Guido Alpa

What is Private Law?

Translated by Antonio Lordi

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Preface to What is Private Law?

Antonio Lordi

The first time I met Guido Alpa was in May 1999 at a conference at the Bocconi University in Milan, during the final year of my Ph.D. in private economic law.

I was attending the conference because the theme of my research was "price in the exchange contract"[1] and Guido Alpa was the only person in Italy to have tackled the theme of contract price, in an essay published in the journal Giurisprudenza commerciale[2].

Considering Professor Alpa's reputation and renown, I was amazed by his openness and availability and the encouragement he offered me in the pursuit of my research. The good fortune of that meeting became clear to me some months later when Guido Alpa was appointed president of the examination board for my doctorate. That encounter and that examination marked the beginning of a friendship and collaborative partnership that stretches beyond geographic boundaries.

Guido Alpa is indeed a lawyer without boundaries, a recipient of awards and recognitions from both legal worlds: civil law and common law. Guido Alpa is already present in the common law bibliography with several books[3] and I am confident that the majority of American Lawyers are already familiar with the achievements of Guido Alpa[4].

What is Private Law? In the six chapters of his book, Guido Alpa offers a new response from a predominantly methodological perspective. The concept of private law as an immutable entity, as established legal principles and meanings, is no longer adequate. Private law must be examined as a system in continual flux, where the principles, the Legal concepts and their meanings change. Reference values may change, despite the unaltered condition of the base values that provide the foundations of private law.

Alpa invites us to consider private law as a dynamic reality in continual evolution, based on and always mindful of the fundamental principles - the concepts that, originating with Roman law and common law and undergoing the nineteenth century codifications, have reached our present day, in the era of globalization of the law.

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1 This work then became a monograph with a preface by Guido Alpa (Lordi, *Il prezzo nel contratto di scambio*, Naples, 2001).

2 Alpa, *Appunti sulla nozione di "prezzo"*, in *Giur. cornm*., 1982, I, 62.

3 *The Age of Rebuilding: Sketches of the New Italian Private Law* (2007); *Italian Private Law*, written with Zeno-Zencovich (2007); *Tradition And Europeanization in Italian Law* (2005); *Compensation For Personal Injury In English, German And Italian Law: A Comparative Outline with Basil Markesinis, and Augustus Ullstein* (2005).

4 Guido Alpa is professor of civil law at the University of Rome «La Sapienza»: he has been visiting professor of law in several universities (University of Oregon, University of California at Berkeley; University of London; Faculté internationale de droit comparé a Mannheim, University of Barcelona, University of Granada). In 1998 he was appointed Master of the Bench at Gray's Inn. It is very rare for a civil lawyer to receive such an appointment. He also received three ID honoris causa from the University Complutense of Madrid, Spain; the University of Lima, Perù and the University of Buenos Aires, Argentina. Besides his academic endeavors, Guido Alpa is President of the Italian Bar Council and he is partner of the law firm Alpa Galletto with offices in Genoa and Rome.

The American lawyer will appreciate the fact that the civil lawyer, and in particular the European lawyer, is open to considering the law and the private law as subjects that change continuously.

Guido Alpa begins his cultural journey with an investigation of the definition of private law. The present day scenario is that private law, though retaining its original historic connotations, is increasingly influenced by other normative systems. Consequently, the role of the private lawyer becomes more difficult, because he needs to develop new tools to describe and understand the legal system.

In Alpa's view, private law is a set of institutes that are not however immutable and not necessarily national in character, but extend also to the Community sphere. This is reflected in the methodology that leads Alpa to devote a whole chapter to "difficult cases." One of the differences commonly said to exist between civil law and common law is that the former has no case law. This myth must be debunked. The use of cases is increasingly recurrent in modern private law, both by doctrine and jurisprudence,

The centrally important chapter IV examines the fundamental institutes of private law: ownership, contract and liability.

At this juncture I feel I should caution the American lawyer who wants to set about studying Italian and European private law. It is the same kind of warning I would give to an American intent on studying the Italian language. Watch out for "False Friends"! Generally speaking, false friends are pairs of words in two languages that look or sound similar, but differ in meaning[5] [e.g., "cold" and "caldo" (warm), "actually" and "attualmente" (currently), "eventually" and "eventualmente" (in case), "addiction" and "addizione" (sum), etc.]. Property and Proprietà, Contract and Contratto, look similar but in fact they have different histories, different legal meanings, and different rules.

Of all the legal subjects, the one that perhaps presents the greatest differences for the common lawyer and therefore for the American lawyer is Property[6]. While the common law notion of property derives from English feudal law, in places influenced by the decisions of the courts of equity (which themselves having been influenced by civil law, seem to exhibit some actual similarities with civil law), the property branch of civil law developed after the French revolution and the definitive elimination of the absolute monarchy. This very different origin and tradition gives rise to principles, dogmas and disciplines that, being so diverse among themselves, cannot, to my mind, be subject to legal comparison (think, for example of the *rule of perpetuities*).

The concept of contract also appears to have different values and meanings, although to a lesser extent. In the United States, the "Holmesian" concept of the contract has given way to the "new spirit of commercial law" of *Alcoa v. Essex*[7] In the "Holmesian" vision[8]: (i) the contract exists only if it involves consideration as defined by bargain theory; i.e., it is not enough to have "benefit conferred by the promisee on the promisor" or "detriment incurred by the promise". Instead, what is necessary is the "relation of reciprocal conventional inducement, each for the other, between consideration and promise"; (ii) if it is ascertained that a contract exists, it will be disciplined only by what is written by the parties, without

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5 http://en.wikipedia.org/wiki/False_friend.

6 Another subject that is fact absent in civil law is evidence – a subject typical of the adversarial trial by jury – an English invention which then migrated to the United States.

7 499 F. supp., 53, 1980.

8 Homes, *The Common Law*, Boston, 1881.

there being any possibility of taking into consideration any eventual contractual contingencies (this was the rigid rule of the so-called absolute contract expressed in *Paradine v. Jane*, Style 47, 82 Eng. Rep. 519, K.B. 1647, which excluded arising impossibility of performance. The theory of absolute contract remained in force until T*aylor v. Caldwell*, 3 B.&S 826, 122 Eng. Rep. 309, K.B. 1863, in which justice Blackburn, citing Pomponio in the Iustinian Digest and I.R. Pothier, imported into common law the theory of objective impossibility of performance); (iii) liability is limited to damages; there is neither execution in specific form nor a general resolution remedy for non-fulfilment; (iv) for Holmes, damages compensation is limited to cases where there has been a specific assumption of risk, thus criticism is aimed at the interpretative openings of *Hadley v. Baxendale* (9 Ex. 341, 156 Eng. Rep. 145, 1854). Grant Gilmore, in his lesson notes at Ohio State University Law School in April1970, proclaimed the "death" of the contract, in its "Holmesian" dimension. The "death" of the contract consisted of the erosion of the consideration requisite, caused largely by the issue of the Restatements of Contracts (specifically section 90) and by the Uniform Commercial Code; of the evolution of remedies for contract resolution by changes in contractual preconditions[9] and in the evolution of protection for contractual non-fulfillment, in the evolution of protection of contractual on fulfilment through the execution in specific form, and the application, also to contracts, of punitive damages. In other words, the common law jurist was somewhat mistrustful of the creation of legal bindings on the contract. From here arose the rigid assessment of the requisite of consideration; a requisite probably imported from Roman law and ironically absent in the systems of civil law. However, the contract seemed to undergo a rebirth ten years later in *Alcoa v. Essex*, in which the court contrasted the "the old spirit of the law" of *Paradine v. Jane*, with the "new spirit of commercial law" which appears in the Uniform Commercial Law and in the Restatements – in other words the legislative interventions held by Grant Gilmore to be the cause of the "death" of the contact, created, in the view of the Alcoa v. Essex judges, the basis of the new theory of contract.

In Italy, just as in France and Germany, the contract first appeared following the reception of Roman law which, beginning in Italy in the twelfth century and developing strongly in the sixteenth century, reached its apex in the French and German schools of the nineteenth centuries. The contract, disciplined in the Italian Civil Codes of 1865 and 1942, is the contribution of this near thousand year period of cultural development, and presents itself to the civil law jurist brimful of theories and disciplines. So we can under stand that to a US common law jurist, like Holmes or later Gilmore, the continental contract would seem to be "limping" right from the outset, being so excessively regulated from various sources, by the mere volition of the parties. By the same token, the contract in its "Holmesian" dimension appears to the civilian to be somewhat "minimalist", lacking the solid theoretical structure of the relations and the legal effects inherent in the continental experience.

A reading of *What Is Private Law?* will allow the American lawyer to start gaining a different perspective and to get to acquaint themselves with the legal institutes studied by Italian colleagues. Guido Alpa's capacity for conciseness is exceptional. The American reader will find in this book a complete and succinct picture of the status of private law in Italy today and the methodology used by Italian lawyers to address modern legal issues. But beyond the legal institutes and the rules, what emerges from Guido Alpa's response to the question "What is private law?" is that Italian private law, despite maintaining its historic identity, is now an integral part of European private law.

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[9] Gilmore, *The Death of Contract*, Columbus, OH, 1974.

The American tourist traveling in Italy and Europe, in the Old World, is struck first and foremost by the history and the antiquity and richness of the monuments. Something similar happens in the sphere of law. The American jurist will find in Guido Alpa's book a marvelous and very useful guide for exploring the world of civil law. "Private law is a branch of existing law, and yet if it were depicted as a pastoral painting, it would appear as quite a multi-hued scenario, offering archeological relics from Roman law; medieval constructs deriving from common law and canon law; trees of liberty with the Phrygian cap, descended from the fundamental rights born of the French Revolution: fecund countryside governed by agrarian law, mills, mines and ports that gave rise to union rights; the monuments of the civil and commercial codes; the splendors of the republican constitution then the dense tangle of briars and brambles, the special legislation of the state and the regions. And in clear view, a spring that issues from the heart of Europe, whence flows Community legislation and the jurisprudence of the Court of Justice".

Preface to the Original

Guido Alpa

This book is neither a summary of the institutions of private law[1], nor a compendium of the philosophy of private law[2], but rather, a narrative in which I describe some legislative and jurisprudential tendencies, doctrinal orientations and intriguing cases that provoke reflection on *private law*. Among the various categories into which legal science is divided by longstanding tradition, private law can boast a millenary history,[3] a great cultural depth, a solid dogmatic organization, and a fundamental practical function.

From the point of view of legal practice, private law is the pre eminent sector in cases handled by lawyers; credit recovery, employment relations, marital relations, disputes between neighboring owners or between owners and possessors of assets, condominial matters, road accidents, compensation of personal damages – these are the matters that "legal operators" con front on a daily basis. If private law should also include commercial law, then we must think of businesses and firms, stocks and shares, bankruptcy, the financial market, the on-line market. All professional spheres of work that constitute the prevailing mass of millions of judicial procedures launched each year or currently pending before judges of every order and grade in our country.

All these themes, which constitute the spinal cord of private law as it is *practiced*, lie beyond the treatment offered here, with the exception of some references in the treatment of more complex problems or in the "difficult" cases. They in fact find their natural home in textbooks of the literature for university students and legal professionals. Private law is in fact the most technically complex branch of law, on account of its age-old evolution and the

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1 Whose function is the subject of many debates: see Scalisi (editors), *Scienza e insegnamento del diritto civile in Italia. Convegno di studio in onore del prof Angelo Falzea, Messina, 6-7 June 2002*, Milano, 2004; for further study see Alpa, *Manuale di diritto privato*, Padua, 2005; an essential and fascinating read is Grossi, *Prima lezione di diritto*, Rome-Bari, 2006, which is a genuine introductory essay to the study of law; among the now "classic" works, Rescigno, *Introduzione al Codice Civile*, Rome-Bari, 2001.

2 Among the first compilations, in a not very philosophical but very traditionalist or technical key, see Cogliolo, *Filosofia del diritto privato*, Firenze, 1891. From more recent times, Raiser, *Il compito del diritto privato*, edited by C. Mazzoni, Milano, 1990. Terminology, concepts, topics of private law are however a point of reference in the "introduction to legal sciences": see the rigorous illustration of Falzea, *Introduzione alle scienze giuridiche. Vol. 1. Il concetto del diritto*, Milano, 1996. On the morphology of present day private Law see Macario and Miletti (editors), *Tradizione civilistica e complessità del sistema. Valutazioni storiche e prospettive della parte generale del contratto*, Milan, 2006; Società Italiana degli Studiosi del Diritto civile, *Il diritto civile oggi. Compiti scientifici e didattici del civilista. Atti del I convegno nazionale*, Capri 7-9 April 2005, edited by Perlingieri, Naples, 2006; Alpa and Roppo (editors), *Il diritto privato nella società moderna. Seminario in onore di Stefano Rodotà*, Naples, 2005; and indeed Rodotà (editor), *Il diritto privato nella società moderna*, Bologna, 1971.

