

REGULATORY POWER AND THE NEW (IM)BALANCE OF POWERS IN CONSTITUTIONAL LIBERAL DEMOCRACIES: SOME REFLECTIONS ON THE RELEVANCE OF NORBERTO BOBBIO'S THOUGHTS FROM AN INDIAN AND EUROPEAN PERSPECTIVE

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This paper aims to provide conceptual tools and arguments, inspired by Norberto Bobbio's rich legal and political theory, which appear particularly relevant to address today's issues of democratic legitimacy and accountability of regulatory structures in the context of Indian and European liberal democracies. The analysis thus confronts from a comparative perspective the structures and modes of operation of Indian and European regulatory structures (in terms of competence, functions and means) with the model of constitutional liberal democracies. The intended outcome of such comparison is to highlight the conditions and limits of the compatibility of current regulatory structures and their resultant regulatory powers on the one hand, with the constitutional liberal democratic order on the other.

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I. INTRODUCTION

The democratic governance of a constitutional state may appear best suited to address the questions that scholars, politicians, companies or simply citizens have to face in our increasingly globalised and digitalised society. The compatibility of the form of power which is commonly called governance with the ideal and theory of constitutional democracy purportedly protecting liberal values is at the root of the dialectical conceptual framework of a constitutional state. In other words, the question could be framed as whether contemporary forms of governance worsen or better democracy as a form of government. A simple lexical meaning of governance is both the activity of governing as well as the way in which a country, a company or an institution is controlled.¹ The control over the conduct and organisation of a company or an institution is a point of primary concern as it implies potential restrictions on economic activities at odds with the liberal doctrine. Said concern arises not only in the economic sphere as it may first appear, but also at the levels of law and politics in the context of the liberal conception of society.² It also brings us to the old debate of the relevance and importance of a democratic state over striking a balance between the conflicting democratic values of equality and liberty.

The intertwined characteristic of the political, legal and economic spheres is notably evidenced by the fact that the principle of free enterprise (economic by nature) is frequently enshrined (through political will) in today's constitutions (as legal instruments) of liberal democratic regimes.³ The freedom of

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¹ OXFORD ADVANCED LEARNER'S DICTIONARY (Oxford University Press, 2015).

² See F.A. HAYEK, *THE ROAD TO SERFDOM* (Routledge Press, 1944).

³ See for instance the constitutional freedom of enterprise (*liberté d'entreprendre*) stemming from Article 4 of the 1789 French Declaration of the Rights of Man and the Citizen (*Déclaration Des droits de l'Homme et du Citoyen*) which forms integral part of the constitutional block (*Bloc de constitutionnalité*) of the French Constitution; See in particular Cons. Constit., 30 November 2012, "Corporations d'Alsace-Moselle", decision no. 2012-285 QPC, where the French Constitutional Council specified in recital 7 of its decision the two objectives of the freedom of enterprise, viz.

enterprise is however not absolute, but rather limited by the need to protect the public interest.⁴ Whilst the choice of the way in which such public interest is to be protected remains in the hands of political authorities, one may but only observe that regulation has been the path usually chosen. Regulation can thus be conceived as a specific mode of governance of the sphere of private sector's activities which combines both the productions of a specific body of norms (usually of a more technical kind) and active supervision of private actors by agencies or independent institutions.⁵ One justification of regulation understood as a mode of governance of private actors is indeed that regulation is a course of action which enables political authorities to ensure that public interest considerations are incorporated and obeyed by private agents.⁶ Regulation would therefore protect public interests and thereby limit the constitutionally guaranteed right of free enterprise by the means of both a normative framework and an institutional framework.

Because of this dual nature of regulation, we shall henceforth rather use the concept of "regulatory structure" to designate such mode of governance of the private sector. Although the term "regulatory structure" has often been used without any strict definition in the context of banking and financial regulation,⁷

the free access to a profession or an economic activity and one's freedom in the conduct of such profession or economic activity. Similarly, the freedom of enterprise is enshrined in the very body of the Italian Constitution, in the first paragraph of Article 41 where it states, "*L'iniziativa economica privata è libera*". Articles 19 (1) (g) read with Article 19 (6) of the Constitution of India which is part of the Fundamental Rights Section of Part III and as such is part of the *unamendable basic structure* of the Constitution, though with reasonable restrictions, grants similar rights, "19(1)(g): All citizens shall have the right (g) to practice any profession, or to carry on any occupation, trade or business."; For a brief introduction, See V.S. Khanna, *Profession, Occupation, Trade or Business* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 867-884 (M. Khosla & P.B. Mehta eds., Oxford University Press, 2016); See also *infra* note 49.

⁴ Amongst others, see the second paragraph of Article 41 of the Italian Constitution which provides in relation to the freedom of economic initiative: "*Non può svolgersi in contrasto con l'utilità sociale o in modo da recare danno alla sicurezza, alla libertà, alla dignità umana*" (our translation: It [economic initiative] cannot be conducted contrary to social utility or in a manner which would cause damage to security, liberty, human dignity); Article 19(6) of the Constitution of India allows the state to impose reasonable restrictions in the interests of general public, offers protection against rent seeking and crony capitalism, to protect weaker and marginalised sections of the populations like protection from unscrupulous money lenders in village communities for example. The contours of the protection have been spelled out in numerous Indian Supreme Court judgments. Khanna writes, "The Supreme Court has held that what is 'reasonable' is likely to vary by context and is based, in some measure, on the nature of activity and conditions in that industry. A number of decisions have held that public interest is a very capacious concept and covers public order, public health, public security, morals, economic welfare of the community, and the objects mentioned in Part IV of the Constitution." V.S. Khanna, *Profession, Occupation, Trade or Business* in S. CHOUDHRY, M. KHOSLA, P.B. MEHTA, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 872 (OUP, 2016).

⁵ M. SÈVE, LA RÉGULATION FINANCIÈRE FACE À LA CRISE 279-280 (pref. Jean-Pierre Jouyet, ed. Bruylant, 2013).

⁶ See G. Ashima, *Regulatory Structure for Financial Stability and Development*, 45(39) ECONOMIC AND POLITICAL WEEKLY 53 (2010): "The public interest theory of regulation defines it broadly as government intervention in markets to influence those decisions of private agents that would otherwise not fully incorporate public interest consideration".

⁷ See G. Ashima, *Regulatory Structure for Financial Stability and Development*, 45(39) ECONOMIC AND POLITICAL WEEKLY 51 *et seq.* (2010).

it may in our opinion fruitfully be used in respect of any other sector subject to regulation and supervision. The concept of “regulatory structure” is thus synthetic by nature, in the sense that it may encompass a wide range of sectors and activities, such as the protection of personal data, banking, financial and insurance regulation, media regulation, healthcare regulation, *etc.* For the purpose of our analysis, we shall then consider that the concept of “regulatory structure” encompasses different phenomena of normative production and supervision in relation to specific norms which have a limited and clearly defined scope of validity and whose effective application (including through sanction mechanisms) is to be ensured by specialised regulatory authorities.

When analysing the mode of operation of regulatory structures, from their normative as much as from their institutional sides, one is however immediately faced with the issue of concentration of powers and functions within the hands of single regulatory authorities. It has indeed been observed that regulatory bodies are usually entrusted with powers, within a limited material scope, with the purpose of making technically specific regulation, of ensuring ongoing and consistent supervision and, as the case may be, of issuing sanctions.⁸ The power entrusted to regulatory structures which generally benefits from some independence and autonomy from political authorities (*i.e.* the government, the parliament and the judiciary) may, to a certain extent, be perceived as a “new” power.⁹ However, the lack of separation of the legislative, executive and judiciary functions, which instead appear to be mingled in single regulatory bodies, (despite their materially limited competence) raises the issue of potential abuses of powers, in direct contradiction with the very conception of a constitutional order¹⁰ and the model of the liberal democratic state. We are reminded of Bobbio here who held that the strength of the liberal democratic model lay in the individualistic conception of history and society at the root of the modern world.¹¹ The individual is for Bobbio the keystone of the entire liberal democratic model, which is built on the dual acceptance of liberty (“*libertà*”) as both the absence of undue restrictions on individual actions (“*non-impedimento*”) and the autonomy of the individual (“*autonomia*”).¹² Bobbio’s conception of the liberal democratic model stems from the distinction made by Benjamin Constant between the liberty of the ancients and the liberty of the moderns,¹³ where the latter would correspond to the liberty-as-

⁸ Hève Causse, *Le pouvoir de régulation*, *La Lettre de l’AFGE*, n°43, 4eme trimestre 2015, 20-21, available at <https://www.hervecausse.info/attachment/636642/> (last visited on April 7, 2020); See also SÈVE, *supra* note 5.

⁹ *Id.*

¹⁰ See in particular, Article 16 of the 1789 French Declaration of the Rights of Man and the Citizen (*Déclaration Des droits de l’Homme et du Citoyen*) which provides that a society where separation of powers (*viz.* originally, legislative and executive powers) is not ensured shall not have a constitution.

¹¹ Norberto Bobbio, *LIBERALISM AND DEMOCRACY* 1-3 (translated by Ryle & Soper, Verso, 2005).

¹² Norberto Bobbio, *Della Libertà Dei Moderni Comparata a Quella Dei Posterì*, in *POLITICA E CULTURA* 172-173 (Giulio Einaudi ed., 1955 (reprinted 1974)).

¹³ For further details, *Id.*, 160 *et seq.*

the-absence-of-undue-restrictions (“*libertà come non-impedimento*”) and would form the corner stone of a liberal state, whereas the former would correspond to the liberty-as-autonomy (“*libertà come autonomia*”) as the corner stone of democracy.¹⁴ On top of the two above-mentioned corner stones, Bobbio distinguishes two load-bearing pillars which are the protection of fundamental rights and the separation of powers,¹⁵ and which are evidently best organised and secured at the constitutional level. To put it in a nutshell, the architecture of Bobbio’s conception of a liberal democracy consists of two corner stones (*i.e.* the two conceptions of liberty of individuals), two pillars (*i.e.* the protection of fundamental rights and the separation of powers) and one key stone (*i.e.* the individual as a rights-entitled legal subject). The material, stones and mortar, to build such a model shall be found on Bobbio’s conception of the legal norm and the legal order as will be shown subsequently in our analysis.¹⁶

In light of the above, we believe that it is against such a strong model of constitutional liberal democracy, as developed by Bobbio, apart from him being one of the leading Italian political and legal thinkers, that current regulatory structures might be fruitfully confronted. We would like to underline two main reasons for such a choice: one contextual, and another methodological. The contextual reason is that Bobbio’s conceptual framework appear at first sight to be the most relevant to address issues and controversies of democratic legitimacy and accountability of regulatory structures in the context of liberal democracies which current Indian and European (at least within the European Union) regimes undoubtedly are. On the methodological side, the reason would be the stance of the “man of culture” (*uomo di cultura*) adopted by Bobbio in all his intellectual endeavours. According to Bobbio, the role of a “man of culture” (*uomo di cultura*) is to disseminate doubts rather than to seek certainties, and to address any issue with measure, circumspection and ponderation.¹⁷ The concepts and arguments put forward by Bobbio, although not being exempt from any criticism, thus appear embedded in such a critical and methodological approach proper to address today’s controversial issues of democratic legitimacy and accountability of regulatory structures. It is however worth noting that the central place occupied by the individual, as the legal subject entitled to various civil, political and social rights, shall not be mistaken as a philosophical approach centred on the self, deprived of any social, cultural or political ties. As Bobbio’s constant criticisms towards Marxism and Existentialism undoubtedly show,¹⁸ his conceptual approach endeavours to replace the individual in its social context rather than to a simplistic reduction to the mass for the former or to the (psychological) self for the latter.

¹⁴ *Supra* note 12.

¹⁵ *Id.*, 167-168.

¹⁶ See Norberto Bobbio, *TEORIA GENERALE DEL DIRITTO* (G. Giappichelli ed., Torino, 1993).

¹⁷ *Supra* note 12, 15 (where the author stated that the duty of the men of culture is more than never to sow doubts rather than gathering certainties (“*Il compito degli uomini di cultura è più che mai oggi quello di seminare dei dubbi, non già di raccogliere certezze*”)).

¹⁸ See in particular, Norberto Bobbio, *THE PHILOSOPHY OF DECADENTISM, A STUDY OF EXISTENTIALISM* (translated by D. Moore & Basil Blackwell, Oxford, 1948).

Taking stock of the current regulatory structures operating in the context of Indian and European constitutional liberal democracies, the present paper thus aims to provide a conceptual analysis from a Bobbian perspective of the legal and political issues of democratic legitimacy and accountability of regulatory structures. In other words, our analysis shall sketch out key concepts and arguments to attempt to answer the question of whether, and under what conditions, regulatory structures may be deemed compatible with constitutional liberal democracies. Aware of the wide range of sectors in which regulatory structures developed, we shall restrict our analysis to two specific sectors for the sake of purposeful comparison, namely: personal data protection, and banking and financial regulation. Also, since a systematic and detailed analysis of Indian and European regulatory structures in the aforementioned sectors would be loaded with technicalities exceeding the conceptual scope of this paper, we shall provide concrete examples only punctually and where particularly relevant. The three different layers of issues in respect of the democratic legitimacy and accountability of regulatory structures will be dealt with, in turn, in three different parts of this paper.

In Part II, we will first consider the issue of the legitimate attribution of competences in a constitutional democratic and liberal state. It will be shown that, in Bobbian terms, regulatory structures belong to the so-called 'inferior state', as part of – and within the limits of - the greater Superior Constitutional State. The analysis will show that regulatory structures are organically compatible with the Bobbian model of a liberal and democratic state, provided that such structures are strictly subjected to the law and are ultimately accountable to the people.

Part III will focus on the functions which regulatory structures are deemed to fulfil. The analysis will show that regulatory structures may be conceptualised as minor orders (*ordinamenti minori*) in the sense of Bobbio's legal theory. It will follow, however, from such conceptualisation that regulatory structures should remain functionally limited and pragmatically justified. Part IV will analyse the means of action available to regulatory authorities to ensure the coherence and effectiveness of regulatory structures. Institutional and normative, as well as *ex ante* and *ex post* means of actions will be scrutinised from a Bobbian perspective. It will be shown that such means of action and sanction need to be strictly framed and proportionate for regulatory structures to meet the requirements of a democratic and liberal state model. The last part will set forth some concluding remarks, thereby underlining the relevance of Bobbio's thoughts and analytical tools to address today's challenges due to the development of regulatory structures within constitutional democratic and liberal states. At the same time, some words of caution will be made, to not forget the broader picture which should include the perspective of the global south as well as the most recent development of the Covid- 19 global pandemic.

II. COMPETENCE AND DEMOCRATIC ACCOUNTABILITY OF REGULATORY STRUCTURES

The regulatory structures are formed as part of the ‘inferior state’/‘civil society’ (in Hegelian formulation) of a ‘Superior Constitutional State’.¹⁹ The structure and competence/powers of the Constitution/Superior Constitutional State itself ensures that the regulatory structures are created in accordance with the constitutional superstructure and function within the limited powers and functions granted thereunder. This ensures both democratic legitimacy as well as accountability by the regulatory structure.²⁰ As part of its function, the regulatory structure mediates between public and private interests and essentially concerns with the exterior or administrative-legal functions of the state. Therefore, in its structure, the regulatory structure is an inferior state/civil society and in its functions, it deals with the exterior/administrative-legal functions. The Superior Constitutional State itself has to function under democratic principles of universal suffrage, elected government, separation of powers, rule of law and accountability, and judicial independence to name a few of the essential features prescribed in its own structure. It is like *Dharmo rakshati rakshitah* – in upholding and protecting the Dharma, one protects oneself.²¹

¹⁹ The idea is discussed below in this Part.

