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EL ENGAÑO EN CONTEXTOS JUDICIALES

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La prueba testifical es probablemente una de las más importantes, pero también la más difícil de valorar[1]. En general, los testimonios aportan el significado de las demás pruebas, fundamentalmente de la prueba material. Un rastro biológico recogido de la escena del delito, aunque los análisis de ADN y las bases de datos permitan ponerle nombre y apellidos, por sí mismo no dice nada acerca del papel que ha jugado esa persona (víctima, testigo o autor) y ni tan siquiera si estuvo en el lugar donde se cometió el delito antes, durante o después de los hechos. Por otro lado, el derecho a ser escuchado forma parte tanto de los derechos de las víctimas como de los acusados. De este modo, la recogida y análisis de los testimonios se convierten en piedra angular de la inmensa mayoría de los procesos judiciales, si además tenemos en cuenta que puede ser el único tipo de prueba en muchos delitos donde no es habitual encontrar ningún otro tipo de evidencia. La Ciencia en colaboración con el Derecho, en lo que se ha venido a denominar la Psicología del Testimonio, ha desarrollado procedimientos específicos para optimizar la toma de

[1] Nieva Fenoll, J. (2010). *La valoración de la prueba*. Marcial Pons.
De Paula Ramos, V. (2019). *La prueba testifical: del subjetivismo al objetivismo, del aislamiento científico al diálogo con la psicología y la epistemología*. Marcial Pons.
Ramírez Ortiz, J. L. (2020). *El Testimonio único de la víctima en el proceso penal desde la perspectiva de género*. Quaestio Facti. Revista Internacional Sobre Razonamiento Probatorio, 1, 201-246. https://doi.org/10.33115/udg_bib/qf.i0.22288.
Vázquez, C. y Fernández López, M. F. (2022). *La valoración de la prueba I: La valoración individual de la prueba*. En J. Ferrer Beltrán (Coord.), *Manual de razonamiento probatorio*. (pp. 289-351). Suprema Corte de Justicia. México.

declaración con el objetivo principal de obtener la mayor cantidad de información maximizando su exactitud. Estos procedimientos son especialmente relevantes cuando se trata de testigos especialmente vulnerables (menores, personas con discapacidad, personas con trastornos mentales y ancianos). Es un hecho ampliamente demostrado por las investigaciones científicas, desde los años 70 del pasado siglo, que los procedimientos de toma declaración inapropiados distorsionan los recuerdos, dando como resultado la aportación de testimonios falsos. El error es consustancial al funcionamiento normal de la memoria y por lo tanto testigos honestos podrían declarar información falsa, convencidos erróneamente de que lo que recuerdan es lo que pasó. No obstante, al valorar los testimonios los operadores jurídicos no contemplan tanto esta posibilidad como el que los testigos pudieran mentir, reduciendo la toma de decisión en la valoración de la prueba testifical a la dicotomía verdad–mentira.

¿Qué es mentir? Desde la psicología definimos el engaño como "el intento deliberado […] de ocultar, generar y/o manipular de algún otro modo información sobre hechos y/o emociones, por medios verbales y/o no verbales, con el fin de crear o mantener en otra(s) persona(s) una creencia que el propio comunicador considera falsa"[2]. La clave de esta definición está en que mentir es un proceso intencional. Sin embargo, en ocasiones, en el proceso judicial, víctimas, testigos o investigados hacen declaraciones que piensan que son verdad, pero no se ajustan a la realidad. Por ejemplo, un testigo puede identificar con total seguridad a uno de los integrantes de una rueda de reconocimiento como su agresor, siendo la persona identificada no el sospechoso sino un miembro de la policía que se ha incluido en la rueda como distractor. En este caso, la identificación de esta persona no se ajusta a la realidad (la persona identificada no es el verdadero culpable), pero el testigo piensa que lo que está diciendo es verdad. En este caso, no se podría acusar al testigo de falso testimonio porque, aunque ha dicho algo incorrecto, no tenía la intención de engañar. Por ello, en el proceso judicial (salvo en los casos de falso testimonio), el objetivo al analizar una declaración no es tanto determinar si la persona miente o dice la verdad como evaluar su credibilidad o verosimilitud. Esto es, si el testimonio se ajusta o no a los hechos, tenga o no la intención de engañar. Si en el ejemplo anterior valoráramos solo si la persona miente o no, diríamos que está siendo sincera (por esa falta de intencionalidad mencionada anteriormente). Y si equiparáramos esa sinceridad con cómo sucedieron los hechos, determinaríamos que la persona identificada es la culpable y aumentarían las probabilidades de que esa persona acabara erróneamente condenada. Puede que en el caso descrito, al tratarse de un policía que estaba trabajando el día de los hechos, el identificado salga indemne. Pero, ¿qué pasaría si dadas las mismas circunstancias el testigo identifica erróneamente

[2] Definición extraída de Masip, J., Garrido, E. y Herrero, C. Defining Deception. (2004). *Anales de Psicología*, 20, 147-171 (p. 148).

a la persona de la que sospecha la policía? ¿Esta persona correría con la misma suerte que el policía?

Por cuestiones como esta, es fundamental que durante el proceso judicial se determine si una declaración se corresponde o no con la realidad, y en caso de que el relato no se corresponda con los hechos, si esto podría deberse a que la persona está mintiendo o a que se está equivocando. La memoria del ser humano no es infalible ni recupera la información como una grabadora, por lo que es posible que el testigo/víctima tenga un falso recuerdo sobre cómo sucedieron los hechos o que su memoria esté distorsionada[3]. Por lo tanto, la credibilidad debería englobar el engaño deliberado y también el error no consciente[4].

Manzanero y Diges[5] definen la credibilidad como una "valoración subjetiva de la exactitud estimada de las declaraciones de un testigo" que surge como resultado de valorar las circunstancias del hecho delictivo, las características del testigo, cómo encaja todo eso con la evidencia disponible y, por supuesto, también los sesgos, creencias y conocimientos que posee el juzgador al analizar el caso.

LA DETECCIÓN INTUITIVA DEL ENGAÑO

El ser humano siempre ha confiado en sus capacidades, y la historia ha respaldado esta creencia en muchos aspectos. Pero, ¿somos capaces de determinar si alguien miente o dice la verdad basándonos únicamente en nuestra propia intuición? Si contestáramos de forma afirmativa a esta pregunta, estaríamos asumiendo que nuestros sentidos nos proporcionan la información necesaria para determinar la veracidad de un testimonio sin necesidad de ninguna herramienta externa.

La literatura científica sobre la detección del engaño lleva más de 100 años desarrollándose[6], por lo que podemos dar una respuesta a esta pregunta desde el conocimiento científico acumulado en este tiempo.

Existe una creencia muy arraigada y presente en todo el mundo que defiende la idea de que las mentiras se pueden detectar a partir de la conducta[7]. Es decir, que determinados gestos o movimientos (como mirar hacia un lado concreto o rascarse la nariz) y verbalizaciones determinadas (como titubear

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[3] Manzanero, A.L. y González, J.L. Modelo Holístico de Evaluación de la Prueba Testifical (HELPT). (2015). *Papeles del Psicólogo*, 36 (2), 125-138.

[4] Ibid

[5] Manzanero, A.L. y Diges, M. Evaluación Subjetiva de la Exactitud de las Declaraciones de los Testigos: la Credibilidad. (1993). *Anuario de Psicología Jurídica*, 3, 7-27.

[6] Denault, V., Talwar, V., Plusquellec, P. y Larivière, V. On Deception and Lying: An Overview of Over 100 Years of Social Science Research. (2022). *Applied Cognitive Psychology*, 36, 805-819. https://doi.org/10.1002/acp.3971

[7] Global Deception Research Team. A World of Lies. (2006). *Journal of Cross–Cultural Psychology*, 37, 60-74. https://doi.org/10.1177%2F0022022105282295

o admitir que no se recuerda una información) están presentes cuando alguien miente, pero no cuando alguien dice la verdad.

Esta creencia está presente tanto en legos como en profesionales del ámbito jurídico, tales como policías, profesionales de la psicología, la criminología o de la judicatura[8]. Recientemente, el Tribunal Supremo aseguraba que para evaluar la credibilidad o verosimilitud de las declaraciones de las posibles víctimas de violencia de género se debían considerar 11 criterios[9]: 1) Seguridad en la declaración ante el Tribunal por el interrogatorio del Ministerio Fiscal, letrado/a de la acusación particular y de la defensa; 2) Concreción en el relato de los hechos ocurridos objeto de la causa; 3) Claridad expositiva ante el Tribunal; 4) "Lenguaje gestual" de convicción, de gran importancia y se caracteriza por la forma en que la víctima se expresa desde el punto de vista de los "gestos" con los que se acompaña en su declaración ante el Tribunal; 5) Seriedad expositiva que aleja la creencia del Tribunal de un relato figurado, con fabulaciones, o poco creíble; 6) Expresividad descriptiva en el relato de los hechos ocurridos; 7) Ausencia de contradicciones y concordancia del iter relatado de los hechos; 8) Ausencia de lagunas en el relato de exposición que pueda llevar a dudas de su credibilidad; 9) La declaración no debe ser fragmentada; 10) Debe desprenderse un relato íntegro de los hechos y no fraccionado acerca de lo que le interese declarar y ocultar lo que le beneficie acerca de lo ocurrido,; y 11) Debe contar tanto lo que a ella y su posición beneficia como lo que le perjudica.

Algunos de estos criterios no solo desconocen la lógica desde el punto de vista de la víctima, sino que son contrarios a las evidencias científicas establecidas desde mediados de siglo pasado. Multitud de estudios[10] han demostrado que la seguridad nada tiene que ver con la realidad de los hechos denunciados. Factores de personalidad, otras características de la víctima (edad, experiencia, habilidades sociales, estado mental, ansiedad, confianza en ser creído…) así como el tipo de delito (reiteración, tiempo transcurrido desde los hechos, número de veces que ha declarado…) son relevantes para explicar la seguridad que expresa una víctima al declarar.

La concreción del relato, la claridad y seriedad expositiva, y la expresividad descriptiva están relacionadas con las habilidades de comunicación, la edad, la inteligencia, cuestiones educativas, así como el tiempo que hace que ocurrieron los hechos y el número de veces que se han relatado, entre otras[11].

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[8] Strömwall, L.A., Granhag, P.A. y Hartwig, M. (2004). "Practitioners' Beliefs About Deception" en P. A. Granhag y L. A. Strömwall (eds), *The Detection of Deception in Forensic Contexts* (pp. 229-250). Cambridge University Press). https://doi.org/10.1017/CBO9780511490071

[9] Sentencia del Tribunal Supremo 678/2019 del 6 de marzo de 2019.

[10] Odinot, G. y Wolters, G. Repeated Recall, Retention Interval and the Accuracy–Confidence Relation in Eyewitness Memory. (2006). *Applied Cognitive Psychology,* 20 (7), 973-985. https://doi.org/10.1002/acp.1263; Wells, G.L. y Murray, D.M. (1984) Eyewitness Confidence en G. L. Wells y E. Loftus (eds), *Eyewitness Testimony: Psychological Perspectives* (pp. 155-170). Cambridge University Press.

[11] Manzanero, A. L. (2010). *Memoria de Testigos: Obtención y Valoración de la Prueba Testifical*. Pirámide.

La ciencia ha demostrado que no existe ningún lenguaje gestual que sea indicador válido de la veracidad de los hechos. Se trata de una falsa creencia asociar mentira a determinados comportamientos no verbales. Recientemente 51 expertos mundiales en psicología forense y del testimonio[12] han firmado un manifiesto donde se denuncia la pseudociencia que está detrás de las propuestas que pretenden detectar la mentira mediante comunicación no verbal.

La ausencia de contradicciones es contraria al normal funcionamiento de la memoria, ya que la memoria es un proceso constructivo y es dinámica por lo que los recuerdos cambian continuamente. Solo con apoyos externos es posible mantener un relato constante y sin variación de los hechos. De igual modo la memoria no funciona como una cámara de vídeo que recoge toda la información. La memoria no es exhaustiva y por lo tanto las lagunas son una característica intrínseca de la misma. Además, hay que considerar que los estudios sobre el recuerdo de experiencias traumáticas[13] muestran que suelen presentarse de forma fragmentada y son difíciles de expresar verbalmente. En los estudios sobre la valoración de la credibilidad se ha mostrado que frecuentemente se confunde mentira con error.

Por último, no puede desconocerse que en un proceso judicial todas las partes tienen intereses (el acusado el interés de salir inocente y en la víctima el interés de que se condene) y resulta ingenuo pedir a una de las partes que aporten información que perjudique sus posiciones.

En esta sentencia, vemos cómo las creencias de los miembros de los tribunales sobre el engaño pueden influir en sus decisiones judiciales. Del mismo modo, los investigadores que empezaron a estudiar la detección del engaño también compartían estas creencias de que la conducta podría revelar el engaño, y por eso comenzaron a examinar qué indicadores comportamentales nos permitían detectarlo y si las personas somos buenas realizando esta tarea de detección.

Una de las teorías del engaño más conocidas por los legos es la propuesta de Paul Ekman sobre las microexpresiones[14]. Según Ekman y Friesen[15] las microexpresiones son expresiones faciales emocionales que tienen una duración muy corta (de una fracción de segundo), son involuntarias y están

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[12] Denault, V., Plusquellec, P., Jupe, L.M., St–Yves, M., Dunbar, N., Hartwig, M., Sporer, S.L., Rioux–Turcotte, J., Jarry, J., Walsh, D., Otgaar, H., Viziteu, A.D., Talwar, V., Keatley, D.A., Blandón–Gitlin, I., Townson, C., Deslauriers–varin, N., Lilienfeld, S., Patterson, M.L. . . van Koppen, P.J. (2020). The Analysis of Nonverbal Communication: The Dangers of Pseudoscience in Security and Justice Contexts. *Anuario de Psicología Jurídica*, 30, 1-12. https://doi.org/ 10.5093/apj2019a9

[13] Manzanero, A. L. y Recio, M. (2012). El Recuerdo de Hechos Traumáticos: Exactitud, Tipos y Características. *Cuadernos de Medicina Forense*, 18, 19-25. https://doi.org/10.4321/S1135-76062012000100003

[14] Ekman, P. (2009). *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage*. W. W. Norton & Co. https://doi.org/10.1080/00029157.2011.10404358

[15] Ekman, P. y Friesen, W. V. (1969). Nonverbal Leakage and Clues to Deception. *Psychiatry*, 32, 88-106.

en el umbral de su detección. Es decir, no somos capaces de identificar estas microexpresiones en la persona que tenemos delante salvo que recibamos entrenamiento para ello o que artificialmente ralenticemos la expresión de esa persona, por ejemplo, reduciendo la velocidad de reproducción del vídeo en el que esa persona se está expresando. En realidad, la teoría de Ekman es mucho más amplia, pero esta parte es la que más ha trascendido a la población general. Desde esta perspectiva, la expresión de una emoción tiene un componente automático e involuntario que no somos capaces de manipular y un componente que sí está bajo nuestro control. En consecuencia, cuando queremos ocultar una emoción, seremos capaces de controlar el componente que sí podemos controlar, pero no podremos modificar el componente automático de la emoción que estamos sintiendo y este se dejará ver en nuestro rostro en forma de microexpresión[16]. Un ejemplo, imaginemos que una persona ha matado a alguien de su familia a quien odiaba profundamente y está alegre por ello. No obstante, quiere ocultar esa alegría y, no solo eso, sino que quiere aparentar estar triste durante el entierro. Esta persona, a pesar de los esfuerzos por controlar su expresión emocional, va a mostrar el componente automático de la alegría (por ejemplo, una pequeña sonrisa en la comisura de los labios) y no va a poder mostrar el componente automático de la tristeza.

Según Ekman, el entrenamiento basado en la detección de microexpresiones permitiría identificar si una persona está mintiendo o está siendo sincera. Sin embargo, si analizamos esta teoría desde el punto de vista científico debemos concluir que no existen estudios científicos rigurosos que apoyen las hipótesis de Ekman. De hecho, los estudios científicos realizados por autores independientes[17] demuestran que el entrenamiento para detectar mentiras a través de microexpresiones no es útil para distinguir si alguien miente o dice la verdad. En resumen, esta teoría no está avalada por la comunidad científica[18]. Por otro lado, no debemos olvidar que determinar si una emoción en verdadera o falsa, no es lo mismo que determinar si lo que dice es verdadero o falso. Diferentes estudios han demostrado que muchas víctimas presentan alexitimia[19], que es un trastorno que dificulta la expresión de las emociones. Pero esta víctima sabe que debe persuadir a los operadores jurídicos acerca de la veracidad de su testimonio y que lo que dice debería ser congruente con lo que siente. De este modo, una víctima real podría fingir sus emociones para cumplir con su obligación de parecer creíble.

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[16] Ibid.

[17] Jordan, S., Brimbal, L., Wallace, D.B., Kassin, S.M., Hartwig, M. y Street, C.N.H. (2019). A Test of the Micro–expressions Training Tool: Does It Improve Lie Detection? *Journal of Investigative Psychology and Offender Profiling*, 16, 222-235. https://doi.org/10.1002/jip.1532

[18] Blandón–Gitlin, I., López, R.M., Masip, J. y Fenn, E. (2017). Cognición, Emoción y Mentira: Implicaciones para Detectar el Engaño. *Anuario de Psicología Jurídica*, 27, 95-106. https://doi.org/10.1016/j.apj.2017.02.004

[19] Boisjoli, C. y Hébert, M. (2020). Importance of Telling the Unutterable: Alexithymia Among Sexually Abused Children". *Psychiatry Research*, 291, 113238. https://doi.org/10.1016/j.psychres.2020.113238; Frewen, P.A., Dozois, D.J.A., Neufeld, R.W.J. y Lanius, R.A. (2008). Meta‐analysis of Alexithymia in Posttraumatic Stress Disorder. Journal of Traumatic Stress, 21(2), 243-246. https://doi.org/10.1002/jts.20320

El conocimiento recopilado durante décadas nos permite concluir algunas cuestiones importantes no solo respecto a la teoría de Ekman, sino también sobre la detección intuitiva del engaño basada en claves conductuales. En primer lugar, podemos concluir que apenas hay indicadores conductuales que estén presentes solo en los mentirosos, ni existen otros que se muestren solo cuando se dice la verdad[20]. En segundo lugar, las personas detectamos las mentiras con una precisión del 54 por 100[21]. Y, en tercer lugar, el entrenamiento para detectar mentiras utilizando estas claves conductuales no permite tasas mucho más altas de acierto[22].

Un 54 por 100 de precisión es un porcentaje inadmisible en un proceso judicial. Esto podría suponer cometer errores en casi la mitad de los casos, con consecuencias tan graves como condenar a un inocente si no tuviéramos más evidencias y solo nos basáramos en el sentido común para detectar si la víctima, el testigo, o incluso el sospechoso, miente o dice la verdad. Aunque pudiéramos pensar lo contrario, los profesionales que lidian con el engaño a diario, como los jueces o policías, tampoco son mucho más precisos a la hora de detectar si alguien miente o dice la verdad[23].

HERRAMIENTAS PARA LA DETECCIÓN DEL ENGAÑO

Debido a la futilidad de las claves conductuales para detectar el engaño a partir de la intuición, la comunidad científica ha tratado de desarrollar herramientas que faciliten esta tarea. Alguna de estas herramientas ha centrado su atención en los comportamientos verbales y otras en los no verbales.

En primer lugar, respecto a las técnicas centradas en las claves verbales, Sapir[24], expoligrafista y antiguo miembro de la policía israelí, desarrolló la técnica SCAN (*Scientific Content Analysis*) para analizar el contenido de un discurso, especialmente durante un interrogatorio policial. El procedimiento consiste en solicitar a la persona sospechosa que describa los hechos según su versión y después esta declaración se analiza en función de su contenido[25]. Esta herramienta propone cuestiones interesantes como no sesgar a la persona entrevistada o que el/la entrevistador/a intervenga solo lo imprescindible para intentar obtener un relato libre. Sin embargo, a pesar de que el FBI y la

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[20] DePaulo, B.M., Lindsay, J.J., Malone, B.E., Muhlenbruck, L., Charlton, K. y Cooper, H. (2003). Cues to Deception. *Psychological Bulletin*, 129, 74-118. https://doi.org/10.1037/0033-2909.129.1.74

[21] Bond, C.F. y DePaulo, B.M. (2006). Accuracy of Deception Judgments. *Personality and Social Psychology Review*, 10, 214-234. https://doi.org/10.1207/s15327957pspr1003_2

[22] Hauch, V., Sporer, S.L., Michael, S. W. y Meissner, C.A. (2016). Does Training Improve the Detection of Deception? A Meta–analysis. Communication Research, 43, 283-343. https://doi.org/10.1177/0093650214534974

[23] Aamodt, M.G. y Custer, H. (2006). Who Can Best Catch a Liar? A Meta–analysis of Individual Differences in Detecting Deception. *The Forensic Examiner*, 16, 6-11.

[24] Sapir, A. (2005). *The Lsi Course on Scientific Content Analysis (SCAN)*. Laboratory for Scientific Interrogation.

[25] Masip,J., Garrido, E. y Herrero, C. (2002). La Detección de la Mentira Mediante la Técnica SCA. *Psicopatología Clínica, Legal y Forense,* 2, 39-62.

CIA la ha utilizado[26], los criterios que propone analizar para determinar si alguien miente o no, no están avalados científicamente[27]. Por ejemplo, esta técnica asume que las declaraciones que carecen de una estructura y las que tienen correcciones espontáneas son engañosas. Sin embargo, el proceso de recuerdo de un hecho puede conllevar retracciones de manera natural y, por lo tanto, lejos de significar engaño, la presencia de este criterio podría significar que la persona está siendo sincera[28].

En segundo lugar, con el objetivo de diferenciar los comportamientos no verbales de las personas que mienten respecto a las sinceras, se han desarrollado un conjunto de técnicas que promueven el rol activo del investigador. Estas herramientas asumen que puesto que si observamos pasivamente la conducta de alguien no somos capaces de determinar su veracidad, quizás podamos obtener mejores resultados si el entrevistador adquiere una actitud activa y utilizar estrategias para intentar maximizar las diferencias que pueda haber entre un relato sincero y uno engañoso.

Dentro de estas estrategias que abogan por un rol activo del entrevistador, podemos incluir propuestas muy diferentes, unas mejores que otras y unas con más base teórica y apoyo científico que otras.

Una propuesta no avalada por la comunidad científica y cuyos estudios tienen importantes errores metodológicos[29] es la *Behavior Analysis Interview* (BAI, Entrevista de Análisis de la Conducta)[30]. Puede que para muchos sea innecesario mencionar una herramienta inservible en un editorial como este, pero la fuerte campaña de márquetin de la empresa que comercializa esta técnica y la aplicación que se hace de ella por los cuerpos policiales de países como Estados Unidos, Alemania o Bélgica[31], hacen necesario su mención. En realidad, la BAI forma parte del primer paso de una técnica más amplia denominada *Técnica Reid*. La BAI, como primera fase del proceso, consiste en una entrevista en la que se realizan preguntas no acusatorias con el objetivo de observar la conducta no verbal de la persona entrevistada. Si, en función de su comportamiento, la persona parece culpable, entonces pasará a la segunda fase de la Técnica Reid. Si no parece culpable, el proceso terminaría en este punto. Ya hemos dicho previamente que la comunicación no verbal no

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[26] Vrij, A., Hope, L. y Fisher, R.P. (2014). Eliciting Reliable Information in Investigative Interviews". *Policy Insights from the Behavioral and Brain Sciences*, 1, 129-136. https://doi.org/10.1177/2372732214548592

[27] Bogaard, G., Meijer, E.H., Vrij, A. y Merckelbach, H. (2016). Scientific Content Analysis (SCAN) Cannot Distinguish Between Truthful and Fabricated Accounts of a Negative Event. *Frontiers in Psychology*, 7, 243. https://doi.org/10.3389/fpsyg.2016.00243

[28] Steller, M. y Köhnken, G. (1989). Criteria–based Statement Analysis en D. C. Raskin (ed), *Psychological Methods in Criminal Investigation and Evidence* (217-245). Springer.

[29] Masip, J., Herrero, C., Garrido, E. y Barba, A. (2011). Is the Behavior Analysis Interview Just Common Sense? *Applied Cognitive Psychology*, 25, 593-604.

[30] Inbau, F.E., Reid, J.E., Buckley, J.P. y Jayne, B.C. (2013). *Criminal Interrogation and Confessions*. Jones and Bartlett Publishers.

[31] Masip, J. y Herrero, C. (2015). Nuevas Aproximaciones en Detección de Mentiras I. Antecedentes y Marco Teórico. *Papeles del Psicólogo*, 36, 83-95.

nos permite diferenciar una declaración falsa de una verdadera, por lo tanto, utilizar este criterio con algún fin, resulta muy peligroso para las personas investigadas. En consecuencia, las personas pasan a la segunda fase del proceso, se encuentran en un gran problema.

El segundo paso de la Técnica Reid consiste en interrogar a la persona sospechosa de forma coercitiva para intentar obtener una confesión, para posteriormente, en la tercera fase, obtener esa confesión de culpabilidad por escrito. Quizás esta segunda fase es lo que ha hecho que esta técnica no prospere en España, porque nuestra legislación prohíbe cualquier tipo de coacción durante la obtención de una declaración[32]. Además, las Fuerzas y Cuerpos de Seguridad del Estado saben que el objetivo de una entrevista policial es la recopilación de la información y no la confesión. Sin embargo, es importante mencionar que, aunque estos profesionales no aplican técnicas de coerción física, no ven del mismo modo otras técnicas coercitivas de carácter psicológico como la minimización[33] (que consiste en reducir la importancia y las consecuencias asociadas al delito para que la persona detenida confiese[34]).

Si la primera fase de esta técnica no se sostiene científicamente, el conocimiento científico rechaza la segunda fase con mayor rotundidad. Existen múltiples estudios que indican que las entrevistas coercitivas cuyo único objetivo es la confesión, obtienen información menos fiable y precisa que una entrevista no coercitiva[35] y, además, el número de confesiones falsas aumenta peligrosamente ante este tipo de interrogatorios[36]. El riesgo de las confesiones falsas por el uso de este tipo de estrategias se ha puesto de manifiesto en investigaciones de laboratorio y en casos de la vida real. Por ejemplo, en 1959, Darrell Parker confesó ser culpable de un delito que no había cometido tras un interrogatorio coercitivo de 9 horas liderado por John Reid, lo que le llevó a permanecer 10 años en prisión injustamente[37].

Otras herramientas desarrolladas desde el punto de vista del entrevistador activo tienen mayor sustento teórico, como las técnicas producidas desde el

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[32] Artículo 389, 391 y 439 del Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal.

[33] Schell–Leugers, J., Masip, J., González, J.L., Vanderhallen, M. y Kassin, S. (2023). Police Interviewing in Spain: A Self–Report Survey of Police Practices and Beliefs. *Anuario de Psicología Jurídica*, 33, 27-40. https://www.doi.org/10.5093/apj2022a4

[34] Meissner, C.A., Surmon–Böhr, F., Oleszkiewicz, S. y Alison, L.J. (2017). Developing an Evidence–Based Perspective on Interrogation: A Review of the U.S. Government's High–Value Detainee Interrogation Group Research Program. *Psychology, Public Policy, and Law*, 23, 438-457. https://doi.org/10.1037/law0000136

[35] Véanse Los Principios Méndez: Iniciativa contra la Tortura, Asociación para la Prevención de la Tortura y Centro Noruego de Derechos Humanos, "Principios sobre Entrevistas Efectivas para Investigación y Recopilación de Información" (mayo 2021) www.interviewingprinciples.com

[36] Vrij, A., Meissner, C.A., Fisher, R.P., Kassin, S.M., Morgan, C.A. y Keinman, S.M. (2017). Psychological Perspectives on Interrogation. *Perspectives on Psychological Science*, 12(6), 927-955. https://www.doi.org/10.1177/1745691617706515

[37] Kozinski, W. (2017). The Reid Interrogation Technique and False Confessions: A Time for Change. *Seattle Journal for Social Justice*, 16 (2), 301-345.

enfoque de la carga cognitiva[38]. Desde este enfoque teórico se explica que las mentiras son más complejas y tienen una mayor carga cognitiva que decir la verdad. Por lo general, cuando una persona miente, debe inhibir la verdad que se activa de forma automática en su memoria, además, debe generar una historia que parezca real y plausible y, por supuesto, el mentiroso debe recordar todo lo que está diciendo por si en el futuro le vuelven a preguntar por ese suceso. Además, habitualmente, el mentiroso evaluará las reacciones de su interlocutor para comprobar que está logrando engañarle con éxito. Desde esta perspectiva, se asume que si por sí misma, esta carga cognitiva no nos permite diferenciar un testimonio sincero de uno falso, la intervención del entrevistador para inducir una carga cognitiva extra maximizaría esas diferencias comportamentales entre sinceros y mentirosos y facilitaría la identificación de engaños[39]. Pedir a la persona que mire fijamente a los ojos del entrevistador[40], solicitar al entrevistado que cuente el suceso en orden inverso al que sucedieron los hechos[41] o pedir al entrevistado que realice una tarea secundaria durante la entrevista[42], son algunas de las técnicas investigadas para inducir esa carga cognitiva externa[43]. Estas técnicas permiten un índice de aciertos más alto que el 54 por 100 mencionado anteriormente. Sin embargo, el porcentaje de aciertos apenas supera el 60 por 100[44], un porcentaje todavía muy bajo para su aplicación en el procedimiento penal. Por lo tanto, sus resultados deben interpretarse con cautela y aún se requiere más investigación al respecto.

Además, este enfoque tiene algunos problemas. Por un lado, es difícil determinar cuánta carga externa estamos induciendo al entrevistado, y puede que sobrecarguemos cognitivamente a la persona, independientemente de que esté mintiendo o diciendo la verdad[45]. En esos casos, puede que nos equivoquemos y asociemos sus gestos y comportamientos con el engaño cuando el origen es la sobrecarga y no una mentira. Por otro lado, mentir no siempre es más complicado que decir la verdad[46]. Si nos preguntan qué comimos el

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[38] Blandón–Gitlin, López, Masip y Fenn, (n 17).

[39] Masip y Herrero, (n 30); Masip, J. y Herrero, C. (2015). Nuevas Aproximaciones en Detección de Mentiras II. Antecedentes y Marco Teórico. *Papeles del Psicólogo*, 36, 96-108.

[40] Vrij, A., Mann, S., Leal, S. y Fisher, R.P. (2010). Look Into my Eyes: Can an Instruction to Maintain Eye Contact Facilitate Lie Detection? *Psychology, Crime & Law*, 16, 327-348. https://doi.org/10.1080/10683160902740633

[41] Vrij, A., Leal, S., Mann, S. y Fisher, R.P. (2012). Imposing Cognitive Load to Elicit Cues to Deceit: Inducing the Reverse Order Technique Naturally. *Psychology, Crime & Law*, 18, 579-594. https://doi.org/10.1080/1068316X.2010.515987

[42] Lancaster G.L.J., Vrij, A., Hope, L. y Waller, B. (2013). Sorting the Liars from the Truth Tellers: The Benefits of Asking Unanticipated Questions on Lie Detection. *Applied Cognitive Psychology*, 27, 107-114. https://doi.org/10.1002/acp.2879

[43] Para una explicación más exhaustiva sobre el enfoque de la carga cognitiva, véase Blandón–Gitlin, López, Masip y Fenn (n 17).

[44] Mac Giolla, E. y Luke, T.J. (2021). Does the Cognitive Approach to Lie Detection Improve the Accuracy of Human Observers? *Applied Cognitive Psychology*, 35, 385-392. https://doi.org/10.1002/acp.3777

[45] Masip y Herrero (n 38).

[46] Blandón–Gitlin, López, Masip y Fenn (n 17).

lunes de la semana pasada, puede que inventarnos algo en el momento lleve menos tiempo y recursos cognitivos que intentar recordar lo que realmente comimos ese día. A menos que tuviéramos una cita especial o fuera un día importante para nosotros, esta información no estará accesible rápidamente en la memoria. Utilicemos un ejemplo más aplicado al ámbito judicial. Si le preguntamos a un sospechoso qué hizo el día 22 de abril de hace dos años. Si la persona es inocente y ese día fue un día normal y cotidiano, puede que no recuerde qué hizo ese día. Puede que imagine que fue a trabajar, como siempre, pero no lo va a saber con certeza. No va a saber si ese día fue al supermercado o volvió directamente a casa después del trabajo. Tengamos en cuenta que los hechos cotidianos y rutinarios no generan recuerdos autobiográficos, sino que solo permiten enriquecer nuestros conocimientos esquemáticos sobre lo que hacemos en determinadas circunstancias (salir de trabajar y volver a casa). Inventar una historia sobre lo que se hizo ese día, con seguridad resulta menos costoso que tratar de recordar realmente qué hizo. En ocasiones les pedimos a los inocentes que realicen tareas de recuerdo que su memoria no le permite llevar a cabo. El culpable recuerda que el 22 de abril mató a una persona, porque ese hecho es muy distintivo. El inocente no es capaz de recordar qué hizo ese día intrascendente. La falta de respuesta del inocente habitualmente se toma de forma errónea como ocultación de la verdad, tal y como veremos en el siguiente procedimiento.

Recientemente, se han desarrollado otros procedimientos como el *Information Protocol*[47]. Este procedimiento propone que el entrevistador adquiera un rol activo desde el enfoque de verificabilidad[48]. Desde este enfoque se asume que las personas entrevistadas que han cometido un delito saben que deben aportar detalles durante sus declaraciones para que el entrevistado les perciba como sinceros[49]. Sin embargo, los detalles reales que estas personas pueden aportar evidenciarían su culpabilidad, por lo que el culpable tratará de buscar un equilibrio entre aportar detalles y parecer sincero. Este equilibrio lo alcanzaría mencionando muchos detalles difíciles de verificar y pocos detalles verificables. El concepto de verificabilidad hace referencia a la capacidad de contrastar la información que ha dicho el entrevistado con información externa como la que podrían aportar terceras personas o sistemas de registro como las cámaras de seguridad[50].

La aplicación del *Information Protocol*[51] consistiría en solicitar al entrevistado que mencionara todos los detalles verificables que pueda para que

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[47] Nahari, G., Vrij, A. y Fisher, R.P. (2014). The Verifiability Approach: Countermeasures Facilitate Its Ability to Discriminate Between Truths and Lies. *Applied Cognitive Psychology*, 28, 122-128. https://doi.org/10.1002/acp.2974

[48] Nahari, G., Vrij, A. y Fisher, R.P. (2014). Exploiting Liars' Verbal Strategies by Examining the Verifiability of Details. *Legal and Criminological Psychology*, 19, 227-239. https://doi.org/10.1111/j.2044-8333.2012.02069.x

[49] Nahari, G., Vrij, A. y Fisher, R.P. (2012). Does the Truth Come Out in the Writing? SCAN as a Lie Detection Tool. *Law and Human Behavior*, 36, 68-76. https://doi.org/10.1007/s10979-011-9264-6

[50] Nahari, Vrij y Fisher (n 47).

[51] Nahari, Vrij y Fisher (n 46).

posteriormente todos esos detalles puedan ser corroborados. Según este protocolo, si el entrevistado es inocente del delito, se esforzará por aportar estos detalles verificables para que su coartada pueda ser contrastada. Sin embargo, el verdadero culpable no podrá aportar este tipo de detalles. Los estudios metaanalíticos realizados hasta el momento[52] indican que efectivamente las personas que dicen la verdad mencionarán más detalles verificables que los mentirosos, y que la cantidad de este tipo de información, será superior respecto al total de detalles aportados en los sinceros que en los mentirosos. No obstante, aún es pronto para saber la efectividad del *Information Procol* y estos mismos metaanálisis arrojan resultados contradictorios sobre esta herramienta.

Como podemos ver hasta el momento, la conducta no verbal no es útil para determinar si alguien es veraz o no y, aunque los procedimientos que valoran las claves verbales ofrecen mejores resultados, todos tienen sus limitaciones y a partir de ellos se obtienen porcentajes de aciertos inaceptables para utilizar como única prueba en un proceso penal.

Estas páginas ponen de manifiesto la dificultad de aplicar una técnica que detecte el engaño con un 100 por 100 de acierto. Ninguna técnica es la panacea, todas tienen limitaciones, y si alguna nos propone detectar el engaño en pocos segundos, probablemente debamos desconfiar de ella y analizarla desde los ojos de la ciencia. Los buenos profesionales de la psicología forense conocen estas limitaciones y son capaces de realizar informes sobre la credibilidad de un testimonio teniendo esto en cuenta. Por ello, normalmente se recomienda no realizar conclusiones categóricas sobre si algo es completamente falso o verdadero, sino que más bien se hable en términos de probabilidad, puesto que los instrumentos de los que disponemos en este momento no nos permiten llegar a otro tipo de conclusiones[53].

A pesar de estas recomendaciones, en ocasiones, se han utilizado instrumentos como el CBCA (*Criteria–based Content Analysis*)[54] para llegar a conclusiones dicotómicas sobre si alguien miente o dice la verdad. Sin embargo, esta herramienta no ha sido diseñada para este propósito. El CBCA es útil para la evaluación de la credibilidad, pero no está diseñada para todo tipo de poblaciones, para todos los casos, ni para todos los momentos procesales[55]. Es más, el CBCA no es una herramienta que deba aplicarse de forma aislada, sino que forma parte del SVA (*Statement Validity Assessment*)[56]. Esto sig-

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[52] Palena, N., Caso, L., Vrij, A. y Nahari, G. (2020). The Verifiability Approach: A Meta–analysis. *Journal of Applied Research in Memory and Cognition*, 10, 1-18. https://doi.org/10.1016/j.jarmac.2020.09.001; Verschuere, B., Bogaard, G. y Meijer, E. (2021). Discriminating Deceptive from Truthful Statements Using the Verifiability Approach: A Meta–analysis. *Applied Cognitive Psychology*, 35, 374-384. https://doi.org/10.1002/acp.3775

[53] Köhnken, G., Manzanero, A.L. y Scott, M.T. (2015). Análisis de la Validez de las Declaraciones: Mitos y Limitaciones. *Anuario de Psicología Jurídica*, 25, 13-19. https://doi.org/10.1016/j.apj.2015.01.004

[54] Steller y Köhnken (n 27).

[55] Köhnken, Manzanero y Scott (n 52).

[56] Köhnken, G. (2004). Statement Validity Analysis and the "Detection of the truth"" en P. Anders Granhag y L. A. Strömwall (eds), *The Detection of Deception in Forensic Contexts* (41-63). Cambridge

nifica que un procedimiento adecuado de evaluación de la credibilidad no solo evalúa lo que dice la persona en el momento de la entrevista, sino que también evalúa las características de la persona evaluada y el contexto del suceso denunciado. Por ejemplo, se debe valorar la edad de la persona, sus capacidades cognitivas y para testificar, el tipo de delito o hecho, el expediente judicial, la información relevante y disponible recopilada anteriormente por otros profesionales, se debe estudiar el número de veces que la persona ha relatado los hechos y de qué manera lo ha hecho, el tiempo que ha pasado desde el hecho hasta la actualidad, la relación del hecho con otros sucesos relevantes para el caso…[57].

Ya se ha hablado mucho sobre el CBCA y el SVA, por lo que no haremos aquí un exhaustivo análisis sobre ella[58]. No obstante, nos gustaría destacar que los estudios indican que el CBCA tiene una precisión global alrededor 70 por 100[59] y que fue desarrollado para evaluar casos de abuso sexual infantil, por lo que, aunque ya se ha estudiado su utilidad en otras poblaciones y delitos, no debería aplicarse de forma indiscriminada sin un análisis previo de la literatura científica que verifique cómo utilizar esta herramienta ante un caso concreto[60]. Además, es importante tener en cuenta el contexto de la evaluación, la situación psicológica, psicopatológica y del desarrollo de la persona entrevistada, sus circunstancias personales… pues en ocasiones, algunas de las respuestas podrán explicarse mejor por estas circunstancias que como resultado de haber sido víctima de un delito[61]. También debemos tener en cuenta que la evaluación debe realizarla un psicólogo forense experto y no el psicólogo clínico terapeuta de la persona evaluada[62]. Por añadidura, puesto que la evaluación de la credibilidad del testimonio no debe plantear como única hipótesis el engaño, se deben plantear hipótesis alternativas como que se trate de una falsa memoria o que existan errores debidos al paso del tiempo o a sugerencias inducidas de forma intencional o no de terceras personas[63]. Por todo ello, hace ya unos años se propuso el protocolo HELPT[64], que permitiría evaluar adecuadamente la prueba testifical (declaraciones e identificaciones) teniendo en cuenta todos los factores anteriores, así como el uso de procedimientos adecuados, adaptados a las características de los testigos.

University Press. https://doi.org/10.1017/CBO9780511490071.003

[57] Köhnken, Manzanero y Scott (n 52).

[58] Para un análisis más exhaustivo de las limitaciones de esta herramienta véase Köhnken, Manzanero y Scott (n 52).

[59] Bogaard, G., Meijer, E.H. y Vrij, A. (2014). Using an Example Statement Increases Information but Does Not Increase Accuracy of CBCA, RM and SCAN. *Journal of Investigative Psychology and Offender Profiling*, 11, 151-163. https://doi.org/10.1002/jip.1409

[60] Köhnken, Manzanero y Scott (n 52).

[61] Sporer, S.L., Manzanero, A.L. y Masip, J. (2021). Optimizing CBCA and RM Research: Recommendation for Analyzing and Reporting Data on Content Cues to Deception. *Psychology, Crime & Law*, 27, 1-39. https://doi.org/10.1080/1068316X.2020.1757097

[62] Ibid.

[63] Ibid.

[64] González, J.L. y Manzanero, A.L. (2018). *Obtención y Valoración del Testimonio. Protocolo Holístico de Evaluación de la Prueba Testifical (HELPT)*. Pirámide; Manzanero y González (n 2).

