GULBENKIAN IDEAS

Let's talk about the Future of Justice

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An idea for the future of justice

1. The judiciary and respect for the rule of law

I would like to begin with an observation: for some years now, the issue of the independence of the judiciary has again been at the centre of European and international debate. The European Union, through the Council of Europe, has been working hard on this issue. The European courts ensure that the independence of judges is respected. Reflections on the *rule of law* are proliferating: in the European Union, the Commission has an annual supervision mechanism in place on compliance with the *rule of law*.

Beyond the specific situation in certain countries, the *perception* of judicial independence has declined everywhere. We find that, in some cases, judicial independence is seriously threatened by interference from political institutions. In other cases, public opinion considers that judges are too close to politics or that they play too active a role and risk *interfering in political decisions*. In short, the relationship between politics and the judiciary has once again become problematic. Recently, a prominent member of the US Supreme Court stated:

> "If the public views judges as politicians in robes, their confidence in the court and the rule of law itself will only weaken, thereby weakening the power of the court, including its power to check and balance other departments [...]. The rule of law depends on trust, a trust that the Court is guided by legal principle, not politics." (Stephen Breyer, 6 April 2021, Scalia Lecture now published in The Authority of the Court and the Peril of Politics, Harvard University Press 2021).

The issue also arises in the United States, especially in debates about the composition and role of the Supreme Court.

I think, therefore, that the first problem we must face for the future of justice is to think again about a true balance of relations and the separation between j*ustice and politics*. This is an old problem: the distinction and distance between *gubernaculum* and *iurisdictio* is the problem that constitutionalism has always faced, ever since the birth of the liberal state. Today it is back at the heart of the debate, albeit in new forms that differentiate it from the past. We need to reflect on the reasons behind so much substantiated attention and concern.

One of the elements that comes to mind is prompted by two observations on the situation of justice in Italy, which have forced my involvement this year in my capacity as Minister of Justice. On the one hand, the judiciary suffers from a serious efficiency problem, with a considerable impact on the effectiveness of the judicial remedies available to citizens. On the other hand, the Italian judiciary suffers from a serious credibility crisis arising from a number of scandals involving the work of the Supreme Judicial Council, which, until recently, exercised its power at times in a manner contrary to the standards of independence and impartiality that should always be the hallmark of the judiciary. Efficiency and credibility, as stressed by the President of the Republic, Sergio Mattarella, in his message to Parliament on the occasion of his re-election:

> *In safeguarding the inalienable principles of autonomy and independence of the Judiciary (cornerstones of our Constitution), the judicial system and the system of self-government of the Judiciary must meet the pressing need for efficiency and credibility, thus responding to the just demands of citizens.*

Efficiency and credibility: two apparently distinct issues. However, these issues go hand in hand not only in Italy. If we analyse the reports on compliance with the *rule of law* in Europe (which the European Commission has been issuing for some years now), we find that some critical points are common to all Member States, albeit to varying degrees: in particular, our judicial systems are inadequate from the point of view of *efficiency* – justice takes too long; moreover, the *independence of judges*, as perceived by citizens and businesses, is unsatisfactory, which undermines citizens' confidence in the judicial system. There is a crisis of *efficiency* and a crisis of *credibility* creeping into many states of reliable liberal persuasion, built on the solid principles of the separation of powers, the independence of the judiciary from political power, and the impartiality and neutrality of judges.

I believe – as I said some years ago at the opening of the judicial year of the European Court of Human Rights – that this situation is largely due to the fact that the judicial system has been overburdened over time with too many tasks, too many functions and therefore too many expectations. This overload also stems from the fact that the judiciary has been forced to almost play the role of a substitute for weak politics, that would not make decisions and would not rule on sensitive, tough and divisive issues. Judges, unlike political institutions, do not control their own agenda and cannot refrain from making decisions.

