note from the other doctor concerned, it was also explained the distance between his practice and the applicant's practice. The applicant has been awarded several evaluations in the past. In 2015, it challenged a total of 17 retrievable reviews on the defendant's portal. After its deletion, the applicant's overall score had risen from 4.7 to 1.5. The applicant then insisted on the deletion of its application. The applicant then insisted on the deletion of its application. In that case, the BGH upheld that action. The BGH had first referred to its preliminary judicature, according to which it was clear that the storage of personal data was in principle permitted with the evaluation of doctors by patients. However, the relevant case stood out from the decision-making so far on a crucial point: jameda had left the position of a neutral information mediator in the opinion of the BGH, through the previously described practice of prominent references to doctors who paid premium packages, which was linked to the evaluation portal. In the case of non-paying physicians, in addition to the basic data and the evaluation of the corresponding doctor, the Internet user was also shown information on locally competing doctors with distance information and grades by means of a cross-bar display. There is no sorting of the displayed doctors according to the overall grade; it is not only doctors who have a better overall score that are shown. On the other hand, the defendant does not hide competitors from doctors who have registered with her for a fee and booked a premium package. The defendant advertises its services to doctors by saying that the individually designed profiles of paying customers are called up much more frequently. At the same time, by displaying his

or her individualised profile on the profiles of non-payers, the paying customer achieves additional attention from users. A premium entry also increases the discoverability of its profile via Google. On the profile of its premium customers, however, Jameda - without disclosing this sufficiently to the Internet user at this point - did not disclose such fades, as already mentioned elsewhere. The BGH then concluded that if Jameda thus withdraws in its role as a neutral information mediator in favour of its advertising offer, the legal position based on the fundamental right of freedom of opinion and media can be asserted only with lesser weight than the applicant's right to the protection of its personal data. That had led to a predominant position of the applicant's fundamental rights in the case pending, so that it had a worthy interest in the exclusion of the storage of its data. According to this judgment of the Federal Court of Justice, Jameda removed the crossbar with the advertisements of locally competing doctors from the basic display. Thus, the claim for cancellation no longer exists in so far as it could be inferred from the judgment discussed.

f) Reasons for decision

The revision was successful. The BGH had upheld the action. According to Paragraph 35(2) sentence 2 No. 1 of the German Data Code (BDSG), personal data must only be deleted if their storage is inadmissible. That would be the case here. Paragraph 35 of the BDSG, like the other provisions of the third section of the BDSG, applies in the event of a dispute. The scope of the BDSG is open under Paragraph 1 II No. 3 of the BDSG that of the third section of the BDSG under Section 27 I 1 No. 1 bdSG. As a legal person governed by private law, the defendant is a non-public body in accordance with Paragraph 2 IV 1 of the BDSG and processes personal data within the meaning paragraph 3 I of the BDSG, via the applicant using data processing equipment. The media privilege within the meaning of Section 57 I 1 RStV, 41 I BDSG also does not preclude the unrestricted application of the BDSG[67]. However, due to the BerGer. findings are not considered to be the result of a journalistic-editorial processing of the evaluations. According to the judgment of the Senate of 23 September 2014 and paragraphs, it is not valid to store the applicant's data at issue. 29 BDSG, since the processing of data is carried out for the purpose of transmitting data. Since data processing is already inadmissible under Paragraph 29 of the BDSG, it may be left to one side whether the data processing is also used as a means of fulfilling certain business purposes of iSv 28 BDSG on the

[67] Vgl. Senat, BGHZ 202, 242 = NJW 2015, 489 Rn. 12- Ärztebewertungsportal II; BGHZ 181, 328 = NJW 2009, 2888 Rn. 17 f.- spickmich.de; ferner Simitis/Dammann, BDSG, 8 Auf. , § 3 Rn. 7 ff.

basis of the applicant's business model to be used in the dispute and is not permitted under that provision. The standard of examination is uniformly decided by the provisions of Section 29 I No. 1 of the German Federal Data Code (BDSG). It is true that it is undisputed that the so-called basic data have been taken from generally accessible sources. In a case taken individually, the admissibility of their storage would therefore have to be assessed in accordance with the less stringent provision of Section 29 I 1 No.2 of the BDSG, which is less stringent than Section 29 I 1 of the German Federal Data Code (BDSG). The circumstances of the dispute presupposed an assessment in connection with the storage of the assessments, since only the joint use of the data fulfils the purpose pursued by the defendant[68]. Unlike the Jameda case, which was decided by the BGH in 2014, the defendant here leaves the position as a neutral information mediator[69].While it provides the internet user who is not paying a doctor's profile with the basic data and the evaluation of the doctor concerned and provides him with information on local competing doctors by means of the cross-bar display, it does not allow on the profile of its premium customer – without disclosing this sufficiently to the Internet user there - such advertisements, which are informed about the local competition. The applicant's right to informational self-determination prevails. However, if the defendant thus withdraws in its role as a neutral information mediator in favour of its advertising offer, it may, in its right to freedom of expression and media (Article 5(1) sentence 1 of the Basic Law, Article 10 eCHR), take advantage of the applicant's right to protection of its personal data (right to informational self-determination, Article 2(1) of the Basic Law in conjunction with Article 1. , Article 8(1) of the ECHR) even with a lower weight, the BGH continued. That leads to a predominant position of the applicant's fundamental rights in the present case, so that it has a worthy interest in the exclusion of the storage of its data (Section 29(1) sentence 1(1) of the BDSG). In the present case, the admissibility of data storage is determined not only in accordance with Paragraph 29 of the German Federal Data Code (BDSG), but also in accordance with Paragraph 28 of the German Data Code (BDSG), since the defendant pursues its own business purposes by using the data. It offers doctors the conclusion of paid contracts for the design of their own profile, which is displayed to the defendant, in which, unlike the basic profile of the non-paying plaintiff, no advertisements of direct competitors are displayed. This obviously goes beyond the mere transmission of

[68] Vgl. BGH, Urteil vom 23. September 2014 – VI ZR 358/13 –, Entscheidungen des Bundesgerichtshof in Zivilsachen (BGHZ) 202, 242-258; NJW 2015, 489 Rn. 24 – Ärztebewertungsportal II und BGHZ 181, 328; NJW 2009, 2888 Rn. 25; s. auch LG Hamburg, MMR 2011, 488 (489); Roggenkamp, K&R 2009, 571.
[69] BGH, Ärztebewertung im Internet-jameda.de, BeckRS, 20426 (2014)

data to the portal users[70]. This leads to a predominant position of the applicant in the event that the defendant's interests, referred to in particular in the Senate judgment of 23 September 2014, predominate the applicant's position on fundamental rights, so that it has a worthy interest in the exclusion of the storage of its data within the meaning of Paragraph 29 I 1(1) of the German Data Protection Act (BDSG). Nothing else arises from the question of the admissibility of advertising on websites under competition law. The dispute is not the case here, but the question of whether there is reason to believe that the applicant has a worthy interest in the defendant's exclusion of the collection or storage of its data. This is the case after the foregoing[71].

g) Jameda IV (OLG Hamm 13.3.2018, 26 U 4/18 (legally binding)

More recently, the OLG Hamm has had to deal with the question of whether Jameda can be obliged to delete the patient evaluation, a patient forgoes education/advice and her prosthetic solutions are partly wrong. In the procedure carried out, the dentist was able to prove that her patient, who was responsible for the evaluation, had in fact been informed by her. This could be found in the patient records of their treatment with the dentist. Since it could be assumed that the patient could be informed, the assessment on the medical portal that the dentist foregoing an education/advice was therefore wrong, therefore Jameda had to be prevented from publishing such a false fact[72]. On the other hand, in the context of a summary examination in the interim proceedings, the General Court had not been able to find that the factual assertion of its patient that the dentist's prosthetic solutions were partly incorrect was not true either[73]. That question could not be resolved without expert opinions, which Jameda was not obliged to obtain in the present proceedings. In that regard, the request was not upheld in that regard, given that the burden of proof was the inaccuracy of the allegations of error of treatment in the relevant proceedings. In the end, Jameda felt obliged to remove the patient evaluation, that the dentist forgoes an education/advice, from her platform, but not the claim that her prosthetic solutions are partly wrong.

[70] BGHZ 202, 242, NJW 2015, 489- Ärztebewertungsportal II.
[71] BGH, Aufnahme eines Arztes in Internetportal gegen dessen Willen- Ärztebewertungsportal III, NJW 2018, 1888.
[72] For a better understanding of the effectiveness of the European Convention on Human Rights in Italy Cfr. A.F. Uricchio, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.
[73] Cfr. Ch. Smekal, *Stabilisierungspolitik im Bundesstaat,* Wirtschaftsdienst, Verlag Weltarchiv, Hamburg, Vol. 58, Iss. 5, pp. 231-235

g.g) Reasons for decisions

The OLG Hamm was right to affirm the reason for the order. The supreme court case-law has passed on the responsibility to the portal operators as to whether or not an assessment complained of by the assessor is deleted. The portal operator is responsible as an indirect disrupter from the time of knowledge of the infringement[74]. If the rated person complains about an assessment with the portal operator, the portal operator may be able to act to delete it. Since the operation of medical evaluation portals with regard to other portals, in s. The BGH calls for a careful examination of objectionable reviews by portal operators on news portals, which from the outset carries an increased risk of personality injuries. If the examination period were legally relevant to the question of the removal of urgency, disabled doctors would soon have to apply for an injunction. This would make the examination procedure pointless. The plaintiff in the order is entitled to refrain from making the statement. The claim follows from Sections 823, 1004 of the German Civil Code (BGB) analogously, Art. 1,2,12 GG. The statement complained of falls within the scope of the applicant's freedom of professional freedom and general right of personality. Honour and social recognition are particularly affected, because it has thus been expressed that the plaintiff in the order, in this case, does not comply with the necessary clarification and advice. This is why a balance is being weighed between the insb. By Means of Art.1 sec.1, 2, paragraph 1 GG, the interests of the applicant in the protection of his social recognition and professional honour, on the one hand, to weigh up the defendant and the freedom of expression of T on the other hand with the freedom of communication enshrined in Article 5(1) of the Fundamental Law. In that case, the interest of the plaintiff prevails because the statement complained of is a finding of a false fact. For the mere award of grades in individual sub-areas, the BGH has denied the existence of a statement of fact. This is followed by the Senate, because the decisive criterion in the classification can be seen in a grade scale, which by its very nature is essentially of an evaluation character[75]. However, that is not the case with the statement at issue and at issue. It is expressly claimed that there is no information or advice- and that of their complete absence. This is largely to be seen as a valuation. From the point of view of the readers of the entry, there is a factual assessment which is open

[74] BGH, , Zeitschrift für IT-Recht und Recht der Digitalisierung MMR 2015, 726 m. Anm. Milstein-Hotelbewertungsportal.
[75] Oberlandesgerichtshof (OLG) Hamm, Störerhaftung des Betreibers eines Ärztebewertungsportals, Zeitschrift für IT-Recht und Recht der Digitalisierung (MMR), 766, 768 (2018).

to the provision of evidence. The necessary implementation or non-execution of information and advice can be determined by means of objective means by means of taking evidence by hearing witnesses and evaluating the treatment documents. This cannot be countered by the fact that the average reader considers it probable that the author of the relevant assessment is a layman who is regularly unable to establish a treatment error. On the one hand, however, the layman is able to determine if he is not spoken to about the treatment and the procedures. On the other hand, it is not clear why readers should not perceive such representations for factual information. They are hoping for well-founded statements as a decision-making aid, which is difficult to reconcile with the assumption of mere lay and thus unqualified statements. Normally, a patient is entitled to an injunction not to distribute the medical data collected about him in accordance with Section 823 (2) of the German Civil Code (BGB), Section 203 (1) No. 1 StGB (Criminal Code). In that case, the T did not appear to have made such a claim. Instead, she made herself available as a witness in opinion v. 3.9.2017. In the opinion of the Senate, this is a implied consent to the exploitation of the medical records, especially since the patient T herself disclosed in her affidavit the facts which, in her opinion, were notable for secrecy. An incorrect collection of evidence would also lead to a requirement to use evidence. Such a party would not apply for the reasons set out above. The defendant is liable as a troublemaker. However, she is not classified as an immediate disrupter because she has not adopted the content posted on the Internet, i.e. has not visibly assumed the content responsibility for the contributions published on the website as her own. However, she must be regarded as an indirect disrupter. In the event of a breach of personal rights, the provider must intervene if it is confronted with its specific complaint by the person concerned in such a way that the infringement can be accepted in the affirmative on the basis of the claim of the person concerned. The Federal Court of Justice[76] has also made requirements for the examination procedure, which go towards obtaining the widest possible possible mutual opinions. The defendant complied with these requirements. However, according to the Senate, the defendant did not draw the right conclusions.

