RIVISTA CRITICA DEL DIRITTO PRIVATO

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ABSTRACTS

CENDON
Twenty years of the application of guardianships have led to major changes, giving rise, in both theoretical and practical terms, to a number of situations that had not previously been take into account.
There are few guardianship judges; registries have too much to do; families are not always the best source of guardians; volunteers are often not up to the task and the legal administrative support is not always adequate or up to dealing with the problems at hand. New challenges arise continuously. The beneficiary's ability to manage his/her own affairs should be supported as much as possible; interdiction and incapacitation should be formally repealed; the so-called covenant of rehabilitation should be given a new lease of life as regards the management of the most serious dependencies and the introduction of the Existential Life Project/Profile everywhere in Italy should perhaps be considered. These are important challenges that must be met if vulnerable people are not to be left to their fate.

SCOZZAFAVA
The purpose of this article is to identify the relationship between property and possession, the powers of the possessor and their extension, and the basis of possessory protection. These are issues on which legal practitioners have long dwelt and on which there are still considerable differences.

NIVARRA
Through the examination of some clinical cases, the essay aims to illustrate the relationship between contracts and remedies in terms of a discipline aimed at self-correction of the imbalance of market power

LONG
Private law is one of the branches of law often portrayed as more gender-neutral, at least in Italy, and seemingly resistant to legal feminism. However, women continue to experience daily discrimination. Historically, legal disparities were even enshrined in law, such as limitations on the legal capacity of wives and, until very recently, the transmission of only the paternal surname to offspring. Presently, these limitations often stem from the presence of gender stereotypes in the decisions of civil courts. As evidenced in this paper, focusing on three pivotal areas (the legal regulation of the female body, unpaid domestic and caregiving work, and the invisibility of domestic violence), these stereotypes are deeply embedded in the traditional androcentric nature of private law. Far from being merely unfortunate and largely harmless expressions, they can lead to a denial of individual rights. Hence, there is a pressing need for actions that primarily address the cultural dimension, including comprehensive training for legal professionals and promoting awareness about the significance of gender-neutral language in legal discourse.

THOBANI
The rules against unfair commercial practices aim at protecting consumers against the risk (among others) of being misled by traders. The assessment of deceptiveness is however extremely delicate when commercial practices refer to a system of beliefs and convictions that are not part of the scientific method. Such is the case, for instance and as the article examines, of reference to esoteric practices, to alternative forms of medicine and to religious tenets. In these cases, to assess if the commercial practice is misleading means to assess if the belief and conviction referred to is true or not, with the risk of impairing pluralism. The essay therefore investigates the balance between the need to protect consumers, on the one hand, and to safeguard cultural and scientific pluralism, on the other, having specific regard to unfair commercial practices.

DI MASI
As a part of this paper, the author looks at the most recent institutional developments about surrogacy and examines their effects on law.
On the one hand, Government refusal to transcribe birth certificates originating in foreign states demonstrates a position that is not compatible with child protection. On the other hand, the constitutional and cassation doctrines' completely closed position on surrogacy (both commercial and solidaristic) is weak and criticisable.
Therefore, the surrogacy directly challenges the interpreter by requiring a countermajoritarian use of the best interest of the child principle, so that parental responsibility could be acknowledged even beyond what is called the traditional family.

NATALE
The European institutional debate on algorithmic justice brings up a series of issues. One of these issues is the so-called "performativity". The fear is that "predictive" justice will over-stabilize the course of law, closing off any space for its evolution. The concerns are at first sight well-founded, as the French literature has highlighted well recently, but which, if overcome, could be turned into opportunities.

GIUNCHEDI
In front of a total legislative inertia, the United Sections of the Court of Cassation were once again called upon to pronounce on the issue of whether a foreign measure conferring parenthood on the intending father to the child born of surrogacy complies with national law. The Author analyses the argumentative structure of the decision, criticizing the purely paternalistic logic adopted by the Court and addressed to protect the weaker party, i.e., the surrogate. The paper highlights the detrimental consequences of the decision: the obstruction of the recognition of intentional homo-affective parenthood, conveying discriminatory treatment based on gender, and an unmotivated and unfair compression of the minor's interest in maintaining the status and the affective continuity.

ALCINI
The paper focuses on the ruling that seems to have untied the knots on a controversial issue concerning the dissolution of de residuo communion. The controversial issue concerns the nature of the acquisition by the non-entrepreneur spouse, it being disputed whether it is a right in rem or a claim. On the sidelines of the decision, the analysis of the institution in question is not omitted, with particular regard to the crucial moment of the termination of the said property regime.