For many decades, we have seen the *rise of the judiciary* (Mauro Cappelletti), with clear and widespread benefits, strengthening the instruments for the protection of individuals and minority groups. But this growth has come at a price, giving rise to an imbalance in the separation of powers, which, like freedom and democracy, is a gain that we cannot take for granted. There is something paradoxical about this situation. After all, signs of crisis are emerging in the judiciary at the very ime when it is experiencing its greatest triumph (P. Prodi).

I should state from the outset that the strengthening of the role of the judiciary is probably irreversible. I should add that I am not nostalgic for the past, for the time of Montesquieu's judge as the bouche de la loi (the mouthpiece of the law). But some trends can and perhaps should be corrected: our societies are increasingly confrontational and all kinds of disputes seek judicial answers and solutions. Family and private matters are increasingly taken to court, as are ethical and political issues. I wonder if we can continue to overburden judges with all these tasks; I wonder if we can continue to think that the judicial system is the only way to resolve conflicts. I also wonder whether our societies would not need to discover or rediscover a whole series of *fora* (instances of dispute management and resolution) *other than* courtrooms, using the courts as a last resort after all other forms of resolution have failed.

2. Hate speech and hate crimes

A non-secondary factor that overwhelms the courts in terms of quantity and complexity is the climate of increasing conflict in our social relations. In our plural societies, conflicts are mounting and are almost always brought to court. Conflict is an integral part of democratic and social life. But it is up to every republic to know how to resolve conflicts and avoid dissension – *stasis* – that destroys the polis, as Greek culture has always taught us.

This observation leads us to a second line of thought: the growing conflict in our societies and the difficulties in resolving it are alarmingly expressed in hate speech and hate crimes, that is, in forms of aggressive and violent discrimination against minority groups. The news continually tells us of frequent serious incidents of hate speech, racism and intolerance: hate crimes against minority groups are growing at an alarming rate, as highlighted in reports by the *EU Agency for Fundamental Rights*.

In current times, the climate of hate must be analysed mainly in the light of the power of social media and must be approached from a transnational perspective. To understand this phenomenon, we cannot but underline the centrality of the online world: during the pandemic, we spent more time online, and data shows that verbal and physical aggression increased exponentially, particularly against disabled people and young women.

I believe that in this respect we must reject the idea that the web is a "neutral space" and understand the real power of algorithms, which in non-transparent ways tend to feed the phenomenon of so-called *echo* chambers. The social media do not offer a blank sheet of paper; on the contrary, they guide our thinking and we should be aware of this.

Moreover, these media tend to be seen as an "anarchic space" where everyone can act and express themselves behind the shield of anonymity or, at least, the absence of a physical relationship which, by increasing the distance from the other and making the relationship abstract, liberates and exempts from any form of responsibility.

Users tend to find online only like-minded opinions, in a drummed repetition of their own opinions, becoming trapped in an echo that resonates in their thoughts. This is the paradox of the internet and the world of social media: a space of freedom – a free marketplace of ideas – that is accessible and free, but inexorably tends to become a place of cognitive distortions, of *echo chambers*, of *confirmation biases*, of *groupthink*, in which people remain trapped more or less consciously.

A society open to a true plural debate, an indispensable condition for the existence of a true democracy, is being undermined by cultural polarisation, egoistic extremism, the standardising conformism of the reference groups themselves, resulting in a growing aggression towards the "other". The most vulnerable groups are the most targeted: migrants, Roma people, religious minorities, people with disabilities, LGBTI people, the elderly, women.

Hate speech is an expression of human and social relations based on the abuse of power, which too often turns into violence: a phenomenon whose dimensions harm the fundamental values of our civilisation.

Hateful words, gratuitous insults, offences, invective against the most vulnerable social groups and victims of prejudice are in themselves serious violations of *human dignity*. But hatred, apart from being an offence against human dignity, can also turn into physical aggression, sexual harassment, *violence* or death. At stake are the values of human dignity and the physical integrity of individuals. The data never ceases to amaze us: while homicide crimes are steadily decreasing, feminicide cases have been increasing for some years now. In the fight against these phenomena, it is necessary to work, above all, from a prevention perspective, it is necessary to improve the training of the agents on the ground in order to develop in them the necessary sensitivity to identify the first signs of risk, it is necessary to take these forms of discrimination seriously and protect potential victims by making restraining orders more effective, including through the support of technology, electronic bracelets, apps, etc.