²⁰ The regulatory structure could be derived from the text/structure and practice of the constitution (inclusive of constitutionalism or constitutional convention) itself which includes balance of powers, or a regulatory structure which itself could draw from the constitution or a legislation which gets framed within the constitutional framework. This can be explored in Bobbio’s work, *See* Norberto Bobbio, *DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER* (translated by Kennealy, Polity Press, 1989 (reprinted 2006)). There are a plethora of other works dealing with these concerns of balancing/proportionality, competence, and constitutionalism resonating Bobbio’s ideas. For more, *See* Matthias Klatt & Moritz Meister, *THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY* (Oxford University Press, 2012); Mark Tushnet, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* (Edward Elgar Publishing, 2nd ed., 2018); Nick Barber, *THE PRINCIPLES OF CONSTITUTIONALISM* (Oxford University Press, 2018); Dieter Grimm, *CONSTITUTIONALISM: PAST, PRESENT AND FUTURE* (Oxford University Press, 2016).

²¹ Sir Ganganath Jha’s translation of Manu’s Code of Law is the most extensive so far, though recently Patrick Olivelle has come up with a critical edition providing both the originals and a contemporary translation.

“धर्म एव हतो हन्तत धरो रक्षतत रक्षषकषतः| तस्राद्धरो न हततव्यो रा नो धरो हतो ऽवधीत||” 8.15. Patrick Olivelle, *MANU’S CODE OF LAW: A CRITICAL EDITION AND TRANSLATION OF THE MĀNAVA-DHARMAŚĀSTRA* 661 (New Delhi: Oxford University Press, 2006). It is translated/transliterated as: “Stricken, Justice surely strikes back; defended, Justice defends. Therefore, never strike at Justice, lest Justice stricken, wipes us out.” Patrick Olivelle, *MANU’S CODE OF LAW: A CRITICAL EDITION AND TRANSLATION OF THE MĀNAVA-DHARMAŚĀSTRA*, 167-168 (New Delhi: Oxford University Press, 2006).

Dharmo Rakshati Rakshitah, for Olivelle would mean: defended, Justice defends, which is also the motto of the first National Law School of India called NLSIU, Bangalore.

On the concept of Dharma, P.V. Kane writes, “*Dharma* is one of those Sanskrit words that defy all attempts at an exact rendering in English or any other tongue. That word has passed through several vicissitudes. The dictionaries set out various meanings of Dharma such as “ordinance, usage, duty, right, justice, morality, virtue, religion, good works, function or characteristic.” Dharma is also personified as a deity. [...] In the hymns of the R̥gveda the word appears to be used

A. REGULATORY STRUCTURES AS A BRIDGE BETWEEN PUBLIC AND PRIVATE INTERESTS: COMPETENCE, CONSTITUTIONAL PRINCIPLES AND DEMOCRATIC ACCOUNTABILITY

In the long march of the state, there has been a ‘primacy of the private’ as a starting point, to the ‘primacy of the public’ as a point of arrival as exemplified by Hegel drawing from Aristotle.²² In the space and notion of ‘time’,²³ the State (along with its legal and political structures, constituting its competence, functions and limitations) does not stop at the Hegelian ‘primacy of the public’ but returns again to the ‘primacy of the private’ according to Bobbio. The ingenuity of Bobbio lies in understanding this circularity of legal and political structures quite well. The rise of the state leads to publicisation of private interests including regulation of private contract, not untrammelled *laissez faire* and the gradual and certain subsumption of civil society within the levels of public power or ‘the state’. With the rise of rights and agency of citizens due to universal franchise in a vibrant democracy made the state or ‘the public’ itself the platform for negotiating and for reaching consensus over conflicting private interests. The state became the platform for contestations and resolutions of private and group interests. Such a function of the state is also explained by the increasingly diverse and complex functions which it has to perform today, such as, dealing with very big corporations, or with group interests in increasingly plural societies, which invariably raises stakes of the private in the public.²⁴

either as an adjective or a noun (in the form *dharman*, generally neuter). [...] the word is clearly derived from root *dhr* (to uphold, to support, to nourish). In a few passages, the word appears to be used in the sense of ‘upholder or supporter or sustainer.’” Pandurang Vaman Kane, HISTORY OF DHARMAŚĀSTRA (ANCIENT AND MEDIEVAL RELIGIOUS AND CIVIL LAW IN INDIA) Vol. I, 1-6 (Pune: Bhandarkar Oriental Research Institute, 2006). For more, See D. Francavilla, *The Hindu Tradition: A History* in ROUTLEDGE HANDBOOK OF RELIGIOUS LAWS 71-72 (Rossella Bottoni & Silvio Ferrari eds., London: Routledge, 2019); Ashok Vohra et al., *Dharma: The Categorical Imperative* (New Delhi: D.K. Printworld, 2005); A. Hildebeitel, *DHARMA: ITS EARLY HISTORY IN LAW, RELIGION, AND NARRATIVE* (New Delhi: Oxford University Press, 2015).

²² Norberto Bobbio, *The Great Dichotomy: Public/Private* in DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER 10-15 (translated by P. Kennealy, Polity Press, 1989 (reprinted 2006)).

²³ To understand Bobbio’s notion of “time”, one can read his essay of the critique of existentialist philosophy, See Norberto Bobbio, THE PHILOSOPHY OF DECADENTISM: A STUDY OF EXISTENTIALISM (translated by David Moore, Oxford: Basil Blackwell, 1948). On the notion of time, important works in the Western canon include Walter Benjamin (included in his essay on history), Martin Heidegger and Jean Paul Sartre. For more, See Walter Benjamin, ILLUMINATIONS 253-264 (THESES ON THE PHILOSOPHY OF HISTORY) (New York: Schocken Books, 2007); Martin Heidegger, BEING AND TIME (translated by Joan Stambaugh, State University of New York Press, 2010); JEAN PAUL SARTRE, BEING AND NOTHINGNESS (Simon & Schuster eds., 1993).

²⁴ Bobbio writes, “Indeed, the two processes – the publicization of the private and the privatization of the public – are not incompatible and in fact interpenetrate each other. The first reflects the process of the subordination of private interests to collective interests represented by a state which increasingly surrounds and invades civil society; the second represents the revenge of private

It is also remarkable to note how Bobbio could presciently observe this phenomenon even before the fall of Soviet Union and the rise of corporate capital with massive rise in trade and investment across borders as a quintessential “revenge of private interests” leading to “the privatisation of the public” which has brought both positives (more globalised world; better economic efficiency; speed and certainty; telecommunications with smart phones; greater global connectivity; innovation; and migration of people and ideas like never before, to cite a few examples) and negatives in its wake (cuts or gradual rolling out of the state from public health, education and transport; environmental degradation with reduction in biological diversity whose full implications are yet to be seen and assessed; climate change; social exclusion and alienation among others). This reverse process as unforeseen by Hegel was seen by Bobbio. Bobbio afforded two examples of “contractual relations characteristic of the world of private relations” which “have re-emerged on the higher plane of politically important relations”²⁵ – first, large trade union organisations for the formation and renewal of collective contracts; second, the relations between political parties for the formation of governmental coalitions. Among these two, only the latter still remains relevant and preeminent, the former’s relevance and force has declined considerably over the years.²⁶ Whilst Bobbio has not specifically focused on regulatory structures and their role in the context of liberal democracies, such structures may be seen, to some extent, as part of the said momentum of the ‘revenge of private interests’. Private actors, either on an individual basis or through a professional association, are indeed often associated with and by regulatory authorities to ensure an effective supervision and keep up with the challenging technicalities and development of a given sector. In India for instance, the Indian Banks’ Association clearly advocates and promotes its role as a communication channel between its members and the regulators and authorities, on the one hand, and, on the other, it performs a representative function before the regulators and other authorities and assists authorities in developing laws,

interests through the formation of large organised groups which make use of the public apparatus in order to achieve their own aims. The state can correctly be seen as the place where these conflicts occur and re-occur, settle down and flare up through the legal instrument of a continually remade agreement which is the modern equivalent of the traditional social contract.” Norberto Bobbio, *The Great Dichotomy: Public/Private in DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER* 17 (translated by P. Kennealy, Polity Press, 1989 (reprinted 2006)).

²⁵ *Id.*, 16.

²⁶ In countries like India, where even in the heydays of trade-union movement (50s to 70s), the majority of workers belonged to unorganised sector (those lacking any union), now with the decline of trade-unionism all-together, there is no collective platform for representing the rights of workers. Such collective representation can be done by democratic and free-trade unions unaffiliated to any party or overt political ideology, but such platforms are missing at the moment (or fizzled out or are fizzling at a fast rate, if they existed). The decline of trade unions or the lack of developing new ones for new emerging sectors is perhaps another global phenomenon. When workers are employees their participation in management or as stakeholders of companies declines considerably if not vanishing altogether. See M. Firtz & T. Letallec, *Workers’ Participation in India, in INTERACTIONS BETWEEN CULTURE AND LAW IN INDIA AND EUROPE*, ARACNE, ROMA 281-292 (S. Rohlfling-Dijoux, J. Luther & Prasannanshu eds., 2019).

rules, regulations and procedures.²⁷ Similarly, amongst many other professional associations, the Euro Bank Association²⁸ at the European Union level and the French Banking Federation (*Fédération Bancaire Française*)²⁹ at the national level for France, for example, constitute specific fora for their members and generally enjoy a privileged relationship with the relevant regulatory authorities.

In Hegelian formulation, read by Bobbio, regulatory structures, especially in their normative aspects, because of governing private law (primarily economic functions of the state and regulating contractual relations) is *Recht*, whereas public law is *Verfassung*, or the Constitution, which is the higher functioning of the state.³⁰ Constitution, according to Aristotle is “[...] an organisation of the offices in a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed.”³¹ A definition of a ‘modern constitution’ is provided by Uday Singh Mehta : “At one level, constitutions are literally the articulation of a plan that establishes the major political institutions of a society: parliament, the executive, the judicial framework, the superior law that constrains ordinary law, the mode and extent of judicial review, the manner in which power is apportioned in different branches of government, the stipulations of the franchise, the rights that citizens have and with respect to whom they may be exercised, along with a variety of other norms that make up the political template of the state.”³²

Democratic accountability as a constitutional principle is assured when power is vested in everybody or the majority, but which also assures freedom or liberty in a state with constitutionally limited powers and functions.³³ It is worth recalling that Bobbio clearly set out that the doctrine of the liberal state at its origins has been conceived as the defence of the “limited state” (“*stato limitato*”) against the “absolute state” (“*stato assoluto*”), and further specified that the declarations of fundamental rights and the division of powers are two crucial institutions of the liberal state as a “*stato di diritto*” (rule of law) whose actions

²⁷ See for further details the website of the Indian Banks’ Association, available at <https://www.iba.org.in/index.html> (Last visited on April 8, 2020).

²⁸ See Euro Banking Association, available at <https://www.abe-eba.eu/> (Last visited on April 8, 2020).

²⁹ See Fédération Bancaire Française, available at <http://www.fbf.fr/> (Last visited on April 8, 2020).

³⁰ Norberto Bobbio, *The Great Dichotomy: Public/Private in DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER* 10 (translated by P. Kennealy, Polity Press, 1989 (reprinted 2006)).

³¹ ARISTOTLE, *POLITICS* 28-32 (translated by Ernest Barker, Oxford University Press, 1946); Cf. U. Mehta, *Indian Constitutionalism: Crisis, Unity and History in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 40 (M. Khosla, P.B. Mehta eds., Oxford University Press, 2016).

³² *Id.*; On the constitutional principles and practice in brief, See Mahendra Pal Singh, *Introduction in V.N. SHUKLA’S CONSTITUTION OF INDIA* A1-A65 (Lucknow: Eastern Book Company, 12th ed., 2016).

³³ Norberto Bobbio, *Classical and Modern Ideas of Liberty in LIBERALISM AND DEMOCRACY* 1-3 (translated by M. Ryle & K. Soper, Verso, 2005).

are materially and formally limited.³⁴ It is thus within this framework of powers' limitation guided by the rule of law that a democratically liberal constitutional state has regulatory structures to offer protection 'to' and protection 'from' corporations (which have much more resources, power and influence at their disposal, and therefore demanding stricter scrutiny by regulatory authorities), on the one hand, and protection 'to' consumers or citizens, on the other hand (*e.g.* in cases of banking frauds, hacking of data, *etc.*). Regulatory structures with democratic accountability as protected by the constitution is a feature of liberalism which has the individual as its basis. As Bobbio writes: "[...] liberalism continues to thrive 'because' it is rooted in a philosophical outlook which, like it or not, gave birth to the modern world: the individualistic conception of society and history."³⁵

As there is increasing technological advancement, including artificial intelligence and robotics, and not just 'computer-ocracy' as identified by Bobbio (writing quite presciently in the 1980s itself),³⁶ not to mention corporations which have a higher turn-out than many states, public accountability of power becomes all the more crucial.³⁷ Public accountability in Bobbian terms has to be applied to regulatory structures as well for greater democratic constitutional legitimacy, otherwise an individual citizen stands no chance of voice, let alone being a stakeholder in such a democratic government. Bobbian public accountability read with Jellinek's theory of legal status (the four statuses being passive, negative, positive and active)³⁸ of citizens added with Häberle's procedural rights (*status*

³⁴ Norberto Bobbio, *Della Libertà Dei Moderi Comparata a Quella Dei Posterì*, in POLITICA E CULTURA 167-168 (Giulio Einaudi ed., 1955 (reprinted 1974)).

³⁵ Richard Bellamy, *Introduction* in THE FUTURE OF DEMOCRACY: A DEFENCE OF THE RULES OF THE GAME II (*translated by R. Griffin*, Polity Press, 1987).

³⁶ *Id.*, 34-35. See also Bobbio, *infra* note 37.

³⁷ Bobbio writes, "Needless to say public accountability of power is all the more necessary in a state like ours, in which technological progress has increasingly given the authorities a practically unlimited power to monitor everything citizens are doing, down to the last detail. If I earlier expressed reservations about whether the 'computer-ocracy' is of benefit to those governed in a democracy, I have no doubt about the service it can perform to those who govern. The ideal of the powerful has always been to see every gesture and to listen to every word of their subjects (if possible, without being seen or heard); nowadays this ideal is realisable. No despot in antiquity, no absolute monarch of the modern age, even if surrounded by a thousand informers, has ever succeeded in having all the information on his subjects that the most democratic governments can obtain using electronic brains. The old question running through the history of political thought: 'Who guards the guards?', can now be reformulated as 'Who controls the controllers?' If no adequate answer can be found to this question, democracy, in the sense of visible government, is lost. In this case we are dealing not so much with a broken promise but with a trend which actually contradicts the basic premises of democracy, a trend not towards the greatest possible control of those in power by the citizens, but towards the greatest control of the subjects by those in power."; *Id.* (it was originally published as *Il Futuro della democrazia* in 1984).

³⁸ Robert Alexy, THEORY OF CONSTITUTIONAL RIGHTS 163-177 (Oxford University Press, 2010).

activus processualis),³⁹ provides protection to constitutional rights, including social rights⁴⁰ of citizens, and better democratic legitimacy.