LA DETECCIÓN DEL ENGAÑO A PARTIR DE INSTRUMENTOS NEUROFISIOLÓGICOS

Después de esta breve exposición sobre la detección verbal y no verbal del engaño, se podría pensar que algunos de los procedimientos explicados no son lo suficientemente sistemáticos y que necesitamos protocolos más estandarizados o pruebas objetivas de corte psicofisiológico para determinar la veracidad de una declaración. Sin embargo, sentimos comunicarles que estas técnicas tienen importantes limitaciones teóricas que impiden su utilización en el contexto forense.

Comenzaremos por uno de los instrumentos más populares entre los legos, el polígrafo o también llamado detector de mentiras. El polígrafo fue introducido por primera vez por John Larsson en 1921. Su nombre proviene de las múltiples medidas simultáneas que este instrumento es capaz de registrar. Las medidas clásicas del polígrafo son: la conductancia de la piel (permite medir la sudoración), medidas cardiovasculares (como el ritmo cardíaco o la presión sanguínea relativa) y la respiración[65]. En el ámbito de la detección del engaño, se teoriza que engañar provoca nerviosismo o activación fisiológica que se traduce en una mayor sudoración, la aceleración del ritmo cardíaco o una respiración acelerada. Esta es la base a partir de la cual se interpretan los resultados obtenidos del polígrafo y es también donde se encuentra el principal problema de este instrumento. En realidad, todas estas variables, están midiendo excitación, ansiedad, culpa… u otras cuestiones, por lo tanto, son medidas indirectas del engaño. Los defensores de este instrumento asumen que mentir genera de forma intrínseca este estado psicofisiológico pero, aunque en algunos casos podría ser cierto, la verdad es que no todas las personas están nerviosas cuando mienten. Ni todas las personas que son sinceras declaran de manera tranquila y relajada[66]. Cualquier persona inocente que está siendo investigada por un delito grave podría ponerse nerviosa en una entrevista policial o ante el juez, simplemente por el miedo a que no le crean, por pensar que no tiene pruebas suficientes para demostrar su inocencia, o porque se encuentra en una situación desconocida en la que no sabe la forma de proceder. En estas situaciones, es normal que las personas inocentes estén nerviosas y es normal que los mentirosos también lo estén. Así como podría ser normal que un psicópata mintiera con absoluta relajación en el estrado.

El polígrafo también tiene limitaciones en su aplicación en el proceso penal español porque su uso contraviene el derecho del investigado a no declarar contra sí mismo y a no confesar su culpabilidad[67]. Sucedería lo mismo con la medición de variables neuropsicológicas durante una declaración.

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[65] Garrido, E., Masip, J. y Herrero, C. (2006). *Psicología Jurídica*. Pearson.

[66] Vrij, A., Granhag, P.A. y Porter, S. (2010). Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection. *Psychological Science in the Public Interest*, 11, 89-121. https://doi.org/10.1177/1529100610390861

[67] Artículo 24.2 de la Constitución Española.

Además de estas limitaciones judiciales, las medidas neurofisiológicas o medidas del sistema nervioso central tienen otras limitaciones adicionales. Podemos medir la actividad del sistema nervioso central a través de diferentes instrumentos. Por ejemplo, podemos utilizar aparatos que registran actividad eléctrica del cerebro en forma de gráfica como el electroencefalograma. O podemos emplear instrumentos de neuroimagen como la resonancia magnética funcional, que genera una imagen dinámica del cerebro en la que se muestran de un color diferente las áreas con mayor y menor flujo de oxígeno en sangre. Un mayor flujo de oxígeno en áreas concretas se asocia con una mayor actividad de estas áreas cerebrales[68].

La detección de mentiras realizada a partir de instrumentos de neuroimagen suele basarse en el enfoque de carga cognitiva y, por lo tanto, asumen que la verdad es la respuesta que se activa de forma automática cuando nos preguntan a cerca de algo (por ejemplo, los hechos delictivos que presenciaste hace una semana) y que, para engañar, la persona deberá inhibir esta respuesta sincera y construir una nueva respuesta falsa pero creíble[69]. Siguiendo la lógica de estos instrumentos, estas actividades cognitivas se relacionan con la activación de determinadas áreas cerebrales. Por lo tanto, se acepta que cuando una persona está declarando falsamente, su actividad cerebral mostrará una activación de áreas relacionadas con la inhibición (como, por ejemplo, la corteza prefrontal ventrolateral)[70]. Sin embargo, puede que esta activación de áreas inhibitorias no esté presente en todos los engaños. Véase lo que se ha dicho anteriormente respecto a que no todas las mentiras suponen una mayor carga cognitiva que ser sinceros. De hecho, también podría ocurrir que una persona que está recordando un evento de forma sincera tenga activadas las áreas cerebrales de la inhibición. Siguiendo el ejemplo que poníamos antes acerca de recordar lo que comió la semana pasada, puede que ante este interrogante recuerde primero lo que comió el día de hoy, o lo que comió ayer, y tenga que esforzarse por inhibir esa información e intentar recordar la comida del día por el que realmente le están preguntando. En este caso, ¿qué pensaría el investigador férreo a estas teorías si observa una activación de áreas inhibitorias en su corteza cerebral?

Como puede deducirse de esta explicación, estas técnicas de neuroimagen también se estarían aproximando al engaño de manera indirecta. No existe una única área cerebral del engaño que se active con cada mentira, si no que asumimos que si al mentir se realizan una serie de actividades cognitivas, entonces se activarán las áreas cerebrales asociadas a esas actividades[71]. Del mismo modo que el polígrafo asume que mentir implica excitación, estas técnicas asumirían que mentir implica tareas cognitivas como la inhibición y la

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[68] Manzanero, A.L. y Álvarez, M.A. (2015). *La Memoria Humana: Aportaciones desde la Neurociencia Cognitiva*. Pirámide.

[69] Meijer, E. y Verschuere, B. (2017). Deception Detection Based on Neuroimaging: Better than the Polygraph? *Journal of forensic Radiology and Imaging*, 8, 17-21. https://doi.org/10.1016/j.jofri.2017.03.003

[70] Ibid.

[71] Ibid.

activación de sus correspondientes áreas cerebrales. Por ello, pensamos que la investigación de nuestro cerebro y de este campo de la neuropsicología en general aún debe recorrer mucho camino para poder aplicarse con garantías en un proceso penal y poder decir con seguridad que somos capaces de identificar el engaño a través de técnicas de neuroimagen.

Por su parte, instrumentos como el electroencefalograma (EEG) registran ondas como la P300, que en muchas ocasiones se ha identificado como un indicador para detectar el engaño. La P300 es un "componente positivo que alcanza su máxima amplitud (microvoltios) en una latencia de aproximadamente 300 milisegundos"[72] después de haberse presentado un estímulo conocido. Es decir, la P300 aparece cuando reconocemos una cara de una persona o cuando la imagen que estamos viendo es significativa para nosotros.

Desde un punto de vista teórico, en el ámbito forense, si nosotros conociéramos la verdadera arma del crimen de un delito y le presentáramos de forma secuencial varias armas al culpable del hecho, entre ellas, la verdadera arma del crimen, la P300 se activaría en el culpable únicamente al ver el arma del crimen y no se activaría al observar el resto de armas. El problema es que la P300 no solo se relaciona con el reconocimiento, sino que también se asocia a procesos atencionales y al procesamiento de estímulos infrecuentes. Por lo tanto, si esa arma llama la atención del sospechoso por algún motivo (por su rareza, por ejemplo), veremos la P300 ante ese objeto significativo para la persona y eso no lo hace culpable del hecho[73]. Además, la P300 no permite diferenciar si el reconocimiento que está teniendo lugar es fruto de un recuerdo real o de una equivocación o falsa memoria[74].

LOS PELIGROS DE LA PSEUDOCIENCIA

Como estamos viendo, las neurociencias son un campo novedoso y atractivo para buscar soluciones que permitan detectar el engaño. Si el engaño es un tema de interés popular, las neurociencias también, y por ello, algunos autores aprovechan este interés para proponer técnicas que, a pesar de no estar validadas científicamente, las envuelven con un aura neurobiológica que las hace parecerlo. La sinergología es una de las disciplinas científicas que dice formar parte de las neurociencias y las ciencias de la comunicación para interpretar la comunicación no verbal de las personas[75]. La sinergología asegura que podemos interpretar fácilmente los gestos y movimientos de las personas porque estos son el resultado de procesos mentales inconscientes

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[72] Terol, O., Álvarez, M., Melgar, N. y Manzanero, A.L. (2014). Detección de Información Oculta Mediante Potenciales Relacionados con Eventos. *Anuario de Psicología Jurídica*, 24, 49-55. https://www.doi.org/10.1016/j.apj.2014.06.004

[73] Ibid.

[74] Puede consultarse el artículo de Terol, Álvarez, Melgar y Manzanero (n 71) para una revisión de todas las limitaciones que puede tener el uso de la P300 en la detección de mentiras y la evaluación de la credibilidad del testimonio.

[75] Turchet, P. (2009). *Le Langage Universel du Corps*. Les Editions de L'Homme.

que se revelan a través del movimiento. Afirma que acciones como rascarse debajo de la fosa nasal derecha indican que no nos estamos creyendo lo que nos están contando, pero que, si nos rascamos la parte izquierda, entonces significa que no estamos diciendo todo lo que estamos pensando[76]. Sin embargo, más que una ciencia, en este caso se trata de una pseudociencia. A pesar de que sus términos nos puedan confundir, no se conoce ningún artículo de revista científica publicado que apoye sus interpretaciones y sus ideas no están avaladas por el conocimiento científico[77]. Por lo tanto, debemos estar atentos y no dejarnos *engañar* por supuestas disciplinas científicas cuyas bases teóricas van en contra del conocimiento que la ciencia ha acumulado durante años.

LA IMPORTANCIA DE RECOPILAR OTRO TIPO DE EVIDENCIAS

Debido a las limitaciones que tienen los procedimientos explicados en este documento, nos gustaría terminar resaltando la importancia de recopilar otro tipo de evidencias más allá de los testimonios. Recopilar información de víctimas y testigos es útil durante el proceso de investigación para poder localizar otros tipos de evidencias, pero, en muchas ocasiones, basarnos solo en una declaración puede ser muy arriesgado[78]. Debido a las limitaciones intrínsecas que tiene la memoria y los procesos atencionales, solo un experto en memoria de testigos y en credibilidad puede ser capaz de valorar si en esa situación concreta es más o menos peligroso fiarnos de la huella de memoria de esa persona. En cualquier caso, la búsqueda de evidencias externas debe ser prioritaria. Como se ha puesto de manifiesto tanto en investigaciones de laboratorio[79] como en estudios de campo[80], la información contextual es más reveladora que la conductual y permite índices de acierto superiores, hasta del 100 por 100[81], en función de la situación en la que nos encontremos. Por lo tanto, basarnos en esta información contextual puede aumentar la precisión de la toma de decisiones judiciales y disminuir el número de errores del sistema.

La información contextual puede ser de muchos tipos, por ejemplo, evidencias físicas, información contrastable con el conocimiento científico o

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[76] Ibid.

[77] Denault, et al. (n 11).

[78] El Proyecto Inocencia ("200 Exonerated: Too Many Wrongfully Convicted" 2007) determinó que el 77 por 100 de los 200 primeros casos de personas inocentes exoneradas en Estados Unidos gracias a las pruebas de ADN habían sido condenadas erróneamente, al menos en parte, por una identificación errónea de víctimas o testigos.

[79] Bond, C.F., Howard, A.R., Hutchison, J.L. y Masip, J. (2013). Overlooking the Obvious: Incentives to Lie. *Basic and Applied Social Psychology*, 35, 212-221. https://doi.org/10.1080/01973533.2013.764302

[80] Sánchez, N., Masip, J. y Herrero, C. (2021). How People [Try to] Detect Lies in Everyday Life. *Trames*, 25(4), 395-419. https//doi.org/10.3176/tr.2021.4.02

[81] Bond, Howard, Hutchison y Masip (n 78).

con las leyes de la naturaleza, testimonios de terceras personas…[82]. Generalmente, esta información es más útil para determinar si lo que dice una persona se corresponde o no con la realidad. Puede que a veces la conducta sirva como un disparador que active la duda de si la persona que tenemos delante nos está mintiendo o si está siendo sincera[83]. Y puede que esta alarma activada nos lleve a buscar activamente más información sobre la veracidad de ese testimonio[84], pero lo que realmente nos va a permitir saber si esa persona miente o no, es la información contextual y las evidencias. Puede que esto sea algo de sentido común, pero la vida real[85] y las investigaciones[86], han puesto de manifiesto que en muchas ocasiones nos dejamos llevar por el atractivo de la información conductual y pasamos por alto la información que realmente puede ayudar a alcanzar la verdad y a resolver un caso en un proceso judicial.

CONCLUSIONES

Pese al empeño de muchos legos, profesionales y científicos de confiar en nuestra intuición a la hora de detectar el engaño en los procedimientos judiciales, los estudios científicos más rigurosos y sistemáticos muestran que no debemos confiar en nuestras capacidades para detectar el engaño. Las herramientas diseñadas para detectar mentiras basadas en claves conductuales tampoco ofrecen porcentajes de precisión muy elevados y todas ellas tienen limitaciones que solo un profesional experto puede valorar. Por su parte, las herramientas neurofisiológicas tienen limitaciones teóricas y jurídicas que impiden usarlas con garantías en el proceso penal.

La mejor estrategia para determinar si alguien miente o dice la verdad sería buscar información contextual del caso que nos permita llegar a una conclusión fiable sobre un testimonio. Solo en el caso de que no exista más información contextual o que esta sea imposible de conseguir, un perito experto en psicología del testimonio y en memoria podría valorar la declaración de la persona, sus circunstancias y su contexto para llegar a una conclusión probabilística sobre si ese testimonio se ajusta o no a la realidad. Por supuesto, difundir esta información entre los operadores jurídicos para que conozcan lo que dice la ciencia sobre estas herramientas y que tengan una base sobre la que juzgar la validez de los instrumentos que se le presenten en el futuro, también nos parece una buena estrategia para llegar a decisiones judiciales más justas y garantistas.

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[82] Masip, J. y Herrero, C. (2015). Police Detection of Deception: Beliefs About Behavioral Cues to Deception Are Strong Even Though Contextual Evidence is More Useful. *Journal of Communication*, 65, 125-145. https://doi.org/10.1111/jcom.12135

[83] Levine, T. (2020). *Duped*. The University of Alabama Press.

[84] Ibid.

[85] Sentencia del Tribunal Supremo 678/2019 del 6 de marzo de 2019.

[86] Bond, Howard, Hutchison y Masip (n 78).

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EFICIENCIA EN EL ACCESO A LA INFORMACIÓN Y FUENTES DE PRUEBA EN EL PROCESO CIVIL: TIBIAS LÍNEAS CONVERGENTES EEUU/EUROPA

EFFICIENCY IN ACCESS TO INFORMATION AND SOURCES OF EVIDENCE IN CIVIL PROCEEDINGS: LUKEWARM CONVERGENCE LINES BETWEEN THE US AND EUROPE

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RESUMEN: La investigación preparatoria como actividad realizada por las partes a fin de recabar información relativa a los hechos que fundamenten su pretensión, además de localizar y asegurar las fuentes de prueba, se configura como un elemento estructural esencial del proceso civil. Los diferentes sistemas procesales existentes configuran la regulación de esta fase de forma totalmente diferente, de manera que, durante décadas, los sistemas del llamado *common law* y *civil law* se han dado la espalda en este concreto aspecto procesal. Sin embargo, en los últimos tiempos, se han abierto líneas convergentes de ambos sistemas que benefician la eficiencia procesal de esta fase preprocesal. El presente trabajo tiene como objetivo primordial analizar cuáles son esas convergencias en ambos sistemas, destacando las ventajas e inconvenientes de las mismas, en orden a mejorar la tutela judicial efectiva de los litigantes, sobre todo, en aquellos supuestos en los que existe una desigualdad intrínseca de los mismos y la asimetría informativa de los hechos y las fuentes de prueba para sostener sus respectivas pretensiones resulta absolutamente palmaria.

PALABRAS CLAVE: investigación probatoria, *discovery*, eficiencia procesal, acceso a la información y fuentes de prueba, Unión Europea, *common law*.

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ABSTRACT: The preparatory investigation as an activity carried out by the parties in order to gather information regarding the facts on which their claim is based, in addition to locating and securing sources of evidence, is an essential structural element of the civil process. The different existing procedural systems configure the regulation of this phase in a totally different way, so that, for decades, the so-called common law and civil law systems have turned their backs on each other in this particular procedural aspect. However, in recent times, convergent lines of both systems have been opened that benefit the procedural efficiency of this pre-procedural phase. The main objective of this paper is to analyze what are these convergences in both systems, highlighting the advantages and disadvantages of the same, in order to improve the effective judicial protection of the litigants, especially in those cases in which there is an intrinsic inequality of the same, and the asymmetry of information between both of the facts and sources of evidence to support their respective claims is absolutely obvious.

KEYWORDS: evidentiary investigation, discovery, procedural efficiency, access to information and sources of evidence, European Union, common law.

1. ENFOQUE CONTEXTUAL DEL ESTUDIO[1]

Como ya estableció en el año 1944 el insigne procesalista Jaime Guasp Delgado en una Conferencia impartida en un Curso de Verano de la Universidad de Oviedo[2], "si de otras instituciones podría decirse metafóricamente que son la médula, el cerebro o el corazón del derecho procesal, de la prueba habría que decir entonces, siguiendo la metáfora, que encierra su sistema respiratorio; un buen régimen de prueba es lo único que, en efecto, puede garantizar el contacto del proceso con el mundo exterior que lo circunda, con el conjunto de verdades que de un modo u otro han de ser recogidas por el proceso para que éste desempeñe eficazmente su misión".

[1] La realización de este trabajo se ha procurado en el marco de una estancia de investigación en la Universitá degli Studi di Génova (Italia) financiada por la Universidad de Málaga (Plan Propio) y el Proyecto I+D+i de generación de conocimiento y fortalecimiento científico y tecnológico, titulado "Ejes de la Justicia en tiempos de cambio", del Ministerio de Ciencia e Innovación, con REF PID2020-113083GB-100. La estancia se realizó durante los meses de noviembre a febrero de 2022/2023 bajo la supervisión del Professore Angelo Dondi a quién estoy profundamente agradecida por sus magistrales enseñanzas, su acompañamiento en la investigación y sus cafés.

[2] Publicada en la Revista de la Universidad de Oviedo.*https://digibuo.uniovi.es/dspace/bitstream/handle/10651/5135/2073100_039.pdf?sequence=1* (última visita, 21/09/2022).

Siguiendo el símil iniciado por Guasp, es muy probable que, desde hace ya tiempo, y mucho más con la revolución digital que el siglo XXI está suponiendo para nuestra sociedad, la prueba civil esté sufriendo una incipiente EPOC (enfermedad pulmonar obstructiva crónica) que dificulta al proceso desempeñar eficientemente su función, como veremos en las siguientes líneas.

Y una de sus dificultades está, precisamente, en ese contacto de la prueba con el mundo exterior. Como todos sabemos, la prueba de los hechos que se pretenden alegar en el proceso pertenece a la esfera extraprocesal, se sitúa en el mundo real, en el mundo de los hechos, mientras que la forma de introducirlos en el proceso es a través de las fórmulas pergeñadas por el ordenamiento procesal. La manera de incorporar los hechos y la prueba de los mismos en el proceso civil está asentada en uno de los pilares básicos de éste como es el principio dispositivo y su consecuencia más inmediata, el principio de aportación de parte. Son los litigantes los encargados de introducir en el proceso los hechos en los que funden sus pretensiones y defensas, así como de aportar la prueba que acredite su veracidad (art. 216 LEC, bajo la rúbrica de "principio de justicia rogada").

Esta configuración del proceso civil redunda en la máxima importancia que, por tanto, tiene una búsqueda eficiente de las fuentes de prueba. Si éstas se sitúan en el ámbito extraprocesal, y para poder formar la convicción del juez que dé origen a la sentencia concreta, deben ser incorporadas al ámbito procesal, es preciso que, como preparación del juicio, las partes realicen una investigación cuya finalidad sea la determinación de las fuentes de las que disponen para acreditar los hechos que fundamentan el derecho que se esgrime en el proceso; es más, en ocasiones será necesaria dicha fase para incluso poder concretar los hechos que van a conformar el objeto del proceso (ORMÁZABAL, 2020, p. 264).

Teniendo en cuentas estas afirmaciones, lo que denominamos investigación preparatoria del proceso civil es la actividad realizada por las partes a fin de recabar información relativa a los hechos que fundamentan la pretensión, además de localizar y asegurar las fuentes de prueba que luego se incorporarán al proceso como medios de prueba y sobre los que el juez tendrá que fundamentar su convicción para posteriormente subsumirlas en la norma aplicable. En este sentido, VOGT (2022, pp. 165 y 166) distingue entre esclarecimiento probatorio y esclarecimiento preparatorio. El primero constituye la comprobación de los hechos por parte del juzgador, que abarca tanto la producción de fuentes de información necesarias para que el juzgador pueda determinar lo que efectivamente ocurrió, como también información sobre la confiablidad de estas fuentes. El esclarecimiento preparatorio tiene una función distinta. No va dirigido al tribunal, sino a las partes. Su finalidad es que éstas puedan tomar decisiones informadas sobre la disputa, con anterioridad a la fase probatoria del proceso. El acceso a información puede cobrar relevancia antes de la iniciación del proceso (esclarecimiento prejudicial) o después de iniciado el proceso, durante la etapa de intercambio de los escritos de discusión, pero antes de la fase probatoria.

Por tanto, la preparación del proceso —o del juicio en sí mismo considerado— realizada por los defensores de las partes, o por éstas mismas, se configura como un elemento estructural esencial del proceso civil. La importancia de este momento no se puede definir en torno a su estricta función de inicio del proceso o de delimitación del objeto del proceso, que no es poco, sino que esta fase debe ser caracterizada sobre el proceso civil en su conjunto, con proyección sobre su desarrollo y, por supuesto, sobre su terminación de forma exitosa (DONDI, 1991, pp. 83 y ss., 2008, p.p. 529 y ss., 2014, pp. 434 y ss.) Así, si en el proceso penal es absolutamente imprescindible esa fase de investigación que tiene carácter netamente jurisdiccional, en el proceso civil, también creemos que es imprescindible esta fase, aunque con connotaciones diferente de las del proceso penal.

Y es que las fuentes de prueba se sitúan al margen del proceso, y seguirán estando ahí con independencia de que se inicie éste. Pero si se decide iniciarlo, las garantías de éxito del mismo están en función de la fortaleza de las fuentes de prueba de las que se dispongan. Si éstas no son lo suficientemente fuertes, el contenido de la sentencia perjudicará a aquel que se colocaba en la posición exigida legalmente para aportar la fuente de prueba a través del medio correspondiente. No hay que olvidar que, en muchas ocasiones, las fuentes de prueba se encontrarán en poder de la contraparte, sin que resulte fácil el acceso a ellas, produciéndose así una asimetría informativa entre ambas. No hay posibilidad, como todos sabemos, de que el proceso finalice sin sentencia por falta de prueba, dada la prohibición del *non liquet* en nuestro ordenamiento procesal civil, a diferencia de lo que pudiera ocurrir en las fases iniciales o intermedias del proceso penal, en las que se puede dictar un auto de sobreseimiento provisional. Lo dicho pone de manifiesto una relación muy directa entre el derecho a la tutela judicial efectiva y el acceso eficaz a las fuentes de prueba, por un lado; y, por otro, como no podía ser de otra forma, el atrayente asunto de la verdad procesal, aspiración máxima, a nuestro juicio, también en el proceso civil (TARUFFO, 2009, 2011 y 2020).

Pero, además, en los últimos tiempos en los que "eficiencia procesal" constituye un término de culto, la falta de acceso a las fuentes de prueba empaña la consecución de un objetivo de tales características. Por un lado, porque, puesto que el conocimiento anterior de las fuentes de prueba de las que dispone el adversario y la eliminación del efecto sorpresa en los pleitos puede conducir a una negociación/acuerdo/transacción que evite la celebración del juicio y obviamente, el *no-pleito* es la mayor eficiencia procesal que puede garantizarnos el sistema. Como establece VIAL, "un buen procedimiento no es aquel que lleva todo asunto a juicio, sino aquel que permite discriminar lo que merece ser llevado a juicio" (2006, p. 720). Entre los detractores de esta opinión se encuentran BURBANK y SUBRIN, (2011, p. 406). Por otro lado, con una investigación probatoria exitosa se alcanza mayor probabilidad de conseguir una sentencia justa para ambas partes, lo que también resulta ser un indicativo máximo de eficiencia, por razones obvias.

Los ordenamientos procesales de la Europa continental no ponen un especial esmero en proporcionar al litigante que los precise medios para investigar sobre los hechos y la prueba que necesita aportar para sostener su pretensión (ORMAZÁBAL, 2020, p. 264), aunque es de justicia reconocer un cierto avance en la consecución de este objetivo. Estos procesos europeos continentales son considerados adversariales solamente en el sentido de que recae en las partes la responsabilidad de presentar al juez los elementos de la controversia, pero en ellos falta la base para considerar como una necesidad el acceso a los hechos y las pruebas de aquélla a través de información recíproca entre las partes (FICARELLI, 2004, p. 139). Es cierto que desde el derecho romano ha llegado a nuestra tradición jurídica la *actio ad exhibendum* (diligencia preliminar de exhibición de cosa mueble), procedimiento que se empleaba accesoriamente a una *actio reivindicatio* para que el poseedor o detentador de una cosa la presentase ante el magistrado para poder después intentar la acción principal. Sin embargo, la regulación del acceso a la información y fuentes de prueba se ha detenido en esa posibilidad de exhibición durante muchos siglos, lo que supone un verdadero obstáculo a la consecución de la verdad material en un proceso civil, ya que solamente puede a llegar a exhibirse un documento del que ya se conoce su existencia. Pero es que, además, la ausencia de una regulación adecuada que permita la conexión extra/intra-probatoria procesal puede dañar, como hemos adelantado, nuestro sistema de tutela judicial efectiva y condenar a las partes de un proceso a prescindir de una defensa adecuada, precisamente por no contar con mecanismos adecuados que permitan acceder a unas fuentes de prueba que no pueden ser obtenidas.

Por el contrario, en los ordenamientos del *common law*, la institución del *discovery* cumple con los objetivos de facilitar esa investigación probatoria que garantice una buena defensa de las pretensiones en el juicio, en un sentido realmente amplio y con mecanismos mucho más efectivos que los previstos en los ordenamientos europeos continentales (ORMAZÁBAL, 2020, p. 301). Para nuestro estudio, el modelo estadounidense de dicha institución representa el punto de partida para un análisis comparado de las estrategias de defensa en la determinación de las características de una controversia civil en la fase preparatoria (DONDI, 1991, p. 118).

No obstante, no todos son luces en la apología del *discovery*: el uso indiscriminado de dicho mecanismo puede conducir a un abuso procesal que dificulte las estrategias defensivas de las partes, lo que DONDI denomina la utilización del mecanismo con una finalidad esencial de h*arassment* (1991, p. 119) que, además de ralentizar e incrementar el coste del litigio, desencadena, paradójicamente, en una falta de eficiencia procesal. Este abuso constituye la otra cara de la moneda que es necesario equilibrar para que el sistema probatorio y, principalmente, la investigación probatoria cumpla la función esencial en el proceso a la que se refería el Prof. Guasp.

Un profundo estudio, por tanto, de la institución del *discovery* revela conclusiones interesantes que extrapolar al propio estudio de nuestros sistemas

procesales. No hay que olvidar que el mensaje central de la ciencia del derecho comparado es la necesidad de fijar parámetros de comparabilidad respecto a las normas jurídicas de distintos ordenamientos. Para el derecho procesal comparado esto es de capital importancia, ya que las normas procesales solo pueden revelar su sentido si se considera el contexto procedimental en el que operan (VOGT, 2022, p. 161). En efecto, como ha señalado DONDI (2018, p. 53), dichas referencias resultan hoy día absolutamente indispensables en cualquier trabajo científico. De manera distinta a lo que acontecía en el pasado, cuando ser comparatista en el campo procesal representaba una culpa prácticamente inexcusable, desde, por lo menos, la mitad o el final de los años noventa parece imposible evitar los llamados "indispensabili richiami comparatistici", y esto claramente a pesar de su calidad o falta de ella.

El trabajo que presentamos en las siguientes líneas pretende sumergirse en el análisis de aquella institución, con el objetivo de desgranar el recorrido evolutivo de la misma y así extraer conclusiones sobre el estado actual de la regulación del esclarecimiento probatorio en los ordenamientos estadounidense, por un lado y las directrices marcadas por el derecho de la Unión Europea, por otro, en esa incipiente expansión de mecanismos reguladores del acceso a la información y las fuentes de prueba. Trataremos de demostrar que las influencias entre ambos sistemas acercan tímidamente los perfiles de la institución, con la coartada de la eficiencia en el punto de mira del observador jurídico-procesal. Dicho acercamiento no es solo unidireccional, sino que se produce también bidireccionalmente, de manera que la evolución de la institución ha demostrado la inspiración del sistema procesal estadounidense en sistemas continentales, sobre todo con una de las últimas reformas de la institución en el año 2015, que se traduce en el otorgamiento de una función más activa al juez en esta fase del proceso, lo que se ha venido a denominar "hibridización" de los sistemas (PEÑA, citando a Damaska, 2017, p. 86).

A diferencia de la doctrina española en la que son puntuales las incursiones en el análisis comparado de esta institución, la italiana ha sido más "revolucionaria" en este aspecto, dadas las tomas de posición de marca reformadora que asumen predominantemente forma de críticas en clave metodológica de las reformas frustradas en dicho país. Se trata de uno de los temas descubiertos por los representantes del enfoque reformador minoritario de la escuela italiana alrededor de la última década del siglo veinte (DONDI, 2018, p. 54), por lo que, a nuestro juicio, resulta altamente conveniente realizar un recorrido sobre la evolución de dicha doctrina, de gran interés científico para nosotros.

2. EL MODELO ESTADOUNIDENSE DE ACCESO A LA INFORMACIÓN Y FUENTES DE PRUEBA

2.1. El discovery como institución ajena al sistema procesal europeo continental: ¿estrechando lazos?

Aunque la institución del *discovery* aparece ligada a los ordenamientos del *common law*, sus orígenes se encuentran estrechamente vinculados al proceso romano canónico (BESSO, 2014, pp. 126-140), lo cual resulta sorprendente, dado el tradicional rechazo de los sistemas jurídicos europeos continentales a la figura. Como establece ORMAZÁBAL (2020, p. 301), "hasta tal punto se trata de una institución en cierto modo repugnante a la mentalidad procesal de la Europa continental, que es precisamente la peculiaridad del proceso norteamericano que mayores motivos de fricción ha provocado desde tiempos remotos entre Europa y los EEUU".

En efecto, ha sido en aquellos ordenamientos donde la institución ha tomado forma y se ha convertido en uno de los estandartes icónicos del sistema procesal de los Estados Unidos, sistema que se caracteriza por un conjunto único de atributos que los comentaristas han llamado "el excepcionalismo estadounidense" (CHASE, 2002, pp. 277-301, MULLENIX, 2014, p. 49).

La institución nace en el derecho inglés, evolucionando a partir de una característica única de los primeros procedimientos de equidad ante el Tribunal de Equidad inglés (Court of Chancery). En algún momento entre el reinado de Isabel I (1558-1603) y finales del siglo XVII, las posiciones fueron sustituidas gradualmente por los interrogatorios y a disponibilidad de la institución en *equity* atrajo a los litigantes en *actions at law* (procedimientos judiciales en los tribunales de *common law*). (GOLDSTEIN,1981, pp. 257-270).

Actualmente, regulado en las reglas 26 a 37 de las *Federal Rules of Civil Procedure* (FRCP), el *pretrial discovery* es el procedimiento procesal a través del cual cada una de las partes puede obtener información de las otras, de cara a concretar el objeto de la controversia, determinar sus posiciones y recopilar prueba para el posterior proceso judicial. Esta fase del procedimiento, que se desarrolla antes del juicio y después de los llamados *pleadings*, permite a las partes, no sólo acceder a las fuentes de prueba concretas cuya existencia les consta, sino también desarrollar una verdadera investigación en la esfera privada de aquéllas con el fin de comprobar si existen pruebas o hechos desconocidos que puedan contribuir al éxito de su pretensión (ORMAZÁBAL, 2020, p. 301). A diferencia de determinadas instituciones europeo-continentales en los que la posibilidad de investigación preparatoria se limita únicamente a las fuentes de prueba documentales, los diferentes medios de los que pueden servirse los abogados de las partes están recogidos en las Rules 27 a 35 FRCP, que podemos resumir en las siguientes líneas:

— Prueba anticipada (Depositions to perpetuate testimony). La Rule 27 prevé el mecanismo para que se tome declaración a un testigo antes de que se presente la demanda con el fin de perpetuar o preservar su testimonio para el juicio.

— Interrogatorios de las partes (Interrogatories to parties)

— Presentación de documentos, información almacenada electrónicamente y objetos materiales, o entrada en terrenos para inspección y otros fines (Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes). Una parte puede solicitar inspeccionar, copiar, probar o tomar muestras de los siguientes elementos en posesión, custodia o control de la parte demandada: cualquier documento designado o información almacenada electrónicamente —incluidos escritos—, dibujos, gráficos, tablas, fotografías, grabaciones de sonido, imágenes y otros datos o compilaciones de datos almacenados en cualquier medio del que pueda obtenerse información directamente; cualquier cosa tangible designada; o permitir la entrada en un terreno designado u otra propiedad poseída o controlada por la parte demandada, de modo que la parte solicitante pueda inspeccionar, medir, estudiar, fotografiar, probar o tomar muestras de la propiedad o de cualquier objeto que se encuentre en ella.

— Exámenes físicos y mentales (Physical and Mental Examinations) . El tribunal que conozca del litigio podrá ordenar a una parte cuyo estado mental o físico —incluido el grupo sanguíneo— sea objeto de controversia que se someta a un examen físico o mental realizado por un examinador debidamente autorizado o certificado. El tribunal tiene la misma autoridad para ordenar a una parte que presente para su examen a una persona que esté bajo su custodia o bajo su control legal.

Como estableció el TS de EEUU, su finalidad es "*make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent*" (United States v. Proctle and Gamble Co., 365 U.S. 677, 682 (1958). Por lo tanto, excede de un simple mecanismo de acceso a fuentes de prueba puesto que cumple funciones añadidas que revitalizan la eficiencia del proceso civil (TROCKER, 2010, p. 120), a saber:

— por un lado, se le atribuye el propósito de que una vez tramitada la misma, la resolución de los procedimientos responda en la mayor medida posible a la realidad de los hechos y dependa, en cambio, lo menos posible de tácticas más o menos ingeniosas o sorpresivas de los abogados durante el juicio;

— por otro, puede cumplir una función equivalente al aseguramiento de prueba, en la medida en que permite preservar un determinado testimonio que, por las razones que sean, la parte instante cree que no podrá practicarse en la vista del juicio;

— además, el intercambio de información que tiene lugar entre las partes permite que, si finalmente debe celebrarse un juicio, las cuestiones a debatir hayan quedado convenientemente delimitadas (GUAL, 2011, p.116);

— se aspira a lograr una litis exenta de asimetrías de información que quebrante, en definitiva, tanto la igualdad de armas como la colaboración exigible a los litigantes que se ve comprometida gravemente con la así llamada "sorpresa injusta" (*unfair surprise*) (PEÑA, 2017, p. 82);

— sirve para perfilar tanto la propia posición como la del contrario, facilitando que las partes testen sus posibilidades de éxito en el juicio, allanando el camino hacia una posible transacción judicial o extrajudicial o hacia una petición de *summary judgment* si la disputa termina quedando circunscrita exclusivamente a cuestiones de naturaleza jurídica (PEÑA, 2017, p. 82);

— es más, tiene como efecto favorable el importar un incentivo para que las partes, en paralelo, consideren seria y fundadamente la adopción, en etapas tempranas del conflicto, de diversas fórmulas de medios adecuados de solución de conflictos diferentes de la justicia estatal, en el modelo ya establecido de *multidoor court room* (PEÑA, 2017, p. 85).

En todas estas funciones se debe tener muy presente el principio de lealtad implícito en el sistema procesal norteamericano, junto al principio adversarial. La lealtad procesal obliga a las partes a una información reciproca y cooperación entre ellas y el medio para realizar esta filosofía de "cartas descubiertas" es el mecanismo del *discovery*. Esta concepción ha aparecido siempre extraña al procesalista europeo, que ha tendido a catalogar como excepcional las obligaciones de colaboración entre las partes, como casi un tributo a su libertad en el litigio y a la exigencia de aplicar la carga de la prueba en su literalidad (FICARELLI, 2004, p. 139). En contra de la regulación de la carga de la prueba, que la considera desfasada, confróntese NIEVA (2023, pp. 1-23).

Son muchas las bondades que se pueden haber atribuido al sistema de *discovery* y el seguimiento de cerca de su evolución y el constante debate científico han contribuido decisivamente a realzar las ventajas que presenta. Pero, a la par que se han exaltado en algunas ocasiones las excelencias de dicho instrumento, también los problemas que ha presentado a lo largo de este siglo han ido detonando en la Europa continental un rechazo al mismo. Precisamente, la evolución de la institución desde que se implantara en el año 1938 ha sido oscilante y reveladora de la necesidad de depurar el mecanismo con vistas a evitar muchas disfunciones en el sistema que han contribuido a que el *discovery* sea visto en Europa con una visión asimétrica y quizás acontemporánea.

En este sentido, si la clásica yuxtaposición de las culturas del *common law* y *civil law* en el ámbito del derecho procesal aparecen superadas desde hace veinte años por la doctrina, que ha demostrado la relatividad de aquella percepción, de manera que hoy se habla de una relación más dinámica y estimulante entre ambos modelos procesales (ANSANELLI, 2018, p. 152), en

el ámbito de la investigación probatoria a través del *discovery*, la separación de modelos ha sido una constante desde hace varias décadas. No obstante, en los últimos tiempos, el acercamiento de los sistemas en torno a este *totem* procesal implica que no podemos rechazar como imposible el hecho de incardinar una perspectiva concreta de las citadas instituciones procesales en ambos sistemas, de forma unidireccional, o incluso bidireccional, tal y como hemos definido el objetivo de nuestro trabajo.

Prueba evidente del rechazo inicial de la institución son las reservas que muchos de los países miembros de la Unión Europea han realizado al art. 23 del Convenio de la Haya, de 18 de marzo de 1970, sobre la Obtención de Pruebas en el Extranjero en Materia Civil o Comercial, según el cual "todo Estado contratante podrá declarar en el momento de la firma, la ratificación o la adhesión, que no ejecutará las cartas rogatorias que tengan por objeto el procedimiento conocido en los países de *common law* con el nombre de *pretrial discovery of documents*". Si bien la institución del *discovery* no se limita a la investigación probatoria de documentos, sino que se extiende a todo tipo de fuentes de prueba, como veremos en el siguiente epígrafe, el referido Convenio limita las comisiones rogatorias al *disclosure* (revelación) documental, algo que critica GUAL (2011, p. 114). Siguiendo la posibilidad establecida en el citado art. 23, algunas Partes Contratantes han efectuado declaraciones generales en contra de todas las cartas rogatorias relacionadas con el *pretrial discovery*, otras han hecho declaraciones particularizadas que imponen ciertos requisitos para garantizar que una solicitud esté suficientemente fundamentada y las pruebas solicitadas estén claramente especificadas. En el primer caso se encuentran Italia y España, mientras que en el segundo caso se encuentra Francia, quien condiciona la aceptación de la solicitud del pretrial *discovery* a que el número de documentos se encuentre limitado y que éstos tengan una relación directa con el objeto del pleito. Esto quiere decir que si Estados Unidos, por ejemplo, solicita de España un acceso ilimitado a fuentes de prueba, España puede negar dicha solicitud con base en la reserva realizada al Convenio.

El caso de Alemania es significativo por su último cambio de rumbo en este aspecto. Una reciente modificación de la Ley alemana de aplicación del Convenio de La Haya antes referido puede cambiar la práctica habitual de este país de rechazar las solicitudes de presentación de pruebas antes del juicio, si se cumplen ciertos requisitos previos. El 1 de julio de 2022[3] entró en vigor una revisión del art. 14 de la Ley de implementación del Convenio, que convierte la anterior reserva absoluta, en virtud del art. 23 del Convenio de La Haya sobre Pruebas, en una reserva cualificada y particularizada. Este nuevo art. 14 dispone que los tribunales ejecutarán las solicitudes de asistencia mu-

[3] Vid. Gesetzesbeschluss [Law Decree], Bundesrat Drucksachen [BR] 225/22, Article 23, disponible en *https://www.bundesrat.de/SharedDocs/drucksachen/2022/0201-0300/22522.pdf?__blob=publicationFile&v=1*.

tua en materia de presentación de documentos antes del juicio si se cumplen los cinco requisitos siguientes:

— Los documentos que deben presentarse se especifican detalladamente.

— Los documentos que deben presentarse tienen una importancia directa y claramente identificable para el procedimiento en cuestión y su resultado.

— Los documentos que deben presentarse están en posesión de una parte implicada en el procedimiento.

— La solicitud no vulnera principios esenciales del Derecho alemán.

— En caso de que los documentos que deban presentarse contengan datos personales, se cumplan los requisitos para la transferencia a un tercer país de conformidad con el capítulo V del Reglamento (UE) 2016/679 del Parlamento Europeo y del Consejo, de 27 de abril de 2016, relativo a la protección de las personas físicas en lo que respecta al tratamiento de datos personales, a la libre circulación de estos datos y por el que se deroga la Directiva 95/46/CE (Reglamento general de protección de datos).

Aun a pesar de estas limitaciones, el cambio de postura de Alemania a este respecto determina que el mecanismo del *discovery* no resulta ya tan ajeno a los sistemas procesales europeos. Si a eso se le añade las recientes reformas en algunos ordenamientos que van incrementando los mecanismos específicos de acceso a fuentes de prueba, acaba resultando en una tibia acogida a un sistema más efectivo de investigación probatoria.