Even after the content of T's comments of 12.7.2017 and 3.9.2017, there were discussions and statements with the plaintiff, so that the blanket assertion in the evaluation could not continue. Furthermore, according to the opinion of 3.09.2017, Ms T herself did not want to claim complete consent to the treatment. On this basis, the statement of fact previously made could not be republished unchanged. The re-publication on 10.10.2017 justified the liability as an indirect disrupter. It was for

[76] Cfr. Ch. Smekal, *Stabilisierungspolitik im Bundesstaat,* 58 Weltarchiv, 231, 235.

this reason that the defendant had to be ordered to refrain from failure on that point, in accordance with the request. However, the plaintiff is not entitled to the allegation to be injunctiond:<< Ms W's prosthetic solutions were partly false...>>. A corresponding claim does not result from a violation of the general right of personality in accordance with Sections 823 of the German Civil Code (BGB), Section 1004 of the German Civil Code (BGB) analogously, Art. 1 and 2 GG. However, there is also a statement of fact. The allegation of a false prosthetic solution concerns the existence of treatment errors, which in turn is accessible from the reader's point of view of the assessment. This applies indibelly in so far as T manifestly complained in its opinion of 12.7.2017, citing the statement of two dentists, a technically incorrect solution with regard to the crowns, and in the opinion of 3.09.2017 refers in detail to the fact that the free bridge link solution is technically flawed. In this respect, it has explanations on the acting forces and the statics as well as on the need to supply the tooth No. 12 of a single crown. The patient was out to complain about the fact of a treatment error. This also became clear to the reader, who was wrongly accessible to the evidence and understood as a statement of fact. An injunction is also not granted under Section 280 of the German Civil Code (BGB) because of a violation of ancillary obligations arising from the contract of use[77]. However, it can be stated that it states that the assessment cannot be published if one of the reasons then given is implemented. It may also be considered true that one of the criteria is specific to particularly serious allegations. At the same time, the defendant refers to its examination procedure in accordance with the present action, that is to say, to the obligations of examination which result from the highest court case-law. It would appear that such an examination would be unnecessary if, in accordance with the guidelines of use, the defendant had to refrain from publication in the event of serious allegations, apart from publication. For this reason, it cannot be stated that the use directives should impose far-reaching rights and obligations as the obligations imposed by the case-law. There are no sufficient motives and indications as to such a weakening of the defendant's own legal position. It follows that the defendant is only partially liable. The LG's decision had to be amended in that regard.[78]

The General Data Protection Regulation[79]

[77] Cfr. A.F. Uricchio/ G. Albenzio/A.M. de Cicco/ E. della Valle, *Mercati Internazionali,* Dizionario merceologico, Edizioni scientifiche Ultra Limes, (2016).
[78] Vgl. Ch. Smekal, *Stabilisierungspolitik im Bundesstaat*, 58 Verlag Weltarchiv, 231, 235.
[79] Cfr. A.F.Urcchio, *Italien der Autonomien. sanfte Entwicklung und Föderalismus (zusammenfassung*), in A. Uricchio, F.L. Giambrone, Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses, Cacucci editore, (2020).

Already from the overview of the highest judicial judiciary in Germany it can be emphasized that a variety of regulations from the most diverse fields of law can apply to the publication of postings, value judgments, product reviews, reviews, insults, insults, etc. Reference is made below to those provisions of the GDPR which played a role in the assessment of the three different parts that made up physician evaluation platforms. Finally, the General Data Protection Regulation is referred to with reference to its uniform integration in the Member States.

4.1) A single data protection in Europe

The European Parliament adopted the EU General Data Protection Regulation on 14 April 2016. The scheme will be applied directly in all EU Member States from 25 May 2018 (see Article 99 GDPR) and will replace Data Protection Directive 95/46/EC and a large part of the member states' legislation on data protection[80]. By introducing this single European new regulation, the EU has implemented the largest reform project in the field of data protection in recent decades. The adoption of the GDPR will revamp EU data protection law, codite the case law of the Court of Justice of the European Union and significantly strengthen consumer rights within the digital market[81]. Thus, on the one hand, the GDPR meets the need to update the legal situation, which is largely due to the increase in data traffic and exchange as well as the globalised digital market[82]. The progressive networking and the continuous acceleration of the economy and society have made an assertive instrument for modern data protection necessary[83]. The General Data Protection Regulation (GDPR) puts a stop to the growing fragmentation of the market through extensive European unification, thereby creating a level playing field and legal certainty in the European internal market. However, it is not only economic interests that have required a recasting of European data protection. On the other hand, due to the digitalisation of everyday life, the fundamental right to the protection of personal data as an individual right and its central codification in Art.

[80] Verordnung (EU) 2016/679 des Europäischen Parlaments und des Rates vom 27.4.2016 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten, zum freien Datenverkehr und zur Aufhebung der Richtlinie 95/46/EG (Datenschutz- Grundverordnung), abrufbar unter: http://eur-lex.europa.eu/legal-content/DE/TXT/?uri=uriserv%3AOJ.L_.2016.119.1.200001.01.DEU.

[81] Albrecht/Janson, CR 2016, 500-509, 501.

[82] Cfr. Ch. Smekal, *Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften*. Ein *Vergleich zwischen der Bundesrepublik Deutschland und Österreich,* in, G.Kirsch/ Ch. Smekal/ H. Zimmermann, Beiträge zu ökonomischen Problemen des Föderalismus.

[83] Zur Kritik an den durch die Handlungsform einer Verordnung entstehenden neuen Rechtschutzkonstellationen s. Klar, Privatsphäre und Datenschutz in Zeiten technischen und legislativen Umbruchs, DÖV, 103, 111(2013).

8 GRCh and art. 16 TFEU have become enormously important. Interventions are currently permitted under the GDPR on the basis of an explicit legal permission or the active consent of the party concerned (see Art. 6 GDPR), and furthermore, an intervention in the case-by-case assessment must be proportionate. The above-mentioned duality of the legislative regulatory impulse highlights the general dual role of data protection law[84]: it proves to be a regulatory right with regard to the exchange of data as well as an individual right of protection[85].There are, of course, follow-up questions from the opening clauses contained in the GDPR. The far-sighted new regulation raises important follow-up questions in the European context. Answering follow-up questions will be the task of legal practice, the courts and politics. This is particularly important for the opening clauses contained in some places in the GDPR, some of which have caused criticism. For example, the GDPR is partly alleged to have failed to achieve full European harmonisation of data protection legislation[86].

4.2) Function of opening clauses

Opening clauses will encourage Member States to provide for specific provisions on certain areas. Thus, in the field of public data processing, in the context of legality requirements in Article 6 and restrictions on individual rights in Article 23, the requirements for the consent of parental responsibility within the framework of art. 8, the special legislation governing sensitive data within the framework of Article 9, in the case of data processing in the employment context (Art.88), on the restrictions on individual rights for archives, science, research and statistics (Art. 89 para. , in the case of the rules on access to public documents (Art. 86) and, furthermore, for national indicators (Art. 87) as well as for the data protection supervision of professional secretaries (Art. 90= and Kirchen (art. 91) in addition to the GDPR, also apply parallel member state standards within the framework of opening clauses. Such a regulatory technique is probably not uncommon in the European judicial area, but this will prove to be a major problem with a view to full harmonisation of data protection.

[84] A.F.Uricchio *Die zwischen der Haushaltsaufsicht*, den außerordentlichen Finanzinstrumenten und der sogenannten windfall taxes anfallenden kosten der sozialrechte, in A.F. Uricchio, F.L. Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen* Entwicklungsprozesses, Cacucci editore, (2020).

[85] Vgl. Nettesheim in Grabenwarter, *Europäischer Grundrechtsschutz*, 2 EnzEuR , § 9 Rz. 52 (2014).

[86] Vgl. Schriftliche Stellungnahme von Alexander Roßnagel zum öffentlichen Fachgespräch zur Datenschutz- Grundverordnung am 24.2.2016 im Anschluss Digitale Agenda des Deutschen Bundestags, Ausschussdrs. 18 (24) 94, S. 1 ff.

The opening clauses in the GDPR underline that negotiation and consensus-building have sometimes been difficult to achieve and that Member States have essentially steadfastly insisted on certain room for manoeuvre within the framework of an EU-wide standard that is fully harmonised. It is almost certain that this is also an effect which has been increasingly expressed by the choice of the regulatory form, namely that of a directly applicable EU regulation. The regulatory technology to be used with regard to the opening clauses in the GDPR requires a profound debate. In view of the European compromise reached and the associated success of far-reaching data protection through the GDPR, the possibility or necessity of Member States' regulations should not be too confusing at first. At the end of the day, the GDPR seeks to provide a comprehensive and, in principle, complete uniform legal framework, but at the same time imply some design skills and obligations for Member States. As a result, however, the regulation as a basic regulation is more of a hybrid of regulation and directive. As a regulation, it merely does not regulate all legal issues itself, but rather entrusts the Member State legislature with a narrowly limited responsibility for the specification of the uniform rules of regulation[87] on the basis of opening clauses. The dissatisfaction expressed in some cases in the treatments with the compromise reached on such opening clauses, in particular with regard to Article 85 GDPR, is an attempt to unify the data protection regime, but the competence of the EU would have to be transferred in order to ensure a uniform regulation of data protection within the EU.

a) Article 85 GDPR - Opening clause

The most important opening clause of the GDPR is reflected in Article 85 GDPR, which contributes to regulating the relationship with freedom of opinion, press and information. This provision is essentially in line with its predecessor standard. Article 9 of the Data Protection Directive (RL/46/EC). Accordingly, by means of legislation, Member States shall reconcile the right to the protection of personal data in accordance with this Regulation with the right to freedom of expression and information, including processing for journalistic and scientific purposes and for scientific, artistic or literary purposes. Because of the clear wording, Member States are obliged to regulate. They must bring about the required harmony themselves through Member States' regulations.

b) No general media privilege

[87] Ch. Smekal, *Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften*. Ein *Vergleich zwischen der Bundesrepublik Deutschland und Österreich,* in, G.Kirsch/ Ch. Smekal/ H. Zimmermann, Beiträge zu ökonomischen Problemen des Föderalismus.

For the purposes of Article 85 GDPR, the use of personal data for journalistic, academic, literary and artistic purposes is also covered. In order to use it in this way, Member States must even provide for exceptions to the scope of the relevant data protection law (see Article 85(2) GDPR) where this is necessary to align the right to the protection of personal data with freedom of expression and information[88]. Each Member State shall forward to the EU Commission the legislation which it has adopted in the light of Article 85(2) GDPR and shall immediately notify any subsequent amending laws or amendments to those provisions adopted. (Art. 85(3) GDPR). Paragraph 2 is sometimes referred to as media privilege, which seems hardly useful in terms of the necessary balance. That is probably due to the fact that the media privilege to be completed by the Member States and thus to be awaited in its actual execution cannot be considered as a general privilege of opinion, which should, on the basis of the principle, be given priority over the right to protect personal data. This would not meet the fundamental conflict of interest and, in each case, particularly high levels of protection under the rule of law or democracy.

The general tension between data protection and freedom of expression

The right to the protection of personal data, on the one hand, and freedom of expression, the press and freedom of information on the other, on the other, regularly clash. A major reason for this is that the fundamental right to data protection is conceptually, according to German legal history, emerging from personal rights as a special outflow of the right to informational self-determination[89]. In a way, it is applied to personality rights, which in turn are closely linked to human dignity (as is the fundamental derivation from Art. 2 sec. 1 GG i.V.m. Art. 1 sec. 1 GG in the dogmatics of the BVerfG. The fundamental right to data protection in Article 8 of the GRCh is also based on that derivation, in which it is in itself completely independent and seems to establish an autonomous scope of application, which must also be considered as a protection mandate. The protection of the data subject and less of the data itself is superficial. On the basis of the protection of personal data, the fundamental right of freedom of expression and information is precluded by a fundamental right which is also formulated

[88] Albrecht/Janson, *Datenschutz und Meinungsfreiheit nach der Da- tenschutzgrundverordnung. Warum die EU-Mitgliedsstaaten beim Ausfüllen von DSGVO-Öffnungsklauseln an europäische Grundrechte gebunden sind – am Beispiel von Art. 85 DSGV*O, Computer und Recht (CR), 500-509, 502 (2016).
[89] Vgl. Albers, *Informationelle Selbstbestimmung*, 15 (2005); Grimm, *Der Datenschutz vor einer Neuorient*ierung, JZ, 585, 585 (2013); Rupp, *Die grundrechtliche Schutzpflicht des Staates für das recht auf informationelle Selbstbestimmung im Pressesektor*, 64 (2013).

independently in Article 11 of the GRCh and is also enshrined in the member states' constitutions or in Article 10 of the European Convention on Human Rights. The resulting legal positions must be brought into harmony in this way by means of practical concordance, so that both are optimally applied[90]. The weighing of the areas of freedom in question presupposes a fine-legal, differentiated solution. Due to the technical advances and the ease of recording of photographs and video recordings, as well as the ever-increasing possibilities of accessing personal data, the difficulties of interference with private life and data protection have probably increased. The necessary balance is being made in the Member States, including in the tension between personal rights on the one hand and freedom of expression, the press and freedom of information on the other. However, general far-reaching regulations in the form of legislation are likely to prove difficult in this balancing process, which is always dependent on individual decisions. At this point it should be noted that with the opening clause. In Article 85 GDPR, a crucial question of the extensive field of data protection remains referred by the EU legislature to the 28 National legal systems. This area of regulation is therefore largely taken up by the Member States. It therefore seems that, with regard to this field of balance, the objective of comprehensive harmonisation has been completely lost. The main reason for this is, first of all, the fact that the EU has so far not been able to provide regulatory information in the Member States in the areas of freedom of expression, the press and information. legislative action and was not able to establish comprehensive competence in this respect either. Furthermore, the Member States would not have accepted any further substantive provisions on these relevant regulatory areas with regard to binding data protection legislation. The fragmentation of Europe seems too far-reaching here, and the resulting divergence between the Member States is still too great[91]. At this point, it can be pointed out that Member States' autonomy in terms of European harmonisation seems undesirable precisely because, in the recent past, standards of protection for journalism and artists have been softened in parts of Europe. This can be illustrated, for example, in the course of the media legislative reforms carried out in Hungary and Poland, as well as the ongoing discussions on the control of public service broadcasting, as in Italy, among others. This development is likely to have reduced the necessary confidence in the standards of the rule of law in many respects. The fact that Member States could now use data protection law as a

[90] Zur praktischen Konkordanz grundlegend Hesse, 20 Grundzüge des Verfassungsrechtes der Bundesrepublik Deutschland, Rz. 72 (1999).
[91] Albrecht/Janson, *Datenschutz und Meinungsfreiheit nach der Da- tenschutzgrundverordnung. Warum die EU-Mitgliedsstaaten beim Ausfüllen von DSGVO-Öffnungsklauseln an europäische Grundrechte gebunden sind – am Beispiel von Art. 85 DSGVO,* CR, 500-509, 503 (2016)

further lever to restrict freedom of the press is likely to have increased this mistrust, among other things. In view of this overall policy scenario, criticism of Article 85 GDPR became increasingly loud in the course of the legislative process. on the other hand, it can be argued that the examples given above concerning the weakening of the standards of protection are individual cases which, from a european point of view[92], conflict with the obligations under primary law, in particular the rule of law, and the case-law that gives rise to them. The question arises as to what, in view of the absence of explicit Europe-wide standards within the scope of the GDPR, could therefore be a balance in terms of national legislative possibilities[93].