B. THE CONSTITUTIONAL LIMITS OF THE COMPETENCE OF REGULATORY STRUCTURES

Legal authority, as a structural concept, is part of the legal-administrative function of the state, but is not ‘The State’. Therefore, reading Bobbio’s analysis of the concept of civil society (which itself is drawing from European ‘political philosophy’ since Aristotle), for example, places legal authority as a legal-administrative authority, as one of the functions of the state, thus placing the family or citizens in today’s terminology on one side, and, ‘The State’ on the other.⁴¹ According to Bobbio, within the Hegelian conceptual distinction, there is a lower state or lower aspect/functions/first stage of the state on the one hand, and the higher Constitutional State on the other.⁴² The first stage/lower state concerns itself with the external well-being of citizens – called the legal-administrative state. For example, the welfare functions or social rights including right to work, equal pay, education, support for poor, medical access and the like in a social democracy. This is, of course, in addition to, settling disputes and punishing the offender as per the law enacted. All these inferior state functions would constitute as part of civil society functions or ‘the civil society’ according to Hegel and not a pre-state formulation as per the natural law theorists.⁴³ On the other hand, the higher state is the ‘Constitution’ or the ‘Superior Constitutional State’ itself from which all competences/powers and functions flow from, including legislative and executive functions, among others. These elements of the Superior Constitutional State are the very essence of the state, the *summum bonum* for the existence of a state, the self-referential or self-sustaining *Dharma* of the state, exuding both its essence as well as its legitimacy.⁴⁴

³⁹ P. HÄBERLE, FUNDAMENTAL RIGHTS IN THE WELFARE STATE (translated by Dr. Thomas Rittler in PETER HÄBERLE ON CONSTITUTIONAL THEORY: CONSTITUTION AS CULTURE AND THE OPEN SOCIETY OF CONSTITUTIONAL INTERPRETERS 60 (M. Kotzur ed., Nomos: Germany, 2018); ROBERT ALEXY, THEORY OF CONSTITUTIONAL RIGHTS 163 (Oxford University Press, 2010).

⁴⁰ On comparative social rights regime and practice in India and Europe, See J. Luther, *Social Rights in the European and the Indian Union* in OPEN MARKETS, FREE TRADE AND SUSTAINABLE DEVELOPMENT: PERSPECTIVES FROM EU AND INDIA 17-37 (M.P. Singh et al eds., Springer, 2019).

⁴¹ Norberto Bobbio, *Civil Society* in DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER 22-43 (translated by P. Kennealy, Polity Press, 1989 (reprinted 2006)).

⁴² *Id.*, 32-33.

⁴³ *Id.*, 22-43.

⁴⁴ Bobbio writes, “Hegel’s civil society represents the first stage of the formation of the state – the legal-administrative state with the task of regulating external relations while the state, strictly speaking, represents the ethical/political moment whose job is to realise the inward adhesion of citizens to the whole of which they are a part – to the extent that the state can be called internal or interior (Gentile’s state *in interiore homine*). The Hegelian distinction between civil society and the state, rather than being a sequence in the pre-state and state forms of ethnicity, represents the

In this Hegelian conceptual framework, *à la* Bobbio, the structural concept of legal authority of today is the ‘inferior state’, looking after the exterior functions of the superior ‘Constitutional State’. The exterior functions of such legal authority include aspects of both administrative as well as judicial functions when it provides frameworks for banking and financial regulations or data protection, for example, and then provides penal sanctions in cases of its violations as part of its judicial functions. If such a legal authority vested in inferior state institutions, which are specially created due to the immensely variegated functioning of a ‘Superior Constitutional State’, oversteps its limits, then the Superior Constitutional State, through its Constitutional Court, intervenes to uphold the higher constitutional values and principles protected by the Constitution itself.

In practice, regulatory structures are set up in both their normative and institutional aspects as inferior state institutions, whose legal authority derives from a delegation of power allowed under the conditions and within the limits of the Superior Constitutional State. The independence and autonomy that regulatory structures generally enjoy may thus not be unlimited. To give but only one example, it is in such a line of reasoning that the French Constitutional Council had the opportunity to rule that the normative power delegated to regulatory authorities is constitutionally possible only to the extent that such delegation is materially restricted and that the content and extent of the delegated power is clearly determined.⁴⁵ In such a functional approach of inferior state institutions (*viz.* regulatory structures), it may be conceptually considered that regulatory structures form part of a Hegelian civil society, as explained by Bobbio, to the extent that regulatory authorities keep into account the everyday needs and aspirations of the individuals and the citizens, as protected by the Constitution, and do not overstep the limits of their constitutionally limited legal authority.

There have of course been critics⁴⁶ of this Hegelian conceptual framework of civil society in Bobbio’s times and ours, but it still serves the

distinction between an inferior and a superior state. While the superior state is characterised by a constitution and constitutional powers (monarchical power, legislative power and governmental power), the lesser state works through two subordinate legal powers: judicial power and administrative power. The mainly negative job of the first is to settle conflicts of interest and repress offences against established law; of the second, to provide for the common interest, intervening in the supervision of morals, the distribution of work, education, the care of the poor: that is, in all the activities that distinguish the *Wohlfahrt-Staat*, the state that looks after the external well-being of its subjects.” Norberto Bobbio, *Civil Society* in DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER 32-33 (*translated by* P. Kennealy, Polity Press, 1989 (reprinted 2006)).

⁴⁵ See Const., Decision no. 85-248 DC, *Loi relative à la communication* (18 September 1986); See also M. Sève, *La régulation financière face à la crise* 282 (pref. Jean-Pierre Jouyet, ed. Bruylant, 2013).

⁴⁶ Karl Popper, as among the foremost liberal critics of Hegel, identifies his ‘Superior Constitutional State’ as nothing but an absolute monarchy. In Popper’s view, Hegel’s absolutist monarchical state under Frederick of Prussia became the modern prototype of absolute authoritarianism, also referred to as absolutism, which laid the seeds of absolutist states of the twentieth century in Europe (Germany and Italy among others) drawing its philosophical and conceptual strength

purpose of conceptually framing a modern legal authority somewhere in-between the ‘Superior Constitutional State’, on the one hand, and the citizen, on the other.⁴⁷ The two main contrary views to Hegelian civil society are those of the Natural Law tradition from Aristotle to Hobbes to Kant who believed civil society to be a pre-state natural society akin to family,⁴⁸ on the one side, and then the Marxist point of view, reaching its conceptual apogee with Antonio Gramsci, who conceived civil society as a post-state formulation, *i.e.* where the state extinguishes and the political society is subsumed in the civil society, on the other side.⁴⁹ As rightly observed by Bobbio, in terms of processes, Natural Law, Hegelian or Marxian views could take the pre-state, anti-state and post-state formulation of a civil society; except that they would differ in terms of the final result which the political society would reach according to each of the three positions. The civil society, as legal authority, can function in conflict or complementarity with the constitutional state governed by democratic principles.

If a body vested with legal authority wants to retain its institutional capacity as an integral element of civil society (in a classical sense), it has to have greater democratic accountability through better checks and balances, with

and justification from Hegel. Marxism as an offshoot of Hegel, despite its claims of countering him, is also in the same framework of authoritarianism and intrinsically opposed to an open society guaranteeing individual liberties, and constitutional safeguards of those liberties, and soon slips into a dictatorship of a few charismatic leaders (if not a single one, though for Hegel, it is a single absolute monarch) or party elites or bureaucratic elites. On Popper’s critique of Hegel, *See* K.R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES VOL II (THE HIGH TIDE OF PROPHECY: HEGEL, MARX, AND THE AFTERMATH)* 27-80 (London: Routledge, 1974); On Popper’s critique of Marxism, *See* K.R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES VOL II (THE HIGH TIDE OF PROPHECY: HEGEL, MARX, AND THE AFTERMATH)* 81-280 (London: Routledge, 1974); This present work is in a liberal constitutional framework, much in keeping with Popper’s liberal framework, it is not going into details of Marxist or for that matter, natural law framework which predates it, without losing its tenor and thrust. As far as Bobbio’s views on this subject is concerned, he also is a liberal constitutionalist with welfare functions increasing fundamental rights effectiveness. *See* NORBERTO BOBBIO, *LIBERALISM AND DEMOCRACY* (London: Verso, 2005); NORBERTO BOBBIO, *LEFT AND RIGHT: THE SIGNIFICANCE OF A POLITICAL DISTINCTION* (Cambridge: Polity Press, 2005); NORBERTO BOBBIO, *WHICH SOCIALISM? MARXISM, SOCIALISM AND DEMOCRACY* (Minneapolis: University of Minnesota Press, 1987); It is also interesting to observe how the Indian socialist thinker, Acharya Narendra Deva was already framing ideas reconciling socialist welfare principles in a democratic polity, keeping its openness intact, predating Bobbio and other European social democrats by a few decades. For more, *See* NARENDRA DEVA, *SOCIALISM AND THE NATIONAL REVOLUTION* (Bombay: Padma Publications, 1946); ACHARYA NARENDRA DEVA VANGAMAYA (SELECTED WORKS OF ACHARYA NARENDRA DEVA: 1918-1956, Vols. 1-3 (O.P. Kejriwal ed., New Delhi: Nehru Memorial Museum and Library, 2002).

⁴⁷ Bobbio writes, “The idea that civil society is the antecedent (or antithesis) of the state has so entered into everyday practice that it now takes an effort to convince oneself that for centuries the same expression was used to designate that collection of institutions which, as a rule, today constitute the state and which nobody would call civil society without running the risk of a complete misunderstanding.” Norberto Bobbio, *The Great Dichotomy: Public/Private* in *DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER* 40 (translated by P. Kennealy, Polity Press, 1989 (reprinted 2006)).

⁴⁸ *Id.*, 23-24, 34-37.

⁴⁹ *Id.*, 24, 27-30.

the final authority resting with the Constitutional Court as the body representing the ‘Superior Constitutional State’. Such democratic accountability cannot be denied on grounds of technicality and procedures or even if there are adequate internal safeguards in the functioning of these legal authorities (e.g. regulatory structures). This brings us to the related issue of how today’s state’s empire primarily rests on regulating economic relations turning it into a ‘social state’, thus redeeming the civil society features of a legal authority as against the Superior Constitutional State (*Rechtsstaat*).⁵⁰ This becomes the “reverse colonization” of the State by the society, in Bobbian terms, as against the society’s “colonization” by the State.⁵¹ The so-called “reverse colonization”, if operating in conflict with the Constitutional State governed by liberal and democratic principles, may entail an increased autonomy and independence of regulatory structures from political authorities and structures of the Superior Constitutional State, and thus give birth to a “new” power concurrent to the “classical” legislative, executive and judicial powers, with the effect of potentially threatening the liberal democratic model cemented by the rule of law in the absence of an effective system of checks and balances.⁵² The Hegelian ‘inferior state’, or ‘civil society’ in other words, becomes the foundation for Bobbian democratically legitimate minor orders (*ordinamenti minori*)⁵³ which is discussed in detail in Part III of this paper.

In a rights-based state, which is a foundational principle of liberal doctrine according to Bobbio,⁵⁴ and taking his ideas forward, the fundamental rights of an individual citizen lies not just against the state but would also lie against regulatory authorities in cases where they overstep their authority or give a decision which directly violates the constitutionally protected fundamental rights (“inviolable” under Article 2 of the Italian Constitution, or Part III fundamental rights protected under the “basic structure doctrine” of the Indian Constitution).⁵⁵

⁵⁰ *Id.*, 42.

⁵¹ *Id.*

⁵² See INTRODUCTION, *supra* Part I.

⁵³ On the concept of minor orders (*ordinamenti minori*), see NORBERTO BOBBIO, *TEORIA GENERALE DEL DIRITTO*, 282 (G. Giappichelli Editore, Torino, 1993), where Bobbio defines the concept as referring to “ordinamenti che tengono uniti i loro membri per scopi parziali, e che investono pertanto una parte soltanto della totalità degli interessi delle persone che compongono il gruppo” (“systems which bind their members together along partial purposes, and which therefore gather only part of the total interests of the persons making up the group” (our translation)).

⁵⁴ See Norberto Bobbio, *L'ETA DEI DIRITTI*, TORINO: EINAUDI (2014); *Also see* NORBERTO BOBBIO, *STATO, GOVERNO, SOCIETA*, TORINO: EINAUDI (1985); NORBERTO BOBBIO, *TEORIA GENERALE DELLA POLITICA*, TORINO: EINAUDI (1999).

⁵⁵ Norberto Bobbio, *The Limits of State Power* in *LIBERALISM AND DEMOCRACY* 12 (*translated by M. Ryle & K. Soper*, Verso, 2005); While discussing the concept of implicit constitutional unamendability, Yaniv Roznai writes on the Indian ‘Basic Structure Doctrine’ as, “According to this doctrine, the amendment power is not unlimited; rather, it does not include the power to abrogate or change the identity of the constitution or its basic features.....Since *Minerva Mills (Minerva Mills Ltd. v. Union of India)*, (1980) 3 SCC 625, the ‘Basic Structure Doctrine’ has been accepted and applied in various other cases, and is now an established constitutional principle in India. It now includes general features of a liberal democracy, such as the supremacy of the Constitution, the rule of law, separation of powers, judicial review, judicial independence, human dignity, national unity and integrity, free and fair elections, federalism

The function of a rights-based constitutional state is thus to protect the individual against the might of the state (acting through its legislature or the executive) by the intervention of constitutional courts, but also against the huge corporations through regulatory bodies.⁵⁶ It should further be added that such rights-based constitutional state shall also protect the individuals from the actions of regulatory bodies themselves.⁵⁷ Representative democracies as upholders of the Constitution, as well as constitutions and constitutional principles keeping the representative character of democracy intact and constitutionally protected, are the foundations of modern democratic constitutions, so that regulatory structures also have to abide by these principles in both having a representative character as well as being constitutionally accountable.⁵⁸ In practice, internal commissions and bodies of regulatory authorities, especially in their judicial capacity, when making use of their power of sanction for breaches of the normative framework of the relevant regulatory structure, have already been subject to formal and substantial independence and impartiality requirements.⁵⁹ It should also be noted that, generally speaking, sanction decisions of regulatory authorities may be appealed before the competent state courts, in particular where the fundamental rights of the sanctioned person (be it a natural or a legal person) have been violated.

Regulatory authorities, as an element of the ‘inferior state’, inevitably have to strike a fine balance between the conflicting values of ‘liberty’ and ‘equality’ of all liberal democratic constitutional states. Liberty exemplifies the individual fulfilment but makes a man nearly Darwinist in conflict, as in constant competition with everyone else, though not in conflict with the principles of the Superior Constitutional State. Such untrammelled liberty when applied specifically to the economic realm turns the society inequitable.⁶⁰ If the parameters of

and secularism.” Y. ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS* 42-47 (Oxford University Press, 2017); For more, See M.P. Singh, V.N. SHUKLA’S *CONSTITUTION OF INDIA 1077-1091* (Lucknow: Eastern Book Company, 2016); M. Khosla, *Constitutional Amendment in THE OXFORD HANDBOOK OF INDIAN CONSTITUTION* 232-250 (Choudhry *et al* ed., Oxford University Press, 2016); For a full-fledged monograph on the subject, See S. KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* (Oxford University Press, 2010).

⁵⁶ Norberto Bobbio, *Liberty versus Power* in *LIBERALISM AND DEMOCRACY* 15-19 (translated by M. Ryle & K. Soper, Verso, 2005).

⁵⁷ *Id.*

⁵⁸ Norberto Bobbio, *Ancient and Modern Ideas of Democracy* in *LIBERALISM AND DEMOCRACY* 27 (translated by M. Ryle & K. Soper, Verso, 2005).

⁵⁹ See ECHR, 5th sect., 6 June 2019, n° 47342/14, Nodet v/ France; ECHR, 4 March 2014, Grande Stevens; BJB April 2014, no. 111h1, p. 209, note J. Chacornac; BJB March 2015, n° 112e6, p. 97, note B. de Saint-Mars; ECHR, 15 nov. 2016, n° 24130/11 et 29758/11, A. and B. v/ Norvège : JurisData n° 2016-024274; See also French Constitutional Council, 18 March 2015, no. 2014/453-454 QPC and 2015-462 QPC : JurisData n° 2015-005120; See also AMF, comm. sanctions, 11 December 2019, no. 18, Société Bloomberg LP.