3 In the wide range of literature see Grossi, *La cultura del civilista italiano. Un profilo storico*, Milan, 2002; Ferrajoli, *La cultura giuridica nell'Italia del Novecento*, Rome-Bari, 1999; Irti, *Codice civile e società politic*a, Rome-Bari, 1995 (reprinted 2007); Alpa, *La cultura delle regole. Storia del diritto civile italiano*, Rome-Bari, 2000; Schiavone, *Ius. L'invenzione del diritto in Occidente*, Turin, 2005.

rigor of its logical categories and its terminology; for these same reasons it is also the subject that introduces us to the study of other branches of law, as Angelo Falzea teaches us in his *Introduzione alle scienze giuridiche*.[4]

Here the discourse is not descriptive but problematic and interlocutory. It flows and then stops, asks questions, looks back on the answers, and circles round the nubs of the arguments.

The terminology, the concepts and the institutions are used to place the reader before emblematic core issues of private law. The methods used are various, just as they are in the studies in this discipline: the exegetic method, the systematic method, the comparatistic method, the historical method, the juris-economic method.

In these pages I have attempted to give of private law an idea constructed as *the image of the society* in which the rules of private law – *our rules* – are applied: Italian society as part of the European context, that has developed a complex of rules to guarantee rights, rights held by physical persons and legal persons, in a dimension that is not only defined by the safeguard of private interests, but also aspires to appreciate the public interest against which the former must be tempered.[5] And all this in a framework of *values* in which the economy, and therefore economic relations, must take account of the needs, the expectations, the basic rights of persons; particularly categories of persons that find themselves in a *weak* position, i.e., the employee with regard to the employer, the consumer with regard to the producer and distributor of goods and services, the savers with regard to the firms that operate in the banks and finance markets, the end users with regard to the public administration, and again, *categories* that find themselves subject to *discrimination* (those who live on or below the poverty threshold, immigrants and of course, women, sexual minorities and so on). The discriminated categories are augmented by other eventualities, examined in careful and aggrieved studies in the European Commission Report on discrimination in Europe.[6]

Some jurists use the telescope to observe private law, and identify its important axes, the general objectives, the overall structure; others use the microscope, studying the single case (indeed as is still said today, the *case in point*), positioning it within the system, deciphering its meanings. Both methods are useful, because private law is at one and the same time an "erudition" law, a "technical" law, a "jurisprudential" law.[7] Besides these two instruments I have al so made use of the "kaleidoscope", because private law is a variegated, complex, fascinating subject. At least this is my idea of "private law", an idea, like Proteus, that remodels itself through time, following the evolution of the system, of procedures, of the "living law", and also the methods of interpretation.

* * *

Patient and precious has been the reading of the manuscript by Giuseppe Conte and Nello Preterossi: two cultivated and dear friends to whom I extend my gratitude, though devoid of any bur den of authorial responsibility.

Rome, June 2007

4 Falzea, *Introduzione alle scienze giuridiche, Il concetto del diritto*, Milano, 1995.

5 Oppo, *Diritto privato e interessi pubblici*, in *Riv. Dir. civ*., 1994, I, p. 25 and following.

6 European Commission, *Equality, Not Discrimination*, Annual Report 2006, Brussels, 2007.

7 After the representation of the system structure, theorized by Sacco in many papers, the most recent of which investigates the origins and evolution of the law: *Antropologia giuridica*, Bologna 2007.

The new edition of this booklet takes account of certain aspects of private law that have changed over the last three decades. The methodological approaches have become frayed, so that the contrast between positive law and law related to other disciplines (Law and…) has become clearer. I never thought that law should be understood and applied as 'pure', but rather that it should necessarily bear the contamination coming from the other social sciences. Hence the choice of field, which emerges from these pages, of a law that, rather than the form, looks at the substance, and at the aims of social justice.

Genoa, February 25, 2022

Chapter I

One Question, Many Answers

Index: 1. In Search of the Meanings of "Private Law". – 2. From the Past to the Present. – 3. Private Law Today.

1. In Search of the Meanings of "Private Law"

Private law is not a neologism, but a hendiadys that encapsulates a world.

If the definitions of private law are arranged diachronically, the timespans having been chosen with due consideration, a peculiarity of private law immediately emerges: its definitions vary in time and space. Any prospective narrator of private law is a product of his time and the society in which he exists; the definitions will therefore vary depending on the cultural and finalistic perspectives of the narrator. Considered in itself, the law mutates, metamorphoses and adapts as though it were a living organism, variously resisting or accompanying and facilitating the transformations and changes in social and economic relations. Quite apart from the content, the very borders that mark the territory of law change in space and time. And the terminology, notions and language of law also experience change, as do the methods of study, the role of the protagonists (legislators, judiciary, scholars, and lawyers) and the practices associated with it.

Reviews of the law are therefore necessary from time to time.

These may coincide with agelong anniversaries, as happened with the Napoleonic Code, or the Civil Code of 1865, or the Civil Code of 1942. These revisions may coincide with celebratory events, as occurred with the fiftieth anniversary of the republican Constitution. Or reviews may be occasioned by endemic upheavals, such as Italy's decision to sign the founding Treaty of the European Economic Community in 1957, which caused Community law to spring up in the national system; or they may depend on the collective imagination, which identified in a symbolic date – the turning point of the third millennium – the moment when to ask how much remained of the old private law, how much had changed in the rules of, and the ways of thinking about private law and where the current evolution of private law would lead.

At one time, changes in the sphere of law were not sudden, but rather, slow and stately; they became traumatic only through the effect of the revolutions, and from the alteration of social models and economic production. Nowadays we have adapted to the new rhythms imparted by modern life, to rushed, volatile and imprecise legislation, to (legal) information transmitted in real, mutable and synthetic time, to the circulation of practices, models and techniques on a global scale, to an economy and to technologies in continual and rapid transformation, and we are often forced to find instant solutions to new problems that pursue us with pressing urgency. And we ask ourselves what the criteria for deciphering these phenomena could be: do we use the old categories or use new ones? Do we adapt to change or resist innovation?

We must use the past to understand the present, but we must project ourselves into the future. And what is the future that awaits private law?

2. From the Past to the Present

In 1726 a young Neapolitan jurist by the name of Francesco Rapolla published a book entitled *De jurisconsulto*: It was an introduction to the study of law, written for young scholars who wished to investigate legal science. It would allow them to acculturate and make use of it in the practice of the law; a sort of beginner's syllabus by a young man for other young people. For Rapolla the starting point for the study of law was civil law, and therefore that law handed down by a learned tradition that had made Roman law the very hub of the juridical world and that had declared that the sole reference in the training of the jurist[1] should be the commentary on the "sacred texts" of Roman law collected in the Justinian Compilation. Rapolla's book was therefore in two sections: the first part described the meaning of law, while the second was devoted to how it should be interpreted. The birth of the Enlightenment in the early eighteenth century saw the contraposition of exegetic interpretation – based on notes and comments on the Roman texts – and systematic interpretation, which sought to give a reasoned ordering to those texts. Private law was the law that governed family relations, succession, property, contracts and damages. It was, for its exactitude, for noble tradition, for rigorous instruction and through cultural choice, the law par excellence.

In 1886 – twenty-five years after the political unification of this country and twenty one years before its legislative union – Emanuele Gianturco, one the great jurists of the nineteenth century, published a successful manual, *Istituzioni di diritto civile*, destined to outlive him and remain in use for over half a century.[2] In the introduction, given over to a treatment of "notion, object and subdivision of the science of law", Gianturco tackled the problem of the definition of private law and solved it by using the technique passed down by the juridical learning of the Romans. Thus, he did not indicate the direct meaning, but obtained it *per differentiam*, contrasting it with public law. In fact he underlined the topicality of the Roman distinction between the law posited as binding (public law) and the law as that which can be derogated by the will of private persons (private law); he highlighted the contrast between the generality of the first and the individuality of the second; the relevance of the first to "the interests of civil community and the state, as a political person", and the pertinence of the second to "private interests", He did add, though, that these distinctions tended to simplify the issue:

> Private law (commercial and civil) contains norms of private law and of public law; the civil governs relations involving persons, as owners of property (laws of property, of obligation and of succession) and as family members (family law); commercial law contains the norms of commerce, of navigation and of bankruptcy.

All things considered, Gianturco copied the titles of the books that were divided into the civil code and the commercial code in force at that time.

Further explanations were not necessary. On the one hand, although the subject was difficult, it was not as complicated as it is today; and on the other hand the author was addressing a reader, the student aspiring to be a jurist, therefore a barrister, judge, or notary, a figure already well prepared insofar as he was a member of the bourgeois elite, accustomed

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1 Rapolla, *De jurisconsulto* (Italian translation with parallel text by Birocchi and Fabbricatore), Bologna, 2006.

2 Gianturco, *Istituzioni di diritto civile*, Firenze, 1886.

to educated language and in a certain way also more mature than the young people of our own times.

His definition of private law was dear but now appears out of date: private law was intended to regulate property, relations, family relations and economic relations in an environment largely free from external constraints, save the exceptional cases where public law slipped in to assert authoritative regulation over certain aspects of those relations, entrusted by virtue of their nature, to the freedom of private persons.

And yet that definition and those specifications were not neutral: Gianturco differed both from our exegetes of the civil code, because he had systematic ambitions, and from the liberal lawyers, who maintained a dear distinction between public law – which should have regarded only the sphere of relations between citizen and state – and private law, which should have concerned only the sphere of relations between private individuals, sheltered from any state intervention, because assigned exclusively to the autonomy of single persons (owners and merchants).

The matter was expounded plainly, with a rational arrangement that imposed order on the content of the civil code, introduced in 1865.

Sixty years on (we are in 1945; wartime operations are ending in Northern Italy, while the centre and south of the peninsula have already been liberated), things had changed considerably.

Lodovico Barassi, another great civilist, published the second edition of his Istituzioni di diritto civile, with various pages devoted to the distinction between public law and private law.[3] There is nothing astonishing in this: in the meantime epochal changes had taken place, such as: the development of a very strong dogmatic base, thanks to the Pandectic School, leading, initially at the mid but mainly at the end of the nineteenth century, to the reorganization of the entire mode of conceptualization of law and private law in particular; the advent of the Fascist regime, which absorbed the person into the state and economic activity into "corporate law"; the promulgation of a new civil code, in which the topics of civil law and commercial law were (at least virtually) amalgamated into a unified code; the Second World War, which involved special laws, introducing into the system and even into the civil code, many rules that were harmful to private interests but beneficial to the broader community.

The conception of private law as a branch of the law intended to safeguard the interests of private persons had endured, but the boundaries between the two entities had shifted, to the advantage of public law.

"Today however – writes Barassi – certain partial erosions have occurred in the field once reserved for private law, in tandem with the fundamental subordination of private activity to the public interest. In some cases the state today assumes as its own, interests that did not migrate from the single individual and therefore had their discipline in statutes regulated by the codes of private law. So, where this discipline remains today e.g. in the civil code, it is a complex of public law norms. We find widespread traces of this irruption of public law into the new civil code; and it is a sign of the times. We ascertain it particularly with regard to family law, whose kinship with public law is today hotly disputed. The truth is that public law has significantly infiltrated the legislative discipline of the family group, without however absorbing it completely."

[3] Barassi, *Istituzioni di diritto civile*, FII published. Revised and updated, Milano, 1945, p. 11 and following.

Family law is a fitting example. But it is not the only one: a browse through Barassi's manual will reveal that the incursions concern: physical persons (who are categorized on grounds of membership or otherwise of the *Aryan race* and therefore discriminated against); property, where we see norms deriving from war legislation linked with stockpiles, requisitions and confiscations, the minimum cultivation unit; labor relations, where employers' corrective powers were strengthened; enterprise planning, as part of the corporate system, and so ono And an illustration of the juridical relation is found, with the treatment of the juridical transaction, an essential category in the dogmatic conception of private law, as the abstract volition of the individual that concerns both the act and its content.

3. Private Law Today

Shortly thereafter, the monarchy fell, the republican constitution was approved and a renewed interpretation of the civil code was issued.

Moving to times closer to our own, in 1971 Stefano Rodotà, posing the problem of the illustration of private law in modern society, did not hesitate to offer a "definition" of private law, but suggested some defining "hypotheses", This was because in the meantime other major changes had occurred: the decline of Pandectic dogma, the advent of the Regional[4] system, the disordering of sources with the intervention of Community Law, the economic planning experiment and the "constitutionalization" of private law.

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Almost four decades have passed since 1971 and now. If we were to we attempt a definition, we ought to illustrate the diverse visual angles from which private law is viewed today. Private law is in fact understood as "common law" to private and public subjects, as a complex of homogenous juridical forms, as a source of self regulation of relations based on ethical values and shared de ontological precepts, as a complex of rules and guarantees for the individual in the information and digital communications technological society, as a technique for extrajudicial resolution of disputes, as a juridicial form of the market and much more.

Among the preliminary issues, the narrator must not only tackle the problem of meaning and content of his subject, or that of demarcating the boundaries of his subject in relation to others of the same systemic universe, but must also face up to another problem: where should the story start from? How to find a way out of the maze; how to "untangle the knot"?

In this regard the solutions can be diverse. The narrator has a free hand in the accomplishment of this task. He may follow the order of the civil code, as did the Exegetie School at the beginning of the nineteenth century in France; or he may follow the geometric construction of the Pandectists, who began from a definition of "fact, act, legal transaction."[5] Or again, he may follow the "nature of things": this path was taken by jurists of the late nineteenth century. And again it was Gianturco who observed that:

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[4] Translator's note: Italy is divided into regions. The regions of Italy are the first-level administrative divisions of the state. Italy has twenty regions: five of them are have special autonomy from the central government, granted by special statutes.

