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Articoli

CANADIAN JURISDICTION AND CANADIAN LEGAL EDUCATION: WHY SHOULD AN ITALIAN SCHOLAR LOOK TO CANADA, AND WHAT CAN HE TAKE AWAY FROM IT WHEN VIEWING IT FROM A FOREIGN (AND ITALIAN) PERSPECTIVE?

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Abstract

This essay examines Canadian bijuralism as a distinctive model for legal education and comparative legal scholarship. It explains how Canada combines common law and civil law traditions within a single constitutional and legislative framework. Particular attention is given to Quebec, whose private law is rooted in the civil law tradition while coexisting with federal and provincial common law systems. The paper highlights the educational impact of bijuralism, especially through dual B.C.L./J.D. programs offered by leading Canadian law schools. It shows how these programs prepare lawyers to operate across provinces, legal traditions, and institutional contexts. From an Italian and European perspective, Canada offers a valuable laboratory for rethinking comparative law beyond purely national categories. The essay focuses especially on two private law issues: contractual cause and the control of unfair clauses in adhesion contracts. Quebec civil law is compared with Canadian common law doctrines such as unconscionability, particularly in relation to exclusion and arbitration clauses. Recent Canadian case law demonstrates an increasing convergence between civil

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This paper has been subjected to double-blind peer review

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law and common law solutions in the protection of weaker contracting parties. The Canadian experience ultimately provides Italian scholars with a rich example of legal pluralism, doctrinal dialogue, and transsystemic legal education.
Keywords: Canadian bijuralism; legal education; comparative law; Quebec civil law; unconscionability.

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1. FOREWORD.

I am grateful to my colleague Chiara Tenella for inviting me to this conference, on "*University Courses in Private and Comparative Law: Educational Models and Prospects in Legal Education*".

I was invited, I suppose, because I have been hosted several times at some of the most important Canadian universities to further my research and teach. My fellow Canadian colleagues have also been invited to reciprocate at our beloved university.

In addition to providing a general overview of the legal framework of the Canadian jurisdiction and the resulting shape of Canadian legal education, I will primarily address the fundamental question of why an Italian scholar should look to Canada and what they can learn by viewing it from a foreign (and Italian) perspective.

I will not discuss the use of the Socratic method in law schools in Vancouver, Toronto or Montreal, as it is well known that it derives from the ideas and case method of Christopher Columbus Langdell[1], dean of Harvard Law School at the end of the nineteenth century. This approach, which combines casebooks and question-and-answer sessions in class, is followed in common law Canadian universities and was also adopted to some extent in our university, when Pier Giusto Jaeger pub-

1 Christopher Columbus Langdell, Dean of Harvard Law School from 1870 to 1895.

lished a series of books titled "Casi e materiali di diritto commerciale" in the 1980s.

This approach has advantages, such as deep attention to law in action before courts, but also disadvantages, such as significant time consumption and diminished systematic and holistic approaches to legal systems as a whole.

2. CANADA AND ITS *BIJURALISM*.

The Canadian legal system is characterized by legal pluralism, which is defined as the coexistence and interaction of multiple sources of law and legal systems.

One form of Canadian legal pluralism is Bijuralism, which is the presence of both common law and civil law within the same legislative framework.

In Quebec, civil and common law have repeatedly exchanged roles in governing property and contract law.

Initially, New France (the territory that is now Quebec) adopted the laws, customs, and practices of the civil law tradition. From 1664 onward, the "Coutume de Paris," a consolidation of civil law rules, was the official governing law of New France. After the British Conquest of 1760 and the Treaty of Paris of 1763, however, the common law of England became the law of reference in New France.

In 1774, the Quebec Act reinstated, with certain exceptions, the rules and principles of civil law in matters of property and civil rights. This act also formalized the coexistence of common and civil law within a single territory in Canada for the first time, with civil law applied to private law matters and common law applied to public law matters[2].

The 1867 Constitution Act divides legislative powers between the Parliament of Canada and the provinces, allowing for the continued coexistence of common and civil law in Canada.

According to subsection 92(13) of the Constitution Act of 1867, matters relating to property and civil rights fall under the legislative jurisdiction of the provinces. These matters include provincial private law issues such as civil liability, torts, property, securities, and contracts. In Quebec, this broad power is exercised in a civil law environment. In contrast, the rest of Canada exercises this power in a common law environment.

2 As recalled in the official website of the Department of Justice Canada.

Since the 1990s, the Department of Justice has ensured that federal acts and regulations are accessible, easily understood, and applicable across Canada in both official languages, in the context of both civil law in Quebec and common law in other provinces and territories.

To be effective and understood across Canada, federal legislation must be bilingual and bijural. This brings us to the topic of interpretation. The relevant principles and parameters for the bijural interpretation of legislative text are set out in the Interpretation Act [3], which confirms that civil law and common law are both equally authoritative sources of law in the context of property and civil rights in Canada.

In particular, Sections 8.1 and 8.2 of the Interpretation Act, read: "8.1. *Duality of legal traditions and application of provincial law. - Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.*

8.2.- Terminology.- Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces".

3. THE TWO SUBSEQUENT CIVIL CODES OF LOWER CANADA AND QUEBEC.

Unlike all the other provinces and territories, which adhere to common law, Quebec has and had civil codes on matters of private law.

As it was recalled: "*Today Quebec has two Civil Codes, the 1993 Civil Code of Québec, and the 1866 Civil Code of Lower Canada, which remains in force to the extent of federal jurisdiction under the Constitution Act of 1867 - notably in relation to marriage, interest and insolvency. The 1866 Code was the fruit of a Codification Commission created in 1857 to consolidate, in a bilingual statement, all civil laws in Canada East. For doctrine, the commissioners relied heavily on the works of the great French jurist Pothier, to a lesser extent on various commentaries on the Code*

[3] The Interpretation Act is a consolidation made on 2025 (R.S.C., 1985, c. I-21) under Subsections 31(1) and (2) of the Legislation Revision and Consolidation Act, in force on June 1, 2009.

Napoléon and occasionally upon the text of the Louisiana Civil Code. They derived the majority of the Code's rules from the Custom of Paris, brought to New France in 1663"[4].

4. CROSS - PROVINCE LEGAL PRACTICE AND THE SUPREME COURT OF CANADA.

The dual legal system, which is based on both common and civil law, requires practitioners who aspire to practice across provinces, as well as federal civil servants, to pursue legal education in both fields. A deep knowledge of both common and civil law is mandatory for practicing efficiently in Quebec and in the other provinces and territories, for serving in public state departments, and for submitting cases before the Supreme Court of Canada (SCC), as well as for being appointed as a judge in it.

Regarding the SCC, former Chief Justice Richard Wagner proudly stated that the SCC is "*the only bilingual and bijural supreme court in the world*" able to "*decide cases in both English and French and from both common law and civil law*".

The Court originally had six judges. The number of Supreme Court justices increased to seven in 1927 and again in 1949, reaching the current total of nine members. The Supreme Court Act requires that three of the nine judges be appointed from Quebec. The others are traditionally appointed from the following regions: three from Ontario, two from the western provinces or northern Canada, and one from the Atlantic provinces.

5. THE IMPACT OF BIJURALISM ON THE LEGAL EDUCATION SYSTEM. THE BACHELOR OF CIVIL LAW (B.C.L.) AND THE JURIS DOCTOR (J.D.): LAW SYLLABUSES AND DOUBLE DEGREES.

Since the Canadian legal system is *Bijural*, some of the main universities started offering dual degree programs. Upon completion, students receive a Bachelor of Civil Law (B.C.L.) for civil law and a Juris Doctor (J.D.) for common law, two degrees to qualify students to practice in both jurisdictions. The standard duration of a

[4] Roderick A. Macdonald, entry *«Civil Code»*, in *The Canadian Encyclopaedia.*

J.D. or B.C.L. program is three years, and the combined program for a double degree is an additional year, for a total of four years.

Among the universities offering these programs are McGill University in Montreal and Osgoode Hall Law School in Toronto (York).

McGill University's double degree program is called the "BCLJD." It started in 1999 as - "*a bold experiment for teaching the common law and the civil law in an integrated or (in McGill parlance) "transsystemic" manner from the first day of the first year of the law school*"[5].

Such a program, established also in Louisiana State University, "*should provide a cosmopolitan citizenship"* because, as it was said, "*Bijuralism is first and foremost a means of gaining a personal culture*"[6], which is the mission of the law schools.

At McGill's Faculty of Law, within the aforementioned curriculum, otherwise referred to as the "National Program", students embark upon an integrated program of studies that qualifies them for Bar Admission Programs across all Canadian provinces. The faculty confers its Bachelor of Civil Law (B.C.L.) and Juris Doctor (J.D.) degrees upon candidates who have successfully completed a minimum of 105 credits.

The first year at McGill is based on courses split into topics taught from both civil and common law perspectives. Topics include: Contractual Obligations and Extra-Contractual Obligations/Torts, which respectively cover, as the syllabuses read, respectively "*Basic concepts of contractual obligation in the Civil and Common Law. Formation and consent; formalities; cause and consideration; relativity of contracts and privity; lesion and unconscionability; performance and breach; frustration and force majeure; contractual remedies*" and "*Integrated study of basic concepts of extracontractual obligations in the Civil and Common law. Fault and other bases for liability; protected interests; causation; reasons for exoneration; apportionment of liability; intersection of human rights and civil wrongs*".

During the second year, *Property Law* is, again, taught on a dual basis (Civil and Common Law, but considering also a third source of law, the Indigenous one). The Syllabus reads: "*Integrated study of the foundations, principles and mechanisms of property law. Examination of common law, civil law and indigenous traditions in respect of property. Key relationships in respect of things and services as well as limitations on property rights*.

In the following years more advanced courses are delivered in the two legal tradi-

[5] N. KASIRER, *Bijuralism in Law's Empire and in Law's Cosmos,* in *Journal of Legal Education,* Vo. 52, Numb 1 and 2 (March/June 2022), p. 29 ss.

[6] N. KASIRER, *Bijuralism in Law's Empire and in Law's Cosmos,* p. 39.

tion perspective: Civil Law Immersion Courses, such as Advanced Civil Law Property (3 credits) and Advanced Civil Law Obligations (3 credits) and Common Law Immersion Courses, such as Advanced Common Law Obligations; Remedies; Restitution; Equity and Trusts and Advanced Torts

Coming to Toronto, at Osgoode Hall Law School -York University the double degree Juris Doctor/Bachelor of Law (Civil) is delivered jointly with the Université de Montréal (with which our University of Milan had had summer schools' program for several years).

As the Osgoode Hall website tells, "*Knowledge of both common law and civil law systems is increasingly valuable in today's environment of frequent cross-border transactions and global clientele. Dual credentials are also valuable when applying for a judicial clerkship at the Supreme Court of Canada. After four years combined study, students graduate with a Juris Doctor in common law from Osgoode Hall Law School and a Bachelor of Law (Civil) from the Université de Montréal, Faculté de Droit. After completing three years in their home faculty, students in the combined program are granted two years advance standing at the other law school and are thus able to complete their second law degree in one year*".

In this joint educational program, students apply for admission during their third year at their home faculty. Admitted students then take a combination of first-year and upper-level courses at the second law school.

As to western Canada, it is worth noting that another prominent Canadian law school, the Peter A. Allard School of Law at the University of British Columbia (UBC)- Vancouver, does not offer a dual degree program. Instead, it focuses solely on common law and provides the option to study civil law concepts during its common law courses. Additionally, it allows students to transfer credits for civil law courses taken outside of UBC. Therefore, students who have already obtained a three-year Bachelor of Civil Law (B.C.L.) from other universities that offer a three-year civil law education program (namely, in Montreal) can earn a Juris Doctor (JD) in only one year in Vancouver.

6. SOME IMPRESSIONS ON THE CANADIAN SCHOLARS' ATTITUDE AND POSTURE TOWARD COMPARATIVE LAW.

Unlike what a European scholar might expect, given the distinctive bijuridical nature of the Canadian legal system, a culture of comparative law is not particularly widespread in Canadian academia. University lecturers and scholars tend to discuss and explore legal issues while remaining firmly within their own legal tradition.

Of course, there are exceptions, particularly among those who, by virtue of their role, are in contact with the two legal families present in the Canadian legal system. One example is Mr. Nicholas Kasirer, a current member of the Supreme Court of Canada (SCC), who was a close friend of Rodolfo Sacco.

Mr. Kasirer spoke with great affection and admiration about Sacco's teachings and their dialogue when he was invited to speak at a seminar in Sacco's memory. The seminar was organized a few years ago by the University of Turin and Antonio Gambaro on November 16, 2023.

The general lack of curiosity in the Canadian academic world about the approaches and methodologies used to study the other legal system sometimes causes Canadian scholars to miss opportunities offered by the comparative law method.

One example stands out.

It is well known that the teaching and educational approach of the "Civilians" is more theoretical and inclined towards dogmatics than that of a common lawyer. With a peculiar "provincialism," Italian scholars tend to undervalue their own conceptual toolkit and envy the case-based study typical of the common law tradition.

However, one area of common law, the Law of Restitution, has undergone a process of identification, autonomy, and systematization through the Restatements of the American Law Institute since the 1930s.

John McCamus, Professor Emeritus at Osgoode Hall Law School is the Canadian standard-bearer and promoter of the autonomous study of this third branch of law, the Law of Restitution, previously scattered among *quasi-contracts* and trusts. I invited him a few years ago to deliver a highly acclaimed series of seminars at our University of Milan.

On that occasion, I noted with surprise that the creation of such a new field of study after contract and torts had not taken advantage, in North America, from the systematization that the subject matter had received in European civil codes.

Indeed, the rules on recovery of undue payments provided by continental civil codes have their roots in the Roman *condictio indebiti* and in the *condictio ob causam finitam* and are frequently employed in civil law jurisdictions to address ineffective or terminated contracts. However, the North American approach appears to demonstrate a limited engagement with the European civile codes and the Roman Law roots of this tradition.[7]

7. WHAT A *BIJURAL JURISDICTION* CAN GIVE TO ITALIAN AND EUROPEAN SCHOLARS AND LAWYERS.

From an alternative standpoint, it is worthwhile to consider the potential benefits that the bijural nature of the Canadian system could offer an Italian or European legal scholar.

Here, I will limit myself to two topics I have addressed in the past: the issue of "cause" as an essential element of the contract[8] and the judicial control over the unilateral drafting of standard terms in adhesion contracts[9].

7.1. Cause and Consideration in Quebec Civil Law.

As for the first one, the meaning of the concept of 'cause,' which Italian legal scholars have lost over the decades due to the different functions to which the causa has been put, I would like to highlight two points.

During the late eighties, we law school students were taught that *cause* and *consideration* perform similar tasks but are specific to different legal systems. Therefore, they do not coexist within the same framework and cannot be compared on a theoretical level.

Furthermore, the doctrine of consideration evolved in a complicated manner in North American common law jurisdictions. On the other hand, civil law code drafters did not define cause.

The concept of cause is currently ambiguous, and the matter seems difficult to address. Civil lawyers seem to have lost the roots of the concept of cause. Problems have arisen in managing the concept of cause itself, as well as in comparing it with

7 At most, a general principle against unjust enrichment "*can serve as a basis for modifying and extending the existing law*", while, "*retaining the existing categories"* which is consistent with the Supreme Court of Canada (J. McCamus, *The Restatement (Third) of Restitution and Unjust Enrichment*, in *Canadian Bar Review* 90.2 (2011): 439-467, at 450)

8 For a more detailed exposure, I would like to make reference to my essay DELFINI, *Instances of Civil Law in North American Common Law Tradition: Cause and Consideration in Quebec and Louisiana Civil Codes,* in *The Italian Law Journal,* Vol. 02 – No. 01 (2016).

9 Once again, I would like to refer to my essay DELFINI, *Unnegotiated Contracts of Adhesion in American Common and Civil Law Jurisdictions: The Canadian and Argentinian Cases,* in *Milan Law Review,* 2021, n. 1.

consideration.

As we know, the first Italian Civil Code, enacted in 1865, was consistent with the Napoleonic Code. The section titled "Upon the Cause of Contracts" contained articles 1119 and 1120, which read "*An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect*" and "*A contract is valid, although its cause is not expressed*", following quite literally the wording of 1131 and 1132 of the Napoleonic Code[10], but in the current Italian Civil Code (ICC), enacted in 1942, the *cause* is mentioned in number 2 of Section 1325 – which sets out the requirement for a valid *contract* – without any explanation of its meaning.

Since the 1942 ICC mentions cause as a requirement for contracts, not for obligations, scholars and courts have started using the concept of cause to control the lawfulness of legal operations and the practical results that the parties to a contract seek. As a result, the meaning of the word "cause" has become uncertain in civil law systems, and the concept has often become redundant as quite a duplication of the object (or subject matter) of the contract.[11]

Therefore, prominent Italian scholars, fully aware of the importance of legal comparisons, proposed returning to the root of the concept of cause as the reason for a promise to be enforceable. They believed this was the only way to give the concept back its understandable meaning[12].

Nevertheless, current case law shows that the concept of cause (mentioned in Section 1325, No. 2 of the ICC) is often used as a general clause to challenge the validity of contracts whose outcomes are not acceptable to the contracting parties.

In their quest to understand cause, Italian scholars and lawyers can look to Canadian law for guidance.

Firstly, Quebec's codification followed French law, which was also influenced by

[10] Nap. Code Section 1131: "*An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect*"; Section 1132: "*An agreement is nevertheless valid, although its cause is not expressed*".

[11] For example, Guido ALPA and Vincenzo ZENO ZENCOVICH, *Italian Private Law,* in *The University of Texas at Austin - Studies in Foreign and Transnational Law*, Routledge – Cavendish, 2007, p. 162, translate the word *cause,* requested as per Section 1325, n° 2, Italian Civil Code, as <<the object [that] is the outcome that the transaction is calculated objectively to produce>> and therefore speak about the object (Section 1325, no 3, Italian Civil Code) as <<subject matter [that] is whatever the declarer is making disposition of, in other words the content of the legal transaction>>.

[12] Rodolfo Sacco, in Sacco – De Nova, *Il contratto*, in Trattato Sacco, 3rd ed, Torino Utet, 2004, I, 790 following the paths of Gino Gorla, *Il contratto. Problemi fondamentali trattati con il metodo comparativo e casistico,* I, Milano, 1955; Gorla, entry on "*Consideration",* in Enciclopedia giuridica, IX, Milano, 1961, 176 ss.

the Louisiana Civil Code of 1870 (LCC)[13]. Its lawmakers also included a definition of cause that is consistent with the one subsequently adopted by the Quebec Civil Code. Section 1967 (LCC) titled "Cause Defined; Detrimental Reliance" reads: "*Cause is the reason why a party obligates himself*".

Secondly, the current Civil Code of Quebec contains a definition of "cause," and despite being a very recent code, dating from the nineties, it does not abstain from laying down definitions as some nineteenth-century codifications did. Thus, we find Section 1410, which defines "cause" as follows: *The cause of a contract is the reason that determines each of the parties to enter into the contract"*.

Finally, Section 984 of the former Code of Québec (then known as Lower Canada) explicitly equates cause with consideration. This is in line with the original meaning of the term "cause," as used in nineteenth-century continental codes. It refers to both the obligation and the transfer of title.

Section 984 of the Civil Code of Lower Canada states the following: «*There are four requisites to the validity of a contract: Parties legally capable of contracting; their consent legally given; something which forms the object of the contract; a lawful* cause or consideration».

We may note that the wording is a *verbatim* replication of Article 1108 of the Code Napoléon, except for the addition of "consideration" as the equivalent of "cause": therefore I am sure many of you are wondering if, before writing his famous entry on "consideration" in the "*Enciclopedia del Diritto*", Gino Gorla had the Civil Code of Lower Canada in his hands!

7.2. Control over unilateral drafting of clauses in adhesion contracts and the Civil Code of Quebec.

As for the second issue, the control over the unilateral drafting of contract claus-

[13] As E. Fabre-Surveyer, a prominent Judge of the Superior Court of the Province of Quebec, pointed out in a speech delivered on 8 April 1938, at the Dedication of the Law Building of the Louisiana State University law school, <<*The position of the civil law in Quebec might well have been very different had not the Code of Louisiana been a successful experiment. In Louisiana the civil law was codified in 1808; the Civil Code of Quebec did not come into existence until 1866. Hence the experience of Louisiana in codifying and applying French civil law in America, extending over half a century, was of inestimable benefit to the framers of the Quebec Code*>> E. Fabre-Surveyer, *The Civil Law in Quebec and Louisiana*, 1 La. L. Rev. (1939), 649. He adds: <<*It is true that during the first half of the nineteenth century other countries had modelled their law on the Civil Code of France; but distance and difference of language made their work less valuable to Quebec than the experience of Louisiana. In 1857, the law decreeing the preparation of a civil code for Quebec stated that "the great advantages which have resulted from Codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the Codification of the Civil Laws of Lower Canada*>>.

es in standard contracts, the current Civil Code of Quebec has confirmed a thesis I had put forward in Italy. Namely, in contracts of adhesion, the systematic unilateral derogation from merely supplementary code provisions may be challenged in court, by the adhering party, as invalid and unenforceable.

This thesis is substantially confirmed not only in the most recent Argentinian code,[14] of 2015 - which Art. 988 states that in contract of adhesion "*must be considered as non-written: the clauses that (…) entail a waiver or restriction to the rights of the adherent or expand the rights of the standard terms drafter which are provided by the code default rules"* - but also by the Canadian Quebec Civil Code of 1991, which Section 1437 provides that "*An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced. An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore contrary to the requirements of good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause".*

In other words, Section 1437 of the Quebec Civil Code makes it clear that the code's default rules — the ones we call "*norme dispositive*" — can only be set aside through vis-à-vis and *ad hoc* negotiations. On the contrary, they cannot be repelled unilaterally by the drafter of standard terms in a contract of adhesion and this applies not only to B2C contracts, but also to B2B ones.

7.3. The way in which the doctrine of unconscionability is used by Canadian common law to address the same topic.

Finally, it is interesting to note that the other Canadian common law provinces have addressed the same issue of controlling unilateral contract terms with a different tool, and yet have ended up with practical outcomes that are very similar to those that may result from the application of Section 1437 of the Civil Code of Quebec in specific cases.

Such a result has been achieved – in the absence of a civil code - through the

[14] The *Código Civil y Comercial de la Nación,* CCCN was enacted in Argentina on 1 August 2015 by Law no. 26994 (*Código Civil y Comercial de la Nación,* or CCCN), repealing the former separate Civil and Commercial Codes and following, on the unification of the two into one, the Italian path set in 1942. Its Art. 988 CCCN, headed "Abusive clauses", reads: *«En los contratos previstos en esta sección, se deben tener por no escritas: a) las cláusulas que desnaturalizan las obligaciones del predisponente; b) las que importan renuncia o restricción a los derechos del adherente, o amplían derechos del predisponente que resultan de normas supletorias; c) las que por su contenido, redacción o presentación, no son razonablemente previsibles».*

evolving development[15] of the doctrine of unconscionability, departing from the original, stricter British one and starting from the suggestions given by the U.S. Uniform Commercial Code[16].

Indeed, moving on from the end of the nineteenth century, English courts of equity began to set aside agreements when they resulted from an inequality of bargaining power, referring to the concept of "unconscionability" [17].

This concept addresses something which "affronts the sense of decency", as it involves a gross overall one-sidedness of the contract or of a specific term such as disclaiming a warranty, limiting damages or granting procedural advantages [18]. According to Canadian case law, awareness of the vulnerability of the other party is not necessary, except in cases where the effects of the doctrine are claimed involving third parties[19].

Under the traditional unconscionability doctrine, the remedy available to the weaker party is basically the "rescission" of the agreement (in equity) [20]. Thus, the scope of the traditional doctrine is unlikely to prove efficient in controlling contract power in adhesion contracts because, as a result of its application, the whole contract – and not only the unconscionable clause - would be set aside. Therefore «it may be asked whether the weaker party, rather than seeking rescission of the entire agreement, may seek to set aside the particularly oppressive term of the contract and enforce the remaining terms of the unconscionable bargain» [21].

The original common law approach can make it difficult to achieve as "generally, if a contract is to be rescinded. The whole contract must be set aside"[22], although in some cases a party can seek the removal of just a part of the contract.

However, a second hurdle arises because common law has not developed a com-

15 It is a common remark that common law jurisdictions outside the United Kingdom, notably Canada and the USA, are more open to establishing a general doctrine of unconscionability: see Beale (ed.), Chitty On Contracts28, 1, London, 1999, 455, referring to Commonwealth courts and in particular to Canadian (but also Australian) courts.

16 *Uniform Commercial Code* (UCC), at § 2-302 "Unconscionable contract or Clause".

17 The roots of the concept lie in equity: see, among others, Treitel, The Law of Contract10, London, 1999, 382; Beale (ed.), Chitty On Contracts28, 1, London, 1999, 450; Calamari, Perillo, The Law of Contracts3, St. Paul, 1987, 399.

18 Calamari-Perillo, op. cit., 406-407.

19 J. McCamus, The Law of Contracts2, Toronto, 2012, 431-436.

20 "Agreements can be set aside, or enforcement can be refused" (Calamari-Perillo, op. cit., 403). In addition, sometimes also damages can be awarded (McCamus, op. cit., 439).

21 J. McCamus, The Law of Contracts2,, 440.

22 B. MacDougall, *Introduction to Contracts,* 5th ed.. Lexis Nexis Canada. 2022, 329.

plete and satisfactory doctrine of severance—a process that would allow courts to remove part of a contract.

Traditionally, case law has applied the so-called "blue pencil test," which involves removing certain words or clauses without adding anything and determining whether the remaining contract still makes sense. Nevertheless, the Supreme Court of Canada has recently developed – starting from -Transport North American Express Inc. v. New Solution Financial Corp. in 2004 - a new approach, called "notional severance", in which «a court allows a term to be severed in conjunction with rewriting part of the contract for the parties to make what is left of the contract have a meaning consistent with the original intent of the parties»[23].

In addition, a selective apply of the doctrine, to set aside merely a part of the contract, is supported in the Uniform Commercial Code (UCC), at § 302, which allows to set aside the unconscionable clause and to enforce the remainder of the contract[24].