The European Union has been working on this issue. The Commission has put forward a proposal to extend the list of EU crimes under Article 83(1) of the TFEU to include hate speech and hate crimes on grounds of race, religion, gender, sexual orientation, disability or age. The JHA Council is working on this. This is a very strong signal, because the EU has limited competence in criminal matters and only intervenes in this area when there are forms of

> *"particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis."* (Article 83).

To date, the crime areas resulting in EU intervention are terrorism, trafficking in human beings, sexual exploitation, corruption and organised crime. In short, if the Commission's proposal is endorsed by Member States, hate crimes will be put on the same footing as other very serious crimes, with the same transnational dimension, and prosecuted uniformly throughout the EU. The Union thus wishes to affirm that hate crimes are incompatible with the fundamental rights of the individual and with the values on which the European Union is based and which are enshrined in Article 2 of the Treaty on European Union. Let us recall the words of this article:

> *"The EU's founding values are 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. These values are common to the member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."*

This European initiative is extremely important for the effectiveness of the fight against hate speech and hate crime, but it must be kept in mind that *criminal law alone is not enough*. The debate within the EU Council of Ministers has shown, among other things, that the use of the criminal law instrument on hate speech needs to be carefully calibrated to avoid its turning into an undue form of restriction to freedom of expression. For this reason, the criminal law instrument should be part of a broader strategy, which includes regulation of social media and training of agents on the ground, but also education in schools and, in general, extensive cultural work.

Above all, I would like to stress that criminal law, whether at national or European level, is not enough to counteract deeply rooted expressions of hatred. Combating hate speech cannot be limited to its prosecution, but must also be done through "education, prevention and restoration". In this regard, allow me to formulate some reflections arising from the application of the criminal rules in force in Italy and the data emerging from the study of case law in this field. Some figures: between 2016 and the first half of 2021, no more than 300 actions were brought for violation of the rules on hate speech and for hate crimes. Moreover, only 20% of the cases were brought to trial, with the rest being shelved. These are very small numbers and lend themselves to two reflections: the first is that the level of complaints is very low indeed. The second is that it is difficult for the judge to establish a causal link between the word and the practice of the discriminatory or violent act, a difficulty that the number of shelved cases

demonstrates. This data confirms that criminal law is useful because it stigmatises certain behaviour, but it is not enough. In order to contain this type of phenomenon, in addition to criminal law, it is necessary to focus on education, prevention and restoration.

And criminal justice can also make an innovative contribution, more severe and more constructive than a simple custodial sentence. Prison sentences, especially if relatively short (as often happens in this type of crime) do not always help to re-educate the offender, as required by our Constitutions, the European Convention on Human Rights and the EU Charter of Fundamental Rights. Care must be taken when using custodial sentences to resolve cases of anger, aggression, conflict and hatred. Can we be certain that this social evil is curable by a few months spent in prison? I would like to recall an interesting passage from the Italian Constitutional Court which, in a recent ruling, pointed out that in the case of short prison sentences,

> *"it is difficult to implement a truly effective re-education programme; on the other hand, that period of detention may be long enough to give rise to serious consequences, since entry into a prison promotes contact with persons convicted of much more serious offences and, in general, with criminal subcultures" (judgment no. 28 of 2022).*

If not accompanied by a rehabilitation and social reinsertion programme, time spent in prison exposes people to the risk of radicalisation. And short custodial sentences do not lend themselves to rehabilitation. More imagination is needed in the use of the criminal law instrument. The Italian Constitution (in Article 27) speaks of punishment, not of imprisonment. The application of alternative measures, community and socially useful work, *probation* and many other alternative instruments are bearing much more fruit than the simple "taste of prison" that exasperates rather than redeems the individual. In short, we need to think about what kind of criminal sanction we want to apply to these serious acts, which we correctly describe as hate crimes: do we want sanctions that help eradicate the root of hatred, prejudice, anger and aggression, or do we want sanctions that expose the prisoner to the risk of radicalisation?