[5] Translator's note: according to the Pandectist school legal effects could be generated by facts, acts and legal transactions (in ltalian fatto, atto and negozio giuridico). Such methodology created in Germany in the 19th century was followed also by the Italian scholars. On this point see Lordi, *Toward a Common Methodology*, in *Contract Law*, 22, *Journal of Law & Commerce*, (2002), 1-15.

> Looking at man and at the various human groupings, the law could be organically divided into law of the individual person (essential and property laws), family law, society law, state law, international law or law of nations. However this division, though philosophically exact, does not satisfy the need for an organic exposition of legal science; it would strip the live organism of the institutions and would bring closer, in merely formal modes, institutions of substantially different character.

But in fact the outlook today is exactly the opposite of that suggested by Gianturco: since the person is the centre of the legal system, and the person is the unique and unrepeatable holder of fundamental rights and the mainstay of values which give rise to the constitutions of the Western world, the international agreements and the European constitution itself, it is from the person-and therefore from the moment life begins until its extinction-that should be our starting point.

And it can be seen – merely by touching him – that before the person, the distinction between public law and private law disappears, and private law can no longer be considered as a complex of rules that safeguards private interests, from the moment that the protection of the person requires publicistic guarantees and limits, prohibitions, coercions, that impact on the relations of private persons.

Chapter II

"Private Law" in a multidisciplinary perspective

Index: 1. The many meanings of "private law". – 2. The boundaries of private law. – 3. Private Law Theory. – 4. The current meaning of 'private law'.

1. The many meanings of "private law"

In Italy, private law, which until the 1960s was confined to the civil code and its exegesis, to the dogmatic framework deriving from the application of current Roman law, and to the application of positive law, has opened up to other disciplines and has been enriched over time, obliging jurists to weave and reweave its theoretical substratum without ever losing touch with reality. In fact, the study of the sources of law includes case law, now considered by most to be an autonomous source with respect to legislation, acts of private autonomy, such as codes of ethics, and practices, particularly negotiation practices, which involve the use of typologies and clauses created to bring about economic exchanges.

Without neglecting the great advantages of formalism, other methods have been added that have enabled civil law scholars to better understand social phenomena such as the family, associations and foundations, or institutions traditionally included within the confines of private law, such as property, contracts and civil liability.

This process, which is both cognitive and creative, has shaped an image of private law that has its own peculiarities and does not correspond exactly to the image of private law found in other legal systems, particularly English-speaking ones.

Indeed, the meaning of private law is not unequivocal.

As is well known, the contrast, or, if you like, the comparison, between the families of legal systems runs along the dualism of common law-*civil law*; 'private law' is a less frequent conventional expression in English or North American legal culture, which stands alongside, and in contrast to, 'public law'.

However, the tendency now is to highlight its new aspects, which are described as follows in the presentation of a compendium written in the form of a handbook by a large number of English and American scholars:

> This field embraces the traditional common law subjects (property, contracts, and torts), as well as adjacent, more statutory areas, such as intellectual property and commercial law. It also includes important areas that have been neglected in the United States but are beginning to make a comeback. These include unjust enrichment, restitution, equity, and remedies more generally. "Private law" can also mean private law as a whole, which invites consideration of issues such as the public-private distinction, the similarities and differences between the various areas of private law, and the institutional framework supporting private law – including courts, arbitrators, and even custom.[1]

[1] *The Oxford Handbook of the New Private Law*, edited by Gold, Goldberg, Kelly, Sherwin, and Smith, Oxford, 2020.

There is nothing new in this way of conceiving private law, at least in the eyes of the Italian jurist: within the boundaries of civil law there are not only contracts, property or civil liability, but the whole law of obligations, which is sometimes studied in its entirety even in common law, at least in English law, as shown for example by the works of Ibbetson, A Historical Introduction to the Law of Obligations, Oxford, 1999 and Cook and Oughton, The Common Law of Obligations, London, Dublin, Edinburgh; there are remedies, now called in this way also by us.[2]

And there are the institutions similar to the trust, such as trusteeship (Lupoi) or the fiducie of recent French law. The other institutions, such as copyright, are part of commercial law, which in Italian law shares with civil law the large partitions of private law.

But there is no question in the representation of private law found in common law countries of the treatment of special contracts, concluded between private individuals (C2C) or between professionals and private individuals (B2C) or between professionals (B2B,B2b), which constitute, today as in the past, the heart of property law, and which animate the scholars of civil law, Italian and French, with regard to the discipline of contractual types, the analogical application of the rules laid down for individual contracts to other contracts whose discipline is lacking, nor are there the discussions that animate Italian doctrine on asymmetrical contracts or, with regard to companies, the protection of stakeholders' interests, without thereby distorting the notion of company to the point of configuring it as 'common good'.

The reality is that these general categories need to be historicized and described in the context in which they operate.[3]

Comparison and history are outside the confines of private law only in the partitioning of university teaching, and therefore purely for the sake of didactic organization, but they naturally flow into it, so to speak, when one examines individual institutions: to give an example, one cannot speak of contractual freedom without linking this expression to the incipient capitalism of the second half of the nineteenth century, or of liability based on fault without recalling the forms of protection of entrepreneurs with respect to the satisfactory demands of consumers in order to promote economic development that would have been hindered if the victims had been awarded compensation.

The similarities, differences, anticipations and delays that can be observed in the different legal systems are the salt of comparative law research, but also the backbone of private law tout court: how can one understand the relationship between property and industry without comparing legal models? And how can we understand the insistence of German dogmatics on the Rechtsgeschaeft, literally translated into Italian and Spanish but untranslatable into French or English, or the insistence of 19th century French and Italian legislators and doctrine on the *location d'oeuvres* if not as an expedient to avoid giving substance to the concrete contents of the employment relationship that highlighted the disparity in the contractual power of the contracting parties?

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2 Di Majo, Rimedi, voce del vol. Enc. dir. dedicated to the Contract, Milan, 2020.

3 *Law: History and Comparison: New Propositions for an Ancient Binomial*, edited by Brutti, Somma, Frankfurt, 2018.

2. The boundaries of private law

The reality is that the boundaries of private law, moreover, the very notion of private law itself is uncertain if it is not contextualised.

In an icastic way, Philippe Malinvaud observed that the notion is very ambiguous and the distinction between private law and public law only functional and jurisdictional.[4]

The periodization of the distinction is important, because the boundaries between one and the other subject matter change as economic and social needs change, as shown by the need to keep the State out of the economic relations of private law in the construction of the free market in the 19th century, as well as the change in perspective when the politics of totalitarian states absorb a large part of the private sphere of individuals – as happened in Italy with Fascism and in Germany with Nazism – and when the welfare state is built, which gradually becomes more extensive until it becomes the *Etat-providence*.

These aspects are ignored in the contributions of English and North American scholars, even if the experience of Beveridge on the one hand and of the Roosevelt New Deal on the other appear of extraordinary interest for the impact they had on the organization of forms of production.

The functions assigned to the protagonists in the creation of rules also vary. Here the field is divided between legislators, judges and private individuals. In the nineteenth century on the Continent, judges were reserved a minority role as mere 'executors': Thibaut had won his duel with Savigny. But at the end of the nineteenth century 'doctrinal law' took over, and with it the 'jurisprudence of interests'.

In the totalitarian experiences – which escape the jurists of common law, who are luckier than we are not to have lived through them and not to keep the tragic memory of them – the role of the judge has had alternating fortunes. Under Fascism the legislator had time to construct an entire legal system, the law of corporatism, and therefore did not want to assign any creative power to the judge; even the general clauses, which constitute the hinge between the text of the law and the facts of concrete life, allowing a gradual adaptation of the legal system to new needs, were applied occasionally and very sparingly. Under the Nazis, since there was no time to construct a new legal system by means of legislation, a "parallel state" was constructed by means of administrative acts and the application of general principles and general clauses by judges.[5]

But even in the magna divisio between the law that governs the relations of private individuals and public law, which governs the relations between the State and the citizen, one must not over-simplify, as demonstrated by the massive interventions of the State to implement public services that would have been too costly for private individuals, or the anticipatory conceptions of totalitarian laws that considered the family as an institution of public law.

Today the distinction is wavering, not only on the Continent, but also in common law countries, so much so that jurists are wondering whether it is worth preserving this 'big divide'. And in Italy the concept of "regulatory private law" is now appreciated, in which the

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[4] Malinvaud, *Introduction à l'étude du droit*, Paris, 2017, p. 209; but see also for an accurate historical analysis, in addition to Desmons' entry, *Droit privé, droit public*, in *Dictionnaire de la culture juridique*, edited by Alland and Rials, Paris, 2003, p. 500; the volume by Sordi, *Diritto pubblico e diritto privato. Una genealogia storica*, Bologna, 2020; and Alpa, *Dal diritto pubblico al diritto privato*, Modena, 2017.

[5] Fraenkel, *The Dual State: a Contribution to the Theory of Dictatorship*, Clark, New Jersey, 2010; Hedemann, *Die Flucht im Generalklauseln, eine Gefahr für Recht und Staat*, Tuebingen, 1933.

market sees private individuals as protagonists, entrusting the State with the role of arbitrator of conflicts and mediator of the interests at stake.[6] This solution would deprive private law of any redistributive function aimed at achieving forms of social justice.

3. Private Law Theory

It is more complex to illustrate to Italian jurists the methodological direction that goes by the name of "private law theory". If it were simply a matter of a critical review of private law (conventionally defined with all the reservations mentioned above), or of the "culture" – changing, complex, variously contaminated – of private law, one could indeed replace this formula with that of the pluralistic perspective suggested by the authors in a recent, important book.[7] However, this operation might appear too hasty, because in fact for some decades North American doctrine has organised this "theory" around private law. The contours of this theory are, however, very nebulous.

So firm is the meaning of 'legal theory' as corroborated by the studies of philosophers of law, legal analysts, epistemologists, and so on, the meaning of "private law theory" appears to be as indefinite as it does not mean, in the intentions of the exponents of this trend, simply "general theory of private law".

An unsurpassable example of the classical conception of "legal theory" is the manual by Wolfgang Friedmann, nowadays unjustly neglected, who, combining his extraordinary culture as a civilian and scholar of international law, as well as a philosopher of law, with the culture of the expert common lawyer, acquired following his expatriation to the United States for racial reasons[8] condensed into a few hundred pages a historical excursus of extraordinary clarity.

Preceded by reflections on justice – in particular the justice of the ancients, from Homeric to Platonic to Aristotelian – his discourse is based on aspects of connection between law, justice, ethics and 'social morality', on the relations between the sciences and law, on the antinomies that mark the general theory of law (the individual and the universe, voluntarism and objective knowledge, the intellect and intuition, stability and change, positivism and idealism, collectivism and idealism, democracy and autocracy, nationalism and internationalism), and then the main theories of law, natural law, Kant's neocriticism, Hegelian idealism, the philosophy of values, sociology, phenomenology and existentialism, the impact of biology and social phenomena on law, and concludes with an analysis of positivism, the jurisprudence of interests, the new idealism, and the problems of justice. Friedmann devotes much space to private law in the concluding chapters of his book, both by discussing the freedoms that mark its content – freedom of contract, freedom of association and employment, freedom of possession and enjoyment of property, freedom of private initiative and personal freedoms – but also by examining some of the problems that are most dear to us today, i.e. the approach to the institutions of private law as seen in the English, North American and continental systems.

Quite different are the contributions collected under the shield of Private Law Theory.

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6 Zoppini, *Il diritto privato e i suoi confini*, Bologna, 2020.

7 Grundmann, Micklitz, Renner, *New Private Law Theory*, Cambridge, 2021.

8 *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain*, edited by Beatson and Zimmermann, Oxford, 2004.

First of all, it is not clear when this formula emerged and constituted a point of reference for the doctrine. In 2005, Peter Cane, one of the most brilliant scholars of civil liability, an exponent of Australian culture halfway between English common law and North American common law, published an essay in response to the request of the editor of the Oxford Journal of Legal Studies to take stock of the "private law theory" of the last twenty-five years. Its origins, provided that they should not be anticipated, should be placed around the 1980s, when the first contributions of American doctrine appeared which, provoked by Rawls' essay on justice, began to reflect on the problem of whether the rules of private law could be used to achieve objectives of distributive justice. These essays, by different authors and with different training, focus mainly on the economic analysis of law, and on the classical institutions of private law: property, contract and tort.[9] But the 25-year limit is not connected with the first statements of this theory, being rather linked to the year of the launch of the journal that promoted the debate.

In fact, Cane discusses three different methodological orientations, which we could assign to the politics of law: the conception that sees private law as an instrument of social policy (instrumentalist theory), the conception that sees private law as a set of rules functional to the realization of aims other than those of private individuals (functionalist theory), the theory that sees private law only as a role in the resolution of conflicts between private individuals (formalist theory, Weinrib). The first two conceptions of private law are promoted by the current of critical legal studies[10] and feminist studies. With the exception of the third conception, which could be considered the most traditional and conservative, the others expound an idea of law that cannot be separated from politics. This is the thesis of D. Kayris' book, The Politics of Law, published in New York in 1980).