Therefore, these two grounds can allow a party to challenge, under the unconscionability doctrine, only some clauses unilaterally crafted by the other party and not the whole contract.

As a result, in the last decades the Supreme Court of Canada has held that the doctrine of unconscionability – which rests mainly on the principle of good faith [25] – may be employed to delete "disclaimer" or "limitation of liability" clauses – and, more recently, also "arbitration" clauses - and to render them unenforceable, maintaining the rest of the agreement still in force [26]. As it was noted, by its seminal decisions, the Supreme Court of Canada has «crafted a unique Canadian rule designed to control the unjust application of exculpatory clauses», that may call "for a new name" for the doctrine itself[27].

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23 B. MacDougall, *Introduction to Contracts,* 331.

24 *Uniform Commercial Code, § 2-302 he*aded "Unconscionable contract or Clause": «(1) *If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination»*

25 See Bhasin v Hrynew, 2014 SCC 71, where Supreme Court of Canada (SCC) – dealing with the performance of the contract – pointed out that a general principle of good faith underlies the law of contracts as it is reflected in many of the existing doctrines, including unconscionability.

26 J. McCamus, The Law of Contracts2, 440.

27 J. McCamus, The Law of Contracts2, 831-832.

The most important cases decided by the Canadian Supreme Court were Hunter and Tercon, in which the court deemed it feasible and practical to delete an unconscionable exculpatory clause and enforce the rest of the contract[28]. These two decisions were followed in 2020 by Uber Technologies Inc. v. Heller, and more recently in 2024 by Lochan v. Binance Holdings Limited, which was decided by the Ontario Court of Appeal regarding the arbitration clause

7.3.1. Hunter v. Syncrude.

In 1989, in the first leading case mentioned above, Hunter v. Syncrude – a decision on a dispute which arose out of three contracts for the supply of gearboxes for the Alberta tar sands project – the Supreme Court of Canada addressed, *inter alia*, the enforceability of a clause included in standard form supply contracts, namely a warranty limiting the liability of the supplier [29].

In the reasoning, it was pointed out: «In light of the unnecessary complexities the doctrine of fundamental breach has created, the resulting uncertainty in the law, and the unrefined nature of the doctrine as a tool for averting unfairness, I am much inclined to lay the doctrine of fundamental breach to rest, and where necessary and appropriate, to deal explicitly with unconscionability»[30].

The Court deemed the exclusion clause enforceable in this case because the parties to the contract were found to have roughly equal bargaining power, rendering the unconscionability doctrine inapplicable [31].

Although the decision was positive on the enforceability of the clause at issue [32], the most important outcome for the topic addressed here is that the Court found it possible, albeit in principle, to not enforce a single clause while maintaining the rest of the contract.

7.3.2. Tercon Contractors Ltd. v. Province of British Columbia

In the 2010 subsequent case Tercon Contractors Ltd. v. Province of British Co-

28 J. McCamus, The Law of Contracts2, 446.
29 Hunter Engineering Co. v. Syncrude Canada Ltd. [1989] 1 SCR. 426.
30 Hunter, at 462 (Chief Justice).
31 Hunter, at 517-518
32 Hunter, at 522.

lumbia[33], the Supreme Court was asked to assess the validity of a standard term (i.e., exclusion clause), which prevented the province from being sued for damages for having awarded a public work of highway construction to an ineligible bidder.

With a majority vote of 5 to 4, the Court found that the exclusion clause could not have prevented the province from being sued for damages due to its ambiguity. Therefore, the Court decided in favour of Tercon[34]. The majority of the Court did not consider the clause applicable to the case due to its unclear wording. Therefore, there was no point in debating whether it could be set aside by the unconscionability doctrine.

However, the issue was raised in the dissenting opinion written by four judges, including Chief Justice McLachlin, Binnie, Abella, and Rothstein, who deemed that the traditional doctrine of fundamental breach was not useful in this case due to its vagueness[35], as was previously noted in Hunter v. Syncrude.

The dissenting minority therefore held it more efficient to rely on the unconscionability doctrine[36].

In the very pragmatic way common law courts shape their reasoning, a three-step test was laid down to assess whether to enforce an exclusion of liability clause included in party's standard terms: «[122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (Hunter, at p. 462). This second issue has to do with contract formation, not breach. [123] If the exclusion clause is held to be valid

33 Tercon Contractors Ltd. v Province of British Columbia 2010 SCC 4, [2010] 1 SCR 69.

34 See reasoning of the Court, Tercon, par. 79: «If I am wrong about my interpretation of the clause, I would hold, as did the trial judge, that its language is at least ambiguous. If, as the Province contends, the phrase "participating in this RFP" could reasonably mean "submitting a Proposal", that phrase could also reasonably mean "competing against the other eligible participants". Any ambiguity in the context of this contract requires that the clause be interpreted against the Province and in favour of Tercon under the principle contra proferentem: see, e.g., Hillis Oil and Sales Ltd. v. Wynn's Canada, Ltd., [1986] 1 S.C.R. 57, at pp. 68-69. Following this approach, the clause would not apply to bar Tercon's damages claim».

35 Tercon, par. 108.

36 Tercon, par. 108.

and applicable, the court may undertake a third enquiry, namely whether the court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts» [37].

Upon applying this to the facts of the case, the dissenting opinion concluded that the exclusion clause, which was drafted as a standard term by the Province of British Columbia, was not unconscionable. Therefore, the Province could not be held liable for awarding the road construction contract to an ineligible bidder.

Performing the second step of the proposed test, the dissenting opinion noted that, although Tercon was not on the same level of power and authority as the Province of British Columbia, Tercon was, in any case, a major contractor perfectly capable of looking after itself in a commercial context. Therefore, the dissenting opinion found that there was no relevant imbalance in bargaining power[38].

Since no material imbalance was found, the clause was deemed valid in the dissenting opinion. Therefore, there was room for the third step of the test: assessing whether an overriding public policy required refusing to enforce the clause. The minority of the court did not find such a policy[39].

In their opinion, the dissenting judges would then have dismissed the appeal, which was not the majority decision. But what is relevant, for the topic here addressed, is that the case confirms the developing of the unconscionability doctrine resulting from Hunter v. Syncrude, id est the applicability of the doctrine not for rescinding a contract as a whole, but to set aside only the clauses found unconscionable, maintaining and enforcing the remainder of the contract as amended without them [40].

Moreover, Tercon is considered a seminal case because the dissenting opinion established a clearer and more precise definition of the Canadian doctrine of unconscionability. It also provided courts and practitioners with a three-step test for applying the doctrine.

After a decade, as predicted by a prominent Canadian scholar[41], more recent Ca-

37 Tercon, par. 122.
38 Tercon, par. 131.
39 Tercon, par. 141.
40 See also J. McCamus, The Law of Contracts2, 826.
41 J. McCamus, *The Law of Contracts*2, 443- 444 who predicted that «the new doctrine is likely to

nadian case law on unconscionability has addressed *arbitration clauses*.

Two cases stand out: Uber Technologies, Inc. v. Heller (2020 SCC 16), which was decided by the Supreme Court of Canada, and Lochan v. Binance Holdings Limited (2024 ONCA 784), which was decided by the Court of Appeal for Ontario.

7.3.3.- Uber Technologies Inc. v. Heller, 2020

The facts of the Uber case, as recalled by the court, were quite simple: «*H provides food delivery services in Toronto using Uber's software applications. To become a driver for Uber, H had to accept the terms of Uber's standard form services agreement. Under the terms of the agreement, H was required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. The fees represent most of H's annual income. In 2017, H started a class proceeding against Uber in Ontario for violations of employment standards legislation. Uber brought a motion to stay the class proceeding in favour of arbitration in the Netherlands, relying on the arbitration clause in its services agreement with H. H argued that the arbitration clause was unconscionable and therefore invalid. The motion judge stayed the proceeding, holding that the arbitration agreement's validity had to be referred to arbitration in the Netherlands, in accordance with the principle that arbitrators are competent to determine their own jurisdiction. The Court of Appeal allowed H's appeal and set aside the motion judge's order. It concluded that H's objections to the arbitration clause did not need to be referred to an arbitrator and could be dealt with by a court in Ontario. It also found the arbitration clause to be unconscionable, based on the inequality of bargaining power between the parties and the improvident cost of arbitration*».

The majority of the Court considered the clause unconscionable:

«*Because of the extensive fees for initiating arbitration, there is a real prospect that if the matter is sent to be heard by an arbitrator, H's challenge to the validity of the arbitration agreement may never be resolved. The validity of the arbitration agreement must therefore be resolved by the court. H's claim that the arbitration clause is unconscionable requires considering two elements: whether there is an inequality of bargaining power and whether there is a resulting improvident bargain. There was inequality of bargaining power between Uber and H because the arbitration*

apply to other clauses that have been the subject of "special notice" requirements under prior law. Of these provisions, perhaps the most likely candidate for subjection to the new doctrine is the "entire agreement clause» and recalled also the «arbitration clauses inserted in consumer services agreements for the apparent purpose of precluding consumer class actions».

clause was part of an unnegotiated standard form contract, there was a significant gulf in sophistication between the parties, and a person in H's position could not be expected to appreciate the financial and legal implications of the arbitration clause. The arbitration clause is improvident because the arbitration process requires US$ 14,500 in up-front administrative fees. As a result, the arbitration clause is unconscionable and therefore invalid».

In the joint reasoning the Court made reference to the said Canadian legal literature and observed: «*Unconscionability is an equitable doctrine that is used to set aside "unfair agreements* [that] *resulted from an inequality of bargaining power" (John D. McCamus,* The Law of Contracts *(2nd ed. 2012), at p. 424). Initially applied to protect young heirs and the "poor and ignorant" from one-sided agreements, unconscionability evolved to cover any contract with the combination of inequality of bargaining power and improvidence*» [para. 54] [42].

Recalling its previous decisions in Hunter, Norberg, and Douez, the Canadian Supreme Court adhered to the two-layer test which «requires both an inequality of bargaining power and a resulting improvident bargain» [par. 65], pointing out that «[74] A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable» and that «Improvidence is measured at the time the contract is formed», and, at the same time, limited the assessment for applying the doctrine to these two requirements [43].

Therefore, the Court considered that «[84] Unconscionability, moreover, can be established without proof that the stronger party knowingly took advantage of the weaker. Such a requirement is closely associated with theories of unconscionability that focus on wrongdoing by the defendant (see Boustany, at p. 6). But unconscionability can be triggered without wrongdoing», noting that otherwise «[85] … A rigid

42 Making reference to (Mitchell McInnes, The Canadian Law of Unjust Enrichment and Restitution (2014), at p. 521; see also 520-24; Bradley E. Crawford, "Restitution — Unconscionable Transaction — Undue Advantage Taken of Inequality Between Parties" (1966), 44 Can. Bar Rev. 142, at p. 143), and adding that: «This development has been described as "one of the signal accomplishments of modern contract law, representing a renaissance in the doctrinal treatment of contractual fairness" (Peter Benson, Justice in Transactions: A Theory of Contract Law (2019), at p. 165; see also Angela Swan, Jakub Adamski and Annie Y. Na, Canadian Contract Law (4th ed. 2018), at p. 925)».

43 In particular, repealing the insertion, suggested by the appellant Uber, that unconscionability would require, in addition, also the following elements: «a victim's lack of independent legal advice or other suitable advice; an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and the other party's knowingly taking advantage of this vulnerability»: the Court rejected such approach because «[82] … This four-part test raises the traditional threshold for unconscionability and unduly narrows the doctrine, making it more formalistic and less equity focused. Unconscionability has always targeted unfair bargains resulting from unfair bargaining. Elevating these additional factors to rigid requirements distracts from that inquiry».

requirement based on the stronger party's state of mind would also erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate».

Then, coming to a crucial point, it said: «[89] … unconscionability has a meaningful role to play in examining the conditions behind consent to contracts of adhesion, as it does with any contract. The many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable, are well-documented … The potential for such contracts to create an inequality of bargaining power is clear. So too is their potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violate the adhering party's reasonable expectations by depriving them of remedies. This is precisely the kind of situation in which the unconscionability doctrine is meant to apply».

The Court is fully aware that the development of the unconscionability doctrine is intended to serve as the principal remedy for controlling the drafting of standard contracts, as well as specific clauses that may render the adhesion contract unfair[44].

Finally, it is worth noting that applying such a new doctrine of unconscionability to standard contracts leads to the excision of the clause while maintaining the enforceability of the rest of the contract, as was seen in the case in question. Therefore, as stated in the decision, «[87] Respecting the doctrine of unconscionability has implications for boiler-plate or standard form contracts»[45].

44 In the words of the Court: «[90] This development of the law of unconscionability in connection with standard form contracts is not radical. On the contrary, it is a modern application of the doctrine to situations where "the normative rationale for contract enforcement ... [is] stretched beyond the breaking point" (Radin, at p. 179). The link between standard form contracts and unconscionability has been suggested in judicial decisions, textbooks, and academic articles for years (see, e.g., Douez, at para. 114; Davidson v. Three Spruces Realty Ltd. (1977), 79 D.L.R. (3d) 481 (B.C.S.C.); Hunter, at p. 513; Swan, Adamski and Na, at pp. 992-93; McCamus, at p. 444; Jean Braucher, "Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State" (2007), 45 Can. Bus. L.J. 382, at p. 396). It has also been present in the American jurisprudence for more than half a century (see Williams v. Walker-Thomas Furniture Company, 350 F.2d 445 (1965), at pp. 449-50)».

45 The Court added: «As Karl N. Llewellyn, the primary drafter of the Uniform Commercial Code, explained: Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning

7.3.4. Lochan v. Binance Holdings Limited (2024).

More recently, the Ontario Court of Appeal addressed an arbitration clause deemed unconscionable in the same way the Supreme Court of Canada did in the Uber decision.

The factual background was as follows: "*The appellant operates the world's largest cryptocurrency trading platform. Between 2019 and early 2022, the appellant sold cryptocurrency derivatives to Canadians through its website. The motion judge found that cryptocurrency derivatives contracts are novel, complex, and risky securities, which present investor protection concerns. A seller is required to file a prospectus prior to selling cryptocurrency derivatives. The appellant did not register with the Ontario Securities Commission or seek an exemption from registration. The appellant did not file a prospectus with respect to any of its securities offerings. The respondents are representative plaintiffs who commenced a proposed class action in June 2022. The claim is based on s. 133 of the Ontario Securities Act, R.S.O. 1990, c. S.5, which provides purchasers with a right of action for recission or damages against a company selling securities for failure to file or deliver a prospectus. The statement of claim proposes a class defined as everyone in Canada who, from September 2019 to the date of certification of the proposed class proceeding, purchased cryptocurrency derivatives from the appellant. The appellant moved to stay the proceeding on the basis that the terms of use contract agreed to by users of the Binance website requires that any disputes be resolved by arbitration. The motion judge dismissed the motion for a stay in favour of arbitration. He found that exceptions to the competence-competence principle applied that justified the Ontario court deciding whether the arbitration clause was void as contrary to public policy or on the basis of unconscionability. He found that a stay in favour of arbitration should be refused because the arbitration clause was void both as contrary to public policy and because it was unconscionable. In coming to the conclusion that the arbitration clause was contrary to public policy and unconscionable, the motion judge's findings included the following: The appellant's website prompted users to open accounts in "under 30 seconds", during which the users purported to agree to roughly 50 pages of terms, including the arbitration clause; The arbitration clause provides that the appellant can change any part of the arbitration agreement, and that by agreeing to the terms of use for the website, users*

of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in. There has been an arm's-length deal, with dickered terms. There has been accompanying that basic deal another which ... at least involves a plain expression of confidence, asked and accepted, with a corresponding limit on the powers granted: the boiler-plate is assented to en bloc, "unsight, unseen," on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair. (The Common Law Tradition: Deciding Appeals (1960), pp. 370-71)».

agree to any subsequent amendment to the terms by the appellant; The record showed that during the proposed class period, the appellant changed the forum of the arbitration and the governing law four times, to various destinations far from Canada, including from April 2020 to January 2021 to an "unspecified location, under unspecified law, under unspecified administration and rules"; The last forum for arbitration set by the appellant, Hong Kong, under Hong Kong law, administered by the Hong Kong International Arbitration Centre, imposed prohibitive costs. For disputes under $1 million USD, the median cost of arbitration is $26,743 USD (approximately $36,000 CAD). This figure does not include costs of travel and accommodation, tribunal appointed expert advice, legal fees, transcript services, etc. The motion judge found that the starting cost to access the arbitral tribunal of approximately $36,000 CAD plus legal fees and travel expenses rendered the forum inaccessible to the average crypto investor: Given that the OSC report discloses that the average crypto investor will have something like a $5,000 claim, the choice of Hong Kong as an arbitral forum – a forum with no connection to either the potential claimants or Binance itself as a Cayman Islands company – could effectively amount to a grant of immunity to Binance. He further found: The Plaintiffs and other prospective class members signed an unnegotiable 'click' contract where not only were the details, including the changeable location, of the arbitration clause buried out of sight, and the logistical complexity and expense of arbitration were not revealed anywhere. <u>Binance, as the party that designed and whose professionals drafted the contract, engineered the arrangement to take advantage of the complexity that was hidden behind that superficially benign appearance of an arbitration clause"</u>.

The court upheld the motion judge's decision and dismissed the appeal, stating that the preeminent principle of competence-competence (which reserves the decision on jurisdiction to the arbitral panel) was correctly set aside in this case, as permitted by the Supreme Court in Uber whenever a Canadian judge is required to assess the enforceability of an arbitral clause based solely on the law and a mere "superficial review of the record."

The Court of Appeal – following the opinion of the SSC in Uber which "*permitted the exception to the competence-competence principle for cases where impediments exist that functionally prevent a party from bringing a matter to arbitration such that, if the issue of validity of the arbitration clause is left to the arbitral tribunal, there is a real prospect that it will never be resolved by the arbitral*" - concurred with the motion Judge on the unconscionability of the clause "*because of the inaccessibility of the arbitration forum due to cost, distance, and choice of law, there was a real prospect that the challenge to the validity of the arbitration clause would never be resolved if it were referred to the arbitral tribunal*".

7.4. Unconscionability v. Section 1437 Civil Code of Quebec.

The above analysis of Canadian case law reveals that exculpatory and arbitration clauses in standard terms that are unilaterally drafted can be challenged under the new Canadian doctrine of unconscionability and set aside. The same result can be achieved more directly under Section 1437, second paragraph, of the Civil Code of Quebec, which provides, as we have recalled, that "*An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore contrary to the requirements of good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause*".

In comparison to the approach of the Quebec Civil Code, the common law approach to controlling the unilateral drafting of adhesion contracts appears to be somewhat complex. This is not unexpected.

Firstly, a complete and efficient doctrine of contract severance has yet to be established in common law, as previously reported.

Secondly, in the absence of a code, it is difficult to determine a self-evident set of "rules normally governing the contract," such as those provided by a civil code. This is likely why the targets of the unconscionability doctrine have only been exculpatory and arbitration clauses. Indeed, after setting aside such clauses, common law can fill the gaps in the remainder of the contract by applying traditional precedents on contractual liability and state jurisdiction instead of arbitral jurisdiction.

We may than wonder if Canadian common law courts will address entire agreement clauses in the next future; as it was suggested "*the most likely candidate for subjection to the new doctrine is the "entire agreement" clause. Known to be a "trap for the unwary", entire agreement clauses have often been held to be enforceable only where Canadian courts are satisfied that the significance of the clause was brought home to the affected party. Moreover, entire agreement clauses might be considered to be at least distant cousins of the exculpatory clauses as they preclude liability for what the unsuspecting party might have considered to be a contractual obligation*"[46].

Despite such differences, significant convergence remains evident in the operational rules of Canadian civil and common law. In conclusion, we concur with the finding that "*the doctrine of the unconscionable term may provide a common law device, long*

[46] J. McCamus, *The Law of Contracts*[2], 444.

awaited by some, that can ameliorate the harsh impact of unfair terms in boiler plate adhesion contracts" [47]: a device that is aimed at the same result as it is already reached under Canadian civil law by virtue of Section 1437 of the Civil Code of Quebec.

[47] J. McCamus, *The Law of Contracts*[2], 444.

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Articoli

LAW MEETS LINGUISTICS: DETECTING GENDER-BASED STEREOTYPES THROUGH CORPUS-BASED ANALYSIS IN THE GENDJUS PROJECT

IL DIRITTO INCONTRA LA LINGUISTICA: SCOPRIRE GLI STEREOTIPI DI GENERE ATTRAVERSO ANALISI BASATE SUI CORPORA NEL PROGETTO GENDJUS

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Abstract

The gendered implications of judicial narratives have been investigated in different fields. The GenDJus project aims at discovering and examining gender-based prejudices, stereotypes and biases in judicial discourses. As a joint effort between lawyers and linguists, the project has relied on corpus linguistics as a method to complement feminist queer legal approaches to human rights. Rather than focussing on the substantial outcomes of the project, this paper presents one of the virtuous effects of GenDJus as an interdisciplinary endeavour. This is the lawyers' curiosity of learning linguistics-specific tools, such as the online platform NoSketch Engine. This system interrogates the corpus, a pre-established collection of legal texts, through different functions that help the researcher identify non-obvious gender-related meanings and assumptions in the judges' voices. Although training in (corpus) linguistics optimizes the potential of NoSketch Engine, this can be used by lawyers as an additional instrument to the critical and/or doctrinal analysis to (i) make their informed choices as to the texts most suitable for subsequent close reading; (ii) identify prejudices,

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stereotypes and biases, including judicial silences; and eventually (iii) articulate significant conclusions as to the way in which courts name and contest such prejudices, stereotypes and biases.

Keywords: gender-based stereotypes; queer feminist approaches; human rights; corpus linguistics

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1. INTRODUCTION[1]

The field of gender and law is growing in scope. As an area of knowledge, it offers alternative perspectives to investigate the law to mainstream, patriarchal constructs that permeate sociolegal approaches and sociocultural realities. But 'gender and law' is something more than an area of knowledge: it is a mode of analysis, as well as a way of asking questions and of challenging the nature and operation of the law. And even more: an interest, a focus of attention, a critical stance.[2] Shortly, using gender constitutes a method of practicing, talking about and learning the law. Adopting a gender approach transcends finding conclusions because it focuses on processes and underlying assumptions – eventually, it is a way of approaching life. This paper illustrates one possible way of living a life with this sensitivity[3] by exploring innovative research trajectories that use digital techniques to support the legal and linguistic investigation into judicially driven gender-based prejudices, stereotypes and biases.[4]

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[1] GenDJus has been a passionate project, full of scientific rigour, kindness and respect. I wish to thank Carmelo Danisi, Gianluca Pontrandolfo, Erika Miyamoto and Chiara Sarni for that and for their comments on an earlier draft of this paper. This paper is part of the interdisciplinary research project 'Rights and Prejudice: Linguistic and Legal Implications of Gendered Discourses in Judicial Spaces (GenDJus)' [P2022FNH9B / CUP J53D23017220001] financed by the Italian Ministry of Education and the European Union (Next Generation EU funding scheme); Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 "Istruzione e ricerca" – Componente 2 "Dalla ricerca all'impresa" - Investimento 1.1, Avviso Prin 2022 PNRR indetto con Decreto Direttoriale n. 1409 del 14 settembre 2022: https://www.gendjus.it.

[2] H. Charlesworth, C. Chinkin and S. Wright, *Feminist Approaches to International Law* in *American Journal of International Law*, 1991, vol. 85, p. 613.

[3] I adopt the term 'sensitivity' because it represents a refusal of the rigidification of gender theory as a – only one specific – theory of law. Cf B. Cossman, *Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)*, in *Critical Analysis of Law*, 2019, vol. 6, p. 37.

[4] For the purposes of GenDJus enquiry, a 'prejudice' is a broad term referring to a positive or negative opinion about or a judgement on other individuals based only on their belonging to a given group. A 'stereotype' is a simplified cognitive representation of a certain social group, being the result of generalization of a number of characteristics considered to be indispensable to the essence of the group. A 'bias' refers to a cognitive shortcut, i.e. a quick process through which we interpret reality. The bias is the cognitive activity using the stereotype as a tool to make judgements about ourselves and others: G. Gilleri, E. Miyamoto and C. Sarni, *Methodology and Theoretical Framework*, in C. Danisi and P. Pontrandolfo (eds.), *Prejudice, Stereotypes and Bias in Sexual, Reproductive and Parental Rights: Linguistic and Legal Implications of Gendered Discourses in International Judicial Spaces*, Palgrave Macmillan,

Doing 'gender and law' does not mean only juxtaposing gender studies with legal doctrine or focussing the positivistic study of the law especially on women and LGBTIAQ+ people. Like any other interdisciplinary effort, 'gender and law' requires the gender legal expert to be familiar with both the substance and the tools that are to be used in the field of 'gender' *and* 'law'. But gender is a rather vague term when it is used to define the field. First, there are as many ways to do gender as there are disciplines that explore gender that could be applied to the study of the law, indeed. Second, scholars working in the same discipline can conceptualise gender in different, sometimes opposite ways. For example, postcolonial feminists have accused early feminist studies from the Global North of homogenizing and systematizing discursively the oppression of women by universalizing western values and applying them cross-culturally.[5]

In this paper, law is an object of study of a jurilinguistic effort with a feminist queer ethos. The enquiry proposes an account of the meanings and functions that two disciplines – linguistics and legal studies – attribute to gender as a sociocultural expression embedded in legal visions and practices.

Equally, 'law' might refer to a panoply of sources, practices and actors playing a variety of roles within diverse regimes. This paper presents an example of how the feminist queer lens can be used in researching international human rights law through machine-driven analysis. The article takes its cue from the project 'Rights and Prejudice: Linguistic and Legal Implications of Gendered Discourses in Judicial Spaces (GenDJus)',[6] an interdisciplinary endeavour between the University of Trieste and the University of Bologna, in which I was involved.

GenDJus aims at detecting gender-based prejudices, stereotypes and biases on sexual, reproductive and parental rights in the case law of selected international and national courts in three languages – English, French and Spanish.

What makes the project peculiar is the synergy between lawyers and linguists.[7]

London [forthcoming].