⁶⁰ Norberto Bobbio, *Democracy and Equality* in *LIBERALISM AND DEMOCRACY* 32-33 (translated by M. Ryle & K. Soper, Verso, 2005); A. Bilgrami, *Lecture in School of Criticism and Theory, Alternative Modernities?: A View from the South*, University of Cornell, available at <https://www.cornell.edu/video/alternative-modernities-a-view-from-the-south> (Last visited on April 10, 2020); On the concept of liberty, in particular, but also on the tyranny of the masses, See

inequity reaches an extreme where public health, education, housing, food and employment is not protected; to list out the most fundamental needs of every human being, even for the less-privileged and less-skilled or talented is not ensured; it leads to an undercurrent of discontentment which can threaten the very existence of a democratic constitutional state protecting liberal values. On the other extreme, if the state only busies itself with bringing equality, it falls prey to authoritarianism and stifles individual liberty, creativity and potential; leading to contraction of economy and an increase in poverty, which such a system initially set-out to eradicate.⁶¹ These two fundamental principles of liberty and equality, which in its present form are a direct by-product of the European Enlightenment project, keeps the democratic state on its toes, lest it becomes inhuman on the one extreme or authoritarian on the other.⁶²

It is not any private agreement but law, even constitutional law, which is the essential source of norms not just governing relations between the individual citizen and the state but also amongst individuals.⁶³ Therefore, any regulatory authority has to comply with the law, in particular with constitutional law. This subordination of power to law, to the Constitution, is the basis of constitutionalism, as Bobbio writes – “In other words, the state whose guiding principle is the subordination of power at whatever level, from the humblest to the most exalted, to the principle of law *via* the process of formally legalizing every act of government. This has come to be known, since the first written constitution of the modern age, as ‘constitutionalism’.”⁶⁴

I. BERLIN, *LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY* (Oxford University Press, 2002); I. BERLIN, *THE HEDGEHOG AND THE FOX IN THE PROPER STUDY OF MANKIND* 436-498 (London: Vintage, 2013).

⁶¹ Bobbio writes, “[...] liberty and equality are antithetical values, in the sense that neither can be fully realized except at the expense of the other: a liberal *laissez-faire* society is inevitably inequalitarian, and an egalitarian society is inevitably illiberal. Libertarianism and egalitarianism are rooted in profoundly divergent conceptions of man and society – conceptions which are individualistic, conflictual and pluralistic for the liberal; totalizing, harmonious and monistic for the egalitarian. The chief goal for the liberal is the expansion of the individual personality, even if the wealthier and more talented achieve this development at the expense of that of the poorer and less gifted. The chief goal for the egalitarian is the enhancement of the community as a whole, even if this entails some constriction of the sphere of individual freedom.” Norberto Bobbio, *Democracy and Equality* in *LIBERALISM AND DEMOCRACY* 32-33 (translated by M. Ryle & K. Soper, Verso, 2005).

⁶² For a critique and analysis of the idea of liberty in conflict with equality, with a view from the Global South in particular, but with one of its own European genealogical origins in Marxism, apart from the main thrust on Mahatma Gandhi, See A. Bilgrami, *Lecture in School of Criticism and Theory, Alternative Modernities?: A View from the South*, University of Cornell, available at <https://www.cornell.edu/video/alternative-modernities-a-view-from-the-south> (Last visited on April 10, 2020).

⁶³ Norberto Bobbio, *Contract and Contractarianism in the Current Debate* in *THE FUTURE OF DEMOCRACY: A DEFENCE OF THE RULES OF THE GAME* 120 (translated by R. Griffin, edited and introduced by R. Bellamy, Polity Press, 1987).

⁶⁴ Norberto Bobbio, *The Rule of Men or the Rule of Law* in *THE FUTURE OF DEMOCRACY: A DEFENCE OF THE RULES OF THE GAME* 142 (translated by R. Griffin, edited and introduced by R. Bellamy, Polity Press, 1987); Though, again, the legal-constitutional principle of ‘rule of law’ itself was abused by the colonial regime in India, for example, and in some ways even the

III. REGULATORY STRUCTURES AS FUNCTIONALLY LIMITED AND DEMOCRATICALLY LEGITIMATE MINOR ORDERS (ORDINAMENTI MINORI)

What role would regulatory structures actually play in liberal democratic societies in the light of Bobbio's legal theory? Our hypothesis would be here to consider that a regulatory structure may be qualified as a "minor order" (*ordinamento minore*) according to Bobbio's conceptual framework. Bobbio namely defines "minor orders" as orders (*ordinamenti*) which have limited scopes (*scopi parziali*) and which therefore deal only with part of the interests of the persons forming part of such groups.⁶⁵ Interestingly, cosmopolitan approaches of law follow the same line of reasoning on the basis of a pluralist approach of law deriving from the notion of communities and community membership.⁶⁶ The pluralist approach of law defended by Bobbio may thus be viewed as one of the foregoers of such cosmopolitan approaches.

It should further be noted that the legal or non-legal nature of such minor orders (*ordinamenti minori*) is considered by Bobbio to be irrelevant in this context, as the legal theorist should not view a legal order as a compact block (*blocco compatto*) but rather as the result of different historical phases of stratification, similarly to the approach generally taken by a geologist or a historian.⁶⁷

post-colonial state is reeling under the vestiges of this ontological abuse of the constitutional principle despite its purported positive and beneficent value in any liberal constitutional democracy. Moiz Tundawala's article is quite interesting to explore despite its ideological underpinnings and misplaced romanticisation of political violence as a form of protest in a 'Gandhian' vein. For more, See M. Tundawala, *On India's Postcolonial Engagement with the Rule of Law*, 6 NUJS L. Rev. 11 (2013), 11-39.

⁶⁵ Norberto Bobbio, *TEORIA GENERALE DEL DIRITTO* 282 (G. Giappichelli Editore, Torino, 1993).

⁶⁶ See Paul Schiff Berman, *GLOBAL LEGAL PLURALISM, A JURISPRUDENCE OF LAW BEYOND BORDERS* (Cambridge University Press, 2012) – where distinctions are made between the cosmopolitan, pluralist and cosmopolitan-pluralist approaches. A cosmopolitan approach is deemed to refer to a framework recognising the co-existence of multiple communities, both local and global, territorial and epistemic, whereas a pluralist approach is deemed to refer to the variety of normative sources, both state and non-state centered. In his work, Paul Schiff Berman advocates for the adoption of the blended cosmopolitan-pluralist approach, thereby combining both the said cosmopolitan and pluralist approaches. When referring to the idea cosmopolitanism, one should nevertheless recall the seminal text of Kant on the matter, where the so-called cosmopolitan principle is viewed as instrumental to ensuring the perpetual peace that humankind longs for; see I. Kant et al, *TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY* (New Haven: Yale University Press, 2006); also, and among others, J. Derrida, *COSMOPOLITES DE TOUS LES PAYS, ENCORE UN EFFORT!* (Paris: Editions Galilée, 1997); J. Huggler, *Cosmopolitanism and Peace in Kant's Essay on 'Perpetual Peace*, 29(2) *STUDIES IN PHILOSOPHY AND EDUCATION* (2009), 129–140; Importantly, it should be reminded that, contrary to Kant's thesis, Bobbio sees rather positively the possibility of a world State and observes that the concrete development of multilateralism at his time tends progressively to the establishment of a universal positive legal order; NORBERTO BOBBIO, *TEORIA GENERALE DEL DIRITTO* 278 (G. Giappichelli Editore, Torino, 1993).

⁶⁷ Norberto Bobbio, *TEORIA GENERALE DEL DIRITTO* 282-283 (G. Giappichelli Editore, Torino, 1993).

Legal orders may therefore not only be complex (*complessi*), in the sense that they possess several normative sources, but also composite (*compositi*),⁶⁸ *i.e.* composed of various rules or set of rules which may be considered as minor orders (*ordinamenti minori*). Bobbio is ready to accept here the so called “institutional approach” famously developed by Santi Romano to the extent that such pluralist approach of law, which conceives legal orders as “institutions” (*i.e.* organised set of norms), may help to understand the composite characteristic of legal orders.⁶⁹ We shall postulate for the time being that regulatory structures may thus be considered as an element of complex and composite legal orders. Such postulate, if verified (as the analysis below will show), would also provide an answer to the issue of democratic legitimacy of regulatory structures, as democratic legitimacy would then flow from the legal order (such legal order benefiting itself from democratic legitimacy in liberal democratic societies) to which each and every regulatory structure is linked (if and only if pre-established legal and constitutional limits are complied with).

In order to verify our initial hypothesis that regulatory structures are minor orders (*ordinamenti minori*), we shall first highlight the extent to which such structures may be considered as an element of a legal order. Second, we shall detail how the scope of regulatory structures are generally defined, noting that, although the concrete scope of each regulatory structure would differ in practice, such scope is functional by nature. More precisely, each regulatory structure pursues the double function of protecting individual rights of beneficiaries of services regulated by the given regulatory structure, and the stability of the given regulated sector.

A. REGULATORY STRUCTURES AS MINOR ORDERS (ORDINAMENTI MINORI)

It should be reminded at the outset that the general theory of law of Bobbio is founded on two pillars: the concept of legal norms and the concept of legal orders. Legal norms are defined as norms whose execution is guaranteed by an externalised and institutionalised sanction, thereby differentiating them from both moral norms (which are solely sanctioned internally, in the self-conscience of the moral subject) and social norms (whose sanction is not organised

⁶⁸ *Id.*, 283.

⁶⁹ *Id.*, 282-283; Please note however that Bobbio is very critical of the “institutional approach” of law as he considers that such approach attempts to reduce the legal nature of an order (*ordinamento*) to the fact that it is a set of ‘organised’ social rules, *i.e.* an institution. Bobbio however observes that there cannot be any institution without an initial production of norms aiming at the regulation of behaviours and that the concept of norms shall not be reduced to the norms produced by the state - *Id.*, 13-15; This is both the point of convergence as well as point of departure with Santi Romano because in Romano’s institutional theory of law, state is not the only norm creating institution, thus also laying foundations to his pluralistic theory of law which is subsumed in his institutional theory of law. For more, See S. Romano, THE LEGAL ORDER (*Edited and translated by M. Croce, Routledge, 2017*).

or institutionalised).⁷⁰ In other words, a legal norm exists as such and possesses a legal nature only because it pertains to a legal order which ensures that a violation of a prescription of behaviour is sanctioned through secondary norms. Such definition however requires to detail what a sanction is and what “pertaining to a legal order” means. Although the possibility of a sanction will be further developed below under Part IV, we can preliminarily observe that Bobbio defines quite broadly the concept of sanction as the response to a breach of a norm within a normative system.⁷¹

Regarding the concept of legal order, it is viewed as an integral part of the theory of the legal norm,⁷² to such an extent that the question of the legal nature of a norm, and more generally the definition of the concept of law itself, is contained in the definition of what constitutes a legal order. A legal order, therefore, shares some characteristics with the concept of normative system but differs from it in other aspects. Bearing in mind that the concept of legal order may be considered as a sub-category of the concept of normative system, we shall attempt to briefly highlight the four core characteristics of the concept of legal order to verify whether and to what extent regulatory structures may generally be conceived as minor orders (*ordinamenti minori*), as opposed to full-fledged legal orders.

First, like any normative system, a legal order is a compound of norms.⁷³ Such norms are said to be generally of two types: norms of conduct (*i.e.* prescriptions aimed at regulating behaviours) and norms of structure or competence (*i.e.* prescriptions aimed at setting out the conditions and processes to produce valid norms of conduct).⁷⁴ To take only a few examples, we shall consider the cases of data protection and banking and financial regulation. Data protection is nowadays famously regulated in Europe through the EU Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (as commonly known as the General Data Protection Regulation, or ‘GDPR’). Such supra-national set of rules is nevertheless still supplemented at national level by legal provisions and guidelines from entrusted regulatory authorities (*e.g.* the Italian code for the protection of personal data (*codice in materia di protezione dei dati personali*)⁷⁵). India is not a party to any convention on protection of personal data but the right to privacy

⁷⁰ Norberto Bobbio, *TEORIA GENERALE DEL DIRITTO* 128 (G. Giappichelli Editore, Torino, 1993); About legal norms (*norme giuridiche*), Bobbio stated that “*si tratta delle norme, la cui violazione ha per conseguenza una risposta esterna e istituzionalizzata*” (translation: “it is about norms, whose violation has for consequence an external and institutionalised response”), thereby distinguishing “*le norme che abitualmente si chiamano giuridiche dalle norme morali e insieme dalle norme sociali*” (translation: “the norms which are usually called legal from moral norms, as well as from social norms”).

⁷¹ Norberto Bobbio, *TEORIA GENERALE DEL DIRITTO* 122-123 (G. Giappichelli Editore, Torino, 1993).

⁷² *Id.*, 162.

⁷³ *Id.*, 169.

⁷⁴ *Id.*, 171.

⁷⁵ Established by Decreto-legislativo 196/2003 GU n.174 del 29-7-2003 - Suppl. Ordinario n.123, as subsequently amended.

has been held by the Supreme Court (nine Judge Constitutional Bench) to be a protected fundamental right under Article 21 (right to life and personal liberty) which is part of the inviolable basic structure of the Constitution of India.⁷⁶ There is a pending Personal Data Protection Bill 2019 which is a revised version of the proposed draft bill by Justice B.N. Srikrishna Committee in 2018 undergoing scrutiny by a joint parliamentary committee.⁷⁷ For the revised bill already tabled in parliament, critics including Justice Srikrishna,⁷⁸ say it would give untrammelled power to the government to access personal data, and if so, it would be in direct contravention of constitutionally protected fundamental right to privacy. Presently the governing law is Information Technology Act 2000, through section 43A and the Central Government Rules (2011) and Clarification (2011) framed thereunder, and Section 72A.⁷⁹ The AADHAR Act for biometric identification of all citizens also has privacy implications (critics are concerned that it is excessive, though the Supreme Court of India has held that it does not infringe the right to privacy)⁸⁰ under its rules and regulations.

With respect to banking and financial regulation in Europe, another specific set of rules and principles are laid down at the supra-national level by the means of directives and regulations (e.g. Directive 2014/65/EU of 15 May 2014 on markets in financial instruments, Regulation (EU) No 600/2014 of 15 May 2014 on markets in financial instruments, Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market, etc.), supplemented at national level by specific provisions (e.g. the French *code monétaire et financier*; the Italian *Decreto Legislativo* of 1 September 1993, no. 385, as subsequently amended, known as *Testo Unico delle leggi in materia bancaria e creditizia* ('T.U.B'); the UK 2009

⁷⁶ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1; See also, Bobbio, *supra* note 49.

⁷⁷ The proposed Data Protection Bill has been transformed beyond recognition by the Government of India as per the original author and the head of the commission, who is also one of the most respected jurists of the country, Justice B.N. Srikrishna, under whose chairmanship the committee had prepared and submitted the draft bill. Not just according to critics, but also by the lead author of the report, Justice Srikrishna, the much transformed bill, if implemented, will lead to serious infringement of privacy rights as guaranteed fundamental right under the Constitution of India. Respecting privacy rights is an important and inalienable fundamental right in a liberal constitutional democracy unlike single-party led authoritarian systems where privacy rights remain unacknowledged or severely curtailed. See M. Mandavia, *Personal Data Protection Bill can Turn India into 'Orwellian State': Justice B.N. Srikrishna*, THE ECONOMIC TIMES, December 12, 2019, available at <https://economictimes.indiatimes.com/news/economy/policy/personal-data-protection-bill-can-turn-india-into-orwellian-state-justice-bn-srikrishna/articleshow/72483355.cms?from=mdr> (Last visited on February 20, 2022); S. Moorthy and C.R. Srikanth, *Data Protection Bill is Orwellian, Loaded in Favour of the Government: Justice B.N. Srikrishna*, MONEY CONTROL, November 26, 2021, available at <https://www.moneycontrol.com/news/business/data-protection-bill-is-orwellian-loaded-in-favour-of-the-government-justice-bn-srikrishna-7763331.html> (Last visited on February 20, 2022).

⁷⁸ *Id.*

⁷⁹ Information Technology Act, 2000, available at https://www.indiacode.nic.in/bitstream/123456789/13116/1/it_act_2000_updated.pdf (Last visited on February 20, 2022).