MICILLO

After clarifying the issues and challenges posed by the application of the requirements of Italian copyright law to street art, the article focuses on the swinging approach of the Courts to the phenomenon of street art. Street art has generated a clear dichotomy in the decisions of the Courts, specifically in relation to economic or moral copyright: in this sense, the article analyses the Banksy cases, judged by the Court of Milan and the European Union for Intellectual Property Office (EUIPO), in which the Court and the Office tend to obstruct the recognition of those rights and the consequent effects that they would have, although a recent EUIPO decision seems to open a new interesting scenario on the relationship between street art and copyright. On the other hand, in the presence of questions on moral copyright, the Courts, not without some bumpy ride, as in the case 5Pointz, come to pronounce themselves in favour of street artists. Important part of the paper focuses on a question about the conflict copyright-street art, id est the need for copyright law for such works, in particular with a study of the opinions in Doctrine that tend to undermine that paradigm. The goal of the paper is to demonstrate also the difficulties of applying copyright law to works both for their inner nature and for the possible betrayal of the historical, artistic and cultural roots of street art that such application would involve. Starting from the analysis of the interests involved, in particular the centrality of the recipient community within the artist-work-community relationship, it is possible to bring the works of street art in the theory of common goods. Street art works can disregard the intellectual property itself, in fact they are born many times without a specific author, often collective, and enhance, indeed, the context and the collectivity where the work is realised, in synthesis they move in the negative space where the collective and widespread creativity bursts. In the final part of the paper we try to show how street art works can be considered as common goods, then with an analysis of the fundamental right at stake, i.e. the fundamental right to culture, and the attitude of street art the legal status of commons with particular regard to the collective and shared management of the street art by the community.

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ABSTRACTS

CALZOLAIO
This work reflects on one of the most relevant aspects of the so-called digital revolution, consisting in the emergence of a de-materialized dimension of mobility-globality of 'objects' that exist only electronically and in a process state, as entities susceptible to continuous mutation and transformation. Data, cryptocurrencies, NFTs are all terms unknown until the recent past, but today familiar. The aim of this article is to investigate the legal qualification of these new entities, adopting a comparative perspective, with particular regard to the civil law and the common law traditions. The 'proprietary' logic continues to appear as a key that is not easy to replace for configuring a relationship of belonging of the new digital entities. However, the difference between the continental and the common law models of property is at the origin of diverging outcomes. The article points out the relevance of the different models of property also in this field, being also at the origin of the difficulties encountered when undertaking regulatory initiatives in the national, European and supranational spheres.

SONELLI
In Dobbs v. Jackson the Supreme Court has deliberated on crucial features of constitutional adjudication, regarding both its merits and methods. The Court has overturned the Constitutional protection of the right to abortion affirmed 50 years ago in Roe v. Wade as part of the right to privacy, and later confirmed in Casey as a component of the «liberty» protected by the XIV Amendment's due process clause. The Court has also re-framed the principle of stare decisis into an instrument that particularly lends itself to the revision of non-originalist precedents. Furthermore, the Court has elevated the «historical tradition» as the decisive criterion for the recognition of constitutional dignity to rights not expressly included in the Constitution (unenumerated rights), through a substantive reading of the due process clause.
Dobbs and its controversial approach, afford us the opportunity to reconstruct critically the evolution of the due process clause, which has over time become a pillar of the USA constitutional architecture. Our analytical reconstruction shed light on the «multi-functional vocation» this clause has acquired in American jurisprudence. The due process clause has developed into: an instrument for reviewing the police power of the States; a normative basis for the process of incorporation under the XIV Amendment of the rights and guarantees included in the Bill of Rights; a «matrix» which allows courts to identify unenumerated rights deserving constitutional protection. In this last regard, the Supreme Court in Dobbs has elected the «historical tradition» as the ultimate criterion for the process of rights identification, to the detriment of other interpretative criteria. Our contribution highlights the inadequacies and critical implications of the Supreme Court's interpretative approach.

VERCELLONE-DI STASIO
Cognitive and informational capitalism has disrupted the boundaries of industrial modernity between work time and leisure time. To understand the significance and stakes of this evolution, our approach will intertwine theoretical and historical analysis. It will aim to show the heterogeneity of the sociotemporal regimes that, during different phases of capitalism, have presided over the organization of work and its articulation with respect to other social times that are included in the so-called leisure time: rest, consumption activities and reproduction of the labor force. After laying the foundations of a Marxo-Braudelian approach of the long historical dynamics of capitalism, we will recall the main features of the sociothemporal regimes that have characterized the extraction of surplus value during mercantilist and industrial capitalism. The last part of the essay will focus more precisely on the controversy provoked by the new forms of exploitation linked to the advent of the Free Digital Labor figure in platform capitalism.

MELI
This paper aims to deepen the relationship between GDPR and consumer law, paying attention to the role of consent and the value of data. The new contractual dynamics require a careful reflection about the scenarios of surveillance capitalism.

MATTERA
The article offers a thoughtful review of the theoretical and political history of Critical Race Theory (CRT), which is a legal and political theory that questions the role of race within society. This theory is undergoing a revival in American conservative consciousness following the murder of George Floyd, a black man killed by a white police officer in Minneapolis in May 2020. The CRT recognises that the legacy of slavery, segregation and the imposition of inferior citizenship on black Americans and other people of colour still permeates US society today. The essay tries to cover history of CRT, its main ideas, its main founders, new terrains in quant CRT and the legislative reactions by state legislatures against it.

BELLOMO
The essay examines the Supreme Court ruling that addressed the issue of the starting date of the limitation period for wage claims after the changes to the sanctions regime for unlawful dismissals introduced by Law no. 92/2012. The Supreme Court's solution – which postpones the dies a quo of the statute of limitations to the termination of the employment relationship – is critically analyzed, particularly with regard to the notion of stability of the employment relationship on which the Court bases its decision.