[5] C. Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, in *Feminist Review*, 1988, vol. 30, p. 80. For others, gender is a Western invention: O. Oyěwùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses*, University of Minnesota Press, Minneapolis, 1997. Colonization gave rise to new social (gender) and geocultural (racial) identities: M. Lugones, *The Coloniality of Gender*, in W. Harcourt (ed.), *The Palgrave Handbook of Gender and Development: Critical Engagements in Feminist Theory and Practice*, Springer, New York, 2016.

[6] GenDJus, 'Rights and Prejudice: Linguistic and Legal Implications of Gendered Discourses in Judicial Spaces (GenDJus)'.

[7] Other studies have explored this synergy: J. Phillips and J. Egbert, *Advancing Law and Corpus*

GenDJus has produced one database containing the above-mentioned case-law, and one corpus. The combination of both has allowed the jurilinguistic team to capture how different courts name, interpret and challenge gender-based prejudices, stereotypes and biases. While the GenDJus database[8] is a collection of legal documents (decisions, advisory opinions and separate opinions), linguists have created the GenDJus corpus to gather machine-readable texts[9] through an digital system, Sketch Engine, widely used in the field.[10] The free online version, NoSketch Engine,[11] is accessible via the GenDJus website.This system has allowed the linguistic team to query the corpus to conduct sophisticated computational searches.[12] The output varies depending on the court at stake, but is homogeneous in its approach for each of them.

The final volume of GenDJus offers an example of this joint work between the two souls – linguists and lawyers – collaborating to draw conclusions on legal reasoning, linguistic patterns and discursive strategies in judicial texts.[13] Equally, scholars involved in the GenDJus project have discussed its theoretical and methodological challenges. [14] Against this backdrop, this enquiry contains *another* (unexpected) result of GenDJus relating to the process of reciprocal learning between members of interdisciplinary projects. This process is told from the perspective of a lawyer – the author – who has learnt during the project how to use an instrument typically

Linguistics: Importing Principles and Practices from Survey and Content-Analysis Methodologies to Improve Corpus Design and Analysis, 2018, vol. 2017, p. 1589-1620.

8 GenDJus, 'Case Law'.

9 T. McEnery and A. Wilson, *Corpus Linguistics. An Introduction*, Edinburgh University Press, Edinburgh, 2001, p. 197.

10 Sketch Engine, 'What is Sketch Engine?'; A. Kilgarriff, V. Baisa, J. Bušta, M. Jakubíček, V. Kovář, J. Michelfeit, P. Rychlý, and V. Suchomel, *The Sketch Engine: Ten Years* On, in *Lexicography*, 2014, vol. 1, p. 7-36.

11 Sketch Engine, 'NoSketch Engine and Sketch Engine: What Is the Difference?'; P. Rychlý, *Manatee/Bonito - A Modular Corpus Manager*, in P. Sojka and A. Horák (eds.), *Proceedings of Recent Advances in Slavonic Natural Language Processing*, 2007, p. 65-70.

12 G. Gilleri, E. Miyamoto and C. Sarni, *Methodology and Theoretical Framework*, in C. Danisi and P. Pontrandolfo (eds.), *Prejudice, Stereotypes and Bias in Sexual, Reproductive and Parental Rights: Linguistic and Legal Implications of Gendered Discourses in International Judicial Spaces*, Palgrave Macmillan, London [forthcoming].

13 C. Danisi and G. Pontrandolfo (eds.), *Prejudice, Stereotypes and Bias in Sexual, Reproductive and Parental Rights: Linguistic and Legal Implications of Gendered Discourses in International Judicial Spaces*, Palgrave Macmillan, London [forthcoming].

14 G. Pontrandolfo and C. Danisi, *Theoretical and Methodological Challenges of Interdisciplinary Legal-Linguistic Research: Reflections from the GenDJus Project*, in S. Goźdź-Roszkowski and G. Pontrandolfo (eds.), *In the Minds of Judges. Argumentative Discourse at the Intersection of Law and Language*, De Gruyter Mouton, Berlin, 2025, p. 257-279.

deployed by linguists, Sketch Engine, to detect the human rights implications of gender-based prejudices, stereotypes and biases in legal reasoning.

After this introduction, I will describe the gender perspective embraced in the paper (Section 2). The objectives and structure of the GenDJus project will be then presented (Section 3). The use of Sketch Engine has allowed GenDJus linguists to both conduct quantitative research and go in-depth with the qualitative study of discursive strategies the legal texts incorporate (Section 4.1). Yet Sketch Engine and particularly its free version NoSketch Engine may be also deployed, with the due methodological adjustments, by lawyers to unveil gender-based prejudices, stereotypes and biases in judicial narratives (Section 4.2). Beyond GenDJus-specific corpus linguisticsm the paper will encourage lawyers to embrace interdisciplinarity as a research choice (Section 5). Conclusions will follow.

2. A PLURALIZING GAZE

Gender approaches abound. The one embraced here is 'feminist queer'. The feminist queer method is indebted to an epistemic tradition concerned with the legal subject being at the centre of multidirectional gender-driven power relations. Since its outset, the feminist method has criticised the exclusionary effect of the male gaze as reproduced in legal norms – that of silencing feminine identities by nullifying or limiting women's entitlements and rights.[15] Beyond the synonymous of gender-as-women, the feminist queer method conceives gender as a combination of subjective and relational roles, attitudes and societal expectations about gender, as well as gender identity, sexual orientation and sex characteristics.

The GenDJus project recognizes that gender acts at the same time as an organizational category and as a by-product of a discursive exercise of power.[16] Such a configuration of gender pluralizes masculinities and femininities, and any other ways

[15] S. Cusack and R. Cook, *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, Philadelphia, 2011; D. Buss and A.S. Manji (eds.), *International Law: Modern Feminist Approaches*, Hart, Oxford, 2005; C. Smart, *The Woman of Legal Discourse*, in *Social and Legal Studies*, 1992, vol. 1, p. 29-44; G. Heathcote, *Feminist Dialogues on International Law: Successes, Tensions, Futures*, Oxford University Press, Oxford, 2019; K. Bartlett, *Feminist Legal Methods*, in *Harvard Law Review*, 1990, vol. 103, p. 829-888; N. Naffine and R. Owens, *Sexing the Subject of Law*, LBC Information Services, North Ryde, NSW, 1997.

[16] M. Foucault, *Histoire de la sexualité: La volonté de savoir*, Paris, Gallimard, 1976, p. 121, 207; J. Butler, *Gender Trouble: Feminism and the Subversion of Identity*, New York, Routledge, 1990, p. 10.

of experiencing one's gendered self-identifications. Generative forces of pleasure are deeply entrenched in genders and sexualities since, for queer theorists, both do not only attract abuses and violations but also celebrate desire, fantasy, and subversion.[17]

The feminist queer method remains feminist because complicating the 'woman question' *à la* Beauvoir[18] does not involve neglecting the feminist project but rather expanding it. For example, queer theory invites to reframe sex/gender as multiple, instable, shifting throughout one's life. This stance reinforces the feminist agenda as it provides additional instruments to eradicate the privilege of hegemonic masculinity and the protective representations of women.[19]

Beyond men-centric narratives, the gender-sensitive lens opens new possibilities to reconsider the place for men, women, and *any* gendered subject. Law, in fact, is gendered. This paper concentrates on queer feminist approaches to international law, particularly human rights. In the human rights discourse, the gendered nature of law has translated into the prevalence of definitions and interpretations that reproduce gender dynamics, disfavouring the disadvantaged and favouring the advantaged.[20] The lack of recognition and of protections of specific gendered subjects has led to their marginalization.[21] The GenDJus project that the next section will present starts from the assumption that gender operates as a power device that defines the frontiers of normativity within and through the law. Legal rules incorporate gender normativity which, in turn, determines the scope of the former, as well as the connected interpretive possibilities. GenDJus builds on legal interpretations and linguistic analyses to uncover gender-based stereotypes in judicial discourse. Let us see how.

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17 D. Otto, *Between Pleasure and Danger: Lesbian Human Rights*, in *European Human Rights Law Review*, 2014, vol. 6, p. 618-628; B. Cossman, *Gender Performance, Sexual Subjects and International Law*, in *Canadian Journal of Law & Jurisprudence*, 2002, vol. 15, p. 293.

18 S. de Beauvoir, *Le Deuxième Sexe - Vol. I*, Paris, Gallimard, 1949. Pluralizing gendered possibilities means opening up to other, 'queer' questions: R. Rao, *Queer Questions*, in *International Feminist Journal of Politics*, vol. 16, 2014, p. 199.

19 D. Otto, *International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry*, in M. Davies and V. Munro (eds.), *The Ashgate Research Companion to Feminist Legal Theory,* Ashgate, Farnham, 2013, p. 198.

20 G. Gilleri, *Sex, Gender, and International Human Rights Law: Contesting Binaries*, Routledge, London and New York, 2024, p. 73-90.

21 C. O'Hara and T.P. Paige (eds.), *Queer Encounters with International Law: Lives, Communities, Subjectivities*, Routledge, Abingdon and New York, 2024; J. E. Halley, *Split Decisions: How and Why to Take a Break from Feminism*, Princeton University Press, Princeton, 2008; V. Hamzić, *The Case of 'Queer Muslims': Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos*, in *Human Rights Law Review*, 2011, vol. 11, p. 237.

3. THE GENDJUS PROJECT

The GenDJus project is good example of how lawyers and linguists could adopt a feminist queer approach in working together to examine gender-related decisions by national and international courts. It does so by using digital tools to collect, store and examine legal entries, namely judgments, separate opinions and advisory opinions by the Court of Justice of the European Union, the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights, the Italian Court of Cassation *(Corte di Cassazione*) and the Italian Constitutional Court (*Corte costituzionale*).

These documents cover three clusters of rights, namely sexual, reproductive and parental rights, three of the areas for which a feminist queer lens has identified the need for anti-stereotyping approaches. Precisely, the examination conducted by the GenDJus team deals with gender-based prejudices, stereotypes and biases to assess whether these are conducive to discrimination,[22] by limiting or nullifying the enjoyment of human rights by the gendered subject.[23] A broad approach to gender, described above as the all-encompassing device of power acting upon any individual, makes consider different social groups, not only women and LGBTIAQ+ people, but also men who do not conform with the normativity of hegemonic masculinity[24] – i.e. who do not appear or behave as 'real men.' Against this backdrop, the research embraces masculinities and femininities in both their traditional or ideal models and their alternative possibilities that are instead subject to the former's normative power.

As anticipated in the introduction, the preliminary steps of the project have involved the creation of two separate collections of materials, the GenDJus database and the GenDJus corpus. To facilitate the search for cases, the database gathers all the above-mentioned legal documents, made available on GenDJus website.[25]

[22] Among others, G. Gilleri and E. Miyamoto, *Broadening Protections? The European Court of Human Rights' Discourse on Gender-Based Violence against Trans and Intersex Persons*, in *The Italian Review of International and Comparative Law*, 2025, vol. 2, p. 331-362. For a list of GenDJus research outputs, see GenDJus can be found at GenDJus, 'Research Outputs'.

[23] For a definition of discrimination, see Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[24] R. Connell, *Which Way Is Up? Essays on Sex, Class, and Culture*, Allen & Unwin, Sydney, 1983; R. Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, in *Harvard Journal of Law and Gender*, 2010, vol. 33, p. 439.

[25] GenDJus, 'Case Law'.

The corpus forms the basis to systematise and extracting information from large amounts of data with the use of Sketch Engine, a corpus building and query system.[26] In order to allow the community to access the corpus, the latter was uploaded to GenDJus website through NoSketch Engine, the free limited version of Sketch Engine.[27] The GenDJus corpus organizes the same legal documents of the database under different subgroups ('subcorpora') on the basis of the court and the language of the texts.

The way in which the corpus and the database appears mirrors the structural choices of the GenDJus' team. Nuanced queries across topics are made possible through 'tagging', i.e. assigning a certain tag or label to the legal document depending on the issue this deals with. Tagging supports categorization and retrieval of texts which, in turn, sustain intersectional analysis. As an example, to narrow the search to the sexual nature of gender-based violence committed against LGBTIAQ+ people from the perspective of the violation of the right to be free from torture, it is possible to combine tags such as 'sexual violence', 'discrimination against LGBTIAQ+ people' and 'torture'. Notably, the tagging system works both for the GenDJus corpus and the GenDJus database.[28] The remainder of this paper will deal mainly with the digital tools to interrogate the corpus.

Just to provide a snapshot, the GenDJus corpus is a trilingual corpus – English, Spanish and Italian – covering the time span between 1960-2024. It contains 1184 judicial texts totalling 15,284,879 million 'tokens.' Technically speaking, 'token' refers to the smallest unit of a corpus, which can comprise a word form, punctuation, abbreviations and anything else between spaces.[29] The large quantity and variety of data fits studies that can be both quantitative and qualitative in nature.

The GenDJus endeavour constitutes an example of a jurilinguistic perspective applied to human rights. Lawyers collaborate with linguists to create a method which

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[26] Lexical Computing, 'Sketch Engine'.

[27] GenDJus, 'Corpus'. The corpus is also registered on Zenodo: G. Pontrandolfo, C. Danisi, G. Gilleri, E. Miyamoto and C. Sarni, 'The GenDJus Corpus [Data Set]', The GenDJus Project - PRIN 2022 PNRR, 2024, DOI: 10.5281/zenodo.14761912

[28] G. Gilleri, E. Miyamoto and C. Sarni, *Methodology and Theoretical Framework*, in C. Danisi and P. Pontrandolfo (eds.), *Prejudice, Stereotypes and Bias in Sexual, Reproductive and Parental Rights: Linguistic and Legal Implications of Gendered Discourses in International Judicial Spaces*, Palgrave Macmillan, London [forthcoming].

[29] G. Gilleri, E. Miyamoto and C. Sarni, *Methodology and Theoretical Framework*, in C. Danisi and P. Pontrandolfo (eds.), *Prejudice, Stereotypes and Bias in Sexual, Reproductive and Parental Rights: Linguistic and Legal Implications of Gendered Discourses in International Judicial Spaces*, Palgrave Macmillan, London [forthcoming].

is strictly legal nor linguistic, but jurilinguistic. This double soul is mirrored in the double methodological choice of the database and the corpus which complement one another. The analysis of the legal implications of the courts' reasoning on gender-based stereotypes are backed by linguistic findings drawn from corpus-assisted queries. Equally, the linguistic enquiry into discursive strategies enacted by courts provide evidence for the legal argumentation.

Sketch Engine as a tool specialised in the creation and interrogation of corpora has played a central role in GenDJus. Methodologically speaking, the project relies on corpus-assisted discourse studies,[30] which originate from the combination of corpus linguistics and critical discourse studies (CADS). CADS fits GenDJus' objectives in that it aims to reveal non-obvious meanings which would be otherwise difficult to capture with traditional methods of linguistic analysis.[31]

Like feminist queer approaches, critical discourse studies, the theoretical framework of CADS, challenges power relations with a special focus on dynamics hidden behind discursive constructions.[32] Both theories problematise the naturalization, legitimation and reproduction of social injustices and inequalities in the dominant discourses.[33] With these tools, GenDJus uncovers asymmetries of domination and subordination that the judicial discourse mirrors and reinforces in relation to gender constructions. The next section offers an overview of a number of functions that Sketch Engine and its free version NoSketch Engine offer to detect how the legal discourse shapes gendered realities.

4. USING (NO)SKETCH ENGINE

Focusing on discursive constructs, the GenDJus uncovers the impact of judicially-driven gendered assumptions on the enjoyment of human rights. In GenDJus, critical discourse analysis serves as a thread that unites the legal and linguistic

30 P. Baker, *Using Corpora in Discourse Analysis*, Continuum, London, 2006.

31 A. Partington, A. Duguid and C. Taylor, *Patterns and Meanings in Discourse. Theory and Practice in Corpus-Assisted Discourse Studies (CADS)*, John Benjamins, Amsterdam and Philadelphia, 2013.

32 T. van Dijk, *Discourse and Power*, Palgrave Macmillan, Basingstoke, 2008; T. van Dijk, *Critical Discourse Analysis*, in D. Schiffrin, D. Tannen and H.E. Hamilton (eds.), *The Handbook of Discourse Analysis*, Blackwell, Oxford, 2001, pp. 352-337; T. van Dijk, *Principles of critical discourse analysis*, in *Discourse & Society*, 1993, vol. 4, p. 249-282.

33 However, the peculiarity and complexity of the legal language have long discouraged the application of critical discourse studies to law: L. Cheng and D. Machin, *The Law and Critical Discourse Studies*, in *Critical Discourse Studies*, 2022, vol. 20, p. 244-245.

dimensions infusing them with feminist queer approaches. As said, Sketch Engine is an online platform to manage and examine large text collections called corpora.

4.1. The Linguists' 'Advantage'

Sketch Engine allows users to study, among others, word usage, grammar patterns, collocations and frequency in the texts constituting the corpus. The use of Sketch Engine, however, is highly technical. Depending on the uses one wishes to make of it, the tool may be more or less accessible to users who are not expert in linguistics. The best use of Sketch Engine implies extensive knowledge of linguistics – concepts, applications and jargon. An array of queries can be addressed on the corpus if one wishes to take full advantage of the instrument and satisfy their linguistic questions. A person truly trained in linguistics can know how to make the most out of a set of queries with an eye to conducting a powerful discourse analysis – at least from my perspective, one of a human rights lawyer at ease with interdisciplinary approaches to law and gender. It is insufficient to *know* how to use Sketch Engine. One should situate their corpus-based research within a certain epistemology and a certain frame to interpret results derived from Sketch Engine on the basis of linguistic theories.

Linguistic strategies used in GenDJus guiding linguistic analysis via Sketch Engine include, for example, the discourse-historical approach, the sociocognitive approach and the social actors approach.[34] For the discourse-historical approach, discursive constructs can be examined from different perspectives among which the qualification of social actors, phenomena and events. Linguistic strategies deconstruct legal documents to study, for example, argumentative devices that judges use, and the connected effects. Through nomination and predication, GenDJus linguists have detected allusions, tropes, implicatures and rhetorical figures.[35] Through argumentation and perspectivization, they have identified the judges' positioning. Is legal reasoning based on arguments or assumptions? What does this tell about the judges' biases towards a certain issue? How does this posture impact the outcome of the decision and ultimately the applicant's rights? Given their focus on diminu-

[34] R. Wodak and M. Meyer, *Methods of Discourse Studies*, 3rd edition, London, Sage, 2016.
[35] M. Reisigl and R. Wodak, *The Discourse-Historical Approach (DHA)*, in *Methods of Discourse Studies*, in R. Wodak and M. Meyer, *Methods of Discourse Studies*, 3rd edition, London, Sage, 2016, p. 31-33.

tives, augmentatives and litotes, intensification and mitigation can help recognise gender-stereotypes which typically imply a system of oppression and domination discrediting certain subjects and valuing others.

The sociocognitive approach aims at capturing those discourse structures that reflect power differentials. It therefore perfectly fits the purpose of identifying gendered asymmetries in legal discourses. Some of these strategies comprise polarization and pronominal expressions in relation to out-groups and in-groups.[36] This approach assumes that syntactic and lexical choices embedded in legal texts can influence those who read them – typically, the courts' view of certain legal issues, institutions or social phenomena has a weight on how people think about them.

The third theoretical frame, the social actors approach, concentrates on the agents or beneficiaries of discourses. The subject of law acquires different shapes depending on how the rules, decisions and interpretations draw their contours. Discursive constructions and representations are the clues that reveal these portrays. For example, for a long time women have been depicted as vulnerable subjects in need of protection. Protective representations in international law have defined women only in relation to their roles of wives and mothers in times of peace and war.[37]

Needless to say, along with the above approaches, the feminist queer perspective already described in the introduction pervades GenDJus' critical discourse analysis to understand the power of language in sustaining and reiterating gender-based hierarchies in legal narratives. With these linguistic strategies in mind, the next subsection presents a number of interrogation tools that can be used in Sketch Engine.

4.2. Some Interrogation Tools

Linguists can make the most out of Sketch Engine because of its design and functions. However, the added value of interdisciplinary projects such as GenDJus resides not only in the final results, but also in the human processes that scientific exchanges trigger. If law is made of words and linguists work on words, therefore linguists have a lot to share with lawyers to help them (or us) better understand legal

[36] T. van Dijk, *Critical Discourse Studies: A Sociocognitive Approach*, in R. Wodak and M. Meyer (eds.), *Methods of Discourse Studies*, 3rd edn, Sage, London, 2016, p. 62-85.

[37] D. Otto, *Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights* Law, in A. Manji and D. Buss (eds.), *International Law: Modern Feminist* Approaches, Hart, Oxford, 2005, p. 118.

meanings. This is even more true in the field of 'crits' – queer, feminist and critical discourse studies – where linguistic structures conceal societal patterns of injustice and systemic (dis)orders.

In this sense, interdisciplinarity means also contamination. Lawyers can learn from linguists and try to become familiar with Sketch Engine for *their* purposes. Perhaps some functions can be managed with more difficulty by lawyers. But some of them can be learnt and deployed to conduct qualitative analysis including unveiling how courts address gender-based stereotypes.[38] Hence, the results of a Sketch Engine-driven research for the purposes of, in our case, human rights law are to be understood against the human rights frame – its concepts, vocabulary and legal implications. In the same way, the specialised field of linguistics provides tailored meanings to specific Sketch Engine queries. Shortly: same tool, different disciplines, different objectives. The remainder of this section outlines some typical steps with Sketch Engine and NoSketch Engine.

The choice as to which subcorpus analyse is the starting point – which court and in which language. Having chosen the preferred corpus, many functions follow. While linguists of the GenDJus team used Sketch Engine to conduct their research on gender-based stereotypes, I will refer to the computational procedures also available for the GenDJus corpus on NoSketch Engine that can be freely accessed via the GenDJus website.[39]

Through *keywords*, the system extracts the list of words which occur statistically more frequently in the corpus if compared against a reference corpus. This query reveals the lexical saliency of certain words which reflects the main issues treated in the collected legal texts. Therefore, in the case of the GenDJus corpus, there are nouns falling within the sphere of sexual, reproductive and parental rights – e.g., 'transgender', 'same-sex', 'ill-treatment', 'child', 'violence'.

[38] Quantitative research is also possible but the qualitative dimension of gender-stereotyping in judicial reasoning is more relevant to the purposes of this inquiry.

[39] GenDJus, 'Corpus'.

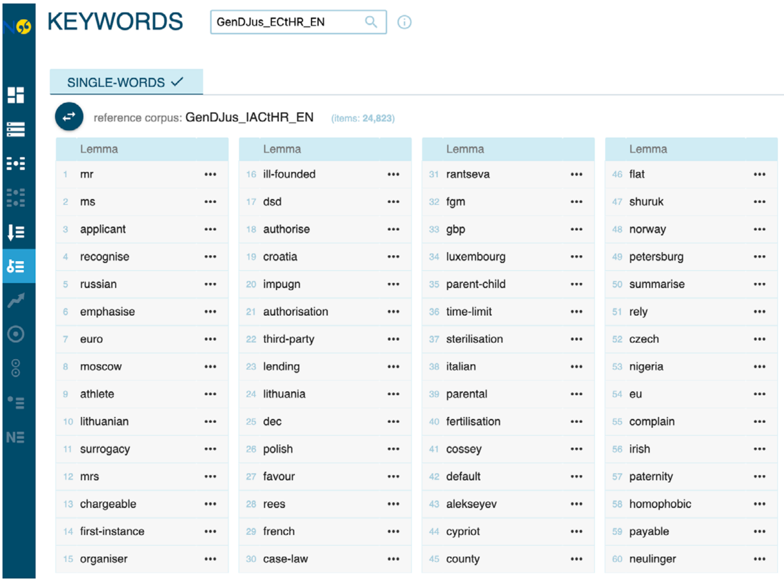

Figure 1. Keywords

For example, the screenshot above shows the list of the sixty words that occur statistically more frequently in the subcorpus containing the decisions and separate opinions in English by the European Court of Human Rights ('GenDJUs_ECtHR_EN').

Beyond that, the user can query the system to conduct a quantitative analysis of the most recurrent words through the tool *wordlist*. Having set the preference for the type of word, such as adverbs, nouns, adjectives, pronouns, the system generates a *frequency list*. Figure 2 below provides an example of the frequency list for the English subcorpus of the Court of Justice of the European Union's case law ('GenDJus_CJEU_EN'). An advanced mode gives the possibility to refine the research by limiting it to words 'starting with', 'ending with' or 'containing' certain letters. For example, one can interrogate the system to produce a list of the frequency of the nouns starting with 'fem-'.

	Word	Frequency ? ↓
1	female	366
2	females	5
3	femalecandidates	2
4	femur	1
5	femmes	1
6	femaleworker	1
7	femme	1
8	femalecandidate	1
9	female-to-male	1

Figure 2. Frequency

In this example, the list therefore includes ‘female’, ‘female candidate’ and ‘female worker’. Of course, results need to be refined, as the researcher might not be interested, in this context, in words such as ‘femur’. Given the breadth of the corpus, this type of work would otherwise require a large amount of time if performed manually. NoSketch Engine nevertheless requires the human intervention to fix this type of inaccuracies.

The tool named *concordance* is a particularly interesting one for the purposes of qualitative legal research. This function interrogates the corpus in order to uncover whether a certain word is used and in which context. The immediate visualization includes a short linguistic context before and after the concerned word, that is the words that preceed and follow the concerned word. The context can be expanded depending on the reading needs of the software user. The following screenshot offers an illustration of it. The prompt in this case is the contextual use of the word ‘mother’ in the English subcorpus of the Inter-American Court of Human Rights (‘GenDJus_IACtHR_EN’).