3. LA CONVERGENCIA DEL MODELO HACIA POSTULADOS MÁS "EUROPEIZADOS"

Desde hace ya tiempo, la doctrina ha venido señalando la constatación de que la fase preparatoria de un juicio constituye un elemento clave de valoración de la eficiencia de los ordenamientos procesales del *common law*; no en vano, esta fase del proceso civil estadounidense ha sido la que más reformas ha sufrido (DONDI, 2003, p. 162), lo que ha dado lugar a que ORMAZÁBAL le atribuya una "mala salud de hierro" (2016, p. 91).

En efecto, gran parte de los debates doctrinales respecto del buen o mal funcionamiento del proceso civil están basados en el análisis de las ventajas e inconvenientes del modelo que se fije para esta fase procesal. Señala DONDI que existen pocos estudios de derecho comparado que hayan subrayado la evolución del *discovery* desde su configuración inicial en el año 1938 (2003, p. 162). Como consecuencia de esto, se han venido construyendo percepciones erróneas de la institución, creando falsos estereotipos que no se corresponden con la realidad. Es a través del estudio de la vasta obra del autor en este tema como se puede entender la visión de la doctrina italiana acerca de esta fase procesal y sus implicaciones, como los propios conceptos de buena defensa, ética de la defensa, abuso procesal, etc.

Un somero acercamiento a las fases decisivas en su evolución nos permitirá vislumbrar, no solo la versatilidad de la figura, adaptándose y moldeándose a la consecución de la quimérica eficiencia procesal sino, además, los cimientos que puedan haberse depositado en la visión de la misma desde la atalaya de los sistemas procesales europeos.

3.1. Las FRCP de 1938: *Adversariness* en todo su esplendor

El momento de la consagración del *discovery* a nivel legislativo fue el año 1938, con la promulgación de las FRCP, teniendo la institución una acogida importante a nivel doctrinal y jurisprudencial. El caso Hickman v. Taylor de la Corte Suprema, considerado por la doctrina como el caso clave en materia de *discovery*, la encumbró como una de las mejores innovaciones de la FCPR y estableciendo que aquél constituye la vía para que las partes obtengan toda la información posible acerca del litigio. En sus propios términos: "Thus, civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial" (329 U.S. 495, 1947p. 329).

En su configuración originaria, el *discovery* encuentra su plena justificación en el modelo adversarial, en el que la actividad procesal es controlada únicamente por las partes, las cuales gestionan cada aspecto del litigio mientras el juez se coloca en una posición neutral y pasiva, de manera que se encuentra ante la delimitación de las cuestiones de juicio ya realizadas por las partes (TARUFFO, 1979 y 2001, HAZARD, 1993, DONDI, 1985). De hecho, MULLENIX califica al mecanismo como la doncella de la justicia adversarial (2014, p. 50).

De esta manera, los instrumentos que proporciona el *discovery* están dirigidos a hacer que las partes (y no el juez) puedan tomar conocimiento de las pruebas de las que disponen las contrapartes; una vez eliminado el factor sorpresa en el debate, éste se transforma en un terreno de batalla de las partes de las cuales debe extraerse la verdad material del caso. Sin embargo, como acertadamente estableció TARUFFO, el instrumento está dirigido a maximizar las oportunidades defensivas de las partes, pero no a maximizar la posibilidad de que la decisión final se funde en la determinación de la verdad de los hechos (2010, p. 129, nota 206), a pesar de que se le atribuya esa función. Y ello porque no necesariamente todas las pruebas descubiertas son efectivamente practicadas en el juicio, ya que también pueden ser objeto de *discovery* pruebas finalmente inadmisibles. La eficacia de las reglas implementadas, en un principio, a fin de obtener un ilimitado conocimiento, significa que éstas habrían impregnado el proceso federal de un carácter de juego limpio (*fairness*) que luego se revelaría como imposible.

3.2. Aparición de los problemas: *discovery abuse*

A finales de los años 70 y en los años 80 empezó a surgir un amplio consenso sobre la disfuncionalidad de esta fase que los litigantes utilizaban de forma excesiva para cargar a la parte contraria con voluminosas y costosas exigencias para proporcionar la información, sin importar la relación que tuviera con el litigio en sí, alegando que se trataba de información necesaria para la concreción de la demanda (*broad discovery*). Se hizo evidente rápidamente que las partes recurrían frecuentemente a los instrumentos de *discovery* para poder, a través de las famosas *fishing expeditions*, obtener información útil para fundamentar sus alegaciones y tener un acceso fácil a datos personales y profesionales sensibles. Se trataba de plantear investigaciones prospectivas e indiscriminadas abiertas con la esperanza de forzar un acuerdo.

Derivadas de estos excesos, se alzaban dos consecuencias perniciosas para el sistema; por un lado, el costo desmesurado del procedimiento —según algunas estimaciones, los costes de la proposición de prueba supusieron entonces entre el 50 y el 90 por ciento de los costes totales de un litigio (WILLGING, SHAPARD,,STIENSTRA y MILFICH (1997, table 4)— ya que, con arreglo al principio que rige las costas en el proceso estadounidense, cada parte soporta las costas causadas a su instancia, lo que fomentaba el uso indiscriminado del *discovery* y alentaba a las partes a cargar a sus oponentes con solicitudes de información costosas, además de que las remuneraciones de los abogados eran altísimas, por la necesaria inversión de tiempo y esfuerzo; por otro, la duración excesiva de esta fase, que enlentecía el procedimiento. Esto desembocó en una práctica habitual que se ha venido denominado *discovery abuse*. Como resultado, éste se convirtió en el centro del litigio, en lugar de ser un mero paso en el proceso de resolución.

3.3. Un *discovery* controlado

Así, identificados los problemas que planteaba la institución, se fueron sucediendo las reformas concatenadas de las FRCP hasta la última en el año 2020, lo que significa que esos problemas se han seguido arrastrando, en mayor o en menor medida, hasta el momento actual. Las dos líneas sobre las que han pivotado fundamentalmente las reformas han sido: la ampliación de los poderes del juez, incrementando su poder coactivo y coercitivo y, de otra parte, la reducción en el flujo de información que puede "descubrirse" en esta fase. Precisamente estas dos características reflejan la tendencia del legislador norteamericano a depurar un modelo que, en su esencia, comparte algunos de los rasgos característicos de los mecanismos de los sistemas europeos en el acceso a la información y prueba.

Como señala DONDI, constituye uno de los estereotipos en la materia del observador europeo la consideración de esta fase como aquella que se

caracteriza por la escasísima intervención del juez, siendo atribuidos todos los poderes de gestión a los abogados de las partes (2021, 162). La habitual concepción del sistema procesal estadounidense como *adversarial system* con atribución de un papel pasivo al juez y percepción de su función como *umpireal*, no tiene correspondencia con la realidad actual del sistema (GUAL, 2011, pp. 116 y ss), fundamentalmente con respecto a la fase previa al juicio, en la que se han ido asumiendo por parte del juez de un papel crucial y prevalente del papel asumido por los abogados. Poder creciente del juez que DE LA OLIVA deslinda de posturas ideológicas, en sus palabras, "aunque algunos puedan fundar y, de hecho, funden sus posturas acerca del papel del juez y de sus poderes en el proceso civil en imperativos o presupuestos ideológicos, es igualmente posible y absolutamente legítimo (y preferible, lo adelanto ya) que la propia opinión sobre el tema que nos ocupa obedezca a razones y motivos ajenos a las ideologías" (2012, p. 243).

Aunque se trata de un instrumento muy complejo, el recorrido de la evolución de la institución, tanto desde el punto de vista conceptual como de la propia disciplina del tratamiento de la fase del *discovery*, puede sintetizarse fundamentalmente como un fenómeno de transferencia progresiva de los poderes de control de esta fase de los abogados al juez en los últimos cuarenta años, lo que DONDI llama *discovery revolution* (2003, p. 164). En efecto, el elemento decisivo ha sido la elemental transformación de un carácter inherente a la esencia del mecanismo tal y como fue concebido en el año 1938 cuando se formularon las FRCP, como es la ausencia de participación del juez en esta actividad de requerimiento e intercambio de información entre las partes. Nótese el eufemismo de hablar de partes y no de abogados en momentos determinados donde la actividad desleal y contraria a la buena fe no es obra de las partes del proceso, sino de sus abogados.

En los años 80, la institución experimenta un cambio de dirección que se singulariza en dos modalidades de intervención del juez, activándose su papel activo en esta fase. Esas dos modalidades son la celebración de una *discovery conference* en el caso de ausencia de acuerdo en la programación de las actividades de investigación (*discovery plan*); y de otro, el reforzamiento de la potencialidad coercitiva y sancionatoria incluidas en la Rule 37, que se ha denominado como la norma de cierre del sistema (DONDI, 1985, p. 190). Posteriormente, se reveló en la práctica que el recurso a la *discovery conference* se vino utilizando con muchísima frecuencia, siendo demostrativo de su utilidad para la reducción de los tiempos de duración de esta fase. Esta circunstancia fue posteriormente confirmada en las reformas del 1993, que señalan un punto de inflexión en la centralización de la función del juez; así lo establece la Rule 16 (*Pretrial-Scheduling-Management*), que hace hincapié en la programación del intercambio de información controlado por el juez.

Una de las primeras demandas de reforma del *discovery* se abordó en la Conferencia Roscoe Pound de 1976, convocada a petición del Presidente del Tribunal Supremo, Warren E. Burger, para evaluar los crecientes problemas de los litigios. El informe final de la Conferencia observó que las *fishing expe-*

ditions parecían ser la norma, y lamentó las necesarias intrusiones en la privacidad del individuo, los altos costes para los litigantes y el correspondiente uso injusto del proceso del *discovery* como palanca para llegar a un acuerdo que habían llegado a caracterizar el sistema legal estadounidense (ERIKSON, 1978, pp.277 y 278). Dos años más tarde, en 1978, el Comité Consultivo de las Reglas Federales de Procedimiento Civil debatió sobre "refinar" el alcance de la institución en los litigios civiles (*Rule 26 Advisory Committee's note*).

Así, y enlazando con la evolución de la supervisión judicial, la característica conceptual central de ésta fue el principio de proporcionalidad, añadido en 1983 (MARCUS, 2001). En aquel momento, se promocionó como un giro de 180 grados en la orientación de las reglas de descubrimiento (MILLER, 1984, pp. 32 y 33). Se dijo que el objetivo era superponer el concepto de proporcionalidad a todo comportamiento en el ámbito de la revelación de pruebas. Pero el cambio radical no se produjo, ya que la íntegra aplicación de este principio de proporcionalidad se ha ido incorporando progresivamente a la práctica habitual del instrumento.

Y es que, descrito el *discovery* efectivamente como el instrumento procesal a través del cual las partes de un pleito se suministran información acerca de los hechos, el contenido de esta fase puede desbordarse, como efectivamente sucedió, lo que dio lugar la racionalización del mecanismo a través del citado principio de proporcionalidad. En efecto, la actual Rule 26(b) (1) establece el requisito de la proporcionalidad en la petición de aquél, por cuanto las partes podrán obtener información sobre cualquier asunto no privilegiado que sea relevante para la demanda o la defensa de cualquiera de ellas y que sea *proporcional* a las necesidades del caso, teniendo en cuenta la importancia de las cuestiones en juego en la acción, la cuantía de la controversia, el acceso relativo de las partes a la información relevante, los recursos de las partes, la importancia de la información para resolver las cuestiones y si la carga o el gasto de la información propuesta supera su posible beneficio. No es necesario que la información incluida en este ámbito de descubrimiento sea admisible como prueba para ser descubierta.

Las reformas sucesivas en cuanto a la regulación federal del *pretrial* y el *discovery* (principalmente las del año 2000) no han venido a contradecir la línea de evolución de la institución. La constricción de las peticiones de *discovery* a la información relevante para sostener las alegaciones o aquellas que aparezcan como razonablemente pensadas para constituir prueba admisible constituye una pieza fundamental para frenar las denominadas *fishing expeditions*. De esta manera, se produce la metamorfosis de un sistema de *broad discovery* y de *automatic discovery* hacia una actividad que es especifica y correlativa a la rápida y efectiva individualización del núcleo del conflicto entre las partes a través de la clarificación solo de las cuestiones realmente controvertidas (DONDI, 2003, p. 166). Además, las reformas que se inician para controlar el flujo de información que debe suministrarse en la fase de *discovery* se relacionan directamente con el aumento de los poderes del juez

en esta fase, en un intento de reducir los riesgos del mismo, pero con la potencialidad de información/clarificación que tiene el instrumento.

El 1 de diciembre de 2020 entraron en vigor las nuevas enmiendas a las Reglas Federales de Procedimiento Civil. La relevancia de la reforma está directamente relacionada con un compromiso continuo con los principios de la Rule 1 respecto a la solución justa, rápida y económica de toda acción. Tal y como pone de manifiesto el Comité Asesor en la implementación de las Rules (*Advisory Committee*), el objetivo de la reforma es directo: conducir a las partes a gestionar las disputas y aportar eficiencia al proceso judicial. De hecho, con este comentario, el Comité anima expresamente a las partes a revelar más sobre sus respectivas posiciones para cumplir con sus deberes en curso para agilizar el *discovery*. Vuelven a ponerse sobre la mesa el principio de lealtad procesal y el deber de colaboración de las partes en el proceso, como características propias del sistema procesal norteamericano tras las FRCP (*candor to the court*) y que han permeado en la aproximación legal que la Unión Europea hace a los sistemas de acceso a la información y fuentes de prueba, como veremos en la segunda parte de este trabajo.

3.4. El *e-discovery*

El acceso a información y fuentes de prueba electrónicas (*E-Discovery*) constituye otra de las etapas en la evolución del *discovery*. Aunque pudiera considerarse como la última etapa en la evolución, por aquello de que la revolución digital parece siempre como lo más novedoso, lo cierto es que ya en la década de 1960, los legisladores de las FRCP empezaron a considerar la necesidad de revelar material electrónico, y la *Rule* 34 se modificó en 1970 para incluir compilaciones de datos de las que pueda obtenerse información. Y fue en la década siguiente cuando el acceso a este material empezó a revelarse como esencial.

Definimos el *e-discovery* como la solicitud realizada durante la fase preparatoria de un proceso judicial por una de las partes a la contraparte de documentación y de información almacenada electrónicamente (*Electronically Stored Information,* en su acrónimo*, ESI*).

Si bien las normas para el acceso a información electrónica son similares al acceso a la información tradicional, el *e-discovery* presenta algunos problemas que no son aplicables a las peticiones de investigación tradicionales. Una de las fuentes de documentación más importante en materia de *e-discovery* son los trabajos realizados por la *Sedona Conference*. La Conferencia de Sedona sobre Retención y Producción de Documentos Electrónicos está conformada por un grupo de abogados y otras personas con experiencia en el manejo de información electrónica en litigios. El grupo se reunió en octubre de 2002 para tratar por primera vez el tema de la producción de información electrónica en el marco del acceso a la información y fuentes de pruebas. Al grupo le preocupaba si las normas y conceptos desarrollados en gran medida

para el acceso a fuentes de prueba en papel serían adecuados para abordar las cuestiones del acceso a fuentes de prueba electrónicas. Tras un intenso diálogo, surgió un conjunto de principios básicos y recomendaciones de buenas prácticas para abordar la producción de información electrónica en los litigios. Estos principios se conocen como los Principios de Sedona (2018). Aunque no podemos realizar un estudio exhaustivo toda la problemática que ha ido suscitando el mismo a lo largo de los años en los EEUU, sí nos resulta interesante resaltar algunos de los problemas a los que las FRCP han ido dado solución, problemas que son perfectamente exportables a los mecanismos de acceso a información y prueba en los sistemas europeos continentales.

— El primero de ellos es la mutabilidad de los contenidos electrónicos; la naturaleza dinámica y cambiante de los datos electrónicos puede hacer que sea difícil que una parte obtenga la información pertinente si los datos se han modificado o destruido. Este problema ha determinado la necesidad de que surja un nuevo deber procesal que aparece antes incluso que el proceso exista; el deber de diligencia en la preservación de este tipo de información. La reforma procesal de las FRCP en diciembre de 2006 y que continúa en enero del año 2009, se centró en destacar que dicho deber se verá conculcado no solo cuando las partes se enfrentan a un concreto proceso sino también cuando resulte previsible que éste tenga lugar. De este modo, el citado deber, que surge en el ámbito estrictamente procesal, se hace extensivo a todos los ámbitos del Derecho desde la protección de los datos de carácter personal, a los aspectos contables, administrativos, etc, atendida la eventualidad de la judicialización de las cuestiones que a aquellos se refiere (GUDÍN-MAGARIÑOS, 2010, p. 205).

En este sentido, la *Rule* 26 (a) que abarca la información inicial que las partes deben proporcionar (*disclosure*) establece que cada parte debe proceder, sin esperar la solicitud de *discovery*, a proporcionar a las demás, entre otros datos, una copia o localización de todos los documentos electrónicamente almacenados, además de los soportes tangibles que la parte tenga en su posesión, custodia o control y debe usar para mantener su demanda o defensa. Es interesante, en este sentido, la jurisprudencia norteamericana detonante de las reformas, analizada por GUDÍN-MAGARIÑOS (2010, pp. 212 y ss).

— El segundo de los problemas deriva también del enorme volumen de información que se almacena electrónicamente y que eleva los costos de la búsqueda de información. Las inmensas capacidades de generación, registro y almacenamiento de datos que poseen los sistemas informáticos, así como la evolución de las tecnologías de recuperación de la información permite que, en la actualidad, se disponga de la posibilidad de acceder a un volumen de información electrónica prácticamente ilimitado. Esta realidad ha generado dificultades muy serias para el correcto desenvolvimiento del proceso de *discovery*, en la medida en que, por un lado, supone un incremento muy notable de sus costes (en términos del dinero, del tiempo y del esfuerzo humano necesarios para efectuar la revisión manual de la información) y, por otro,

contribuye a que en esta etapa procesal se multipliquen las oportunidades de disputa entre las partes sobre cuestiones tales como la extensión de la información a revisar o el método adecuado para realizar la búsqueda, en ocasiones, con el único ánimo de dilatar el proceso o, sencillamente, de dificultar la labor del oponente, (SOLAR, 2020, parr. 21). No obstante, como veremos más adelante, la inteligencia artificial puede ayudar a paliar este problema.

Aunque el principio de proporcionalidad es aplicable en toda su extensión también a toda la información almacenada electrónicamente, el aumento de información encarece el coste del acceso y dificulta sobremanera la selección de la información relevante para los abogados, de manera que, una vez más, la eficiencia del sistema se ve comprometida. No obstante, la *Rule* 26(b)(2)(B), introducida en la reforma de 2006, establece las limitaciones específicas sobre la información almacenada electrónicamente.

— El tercero de los problemas en materia de acceso a información almacenada electrónicamente es el límite de la confidencialidad y de la protección de datos que se recrudece en este ámbito. En el derecho norteamericano, los derechos asociados a la confidencialidad o a la intimidad pueden ser objeto de renuncia, la cual puede tener lugar con conocimiento de la parte o inadvertidamente como consecuencia del acceso fortuito a dicha información. El problema que se presenta cuando tratamos de información electrónicamente almacenada es que, atendido el gran volumen de información que se contiene en los soportes electrónicos, la aportación indiscriminada al proceso de los soportes que contienen este tipo de información, pueden dar lugar a situaciones en que la parte que haga aportación de aquéllos quede expuesta a verse sorprendida por revelaciones inesperadas o por información comprometida, situación que la dejaría en manifiesta indefensión, no solo por el hecho de la vulneración de los derechos que pueda implicar el acceso a ciertos contenidos, sino también por el carácter parcial de dicha información al extraerse de un contexto en el que la información no se encuentre perfectamente sistematizada. Todo esto puede dar lugar a una renuncia tácita de la parte a la situación privilegiada de la parte, cuyas consecuencias pueden ser decisivas en el curso del pleito (GUDÍN-MAGARIÑOS, 2010, p. 233).

3.5. La inteligencia artificial en el acceso a la información y fuentes de prueba

Como hemos puesto de manifiesto en el epígrafe anterior, muchos de los problemas derivados de la llamada *e-discovery* se concentran en torno al volumen de información que los soportes digitales contienen, además del deber de preservación de la información que puede elevar este volumen. Se han utilizado muchas herramientas destinadas a la selección de la información relevante, fundamentalmente la llamada *keyword* (palabra clave), pero se han demostrado claramente insuficientes.

Para paliar estos problemas que redundan, obviamente, en la eficiencia del mecanismo, la inteligencia artificial puede dotarnos de instrumentos de codificación predictiva que pueden ser extremadamente útiles en el *e-discovery*. La codificación predictiva resulta ser una tecnología diseñada específicamente desde su origen para el desempeño de una tarea legal. Se trata de una herramienta que se ha mostrado capaz de analizar enormes volúmenes de información electrónica procedentes de cualquier tipo de fuente y en cualquier tipo de formato digital e identificar aquella que es relevante en el contexto de un determinado proceso judicial de una manera mucho más rápida, económica y precisa que cualquier equipo de abogados. De esta manera, la utilización de inteligencia artificial viene a paliar las desventajas de una *ESI* ingente y desproporcionada, en ocasiones, incluso molesta.

Ahora bien, la utilización de la inteligencia artificial en el seno de los sistemas procesales debe ser analizada de forma cautelosa y cuidadosa. Como señala COMOGLIO (2022, p. 60), es diferente utilizarla para que ésta "sugiera" una posible selección de las pruebas a las partes o al juez, preservando la libertad judicial, o directamente "seleccione" las pruebas dejando a las partes y al juez exclusivamente el control de si se opera o no esta selección. Creemos que la segunda de las funciones pone en juego muchas cuestiones éticas que de momento están siendo cuestionados en el ámbito del derecho. Pero respecto de la primera opción, es interesante ver la progresiva utilización de estos mecanismos en EEUU, utilización amparada por la propia jurisprudencia norteamericana en numerosas ocasiones. La primera resolución data de hace 10 años ya, Da Silva Moore v. Publicis Groupe & MSL Group, [No. 1:2011cv01279 – Document 96 (S.D.N.Y. 2012)]. Es lo que se ha denominado *Technologic Assisted Review* (TAR). No obstante, hay que señalar que los casos en los que se ha permitido, ha sido una cuestión decidida de común acuerdo por las partes para la fase del *discovery*, habiéndose rechazado por parte de los tribunales, de momento, la coerción para utilizarla. En este sentido, la sentencia del Juez Peck en el caso Hyles contra la ciudad de Nueva York [Hyles v. N.Y. City 2016 WL 4077114 (S.D.N.Y. August 1, 2016)], recoge la negativa a ordenar al demandado que la utilizara, citando el Principio 6 de *Sedona Conference*, que establece claramente que las partes son las mejor situadas para evaluar los procedimientos, metodologías y tecnologías apropiados para preservar y producir su propia información almacenada electrónicamente.

4. EFICIENCIA DEL MODELO PROCESAL CIVIL EUROPEO CON RELACIÓN AL ACCESO A LA INFORMACIÓN Y FUENTES DE PRUEBA

Como ya hemos puesto de manifiesto, la investigación preparatoria civil en los procesos de corte europeo-continental ha distado mucho de aproximarse a una institución como el *discovery*. Como bien pone de manifiesto GASCÓN INCHAUSTI (2020, p.785), "ocurre, además, que en muchos ordenamientos

de corte continental el acceso a esas fuentes de prueba es limitado: en ocasiones, por las propias reglas procesales en sí mismas, que no contemplan un derecho a reclamar y un correlativo deber de exhibir fuentes de prueba, o lo hacen de manera muy timorata; en otros casos, se añade a lo anterior la prevalencia que se otorga a normas aparentemente colaterales a las procesales, como las relativas a la protección de datos, de información confidencial o de secretos comerciales".

Tradicionalmente, la mayoría de los ordenamientos procesales civiles han regulado desde hace tiempo la exhibición de documentos en sede probatoria para aquellos documentos que no están en poder de la contraparte, regulación que adolece de grandes diferencias con la exhibición de documentos en la fase del *discovery*. Si tomamos distancia de esa similitud inmediata y miramos su función dentro del contexto procesal, aparece una diferencia determinante. La mayoría de las regulaciones de la exhibición —al margen de las diligencias preliminares de exhibición de cosa mueble— se incardinan en la fase procesal de prueba y no antes, de manera que se entiende como operación probatoria, en el sentido que permite suministrar una base para la decisión del tribunal sobre la ocurrencia de los hechos. En el *discovery* estadounidense, la exhibición de documentos en cambio, opera antes de cualquier etapa probatoria, lo que demuestra que tiene una función completamente distinta a la función probatoria. Su función no es aportar a una cognición por parte del tribunal, sino a una prognosis de las partes sobre el futuro desarrollo del proceso (VOGT, 2022, p. 162).

Por otro lado, las diligencias preliminares que muchos ordenamientos regulan aparecen también ciertamente limitadas en la eficacia de la investigación preparatoria puesto que se trata de un mecanismo de esa naturaleza ofrecido únicamente a la parte demandante, y no a la demandada, por lo que, en puridad, no podemos concluir en otorgarle la naturaleza de mecanismo de acceso a fuentes de prueba, puesto que vulnerarían radicalmente el principio de igualdad procesal.

Pero en los últimos años, se ha producido una cierta apertura en la Unión Europea hacia una regulación más amplia de los mecanismos de acceso a fuentes de prueba, amplitud que se refiere tanto a fuentes de prueba distintas de la documental como a la regulación de instrumentos coercitivos que redunden en una eficiencia de aquellos. En las siguientes líneas destacaremos cuáles son las líneas de actuación en este sentido, resaltando los instrumentos legislativos o paralegislativos que aquella ha empezado a implementar, de manera que podemos afirmar que se está produciendo una cierta apertura hacia un sistema eficiente en la gestión judicial de la información y fuentes de prueba, amén de una avocación hacia una tutela judicial más efectiva de las partes litigantes en un proceso.

4.1. Ampliación de mecanismos de acceso a fuentes de prueba en contextos específicos

Sin el ánimo de realizar un exhaustivo análisis de las regulaciones impulsadas por la Unión Europea en este sentido, puesto que dicho análisis excedería del objeto del presente trabajo, sí queremos destacar cuáles han sido los impulsos europeos en forma de Directivas en los últimos años, de las que se han hecho eco algunos autores como ALBA CLADERA (2022, p.246), VALLINES GARCÍA (2020, pp. 157 a 159) y GASCÓN INCHAUSTI (2018, pp. 133 y 134).

El primero de esos impulsos fue la Directiva 2004/48, de 29 de abril de 2004, relativa al respeto de los derechos de propiedad intelectual, cuyo art. 6 está referido al acceso a las fuentes de prueba, su art. 7 al aseguramiento de la prueba y el art. 8 al derecho a la información. Esta Directiva fue transpuesta por España en la Ley 19/2006, de 5 de junio, por la que se amplían los medios de tutela de los derechos de propiedad intelectual e industrial y se establecen normas procesales para facilitar la aplicación de diversos reglamentos comunitarios, que llevo a cabo una profunda reforma de las diligencias preliminares de la LEC española.

El segundo de ellos fue la Directiva 2014/104/UE del Parlamento Europeo y del Consejo, de 26 de noviembre de 2014, que establece determinadas normas por las que se rigen, en virtud del Derecho nacional, las acciones de daños resultantes de las infracciones del Derecho de la competencia de los Estados miembros y de la Unión Europea. A través de la nueva regulación se permite que los justiciables en el campo del Derecho de la competencia tengan conocimiento de los elementos que les puedan servir para tratar de formar la convicción judicial en los procesos en los que se reclamen daños. España transpuso dicha Directiva en su Real Decreto-ley 9/2017, de 26 de mayo. El citado RD introdujo una modificación en la LEC para facilitar la prueba en los procedimientos por daños resultantes de la violación de las normas sobre competencia, con el objetivo principal de la consecución de una mejor tutela de los derechos de los justiciables en dicho campo. A tal fin, se estableció una regulación sobre el acceso a las fuentes de prueba en la Ley 1/2000, de 7 de enero, mediante una nueva Sección 1.ª bis («Del acceso a las fuentes de prueba en procedimientos de reclamación de daños por infracción de las normas de competencia»), en la que se determinan los requisitos para solicitar del tribunal una medida de acceso a fuentes de prueba, un elenco ejemplificativo de posibles medidas, así como la ejecución de éstas y las consecuencias de la obstrucción a su práctica, siempre moduladas por el principio de proporcionalidad.

El último de los impulsos europeos a la eficiencia de la investigación probatoria en el ámbito del proceso civil ha sido la Directiva (UE) 2020/1828, de 25 de noviembre, relativa a las acciones de representación para la protección de los intereses colectivos de los consumidores, y por la que se deroga

la Directiva 2009/22/CE, 2020. En sus arts. 18 y 19 se prevé la exhibición de pruebas para las acciones en defensa de intereses colectivos de consumidores y usuarios. Ya en EEUU quedó suficientemente demostrada la eficacia del *discovery* en las llamadas *class actions* y la Unión Europea ha querido dar un toque de eficiencia en la futura regulación de los ordenamientos de los Estados Parte en este ámbito tan vulnerable para los consumidores. En efecto, en todos estos casos parece que existe una mayor trascendencia social o colectiva de los intereses a proteger y, por tanto, mayor relevancia en la importancia del debido acceso a las fuentes de prueba, amén de que, en muchas ocasiones, la desigualdad intrínseca de las partes puede derivar en un aumento de la dificultad probatoria. España ha empezado a tramitar la transposición a través de un Anteproyecto de Ley de acciones de representación para la protección de los intereses colectivos de los consumidores, en el que, en lo relativo al acceso a fuentes de prueba, se remite a la regulación en materia de infracción del derecho de la competencia.

4.2. La propuesta de Directiva sobre normas mínimas comunes en el proceso civil

En el ámbito de los instrumentos jurídicos del llamado *soft law* se encuentran las llamadas normas mínimas comunes en el proceso civil en la Unión Europea. De conformidad con el art. 81, apartado 2, del Tratado de Funcionamiento de la Unión Europea (TFUE), que hace referencia a la cooperación judicial civil, ésta puede adoptar medidas destinadas a garantizar, entre otras cosas la cooperación en la obtención de pruebas, el acceso efectivo a la justicia y la eliminación de los obstáculos al buen funcionamiento de los procedimientos civiles, fomentando, si es necesario, la compatibilidad de las normas de procedimiento civil aplicables en los Estados miembros. De esta manera, el Parlamento Europeo adoptó la Resolución de 4 de julio de 2017 con recomendaciones a la Comisión sobre normas mínimas comunes de procedimiento civil en la UE (Res. 2015/ 2084 (INL), entre las que se incluyen una Propuesta de Directiva sobre Normas Mínimas Comunes que se aplicaría en los litigios con repercusión transfronteriza en materia civil y mercantil.

Esta Propuesta de Directiva se hace eco de la eficiencia procesal en su art. 7.1 y con relación indirecta a la información y fuentes de prueba, establece que: "Los órganos jurisdiccionales de los Estados miembros respetarán el derecho a la tutela judicial efectiva y a un juez imparcial que garantice el acceso efectivo a la justicia y el principio contradictorio del proceso, especialmente cuando se pronuncie sobre la necesidad de una vista oral, sobre los medios de práctica de la prueba y sobre el alcance de la práctica de la prueba". Por otra parte, el art. 9.2 al establecer los principios generales de la tramitación del procedimiento, hace referencia a conceptos tan típicamente anglosajones como la cooperación de las partes durante el proceso, la determinación de los problemas en una fase temprana, y el establecimiento de calendarios para controlar el desarrollo de la acción, entre otros. Pero, sobre

todo, el art. 10 de la Propuesta, relativo a la práctica de la prueba, establece que los Estados miembros deben velar por la disponibilidad de medios eficaces para presentar, obtener y conservar las pruebas teniendo en cuenta los derechos de defensa y la necesidad de proteger la información confidencial. Esto significa una asunción de la necesidad mecanismos de obtención de información y fuentes de prueba

4.3. Las Reglas de ELI/UNIDROIT sobre un proceso civil europeo (*European Rules of Civil Procedure*)

En 2004, UNIDROIT, junto con el *American Law Institute* (ALI) publicaron los Principios ALI-UNIDROIT sobre el proceso civil transnacional, otro instrumento de *soft law* para facilitar la litigación transnacional (HAZARD,TARUFFO, STÜRNER y GIDI, 2001), en el que se realiza una primera aproximación a unos principios generales en materia del acceso a la información y la prueba.

Partiendo del principio de buena fe de las partes y sus abogados al tratar con el tribunal y con las otras partes (Principio 11.1), el principio 16 hace referencia al acceso a la información y la prueba. Con carácter general, el tribunal y cada parte deberán tener acceso a las pruebas relevantes y no confidenciales, incluyendo las declaraciones de las partes y de los testigos, dictámenes de peritos, documentos y pruebas provenientes de la inspección de bienes, del ingreso a inmuebles o, bajo circunstancias adecuadas, del examen físico o mental de una persona. Las partes deberán tener derecho a presentar declaraciones a las que se les atribuya valor probatorio (16.1). Ante la solicitud oportuna de una parte, el tribunal deberá ordenar la revelación de pruebas relevantes, no confidenciales y razonablemente identificadas que estén en posesión o bajo el control de otra parte, o si fuera necesario y en justos términos, de un tercero. Tal exhibición no puede objetarse porque la prueba pueda ser adversa para la parte o para la persona que hace la revelación (16.2).

Los *Transnational Principles* reflejaron perfectamente la convergencia entre los dos sistemas que la evolución del sistema norteamericano había experimentado y la convicción de los sistemas europeo-continentales hacía una mayor permisividad en el acceso a las fuentes de prueba en poder de la contraparte o terceros. Así, aquéllos tendían a evitar en cierta manera los excesos de ambos sistemas; por un lado, la tendencia norteamericana hacia un *broad discovery*; y de otro, el peligro de una terminación excesivamente temprana de la búsqueda de fuentes de prueba (STÜRNER , 2005, p. 237).

Estos principios constituyeron un modelo de equilibrio entre las distintas familias y tradiciones jurídicas, pero no se adaptaron bien a las especificidades de los sistemas jurídicos europeos. Por ello, el *European Law Institute* (ELI) y UNIDROIT unieron sus fuerzas para desarrollar unas Reglas Modelo Europeas de Proceso Civil (ERCP, en su acrónimo en inglés) que se publicaron en 2020. Las Reglas están formuladas en inglés y francés, idiomas ofi-

ciales de ambas instituciones y pueden consultarse aquí: unidroit.org/instruments/civil-procedure/eli-unidroit-rules. La traducción al español no oficial ha sido realizada por GASCÓN y DE BENITO en el marco de las actividades de la Cátedra Jean Monnet de Derecho Procesal Civil Europeo de IE University, financiada por la Comisión Europea.

Se califican estas reglas como europeas en un sentido amplio, ya que éstas no emanan de ninguna institución de la Unión Europea ni, por supuesto, implican ningún tipo de vinculación ni por la propia Unión ni por sus Estados miembros (ALBA CLADERA, 2022, p. 247). La idea era ir más allá de la formulación de los principios transnacionales y desarrollar normas más detalladas, teniendo en cuenta los instrumentos jurídicos existentes a nivel de la UE, las tradiciones jurídicas europeas y la evolución jurídica actual en Europa, de manera que se perfeccionara un modelo de *soft law* con relación a la posible armonización de un proceso civil europeo, en su contenido mínimo. La conclusión de este proyecto no es más que el final del primer paso. Tal y como establece el Preámbulo de las Reglas, éstas deben iniciar ahora un nuevo viaje, una fascinante incursión en la modernización de un Derecho procesal europeo más armonizado y que permita una mejor comprensión y un mejor uso de las normas procesales, objetivo especialmente relevante en una época en la que circunstancias extremas pueden poner a prueba los sistemas procesales.

En lo que respecta a la materia de acceso a la información y prueba, uno de los aspectos más difíciles de todo el texto propuesto (GASCÓN, 2021, p. 292), el modelo de ELI/UNIDROIT sigue la línea iniciada con las Directivas europeas señaladas en el epígrafe anterior. El conjunto de normas sobre acceso a la información y a las pruebas contenidas se basa en un enfoque pragmático y realista del derecho constitucional a la prueba (GASCÓN y STÜRNER, 2019, p. 19). Se produce así esa tibia convergencia con el modelo previsto en los ordenamientos del *common law*, tal y como lo define GASCÓN, en una suerte de "*European way to discovery*", que permita superar las dificultades a la hora de acceder a las pruebas en poder de la contraparte o de terceros, pero sin incurrir en los peligros y excesos asociados a esta herramienta en el modelo procesal civil estadounidense (2019, p. 19). Conviene recordar aquí la evolución de la que nos hemos hecho eco en los epígrafes anteriores del mecanismo del *discovery* y también su tibia convergencia hacia un modelo más controlado por el juez y con requisitos de proporcionalidad que constriñen el flujo de información que se pretende obtener.

Sin ánimo de realizar una descripción detallada de la regulación propuesta en las ERCP, que ya ha realizado la doctrina más autorizada, y partiendo de que el Capítulo 2º del Título VII establece, con carácter general, la posibilidad de que se decrete judicialmente a instancia de parte el acceso a la información y a las fuentes de prueba en poder de otras partes o terceros, las principales características de la misma y que constituyen elementos convergentes en ambos sistemas son las siguientes:

— El modelo parte de un principio básico de deber de colaboración de las partes y sus abogados, lo que podría encuadrarse bajo un genérico principio de lealtad procesal (arts. 2, 3 y 4).

— La necesaria constricción de la información para no sobrepasar el umbral de eficiencia del mecanismo y conseguir un efecto paradójico del mismo mediante la avalancha de información innecesaria que colapse el sistema. Los autores de las Reglas son especialmente cautelosos al establecer expresamente la proscripción de cualquier solicitud de acceso a fuentes de prueba que pretenda la obtención de información de forma genérica, especulativa o injustificadamente amplia. La constricción está basada en cuatro criterios básicos establecidos en el art. 102.2; a saber, necesidad (que la fuente de prueba a que pretende acceder es necesaria para probar hechos controvertidos del proceso, actual o potencial); subsidiariedad (que no puede acceder a esa fuente de prueba sin la ayuda del tribunal) y proporcionalidad (que las fuentes de prueba a las que pretende acceder son, por su naturaleza y cantidad, razonables y proporcionadas, para cuya determinación se tendrán en cuenta los intereses legítimos de todas las partes y terceros interesados).

— La ponderación de la confidencialidad. La confidencialidad de la información podrá ser sopesada con relación a las circunstancias de los criterios anteriormente expuestos, pero protegiéndola mediante medidas determinadas como suprimir pasajes sensibles en documentos; celebrar audiencias a puerta cerrada (*in camera*); limitar las personas a las que autoriza el acceso o la inspección de la prueba; encargar a peritos la elaboración de resúmenes de la información en forma agregada o en cualquier otra forma no confidencial; redactar versiones no confidenciales de resoluciones judiciales en las que se supriman pasajes que contengan datos confidenciales; limitar el acceso a determinadas fuentes de prueba a los representantes y abogados de las partes o a peritos sujetos a obligación de confidencialidad.

5. EL *E-DISCOVERY* EN LA UNIÓN EUROPEA

Tal y como poníamos de manifiesto en el apartado referente al llamado *e-discovery* en el derecho estadounidense, dada las crecientes líneas convergentes entre ambos sistemas, la mayoría de los problemas planteados por la *ESI* pueden resolverse con los criterios establecidos de proporcionalidad, necesidad y utilidad que regulan los instrumentos europeos de acceso a la información y fuentes de prueba, ya reseñados anteriormente.

Es el problema de la confidencialidad de los datos y la protección del derecho a la intimidad el que ha planteado mayores problemas, articulándose la utilización de nuevos instrumentos en el desarrollo de los mecanismos de acceso a la información y prueba, fundamentalmente en el ámbito de los procesos en defensa de la competencia. La Directiva no hace referencia a este recurso, pero es algo que se viene utilizando en la práctica con base en documentación proporcionada por la Unión Europea. Estamos haciendo

referencia a lo que se denominan "salas de datos virtuales", incluidas como recomendación de la Comisión Europea en su documento de 2018 *Directrices destinadas a los órganos jurisdiccionales nacionales sobre cómo calcular la cuota del sobrecoste que se repercutió al comprador indirecto*, en materia de procesos en defensa de la competencia. En ellas se establece, en el parágrafo 30 que, al ordenar la exhibición de información confidencial, es fundamental que el órgano jurisdiccional haya implantado medidas destinadas a proteger la misma. Algunos ejemplos de este tipo de medidas pueden ser la puesta en común de información a través de círculos de confidencialidad o mediante salas de datos en los que los representantes de las partes pueden acceder a la información confidencial pertinente para el asunto en cuestión. La Comisión utiliza salas de datos para dar a las partes en los asuntos de fusiones y prácticas colusorias acceso a la información confidencial; véase, por ejemplo, el documento de trabajo de la Comisión «Mejores prácticas para la obtención y practica de pruebas y la recogida de datos en los casos relacionados con la aplicación de los arts. 101 y 102 del TFUE en casos de concentración», apartado 47. No es algo que esté regulado con carácter general, pero que puede servir de guía para un eficiente acceso a la información y fuentes de prueba. La ausencia de referencia legal explicita no veta la posibilidad que se plantea (ALBA, 2022, p. 262).

De este modo, con apoyo en estos recursos, los jueces decidirán la delimitación de la extensión del acceso a la *ESI*, hasta donde llegarán las facultades de dominio y disposición del titular de la información, los medios técnicos que la harán posible y la asistencia técnica de la que podrán servirse durante su desarrollo (PASTOR, 2019, p. 216).