⁸⁰ K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.

Banking Act, *etc*)⁸¹ and rulebooks or general regulations and guidelines of specialised regulatory authorities (e.g. Italian CONSOB⁸² Regulation no. 11971 of 14 May 1999 on securities issuances; the Handbook of the UK Financial Conduct Authority,⁸³ the *Règlement général* of the French *Autorité des marchés financiers*,⁸⁴ *etc.*). In India, the Reserve Bank of India ('RBI', India's Central Bank) is the main regulatory authority through its rules, regulations (e.g. The Master Circulars of 2015 implementing Basel I and Basel III norms, with some amendments added in 2017, for the banking sector), directions and guidelines for the banking sector.⁸⁵ Besides, two additional acts are central to the governing of the banking sector: The Banking Regulation Act, 1949 and the Foreign Exchange Management Act 1999. Additionally, the Bankers Books Evidence Act 1891, the Recovery of Debts due to Banks and Financial Institutions Act 1993, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002, and the Payment and Settlement Systems Act 2007 govern different aspects of the banking and financial sector.

Regulatory structures in both data protection, and banking and financial sectors, within the European Union as well as in India, may therefore clearly be viewed as a complex set of norms with several material ramifications and subdivisions.

Second, again similarly to any normative system, a legal order must be coherent, that is to say that each single norm must not contradict another norm of the same legal order. In other words, a single norm mainly pertains to a legal order insofar as it is compatible with any other norm of such legal order.⁸⁶ A legal

⁸¹ Note that the examples here provided are meant to be generic examples of national implementations of supra-national norms in Europe. The scope is indeed not to overburden the reader with details that are not immediately relevant for the present purpose. The French code monétaire et financier can however be consulted at <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006072026/> (Last visited on February 23, 2022); The UK 2009 Banking Act is available at <https://www.legislation.gov.uk/ukpga/2009/1> (Last visited on February 23, 2022).

⁸² Acronym which stands for *Commissione Nazionale per le Società e la Borsa* ('National Commission for Companies and Stock Exchange').

⁸³ The FCA Handbook, available at <https://www.handbook.fca.org.uk/handbook> (Last visited on February 23, 2022).

⁸⁴ The *Règlement Général*, available at <https://www.amf-france.org/fr/eli/fr/aai/amf/rg/20210923/notes> (Last visited on February 23, 2022).

⁸⁵ BASEL III compliance, available at https://rbidocs.rbi.org.in/rdocs/notification/PDFs/58BS09C403_D06BC_14726AB61783180628D39.PDF (Last visited on February 20, 2022), available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/CIRCULARCCB6DB27B9062D14007BD700245BE816F26.PDF> (Last visited on February 20, 2022).

⁸⁶ NORBERTO BOBBIO, *TEORIA GENERALE DEL DIRITTO* 128 (G. Giappichelli Editore, Torino, 1993); One should bear in mind that such characteristic of a "system" is held by Bobbio as being the essential element, that is to say the "definitional" core of the concept of system, which makes of a normative system an organised totality ("*una totalità ordinata*", *Id.*, 201). Along with the above meaning of the concept of system, Bobbio (*Id.*, 205-207) acknowledges two other conceptions: one based on deduction and characterised as stemming from the conception of Leibniz (which we could name "deductive conception" of system), and another one based on classification of empirical facts observed and characterised as stemming from the theoretical framework developed by Savigny (which we could call "empirical conception" of system).

order, or likewise any normative system, shall thus not allow any antinomies⁸⁷ between any of their single normative elements.⁸⁸ Although antinomies within a normative system may well appear in practice, the scope of this paper does not allow a detailed analysis of the means identified by Bobbio for interpreters, or more generally those in charge of the application of the norms, to resolve normative antinomies.⁸⁹ It is sufficient for our purpose to observe that for a normative system to exist there must be a requirement (*esigenza*) that (legal) antinomies are resolved, as otherwise the requirements of certainty (corresponding to the value of peace and order) and of justice (corresponding to the value of equality) would be undermined.⁹⁰ Such a requirement of coherence is notably satisfied in Europe in the cases of data protection, as well as banking and financial regulation, through the use of both supra-national⁹¹ and national means of interpretation. It is worth noting that antinomies amongst or in relation to specific regulatory rules (e.g. market abuse rules) are frequently dealt with either by state courts and/or by sanction commissions of the relevant regulatory authorities.⁹²

Third, a legal order must be unitary, that is to say that all norms of a legal order must eventually derive, directly or indirectly from one fundamental norm (*norma fondamentale*).⁹³ Bobbio clearly draws his conception of the unity of a legal order upon the legal theory developed by Kelsen.⁹⁴ A legal order may be

⁸⁷ *Id.*, 215; Bobbio notes that ‘antinomies’ in normative systems are situations where two norms are incompatible within the same system and the same scope of validity; *Id.*, 214 (Bobbio details clearly that the scope of validity of each single norm must be determined in accordance with temporal, spatial, material and personal criteria).

⁸⁸ *Id.*, 208; Bobbio insists that coherence of normative systems is not to be conceived as the coherence of the system as a whole, but rather as the compatibility of each single norm with any other single norm deemed to form part of the same system.

⁸⁹ See *Id.*, 217-232 – where the author develops arguments around the main interpretative rules to resolve antinomies: *lex posterior derogat anteriori*; *lex superior derogat inferiori*; and *lex specialis derogat generali*.

⁹⁰ *Id.*, 234-235 (the author noting that the requirement of coherence has to be distinguished from the validity of norms, as there may be instances where two norms equally valid and at the same hierarchical level (*i.e.* with the same normative force) are incompatible).

⁹¹ The *lex superior* rule being notably affirmed through the case-law of the European Court of Justice (‘ECJ’) which sets out the requirement for national judges to set aside any national provision (even at constitutional level) contrary to EU law; See ECJ, July 15, 1964, *Costa v. ENEL*, C-6/64; ECJ, 9 March 1978, *Simmmenthal*, C-106/77.

⁹² See for instance a recent ruling of the French *Autorité des marchés financiers* (AMF): AMF, comm. sanctions, decision, 11 December 2019, n° 18, *Société Bloomberg LP* (where the sanction commission of the AMF stated that it was to be considered as a jurisdiction for the purposes of European Union Law).

⁹³ NORBERTO BOBBIO, *TEORIA GENERALE DEL DIRITTO* 201 (G. Giappichelli Editore, Torino, 1993).

⁹⁴ Norberto Bobbio is indeed viewed as the ‘importer’ of Kelsenianism into Italy; See Norberto Bobbio & D. Zolo, *Hans Kelsen, the Theory of Law and the International Legal System: A Talk*, 9 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 355-367 (translated by Iain L Fraser, 1998); Contrasting Bobbio’s views from those of Kelsen, Melissa Lane observes that: “[...] he [Bobbio] sought, on the one hand, to outline the formal characteristics of legal rules, and, on the other, to identify the character of law more intimately than Kelsen had done, with its forming part of an institutional system of rules. Unlike Kelsen, however, Bobbio did not believe law was necessarily a unitary system. On the contrary, he argued that any complex legal code would contain a

simple or complex, depending on whether there is one single normative source or several.⁹⁵ A regulatory structure should clearly be considered as a complex system, as the applicable norms may stem from various legal sources, such as international treaties, supra-national directive and/or regulation (in the context of European Union law), national legislation, executive decrees and orders, regulatory rulebooks and guidelines of regulatory authorities, code of conducts. Rulebooks and general regulations of regulatory authorities, for instance, are generally speaking elaborated by regulatory authorities but confirmed by and formally adopted by a decree, or in other words “received” by the legal order of the relevant state.⁹⁶ In line with Bobbio’s theory, said legal sources would be considered as direct and/or indirect sources, the latter being those sources which derive their normative power either from delegation (e.g. rulebooks and guidelines from regulatory authorities) or after being “received” by a legal order (typically in the case of codes of conducts and customary norms).⁹⁷ All regulatory norms must however be compatible with the constitutional or supra-national framework (specifically in the European Union law context).⁹⁸ Regulatory structures may therefore be considered as a complex normative order (given the various possible normative sources) and as an element of a legal order as rules can be traced back to hierarchically superior norms. In the absence of any fundamental norm allowing for a true and complete autonomy, regulatory structures may therefore not be conceived as legal orders *per se*.⁹⁹

Fourth, a legal order should be complete, that is to say that there is a legal norm to resolve each and every dispute which may occur.¹⁰⁰ Bobbio acknowledges and analyses different ways in which a legal order may resolve any case (e.g. reasoning by analogy, general principles of law, *etc.*),¹⁰¹ but nevertheless clearly states that completeness (*completezza*) is a necessary condition for those legal orders which possess both rules according to which (a) judges are required to resolve any dispute, and (b) judges must resolve any dispute in respect of a norm of the normative system.¹⁰² Regulatory structures are usually strictly limited to specific sectors or markets, as shown by the variety of regulatory bodies and rules (e.g.

number of conflicting norms. Bobbio was also less concerned than Kelsen with the justificatory as opposed to the systemic normativity of laws. Law, he argued, was a language, which derived its prescriptive quality through the use people made of it to communicate certain norms to each other.” M. Lane, *Positivism: Reactions and Developments* in THE CAMBRIDGE HISTORY OF TWENTIETH CENTURY POLITICAL THOUGHT 339 (T. Ball & R. Bellamy ed., Cambridge University Press, 2003).

⁹⁵ NORBERTO BOBBIO, *TEORIA GENERALE DEL DIRITTO* 173 (G. Giappichelli Editore, Torino, 1993).

⁹⁶ See for instance the case of the general regulation of the French *Autorité des marchés financiers*.

⁹⁷ NORBERTO BOBBIO, *TEORIA GENERALE DEL DIRITTO* 173-176 (G. Giappichelli Editore, Torino, 1993). For further details on the normative power entrusted to regulatory authorities, please refer to our developments Part II of this paper.

⁹⁸ See *supra* Part II.

⁹⁹ *Id.*

¹⁰⁰ NORBERTO BOBBIO, *TEORIA GENERALE DEL DIRITTO* 237 (G. Giappichelli Editore, Torino, 1993).

¹⁰¹ See NORBERTO BOBBIO, *TEORIA GENERALE DEL DIRITTO* 237 *et seq.* (G. Giappichelli Editore, Torino, 1993).

¹⁰² *Id.*, 240.

in the fields of personal data protection, payment services, investment services, etc.). While the scope of a regulatory structure is thus limited, a certain degree of autonomy is left to regulatory authorities to adopt guidelines,¹⁰³ with the aim to ensure maximum clarity and completeness within the limits of a given ‘corpus’.

As a result of the above, we may conclude that regulatory structures are not legal orders as such, but that they would rather qualify as minor orders (“*ordinamenti minori*”) linked to specific legal orders of which they are an element and from which they may derive their democratic legitimacy, provided that all the conditions (legal and constitutional) set out by the relevant legal order are complied with. In that sense, regulatory structures, on balance with the autonomy and independence they may be afforded, should be made accountable towards the political and democratic authorities of the legal order to which they depend.

B. FUNCTIONALLY LIMITED SCOPE OF REGULATORY STRUCTURES

The question of regulatory structures is eventually one of architecture. As Bobbio distinguished legal orders (*ordinamenti giuridici*) per spatial/territorial, temporal and material criteria,¹⁰⁴ we may likewise distinguish regulatory structures or architectures as minor orders (*ordinamenti minori*). Regulatory structures may thus differ from one state or territory to another (‘spatial distinction’),¹⁰⁵ from one sector to another (‘material distinction’),¹⁰⁶ or again from one time to another (‘temporal distinction’).¹⁰⁷ The following development will however focus mainly on the spatial and material distinctions between regulatory structures, it being noted that such distinctions *in fine* derive from the double function of any regulatory structure, *i.e.* the individual protection of the beneficiaries of the regulated services and the stability of the relevant regulated sector.

The scope of regulatory structures, as defined above, may usefully be detailed from the perspective of the so called “functional regulation” system. Functional regulation is generally viewed as being based on the commodities,

¹⁰³ See for instance the power granted to the European Securities and Markets Authority (ESMA) to issue guidelines and recommendations in supplement to enacted regulations, as set out in Articles 8 and 16 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) (JO L 331 of 15.12.2010, pp. 84–119). The same power is granted to the European Banking Authority (EBA), as set out in Articles 8 and 16 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010, establishing a European Supervisory Authority (European Banking Authority) (O L 331 of 15.12.2010, pp. 12–47)).

¹⁰⁴ For further details, please refer to NORBERTO BOBBIO, *TEORIA GENERALE DEL DIRITTO* 285 *et seq.* (G. Giappichelli Editore, Torino, 1993).

¹⁰⁵ *Id.*, 289-291 (Regulatory structures, as much as legal orders in the sense of Bobbio, are applicable on a specific territory only, which makes possible to distinguish them along geographical lines).

¹⁰⁶ *Id.*, 291-292 (As already mentioned earlier, regulatory structures are specific to one field or area, thereby making them materially distinguishable).

¹⁰⁷ *Id.*, 285-289 (Regulatory structures, as much as legal orders in the sense of Bobbio, are not immutable, but rather evolve over time, thereby making them temporally distinguishable).

transactions or products offered by a regulated entity rather than on such entity itself.¹⁰⁸ The material criterion of whether a given product, service or more generally a transaction falls within the scope of a specific regulatory structure may therefore appear as the first criterion of distinction to be considered. From the perspective of legal reasoning, such step would be that of the qualification of given factual circumstances. Each regulatory structure would thus determine which facts or behaviour they shall regulate. Such qualification does not however define the normative range of a given regulatory structure.

We shall here make the hypothesis that the normative range of a regulatory structure is defined according to the aims or functions of any regulatory structure. Such functions are twofold, and, as several scholars may already have highlighted, are linked to both sides of a regulated transaction, namely: the beneficiaries of a regulated product or service, on the one hand, and the provider of such product or service, on the other hand.¹⁰⁹ Thus, there exists a dual function of a regulatory structure – of protecting the interest of beneficiaries of regulated services and of ensuring the stability of the regulated sector through close supervision of the services or product providers, both of which shall be discussed in the subsequent sub-parts.

1. Individual protection of beneficiaries of services

The beneficiaries of regulated services are generally viewed as the weak party in a transaction involving regulated services such as payment services, investment services (*e.g.* issuance of notes, tokens, *etc.*), management of personal data, *etc.* Weak parties would involve various categories of persons such as consumers, investors, account holders, insured persons, data subjects, *etc.*¹¹⁰ When one of the parties to a regulated transaction meets the conditions of one or several such categories, it may benefit from specific rights and derogatory provisions (*e.g.* enhanced and detailed information, the right to withdraw from a commitment

¹⁰⁸ See the definition of ‘Functional regulation’ on Investopedia, available at <https://www.investopedia.com/terms/f/functional-regulation.asp> (Last visited on March 29, 2020).

¹⁰⁹ K. Yamauchi, *JAPANISCHES RECHT IM VERGLEICH, JAPANISCHES INSTITUT FÜR RECHTSVERGLEICHUNG* 280 (Chuo Universitätsverlag, Tokyo, 2012); See also T. Bonneau, *RÉGULATION BANCAIRE ET FINANCIÈRE EUROPÉENNE ET INTERNATIONALE* (Bruylant, 5th ed., 2020); GEORGE J. BENSTON, *REGULATING FINANCIAL MARKETS: A CRITIQUE AND SOME PROPOSALS* (American Enterprise Institute, 1999).