3. Restorative justice

These last observations lead us to seriously consider the enormous potential of a new way of looking at the application of a form of justice that does not act as a substitute, but rather as a complement to conventional punitive justice.

Restorative justice places the victim at the centre. Restorative justice sees crime not as the infringement of a rule, but rather as an infringement upon a person. Restorative justice asks the offender to look the victim in the eye and take full responsibility for his or her actions. Restorative justice aims to allow the victim and the perpetrator of a crime to confront their respective "subjective" experiences, with the objective of jointly overcoming the consequences that the event had on them and, if possible, rebuild, repair and close the wound opened by the offence.

Restorative justice has very ancient roots, which hark back, for example, to Hebrew culture. In contemporary times, it was above all the experience of the Truth and Reconciliation Commission in Nelson Mandela's and Desmond Tutu's South Africa that has served as an inspiration for many experiments carried out throughout Europe – for example in the Netherlands and Ireland, but also in Georgia and other member States of the Council of Europe.

A criminal system that focuses on punishment and retribution, rooted in the democratic values that we all recognise today, in addition to seeking to establish a correspondence between the violation of a rule and a sanction, is rightly concerned with surrounding the accused with every possible guarantee, against whom the full force of the criminal law, which rightly falls under the purview of the State, is brought to bear.

In the context of restorative justice, there is a paradigm shift, since the violation, rather than being considered a violation against a legal good or against a norm, is considered a violation against a person, breaking, in the first place, the possible relationship with the offended person and, consequently, the "pact of citizenship" with the community. It is people and social relationships, therefore, that are at the heart of the universe of restorative justice, which is based on the building of ways to allow the victim and the offender, by mutual agreement, to meet in the presence of an impartial third party to restore what the crime has destroyed.

It is not an "instrument of leniency", nor is it indicative of "weakness". Rather, it is justice that seeks to tame the ferocity of the violence and rebuild the bonds broken by the commission of the crime. At the heart of restorative justice, which is an important part of the reform of criminal procedure approved in recent months by the Italian Parliament, there is always an encounter: the encounter between offender and victim.

When the perpetrator of a crime (for example a hate crime, but potentially any crime) is made to "feel" the consequences of their act by facing their victim, we are asking them to take all their responsibilities, not only towards the State (which acts, in an abstract sense, as the guardian of the legal goods to be protected), but also towards the victim themselves. Furthermore, the intention is, above all, to prevent the recurrence of the crime.

Restorative justice can effectively free the offenders, but first and foremost the victims, from the consequences of hatred, offering them the possibility of some "redress" which, in most cases, is never achieved through the mere conviction and execution of the sentence imposed. The paths of restoration can gradually give rise to a new formulation of the relations within the polis, not only applicable to cases involving a criminal offence, but also to family, social and political relations, where a different form of dispute resolution can allow the development of richer and more fruitful relations, initiatives and solutions to the problems not only of daily life, but also of the life of a nation. The starting point lies in the perception of the "other", who is no longer considered as an enemy to be brought down, but as a person with common ground and whose needs can be shared to the extent that it becomes possible to trace a common path capable of offering a space that makes sense to all parties involved.

Naturally, when talking about restorative justice, we must highlight its voluntary nature: the parties participate with complete freedom in the mediation carried out by an impartial third entity. That is why it is necessary that the paths of restorative justice find a suitable space in the legal system and be regulated by rules that grant them the same dignity as the other elements of criminal procedure, and can be adopted at all stages of the proceedings, as required by Directive 2012/29/EU.