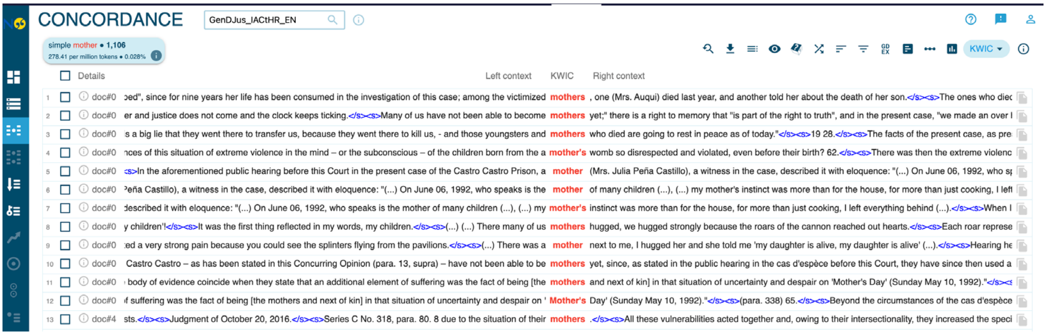

Figure 3. Concordance ('mother')

Unlike the wordlist, which provides the quantitative data of the most recurring words, concordance allows the researcher to understand the meaning of the searched words in relation to the sentences where they appear in the text. In this way, terms are given contextual meaning and the judges' assumptions on gendered issues are more likely to surface. In the above example, the short context that NoSketch Engine provides allows the researcher to select the sentences, and therefore the decisions, where, for instance, 'mother' is coupled with 'womb' and 'instinct'. A closer reading may then help refine the research focused on, e.g., judicial narratives on motherhood, where the latter is associated – always to continue the example – on natural attidudes ('instinct') based on specific biological attributes ('womb').

Entry points such as 'prejudice', 'stereotype', 'bias', 'stigma' and 'stigmatization' serves to interrogate the system to find where the concerned court use them. Let us take 'stereotype' in the subcorpus GenDJus_IACtHR_EN for example.

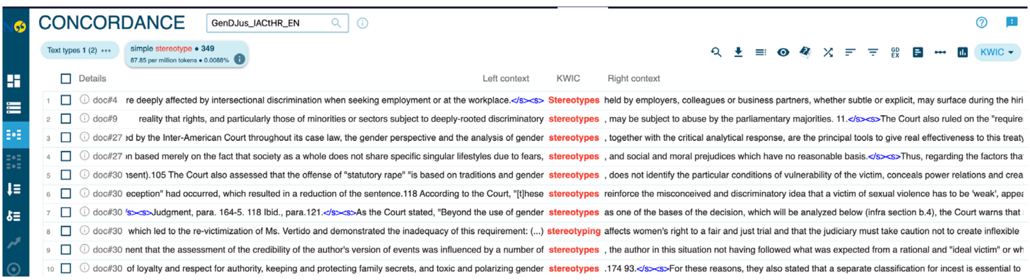

Figure 3. Concordance ('stereotypes')

This type of analysis targets linguistic behaviours. The contextualised search of a certain word can be accompanied by that of its modifiers, that is optional elements, such as evaluative adjectives, that clarify, describe or add details to the entry word. For example, close to 'stereotype' there can be words such as 'detrimental', 'gender', 'deeply-rooted', 'negative' or 'discriminatory.'[40] The following screenshot is the result of the entry expression 'discriminatory stereotype' in the context of the subcorpus GenDJus_IACtHR_EN.

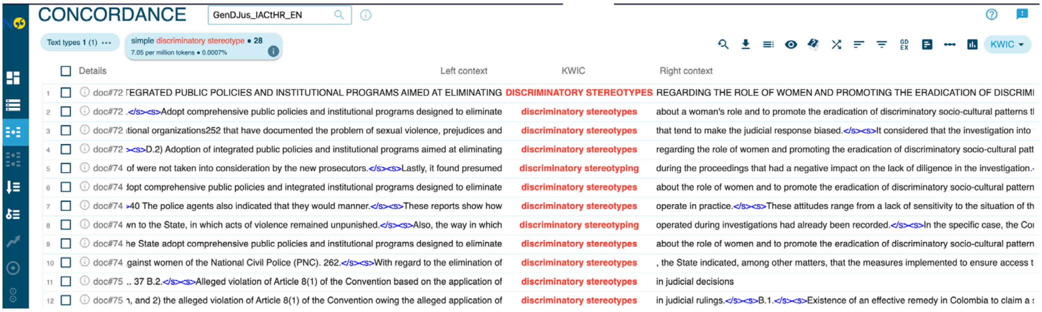

Figure 4. Concordance ('discriminatory stereotype')

This is the key mode pto uncover stereotypes, prejudices and biases in the subcorpora.[41] Concordance acts as a key tool in unpacking prejudices, stereotypes and biases by, for instance, detecting the words that are typically associated to certain individuals and their possible connected derogatory or delegitimizing meanings.[42] This function helps also recognise judicial assumptions[43] as to how an individual is expected behave depending on their gender or the intersectional axes of identities.

[40] G. Gilleri, E. Miyamoto and C. Sarni, *Methodology and Theoretical Framework*, in C. Danisi and P. Pontrandolfo (eds.), *Prejudice, Stereotypes and Bias in Sexual, Reproductive and Parental Rights: Linguistic and Legal Implications of Gendered Discourses in International Judicial Spaces*, Palgrave Macmillan, London [forthcoming].

[41] In other cases, prejudices, stereotypes and biases are not named by the Court, but can be reproduced by the Court itself. Searching for these requires a close reading of the texts, expecially when silences conceal prejudices, stereotypes or biases. Most frequently, the GenDJus project has been concerned with the prejudices, stereotypes and biases that the EU and international courts have identified in the domestic case-law.

[42] Some of these researches can be performed through *word sketch*, a tool that is not available in the free version NoSketch Engine.

[43] P. Baker, *Sociolinguistics and Corpus Linguistics*, Edinburgh University Press, Edinburgh, 2010, p. 127-133.

This is the case of the word 'lifestyle', which, combined with the specific 'gay' sexual orientation acquires a derogatory meaning.[44] The following screenshot contains some uses of it.

Figure 5. Concordance ('gay lifestyle')

To better understand the meaning of the expression 'gay lifestyles', the researcher can open the respective document, and find out how the Inter-American Court of Human Rights names and contests such stereotyped representation:

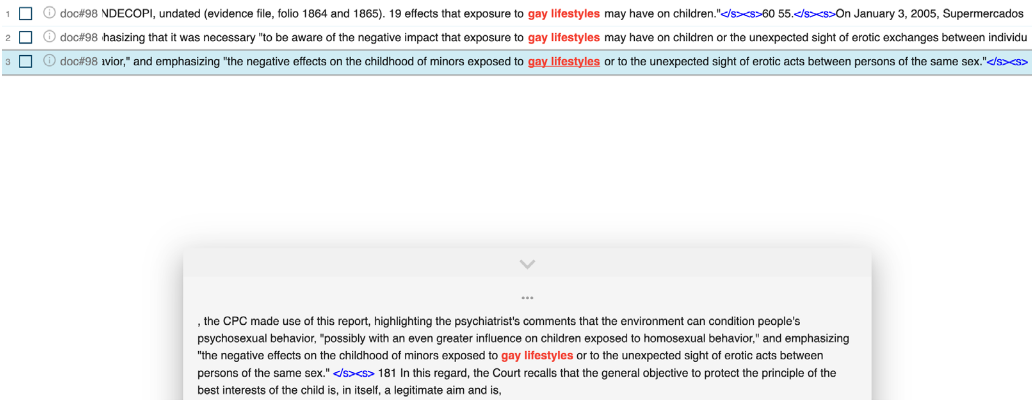

Figure 6. Context of concordance ('gay lifestyle')

Finally, under concordance other two quantitative functions complement the qualitative contextual identification. The first one shows the distribution of the word, i.e. the parts of the corpus where the entry point was found. The second one generates

[44] K. Peruzzo, *International Judicial Discourse and Non-Derogatory Language Use: A Case Study on ECtHR Judgments* in S. Goźdź-Roszkowski and G. Pontrandolfo (eds.), *In the Minds of Judges. Argumentative Discourse at the Intersection of Law and Language*, De Gruyter Mouton, Berlin, 2025, p. 227-256.

the raw frequency and the relative frequency of the occurring words. While the former counts the numbers of hits, i.e. how many times the word appears, the latter represents the frequency per million tokens by dividing the number of occurrences by the total number of words contained in the corpus. This provides a more fine-grained picture and allows the user to compare corpora which are different in size.

All the above constitutes a meaningful first step to (1) decide which document (or case) is more suitable for the research and then (2) continue with the close reading of the text. Such an exercise would take a long time if conducted without the help of NoSketch Engine. The concordance tool indicates possible paths to be further deepened with the close reading of the documents in the more traditional legal way of performing qualitative explorations. At the same time, it offers an additional lens to the traditional legal analysis to draw conclusions as to anti-stereotyping judicial approaches – how judges identify and address them. The empirical approach underlying corpus-based tools provides evidence that allows the lawyer to avoid cherry-picking[45] of unrepresentative data.

Finally, to obtain a snapshot of the corpus, specific filters (also known as *text types*) facilitating the refinement of the queries make it possible to easily navigate the corpus. They can be divided by text genre (e.g., judgment, advisory opinion) or by specific topic (e.g., abortion, adoption, obstetric violence). Filtering helps investigate judicial discourses by, for example, restricting the scope of the examination to the way in which the separate opinions in the Inter-American Court of Human Rights' case law shape gendered discourses on sterilization.[46] The system generates graphs to visually illustrate statistics of the whole corpus.

Having explained the potential of Sketch Engine, the next section contains a reflection on the theoretical premises and methodological challenges for lawyers to embrace corpus-based linguistics.

[45] For a comparison between qualitative research and corpus-based analysis as to the risk of cherry-picking, see P. Baker and E. Levon, *Picking The Right Cherries? A Comparison Of Corpus-Based and Qualitative Analyses of News Articles about Masculinity,* in *Discourse & Communication*, 2015, vol. 9, p. 221-236. See also G. Pontrandolfo and C. Danisi, *Theoretical and Methodological Challenges of Interdisciplinary Legal-Linguistic Research: Reflections from the GenDJus Project*, in S. Goźdź-Roszkowski and G. Pontrandolfo (eds.), *In the Minds of Judges. Argumentative Discourse at the Intersection of Law and Language*, De Gruyter Mouton, Berlin, 2025, p. 257-279.

[46] G. Pontrandolfo and G. Gilleri, *The Inter-American Court of Human Rights*, in C. Danisi and G. Pontrandolfo (eds.), *Prejudice, Stereotypes and Bias in Sexual, Reproductive and Parental Rights: Linguistic and Legal Implications of Gendered Discourses in International Judicial Spaces*, Palgrave Macmillan, London [forthcoming].

5. EMBRACING INTERDISCIPLINARITY

The previous sections have illustrated the main features of NoSketch Engine. The potential of the instrument is inherently connected to the user's ability to connect the search results to theoretical frames that provide meanings to the contextual analysis. The GenDJus experience has showed that linguists are better skilled at carrying out this kind of work. But lawyers can equally make interesting uses of the tool.

In this section, I wish to encourage lawyers to gain the knowledge to master alternative means to conduct their research. While I have previously deployed NoSketch Engine as a member of the GenDJus team in concert with linguists, the online platform also lends itself to solo exercises by lawyers. The above section has explained some practical uses and, at the same time, reasons for which lawyers could benefit from NoSketch Engine.

The point is not sponsoring one system over another; I brought the case of (No) Sketch Engine because this is the one the GenDJus methodology has adopted, but other tools exist.[47] Rather, the complexity of social phenomena calls – today more than ever – for methods that could cross the boundaries of separate disciplines. Like all new adventures, an unedited interdisciplinary effort such the present one between corpus-based linguistics and critical legal approaches to human rights carries with it sceptics, cautious and enthusiasts. Enthusiasm prevails in this paper, while caution – but not scepticism – assists these reflections.

It is likely that interdisciplinarity, today, involves the use of instruments that are digital. Accepting that machines can be of help allows the researcher to save time on certain tasks that can be devoted to deepening other research phases. Technology can be a powerful device but does not live its own life alone. Human agency remains the alpha and omega of any digital process, and inaccuracies and fallacies are always around the corner. Interpretation is key to first organise the material – in our case, the corpus. The way in which this is organised will determine the trajectory of the subsequent research. Many other choices follow relating to the types of queries, the filters and advanced criteria. NoSketch Engine, like any other digital tool, is a means, not an end. It does not produce ready-to-use results. Any of the latter should be read, understood and interpreted – and there comes the difference between people

[47] Among others: AntConc, WordSmith and #LancsBox X.

trained in linguistics and people trained in law. More generally, the use one wishes to make of the results ends up shaping the meanings attached to such results. All this should be taken into account.

Besides the practical advantages, a more theoretical question arises: why should a lawyer embark in a methodological adventure like the one promoted in this paper?

Law and linguistics are not far one from each other,[48] for at least two reasons. First, law *is* language, law *cannot exist* without language – and so do all of us.[49] Linguistics helps understand what legal actors say as well as what the linguistic strategies they (unconsciously) choose assume, as the GenDJus' focus on prejudices, stereotypes and biases has shown. Language is therefore essential to create, negotiate, and convey meanings in the realm of gender and law.

Second, the study of both law and linguistics cannot transcend the normativity. It is true that we understand and shape reality through language in the same way that language shapes and penetrates us.[50] However, these dynamics does not happen in a vacuum but rather follow the rules that regulate language and law. The rules of law are those set by legal regimes as well as those that sustain them. The rules of language provide that the word exists only within the pre-established articulation of language. This is the condition for the word to exist.[51] The individual occupies an unstable terrain between the subjective function of the word (what we say) depending upon the universal rules in the field of language (how it should be said). The gendered nature of the sociocultural norms embedded in the legal and, in the case of GenDJus, judicial discourse further strengthens the normativity that any rule carries. Corpus linguistics can optimize the legal examination of idealised assumptions on such norms that constrain gender roles, behaviours, attributes and relations.

Overall, using a method at the intersection of law and linguistics allows the cu-

[48] For some questions as to the possible common ground between the two, see W.D. Popkin, *Law and Linguistics: Is There Common Ground?*, in *Washington University Law* Review, 1995, vol. 73, 1043-1045. For an overview of some applications of language-related processes in international law, see B. Pirker and J. Smolka, *International Law and Linguistics: Pieces of an Interdisciplinary Puzzle*, in *Journal of International Dispute Settlement*, 2020, Vol. 11, p. 501-521.

[49] For Jacques Lacan, this is what makes the human being differ from other beings: we are *parlêtre*, that is, speaking (*parler*) beings (*être*): J. Lacan, *Joyce e Il Sintomo*, in A. Di Ciaccia (ed.), *Altri scritti*, Einaudi, Milan, 2013, p. 558.

[50] G. Gilleri, *Sex, Gender, and International Human Rights Law: Contesting Binaries*, Routledge, London and New York, 2024, p. 5.

[51] The dependency is bidirectional: the existence of the linguistic code depends upon the individual act of the word: J. Lacan, *Il Seminario. Libro II: L'io nella teoria di Freud e nella tecnica della psicoanalisi (1954–1955)*, Einaudi, Milan, 2006, p. 349-363.

rious lawyer to add further analytical layers to the investigation of legal sources and practices. It can also inform strategies to improve the ways legal experts and judges frame and reason on gendered and sexual groups. Eventually, cross-pollination has the potential to lead to fine grained solutions ensuring a fuller enjoyment of human rights.

Upholding interdisciplinarity means something more than encouraging collaboration. It is about opening to unknown instruments, getting their hands dirty, listening to those who are really experts, and, ultimately, learning heterodox approaches to penetrate unexplored lands.

6. CONCLUSION

The reflections contained in this paper derive from the experience of the interdisciplinary GenDJus project. GenDJus aims at discovering and examining gender-based prejudices, stereotypes and biases in judicial discourses. As a joint effort between lawyers and linguists, the project has relied on corpus linguistics as a method to complement feminist queer legal approaches to human rights. Rather than focussing on the substantial outcomes of the project, the present investigation has presented one of GenDJus-related virtuous effects. This is the lawyers' curiosity of learning linguistics-specific instruments, such as the online platform NoSketch Engine.

This paper has emphasised that linguistic training can optimise NoSketch Engine-informed research outcomes as an extensive knowledge in linguistics provides the theoretical frame(s) to make the most out of the system. Nevertheless, lawyers can also use NoSketch Engine interrogation tools, such as *keywords*, *concordance* and *frequency*, as an additional instrument to the critical and/or doctrinal analysis to (i) make their informed choices as to the texts most suitable for subsequent close reading; (ii) identify prejudices, stereotypes and biases, including judicial silences; and (iii) articulate significant conclusions as to the way in which courts name and contest them. Overall, this paradigmatic example has materialised in a cautious enthusiastic ode to interdisciplinarity.

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Articoli

"TRAHIU-ME, MATEI-A!" – IL CASO ALMADA: EVARISTO DE MORAES TRA OPINIONE PUBBLICA E SPETTACOLARIZZAZIONE DELLA GIURIA NEI DELITTI PASSIONALI (RIO DE JANEIRO, 1901-1922)

"Trahiu-me, matei-a!" – The Almada case: Evaristo de Moraes between public opinion and jury spectacularisation in crimes of passion (Rio de Janeiro, 1901–1922)

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Abstract

The research investigates the spectacularisation of the Brazilian Jury Court as a defensive strategy in trials of "crimes of passion", while also examining the role of the press in constructing the narrative. During the period under analysis, the crime of conjugal infidelity operated within a fragmented moral framework that punished adulterous men and women differently, embedded within a broader network of gender-based discriminations. Such cases reinforced heterosexual normativity, alongside penal normativity, through the imposition of rigid gender roles. In this context, "violent passion" was invoked by defence attorneys as an exculpatory element; far from restrained, they appealed to the emotions of jurors, spectacularising the scene of death. As a case study, the research focuses on the trial of Almada (1901) in Rio de Janeiro for the killing of his wife. The analysis moves between

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Evaristo Moraes's (1922) memoirs, reflecting on his role in the defence, and contemporary newspaper reports. This examination of sources aims to uncover the gendered dynamics embedded in the publicization and adjudication of such crimes.

Keywords: crimes of passion; adultery; jury spectacularisation; public opinion; criminal legal history.

Questo contributo è stato sottoposto a referaggio anonimo (doppio cieco)
This paper has been subjected to double-blind peer review

Summary: 1. Introduction – 2. "Crimes of passion": an epilogue to femicide – 2.1. Evaristo de Moraes and his "series on crimes of passion"– 3. The Case of Almada and the shaping of public opinion – 3.1. The report of the crime – 3.2. The trial: a spectacularisation of the jury? – 4. Concluding remarks: Moraes' triumph and the enduring legacy of crimes of passion.

1. INTRODUCTION

The research investigates the spectacularisation of the Brazilian Jury Court as a defensive strategy during the trials of so-called "crimes of passion", while also examining the role of the press in shaping the narrative of events and in constructing public opinion. Situated within the field of feminist legal history[1] and understanding gender as an essential analytical category to historical inquiry[2], the analysis of sources seeks to uncover gender-based discrimination and the possible stereotypes embedded in the publicization and adjudication of such crimes, often permeated by the argumentative framework that would later become known as "the legitimate defence of honour" thesis.

As a case study, the research draws on the account offered by Brazilian jurist Evaristo de Moraes regarding the trial of the homicide committed by the *alferes* Almada in 1901, in Rio de Janeiro, against his wife. The analysis moves between Moraes's personal and descriptive recollections of his practice as a criminal *rábula* —recorded in his book *Reminiscências de um Rábula Criminalista* (1922)—, and contemporary newspaper reports on the case, preserved in the digital archive of the

[1] An autonomous field of inquiry aimed at incorporating women into legal history, M. Drakopoulou, *Feminist historiography of law: exposition and proposition*, in M. D. Dubber, C. Tomlins (org.), *Oxford Handbook of Legal History*, OUP, Oxford, 2018, p. 603–620. See also: A. Facchi, *A partire dall'eguaglianza. Un percorso nel pensiero femminista sul diritto*, in *About Gender*, 1 (1), 2012, p. 118–150; A. Simone, *L'approccio del «femminismo giuridico» come limite ed esperienza del diritto. Un'interpretazione*, in R. De Giorgi (org.), *Limiti del diritto. Prospettive di riflessioni e analisi*, Pensa Multimedia, Lecce, 2018, p. 272–283. With Regard to women's legal history, F. Batlan, *Engendering Legal History*, in *Law & Social Inquiry*, 30 (4), 2005, p. 823–851; T. A. Thomas-T. J. Boiseau, *Introduction: law, history and femnism*, in T. A. Thomas, T. J. Boisseau (org.), *Feminist Legal History*, NYU Press, 2011, p. 1–30; S. Vandenbogaerde, *Introduction. (Wo)Men in legal history: possibilities and challenges for gendered legal historical research*, in S. Vandenbogaerde *et al.* (org.), *(Wo)Men in Legal History*, Centre d'Histoire Judiciaire, Lille, 2016, p. 1–22.

[2] As notably theorised by J. W. Scott, *Gender: A Useful Category of Historical Analysis*, in *The American Historical Review*, 91 (5) 1986, p. 1053–1075. See also S. Salvatici, *Storia delle donne e storia di genere*, in *Contemporanea*, 13 (2) 2010, pp. 303–305. In Brazil, J. M. Pedro, *Traduzindo o debate: o uso da categoria gênero na pesquisa histórica*, in *História (São Paulo)*, 24, 2005, p. 77–98.

Brazilian National Library[3]. The temporal scope spans from 1900, the year the crime was committed, to 1922, when Moraes's book was published.

The approach therefore relies primarily on written sources produced by literate men, which reflect the masculine, patriarchal, and heteronormative worldview that shaped the storytelling of such crimes. It is nevertheless important to acknowledge, on the one hand, the existence of women who themselves committed "crimes of passion"[4], and, on the other, women who wrote critically about these issues, denouncing the discriminatory structures embedded in criminal law[5].

2. "CRIMES OF PASSION": AN EPILOGUE TO FEMICIDE

To classify the Almada case as femicide would constitute a conceptual anachronism[6]. The term was incorporated into the Brazilian legal framework in 2015[7]; during the 19th century, the killing of women motivated by gendered dynamics fell

[3] By selecting the period between 1900 and 1907 and using the keywords "alferes almada", several results were identified, from which reports published in the newspapers *O Paiz*, *Jornal do Commercio*, *Gazeta de Notícias*, *A Imprensa*, and *A Notícia* were selected.

[4] The crimes of passion were not limited to homicides committed by men against female partners. Furthermore, offences perpetrated by women involved different sexual, moral, and psychological dynamics, encompassing, in addition to the murder of husbands, crimes of infanticide and abortion. On this topic, see Mariza Corrêa's study on Campinas/SP during the decades 1952–1972: M. Corrêa, *Morte em família. Representações jurídicas de papéis sexuais*, Graal, Rio de Janeiro, 1983, in special p. 241 ss. For the time frame under analysis, see, regarding infanticide in the name of honour, A. P. Zappellini Sassi, *Infanticídio honoris causa e a dupla legalidade de gênero no Código Penal brasileiro de 1890*, in Nunes D. (org.), *Estudos em história do direito penal e da justiça criminal*, LAECC, Florianópolis, 2024, v. 2, p. 193–206. Concerning self-induced abortion, B. Madruga da Cunha, *A criminalização do autoaborto na Primeira República brasileira: uma análise a partir dos autos criminais do arquivo do Tribunal de Justiça de Santa Catarina (1890- 1940)*, Universidade Federal de Santa Catarina (master's thesis), Florianópolis, 2020.

[5] See the contrasts highlighted by Bruna Santiago Franchini concerning the double standard of sexual morality present in adultery offences under the 1830 and 1890 Codes, based on writings by male jurists and opinion pieces authored by women published in the press: B. Santiago Franchini, *Juristas letrados, críticas feministas e o continuum patriarcal do direito (Brasil, 1852-1932)*, in *Estudos em história do direito penal e da justiça criminal*, LAECC, Florianópolis, 2024, vol. 2, p. 153–192. Along similar lines, Susan K. Besse examined how women expressed their opinions in newspapers regarding the apparent rise of violent crimes committed by both men and women: S. K. Besse, *Crimes of passion: the campaign against wife killing in Brazil, 1910-1940*, in *Journal of Social History*, 22 (4), 1989, p. 653–666.

[6] Its conceptualisation within the feminist theory is attributed to Diana Russel, who, in the 1990s, described it as "the misogynist killing of women by men", Russell D. E. H., *Preface*, in Radford J.-Russell D. E. H. (eds.), *Femicide: The Politics of Woman Killing*, TWAYNE, New York, 1992, p. XI.

[7] Femicide (*feminicídio*) in Brazil refers to the murder of women for "reasons related to their condition as female" and was formally incorporated into the criminal-legal framework in 2015 through Law No. 13,104 of 9 March 2015, as an aggravating circumstance of the crime of homicide. See C. Hein de Campos, *Feminicídio no Brasil. Uma análise crítico-feminista*, in *Sistema Penal & Violência*, v. 7, n. 1, p. 103-115.

within the category of 'crimes of passion'—a concept that emphasized the emotion that allegedly drove the actor rather than the criminal act itself, or its fatal outcome. According to Susan K. Besse[8], from the 1910s onward the country experienced growing social concern over "wife killings" and, propelled by the sensationalism cultivated by the press, such cases remained in the public spotlight at least until the late 1930s.

Under the 1890 *Código Penal*[9], the killing of women by their partners was commonly justified through the figure of adultery, and the attention devoted by newspapers and jurists to such offenses increased exponentially. The crime of conjugal infidelity rested on a long-standing and fragmented moral framework that punished adulterous men and women differently, codified within a broader network of gender-based discriminations[10].

The offense was regulated under Chapter IV of Title VIII, "Crimes against the security of honour and the honesty of families"[11]. As a rule, article 279 provided that a wife who committed adultery would be punished with one to three years of cellular imprisonment. Paragraph 1 imposed the same penalty on the adulterous co-author, on the husband who kept and maintained a concubine, and on the concubine herself. Paragraph 2 restricted prosecution to husbands who had not consented to the adultery, and article 281 allowed the annulment of both accusation and conviction through forgiveness or reconciliation between the spouses. The *Código* thus established specific subjects as perpetrators and victims, grounded in heteronormative standards of conjugality, since heterosexual and monogamous marriage constituted the legal norm. The law was lenient towards husbands who engaged in

[8] S. K. Besse, *Crimes of passion,* cit., p. 653.