In the eyes of the Italian jurist, these perspectives are also well known, and, so to speak, by now customary, at least since the publication in Italy, starting in the 1970s, of a number of journals dedicated precisely to the critical study of law, such as Politica del diritto, Democrazia e diritto, Rivista critica del diritto privato, Quale giustizia (later to become Questa giustizia), Critica del Diritto, and so on.

Intertwined with these conceptions are the various streams of economic analysis of law, in particular the conception of normative economics, which goes back to Richard Posner and the Chicago School, and that of Law & Economics by Guido Calabresi of the Yale School.

Then there are the problems linked to the conception of justice, distributive, corrective, commutative. Here the divisions between the most representative authors of private law theory are clear: those who do not tolerate 'intrusions' of the legal system into the sphere of relations between private individuals, e.g. Weinrib[11], exclude that there is room for a distributive justice with the aim, as John Finnis maintains[12] of sharing profits and disadvantages, roles and commitments, resources and opportunities between the parties, and support the 'autonomy' of private law. However, this position is opposed by all those who see in the rules of law a relational system in which the interests of the parties are compared and composed, taking into account their status, their bargaining power, and the social aims to be achieved.

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9 Cane, *The Anatomy of Private Law Theory: A 25th Anniversary Essay*, in *Ox. J. Leg. Stud.*, 25, 2005, n. 2, p. 203 ff.

10 See Cane, notes 18 and 19.

11 Weinrib, *The Idea of Private law*, Cambridge, Mass., 1995.

12 Finnis, *Natural Law and Natural Rights*, Oxford, 1980.

This opposition now appears under the species of the neorealists and the neo-conceptualists, the former being oriented towards confining the aims of private law within the limits of corrective justice, the latter open instead to the application of social aims and thus to the distribution of burdens, obligations, duties and rights and other positions of advantage among private individuals.[13]

The most recent, well-informed and comprehensive essay on the subject is by Steve Hedley, professor at University College Cork, and also founder of a website devoted to private law theory (Private Law Theory: The State of the Art, https://ssrn.com/abtract=3917777). In these pages, Hedley discusses the studies that have appeared in recent years. He examines their methodological aspects and their impact on legal research. But also the ideological assumptions, which are those underlying the great currents of thought such as legal realism, positivism, with the variant of formalism, theories of justice and so on (all aspects already anticipated by Hedley in The Rise and Fall of Private Law Theory, in 134 L.Q.Rev., 2018, p. 214 ff.).

4. The current meaning of 'private law'

This long foreword should guide us in understanding how the meaning of the expression 'private law' should be accepted today.

The starting point is the theory of pre-understanding, by Gadamer and Esser, long studied, translated and discussed also in Italy. Here, rather than jurisprudential references, perhaps it would be interesting to take up the considerations that jurists make on the distinction between "provision" and "norm" (Tarello, Guastini, Parodi), and therefore the different operations and manipulations that the interpreter brings to the normative text. Certainly appreciable is the reference to the works of Marx, Durkheim, Weber, Polanyi, since the authors who in the English or North American experience of Private Law Theory blatantly ignore the contributions of continental European scholars, and the great protagonists of Western culture mentioned above.

Equally interesting is the profile of the economic analysis of law. Here the reconstruction of the theoretical profiles hinges on the origins of this approach, in particular on Coase's "problem of social cost", and on its developments, with particular regard to the contributions of Williamson and Arrow. Certainly, this is the aspect most frequently addressed by the builders of Private Law Theory, who distinguish – correctly – between economic analysis of law and Law & Economy according to the teaching of Guido Calabresi. However, it is clear that, even if represented in a more circumscribed way, the proposal is that this direction cannot be considered as all-encompassing and 'normative', as it must be combined with the other social aspects.

It is interesting to note that this direction has been affirmed in Europe, first of all in Italy, since the 1960s, both with Pietro Trimarchi's research and with the translation of Guido Calabresi's essays, also edited by Stefano Rodotà. It has appeared more recently in England, as well as in France. In Germany, the manual by Schaefer and Ott – which has been translated into Italian – presents a particular feature, absent from other continental experiences, namely the study of the economic aspects of domestic law, while, as happens with all the contribu-

[13] Dagan and Zipursky, *Introduction: the distinction between private law and public law*, in *Research Handbook of Private Law Theory*, London, 2020, p. 20.

tions of philosophers of law, the authors of Private Law Theory refer, so to speak, naturally to the experience they know best, namely the American experience.

This reconstruction cannot fail to include an analysis of the communicative theory of Habermas and Luhmann, an aspect also normally neglected by English and North American authors.

Comparative law and historical analysis have been mentioned. In this regard, it may be useful to mention the contributions in English by our protagonists of comparative law, from Gorla to Sacco, and, as far as historical studies are concerned, the works translated into English by Paolo Grossi and Antonio Padoa-Schioppa.

Now, one of the most complicated aspects relates precisely to the role that *values* can play in the interpretation of laws and in the solution of cases: it is not only a question of the limits to the freedom of the interpreter, but more generally of the legitimation of values, as such, in the discourse of jurists. Talking about values does not necessarily imply a priori agreement with the philosophy of values, nor does it imply abdication of control over the interpreter's discretion. And yet they are referred to by the legislature itself; their binding nature does not derive from an inductive hermeneutic process but directly from the legislative text itself: shining examples of the legitimacy of recourse to values are to be found in the texts of the Treaties of the European Union and in the Preamble to the Charter of Fundamental Rights. Articles 6 and 7 of the EU Treaty state that the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as laid down in Article 2 of the Treaty on European Union (TEU). And the preamble to the Charter states that the Union, «aware of its spiritual and moral heritage» is founded «on the indivisible and universal values of human dignity, freedom, equality and solidarity» and is based on the principle of democracy and the rule of law.

Well, we cannot think that the 'theory' of private law can ignore these premises: in other words, private law, however it may be conceived, and however it may be delimited, cannot subsist without the recognition of these values. Otherwise, there is a risk of proposing an incomplete or even anti-historical representation. Incomplete, because private law cannot be reduced to private patrimonial law, so that the idea that private law is confused with the institutions of private law, and in particular is reduced to considering only property, contract and liability, is absolutely reductive and must be rejected. It is anti-historical, because the concept of a private law connected to the free market is proper to the 19th century, but it creaks in the second half of the 20th century, and becomes unfeasible from the third millennium onwards.

Still talking about values and principles, one of the most extensive and involving debates in literature (not only European) concerns the relationship between principles and rules. Principles have been taken seriously, and thus Ronald Dworkin's fears have been dispelled. But rather little thought has been given to the birth of principles.

The world of principles is older than that of values: as we know, it is already rooted in Greek philosophy, and then penetrates into legal discourse with the regulae iuris. The case law of the Court of Justice and of the European Convention on Human Rights (which is expressly referred to in the Preamble to the Charter) shows that this technique is one of the tools used by the jurist – legislator, judge, scholar – to outline the characteristics of a system and thus the "face" of private law in its historical and geographical location.

The very immanence of principles to the hermeneutic method implies a reconnaissance of the sources of private law.

Here another theme opens up.

And the question that the jurist asks himself, a question that invests the entire concept of Private Law Theory, is whether it is possible to reconstruct a "theory" of private law divorced from the legal system in which it should be inserted.

It is clear that the authors of the common law world do not see this as an essential problem connected with their approach because in that world the circulation of ideas is closely linked to conceptions of institutions and phenomenal realities that are homologous to each other. But Wolfgang Friedmann, and then all the scholars of comparative law over the last century, have already warned that the circulation of models, the transplantation of institutions, and the affinities of legal reasoning cannot lead to a homologation of legal systems. Beyond the problem of "competition between systems", the creation of a "common core" or even a unified text of rules (as the Study Group for a European Civil Code has proposed to do with the Draft Common Frame of Reference) suffers from all the difficulties dictated by the contingent situations existing in the national legal systems.

It is precisely the consideration of certain institutes of private law that demonstrates the impossibility of constructing an "ideal private law" or, in any case, a "theory" of private law that is extraneous and superior to, or detached from, a legal system in force in a given place at a given time. This does not mean that there can be nothing beyond positive law, but it does mean that when discussing matters of positive law it is not possible to ignore it.

For example, the common law circularity of themes and questions concerning the "essence" of the contract is understandable: the common lawyer may portray the contract as a "promise", and thus emphasise its moral value, or as a "bargain", and thus emphasise its instrumental function. But can a civilian speak of a contract without presupposing the definition of Vertrag of German law, of contrat of French law, or of contract of Italian law, sometimes imposed by the civil codes? The same can be said of property, of 'common goods', of copyright (patrimonial and moral). The discussion on torts is simpler, because, beyond the peculiarity of the rules of the civil codes and case law, the problems relating to the distribution of risk, compensation for damage, prevention of damage and its sanction have a less relevant historical background, a more concrete immediacy in reality and an easier "exportability". The debate on damage caused by robots or driveless cars is a universal chorus of voices that can be coordinated without any particular problems.

Chapter III

Private Law and Social Needs

Index: 1. Normative Polycentrism and Social Control. – 2. European Community Law. – a. Critical Interpretation. – b. Juridical and Economic Integration. – c. The Functional Interpretation. – d. The Jurisprudential Interpretation. – 3. The Civil System and Private Regional Law. – 4. Measures of the Independent Administrative Authorities and Moral Suasion. – 5. Deontological Codes. – 6. Effects of Normative Polycentrism. – 7. Private Law as a Branch of "Variable Geometry" Law.

1. Normative Polycentrism and Social Control

Private law is a branch of existing law, and yet if it were depicted as a pastoral painting, it would appear as quite a multi-hued scenario, offering archeological relics from Roman Law; medieval constructs deriving from common law and canon law; trees of liberty with the Phrygian cap, descended from the fundamental rights born of the French Revolution; fecund countryside governed by agrarian law, mills, mines and ports that gave rise to union rights; the monuments of the civil and commercial codes; the splendors of the republican constitution then the dense tangle of briars and brambles, the special legislation of the state and the regions. And in clear view, a spring that issues from the heart of Europe, whence flows Community legislation and the jurisprudence of the Court of Justice.

It is a landscape that has altered very rapidly. One of the most significant transformations of private law in recent years has concerned its sources.[1]

Until the 1960s norms were established according to a binary model: the law of the state and the consuetudinary. From 1957 onwards the Community legislator intervened. Following the implementation of the constitutional provisions for the establishment of the Regions, the picture became more complicated when regional legislation carne into effect from 1972 onward. Then the sources began to fragment. And thus began the growth of "normative polycentrism", on the basis of which the bodies that produce rules for those relations conventionally ascribed to private law began to multiply, the processes of normative production became differentiated,[2] the forms of social control of processes and results of normative production morphed into participative, consultative and self disciplinary models; and the state is increasingly attracting legislative competences relating to private autonomy, shared, where allowed by the constitutional provisions, with the regional legislators.

And yet more. The European Constitution ratification process, which has experienced considerable teething difficulties despite some member states (such as Italy) having warmly welcomed the move towards the "constitutionalization" of Community law, raises again the problem of direct application of Community constitutional norms to relations between private subjects. However the constitutional values appear to be imprinted with a kind of schizophrenic tendency: one the one hand, the guarantee of basic rights and on the other, the reaffirmation of the market, with the preeminence of principles that assure efficient competi-

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1 For an overview see Alpa, *Trattato di diritto civile*, t. I, *Storia, fonti, interpretazione*, Milano, 2000.

2 Giving rise to a phenomenon that Natalino Irti described in terms of *Nichilismo giuridico*, Rome-Bari, 2004.

tion. This reflects tables of contrasting values that show no immediate prospect of resolution. Also, not to be overlooked are: the normative activity expressed by the jurisprudence of the Court of Justice, the normative activity of the independent administrative authorities, the "codification" for uniform models of practice, particularly transactional practices.[3]

Alongside these polycentric tendencies the national legislation works towards the production of "sector codes" (the consumer code, the insurance code, the intellectual property code and so on) and the recodification of the civil code, with special reference to Books I, IV and V; though we must note al so the dissemination of rules in special laws, in "container" laws, in laws of simple deferral, in transient laws, and in the most glaring cases, "blank norms", In the wake of globalization and the Community initiatives, some legislators made sweeping changes to recodify or modify civil codes no longer considered marginal, thanks to the effect of the "decodificazione" phenomenon, but again in vogue as the corrective tissue of common law. But what recodification models must we pinpoint[4] to verify compatibility with the system, with the cultural context and with the institutional political situation?

Is it possible once again to consider the sources with reference to the usual conceptual frameworks and terminological formulas? Is it again possible to subsume them into a coherent "system", and what effects might this systematization produce on the justiciability of interests and the involvement of their holders, no longer considered simple recipients of the norms but rather as co-actors in the normative process? We will try to give an answer – an attempt at an answer – at the end of the chapter.

But there is one aspect of this scenario we need to reflect on further – the fact that the sources concerned are not of equal quality and strength. In particular, the involvement of Community Law, which stands next to state law, regional law, the consuetudinaries, jurisprudence, requires special attention because the categories needed to decipher this part of the system are different to those usually adopted to describe a national system. The Community system has proved an excellent motor for the development of private law: it has introduced competition rules, rules for consumer and environmental protection, and now it is introducing rules concerning the basic subject categories of private law: the contract and civic liability.