The final declaration of the Conference of Ministers of Justice of the Member States of the Council of Europe, held in Venice last December, also points in this direction. In its conclusion, the declaration invites the Council of Europe to encourage and assist its member States to:

> *Develop national action plans or policies, where necessary, for the implementation of Recommendation CM/Rec (2018)8 on restorative justice in criminal matters, by ensuring inter-agency co-operation nationwide, adequate national legislation and funding, while reflecting on the idea that a right to access to appropriate restorative justice services for all the interested parties, if they freely consent, should be a goal of the national authorities; Promote a broad application of restorative justice for juveniles in conflict with the law, as one of the more valuable components of child-friendly justice according to the Guidelines of the Committee of Ministers on Child-Friendly Justice (2010); Stimulate in each member State a broad implementation of restorative justice, its principles and methods as a complement or, where suitable, as an alternative to or within the framework of criminal proceedings aiming at desistance from crime, offenders' reintegration and victims' recovery; Consider restorative justice as an essential part of the training curricula of legal professionals, including the judiciary, lawyers, prosecutors, social workers, the police as well as of prison and probation staff and to reflect on how to include the principles, methods, practices and safeguards of restorative justice in university curricula and other tertiary level education programmes for jurists, while paying attention to the participation of civil society and local and regional authorities in the restorative justice processes and addressing the Council of Europe when in need for co-operation programmes and training of its officials implementing restorative justice; Raise the awareness of restorative justice processes nationwide, and put into practice projects aiming at a widespread communication of the role and benefits of restorative justice in criminal matters, by providing a response beyond penal sanctions;*

Later, at their 1421st meeting on 12 January 2022, the Ministers of the Council of Europe's Deputies:

> *welcomed the Venice Declaration on the role of restorative justice in criminal matters, adopted by the Ministers of Justice of the Council of Europe on the occasion of the Conference on Crime and Criminal Justice – the role of restorative justice in Europe, held on 13-14 December in Venice (Italy); invited all interested parties to reflect on the outcome of the Conference and to make appropriate use of it; invited the European Committee on Crime Problems (CDPC) and the Secretariat to take into account in their further work the proposals made at the conference.*

I believe that if we want to look to the future of justice, we cannot ignore this truly innovative notion of criminal justice – a third way between punishment and pardon, between sanction and amnesty – capable, as some historical and glorious experiences have already shown, of rebuilding social ties and above all of pacifying the people involved in an episode of crime, whatever its gravity.

Marta Cartabia (PhD, European University Institute, 1993) is the Italian Minister of Justice, full professor of Constitutional Law and President emeritus of the Italian Constitutional Court. She taught in several Italian universities and was visiting scholar and professor in France, Spain, Germany, and US. She was appointed senior expert of FRALEX – Fundamental Rights Agency Legal Experts – Vienna (2008-2010) and adjunct member of the European Commission's Network of Independent Experts on Fundamental Rights (2003-2006).

Since 2013, she has been invited to the annual *Global Constitutionalism Seminary*, part of the *Gruber Program for Global Justice and Women's Rights,* a signature international program of Yale Law School. Since December 2017, for Italy, she is member of the European Commission for Democracy through Law of the Council of Europe (also known as Venice Commission).

She is a member of the *Associazione Italiana dei Costituzionalisti*. She is co-president of ICON•S (*The International Society of Public Law*); as a co-founder of the Italian Chapter of the latter in 2018, she was its co-president until 2021. She sits in the scientific and editorial board of a number of academic law journals. She is currently member of the Advisory Board of the *International Journal of Constitutional Law* (I•CON) and one of the founders and, at present, the co-editor in chief (with prof. Giacinto della Cananea) of the Italian Journal of *Public Law.*

She is author of many books, book chapters and articles; among her recent publications, in 2020, with V. Barsotti, P. Carozza and A. Simoncini, she edited the book *Dialogues on Italian Constitutional Justice. A Comparative Perspective* (Routledge). With N. Lupo, she co-authored *The Constitution of Italy* (Hart Publishing, 2022). In December 2020, she has been awarded an honoris causa PhD in Law by the Sant'Anna School of Advanced Studies (Pisa).