¹¹⁰ See for instance the specific jurisdictional rules laid down in the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in particular in respect of consumers (Article 17 *et seq.*), insured persons (Article 10 *et seq.*), and employees (Article 20 *et seq.*). The issue of the adequate protection of weak parties is however broader than jurisdictional rules alone, as it extends also to substantive private law rules. The concept of weak party generally refers to any party at a disadvantage because of its/her/his dependence, inexperience or lack of economic power; See M. Hesselink, *THE PROTECTION OF WEAKER PARTIES*, CFR & SOCIAL JUSTICE 29-42 (Berlin, New York: Otto Schmidt/De Gruyter, 2009); N. Reich, *The Principle of Protection of the Weaker Party* in *GENERAL PRINCIPLES OF EU CIVIL LAW* 37-58 (Intersentia, 2013); S. Vogenauer & S. Weatherill, *GENERAL PRINCIPLES OF LAW: EUROPEAN AND COMPARATIVE PERSPECTIVES* (Hart Publishing, 2017).

within a certain period of time, a right to start legal action before specific courts, etc).

Whilst the scope of this study does not allow us to deal in depth with all or most of the specific rights and derogations benefiting such weak parties, it should be underlined that the said concept of weak parties is not to be confused with that of vulnerable persons. Whereas vulnerability refers to elements of quality and identity of a person,¹¹¹ the concept of weak party refers, especially in the contractual field, to the acts of a person by reference to abstract and moving categories.¹¹² The concept of weak party does not therefore create any privileges linked to a specific status, since any individual may at some stage be subsumed under one such category, be it that of a consumer, investor, data subject, or the like. Categories may also overlap at times, like that of an investor who may simultaneously be considered as a consumer under some circumstances.¹¹³ Regulatory structures are thus generally framed in a way that allows to strike a balance between the freedom of any individual to set and achieve his or her own ends, on the one hand, and the effective protection of weak parties commanding to introduce specific rights and derogations, on the other hand. Ultimately, the protection of weak parties does not contradict the theory of political and economic liberalism.¹¹⁴

2. Stability of the relevant market/sector

From the liberal perspective, which is the one taken by Bobbio, more concerns would arise from the control and supervision of services or product providers, as direct control over them might affect choices of services and products to be offered.¹¹⁵ It should however be noted that regulatory authorities (either in India or within the European Union) do not determine nor directly control the quantity and quality of regulated services or products. In that sense, regulation differs from planning. Furthermore, it should also be recalled that not all regulatory structures are set to regulate a market where offer and demand shall be freely expressed in accordance with antitrust principles. Some sectors such as that of personal data protection is “off market”, to the extent that personal are not deemed to be patrimonial goods which could be bought or sold. Nevertheless, in both “in market”

¹¹¹ Such elements of quality may typically refer to gender, age, handicap, etc. See J. Herring, *The Use of the Inherent Jurisdiction and Vulnerable People, and Contract Law and Vulnerability in VULNERABLE ADULTS AND THE LAW* (Oxford University Press, 2016).

¹¹² See for instance, M. Fabre-Magnan, *L'INSTITUTION DE LA LIBERTÉ* 90 (PUF, 2018).

¹¹³ See ECJ, 3 October 2019, *Jana Petruchová c. FIBO Group Holdings Limited*, C-208/18; At national level, courts have also delivered similar rulings; See also for instance, the case decided by the French court of cassation— Cass. Ire civ., 26 June 2019, n° 18-15.102: *JurisData* n° 2019-011412.

¹¹⁴ F. Hayek, *THE ROAD TO SERFDOM* (Routledge Press, 1944); The liberal conception developed by Hayek, in particular, that State intervention is admissible in the economy only under some pre-established conditions equally applicable to all individuals, irrespective of any specific status, may also be found to a certain extent in Bobbio's political thoughts, and notably in NORBERTO BOBBIO, *LIBERALISM AND DEMOCRACY* (translated by M. Ryle & K. Soper, Radical Thinkers, Verso, London-New York, 2005).

¹¹⁵ *Id.*; See also Norberto Bobbio, *DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER* (translated by P. Kennealy, Polity Press, 1989 (reprinted 2006)).

and “off market” sectors, a close supervision of services or product providers is generally considered to be paramount to ensure the stability of the given sector.

In respect of the banking sector for instance, stability is mainly ensured through prudential supervision to prevent any in-chain insolvency.¹¹⁶ Within the European Union, such supervision is notably given effect through prudential directives and regulations¹¹⁷, at European Union and national level, within the Single Supervision Mechanism (‘SSM’). The SSM indeed aims to (a) ensure the safety and soundness of the European banking system, (b) to increase financial integration and stability, and (c) to ensure consistent supervision. Another crucial issue to ensure fair competition and the stability of the banking and financial sector is the fight against market abuse,¹¹⁸ money laundering and the financing of terrorism. Market abuses (e.g. insider trade dealings, false or misleading information disclosures, market manipulations) may indeed undermine the normal functioning of markets, as well as money laundering or financing of terrorism may give rise to market discrepancies. This is the reason why services or product providers are expected to put in place compliance and internal control mechanisms and may be held accountable for it.

Amongst the various means of supervision available to regulatory authorities, one should be reminded that regulatory bodies may also have direct intervention powers in some limited circumstances. European regulatory authorities in the banking,¹¹⁹ financial,¹²⁰ and insurance¹²¹ sectors, along with national regulatory authorities, may indeed restrict or limit the marketing and distribution of certain products or services. The European Securities and Markets Authority (‘ESMA’) has, for instance, several times prohibited for a duration of three months, the marketing and sales of contracts for differences (‘CFDs’) and foreign exchange binary options to detail clients.¹²² Lately, several national financial market authorities within the European Union (e.g. the French AMF,¹²³ the Spanish CNMV¹²⁴ and the Italian CONSOB¹²⁵) have issued temporary bans on short selling operations in

¹¹⁶ K. YAMAUCHI, *JAPANISCHES RECHT IM VERGLEICH*, JAPANISCHES INSTITUT FÜR RECHTSVERGLEICHUNG 280 (Chuo Universitätsverlag, Tokyo, 2012).

¹¹⁷ Such body of norms include notably Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV) and Regulation (EU) No. 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms (CRR).

¹¹⁸ See for the European Union – Regulation (EU) No. 596/2014 of 16 April 2014 on market abuse (‘market abuse regulation’).

¹¹⁹ The European Banking Authority (‘EBA’).

¹²⁰ The European Securities and Markets Authority (‘ESMA’).

¹²¹ The European Insurance and Occupational Pensions Authority (‘EIOPA’).

¹²² See for instance, ESMA Decisions (EU) 2018/795, (EU) 2018/1466, (EU) 2018/2064, (EU) 2019/509.

¹²³ The acronym stands for *Autorité des Marchés Financiers* (‘Financial Markets Authority’).

¹²⁴ The acronym stands for *Comisión Nacional del Mercado de Valores* (‘National Securities Market Commission’).

¹²⁵ The acronym which stands for *Commissione Nazionale per le Società e la Borsa* (‘National Commission for companies and stock exchange’).

the context of the Covid-19 pandemic crisis¹²⁶ to prevent any further destabilisation of financial markets (especially in respect of equity markets). Such direct intervention measures do not however undermine the liberal approach of regulation, provided that measures do not discriminate between services or product providers and the said measures are proportionate to the legitimate aim pursued (*i.e.* the stability of the market, enhanced protection of detail clients or consumers, *etc.*).

IV. MEANS OF REGULATION AND SUPERVISION AND DEMOCRATIC ACCOUNTABILITY OF REGULATORY STRUCTURES

As we have already briefly pointed out above through some examples,¹²⁷ regulatory authorities may resort to several means (direct or indirect) to ensure an effective regulation and supervision of the relevant regulated sector. In other words, the general question which could be framed would be that of the means available to regulatory authorities to exercise the powers entrusted to them. Being reminded that Bobbio considers the concept of power as being based on the two principles of consent and force,¹²⁸ the above question may be rephrased as follows: what degrees of consent and force are involved in the tools available to regulatory authorities? Such means may be either *ex ante* (*i.e.* tools available to ensure an efficient supervision of the supervised entities), or *ex post* (*i.e.* sanctions available in case of violation of applicable norms) as shall be discussed in the subsequent section. As discussed above in Part II(B), both these issues of competence and sanctions of a regulatory authority are part of the inferior functions or administrative-judicial functions of a state. The competence granting *ex-ante/ex post* functions to a regulatory authority might be the result of the statute creating the regulatory authority, or the statute governing the said regulatory authority or the competence granted to the regulatory authority to create its own set of rules and procedures governing its functions but not in contravention with the Constitution/Constitutional Principles/Superior Constitutional State. Besides, beyond the mere description of *ex ante* or *ex post* powers, a question of paramount importance from the Bobbian perspective is to consider whether such powers (in respect of their degrees of consent and force) remain compatible with a liberal and democratic state.¹²⁹

¹²⁶ See the positive opinions on such bans delivered by ESMA, available at <https://www.esma.europa.eu/regulation/trading/short-selling> (Last visited on March 30, 2020).

¹²⁷ See *supra* Part III(B).

¹²⁸ Norberto Bobbio, *TEORIA GENERALE DEL DIRITTO* 143 (G. Giappichelli Editore, Torino, 1993).

¹²⁹ Noting that Bobbio defines such liberal democratic state by referring to a “right-based state” defined by its constitutional mechanisms aiming at obstructing or hindering the arbitrary use of power and preventing its abuse or illegal exercise; as to which, please see Norberto Bobbio, *LIBERALISM AND DEMOCRACY* 13 (*translated by Ryle & Soper, Verso, 2005*).

A. *EX ANTE MEANS AND PRINCIPLES OF REGULATION AND DEMOCRATIC ACCOUNTABILITY*

Whilst in practice regulatory authorities may exercise their regulatory powers thanks to various means, the overall regulatory structure may be organised according to various principles and on different modes which may bear consequences on regulation and supervision *in concreto*.

1. Principles of ex ante regulation and supervision

Regulatory structures are nowadays based on the principle that regulation *stricto sensu* (i.e. the production of norms) and supervision are interdependent and necessary functions to ensure an efficient regulatory policy.¹³⁰ Regulatory structures thus rely on a specific normative framework as well as on an institutional network. *Ex ante* is pre-emptory in its nature, and different set of institutions have to abide by the normative framework set-up and/or implemented by their respective governing regulatory authority.

i. *Normative regulatory framework*

At the normative level, regulatory structures may be organised in different ways. Regulation may indeed be based on rules, in which case detailed rules would be set out at a high level of the “Kelsenian pyramid” of normativity.¹³¹ Conversely, regulatory framework may be standard-based, thereby leaving an important flexibility to supervisors and interpreters when implementing regulatory norms.¹³² Without purporting to be exhaustive, another type of standard-based approach, not exclusively relying on principles or standards, but rather advocating for expressly stating the objectives of each principle or rule, would be the so-called objective-based approach.¹³³ Whilst we are not able to conduct an in-depth analysis of the different possible approaches, it is worth taking stock of the current framework in the banking and financial sector. The current normative framework in the banking and financial sector within the European Union is organised along

¹³⁰ M. Sève, *LA RÉGULATION FINANCIÈRE FACE À LA CRISE* 279-280 (pref. Jean-Pierre Jouyet, ed. Bruylant, 2013). See also J. De Larosière, (Présid.), *The high-level group on financial supervision in the EU*, 25 février 144, Bruxelles (2009).

¹³¹ H. Kelsen & B. Paulson, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW* (Oxford: Clarendon, 1997).

¹³² S. Woods, *Stylish Regulation*, *UBS Financial Institutions Conference*, LAUSANNE, May 16, 2019, available at <https://www.bankofengland.co.uk/-/media/boe/files/speech/2019/stylish-regulation-speech-by-sam-woods.pdf> (Last visited on February 25, 2020). M. Sève, *LA RÉGULATION FINANCIÈRE FACE À LA CRISE* (pref. Jean-Pierre Jouyet, ed. Bruylant, 2013); J. De Larosière, (Présid.), *The High-Level Group on Financial Supervision in the EU*, 25 février 144, Bruxelles (2009).

¹³³ For a concrete example of how such objective-based approach would work in practice, See M. Bryane & G. Say-hak, *Is Hong Kong a Potential Role Model for Objectives-Based Financial Regulation?*, 15(1) *CAPITAL MARKETS LAW JOURNAL* 115 *et seq.* (2020).

the lines of the four-level model recommended by the 2001 Lamfalussy report,¹³⁴ namely: directives and regulations adopted by the European Union (EU) co-legislators¹³⁵ as level one regulatory instruments; delegated regulations drafted by regulatory authorities and approved by the EU commission and the EU parliament as level two instruments; guidelines, recommendations, joint statements, *etc.*, drafted and adopted by regulatory authorities as level three instruments; and ongoing monitoring by the EU commission of EU member states' compliance with EU law at level four. It has been observed that EU regulatory framework in the banking, financial and insurance sectors is very dense and contain many detailed rules in level one instruments,¹³⁶ while not expressly stating regulatory objectives as part of the body of the normative text (often but not systematically leaving statements of objectives in the realm of recitals of directives or regulations). It has been said that such "rule-based" approach, so to speak, has been "the obvious answer to a very fragmented regulatory and supervisory landscape"¹³⁷ in Europe.

By way of comparison, in the case of the Indian banking and financial normative regulatory framework, instances of both the rule-based approach and the principle-based approach have been observed.¹³⁸ For example, with the opening up of Indian economy since the late 1980s with 1990 as a watershed moment, regulations needed to be framed for the financial sector (securities and exchange) with the enactment of the Securities and Exchange Board of India (SEBI) Act, 1992. It was an immediate response to insider trading and the 1992 Indian stock market scam (the Harshad Mehta case) requiring immediate reforms in the equity market for better corporate governance and regulatory standards to be then governed by the statutorily created regulatory authority called SEBI. For almost three decades, as a classic case of administrative-legal function, SEBI has *ex-ante* functions for approving or directing amendments of by-laws concerning security exchanges; inspecting books of accounts of recognised securities exchanges or financial intermediaries; supervising authority over brokering and compelling companies to enlist in security/ies. Over the years its functions have become very diversified and complex with many committees and twenty departments dealing with specific issues/regions concerning the financial market.

Some European national regulatory authorities however, such as the French market authority, have advocated for a "principle-based" EU regulatory framework, giving regulatory authorities the "appropriate tools to build

¹³⁴ LAMFALUSSY REPORT, Final Report, 2001, available at <https://www.esma.europa.eu/document/lamfalussy-report> (Last visited on March 30, 2020), at 6.

¹³⁵ That is to say the EU Council and the EU Parliament.

¹³⁶ R. Ophèle, *Speech, FIA's International Derivatives Expo Conference - Shaping EU27 Capital Markets to Meet tomorrow's Challenges*, June 4, 2019, available at <https://www.amf-france.org/Actualites/Prises-de-paroles/Archives/Annee-2016?docId=workspace%3A%2F%2FSpacesStore%2F650582a5-f3cb-4d7a-bb47-0d50463aacdd> (Last visited on March 30, 2020).

¹³⁷ *Id.*

¹³⁸ G. Ashima, *Regulatory Structure for Financial Stability and Development*, 45(39) ECONOMIC AND POLITICAL WEEKLY 59 (2010).

a more unified and reactive supervision, alongside an appropriate level of accountability”.¹³⁹ When contemplating post-Brexit regulatory framework, Simon Woods, Deputy Governor of the UK Prudential Regulation Authority, eloquently spoke of “stylish regulation” in respect of such kind of approach.¹⁴⁰ When this “stylish regulation” or “principle-based” approach is said to be adopted, it shall be ensured that the resulting regulatory structure remain a “minor order” functionally guided by liberal objectives¹⁴¹ within the constitutional limits of liberal democratic standards.¹⁴²

ii. Institutional regulatory framework

The institutional regulatory framework may first be organised depending on each specific subject matter, such as data protection, banking operations, derivatives operations, (online) payments, *etc.* Furthermore, specialised regulatory bodies may be in charge of both macro and micro supervision, or solely in charge of one such level of supervision. The so-called “Twin Peaks” institutional model indeed advocates that macro-prudential and micro-prudential supervision shall be realised by distinct and specialised regulatory bodies, especially in the banking and financial sectors.¹⁴³ It is also worth noting that supervision may further be conducted following a “risk-based” approach, meaning that the intensity with which the normative regulatory framework is implemented may vary depending on the actual risks assessed.