[9] Brazil, *Codigo Penal dos Estados Unidos do Brazil*, Decreto n. 847, de 11 de outubro de 1890.

[10] The study is part of a series of investigations in which, drawing on Mario Sbriccoli's theorisations on the *duplice livello di legalità penale (*M. Sbriccoli, *Caratteri originari e tratti permanenti del sistema penale italiano (1860-1990)*, in *Storia del diritto penale e della giustizia: scritti editi e inediti (1972-2007)*, Giuffrè Editore, Milano, 2009, vol. 1, pp. 596-597)*,* I seek to analyse how gender distinctions permeated a wide range of criminal law subcategories. In previous research, I observed that, in the case of infanticide, the *Código Penal* granted a form of "bonification" to women who were considered honest prior to the fact. I termed this phenomenon the double legal standard of gender (*dupla legalidade de gênero*): A. P. Zappellini Sassi, *Infanticídio honoris causa*, cit. In the context of sexual offences, I found that criminal protection was embedded within an even more complex network of discrimination. The double legal standard of gender, in practice, was part of a chain composed of multiple levels of discrimination, both *intragender* and *intergender*: A. P. Zappellini Sassi, *La tutela dell'onestà femminile nella disciplina dei reati sessuali in Brasile tra modernizzazione e conservazione dell'ordine patriarcale (1890-1930)*, Università degli Studi di Milano (Thesis), Milan, 2025, p. 194.

[11] Brazil, *Codigo Penal, cit.*

occasional extramarital relations, sanctioning only cases in which the man maintained a more stable, parallel relationship with a second partner.

Finally, for purposes of convicting the adulterous co-respondent, that is, the man who committed adultery with a married woman, article 280 solely admitted, as proof, the *flagrante delicto* and written documents. The occurrence of *flagrante delicto* alone was insufficient to justify the homicide of the wife, and the violent action was frequently rationalized through legislative provisions interpreted to validate the author's reaction upon witnessing an act of infidelity. For instance, article 27 exempted from criminal responsibility those who found themselves in a "state of complete deprivation of senses and intelligence" during the fact. Additionally, article 32, §2 expanded the scope of self-defence beyond the protection of life to encompass "all rights that may be violated", and article 42 established mitigation of penalties when the crime was committed in retaliation for a grave insult (§2), in defence of oneself or one's rights (§3), or following provocation or aggression by the other party (§5).

These provisions paved the way for the consolidation, within the criminal system, of a defensive thesis that would be known as "legitimate defence of honour"[12]. The men who perceived their honour as threatened by the discovery of a betrayal resorted to extreme violence, producing crimes rooted in feelings of hatred and repulsion towards the violation of specific gender roles associated with the ideal of the devoted and faithful wife. Such cases reaffirmed, through the imposition of rigid sexual roles, heterosexual normativity alongside penal normativity. In this context, "violent passion" was invoked as an exculpatory element by defence attorneys who, far from restrained, appealed to the emotions of jurors, spectacularizing the scene of death as a final act of love.

[12] The *Código Penal*, although establishing that emotion or passion did not exclude criminal liability (art. 24, I) and prescribing identical penalties for both the adulterous husband and wife (art. 240), recognised the influence of "violent emotion" after an "unjust act of the victim" as a mitigating circumstance (art. 48, IV, c). In addition, it disciplined a form of excessive self-defence, establishing that an agent who exceeded the limits of self-defence through culpable conduct would be liable if the act was punishable as a negligent crime (art. 21, sole paragraph), Brazil, *Codigo Penal*, Decreto n. 2.848, de 7 de dezembro de 1940. These provisions became central to the doctrine of legitimate defence of honour, which effectively reattributed intent in cases of crimes of passion, frequently resulting in acquittals before the jury. In that context, criminal law was conceived as a bastion of social order, and "attention shifted to demonstrating that the defendant was a morally upright and socially respected citizen, in contrast to the victim, whose moral character was highly questionable", S. K. Besse, *Crimes of passion*, cit. A similar dynamic to cases of sexual violence, marked by the phenomenon of secondary victimisation and the "honest woman" ideal. See A. P. Zappellini Sassi, *Virgin or not, and dishonest? The treatment of female victims of sexual violence within theBrazilian criminal justice system (1890-1930)*, in *About Gender*, 14 (28) 2026, p. 115–132.

2.1. Evaristo de Moraes and his "series on crimes of passion"

Reminiscências de um Rábula Criminalista (1922) was published when Evaristo de Moraes obtained his bachelor's degree in law, as a tribute to the distinguished professional trajectory he had already established[13]. The collection of memoirs recounts the period during which he practiced as a criminal *rábula*, a legal representative without formal professional qualification, an uncommon yet lawful practice at the time[14]. The work opens with the author's recollections of his first appearance before the Jury court in 1894 and proceeds with reflections on the dynamics of the criminal forum and the actors involved in it, as well as accounts of several cases in which he participated.

Moraes described the Almada case as the inaugural event of his "series on crimes of passion". As the title suggests, he acted in numerous cases of this nature, which eventually gave rise to studies and publications. In a specific work on offenders driven by passion and emotion (*apaixonados* and *emotivos*), the author criticized the "uniformly repressive criterion" employed by the Brazilian *Código Penal* in addressing such offences and advocated for greater consideration of the motives that led the agent to commit the crime, as well as for an assessment of the defendant's prior character, in the individualisation of criminal responsibility[15].

Acknowledging that his perspective did not align with the codified principles and norms, he nonetheless declared acting within the bounds of legality: "whenever we defend before the jury […], we have made strict application of the erroneous doctrine of the Penal Code, drawing from it its logical conclusions, for it is not per-

[13] In fact, some chapters had already been published in the *Archivio Vermelho* as noted by G. Siqueira, *Prefacio*, in E. Moraes, *Reminiscencias de um rabula criminalista,* A grande livraria Leite Ribeiro, Rio de Janeiro, 1922, p. I, and by the author himself, E. Moraes, *Palavras de explicação*, in E. Moraes, *Reminiscencias*, cit., p. VII–VIII.

[14] Although Moraes, even without a law degree, was authorized to act as an attorney, women, despite holding law diplomas, were, in the same period, routinely barred from entering the Brazilian legal profession, a markedly male and elitist environment. In Brazil, the first enrolment of a woman in a law course occurred in 1889, as noted by M. Rago, *Os prazeres da noite: prostituição e códigos da sexualidade feminina em São Paulo (1890-1930)*, Paz & Terra, São Paulo, 2008, p. 81. The first woman to practise law as a defence attorney before the Rio de Janeiro jury court was Myrthes de Campos. In his book, Moraes recounted Campos and Maria Coelho's struggle in the face of repeated prohibitions against their professional practice in Rio de Janeiro, praising their persistence. He also recalled having opposed both women in a jury trial, E. De Moraes, *Reminiscencias*, cit., p. 122. Regarding the prior, see B. Santiago Franchini, *«Foi obra do homem na sua sabedoria infinita»: o Direito segundo Josephina Álvares de Azevedo, Maria Lacerda de Moura e Myrthes de Campos (1888-1937)*, Universidade Federal de Santa Catarina (master's thesis), Florianópolis, 2023, p. 176.

[15] E. De Moraes, *Problemas de direito penal e de psychologia criminal*, Leite Ribeiro & Maurilio, Rio de Janeiro, 1920, p. 198-201.

mitted to us to induce the judges to decide against positive law"[16]. As will be seen, however, through emotive and eloquent rhetorics, the author was able, in practice, to operationalize his interpretative stance to secure the defendant's acquittal.

3. THE CASE OF ALMADA AND THE SHAPING OF PUBLIC OPINION

The press plays a significant role in shaping public opinion, which, within the framework of the liberal state, operated as a de facto "constitutional power"; asserting, over the course of the 19th century, an "influence" within the courts of justice—particularly in jury trials which, while functioning as representatives of popular sentiment, simultaneously became privileged objects of criticism and social scrutiny[17].

In Brazil, following the establishment of the press in the early 19th century, news began to circulate with increasing speed through printed periodicals. By the end of the century, newspaper outlets employed various strategies to capture public attention: among them, the dissemination of criminal news. When reporting crimes, newspapers in the city of Rio de Janeiro frequently adopted a novelistic narrative style, drawing the public into stories enveloped in mystery and astonishment. However, engagement with the broader public was part of a wider strategy aimed at increasing the number of readers and listeners to boost sales, while the press remained an elitist space that often stigmatized their behaviour[18].

3.1. The report of the crime

Newspaper reports were unsigned; nevertheless, given their proximity to criminal cases, journalists occasionally appeared as witnesses in police and judicial proceed-

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[16] E. De Moraes, *Problemas de direito penal*, cit. Dear reader, please note that this and all other source citations have been translated from Brazilian Portuguese, with the aim to preserve the text's fluidity.

[17] L. Lacchè, *«Non giudicate». Antropologia della giustizia e figure dell'opinione pubblica tra Otto e Novecento*, in *Altorilievi. Università degli Studi di Napoli Federico II. Seminario di Studi Storico-giuridici*, Satura, Napoli, 2006, p. 16-33. For the Brazilian translation, L. Lacchè, *Não julgueis: antropologia da justiça e figuras da opinião pública entre os séculos XIX e XX*, Dialética, São Paulo, 2023. In Italy, regarding the connections between public opinion and the independence of lawyers, see R. Bianchi Riva, *The Legal Profession, Politics and Public Opinion: Some Reflections on the Independence of Lawyers and the Rule of Law in Modern Italy*, in *Giornale di storia costituzionale / Journal of constitutional history*, 44 / II, 2022, p. 63-79.

[18] T. Torres Medeiros da Silva, *O noticiário criminal e os repórteres policiais dos jornais da cidade do Rio de Janeiro no início do século XX*, in *Intellèctus*, XVII (2), 2018, p. 113–126.

ings. Thiago Torres Medeiros da Silva19 identified that the reporter for *O Paiz*, Jarbas de Aymorés de Carvalho, served as a witness in the homicide case analysed here. On the street where the events occurred stood the 14th police precinct of Rio de Janeiro, which Carvalho had visited to speak with the police commissioner—likely in search of information about another criminal matter. He learned that the commissioner had been called to a crime scene and went there himself, finding the victim's body inside the house. Acting in a police fashion, he questioned Almada about the authorship of the crime, which the latter confessed. At the precinct, he witnessed the suspect's formal admission of guilt.

The events were reported in March 1901. According to *O Paiz*, J. B. P. de Almada was an *alferes*[20] in the First Cavalry Regiment of the Army and had received an honorific distinction for his service in the Canudos War. He was married to J. C. M. S. [21], a woman from a prominent *carioca* family[22]. The couple had two young children and, according to the press, had recently begun to experience marital discord. The press account of the alleged offence, classified as a crime of passion, was accompanied by a detailed narrative of the couple's domestic dynamics. It was asserted that the husband had, for several months, harboured suspicions regarding his wife's fidelity; on 12 February, following "continuous quarrels and struggles", she had left the marital home. More than fifteen days later, a brother-in-law allegedly informed Almada of her whereabouts[23].

Gazeta de Notícias[24] reported the events leading up to the crime:

> For seven years of marriage, the sincerest joy reigned in that home. Two months ago, however, slight suspicions began to disturb the peace that had prevailed until then. Thus, on the 12th of last month, when *alferes* Almada arrived at his residence on Rua do Malloso no. 14, he found the house abandoned, for his wife had left with their two children, and despite all inquiries he could not discover the whereabouts of the unfaithful [woman]. On the 3rd of the current [month], he learned from Sa'nt Clair Padua that his wife was hiding

19 T. Torres Medeiros da Silva, *O noticiário criminal*, cit., p. 117-120.

20 Rank equivalent to second lieutenant.

21 Although the events were part of the public record, the names of the parts and testimonies that have not yet become notorious have been abbreviated.

22 O Paiz, *Othelo*, January 10th, 1900, year XVI, n. 5633, p. 2.

23 O Paiz, *Othelo*, cit.

24 Gazeta de Noticias, *Scena de Sangue*, March 10th, 1900, year XXI, n. 69, p. 1.

> in a shack on Dias da Cruz Street; there went the *alferes* Almada, making the unfaithful wife come back home, and after many promises of repentance and reform, all was at peace.

Employing a vocabulary characteristic of criminal accusation, the press initiated a process of shifting culpability onto the victim, portraying her as the perpetrator of prior adulteries and holding her responsible for disrupting the domestic order. It described the husband's discovery of the "whereabouts of the unfaithful woman", whom he dragged back home, where the once "fugitive" allegedly begged for forgiveness and promised to amend her behaviour. *A Imprensa*[25] followed a similar narrative, claiming that a "criminal thought" had led her to abandon a happy home, for her "weak spirit" had been seduced by a younger "lad". While she reportedly complained of her husband's jealousy, "she made herself an adulteress, he a murderer".

The wife's alleged promise to change did not endure, for on 9 March she left the home once again. At this point, a third figure entered the scene. The couple's domestic worker, B. T. A, upon realizing that her employer had supposedly abandoned the home, left the children with a neighbour and went to inform the husband[26]. Initially described as an accomplice, the worker claimed not to know the woman's whereabouts; however, after being threatened and inflicted "a slight knife wound" by Almada, she led him to the lodging where his wife was staying, and he brought her back home[27].

J. C. M. S.'s body would leave the house only in death.

Upon returning to the marital home, the husband ordered the worker to fetch the children from the neighbour's house and, during that interval, allegedly killed the wife with a knife. *O Paiz*[28] reported that when B. T. A. returned, she heard a scream and found her female employer lifeless on the floor, with a wound over her heart: "the *alferes* standing calmly at her side, still held a thin pointed knife, stained with blood". According to Moraes[29], the killing followed the wife's confession of adultery. *A Imprensa*[30] reported that she had admitted having a lover with whom she wished to live. Upon hearing that, Almada ran to the dining room, seized a knife,

25 A imprensa, *Tragedia. Traiu-me? Matei-a!*, March 10th, 1900, year II, n. 519, p. 2.
26 O Paiz, *Othelo*, cit.
27 A imprensa, *Tragedia*, cit.
28 O Paiz, *Othelo*, cit.
29 E. De Moraes, *Reminiscencias*, cit., p. 179-180.
30 A imprensa, *Tragedia*, cit.

and struck her in the heart. Turning himself in, he confessed: "*trahiu-me, matei-a*!" ("[she] betrayed me, [I] killed her!").

The version of events narrated by the perpetrator was entirely unilateral: in the absence of eyewitnesses, the murdered woman's alleged confession of adultery could not be verified.

The police report, prepared by commissioner Estevão de Rezende and published in the *Jornal do Commercio*[31], concluded that the suspect had violated article 294, §1 of the *Código Penal*. Going beyond factual determination, and applying a negative moral judgment[32], the commissioner condemned adultery-based homicide as a "pernicious" custom among "civilized" peoples which, glorified by "public applause" and often left unpunished, had driven the suspect through an "imitative impulse". The testimonies collected cast doubt on the victim's conduct and reputation, yet none categorically affirmed the existence of adultery either prior to or contemporaneous with the crime. In fact, they indicated that the victim had been mistreated by her husband and, for that, had left home. While concluding that the suspect was guilty, the commissioner characterized adultery-based homicide as an outdated legal category, typical of "primitive" societies that regarded the wife as her husband's property: "doesn't proceed, therefore, under any aspect, the exculpation of those who kill 'to save their honour,' as though honour, to be restored and made unpolluted, required bathing itself in the blood of a defenceless woman"[33].

Not all police officers, however, shared this view. Moraes[34] recounted that the suspect, held in a military barracks on Rua Figueira de Mello, was "surrounded by the sympathy of his companions and the discreet protection of the commander", likely owing to his status as an army officer. The police had even offered to cover the costs of his defence.

The publication in the press of the police report suggests, as Medeiros da Silva[35] argued, a close relationship between journalists and police officials. Moreover, other professionals involved in the investigation also appear to have granted the press

[31] Jornal do Commercio, *Parte Judiciária*, June 12th, 1902, year 81, n. 162, p. 8.

[32] Police inquiries were usually submitted to the judiciary with a final report by the commissioner, who incorporated the facts and extracted from them his own version, thereby providing, in some extent, a personal interpretation of the events, M. Corrêa, *Morte em família,* cit., p. 35.

[33] Jornal do Commercio, *Parte Judiciária*, cit.

[34] E. De Moraes, *Reminiscencias*, cit., p. 180.

[35] T. Torres Medeiros da Silva, *O noticiário criminal,* cit.

privileged access. A journalist from *A Notícia*[36] gained entry to the morgue and described the victim's body in detail, concluding: "despite the clotted blood staining her face, despite the complete disarray of her hair, her countenance, little altered, is still pleasant".

Even after death, gender norms continued to assert themselves.

3.2. The trial: a spectacularisation of the jury?

During the time in which the 1890 *Código Penal* remained in force, criminal procedure in Brazil was decentralized, having each Federal State the authority to organise its own norms[37]. Initially grounded in the 1832 *Código de Processo Criminal*[38], the federative units adopted ordinary laws that modified procedural rules, and from 1910 onward they began to undertake codification processes based on the "model code" drafted by the Federal District[39].

At the time of the events, the 1894 Consolidation[40] was in force in Rio de Janeiro. Continuing the imperial tradition, it maintained the broad jurisdiction of the jury court[41]. The institution was composed of forty-eight jurors, twelve of whom formed the trial council[42]. As a rule, jurors were required to be literate male citizens over twenty-one years of age and in full possession of their political rights[43]. Women were excluded from this conception, with the first female jurors in Rio de Janeiro

[36] A noticia, *Scena de sangue,* March 10th and 11th, 1900, year VII, n. 59, p. 2.

[37] As established by article 34, No. 23 of the *Constituição da República dos Estados Unidos do Brasil*, 1891. Criminal procedure was once again centralised with the enactment of the 1941 *Código de Processo Penal*, A. L. Sabadell, *Los Problemas del derecho procesal penal único en una federación: la experiencia de Brasil.*, in Instituto Nacional de Ciencias Penales, Max-Planck Institut fuer Auslaendisches und Internationales Strafrecht (org.), *Hacia la Unificación del Derecho Penal. Logros y desafíos de armonización y homologación en México y en el Mundo*, Instituto Nacional de Ciencias Penales, Districto Federal, 2006, v. 1, p. 585–615.

[38] The Code had already been reconsolidated following reform processes in 1841 and 1871, D. Nunes, *Codificação, recodificação, descodificação? Uma história das dimensões jurídicas da justiça no Brasil imperial a partir do Código de Processo Criminal de 1832*, in *Revista da Faculdade de Direito da UFMG*, 74, 2019, p. 135–166.

[39] R. J. Nodari, *Uma "clamorosa e perigosa «desintegração» do direito nacional? Ordem, liberdades e a questão da diversidade legislativa no processo penal brasileiro (1889-1930)*, Dialética, Belo Horizonte, 2023, p. 104-139.

[40] M. Da Gama Coelho, *Consolidação das leis do processo criminal do estado do Rio de Janeiro*, Typographia Guimarães, Rio de Janeiro, 1853.

[41] The jury court, convened and presided over by a judge of law (art. 32, I), was competent to adjudicate ordinary criminal offences and cases of bankruptcy (arts. 28, d, and 35).

[42] Arts. 353 and 354.

[43] Art. 362, a), b), c).

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serving only in 1933[44]. Also excluded were, among others, those deemed "notoriously lacking in good sense, integrity, and good morals", as well as those without "means of decent subsistence"[45]. Consequently, the prevalence of a community-based model of adjudication[46] did not translate the justice system being genuinely democratic or accessible to the broader public[47].

As Luigi Lacchè[48] observes, in Europe, by the late 19th century, the increasing public visibility of courtroom debates paved the way for the emergence of the "penalist lawyer" as a distinct figure: an orator but also an actor, who contributed to the development of the *processo celebre*. With the support of the press, this publicisation likewise fostered a form of *giustizia-spettacolo*[49], marked by the theatricalisation of judicial proceedings.

Evaristo de Moraes was, without doubt, a captivating orator, and the Almada trial was, indeed, reported by *O Paiz*[50] as a celebrated trial. The proceedings took place on 11 June 1901, during the fifth ordinary session of the Rio de Janeiro jury court, presided over by judge Gama e Souza. The prosecution was led by public prosecutor Jayme de Miranda, but it was the presence of two renowned attorneys, Carlos Arthur Busch Varella for the private prosecution and Evaristo de Moraes for the defence, that drew the attention of the press.

Recalling the trial, Moraes[51] noted that, faced with such "terrible adversaries," he had prepared himself for "a tremendous struggle".

44 Beatriz Sophia Mineiro e Julieta Capanema, as analysed by P. Buogo, *O recurso de apelação obrigatório às decisões absolutórias proferidas pelo Tribunal do Júri no estado de Santa Catarina durante a Primeira República e o início do Estado Novo (1889-1938)*, Universidade Federal de Santa Catarina (master's thesis), Florianópolis, 2025, pp. 157-158.

45 Art. 362, sole paragraph, a) and e).

46 R. J. Nodari, *Uma "clamorosa e perigosa «desintegração»*, cit., p. 200.

47 In Rio de Janeiro, as also verified in the state of Santa Catarina, the jury exhibited a highly specific demographic profile, operating as a justice institution of and for the *galantuomini,* a Justice primarily founded on the protection of the abstract, honest, and respectable bourgeois male citizen, as conceptualized by *L. LACCHÈ, Introduzione, in La giustizia per i galantuomini. Ordine e libertà nell'Italia liberale: il dibattito sul carcere preventivo (1865-1913), Giuffrè, Milano, 1990, p. 3-4*. See A. P. Zappellini Sassi, *La tutela dell'onestàfemminile,* cit., cap. III. See also D. Nunes-B. Madruga Da Cunha-M. Costa, *O Processo Penal no estado de Santa Catarina entre Primeira República e Era Vargas*, in *Revista Brasileira de Direito Processual Penal*, 7 (2), 2021, p. 1102–1103; P. Buogo, *O recurso de apelação*, cit., p. 122.

48 L. Lacchè, *«Non giudicate»,* cit., p. 32. See also L. Lacchè, *Justiça criminal e opinião pública na Itália entre os séculos XIX e XX*, in *Rev. Bras. de Direito Processual Penal*, 7 (2), 2021, p. 801–826.

49 L. Lacchè, *«Non giudicate»,* cit.

50 O Paiz, *Processo Celebre. Absolvição unânime*, June 12th, 1901, year XVII, n. 6091, p. 1.

51 E. De Moraes, *Reminiscencias,* cit., p. 180.

Almada had been charged with aggravated homicide[52] and Varella[53] described the case as a "monstrous outrage," committed "coldly and deliberately". He argued that the young woman had sought refuge in the home of relatives "of irreproachable honesty" to escape her husband's mistreatment. Thus, there was no evidence of conjugal infidelity, and the claim of "affront to honour" was illegitimate: by imputing false adultery to her, the accused had also committed the crime of calumny. Considering "all the resources of advocacy that I might lawfully employ to prevail" as justified, Moraes[54] sought to portray Almada in a heroic light, emphasising his bravery in a bloody war. *O Paiz*[55] reported the scene:

> Mr. Evaristo de Moraes began by highlighting the contrast between the accused who wept and the *alferes* who departed for Canudos. There, continued the orator, is the man who did not fear the bullets of the *jagunços*, yet fears the injustice of his fellow [citizens]. And then, the contrast seemed even more striking to the orator when he compared the two situations of the poor mother of the accused. At that time, when he left for Canudos, she embraced him knowing he was going in search of glory, for he was brave, valiant, a hero. Now, she does not know which path he will follow, justice or iniquity.

Citing the opinions of physicians and jurists, the *rábula* argued for the defendant's acquittal, while seeking to sway the jurors by emphasizing the mother's anguish and invoking the plight of the couple's children: "deceased the disgraced lady who had been the defendant's wife, he is left with two children in his arms. The jury cannot restore the deceased [lady], and by imprisoning the defendant it will deprive those poor little beings of their only support"[56].

Ultimately, Moraes's[57] masterstroke was the study of an uxoricidal case in which Varella himself had served as defence counsel thirty years earlier. From the proceedings, he selected "the most incisive [quotations], those in which the eloquent advocate explained the defendant's conduct, describing the irresistible force of passion".

52 Article 294, §1º, *Codigo Penal.*
53 O Paiz, *Processo Celebre*, cit.
54 E. De Moraes, *Reminiscencias*, cit., p. 180.
55 O paiz, *Processo Celebre*, cit.
56 E. De Moraes, *Reminiscencias*, cit., p. 180.
57 E. De Moraes, *Reminiscencias*, cit., p. 181.

By theatrically reading these passages, he turned the prosecutor's own words against him, producing a powerful demoralizing effect before the jury. From that point onward, as he recalled, "the case was won".

4. CONCLUDING REMARKS: MORAES' TRIUMPH AND THE ENDURING LEGACY OF CRIMES OF PASSION

The defendant was acquitted unanimously, the jury recognizing that he had committed the act in a state of complete deprivation of senses[58].

Evaristo de Moraes acknowledged adhering to a distinct doctrinal framework from that established in the Brazilian Code. Although he maintained that he did not transgress legal boundaries within the jury trial, he relied on strategies of emotional appeal and courtroom spectacle designed to secure juror acquittal. Given that the jury body was composed of a highly circumscribed demographic, any appeal to emotion or empathy necessarily operated within the normative expectations of dominant gender roles. Thus, it was not systematically incoherent that the man who, driven by uncontrollable passion, claimed to defend his honour against the alleged transgressions of an adulterous wife, was acquitted by his peers as though he were a victim of the circumstances.

O Paiz[59] reported the emotional reunion of the *alferes* with his mother and children. Yet not all the press was moved by the spectacle. According to Moraes[60], the acquittal's unanimity was poorly received, since the news outlets launched "campaigns of discredit" whenever the jury favoured defendants in crimes of passion. Particularly, he cited the critique published in *A Notícia*, allegedly written by jurist Virgilio de Sá Pereira under the pseudonym Meirinho[61].