The problem of fundamental rights

The balance that is at the heart of the national legislators is essentially a question of individual, conflicting freedoms, which are delimited in the European legal systems by the areas of protection of fundamental rights. In resolving this problem, the national legislature must therefore, above all, put into question the fundamental rights which it must comply with with regard to its legislative activity. Since this is the problem of the question of fundamental rights to be applied, the problem arises as to which level of fundamental rights to apply. With regard to the subject matter of the examination - in this case the intervention of the national legislator on the basis of a European regulation - both national fundamental rights from the respective constitution and European fundamental rights can be taken into account under the Charter of Fundamental Rights. Furthermore, the ECHR acts as another European standard, which ultimately results in a three-tier system of fundamental protection. Thus, the problem is overlaid from the level of the simple law of the regulation upwards to the constitutional level. The resulting difficulties of delimitation between the fundamental rights levels have been simmering in the case-law for some time. It must be stressed that the debate on fundamental rights is often mixed up with other issues such as the competence of the final decision. This is due to the fact that the wider the scope of European fundamental rights, the wider the jurisdiction of the ECJ, whereas that of the BVerfG is consequently pushed back. It is also necessary to examine whether the Member States, when the opening clauses are to be filled in, implement se-re-enactment of EU law, that is to say, act within the

[92] Cfr. Ch. Smekal, *Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften*. Ein *Vergleich zwischen der Bundesrepublik Deutschland und Österreich,* in, G.Kirsch/ Ch. Smekal/ H. Zimmermann, Beiträge zu ökonomischen Problemen des Föderalismus.

[93] Vgl. Rangliste der Pressefreiheit vom 20.4.2016 von Reporter ohne Grenzen (abrufbar unter: https://www.reporter-ohne -grenzen.de/rangliste/2016/ueberblick.

scope of EU law and, in that way, are fully subject to European fundamental rights. The ECJ[94] believes that if European law does not give any scope for implementation, European fundamental rights must be applied. Furthermore, the ECJ considers that the application of European fundamental rights is also necessary in cases where details are regulated by the Member States, but they can choose between several options – thus there is scope for implementation. The application of European fundamental rights in situations such as the present weighing up of the provisions of the GDPR, which are referred to in Article 85(2), with freedom of expression, press and information, is likely to have been further strengthened by the broad interpretation of Article 51(1) of the GRCh in the Akerberg Fransson decision of the ECJ in 2013. The ECJ has extended its jurisdiction and scope in the area of fundamental rights to a great extent, without encountering significant opposition from the Member States' constitutional courts in the respective cases.

E) Member State leeway on Article 85(2) GDPR

To the far-reaching extent of Article 85(2) GDPR and article 85(1) GDPR, including questions of scope and remedies, liability and sanctions, a sector-specific provision is provided for by Member State law, to the extent that such legislation is deemed necessary to link data protection with freedom of the media and freedom of expression. Particular attention is paid to the possibility of restricting the right to be forgotten (Article 17(2) GDPR) in the interests of freedom of expression and the guarantee of free discourse, especially in the light of the decisions taken in recent years[95]. However, since freedom of expression and media is therefore universally constitutory with regard to a liberal democracy, there is an obligation for the German legislators in the Federal Government and especially for the Länder to regulate, so that the general data protection, which is not tailored to the media and the arts, seems to crush the freedom to express and communicate. This is especially true because the existing data protection press privilege only claimed to apply to institutionally consolidated journalistic and editorial media actors and not explicitly for the entire area of opinion and media. In this respect, the extent to which the concept of journalism will be redefined by the legislature is decisive. Media and cultural law is a matter for the Länder. An implementation by the Confederation, for example in the manner of Section 41 (1) of the German Federal Data Protection Act (BDSG) (BDSG) is not deemed necessary. Until 2018, the press

[94] Ch. Smekal, *Stabilisierungspolitik im Bundesstaat,* Wirtschaftsdienst, 58 Weltarchiv, Iss. 5, 231, 235.
[95] Art. 85 (2) DSGVO.

data protection law, especially in its main features, was regulated in Section 41 of the German Federal Data Protection Act (BDSG).
The federal government's legislative competence originally arose from Article 75(1) no.2 of the Basic Law. However, according to the federalism reform in 2006, which abolished Article 75 of the Basic Law, it had become questionable for the old BDSG whether the framework legislative competence, which continued under Article 125 a. paragraph 1 sentence 1 GG, still allowed the Confederation a corresponding regulatory competence[96], at least for the press sector. Admittedly, the Federal Government is granted the right of editorial development with regard to such framework legislation. Against the background of the comprehensive EU data protection reform and the fundamental transformation of the BDSG, however, it will be possible to assume with good reason that the federal government no longer has any competence. However, the majority of Media- and art-related German law is already state law, especially in the form of the press and media laws of the Länder as well as the Broadcasting State Treaty and in future the Media State Treaty. The Länder had to implement less substantive changes in the implementation and implementation, but rather to react to the change to the direct applicable ordinance and the abolition of federal law. In any case, the legislators in the federal government, and especially in the Länder, are now reluctant to use the entire standard in terms of media, cultural and utterance law to comply with the requirements of European law, in particular. to implement the principle of necessity. In the German constitutional order, media and culture are a matter for the Länder. This is enshrined in Art. 23 sec. 6 sentence 1 GG. However, the notification under Article 85(3) GDPR is, however, also a federal matter to the EU because of the responsibility for the external representation of the general government. The opening clause in Article 85 GDPR leaves a crucial question of the broad field of data protection referred by the EU legislature to the 27 member states of the law. This area of regulation is largely confined to the Member States. It is thus possible to state that the objective of far-reaching full harmonisation has been completely missed with regard to this field of weighing[97].

Digitisation and Europe

Many politicians, stakeholders, journalists and legal scholars have made it their mission to point out, by means of various examples, that in times of globalisation,

[96] Cfr. Ch. Smekal, *Stabilisierungspolitik im Bundesstaat,* Wirtschaftsdienst, 58 Weltarchiv, Hamburg, Iss. 5,231,235.
[97] Maiwald, in, Schmidt-Bleibtreu/Hoffmann/Henneke, GG, 14. Auf. 2018, art. 125 a Rn. 13.

European integration and other international trends (information technology) larger administrative units than federal states should be demanded and, in addition, competence adjustments, often leading to highly centralistic demands, have to be carried out[98]. The argumentation guidelines are based primarily on decision-making and administrative costs considerations and, in accordance with the zeitgeist surrounding public tasks, fit into the general complaint about too much bureaucracy, too high administrative costs, too many civil servants. From a financial economic point of view, however, they often prove to be reductionist or simplistic and follow more well-known but in many respects one-sided plausibility of literature as research-systematic evidence. Two arguments have been taken up at this point: since the assessment of a state organisation from a financial and economic point of view alone requires not only a cost and a benefit-resp opportunity cost evaluation, and should be familiar to everyone that, in addition to the pure administration costs, other cost potentials such as information gathering and control costs could be legally relevant, the published assessments all too often relate to a single dimension of the costs, alternating with the quantitatively easier-to-represent decision-making and administration costs.
It should be noted that for reasons of hypothetical notion that << size means low costs in the case of administration>>, the greater the cheaper, the more recent results of financial-economic research are omitted. Research results provide evidence that larger can also mean more expensive. Other authors, on the other hand, are committed to the hypothetical belief that there is underutilisation of capacities (frequency problem) or a problem of lack of participation in the areas of responsibility they highlight. The aforementioned utilization or participation studies are usually missing as justification. Again, other authors agree with the hypothesis that the specific local or national awareness and thus the desire for independent representation decreases over time. Representation decisions in larger, centralized administrative and governmental organizations would then be accepted.It must, of course, be pointed out in the latter context that homogeneous performance of tasks, which are in fact to be granted in the sense of uniformity of living conditions, can therefore be determined <<uniformly>> can only be organised according to minimal cost considerations of the most favourable level of organisation. Where room for manoeuvre is provided for, desirable and economically sensible, and perhaps even necessary, in addition to the balances made by the decision-makers and administrators, those on the part of the citizens must be protected and substantially taken into account. These considerations must be put in the historical as well as spatial context. Such considerations are ultimately

[98] Vgl. Chr. Smekal/ E. Thöni, Österreichs Föderalismus zu teuer?

exaggerated by society as a whole (e.B. division of power, democracy, subsidiarity, as well as macroeconomic systemic decisions. If today, for example.B orderly location competition is accepted as an efficient instrument for the establishment of companies, appropriate room for manoeuvre in spatial planning at all levels is desirable and advantageous. The question arises that the GDPR, e.g. in Europe or several implementing laws of the respective Member States or Länder follow in a federal state, the diversity of which raises the usefulness of the distribution of competences[99].

Federalist Sub-Principles

The economic and financial analysis of the distribution of tasks and financing in federal countries draws on the following assessment criteria in the form of federal sub-principles. The principle of fiscal equivalence and consistency of benefit dispersion and territory should be mentioned here. Olson points out that, from an economic point of view, an optimal federal structure is only achieved when the collectives making decisions on the relevant provision include all beneficiaries, stakeholders and stakeholders. As the goods and services provided are scattered throughout the area, the territory should cover the area of benefit diversification[100]. The former is referred to as the correspondence principle of the latter as a principle of congruence[101]. If the territory and the scope of the benefit spread differ, external effects, also called spillovers, occur. In the case of spillouts, for example, citizens outside the territory benefit from the goods in question, but without contributing to the costs. An attempt should therefore be made to internalise all externalities, i.e. to reconcile beneficiaries and payers. Ultimately, this would result in a large number of optimal single-issue organisations. It cannot be concluded from this that it would be useful to create a different deployment organization for each function or task. The large or large number of such organisations would no longer be possible from both the private and private sides, but would ultimately no longer be manageable and co-determined by the citizen. There are also various, in many cases high fixed costs associated with setting up the diverse delivery organizations. For this reason, in reality, different tasks and individual tasks are combined into a multifunctional government unit (jurisdiction). This is achieved in particular with the same spatial dispersion of the benefits of different tasks, but also in those cases where the costs of spillovers are lower than the cost savings with more

[99] Vgl. Chr. Smekal/ E. Thöni, *Österreichs Föderalismus zu teuer*?
[100] E. Thöni, *Politökonomische Theorie des Föderalismu*s, (1986).
[101] D. Biehl, *Die Reform der EG- Finanzverfassung aus der Sicht einer ökonomischen Theorie des Föderalismus* , in M. E. Streit (hrsg.), Wirtschaftspolitik zwischen ökonomischer und politischer Rationalität, (1988).

decentralized provision in the sense of, for example, optimal provision of competence[102].

5.2) The principle of subsidiarity

From an economic point of view, this widely used principle requires that the lower or smaller local authority should take priority in the provision of public goods and services when the preferential or frustration costs play a significant role in relation to production/supply costs and can thus be reduced. The corresponding principle is interpreted to the extent that in the event of a conflict - i.e. when the delivery costs increase more than the preferential costs decrease - the preferential costs are more weighted and the performance of tasks remains at the lower level. A particular problem of the application of this principle is the case of interpretation of the principle of subsidiarity in the EU Treaties. In contrast to the above, the EU Treaties are also interpreted in part as follows: whenever the EU level can perform tasks equally well or better than the national levels, it should take over the tasks. In the meantime, however, the majority is calling for the interpretation that, if the EU wants to take up tasks or want to take over, it, and not the national levels, must demonstrate its advantage.

5.3) The principle of optimal competence differentiation

As reality shows, it is necessary to draw the boundary between full competences and sub-competences, which are or are assigned to different competences. In the case of assignment to several levels, it follows that the individual levels are no longer autonomous in the performance of the sub-tasks. Instead, the tasks must now be carried out more in cooperation with the other body. As a consequence, the problem of transaction costs almost inevitably follows policy interdependence. When weighing up when the benefits of cooperation outweigh the disadvantages of policy integration, the corresponding preferential costs are very important.