Por último, no podemos dejar de hacer referencia a la utilización de la inteligencia artificial en estos mecanismos de *e-discovery* en el seno de la Unión Europea. Tal y como pusimos de manifiesto con respecto a la utilización de la codificación predictiva en EEUU, esta herramienta puede ser extremadamente útil en este aspecto y aunque no tenemos normativa específica al respecto, estamos seguros de que el camino a seguir será ese, lo que también conducirá, sin duda, a un acercamiento entre los ordenamientos de *civil law* y de *common law* (COMOGLIO, 2022, p. 74).

6. CONCLUSIONES

Si el presente trabajo ha tenido como objetivo analizar las tibias líneas convergentes EEUU/Europa en la aproximación legal del acceso a la información de las fuentes de prueba, es de justicia que, en esta última parte del mismo, a modo de modestas conclusiones, se resuman cuáles consideramos que son esas líneas convergentes que puedan permitir un acercamiento entre ambos sistemas procesales.

La idea global de la que se debe partir es un cierto abandono de la tradicional ajenidad con que la institución del *discovery* ha sido vista por los

sistemas europeo-continentales. Prueba de ello es la consideración de la institución desde un punto de vista legislativo europeo, que ha llevado a la Unión Europea a introducir un mecanismo de acceso a la información y fuentes de prueba en determinados ámbitos jurídicos donde la asimetría informativa resulta más patente. Este podría y debería ser el punto de partida para que, tanto aquélla como los diferentes ordenamientos procesales nacionales, extiendan dichos mecanismos a todos los ámbitos jurídico-civiles donde sea necesario. Por otra parte, por parte de ciertos países como Alemania se ha virado de una autentica repulsa al instrumento a una aceptación del mismo a la hora de permitir, vía Convenio de La Haya de 1970, los requerimientos de *discovery* con base en procesos que se estén celebrando en EEUU.

Con base en las regulaciones legales de los mecanismos aun lado y al otro del Atlántico, debemos destacar los siguientes itinerarios confluyentes:

— La progresiva eliminación del *broad discovery* por parte de EEUU, con anclaje en el principio de proporcionalidad, tan sucesivamente reformado para intentar "afinar" el objeto del mecanismo, siempre con la idea de alcanzar un proceso eficiente, rápido y justo. Del lado de Europa, los mecanismos introducidos se centranprimordialmente en los criterios de proporcionalidad, necesidad y subsidiariedad.

— El también sucesivo aumento de los poderes de control del juez en esta fase, que han introducido el conocido concepto de *case management*, al igual que lo ha hecho Europa en sus instrumentos legislativos en las materias específicas en las que ha introducido este tipo de mecanismos.

— El tradicional principio de lealtad procesal, ética y deber de colaboración de las partes y sus defensores en el proceso, tan característico de los EEUU, ha permeado en la regulación de los mecanismos de acceso a la información y la prueba en la Unión Europea, de manera que se han extrapolado incluso a la propuesta de regulación de normas mínimas para un proceso civil europeo, con carácter general.

— La inteligencia artificial como herramienta novedosa, con perfiles legales aun dudosos, pero de marcada eficacia en estos sistemas de acceso a la información y prueba, se revela como elemento de unión también entre ambos sistemas procesales. La utilización de la misma en esta fase procesal en los EEUU, avalada por la jurisprudencia, permite considerar la posibilidad de su utilización en los mecanismos europeos de acceso a la información y fuentes de prueba.

Consideramos que estas líneas convergentes deben servir para que la Unión Europea se aventure a ampliar la regulación de los medios de acceso a la información y prueba, no solo desde un punto de vista objetivo, generalizándose las posibilidades, sino también desde un punto de vista subjetivo, extendiendo la posibilidad a cualquier litigante en el proceso.

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ANCORA SU "IL GIUDICE E L'ALGORITMO". RIFLESSIONI CRITICHE SU INTELLIGENZA ARTIFICIALE E GIUSTIZIA PREDITTIVA (OCCASIONATE DA UN CONTRIBUTO DI MICHELE TARUFFO)*

ON "THE JUDGE AND THE ALGORITHM", AGAIN. CRITICAL REFLECTIONS ON ARTIFICIAL INTELLIGENCE AND PREDICTIVE JUSTICE (STARTING FROM A CONTRIBUTION BY MICHELE TARUFFO)

Carlo Vittorio Giabardo**

ABSTRACT: A partire da un risalente, ma significativo, contributo di Michele Taruffo sull'applicazione delle tecnologie dell'intelligenza artificiale al diritto processuale, e, in particolare, circa i limiti (e le speranze) dei tentativi di formalizzare in linguaggio logico il ragionamento giudiziale (anche, ma non solo, al fine di operare predizioni), si prenderà in considerazione l'attuale insistenza sul concetto di "giustizia predittiva". L'occasione — quasi di "storia" dei rapporti tra intelligenza artificiale e processo — ci consentirà poi di andare oltre e riflettere in maniera critica sulla tendenza, attuale e futura, ad automatizzare la decisione giudiziale (o parti di essa), in un'ottica ancora più ampia di valorizzazione dell'elemento umano insito nell'atto del giudicare.

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* Di prossima pubblicazione, in versione leggermente diversa e in traduzione spagnola, in R. Cavani, G. Priori, *Diálogos con Taruffo. Un homenaje desde el Perù*, Lima, 2023. Il titolo richiama deliberatamente un mio precedente lavoro, Giabardo (2020), ma anche, con leggere modifiche, Giabardo (2021), con il quale questo contributo si pone in ideale continuità. Un ringraziamento al Prof. Renzo Cavani per i sempre proficui dibattiti sul tema e sulla versione originale dell'articolo, e ai due *referees* della *Revista*.

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PAROLE CHIAVE: Giustizia predittiva, Intelligenza artificiale e diritto, Diritto processuale civile, Giustizia Algoritmica, Giudizio.

ABSTRACT: Starting from a past, but still highly-significant, contribution by Michele Taruffo on the application of artificial intelligence technologies on dispute resolution mechanisms and, in particular, on the limits (and hopes) of the attempts to formalize legal reasoning into a logical language (also, but not only, in order to make predictions), this article will consider the current academic discussions on "predictive justice". This will also represent an opportunity to go beyond this issue and to reflect, in a critical fashion, on the present and future tendency to automize judicial decisions (or at least parts of them), highlighting the "human element" inherent in the very act of judging.

KEYWORDS: Predictive Justice, Artificial Intelligence and the Law, Dispute Resolution and Civil Process, Algorithmic Justice, Judging.

1. PREMESSA

Può apparire persino scontato ricordare come innumerevoli ed eterogenei siano i punti di contatto tra l'intelligenza artificiale e il diritto, tanto che non è possibile, in questa sede, neppure avanzare un tentativo di catalogazione: dai diritti fondamentali della persona (la protezione della *privacy* e la libera manifestazione del pensiero, solo per fare due esempi) alle questioni etiche, dal diritto contrattuale (in relazione ai cd. *smart contracts*) agli enigmi della responsabilità civile legati alla robotica e all'automazione (si pensi ai danni causati dalle *self-driving cars* o dai droni), dalla finanza all'amministrazione pubblica, dal controllo e repressione della criminalità (*cyber* o no) al diritto del lavoro (si consideri la delicata disciplina delle piattaforme digitali), dal diritto europeo a quello costituzionale (si pensi a tutte le legittime paure connesse al cd. *stato della sorveglianza*), non vi è un solo ramo dell'esperienza giuridica, oggi, che possa dirsi esente dall'interferenza della rivoluzione tecnologica in corso[1].

Una delle aree certamente più vivaci del variegato mondo dell'*Artificial Intelligence & the Law* riguarda il diritto processuale e, più in generale, il campo dell'amministrazione della giustizia. Anche qui, peraltro, le questioni

[1] Un'ottima vista panoramica di molti di questi punti di contatto la si può trovare in Barfield e Pagallo (2018). Dalla prospettiva, invece, della riflessione giusfilosofica, si vedano i contributi raccolti di recente in Martín, Jiménez (2022). Per una introduzione rigorosa e aggiornata alle categorie, Sartor (2022).

sono molteplici e distinte, interessando àmbiti diversi (per es., la professione e il mercato dei servizi legali[2]) e momenti differenti dei vari tipi di processo (quali, ad es., le indagini, laddove esistano, l'assunzione delle prove o la decisione[3]). La parte più rilevante della letteratura in tema converge però attorno all'enorme problema — che è prima di tutto filosofico — della cd. "giustizia predittiva", al quale dedicheremo le brevi riflessioni che seguono[4].

Torneremo in seguito su alcuni punti che a me paiono oscuri di questo concetto, così come usato oggi (v. *infra*, Par. 3 e 4). Basti fin da ora rilevare come, in via del tutto generale, con "giustizia predittiva" si suol far riferimento all'esigenza, e di riflesso alla capacità, di un soggetto (sia esso una parte potenziale, un avvocato, o un giudice) di poter prevedere, con un alto grado di accuratezza, una decisione e, nello specifico, la decisione finale che chiude una controversia presente (attuale) o futura (potenziale), prima quindi che questa sia decisa. L'aspirazione della prevedibilità delle decisioni, nella sua generalità, è ben radicata nella coscienza del giurista, in quanto una delle componenti fondamentali della certezza del diritto, la quale è a sua volta elemento non negoziabile dello stato di diritto[5]. In questo senso, la necessità della previsione è qualcosa di molto antico.

L'espressione "giustizia predittiva" ha però assunto un significato, se vogliamo, più radicale ed estremo con l'uso dell'intelligenza artificiale, la quale consente, soprattutto (ma non solo) grazie alle tecniche di *machine learning*, al sistema di anticipare — e, in ipotesi, anche suggerire al giudicante - la decisione, basandosi sull'esempio di una quantità che sia la più grande possibile (cd. *big data*) di casi simili passati. La macchina, estraendo dai dati disponibili nuove informazioni, fornisce quindi una conoscenza che all'uomo, senza l'ausilio dell'intelligenza artificiale, sarebbe difficilissima, se non impossibile, da raggiungere (Antoine Garapon parla dell'apertura di un orizzonte di conoscenza *"sovrumana"*[6]).

Che tipo di trasformazione può comportare tutto ciò attorno all'idea di giudicare? Perché sentiamo l'esigenza di mettere in pratica e potenziare queste tecniche? E, quindi, prioritariamente: che idea di giudizio fa da sfondo a queste evoluzioni?

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[2] Cfr. per tutti, l'analisi futuristica e autorevole di Susskind (2023).

[3] Per una visione d'insieme, cfr. Nieva-Fenoll (2018). V. anche Bueno de Mata (2022). Per l'aspetto specifico della selezione delle prove, Comoglio (2022).

[4] L'aspetto propriamente filosofico della giustizia predittiva non può essere tralasciato. Non è un caso che nel 2018 l'intero numero dei prestigiosi *Archives de philosophie du droit* (n. 1) siano stati dedicati a questo tema (*La justice prédictive*). Si vedano i contributi in *https://www.cairn.info/revue-archives-de-philosophie-du-droit-2018-1.htm. P*er molte indispensabili nozioni tecniche, eccellente ed accessibile la ricostruzione da parte di Santosuosso, Sartor (2022). V. anche il capitolo scritto da Sartor e Lagioia (2020) che si contraddistingue anch'esso per chiarezza e semplicità delle spiegazioni.

[5] Per il punto di vista del processualcivilista, v., per tutti., Costantino (2015).

[6] Garapon (2017).

2. UN PASSO INDIETRO. MICHELE TARUFFO (CRITICO, MA OTTIMISTA) E L'INTELLIGENZA ARTIFICIALE APPLICATA AL RAGIONAMENTO GIUDIZIALE

Facciamo un passo indietro, quasi di storia dell'intelligenza artificiale applicata al diritto processuale.

Nel corso della sua traiettoria, Michele Taruffo ha dedicato espressamente ed esplicitamente all'uso dell'intelligenza artificiale nel processo un solo articolo, scritto in inglese, dal taglio tecnico e dal tono sì scettico, ma aperto al futuro, pubblicato nella parte finale della decade degli anni Novanta (un'epoca nella quale scrivere di questi temi, soprattutto da parte dei processualisti, non era certo *mainstream*)[7]. Rileggere quel contributo ci dà l'occasione di ripercorrere alcune tappe dell'uso dell'intelligenza artificiale nel processo, pensare il senso di quest'uso e come questo sia oggi mutato, sia quantitativamente sia qualitativamente.

In questa analisi va però tenuto fermo un fattore di continuità che, a mio avviso, non deve passare in secondo piano nelle riflessioni attuali, e cioè che mi pare che l'esigenza sottostante all'impiego, pur variegato, degli algoritmi digitali nel processo di decisione sia - quasi in maniera sottaciuta e non esplicitata - quella di ridurre, circoscrivere, o quantomeno disciplinare il più possibile il margine d'azione del giudicante. Questo obiettivo di disciplinare e ridurre l'alveo di decisione lasciato interamente all'uomo può, naturalmente, avvenire sotto differenti vesti: offendo al giudicante strumenti che ne potenzino le facoltà razionali (ad es., il calcolo di certe probabilità), o che ne migliorino le argomentazioni, insomma, che ne potenzino l'azione (cd. *human enhancement*), di modo che egli sia naturalmente portato a fare affidamento su di essi; oppure indicandogli direttamente la strada da seguire in quanto già percorsa da giudici precedenti, semplificando e ottimizzando così il processo decisionale; oppure ancora — ma l'ipotesi è al momento lontana, seppur *filosoficamente densa*, e quindi meritevole di riflessione — sostituendo direttamente la scelta umana con la "scelta algoritmica": il che, se appare, come appena detto, non all'ordine del giorno nell'ambito del giudizio processuale a causa della sua natura altamente complessa e significativa (dal punto di vista valoriale, politico, sociale, ecc.), è già una realtà per molte altre scelte più semplici, e che pure incidono prepotentemente nella nostra vita[8].

Procediamo con ordine.

Scopo di quelle riflessioni di Michele Taruffo era sottoporre a vaglio critico una impresa che avrebbe avuto grandi sviluppi e risultati teorici di vasta portata negli anni a seguire, e cioè la rappresentazione (la formalizzazione) logico-simbolica del ragionamento giudiziale; un tipo di ragionamento che,

[7] Ci riferiamo a Taruffo (1998), contenuto anche in Sartor, Branting (1998).

[8] Ad es. per l'esame di richieste di visti, la selezione del personale, l'accesso a finanziamenti (*credit scoring*) e via dicendo.

come Taruffo stesso aveva e avrebbe poi evidenziato in molteplici suoi lavori precedenti e successivi, è caratterizzato nella pratica da una grande complessità, ben lontana dall'immagine, quasi stereotipata, che spesso se ne ha, e cioè come un facile e semplice sillogismo[9]. L'obiettivo di molti sforzi degli studiosi di logica giuridica applicata all'intelligenza artificiale era quella di, per così dire, "*computerizzare*" il ragionamento dei giudici[10]; spesso, però, ciò avveniva — almeno all'epoca in cui Taruffo scriveva le sue considerazioni — a costo di enormi semplificazioni e ingenuità, non certo in grado di restituire un'immagine né fedele né utile in concreto del "ragionamento argomentativo" contenuto nelle sentenze. È proprio su questo punto che, come ora si vedrà, la visione di Taruffo è più critica.

Taruffo esprime le sue perplessità (ma anche le sue speranze) sullo stato dell'arte. Più nel dettaglio, dopo aver messo in chiaro che la decisione giudiziale (paradigmaticamente: la sentenza) si configura, descrittivamente, come una scelta tra ipotesi alternative, o meglio, più precisamente, come un congiunto di scelte[11] (sia in quanto alla ricostruzione dei fatti, sia in quanto al diritto applicabile e alla sua interpretazione), e che quindi il ragionamento del giudice ha, fondamentalmente, una "struttura dialogica"[12], e dopo aver sottolineato con rigore che il giudice ha l'obbligo di *giustificare* — e non semplicemente di *spiegare* — la sua decisione nella motivazione[13], conclude con grande scetticismo circa la possibilità per la logica formale — almeno di quella esistente all'epoca — di catturare ed esprimere la complessità di questo processo[14].

Quello di Taruffo era sì scetticismo, ma non certo rifiuto o rigetto verso ogni tentativo di rinchiudere e ridurre a formule logiche il ragionamento giudiziale, come pure alcuni studiosi, con più pessimismo, ritenevano[15]. Al contrario, ciò che Taruffo là esprimeva era un cauto ottimismo attorno allo sviluppo futuro di un nuovo armamentario logico e quindi il plauso verso quei tentativi — portati avanti, tra gli altri, congiuntamente da Henry Prakken, professore di *Intelligence Systems* presso l'Università di Utrecht e Giovanni Sartor, professore di filosofia del diritto e informatica giuridica dell'Università di Bologna — che già all'epoca risultavano più promettenti, volti a prendere sul serio l'eterogeneità delle argomentazioni (cd. *argumentation-based approaches*) e quindi a tentare di conciliare la logica simbolica con la teoria

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[9] Non è questo l'aspetto sul quale ci soffermeremo qui. In ogni caso, v. quanto ribadito in Taruffo (2020) spec. pp. 99 ss. e in Taruffo (1989). Cfr. anche le osservazioni di Passanante (2021).

[10] La parola "computerizzare" (*computerize*) è dello stesso Taruffo (1998), p. 316.

[11] Taruffo (1998), p. 312: «*judicial decision can and should be considered as a set of choices among alternative hypotheses of possible decisions*». Per un discorso più articolato sul punto, Taruffo (1975).

[12] Taruffo (1998), p. 313: «*The judge's reasoning concerning the various hypotheses about the legal and factual issues has a basically dialogical structure*».

[13] Taruffo (1998), p. 314.

[14] Taruffo (1998), p. 316: «*If one considers the evident features of complexity, variability, flexibility and discretion that are typical of judicial decisions, any approach aimed at interpreting the judicial reasoning according to logical rules and models may appear as doomed to failure*».

[15] All'epoca, in senso molto critico, v., ad es., Leith (1998).

dell'argomentazione, a prediligere l'uso di strumenti logici complessi (quali le logiche cd. "non-monotone"), a dar conto della "vincibilità" o "defettibilità" degli argomenti (*defeseability*), a estendere lo sguardo al di fuori della deduzione: in definitiva ad abbandonare, una volta per tutte, il vetusto modello sillogistico come paradigma esplicativo della sentenza[16].

In effetti, già da tempo, soprattutto da parte degli studiosi di intelligenza artificiale, erano allo studio nuove logiche di tipo non deduttivo e modelli di ragionamento che stavano dando grandi risultati in termini di chiarezza e rigore (in particolare, ma non solo, nel difficile campo della *defeseability* e in quello del ragionamento con precedenti[17]).

2.1. (Segue). Sul "sogno" della *mechanical jurisprudence*

Viene spontaneo domandarsi circa i fini pratici, il senso concreto di tali tentativi di rappresentazione formale (non è qui in discussione il loro sicuro impatto teorico, a prescindere dalle applicazioni pratiche).

Le ragioni erano le più svariate e Taruffo ne elencava almeno due:

(1) La prima era quella di costruire programmi capaci di svolgere compiti giuridici semplici, ripetitivi e frequenti che funzionassero mediante procedure standardizzate, di modo che «*in each single case one should only insert the individual data, and the outcome — that is: an order, an act, a decree — should be automatically produced*»[18]. Qualcosa di molto simile è stato poi raggiunto, anche se in settori differenti, perché più semplici, rispetto a quello della risoluzione dei conflitti in un giudizio, quali ad es., quello delle prestazioni previdenziali e sociali o quello della pubblica amministrazione (anche se, qui, con grande cautela)[19].

(2) Un secondo fine avrebbe potuto essere quello di sviluppare programmi "di supporto" al giudice (cd. *judicial decision support systems*) in grado, ad es., di misurare la giustificabilità di certe conclusioni date certe premesse argomentative, e quindi di indicare al giudice il ragionamento "più corretto", oppure ancora di "razionalizzare" il suo margine di discrezionalità, specialmente in ambito penale: una finalità, in sé, alla quale Taruffo guardava con favore[20].

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[16] Taruffo (1998), p. 322 e 323, il quale faceva riferimento, in particolar modo, agli studi di Sartor (1994) e Sartor (1998) e di Prakken, Sartor (1996) e di Prakken, Sartor (1997).

[17] Per una visione aggiornata dei risultati, Prakken, Sartor (2015). Si veda anche, più in generale, la riflessione di Costanzo (2023).

[18] Taruffo (1998), p. 317, il quale però non manca di esprimere anche qui moderato scetticismo.

[19] Santosuosso e Sartor (2020) ricordano, a proposito dei cd. "sistemi esperti che applicano regole" (cd. *rule-based*, p. 1766), il sistema *Oracle Policy Automation*, in uso tanto nel settore pubblico di varie giurisdizioni (quali il Dipartimento per l'immigrazione australiano, nel concedere i visti), quanto nel settore privato. Sull'uso degli algoritmi nel diritto amministrativo, v., di recente, il bel volume di Gallone (2023).

[20] Taruffo (1998), pp. 319 ss. Peraltro, Taruffo metteva in guardia che, mentre da un lato «*there may be efficient AI methods to rationalize the judge's sentencing*», dall'altro «*the danger is of eliminating*

(3) Un altro obiettivo ancora — aggiungiamo noi — era quello di costruire sistemi predittivi embrionali, per lo più basati sulla tecnologia dei cd. "sistemi esperti" (*expert systems*), in grado di indicare agli utilizzatori del programma, e quindi in ipotesi anche al giudice stesso, il probabile esito della controversia, o di un elemento della stessa, a partire dall'elaborazione dei dati contenuti in casi concreti precedenti (cd. *case-based reasoning*)[21].

Già da queste superficiali, e certamente insufficienti, notazioni emerge a mio parere chiaramente come il "sogno proibito" — infrantosi sul duro terreno della pratica, ma non per questo mai del tutto abbandonato — era, e rimane ancora oggi, quello della *machina sapiens*, capace di *ius dicere*, oppure anche di argomentare e ragionare, semplicemente applicando un insieme di regole e schemi di ragionamento[22]. Il modello sognato è pur sempre quello della macchina che, ricevuti alcuni *input* di partenza (le informazioni rilevanti), dopo alcuni calcoli formali più o meno logicamente sofisticati, emette un *output* (la decisione finale, o parti di essa, oppure un'argomentazione giuridica).

Ci sarebbe da chiedersi il *perché* di questo sogno, il quale, pur nella sua ingenuità (della quale Taruffo, in quell'articolo, fu ben consapevole) ci dice molto sul diritto. È un sogno *arcaico*. Arcaico perché — a prescindere dall'efficacia pratica (perlopiù scarsa) di tali strumenti o dalle loro modalità concrete di funzionamento — si pone in perfetta continuità con la tendenza a "*meccanicizzare*" la scienza del diritto: questo il senso della cd. *mechanical jurisprudence*, già a suo tempo fortemente criticata da Roscoe Pound e da altri esponenti del Realismo Giuridico Americano[23]. L'idea che sta dietro a questo sogno è quella della decisione intesa come l'effetto dell'applicazione meccanica di regole, cieca alle conseguenze e alla giustizia variabile del caso concreto, e non intesa, invece, come punto d'arrivo di un percorso che è — a mio avviso, *innanzitutto dal punto di vista prescrittivo* e non solo descrittivo — profondamente umano: una impresa razionale, certo, ma permeata da valori, emozioni, sentimenti, persuasione, elementi retorici e quindi valutazioni

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the judge's discretion rather than rationalizing it». E così proseguiva, offrendo comunque un giudizio positivo dell'intenzione sottostante: «*AI methods may be efficient insofar as they reduce or eliminate the vagueness, the fuzziness, the open texture and the indeterminacy of the standards governing the practice of sentencing. Such a reduction or elimination may even be considered as a positive change in the field of criminal law, to the extent that it may increase uniformity and foreseeability (and then certainty and equality) in sentencing, and correspondingly it may decrease or eliminate subjectivity, uncertainty, variability and even inequal treatment in sentencing. From this point of view this may even be considered a reasonable or rational change, if it is assumed that values such as uniformity, and so forth, should take the place of case by case evaluations*». (p. 322).

[21] Celebre è il sistema cd. HYPO (costruito alla fine degli anni '80 da Kevin D. Ashley, durante il suo dottorato sotto la guida di Edwina L. Rissland) a proposito delle controversie sulla violazione dei segreti industriali, il cui ragionamento funziona per "fattori" associati ai casi. Va specificato che HYPO — tecnicamente — si limita a offrire argomenti su come un caso dovrebbe esser risolto; la sua funzione è, pertanto, essenzialmente giustificatoria, non predittiva, anche se, evidentemente, a partire dalla giustificazione offerta si possono poi formulare previsioni. Su questo sistema, Ashley (1990).

[22] Ruffolo (2021). Su questo "sogno proibito" (del positivista), rimando a quanto detto in Giabardo (2020), spec. Par. 2.

[23] Pound (1908).

e margini di discrezione[24]. All'occhio di chi scrive, questi fattori non sono difetti da tollerare, ingredienti, purtroppo, ineliminabili, circostanze delle quali non resta che prendere atto, che rendono il funzionamento del diritto imperfetto e delle quali converrebbe sbarazzarsi, se solo fosse possibile, ma tutto al contrario un qualcosa di benefico, che deve essere innanzitutto capito e studiato, per poi esser salvaguardato come un elemento prezioso e irrinunciabile. Mi sento quindi di dire che non solo il diritto non è (descrittivamente) una macchina — per riprendere il titolo del saggio di Giovanni Tuzet appena citato — *ma nemmeno dovrebbe esserlo*.

Riprenderò questo punto nella parte finale di questo articolo.

Facciamo ora un salto in avanti e diamo un breve sguardo al panorama contemporaneo.

3. IL PROBLEMA DELLA GIUSTIZIA PREDITTIVA, OGGI

Michele Taruffo scriveva il suo saggio prima dell'avvento massivo del cd. *machine learning* (apprendimento automatico), la tecnologia sulla quale si sono di più concentrati gli sforzi ingegneristici da allora. In questo paradigma, la macchina, debitamente istruita, addestrata (dall'algoritmo detto "addestratore", *training*) apprende essa stessa a svolgere il compito assegnatole, dai dati forniti. L'uomo dota la macchina di un metodo di apprendimento, che viene applicato autonomamente al *data set*, cioè alla base di dati disponibili. In termini più tecnici: la "base di conoscenza" del sistema non è fornita dall'uomo, come era nel caso dei "sistemi esperti", ma viene costruita dalla macchina stessa[25].

Molta strada da allora è stata quindi fatta. Non solo le tecniche, ma anche i fini dell'impiego dell'intelligenza artificiale nel processo sono cambiati. La finalità di previsione è diventata preponderante. Oggi, vari sono i sistemi in grado di elaborare una risposta accedendo a una mole quanto più grande possibile di decisioni passate — migliaia, milioni: cd. *big data* — e di restituire, su quella base, una previsione accurata dell'esito di una nuova controver-

[24] Interessante leggere le considerazioni, espresse per lo più dal punto di vista dell'inopportunità *in senso descrittivo* della metafora del diritto come macchina, di Tuzet (2009) e l'analisi ivi contenuta delle posizioni, tra le altre, del Realismo Giuridico Scandinavo (pp. 403 ss.), Americano (pp. 405 ss.) e del positivismo giuridico italiano (spesso accusato di avere una visione, appunto, meccanica), e, in particolare, di Uberto Scarpelli (pp. 409 ss.): «Il diritto… — constata Scarpelli (1965), p. 40-41, riportato da Tuzet, p. 410 — appare ben altro che una macchina logica per operazioni deduttive, esso è una vicenda molto umana di comportamenti dotati di senso e di messaggi linguistici, con zone di vaghezza e ambiguità, scelte e decisioni nelle zone morbide o forzando le zone dure, argomenti ed appelli di vario peso e forza, e per tali vie immissioni di valori, intrusioni di sentimenti e risentimenti, manifestazioni degli aspetti superiori o affioramenti degli aspetti inferiori ed oscuri nelle personalità, ecc.». Lo stesso, a mio giudizio, dovrebbe dirsi del processo (v. *infra*). Tuzet sembra però più aperto, anche se in senso dubitativo, sulla bontà della *portata prescrittiva* del diritto come macchina (ossia: il diritto non è una macchina, *ma dovrebbe tendere ad esserlo*). V. anche le specificazioni, utili per chiarificare il senso di "macchina" usato nel testo, di Poggi (2009).

[25] Più diffusamente, Santosuosso, Sartor (2022), pp. 1767 ss.

sia simile, presente o futura (spesso, ma non necessariamente, a partire da dati testuali, quali ad es., la descrizione dei fatti). Lo «*scopo di sistemi intesi a "predire" la decisione dei giudici non è… quella di fornire sempre la decisione corretta, ma piuttosto quella di anticipare le decisioni che di fatto i giudici potrebbero adottare*»[26].

Di questa previsione possono farsi usi distinti. Questa può servire innanzitutto alle parti e agli avvocati, i quali possono misurare *ex ante* la probabilità di successo di un'eventuale azione in giudizio su un certo tema (l'esempio è quello del programma "Claudette", utilizzato per l'identificazione anticipata delle clausole abusive contenute nei contratti *online* dei consumatori[27]); ma nulla esclude che la prognosi di decisione possa anche esser offerta al giudice stesso, a mo' di indicazione. È questa l'ipotesi che ci appare meno innocua.

Anche i contesti nei quali si può far uso delle predizioni sono vari: la predizione può servire nell'ambito della valutazione di un solo elemento della decisione finale (ad es., l'ammontare dell'assegno nelle controversie familiari[28]; o — esempio assai meno innocuo — il grado di pericolo della reiterazione del reato ai fini dell'applicazione delle misure cautelari alternative alla detenzione: la mente va al ben noto e assai discusso programma Compas[29]), ma può anche servire per la (pre)determinazione dell'esito ultimo della controversia in termini binari e secchi (colpevole *vs*. innocente; ragione all'attore *vs*. ragione al convenuto): nei casi in cui la predizione sia basata sulla tecnologia delle cd. reti neurali il responso è difatti raggiunto in modi non comprensibili all'essere umano, a causa del funzionamento intrinseco del meccanismo (cd. sistemi opachi o *black box*)[30]. Il sistema, in questi casi, *non spiega*, nel senso che non fornisce ragioni del perché è giunto a quella conclusione.

Gli interrogativi che questo stato di cose solleva sono molti e svariati.

Due, in particolare, tra i molti, mi sembrano meritevoli di attenzione.

(1) Il primo riguarda il senso di fondare, anche solo potenzialmente, la decisione di un caso sulla base di una generalizzazione statistica delle soluzioni date a controversie simili da parte di una moltitudine di giudici precedenti. Quello che il sistema offre, almeno in questi modelli e ogniqualvolta la soluzione proposta sia una sola, è quindi la decisione del giudice *medio*[31]. La

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[26] Così Santosuosso, Sartor (2022), p. 1768.

[27] Acronimo di "CLAUSeDETecTEr", ideato e implementato dai Proff. Giovanni Sartor e Hans-W-Micklitz. V. Lagioia, Sartor (2020), ove si può leggere anche una dettagliata ricostruzione di come avviene l' "addestramento" del sistema; v. anche Lippi, Pałka, Contissa, et al. (2019).

[28] Da ultimo, interessante la disamina di Sertori (2023). V. anche Cecchella (2020).

[29] Acronimo di *Correctional Offender Management Profiling for Alternative Sanctions*, il quale ha generato enormi critiche e dibattiti, a partire dalla discussa decisione della *Wisconsin Supreme Court*, *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016). I riferimenti in letteratura a questa vicenda sono innumerevoli; v., in luogo di molti, il commento in *Harvard Law Review*, 2017, *https://harvardlawreview.org/2017/03/state-v-loomis/*). Va specificato che qui il sistema non si basa su casi precedenti, ma su un questionario, complesso, le cui risposte determinano il calcolo della probabilità.

[30] Si veda Santosuosso, Sartor (2022), p. 1770, per l'accurata spiegazione tecnica.

[31] Santosuosso, Sartor (2022), p. 1774, i quali precisano, pertanto, che «l'obiettivo ha una importanza più limitata per il giudice, il cui compito è quello di adottare una decisione giuridicamente

risposta a questa ricerca di senso va ricercata nella promozione dei valori di coerenza e quindi certezza, o meglio, *calcolabilità* del diritto[32]. Valori certamente portanti, direi persino identificativi del fenomeno giuridico in quanto tale (un diritto imprevedibile difficilmente è in grado di svolgere la sua funzione sociale), ma che non possono né devono rappresentare un altare sul quale sacrificare il *fare giustizia* attraverso il diritto[33].

A questo stesso riguardo, nemmeno l'accostamento di questo fenomeno a quello del precedente mi pare del tutto adeguato. La pratica del precedente implica una sorta di *dialogo* tra il caso presente e un caso determinato passato, tra i fatti che hanno determinato il primo esito e i fatti del secondo, e quindi sottintende anche un dialogo tra il giudice successivo e il giudice anteriore, di pari grado oppure superiore. Questo dialogo intergenerazionale, condotto anche a livello personale, tra giudici con nomi e cognomi, pur appartenenti a diverse epoche, è una delle grandi ricchezze del *common law* (ricordiamoci della bella metafora di Dworkin, per il quale il *common law* sarebbe come un grande romanzo, in cui i giudici successivi riprendono e sviluppano la trama lasciata da quelli venuti prima di loro)[34]. Così, allo stesso modo, mi sembra di poter dire che racchiude una certa idea di dialogo anche la nozione di nomofilachia, impiegata per fondare la necessità del rispetto dei precedenti delle corti supreme, comunque li si intenda. In Italia, infatti, da più parti ora si parla di nomofilachia *dialogica*, o *discorsiva*, per indicare appunto il fatto che la decisione o la "massima" della corte suprema non va intesa come un mero dato sul tavolo, da accogliere o rigettare *tout court*, ma come un punto di partenza per intessere un discorso, anche critico, sui punti oggetto di controversia[35]. Più difficile è applicare l'etichetta di dialogo quando l'interlocutore è una macchina.

(2) Il secondo riguarda l'efficacia che alla previsione si vorrà dare, qualora questa veda il giudice come suo naturale destinatario. Sono tranquillizzanti le parole di Amedeo Santosuosso e Giovanni Sartor, i quali precisano che le «*macchine e i sistemi di* machine learning *non decidono alcunché*», in quanto

> «*per decidere bisogna essere titolati a farlo e, a quel che ci risulta, nessuno ha intitolato questi sistemi a decidere. Quindi, le macchine non prendono il posto degli umani, a meno che non siano proprio gli umani a sottrarsi ai propri compiti, conferendo una malaugurata* auctoritas *alle macchine, di diritto (cioè prevedendo*

corretta», il che porterebbe a preferire sistemi che offrano più di una risposta possibile.

[32] Sulla calcolabilità del diritto cfr. i molteplici studi di Natalino Irti e, *ex multis*, Irti (2018).

[33] Su questo "fare giustizia" mi ero trattenuto in Giabardo (2020), spec. Par. 3.

[34] Dworkin (1986), pp. 228 ss.

[35] Canzio (2017) precisa che questa visione «si ispira alla teoria discorsiva elaborata da Jürgen Habermas. La decisione giudiziale è un "agire comunicativo orientato all'intesa", retto da una "etica del discorso" basata sulla forza degli argomenti e non sugli argomenti della forza». In dottrina si parla anche di "nomofilachia orizzontale" e "integrata" (Conti, 2021) o di "nomofilachia sostenibile" (Di Stefano, 2021).

l'efficacia giuridica della predizione automatica) o anche solo di fatto (adeguandosi passivamente a tale predizione)»[36].

In effetti, l'obiezione per la quale il pericolo di una decisione giudiziale in gran parte automatizzata non sarebbe all'orizzonte va presa sul serio per ridimensionare allarmismi ingiustificati. Ma il teorico del diritto dovrà pur chiedersi se è quello il fine della strada che si sta percorrendo oppure no, se è quella cioè la meta verso la quale si sta andando, più o meno consapevolmente, se è quello, cioè, il "sogno" che ispira l'azione attuale e quali buone ragioni ci siano, eventualmente, per opporsi a intraprendere fino in fondo quel cammino.

4. IL GIUDICE COME PILOTA ("*CALCOLARE NON È PENSARE*")

Quello di cui c'è bisogno, in questo paesaggio perlopiù inesplorato, è continuare la riflessione sul *giudicare*; non tanto dalla prospettiva tecnico-giuridica (su questo, insuperabili sono i contributi che ci ha offerto Michele Taruffo), ma dalla prospettiva filosofica, arricchendola con i tanti spunti offerti dalle tecniche di giustizia predittiva[37].

Pur quindi nella consapevolezza che certi pericoli dell'uso processuale dell'intelligenza artificiale per ora sono adombrati solo a grande distanza, mi interessa sottoporre a lente di ingrandimento quale sia l'immagine del giudizio e del giudice che emerge dalla tendenza di cui stiamo discorrendo.

Riprendendo quanto detto poco fa sulla visione macchinistica del diritto, non credo di sbagliarmi molto se affermo che l'idea che sta dietro è quella del giudice come un pilota d'aereo, il quale è bene e meglio che si faccia assistere e guidare durante il volo dai sistemi di controllo artificiali (molto più precisi, molto più affidabili, molto più efficienti), salvo esser chiamato, in circostanze specifiche ed eccezionali, forse, a compiere talune scelte discrezionali che solo lui è grado di prendere, nell'attesa però che, in futuro, anche queste vengano assunte in automatico. In circostanze fisiologiche, ci fidiamo di più del

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[36] Santosuosso, Sartor (2022), p. 1779. Il rischio di adeguamento passivo, peraltro, mi sembra alto: quanti giudici, al fine di, per così dire, "cautelarsi", si conformeranno alla decisione automatizzata, anche se non sembra *far giustizia* nel caso di specie? L'effetto de-responsabilizzante è concreto.

[37] Sul *giudicare*, in termini filosofici, si veda l'opera già intrapresa da Garapon (2007). Antoine Garapon stesso ha offerto poi penetranti analisi sul tema della giustizia predittiva, tra i quali si segnala, Garapon, Lassègue (2018) Nel dibattito italiano, sul giudicare all'epoca delle tecnologie della predizione, v., con diversità di accenti, Carratta (2020); Battelli (2020); Breggia (2019); Gabellini (2022) e Gabellini (2019); Lombardini (2022); Zaccaria (2020). Assai di recente, sullo spinoso tema del giudizio giuridico, inteso quale «chiave di accesso ad una concezione radicalmente umana del diritto» (p. 199) si è confrontato Lo Giudice (2023) con risultati ai quali sentiamo di aderire vigorosamente. Il pensiero dell'A. — che si discosta dalle pretese di ridurre il giudizio tanto a una pura determinazione logico-oggettiva tanto a un puro atto d'arbitrio, pp. 186 ss. — fa tesoro delle riflessioni di giganti del passato che hanno più di altri approfondito la natura misteriosa del giudizio, e cioè soprattutto Carnelutti (1949) e Capograssi (1950). Per la parte relativa all'impatto della giustizia algoritmica, Lo Giudice (2023), pp. 194 ss.

computer di bordo o del pilota automatico che di quello in carne ed ossa. Il primo svolge meglio il suo compito. In altri termini: l'*umanità* del pilota non aggiunge nulla all'impresa del volo, semmai la ostacola: è una debolezza, non una forza. È la macchina che, ad es., misurate certe condizioni atmosferiche, calcola e fornisce le indicazioni ottimali di volo o di atterraggio al quale il pilota farà meglio ad adeguarsi. Ma in questo caso, a ben vedere, non stiamo parlando né di decisione né di giudizio, quanto di una via obbligata da percorrere (decidere e giudicare non implicano concettualmente forse anche scegliere, e anzi, scegliere tra opzioni ugualmente ragionevoli? Altrimenti, che senso avrebbe collegare intimamente scelta e responsabilità?). La discrezionalità è pressoché azzerata; e se non lo è del tutto, è solo perché l'intelligenza artificiale non ha fatto ancora abbastanza passi in avanti da rendere quell'intervento umano superfluo. Ma quello rimane l'orizzonte.

Trasportiamo tutto ciò nel campo dell'esperienza giuridica. Purtroppo, mi pare di vedere che la metafora del diritto come macchina (e del giudice come pilota) — quale ideale regolativo e non descrittivo, sia chiaro — sia ben viva [38]. Il rischio che il punto d'arrivo sia il seguente c'è: il giudice è bene che si faccia guidare dalla macchina nelle sue determinazioni, che sono più oggettive, più prevedibili, meno altalenanti (nella valutazione dei rischi, nella determinazione dei risarcimenti, nel calcolo delle probabilità di colpevolezza, nell'interpretazione delle disposizioni, e via dicendo), e che se ne discosti solo laddove egli abbia più che ottime ragioni per farlo. È quella funzione che Giovanni Tuzet ha denominato dell' «*algoritmo come pastore del giudice*» [39]. E se proprio non si può fare a meno che il magistrato usi la sua propria discrezionalità, che lo faccia solo laddove l'algoritmo non è, per il momento, in grado di arrivare, in attesa che, prima o poi, anche lì giunga la sua capacità.

Ma allora — a mio avviso — non dovremmo parlare più di giudizio, che implica la scelta. Prender atto di ciò che non poteva non esser fatto non è decidere [40]. *Calcolare non è pensare* [41].

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[38] Condivido quindi la sconsolata constatazione di Zaccaria (2020): «… la tentazione del robot che ragiona e decide, l'esaltazione dell'infallibilità della macchina a fronte della fallibilità dell'uomo, l'idea della costruzione di un mondo nuovo basata sulla delega alle macchine, ritornano a serpeggiare nel mondo contemporaneo… ».

[39] Tuzet (2020).