The article condemned as odious the acquittal of "brave slayers of women" who, injured not in their honour but in their sense of property, were absolved through the "pathetic rhetoric" of their defenders. Meirinho[62] directly criticized Moraes's performance:

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[58] Jornal do Commercio, *Parte Judiciaria*, cit.

[59] O Paiz, *Processo Celebre*, cit.

[60] E. De Moraes, *Reminiscencias*, cit., p. 182.

[61] Term that in the Portuguese-speaking tradition designated a court officer functioning as an assistant to the judge.

[62] A noticia (Meirinho), *Foi julgado o alferes Almada. Absolvido unanimemente*, in Semana Judiciaria, June 19th, 1901, year VII, n. 144, p. 3.

> In the mouth of an advocate such as Mr. Evaristo de Moraes, the defence in such cases emerges skilfully. [...] If the defendant is a soldier, they make him a hero. [....] Then a charge of legal cavalry falls noisily upon the indictment—inept, incongruent, contradictory. The banner of deprivation of senses covers this moral contraband. Italian authors are cited above all. The lawyer then takes the pulse of the jurors, and if they still resist, he returns to the pathetic, pleading with sobbing tears in his voice. He points to a corner of the room, addresses a venerable lady veiled in mourning and tears, showing all the faint figure in whom an irreparable sorrow prospers funereally. It is the defendant's mother […]. Ladies in the gallery weep, some jurors have moist eyes and conceal their emotion. [...] The acquittal is fatal[63].

Evaristo de Moraes had achieved notoriety as a criminal *rábula*, and, as it happens, his work on crimes of passion—as well as the jury as an institution itself—elicited ambivalent reactions not only from the press but also from other jurists. In the preface to Moraes's memoirs, Galdino Siqueira[64], a prominent public prosecutor, praised his eloquence and skill before the jury:

> A consummate orator. With that ability to adapt himself to the audience, with prompt conception, easy, fluent diction, a voice that hovers dominantly, with those shifts in tone harmonious with the subject, imperturbable regardless of interruptions, to which he immediately responded, decisively, sometimes ironic, sometimes imperative, sometimes tender, taking advantage of every circumstance that might benefit his client, drawn from the case file or from the moment, he soon held the audience captive to his eloquent speech.

Despite Moraes's expressiveness and creativity, his defence strategies in crimes of passion were not immune to criticism. In 1925, with the creation of the Brazilian Council of Social Hygiene, a group of public prosecutors in Rio de Janeiro began to

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63 A noticia (Meirinho), *Foi julgado o alferes Almada,* cit.

64 G. Siqueira, *Prefacio*, cit., p. IV. Siqueira, a public prosecutor and professor in Rio de Janeiro, gained prominence in the years following the draft Penal Code he proposed in 1913 which, although it did not proceed in Parliament, brought him recognition. On the subject, see R. Sontag, *Para uma história de gavetas: o projeto de Código Penal brasileiro de Galdino Siqueira (1913)*, in *Italian Review of Legal History*, 11, 2025, p. 331–371.

act "against the benevolence" with which such offenders, *criminosos passionais,* were treated and to investigate their "true" motivations[65]. Indeed, the public prosecutor Roberto Lyra[66], in the preface to the Brazilian translation of Enrico Ferri's *O delicto passional na civilização contemporânea* (1934), criticized the "vulgarisation of criminal law" fostered by the the jury system, where skilful lawyers could manipulate the "general conscience" to secure the acquittal of homicidal defendants.

Whereas Moraes[67] adhered to the so-called "pathological theory", which identified intense passion with madness and, under certain conditions, admitted it as a ground for excluding criminal responsibility, Lyra[68] argued that passion and madness should not be conflated. He criticized the adjudication of such crimes by jury courts, which, in his view, effectively legitimized the right to kill. According to Lyra, although the dominant Brazilian doctrine, aligned with foreign theories, did not recognise passion as an autonomous ground for exculpation, some lawyers, "*habitués*" of the jury, among them Evaristo de Moraes, continued to defend this thesis before popular courts, succeeding by virtue of their eloquence.

Nonetheless, the punitivist campaign against wife-killers did not aim to challenge gender hierarchies or critique the prevailing configurations of the family institution, since these authors were far from endorsing female independence: Roberto Lyra, in fact, was emphatic in proclaiming the inferiority of women[69]. It was only at the end of the 1970s that this issue was taken up from a feminist perspective, in protests led by women in response to the public outcry over the widely publicized murder of Ângela Diniz by Doca Street. Under the slogan *quem ama, não mata* (those who love, do not kill) women took the streets denouncing intimate partner violence and demanding justice and dignity[70].

Still, despite decades of legislative reforms, the thesis of legitimate defence of honour maintained a long-standing presence within the Brazilian criminal justice

[65] The public prosecutors Roberto Lyra, Carlos Sussekind de Mendonça, Caetano Pinto de Miranda Montenegro, and Lourenço de Mattos Borges also counted on the collaboration of Judge Nelson Hungria, who in the following decades would advance a series of critiques of the jury institution, as analysed by R. Sontag, *«A eloquência farfalhante da tribuna do júri»: o tribunal popular e a lei em Nelson Hungria*, in *História*, 28 (2), 2009, p. 267–302.

[66] R. Lyra, *Prefacio*, in *O delicto passional na civilização contemporanea*, Saraiva, Rio de Janeiro, 1934, p. 7–40.

[67] E. De Moraes, *Problemas de direito penal*, cit., p. 161.

[68] R. Lyra, *Prefacio*, in *O delicto passional*, cit.

[69] S. K. Besse, *Crimes of passion: the campaign against wife killing in Brazil, 1910-1940*, cit.

[70] M. Pillar Grossi, *De Angela Diniz a Daniela Perez: a trajetória da impunidade*, in *Revista Estudos Feministas*, 1 (1), 1993, pp. 166–168.

system and continued to be invoked as a defensive argument in court until 2023, when the Federal Supreme Court finally declared its unconstitutionality through *Arguição de Descumprimento de Preceito Fundamental* No. 779.

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Articoli

LA MONETIZZAZIONE DEL DATO FRA INFOSFERA E DOCUSFERA

DATA MONETIZATION BETWEEN INFOSPHERE AND DOCUSPHERE

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Abstract

L'articolo esplora il perimetro d'azione della monetizzazione dei dati personali, mostrando come tale fenomeno si origini dalla registrazione di ogni attività umana nella docusfera e dalla loro successiva trasformazione in informazioni economicamente sfruttabili. In seguito, basandosi su un caso emblematico di monetizzazione da parte di Meta, propone la possibile introduzione di un nuovo diritto a conoscere il valore economico dei propri dati, mostrandone l'inquadramento giuridico e le implicazioni sistematiche. In conclusione, si sottolinea come tale aumento del potere contrattuale dell'utente debba essere affiancato agli attuali strumenti normativi in una strategia volta a rafforzare la consapevolezza degli utenti circa il ruolo dei dati come principale bene dell'economia digitale.

Parole chiave: infosfera; dati personali; docusfera; monetizzazione; privacy

Questo contributo è stato sottoposto a referaggio anonimo (doppio cieco)
This paper has been subjected to double-blind peer review

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The article explores the scope of personal data monetization, showing how this phenomenon arises from the recording of every human activity within the docusphere and their subsequent transformation into economically exploitable information. Then, drawing on an emblematic case of monetization by Meta, it proposes the possible introduction of a new right to know the economic value of personal data, examining its legal framework and the systemic implications. In conclusion, it emphasizes that the increase of users' contractual power should be complemented by existing regulatory tools as part of a strategy aimed at strengthening users' awareness of the role of data as the main asset of the digital economy.

Keywords: infosphere; personal data; docusphere; monetization; privacy

Questo contributo è stato sottoposto a referaggio anonimo (doppio cieco)
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1. LA CENTRALITÀ DEL DATO

Negli ultimi anni, l'influenza del dato ha subito un esponenziale aumento grazie ad una molteplicità di cambiamenti tecnologici e sociali, che ancora oggi stanno incidendo sul suo utilizzo e sul suo valore[1].

L'enorme quantità di dati che circola nel digitale, unita alle nuove forme di profilazione e al rischio a cui essi sono sottoposti, ha permesso che, nel tempo, assumessero un'esplicita valenza economica. Oggigiorno, la concezione di "privacy" espressa da Warren e Brandeis[2], pur restando condivisibile in linea di principio e dal punto di vista teorico, trova una difficile applicazione pratica proprio per questa ragione[3]. Tutto ciò rende evidente come l'ambiente digitale non ne influenzi solamente il valore sociale ed economico, ma ne rimanga a sua volta strutturalmente influenzato in quanto costruito e alimentato dalle informazioni stesse.

Queste ultime, oltre che essere di genere e qualità molto differenti, sono prodotte e provengono dalle fonti più disparate[4]. Da un lato, infatti, vi sono i dati personali che comprendono sia quelli strettamente legati alla soggettività individuale come il nome, tratti caratteriali o fisici e caratteristiche simili, sia quelli riguardanti gli aspetti sociali, lavorativi e privati. Dall'altro lato, vi sono altre tipologie di dati quali risorse multimediali, articoli, documenti, applicazioni, algoritmi e i contenuti prodotti automaticamente dal digitale stesso.

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1 «Dall'adozione della direttiva comunitaria 95/46/CE […] ad oggi, il contesto sociale ed economico è profondamente mutato: nella società dell'informazione, la grande quantità di dati personali generati dall'odierno mondo elettronico, combinata con le nuove tecnologie a disposizione, che rendono sempre più sofisticati e meno facili da rilevare gli strumenti di raccolta e trattamento delle informazioni personali, aumentano in modo esponenziale i rischi di esposizione delle persone a forme illegittime di intrusione nella propria sfera privata e di spoglio della propria identità». M. Gambini, *La protezione dei dati personali come diritto fondamentale della persona: meccanismi di tutela*, in *Espaço Juridico Journal of Law*, 2013, vol. 14, n. 1, p. 150-152.

2 Interpretata come il diritto a non essere disturbati. S. Warren, L. Brandeis, *The Right to Privacy*, in *Harvard Law Review*, 1890, vol. 4, n. 5, p. 193.

3 Il GDPR propone un approccio basato sul binomio diritto-rischio, che prevede che la circolazione dei dati vada di pari passo con un alto livello di protezione. G. Sartor, F. Lagioia*, The impact of the General Data Protection Regulation (GDPR) on Artificial Intelligence,* Brussels, European Parliament, 2020, p. 66.

4 Un'informazione può essere un dato personale, un'azione compiuta sul web o nel mondo reale e altro ancora. «[…] il benessere e lo sviluppo non sono più solo connessi alle tecnologie dell'informazione e della comunicazione, ma dipendono in modo sempre più intenso ed inscindibile dalle medesime». S. Calzolaio, L. Ferola, V. Fiorillo, E. A. Rossi, M. Timiani, *La responsabilità e la sicurezza del trattamento* in L. Califano, C. Colapietro, *Innovazione tecnologica e valore della persona. Il diritto alla protezione dei dati personali nel Regolamento UE 2016/679*, Editoriale Scientifica, Napoli, 2017, p. 139.

Inoltre, il contributo dell'intelligenza artificiale ha amplificato le capacità del virtuale di elaborare, organizzare e personalizzare i contenuti in base alle esigenze degli utenti, rendendo il web sempre più interattivo. Ciò significa che, tale ambiente, non è solo un contenitore passivo di informazioni o risorse, ma un vero e proprio spazio dinamico, in cui i dati vengono continuamente aggiornati, trasformati e resi disponibili in nuove modalità di fruizione.

2. INTERPRETAZIONI DEL VIRTUALE

Tale complessità ha dato luogo a differenti interpretazioni del digitale che ne evidenziano i vari livelli di profondità, senza necessariamente contraddirsi fra loro. Nello specifico, emergono due principali posizioni: la prima legge il web in senso informazionale, la seconda in direzione documediale.

2.1. L'infosfera

Il concetto di "infosfera" compare per la prima volta negli scritti di Kenneth Boulding, che lo utilizza per definire l'ambiente costituito da differenti informazioni e collegato teoricamente alle altre "sfere" che costituiscono il mondo umano, ossia l'atmosfera, la biosfera e la sociosfera:

> «[…] just as in the economy we regard each individual or economic organization as a node in a network […] so we can conceive each individual or group of individuals as a node in a global network of inputs and outputs of information, symbols, and language. This concept is particularly important because it is the "infosphere" to coin a name for it […]. The infosphere then consists of inputs and outputs of conversation, books, television, radio, speeches, church services, classes, and lectures as well as information received from the physical world by personal observation. […] it is clearly a segment of the sociosphere in its own right, and indeed it has considerable claim to dominate the other segments. […] development of any kind is essentially a learning process and that it is primarily dependent on a network of information flows[5]»

[5] K. E. Boulding, *Economics as a Science*, McGraw-Hill, Bombay-New Delhi, 1970, p. 15-16.

Pertanto, gli individui sono "nodi" in una rete globale costituita da scambi informativi sia simbolici sia linguistici, equivalenti agli input e agli output che formano l'infosfera. Questo intreccio si rispecchia altresì nel rapporto dell'infosfera con la sociosfera (e con le altre sfere), in quanto qualsiasi sviluppo è un processo dipendente da un "network di flussi informativi". L'unificazione fra informazione e società, inoltre, è divenuta ancora più rilevante con l'avvento dell'intelligenza artificiale e dei nuovi modi di comunicare che essa rende possibili[6].

Quest'ultimo tipo di sviluppo è stato anticipato da Alvin Toffler nello scritto *The Third Wave*, da cui emerge come il concetto di infosfera possa essere applicato anche alle società precedenti a quella attuale e, addirittura, a quelle agricole o non industrializzate[7]. L'infosfera attuale, ossia quella della *third wave*, viene prodotta specificamente dalle trasformazioni della tecnosfera e ha impatti più profondi delle precedenti, essendo capace di rivoluzionare la mente umana, l'immagine del mondo e la possibilità di conferire o rinvenire un senso[8].

In tal modo, si viene a creare un circolo di reciproca influenza tra la dimensione umana e quella tecnologico-informativa: come la prima è affetta dai cambiamenti della tecnosfera e dell'infosfera così, a sua volta, risulta essere l'origine principale di questi mutamenti. Infatti, oggigiorno, ci si trova di fronte a dispositivi in grado di produrre autonomamente determinati output che non sembrano corrispondere agli input dati. Questi imprevisti o ambiguità derivano parzialmente dalla capacità dell'infosfera di trasformare l'ambiente rendendolo "intelligente"[9]. Ciò significa che l'uomo, grazie all'intelligenza artificiale, può dialogare con esso, trasformandolo, ottenendo risposte e sperimentando nuove forme di interazione[10].

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6 Fra i quali rientra la comunicazione che avviene esclusivamente fra robot e quella che riguarda l'uomo e le intelligenze artificiali.

7 Vi è un'infosfera della *first wave* e una della *second wave*, riguardanti rispettivamente la trasmissione orale di racconti e i prodotti scaturiti dalla radio e dagli altri mass media. A. Toffler, *The Third Wave*, William Collins Sons, Londra, 1980, p. 43.

8 La nascita di questa nuova infosfera avrà «[…] *a far-reaching impact on that most important sphere of all, the one inside our skulls. For taken together, these changes revolutionize our image of the world and our ability to make sense of it The emerging Third Wave info-sphere makes that of the Second Wave era* […] *seem hopelessly primitive by contrast. In altering the info-sphere so profoundly, we are destined to transform our own minds as well – the way we think about our problems, the way we synthesize information, the way we anticipate the consequences of our own actions*» A. Toffler, *The Third Wave*, William Collins Sons, Londra, 1980, p. 181 e 188.

9 «*Today, as we construct a new info-sphere for a Third Wave civilization, we are imparting to the "dead" environment around us not life but intelligence*». A. Toffler, *The Third Wave*, William Collins Sons, Londra, 1980, p. 184.

10 «*In all previous societies the info-sphere provided the means for communication between humans. The Third Wave multiplies these means. But it also provides powerful facilities, for the first time in history, for machine-to-machine*

Negli anni successivi, Luciano Floridi rilegge e approfondisce il termine in base ai recenti sviluppi tecnologici i quali, influenzando direttamente l'infosfera, la modificano dal punto di vista contenutistico e formale. Egli nell'opera *Philosophy and Computing*, scrive:

> «The computerised description and control of the physical environment, together with the digital construction of a synthetic world, are, finally, intertwined with […] the transformation […] of data, information, ideas, knowledge, beliefs, codified experiences, memories, images, artistic interpretations and other mental creations into a global infosphere. The infosphere is the whole system of services and documents, encoded in any semiotic and physical media, whose contents include any sort of data, information and knowledge […], with no limitations either in size, typology or logical structure. Hence it ranges from alphanumeric texts […] and multimedia products to statistical data, from films and hypertexts to whole text-banks and collections of pictures, from mathematical formulae to sounds and videoclips […] Computer science and ICT provide the new means to generate, manufacture and control the flow of digital data […] thus managing its life cycle (creation, input, integration, correction, structuring and organisation, updating, storage, searching, querying, retrieval, dissemination, transmission, uploading, downloading, linking, etc.) […] The infosphere constitutes an intellectual space whose density and extent are constantly increasing, although at disparate rates in different ages and cultures[11]»

Floridi, dunque, sottolinea che il controllo del mondo fisico e la costruzione di ambienti virtuali, sono strettamente correlati alla trasformazione dell'universo conoscitivo in un'infosfera globale. Le tecnologie dell'informazione, in questo contesto, non sono solamente ricettive, ma hanno altresì un ruolo attivo, contribuendo a creare, rielaborare e organizzare dati, informazioni o conoscenze. Proprio per queste caratteristiche, l'infosfera subisce un incremento continuo, sia quantitativo sia qualitativo.

communication and, even more astonishing, for conversation between humans and the intelligent environment around them». A. Toffler, *The Third Wave*, William Collins Sons, Londra, 1980, p. 194.

11 L. Floridi, *Philosophy and Computing*, Routledge, New York, 1999, p. 8-9.

Tale ambiente, inoltre, è costituito da enti informazionali capaci di produrre fenomeni che lo trasformano, modificando soprattutto i processi e le relazioni fra gli enti stessi[12]. Dunque, il rapporto uomo-macchina o quello fra esseri umani mediato dal digitale, intacca l'infosfera e ridefinisce le modalità di percepire, accedere e vivere l'informazione nel virtuale[13].

Secondo questa prospettiva, il mondo fisico e quello virtuale, in un senso quasi ontologico, risultano interconnessi o addirittura inestricabili, tanto che Floridi presenta cinque "re-ontologizzazioni" apportate da tale unione.

La prima è la digitalizzazione dell'ambiente informazionale e si manifesta nell'uso quasi globale di dischi rigidi o del *cloud computing,* in sostituzione dei supporti cartacei[14].

La seconda, è l'identificazione fra l'ontologia di sistemi come software e database e quella dei dati stessi. In altri termini, l'immaterialità delle informazioni, dal punto di vista ontologico, diviene la stessa dei loro supporti. Ciò comporta un'uniformità di gestione dell'informazione da parte di diversi dispositivi intelligenti, come avviene per l'*ubiquitous computing* e le *smart cities*.

Il terzo tipo si riferisce alla nascita di nuovi agenti informazionali sia artificiali, come dispositivi o applicazioni intelligenti, sia "ibridi", come gli esseri umani che usano tali strumenti per navigare nel web o svolgere certi compiti[15]. Tali agenti, condividono la medesima ontologia dell'infosfera e possono operare anche senza l'uomo, prendendo o comunicando decisioni. Questa loro crescente indipendenza, solleva importanti questioni etiche e legali circa la loro responsabilità morale e il loro statuto giuridico.

La quarta tipologia riguarda le interazioni fra esseri umani e macchine, nonché quelle che avvengono fra i dispositivi stessi senza alcun concorso umano. Tali interazioni, paiono sempre più informazionalizzate e virtuali, non essendovi più una netta distinzione ontologica fra ciò che viene processato e ciò che processa. In ques-

12 «*The infosphere is the environment constituted by the totality of information entities – including all agents – processes, their proprieties and mutual relations*». L. Floridi, *Information Ethics: On the Theoretical Foundations of Computer Ethics*, in *Ethics and Information Technology*, 1999, vol. 1, n. 1, p. 44.

13 A. Fabris, *Etica per le tecnologie dell'informazione e della comunicazione*, Carocci, Roma, 2018, p. 86-88.

14 L. Floridi, *The Ontological Interpretation of Information Privacy*, in *Ethics and Information Technology*, 2005, vol. 7, n. 4, p. 191.

15 «*This change concerns the emergence of artificial and hybrid agents (i.e. partly artificial and partly human; consider the group of our students as a single agent, equipped with digital cameras, laptops, palm pilots, mobiles, a wireless network, digital TVs, DVDs, CD players*». L. Floridi, *The Ontological Interpretation of Information Privacy*, in *Ethics and Information Technology*, 2005, vol. 7, n. 4, p. 192.

to contesto, anche la persona viene interpretata come un "inforg", ossia come un "organismo" informazionale[16].

L'ultima re-ontologizzazione, si riferisce proprio a tale ridefinizione dell'uomo, il quale si trova a vivere contemporaneamente nella biosfera e nell'infosfera. Questa trasformazione, non implica semplicemente che egli abbia un'identità digitale, ma soprattutto che si debba comprendere come agente informazionale tra altre entità simili, sia naturali sia artificiali. A questo proposito, Floridi distingue tra dispositivi che si adattano a chi li utilizza per facilitare o velocizzare alcune operazioni e tecnologie che costruiscono ambienti in cui gli utenti interagiscono. L'interfaccia di un computer, ad esempio, non è tanto uno strumento di controllo del dispositivo, ma un portale attraverso cui l'utente si immerge nell'infosfera, diventandone parte attiva.

Queste re-ontologizzazioni testimoniano, in definitiva, che l'informazione digitale è capace di ricostruire la realtà stessa, influenzando il modo in cui si vive e si percepisce, nonché quello in cui viene pensata e applicata la legislazione.

2.2. La docusfera

Il termine "docusfera" è stato coniato da Maurizio Ferraris per descrivere l'ambiente costituito dalla totalità dei documenti e delle registrazioni prodotte e archiviate dall'uomo. Questo "spazio" comprende testi scritti, immagini, dati digitali, interazioni sui social media e ogni tipo di traccia lasciata nel mondo informatico e fisico. Il concetto, secondo il filosofo, si rende necessario per supplire alle ambiguità da cui è afflitta l'infosfera, specialmente per quanto riguarda il modo in cui viene inteso il termine "informazione". Infatti, sebbene nell'infosfera tutto sia informazione, non sempre quest'ultima risulta comprensibile in maniera univoca. A tal proposito, egli scrive che quanto si trova online:

> «[…] è un'informazione per quei pochi che sanno come utilizzarla per profilarmi. Il che […] genera una grandissima differenza fra coloro che sanno leggere solo le informazioni in chiaro e quelli che sanno interpretare i documenti: una differenza non meno grande di quella che intercorre fra analfabetismo e cultura»[17]

[16] L. Floridi, *Il verde e il blu*, Raffaello Cortina, Milano, 2020, p. 149.
[17] M. Ferraris, *Documanità*, Laterza, Bari, 2021, p. 23.

Inoltre, le stesse caratteristiche dell'infosfera, lungi dal contribuire a risolvere la questione, la complicano ulteriormente. La prima fra queste è la viralità, che fa sì che vi sia un'enorme crescita delle interconnessioni e una molteplicità di fonti rese disponibili a milioni di utenti. La seconda è la persistenza, intesa come presenza costante e come "eterno ritorno" di dati o documenti, qualunque sia il contenuto. La terza è la mistificazione, ossia la creazione di identità e notizie false, la cui fonte è creduta pur rimanendo anonima, fatto che in precedenza non si è mai verificato con così tanta facilità[18]. L'ultimo aspetto è la frammentazione, per cui una determinata fonte, raggiungendo moltissimi destinatari, "si frammenta in una molteplicità di fonti che generano comunità di recezione e di discussione molto più ristrette[19]", il che corrisponde a una frammentazione a livello ideologico e ad una atomizzazione sul piano psicologico[20].

Dunque, mentre l'infosfera rappresenta la superficie delle informazioni disponibili[21], la docusfera costituisce la struttura profonda del web, dove ogni azione o comportamento viene documentato, archiviato e osservato. In questa prospettiva, l'infosfera e la docusfera sono due modi differenti, ma correlati[22], di interpretare il virtuale e ciò che lo produce: il primo "tolemaico", il secondo "copernicano". Secondo Ferraris, Floridi, nonostante abbia dato nuova linfa al concetto, resta legato ad un'interpretazione tolemaica dell'infosfera, ritenendo che la rivoluzione dell'informazione abbia una portata storica sulla *forma mentis* dell'uomo, tanto da poter essere paragonata a quelle di Copernico, Darwin, Freud e Turing[23].

Tuttavia, commenta Ferraris, interpretarla in tal senso equivale a sostenere una

[18] Le informazioni anonime e fittizie «[…] godono di libera cittadinanza nell'informazione, mentre in precedenza l'anonimato screditava una notizia». M. Ferraris, *Documanità*, Laterza, Bari, 2021, p. 24.

[19] M. Ferraris, *Documanità*, Laterza, Bari, 2021, p. 24.

[20] In uno studio condotto dall'Università di Standford emerge che il 46.1 % dei partecipanti basi la credibilità del sito sul suo design e il 3.7 % sulla chiarezza delle informazioni contenute. B. J. Fogg, C. Soohoo, D. Danielsen, L. Marable, J. Stanford, E. R. Tauber, *How Do People Evaluate a Web Site's Credibility? Results from a Large Study*, Stanford Persuasive Technology Lab, 2002, p. 23.

[21] «[…] l'infosfera è la schiuma superficiale, e particolarmente torbida, di un mare ben più vasto, che definisco "docusfera", e che consiste nell'ambito della documentalità» e «[…] il web è in minima parte infosfera e in massima parte una docusfera e una biosfera». M. Ferraris, *Documanità*, Laterza, Bari, 2021, p. 41 e 310.

[22] A tal proposito, si veda la figura nel seguente articolo: M. Ferraris, *Web tolemaico e web copernicano*, in *Phenomenology and Mind,* 2021, vol. 20, p. 150.