6) Strengthening the EU's digital and technological sovereignty

As announced by the EU, Europe must become digitally and technologically sovereign in order to remain capable of action in the future. The EU wants to

[102] Vgl. Chr. Smekal/ E. Thöni, *Österreichs Föderalismus zu teuer*?

provide common responses to deal with technical developments in artificial intelligence, cyber or quantum computing. Europe cannot rely on foreclosure. It is in their fundamental interest to use and develop their innovative strength as a research-heavy continent with a broad industrial base in a fair competition. Europe must have its own skills at the top of the international level in key technologies, but in cooperation with like-minded partners it must ensure the openness of the European internal market[103]. High-performance, secure and sustainable digital infrastructures are an important foundation. Common European standards and standards must go hand in hand with the development of new technologies. It is also important to ensure that the European foundation of values is transferred into the digital age. With regard to European data policy, the focus is on innovation, responsible use, sustainability, data literacy and security. European data governance must be promoted, for example with regard to the agricultural sector and the use of data in the transport sector. A real European health data area must be set in place and the development of a << Code of Conduct>> on the use of health data. Europe must promote responsible, public and human-centred development and use of artificial intelligence (AI).The aim is thus to make the enormous value-creation potential of the key technology of artificial intelligence usable across all sectors. Applications of Artificial intelligence should contribute to the benefit of the liberal society. There must be no compromise on existing and European values and fundamental rights. Given the current GDPR and the Member States' discretion with regard to the granting of fundamental rights assessment portals, Europe currently has to reckon with reductions in such fundamental rights. Regulation should target risks, but also strengthen trust and enable innovations to realize the enormous value-added potential of AI[104]. A well-functioning digital market[105] is a prerequisite for the EU's competitiveness. A modern digital governance policy must be based on a modern digital governance policy that supports digital change through economic policy frameworks, while at the same time making it competitively and socially sustainable. Increasingly, technology also determines the struggle for international influence and thus becomes a decisive factor in foreign policy. Europe must actively address its positioning as a digital design power alongside the US and China technospheres. This is why Europe wants to boost the construction of European digital diplomacy by establishing a Digital Diplomacy Network between the foreign affairs of the Member States, led by the

[103] Cfr. Bischof K. Küng, *Damit sie das Leben haben. Leben mit Gott Ehe und Familie Lebenschutz.*
[104] Vgl. Deutscher Bundestag, *Die parlamentarische Dimension der deutschen EU- Ratspräsidentschaft vom 1.Juli bis zum 31. Dezember 2020.*(Deutscher Bundestag, Infobrief PE 6- 3010- 061/20).
[105] For a better understanding of the Italian financial science, financial law and public accounting Cfr. A.F. Uricchio/ V.Peragine/ M. Aulenta, *Manuale di Scienza delle Finanze, Diritto finanziario e contabilità pubblica,* Nel Diritto Editore, Roma.

EEAS. Within European development cooperation, too, Europe wants to further expand the possibilities of digitalisation and make use of it, for example by promoting digital capabilities and data-driven markets in Africa.

6.1) Online platforms

The European Union is committed to modernising the 20-year-old EU legislation on digital services and online platforms. << online platforms now play a central role in our everyday lives, our economy and our democracy. This also engoes a greater responsibility. Europe must be prepared to set its own rules. just as Executive Vice-President Margarethe Vestager has already said that a meaningful and innovative digital future must be designed. The current legal framework for digital services is already too old. It helped to support the growth of digital services in Europe, but has no answers to many of the pressing questions about the role and responsibility of the largest Internet platforms in particular. Europe urgently needs a modernised legal framework to stem the increasing regulatory fragmentation from member state to Member State to ensure that all people within Europe are protected online as well as offline. All European companies need a level playing field so that they can grow and innovate and compete globally. The safety of users, which is paramount and the guarantee of their fundamental rights, in particular their right to freedom of expression, must be systematically safeguarded. The first regulation would concern the principles of the e-commerce Directive, in particular as regards the freedom to provide digital services throughout the EU internal market, in accordance with the rules on the place of establishment, and a comprehensive limitation of liability for user-generated content. With regard to these principles, the Commission wants to make clear and modern rules on the role and obligations of online intermediaries in force, including for non-European intermediaries operating in the EU. A governance system is also needed to ensure that these rules are properly implemented throughout the EU internal market[106], while ensuring respect for fundamental rights. The second measure concerns the issue of a level playing field in the European digital markets, which currently have the role of <<Gatekeeper>> by a few major online platforms. The Commission is invited to examine rules aimed at addressing these market imbalances in order to give consumers the widest possible choice and to continue to compete for digital services in the single market and to incentivise innovation. The legal framework for digital services has remained unchanged[107] since the adoption of the e-commerce

[106] Cfr. C.A.Giusti, *La corporate governance delle societá a partecipazione pubblica*, (2018).
[107] Cfr. A.F. Uricchio/ V.Peragine/ M. Aulenta, *Manuale di Scienza delle Finanze, Diritto finanziario e contabilità pubblica,* Nel Diritto Editore, Roma.

directive in 2000. This Directive, which is a cornerstone for the regulation of digital services within the EU, harmonised the principles relating to the cross-border provision of services[108]. The Commission has also issued general guidance for online platforms and Member States on how to deal with illegal online content in the form of recommendations in 2018. However, further targeted measures need to be taken to coordinate cooperation between online platforms, public authorities and trusted organisations in areas such as combating illegal hate speech on the Internet or ensuring that products offered to European consumers on the Internet are safe. Europeans must be prepared to define online platforms.

6.2) Concepts of State Law and Economic Federalism

Federalism is referred to in state law as a form of organization of the state. The inherent idea of the federal state is based on a division of political powers and, with it, the state's performance of tasks between the Confederation and the member states, which is reflected in a federal constitution. The hallmark of the division of power between the federal government and the states is that both levels of legislative law may also have jurisdiction. This distinguishes them from the so-called territorial and functional self-governing bodies, to which only administrative tasks within their own and/or delegated scope are assigned. States in which the Member State element is lacking and are dualistly confronted by the central state and a large number of territorial self-governing bodies are not described as federalist from the point of view of state law. For the distribution of tasks in the state and the selection of the financing arrangements necessary for their financing, it is of considerable importance, which theoretical justification is assumed with regard to the origin and purpose of the states. If it is assumed that the states were historically present before the federal state and that the merger with the federal state takes place subsidiarily, the political weight of the corresponding states will have to be assessed differently from a consideration which gives the confederation an overriding legal status, from which a modified autonomy of the states is based.In the latter case, the member states are only gradually distinguished from the territorial self-governing bodies of the municipalities. The economic theories of federalism are not, by their very nature, based on the legal quality of local authorities, but on the one hand on the economically efficient fulfilment of public tasks by appropriate forms of

[108] Europäische Kommission, Deutschland, Presse, Ihre Meinung zum neuen EU-Gesetz für digitale Dienste und Online- Plattformen ist gefragt.

organization and, on the other hand, on the necessary financing systems[109]. When examining the question at which territorial level certain public tasks can be most efficiently provided, the concept of federalism is usually limited to a dual system of fully decentralised units on the one hand and a fully centralised entity on the other. Public budgets are then regarded as production units in respect of certain public services which achieve their optimum application of public services in terms of size of holdings, where marginal benefits and marginal costs are the same. Any discrepancies between marginal benefits and marginal costs in terms of performance lead to economically inefficient outputs and require an improvement in the size of the holding in favour of centralisation or decentralisation[110]. In this view, only the character of an intermediate form of decentralization or centralization is granted – depending on the viewer's point of view. In addition to these above-mentioned aspects of the efficient provision of public budgets[111], distributional arguments are also used for the establishment of federalist systems from an economic point of view. Assuming that in a larger geographical area, several states exist independently without legal link, and that some of these states are richer and others are poorer again, it creates a number of economic or political problems in certain circumstances[112].

Global take-down: de-indexation and territoriality. A new Google case at the Court of Justice

The legal reality at national and European level has focused – especially in recent years – on the question of balancing the conflicting interests relating to the so-so-good right to remember and the right to be forgotten. The right to be forgotten, that is, the right of an individual to no longer be remembered for events that have been the subject of news in the past, is also the requirement for his own anonymity, where the public interest in knowing a fact / included in the time space necessary to inform the community, fades until it disappears[113]. It is precisely on the basis of these factors that the new dimension assumed by the right to be forgotten is

[109] A.F. Uricchio/ V.Peragine/ M. Aulenta, *Manuale di Scienza delle Finanze, Diritto finanziario e contabilità pubblica,* Nel Diritto Editore, Roma.
[110]F.L.Giambrone, *Finanzföderalismus als Herausforderung des Europarechts*, Collana del Dipartimento Jonico in Sistemi Giuridici ed Economici del Mediterraneo: societá ambiente e culture, (2020).
[111] A.F.Uricchio, *Die zwischen der Haushaltsaufsicht, den außerordentlichen Finanzinstrumenten und der sogenannten windfall taxes anfallenden kosten der sozialrechte*, in A.F. Uricchio, F.L. Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* Cacucci editore, 2020.
[112] A.F.Uricchio, F.L. Giambrone, *European Finance at the Emergency Test*, Collana del Dipartimento Jonico Sistemi Giuridici ed Economici del Mediterraneo: societá ambiente e culture, (2020).
[113] C. A. Giusti, *Global take-down: deindicizzazione e territorialitá. Un nuovo caso Google alla Corte di giustizia*, p. 1.

justified: the role played by the course of time, as an essential component, undergoes profound change and with it also the interest underlying this right is understood. The problem shifts from the need to avoid a new publication of information previously disclosed to that of preventing it from being on the internet[114]; from the reference to a news that comes to the attention of the public to another that, potentially, has never come out of it. In view of the above, it is clear that search engine managers play a major role in the process of storing and disseminating news. In essence, it is more than a real right to be forgotten, a *'right not to be found easily'*, understood as a specific and peculiar framing of the right to be forgotten aimed at obtaining not the deletion of the data, but only its de-indexation by search engines[115]. This particular legal situation[116], as is now well known, was the subject of the famous judgment of the European Court of Justice in the *Google Spain* case, in which the Luxembourg courts for the first time expressly ruled on the right of the person concerned to apply directly to the search engine operator for deletion, from the list of results of a search carried out from his name, 'links to web pages published by third parties and containing information relating to that person even if that name or such information is not previously / or simultaneously deleted from the web pages in question, and where appropriate even when their publication on those web pages is lawful in itself'. The right to de-indexation of certain content on the web pages does not take account of the fact that the information resulting from an Internet search is found to be incompatible with Article 6, paragraph (1)(c)(d) and (e) of the Directive, either because they are 'inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing', or are kept in such a way as to allow the identification of the persons concerned for a longer period of time than is necessary[117]. The Court of Justice seems to have established the almost absolute primaity of the right to respect for one's private life and to the protection of personal data, ex Art. 7 and 8 ECHR, with regard to the freedom of expression and information, guaranteed by Art. 11 of the same Charter[118]. However, the Court of Justice identifies a twofold

[114] F. Russo, op. cit., p. 304; G. Finocchiaro, Il diritto all'oblio nel quadro dei diritti della personalità, in Dir. inf., p. 593, (2014).
[115] F. Russo, *Diritto all'oblio e motori di ricerca: la prima pronuncia dei Tribunali italiani dopo il caso Google Spai*n, cit., 305.
[116] C. A. Giusti, *Global take-down: deindicizzazione e territorialitá. Un nuovo caso Google alla Corte di giustizia*, p. 4.
[117] C. A. Giusti, *Global take-down: deindicizzazione e territorialitá. Un nuovo caso Google alla Corte di giustizia*, p. 5.
[118] D. Miniussi, *Il "diritto all'oblio": i paradossi del caso Go*ogle, cit., 217; G. SCORZA, Corte di Giustizia e diritto all'oblio, cit., p. 1481. Per un'analisi critica su questo aspetto si rimanda a O. POLLICINO, Un digital right to privacy preso (troppo) sul serio, cit., p. 569 ss.; S. SICA – V. D'ANTONIO, La procedura di deindicizzazione, cit., p. 714, specifying that those texts 'which show that the judgment in question is seriously deficient, in so far as it offers a deeply restrictive view of Article 11 of the Charter of Fundamental Rights'.

limitation on the predomination of the right to deindicisation over that of the public to find information on the web. This limitation can be traced back to: (i) the hypothesis that it appears, for particular reasons (e.g. the role played by the person concerned in public life), 'the interference in his fundamental rights is justified by the prevailing interest of the public to have access ... the information in question'; (ii) the time elapsed since the publication of the information to see whether the person concerned has a right to 'no longer be linked to his name at this stage'.

2. As is now known on the 'right to be forgotten', the Court of Justice ruled in its judgment of 13 May 2014 (delivered in Case C-131/12), in the Google Spain SL case, Google Inc. vs Agencia Española de Protección de Datos, Mario Costeja González (Case C-131/12)[119].

In fact, in this judgment, the Court has clearly expressed its opinion on the nature and protections that must be reserved for a person whose information is unseeded and made available by a search engine to the virtual people. It is therefore a decision whose scope concerns not so much the case of the right to be forgotten in its entirety, but its application in relation to search engines and its declination as the right to reduce one's telematic visibility, or 'right to deindicization', which results[120]. Moreover, this interpretation is in fact already anticipated by the fact that precisely the term 'right to be forgotten' appears in an escapeive way, in order to make room for that particular and marginal 'fragment' of the right to be forgotten: the right to obscure certain search results associated with one's name from search engine technologies, that is, a modern prerogative of its own and exclusive prerogative of relations between internet users and search engine managers. "Another important element of the decision – in order to determine the primaity of the right to deindicisation over the right to information – is undoubtedly the time that has sufficiently elapsed to make the data to be /or deindicised no longer necessary in relation to the purposes for which they were collected or processed. In different ways, it is worth noting that operator[121] has recognised the position of person responsible for the processing of personal data: that is, the activity of finding public information or entered by third parties on the Internet, in indexing them automatically, in storing it temporarily and, finally, in

[119] A. F. Uricchio, F.L.Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses*, Collana del Dipartimento Jonico in Sistemi Giuridici ed Economici del Mediterraneo: societá ambiente e culture, (2020).

[120] See on this point I would refer you to C. A. GIUSTI, In addition to the right to be forgotten, paragraph 1-10.