[40] Un esempio tratto da un ambito differente può contribuire a rendere chiaro ciò che voglio dire: spesso, piegandosi a un malinteso senso di obiettività o semplicemente per rapidità, negli esami universitari o nei test di ammissione si sottopongono agli studenti questionari a risposta chiusa cd. "a lettura ottica automatizzata", in cui le risposte del candidato (sì/no) vengono rilevate da uno *scanner*. Vi è qui giudizio, propriamente detto, da parte del professore? No. L'esaminatore non giudica né valuta: semplicemente ratifica il risultato. La sua discrezionalità è annullata e il suo intervento superfluo. Così, similmente, il meteorologo che, a seguito di raffinate elaborazioni matematiche e simulazioni fatte dalla macchina, decreta che domani (probabilmente) pioverà, non sta decidendo o giudicando che domani pioverà, ma sta ratificando un responso già dato (e non può fare diversamente). «Giudicare qualcosa — insegna ancora Zaccaria (2020) — implica necessariamente prendere posizione di fronte ad essa, scegliendo tra una o più alternative».

[41] Supiot (2007, ed. or., 2005), Prologo, 13. Su questa affermazione, che è heideggeriana nel suo spirito, e le sue implicanze per il diritto, Romano (2018).

5. PROCESSO, GIUDIZIO, VALORI UMANI

Calcolabilità, prevedibilità, oggettività, assenza ideale di stati mentali, scomparsa della soggettività del giudice nel fare giustizia; si parla del "giudice emotivo" sempre e solo in senso negativo[42].

Naturalmente, tutto ciò sta in piedi solo se si equipara il giudizio giuridico a una impresa puramente tecnica: il che non solo non è affatto pacifico, ma va anzi sconfessato. Se vogliamo, tendenzialmente, che un pilota d'aereo metta da parte la sua umanità (così come deve metterla da parte l'ingegnere, il fisico, il biologo, lo scienziato, ecc.), che ciò debba farlo il giudice, mi sembra altamente discutibile. «*L'atto giudiziale non è… un atto di pura tecnica giuridica, ma un atto di coscienza: la coscienza del "giusto". Esso è rivolto a una comunità umana e, allo stesso tempo, la impegna…*»[43].

Il processo è una situazione molto particolare. Seppur partecipi di elementi propri di altre avventure umane (la storia, la scienza: tutti e tre i contesti rappresentano "imprese epistemiche", in quanto si occupano della ricostruzione veritiera di uno stato di cose), il processo dalle altre due si distingue in quanto vi è un conflitto umano, sul quale un soggetto (il giudice) avrà l'ultima parola. Il processo, a differenza di un libro di storia o di un articolo scientifico, termina con una decisione, autoritativa e pubblica, che da un lato determina e ricostruisce quella porzione di fatti della vita rilevanti e dall'altro ne fa ricadere le conseguenze concrete che il diritto astrattamente ricollega alla situazione. L'atto finale del giudizio stabilisce *ex autoritate* i confini (*definisce*) sia del fatto sia del diritto: taglia, separa, divide. Tale decisione finale, in aggiunta, non solo avrà dirette conseguenze personali, ma anche ripercussioni sociali, dirette e indirette, più o meno ampie, essendo il processo una forma *pubblica* di risoluzione delle controversie attraverso l'interpretazione e applicazione del diritto. Questo fa del processo l'evento *drammatico* dell'esperienza giuridica per eccellenza, nel senso etimologico del dramma: cioè azione scenica. Non sarei disposto a negare che *giudicare giuridicamente* comporta quindi una responsabilità. E la responsabilità è sempre e solo umana[44].

Se è così, quali qualità autenticamente umane allora deve egli impiegare, in aggiunta a quelle tecniche, per raggiungere una *buona* decisione?

La domanda non sembra impertinente. Tra queste qualità, azzarderei a elencare, in ordine sparso, l'empatia — il "pensare mettendosi al posto degli

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[42] Per un ampio panorama delle forme in cui le emozioni agiscono nel processo, da un punto di vista descrittivo, v. Forza, Menegon, Rumiati (2017). V. però la recensione perlopiù critica di Taruffo (2018) che muove l'accusa agli A. di aver marginalizzato la componente razionale della motivazione. Per un taglio empirico e sociologico della questione, con esempi e interviste tratte dalle corti italiane, cfr. l'interessantissimo lavoro di Minissale (2022) a cui si rimanda anche per l'ampia letteratura citata.

[43] Gaboriau (2018) p. 208.

[44] Scriveva Satta (1994, p. 17, ed. or. 1949): «*La realtà è che chi uccide non è il legislatore ma il giudice; non è il provvedimento legislativo ma il provvedimento giurisdizionale*».

altri[45]", una delle radici della giuridicità e la prima virtù a esser soppressa in un mondo interamente algoritmico[46] — la compassione, la propensione all'ascolto, la sensibilità, l'umiltà, l'apertura di mente, l'*intuito* (che partecipa, forse, più dell'emozione che della ragione), l'immaginazione, la creatività, l'aver sviluppato un senso di giustizia che nasce dal confronto con le situazioni, un'intelligenza pragmatica, una capacità di *sentire* (*feeling*) al fine di comprendere meglio, il dono di saper far uso del buon senso, e via dicendo. Ci sono importanti, e non sempre adeguatamente conosciute, linee di ricerca, sia teoriche sia empiriche, che vanno in questa direzione ed è bene che si prendano in seria considerazione[47]. La filosofa del diritto Amalia Amaya, per es., ha particolarmente approfondito il tema delle "virtù giudiziali" (imparzialità, sobrietà, coraggio, *saggezza* e *giustizia*), soprattutto in riferimento alla teoria dell'argomentazione, nel campo di un più ampio programma, neoaristotelico, di "etica delle virtù"[48].

Se guardiamo l'atto del giudicare da questa prospettiva, anche l'emotività del giudice è un qualcosa che, lungi dal rappresentare un *minus* rispetto a un ideale, un ingombro, un difetto da eliminare, una imperfezione, è, al contrario, una risorsa da incanalare nella direzione giusta, un prezioso alleato nella risoluzione giusta del conflitto, se gestita naturalmente nella forma corretta[49]. Certo, non bisognerà intendere — ovviamente — questa emotività come capriccio, come moto dell'anima incontrollato e tiranno, come impulsiva passionalità, che porta a parzialità e condizionamenti nella decisione, ma come una indispensabile chiave di accesso a una più piena comprensione del conflitto tanto nella sua reale portata oggettiva ("ciò che è in gioco", potremmo dire) quanto in quella soggettiva (il suo elemento umano, esperienziale, il suo rappresentare uno spaccato di vita vissuta e sofferta da soggetti in carne ed ossa), al fine di riuscire a cogliere tutte le implicazioni della propria decisione sia nel caso di specie sia per l'ordinamento.

Vale la pena specificare che questa valorizzazione dell'elemento umano non significa affatto rinnegare, o anche solo indebolire, la valutazione razio-

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[45] Lo Giudice (2023) p. 181 («Il giudice dovrebbe dunque immaginare cosa sentirebbe e cosa penserebbe se fosse lui, e non altri, a trovarsi nelle situazioni vissute dagli altri. Più intensa è la capacità immaginativa più profonda sarà la capacità rappresentativa e quindi maggiore sarà la capacità di attribuire a ciascuno il suo»).

[46] «Il senso giuridico è radicato nella capacità umana di dialogare e provare empatia, l'essere umano sente che se qualcosa lo lede, probabilmente è ingiusto commetterlo nei confronti dell'alterità. L'*homo juridicus* del nuovo millennio avrà l'intelligenza di riavviare il discorso della giuridicità? O l'empatia sarà destinata ad essere un ricordo onirico? Le possibilità empatiche sono evidentemente interdette agli intelletti sintetici, agli algoritmi, alle intelligenze artificiali e alla robotica giuridica», così Avitabile (2017) pp. 315 ss.

[47] V. ancora Minissale (2022).

[48] *Ex multis*, Amaya (2011a), (2011b), (2017). Ma vedi, innanzitutto, Solum (2003). Nella letteratura giusfilosofica italiana, v. anche Corso (2022) e Corso (2014). Sulla compassione, Bandes (2017). V. anche quanto riportato da Minissale (2022), spec. pp. 788 ss.

[49] «Una ragione senza emozioni conduce a cattive decisioni… Nel corso della deliberazione, il giudice deve dimenticarsi delle sue emozioni, per fare un ragionamento a freddo? (…) Nel giudizio, l'emozione è soltanto canalizzata o anzi è utilizzata per raggiungere un giudizio più equilibrato?»: queste e altre importanti domande si chiede Jeuland (2018). V. anche Esposito (2021).

nale della prova e la motivazione della sentenza intesa come giustificazione razionale (e a posteriori) della decisione — due colonne portanti dell'insegnamento di Michele Taruffo. Piuttosto, si vuole porre l'attenzione sul fatto che, in generale, la componente emotiva, latamente intesa, non è estranea ai processi cognitivi, ai ragionamenti e alle argomentazioni razionali (credere il contrario sarebbe incorrere nell' "errore di Cartesio", secondo la celebre espressione di Antonio Damasio): non fa certo eccezione l'attività del giudice, tanto nella *selezione* e *determinazione* dei frammenti rilevanti dei fatti, qualificati giuridicamente, e nella *valutazione* del materiale probatorio, da un lato, quanto nell'*individuazione* e *interpretazione* delle disposizioni normative, dall'altro. Il contesto in cui viene in gioco il positivo riconoscimento dei valori umani, pertanto, non è tanto quello della *justification*, quanto quello della *discovery* (cioè non nel "come la sentenza è fatta", ma nel "come la sentenza si fa"[50]).

6. CONCLUSIONE. DUE BREVI ESTRATTI, DA MEDITARE, SULL'UMANITÀ DEL GIUDICARE

Voglio concludere queste brevi critiche all'uso delle predizioni algoritmiche intese come un qualcosa che, potenzialmente, può farci perdere di vista il valore umano del processo e del fare giustizia con le parole di due giuristi che hanno saputo esprimere questa umanità del giudicare di fronte alle sfide dell'intelligenza artificiale in maniera molto profonda.

Le prime parole sono di Simone Gaboriau, magistrato presso la *Cour d'Appel* di Parigi. L'Autrice, in uno studio critico sulla questione, sostiene come il «*senso d'umanità*» comprenda «*una sensibilità per le situazioni sottoposte al suo giudizio*», la quale sola permette

> «*al giudice di considerare la dimensione umana delle sue decisioni. Spetta a lui, nella valutazione dei fatti come nella fase decisionale, trovare un equilibrio tra empatia, compassione, comprensione, rigore e severità, in modo che la sua applicazione del diritto sia avvertita come legittima e giusta*»[51].

Qui vediamo che la qualità principale del giudicare è quella dell'equilibrio (sia nella lettura giuridica dei fatti sia nella concreta pronuncia della sentenza) tra soggettività ("empatia, compassione, comprensione") e oggettività ("rigore e severità") del giudicante, affinché l'applicazione del diritto non sia solo legittima, e anzi, giusta, ma sia anche percepita come tale. Vi è qui un richiamo, neanche tanto implicito, quindi, alla responsabilità di colui che giudica ("spetta a lui"), la quale deve essere resa visibile e identificabile: c'è un giudice che ha ascoltato — l'ascolto è una forma di riconoscimento relazionale: *la macchina non ascolta* — e quindi ha deciso, e al quale possono essere indirizzate le doglianze. Una persona ha *giudicato*: che è una forma contratta

[50] Cfr. Di Donato (2021), la quale rimanda al già citato volume *Il giudice emotivo*.
[51] Gaboriau (2018) p. 211.

per dire che ha fatto uso (buon uso) delle proprie facoltà critiche, intellettuali ed emotive, le quali per natura sono discrezionali, non riducibili per fortuna a un automatismo, a una generalizzazione statistica o a un passivo adeguarsi a un responso computazionale.

La stessa esigenza di umanità e di valorizzazione della soggettività del giudicante (laddove si fa positivo riferimento al libero convincimento, inteso evidentemente come una garanzia e non come una porta aperta all'arbitrio) è sottolineata anche dal filosofo del diritto Giuseppe Zaccaria, il quale, in un profondo contributo incentrato sulle *figure* del giudicare, afferma che:

> «*Accettare questa nuova dimensione normativa del calcolo fondata su una razionalità non più legata ad un'intelligenza vivente e consapevole, e non basarsi invece sul libero convincimento di un giudice, implica la rinuncia all'umanità del diritto e della giustizia, l'illusione di liberarsi una volta per tutte dalle imperfezioni e limitatezze umane sostituendo alla giustizia imperfetta degli uomini una certezza scientifica assoluta. Le idee e le emozioni umane, connotate come sono da innumerevoli sfumature, hanno paradossalmente il loro punto di forza proprio nell'imperfezione*» [52].

Razionalità legata all'*intelligenza vivente e consapevole* (contrapposta, quindi, implicitamente, a una intelligenza *inanimata* e *incosciente*: l'intelligenza artificiale, appunto), dove le debolezze umane vengono capovolte per esser viste nella loro luce positiva e arricchente. Vi è, in queste parole, un invito al recupero della fiducia nelle capacità umane, fiducia che, nel fondo, è negata, se non proprio calpestata, ogniqualvolta *affidiamo* alla macchina compiti che sono inerentemente umani (il perché questo accada, è una domanda di carattere sociologico tra le più difficili).

E così l'Autore conclude — e noi con lui — con una domanda che risuona essenziale:

> «*Ma che giustizia sarebbe quella che non si indirizza al sentimento di giustizia ma, disinteressandosi della specificità del caso, ritiene che la delega dell'uomo alle macchine presenti un carattere di necessità?*» [53].

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[53] *Ibidem*.

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SEARCHES AND SEIZURES OF ELECTRONIC DEVICES IN EUROPEAN CRIMINAL PROCEEDINGS: A NEW PATTERN FOR INDEPENDENT REVIEW?*

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ABSTRACT: There is a lack of comprehensive EU discipline in the area of digital search and seizure. Accordingly, the Authors will explore the scope and content of Article 8 ECHR in order to identify the minimum standards that it entails, with regard to the need for both prior and *ex post* independent oversight, should a digital search and seizure be ordered by the prosecution authorities. Against this background, the Italian legal framework will be used as a benchmark to determine the extent to which the aforementioned guarantees are safeguarded and the impact that the relevant ECtHR's case-law could have at the domestic level.

KEYWORDS: Search and seizures; Electronic devices; Article 8 ECHR; Independent oversight; Data retention

* The present paper is the result of a joint research carried out by both Authors. However, §§ 1 and 3 have been written by Lorenzo Bernardini, while §§ 2 and 4 have been written by Francesco Sanvitale. The Authors shared the writing of § 5.

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REVIEW: IS IT TIME FOR A NEW PARADIGM?: 4.1. Hints from the ECtHR; 4.2. The *Fil Rouge* Between Proportionality and *Ex Post* Independent Review: Deconstructing the Puzzle; 4.3. Conceptualising a Brand-New Model of *Ex Post* Judicial Oversight—5. CONCLUDING REMARKS: 5.1. Is There an Elephant in the Room? Looking at the 'Data Retention Saga'; 5.2. Public Prosecutors and Judicial Control: A Never-Ending (Italian) Story; 5.3. Trying to Pull the Strings, From Italy to Europe.— BIBLIOGRAPHY

1. THE PLAYGROUND OF THE ANALYSIS: THE LACK OF AN EU DISCIPLINE ON SEARCHES AND SEIZURES OF ELECTRONIC DEVICES

The utilization of electronic devices has become ubiquitous in contemporary society, and their importance as sources of evidence in criminal proceedings cannot be overstated. In order to ensure the preservation of relevant digital evidence during the investigations, European criminal justice systems have customarily employed searches and seizures measures, which allow the competent authorities to temporarily seize such items, preventing the owner of the electronic device from altering, transferring, converting or deleting any data contained therein. These orders thus serve as an indispensable tool for securing digital evidence and ensuring that it remains intact during the preliminary investigations and, eventually, the trial.

In other words, searches and seizures of electronic devices are issued almost always for evidence-related issues. Ordinarily, national authorities implement them in the context of investigations into serious criminal offences such as fraud, money laundering, and cybercrime, among others. Yet, searching and seizing of these items could conceivably occur should investigations for other crimes be carried out (e.g., manslaughter, robbery or drug trafficking), given their widespread employment in everyday life and hence their helpfulness for criminal justice authorities. In any case, searches and seizures measures play a crucial role in ensuring the preservation of digital evidence by guaranteeing that the integrity of the electronic device's content is maintained. Currently, almost every criminal investigation is faced with the necessity to access electronic data, for the purpose of reconstructing the procedural truth.

It is important to understand that the technological development brought unexpected changes to criminal proceedings, specifically as regards digital evidence and all the procedures related thereof. As has been interestingly observed:

> 'Computer searches … are much different from ordinary searches for physical evidence due to the complexity of information stored within a computer or hard drive as well as the technical expertise required to retrieve such evidence. Often times, the police seize a suspect's computer and take it to a police laboratory for extensive examination by forensics experts. These forensic examinations may take days, months, or even years'[1].

[1] Bartholomew (2014), p. 1027.

Against this background, it shall be taken into account that the exponential growth in the usage of electronic tools has led to an unprecedented amount of personal data being generated, stored, and transmitted on a daily basis, thereby giving rise to several privacy and security concerns. This is especially so in the realm of criminal proceedings, should the contents of electronic devices constitute the focus of investigation. It is thus crucial to consider that the implementation of searches and seizures of electronic devices in criminal proceedings must be in balance with the protection of the individual's right to privacy. While the preservation of personal data proves to be essential, it is equally imperative that the use of such measures does not result in an unjustifiable infringement of the right to private life.

Despite the significance of the matter, as will be explained, no EU piece of legislation deals *explicitly* with the grounds and modalities of searches and seizures of IT tools. Notably, the former measure is not even mentioned in EU law, while seizures (encompassed in the broader category of 'freezing orders') have been regulated, but solely to a limited extent.

Indeed, beside traditional kinds of freezing orders, which may be labelled as 'evidentiary' or 'probatory' ones, another cluster of measures have progressively been employed by the criminal authorities, that is, the freezing orders with the purpose of confiscation (i.e. 'economic seizures'). In this instance, frozen property—even an electronic device—is deemed relevant not because of its *content* or its *informative attitude* as 'evidence', but rather because of its *economic value*.

The purpose of seizures/freezing orders in view of subsequent confiscation is based on the fact that criminal organizations take advantage of free movement of goods, services and individuals within the EU to carry out their nefarious activities with relative ease, and as such, pose a significant threat to the security and stability of the region[2]. These organizations, because of their complex and sophisticated structures, pose a formidable challenge to national law enforcement agencies in their efforts to disrupt and dismantle them. One approach that has proven effective in combating these organizations is the targeting of their financial assets, which are vital to their continued operation and sustained success[3]. Freezing orders, along with subsequent confiscation measures, may constitute an efficacious strategy in disrupting the activities of criminal organizations. By preventing these organizations from accessing and using their assets, they are impeded in their ability to continue their criminal endeavours. Furthermore, the implementation of freezing orders serves as a deterrent to potential criminal actors, as the hypothetical loss of assets serves as a disincentive for engaging in illicit activities.

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[2] See, in this regard, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy to tackle Organised Crime 2021-2025 (COM(2021) 170 final), 14 April 2021.

[3] Cfr. the Europol report *Out of their hands: Europol and asset recovery*, 13 March 2023 (*https://www.europol.europa.eu/media-press/newsroom/news/out-of-their-hands-europol-and-asset-recovery*).

It is in this context that the EU has begun to reflect on the opportunity to build up a regulatory system in this respect[4]. Accordingly, in the last decade, the attention paid by the EU to freezing orders for the purpose of confiscation has increased. Notably, only the perspective of targeting illegal assets has been considered by the EU legislature when regulating criminal seizures/freezing orders. This is apparent from the wording of Directive 2014/42/EU[5], whose purpose was to lay down minimum rules related to confiscation and freezing orders in criminal matters.

The aim of the aforementioned Directive was thus based on the necessity to target the assets of criminal organizations. In other words, the objects of seizures/freezing orders and confiscation measures are those items—including electronic ones[6]—deemed to constitute 'instrumentalities' or 'proceeds' of certain criminal offences[7]. The Directive has therefore espoused an economics-driven approach, linked to the need to identify, confiscate and reuse criminal assets[8]. Accordingly, merely freezing orders for the purpose of confiscation have received a comprehensive regulation within the EU legal framework.

From a material standpoint, no distinction may be drawn between the *implementation* of 'evidentiary' or 'economic' seizures—both imply a provisional ban on certain behaviours related to the property at stake (e.g., its disposal or destruction), leading to the temporary control or custody of such assets by the competent authority (e.g., the public prosecutor, or the investigating judge)[9]. Furthermore, both measures can affect electronic devices. What makes the difference here is the *purpose* of the measure at stake: either to secure evidence or to prevent the dissipation of property. It is only in the latter case that the EU has laid down specific rules.

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[4] For the sake of completeness, it is noteworthy that, since 2001, the EU adopted several provisions addressing the issue of seizures/freezing orders in criminal proceedings. *Inter alia*, it is worth recalling Framework Decisions 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime [OJ L 182, 5.7.2001, p. 1-2] and 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property [OJ L 68, 15.3.2005, p. 49-51]. It is clear that the action taken by the EU legislature was driven by an economics-based approach.

[5] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [OJ L 127, 29.4.2014, p. 39-50].

[6] It is no surprise that one could think that also electronic devices may be embodied within such definition, as they have a rather high economic value and are oftentimes either an instrumentality or proceeds of a criminal offence. An electronic tool, e.g., a smartphone or a laptop, could be employed in order to commit several of the offences listed in Article 3 of Directive 2014/42. Such a circumstance leads to the assumption that those devices could be labelled as 'instrumentalities' as per Article 2(3) of the Directive, that is, any property 'used or intended to be used, in any manner' for the aforementioned purpose. Analogously, they could also constitute 'proceeds' of the crime of money laundering or drug trafficking, should those tools be bought with money derived from the latter.

[7] See Article 2(2), Directive 2014/42/EU.

[8] The latter aimed to approximate domestic legislations facilitating mutual trust among the Member States, establishing minimum rules concerning the definition of sanctions in the areas of particularly serious crime with a cross-border dimension for the crimes listed in Article 83(1) TFEU.

[9] See Article 2(5), Directive 2014/42/EU.

At the same time, the Directive aiming at defining minimum rules, there shall be no prejudice to the possibility, up to the Member States, to provide 'more extensive powers in their national law, including … in relation to their rules of evidence'[10]. The EU legislature was indeed conscious that not only 'property' does have a relevance for its monetary value, but it also proves to be essential as *evidence* throughout criminal proceedings. As long as confiscation measures will not eventually be hindered, 'property' can be employed as evidence[11]. This holds true *also*—and especially—with regard to electronic devices, as the data they contain may be profoundly relevant in order to carry out wide-ranging and effective investigations. Hence, such items might be frozen with a view to subsequent confiscation but, in the meanwhile, may be used as evidence due to their content, provided that such an operation should not hamper the subsequent confiscation measure. Against this backdrop, it can be inferred that the Directive 2014/42 proves to be useless for the purpose of understanding *how*, and *to what extent*, EU law might regulate *seizures/freezing orders affecting electronic devices* and *based on evidence-related needs*.

More correctly, nonetheless, one could focus on the very issue triggered by this matter, namely, the huge amount of data that are contained inside IT tools and, in the last instance, the interference with the fundamental rights to privacy and the protection of personal data of the individuals concerned. Indeed, breaches of these fundamental rights may produce significant outcomes (e.g., a serious damage to reputation; the disclosure of high-sensitive information concerning medical treatments or sexual orientation; the dissemination of bank accounts credentials; a breach of confidentiality which should cover certain conversations, for instance, among lawyers and their clients). Accordingly, to seize laptops or smartphones could be problematic not due to their economic value, but rather frequently because of the massive amount of personal data enclosed therein (serving as *digital evidence*) and which, as a matter of fact, might relate also to individuals other than the device's possessor.

Against this background, one cannot but acknowledge that the widespread employment of new forms of communication reshaped the attitude through which personal data are looked at (and consequently retained) by individuals. Such a phenomenon may have a significant influence *vis-à-vis* the whole structure of criminal proceedings[12]. In carrying out their activities, national authorities may become aware of a huge amount of data. Historically, personal information concerning a suspect might have been obtained *inter alia* through witnesses, phone tapping and material evidence (e.g., tax documents). Nowadays, things have profoundly changed. To take a concrete example, smartphones and personal computers have become the strongbox in which individuals collect personal information, the latter belonging not

[10] Recital 22, Directive 2014/42/EU.

[11] Recital 28, Directive 2014/42/EU.

[12] There has been a 'change of paradigm that technological progress has generated in this area of law', according to Bachmaier Winter (2022), p. 4.

only to the latter but also to third parties. Their employment as helpful means in the context of criminal investigations is thus not at issue.

Foremost among the aforementioned topics is the issue of *procedural guarantees* to be ensured to the individual concerned—being the latter either the suspect/accused person or a third party—in the face of the huge power which oftentimes is retained by prosecuting authorities in searching and seizing electronic devices.

In this regard, our analysis will focus on the Italian domestic framework –specific provisions of the Italian Code of Criminal Procedure (hereinafter: 'CCP') provides the public prosecutor with the power to search and seize IT tools without any prior or *ex post facto* judicial oversight. As will be explained, that lack of any control on the public prosecutor's activities might be problematic in light of the fundamental right to private life and correspondence, acknowledged both by the European Convention on Human Rights (hereinafter: 'ECHR'), as interpreted by the European Court of Human Rights (hereinafter: 'ECtHR'), and by the EU Charter of Fundamental Rights (hereinafter: 'the Charter'), as interpreted by the Court of Justice of the European Union (hereinafter: 'CJEU'). Such circumstance may serve as a benchmark for assessing the degree of guarantees which shall be in place avoid any arbitrary infringement of those prerogatives.

Accordingly, a brief analysis of the Italian legal framework will be depicted (§ 2). Subsequently, the settled ECtHR's case-law on digital searches and seizures will be scrutinised, in order to set the minimum standard of procedural prerogatives (i.e., the existence of an independent oversight) that stem thereof and its impact on the Italian legal framework (§§ 3-4). Conclusively, final remarks will be developed with some proposals *de iure condendo*, in the light of the unceasing cross-fertilisation between the two European legal frameworks (§ 5).

2. BALANCING POWERS WHEN IMPLEMENTING DIGITAL SEARCHES AND SEIZURES: OLD AND NEW CHALLENGES IN THE ITALIAN CRIMINAL JUSTICE SYSTEM

The Law No. 48/2008, which transposed in Italy the Council of Europe Convention on Cybercrime, the so-called 'Budapest Convention'[13], has chosen to regulate investigative operations aimed at obtaining and using electronic data in criminal proceedings, in the context of inspections, searches and seizures[14], through specific amendments of the Code of Criminal Procedure[15].

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[13] Cfr. the Convention on Cybercrime of the Council of Europe, done on 23 November 2001 (*https://rm.coe.int/1680081561*).

[14] An analogous choice has been made by many other EU Member States. See Bartoli, Lasagni (2021).

[*Nota 15 en página siguiente*]

The admissibility of digital evidence in criminal proceedings has challenged the doctrinal boundaries and relationships between 'inspections', 'searches' and 'seizures'[16]. Faced with an electronic device, it is legitimate to question, for example, whether the opening of a folder should be classified as an 'inspection' or a 'search', or whether the seizure should be deemed to pertain to the device containing the electronic data or to the data themselves. However, there is at least one feature which is common to the three aforementioned measures—they can be ordered and executed by the public prosecutor without the need for any sort of (independent) authorisation. In other words, whether the search or a seizure of an IT tool is needed, Italian public prosecutors can act *motu proprio*. This circumstance, as will be seen, plays a pivotal role in emphasising the inadequacy of the Italian criminal justice system in protecting the (fundamental) right to private life and correspondence.

In any case, different procedural rules apply depending on the legal qualification of the act. In particular, the available legal remedies differ: for instance, an effective judicial review (*riesame*) is available solely to challenge the seizure warrant (Article 257 CCP). Hence, there is still some merit in trying to sketch the boundaries among the aforementioned measures.

In doctrinal circles, it has been argued that should the activity at stake consist solely in the mere *observation* of the device or of what it contains at the time of its finding, such activity may constitute an 'inspection'. If searches are conducted, even just by opening a file or folder, then such activity should be classified as a 'search'[17]. Should files be copied using specific devices (e.g., a USB pen drive) or techniques (e.g., the 'bit stream image'), a 'seizure' of the files is carried out. This is the solution suggested by the Italian Court of Cassation, that distinguishes between the 'seizure' of the file itself and the device that contains it: when, for instance, a personal computer is seized, not only the device is considered to be the object of the seizure warrant, but also any file that has been copied and retained[18].

In particular, the *fil rouge* between 'searches' and 'seizures' has become uncertain in the digital realm. In non-digital investigations, the authority usually issues a search warrant and, if evidence is found, a seizure can be implemented. However, in the digital field, the opposite is often true[19]. As

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[15] About searches and seizures, see Braghò (2019). Specifically on seizures, see Monti (2019). With regard to Article 354(2) CCP, concerning urgent checks of the *locus commissi delicti*, objects and persons and in particular on the preservation of the electronic data acquired in that context, see Lorenzetto (2019).

[16] In a nutshell, 'inspections' aim at ascertaining traces or other material effects of the offence on persons, in places or things (Articles 244-246 CCP); 'searches' consist in the examination of a person's body, property or other area which the person would reasonably be expected to consider as private by a law enforcement officer for the purpose of gathering evidence (Articles 247-252a CCP); finally, 'seizures' consist in the act of taking property, including cash, real estate, vehicles, *etc.*, that has been used in connection with or acquired through illegal activities (Articles 253-263 CCP).

[17] Cuomo (2022), pp. 631-632.

[18] Court of Cassation, Joint Chambers, 20 July 2017, No. 40963, Andreucci, ECLI:IT:CASS:2017:40963PEN, paras. 8-13.

[19] See Cascone (2022), p. 134 and Torre (2019), pp. 1433-1437. Additionally, see Felicioni (2019).

a general rule, investigating authorities make *first* a forensic copy of the IT device (a 'seizure') and, *afterwards*, search for the relevant data—this *modus operandi* is followed in order to preserve data integrity[20].

As one can easily understand, the right to private life may be under threat should digital investigations be carried out by the prosecuting authorities. As already said, these investigations can potentially reveal an unlimited amount of information, far beyond what is feasible through 'traditional' inspections, searches and seizures[21]. In this regard, it is evident that the right to private life is breached, for instance, where the creation of a forensic copy of a certain device is implemented by prosecuting authorities.

Against this background, the Decree-Law No. 132/2021 provides for the need for a judicial authorisation should the prosecutor aim at acquiring digital data collected by internet service providers[22]. Thus, one may question the appropriateness of the Italian prosecutors' power to issue searches and seizures warrants *motu proprio* for the purpose of gathering evidence, without a prior judicial authorisation. Indeed, there is no doubt that, through the aforementioned measures, the same data collected by Internet service providers can be obtained[23].

The issue becomes even more problematic when one considers the increasing practices of investigative authorities to store data in data banks for extremely long periods time, as those activities are not governed by strict rules protecting the secrecy of the data contained therein[24].

On the matter, the Italian Court of Cassation established that, as a general rule, a seizure of all the data stored in a certain digital device, without any prior selection, is not admissible[25]. Otherwise, there is a risk of nebulous and wide seizures, adopted to fasten investigation without a proper justification and reference to a specific crime.

The Court of Cassation also dealt with another interesting feature—the existence of an effective remedy through which the individual concerned may challenge the seizure warrant, eventually asking for the latter's review. According to previous jurisprudence, once the device has been returned to its

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[20] See the Interpol *Guidelines for digital forensics first responders. Best practices for search and seizure of electronic and digital evidence*, March 2021. In this regard, see Bartoli (2018), p. 16; Lorenzetto (2019), pp. 153-154; Ziccardi (2019), pp. 165-177.

[21] 'Inspections', 'searches' and 'seizures' related to physical evidence, and thus other that digital data, affect primarily the rights to domicile, personal liberty or property.

[22] Article 132 Legislative Decree No. 196/2003, i.e., Privacy Code.

[23] Chelo (2022).

[24] In this regard, it is worth mentioning a document issued by the Public Prosecutor's Office of Trento ('*Nota d'indirizzo organizzativo*', 22 October 2021), which highlights the lack of clarity of the provisions and the questionable practices of the investigative bodies.

[25] Court of Cassation, 24 February 2015, No. 24617, ECLI:IT:CASS:2015:24617PEN. Additionally, see, among others, Court of Cassation, 28 September 2021, No. 38460, ECLI:IT:CASS:2021:38460PEN; Court of Cassation, 5 July 2021, No. 32761, ECLI:IT:CASS:2021:32761PEN; Court of Cassation, 9 December 2020, No. 6623, ECLI:IT:CASS:2021:6623PEN.

owner, that person should no longer have access to the judicial remedy, since his/her right to property had been restored[26].

Nevertheless, recent case-law has overruled this approach. Particularly, the Italian Court of Cassation has set forth that the interest in challenging a seizure warrant is not diminished should the files extracted from the (already) returned device be *still in the possession of the investigative authorities*, as there is a material and current interest in the exclusive availability of the data[27].

Finally, the lack of a remedy in the case of a search without subsequent seizure was another issue. The ECtHR found that the Italian legislation was not in keeping with Article 8 ECHR[28] and, accordingly, a change in the domestic legal framework was clearly needed. To this end, the Legislative Decree No. 150/2022 (the so-called 'Cartabia reform') introduced a specific provision within the CCP (i.e., Article 252a CCP), which provides the individual concerned with a new remedy, specifically devoted to challenging the search warrant issued by the public prosecutor in the event that no subsequent seizure has taken place[29].

It is likely that the ECtHR will trigger further changes in the near future, as it seeks to circumscribe the boundaries of digital investigations, alongside their world-wide spreading. The broad scope of application of Article 8 ECHR makes it a perfect and flexible paradigm to encompass any violation of the digital environment by public authorities. The following paragraphs will analyse the judicial oversight paradigm in the field of digital searches and seizures that stems from the ECtHR's case-law.

3. SEARCHES AND SEIZURES OF ELECTRONIC DEVICES AND *EX ANTE* INDEPENDENT CONTROL. THE NEED FOR A NEW STANDPOINT

In this Section, it will be advocated that searches and seizures of electronic devices should *solely* be carried out once a prior authorisation, rendered by an independent body, has been granted (i.e., 'independent review'). While this practice does not appear to be widespread across the EU[30], it appears none-

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[26] Court of Cassation, Joint Chambers, 24 April 2008, No. 18253, Tchmil, ECLI:IT:CASS:2008:18253PEN.

[27] Court of Cassation, Joint Chambers, No. 40963/2017, supra note 18, paras. 19-21. Beforehand, the same principle was established by Court of Cassation, No. 24617/2015, supra note 25, paras. 7-7.3. More recently, see Court of Cassation, 3 February 2022, No. 18502, ECLI:IT:CASS:2022:18502PEN, paras. 2.1-2.2.

[28] *Brazzi v. Italy*, App. No. 57278/11 (ECtHR, 27 September 2018), ECLI:CE:ECHR:2018:0927JUD005727811.

[29] The same Legislative Decree No. 150/2022 laid down an equivalent remedy in Article 352(4a) CPP, in case the search was conducted directly by the police.

[30] We have already dealt with the Italian legal framework. It is also noteworthy that in the Spanish legal system, seizures for evidence-related purposes are deemed to be measures that do not affect

theless that the need for a preventive oversight—albeit not being an absolute requirement of Article 8 ECHR—is embodied within the relevant ECtHR's case-law on the right to private and family life.

For the purpose of depicting these findings, it will first be necessary to glance *whether* and *to what extent* the abovementioned rights are ensured within the ECHR legal framework. Emphasis will be put upon the scope and the content of Article 8 ECHR (§ 3.1). Against this background, it will be explained that the ECtHR has dealt on several occasions with the issue of surveillance measures in the context of criminal proceedings—the relevant case-law may provide insightful guidance which help in carving out the significance of a prior independent oversight stemming from Article 8 ECHR (§ 3.1.1). What is more, the Strasbourg Court gave illustrious examples which foster the idea that an *ex ante* independent oversight is of paramount importance in order to avoid arbitrary action by public authorities when carrying out searches and seizures of IT devices (§ 3.1.2). An additional paragraph will provide a concise portrayal of the main advantages that may be seen in this line of reasoning, delving into any unresolved questions that may persist (§ 3.2).

3.1. 'You shall not pass'. Avoiding Arbitrariness Through Prior Oversight: Searches and Seizures of Electronic Devices Before the ECtHR

Whereby searches and seizures of electronic devices in the context of criminal proceedings may raise several and different fundamental rights issues, the modest aim of this Section will focus on the right to private life and correspondence, to which every individual is entitled under Article 8 ECHR. We will focus, in particular, on the '*protection classique*' acknowledged by the Convention with regard to the intimate personal relations, which shall be safeguarded from any sort of external interference[31].

Aside from a first, absolute, acknowledgement of this prerogative[32], the wording of Article 8 ECHR reveals that the latter may be restricted should specific grounds be met in the material case[33]. It is worth recalling that, as

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fundamental rights, and therefore do not require a prior judicial authorisation to be carried out by the police or the public prosecutor. See De Lucchi López-Tapia, Jiménez López (2022), p. 172. In Germany, under Article 98 *Strafprozeßordnung* (StPO), while freezing orders are normally to be ordered by a court, the public prosecutor or the police may also execute *motu proprio* a seizure 'in urgent circumstances'. In this latter case, judicial review is still automatically ensured *ex post facto*, within three days, but solely in certain cases (e.g., the individual concerned was not present during the operations or an objection against the seizure has been lodged). Finally, it is worth recalling the Belgian domestic framework—the public prosecutor may autonomously seize objects for a wide range of evidentiary purposes, in particular '*de tout ce qui pourra servir à la manifestation de la vérité*' (see Articles 35 and 28a(3) *Code d'Instruction Criminelle*).

[31] See Renucci (2021), p. 279, with further references cited therein.

[32] Article 8(1) ECHR.

[33] Greere (2006), p. 257.

a preliminary question, the ECtHR shall assess whether the measure under scrutiny constitutes an 'interference' as per Article 8 ECHR[34]. Where such assessment has been positively fulfilled, the ECtHR will examine: (i) whether there is a legal basis in domestic law for the implementation of the measure at stake[35]; (ii) whether the interference is necessary in a democratic society[36]; (iii) whether the interference furthers a legitimate aim (e.g., the prevention of crime)[37].

As has been reiterated by the ECtHR, the purpose of this threefold test is to protect individuals from arbitrary interference with their private life[38]. Although cited very frequently in the ECtHR's case-law on Article 8 ECHR, it is noteworthy that there is no consensus among legal theory scholars on the content of the notion of 'arbitrariness'[39]. While it is not the purpose of this essay to explore such issue, it is important to circumscribe the notion of 'arbitrariness', the avoidance of which is the very aim of the establishment of independent review mechanisms. To break through this deadlock, it could be argued that such a notion encompasses both illegal conducts and those behaviours which are characterised by elements of inappropriateness or injustice[40]. Accordingly, those interferences implemented against individuals that are neither necessary nor proportionate nor reasonable in the material case may be deemed arbitrary, albeit implemented in accordance with domestic law provisions[41]. This line of reasoning, which stems directly from international law, is in keeping with the relevant ECtHR's case-law, which notably tends to discern 'unlawful' conducts from 'arbitrary' ones[42].

That being said, it is apparent that the scope of Article 8 ECHR relies on to the need to avoid haphazard behaviours by public authorities in very sensitive areas, such as those relating to private life and communications—for what is relevant here, such a provision acknowledges a *negative* prerogative, a sort of 'right to be left alone'[43].

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[34] See, for instance, *Vinci Construction and GTM Génie Civil et Services v. France*, App. Nos. 63629/10 and 60567/10 (ECtHR, 2 April 2015), ECLI:CE:ECHR:2015:0402JUD006362910, para 63 and, more recently, *Särgava v. Estonia*, App. No. 698/19 (ECtHR, 16 November 2021), ECLI:CE:ECHR:2021:-1116JUD000069819, para 85.

[35] Amongst other authorities, see *Modestou v. Greece*, App. No. 51693/13 (ECtHR, 16 March 2017), ECLI:CE:ECHR:2017:0316JUD005169313, paras. 30-38.

[36] See, for instance, *Naumenko and SIA Rix Shipping v. Latvia*, App. No. 50805/14 (ECtHR, 23 June 2022), ECLI:CE:ECHR:2022:0623JUD005080514, paras. 50-63.

[37] See *inter alia Adomaitis v. Lithuania*, App. No. 14833/18 (ECtHR, 18 January 2022), ECLI:CE:ECHR:2022:0118JUD001483318, para 84.

[38] *P. and S. v. Poland*, App. No. 57375/08 (ECtHR, 30 October 2012), ECLI:CE:ECHR:2012:-1030JUD005737508, para 94.

[39] See *inter alia* Harnold, Harris (2017), pp. 55-70 and Valentini (2017), pp. 817-832.

[40] See the HRC report *CCPR General Comment No. 16: Article 17 (Right to Privacy)*, 8 April 1998, para 4.

[41] See the HRC report *The right to privacy in the digital age*, A/HRC/27/37, 30 June 2014, paras. 21-27.

[42] See, in this regard, *Mozer v. the Republic of Moldova and Russia*, App. No. 11138/10 (ECtHR, 23 February 2016), ECLI:CE:ECHR:2016:0223JUD001113810, para 196.

[43] Schabas (2015), p. 366.

Among other guarantees, such aim is customarily pursued—albeit not exclusively—by the establishment of independent control mechanisms over the State's activities. In every branch of law, indeed, it is a settled belief that government actions 'that deviate from their legal authority, whether accidentally or deliberately, may not be permitted'[44]. For this to happen, public authorities should be aware that their behaviour may be subject to scrutiny by another 'power' (*pouvoir*), according to the old-fashioned Montesquieu's standpoint, which is deemed to possess a certain degree of independence and impartiality[45]. While such an assessment may take place either *before* or *after* the act at stake, traditional doctrine focused on the pre-eminent role of prior independent review as the most effective tool to prevent arbitrariness.