[23] L. Floridi, *The 4th Revolution. How the Infosphere is Reshaping Human Reality*, Oxford University Press, Oxford, 2014, p. 87-94; L. Floridi, *Il verde e il blu*, Raffaello Cortina Editore, Milano, 2020, p. 151-158.

banalità e a ignorare che il punto focale è quello riguardante la massiva registrazione del pensiero, la trasmissione di informazioni e la documentazione delle azioni o interazioni umane[24].

Al contrario, interpretando queste due dimensioni in modo unitario, si riuscirebbero a tenere assieme sia gli aspetti legati all'attestazione massiva delle azioni umane sia quelli più strettamente informazionali. Il web, così facendo, verrebbe letto come un enorme archivio "attivo", in cui si verificano scambi sociali, legali e personali che vengono accuratamente registrati e memorizzati.

Inoltre, si riuscirebbe altresì a spiegare come il valore economico del dato derivi primariamente dalla registrazione degli atti umani (sia che avvengano nel mondo reale sia sul web), depositati nella docusfera come "fatti" e non ancora come informazioni. La capacità di leggere tali documenti in maniera estesa (e, perciò, di tradurli in "informazione") li riveste di un potere economico fondamentale, che non si basa esclusivamente su singoli dati isolati e frammentati, ma sulla loro correlazione[25]. Il web, quindi, documentando l'essere dell'uomo e le sue attività, pone le condizioni tecniche e sociali che permettono la trasformazione delle azioni in dati e di questi ultimi in un profilo occulto dell'utente, da cui trarre valore economico.

L'economia contemporanea in questo settore, perciò, si fonda anzitutto sulla raccolta, sulla registrazione e sullo sfruttamento delle tracce digitali lasciate dagli utenti. In questo senso, la docusfera diventa un nuovo "territorio" economico e sociale, dove il valore si desume dalla capacità di organizzare, utilizzare e monetizzare informazioni.

3. LA MONETIZZAZIONE DEL DATO

L'infosfera e la docusfera, dunque, non hanno semplicemente un valore descrit-

[24] L'infosfera di Floridi è "tolemaica", in quanto pone l'accento sulla diffusione delle informazioni, sul loro scambio e sulla loro influenza sull'essere dell'uomo. «Tra il minimalismo della rivoluzione industriale e il massimalismo della ferita narcisistica [di Freud] credo che la più corretta genealogia della quarta rivoluzione sia quella che la concepisce non come un rivolgimento del modo di pensare, bensì di annotare e trasmettere i pensieri. Invece che un cambiamento ideologico delle visioni del mondo, abbiamo una quarta trasformazione tecnica dei supporti della registrazione e della comunicazione, dopo il passaggio dall'oralità alla scrittura, quello dai rotoli ai libri, e l'invenzione dei caratteri mobili». M. Ferraris, *Web tolemaico e web copernicano,* in *Phenomenology and Mind,* 2021, vol. 20, p. 149.

[25] Tale correlazione fra dati, secondo alcuni, per il suo carattere trasversale nel web, comporta una "normatività" occulta insita nella stessa natura dei mezzi digitali. A. Rouvroy, T. Berns, *Gouvernementalité algorithmique et perspectives d'émancipation. Le disparate comme condition d'individuation par la relation?*, in *Réseaux*, 2013, vol. 1, n. 177, p. 168-171.

tivo, ma permettono di precisare il retroterra al contempo teorico e concreto della monetizzazione dei dati personali. Da un lato, l'infosfera pone necessariamente al centro la circolazione e la produzione dell'informazione, dall'altro la docusfera chiarisce che tale ambiente acquisti rilevanza economica e giuridica soprattutto in quanto fondato sulla registrazione. Senza questa componente, ogni evento umano risulterebbe effimero e incapace di essere catturato dalla logica della profilazione e della datificazione.

Da questo punto di vista, la docusfera contribuisce alla comprensione di come il diritto non si trovi più soltanto dinanzi a informazioni comunicate consapevolmente, ma a un sistema di produzione continua di documenti[26], spesso generati indirettamente o inferiti a partire dai comportamenti registrati. La questione giuridica, pertanto, si estende oltre la mera liceità della raccolta dei dati, riguardando la capacità di conservare, correlare e valorizzare economicamente le tracce registrate. In tal modo, le norme europee sulla privacy, sui mercati digitali e sui contratti di fornitura di servizi possono essere interpretate come possibili, ma perfettibili, risposte allo stesso fenomeno, ossia la trasformazione documediale dell'agire umano in risorsa economica.

L'infosfera-docusfera, dunque, mostra come la monetizzazione sia inscritta nella stessa struttura documediale del web. Il valore economico nasce perché l'ambiente digitale conserva le azioni umane, le rende confrontabili e le collega ad altre inserendole in sistemi capaci di costruire profili, prevedere comportamenti, orientare decisioni e personalizzare i contenuti proposti. Se non si comprende questa trasformazione fondamentale, risulta difficile cogliere la portata della monetizzazione in termini antropologici e giuridici[27].

In questa prospettiva, può essere collocata l'espressione ideata da Korker e Weinstein per definire la valuta propria del mondo virtuale. I due studiosi, infatti, sintetizzando due aspetti centrali della società digitale, scrivono che l'informazione è "*the*

[26] «[…] all'inizio ci sono dei comportamenti che vengono fissati in documenti (i dati) e che possono, in determinate circostanze e disponendo di opportuni strumenti di calcolo e di interpretazione, trasformarsi in informazioni, che generalmente non sono trasparenti né di pubblico dominio. Trattandosi di una produzione di oggetti sociali resa possibile dalla esplosione della registrazione, il web è anzitutto una Docusfera, un ambito in cui si producono documenti, che non necessariamente veicolano in chiaro delle informazioni, non più di quanto possa farlo una traccia di DNA che diviene informativa solo quando viene sottoposta a esame scientifico». M. Ferraris, *Web tolemaico e web copernicano,* in *Phenomenology and Mind, 2021,* vol. 20, p. 158.

[27] La logica del ragionamento è la seguente: azione umana → registrazione → documento → dato personale → aggregazione → profilo → valore economico → questione giuridica.

digital money of virtual society: soft value for a soft (virtual) society".[28]

La prima caratteristica del mondo tecnologico è quella di dissolvere il "corpo" dell'uomo, ossia l'interezza della sua persona, nel virtuale, trasformando la vita in un insieme di dati da catalogare e conservare[29]. Tale procedimento, tuttavia, non è fine a sé stesso, ma mira a far fruttare quanto raccolto e memorizzato. In questo modo, l'informazione si trasforma in denaro e, dunque, nel motore e nel contenuto specifico della società digitale.

Il secondo aspetto è la valutazione della qualità di questa società, che viene definita "debole" proprio perché fondata su un valore, ossia la valuta informazionale, "*soft*" in quanto privo di collegamento con l'umano. Tale "*soft virtual society*" viene costruita e alimentata da un "valore senza valore", poiché esclude la centralità della persona.

3.1. Un esempio attuale

Come anticipato, la registrazione e archiviazione massiva di atti umani, trasformati in informazioni, offre alla monetizzazione un "capitale" fondamentale su cui investire. In questo senso, ciò che i dati personali rivelano, li rende un investimento sul futuro, poiché si possono prevedere gli interessi dell'utente, scommettendo sulla loro continuità temporale[30]. Per esempio, la stessa fruizione di un servizio genera informazioni che vanno a sommarsi a quelle cedute prima di poterne usufruire, facendo sì che l'unione complessiva di questi dati contribuisca alla creazione di un profilo più preciso della persona e permetta di offrirle opportunità sempre più mirate. Vi è, dunque, sia un valore intrinseco del dato, in quanto bene fondamentale nella società dell'informazione, sia un valore correlato al suo contenuto e alle modalità di

[28] Il primo aspetto è contenutistico, il secondo qualitativo. A. Kroker, M. A. Weinstein, *Data Trash. The Theory of the Virtual Class*, New World Perspectives, Montreal, 1994, p. 147.

[29] «[…] *the body becomes a passive archive to be processed, entertained, and stockpiled by the seduction apertures of the virtual reality complex*». A. Kroker, M. A. Weinstein, *Data Trash. The Theory of the Virtual Class*, New World Perspectives, Montreal, 1994, p. 6.

[30] I dati «valgono molto più del denaro perché ci parlano non di ciò che il consumatore ha ma di ciò che è, delle sue credenze, delle sue debolezze, delle sue speranze […]. In questo quadro, la profila azione va concettualizzata come un fenomeno analogo alla borsa, dove si ammette senza difficoltà che si creano dei prezzi scommettendo sul futuro e sul comportamento degli esseri umani […] è molto più redditizia, perché […] si tratta […] di conoscere con esattezza i bisogni umani, diminuendo il rischio di impresa e massimizzando il profitto e l'automazione». M. Ferraris, *Documanità*, Laterza, Bari, 2021, p. 61-62.

utilizzo[31].

Si pensi a come Facebook o piattaforme simili vengano presentate come totalmente gratuite[32], quando in realtà, ciò è riferibile soltanto ad un pagamento in denaro per potersi iscrivere. Infatti, in modo non trasparente, attraverso molteplici modalità di reazione come il like e il "cuore", si viene a creare e si alimenta un'estesa economia fondata sul potere del dato. Reagire ad un post, non è la semplice espressione di una preferenza, ma significa contribuire alla costruzione di un sistema in cui i contenuti circolano grazie al numero e alla tipologia di reazione. Tale sistema, inoltre, si spinge al di là della stessa applicazione, grazie a plugin che permettono di tracciare la navigazione degli utenti anche al suo esterno. Tramite questo approccio, ogni interazione, condivisione o visita ad una pagina web attraverso un certo plugin, genera uno scambio e una fusione di informazioni riguardanti l'utente[33]. È proprio tale dinamica che costituisce l'aspetto monetario di tali piattaforme, le quali contribuiscono alla costruzione di un'economia dei like[34], in cui è la persona stessa a diventare il prezzo da pagare per ottenere un "servizio"[35].

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[31] «Il dato, grazie alle modalità di trattamento ora possibili, ha aumentato esponenzialmente il proprio valore economico. Appare possibile così affermare un valore economico intrinseco del dato in quanto tale, ed un valore economico relativo alle informazioni che questo dato è portatore nel momento in cui esso si palesa verso terzi». S. Bonavita, *Le ragioni dell'oblio*, in *Ciberspazio e Diritto*, 2017, vol. 18, n. 57, p. 92.

[32] «La caratteristica di tutti questi servizi è quella di essere forniti senza la richiesta di un corrispettivo monetario. Il che ha fatto sostenere […] che si trattasse di servizi "gratuiti"». G. Resta, V. Zeno-Zencovich, *Volontà e consenso nella fruizione dei servizi in rete,* in *Rivista trimestrale di diritto e procedura civile*, 2018, p. 414

[33] «*Facebook's Like button is part of the Social Plugins which allow webmasters to exchange data with the platform and leverage Facebook's social graph. This social graph is a representation of people and their connections to other people as well as objects within the platform and poses a key asset for Facebook.* […] *the platform opened up their social graph for external content by providing a way for webmasters to integrate any page outside Facebook into the graph. This integration is mainly facilitated through the introduction of Social Plugins, including the external Like button, to enable a personalised, social experience of the web. The plugins allow for a controlled way of exchanging preformatted data between Facebook and the external web as they enable data flows from and to the platform through actions such as liking or by showing which users have engaged with the website or its content within Facebook. These features play an important role in Facebook's strategy of 'building a web where the default is social' as the Open Graph and Social Plugins mediate the connections between the platform, external websites and users through platform-specific activities*». C. Gerlitz, A. Helmond, *The Like Economy. Social Buttons and the Data-intensive Web,* in *New Media & Society*, 2013, vol. 15, n. 8, p. 1352.

[34] «[…] *this data collection in the back end can be connected to the platform's social graph, merging two sources of user data together that had not previously been connected. Facebook's expansion into the web does not only come with implications for an understanding of the social web and its economic affordances, but also contributes to a new perspective on the fabric of the web. What emerges, when exploring the connections between websites forming through the presence of tracking devices, are clusters organised around major data analytics corporations*». C. Gerlitz, A. Helmond, *The Like Economy. Social Buttons and the Data-intensive Web,* in *New Media & Society*, 2013, vol. 15, n. 8, p. 1357-1358.

[35] Rodotà ritiene che tale trasformazione sia una mercificazione dell'umano, segnalando il rischio

Sul tema, alcuni autori, hanno sollevato dei dubbi circa l'interpretazione della cessione dei dati come un legittimo corrispettivo del servizio offerto, appellandosi alle sentenze emesse dai Giudici del Consiglio di Stato[36].

Tuttavia, queste considerazioni vanno valutate alla luce della decisione, presa da Meta alla fine del 2023, di introdurre il modello "*pay or consent*" in risposta a normative europee quali il *Digital Markets Act*. A seguito di tale aggiornamento, l'utente può scegliere tra il pagamento di un abbonamento mensile per evitare le inserzioni pubblicitarie e l'utilizzo gratuito del proprio account, subordinato all'accettazione della monetizzazione dei dati per personalizzare le inserzioni[37].

Oltre alla discussa conformità alle norme europee che tale provvedimento pone, sembra altresì che il pagamento in denaro eviti l'utilizzo dei dati personali per scopi di marketing e che quindi l'utente si trovi di fronte alla scelta di pagare, per la prima volta, in denaro al posto che rendere moneta le proprie informazioni. Tuttavia, è dubbio che tale transazione ponga un argine a qualsiasi monetizzazione e che sia semplicemente un provvedimento incentrato sui dati utilizzati per le pubblicità personalizzate[38].

Alla fine del 2024, Meta decide di abbassare i prezzi dell'abbonamento e di introdurre un'esplicita terza via, in cui si utilizzano meno dati per orientare l'algoritmo che seleziona le pubblicità da mostrare, a patto che si accetti di vedere obbligatoriamente spot che interrompano per qualche secondo lo "scorrimento verticale"[39].

che i dati divengano un «titolo da scambiare sul mercato». S. Rodotà, *Tecnopolitica. La democrazia e le nuove tecnologie della comunicazione*, Laterza, Bari-Roma, 1997, p. 155.

36 «I dati personali che gli utenti forniscono a Facebook per utilizzare il servizio sono o non sono un corrispettivo del servizio? Neppure la lettura della sentenza [del Consiglio di Stato del 29 marzo 2021, n. 2631] in commento consente di rispondere alla domanda. La contestazione dell'Autorità Garante della concorrenza e del mercato relativa all'ingannevolezza della qualificazione del servizio come gratuito da parte di Facebook sembra, a ben vedere, ritenuta dai Giudici del Consiglio di Stato, fondata più sul fatto che, per un verso o per l'altro, Facebook trarrebbe un beneficio economico dallo sfruttamento commerciale dei dati degli utenti che sul fatto che tali dati personali rappresentino il corrispettivo del servizio». I Giudici hanno ritenuto che i dati personali dovuti per iniziare il servizio venissero in seguito utilizzati per fini commerciali all'insaputa dell'utente. G. Scorza, *Facebook non è gratis?*, in *Diritto di Internet*, 2021, n. 3, p. 567.

37 Come si nota, non vi è una terza opzione; o meglio, quest'ultima risulta essere l'abbandono della piattaforma.

38 O almeno, su alcune pubblicità personalizzate, dato che certi contenuti promossi da creator e aziende sono visibili, come dichiarato nell'informativa. C. Ghidotti, *Facebook e Instagram: abbonamento o pubblicità senza skip*, 18 luglio 2025, 11.12.2025.

39 «*While this new choice is designed to give people an additional control over their data and ad experience, it may result in ads that are less relevant to a person's interests. That means people will see ads that they don't find as interesting. This drop in relevance is inevitable given that drastically reduced data is being used to show these less personalized ads to people. In a low data environment, we will also introduce ad breaks to allow advertisers to connect with a wider*

Tale opzione, potrebbe essere considerata quell'"alternativa equivalente e gratuita" richiesta dalla Corte di Giustizia dell'Unione e, di seguito, dall'EDPB per far sì che le piattaforme offrano soluzioni pienamente compatibili con il GDPR[40].

Tuttavia, anche quest'ultimo aggiornamento, ha generato discussioni circa la sua reale conformità al Regolamento 2016/679 e ad altre normative europee. A gennaio del 2025, l'Ufficio europeo delle Unioni dei consumatori prende parte al dibattito sostenendo che Meta continui a violare il GDPR e il *Digital Markets Act*. Nel primo caso, Meta non rispetterebbe il consenso libero e informato, il ritiro o la separazione del consenso stesso e la minimizzazione dei dati. Infatti, legare indissolubilmente il consenso alla pubblicità comportamentale, non permette una scelta veramente libera e nemmeno sufficientemente informata, poiché mancano le caratteristiche specifiche di come ciò avvenga. Inoltre, tale libertà, diminuisce ulteriormente perché Meta non dà nemmeno la possibilità di prestare un consenso separato per il trattamento dei dati sulle sue piattaforme e al loro esterno[41]. Infine, anche la "terza opzione", descrive molto vagamente la tipologia e le tempistiche di raccolta, non indicando alcuna restrizione sul tipo di dati ottenuti o sul limite temporale di conservazione[42].

Le violazioni del *Digital Markets Act*, invece, riguarderebbero l'utilizzo di un linguaggio ambiguo e il design dell'informativa, che appare ideato per ostacolare il libero consenso. Per esempio, Meta usa la parola "informazioni" e non "dati personali", dando l'impressione che non si parli di qualcosa di strettamente legato alla persona. Inoltre, la scelta del verde per contrassegnare il mantenimento della pubblicità comportamentale, può portare a non considerare la suddetta terza opzione e a indurre

audience. This means that some of the ads people will see in the less personalized ads experience will be unskippable for a few seconds. […] *This change will help us continue to provide value to advertisers which ensures we can offer people a less personalized ads experience at no charge*». *Facebook and Instagram to Offer Subscription for No Ads in Europe*, 12 novembre 2024, 19.12.2025.

40 «[…] al fine di garantire una scelta vera e propria ed evitare di porre gli utenti di fronte a una scelta binaria tra il pagamento di un corrispettivo e il consenso al trattamento per finalità di pubblicità comportamentale, i titolari del trattamento dovrebbero valutare la possibilità di offrire anche un'ulteriore alternativa gratuita ("alternativa gratuita priva di pubblicità comportamentale")». EDPB, *Parere 8/2024 sul consenso valido nel contesto dei modelli "consenso o pagamento" attuati dalle piattaforme online di grandi dimensioni*, 17 aprile 2024, p. 24.

41 Infatti, Facebook può accedere al tracciamento dei dati anche quando si consultano altri siti con il suo plugin.

42 «[…] *it is not clear whether information about the age, gender and location used for the purpose of ad personalisation is based on information provided by the user or inferred, or whether this is in-platform data or off-platform data*». *Beuc Assessment Of Meta's Latest Pay-Or-Consent Policy For Facebook And Instagram Users*, gennaio 2025, p. 8.

l'utente a dare a quel colore una valenza morale[43].

In secondo luogo, anche se l'utente dovesse scegliere tale terzia via, non riceverebbe un servizio equivalente a quello che prevede la pubblicità comportamentale, ma uno peggiore. Infatti, gli spot che compaiono nei *reel,* non potendo essere evitati, interrompono la fruizione del servizio e, a lungo andare, stufano l'utente, tanto da farlo ritornare al pieno utilizzo dei propri dati[44].

In terzo luogo, Meta, oltre non chiedere il consenso per i dati personali ricevuti da terze parti che ne utilizzano i *tools,* li combina con quelli che raccoglie tramite il consenso esplicito, personalizzando maggiormente l'esperienza dell'utente su entrambi i servizi.

3.2. Quali possibili soluzioni?

La monetizzazione, dunque, è una pratica trasversale in un ecosistema basato sull'intreccio di piattaforme che collaborano per interessi diversi, ma convergenti.

Tutto ciò, dovrebbe interpellare l'utente su come "abitare" in questo sistema, che lo riduce ad un "inquilino" in un edificio di cui non conosce gli amministratori[45]. Ciò non significa che l'impegno personale nel proteggere i propri dati sia l'unico strumento, ma che diventi fondamentale soprattutto quando la legislazione fatica a offrire soluzioni proporzionate[46]. Pertanto, è necessario sia un approccio *bottom-up* sia uno *top-down* per fronteggiare adeguatamente le crescenti sfide poste dalla monetizzazione.

[43] Il verde può far pensare, infatti, che l'opzione sia la migliore.

[44] «*Testing users' response to this new feature, a PRWeek survey found that 51% of Instagram users would delete the app rather than use it with repeated ad breaks* […] *it seems likely that this is a practice that will encourage end users to abandon the degraded, less personalised service in favour of consenting to the tech giant's use of personal data*». *Beuc Assessment Of Meta's Latest Pay-Or-Consent Policy For Facebook And Instagram Users*, gennaio 2025, p. 8.

[45] «*An unfair distribution of power has thus emerged whereby our data are gathered, analyzed, and monetized by private companies while we accept cookies in a hurry. Today's digital economy is a rentier's wet dream come true. We have become serfs in the digital fiefdoms of the techno-oligarchs, tenants, instead of co-owners, of the enormous economic value that we generate through our digital avatars*». G. Zarkadakis, *The Internet Is Dead: Long Live the Internet*, in H. Werthner, E. Prem, E. A. Lee, C. Ghezzi (eds), *Perspectives on Digital Humanism*, Springer, 2022, p. 47-48.

[46] «Il giurista è di conseguenza indotto a rivedere assunti un tempo indiscussi – primo tra tutti quello della "non monetizzabilità" della persona umana – e ad adeguare le proprie categorie concettuali ad una realtà in rapida e profonda trasformazione». G. Resta, *Autonomia privata e diritti della personalità. Il problema dello sfruttamento economico degli attributi della persona in prospettiva comparatistica*, Jovene, Napoli, 2005, p. 2-3.

3.2.1. Prospettive personali di mitigazione

Uno studio condotto dall'OCSE, esplora i parametri per stimare il valore economico dei dati notando come la loro catena di valore venga costruita in base a quattro fasi susseguentesi fra loro[47].

La prima fase, ossia quella di raccolta, manifesta la dimensione documediale: si osserva il comportamento dell'utente e si deducono ulteriori dati basandosi sull'analisi di quelli che si possiedono.

La seconda, è quella di archiviazione e aggregazione, grazie a cui i dati vengono riuniti in database per ottenere un profilo più completo della persona[48]. Questa fase, pur essendo ancora legata all'ambito della docusfera, costituisce il punto di raccordo verso l'infosfera, poiché il singolo documento non ha valore finché non collegato ad altri.

La terza fase segna il passaggio definitivo all'infosfera e alla traduzione dei documenti in informazioni. Essa comporta l'analisi dei dati tramite tecniche che combinano quelli già in possesso con altri, provenienti da diverse fonti, per identificare trend e ottenere informazioni non altrimenti osservabili, fondamentali per comprendere il valore monetario del dato[49].

L'ultima, riguarda l'impiego effettivo dei dati da parte di enti pubblici, fornitori di servizi e utenti finali e rappresenta il momento propriamente economico della catena.

Questo approccio è fortemente incentrato sulla persona e sull'elevata possibilità di personalizzazione del servizio offerto, a patto che l'utente-consumatore non

[47] La raccolta avviene grazie alla cessione più o meno volontaria, attraverso l'osservazione del comportamento dell'utente e tramite una deduzione basata sull'analisi dei dati a cui si ha accesso. Esempi della prima modalità sono la creazione di un profilo social, il suo utilizzo e l'acquisto di prodotti online. I dati raccolti tramite l'osservazione del comportamento riguardano la cronologia di ricerca, la geo-localizzazione o altro ancora. Infine, un esempio di dato dedotto è la valutazione dell'affidabilità creditizia, calcolata in base a elementi rinvenuti nella storia finanziaria della persona. OECD, *Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value* in *OECD Digital Economy Papers*, n. 220, OECD Publishing, Parigi, 2013, p. 10-11.

[48] Si pensi ai dati sanitari salvati in un unico fascicolo sanitario elettronico, come previsto dalla legislazione italiana.

[49] I risultati di queste analisi sono applicati al miglioramento della *customer experience* e all'ottimizzazione di servizi pubblici. Gli attori principali di questa attività si occupano della gestione delle relazioni con i clienti, con agenzie pubblicitarie online, con broker di dati e con società che studiano le ricerche di mercato. A prescindere dalle competenze di ciascuno, tuttavia, sembra emergere una vera e propria "*tracking industry*". OECD, *Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value* in *OECD Digital Economy Papers*, n. 220, OECD Publishing, Parigi, 2013, p. 13.

interrompa il "flusso di dati"[50]. Tuttavia, ciò fa emergere altresì come questi ultimi abbiano un valore economico solo per chi li gestisce e non per l'utente che li cede[51].

Comunque sia, tale raccolta non può prescindere dalla collaborazione dell'utente, che è di due tipologie principali. Nella prima, è l'interessato a comunicare le informazioni necessarie a seguito di una richiesta da parte di una piattaforma che li vuole utilizzare. Nella seconda, l'utente viene incentivato ad usufruire di determinati servizi o beni, per l'ottenimento dei quali è necessaria la registrazione delle informazioni (che, come si è visto, è la base imprescindibile di ogni monetizzazione)[52].

A questo proposito, alcuni studi hanno mostrato che anche se tale collaborazione è attiva, è sempre accompagnata da un'inerzia latente. Secondo un sondaggio commissionato dalla Direzione generale della Giustizia e dei consumatori, solo il 18% legge integralmente l'informativa, mentre il 31% accetta o rifiuta immediatamente. Fra questi ultimi, il 67% dichiara di non leggerla perché troppo prolissa, il 38% perché troppo difficile da comprendere e il 15% perché le piattaforme non la rispettano[53]. Al contempo, tuttavia, quando interpellati se ritenessero un problema diffondere i propri dati, il 57% ha risposto affermativamente e il 35% in modo negativo; mentre, circa il baratto fra le informazioni personali e determinati servizi,

[50] Ferraris denuncia la trasformazione dell'utente in produttore-consumatore ("*prosumer*") che attraverso il web non solo beneficia di un servizio, ma contribuisce a conferirgli un senso e ad attenervisi diligentemente. M. Ferraris, *Documanità*, Laterza, Bari, 2021, p. 71-72.