[121] F. BRAVO, *Sul bilanciamento proporzionale dei diritti e delle libertà "fondamentali", tra mer- cato e persona: nuovi assetti nell'ordinamento europeo*?, cit., p. 190,

making it available to Internet users in a certain order of preference, where such information contains personal data[122].

A further not insignificant fact in relation to the territorial application of Directive 95/46 is that where the operator of a search engine opens a branch or subsidiary in a Member State (in this case Google Spain) intended to promote and sell the advertising space proposed by that search engine and the activity for which it is directed to the inhabitants of a Member State, that activity constitutes a 'establishment' of the person responsible for such processing in the territory of that Member State. Although, in the context of google Spain, the Court chooses to give priority only to the protection of the user's personal data or to the fundamental rights of the 'wanted person' and subsequently 'indicated in the results', it is silent on the question of the territoriality of the deletion, not in particular whether it is necessary to deal differently with a search carried out at European rather than world level; that is, in which area to limit the action of the search engine. And it is precisely on the question of territoriality, as we will have the opportunity to better represent later, that the new Google case brought to the attention of the Court of Justice in Case C-507/17 (Google/ 2 CNIL)[123], The question arises: whether or not Google may be subject to a warning, in order to proceed with the request of a natural person to deindex links obtained as a result of a specific search, starting with the name of the person concerned, which are of good use to the person concerned, taking due account of the importance for search engines of ensuring the protection of the right of access to information and freedom of expression. In particular, the question referred for a preliminary ruling by the Council of State

[122] S. SICA – V. D'ANTONIO, op.cit., p. 149.

[123] For an examination of case v. M. SENOR, The global take-down being examined by the Court of Justice of the European Union, in filodiritto.com, whose summary of the case we allow ourselves to report: "The case stems from an appeal filed by Google Inc. for the annulment of a measure by which the CNIL (Commission nationale de l'informatique et des libertés), the French Guarantor for the protection of personal data, has issued a fine of 100 million euros against the American multinational for not complying with the order to remove from all the domain names of the Google search engine the results relating to news "to be forgotten" concerning a French citizen. In the run-up to the investigation before the CNIL, Google had proposed, as an alternative solution to the so-called global de-listing, the option to use the geo-blocking technique, i.e. to block access to the offending results through the identification of the IP address of the searcher, but the proposal was rejected by the French Data Protection Supervisor as it was judged to be insufficiency to fully safeguard the right to be forgotten by the data subject. In its appeal to the Conseil d'état, Google reiterated its position that it was strongly opposed to the principle of global take-down, arguing that the CNIL's order would violate the principles of courtesy and non-interference recognised by international law and would represent a disproportionate intervention in relation to the freedoms of expression, information, communication and the press guaranteed by Article 11 of the Declaration (French) of human and citizen rights of 1789. , Article 11 of the Charter of Fundamental Rights of the European Union and Art. Article 10 of the European Convention on Human Rights and Fundamental Freedoms. In the judgment before the Conseil d'état, a number of civil rights associations were also set up, including the Wikimedia Foundation, Microsoft, Fondation pour la liberté de la presse, reporters committee for freedom of the press and the Internet Freedom Foundation, calling for the annulment of the CNIL's measure for violation of freedom of expression.'

French and brought to the attention of the Court of Justice can be summarised as follows: 'whether the 'right to delete', as laid down by the Court of Justice in the Google case, is to be interpreted as meaning that the operator of a search engine, in following up an application for cancellation, is obliged to perform that operation on all the domain names of its engine , so that the links at issue no longer appear, irrespective of where the research initiated on the applicant's name is carried out, and also outside the territorial scope of the Directive of 24 October 1995.'
With regard to this question, Advocate General Maciej Szpunar , in his recently published Opinion, sought to respond negatively to this question, arguing in particular that a 9 differentiation is necessary depending on the place from which the research is carried out; in particular, research requests made outside the territory of the European Union should not be affected by the deindicisation of research results. It would not be plausible, according to the Advocate General's approach, for a broad interpretation of the provisions of EU law which would allow them to have an effect beyond the territorial scope of the Member States. It is therefore necessary to balance the fundamental right to be forgotten with the legitimate interest of the public in having access to the information sought[124].
If global de-indexation were to be accepted, the EU authorities would not be able to define and determine the right to receive information, let alone balance it with other fundamental rights of data protection and privacy. This is all the more so since such an interest on the part of the public in having access to information will necessarily vary from one third State to another, depending on its geographical location. If it were possible to carry out global deindicisation, there would be a risk that access to information would be prevented from being accessed by persons in third countries and that, reciprocally, third states would prevent access to information for persons in the Member States of the Union. A further profile to be investigated in the light of the Google c/CNIL case concerns the question of the so-called territoriality of deindicization and, in particular, the question arises: in what context should the action of the search engine be limited? Advocate General Szpunar, after answering the first question for a preliminary ruling, examined the following questions: (i) whether the operator of a search engine, in following a request for deletion, is required only to delete the disputed links that appear as a result of a search carried out from the name of the applicant on the domain name corresponding to the State in which the application is deemed to have been made or, more generally, on the domain names of the search engine corresponding to the national extensions of that engine for all Member States of the Union; (ii) if the

[124]F. L. GIAMBRONE, *New fiscal, monetary, financial banking and capital perspectives of the European Un*ion, Universitá Aldo Moro di Bari, 39 Centro Interuniversitario "Popolazione, Ambiente e salute", (2020).

manager of a search engine, when he accepts a cancellation request, it is required to delete, by the so-called 'geographical block' technique, from an IP address which is deemed to be located in the state of residence of the beneficiary of the 'right to delete', the disputed results of searches carried out from the name of the latter, or even, more generally, from an IP address which is deemed to be located in one of the Member States subject to Directive 95/46, irrespective of the domain name used by the Internet user carrying out the search.
In particular, the question referred for a preliminary ruling by the French Council of State and brought to the attention of the Court of Justice can be summarised as follows: 'whether the 'right to delete', as laid down by the Court of Justice in the Google case, is to be interpreted as meaning that the operator of a search engine, in following up an application for cancellation, is obliged to perform that operation on all the domain names of its engine , so that the links at issue no longer appear, irrespective of where the research initiated on the applicant's name is carried out, and also outside the territorial scope of the Directive of 24 October 1995.
'With regard to this question, Advocate General Maciej Szpunar , in his recently published Opinion, sought to respond negatively to this question, arguing in particular that differentiation is necessary according to the place from which the research is carried out; in particular, research requests made outside the territory of the European Union should not be affected by the deindicisation of research results. It would not be plausible, according to the general lawyer's approach, to have a broad interpretation of the provisions of EU law which would allow them to have an effect beyond the territorial scope of the Member States. It is therefore necessary to balance the fundamental right to be forgotten with the legitimate interest of the public in having access to the information sought[125]. If global deindicisation were to be accepted, the EU authorities would not be able to define and determine the right to receive information, let alone balance it with other fundamental rights of data protection and privacy. This is all the more so since such an interest on the part of the public in having access to information will necessarily vary from one third State to another, depending on its geographical location. If it were possible to carry out global deindicisation, there would be a risk that access to information would be prevented from being accessed by persons in third countries and that, reciprocally, third states would prevent access to information for persons in the Member States of the Union. A further profile to be investigated in the light of the Google c/CNIL case concerns the question of the so-called territoriality of deindicization and in particular the question arises: in what context

[125] F.BRAVO, *Sul bilanciamento proporzionale dei diritti e delle libertà "fondamentali", tra mercato epersona: nuovi assetti nell'ordinamento europeo*?, cit., 190.

should the action of the search engine be limited? Advocate General Szpunar, after answering the first question for a preliminary ruling negatively, examined the following questions: (i) whether the operator of a search engine, in following a request for cancellation, is required only to delete the links at issue which appear as a result of a search carried out from the applicant's name on the domain name corresponding to the State in which the application is deemed to have been made or, more generally, on the domain names of the search engine corresponding to the national extensions of that engine for all The Member States of the Union; (ii) if the manager of a search engine, when he accepts a cancellation request, it is required to delete, by the so-called 'geographical block' technique, from an IP address which is deemed to be located in the state of residence of the beneficiary of the 'right to delete', the disputed results of searches carried out from the name of the latter, or even, more generally, from an IP address which is deemed to be located in one of the Member States subject to Directive 95/46, irrespective of the domain name used by the Internet user carrying out the search. The argument put forward by the Advocate General is based on the assumption that, once the right to de-indexation within the Union has been established, the operator of a search engine must take all the measures at his disposal to ensure effective and complete de-indexation, at the level of the territory of the European Union, including by the so-called 'geographical block' technique from an IP address which is deemed to be located within a Member State of the Member States. , regardless of the domain name used by the Internet user searching. In other words, the Lawyer argues that the deletion must be carried out not at national level, but at European Union level, since Directive 95/46 , which is part of an internal market logic, involving an area without internal frontiers, undoubtedly aims to guarantee a high degree of protection within the European framework, which in turn takes the form of the creation of a complete system of data protection that crosses national borders. Clearly, a deletion which would only be relevant at national level would run counter to the objective of harmonisation and the practical effectiveness of the provisions of Directive 95/46; without, among other things, noting that in the application of Regulation 2016/679, that question does not even arise, since the Regulation as such is 'directly applicable in all Member States'. Based on Article 16 TFEC, Regulation 2016/679 goes beyond the internal market approach of Directive 95/46 and aims to ensure a comprehensive system of protection of personal data within the Union.

7) Conclusions

Due to the decision of the Federal Court of Justice with regard to the teacher portal <<spickmich>>, the highest judicial case law regarding personal evaluation platforms is available for the first time. Although the judgment may give the best of the first lines for their legal assessment, the balance between the right of personality and freedom of communication will always depend on the platform design in individual cases. Although this BGH (Federal Court) decision can ultimately be understood as yes to teacher evaluation platforms, in Germany a balance of interests is required in Germany in assessing the admissibility of specific evaluation platforms. In its judgment, the Federal Court of Justice clearly emphasised that freedom of expression is such a great asset that certain impairments of the protection of personal rights are to be accepted. This is the idea behind the concept of evaluation platforms, which may seem quite legitimate. The rated ones turn the tables, so to speak, and subject their instructors to an evaluation. However, it must be borne in mind that these notes can be allocated by anyone who has an e-mail address and is therefore visible to the entire Internet community. An important function is assigned access mechanisms, which are able to deter users from retrieving the ratings without a legitimate interest in information. Furthermore, the platform operators should not make the profiles appear on the page and via search engines by entering the name. In the case of abusive ratings or entries, error messages or other mechanisms must be used to ensure that the corresponding contribution is cancelled. The fact that, despite the existence of appropriate measures, individual assessors feel denounced will not be avoided to the limit of insult or insult, in order to ensure the protection of the freedom of expression on the Internet, which is constituted for the liberal-democratic basic order par excellence[126].The German judiciary on evaluation platforms of teachers (spickmich.de and myprof.de) and doctors (jameda.de) has determined the fundamental admissibility of such portals after careful consideration of the interests between the right to informational self-determination of the person concerned and the freedom to communicate. However, the barrier to the legality of assessments is drawn where a risk of stigma becomes apparent, exclusion is to be feared or a pillory effect can be achieved. It was therefore also important for the assessment of the specific individual cases that all platforms, by their technical design, provided for appropriate measures or arrangements for dealing with conspicuous assessments. The Jameda judgment II will probably apply to all evaluation portals. The verdict wrongly strengthens the backs of the convicted. You can now more easily delete ratings. The portals can no

[126] Gounalikis/ Klein, *Zulässigkeit von personenbezogenen Bewertungsplattformen- Die „Spickmich" Entscheidung des BGH vom 23.6.2009*, Neue Juristische Wochenschrift (NJW), 571(2010).

longer rely on a simple examination, but must comply with their secondary burden of presentation and, in the event of suspicion of misjudgment, request any supporting documents. If this is not the case, they themselves could be prosecuted. Thus, the BGH has contributed to the development of the complaint procedure developed by it into a detection procedure. In doing so, the assessment at issue was purely expressing opinions[127]. In the end, the BGH equates an opinion-expressing assessment of a vulnerable statement of fact, as long as it lacks any basis[128].On the other hand, this probably does not place an undue burden on the portals: they are not obliged to intervene until they have been asked to do so by the rated. They will still not be charged for a pre-publication test. It must not be forgotten that their own offer should now seem more reliable: portal visitors could end up giving more confidence than before. In the end, therefore, this decision will not only be sufficient to protect the assessor. Other users and the portal itself can also profit from deleting incorrect assessments. The aim of the visitors is to inquire as much as possible about a service and then decide whether they will claim the rated doctor or the respective company. If they assume that they can no longer rely on the reviews submitted on the Internet portal, there is no reason to visit the site. As a result, you can no longer rely on the content of the portal. The result would be that the number of visitors to the portals would probably decrease. If this were to happen, no one would be helped. In the end, the Jameda II judgment has probably provided more legal certainty for everyone[129].Furthermore, it could be stated that in Jameda III judgments in the dispute in the order of a dentist from Hessen against the evaluation portal Jameda, the Higher Regional Court of Hamm partially amended the judgment at first instance. The Munich-based company has failed to publish on its portal the claim that the plaintiff doctor forgoes information/advice. On the other hand, the claim that prosthetics solutions are partly incorrect may remain online for the time being. This was ruled by the Higher Regional Court of Hamm in a judgment of 13.03.2018. The Higher Regional Court has considered it to be proven that the patient from which the evaluation was initiated was apparently informed by the dentist. This would be apparent from the patient records on the treatment submitted to the file. However, if the patient could be informed, the assessment on the portal that the dentist foregoes education/advice is incorrect. That is why the Munich-based company must be prevented from publicly