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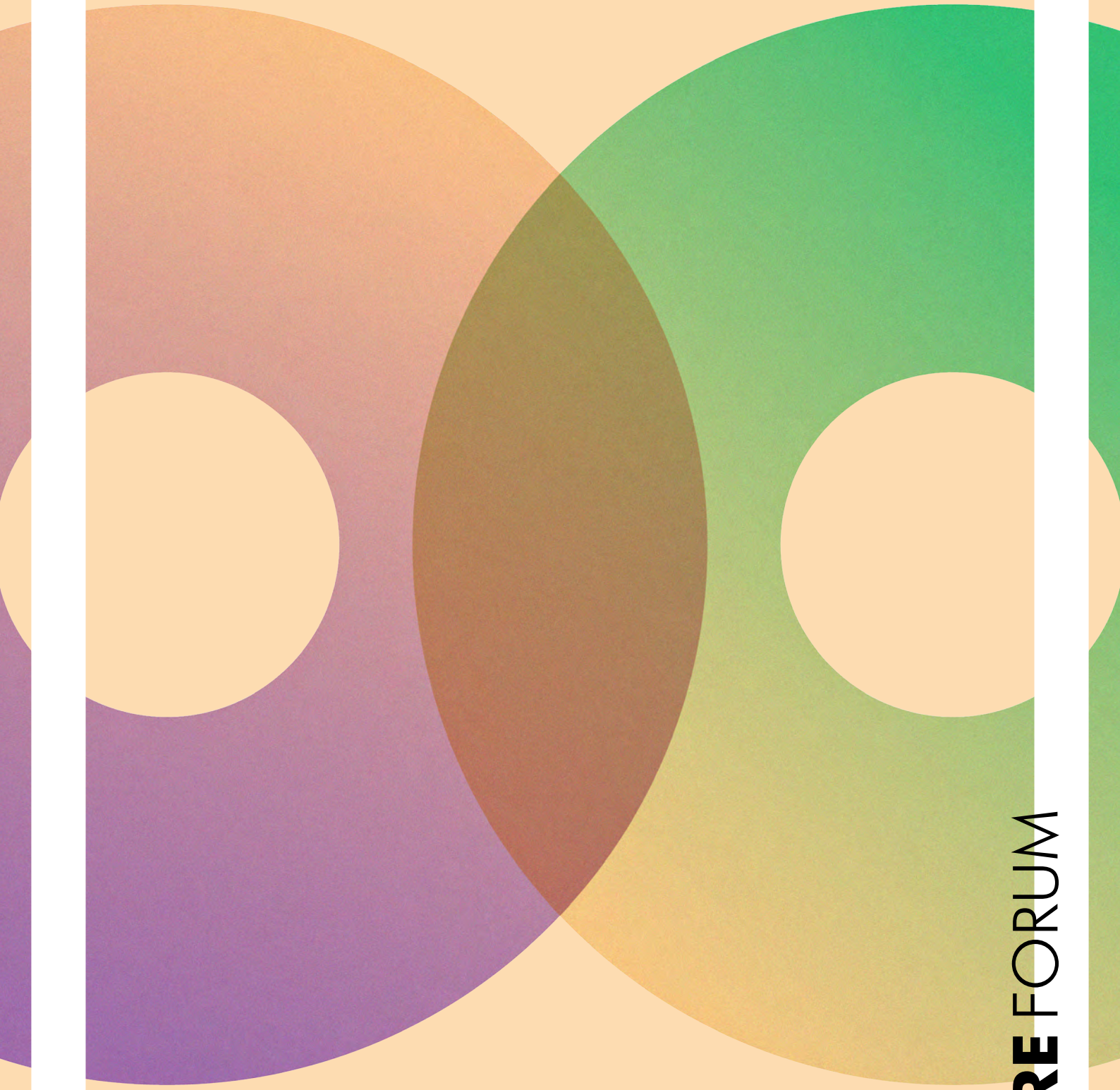

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