[51] Gli utenti producono "valore", senza essere retribuiti, poiché «in cambio offrono [le piattaforme] loro dei servizi (informazioni, intermediazioni, intrattenimenti)». M. Ferraris, *Documanità*, Laterza, Bari, 2021, p. 84; i flussi di dati generati e trasmessi attraverso infrastrutture *cloud* ed *edge*, generano benefici economici di circa 2 miliardi di euro. P. Foley, F. Dog, A. Gemmell, J. Rys, C. Vinciguerra, *Economic Value of Data Flow*, Publications Office of the European Union, Luxembourg, 21 febbraio 2023.

[52] «Per raccogliere i dati una strategia è dunque quella di incentivare la fruizione di beni e servizi che, nell'essere utilizzati, in virtù della tecnologia adottata, registrano informazioni. L'altra strategia è invece quella di chiedere informazioni direttamente agli interessati. Le tipologie di dati raccolti sono diverse nei due casi: se ci si rivolge con una richiesta all'interessato, le informazioni sono filtrate da una sua valutazione e verbalizzazione; nell'altro caso, le informazioni raccolte riguardano i suoi comportamenti. La collaborazione richiesta per consentire la raccolta dei dati è dunque diversa nei due casi: mentre nel primo l'interessato deve collaborare attivamente comunicando egli stesso le informazioni, nel secondo la collaborazione è, per così dire, passiva, nel senso che è sufficiente che l'interessato usi un bene o servizio affinché i dati generati da tale comportamento siano suscettibili di registrazione». S. Thobani, *Il pagamento mediante dati personali* in S. Orlando, G. Capaldo (eds), Annuario 2021 Osservatorio Giuridico sulla Innovazione Digitale, Sapienza Università Editrice, Roma, 2021, p. 361-379.

[53] Il sondaggio è stato condotto nel 2015, ossia prima che il GDPR stabilisse che le informazioni relative al trattamento debbano essere date «in forma concisa, trasparente, intelligibile e facilmente accessibile» (art. 12). *Special Eurobarometer 431 "Data protection"*, giugno 2015, p. 84-85 e 87.

il 52% lo ritiene problematico e il 29% pensa sia adeguato[54]. Nel 2019, la Commissione ha condotto un nuovo sondaggio per verificare quali cambiamenti siano avvenuti dall'entrata in vigore del GDPR, dal quale è emerso che la percentuale di coloro che leggono (almeno parzialmente) l'informativa è scesa al 60%, mentre quella di chi la legge integralmente si attesta attorno al 13%. Le motivazioni dietro a questi comportamenti, invece, non hanno subito rilevanti modifiche percentuali o argomentative[55].

Questi sondaggi confermano la veridicità del cosiddetto "*privacy paradox*", che pone in contrasto il desiderio degli utenti di proteggere i propri dati e l'irriflessa accettazione delle informative o dei cookie in cambio di benefici minimi. Tale dicotomia, può scaturire dall'unione di più fattori, come le condizioni dell'informativa e le finalità che la profilazione si propone, oltre che dipendere dall'inconsapevolezza delle alternative o dalla necessità di accedere a un determinato servizio, che si ritiene essenziale in quel momento[56].

Per queste ragioni, dunque, è importante potenziare la consapevolezza dell'utente circa i propri diritti digitali e sostenere la non contraddittorietà fra il desiderio di fruire di un certo bene e la volontà di mantenere un alto livello di privacy.

Secondo alcuni, il primo passo da compiere è quello di migliorare i benefici offerti dai diritti previsti dagli articoli 11 e 12 del GDPR, così da agevolare la comprensione dell'informativa e la scelta consapevole della sua accettazione. Questo approccio valorizzerebbe la dignità della persona e l'aspetto qualitativo del dato in

[54] *Special Eurobarometer 431 "Data protection"*, giugno 2015, p. 29.

[55] Il 66% ritiene che sia prolissa, mentre il 31% (a differenza del 38% precedente) che sia difficile da comprendere. *Special Eurobarometer 487a The General Data Protection Regulation*, giugno 2019, p. 2.

[56] «[…] *people routinely and expertly engage in* […] *a so-called privacy calculus. This context-dependent calculus naturally leads to situations in which consumers will choose to protect their data, and other situations in which protection will be seen as too costly or ineffective, and sharing is preferred.* […] *neither does the sharing of certain information with others imply, per se, a loss of privacy, nor the complete hiding of data is necessary for the protection of privacy. In fact, the observation that people seem not to protect their privacy online very aggressively does not justify the conclusion that they never do so* […] *consumers are, sometimes, willing to pay a price premium to purchase goods from more privacy-protective merchants* […] *the purported dichotomy between privacy attitudes and privacy behaviors is actually the result of many, coexisting, and not mutually exclusive different factors. Among them, a role is likely played by various decision-making hurdles consumers face when dealing with privacy challenges, especially online, such as asymmetric information, bounded rationality, and various heuristics. For instance, some individuals may not be aware of the extent to which their personal information is collected and identified online (many Internet users are substantially unaware of the extent of behavioral targeting, and many believe that there is an implied duty of confidentiality and law that protects their data despite disclosure). Or, some individuals may not be aware of possible alternative solutions to their privacy* […] *some individuals' privacy-sensitive decision making – even that of well-informed and privacy-sensitive subjects – may be affected by cognitive and behavioral biases*». A. Acquisti, C. Taylor, L. Wagman, *The Economics of Privacy,* in *Journal of Economic Literature*, 2016, vol. 54, n. 2, p. 477-478.

un contesto fortemente incentrato sul suo valore economico attuale e potenziale. Tuttavia, la controprestazione economica rappresentata dai dati, portando alla mercificazione della propria identità digitale, non può essere arginata solo attraverso la piena applicabilità dei propri diritti attuali, ma altresì tramite la consapevolezza del valore monetario dei propri dati. In tal modo, l'aspetto quantitativo verrebbe sfruttato a vantaggio degli utenti, che da spettatori quasi passivi, sarebbero messi in grado di esercitare un potere contrattuale[57].

Di conseguenza, secondo alcuni, andrebbe introdotto l'obbligo per i titolari del trattamento di informare l'interessato di tale valore, laddove ciò sia rilevante nel contesto dell'operazione "economica" in corso[58].

Anzitutto, tale diritto andrebbe affiancato agli articoli 13 e 14 del GDPR, assicurandosi che l'Autorità Garante si impegni a definire linee guida *ex ante*, a monitorarne il rispetto e a valutare provvedimenti per gli inadempienti[59]. Gli obblighi di trasparenza e correttezza ivi inclusi possono essere considerati una base teorica fondamentale per la sua ricostruzione, soprattutto perché la dimensione economica non è qualcosa di accidentale, ma è connessa in modo sostanziale alle dinamiche dell'infosfera-docusfera. Così facendo, anche la logica economica che soggiace dietro l'accettazione dell'informativa verrebbe inquadrata nel diritto alla trasparenza, rendendolo più completo.

[57] «*The traditional, passive approach to informational privacy has only protected data as per their personal/ emotional (qualitative) value, but in order to reduce information asymmetry in the big data era and to make individuals stronger players in this data-driven economy, what is necessary is to provide more and more information about the monetary (quantitative) value*». G. Malgieri, B. Custers, *Pricing Privacy. The Right to Know the Value of Your Personal Data*, in *Computer Law and Security Review*, 2018, vol. 32, n. 2, p. 290.

[58] Ad esempio, ciò dovrebbe avvenire quando dati non strettamente necessari vengono monetizzati come controprestazione senza la richiesta di denaro. In questi casi, infatti, il guadagno da parte del titolare del trattamento avviene in un secondo momento, poiché i dati sono utilizzati alla stregua di un capitale su cui investire. «[…] *data is as a form of capital that is distinct from, but has its roots in, economic capital. Data capital is more than knowledge about the world, it is discrete bits of information that are digitally recorded, machine processable, easily agglomerated, and highly mobile. Like social and cultural capital, data capital is convertible, in certain conditions, to economic capital. But* […] *not all value derived from data is necessarily or primarily monetary*». J. Sadowksi, *When Data is Capital: Datafication, Accumulation, and Extraction*, in *Big Data & Society*, 2019, vol. 6, n. 1, p. 4.

[59] «[…] *unnecessary personal data (for instance, via cookies) are often collected via "alternative" purposes, such as improving the provision of a digital service or improving the experience of customers. Although data controllers should declare that personal data which are not necessary for the performance of a contract are collected as an alternative payment for that service, they do not have any duty to "price" those data or to inform users about these prices. That is why we propose de lege ferenda adding a new right to information to article 13 and 14 GDPR: in each data processing where the value of customers' personal data is relevant for the economic transaction, the price of these data should be communicated to the consumer*». G. Malgieri, B. Custers, *Pricing Privacy. The Right to Know the Value of Your Personal Data*, in *Computer Law and Security Review*, 2018, vol. 32, n. 2, p. 297.

In secondo luogo, la proposta potrebbe essere altresì integrata nelle condizioni che rendono il consenso pienamente valido. Il Parere 8/2024 dell'EDPB fra i requisiti del consenso informato elenca la "comprensione completa e chiara del valore, della portata e delle conseguenze" di una scelta, argomentando che il considerando 42 del GDPR "non fornisce un elenco esaustivo di informazioni da trasmettere all'interessato per garantire il consenso informato[60]". Se il "valore" della scelta va compreso appieno e il considerando 42 non individua in modo esaustivo le condizioni per un consenso informato, allora l'indicazione del valore economico del dato potrebbe divenire un ulteriore criterio per garantire il pieno rispetto di tali indicazioni[61].

Tuttavia, oltre ai vantaggi legati al potenziamento della trasparenza e della consapevolezza del consenso, potrebbero sorgere anche delle criticità etiche da valutare con attenzione.

La prima riguarda il calcolo del valore effettivo dei dati e a chi dovrebbe essere affidato. Malgieri e Custers ritengono che, a causa della grande variabilità dei fattori che contribuiscono all'ottenimento del risultato, sia opportuno esprimerne il valore in una prospettiva mensile e non in senso assoluto[62]. Così facendo, gli utenti verrebbero messi nella condizione di controllare le fluttuazioni di valore e rinvenire metodi per aumentarlo o stabilizzarlo.

Ciò significa, inoltre, che il singolo dato ha poco valore poiché non porta con sé un potere informativo particolarmente rilevante per aziende e piattaforme; sono i *dataset*, infatti, a possedere un valore e un prezzo vero e proprio[63], influenzato da quattro i criteri principali. Il primo è l'ammontare quantitativo di informazioni possedute, che vengono attinte e tradotte dalla docusfera. Il secondo è la completezza delle informazioni, senza la quale la prima caratteristica avrebbe scarso valore. Per esempio, se si hanno a disposizione molti tratti fisici e anagrafici in un dato set, ma mancano completamente informazioni sul cognome, sull'indirizzo e sul numero di

[60] EDPB, *Parere 8/2024 sul consenso valido nel contesto dei modelli "consenso o pagamento" attuati dalle piattaforme online di grandi dimensioni*, 17 aprile 2024, p. 37.

[61] Ad esempio, nel modello "*pay or consent*", ciò potrebbe contribuire a ridurre l'asimmetria informativa fra piattaforma e utente, conferendo a quest'ultimo più elementi per valutare la decisione da prendere.

[62] G. Malgieri, B. Custers, *Pricing Privacy. The Right to Know the Value of Your Personal Data*, in Computer Law and Security Review, 2018, vol. 32, n. 2, p. 294.

[63] «*Knowing that John is male is probably worth less than knowing that John is a male, 35-year old married physician living in a Milwaukee suburb and interested in baseball, jogging and movies. Still, the missing surname of John may affect the value of these personal data negatively*». G. Malgieri, B. Custers, *Pricing Privacy. The Right to Know the Value of Your Personal Data*, in *Computer Law and Security Review*, 2018, vol. 32, n. 2, p. 295.

carta di credito, quel set varrà meno di un altro che ha un numero inferiore di caratteristiche simili, ma più complete. Il terzo è l'accuratezza, che si riferisce al grado di aggiornamento del dato: una persona può cambiare lavoro o numero di cellulare, ma se ciò non emerge, il set perderà valore per il suo scollamento dalla realtà. Inoltre, l'accuratezza si riferisce al fatto che alcuni dati sono più importanti di altri in quanto tratti unici e rari[64]. L'ultimo fattore è il livello di identificabilità, ossia il potere dei dati anonimi di indicare l'individuo a cui si riferiscono e rivelare *pattern* o informazioni nascoste[65].

Questa complessità comporta la necessità di un calcolo accurato e onesto che, pertanto, non può essere completamente affidato ai titolari, senza una supervisione imparziale (eventualmente coordinata dall'EDBP). Infatti, comunicarne il valore contraddirebbe il loro interesse economico, costringendoli a rivelare modelli di business, con il rischio che vi siano volute sottostime o che gli utenti si accorgano di quanto frutti. Tale supervisione, dovrebbe imporre al titolare degli obblighi di *accountability*, fra i quali la documentazione della liceità del trattamento e la giustificazione dei criteri utilizzati per rappresentare la dimensione economica del dato. Si dovrebbe chiarire poi dove indicare il dettaglio del prezzo e se comunicare gli aggiornamenti all'interessato una volta al mese o secondo una scadenza temporale concordata.

La seconda problematica manifesta il rischio di un rafforzamento della mercificazione dei dati e delle disparità di mercato fra quelli delle persone più abbienti e di chi ha meno disponibilità economiche. È fondamentale, pertanto, evitare che ciò implichi una reificazione della persona, mostrando come, al contrario, ciò favorisca il rispetto della sua intrinseca dignità. La mercificazione dell'uomo, infatti, non avviene mediante l'indicazione del valore dei dati, ma attraverso il suo occultamento per finalità di carattere statistico ed economico. Piuttosto, restituendo visibilità a ciò che

[64] Le caratteristiche «[…] *referring to ethnicity, religion, health, union membership, politics, criminal records, substance abuse and sexual preferences, are more 'telling' about people. Many people also tend to treat these characteristics with more care and disclose them less often. As such, the availability and nature of these characteristics is more rare and unique and makes them harder to collect*». G. Malgieri, B. Custers, *Pricing Privacy. The Right to Know the Value of Your Personal Data,* in *Computer Law and Security Review*, 2018, vol. 32, n. 2, p. 295.

[65] «*Anonymous data does have monetary value, as it may be very useful for several purposes, including policy-making, strategic decision-making and scientific goals. Big data may reveal patterns that are useful for targeted approaches that are not on an individual level. For instance, knowing that diapers and beer cans are usually bought together by customers, especially on Saturdays, is anonymous data that is very useful for targeted marketing and advertising*». G. Malgieri, B. Custers, *Pricing Privacy. The Right to Know the Value of Your Personal Data,* in *Computer Law and Security Review*, 2018, vol. 32, n. 2, p. 296.

è nascosto, si rende l'utente consapevole del valore della sua persona per il mercato digitale, garantendo un rispetto più completo della sua dignità.

Queste criticità, in definitiva, non rendono impraticabile la proposta, ma ne suggeriscono un'introduzione graduale, priva della pretesa di un suo funzionamento immediato o di sperimentarne subito i benefici. Il primo passo da compiere, potrebbe essere quello di introdurlo provvisoriamente, affinandolo in maniera costante in base alle difficoltà che emergono.

Si potrebbe pensare, inoltre, di dividere in tre livelli (basso, medio e alto) il valore dei dati, attraverso parametri da aggiornare a seconda dei valori di mercato, delle finalità proposte, della durata della conservazione e della tipologia o quantità di dati richiesti. Infine, si potrebbe delineare una "piramide del rischio" modellata su quella dell'AI Act, in cui indicare il livello di pericolosità in caso di accettazione dell'informativa[66]. Così facendo, il rischio non coinciderebbe con la semplice possibilità di un danno alla privacy, ma con il livello di esposizione dell'interessato a forme di valorizzazione del dato non esplicitamente percepibili. Ad esempio, la fascia di rischio elevato potrebbe comprendere quei trattamenti che consentono di dedurre ulteriori informazioni in base ad abitudini, disponibilità economiche e preferenze individuali per poi monetizzarle in un secondo momento senza un ulteriore consenso da parte dell'utente.

Quanto detto, rende evidente che la garanzia della privacy non comporti altresì che i dati siano al sicuro. La dimensione della monetizzazione, infatti, supera quella della privacy, poiché l'anonimità del dato o la sua sicurezza sono condizioni che riguardano la protezione da ciò che è esterno ai limiti posti dalla salvaguardia dei dati. La monetizzazione, invece, agisce "dall'interno"[67], nascendo dalla documentazione e diventando effettiva a seguito del consenso, ma può porre problemi più gravi per la dignità della persona rispetto ad un *data breach*[68].

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[66] Alcuni parametri per stabilire i differenti livelli di rischio, potrebbero essere la tipologia di dati unita alla loro quantità e completezza, le modalità e i fini dell'utilizzo, i termini cronologici dell'informativa e cosa accada effettivamente ai dati una volta reciso il contratto.

[67] Si pensi all'importanza di controllare periodicamente l'accumulo di *cookie* per evitare che continuino a «fornire informazioni […] senza che egli riceva alcunché in cambio». G. Resta, V. Zeno-Zencovich, *Volontà e consenso nella fruizione dei servizi di rete*, in *Rivista trimestrale di diritto e procedura civile*, 2018, vol. 72, n. 2, p. 417.

[68] Alcuni esprimono il concetto di *data dignity* come alternativo al modello di business attuale, il quale dovrebbe essere sostituito da: «[…] *an emerging class of business models in which internet users are also the customers and the sellers. Data creators directly trade on the value of their data in an information centric future economy. Direct buying and selling of information-based value between primary parties could replace the selling of surveillance and persuasion to third parties. Platforms would not shrivel in this economy; rather, they would thrive and*

3.2.3. L'inquadramento legislativo della monetizzazione

L'inquadramento normativo della monetizzazione può essere letto, alla luce delle categorie esaminate in precedenza, come il tentativo del diritto europeo di governare gli effetti giuridici della docusfera-infosfera.

L'Europa, negli ultimi anni, sta progressivamente riconoscendo e cercando di regolare la monetizzazione e gli aspetti ad essa correlati, come la raccolta dati, la liceità del consenso e l'utilizzo delle informazioni come controprestazione contrattuale. Tuttavia, non esistono direttive incentrate esclusivamente su questo punto, ma piuttosto vi è il tentativo di normarlo, includendolo in differenti provvedimenti volti ad inquadrarne singoli aspetti o problematiche.

Ad esempio, da un punto di vista non strettamente legislativo, vi sono le linee guida e le disposizioni dell'*European Data Protection Board*, come il Parere 8/2024 sul modello "*consent or pay*". Vi sono, inoltre, le Joint Opinions dell'EDPB e dell'EDPS, capaci di fornire pareri su determinate proposte legislative prima della loro approvazione definitiva, come avvenuto per il *Data Governance Act*[69].

Invece, una delle prime iniziative legislative, è la Direttiva UE 770/2019, entrata in vigore a giugno del 2019 con obbligo di applicazione a partire dal 2022. Tale Direttiva, riguarda i contratti di fornitura di contenuto digitale e di servizi digitali e, per la prima volta, riconosce esplicitamente che i dati personali vengano utilizzati come moneta di scambio in molti modelli commerciali. In questi casi, l'operatore economico è tenuto a fornire una controprestazione e a trattare i dati ottenuti rispettando il diritto dell'Unione ed esclusivamente per i fini dichiarati[70]. La Direttiva, quindi, si applica quando l'utente fornisce i propri dati direttamente o presta il consenso al loro uso per fini commerciali[71]. Ciò significa che i dati personali vengono

grow dramatically, although their profit margins would likely fall as more value was returned to data creators. […] *a market for data would restore dignity to data creators, who would become central to a dignified information economy.* […] *People will be paid for their data and will pay for services that require data from others. Individuals' attention will be guided by their self-defined interests rather than by manipulative platforms beholden to advertisers or other third parties. Platforms will receive higher-quality data with which to train their machine learning systems and thus will be able to earn greater revenue selling higher quality services to businesses and individuals to boost their productivity. The quality of services will be judged and valued by users in a marketplace instead of by third parties who wish to influence users. An open market will become more aligned with an open society when the customer and the user are the same person*». J. Lanier, E. G. Weyl, *A Blueprint for a Better Digital Society,* in *Harvard Business Review*, 2018, p. 3-4; M. Ferraris, *Documanità*, Laterza, Bari, 2021, p. 301-303.

[69] EDPB-EDPS, *Joint Opinion 03/2021 on the Proposal for a regulation of the European Parliament and of the Council on European data governance (Data Governance Act)*, versione 1.1, 9 giugno 2021.

[70] Direttiva UE 770/2019, considerando 24.

[71] Non si applica quando l'operatore economico fornisce il contenuto digitale per obblighi di

riconosciuti come una vera e propria forma di pagamento alternativa al denaro[72], alla quale deve seguire una controprestazione corrispondente, che può essere a sua volta accompagnata da un utilizzo dei dati che supera i confini stessi della fruizione del servizio[73]. La funzione economica del dato qui riconosciuta, può diventare un'ulteriore base giuridica sulla quale introdurre e giustificare la comunicazione del suo valore nella controprestazione in corso.

In seguito, per rispondere alle crescenti esigenze di regolare il mercato digitale negli aspetti più opachi, l'Unione ha promulgato il *Digital Markets Act,* in vigore da maggio del 2023. Tale aggiornamento normativo, impone nuovi obblighi alle *gatekeeper platforms* quali l'impossibilità di combinare dati personali provenienti da fonti diverse senza un valido consenso o altra base giuridica, l'imposizione di vincoli di portabilità, interoperabilità e accesso continuo ai dati, per consentire a utenti e imprese di utilizzarli in altri contesti[74]. Così facendo, il Regolamento riduce la possibilità delle piattaforme di usufruire in modo opaco dei dati e, di conseguenza, ne ostacola uno sfruttamento economico maggiormente esteso.

Un ulteriore sviluppo, nella direzione di un più ampio riconoscimento della monetizzazione, è avvenuto con la pubblicazione del *Digital Services Act,* applicabile dal febbraio del 2024, che impone limiti alla profilazione tramite le pubblicità, vietando quella comportamentale se basata su dati sensibili.

Il primo riguarda l'adozione di etichette chiare per ciascun annuncio, così da far conoscere agli utenti chi li sta finanziando. Il secondo prevede l'istituzione di archivi pubblici in cui raccogliere le informazioni sugli annunci mostrati. Il terzo, punta a rendere consapevole l'utente delle modalità di monetizzazione dei dati nelle pubblicità online[75], sottolineando come tali informazioni debbano essere "adeguata-

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legge o quando sono raccolti metadati. Direttiva UE 770/2019, art. 3.

72 La Direttiva definisce "prezzo" la «somma di denaro o la rappresentazione di valore digitale dovuto come corrispettivo per la fornitura di contenuto digitale o di servizio digitale». Direttiva UE 770/2019, art. 2 (7).

73 Su questo alcuni fondano la differenza fra monetizzazione e patrimonializzazione: «[…] da un lato, secondo lo schema di asimmetria ordinaria fornitore forte e contraente debole, l'emersione della funzione di controprestazione del consenso al trattamento dei propri dati a fronte di servizi digitali resi dal prestatore online come segnalato anche nella recente normativa europea (c.d. patrimonializzazione); dall'altro la remunerazione dell'interessato, secondo lo schema di asimmetria inversa "fornitore" dei dati personali debole e contraente forte-titolare del trattamento, a fronte dello sfruttamento dei propri dati personali per finalità economiche da parte dei Big Tech (c.d. monetizzazione)». E. Tosi, *Dati personali e contratto: un ossimoro apparente,* in *European Journal of Privacy Law & Technologies*, 2023, n. 2, p. 84.

74 Regolamento UE 1925/2022, art. 5 (2), lett. a-d; art. 6 (8-9); art.7.

75 Regolamento UE 2022/2065, art. 46.

mente condivise lungo tutta la catena del valore"[76]. Anche in questo caso, affianco all'indicazione delle modalità in cui il dato è monetizzato, può essere indicato altresì il livello di redditività, rispettando i criteri poc'anzi presentati.

Ad oggi, questi documenti strettamente normativi uniti alle linee guida dell'EDPB e ad altre indicazioni, determinano l'approccio europeo alla monetizzazione. Tuttavia, è da notare, da ultimo, un elemento quasi contraddittorio. Secondo alcuni autori, infatti, a fianco della protezione dei dati, sta emergendo una disciplina di stampo contrattuale, focalizzata sul loro scambio. Se, come stabilisce il *Data Act,* i dati sono componenti essenziali dei servizi connessi o dei prodotti correlati[77], allora ne viene riconosciuta la valenza contrattuale, sebbene in caso di conflitto prevalga il GDPR. Pertanto, ci si interroga sulla possibilità di rendere armoniosa la protezione dei dati con il loro aspetto contrattuale e sulla convenienza strategica di un approccio che prediliga il primo polo piuttosto che il secondo[78].

In conclusione, tali direttive, mostrano come il diritto a conoscere il valore dei propri dati possa essere integrato in modo trasversale nella legislazione europea giustificandolo tramite il principio di trasparenza (art. 5, 12, 13, 14 del GDPR), i caratteri vincolanti del consenso informato (considerando 42 del GDPR) e il riconoscimento del dato come prezzo per accedere ai contenuti digitali (Direttiva UE 770/2019, art. 2, 7). In tal modo, l'utente beneficerebbe di un potere contrattuale più forte, evitando che il valore delle tracce digitali sia unilateralmente governato dai titolari e realizzando in modo più completo quell'antropocentrismo auspicato dall'Unione Europea per riequilibrare il potere informativo.

[76] Regolamento UE 2022/2065, considerando 107.

[77] Regolamento UE 2023/2854, art. 2 (6-7).

[78] S. Martinelli, *I nuovi modelli di utilizzo dei dati: digital services e data economy*, in G. C. Feroni (eds), *Commerciabilità dei dati personali. Profili economici, giuridici, etici della monetizzazione*, Il Mulino, Bologna, 2024, p. 318-328.

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