In respect of the institutional network in the EU banking and financial sector, a complex system of interlinked EU regulatory bodies and national regulatory authorities has been enhanced on the basis of the 2009 *de Larosière* report¹⁴⁴ drafted following the financial and economic crisis which started in 2007: it is the European System of Financial Supervision (‘ESFS’). The ESFS is a network built around three EU regulatory authorities (ESMA, the EBA, and EIOPA),¹⁴⁵

¹³⁹ *Id.*; See also R. Ophèle, *From Brexit to Financial Innovations, New Challenges for Financial Regulation*, OMFIF, March 15, 2018, available at <https://www.amf-france.org/Actualites/Prises-de-paroles/Archives/Annee-2016?docId=workspace%3A%2F%2FSpacesStore%2F02d32070-8a04-434a-a237-5b402bbf7139> (Last visited on February 25, 2022).

¹⁴⁰ S. Woods, *Stylish Regulation*, *UBS Financial Institutions Conference*, LAUSANNE, May 16, 2019, available at <https://www.bankofengland.co.uk/-/media/boe/files/speech/2019/stylish-regulation-speech-by-sam-woods.pdf> (Last visited on February 25, 2020).

¹⁴¹ See *supra* Part III.

¹⁴² See *supra* Part II.

¹⁴³ See B. Eichengreen & N. Dincer, *Who Should Supervise? The Structure of Bank Supervision and the Performance of the Financial System*, NBER WP 17401; M. Taylor, *Redrawing the Regulatory Map: A Proposal for Reform*, *Journal of Financial Regulation and Compliance*, n°5, 1997; M. Bryane and G. Say-hak, *Is Hong Kong a Potential Role model for Objectives-Based Financial Regulation?*, 15(1) CAPITAL MARKETS LAW JOURNAL 115 *et seq.* (2020).

¹⁴⁴ J. De Larosière (Présid.), *The High-Level Group on Financial Supervision in the EU*, February 25, 2009, Bruxelles.

¹⁴⁵ For further details and references to the founding regulations of each regulatory authority forming part of the ESFS, please refer to the European Commission’s website available at https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/european-system-financial-supervision_en (Last visited on February 25, 2022).

the European systemic risk board and national supervisors. The main task of the ESFS is to ensure consistent and appropriate financial supervision throughout the EU.¹⁴⁶ The ESFS is supplemented by the SSM (as briefly described above under Part III(B)(ii)) in the banking sector, where credit institutions are supervised either directly by the European Central Bank if they are considered to be significant (*i.e.* presenting a systemic risk to the entire financial system in case of failure), or indirectly through national supervisory authorities if they are not.¹⁴⁷ It should be noted that within the ESFS, macro-prudential and micro-prudential supervision are conducted by distinct and specialised body at EU level. The EU institutional and supervisory network may therefore correspond, at least partially, to the so-called Twin Peaks model. Moreover, the general approach taken by EU and national regulatory authorities within the ESFS and SSM when adopting guidelines, recommendations, *etc.*, as well as when implementing the normative regulatory framework, follows a “risk-based” approach. However, as set out already by the *de Larosière* report, supervisory authorities must always be independent from any political or economic lobby, while yet remaining accountable towards political authorities (*i.e.* government and parliament, at both EU and national levels).¹⁴⁸

Similarly to the European institutional regulatory framework, the Indian banking and financial regulatory structure appears to be built around the lines of the Twin- Peaks model, differentiating in particular the regulatory bodies in charge of the macro and micro prudential regulation.¹⁴⁹ It is worth noting that the Indian institutional regulatory framework in the banking and financial sector is mainly built around the functionally and materially limited institutions of the Reserve Bank of India (‘RBI’) for banking regulation, the Securities and Exchange Board of India (‘SEBI’) for market securities regulation, and the Insurance Regulatory and Development Authority of India (‘IRDAI’) for insurance and pension schemes regulation.¹⁵⁰ In light of the particular resilience of the Indian financial system during the 2008 financial and economic crisis, scholars have warned against any reform of the banking and financial regulatory structures contemplating a stronger involvement of political authorities, and specifically underlined that while “regulators must be accountable to Parliament”, “their

¹⁴⁶ See European Central Bank, available at https://www.bankingsupervision.europa.eu/about/esfs/html/index_en.html (Last visited on February 25, 2022).

¹⁴⁷ See in particular, Regulation (EU) No. 1092/2010 of the European Parliament and of the Council of November 24, 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board; Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

¹⁴⁸ J. De Larosière (Présid.), *The High-Level Group on Financial Supervision in the EU*, February 25, 2009, Bruxelles, 187.

¹⁴⁹ G. Ashima, *Regulatory Structure for Financial Stability and Development*, 45(39) ECONOMIC AND POLITICAL WEEKLY 59 (2010).

¹⁵⁰ One can refer to Tannan’s banking law more generally, and to its introduction in particular, to identify the number of legislations and institutions which act as regulatory bodies governing India’s banking laws and practice. For more, See V. KOTHARI & M.L. TANNAN, *BANKING LAW & PRACTICE IN INDIA* (LexisNexis, 2021).

technical knowledge and decisions must be respected”, and further affirmed that “ministers should come in only as a last and rare resort”.¹⁵¹

It should however be pointed out that the discussion around the structure of the regulatory institutional framework has often been framed in terms of efficiency, and that, in this respect, Bobbio’s conceptual framework does not allow an in-depth analysis, as his legal theory deals only, and yet accessorially, with the issue of efficacy of legal norms and legal orders rather than their efficiency.¹⁵² The question of efficiency indeed introduces a concept of costs which appears not to have been taken into consideration by Bobbio. The most efficient regulatory structures being thus, generally the less costly ones.

2. Regulatory tools for ex ante supervision and regulation

Regulatory authorities may resort to several means to ensure an efficient supervision and regulation of a given sector. For the purpose of the present analysis we shall analyse only but a few, namely the licenses, authorisation or registration requirements, the reporting requirements and the information disclosure requirements. Although, as noted above, Bobbio did not conduct specific legal analysis in terms of efficiency, he carefully dealt with the various modes of social control through legal instruments, from structural and functional points of views.¹⁵³ Bobbio could indeed distinguish, amongst other distinctions, between direct control mechanisms (e.g. documentary or on-site inspections conducted by regulatory authorities) and indirect control mechanisms (e.g. through repressive or rewarding sanction mechanisms; through encouraging or discouraging mechanisms, such as burdensome reporting obligations or simple customer information requirements).¹⁵⁴

The consent of regulated entities to submit to the powers of regulatory authorities of a particular regulatory structure is mainly ensured through the requirement to obtain a license, an authorisation or to register before any offering or distribution of regulated products or services.¹⁵⁵ License applications generally require entities to satisfy stricter conditions than an authorisation process or a mere registration. In any event, such requirement *ab initio* (i.e. before the conduct of any regulated activity) is of the kind to enhance the voluntary compliance (or

¹⁵¹ G. Ashima, *Regulatory Structure for Financial Stability and Development*, 45(39) ECONOMIC AND POLITICAL WEEKLY 61 (2010).

¹⁵² See notably the brief considerations developed by Bobbio around the concept of efficacy in NORBERTO BOBBIO, *TEORIA GENERALE DEL DIRITTO*, 23-44 (G. Giappichelli Editore, Torino, 1993).

¹⁵³ Norberto Bobbio, *Dalla Struttura Alla Funzione. Nuovi Studi Di Teoria Del Diritto* 47-49 (Prof. M.G. Losano, Biblioteca Universale Laterza, 2007).

¹⁵⁴ *Id.*

¹⁵⁵ See for instance, Section 22 of the Indian Banking Regulation Act, 1949, requiring companies to obtain a banking license before starting any banking operation. Similarly, please See for example, Article L. 511-9 of the French *code monétaire et financier*, setting out the requirement to obtain a banking license for the conduct of banking operations on the French territory.

adesione spontanea) of regulated entities with the regulatory normative framework.¹⁵⁶ In other words, licensing, authorisation or registration requirements set out “membership” conditions and “entrance fee” to a specific regulatory structure, but reward the successful applicants with the possibility to conduct certain (usually profitable) activities. Conversely, any failure to comply with licensing requirements is generally criminally sanctioned,¹⁵⁷ and the total or temporary withdrawal of a license, authorisation or registration may also constitute a sanction in case of a serious breach of other applicable norms.¹⁵⁸

Reporting requirements may apply periodically or on an ongoing basis, and aim at providing regulatory authorities with the necessary information to effectively control and supervise the relevant entities. The increase of the elements of information, that regulated entities are required to report to their supervisory authorities (especially in the banking, financial and insurance sectors) are a real burden whose costs tend to increase constantly over time. That is the reason why regulated entities are sometimes prompted to externalise reporting requirements to the benefit of specialised start-ups (so called “RegTechs”) which develop computer codes and algorithms to ease the compliance with reporting requirements. Said reporting may have a statistical purpose (allowing supervisors to have a detailed overview of the regulated sector) or may serve the purpose of checking the effective compliance with internal control and internal organisation requirements. It is worth noting that some regulatory authorities contemplate the possibility to heavily rely on data and direct reporting to regulatory authorities by the beneficiaries of regulated services or products themselves in order to be able to detect feeble signals of non-compliance and asymmetrical information.¹⁵⁹ Such regulatory approach is said to be “data-based” and would ensure almost real time reaction by regulatory authorities in case asymmetrical information on products or services is detected.

Finally, in line with the liberal approach of regulation, truthful, correct and complete information by regulated entities in respect of the services or products they offer or distribute is paramount. Information requirements aim not only to provide details on a specific product or service, but also to inform the beneficiaries of such service or product of their rights.¹⁶⁰ Such information re-

¹⁵⁶ On the voluntary compliance (*adesione spontanea*) issue, See notably NORBERTO BOBBIO, *TEORIA GENERALE DEL DIRITTO* 131-134 (G. Giappichelli Editore, Torino, 1993).

¹⁵⁷ See for instance Article L. 511-5 of the French *code monétaire et financier* setting out the prohibition to perform banking operations without being licensed to do so. Any breach of such “banking monopoly” rule is sanctioned by Article L. 571-3 of the same code with up to three years imprisonment and a fine up to Euro 375 000 for natural persons or Euro 1, 875, 000 for legal persons.

¹⁵⁸ See *supra* Part IV(B).

¹⁵⁹ See Joint note, July 8, 2019, *Nouvelles Modalités De Régulation: La Régulation Par La Donnée*, available at https://www.amf-france.org/Actualites/Communiqués-de_presse/AMF/annee2019?docId=work_space%3A%2F%2FSpacesStore%2Fd07af77c-5136-40e8-97c9-e67e3deb3d9b (Last visited on March 30, 2020).

¹⁶⁰ For instance, one may think of the right of withdrawal in consumer contracts. The right of withdrawal in consumer contracts has been notably harmonised at the EU level by the Directive 2011 /

quirements apply for instance in the case of issuances of shares or bonds,¹⁶¹ and may vary depending on the experience and knowledge of the beneficiary party or if the beneficiary qualify as a “weak party” (as to which, please see our developments in Part III(B)(i) above). Pursuant to the GDPR, information of the data subject through information notices on the way his or her personal data is to be collected, processed and stored is also key for any company conducting business within the European Union. Any failure by businesses (located inside or outside the European Union) to comply with GDPR requirements in respect of personal data of EU customers expose such businesses to heavy fines.

B. *EX POST MEANS OF REGULATION AND DEMOCRATIC ACCOUNTABILITY OF REGULATORY STRUCTURES*

In practice, several types of regulatory sanctions may be observed. Sanction mechanisms are set out as concrete means of regulation and supervision to ensure the effectiveness of the normative regulatory framework, and are thus governed by several principles aimed at ensuring the compatibility of such mechanisms with the constitutional liberal democratic model.

1. Ex post regulation and supervision: principles governing sanction mechanisms

As already briefly mentioned above in Part III(A), Bobbio defines quite broadly the concept of sanction as the response to a breach of a norm within a normative system.¹⁶² The concept of ‘legal’ sanction (“*sanzione giuridica*”) is key for Bobbio, as it allows to distinguish between norms which are legal and those which are not. Bobbio thus defines a legal sanction as the external (*i.e.* the reaction of a social group) and institutionalised (*i.e.* emanating from the same normative sources as the primary norms of conduct) response to the breach of a prescriptive proposition aimed at regulating one’s conduct (*i.e.* a norm).¹⁶³ It is however evident that some norms, although indubitably part of a legal order, would not trigger any direct legal sanction in case they are violated. It shall however be reminded that Bobbio does not consider that a legal sanction has to be attached to every single norm in case of breach, but rather that the legal order as a whole, to which the relevant norms pertain, shall provide effective institutionalised sanctions.¹⁶⁴ In other words, the legal nature of the normative framework of regulatory structures

83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (JO L 304 of 22 November 2011, 64–88); *See* Article 9 for the specific right of withdrawal.

¹⁶¹ *See* for instance Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

¹⁶² Norberto Bobbio, *TEORIA GENERALE DEL DIRITTO* 122-123 (G. Giappichelli Editore, Torino, 1993).

¹⁶³ *Id.*, 128-129.

¹⁶⁴ *Id.*, 134-135 (where the author notably stated that “when we speak of an organised sanction as a constitutive element of the law, we do not make reference to single norms but rather to the normative order taken as a whole” “[...] *quando si parla di una sanzione organizzata come elemento*

(which qualify as minor orders rather than legal orders, as shown in Part III(A) above) would depend on whether the regulatory norms may be viewed as globally subject to legal sanctions as defined in Bobbio's terms.

Bobbio nevertheless acknowledged that there might exist some normative orders which do not provide for any sanction in case of violations of their norms.¹⁶⁵ However, given the broad view of what may qualify as a normative order legally sanctioned, which would include organisations such as the mafia, secret organisations or any type of associations where expulsion procedures or other minor sanctions are contemplated,¹⁶⁶ we fail to see clearly what kind of normative framework would fall outside Bobbio's definition. Here, Santi Romano is perhaps more consistent in his institutional theory of law and the plurality of legal orders by holding even mafia as a legal institution though running counter to the Superior Constitutional State.¹⁶⁷ Nonetheless, it should be noted that Bobbio usefully distinguishes legal sanctions according to their intensity, which would depend on the entity in charge of issuing and/or executing the sanction. If the person liable for the breach of a norm is itself in charge of executing the corresponding sanction, the sanction mechanism would follow a self-regulatory process ("*autotutela*") and would be of lesser effectiveness.¹⁶⁸ Conversely, if another person or entity is in charge of ensuring the execution of the sanction issued as a response to a violation, the sanction mechanism would follow an institutionalised process ("*eterotutela*") and would be deemed to be of an enhanced effectiveness ("*efficacia rafforzata*").¹⁶⁹ The distinction between self-regulation and external regulation generally made in the scholarships dealing with the theory of regulation¹⁷⁰ may therefore be re-framed in Bobbio's terms as corresponding respectively to "lesser effective sanction mechanisms" and "enhanced sanction mechanisms." It should however be pointed out that a "pure" self-regulatory framework, *i.e.* exempt from any external check, would likely fail to meet the requirements of the liberal democratic model in terms of protection of individual rights and the rule of law (as to which, please refer to our introductory remarks and our developments in Part II above). In any event, Bobbio does not overestimate the role of sanctions as regards the effective application and execution of norms, since he underlines that the effectiveness of any legal norm highly depends on the consent and spontaneous adhesion ("*adesione spontanea*") of the legal subjects.¹⁷¹ A fair and fine balance must therefore

costitutivo del diritto ci si riferisce non alle norme singole ma all'ordinamento normativo preso nel suo complesso [...]" (our translation)).