2. European Community Law

Cannot Community law be examined as an elaborated "ordering" and therefore illustrated in accordance with the models of the national orderings? One very simple thing: the sources diverge, the connection with the state diverges, the political unit diverges, the criteria for interpreting the norms diverge, and until the European constitution comes into force, it remains a struggle to create a Stufenbau to impart "order" on the Community system. If to this we add all the problems of relations between supranational and internal systems, the stances that are initially unwilling, then wavering, and ultimately not very convinced of the jurisprudence of the Constitutional Courts of the members countries, and then the directives translation techniques of into member state languages, the implementation of directives and their interpretation – both by the Court of Justice and the national judiciaries – what we get is

[3] All problems tackled by the authors who have collaborated on the volumes of *Trattato di diritto civile* supervised by Rodolfo Sacco, for Utet (in particular, see *Le fonti non scritte e Il diritto soggettivo*).

[4] On this point see the vital contributions in *Codici*, edited by Grossi, Milan, 2000; and Patti, *Codificazioni ed evoluzione del diritto privato*, Rome-Bari, 1999.

a sometimes centripetal, sometimes centrifugal accretion of forces that merely provides grist to the Eurosceptics' mill.

The latter group can be grouped into various camps: nationalist Eurosceptics, who favor their national law for its function as a carrier of traditions, history and models that may come under threat from the advance of Community law (and worse still, from European private law); and liberal Eurosceptics, who fear the intervention – or rather the "intrusion" – of the Community legislator into the business of economic relations, which should instead be entrusted to spontaneous evolution; radical Eurosceptics, who on the other hand see Community law either as the codification of rules protective of strong economic interests and detrimental to weaker interests, or the danger of stalling and suffocating the social evolution of the internal systems, and therefore the equalization of the systems.

Obviously, many of these criticisms must be given serious consideration, so that even the Euroenthusiasts realize that this historical, political, economic and especially legal phenomenon must be examined with care. From here stems the interest in the growing body of critical writing in the field of legal literature, which helps us reflect on Community law and thus on European private law.

a. Critical Interpretation

One of the most thrusting critical analyses of Community law, intended not so much to evidence its constriction of the market, but rather its meager sensitivity towards the social aspects of this set of rules, arises from the AngloSaxon world, in the work of Ian Ward.[5] In his introduction to the essay Ward begins with the assertion that Community law is subject to extremely rapid evolution – and it would be interesting, from this angle to ask whether the same happens in the national systems independently of the impetus they receive from the supranational norms. He al so emphasizes another innovative aspect of this body of rules: the fact that it originally arose in the sphere of public law and then gradually extended to impact on "substantial law" (the term Ward uses to refer to private law). Ward continues, warning that Community law resides on a genuine, consistent and binding "philosophy" that is nourished by political choices. An aspect often sidelined in experts' discourses on the subject, Ward's enquiry aims to reveal the aporia and the injustices of the rules. Viewing them from an outsider's perspective, he also lays bare their metajuristic aspects, when it becomes evident that – as with any other juridical system – the juridical analysis of Community law can only be conducted if harnessed with historical, political, philosophical analysis and other yet other disciplines.

From the political point of view, Community law originates and develops with the emergence of the idea of a united Europe. If we overlook historical events, the endeavors of the great leaders, or the ideals that drove the Roman emperors, the Papacy, Charlemagne, and other characters who have yearned for the union of the regions that make up Western Europe, we can delineate, in the history of philosophical thought, some theorists of the unification of Europe.

Leibniz, whose Codex juris Gentium propounded a pan-European public philosophy; Kant, who considered it in his essay "Perpetual Peace"; and Nietzsche, who witnessed the rise of industrial modernity and the forces of capital as a tide that threatened to submerge and therefore unify Europe. Looking back at the political-cultural initiatives of the twentieth cen-

[5] Ward, *A Critical Introduction to European Law*, II pub., London, 2003.

tury, Ward picks out the movement, promoted by Lord Milner in 1910 and by Lord Lothian at the end of the First World War, which laid down the foundations of federalism. However the European Union was not born out of idealism but rather economic motives, although it is true that the federalist movement prepared the ground and for a certain time facilitated the development of the Union. Churchill was also convinced of the need for a union of European states, judging by his famous post World War II 1946 speech in Zurich, where he called for a unitary state. But this was a political notion conditioned by circumstances.

Churchill was thinking of a European union promoted by the continental states, controlled by France – to heading off any dissolvent moves from Germany – but not involving the United Kingdom (at the time still committed to the idea of a British Empire transformed into a Commonwealth, positioned politically between the USA and the Soviet bloc).

Another political reason for the creation of a European Union emerged in the 1950s, as a reaction to US economic hegemony: this factor must be taken into account in the entire evolution of the Europeanist movement; and still today the cohesive strength of the Union can be attributed to this need. This was a "functional" federalism in contrast to any territorial or idealist notion. Figures from the socialist spectrum also contributed to the idea of a united Europe. The foremost of these was the great German politician Carlo Schmid, father of the German constitution.

Ward reprises the theme of the construction of the Union in successive phases, citing the efforts of other statists such as Robert Schuman, Jean Monnet, Van Zeeland, Paul-Henri Spaak and in Italy, Altero Spinelli. In Spinelli's view, the members of this group were the "blessed' founders of the Union. The rest is the history of the European Union through the signing of the treaties, to the Nice Charter and the treaty for the European constitution. Ward insists it is more an economic and juridical rather than political history. And in fact, as was mentioned above, the Union is founded more on law and laws than on political unity, something which is yet to come.

In this juridical construct Ward underlines the role Court of Justice of the European Community: a technical role, but also one of the policy of law, because with its decisions the court has not only identified the general principles that sustain Community law – and therefore the Community itself – but has established: (i) the prevalence of Community law over national laws; (ii) the horizontal effect of the directives; (iii) the foundations of a common administrative law; (iv) the foundations of a common constitutional law.

b. Juridical and Economic Integration

This process of juridical integration was very incisive in the initial decades and then began to slow down. It is difficult to say if this was due to the fact that the court had achieved its intended aims, or whether it was because the judges and attorney generals who had given the court its vitality had changed over time, or whether the entire European construct had suffered a political slowdown, and the court was merely following suit.

In the early decades the court – as expressed in Mancini and Keeling's[6] metaphor – acted in accordance with the "the genetic code transmitted to it by the founding fathers of Europe, and therefore with the conviction that its task consisted of the application of a Treaty whose primary objective was the realization of a union of the peoples of Europe". In other

[6] Mancini, Keeling, *From CILFIT to ERT: The Constitutional Challenge facing the European Court*, *11 Yearbook of European Law*, l, 1994, p. 186.

words the court acted as a tireless promoter of centralism, uniformity and unification. But criticisms directed at the court by those opposed to the creativity of the judges, especially the judges stepping in to substitute the inert legislator, may have slowed its course. In any case recognition is given to the court for its leading role in the pursuit of a strategy for market integration.[7]

These are the premises on which Ward bases his interpretation of the phenomenon of "Community law", adopting some diverse perspectives: (i) the law of European integration; (ii) the law of the market; (iii) the law of persons; (iv) the future of Europe.

Integration (economic, social, political and legal) passes through a phase of creation of rules common to all subjects. This leads to one of the pushes towards the creation of a "European civil law", which finds opposition from the exponents of non-codified experiences, *in primis* almost all British jurists and politicians. All the phases that have led to greater integration have been rejected by British politicians and jurists: Ward is meticulous in providing details of debates in Parliament, the House of Lords, in political programmes that at first showed indifference towards the EC, then membership of the Community, then UK obstructionism within the Union, before putting forward the argument of those who agree that "the sole significant barrier to European Union reform", in its most unitary and integrated sense, is posed by the United Kingdom.[8]

There is however an area where the UK has diligently adhered to EC programmes: the promotion of fundamental rights (to which prior reference has been made) with the approval of the Human Rights Act (1998).

Even the single market project was achieved despite an "awkward" partner like the UK. Nor did the advent of Blairism substantially alter British Eurosceptiec policy, informed by the motto "Keynes at home, Smith abroad", And in fact Community policy, at least in some sectors, has ended up as "liberalization" of the market. This at any rate is the conviction of those who have studied the circulation of goods: Community law in this sector has been informed by a policy of substantial *deregulation*;[9] a conviction that Ward documents on the basis of cases of the Court of Justice, which cannot be reported in these pages.

Competition regulation is aimed at a level of "possibility", compatible with the needs of the operators and with the policies for protection of the environment and those consumers in conflict with the former. The model that emerges is a mix of the continental model, which adopts social policy as its guideline, and the Anglo-American model, which proceeds case by case.

Ward also holds a substantially critical view of the policy for the protection of consumers, whom he sees in the same way as "workers", as the weak counterpart of the economic potentates listened to in Brussels. And the conclusion on market regulation is that the economic union has ended up stifling political freedom.

We will come back to these conclusions in successive chapters, also because – from the Italian perspective – the consumer safeguard policy can be considered to be contrary to

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7 Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, Oxford, 1993.

8 Duff, *Britain and Europe: The Different Relationship*, in *The European Union Beyond Amsterdam: New Concepts of European Integration*, edited by Westlake, London, 1998.

9 Weatherill, *Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation*, in *36 Common Market*, *L. Rev*., 1999, p. 51 and following.

one of the strongest modernizing drives of the juridical system, and certainly not biased towards the economic operators.

Equally critical is Ward's position regarding the Community law of persons, considered here not so much in the context of "European citizenship", as in the fight against discrimination. Ward's argument, somewhat isolated in the Italian context and hotly debated in Britain, is that the Community law in question is in favor of discrimination and not against it, and that it is essentially a hypocritical norm, because its stated purpose is the promotion of equality, but it is just as much concerned, albeit in a formal manner, with inequalities regarding: employees – not protected when they should be; immigrants in relation to European citizens, women in relation to men, and minorities (including sexual orientation) in relation to the majority group.

The conclusion could only be dubitative: the moves towards liberism are at odds with those of a social-democratic slant, the strengthening of European citizenship conflicts with the laws for foreigners and immigrants, so that to privilege "multiplicity" in "unity" becomes an impracticable task, even if the goal of "European Humanism" is the cipher that connotes the European model compared with the other existent models in the western world.

c. The Functional Interpretation

The critical analysis of Community law marries with functional analysis. Functional analysis has the purpose of considering the objectives, principles and methods followed by Community bodies in the production of Community law.

The first step of the normative process is identified by the authors in the case Costa v. Enel, decided by the EC Court of Justice far back in 1964 (C 6-64). In this case the court declared that "the EC Treaty has created its own juridical system that (…) has become an integral part of the juridical systems of the member states, and the national courts are obliged to apply it.[10] But as soon as this process was begun, Community law became the "law of European citizens and residents", and therefore turned into a *personal* law.[11]

As happens in every juridical system, the interpreter does not stop at merely commenting the literal text of the provision, but seeks to uncover the spirit underlying it: the spirit of Community law consists primarily in the opening up of markets and the construction of a single market, which obviously involves the removal of existing barriers the national structures that might obstruct this fundamental aim.

The effects of the creation of the single market are however reflected in the establishment of fundamental rights and in the legislative integration of the European Union. Not only legislative, though: the jurisprudence of the Court of Justice has played and still plays an eminent role in this process. The Court – in the case of Van Gend and L05S (C-26/62) – ruled that Community law constituted a "new juridical system of international law, for the benefit of which some member states curbed their sovereignty, albeit in clearly defined sectors, a system binding not only for the states but also for the citizens". Its bindingness is supported by appropriate sanctions for violation of the rules.

In any case, as evidenced above, the Community law system cannot be considered on a par with the traditional conception of a juridical system, because it is incomplete: some-

[10] In this regard see Reich, Goddard, Vasilijeva, *Understanding EU Law. Objectives, Principles and Methods of Community Law*, Oxford, New York, 2003.

[11] Reich et al., *op.cit*., p. v.

times Community law is expressed through principles instead of detailed rules, and the member states are therefore entrusted with completing the precept. The protection of citizens seems more similar to a simple "obligation of means" rather than an "obligation of results": and moreover what is lacking – for the moment – is a systematic and organic statement of the duties of the citizenry.

In this regard the single market is regulated by principles and not by precise norms; there are no general principles that maintain the protection of private autonomy, but opinion is unanimous that the internal system rests on this, and therefore codifies an "implicit" principle within it.

In the same way the Community system does not normally deal with remedies: They are entrusted to the national courts.

But the liberal intent that stimulates the creation of the single market must not be understood in an absolute sense: the Union pursues its "policies of law" (e.g., in the areas of environment and consumers, agriculture, fisheries, transport and foreign trade) that have the effect of erecting just as many barriers to the operation of the member states and of European citizens.