[127] For a better understanding of the effectiveness of the European Convention on Human Rights in Italy Cfr. A.F. URICCHIO, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.
[128] Herrmann/ Schwarz, Kommentar zu BGH, jameda .de II, Wirtschaft in Recht und Praxis (WRP) 6/2016.
[129] BGH, Betreiber eines Ärztebewertungsportals hat erhöhte Prüfpflichten, Meldung der beck-aktuell-Redaktion vom 1.03.2016.

disclosing such a false fact[130].Furthermore, the patient's assertion that the dentist's prosthetic solutions were partly false, the accuracy of which was questioned, could not be established by the Senate during the summary examination in the preliminary injunction procedure. Insofar as doctors perform their treatments without errors, however, patients notice a mistreatment in evaluation portals and portal operators do not cancel the remark and in the urgent procedure without expert opinion there is not a sufficient probability with regard to the untruth of the finding, here with regard to an internet search of the name of the doctor at worst as hit of the search engine <<Mistreatment>> or solutions of Dr. x were partly wrong or similar. This can have a huge impact on the existence of the doctor in question. Instead of ensuring greater transparency in health care, such assessments can lead to manipulation of the perception of flawless medical performance. This does not in any way contribute to providing the patient with the information he considers necessary when looking for a doctor. A non-truthful statement of fact can remain published on the Internet, as the doctor does not intend to proceed further due to costs and withstands expensive expert reports[131].
The content was classified here as a statement of fact, the untruth of which was not sufficiently likely without expert opinions. In fact, there was no clear mistreatment[132]. It was difficult to ass to know whether incorrect treatment had actually been carried out, as the OLG (Higher Regional Court) Hamm was unable to do so without receiving an expert report. The average reader of the review will assume that a mistreatment was actually carried out and assume that it was rather serious and that the doctor therefore did not have it deleted[133]. This is to the detriment of the doctor-seeker in many respects, as it does not help him to decide who meets the desired requirements for the required treatment and personal preferences[134]. This makes it even more difficult to find the right doctor for the desired treatment and the underlying purpose of the search is unfounded. As already stated, the opening clause in Article 85 GDPR continues to refer a crucial question of the broad field of data protection to the 28 Member States' regulations

[130] BGH, Betreiber eines Ärztebewertungsportals hat erhöhte Prüfpflichten, Meldung der beck-aktuell-Redaktion vom 1.03.2016.
[131] OLG Hamm, Störerhaftung des Betreibers eines Ärztebewertungsportals, Zeitschrift für IT- Recht und Recht der Digitalisierung (MMR) 766, 769 (2018).
[132] For a better understanding of the effectiveness of the European Convention on Human Rights in Italy Cfr. A.F. URICCHIO, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente,* in AA.VV., Dialoghi con Ugo Villani, Cacucci.
[133] For a deep understanding of the European values F.L.GIAMBRONE, *Aspekte des türkischen Familienrechts unter Würdigung familienrechtlicher Rechtsinstitute aus Italien und Österreich. Eine Rechtsvergleichung,* (2016).
[134] A. F. Uricchio/ F. L. Giambrone, *Schlussfolgerungen,* in A.F. Uricchio, F.L.Giambrone, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses,* Cacucci editore, 2020.

by the EU legislature[135], and thus that corresponding area of regulation is allocated to the Member States. It can therefore be concluded that, with regard to this field of weighing, the objective of comprehensive harmonisation has failed. As mentioned above, the above problem is due to the fact that the EU has so far failed to act in the areas of freedom of expression[136], the press and freedom of information in the Member States and has not been able to fully justify competence. Even today, there are no broad substantive provisions on these regulatory areas within the framework of binding pan-European data protection legislation in Europe[137].The fragmentation within Europe seems too diverse, and the divergence of the GDPR within the Member States is still too extensive. With regard to the question of how courts are to assess the business model of evaluation platforms in the future, it can be stated that the latter should be guided by European fundamental rights when filling the scope for implementation. This balance, to be carried out by the national legislators, is, in effect, a question of individual, divergent freedoms, which in the European legal systems are delimited by the protection areas of fundamental rights. The problem is also due to the fact that the scope for implementation granted by the opening clause cannot be distinguished from a margin for transposition granted by a directive. National courts must follow the ECJ's approach, if European law does not provide for any scope for implementation, and European fundamental rights should be applied. However, such an agency situation does not exist in Article 85 GDPR (General Data Protection Regulation). However, the ECJ believes that Fundamental European fundamental rights should also be used in cases where details are regulated by the Member States or where they can choose between several options - i.e. where there is room for implementation. European harmonisation is also desirable, for example, because standards of protection for journalists and artists in parts of Europe have been increasingly softened in the recent past. This is clear from the media legislative reforms in Hungary and Poland. European harmonisation would ensure legal certainty with regard to legal entities. In the final place, it is advisable to apply the European fundamental rights standard from the GRCh with regard to the scope for implementation and then to examine the design of the balancing task under Article 85 GDPR. A major reason for this is the guarantee of a uniform fundamental rights

[135] For a better understanding oft he corporate governance of public owened companies cfr. C. A. Giusti, *La corporate governance delle societá a partecipazione pubblica.*
[136] Cfr. Ch. Smekal, *Verschuldungsbeschränkungen und Verschuldungsverhalten der Gebietskörperschaften*. Ein *Vergleich zwischen der Bundesrepublik Deutschland und Österreich,* in, G.Kirsch/ Ch. Smekal/ H. Zimmermann, Beiträge zu ökonomischen Problemen des Föderalismus.
[137] OLG Hamm, Störerhaftung des Betreibers eines Ärztebewertungsportals, Zeitschrift für IT-Recht und rEcht der Digitalisierung (MMR), 766, 769 (2018).

standard[138] within the EU and its Member States. The national courts of the Member States must comply with the case law of the ECJ in order to apply European uniform law. With regard to the GDPR, as in the case of other regulations, the result of a European fundamental rights standard is particularly recommendable, since it is a regulation with narrow scope for design and not a directive. The form of regulation adopted and adopted allows the national legislator to be more bound to the European canon of fundamental rights as a feature of unification. As has already been mentioned, the principle of subsidiarity should be better applied. According to this principle, the lower or smaller local authorities should be given priority if preference or frustration costs play a better role than production deployment costs and can thus be reduced. However, the interpretation of the principle of subsidiarity in the EU Treaties is more problematic. Whenever the EU level can fulfil competences equally well or better than the national levels, it should exercise the appropriate competence. However, in this respect, the EU is obliged to demonstrate the benefit[139]. It alone could better pay for data protection in Europe. The EU[140] has also spoken out about strengthening the EU's digital and technological sovereignty. Europe must take a leading role, which means that it has more powers in order for ecological and digital change to occur[141]. By amending the Lisbon Treaty, Member States could renounce a certain part of their competences and transfer them to the EU[142]. Such a loss of sovereignty would only be justified for the protection of European citizens. This would strengthen democratic values and respect our fundamental rights[143], thereby contributing to a sustainable, climate-neutral and resource-efficient economy. Some thoughts should be adressed towards a possible global take down and GDPR. According to Art. 3 of the GDPR, with reference to the territorial scope of application it is established that <<'1. This Regulation shall apply to the processing of personal data carried out in the course of the activities of an establishment by a data controller or data controller in the Union, whether or not the processing is carried out in the Union. 2. This Regulation shall apply to the processing of the personal data of data subjects in the Union, carried out by a data

[138] For a deep understanding of the European values Cfr. Bischof K. Küng, *Damit sie das Leben haben. Leben mit Gott Ehe und Familie Lebenschutz.*

[139] Cfr. Carloalberto Giusti, *La gestione delle sopravvenienze contrattuali, rinegoziazione e intervento giudiziale*, 2018.

[140] For a deep understanding of the European values Cfr. Bischof K. Küng, *Damit sie das Leben haben. Leben mit Gott Ehe und Familie Lebenschutz.*

[141] Europäische Kommission, Mitteilung der Kommission an das Europäische Parlament, den Rat den Europäischen Wirtschafts-und Sozialausschuss und den Auschuss der Regionen, Gestaltung der digitalin Zukunft Europas, COM (2020) 67 final.

[142] A.F.Uricchio, F.L Giambrone, *European Finance at the Emergency Test*, (2020).

[143] A. F. Uricchio, *Efficacia della convenzione europea dei diritti dell'uomo nell'ordinamento italiano con particolare riguardo ai diritti del contribuente*, in AA.VV., Dialoghi con Ugo Villani, Cacucci.

controller or data controller who is not established in the Union, where the processing activities concern: or (b) monitoring of their behaviour to the extent that such behaviour takes place within the Union. 3. This Regulation shall apply to the processing of personal data carried out by a data controller who is not established in the Union, but in a place subject to the right to a Member State under public international law.' Well, in the light of the new rules that came into force on 25 May 2018, the question must be asked whether – in a similar case – the considerations made by the Advocate General in Case C-507/17 can in any case be shared by the Court. As stated in the text of the conclusions, the questions raised by the referring court concern the interpretation of the provisions of Directive 95/46 and not those of Regulation 2016/679. This Regulation, which applies from 25 May 2018, repealed the Directive with effect from that date; In view of the fact that in french administrative procedural law, the law applicable to a dispute is that applicable on the date of the contested decision, there is no doubt that Directive 95/46 will apply to the main proceedings. The Court of Justice is therefore called upon to interpret the provisions of that directive. Article 10 of the Directive is applicable to the Article 3 of the GDPR enshrines the principle of extraterritoriality of the right to the protection of personal data; It provides for the applicability of the Regulation for the processing of data subjects in Europe even if the holder or person responsible is not established in the Union[144]. Furthermore, Rule 17 of the Rules of Procedure regulates the right to cancellation by establishing that it does not apply in the event that the processing is necessary for the exercise of freedom of expression and information and, among others, for reasons of public interest in the field of public health, for the purposes of archiving in the public interest, historical research, scientific or statistical research. The right to be forgotten as conceived after the Google Spain ruling, moreover, has been transposed into the European Regulation on the protection of data No 679/2016 (GDPR) where art. 17, under the heading 'right to delete', the data subject has the right to obtain from the data controller the deletion of personal data concerning him without unjustified delay, if: (i) the need for it to be processing is removed; (ii) the data subject withdraws the consent on which the processing is based; (iii) and there is no other legitimate reason to proceed with the same. European legislation also lays down cases in which the person concerned cannot exercise the right to be forgotten for facts concerning him in the presence of two hypotheses. The first occurs if the processing of personal data is carried out for the exercise of the right to freedom of expression and information; the second is in the event that the processing is carried out for the

[144] C.A.Giusti, *Global take-down: deindicizzazione e territorialitá. Un nuovo caso Google alla Corte di Giustizia*, p.20.

performance of a legal obligation provided for by Union law or of the Member State to which the data controller is subject, or for the performance of a task carried out in the public interest or in the exercise of public authority by the data controller. According to the Advocate General, a distinction should be made according to the place from which the research is carried out, excluding the possibility of applying the right to cancel in the event that searches are carried out outside the territory of the Union. This would certainly apply, in accordance with the approach adopted, to the provisions of Directive 95/46. The question, at this point, is whether these conclusions can also be adopted with regard to the GDPR Regulation, where Article 3 is the legal basis for a unilateral extension of the scope of the regulation[145]. What matters is the presence of the territory of the Union[146], by means of an establishment, a holder or person responsible, together with the fact that the processing must take place in the context of the activities of that establishment. The solution proposed by the Advocate General excludes the possibility of worldwide de-indexation, however, by reason of the provisions of Article 3, the extraterritorial applicability of the GDPR could lead to the possibility of worldwide de-indexation, or at least a geographical blockage, if in the balance between fundamental rights, and in particular between the right to the protection of personal data and private and private life, the legitimate interest of the public in accessing sought-after information, the conditions, is the first to prevail. However, precisely in terms of balancing rights, in the light of the innovative provisions contained in the Regulation, it cannot be reaffirmed that, unlike Directive 95/46/EC, Article 95/46/EC does not provide for the principle of equal treatment for men and women[147]. Article 17(3) expressly provides that the right to cancellation

[145] On the territorial scope of the GDPR, see the considerations of M. VALERI, Territorial- 322 rial scope of the GDPR, the EDPB guidelines: here are the critical nodes, in agendadigitale.eu. EDPB guidelines confirm the application of gdpr to the processing of personal data in the context of activities carried out by a holder or manager in an establishment located in the European Union and regardless of whether this establishment takes place in the Union or not.

[146] EU-Komm, Brüssel, den 19.2.2020 COM(2020) 67 final, according to which, digital technologies, as advanced as they may be, are just one tool. They cannot solve all our problems. Yet they make things possible that were unimaginable a generation ago. The success of Europe's digital strategy will be measured by our ability to use these tools to create public goods for European citizens.
The data-agile economy and its enormous transformation potential will affect us all, and Europe stands ready to reap the full benefits of this. However, in order to make the digital transformation a success, we need to create the right framework conditions to ensure trustworthy technologies, to give companies confidence in digitization and to give them the skills and resources they need for this process. Coordinating the efforts of the EU, Member States, regions, civil society and the private sector is crucial to achieve this and to strengthen Europe's leading role in the digital field. Europe can embrace this digital transformation and help shape global standards in technological development and, more importantly, ensure the inclusion and respect of every single person. Digital transformation can only work if it benefits everyone, not just a few. It is a truly European project – a digital society based on European values and Rules – that can serve as a real inspiration for the rest of the world.