In the context of criminal proceedings, this line of reasoning is of pivotal importance under several aspects. Markedly, suspects and accused persons may be subjected to coercive measures during the investigation phase, and it would be arbitrary not to have a *prior* check on the lawfulness of the latter. Pre-trial detention or house arrest may be examples of legal tools that should be authorised *ex ante* by an independent body, for the sake of ensuring that the action of public authorities is provided for by law, is necessary in the material case and is proportionate to the aim pursued. It is noteworthy that, when it comes to the right to personal liberty, domestic legislations proved to be very cautious in granting the investigating authorities the autonomous power to restrict this right without a proper, anticipated control, which is ultimately assigned to the judicial authority.

While prior independent review mechanisms have been progressively entrenched in contemporary criminal justice systems, there is nonetheless a lack of understanding as to whether such review is *also* required when interests other than the right to personal liberty are jeopardised. To come back to private life and correspondence, it might be debatable whether such prior protection should *always* be afforded where the abovementioned prerogatives are threatened, e.g., during preliminary investigations.

A fairly common activity, the search and seizure of an IT device could be tantamount of gathering almost *all* personal information relating to that person and, oftentimes, to third parties[46]. Accordingly, such measure could be particularly severe, even more so than other traditional means of surveillance, such as wiretappings[47]. It therefore deserves adequate guarantees, aimed at preventing prosecuting authorities from collecting such a large amount of evidence through arbitrary behaviour.

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[44] Smith (2015), p. 215.

[45] Montesquieu (1965).

[46] See Kerr (2005), pp. 531-585 and, for a comparative perspective, Winik (1994), pp. 75-128.

[47] The data contained in an electronic device could depict a nearly complete portrait of the person under investigation. Not only photos or videos, but also the content of emails, SMS messages, traffic and location data may be inspected and retained by the investigating authorities. Conversely, wiretappings disclose solely partial, albeit relevant, pieces of information, such as the suspect's conversations at the moment they are made. A constant reference to the discipline of wiretapping, as shaped by the ECtHR, is thus of some relevance in that it could provide a benchmark for our analysis.

It is against this background that the relevance of Article 8 ECHR arises[48], acting as a solid gatekeeper for the privacy and data protection rights of the individuals involved in criminal proceedings whose electronic devices are searched and seized for the purpose of collecting evidence. Indeed, several judgements rendered by the ECtHR have addressed this issue. Here, the question that arises is the following—to what extent does Article 8 ECHR provide an acceptable level of protection for individuals when the abovementioned measures are taken by public authorities in the context of criminal proceedings? And, in particular—is the need for a prior review embodied in the protection ensured by Article 8 ECHR?

3.1.1. Minimum Guarantees in the Field of Surveillance Measures Before the ECtHR

In order to sketch the minimum ECHR standards to be applied should searches and seizures of IT devices be implemented, it is worth recalling the relevant case-law on surveillance measures in the context of criminal proceedings.

More generally, the existence of a *prior* authorisation burden on prosecution authorities composes 'an important safeguard against abuse'[49]. The Court has made it clear that the safeguards against arbitrariness include the existence of an 'effective scrutiny' of measures encroaching on Article 8 ECHR[50]. Accordingly, one of the factors typically taken into account by the ECtHR in assessing whether surveillance procedures are not ordered in an arbitrary fashion relates to the possible existence of an authority that grants such operations *a priori*. Remarkably, attention should be paid to the extent and the quality of such an assessment[51]. This evaluation is embodied within the 'third test' encompassed in Article 8 ECHR—whether a certain measure is 'necessary in a democratic society'—, given that, while national authorities hold a certain margin of discretion in assessing the need for an interference, this discretion shall go 'hand in hand with European supervision'[52].

In a famous passage of *Roman Zakharov*, the Grand Chamber underlined 'the risk that a system of secret surveillance set up to protect national security

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[48] Although not the focus of the present analysis, it is noteworthy that searches and seizures of electronic devices have also raised issues under Article 10 ECHR, when IT tools are owned by a journalist. See, among other authorities, *Sergey Sorokin v. Russia*, App. No. 52808/09 (ECtHR, 30 August 2022), ECLI:CE:ECHR:2022:0830JUD005280809.

[49] *Kamić v. Croatia* (dec.), App. No. 37517/16 (ECtHR, 20 September 2021), ECLI:CE:ECHR:2021:-0928DEC003751716, para 23.

[50] *Lambert v. France*, App. No. 23618/94 (ECtHR, 24 August 1998), ECLI:CE:ECHR:1998:-0824JUD002361894, para 34.

[51] A mere formal assessment does not suffice for this purpose. See, for instance, *Vinci Construction*, supra note 34, para 79.

[52] *Funke v. France*, App. No. 10828/84 (ECtHR, 23 February 1993), ECLI:CE:ECHR:1993:-0225JUD001082884, para 55. Such a need shall be 'convincingly established'.

may undermine or even destroy democracy under the cloak of defending it'[53]. Although the implementation of IT searches and seizures cannot apparently be equated to bulk surveillance mechanisms, it should not be underestimated that the theoretical possibility for a public prosecutor to carry out these activities without any prior control whatsoever might lead to their haphazard employment *en masse*. Furthermore, in both cases, the domestic bodies need to act in the lack of the individual's awareness, which makes it unlikely that the suspect will have an effective remedy before the measure is issued. What is more, the access to data stored in an electronic device—if implemented without a prior assessment of its necessity and proportionality *in concreto*—might hamper the protection afforded by Article 8 ECHR, given that those activities may nowadays endanger not only the suspect's personal data but also those of third parties.

It descends that, from a practical perspective, one of the most effective means of preventing investigating bodies from arbitrarily infringing Article 8 ECHR would appear to be a prior review of the undertakings carried out by investigating authorities, *a fortiori* 'in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole'[54]. Albeit written in 1978 and referring to surveillance measures, it is apparent that this quote from *Klass* retains its relevance in relation to searches and seizures of digital devices.

As for the kind of authority competent to authorise the surveillance, the ECtHR developed a nuanced line of reasoning. 'In principle'[55], it would be a judicial authority, which provides the highest guarantees of 'independence, impartiality and a proper procedure'[56]. Yet, the Court was open to acknowledge that, should a certain body be sufficiently independent of the executive, such circumstance may not be seen incompatible, as such, with the Convention[57]. In the landmark *Big Brother Watch* judgement, the Court expressed its 'preference' for judicial review but stressed that this was not a 'necessary requirement'[58]. In a nutshell, what is relevant for the ECtHR is the high degree of independence that shall characterise the body which is ultimately charged with assessing the necessity and proportionality of the measure in question.

A rich case-law of the ECtHR addressed the need for a prior independent review in the light of Article 8 ECHR in cases of telephone tapping. In *Dumitru Popescu (No. 2)*, the Court found a breach of the abovementioned provision

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[53] *Roman Zakharov v. Russia* [GC], App. No. 47143/06 (ECtHR, 4 December 2015), ECLI:CE:ECHR:2015:1204JUD004714306, para 232.

[54] *Klass and Others v. Germany* [Plen.], App. No. 5029/71 (ECtHR, 6 September 1978), ECLI:CE:ECHR:1978:0906JUD000502971, para 56.

[55] Ibid.

[56] Ibid., para 56 *in fine*.

[57] See, among other authorities, *Roman Zakharov*, supra note 53, para 258 and the case-law cited therein.

[58] *Big Brothers Watch and Others v. the United Kingdom* [GC], App. No. 58170/13 *et al*. (ECtHR, 25 May 2021), ECLI:CE:ECHR:2021:0525JUD005817013, paras. 197 and 351.

in that, *inter alia*, the prosecutor's authorisation to intercept communications was not subject to any *a priori* review by a judge or other independent authority, either *ex officio* or at the request of the person concerned[59]. The same line of reasoning—redolent of the well-know *Klass and Others* judgement[60]—was then adopted by the Grand Chamber in *Roman Zakharov*[61]. Notably, the ECtHR held that no breach of Article 8 ECHR may be found where phone tapping measures were implemented after a judicial authorisation assessing their necessity *in concreto*[62]. To this acknowledgement, it is worth recalling that in *Dragojevič*, the ECtHR took particular account of the existence of a robust mechanism for obtaining prior authorisation to carry out wiretappings:

> 'The domestic law thereby provides for prior authorisation of the use of secret surveillance measures which must be sufficiently thorough and capable of demonstrating that the statutory conditions for the use of secret surveillance have been met and that the use of such measures is necessary and proportionate in the given circumstances. Strictly speaking, every individual under the jurisdiction of the Croatian authorities, when relying on these provisions of the relevant domestic law, should be confident that the powers of secret surveillance will be subjected to prior judicial scrutiny and carried out only on the basis of a detailed judicial order properly stipulating the necessity and proportionality of any such measure'[63].

What is more, the judicial order on which a surveillance measure is based cannot be drafted in such nebulous terms as to leave 'room for speculation', without properly identifying the person concerned by the measure at stake[64].

Interestingly, the same held true in relation to home searches[65]. In this regard, the Court has customarily emphasised the positive obligations of the Contracting States in safeguarding the guarantees stemming from Article 8 ECHR. As already said, they must provide concrete safeguards against abusive behaviour towards the individual concerned[66]. For instance, the lack of 'any requirement of a *judicial* warrant' as a basis for the actions of customs authorities in carrying out house searches and seizures was considered an important factor to be taken into account in finding a breach of Article 8

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[59] *Dumitru Popescu v. Romania (No. 2)*, App. No. 71525/01 (ECtHR, 26 April 2007), ECLI:CE:ECHR:2007:0426JUD007152501, paras. 72-73. Other circumstances that led the Court to find a violation of Article 8 ECHR were the lack of independence of the prosecutors and, remarkably, the lack of any *ex post* review of the legality of the intrusive measure under investigation.

[60] *Klass and Others*, supra note 54, para 55.

[61] *Roman Zakharov*, supra note 53, para 258

[62] See *İrfan Güzel c. Turquie*, App. No. 35285/08 (ECtHR, 7 May 2017), ECLI:CE:ECHR:2017:-0207JUD003528508, paras. 78-79.

[63] *Dragojević v. Croatia*, App. No. 68955/11 (ECtHR, 15 January 2015), ECLI:CE:ECHR:2015:-0115JUD006895511, para 92.

[64] *Azer Ahmadov v. Azerbaijan*, App. No. 3409/10 (ECtHR, 22 July 2021), ECLI:CE:ECHR:2021:-0722JUD000340910, para 71 and the case-law cited therein.

[65] *Kamić*, supra note 49, paras. 23-24. See also *Wolland v. Norway*, App. No. 39731/12 (ECtHR, 17 May 2018), ECLI:CE:ECHR:2018:0517JUD003973112, para 76.

[66] *Wieser and Bicos Beteiligungen GmbH v. Austria*, App. No. 74336/01 (ECtHR, 16 October 2007), ECLI:CE:ECHR:2007:1016JUD007433601, para 57.

ECHR[67]. Nevertheless, the lack of an *a priori* independent authorisation does not automatically lead to a violation of the Convention. Indeed, the existence of an *ex post facto* oversight on home searches warrants may, on a case-by-case basis, compensate for the lack of a preventive review[68]. Conversely, the absence of any assessment of the lawfulness of the measure at stake (both *ex ante* and *ex post*) may automatically lead to a breach of Article 8 ECHR[69].

To take it in a nutshell, an independent review shall be carried out at least once during the criminal proceedings, so that the person concerned can challenge the (alleged) necessity, proportionality and duration of the measure in question. Should the *ex post facto* review do not explain whether the issuing authority (e.g., the prosecutor) had sufficient and relevant grounds for issuing a search warrant, Article 8 ECHR is violated[70]. Criminal proceedings are thus analysed 'as a whole' by the ECtHR, echoing the (questionable) 'fairness as a whole' test, developed in relation to Article 6 ECHR[71], and based on the idea that certain counterbalancing factors can 'compensate' for a breach of the Convention (and ultimately render 'fair' a procedure that could not, otherwise, be so defined)[72].

Against this background, the benchmark of the guarantees stemming from Article 8 ECHR *in parte qua* could be summarised as follows: (i) in principle, there is a need for an effective and comprehensive *prior* oversight upon the necessity and proportionality of the intrusive investigative measure; (ii) such review may be carried out by either a judicial or an administrative body, provided that the latter authority is sufficiently independent of the executive; (iii) the lack of a preventive assessment of an intrusive measure is not, in itself, in breach of the Convention, provided that other counterbalancing factors are present in the material case, e.g., an *ex post facto* review.

3.1.2. Prior Independent Oversight Under Article 8 ECHR: How floue *Is the ECtHR Approach?*

When it comes to seizures and searches of digital evidence, the standpoint of the Court of Strasbourg mirrors the framework already outlined. Indeed, it

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[67] *Funke*, supra note 52, para 57, emphasis added. The Court stressed that 'above all' the absence of a prior judicial oversight led the restrictions foreseen in the domestic law 'too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued'.

[68] *Smirnov v. Russia*, App. No. 71362/01 (ECtHR, 7 June 2007), ECLI:CE:ECHR:2007:-0607JUD007136201, para 45 *in fine*. See § 4.1.

[69] *DELTA PEKÁRNY a.s. v. the Czech Republic*, App. No. 97/11 (ECtHR, 2 October 2014), ECLI:CE:ECHR:2014:1002JUD000009711, paras 88-94.

[70] *Dorożˇ v. Poland*, App. No. 71205/11 (ECtHR, 29 October 2020), ECLI:CE:ECHR:2020:-1029JUD007120511, para 28.

[71] See Caianiello (2017) and Kostoris (2020).

[72] For what concerns searches and seizures of electronic devices, the existence of an independent *ex post facto* review may be seen as a counterbalancing factor that compensates for the lack of a prior oversight *in parte qua*.

is apparent that searches and seizures of electronic devices as such constitute an interference with 'private life' and 'correspondence'[73], within the meaning of Article 8 ECHR[74]. In past years, several cases have been brought before the ECtHR on this specific issue. On a first sight, their findings could be considered to be in line with the established case-law on data protection.

One of the earliest rulings on searches and seizures of electronic data was *Wieser and Bicos*[75]. The first applicant was an Austrian lawyer and owner and general manager of the second applicant, a holding company. A search was carried out by Austrian police at the registered office of the first applicant's company, which was also his law firm—these activities also embodied the analysis of the first applicant's computer and the copying of the data contained therein[76]. Those operations were executed within the limits set out in the search warrant[77].

In finding a breach of Article 8 ECHR, the ECtHR attached greater relevance to the mismatch between the procedural guarantees ensured to the applicants and their implementation in the material case. While acknowledging that the intrusive measures had been preventively authorised by the investigating judge, the Court found *inter alia* that the applicants had not been provided with a report on the police activities at the end of the latter, nor had the officers carrying out the investigations made any communication concerning the outcome of the research. Nevertheless, these guarantees were laid down in domestic law[78]. Furthermore, the *manner* in which the searches and seizures activities were carried out was taken into consideration by the ECtHR, as the duty of professional secrecy surrounding lawyers' activities might have been hampered should an *arbitrary* collection of data be allowed *vis-à-vis* a legal counsel[79]. Hence, these shortcomings, taken as a whole, were deemed relevant in finding a violation of Article 8 ECHR on the part of the Austrian authorities[80].

Several interesting considerations stem from this judgement. As for the nature of the preventive oversight carried by the investigating judge, the Court

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[73] *Vinci Construction*, supra note 34, para 63.

[74] *Posevini v. Bulgaria*, App. No. 63638/14 (ECtHR, 19 January 2017), ECLI:CE:ECHR:2017:-0119JUD006363814, para 65. The Court referred to the 'search of residential and business premises entailing … the seizure of equipment containing electronic data'.

[75] *Wieser and Bicos*, supra note 66.

[76] The domestic court, upon a request for legal assistance from Italian authorities, 'ordered the seizure of all business documents revealing contacts with the suspected persons and companies' (ibid., para 7 *in fine*).

[77] Ibid., para 59.

[78] Ibid., paras. 58-63.

[79] Ibid., para 65. In this respect, the Court quoted *Niemietz v. Germany*, App. No. 13710/88 (ECtHR, 16 December 1992), ECLI:CE:ECHR:1992:1216JUD001371088, para 37, in which it interestingly set forth that 'where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 (art. 6) of the Convention'. The Court additionally stressed that the electronic data seized contained broadly the same information as the paper documents seized, some of which were returned to the first applicant by the investigating judge as being covered by professional secrecy.

[80] Ibid., para 66.

was apparently satisfied that such an assessment would have constituted an 'adequate and effective'[81] safeguard against any abuse or arbitrariness. Moreover, although the existence of an *ex post facto* review was not explicitly mentioned, the individual concerned had the formal possibility of requesting that seized objects be sealed and submitted to the investigating judge, in order to exclude their employment as evidence in the investigations[82], a decision that could have been taken by a judicial body (i.e., the Review Chamber)[83]. Yet, it is noteworthy that the police officers searched and seized a massive amount of data without providing the applicant-lawyer with the opportunity, on the one hand, to object and have the disks sealed and, on the other hand, to receive a detailed and precise list of the data seized and eventually copied together with the search criteria adopted in the material case[84]. These circumstances played a key role in exacerbating the prejudice suffered by the applicant-lawyer under Article 8 ECHR[85].

Five years later, a similar situation—involving an Austrian lawyer, Mr Robathin, whose electronic data had been searched and seized—was examined before the ECtHR[86]. In this case, however, the police officers apprehended *all* the files contained in the applicant's computer system, pertaining to his law firm. Subsequently, and solely on the proposal of the representative of the Bar Association who was present during the operations, these data were split into four CDs. Solely one of the latter contained the files relating to R. and G., alleged victims of the applicant's conducts of fraud, theft and embezzlement[87].

As in *Wieser and Bicos*, the search warrant was issued by the investigating judge and gave details in respect of the alleged acts, the time at which they were committed and the damage allegedly caused[88]. Nevertheless, and in contrast to that judgement, the wording of the warrant was so much vague that it led *de facto* to unlimited searches and seizures of almost all documents,

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[81] These two expressions have been frequently quoted in the ECtHR's case-law on this issue. See, among others, *Société Colas Est and Others v. France*, App. No. 37971/97 (ECtHR, 16 April 2002), ECLI:CE:ECHR:2002:0416JUD003797197, para 48.

[82] *Wieser and Bicos*, supra note 66, para 64.

[83] Ibid., para 15 in conjunction with para 33. The Court observed that such guarantee applies both to paper documents (as explicitly written in domestic law) and, *mutatis mutandis*, to electronic data.

[84] Still, it is of a certain interest that 'the search was carried out using the name of the companies involved and the names of the suspects in the Italian proceedings' (ibid., para 12). In spite of other shortcomings, this *modus operandi* could be considered compatible with Article 8 ECHR, in that it prevents investigating authorities from coping and apprehending almost *all* electronic material contained in electronic devices (ibid., para 59).

[85] Yet, as will be explained, it could be argued that the danger of such tools is inherent in their nature. The risk of disproportionate intrusion into the private sphere of individuals through searches and seizures for the purpose of collecting digital evidence is *in rerum natura*. This aspect is certainly emphasised in certain specific cases, e.g. where a lawyer is involved in a criminal investigations. However, it seems that such a risk is triggered as soon as the abovementioned measures are implemented against any individual.

[86] *Robathin v. Austria*, App. No. 30457/06 (ECtHR, 3 July 2012), ECLI:CE:ECHR:2012:-0703JUD003045706.

[87] Ibid., paras. 7-11.

[88] Ibid., para 45 *in fine* (compare *Wieser and Bicos*, supra note 66, para 58).

personal computers and discs in the applicant's possession [89]. Thus, the Court looked at possible counterbalancing factors which could provide the individual concerned with sufficient protection against arbitrariness, the *ex post* remedy before the Review Chamber being of paramount importance in this respect [90]. Considering the latter to be overly formalistic and unsubstantiated, a breach of Article 8 ECHR was found to have occurred, in that the search of all the applicant's electronic data was disproportionate *in concreto* [91].

At a first sight, *Robathin* seems to attach great importance to the lack of an adequate and effective *ex post facto* oversight of the intrusive measures at stake. The wideness of the content of the search warrant was considered *en passant*, the Court having focused on the assessment subsequently made by the Review Chamber. However, in the last paragraph, the ECtHR observed that where an investigation relates solely to the activities of the suspect in relation to well-identified victims, 'there should be particular reasons to allow the search of *all other data*, having regard to the specific circumstances prevailing in a law office' [92].

This standpoint, albeit articulated at the end of the line of reasoning developed by the ECtHR, revealed interesting features.

Firstly, where a general search of documents or data is envisaged by the authorities, there shall be a thorough assessment of the necessity to adopt bulk intrusive measures, which may involve information other than that relevant for the material case. Secondly, such an assessment should, as a rule, be carried out *before* the start of the relevant operations begin—such approach proves to be the most adequate for the purpose of preventing the investigating authorities from arbitrarily interfering with the individual's right to respect for private life and correspondence. This holds true *a fortiori* when the suspect is a lawyer, who deserves a higher degree of protection on account of his/her duties of professional secrecy. Thirdly, should a prior oversight have not been conducted with regard to the need to search *all* documents or data owned by the suspect, the existence of *ex post facto* guarantees plays a pivotal role in compensating the lack of a preventive control on the necessity and proportionality of the measure in question.

Yet, it is difficult to understand why 'deficiencies in the limitation of the scope of the search and seizure warrant' [93] might not *per se* constitute a breach of Article 8 ECHR. Where those measures are employed for gathering personal data, the risk of collecting irrelevant and personal data unrelated with the material case is exceedingly high. As a matter of principle, the issuing author-

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[89] Ibid., para 47 (see *a contrario Wieser and Bicos*, supra note 66, para 59). See, as a recent authority, *Kruglov and Others v. Russia*, App. Nos. 11264/04 *et al*. (ECtHR, February 2020), ECLI:CE:ECHR:2020:-0204JUD001126404, para 127 and the case-law cited therein.

[90] Ibid., para 51.

[91] Ibid., paras. 51-52. Compare *Vinci Construction*, supra note 34, paras. 78-79.

[92] Ibid., para 52, emphasis added. The Court was ready to accept that 'there were no such reasons either in the search warrant itself or in any other document'.

[93] Ibid., para 47.

ity should carry out a preventive screening of the relevant information, i.e. before the start of the operations, unless such a screening proves impossible for specific reasons which must be set out exhaustively in the warrant. This view would aim at strengthening the right of everyone not to be subjected to haphazard intrusions into their private sphere. Still, in light of the precedent established in *Robathin*, it may be deemed permissible, under certain circumstances and with the presence of solid *ex post facto* counterbalancing factors, that the collection of data against the suspect in a general manner does not constitute a violation of Article 8 ECHR.

Reference is to be made to the fact that, while police officers searched and seized all the applicant's data, 'all the copied discs were sealed and could only be examined under the control of the Review Chamber'[94]. Accordingly, the investigating authorities could not employ those pieces of information until a decision issued by a judicial body[95]. Indeed, such mechanism could be seen as an alternative[96] pattern aimed at preventing the bulk, non-necessary and non-proportionate employment of intrusive measures for the purpose of gathering electronic evidence, as the collected material was 'frozen' as soon as the applicant objected to the search of the data.

In 2017, the ECtHR rendered another judgement related to searches and seizures of equipment containing electronic data. In *Posevini*, the intrusive measures—i.e., the searches of the applicant's home and his photography studio—were based on judicial warrants, a fact which the Court emphasised in distinguishing the material case from other previous decisions[97]. For the sake of completeness, a list of the electronic elements seized from the applicant's premises would provide a comprehensive portrait of the intrusiveness of the operations: eleven SIM cards, a laptop computer, three mobile Internet dongles, a mobile telephone, three desktop computers, two video cameras, two still cameras, several flash memory cards and flash memory drives[98].

Against this background, the Court reiterated that the mere existence of a prior independent oversight is not *per se* a sufficient safeguard for the purposes of Article 8 ECHR, as it is the *manner* in which such assessment is carried out that is of paramount importance[99]. As the domestic judge analysed in-depth all the relevant material at his/her disposal, the Court accepted that

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[94] Dissenting Opinion of Judges Kovler and Lorenzen, attached to *Robathin*, supra note 86.

[95] The situation would have been different if, for instance, the authorities had been able to *make immediate use* of the data obtained in a generalized manner, pending the decision of the judicial body to which the interested party had appealed. In such a case, the infringement of privacy and correspondence would already have occurred, and *ex post facto* control could at most exclude certain evidence from the proceedings, but could not, for example, prevent the authorities from becoming aware of it in any case.

[96] It is worth recalling that, in the context of the present analysis, the existence of a prior independent oversight over an intrusive measure may be seen as the most important means to avoid arbitrariness on the part of public authorities may be avoided.

[97] *Posevini*, supra note 74, paras. 67 and 70 and the case-law cited therein.

[98] Ibid., paras. 14-15.

[99] Ibid., para 70.

the judicial warrants were based on a reasonable suspicion[100]. Yet, these warrants were drafted in very broad terms, allowing for the search and seizure of all objects related to the criminal offence under investigation. May this fact be detrimental to the quality of *ex ante* independent scrutiny? Following a case-by-case approach[101], the Court's answer was in the negative and was essentially influenced by the speed with which the Bulgarian investigative authorities were obliged to act in the material case. What is more, the ECtHR considered that the identification of the, object of the search warrant, with. all items related to the criminal offence under investigation. was 'sufficient *in the circumstances*' to properly limit the margin of manoeuvre given to the investigating bodies[102].

Nevertheless, the Court seems to weaken the importance of a prior independent oversight over extremely intrusive measures. Indeed, it may be questionable whether the 'nature of the alleged offence' can serve as a limit for public authorities in carrying out searches and seizures. Quite the contrary, such standpoint may lead to abusive behaviour on the part of prosecuting authorities, allowing them, for instance, to define the offence under investigation in wide-ranging terms, in order to collect as much data as possible. As is apparent, the identification of the criminal behaviour to be investigated is a task which falls *entirely* in the hands of the public prosecutor—his/her discretionary power in the drafting of criminal charges can in no way serve as a deterrent that can narrow police officers' activities.

Letting the assessment of an intrusive measure be influenced by such ground does not seem to be in keeping with the need to avoid arbitrary behaviour on the part of public powers. Indeed, should such line of reasoning be acknowledged, the margin of discretion of prosecuting authorities would not appear to be subject to any *concrete* limitation, as almost every IT tool might be linked—at least 'potentially'—with a certain alleged offence, given that every individual's personal data is *de facto* contained therein nowadays[103]. Against this background, the extent of the *ex ante* independent review appears to be reduced, arguably disregarding the need to ensure that the measures in question shall be kept within reasonable bounds[104].

Shortly after *Posevini*, the ECtHR rendered another judgement concerning searches and seizures of electronic data[105]. In that case, the applicant, Mr Trabajo Rueda, brought a computer to a technician, in order to have it repaired, stating that it was not protected by a password. As soon as the spe-

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[100] Ibid., para 71.

[101] See *Sher and Others v. the United Kingdom*, App. No. 5201/11 (ECtHR, 20 October 2015), ECLI:CE:ECHR:2015:1020JUD000520111, para 174.

[102] *Posevini*, supra note 74, para 72, emphasis added.

[103] Ibid., para 72 *in fine*.

[104] In this regard, see *Ernst and Others v. Belgium*, App. No. 33400/96 (ECtHR, 15 July 2003), ECLI:CE:ECHR:2003:0715JUD003340096, para 116.

[105] *Trabajo Rueda v. Spain*, App. No. 32600/12 (ECtHR, 30 May 2017), ECLI:CE:ECHR:2017:-0530JUD003260012.

cialist discovered child pornography material within the device, he informed the police, who searched and then seized it. The applicant was subsequently arrested[106]. It is noteworthy that no prior independent warrant was issued due to the urgency that, according to the police, existed in the material case—searches and seizures without a preventive independent authorisation were foreseen in domestic law. However, the applicant challenged *inter alia* the existence of such urgency ground.

The standpoint taken by the Strasbourg Court in *Trabajo Rueda*—in finding a breach of Article 8 ECHR—looks like an attempt to strengthen the role of *ex ante* judicial review over intrusive measures. Looking at the domestic framework, the ECtHR established that the urgency situation that may lead to omit such control shall exist *in concreto* and cannot be presumed by the police. In the material case, the ECtHR found that the Spanish authorities did not properly justified the need to act without any prior authorisation (which, notably, could have been obtained '*relativement rapidement*'), thus rendering the search and the seizure of the applicant's computer disproportionate *per se* and, as a consequence, unnecessary in a democratic society within the meaning of Article 8(2) ECHR[107].

But the kernel of the judgement lies elsewhere. Indeed, for the first time, the ECtHR emphasised the pivotal role of the prior oversight in the following terms:

> 'La Cour constate que, en ce qui concerne l'accès au contenu d'un ordinateur personnel par la police, la jurisprudence du Tribunal constitutionnel a établi la règle de l'autorisation judiciaire préalable, condition exigée *en tout état de cause* par l'article 8 de la Convention (*qui requiert la délivrance d'un mandat par un organe indépendant*) lorsqu'une atteinte à la vie privée d'une personne est en jeu'[108].

In the light of the previous case-law, this *obiter dictum* depicts unprecedented—and valuable—aftermaths. In fact, referring to the settled Spanish Constitutional Court's case-law, the ECtHR elucidates that an *ex ante* independent oversight is a circumstance entrenched *in any event* in the content Article 8 ECHR. The extent of the wording adopted (*en tout état de cause*) cannot but lead to this crystal-clear conclusion. What is more, the Court seems open to granting individuals with an *absolute* prerogative to have any intrusive measure likely to threaten the right to private life assessed by an independent body *before* it is implemented. In a nutshell, rather than distinguishing different situations and multifaceted controls over intrusive measures on a case-by-case basis, the Strasbourg Court seems here to cast light on a new 'universalistic' perspective on the procedural guarantees stemming from Article 8 ECHR—the need to foresee a prior independent authorisation in all cases where an intrusive measure is to be implemented by the prosecuting authorities.

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[106] Ibid., paras. 5-7.
[107] Ibid., paras. 45-47.
[108] Ibid., para 35, emphasis added.

Whereby isolated and limited to the material case[109], such 'U-turn' may nonetheless reveal the inconsistency of the fuzzy *status quo* within the settled ECtHR's case-law on procedural guarantees arising from Article 8 ECHR, as emphasised above. This holds true *a fortiori* should one consider that the ECtHR quoted two judgements in order to support this line of reasoning which, however, did refer to wiretappings (and not to digital searches and seizures)[110]. As subsequent judgements have (again) upheld the traditional blurred approach of the Strasbourg Court, we cannot but blame the 'imprecise direction'[111] taken by the ECtHR in denying the significance of a mandatory prior independent supervision in all cases where intrusive measures involving electronic devices are taken against an individual in the context of criminal proceedings.

3.2. Legal Challenges *Pro Futuro*

'How many of us can claim to keep an impenetrable wall between the personal and professional data held within our smartphones?'[112]. The query posed by Judge Pavli sketches the main issue surrounding searches and seizures of electronic devices, as depicted above. We have highlighted that the risk of investigative authorities obtaining (quite easily) a massive amount of data pertaining to a potentially undefined number of individuals is extraordinarily high. What is more, the information gathered may be unrelated to the ongoing criminal investigation and may disclose sensitive data about third parties. Finally, the data collected from a smartphone or a laptop, even when related to the suspect, may reveal extremely private circumstances (e.g., sexual orientation) which shall not be taken into account, in any manner, in a criminal investigation. The impact of these three circumstances on the fundamental rights to personal private life and correspondence cannot be underrated.

Spontaneously, one could think that, in order to avoid haphazard behaviour on the part of investigating authorities, it would be a suitable idea to set up a prior independent scrutiny mechanism. In contrast to those legal systems in which the public prosecutor can *autonomously* implement the aforementioned measures, a shift towards a new standpoint on this issue ought to be reached. Accordingly, independent oversight can (and should) become the cornerstone of the procedure in which searches and seizures of IT tools by the investigating authorities are envisaged.

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[109] Still, it is noteworthy that *Trabajo Rueda* was essentially decided without this standpoint being significant for the verdict.

[110] *Iordachi and Others v. Moldova*, App. No. 25198/02 (ECtHR, 10 February 2009), ECLI:CE:ECHR:2009:0210JUD002519802 and *Dumitru Popescu*, supra note 59.

[111] Mistilegas et al. (2022), p. 32.

[112] *Särgava*, supra note 34, Concurring Opinion of Judge Pavli.

Against this background, as discussed above, the position taken by the ECtHR in its settled case-law proves to be blurred. What can be observed here is a nuanced line of reasoning that the Strasbourg Court has followed within its settled case-law. The core of the analysis is that an *ex ante* independent oversight is not needed *per se* under Article 8 ECHR. Still, the existence of such control is a factor to be duly taken into consideration by the Court, albeit it is not a necessary ground, the absence of which may automatically lead to a breach of the Convention.

If our reading is correct, and in the light of the above, there is a major flaw in this line of reasoning. We can label it as a 'qualitative' inadequacy. Here we refer to the 'quality' of the intrusive measure at stake which shall meet all the grounds laid down in Article 8 ECHR (and hence *inter alia* be necessary and proportionate in the material case).

Whereby it is true that a prior oversight would not render, in itself, the whole procedure non-arbitrary, we have no difficult in sharing the view that the lack of any previous independent authorisation clearly risks providing public prosecutors or police officers with a wide-ranging power to collect electronic evidence—this clearly runs counter with the well-established need to ensure that any interference with fundamental rights is necessary and proportionate in the material case. Indeed, the lack of any previous scrutiny in this field could plainly lead to abuses, as the investigating authorities may decide, for instance, to search and seize *every* IT tool owned by an individual for evidentiary purposes. Without any prior review, the above considerations do not appear to be mere speculations.

Against this background, we are aware that there might be domestic frameworks that would struggle to comply with these *dicta*. To take a concrete example, as has already been explained, Italian public prosecutors hold a wide power in ordering searches and seizures of electronic devices for the purpose of gathering evidence. Paraphrasing *Funke*, they hold 'exclusive competence to assess the expediency, number, length and scale of inspections'[113].

Given the profound differences between State Parties in this respect, the ECtHR's self-restraint *in parte qua* can be easily understood. However, when it comes to assessing the firmness of human rights, political implications stemming from certain decisions should be set aside. Arguably, the Court's nuanced reluctance to impose a prior independent oversight on every search or seizure of electronic devices was one of those (frequent) instances where politics have regrettably overwhelmed the very substance of a fundamental right.

[113] *Funke*, supra note 52, para 57.

4. PROMOTING A WIDE-RANGING MODEL OF *EX POST* INDEPENDENT REVIEW: IS IT TIME FOR A NEW PARADIGM?

The pivotal role of an *ex post facto* control over digital searches and seizures will be depicted in this Section. Firstly, the relevant ECtHR case-law will be examined. It will be observed that the *ex post facto* oversight is listed among the safeguards that can be put in place against State's arbitrariness. Moreover, it will be noted that such subsequent assessment holds a peculiar characterisation, since it may become the very moment in which the existence *in concreto* of all grounds to be met in the material case as per Article 8 ECHR can be conducted, *after the implementation of the measure at stake* and thus *from a comprehensive standpoint* (§ 4.1). That being said, our analysis will focus on shaping the structure and content of the proportionality test to be carried out within this phase (§ 4.2). Finally, a comparison will be made between different paradigms of subsequent independent review in order to assess which could be the most feasible at the domestic level (using the Italian legal framework as a benchmark), for the same purposes (§ 4.3).

4.1. Hints from the ECtHR

The ECtHR has famously stated that 'the rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure'[114].

In a nutshell, judicial control is inextricably connected to the need to ensure the effectiveness to fundamental rights and is, in turn, closely linked to the rule of law. However, the question remains as to why an independent oversight is particularly needed when it comes to digital searches and seizures, and what legal interest need to be safeguarded by such a mechanism.

In relation to investigative measures that may impact the privacy of individuals, the ECtHR assesses the consistency of national systems of judicial review with the Convention under the 'necessity in a democratic society' test under Article 8(2) ECHR.

The Strasbourg Court found numerous infringements of the right to private life. As briefly mentioned, in *Klass and Others*, the issue of secret surveillance was at the centre of the judgement. In this context, the question of an *ex post* judicial control was closely tied to the matter of subsequent notification, since a long time could elapse before the person was aware that he or she was being secretly monitored. The rules governing secret operations thus appear

[114] *Klass and Others*, supra note 54, para 85.

to be different from those that are applicable to searches and seizures, of which the person is aware immediately before they are carried out.

However, as regards the existence of an independent oversight, the Court's approach remains constant and unvarying: there is a sort of 'independent control degree' that has to be achieved, to be established in the light of an overall consideration of many factors, first of all the existence of both an *ex ante* and *ex post* control or only one of them[115], but also whether the search concerns a natural or a legal person[116] and whether other rights are at stake, such as the lawyers' professional privilege[117]. In any event, the Court did not go far enough in acknowledging the absolute necessity of an *ex post facto* assessment of those measures which may threaten the scope of Article 8 ECHR to be foreseen in domestic frameworks—analogously to what has already been explained about prior independent oversight, the ECtHR's position in this field proves to be blurred, as it analyses the existence of such subsequent control as *one of the factors* to be considered within its line of reasoning.

The Court has thus developed a case-by-case approach. Despite starting from the same wide-ranging principles and even in the presence of similarities between legal systems, the jurisprudence on digital searches and seizures has sometimes varied[118]. Allegations of inconsistency and unpredictability are not without merit. Nevertheless, it may be possible to identify the key considerations for the ECtHR and understand the underlying rationale behind the requirement for an *ex post* independent review of digital searches and seizures.

The Court listed a number of factors which are deemed relevant in ascertaining whether effective safeguards against abuse or arbitrariness are available under domestic law for the purposes of Article 8 ECHR. Certainly, the existence of independent supervision of the measure at stake plays a key role. But other circumstances should also be carefully scrutinised. Firstly, the seriousness of the offence under investigation[119]. Secondly, the status of

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[115] *K.S. and M.S. v. Germany*, App. No. 33696/11 (ECtHR, 6 October 2016), ECLI:CE:ECHR:2016:-1006JUD003369611, para 45. The Court argued that an *ex ante* independent oversight would not in itself necessarily amount to a sufficient safeguard against abuse; still, it implicitly assumes that it plays a key role. The same was held in *Vinks and Ribicka v. Latvia*, App. No. 28926/10 (ECtHR, 30 January 2020), ECLI:CE:ECHR:2020:0130JUD002892610, para 104 that refers to *Posevini*, supra note 74, para 70.

[116] *Niemietz v. Germany*, supra note 79, para 31; *Bernh Larsen Holding a.s. and Others v. Norway*, App. No. 24117/08 (ECtHR, 14 March 2013), ECLI:CE:ECHR:2013:0314JUD002411708, para 159.

[117] *Kruglov and Others*, supra note 89; *Smirnov*, supra note 68; *Yuditskaya and Others v. Russia*, App. No. 5678/06 (ECtHR, 12 February 2015), ECLI:CE:ECHR:2015:0212JUD000567806.

[118] *Bernh Larsen Holding a.s.*, supra note 116 and *DELTA PEKÁRNY a.s.*, supra note 69. Both judgements concerned the application of administrative inspection measures against legal persons. In the first case, the inspection was held to be lawful even though there was no judicial oversight at any stage of the proceedings. In the second case, even though an *ex post* judicial review was foreseen, such control was considered ineffective and, accordingly, the ECtHR found a violation of Article 8 ECHR. Notably, *Kruglov and Others*, supra note 89 should be considered as a peculiar case—both *ex ante* and *ex post* judicial controls were provided for, but they were nonetheless considered insufficient to prevent a violation of Article 8 ECHR.

[119] In *K.S. and M.S.*, supra note 115, para 48, tax evasion was considered a serious offence and this element was particularly relevant in the Court's reasoning.

the person concerned, in particular whether he/she was already suspected of having committed a criminal offence or having engaged in unlawful activities[120]. Thirdly, whether there was a reasonable suspicion of criminal activity[121]. Fourthly, whether the scope of the investigative measure was reasonably limited[122]. Then, the manner in which the search was executed[123]. Finally, whether some kind of redress or legal consequences[124] were provided by the domestic system in the event of a violation of the individual's rights[125].

As previously stated, the degree of independence of the authority that issued the warrant, as well as the existence of an *ex post facto* judicial review, are listed among these circumstances.

However, it is noteworthy that the ECtHR casts light on the necessity of an effective *ex post facto* independent review, *a fortiori* in those cases in which an *ex ante* independent control has not been carried out[126]. In determining the effectiveness of the review, one can easily notice that all the grounds listed above reappear—an independent authority must be able to assess all of them. Thus, the rationale behind the necessity to establish an *ex post facto*

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[120] *Smirnov*, supra note 68, para 46; *Kruglov and Others*, supra note 89, para 126.

[121] For instance, see *Modestou*, supra note 35, para 44. In this case, the ECtHR highlighted the fact that the search took place at an early stage of the investigation, when the risk of investigative measures being taken 'as a means of providing the police with compromising evidence relating to individuals who have yet to be identified as suspects in relation to an offence' was extremely high.

[122] *Kruglov and Others*, supra note 89, para 127. Ibid., paras. 128-137: the ECtHR identified numerous shortcomings in both the *ex ante* and *ex post* judicial reasonings and safeguards, with regard to the purpose of the measure in question and the selection of the material to be searched and seized. The same happened in *Smirnov*, supra note 68, para 47 and *Modestou*, supra note 35, para 46. In *K.S. and M.S.*, supra note 115, para 54 the Court considered it positive that the scope of the warrant was limited to what was strictly necessary in the circumstances of the case, also by making an explicit and detailed reference to the tax evasion offence under investigation and, also, by specifying the items sought as evidence. The same reasoning proves to have had an influence on *Bernh Larsen Holding a.s.*, supra note 116, para 173.

[123] In *Modestou*, supra note 35, para 51 a relevant circumstance was that the person was not present at any time during the search. In *Smirnov*, supra note 68, para 48, the ECtHR emphasised the lack of safeguards to avoid interference with the suspect's professional privilege (because he was a lawyer).