Now, it becomes evident that Community law is not – for the moment – informed by the principle of the hierarchy of sources. So some basic questions remain open, towards which the Court of Justice has not kept a uniform and consistent stance: it is debatable whether the rules are sufficiently clear and precise, whether the laws recognized towards single per sons are justiciable and whether they are unconditional, and whether it is possible to apply Community rules horizontally. Since it is not possible to give a definitive and general response to these questions, it is proposed that these questions be examined – from a resolutely functional perspective – on a *case by case*[12] basis.

d. The Jurisprudential Interpretation

The process of Europeanization of private law is the result of multiple factors: it is not only the underlayer common to many juridical structures that make up a sort of "common juridical culture",[13] not only the transplant, harmonization and sometimes homogenization of juridical rules, helped along by the process of Union integration,[14] but also through the role of doctrine[15] and especially jurisprudence: in particular the jurisprudence of the EC Court of Justice.

Of the many roles held by the Court of Justice, Federico Mancini put the spotlight on its role of guarantor: The rulings of the Court of Justice have asserted the fundamental rights of European citizens, along with some base principles of Community law that secure its unity and strengthen its evolution, like the principle of parity of treatment, the principle of proportionality, the principle of subsidiarity.[16] The interpretation of Community rules has also rein-

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[12] Reich et al, *op.cit*., p. 20 and following.

[13] Mueller-Graff, *Les perspectives d'un droit commun européen*, in *Rev. affaires europ*., 1998, p. 242 and following.

[14] Tizzano, *Il diritto privato dell'Unione europea*, vol. I, Torino, 2000, p. viii.

[15] Ost, *The Adjudication of Law and the Doctrine of Private Law*, in *The Harmonisation of European Private Law*, edited by Van Hecke and Ost, Oxford and Portland (Oregon), 2000, p. 167 and following.

[16] Mancini, *Democrazia e costituzionalismo nell'Unione europea*, Bologna, 2004, with an introduction by Amato.

forced the creation of the single market, assuring the economic operators' greater certainty of the law and greater predictability of solutions: a role of guarantor of market order that stands alongside the prior role.[17] But as we await the particular nature of Community law to be seen as juridical system, the court performs a further role: that of creator of jurisprudential rules that fill in the gaps in the system.

Many commentators believe that the work of the Court has been more vigorous in the area of tackling barriers to competition and in the area of discrimination in employment than in other fields, but – examining jurisprudence from the point of view of the formation process of a private European law – it is believed that the roles mentioned above can be accompanied by another equally relevant one: *the jurisprudential creation of European private law*.[18] This latter role produces notable effects in the evolution of the national systems. It is a sort of "fertilization" that operates in two directions: for its decisions, the court assumes terms, concepts and institutes inferred from the national systems, and by reelaborating them, codifies them and applies them generally, so that they fall into the national systems, maintaining an expansive force. This is why it is emphasized that European private law is in large part jurisprudential.[19] Some decisions will be dealt with in the chapter on *difficult cases*.[20]

3. The Civil System and Private Regional Law

Private law evolves also with stimulus "from below", i.e., legislation promoted by the regional governments. Until 2001 doctrine and jurisprudence held that the regions discharged no legislative function in matters concerning private law (even though the regional legislators made numerous attempts to intrude into this sector – the preserve of the state – all

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[17] Shapiro, *The European Court of Justice*, in *The Evolution of EU Law*, edited by Craig and de Burka, Oxford, 1999, p. 328.

[18] Scannicchio, *Il diritto privato europeo nel sistema delle fonti*, in *Trattato di diritto privato europeo*, edited by Lipari, voi.1, 2nd pub., Padova, 2003, p. 153 and following.

[19] The literature of the Court of Justice and the single cases resolved by it is immense. The jurisprudence collections are instead not so numerous. In Italian literature we signal some precious casebooks, which adopt different criteria for the organization of materials. For Italian law, it is important to indicate – given the frequency with which the judges turn to the Court of Justice to resolve problems of application of Community law in internal law – that this "dialogue" between Italian judges and the Court of Luxembourg judges has been very valuable, because it has contributed to the very evolution of Community Law. We need only refer to what are now "classic" cases: *Costa* v. *Enel* (C-6/64), *Simmenthal* (C- 106/77), *Fratelli Costanzo* (C-103/88), *Francovich* (C-6 e C-9/90), *Merci Convenzionali* (C-179/90), *Faccini Dori* (C-91192), *Job Centre* (C-55/96), *Gorgonzola* (C-87/97), *Gozza* (C-371/97), *Bombardini* (C-285/99), *Gottardo* (C-55/00), *Arduino* (C-35/99), *Consorzio italiano fiammiferi* (C-198/01). Recent cases, regarding citizens of other states, are significant for illustrating how the Court of Justice models the rules of European contractual law and civic responsibility. Among the many I would like to point out are: *EasyCar (UK) Ltd./Office of Fair Tradin*g (C-336/03) in which car rental contracts evaded the discipline of consumer contracts, *Gruber/Bay WA AG* (C-464/0 1) in which it was excluded that mixed use contracts could be included among consumer contracts; *Peter Paul* (C-222/02), in which the state was deemed not responsible for the lapse in vigilance of the administrative authorities appointed to the control of guarantee funds for savers.

[20] See chapter VI below: the text of the decisions, together with others that concern the matter of relations between private persons, is collected in *Casi scelti in tema di diritto privato europe*o, edited by Capilli, with an introduction by Alpa, Padua, 2005.

were blocked by the rulings of the Constitutional Court). Today however the issue is more complicated. At the dawn of the new millennium an upheaval, triggered by the constitutional reform called for by law No. 3 of 2001, loomed into view: the collision between state law and regional law.

In the wake of the constitutional reform that reformulated articles 117 and 118 of the constitution, the question of "regional private law" arose again. The regions waited neither for the specification of the interpretative lines designed to clarify the meaning of the reform, nor for the state legislator's elaboration of the "general principles" into which to place the regional laws in spheres (no longer termed "matters") of concurrent legislative competence. The result is that there are now numerous regional laws that impact on relations of private law, beginning with those that regulate the new professions. The Constitutional Court had to intervene, in order to launch the hermeneutic process necessary to coordinate the two normative sources.

With two sentences, exemplary on account of their logical consistency and topic-by-topic correctness, the Constitutional Court has taken a stance on the issue of state normative competence concerning the matter of the "civil system" (art. 117 para. 2 letter *l* Constitution.) and the other areas regarding "private law" and on the question of the boundaries of regional legislative competence: the first pronouncement (No. 353 of 2003) concerned the regulation of the new professions, while the second dealt with the phenomenon of 'mobbing' (No. 359 of 2003). It is a rather complex problem, once considered uncommon[21] but one which has now become central to the organization of the new constitutional arrangement.[22]

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[21] In particular see Galgano, *Le Regioni e il governo della società civile*, in *Giur. Cost*., 1977, I, 329; Alpa, *Diritto privato e legislazione regionale*, in *Impr., amb., pubbl. amm*., 1979, 219 and following; and more recently Vitucci, *Il diritto privato e la competenza legislativa delle Regioni in alcune sentenze della Corte c*ostituzionale, in *Giur. it.*, 1998, 1301 and following; Alpa, *Il diritto costituzionale sotto la lente del privatista*, in *Riv. dir. cost.*, 1999, 34 and following; Lamarque, *Aspettando il nuovo art. 117 della Costituzione: l'ultima pronuncia della Corte costituzionale sul limite del diritto privato nella legislazione regionale*, in *Le Regioni*, 2002, 579.

[22] For contributions from the privatists see Irti, *Sul problema delle fonti del diritto*, in *Riv. Trim. dir. proc.civ*., 2001, 702 and following; Roppo, *Diritto privato regionale?*, in *Pol. dir*., 2002, 553 and following; Vitucci, *Proprietà e obbligazioni: il catalogo delle fonti dall'Europea al diritto privato regionale*, in *Europa e dir.priv*., 2002, 753 and following. The quarterly periodical Dir. Proc. Civ. organized its annual seminar on this theme (December 2002); papers are now collected in the volume *L'ordinamento civile nel nuovo sistema delle fonti legislativ*e, Milano, 2003 with contributions from Lipari, *Il diritto privato tra fonti statali e legislazione regionale*, *ivi*, 3 and following; Schlesinger, *Ordinamento civile*, p. 27 and following; Alpa, *Il limite del diritto privato alla potestà normativa regionale*, 105 and following; Gambaro, *Comunicazione*, 121 and following.
For the relevance of material on the civil system and other matters to which the agricultural "division" can be referred, I would indicate the acts of the study meeting on *Il governo dell'agricoltura nel nuovo titolo V della Costituzione*, headed by and with a paper by Germanò, Milano, 2003, with contributions from Galloni, D'Atena, Alpa, Grassi (S.), Iannarelli, Trebeschi, Costato, Romagnoli (E.), Rook Basile, Germanò, Barbini, Chiappetti.
For labor law see among the many: Treu, *Diritto del lavoro e federalismo*, in *L'ordinamento civile*, cit., 35 and following; Tosi, *I nuovi rapporti tra Stato e Regioni: la disciplina del contratto di lavoro*, in *ADL*, 2002, 599 and following; Magnani, *Il lavoro nel Titolo V della Costituzione*, *ivi*, 645 and following; Carinci, *Devolution e diritto del lavoro*, in *http://www.amministrazionecammino.luiss.it*, 2001; Rusciano, *Il diritto del lavoro nel federalismo*, in *Lav.Dir*., 200 l, 495 and following; Ballestrero, *Differenze e principio di uguaglianza*, *ivi*, 2001, 424; Persiani, *Devolution e diritto del lavor*o, in *ADL*, 2002, 19 and following.

The court's position was met with a certain amount of apprehension on the part of many privatists: prior to the reform of article 117 of the constitution the Constitutional Court judges had on various occasions pronounced on the problem generally, couching it in terms of "limit of private law before the Regional normative power"; they had adopted a basically restrictive line, but at certain times exhibited hesitation, either because of the particularity of the case under examination or because of the need to concede even a modest space to the incursion of regional legislation in a sector that was traditionally the competence of the state. So then, legal doctrine, amalgamating the pronouncements, was able to distinguish the various phases in which the disfavor for private regional law had experienced alternating fortunes.

With the reform of the text of article 117 of the constitution, called for in constitutional law No. 3 of 18 October 2001, and with the "adjustment" action to the system called for by law no. 131 of 5 lune 2003, the scenario has changed but some ambiguity has crept into the normative text, due to a different specification and classification of the subjects, as regards Regional competence (at the time residual and by exception) provided for in the original text, due likewise to the uncertainty of the semantic boundaries of the "subjects", as well as uncertainty of the production modalities of legislation of concurrent competence. It was expected that the court would pronounce on some important questions: would it have maintained an oscillating position even after the so-called devolution? Would it have recalled its previous sentences, even if they referred to a different kind of constitutional system, to resolve its exegetic problems? Would it have ma de some concessions to the imagination of local law or would it have defended the citadel of "private law" keeping it within the bounds of the state reserve? And how would it have been able to clarify the meaning of ambiguous legislative terms?

For the moment at least these fears seem to have dispersed: private law, understood as a "civil system" remains firmly within state competence. Beyond the area of the "civil system" we must proceed with caution and ascertain matter by matter, and in some instances even case by case.

To those interpreters entrusted with the task of disentangling this intricate issue, the most recent sentences of the Constitutional Court have proved a decisive aid. The theme is resumed at a later point, in chapter VI, where some "difficult" cases are examined.

4. Measures of the Independent Administrative Authorities and Moral Suasion

This aspect of standardization techniques has also been the subject of a detailed analysis that cannot be reported here. The occasion was a conference organized by Pietro Sirena in Siena in 2004. The essential points relate to both the action of the independent administrative

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For public law in the estensive body of literature see especially the essays collected by Ferrari and Parodi, in *La revisione costituzionale del Titolo V tra nuovo regionalismo e federalismo. Problemi applicativi e linee evolutive*, Padova, 2003, with contributions from Ferrari, Pizzetti, Floridia, Carrozza, Parodi, Fracchia, Sicardi, Di Giovine, Romboli, Bianchi, Balduzzi, Garbarino, Ruggeri and Salazar (C.); on the "civil system" see in particular Bartole, *Regioni e ordinamento civile: il punto di vista del costituzionalista*, then *l'ordinamento civile*, cit., 7l and following; for fundamental rights, Luciani, *I diritti costituzionali tra Stato e Regioni (a proposito dell'art. 117 comma 2, letto m), della Costituzione*, in *Pol.dir*., 2002, 345 and following.

authorities in drawing up rules on contracts – e.g., the Consob regulations on contracts with investors, the deliberations of the Bank of Italy on the transparency of contracts, the memoranda of ISVAP (Institute of Vigilance on Private Insurers and the Collective Interest) on insurance policies – and the moral suasion measures enacted by the authorities to ensure the decisions of private autonomy conform with current rules; for example, the initiatives of the competition and market watchdog regarding the concentrations that could alter the competition system in single sectors of the market.[23]

What has emerged is:

(i) the tendential uniformity of contractual texts;
(ii) the transparency of contractual conditions;
(iii) control of the correctness of the conduct of market operators, with particular regard to conflicts of interest.

5. Deontological Codes

The deontological codes are also enjoying a positive phase, because the Community directives' frequent appeals to the national legislator and economic operators, aimed at introducing deontological codes that can regulate (a) the behaviors of suppliers of goods and services on the markets and (b) the initiatives taken by the national legislator (as happens for codes in company, financial and insurance areas) or by entrepreneurial and professional sectors concerned have raised the problem of the elaboration, juridical relevance and application of these normative models.