[147] C.A.Giusti, *Global take-down: deindicizzazione e territorialitá. Un nuovo caso Google alla Corte di Giustizia*, p.20.

shall not apply where processing is necessary for the exercise of freedom of expression and information and, among other things, for reasons of public interest in the field of public health, for the purposes of archiving in the public interest, historical research, scientific or statistical research. Having said that, in a hypothetical balance of these rights, we will have, on the one hand, the right to be forgotten, considered in Europe[148] to be a fundamental right of the universally protectable person, and, on the other hand, a series of equally fundamental rights, or, on the other hand, purely national public interests which, in fact, would also be applied, as a result and for the effects of balance, beyond European borders. The principle of extraterritoriality laid down for data protection would therefore also be imposed with regard to the other rights and interests at stake and would lead to the paradox that, in order to guarantee the right to be forgotten by a European citizen, the fundamental rights (in particular freedom of expression and information) of citizens of the rest of the world would potentially be harmed[149].

[148] EU Kommission, MITTEILUNG DER KOMMISSION AN DAS EUROPÄISCHE PARLAMENT, DEN RAT, DEN EUROPÄISCHEN WIRTSCHAFTS- UND SOZIALAUSSCHUSS UND DEN AUSSCHUSS DER REGIONEN Gestaltung der digitalen Zukunft Europas, according to which, a strategy for global cooperation in the digital field aims to propose a European approach to digital transformation, building on our long and successful history of technology, innovation and inventiveness, building on European values, including openness, to project these values onto the international stage and work with our partners. It will also reflect the EU's efforts in Africa and other parts of the value of achieving the Sustainable Development Goals, digitisation for development ("Digital4Development") and capacity building.

[149] On this point we refer to the analysis carried out by M. SENOR, The Global Take-Down under consideration by the Court of Justice of the European Union, in medialws.eu. See also S. BONAVITA - R. PARDOLESI, *GDPR and right to cancellation (oblivion),* in Danno e resp., 2018

MAURO GRONDONA

IL BENEFICO PLURALISMO METODOLOGICO DELLA COMPARAZIONE GIURIDICA

(una nota di lettura di: PIER GIUSEPPE MONATERI, *Advanced Introduction to Comparative Legal Methods*, Cheltenham, UK – Northampton, MA, USA, 2021, pp. xii-125)

1. Poco più di cento pagine (bibliografia e indice analitico compresi) per darci un quadro sintetico ma tutt'altro che generico e poco approfondito, soprattutto in riferimento alle premesse e alle conseguenze culturali dell'adesione a una certa metodologia giuscomparatistica (anzi, l'autore, in chiave spiccatamente analitica, ripercorre molto da vicino le vicende della metodologia nel, e del, diritto comparato) dello stato dell'arte del metodo nella comparazione giuridica. Da questo punto di vista non c'è dubbio che si tratta di volumetto tra i più felici della collana che lo ospita. Appunto, una (vera) introduzione (veramente) avanzata alla comparazione.

Riuscire a essere sintetici senza incorrere in gravi omissioni, e al contempo senza rinunciare a offrire al lettore il proprio punto di vista sul diritto comparato (v. spec. il cap. 5, e in particolare i §§ 5.1, 5.3 e 5.4), è compito non facile. Monateri lo ha svolto da par suo; si può subito aggiungere che il lettore molto beneficerà delle doti di sintesi dell'autore: se non altro perché questo volume consente un'ideale ripasso metodologico, sollecitando quei recuperi che giacciono nella memoria inconscia di ciascuno di noi, e che sempre attendono un qualche segno per tornare a manifestarsi (qui ad es., vorrei richiamare l'attenzione, ampia e critica, rivolta a – come diceva Salvatore Satta, e non aveva torto – 'il grande' Esmein; ma anche il riferimento al 'Trattato' di Arminjon, Nolde e Wolff, uscito nel 1950 e subito recensito (nel suo vol. I) dal nostro Tullio Ascarelli nell'«Annuario» di Salvatore Galgano. Ecco, dicevo prima: senza incorrere in gravi omissioni. Il nome di Ascarelli è assente, e ciò può stupire. Ma allora bisogna subito dire (e sarà questo un aspetto che potrà anche far discutere e spiacere) che pressoché tutti gli italiani, a partire dall'autore, sono assenti. Ciò, direi, non solo per una ragione linguistica, dato che la bibliografia è quasi esclusivamente – pochissimi i contributi in francese e in tedesco citati – in inglese. A mio giudizio, queste assenze italiane (e al di là dell'eventuale tigna *ad personam*, che però la scienza per principio non conosce) vanno semplicemente lette – il che, però, è forse è anche più grave – come una critica rivolta all'intera giuscomparatistica italiana (resta comunque a mio avviso

inspiegabile l'assenza di Mauro Cappelletti: ma l'autore avrà forse così ragionato: se mancano Gorla e Sacco, potrà mancare pure Cappelletti), e soprattutto a quella più recente, senza dubbio meno propositiva, in chiave metodologica rispetto ad altre esperienze culturali (ma anche rispetto al passato della giuscomparatistica italiana), e più attenta alla micro- che non alla macro-comparazione. Del resto, l'essere passati, quanto al nome dell'insegnamento, dagli attraenti 'sistemi giuridici comparati' al meno brillante e fantasioso 'diritto privato comparato', nonché al 'diritto pubblico comparato', ha fatto immaginare, forse, in chi ha concepito e promosso la riforma, un di più di professionalizzazione (imparo che cos'è il contratto in Italia e in Francia, e via enumerando), o un di più di tecnicizzazione giuspolitologica (imparo come funziona un determinato meccanismo elettorale di un determinato ordinamento costituzionale, soprattutto nella prospettiva riformatrice: prospettiva questa, al più, del docente, però, non certo del discente). Si può anche aggiungere, quale ulteriore ragione dell'assenza della letteratura italiana, come il grosso della bibliografia non risalga oltre la metà degli anni '90. E se ne comprende il perché: in caso contrario, il dialogo con le prospettive metodologiche attuali, nonché con le riletture e le ricostruzioni condotte oggi, non ieri o l'altro ieri, delle varie metodologie maggiormente seguite in un passato più o meno recente, si sarebbe rivelato impossibile.

Ovviamente, una riflessione che si presenti da subito per quello che è: un ambizioso e colto discorso sul metodo, una presa di posizione sul metodo, potrà far sorgere qualche perplessità (in Italia più che all'estero, però, come appunto la letteratura citata ben dimostra).

Il classico argomento critico (classico, ma sempre infondato) è che la discussione sul metodo ha fatto il suo tempo, ha esaurito il suo scopo; che il metodo va praticato e non teorizzato, ecc. Ora, la circostanza che il diritto (e oggi ne siamo tutti convinti) sia una scienza pratica, che si muove tra l'utilità individuale e sociale, tra il benessere individuale e collettivo, non significa affatto che al giurista non sia più richiesto un ragionamento strettamente giuridico rigoroso: Monateri, anzi, reagisce contro l'accusa, di ieri e di oggi, di un eccesso di logicismo tra i giuristi; accusa che in sostanza egli assimila alla perdita di quel rigore argomentativo invece indispensabile, venendo altrimenti meno il fondamento stesso del ragionamento: l'ordine del concetto, che è poi l'ordine della categoria, che è poi l'ordine del pensiero, e che, alla fine, è l'ordine della soluzione. Cioè a dire: una soluzione che riflette l'ordine del sistema, nel quale, ma invero ormai da tempo, Monateri è tornato a credere – e non sarà un caso, allora, ma riprenderò brevemente il discorso in chiusura, che il nostro autore guardi ai metodi empirici, quantitativi, statistici, quale ancora di salvezza, tanto metodologica, rispetto al tempo presente, quanto applicativa: un antidoto contro una conoscenza falsante della realtà (che è poi la

premessa di ogni falsa coscienza, in questo caso comparatistica). Ciò, tanto più oggi, tempo connotato da una tensione, se non da un vero e proprio scontro, tra un diritto comparato quale veicolo di universalizzazione e un diritto comparato strumento dell'identità, e che all'universale (una universalità intesa come un carattere capace di avvicinare e quindi aperto alla reciproca comprensione) contrappone, forse più ancora che il relativo (p. 110), l'unicità rispetto a se stessi, ai contesti in cui si vive, addirittura al cibo, insistentemente culturalizzato per meglio essere protetto contro le diversità. Un diritto comparato in difesa delle identità, di ciò che è geograficamente unico, o comunque tipico, di ciò che appare opporsi a quei modelli (anche organizzativi: ne fa fede il tema dell'organizzazione del lavoro in Italia), che globalmente hanno più successo, e che solitamente godono di cattiva fama. Tutto naturalmente dipende dallo scopo a cui i modelli sono utilizzati (sotto questo profilo, infatti, Monateri non intenderebbe delegare la raccolta dei dati economici unicamente, come del resto già ora avviene, a quei soggetti che hanno per scopo statutario il predisporre norme finalizzate a irrobustire una certa idea di globalizzazione economica, p. 110).

Ma la lotta contro le diversità – proprio nella prospettiva del pluralismo metodologico cui Monateri, se non si richiama interamente, in chiave prescrittiva, certo mostra una adesione culturale di fondo, intanto perché questo saggio è anche un libro di storia del diritto comparato – è oggi persa in partenza, perché antistorica.

Ora, la visione universalizzante del diritto (che, a certe condizioni, può essere meglio attuata nella prospettiva di un ordine spontaneo socio-giuridico, che non nella prospettiva di un serrato costruttivismo giuridico, che come tale rappresenta in sé un ostacolo alle novità) implica in sé una attitudine all'assimilazione, da molti, e io direi stranamente, anche in Europa, rifiutata, a tutela di incerte e spesso inutili, quando non dannose (se servono per andare alla ricerca della purezza di un modello – culturale, etnico, sociale, antropologico – originario: del resto, la tensione verso l'individuazione di modelli archetipici, oltre ad avere una forte rilevanza geopolitica, p. 25, storiograficamente ricostruibile, si spiega bene pensando agli sfolgoranti successi che la filologia classica tedesca, e in generale l'antichistica germanica, conobbero nei primi cinquant'anni del Novecento, altrettanto storiograficamente ricostruibile, e infatti ricostruita), identità culturali: ma anche qui, e contro ogni intenzione malevola di partenza, un approccio seriamente quantitativo potrebbe invece incoraggiare un ritorno alla difesa delle identità e addirittura (che per me è ancora peggio) un utilizzo in chiave analitica del concetto di identità, che al limite potrebbe però essere messo a frutto per ripensare, tra i molti ambiti, il carattere degli interventi assistenziali dello Stato, o per dar vita a nuovi programmi di educazione finanziaria. Una diversità di identità

quantitativamente misurabile e misurata, e quindi un fatto, che come tale legittima poi specifici interventi della politica. Il che, probabilmente, non troverebbe il pieno assenso di Monateri, anticostruttivista e dunque critico dell'ordoliberalismo, che nel volume viene peraltro qualificato nei termini (ancora più critici, almeno per molta parte dell'opinione pubblica, e non solo) di 'neoliberalismo'.
Ma torniamo al possibile 'fastidio' per un discorso sul metodo come tale: il metodo, rispetto a ogni scienza, esprime i fondamentali caratteri che la connotano, *ratione temporis*. Da questo punto di vista lo studio del metodo è anche (perché perfettamente legittimo studiare il metodo sotto il profilo strettamente concettuali: quali sono i concetti giuridici che hanno caratterizzato e caratterizzano la comparazione giuridica?) uno studio di carattere storiografico,e dunque a base storicista. Si può benissimo essere storicisti (ma Monateri rimane fedele al Popper antistoricista, p. 93) senza identificare lo storicismo con la sola ricerca delle leggi dello sviluppo storico. E tuttavia, anche il ricorso ai metodi quantitativi potrebbe riaprire una questione apparentemente chiusa: tutto dipenderà dalla quantità e dalla qualità dei dati raccolti, nonché, come sempre, il tipo di domanda che verrà formulata in termini empirici. Il metodo empirico non ha una risposta per ogni domanda, e soprattutto può rispondere solo a quelle domande aventi base empirica.

2. La materia trattata nel volume è ripartita in cinque capitoli preceduti da una prefazione, che traccia molto nettamente non solo le linee della ricerca ma anche i presupposti e gli scopi della stessa, tra cui vi è l'appello alla responsabilità delle *élites* del mondo giuridico, che sono poi coloro in grado di dare una voce ai documenti normativi.
I capitoli sono i seguenti: il diritto comparato quale disciplina; diritto comparato e geografia giuridica; diritto comparato e storiografia giuridica; diritto comparato e teoria generale del diritto; diritto comparato e riforme.
È chiaro fin dai titoli quanto questo volumetto (appunto scritto in inglese) appartenga interamente a una tradizione di studi (possiamo usare questo termine, con la consapevolezza, che è in Monateri, p. xi, che la tradizione è un discorso, cioè si costruisce e ricostruisce retoricamente: di qui il richiamo a Hayden White, che però colpisce, se poi Monateri va alla ricerca di una oggettività giuridica perduta, aprendo appunto significativamente agli *Empirical Methods*) che è globale, nel senso migliore del termine: esiste una scienza giuridica globale, e ovviamente questa scienza ha a che fare con la comparazione giuridica (ma allora come non pensare alla grandiosa 'Storia universale' di Eduard Meyer, tutta a fondamento comparatistico, che oggi può non certo rinascere, ma che certo può essere ripensata

nella prospettiva della dialettica tra 'global history' e 'world history', con le sue evidenti ricadute nell'ambito politico?). Non sarà un caso, infatti, che dei quattro – ma uno di essi insegna negli USA – giuristi italiani citati: Sabino Cassese, Ugo Mattei, Francesco Parisi, Aldo Schiavone, il primo di essi, usando la lente del diritto amministrativo, molto si è occupato di globalizzazione giuridica, in senso simpatetico con quella esigenza di universalizzazione giuridica, che non può essere oggi tradotta, brutalmente, come neocolonizzazione culturale, perché i presupposti di partenza sono evidentemente diversi di quelli di cento o cinquant'anni fa, e dunque, crocianamente, forse, oggi, dovremmo e potremmo essere più disponibili a identificare diritto e politica. Non nel senso di una perfetta, reciproca coincidenza, impedendo così ogni distinzione, che resta fondamentale come tutte le distinzioni non inutili, ma nel senso che il diritto, esattamente come la politica, attiene alla dimensione dell'utile ed è strumento di realizzazione di un'attività in questo senso certamente politica[350], amministrando interessi e prendendo posizione su di essi.