[124] In *Bernh Larsen Holding a.s.*, supra note 116, para 171, the Court emphasised the lack of a rule imposing the destruction of irrelevant data. In other cases, the exclusion of evidence was considered a sufficient consequence attached to the ascertained invalidity of the warrant (*Panarisi v. Italy*, App. No. 46794/99 (ECtHR 10 April 2007), ECLI:CE:ECHR:2007:0410JUD004679499, paras. 76-77; *Uzun v. Germany*, App. No. 35623/05 (ECtHR 2 September 2010), ECLI:CE:ECHR:2010:0902JUD003562305, paras. 71 e 72; *Trabajo Rueda*, supra note 105, para 37).

[125] *Inter alia*, in case of digital searches and seizures affecting lawyers, also the presence of a special observer during the search and the possible repercussions on the work and the reputation of the affected persons by the search play a central role (*Kruglov and Others*, supra note 89, para 125; *Yuditskaya and Others*, supra note 117, para 27). Interestingly, in *K.S. and M.S.*, supra note 115, para 56, the latter requirement was taken in consideration, even if the case did not concern a lawyer.

[126] In *DELTA PEKÁRNY a.s.*, supra note 69, para 91, the limitations on the scope of the judge's prerogative of review played a key role in the ECtHR's line of reasoning. See also *Vinci Construction*, supra note 34, para 78. *Smirnov*, supra note 68, para 45, where the lack of an *ex ante* judicial oversight on a search warrant was not counterbalanced by the (excessively formal) *ex post facto* review. Even the timing of the subsequent review may have an influence on the latter's effectiveness—in *Modestou*, supra note 35, para 52, a prosecutor issued the warrant and delegated its execution to the police. In finding a breach of Article 8 ECHR, the Court highlighted the fact that the judicial review took place more than two years after the event.

independent control can ultimately be depicted—to check the proportionality of the *entire investigative operation*, taking into consideration its merits and subsequent execution. In order to be effective, the independent review cannot be limited to assessing the formal aspects surrounding the lawfulness of the procedure. For this reason, should a superficial and merely formal *ex post* independent review take place, the Court has oftentimes found this practice to be incompatible with Article 8 ECHR[127].

Therefore, the pivotal role of the principle of proportionality proves to be the very reason why an independent subsequent review is needed. But proportionality is a shapeshift standard and it is crucial to clearly define its boundaries. This may shed light on the differences between *ex ante* and *ex post* independent review.

4.2. The *Fil Rouge* Between Proportionality and *Ex Post* Independent Review: Deconstructing the Puzzle

It is of utmost importance to distinguish between two stages of violation of the right to private life when gathering digital data.

The first stage pertains to the infringement of the data owner's privacy, which occurs when a police officer or any other individual is granted access to the data[128]. As stated above, this type of violation necessitates a judicial control *prior* to the execution of the measure at stake, as only an *ex ante* independent authorisation can provide a legal basis for a breach of the fundamental right to private life and correspondence. Furthermore, in order to ensure transparency and compliance with the principle of proportionality, various rules can be introduced to regulate live forensic procedures, such as provisions to preserve the integrity of the chain of custody or to impose the involvement of an expert from the first access to the digital data.

With this in mind, further and subsequent interferences of the right to private life may occur. Specifically, when the data become known to other people and, in particular, when they become public, other violations take place[129].

The problem is that the initial judicial authorisation *cannot encompass subsequent infringements*[130]. In order to mitigate the initial risk and to prevent unnecessary and unjustified violations of privacy rights, we believe that a *second* independent control should be established. This is due to the impossibility of foreseeing in advance the content of the electronic device at stake. In this light, it is noteworthy that live forensic best practices dictate that the forensic expert shall make an integral copy of the device, in order to preserve

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[127] This was the case in *Bernh Larsen Holding a.s.*, supra note 116, and *Kruglov and Others*, supra note 89.

[128] Caprioli (2021), p. 1148.

[129] Ibid.

[130] Kerr (2005), pp. 575-576.

and avoid altering the evidence. Arguably, such a circumstance may reveal the need to ensure a *second* assessment (after the first one carried out without knowing the nature of the data contained in the IT tool).

Against this background, the concern is not only to assess whether the search or seizure was lawful but also, and more critically, to promptly *identify* all relevant material. Remarkably, the right to private life that has already infringed holds the same characterisation that it had at the time of the first intrusion; yet, the potential for the interference is even greater at this stage, as the selected data are now at the disposal of the investigating authorities, who can use them to launch further investigations. Furthermore, those pieces of information may also become public at trial. The need for independent scrutiny becomes even more pressing.

An *ex post* independent review may solely take place once all relevant information has been disclosed to the individual concerned, as the measure at stake (e.g., the search) has already been implemented. Therefore, fair trial rights can be upheld at this stage: adversarial procedure, a neutral and impartial judge, rights of the defence, the right to become aware of the grounds underlying the measure in question and the right to an effective remedy[131]. An adversarial context is also the best way to establish the facts under investigation, as nothing is more valuable than a confrontation with the data owner in order to understand the meaning of the information and assess its relevance to the case. To the contrary, 'warrant applications are *ex parte*; a judge must try to judge whether the search protocol is appropriate based only on the government's presentation of the empirical picture'[132]. This asymmetry can thus be balanced through a *subsequent* assessment of the circumstances that led the first authority to issue a search or a seizure order. In other words, the (limited) knowledge of the judge who previously authorised the intrusive operations ought to be 'corrected' setting up a *new* assessment, to be carried out in *full knowledge* of the circumstances of the case (among which, notably, the *content* of the data seized is of pivotal importance).

In this light, two different proportionality standards may be applied by the authority in charge of the *ex post facto* independent review, in order to select relevant data and protect the right to private life. These standards, to be applied cumulatively, rely upon the hints coming from the ECtHR listed in the previous paragraph.

A first, retrospective, proportionality test, would assess the *lawfulness* of the search or seizure. The competent authority shall put itself in the position of the prosecutor or judge who authorised it, by examining whether the grounds for taking the investigative measure—based on the prognostic assessment possible at the time—existed from the outset. The grounds to be taken into account, and to be weighed against the individual's privacy, would

[131] On fair trial standards with regard to its jurisdictional grounds, see Alonzi (2011), p. 146.
[132] Kerr (2005), p. 575. Additionally, see Zappalà (1994), p. 474.

be the necessity of the act at stake for the investigation (i.e., the act shall result suitable to its objectives and no other less intrusive shall be available *in concreto* in order to reach the same objective), along with the seriousness of the offence and the reasonable suspicion of criminal activity at the time of the search. The latter can be referred to as 'the proportionality *stricto sensu* stage'—even if the measure under scrutiny would appear appropriate and efficient compared to its objective, it is the objective as such that must be examined to determine whether it justifies the State's interest overriding the individual's interest.

At the same time, the *manner* in which the search or seizure was carried out would be assessed as part of this retrospective review of the investigative process. Any errors or abuses committed by the police or experts would be taken into account. Possible grounds in this regard would include the need to preserve human dignity, respect for the scope of the warrant and the rules on maintaining the integrity and reliability of data.

In case this first test fails, the main consequences are twofold: on the one hand, there should be financial redress for the individual concerned; on the other hand, the evidence gathered thereby should not be admitted at trial[133].

Conversely, should the retrospective test find the investigative measure to be lawful, a second, *prospective*, proportionality test would apply.

Remarkably, despite the fact that investigating authorities have acted in accordance with the law, the right to private life and correspondence still holds the potential to be breached. To mitigate this risk, the parameters relating to the admissibility of evidence in the domestic legal system must be taken into account in order to assess whether there is a *real need to use them at trial*, also in the light of the seriousness of the interference carried out in the material case. In particular, the proportionality assessment would relate to *each piece of information and its usefulness in the trial*. It is essential to ensure that the irrelevant material is destroyed, as required by the ECtHR[134]. In particular, the data should be suitable to prove the fact under investigation and should not be redundant, i.e. if the same fact can be established through other evidence, there is no need of using the digital data gathered. Additionally, the independent authority could again focus on the seriousness of the offence.

Finally, the position of third parties whose data have been searched and eventually seized should be protected too. In fact, it is hard, if not impossible,

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[133] In our view, the so-called 'fruits of the poisonous tree' doctrine should be applied. As is well known, the doctrine, originated in *Nardone v. United States*, 308 U.S. 338 (1939) judgement delivered by the Supreme Court of the United States, prevents national authorities from employing, to the detriment of the accused, information derived from facts obtained as a result of unlawful acts committed by State agents. In the Italian domestic system, even if it has never been plainly accepted, the doctrine has been applied in some judgements. On the issuing of a seizure warrant after an unlawful search, see Illuminati (2010), pp. 534-535.

[134] *Bernh Larsen Holding a.s.*, supra note 116.

to determine in advance the exact data that are stored in a given device[135]. Furthermore, as already stated, the best practice consists in making a forensic copy of the device as it was found. Therefore, it is only during the *ex post facto* independent review that the exclusion of data belonging to third parties becomes conceivable (and also feasible). In this sense, it can be argued that third parties with a legal interest in the case must have the opportunity to defend themselves against the publication of their data and that other-than-judicial authorities (e.g., Data Protection Supervisors)[136] may be involved in criminal proceedings to ensure the protection of private life, should it be necessary.

To some extent, the pattern of the control envisaged in this paragraph may seem abstract. However, it summarises and organises the otherwise unclear requirements set forth by the ECtHR. Furthermore, such a judicial oversight might not be entirely unfamiliar to investigating authorities (e.g., a similar phase is foreseen for analogous measures, such as wiretappings—this is the approach taken in Italy, where the preliminary investigation judge is tasked with reviewing the pertinent material collected through such means and making a selection thereof).

4.3. Conceptualising a Brand-New Model of *Ex Post* Judicial Oversight

It is possible to distinguish among three main types of *ex post* judicial control of the acts carried out during the investigations. Firstly, a wide-ranging assessment that can be granted by the court deciding on the merits of the case (thus, at the end of the main trial). Secondly, a control of specific measures that can be triggered by the suspect through special remedies. Thirdly, an *ad hoc* control over certain measures, that is not triggered by the suspect, but is automatic (*ex officio*).

The first check is a general one, where the judge applies exclusionary rules. It is oftentimes mentioned by the ECtHR in its overall assessment of the safeguards that provide sufficient protection against arbitrariness[137]. However, this kind of control could eventually take place years after the violation has occurred. This might be inconsistent with the needs underlying the *ex post* judicial review in the context of the preliminary investigations. After all, as has been explained, the Strasbourg Court in *Modestou* emphasised the importance of a *prompt* review[138]. Indeed, the issue is that it may be too late—or too little can be done—to restore the damage. This is why the second form of control is often enforced. It happens in the context of precautionary measures (e.g., pre-trial detention). In Italy, not only coercive precautionary meas-

[135] Kerr (2005), p. 575.
[136] In this regard, see Lasagni (2022), pp. 12-14.
[137] See supra note 124.
[138] *Modestou*, supra note 35, para 52. See § 4.1.

ures can be challenged through a quick remedy, namely the judicial review of the orders imposing a coercive measure (*riesame*), but also seizures are subject to such a control.

In particular, the person affected by a digital seizure for evidence-related purposes can challenge the decree that carried it out. As explained in the first paragraph, the Italian Court of Cassation has held that, even after the return of the seized items, the person has a concrete interest in requesting the destruction of any copies of the data held by the investigating authorities, since the right to private life is at stake and, more specifically, the right to 'the exclusiveness of the informative ownership'[139]. This formula depicts the individual's prerogative to have full control over the data owned by an individual and not to have them in possession of public authorities or whoever else without a proper reason.

Furthermore, it is noteworthy that the Italian case-law has gradually extended many principles originally established for coercive precautionary measures to property-related precautionary measures (e.g., preventive seizures) and, in turn, to seizures issued for the purpose of gathering evidence. This is clearly the case with the principle of proportionality[140].

Thus, the Italian legislation appears to be in line with the requirements laid down by the ECtHR and summed up above—the judicial review of the seizure warrant is a prompt judicial remedy, where the judge is able to rule on all relevant matters of fact and of law and, moreover, holds the power to annul, revise or confirm the measure in question, also on the basis of the principle of proportionality.

Nonetheless, some shortcomings still remain. Firstly, there is no clear set of rules aimed at protecting the chain of custody of the data searched and seized[141]; secondly, the CCP does not provide for the involvement of third parties (that is, they cannot apply for a review of the search and seizure measures) and the protection of their legal interests essentially relies on the decisions taken by the person concerned in response to the seizure; lastly, should an appeal be lodged before the Court of Cassation against the outcome of the review procedure, it may pass a long time for a decision to be taken. This may happen in the case of an annulment 'with referral' by the Court of Cassation, which occurs when the latter annuls the decision, but decides to refer the case back to the judge of the review procedure, for a new decision on the merits.

In this case, no strict time limits are foreseen for the new judgement to start and, in the meantime, the data remains at the disposal of the investigat-

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[139] Court of Cassation, Joint Chambers, No. 40963/2017, supra note 18, para 19.

[140] Court of Cassation, Joint Chambers, 19 April 2018, No. 36072, Botticelli, ECLI:IT:CASS:2018:36072PEN, para 4.4. Additionally, see, among others, Court of Cassation, 27 January 2022, No. 18649, ECLI:IT:CASS:2022:18649PEN; Court of Cassation, 7 September 2021, No. 39168, ECLI:IT:CASS:2021:39168PEN; Court of Cassation, 2 May 2019, No. 18316, ECLI:IT:CASS:2019:18316PEN, para 2.2.

[141] Articles 259 and 260 CCP are not enough, as they are limited to pose general rules, without any clear indication on how to reach their objective.

ing authorities[142]. Another significant lacuna, as previously discussed, was the one pointed out by the landmark *Brazzi* judgement[143], namely the lack of any remedy in the event of a search that is not followed by a seizure. Notably, the recent reform mentioned above[144], as already said[145], established a new remedy specifically devoted to this eventuality, which is designed as an 'opposition' against the search warrant[146]. However, a crucial point is still not addressed, namely the *repercussions of a successful opposition*. For instance, it remains unclear whether a financial compensation could be granted[147]. In the absence of such compensation, it is challenging to assess the significance of the opposition.

The third model of judicial review can be found, in the Italian legal framework, in the case of arrest. In this context, urgent action is required to validate the already executed arrest warrant and, given the importance of the rights involved and the persistent urgency of the situation, a swift judicial review is mandatory and automatic, except in cases of release. This model is particularly effective in safeguarding the rights of the suspect, and the short time limit is justified by the fact that the right to personal liberty is at stake[148].

The need to select data may recommend a different time limit, but a similar model may be suggested for the protection of digital data in the investigative phase, given: (i) the growing importance of the right involved; (ii) the need for a remedy that protects *ex officio* the rights of third parties even in the absence of any action by the suspect; (iii) the need for a prompt decision in order to mitigate the risk of data leaks.

Indeed, the third model can be found in the Italian provisions on the selection of the materials gathered through wiretappings operations. To be fair, both the second and third models are now applicable in this context, as two different patterns apply, depending on when the prosecutor submits this material. If this happens before the end the of preliminary investigations, the judge's review is automatic (third model). If the public prosecutor submits the results of the interceptions along with the notice of the conclusion of preliminary investigations, it will be up to the public prosecutor to make the initial selection and then, at the request of the defence, the judicial review may take place (second model).

The very idea of entrusting to the prosecutor with the selection of the data is debateable[149]. Moreover, the unclear time limit[150] and the dependence of third-party protection on the suspect's decision raise further questions.

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[142] Court of Cassation, 15 June 2017, No. 39259, ECLI:IT:CASS:2017:39259PEN.

[143] *Brazzi*, supra note 28.

[144] Legislative Decree No. 150/2022.

[145] See § 2.

[146] Article 252a CCP. See also Article 352(4a) CCP.

[147] Gialuz (2022), p. 49.

[148] In view of the guarantees surrounding this procedure, Alonzi (2011), pp. 186-187 considers it to be the prototype for reforms of the precautionary measures' procedure.

[149] See Scalfati (2020), pp. 2-3. See also Caprioli (2021), p. 1396.

[150] Cabiale (2020), pp. 37-38.

However, compared to the rules governing the review of the 'ordinary' seizure decree, an enhanced data protection is provided by *ad hoc* rules governing their storage in a specific archive (Article 269 CCP)[151].

The first pattern, which provides for an automatic control by the judge, clearly ensures a better protection of the right to private life. However, prosecutors usually submit the pieces of information gathered by means of wiretaps at the conclusion of the preliminary investigations stage (thus avoiding the *ex officio* control by the preliminary investigation judge). In fact, they would have no advantage in disclosing them beforehand. There is therefore a great risk that the first pattern will remain on paper.

Conclusively, we believe that the third paradigm of *ex post* judicial control should be enforced prior to the admission of digital evidence at trial. This model meets all of the ECtHR's requirements for *ex post facto* independent control, and other forms of assessment may not effectively protect the right to private life enshrined in Article 8 ECHR.

5. CONCLUDING REMARKS

The right to private life and correspondence needs strong procedural guarantees in order to be safeguarded, and, among others, both *ex ante* and *ex post* oversights prove to be effective in this respect. Yet, Italian legal framework does not provide for such guarantees. The public prosecutor is 'left alone' with the task of deciding *whether* and *to what extent* a search and seizure of electronic devices would be necessary and proportionate in the material case. The role of the preliminary investigating judge is thus pointless for this purpose.

Certainly, this choice is not in breach of neither the EU law nor the ECHR. The former does not provide any specific rule in this field, while the latter has developed a nuanced case-by-case jurisprudence.

Nevertheless, the line of reasoning advocated here—that is, the need, in any case, for an independent prior and *ex post facto* scrutiny on the measure under investigation—cannot ignore two other (collateral) issues that should be considered, albeit briefly.

Firstly, in the lack of an *ad hoc* discipline concerning IT tools, the CJEU has developed a florid case-law on the access by public authorities to retained data for the purposes of criminal prosecution. The principles developed therein, while not regulating digital searches and seizures, can be considered *mutatis mutandis* as a minimum theoretical framework from which to start, in order to emphasise that, should a prior independent authorisation be needed when external data shall be gathered, such control should exist *a fortiori* when the entire content of an IT tool is to be searched and seized (§ 5.1).

[151] On the secrecy of the data contained therein, see Nappi (2020) and Gialuz (2020), p. 68.

Secondly, fostering more independent review in this field might not be without consequences for the entire structure of criminal procedure. This process of widening judicial prerogatives confronts us with one of the paradoxes at the heart of criminal justice systems, namely the role of the public prosecutor as an independent authority. While, as will be explained, we may agree that the latter lacks independence in the sense envisaged by the CJEU, it cannot be underestimated that this 'shift' towards a major presence of the judge in the preliminary investigations phase would progressively weaken the role of the public prosecutor in accusatorial systems—this may represent a sensitive issue for Member States that are customarily reluctant to share their prerogatives in criminal matters.

5.1. Is There an Elephant in the Room? Looking at the 'Data Retention Saga'

As is known, the expression 'data retention saga' is commonly used to refer to a series of judgements rendered by the CJEU that have progressively imposed strict boundaries on the EU Member States' legal frameworks regarding the retention of digital data by telephone and internet service providers, as well as the access to such data by public authorities for the purpose of prosecuting crime[152]. The 'saga' begun with the landmark *Digital Rights Ireland*[153], which found the Directive 2006/24/EC (the so-called Data Retention Directive)[154] to be invalid and thus determined the Directive 2002/58/EC (the so-called e-Privacy Directive)[155] to come back into force.

Among those judgements, *H.K.*[156] has had a tremendous echo, especially in Italy[157]. In particular, the CJEU has held that the power to authorise access by a public authority to traffic and location data for the purposes of a criminal investigation cannot be conferred upon the public prosecutor's office, 'whose task is to direct the criminal pre-trial procedure and to bring, where

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[152] Among the most recent judgements, see Joined Cases C-793/19 and C-794/19, *SpaceNet*, ECLI:EU:C:2022:70 and Joined Cases C-339/20 e C-397/20, *VD*, ECLI:EU:C:2022:703.

[153] Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*, ECLI:EU:C:2014:238.

[154] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [OJ L 105, 13.4.2006, pp. 54-63].

[155] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [OJ L 201, 31.7.2002, p. 37-47].

[156] Case C-746/18, *H.K.*, ECLI:EU:C:2021:152.

[157] See, among others, Resta (2021) and Spangher (2021). Subsequently, *H.K.* triggered the aforementioned reform, in the 2021, of Article 132 of the Legislative Decree No. 196/2003, i.e., Privacy Code—this provision now foresees the need for a judicial authorisation should the prosecutor aim at acquiring traffic data collected by Internet and telephone service providers (cfr. § 2). In this regard, see Filippi (2022), Malacarne (2021), pp. 1164-1168 and Resta (2021).

appropriate, the public prosecution in subsequent proceedings'[158]. Conversely, the access by the competent national authorities to the retained data must 'be subject to a prior review carried out either by a court or by an independent administrative body'[159].

The position taken by the CJEU was to ensure that the possibility of access to the retained data is assessed in the light of the principle of proportionality[160], with the view of striking 'a fair balance between, on the one hand, the interests relating to the needs of the investigation in the context of combating crime and, on the other, the fundamental rights to privacy and protection of personal data of the persons whose data are concerned by the access'[161].

Accordingly, a public prosecutor, albeit formally 'independent' from the Government, proves not to be in the best position to carry out the required proportionality assessment of the access to the data concerned. It is important to note that a public prosecutor does not hold a neutral role in the context of criminal proceedings, due to his/her duty to conduct the investigation and, should it be case, to conduct prosecutions before the courts.

Against this backdrop, the CJEU has further observed that, in any case, the prior review shall be carried out by a body which acts objectively and impartially, free from any external influence, and which must act as a third party *vis-à-vis* the authority requesting access to the data. In other words, it must not be involved in the conduct of the criminal investigation in question, while maintaining a neutral stance *vis-à-vis* the parties to the criminal proceedings[162].

Additionally, it was stated that the existence of a *subsequent* review by a court 'would not enable the objective of a prior review, consisting in preventing the authorisation of access to the data in question that exceeds what is strictly necessary, to be met'[163]. In a nutshell, the CJEU seems to think that an *ex post* independent review over the act issued by a prosecutor, would not compensate for the lack of an *ex ante* oversight. In the words of AG Pitruzzella, this is due to the fact that 'otherwise the prior nature of the review would lose its purpose, which is to prevent access to retained data that would be disproportionate to the objective of investigating, prosecuting and sanctioning criminal offences'[164]. In terms of practical consequences, the approach

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[158] *H.K.*, supra note 156, para 59.

[159] Ibid., para 51.

[160] One of the main grounds relates to the *scope of the access*, which should be granted, as a general rule, 'in relation to the objective of fighting crime, only to the data of individuals suspected of planning, committing or having committed a serious crime or of being implicated in one way or another in such a crime' (ibid., para 50).

[161] Ibid., para 52. In this regard, see, additionally, Case C-746/18, *H.K.*, Opinion of AG Pitruzzella, ECLI:EU:C:2020:18, para 105.

[162] *H.K.*, supra note 156, paras. 53-54. In this regard, see, additionally, *H.K.*, Opinion of AG Pitruzzella, supra note 161, paras. 110-126.

[163] *H.K.*, supra note 156, para 58.

[164] *H.K.*, Opinion of AG Pitruzzella, supra note 161, para 128.

envisaged in *H.K.* would tend to distinguish the scope and the extent of the two different supervisions. What is more, the CJEU seems to reject the assessment of the proceedings 'as a whole' that the ECtHR has repeatedly advocated in this field.

Interestingly, *H.K.* proves to take into account the peculiarities of *each* assessment; nevertheless, it casts light on the paramount importance of the *ex ante* control of the access to the retained data, the absence of which, in the material case, cannot be made up for by a subsequent review of the material gathered thereby. Accordingly, while there is a blurred symmetry between prior and *ex post facto* review in the eyes of the ECtHR—the lack of the former not entailing, as such, a breach of the right to private life—, the opposite is certainly true at the EU level, where *any* access to electronic data must be authorised *a priori* by a judicial or independent body[165].

We have already made it clear that digital searches and seizures for evidence-related purposes are not, as such, regulated by EU law[166]. Still, it is possible to highlight that the theoretical background that had inspired the CJEU rulings of the 'data retention saga' is proving to be valid in relation to digital searches and seizures for the purpose of gathering evidence in the context of criminal proceedings.

Notably, in the aforementioned *Digital Rights Ireland*, the CJEU stated that the data retained by telephone and internet service providers, such as location data, the calling telephone number and the number called in a telephone communication and the IP address for internet services, 'taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them'[167]. In other words, the retention of and the access to data which make it possible to depict essential aspects of the private life of individuals brings to a serious interference with their right to private life and the protection of their personal data, as enshrined in Articles 7 and 8 of the Charter.

This is the very theoretical basis of the whole 'data retention saga', including the need for judicial authorisation established by *H.K.* Foremost among these strands is the ECtHR's commitment to avoid a wide-ranging and extremely invasive collection of data that may relate to aspects of this individuals' life other than those that may be relevant for the purposes of a criminal investigations.

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[165] See De Terwangne (2022), p. 23.

[166] See § 1.

[167] *Digital Rights Ireland*, supra note 153, para 27. This expression has been frequently quoted within the relevant CJEU's case-law. See, among others, Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB*, ECLI:EU:C:2016:970, para 99.

Additionally, one cannot but acknowledge that digital searches and seizures give public authorities the access not only to the very same data that they can obtain by accessing to the data stored by telephone and internet service providers, but also to the content of SMS, e-mails, notes *etc*.

Thus, the blurred state of the art in EU law is the following—on the one hand, specific safeguards for the access to data retained by telephone and internet service providers are foreseen (and among these safeguards, the prior review on the proportionality of the access by an independent and impartial authority plays a pivotal role), while, on the other hand, no limitations are expressly imposed on prosecuting authorities with regard to digital searches and seizures[168]. As anticipated, Directive 2002/58/EC is currently in force and triggers the EU competence solely in the field of data retention, letting aside the topic under consideration here. This turns into a lack of substantive and procedural guarantees for the suspect or the accused person which has not yet been dealt with by the EU legislature. While this picture is plainly inconsistent with the relevant ECtHR's case-law, it is worth recalling that the absence of EU rules in this field stems from the lack of political consensus in a very sensitive area of criminal procedure.

For the sake of truth, we have to admit that the *ratio* behind the 'data retention saga' also relates to the need to avoid the risk of a sort of bulk private surveillance caused by the retention of a huge amount of data by telephone and internet service providers. The implementation of digital searches and seizures does not raise this issue.

Certainly, it could be argued that the increasingly frequent and widespread use of such investigative measures raises the same concern expressed by CJEU in relation to data retention by telephone and internet service providers. Indeed, this is the likelihood 'to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance'[169]. Remarkably, such a perception might stem not only from massive data retention or from secret surveillance methods (e.g., wiretappings), but also from the possibility to search and seize IT devices without the lawfulness of such measures being assessed by a court or an independent body.

That being said, in the lack of any EU piece of legislation specifically addressing this issue, the settled ECtHR's case-law on Article 8 ECHR provides a benchmark against which national authorities may be limited in issuing and executing searching and seizures measures. Albeit not ensuring the same level of protection sketched by the CJEU in the context of the 'data retention saga', it is nonetheless crucial in setting limits to prosecuting bodies while protecting the right to private life and correspondence. It is in this light that

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[168] In this regard, see Chelo (2022), pp. 1583-1592.

[169] *Digital Rights Ireland*, supra note 153, para 37. In this regard, see, also Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger*, Opinion of AG Cruz Villalón, ECLI:EU:C:2013:845, paras. 52 and 72.

the 'clash between those who seek to defend liberty and those who seek more security'[170] can hopefully be brought to an end.

5.2. Public Prosecutors and Judicial Control: A Never-Ending (Italian) Story

Against the background outlined above, there is still a critical issue to be addressed. Advocating for more independent oversight of certain acts, normally carried out by the public prosecutor, could have consequences for the whole structure of the preliminary investigation phase and, to a wider extent, for the role of the judge and the public prosecutor, and their connections. Essentially, the more the public prosecutor's prerogatives are subject to authorisation by the judge or an independent authority, the less relevant the role of the public prosecutor will be in the whole procedure. What are the practical consequences of this judge-centred tendency, particularly in the field of electronic evidence? Might this approach be effective in ensuring the fundamental rights of the suspect or the accused person?

To answer this question, it is worth recalling some of the findings developed within the Italian academic debate on the role of the public prosecutor and the preliminary investigation judge (*giudice per le indagini preliminari – GIP*).

Before the entry into force of the CCP in 1989, the investigative phase in Italy was dominated, alongside the prosecutor, by the investigating judge (*giudice istruttore*). This examining magistrate was vested with broad inquisitorial powers[171].

Many scholars have argued that, in order to introduce the features of the adversarial system into the criminal trial, that powerful body, which conducted the investigations by means of 'unchecked powers', should have been expunged from the domestic framework[172]. In line with this doctrinal standpoint, the aforementioned CCP abolished the investigating judge figure and gave the prosecutor the leading role in the investigative stage. Such a strong role was (and still is) supposed to be counterbalanced by the fact that what is gathered during the 'preliminary investigations' does not constitute 'evidence' as such—indeed, the 'evidence' that the judge can use for the final decision may only be constituted, as a general rule, by the materials and information gathered in court during the trial, through cross-examination and within adversarial proceedings.

In a nutshell, the idea behind the new structure of the Italian criminal procedure was based on the assumption that the preliminary investigation was a

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[170] Juszczak, Sason (2021), p. 259.

[171] On the inquisitorial Italian criminal justice system before 1989, see, *inter alia*, Cordero (2012), pp. 86-87.

[172] The idea stemmed from the famous *'bozza Carnelutti'* (see Carnelutti (1963)) and Cordero (1965). For a historical perspective, see Colao (2016), pp. 241-277, Orlandi (2016) and Reale (2018).

phase that was 'neither relevant nor weighty'[173]. The brand-new preliminary investigation judge was (and still is) designed to be confined to supervisory functions to be exercised in exceptional cases, specifically laid down in the CCP and involving the fundamental rights of the suspect at the investigative stage, such as his/her personal liberty. The aim was to create an agile and streamlined stage aimed solely at preparing the trial, in order to put the latter and the adversarial rules in place therein at the core of the proceeding[174].

What has happened is that the investigation stage has quickly become lengthy and burdensome for the suspect, who is subjected to the intrusive investigative measures at the disposal of the prosecutor, oftentimes without adequate counterbalancing powers[175]. This may be the case with searches and seizures for the purpose of gathering evidence (even electronic evidence), the execution of which is not subject to any prior control by the preliminary investigation judge. Furthermore, the control exerted by that magistrate resulted oftentimes to be lax, formalistic and unsubstantiated. In this regard, it is noteworthy that the Italian Court of Cassation had to deal with ordonnances or decrees issued by preliminary investigation judges which were merely a 'copy-paste' of the prosecutor's request[176].

Against this background, the Italian academic debate has also focused on the fact that the public prosecutor, even if controlled by a judicial authority in certain circumstances, could anyway hold a *quasi*-absolute power in the preliminary investigation phase, due to its inherent inquisitorial tendency[177]. Amusingly, this view seems to be shared, to a certain degree, by other scholars who claim that after 1989 the prosecutor is *de facto* the 'evidence master'[178].

This backdrop explains why, over the years, the rights of the defence in the investigative stage have been progressively strengthened (notably, specific regulation on defence investigations has been established)[179]. A number of provisions have been introduced to ensure a proper control by the preliminary investigation judge over prosecutor's acts (e.g., the requirement of an *independent* and specific assessment of the main grounds foreseen for the adoption of precautionary custodial measures)[180]. Recently, as mentioned above, a law was passed to ensure that the public prosecutor has to ask the preliminary investigation judge for authorisation to access to traffic data stored by telephone and internet service providers[181].

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[173] Nobili (1998), p. 35 *et seq*.

[174] Zappalà (1989), pp. 49-51.

[175] Giuliani (2018), pp. 484-486.

[176] For instance, see Court of Cassation, 24 May 2012, No. 22327, ECLI:IT:CASS:2012:22327PEN.

[177] In 1965, this was the prediction, with regard to the proposal of an investigative stage assigned to the sole public prosecutor, of Nuvolone (1965), pp. 195-197.

[178] Ferrua (1996), p. 51.

[179] Articles 391(a)–391(i), established *ex novo* by Law No. 397/2000.

[180] Article 292(2)(ca) CCP, established *ex novo* by Law No. 47/2015.

[181] Article 132 Legislative Decree No. 196/2003, i.e., Privacy Code, modified by Decree-Law No. 132/2021.

What we described so far is an Italian story. However, the problems that have arisen in Italy may arguably also be found within other domestic systems, where legislators might struggle to strike a balance between efficient investigations and a proper protection of fundamental rights, by introducing an independent control over certain public prosecutors' acts.

In a nutshell, the twin-track system that has been developed in Italy can be summarised as follows. There are some acts that the public prosecutor can implement *motu proprio* and without any control (e.g., searches and seizures of electronic devices for evidentiary purposes), while there are other acts that the public prosecutor can carry out solely once the authorisation of the preliminary investigation judge has been granted (e.g., access to retained data).

What is interesting here is the fact that, from a practical point of view, both the public prosecutor and the preliminary investigation judge are *independent* from the executive according to Italian Constitution (so-called 'external independence'). Focusing on this point alone, one may question the necessity to foresee a sort of 'duplication' of independent bodies within the framework of preliminary investigations.

Yet, there is another factor which needs to be assessed, that is, the 'internal independence' of the magistrate *vis-à-vis* the parties to the criminal proceedings (i.e., impartiality)[182]. But again, at first glance, the Italian system might seem redundant—the public prosecutor is obliged by the CCP to carry out its investigations both *à charge et à décharge*. This is quite evident from the wording of Article 358 CCP: 'the public prosecutor … shall also carry out investigations into facts and circumstances in favour of the person under investigation'.

Admittedly, there is some merit in the view that the presence of a judge alongside the prosecutor, who is supposed to be objective and impartial, is a contradiction in terms[183]. It is certainly true that a certain ambiguity on the part of the prosecutor is unavoidable, since he/she will always share, to a certain extent, the interest of the judge, namely the duty to enact criminal law[184]. The public prosecutor represents, in fact, an essential articulation of jurisdiction and has to promote it within its limits[185].

Nevertheless, the need for a judge during the investigative stage arises from the inevitable bias to which the prosecutor is exposed[186]. Thus, although in presence of an independent and impartial prosecutor, the existence of a preliminary investigation judge is neither illogical nor contradictory. This also explains why, as has been said, such judge should not be 'stronger' than

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[182] This is quite clear from the wording of *H.K.*, supra note 156, para 50 *et seq*.

[183] Ferraioli (2014), pp. 111-112 and 117.

[184] Caianiello (2003), pp. 11-14. On the importance of a functional distinction between prosecutors and judges, who should at least partly pursue different interests, see Riccio (2011), pp. 352-355.

[185] Orlandi (1999), p. 211. In this regard, see the opinion of Carnelutti (1953), p. 260, according to which the prosecutor is a judge making itself a party, by lowering from its natural position.

[186] Caianiello (2003), pp. 11-12; Orlandi (1999), p. 211; Santoriello (2021).

the prosecutor, but it should be 'more different'[187], meaning that it is crucial not to give the preliminary investigation judge autonomous powers, but to keep the latter away from any duty of conducting the investigation[188]. It could even be argued that the aforementioned *H.K.*'s reasoning on the lack of neutral stance for the prosecutor (see § 5.1) is not an entirely new acknowledgment in the Italian system.

Indeed, the Italian CCP tended to deprive the public prosecutor of any decision-making power regarding the adoption of measures restricting the freedoms protected by the Constitution, also in order to 'purge' the prosecutor of any function that was not compatible with its role as a party[189]. This explains why someone was even surprised that searches and seizures were (and are) left in the hands of the prosecutor[190].

Following this line of reasoning, one could even argue that increasing the occasions for and the intensity of judicial review of the public prosecutors' acts might have the positive effect of reducing the latter's powers and, as a consequence, enhancing a feature that is really important for adversarial proceedings, namely the equality of arms.

5.3. Trying to Pull the Strings, From Italy to Europe

In the light of the foregoing, may the Italian public prosecutor be regarded as *independent* in the sense envisaged in *H.K.*?

If our reading is correct, the answer must be in the negative. As the public prosecutor is responsible for investigating crimes and is therefore fully involved in the criminal proceedings, it may be questionable whether he/she holds a neutral stance towards the parties to the criminal proceedings. In this regard, the aforementioned obligation laid down in Article 358 CCP, by analogy with which was held in *H.K.*, cannot ensure *per se* that the decision to order the access to retained data is assessed by a public prosecutor acting as a third party[191]. After all, this viewpoint seems to be in keeping with what AG Pitruzzella emphasised in his Conclusion in *H.K.*—an authority is to be deemed independent: (i) if it is not subject to external pressures and (ii) if it can perform its activities with objectivity, thus securing impartiality, weighting its decisions as a third party[192].

Certainly, it is somewhat paradoxical that *non-independent* public prosecutors need an *independent* authorisation in order to access retained data, while they can search and seize electronic devices *motu proprio*, without any

[187] Zagrebelsky (1996), pp. 26-27.
[188] Ibid, p. 27. In this regard, see Greci (1988), p. 372.
[189] Alonzi (2011), p. 140.
[190] Angiolini (1992), p. 115.
[191] See, by analogy, Rovelli (2021), p. 208.
[192] Revolidis (2020), p. 323.

sort of oversight. This inconsistency, which is clearly evident when analysing the findings of the ongoing 'data retention saga' (being the ECtHR's case-law more blurred in this field), can also be observed in inquisitorial legal systems, where the independence of investigating judges has recently been questioned—according to Van Muylder, for instance, it cannot be excluded that Belgian investigating judges '*ne présente pas l'indépendance nécessarie pour autoriser l'accès à des métadonnées conserves par les opérateurs*'[193]. Apparently, this might also hold true with regard to other investigating judges (e.g., the French, the Dutch or the Spanish ones).

The ongoing debate on the impact of the 'data retention saga' and the role of public prosecutors within domestic systems clearly sketches the framework within which new rules on searches and seizures of IT tools should be laid down. Given the nuances of the ECtHR's case-law, it will arguably be up to the EU legislature to find a path to achieve consistency between the settled case-law of both the European courts on the one hand and to the protection of the right to private life and correspondence in Europe on the other, trying to equalise procedural guarantees for similar breaches of the aforementioned prerogatives.

After all, criminal proceedings 'feeds on information'[194]. The easier it is to obtain information from individuals, the more solid the procedural guarantees should be. From this perspective, it may be feasible to safeguard the right to private life in its two pivotal elements—as the 'right to be let alone' (i.e., the right of individuals to exclude third parties from their private sphere)[195] and as the right of individuals to freely dispose of their own data (*habeas data*)[196].

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[193] Van Muylder (2022), p. 365.
[194] Orlandi (1998), p. 140.
[195] Van der Sloot (2021).
[196] Pérez-Luño Robledo (2017), p. 215 *et seq*.

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THE NEW TECHNOLOGIES AND THE CIVIL JUSTICE AS COMMONS*

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ABSTRACT: Civil justice certainly belongs to the "commons" and, therefore, systems need to be adopted to prevent its depletion.

New technologies and artificial intelligence tools can help prevent waste of this important resource and enable the creation of a secure and robust repository for civil legal data that will enable stakeholders, researchers and the public to better understand the system and individuals to better evaluate alternatives.

To date, however, data on civil proceedings are very scarce, and to classify them it is essential to overcome some particularly important privacy issues.

A good project from this point of view has been initiated in Italy and is called the Next Generation UPP Project. The Project aims to improve the justice system in northwestern Italy through the strengthening of Judicial Offices (JPOs), technological innovation, and experimentation with new patterns of collaboration between universities and judicial offices.

KEYWORDS: artificial intelligence; civil justice; commons; privacy protection; civil process; new technologies; predictive justice.

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1. DEFINITION OF COMMONS

It is our conviction that civil justice can be included in the category of the so–called "common goods".

Before illustrating the elements that allow us such a consideration, we consider it useful to identify—albeit briefly—the elements characterizing the commons[1].

It should be pointed out that in our legal system there is neither a category[2] nor a unanimously agreed legal definition[3–4] of common goods, which present «too much variability for them to be described by a set of fixed and universal principles»[5].

In any case, they can be understood as those goods, endowed with the requisites of essentiality and irreplaceability[6] that acquire their characterization due to the constraint of destination that marks them, being functional to the realization of the fundamental rights of the person[7] and generating a collective utility[8].

Indeed, it is precisely the material and socio–cultural needs of the person that lead to the identification of that goods that, in the name of the selfish nature of the human beings, cannot be left to the government of mercantile logic. Moreover, in relation to these goods, it is necessary to adopt measures that can guarantee their indiscriminate accessibility to all, as well as their correct and efficient use.

In particular, considering the typical exhaustible character of common goods, it is necessary to ensure their exploitation in proportion to collective needs and the capacity of individuals, avoiding excess and waste and ensuring their efficient use.

Emblematic on this point is the essay by the American ecologist Garret Hardin entitled "*The Tragedy of the Commons*" published in the journal *Scien-*

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[1] Giannelli (2013), p. 583.

[2] Luccarelli (2013), p. 63.

[3] Mattei (2017).

[4] Various definitions have come up. The Unimondo association has defined the commons as «the set of principles, institutions, resources, means and practices that allow a group of individuals to constitute a human community capable of ensuring the right to a dignified life for all»—translation from Italian to English by us—(cf. Officina delle idee di Rete@Sinistra *(2010)*. This is a definition analogous to that of the social doctrine of the Catholic Church, which defines the common good as «the sum total of those conditions of social life that allow both collectivises and individual members to reach their own perfection more fully and more rapidly»—translation from Italian to English by us—(cf. Pontificio Consiglio della giustizia e della Pace (2013), point 164).