The discussion regarding this theme should be wide-ranging because there are now several "generations" of codes, and also because there are different types of codes. Regarding the generational aspect, the first codes elaborated and applied in Italy were considered on a par with organizations' internal rules, as happened with the advertising self-regulatory code. Then there are the professional codes like the deontological codes of journalists, doctors and so ono The deontological code in the end became an ordinary standardization and norms production technique, used by the legislator for the task of regulating the conduct of the operators, while reserving for itself or for other standardization and norms production centers – like the independent administrative authorities – a substitutive and corrective function, in the case of partial or total non-fulfillment of the categories concerned. An example would be the personal data guarantor, where in the event of indolence on the part of obligation recipients, can exercise a substitutive function.

It should be noted however, that many codes – especially those concerning the exercise of the liberal professions – are based on old data. So bearing mind the jurisprudence of the Court of Cassation, they can be assimilated into collections of "uses or consuetudinaries": in this case the codes move away from the specific sphere of private autonomy, and assume the function of primary rules, despite their consuetudinary source. This is the case, for example, of the deontological code of the legal profession, on the basis of which the National Legal Council exercises its function of exclusive social jurisdiction on the deontology of the lawyers.[24]

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[23] On this point see Alpa, *I contratti d'impresa, i regolamenti e gli usi normativi*, in *Vita not*., 3, 2004.

[24] Consiglio Nazionale Forense, *Codici deontologici e autonomia privata*, edited by Alpa and Zatti, Quaderni di Rassegna Forense, Milan, 2006; Perfetti, *Corso di deontologia forense*, Padua, 2007.

In recent years the jurists, initially through autonomous choice and later because of obligation from normative provisions and legislative reform of the intellectual professions, have conducted critical analyses on the ordering categories of professional deontology, and even the raison d'être of the professional rules of conduct.

In an initial phase, discussion was made of the multiplicity and complexity of these rules, ascribed to private autonomy: the selfregulatory norms appeared much like the rules the "legal profession" gave itself on the basis of the freedom granted by the legislator, well aware that in the sphere of independent work, not only was recourse to collective agreements not possible – as had happened, in the guise of corporate norms, under a certain Regime in the past – but neither could the state meddle with the ethics that this professional class expressed. The members of the class discharged a function of ethical control, intended to classify colleagues on the basis of continuity of observance of the canons of correctness, and also to exclude those non-conformant elements from exercising the profession. The control had a triple function: safeguarding the public interest so that the intellectual professions should efficiently exercise their essential role in the sphere of civil society; safeguarding the interests of the profession category in question, so that it may suffer no negative reaction from the wider community as a result of indecorous behavior on the part of single practitioners; performing a deterrent function, so that the single professional may be discouraged from violating ethical canons from fear of subsequent possible sanctions.

But as long as the class was cohesive, was unequivocal in its outlook and represented, in the social structure, the expression of the middle class, especially the "managerial class", then the deontological code more resembled the expression of a manifesto of spontaneously shared values rather than a set of rules to inculcate, to lay bare in lawyer training, to refer in the form of a permanent apprenticeship to the attention of the category membership.

In a second phase, attention was placed on the nature of the rules, collocated in the sphere of private autonomy. Were they transactional – as in the case of the rules of an associative statute? Or were they regulatory, similar to what the effect would be of a power assigned to the representative bodies of the category? Or again were they extratransactional norms, the result of spontaneous observance and therefore consuetudinary in nature?

And just how binding could these rules have been made? Being juridical rules with high ethical content, could they have crossed the boundaries of the law, to ensure that the professional would be bound by a table of values that required him to make a greater effort in the application of his science or technique, when the positive system (geared towards fulfilling the "minimum ethic") would not have asked such a thing?

The third phase – confused, problematic and convulsive – is the one we now find ourselves in. Maybe because we are in the midst of the storm and don't know when it will pass, that it seems ever more dark and menacing. It is the phase in which the institutions regard the professional rules not only critically but with hostility. The legislator, unaware of their nature, wants to interfere with their creation, wants to assign government or the public administration the role of censor, or even allow those who are not part of the category but have a stake in the exercise of professional activity, to join the regulatory corps and pass judgment on the professional who has gone astray of the rules. Others – applying the notion of competition and market freedom in a distorted manner – believe that the deontological rules, being restrictive of behavior, constitute an obstacle to the circulation of services, so they regard the rules with suspicion, they test their worth, they deprive them of ambit and effect. In other words it means bringing the professional closer (if not actually merging him) to the entrepreneur, turning him loose not only in negotiating the fee but also in grabbing clients, and above

all it means removing him from internal justice (considered too… domestic) and having him evaluated and sanctioned by entities outside the profession.

Unlike other categories of economic activity, one of the distinguishing features of the professions – meaning the carrying on of an independent, autonomous and intellectual profession – is that deontological rules have an additional effect, i.e., they signal the category of membership, and thus arouse awareness of it among all the adherents. What happened was that in order to break into the category, the professional had to acquire the culture, technical training and ethical awareness; he had to pass an entrance exam, after going through an apprenticeship in the activity he was preparing for; in effect he became part of an elite. This is the internal reflex of a procedure that is intended to safeguard the public interest so that the intellectual professions are not a preserve of the inept, and, owing to their delicate nature, are entrusted to expert and able hands.

6. Effects of Normative Polycentrism

At this point we should develop the argument of the boundaries of private law in an open perspective: we must ask in what forms and with what techniques the recipients of the norms (however created) participate in the shaping of the normative process, and thence what social control the singles, the categories, the associations and the intermediate bodies can exercise.

A few cues – and no more – can be taken from the observations recently made on the role of private autonomy, of the centers of scientific elaboration, of the involvement of recipients of provisions from standardization and norms production centers. But if we wanted to reach a conclusion expressed in abbreviated form, we might observe that:

(i) normative polycentrism tends to shift the function of regulation of behavior and of activities (when not involving single private relations) away from bodies institutionally appointed to create norms for other entities (institutions, administrative authorities, professional categories, associations of various types);

(ii) the involvement of the categories concerned and the consumers and savers associations tends to arrange interests in conflict in the instance of the "orchestration" of the rules, executed however not in parliament but in other contexts;

(iii) the dialogue relationship, through consultation techniques, between creators of norms and recipients tends to anticipate conflicts and to recompose them prior to the introduction of the norms;

(iv) centers of standardization production – though based on the safeguard of public and collective interests – nevertheless suffer from the problem of representativity.

So – positive and negative aspects that restore the image of a "mild" law, i.e., no longer dominated by a legislative or "taxative" component but more multifaceted because imbued with jurisprudential law, and transactional law, in which the protagonists are private subjects, i.e., the producers of the rules who are also the recipients of those rules.[25]

[25] Grossi, *Società, diritto, Stato*, Milan, 2006, p. 235 and following.

7. Private Law as a Branch of "Variable Geometry" Law

Private law – it will be specified better in the concluding chapter – is a branch of law that has accumulated layers in the course of time: at its base we ascertain a kind of "hard core"; the terminology and dogmatic elements, which constitute the terrain upon which it has been built, and then the higher layers closer to us, which reflect the formation of the very rules of a society of "globalized" capitalism. In fact the terminology changes in time, the terms used acquire new meanings, boundaries evolve, expanding or contracting depending on variations in the sources of the law. This, because the reference values evolves[26], the notion of the individual and the person, of fundamental rights, of family, of property, of contract, the distribution of resources and the role of civic responsibility, the notion of market, are all evocative terms, defining criteria, agglutinants, inherent to concepts of life and society, of the economy, of exchange, of the needs of individuals and of communities. Against this background private law is sometime assigned various tasks, almost as if the law, and with it private law, should fulfill all the needs of a modern and complex society such as that in which we live. In the majority of cases, the law and therefore private law, can in fact give responses to these needs; responses that appear satisfactory. But the geometry of the framework with which this branch of law can be represented is variable – not just diachronically, but al so in the instance when the jurist attempts to describe it. The convulsive succession of laws however strengthen uncertainty and transitoriness and the impression given is that the relation between law and reality that the law must govern is one that resembles the relationship of Achilles to the tortoise. The law chases reality, but as soon as it seems to have caught it, the scene has already changed because the legislator has intervened with a modification or because reality itself has rebelled against the rules and has created its own. The patient work of the jurist, almost like the cloth of Penelope, struggles to make this world work in a system, in the knowledge that it is a provisional system, useful until new phenomena require a new rebuilding initiative. The following chapters try to restore, by way of images, problems and "cases", this imaginary world that constitutes the (private) law machine.

[26] On this point see Cotta, *Il diritto come sistema di valori*, Cinisello B., 2004; Lipari, *Diritto e valori sociali. Legalità condivisa e valori della persona*, Roma, 2004.

Chapter IV

The Italian Civil Code (1942) after the fall of Fascism

Index: 1. The debate on recodification. – 2. The arrangement of the new civil law. From the formal method to the historical-comparative-case method. – 3. Commentaries on the Civil Code. – 4. The 1960s. – 5. The new manuals. – 6. The "seasons" of civil law doctrine.

1. The debate on recodification

With the fall of the regime, the debate opened on the advisability of repealing the codes introduced during the Fascist era. The debate was conducted without controversy: Giuseppe Ferri, already in the early months of 1945, and even before the whole country was freed from the Nazi occupation and civil war, distinguished the political factor from the technical factor. He stressed that a code was never the creation of a regime or a political faction, since it was "an organic complex of principles consolidated through decades and sometimes centuries of experience, principles that only rarely derive nourishment from the political environment in which the codes are published. All that is contingent or immediate goes beyond the subject matter of a code to find its most suitable home in special legislation".

Similarly, Mario Rotondi in La riforma delle istituzioni della legislazione privatistica e del codice civile (Reform of the Institutions of Private Law and the Civil Code) had argued, in a magazine that came out of the woodwork in the last months of the war and the Nazi occupation, the reasons according to which the return to legality could not pass through the abrogation of the Civil Code, together with the entire legislation of the twenty years of Fascism. The certainty of legal relations, the excessiveness of the remedy, and the damage that would be caused discouraged this solution. And he pointed out that most of the normative innovations of the regime, despite the proclaimed fascist inspiration, were – especially the civil code – "largely the result of an elaboration independent of any political concern".

The prevailing opinion is for the preservation of the regime's codes. And that it is sufficient to eliminate "the frills and political inserts", rather than repealing technically valuable codes, to fall back into a system now consigned to the past. The controversy was heated on a technical level, because some, such as Valeri, believed that the unification of the two codes was an unfortunate solution; others, such as Mossa, believed that the codes were the image of the regime and should therefore be scrapped.

The new civil code, "Ferri writes", represented considerable progress compared to the previous code. "The greater protection given to illegitimate children, the affirmation of the social basis of property, the protection of good faith and appearance in legal commerce, the protection of the worker in subordinate labour relations, the defence of the weaker party" are conquests which cannot be renounced, even if they are the result of Fascism. In short, the reasonable consideration prevails that destroying is easier than building, and that amending is better than writing, since it is not necessary to revolutionise the system.

It therefore seems sufficient to amend the text from the references to the corporative order and the expressions that recall, as a lexical aspect, the 'values' of the defeated regime.

2. The arrangement of the new civil law. From the formal method to the historical-comparative-case method.

After the Second World War, the civilist culture remained faithful to the cultural tradition inaugurated in the 1920s and 1930s: a formalist tradition with a Pandettistic basis, systematic, completely alien to the approach of the institutions of the civil code to the palpitating reality, to a society that was changing rapidly, that was opening up to social mobility, to a culture that, in its various components – with the exception of the legal one – allowed itself to be permeated by the fashions launched across the Atlantic.

The civilists set in motion the great process of arranging the new law. The aim of the authors is to illustrate the civil code in its literal and systematic meaning, in its historical roots and in the most relevant modifications with respect to the 1865 code: the culture of the late 19th century, the theoretical perspectives of Germanic origin, the influences of jurisprudence make the subjects complex; in any case, civil law is still condensed in the civil code. The collection of preparatory acts to the code, published by the secretaries of the ministerial commission for the reform of the civil code G. Pandolfelli, G. Scarpello, M. Stella Richter and G. Dallari, is fundamental to this weaving and warping. In reproducing the salient passages of the Report to the King and the Report of the Lord Chancellor – prepared by the jurists who were part of it with a high scientific content, with comparisons with the previous code and with the most relevant foreign codes – this work still constitutes a mine of information, even if it sometimes gives the impression of an overlapping of the ideas that are intended to be imposed with the real situation that had developed in the decades before the code was drawn up.

The first monographs appear, updating the treatment of individual institutions, the first treatises are published, new encyclopaedias begin to be published and new journals are inaugurated.

In a necessarily elementary historical synthesis, it is impossible to account for even the most significant contributions, given the vastness of this literature. The option that imposes itself, therefore, is to offer a few examples of these contributions.

Mirror and at the same time foundation of this culture – almost embracing all its complexity and vastness – are the rarefied pages of the General Doctrines of Civil Law by Francesco Santoro Passarelli, which appeared in Naples in 1944 and were destined to remain, with the integrations and modifications edited by the Master, for almost half a century as the happiest example of systematic doctrine that succeeds in depicting, more geometrically, the fundamental institutes of civil law. The General Doctrines stand as the modern "general part" of the treatises on civil law; they concern persons, things, relationships and legal facts, with particular attention to the legal transaction.