¹⁶⁵ Norberto Bobbio, *TEORIA GENERALE DEL DIRITTO* 138 (G. Giappichelli Editore, Torino, 1993).

¹⁶⁶ *Id.*, 139.

¹⁶⁷ S. Romano, *THE LEGAL ORDER*, pp. 21, 58-60 (*Edited and Translated by M. Croce, with a foreword by M. Loughlin and an afterword by CROCE, M.*), Routledge, 2017.

¹⁶⁸ Norberto Bobbio, *TEORIA GENERALE DEL DIRITTO* 130 (G. Giappichelli Editore, Torino, 1993).

¹⁶⁹ *Id.*

¹⁷⁰ See for instance M. Sève, *LA RÉGULATION FINANCIÈRE FACE À LA CRISE* 280 *et seq.* (pref. Jean-Pierre Jouyet, ed. Bruylant, 2013).

¹⁷¹ Norberto Bobbio, *TEORIA GENERALE DEL DIRITTO* 131-133 (G. Giappichelli Editore, Torino, 1993).

be struck between the consent of the legal subjects to the norms and the force of the sanctions.

It is thus worth recalling that the distinguishing criteria highlighted by Bobbio between legal norms and social norms is the proportionate character of the former, as opposed to the lack of proportionality of social sanctions between the violation of norms and the response to it.¹⁷² The requirement that sanctions be proportionate to the violation leads to the institutionalisation of sanctions through specific provisions originating from the same normative sources as the primary norms of conduct of a given legal order.¹⁷³ In other words, normative regulatory frameworks should contain both primary norms of conduct and sanction mechanisms aiming at ensuring that sanctions are proportionate to the violations of the given normative framework. One may add that the lack of proportionality of the sanction, on top of the failure of such sanction to qualify as a legal sanction (and thereby qualifying as a social reaction which may face repression by the relevant legal order), would be contrary to the liberal democratic model aiming at guaranteeing the rights and freedoms of the individual.¹⁷⁴ The paramount role of the proportionality analysis in respect of the protection of fundamental rights of individuals in the context of liberal democratic states should be here, recalled and underlined. The legitimacy of sanctions and more generally any kind of interference with individual rights depends indeed on whether such interferences are both necessary and balanced.¹⁷⁵

2. Ex post regulation and supervision: examples and categories of regulatory sanctions

Regulatory authorities may use different kinds of sanctions against different kinds of legal subjects, within the limits of the powers which have been delegated to them.¹⁷⁶ In this respect, attention should first be drawn to the fact that sanctions may be issued against both legal or natural persons, who are either under the direct supervision of the sanctioning regulatory authority or who, whilst not being under the direct supervision of the sanctioning authority, nonetheless violated the normative regulatory framework of which the sanctioning authority has the charge. Such is for instance the case of the market abuse regulation in force within the European Union, which notably sets out market manipulation, insider dealing, and false or misleading information offences.¹⁷⁷ National regulatory authorities of European Union member states are in charge of sanctioning any of the above listed offences committed on their national territory or affecting the

¹⁷² *Id.*, 128.

¹⁷³ *Id.*

¹⁷⁴ See *supra* Parts I-II.

¹⁷⁵ R. Alexy, *THEORY OF CONSTITUTIONAL RIGHTS* (Oxford University Press, 2010); A. BARAK, *PROPORTIONALITY* (Cambridge: Cambridge University Press, 2012); S. Burnton, *Proportionality*, 16(3) *JUDICIAL REVIEW* 179–181 (2011).

¹⁷⁶ Please refer to our developments in Part II above for further details.

¹⁷⁷ Regulation (EU) No. 596/2014 of 16 April 2014 on market abuse ('market abuse regulation').

financial market under their supervision, irrespective of whether the offender is a natural or a legal person, either located abroad or on the national territory.¹⁷⁸

Furthermore, bearing in mind that regulatory authorities form part of the institutional framework of regulatory structures conceived as minor orders (“*ordinamenti minori*”),¹⁷⁹ sanction mechanisms set out by a given regulatory structure shall not be final and are not necessarily exclusive of other more common legal courses of actions available under the legal order to which said regulatory structure is linked. Sanction decisions issued by regulatory authorities are generally not final, since appeals, although possibly under some conditions, are generally available before state courts.¹⁸⁰ Also, parallel sanction proceedings before regulatory authorities and competent state courts (especially criminal courts) of the relevant legal order may be possible, provided that they are complementary and connected with a sufficiently close substantial and temporal link to prevent any breach of the individual right not to be prosecuted and sanctioned twice for the same facts (as known as the *ne bis in idem* principle constitutionally and internationally protected as a fundamental right).¹⁸¹

Without purporting to be exhaustive, we shall then briefly outline some possible sanctions available to sanction commissions or bodies of regulatory authorities. Such sanctions may be either pecuniary or non-pecuniary. Amongst the non-pecuniary sanctions, the total or partial withdrawal of the license, authorisation or registration which allowed a company or a person to conduct a certain regulated activity would appear as a particularly severe sanction. This is because such withdrawal would entail a *de jure* and *de facto* “excommunication” (*akin* to an economic death sentence in case of a total withdrawal) of the sanctioned person from a given sector or market. The sanction of partial or total withdrawal is notably available to banking regulatory authorities both in Europe and in India.¹⁸² Less

¹⁷⁸ See notably in this respect: AMF, comm. sanctions, decision, 11 December 2019, n° 18, Société Bloomberg LP, where the French market authority sanctioned a legal person located on the French territory, but which is not under its direct supervision, for breaches of the market abuse regulation. See also AMF, comm. sanctions, decision, 24 October 2018, SAN-2018-13, MM. Eaitisham Ahmed, A, Scott Davis, Geoff Foster, Mark Penna, B, Leslie Stafford, where the French market authority sanctioned natural persons located outside the French national territory for breaches of the market abuse regulation affecting the French securities market.

¹⁷⁹ Please see our developments in Part III(B) above for further details on this point.

¹⁸⁰ This is notably the case of the sanctions decisions of the French market authority which may always be appealed before the *Conseil d'Etat*, i.e. the highest administrative court in the French legal order.

¹⁸¹ See ECHR, 5th sect., 6 June 2019, n° 47342/14, Nodet v/ France; ECHR, 4 March 2014, Grande Stevens: BJB April 2014, no. 111h1, p. 209, note J. Chacornac; BJB March 2015, n° 112e6, p. 97, note B. de Saint-Mars; ECHR, 15 nov. 2016, n° 24130/11 et 29758/11, A. and B. v/ Norvège: JurisData n° 2016-024274; See also French Constitutional Council, 18 March 2015, no. 2014/453-454 QPC and 2015-462 QPC: JurisData n° 2015-005120; See also the specific coordination procedure set out by the law no. 2016-819 of 21 June 2016 in article L. 465-3- 6 of the French *code monétaire et financier*.

¹⁸² See for instance, Article L. 612-39, 6° and 7° of the French *code monétaire et financier*, in respect of French national banking authority; For India, please refer to the provisions of the Indian Banking Regulation Act, 1949.

severe non-pecuniary sanctions would be, in a decreasing scale of severity: temporary limitations or prohibitions to conduct certain activities, forced dismissal or suspension of managers, vexatious notices or simple warnings.¹⁸³ Pecuniary sanctions are fines, whose amount would generally vary depending on various factors, such as whether the offender is a natural or a legal person (the fine being higher for legal persons) or whether the offence was committed intentionally or repeatedly. Whilst regulatory authorities enjoy a certain margin of appreciation in the determination of the amount of a fine in light of the specific circumstances of a case, the relevant normative framework however sets maximum limits, either in the form of a percentage (*e.g.* in relation to a company's turnover) or in the form of a nominal figure.¹⁸⁴ The European general data protection regulation thus famously enables national regulatory authorities to sanction breaches of the regulation with fines up to Euro twenty million or four percent of the annual global turnover on the basis of the preceding fiscal year.¹⁸⁵

V. CONCLUSION

To conclude our analysis, we may briefly resume our initial considerations and attempt to provide an answer to the question of the compatibility of regulatory structures with liberal democratic principles. Our analysis has indeed attempted to tackle the issue of democratic legitimacy and accountability of regulatory structures, in both their normative and institutional aspects, while taking due account of the various dimensions of regulation conceived as a mode of governance enabling political authorities, mainly through an agency-based model of autonomous and independent institutions, to ensure that private agents incorporate public interest considerations in the conduct of their activities (mainly of an economic nature). We have thus reached the conclusion that regulatory structures may be viewed as a specific dimension of the Hegelian “inferior state” *à la* Bobbio, thereby subject to and limited by superior legal and constitutional considerations in respect of their powers and competence. This consequently led us to conceive regulatory structures, in both their normative and institutional frameworks, as functionally limited minor orders (“*ordinamenti minori*”), which are deemed to operate together with the legal order of which they constitute an integral part. Regulatory structures would then derive their democratic legitimacy from such legal order, to the extent that all the legal and constitutional conditions of such legal order are satisfied, and provided that the said legal order developed along the lines of the liberal democratic model. Compliance with the liberal democratic model as defined by Bobbio is ensured in particular through the functional limits of regulatory structures, *i.e.* the protection of the rights of the individual and the systemic stability of a given sector or market. However, regulatory structures which conform with the liberal democratic model are fully efficient only to the extent that

¹⁸³ See for instance the provisions of article L. 612-39 of the French *code monétaire et financier*, in respect of the power of sanction afforded to the French national banking authority.

¹⁸⁴ See for instance the provisions of Article L. 612-39 of the French *code monétaire et financier*.

¹⁸⁵ EU Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

they possess effective supervision tools and sanction mechanisms which do not undermine the superior principles of such model. Only some punctual examples of both European and Indian regulatory structures in the fields of data protection and banking and financial regulation have been given throughout the paper, thus avoiding much of the technicalities. Though it is believed by us that it has not undermined the broader picture, which, to answer our initial question, is that of the conceptual compatibility of regulatory structures with liberal democracies, provided that some core and strict conditions are met. The recent evolution of regulatory tools and tendencies to change the current regulatory approach must however be kept under close scrutiny. Data-based approaches aided by massive use of algorithms and artificial intelligence, together with a greater autonomy of regulatory authorities under principle-based approaches, may indeed permanently affect and undermine the basic principles of the constitutional liberal democratic model of European and Indian societies.

Additionally and conceptually, as a note of caution towards the preceding analysis, and in light of the view from the Global South (the formerly colonised countries in the recent past), as exemplified by the Indian experience, what is lacking in the Bobbiano conceptual genealogical formula of cohabitation of liberalism with democracy is how liberalism was not just used to justify colonialism by European colonial powers as a “natural right” in non-European societies, but also its role in denying any form of democratic representation and accountability.¹⁸⁶ Developing into a full-blown Häberleian “open society of constitutional interpreters” on the other end of the spectrum was simply out of question, not just because of being “colonial subjects” and not “citizens”, but also denied from having any constitution to begin with.¹⁸⁷ As a matter of fact, liberalism became the most important ideological tool for the justification of colonial exploitation, differentiation in its application at ‘home’ and the concept itself becoming a tool of differentiation, exclusion and shameless exploitation of the ‘native’ population.¹⁸⁸ This is, of course, in addition to the lack of review of writings coming from formerly colonised societies like India and the immense intellectual scholarship freely available

¹⁸⁶ T.R. Metcalf, *LIBERALISM AND EMPIRE, THE NEW CAMBRIDGE HISTORY OF INDIA III.4: IDEOLOGIES OF THE RAJ 28-65* (Cambridge University Press, 1998). On the colonial state in India, Mahendra Prasad Singh writes, “Functionally, the colonial state in India was neither comparable to the Bonapartist or Prussian Junker state holding the balance between feudal aristocracy and emergent bourgeoisie nor the Andersonian model of European absolutist state which was essentially a reinforced apparatus of feudal domination of the peasantry. It did not either belong to the category of ‘patrimonial authority’ or ‘patrimonial bureaucratic empire’. It was instead a political instrument of the British imperial or metropolitan capitalist state, and, for this reason, largely undetermined by the mode of production in colonial India.” M.P. Singh, *The Colonial State in INDIAN POLITICAL SYSTEM 5* (M.P. Singh, H. Roy ed., Noida: Pearson, 2018).

¹⁸⁷ P. Häberle, *The open society of constitutional interpreters – A contribution to a pluralistic and procedural constitutional interpretation (translated from German by Stefan Theil, Postdoctoral Research Fellow, Bonavero Institute, Oxford University)* in PETER HÄBERLE ON CONSTITUTIONAL THEORY: CONSTITUTION AS CULTURE AND THE OPEN SOCIETY OF CONSTITUTIONAL INTERPRETERS (M. Kotzur ed., Nomos: Germany, 2018).

¹⁸⁸ U.S. Mehta, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (University of Chicago Press, 1999).

in the European ‘English language’ from colonial times to post-colonial scholarship in intellectual history.¹⁸⁹ The expectation increases from Bobbio because he bluntly offered Gandhi and not Lenin as the ‘moral exemplar’ and a model to follow for the whole world, including Europe.¹⁹⁰ Additionally, in the very important and lively debate on the concept of “*mitezza*” (meekness) with his friend, the major Italian-European Gandhian scholar, Giuliano Pontara, he had great estimation of Gandhian ideas and practice when the two differed on the fundamental meaning of “politics” and Bobbio writes: “[...] I was well acquainted with Gandhi’s non-violent theory and practice, and of course Pontara knew this.”¹⁹¹ Besides, Bobbio was also close to Aldo Capitini (whose works Bobbio edited), who was inspired by Gandhi’s ideas, and was an endearing figure of resistance against the fascist regime in Italy.¹⁹²

In addition to the above risks underlined in respect of the currently perceptible tendencies of changes in regulatory approaches and modes of operation, another word of caution would concern the access to information, transparency and accountability which are very much embedded in the functioning of a liberal democratic constitution. It is as much relevant for a regulatory authority as it is for countering the COVID-19 pandemic which humanity is faced with today. To not deny truth along with aspects of governance which need to function transparently are features of a liberal democratic constitutionalism. Like Professor Amartya Sen’s thesis of how in democracies people did not die of hunger,¹⁹³ similarly in democracies, people should be better able to deal with pandemics and their regulatory authorities are held to democratic and constitutional accountability while administering its ‘inferior state/civil society/administrative-legal functions’ to uphold the *Dharma* of the Constitution. Therefore, like liberalism and democracy cohabit with the constitution to mediate between liberty and equality, so does the regulatory authority, as an institution, mediate between the state on the one hand and citizens on the other and in its functions as an inferior state/administrative-legal state, the regulatory authority functions as the deciding authority between the citizens on the one hand and financial institutions on the other. This is how the balance of powers is struck in the liberal constitutional democracies of India and Europe.

¹⁸⁹ Among the precolonial writings, to say the least, not even the writings of Mahatma Gandhi, including *Hind Swaraj* or *The Story of my Experiments with Truth* are directly explored. The writings of Professors R.S. Sharma, D.D. Kosambi and Ranajit Guha have been abundantly and universally available in the English language since the 1960s to cite just a few of the representative scholars whose works started to appear in the early post-colonial period. Additionally, the writings of the Subaltern Studies Collective, who ironically used Gramscian conceptual categories, have been available since the 1980s. Though, he referred to the works of Professor Amartya Sen.

¹⁹⁰ Norberto Bobbio, *Toward a New Republic?* in IDEOLOGICAL PROFILE OF TWENTIETH-CENTURY ITALY 197 (Norberto Bobbio ed., translated by L.G. Cochrane, Princeton University Press, 1995).

¹⁹¹ Norberto Bobbio, *Introduction* in IN PRAISE OF MEEKNESS: ESSAYS ON ETHICS AND POLITICS 3 (translated by T. Chataway, Polity, 2000).

¹⁹² *Id.*, 35-36.

¹⁹³ Amartya Sen, POVERTY AND FAMINES (Oxford University Press, 1983).