[5] Translation from Italian to English by us. Cf. Bollier (2017). The author goes on to state that «each good, each common, presents peculiar dynamics depending on the participants, its history, cultural values and so on».

[6] Petrella (2010).

[7] Sanlorenzo (2017).

[8] Giannelli (2013), p. 604.

ce, in which context he argued that free enterprise in the management of the commons would lead to the ruin of all[9].

In support of this assumption, Garret recalled the position of the economist William Forster Lloyd, who believed that grazing land open to the use of anyone who wants to enjoy it has the inexorable destiny of promoting a crisis of the system and of being exhausted in view of the continuous increase of shepherds who would like to exploit it to increase their flock[10].

Hardin points out that the same reasoning can also be followed regarding pollution, since «the rational actor finds that the cost of his portion of the discharge into the common good costs less than it would cost him to clean up his discharge before disposing of it»[11].

It is precisely based on these considerations that Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability concerning the prevention and remedying of environmental damage was adopted.

Ultimately, it is possible to consider as "commons" those goods from the exploitation of which no one can be excluded, devoted to be exhausted or not to work in the absence of adequate institutional interventions.

It has to be underlined that common good is not necessarily an element of nature (e.g. water, the atmosphere, etc.), but can be also the result of social production (e.g. public services). In these latter cases the non–exclusion of anyone is simply the outcome of a decision at legal or political level. In this respect we firmly believe that a community having made certain decisions, can count, among its common goods, also services of public interest and in particular civil justice[12]. In this case clearly the non–exclusive character is determined not by the nature of the goods, but by—as already said—a decision at political, legal or sociological level.

In the Italian Constitution some fundamental rights require the organization of specific public services: social dignity and the full development of the human person (art. 3 of the Constitution), work (art. 4), personal freedom

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[9] Hardin (1968), pp. 1242 ss.

[10] Lloyd (1833), p. 31: «If a person puts more cattle into his own field, the amount of the subsistence which they consume is all deducted from that which was at the command, of his original stock; and if, before, there was no more than a sufficiency of pasture, he reaps no benefit from the additional cattle, what is gained in one way being lost in another. But if he puts more cattle on a common, the food which they consume forms a deduction which is shared between all the cattle, as well as that of others as his own, in proportion to their number, and only a small part of it is taken from his own cattle. In an inclosed pasture, there is a point of saturation, if I may so call it, (by which, I mean a barrier depending on considerations of interest,) beyond which no prudent man will add to his stock. In a common, also, there is in like manner a point of saturation. But the position of the point in the two cases is obviously different. Were a number of adjoining pastures, already fully stocked, to be at once thrown open, and converted into one vast common, the position of the point of saturation would immediately be changed».

[11] Hardin (1968), p. 1245.

[12] See also Giannelli (2013), p. 604.

(art. 13), health protection (art. 32), education (Art. 33 and 34), the protection of one's rights and legitimate interests (art. 24). Civil justice is the essential tool in order to ensure the last mentioned right and access to it cannot be excluded in order to protect this right as well as many others fundamental rights provided for by this Constitution.

2. CIVIL JUSTICE AS COMMONS

Having reached this point, we wish to reiterate our assumption that civil jurisdiction is a "commons".

What is clear is the benefit that the community obtains from a well–functioning civil justice system, which is aimed at the correct application of legal norms and guaranteeing the protection of rights.

On the other hand, even limiting the analysis to business matters, it cannot be disputed that the defense of property rights and the enforcement of compulsory relationships are essential elements for the proper functioning of the national economy. Indeed, in an economic system in which the jurisdictional protection of property rights is effective, «the incentives to save, to invest and to start new business activities and to expand existing ones are, *ceteris paribus*, greater, with positive repercussions on the country's medium–to long–term growth prospects» [13].

That said, it must be acknowledged that the "resource of justice", unfortunately, is not an unlimited resource. In this regard, there is a need for institutional intervention that not only guarantees indiscriminate access to it to all those who need it, but also regulates its exploitation to prevent the so–called "tragedy of the commons".

In this respect, it is well known that new technologies and specifically artificial intelligence tools, can play a fundamental role in improving the effectiveness of civil justice.

It is therefore mandatory the creation of a secure and robust archive containing civil judicial data, which could be instrumental in making research faster and less costly for legal practitioners in general but, above all, for "those who have the last word", the judges. Such an archive, if accessible to individual citizens, would allow for greater knowledge of living law with the consequent possibility of self–determination by being able, at the very least, to foresee the resolution of judicial disputes in relation to similar cases.

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[13] Translation from Italian to English by us. Cf. *The efficiency of civil justice and economic performance*, thematic focus no. 5 of 22 July 2016 prepared by the Parliamentary Budget Office. https://www.upbilancio.it/wp–content/uploads/2016/07/Focus_5.pdf.

The subject is particularly complicated if one considers that there are difficulties in defining even the term "artificial intelligence"[14]. In very general terms, it can be said that it is the science that deals with how to create intelligent machines and has found, in the possibilities offered by computer science, the way to achieve this[15].

Artificial intelligence, moreover, has also been defined as the ability of a technological system to provide performance similar to that of human intelligence, i.e. the ability to solve problems or perform tasks and activities typical of human *action*. This presupposes, in the most advanced systems, the ability not only to automatically and autonomously process huge quantities of data and provide answers to those questions for which such systems have been programmed, but also to acquire, on the basis of special learning algorithms, the aptitude to make predictions or take decisions[16].

3. PREDICTIVE JUSTICE

Related to the topic of the use of artificial intelligence in civil justice, the fascinating subject of predictive justice comes to the fore. The latter can be defined as «the computer tool, based on a database of case law, which, with the help of sorting/sorting algorithms and (the more refined) "neural networks", makes it possible to anticipate what the statistical probability of success in a legal dispute will be»[17].

The advantages of using artificial intelligence mechanisms are many and undeniable, also in terms of predictive justice[18].

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[14] The term "Artificial Intelligence" originated in 1955 with the proposal of a conference on the subject by John McCarthy, Marvin Minsky, Nathaniel Rochester and Claude Shannon. The cited paper introduced the term "artificial intelligence" for the first time and justified the need for it to the conference in the following terms: «the study will proceed on the basis of the conjecture that, in principle, any aspect of learning or any other characteristic of intelligence can be described so precisely that a machine can be constructed to simulate it. Attempts will be made to understand how machines can use language, form abstractions and concepts, solve types of problems hitherto reserved only for humans, and improve themselves»—translation from Italian to English by us—(see *Proposta di un progetto di ricerca estivo sull'intelligenza artificiale presso il Dartmouth College*, translated by Paronitti). The conference took place in the summer of 1956 at Dartmouth College in Hanover, New Hampshire.

[15] Ferrari (2019), p. 1052.

[16] Lombardini (2019).

[17] Boucq (2017), p. 527.

[18] On the topic, Castelli & Piana (2018); Carleo (2017); Morelli (2017); Viola (2017); Dondero (2017), p. 537. The term "predictive justice" has been defined as a very concise *label* describing a range of options that have in common the application of sophisticated technologies for both analytical/inductive purposes (discovering decision–making *patterns* or behavioural *patterns* by analysing and processing data that concerning cases and decisions that have already taken place) and prospective purposes (propensities are identified and on this basis the probabilities with which the decision of the judge—in case of judicial solution of disputes—or of the mediator—in case of activation of *ADR* (*Alternative Dispute Resolution*) mechanisms—can be expected to converge on a point that we can define as focal) are assessed).

As far as lawyers are concerned, in particular, the use of algorithms makes it easier to know, albeit in statistical–probabilistic terms, the outcome of a possible judgement and, consequently, to avoid unnecessary litigation and, possibly, to resort to alternative ways of resolving disputes with consequent deflation of litigation and saving unnecessary litigation costs.

The use of algorithms in the administration of justice would also enable the judge to resolve disputes entrusted to him more expeditiously.

Indeed, algorithms make it possible to analyze a huge amount of data (so–called *Big Data*) in far shorter times than it would take a human being to do so.

These new technologies would allow for a better exploitation of the resource of justice by constituting support, guidance and integration tools for the interpretative and decision–making process, that would guarantee greater efficiency in the resolution of disputes.

From another point of view, predictive justice tools would also allow for a greater degree of predictability and stability of decisions, avoiding sudden and contradictory changes in case law[19].

Even, according to some, these instruments would be functional to guarantee—besides a modernisation and simplification of access to jurisdiction—greater legal certainty[20]. The latter, moreover, would also improve access to justice for citizens, who sometimes desist from going to court for fear of facing the costs of lengthy lawsuits with an uncertain outcome. In any case, it must be emphasised that these instruments are not intended to anticipate the ruling, but rather to make the parties participate in the judge's possible reasoning[21].

4. NEW TECHNOLOGIES AND THEIR USE IN CIVIL JUSTICE VS. PRIVACY ISSUES

That being said—apart from the many issues that may arise in connection with the functioning and usefulness of the above–mentioned mechanisms, which cannot be dealt with here—it is necessary to reconcile the use of tools belonging to the sector in question with *privacy* principles.

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[19] According to Castelli & Piana (2018): «it is not a matter of predicting with pinpoint accuracy the operative part of a judgment, but of identifying the direction of the judge's reasoning. Since such reasoning never has the nature of a linear syllogism, but is composed of deductive inductive analogical steps, the prediction will be focal and not punctual» (translation from Italian to English by us). On the use of databases, see Castelli & Piana (2019), p. 50 and p. 115 and Vincenti (2019), p. 112.

[20] Mekki (2018), p. 28.

[21] Certainly, such an algorithm would be well applicable to simple, standardised disputes with low litigiousness and few variables and those serious disputes (think of consumer contract disputes). Furthermore, such an algorithm could be used for the calculation of family allowances for spouses and/or offspring.

Indeed, it should be pointed out that artificial intelligence systems only "feed" on and evolve through the use of huge amounts of data from different sources and generally collected for a different purpose and this, as mentioned, poses a *privacy* issue.

Denying access to some or all of this data in deference to *privacy* would necessarily weaken the artificial intelligence that learns from the data itself: in fact, if such systems are trained on a limited dataset, representative of only a small segment of the population, they will propagate a distorted and narrow viewpoint.

Moreover, data are necessary not only for artificial intelligence to reach its full potential, but also to enable it to guard against bias and prevent errors.

Artificial intelligence, in fact, like the humans who develop it, is not free of biases or errors, however, it has the potential to avoid many of the irrational errors that characterize human decision–making and to make the detection of these errors easier and more reliable. To do this, artificial intelligence tools must train on a multitude of data, especially sensitive or protected data[22]. Thus, denying access to or preventing the storage of certain data will only make it more difficult to detect and remedy distortions, while denying all segments of society the full potential of the benefits of artificial intelligence.

The subject matter is a clear representation of a substantive reality in which rights do not live in isolation at all, but rather in continuous dialogue and potentially even in conflict with each other.

Moreover, the spread of artificial intelligence systems creates the opportunity to come up with interpretative approaches suitable to allow one to enjoy the benefits of advanced technologies while at the same time being able to reasonably assume that individual *privacy* is guaranteed, given that artificial intelligence should first and foremost "feed" on non–personal data, to the circulation of which EU Regulation 2018/1807 is dedicated.

This requires, at the legislative level but also at the level of interpretation, a balance between the right to an efficient and functional civil jurisdiction to satisfy the fundamental rights of individuals and the right to privacy.

5. ARTIFICIAL INTELLIGENCE IN THE EVIDENCE PHASE OF CIVIL PROCEEDINGS

The same balance is also needed to exploit the potential of artificial intelligence for certain specific tasks in the civil proceedings, such as for the evidence phase.

The interaction between artificial intelligence tools and evidence phase in civil proceedings has been studied above all in the United States in relation

[22] It is easy to understand that data on race, ethnicity, gender and other special sensitive data can help identify and remedy bias or discrimination in artificial intelligence models.

to discovery and e–discovery. According to the amendments that technological evolution and digitization have implied for the discovery phase, causing it to deviate towards e–discovery, legal practitioners started to look for tools capable of resolving, albeit perhaps not completely, the difficulties posed by the e–discovery and found the TAR (Technology Assisted Review), which uses sophisticated algorithms to allow a computer to determine the relevance of a document[23].

The advent of the use of these tools has first of all led to a real revolution within *law firms,* in the context of which, in order to cope with technological difficulties, departments have been created to manage *e–discovery* and, when this was not possible, the work of *discovery has* been entrusted to external structures specialized in IT. For *law firms,* the very selection of a suitable provider of these services meant acquiring new skills[24].

The need for TAR also stems from the fact that the e–discovery includes much more than what was already included in the paper discovery*: it* involves examining not only *emails* and digital documents, but also documentation originating from *social media* such as Twitter, Facebook and Linkedin, from databases that are not necessarily online, as well as from network–connected devices such as *smartphones* and car "black boxes" or from *smart* home automation systems such as alarm systems, thermostats or virtual assistants such as Amazon Echo, given the fact that all of the above elements store potentially relevant data and documentation both locally and on the *cloud*.

Precisely because of this, human–led examination was no longer a viable alternative for handling *e–discovery* in a plurality of disputes[25].Today, the state of the art in *e–discovery is,* therefore, AI–assisted predictive coding.

The review process that is carried out by the TAR starts with the identification of the electronic documents to be reviewed. A team member enters the documents into software to build an analytical index. Numerous software packages are available that can apply a set of instructions and rules ("algorithms") to a dataset. As far as algorithms are concerned, there are also a plurality of them: in fact, alongside algorithms that enable basic keyword searches, other algorithms that have been developed in the context of Natural Language Processing—by this meaning that interdisciplinary field of re-

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[23] On TAR and their influence on litigation see the contribution by Kerschberg (2018), pp. 213 ss. Comoglio (2018), pp. 264 ss. In order to understand the relevance of the artificial intelligence in civil proceedings see Nieva-Fenoll (2018).

[24] Marcus (2006), pp. 634-635: «Although the possibilities of such discovery might seem similarly momentous, the outcome of a fairly comprehensive effort to grapple with its problems is hardly revolutionary. And this change has been accompanied by strong statements of concern that it will usher in an era of significantly changed discovery, and therefore significantly altered litigation. Although only time will tell the eventual story, the E–Discovery episode is sufficiently ambiguous that it could support arguments about a coming Brave New World or 1984».

[25] Grossman & Cormack: «Manual review is an expensive, burdensome, and error–prone process. Scientific evidence suggests that certain TAR methods offer not only reduced effort and cost, but also improved accuracy, when compared to manual review».

search encompassing not only computer science, but also linguistics—have become increasingly important. These are algorythms capable of analysing and understand natural language in a similar way, but tend to perform better, than humans who use that language in everyday life.

Natural Language Processing is capable of proceeding to lexical and phrasal semantic analysis and also of analyzing the syntactic structure of the text, associating the morphological categories related to the individual words, identifying syntactic dependencies and, therefore, relating the meaning to the context and the way the words are used. Also within the sphere of Natural Language Processing, Word Mining and Text Mining algorithms have been developed, which, on the basis of text samples and further materials provided, proceed to an analysis of the text that differs clearly from both syntactic and grammatical analysis and which is aimed at bringing out the co–occurrence and relationships existing between the words of a text, those words and the text, the words of a text with the words of another text and with other texts and between texts. Certainly today, these algorithms are the most advanced and the most recent among those used by TAR[26].

Regardless of the specific software technology and algorithm used, it is clear that all artificial intelligence systems are based, as mentioned above, on a set of documents identified ex ante and provided to the system and, from these, select the relevant documents from all those produced[27]. Once the operation of selecting original documents has been accomplished, the artificial intelligence system must also be taught the criteria by which that *set of* documents was selected, so that the same system can apply them to much larger *sets of* documentation.

As already mentioned, the exponentially growing mass of data makes it possible to fulfil what the computer lacked: big data on which to "practice" and learn autonomously. It is also evident that, regardless of the function for which it is adopted, artificial intelligence has the advantage of reducing computational time[28], which cannot be compared with the past or with human processing capacity, of improving predictive capacity[29] and of reducing costs[30].

It is precisely on the basis of these advantages that the American *Supreme Court* jurisprudence has shown a clear tendency to consider the use of TARs permissible[31], while emphasizing the need for the parties to share the tech-

[26] The aforementioned tools certainly belong to the so–called *machine learning* and are therefore able to identify patterns, classify documents and generally improve their work on the basis of the additional data provided to the tool (see on this point Surden (2014), p. 87-95).

[27] Scholtes & Van Cann & Mack (2013).

[28] McGinnis & Pearce (2014), p. 3041.

[29] With respect to this, see the considerations made by Nieva Fenoll (2018), p. 15.

[30] Kerschberg (2018).

[31] See *Winfield v. City of New York*, 27 November 2017, in which Justice K.H. Parker cites Sedona Conference Principle No. 6, according to which «responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and produc-

nology used and the possibility for each party to independently assess the appropriateness of using these tools.

6. ACTUAL USES OF ARTIFICIAL INTELLIGENCE IN ITALIAN CIVIL PROCEDURE SYSTEM

Apparently in Italian civil procedural system, and particularly in the evidentiary phase of our civil trial, artificial intelligence has no place and, considering the many IT deficiencies of the Italian courts, one could say that it is difficult to imagine its use in the near future.

This, however, is not entirely true; one only must think of proceedings for the protection of trade secrets.

Certainly, this is not the place to go over the evolution of legislation on trade secrets, however, at least few words are needed. In our legal system, the industrial secret was for a long time protected through the discipline of unfair competition and this by virtue of paragraph III of Article 2598 of the Civil Code[32]; it is only with the enactment of the code of industrial property and, therefore, with legislative decree no. 30 of 10 February 2005 that the secret acquires the *status of a* non–titled industrial property right, with respect

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ing their own electronically stored information» and ruled on the admissibility of the use of TARs, while inviting the party to share with the other party the criteria on the basis of which the TARs were instructed. In favour of the use of TARs back in 2012 see *Global Aerospace v. Landow Aviation*, No. 61040, Loudoun County, Va Cir. Ct, 23 April 2012, at *www.casetext.com* as well as Judge Peck's opinion: «Until there is a judicial opinion approving (or even critiquing) the use of predictive coding, counsel will just have to rely on this article as a sign of judicial approval. In my opinion, computer–assisted coding should be used in those cases where it will help "secure the just, speedy, and inexpensive (Fed. R. Civ. P. 1) determination of cases in our e–discovery world» (Peck (2011), *Search, Forward*, in *Law Technology News*. Judge Peck's considerations in favour of the use of TARs can also be found in the interview with Judge Peck himself, in Li (2018). On the use of the TAR see also The Sedona Conference Working Group Series titled *The Sedona Conference. TAR Case Law Primer, Second Edition*, of February 2023, which refers to several cases where the TAR has been applied. Among them, *Indipendent Living Center v. City of Los Angeles* in which the Court ordered the use of TAR to search a lot of documents (more than two millions) after little or no discovery was completed before the discovery cut-off; *OSI Restaurant Partners v. United Ohana,* in which the Delaware Court of Chancery granted the defendant's motion to compel in part, ordering the plaintiff to identify responsive documents by applying TAR to all produced documents that had not previously undergone a document–by–document attorney review for responsiveness. Similarly, in *Winfield v. City of New York*, after «numerous complaints about the pace of discovery and document review, which initially involved only manual linear review of documents» the court ordered the responding party to begin using TAR «to hasten the identification, review, and production of documents responsive to Plaintiffs' document requests». For more cases see Aa. Vv. (2023), p. 11.

[32] On this point Blandini (1997), p. 741; Auteri (1998), p. 131; Id. (1981). AA.VV (1981); Dalle Vedove (1998), p. 245; Abriani & Cottino (2001), p. 247; Auteri (1983); Barbuto (1996); Bertani (2005), p. 22; Franchini Stufler (2005), p. 363; Guglielmetti (2003); Traverso (2002), p. 387. It should be noted that, according to some scholars, before the enactment of the Industrial Property Code (Legislative Decree 30/2005), the subject matter of industrial secrecies and their protection was to be found in Article *6–bis*, Inventions Law. In favour of this interpretation see Frignani (1996), p. 337 and p. 350; Mansani (2002), p. 2016. Also recently, the possibility of using unfair competition protection with respect to secrets when they do not meet the requirements of art. 98 IPC had been affirmed, see Sbariscia (2018), p. 127; Bertani (2000), p. 103.

to the violation of which a discipline is dictated in conformity with that of the other industrial property rights[33]. In particular, the Industrial Property Code dedicates Articles 98 and 99 of the IP Code[34] to the secret, thus identifying both a substantive and procedural discipline of confidential business information[35]. Such discipline is moreover perfectly in line with the *TRIPs* agreements[36]. With the corrective decree of the Industrial Property Code (legislative decree no. 131 of 13 August 2010)[37] the legislator returns to deal with the institute in question and, in particular, amends Article 99 of the IPC, specifying, in the context of the above–mentioned provision, that the owner of the secret may prohibit third parties from conduct consisting in the acquisition and disclosure of the same secret "in an abusive manner"[38].

The protection of trade secrets in the context of a society characterized by an elevated digitalization of information as well as by *cloud computing* services is becoming increasingly important; it is in this context that the European legislator is prompted to attempt the harmonization of the laws of the Member States on the subject. Already in 2011, a study was commissioned to understand which were the most significant elements that had to be taken into account for a harmonized and strengthened protection of secrecy; the findings of this study led to the adoption of EU Directive 2016/943 of 8 June 2016 «On the protection of confidential know–how and confidential business information (trade secrets) against unlawful acquisition, use and disclosure»[39].

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[33] See Art. 1 IPC: Industrial property rights «For the purposes of this Code, the expression industrial property includes trademarks and other distinctive signs, geographical indications, designations of origin, designs and models, inventions, utility models, topographies of semiconductor products, trade secrets and new plant varieties».

[34] Article 98 of the IPC identifies the subject matter of trade secrets as well as the characteristics they must have to qualify as such. It must be secret information, endowed with economic value as secret and subject to reasonably adequate security measures to keep it secret. Article 99, on the other hand, deals with the protection of secrets, and provides for equal tools in favor of secrets and of proprietary rights.

[35] In the first version of Art. 1 IPC the expression "trade secrets" was instead "confidential business information"; the change was made to implement EU Directive No. 2016/943 of 8 June 2016.

[36] This is the agreement (*Agreement on Trade–Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods*) signed in Marrakech in 1995, within the 1994 GATT (*General Agreement on Tariffs and Trade*) *according. On TRIPs in* general, see Aa.Vv. (2010), p. 575. Correa (2007) p. 438. Lavagnini (2007); Marchetti & Ubertazzi (2012), p. 5; Contaldi (2009), p. 79; Morgese (2009), p. 410. Article 39 of *TRIPs* deals with secrecy, which requires the contracting states to protect secrecy against unfair competition.

[37] This is the corrective decree of the Industrial Property Code published in the Official Gazette of 18 August 2010. The regulatory intervention concerns both the substantive and procedural regulation of industrial property, see Bottero (2011). Galli, (2011), p. 277; Floridia (2010), p. 405; Cartella (2011), p. 255. See also Ferrari (2011), p. 1473.

[38] The illustrative report of legislative decree 131/2010 explains the change in these terms: the new provision «replaces paragraph 1 of Article 99 of the Code, reforming the text to make it conform to Article 39 of the Trips Agreement». According to some scholars, this would constitute a retreat of the protection of the secret, that cannot be uised against the third party in good faith. In this perspective Pastore (2011), p. 273, in particular, p. 299, or a downsizing of the same, see Vanzetti (2011), p. 95.

[39] The directive at issue is known as the "Trade–Secrets Directive". On its implementation by the Italian legislator see Galli (2018), p. 25. Libertini (2018), p. 3. Id. (2017), p. 575. The scholars empha-

The Directive was implemented in Italian legal system by means of Legislative Decree no. 63 of 11 May 2018[40], in the context of which, apart from a change on a linguistic level, in that the wording "secret information" has been abandoned and we now speak of trade secrets or know–how[41], the secrecy requirements necessary to qualify secrets as such have been substantially maintained, but the scope and incisiveness of the protection have been broadened, as culpable conduct is now also punished and special powers have been granted to the judge in proceedings concerning the unlawful acquisition, disclosure or use of secrets, in order to prevent those same secrets from being disclosed or disseminated in this way. In the same vein, moreover, the legislator has also provided for a tightening of the penalties that may be imposed by the judge, establishing, however, that as an alternative to the application of precautionary measures, such as the injunction and withdrawal from the market, the judge may authorize the continuation of the infringing activity, provided that a security is paid for an appropriate amount for the purpose of any compensation for damages suffered by the legitimate holder[42].

All this being said, the reason why proceedings on infringement of secrets are of interest here derives from the evidentiary difficulties that often arise

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sized how the directive had only reached a partial harmonization, which therefore has not affected the different national models and has not even managed to unequivocally define the legal nature of secrecy, leaving significant uncertainties in relation to the possible conflicts of applicable regulations, in particular in case of transnational breaches of the same secret. The issue concerns in particular the qualification of the breach of secrecy as an act of unfair competition or as an infringement of an intellectual property right (Falce (2017), p. 560 underlines the still existing uncertainty). Notwithstanding these criticisms, other scholars pointed out that the directive has in fact, based on Article 114 TFEU, identified the most relevant forms of unlawful acquisition of know–how and dictated uniform rules on remedies and exceptions, extending protection also to third parties who, although having unwittingly violated the secret, have used it by engaging in production and/or marketing conduct in further violation of the same. In this hypothesis, a more favourable remedy mechanism is provided for, which consists in the payment of compensation provided that the third party has «originally acquired a trade secret in good faith, but only learnt at a later date [...] that his knowledge of the secret in question came from sources that were unlawfully using or disclosing the secret in question» and also that there is a disproportionate damage in relation to the person concerned and the compensation is satisfactory for the injured party (see Recital 29 of the Directive). The Italian legislature has implemented the requirements of the Directive also regarding this point but has removed the condition according to which the possibility of imposing compensation was to be considered linked to the consent of the injured party.

[40] Cf. Ciccone & Ghini (2019), p. 525; Mastrelia (2019), p. 513; Serafini (2018), p. 1329.

[41] In fact, the directive includes know–how in secrecy. Relevant — in this respect — is Recital 1: «Non–commercial undertakings and research organizations invest in the acquisition, development, and application of know–how and information, which are the currency of the knowledge economy and provide a competitive advantage. Investment in the production and exploitation of intellectual capital is a key determinant of the competitiveness and innovativeness of companies in the market and thus the return on their investment, which is the underlying motivation for companies' research and development activities. The latter resort to various means to appropriate the results of their innovative activities when the openness of the market does not allow for the full exploitation of the investments made in research and innovation. One of these is the use of intellectual property rights, such as patents, design rights or copyright. Another means of appropriating the results of innovative activities is to protect access to and exploitation of knowledge that is valuable to the entity that owns it and is not disseminated. This valuable *know–how* and business information, which is not disclosed and is intended to remain confidential, is called a trade secret».

[42] This is the amendment implemented in Article 132 paragraph 5–*bis* of the IPC.

in these judgments, whether provisional or on the merits; it is sufficient to think of the difficulties that a company may encounter when one of its former employees decides to resign and accepts a job offer from a competitor and the company itself fears that the employee has stolen some of its trade secrets in order to make them available to the new employer. In these cases, the practice of Italian courts is to grant—obviously on the basis of justified claims—industrial description orders *inaudita altera parte,* aimed at allowing the owner of the secrets to obtain proof of their violation; such acquisition is permitted by providing that a computer forensics expert can access all the devices of the former employee and the new employer of the same, acquiring all the data present on the devices in question and possibly also paper data that are scanned and thus become digital data themselves.

Bearing in mind that the judge normally issues an order in which he also identifies all the safeguards that must be adopted in order to avoid the disclosure, in the course of the proceedings, of the secrets for the protection of which the order has been granted.

It is clear that, for the purposes of identifying in the bulk of the documents acquired, those that are relevant, the use is normally envisaged, by the computer forensics expert, in contradistinction with the consultants appointed by the parties and endowed with the same skills, of software that is able to make this selection, on the basis of keywords[43]. The use of these tools therefore provides for the prior elaboration, by the judge, of the keywords on the basis of which the search will be carried out, which normally consist, purely by way of example, of the names of the companies, the names of their clients or even the names of the secrets themselves, for example "recipe for paradise cake"; moreover, the keywords in question are very often the subject of discussion during meetings between the computer forensics experts involved.

With a view to the future use of more complex artificial intelligence tools, such as the more advanced Natural Language Processing tools, to a certain extent the identification of relations between inferred facts, facts and evidentiary instances could be more precise, provided that the artificial intelligence tools are adequately trained.

It is believed that greater accuracy can be acquired through the development of computational language models. Linguistic modelling is a form of unsupervised learning underlying the processing of unstructured data. Text Mining and Text Preprocessing techniques appear to be particularly relevant in this respect. Text Mining, unlike Data Mining, which includes all techniques for analyzing and interpreting quantitative data generally derived from observations in science or economics, incorporates all statistical techniques and algorithms for the classification, automatic extraction of information and grouping of text documents; it is based on the retrieval of information from text documents, which are, however, in a highly unstructured and confused

[43] On the topic see Ganesh (2017), p. 21.

format, so that the information is lost in "a sea of words". Text Preprocessing consists of a series of operations aimed at cleaning the text of all those linguistic forms that may pollute the subsequent retrieval of information.

The purpose of Text Preprocessing is to convert the text in such a way as to put in the best possible conditions both the algorithms that, through the tools of Natural Language Processing, will have the task of describing the words through a multi–vector representation, and the algorithms in charge of extracting the information to characterize the texts under examination[44]. After Text Processing is the vector extraction phase, and this is done specifically by means of the Word Embedding technique[45], precisely that technique that allows the representation of sentences and words through the use of vectors[46]. Based on methodologies from machine learning, it is in fact possible to exploit models that automatically extract from documents the information needed to train neural networks. By means of Word Embedding, it is possible to decode the semantic and syntactic information of words, and this technique makes it possible to identify the relationships existing between words contained in different texts. Certainly this methodology is difficult to understand for anyone who does not have, like the writer, a real expertise in computer science, however, in light of the results obtained to date by computer science, it is believed that these Word Embedding methodologies can be used for a number of purposes and, therefore, also in order to improve operations of classification of factual circumstances and subsumption of the same in the cases invoked in order to identify the limits of the evidentiary instances.

7. CONCLUSIONS: A RECENT ITALIAN INITIATIVE FOR NEW TECHNOLOGIES IN CIVIL JUSTICE (NEXT GENERATION UPP)

In conclusion, the implementation of artificial intelligence and new technologies can be a concrete help to improve the efficiency of justice as well as a tool that allows for greater legal certainty, which—as anticipated—contributes to a better distribution of available resources in order to avoid their depletion.

In this respect, attention can be focused on a very important Italian initiative—precisely aimed at the implementation of artificial intelligence and new technologies in the civil justice system—called Next Generation UPP.

Next Generation UPP—UPP stands for "*Ufficio per il processo*" and we are going to translated it as "Trial Offices"—is a project of the University of Tu-

[44] On the subject see Kursat Uysal & Gunal (2014), pp. 104 ss.

[45] The most widespread word vector analysis technique to date is that of GloVe (literally *Global Vector*); underlying GloVe is the idea that it is possible to derive semantic relationships between words in light of their succession from the recurrence matrix.

[46] The *Word Embedding* approach was first identified by Mikolov in 2013 (Mikolov & Chen &. Corrado & Dean (2013).

rin, Departments of Law, Computer Science and Management, in partnership with eleven universities in North-West Italy. The project is part of the «Unified Project for the Dissemination of the Trial Office[47] and the Implementation of Innovative Operational Models in Judicial Offices for the Disposal of the Backlog» promoted by the Ministry of Justice under the NOP Governance and Institutional Capacity 2014–2020 and implemented in synergy with the

[47] The Trial Office had been inserted in our legal system by Decree Law No. 90 of 24 June 2014, *Urgent Measures for Administrative Simplification and Transparency and for the Efficiency of Judicial Offices,* converted with amendments by Law No. 114 of 11 August 2014. Namely the cited Decree Law provided for the Trial Office inserting Article 16–*octies* into the Law No. 221/2012 which had dictated the first provisions for digital justice, to emphasize the close link between technological innovation, organization, and the quality of justice. Article 16–*octies* provides: «In order to guarantee the reasonable duration of the trial, through the innovation of organizational models and by ensuring a more efficient use of information and communication technologies, organizational structures called "trial office" are established at the courts of appeal and ordinary courts, through the employment of clerical staff and those who carry out, at the aforesaid offices, the training traineeship pursuant to Article 73 of Decree Law no. 69, the successful completion of which becomes a qualification for the competition in the judiciary, as well as auxiliary appeal and honorary court judges. The SCM and the Ministry of Justice are asked to implement the provision within the available resources and without any additional expense». Subsequent Decree–Law No. *83 of* 27 June 2015*, Urgent Measures on Bankruptcy, Civil and Civil Procedure and on the Organization and Operation of the Judicial Administration,* converted with amendments by Law No. 132 of 6 August 2015, introduced additional incentives for the provision of court internship. With Ministerial Decree dated 1 October 2015, the Minister of Justice adopted the *Organizational Measures necessary for the operation of the trial office*; Article 2 provides that the presidents of courts of appeal and tribunals shall establish the trial offices based on available human resources and that the administrative managers shall adopt personnel management measures in agreement with the determinations of the head of the office. Paragraphs 3 and 4 provide: «3. The president of the court of appeal or of the court shall allocate the organizational structures referred to in paragraph 1 to support one or more professional judges, considering as a priority the number of contingencies and pending cases as well as, for the civil sector, the nature of the proceedings and the management program referred to in Article 37(1) of Decree Law No. 98 of 2011»; «4. The coordination and control of the organizational structures referred to in paragraph 1 shall be exercised by the Presidents of Chambers, or by the judges delegated to perform the before mentioned tasks». On the Trial Office see Finocchiaro (2015), p. 973. Moreover, with Decree Law No. 168 of 31 August 2016, *Urgent measures for the definition of litigation at the Court of Cassation, for the efficiency of judicial offices*, *as well as for administrative justice*, converted with amendments by Law No. 197 of 25 October 2016, the trial office tasks had been extended to administrative justice. Legislative Decree No. 116 of 13 July 2017, aimed at the systematic reform of the honorary judiciary, provides for the assignment of honorary justices of the peace to the «organizational structure called "trial office"», where they will carry out exclusively the tasks and activities inherent to the same, subject to the limited assignment of civil and criminal proceedings (art. 9). On 9 June 2021, the Government adopted Decree Law No. 80, *containing Urgent Measures to Strengthen the Administrative Capacity of Public Administrations Functional to the Implementation of the National Recovery and Resilience Plan (PNRR) and for the Efficiency of Justice*, converted with amendments by Law No. 108 of 29 July 2021. Article 11 of the latter provides, subject to the approval of the PNRR by the European Commission, that, in order to facilitate the full operation of the organizational structures known as the trial office, the Ministry of Justice may initiate procedures for the recruitment on fixed–term employment contracts of 16.500 trial office staff (graduates in law or, in a minority share, economics and political science), with the qualifications of administrative, IT and statistical officer. The first recruitment procedures of trial office staff had been already performed. With respect to the relevance of the trial office see Civinini (2022); Ghirga (2022), p. 185. Finally legislative decree No. 151/2022 provides that at tribunals, courts of appeals, Supreme court and courts for persons, juveniles and families one or more units of trial office are set up for civil and criminal matters; it provides also for the establishment of several units at the Supreme court and at the General Prosecutor's Office of the Court of the Supreme court (Article 1). Each unit is coordinated and managed by the heads of the judicial offices, who define the priorities of intervention, the objectives to be pursued and the actions to implement them.

interventions included in the National Recovery and Resilience Plan (PNRR) in support of civil justice reform that had been enacted quite recently and will be in force at the end of this month, namely on February 28, 2023[48].

The project aims to improve the performance of justice in Northwest Italy through the strengthening of trial offices, experimentation with new collaborative schemes between universities and judicial offices, and technological innovation. These objectives had been considered worthy of funding and consistent with Action 1.4.1 of the NOP Governance and Institutional Capacity (2014–2020) and by the Directorate General for the Coordination of Cohesion Policies of the Ministry of Justice.

Next Generation UPP involves the judicial offices of courts of appeal of Brescia, Genoa, Milan and Turin, the courts of the relevant districts and the juvenile courts that actually recently the civil justice reformed severely.

With the approval of the PNRR, Italy made a commitment to the European Commission to achieve specific targets, with reference to the reduction of the length of proceedings and the elimination of the ultra–long civil and criminal backlog, in accordance with the reasonable duration of trials. To help maintain the commitments made and improve the performance of justice in northwest Italy, the project intends to adopt a multidisciplinary approach at each stage by harnessing legal, business and IT expertise.

The purpose is to achieve a structural reform that, by means of artificial intelligence, economic–managerial control, change management and digitization tools, will ensure that an organization can function efficiently, rationally and in a coordinated manner by correcting cognitive biases and avoiding waste of time and resources.

Next Generation UPP project is consistent with what the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) highlighted in the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment, aims to enhance the digitization process of judicial activities as a basis for the application of Legal Analytics (LA) tools and to create a technical environment in which different disciplines, including data science, artificial intelligence (AI), machine learning (ML) and natural language processing (NLP), can converge.

The project coordinators agree that AI is merely meant to support the human operator, not replace it. In fact, AI is intended to expand the tools of knowledge and analysis, in fact and in law, available to the constitutionally

[48] The reform of civil justice had been enacted by Legislative Decree no. 149 of 2022 in accordance with the delegation law no. 206 of 2021. It is a very wide reform that implies amendments not only to Civil Procedure Code, but also to Civil Code and too other laws. In its original version article 35 of the said legislative decree provided for the entry into force on June 30, 2023, but with law no. 197 of December 29 2022 the entry into force date had been anticipated to next February 28, 2023. With respect to the reform—the contents of which is very ample and cannot be taken into consideration here—see Tiscini (2023); Carratta (2023); Cecchella (2023).

autonomous magistrate, so that he or she becomes authentically aware of his or her choices.

In this context a prominent role has been recognized to the Trial Offices and the staff employed therein, present and future. Over the next five years, the Trial Offices structure will undergo a temporary, but substantial change due to the PNRR–funded intake of 16,500 new employees destined to be exhausted at the end of 2026. The challenge is therefore twofold: to make the most of this once–in–a–lifetime opportunity by managing term staff in the best possible way, and to properly set up Trial Offices so that they continue to perform their functions efficiently once the extraordinary workforce is exhausted.

Thus, the first line of action concerns the «definition of operational forms for the establishment and implementation of the Trial Offices».

After an initial phase of acknowledgment regarding the functioning of the judicial offices at which the Trial Offices are active and those that still lack them, the project envisages the «definition of the catalog of activities and procedures for the activation and strengthening of the Trial Offices» [49].

In concrete terms, this action will see the implementation of some of the following operational modules: supporting the writing of the motivation of civil and criminal measures; creation of the conceptual sentence file–model; document builder systems; semi–automatic anonymization of judicial decisions; semantic analysis tools for judgments; study and prototyping of tools for automatic extraction of information from documents submitted by the parties; automatic classification of documents in trial folders and their correlation; use of AI techniques for precedent management; enhancement of the existing digital; case law databases.

The second line of intervention is aimed at «identifying models for the management of incoming flows and backlogs at Court Offices». The project makes use of the legal, IT and business skills of the recruited resources by implementing the following activities: economic–managerial domain control over reconnaissance activities; identification of offices for testbed and support for formalization of processes modeling of flows for the testbed; assessment of testbed activities.

The third line of intervention involves the «Activation and testing of models and plans related to the previous actions» through the establishment of a Task Force to deal with the activation and testing of the models and plans developed during the project and to assess their capacity building and extension at the national level as well.

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[49] The phase of acknowledgment with respect to the functioning of the judicial offices at which the Trial Offices are active and those that still lack them is finished and meanwhile the IT and business experts are working on the definition of activities and procedures for the activation, if needed, and the strengthening of the Trail Offices. Those updated information had been gathered during a conference organized by the University of Turin on January 30, 2023.

The fourth line of intervention acts on the role of university institutions and their relationship with the world of civil justice. The desire is to define new collaborative patterns based on sharing of objectives, collaboration, experimentation capacity, identification of potential, and development of organizational capacity, in order to improve justice services for citizens and territories.

Next generation UPP identifies activities to be carried out in the context of the single— and three—year master's degree program in the legal disciplines and activities to be carried out in the context of postgraduate offerings, such as: changing the syllabi and examination methods of the fundamental courses for the training of the future practitioner of jurisdiction, with greater emphasis on the acquisition of skills necessary for the new market of jurisdiction, primarily the ability to draw up concept maps and approach practical cases; writing workshops, legal informatics workshops, legal clinics for deserving students in the single–cycle master's degree program; training of graduate student scholars and/or fellows to be sent to judicial offices in the Northwest area as part of Next Generation UPP; training of trial clerks recruited through the extraordinary examination phase under the NRP–funded recruitment plan; higher interdisciplinary training courses or executive master's programs.

Clearly the objectives of the project are different and on different levels.

With respect to the situation of the Trial Offices the aim is to safeguard and improve the UPP facility projected beyond 2026, when the activity of the extraordinary workforce envisaged by d.l. 80/2021 and funded by the PNRR will end as well as to achieve—during the implementation period—a more efficient management of incoming litigation and a reduction in the civil backlog by the judicial offices involved.

With respect to the training context, the main objective is to be able to train law graduates equipped with the skills necessary to be placed in the Trial Offices by minimizing the need for on–the–job training by judicial offices and initiate with judicial offices (and bar associations) new forms of postgraduate collaboration suitable for meeting the needs of the justice market.

The final goal is both to have judicial offices in the relevant Macro Area who could have acquired a more efficient method of managing judicial affairs and utilizing the Trial Offices in order to contribute to the reduction of the backlog of cases and reduce the average duration of proceedings and to have law graduates in the Macro Area who could have acquired soft skills, IT and management skills for inclusion in the Trial Offices.

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