In questa prospettiva, un diritto comparato siffatto è, a ben vedere, *naturaliter* globalizzato, nel senso dell'interdipendenza discorsiva e quindi metodologica, anche quando voglia colpire la globalizzazione delle idee richiamando analogicamente la globalizzazione economica, e così innestando una equazione elementare (ma anche fallace) tra forza economica e forza delle idee, tutta all'insegna della prevaricazione.

Un libro sulla comparazione giuridica edito, come questo, nel 2021, anche quando voglia rivendicare, come ricordato più sopra, la irrinunciabilità all'idea di ordine giuridico (un ordine che, per Monateri, è concettuale, ma non è politicamente imposto, altrimenti cadremmo nella trappola di quel costruttivismo giuridico, che, hayekianamente, è manifestazione di abuso della ragione), anche quando voglia assegnare o riassegnare un ruolo alle *élites* giuridiche. Ma, come noto, e basterà qui fare un genericissimo riferimento alla discussione tra Paolo Grossi e Massimo Luciani, l'elitismo giuridico (del resto oggi ritorna l'attenzione per Gaetano Mosca, il che è un bene) può entrare in conflitto con l'idea di un diritto frutto di una deliberazione politica in senso stretto, cioè parlamentare: Luciani qualificava, in sostanza, antidemocratica l'idea di un diritto, diciamo pure, costruito da quella

[350] Cfr. infatti B. Croce, *Giustizia internazionale*, orig. in *La Critica*, 20 settembre 1928, p. 382 ss., poi apparso in altre raccolte di saggi crociani, e che io leggo e cito da C. Nitsch, *La feroce forza delle cose. Etica, politica e diritto nelle* Pagine sparse sulla guerra *di Benedetto Croce*, Napoli, Bibliopolis, 2020, pp. 90-91, testo e note 82 e 85: «In questo continuo trasfondersi della morale nella politica, che pur rimane politica, è l'effettuale progresso etico dell'uman genere. […] Come il poeta, che non conosce concetti ma stati d'animo, si trova dinanzi stati d'animo perfusi di un nuovo pensiero, così il politico, che non conosce se non interessi e utilità, si trova dinanzi nuovi interessi e nuove utilità sorte da nuovi bisogni morali, e non può respingerli, e deve fare i conti con loro, cioè deve accettare quella nuova materia insieme con le altre e come accettava le altre, e darle col suo operare forma politica».

stessa *juristocracy* che a molti, *quorum* Monateri, spiace. Eppure, se accettiamo l'idea che il diritto (tanto nella sua struttura quanto nella sua funzione) è l'unità di misura dei rapporti sociali (termine, ovviamente, che racchiude ogni dimensione della socialità, ricomprendendo quindi, e anzi partendo da, l'individualità), è evidente che, in chiave metodologica, il campo si allarga (potenzialmente è uno spazio senza confini), perché il primario sforzo sarà diretto alla conoscenza delle, e poi al raffronto tra le, varie 'esperienze giuridiche' storicamente attestate e documentabili, all'insegna, da un lato, della massima apertura metodologica (tutto ciò che serve a capire merita di essere utilizzato), e, dall'altro (ma i due profili sono evidentemente ben collegati), dell'inevitabile pluralismo dei fattori di produzione della giuridicità (che poi è una prospettiva, tanto metodologica quanto operativa, a cavallo tra l'Hayek teorico dell'ordine spontaneo e il Leoni teorico del diritto come pretesa individuale).

Del resto, il libro di Monateri, se trova, alla fine, nei metodi quantitativi una speranza di oggettività contro l'ideologia ma soprattutto contro gli ideologismi (e in questo senso non c'è dubbio che il diritto come tale possa e debba essere immune da operazioni falsificatrici, per volontà o per ignoranza, della realtà), accetta l'inevitabile pluralismo metodologico insito in ogni scienza comparatistica.

E sono ben noti (anche se non sempre dichiarati) i debiti che i giuscomparatisti hanno contratto con i linguisti.

Inoltre, il titolo al plurale (metodi, non metodo), dà per ammesso che, se la comparazione, prima di tutto, serve appunto per comprendere, poi essa serve a valutare simiglianze e differenze, a giudicare, a riformare. Ecco l'uso a cavallo tra il scientifico e il politico del diritto comparato; ecco l'impossibilità di ritenere che ciascun metodo risponda unicamente a una propria logica interna. Essa ben può esserci, e come tale potrà essere studiata, ma la teorizzazione e l'applicazione di un metodo è evidentemente la risposta a una determinata esigenza, o, ancora più semplicemente, al contesto nel quale il ricercatore, o la ricercatrice, operano.

Già il nostro Giacomo Leopardi, nello Zibaldone, p. 1191, scriveva: «comparazione ch'è l'unica fonte dell'idea delle proporzioni e convenienze»; peraltro, il passaggio dall'estetica, all'etica e poi al diritto, rispetto al carattere sistematico di quest'ultimo, e rispetto al senso di un ordine che è tale solo perché esprime una moralità e una eticità che da potenza diventa atto, è ben noto; e, storicamente, anche il diritto comparato ha giocato questo ruolo di strumento – qui potremmo anche dire imperialista – di esportazione di modelli giuridici che, prima di esser tali, erano modelli o assetti sociali, culturali, economici. Nel momento in cui, per esprimerci in modo sintetico e non troppo preciso, le coscienze nazionali culturalmente colonizzate sviluppano quel sentimento cultural-patriottico che non divenga sterile rivendicazione oppositiva contro l'altro (rifiutando così *in*

radice quell'idea di assimilazione, che è invece è l'elemento che meglio esprime il carattere dell'umanità), ma che funzioni invece appunto quale strumento non solo e non tanto di emancipazione, ma, soprattutto, di consapevolezza culturale, tutto ciò porta inevitabilmente ad aprirsi non solo alla comparazione come tale (l'esempio dell'America Latina va tenuto presente), ma al pluralismo metodologico, fermi nell'idea che c'è (o ci può essere) un metodo per ogni specifica esigenza, e che c'è un metodo (o più metodi) per ogni contesto.
Ecco che, allora, un altro significativo apporto del volume di Monateri è l'aver mostrato come la (consueta, in tutti gli ambiti) battaglia sul metodo, in realtà, sia una battaglia che, nel momento in cui si autoraffigura come tale, nasconde la politica dal diritto, reclamando una unicità metodologica da intendersi come la migliore garanzia di scientificità. Ma progressivamente questa convinzione è venuta meno, e si è in contrario affermata quella pluralità funzionale del diritto comparato, che richiede, se non un sincretismo metodologico, quantomeno una pluralità di metodi, da mettere a frutto a seconda dello specifico obiettivo che si vuole conseguire.
Da questo punto di vista, la riflessione di Monateri sui metodi del diritto comparato insegna anche, richiamando alcuni contributi notevoli e rappresentativi della discussione metodologica di ieri e di oggi (e anche degli scopi cui tende questa discussione), che il costante ritorno sui problemi metodologici (ma è vero che, in Italia, al contrario di quanto accadde nel passato, questa discussione non ha suscitato oggi quegli stessi interessi teorici che altrove sono invece ben evidenti e anche accesi, quando contrapposti), che il metodo serve all'autorappresentazione (p. 79) delle varie componenti giuridiche. Nel metodo ci riflettiamo, in quanto giuristi, e il metodo ci riflette.

3. Si può forse aggiungere che l'attenzione metodologica rivolta al diritto comparato fa anche molto ben comprendere quante variegate siano (o possano essere) le dimensioni del diritto. E sono tutte scientificamente legittime (direi pure in chiave didattica, anche se Monateri non si sofferma sull'altro grande tema: come si insegna il diritto comparato), sia appunto nella prospettiva teorica (che cos'è e cosa serve il diritto comparato), sia nella prospettiva operativa, cioè un diritto comparato che può svolgere un ruolo di fonte del diritto (ma anche un diritto comparato che serve per conoscere ciò che è, e che deve rimanere, diritto straniero).
Lungo questa linea, è evidente che il ritorno dell'idea di universalizzazione del diritto va di pari passo con l'idea di universalizzazione di taluni diritti. È dunque chiaro che qui siamo di fronte a un uso politico e ideologico (ma nel senso, che non ha nulla, come tale, di negativo, di scelta degli obiettivi da conseguire, partendo da determinate premesse di valore, che certamente possono essere concettualizzate e

dunque trasformate in categorie, e anzi questo è ciò che abitualmente accade) del diritto comparato, che impiegherà tanto argomenti strutturali quanto funzionali per incidere sull'ordinamento, il quale, pur appartenendo all'area della liberal-democrazia, che è la *naturalis ratio* contemporanea, è comunque un ordine a fondamento storico: ed è appunto la storicità dell'ordinamento il primario fattore di legittimazione del pluralismo metodologico. Ferma restando la salvaguardia della liberal-democrazia. Chi ne sta fuori, tanto come istituzione quanto come individuo, è certamente legittimato a farlo, con il limite del rispetto di quella che, con la vecchia e felice formula, va sotto il nome di libertà individuale, che però, appunto, non ha vita facile, al di fuori delle liberal-democrazie, cioè al di fuori dello Stato di diritto[351]. Come reagire contro ordinamenti giuridici antiliberali è tema spinoso e che certamente va oltre il perimetro del volume di Monateri; ma la scelta dell'inerzia, e più in generale della prudenza, è a mio avviso sempre opinabile.

Se peraltro confrontiamo, o comunque ci interroghiamo sulla globalizzazione del diritto e sulla universalizzazione del diritto (che non sono necessariamente la stessa cosa, posto che il riferimento alla globalizzazione va inteso come esigenza di uniformare determinate regole, primariamente per ragioni economiche o per conseguire obiettivi che solo globalmente possono essere raggiunti; laddove il riferimento all'universalizzazione del diritto ha un intrinseco significato etico: rendere in primo luogo i diritti di libertà diritti universali; il che significa fare in modo non solo che questi diritti vengano affermati ma che poi siano attuati e tutelati; e a seguito dei diritti di libertà garantire almeno alcuni di quei diritti sociali che, come tali, rafforzano l'ordinamento giuridico nella prospettiva istituzionale, pensando soprattutto alla fiducia di cui un ordinamento dovrebbe essere fonte. Dove non c'è fiducia, sia tra privati, sia tra apparati e privati, non ci può essere diritto, almeno secondo una interessante recente proposta, che invoca l'abbandono del 'paradigma sfiduciario' e l'adozione del 'paradigma fiduciario'[352]), vediamo come il metodo empirico-quantitativo possa rivelarsi assai utile, intanto per conoscere quella che chiamiamo realtà dei fatti, e che dunque richiede nell'osservatore la capacità di raccogliere (quando ciò sia possibile, e sempre che una 'domanda empirica' possa avere senso: e senso l'ha solo quando i dati raccolti possano servire come base per testare un fatto; e la domanda, cioè l'ipotesi di lavoro, deve essere posta in un modo tale da consentire di estrarre dai dati il

[351] Per un'accorata e efficace difesa del liberalismo (cioè, appunto, di quel modello liberal-democratico, che, a seconda del contesto storico, sarà chiamato a intensificare o a ridurre il tasso di socialdemocrazia necessario in ogni matura liberal-democrazia contemporanea: è infatti il passaggio dal liberalismo classico a quello contemporaneo, che ha segnato la vita di tutte le liberal-democrazie ormai da decenni), v. ora F. Fukuyama, *Il liberalismo e i suoi oppositori* (trad.it.), Milano, Utet, 2022.

[352] T. Greco, *La legge della fiducia. Alle origini del diritto*, Bari-Roma, Laterza, 2021.

maggior numero di implicazioni osservabili[353]), e poi di mettere a frutto, in chiave programmatica, una serie di dati.
Lasciando qui da parte la questione dell'opportunità, se non della necessità, che il giurista come tale interessato all'impiego di questa metodologia (quindi il 'giurista empirico') accetti il principio di assimilazione scientifica, in riferimento, quanto meno, al campo della statistica, l'accoglimento di questa metodologia (che, peraltro, presentandosi come il *New Legal Realism*, forse avrà, in Italia, miglior fortuna di quanto ne abbia avuta l'analisi economica del diritto, nonché gli studi improntati alla 'Comparative Law and Economics') potrà forse servire per opporre una reazione contro ciò che è ormai divenuto un eccesso di retorica giuridica, che però non sempre bene si concilia con l'eccesso di costruttivismo giuridico. Siamo di fronte a un duplice abuso della ragione?
Il saggio di Monateri invita a riflettere soprattutto su quest'ultimo aspetto.

[353] Un testo di riferimento è: R.M. Lawless, J.K. Robbennolt, Th.S. Ulen, *Empirical Methods in Law*, 2nd ed., New York, NY, USA, 2016.