The year in which the General Doctrines were published saw our country still divided in two, and the fate (not of the war, by now foreseeable, but) of the institutions was uncertain: it was not known whether the new regime that was to take over from the dictatorship would keep alive the codes promulgated by the now fallen regime (at least in central and southern Italy); it was not known whether the institutions of civil law would change. It is true that – once the normative references to the civil code have been eliminated – the system it constructs is destined to remain unaltered, whatever happens, precisely because the strength of legal culture lies in its models, which go beyond the normative texts, considered a contingent factor.

Respectful, however, of the unifying choice of the drafters of the civil code, Santoro Passarelli professes the uniqueness of private law as civil law, commercial law being, in his view, now absorbed into civil law. This too may appear a curious position, given that all commentators are convinced that the new code was influenced by the commercial code and above

all by the choices made by the Royal Commission for the drafting of the new commercial code, which was then incorporated into Book V of the Civil Code. In short, that the new regulatory reality expressed the trend towards the commercialisation of civil law rather than the opposite trend. The work was warmly welcomed, and the most influential legal philosopher of the time, Giuseppe Capograssi, saw in it 'an effort of thought on the new code that does honour to Italian science and school'. And in fact, beyond the extraordinary effort to contain the general part of the civil law in a little more than two hundred pages, with a dry and sculptural tone, one notices the author's enormous culture, ranging from civil to commercial law, from the doctrine prior to the code to that of the time and later, from non-fiction contributions also of minor extension and commitment to monographs and treatises, without forgetting the most relevant pronouncements of the Supreme Court.

There is no historical depth, almost entirely absorbed by the hypothesis of the concepts; the only traces of the historical development are in the formalistic evolution of the legal statements. There is even less reference to the economic facts with which the legal form is imbued. Here, law is pure, very pure form declined on the basis of a coherent logic as rigid as armour; law is represented as a "here" and a "now", described as an indisputable, indefectible, unchangeable datum and conceptual constructions as its connatural support. It is therefore an intrinsically ideologised product, even if it appears to be immune to any meta-juridical contamination.

The work that stands out for the absolute novelty of its method, for the richness of the cases considered and for the ingenuity lavished on it, however, is due to Gino Gorla: Il contratto. Fundamental problems treated with the comparative and casuistic method. As the title suggests and as the author makes clear in the preface, the methodological innovation is determined by the need for concreteness, for control of abstract methods, for emancipation from natural law. Comparison is used to explain the reasons for similarities and differences between legal systems; "comparison is nothing but history", it is a way of escaping abstractions and generalisations; and it is significant that comparison is extended to the common law experience, as well as to the well-known French and German experiences. Casuistry serves to reproduce the mental process that leads judges and legislators (…) to formulate abstractions of rules and principles in order to descend, in a continuous exchange or circle, to the problem of the concrete case. It is a question of seeing how rules and principles (i.e. the men who use them) behave, adapt and modify themselves in the face of this problem, which is then that of justice, historically conditioned. The case method used is not taken mimetically from the American experience: there it is used comparatively only to learn about foreign rights, while here it is used to understand the Italian system as well, to ascertain the ancient roots of the institutions and models of reasoning, to verify the law in action, as a result of the manipulations of the interpreters. A method, therefore, that does not neglect the merits of the logical-systematic method, but places them alongside the merits of the historical-comparative-case method. The cultural environment of the time was so hostile or prejudiced towards other methods that Gorla felt the need to justify himself: order, organisation, the logical development of thought, its discipline, were not neglected; but they were no longer considered as the only method for the study and representation of law. This avoids the risk of turning the generalisations and abstractions that hypostatise law into general theory into a kind of 'natural law', as if law were nothing but general theory and common law were not law. The consequence of applying the formal method is the dulling of studies, the conception of a law uprooted from its history and reality, which leads to the abyss between theory and practice. From a didactic point of view, the work is extra ordinem for another reason: it succeeds in communicating to students a fundamental key to interpretation, namely that the provisions they are dealing with are not

an 'indefectible datum'; it gives students 'the sense of the problem and its varied historical development, rather than that of the solution'.

It gives the student "a sense of the problem and its varied historical development rather than the solution": the development of the contractual obligation in civil law moves from Roman law, passes through intermediate law, arrives at Domat and Pothier, at canon law, at Grotius and at the theorisation of the consensualistic principle; it deals with obligations to give, of the donation cum onere, of the causa praeterita, of promises, of the nudum pactum, of the just cause, of the form; the criticism of the Bettian conception of the economic-social function of the cause is rigorous and persuasive. Against the doctrinal and casuistry evolution of civil law Gorla illustrates in parallel the evolution of common law, with particular regard to consideration. Already in these terms the subject matter, collected in the first volume, would be sufficient to upset the theory of obligations and contracts hitherto taught in the universities. But the second volume, on the casuistic method, is even more surprising: here the donation as formal contract is treated in relation to other contracts, the sufficient cause, the promise and the alienation for a cause praeterita, the gratuitous obligations, the intention to contract, both in the jurisprudence of the civil law systems and in the jurisprudence of the common law; the work ends with the comparison of the jurisprudential models.

The methodological innovation is such that in the homogeneous Italian culture of the time it has little immediate impact, taking decades for Gorla's teaching to be assimilated and reproduced; it is now also practised abroad where Gorla's name appears as a symbol of the best Italian culture of civil and comparative law.

3. Commentaries on the Civil Code

Among the first commentaries is the one edited by M. D'Amelio and E. Finzi. Finzi, published in Florence in 1949.

Among the treatises covering the whole of private law is Francesco Messineo's Manuale di diritto civile e commerciale, the first volumes of which began to appear in Milan during the war years, as supplements to the Istituzioni di diritto privato; in the years 1946-1947 the work took the title of Manuale, and consisted of three volumes, followed by a new edition, enlarged to six volumes plus indexes, published in 1955. It is a monumental work, because it is the work of a single author, with a descriptive content, in which all the institutes are set out in a flat and meticulous manner, complete with references to doctrine and case law. It is a work that seeks – to repeat Aurelio Candian's words – to combine lexical, logical-teleological, systematic and historical factors, making some concessions to evolutionary interpretation. It will be a sort of "work in progress" that its author will wait for all his life, in order to update, amend and integrate it.

A few years after the publication of the General Doctrines, another fundamental work appeared that was destined to influence not in the immediate future but in the future the method of legal studies, the Interpretation of Law and Legal Acts by Emilio Betti. An extraordinary scholar of civil law and Roman law, procedural law and international law, Betti had already published the other work for which he will be remembered, the General Theory of Legal Transactions. This latter work has been mentioned in the context of the historical reconstruction of the notion of legal transaction. The essay on the interpretation of law and legal acts is famous not only in Italy, but also abroad, especially among hermeneutic philosophers, who rightly consider it one of the masterpieces and cornerstones of hermeneutic theory. Here Betti expresses his profound, eclectic culture, constructing the general theory of legal interpretation, taking into account the historical recognition and integrative devel-

opment of the norm, the "evolutionary efficiency" of legal interpretation, the interpreter's discretion, the different forms of interpretation, analogy, the general principles of law, and completes the treatment with the interpretation of custom, administrative acts, judgments, private law transactions, and international treaties. German doctrine is Betti's natural interlocutor, illustrating in all its folds, even the most hidden ones, the meaning of the text and the contribution of its interpreter.

The furrow traced by Betti became a "classic place", from which civilists, publicists, legal philosophers and hermeneutics could not ignore.

We are now on the threshold of the 1960s. Proceeding further becomes difficult in a context of historical reconstruction, since the individual subjects belonging to civil law must rather be dealt with separately.

4. The 1960s

The most copious production is recorded in the field of obligations and contracts. And it is to this that we should refer in order to get a feel for the evolutionary phases of the doctrine of civil law.

In Milan, in 1944, the Dottrina generale del contratto (General doctrine of contracts) by Francesco Messineo appeared, which constituted one of the first attempts to dogmatically frame the regulations of the code, which had changed a great deal compared to the previous code.

The first major treatment of the subject was by Lodovico Barassi, who in 1946 published La teoria generale delle obbligazioni, articulated in its structure, sources and implementation. The great master, who had already made his acumen known at the end of the nineteenth century with his writings on civil liability and labour relations, set out the subject in a cultured and persuasive manner, in dialogue with French and German jurists.

Ruggero Luzzatto, a pupil of Vittorio Polacco, returned to teaching at the Genoa Law Faculty after being expelled due to racial persecution, and published a course on Le obbligazioni nel diritto italiano (Obligations in Italian Law), entirely centred on the notion of cause: "the study of the cause – he specified in the introduction – not only often makes it possible to determine, in an adequate manner, the quid and quantum debeatur, but even influences the an debeatur, that is, it serves to decide whether the performance is due or not". Going against the current, criticising the doctrine that in investigating obligations disregards their cause, he systematically examines the discipline of individual obligations, and devotes ample space to the treatment of the different types of performance.

In the same year Pacchioni's edition, Obbligazioni e contratti, edited by his student Cesare Grassetti and Scuto's Teoria generale delle obbligazioni appeared.

The following year, Le obbligazioni by Gangi appeared and Michele Giorgianni, a student of Salvatore Pugliatti, published a course of lectures on Le obbligazioni, which stands out for the clarity of its exposition and for the sharpness of its investigation.

Betti responded to this and other works on the subject with the General Theory of Obligations articulated in prolegomena concerning the economic and social function of relations of obligation, the structure, the sources and events, the preventive and subsequent defence. The author's profound culture made this work a new cornerstone of civil law doctrine.

In Naples, in 1955, Luigi Cariota Ferrara published an extensive monograph on Il negozio giuridico nel diritto privato italiano (The legal transaction in Italian private law), conceived above all as a reconsideration of Pandett's teaching in the light of the new discipline

of the Civil Code. Cariota Ferrara distances himself from Betti's statist conception. While for Betti, the characteristic of the legal transaction "is that its specific case, even before its effect, prescribes a binding regulation which, strengthened by the sanction of law, is destined to become a legal precept", for Cariota, it is not the case that a legal transaction is a legal precept, but the fact that it is a legal transaction. According to Cariota, it is not the will that produces legal effects, nor is it the legal system that acts as a force that generates them, but "it is the law that authorises private autonomy, making it possible for the legal transaction to produce legal effects by itself, giving it efficacy". The theory of the transaction is framed within the framework of the distinction between legal acts and facts, in particular between 'voluntary facts', which are represented as the ordering category of relations between private individuals.

5. The new manuals

In the post-war period, the variety of manuals is considerable; three treatises stand out for their penetrative capacity: those of Barbero, Trabucchi and Torrente.

Domenico Barbero's analysis, set out in a framework erected as a 'system', is the most articulate, and is the one that most clearly reflects and expresses the values on which the author's training is based. It starts from the opposition between the individual and the State, and from the alternation of conceptions that focus the concept of law on the individual (naturalistic theories) and conceptions that absorb the individual into the State (legal positivist theories); The idea advocated is that above the individual there is not the State, but law; the State does not exist, but consists in a function; the distinction between public and private law is therefore not a distinction of compartments of the legal system, but a distinction of norms: the rules of public law are those that make up the backbone of the State, those of private law establish the relations between subjects on an equal footing; the former are mandatory, the latter are left to the discretion of the individual. The author is aware of the fact that the distinction is often uncertain and leaves 'grey areas' open. What strikes today's reader is the absence of references to Roman law and the historical development of the concepts and distinction, the absence of a list of the distinguishing criteria, the inevitability of the distinction, and its subsumption within the framework of the differentiation of 'norms'.

More problematic are the other two manuals, the updated editions of which are considered here, currently in circulation.

Alberto Trabucchi's analysis takes place on two levels. In the text the elementary definition is set out: public law regulates the organisation of the state, of public bodies and the relations that are established between them, as well as the relations that they establish with 'citizens'; these are relations dominated by the participation of a subject who is the bearer of 'superior interests', and therefore the subjects are not on an equal footing with each other, a footing that instead marks the relations between private individuals, to which private law sets premises and limits to the interests of individuals. In the notes to the text, the social dimension of relations flows into private law; but it is noted that the distinction between public and private law "once quite clear, is becoming more and more uncertain and confused"; private interest is often represented as public interest, authority overtakes the public sphere; on the first side, private autonomy is compressed by public requirements, on the second side the public administration realises public and private interests in relations with private individuals "in a regulatory system that must necessarily be unitary, because this is how civil law is understood in the modern sense". The distinction is not clear-cut and constant, also because of the greater sensitivity to social problems.

In the version of Andrea Torrente's manual (now reformulated by Piero Schlesinger) the distinction, which is said to be 'traditional', is represented in terms of the supremacy of the public subject in public relations and the equality of subjects in private relations. However, the contrast is defined as variable and uncertain, as well as impossible where the rules pursue both a public interest and a private interest; the clear-cut distinction envisaged by the Roman proverb is by now evanescent, and must be preserved as an orientation and a general criterion, given the confluence of social interests in public law.

The simplified version of this problem as it appears in some institutional manuals has salient and uniform features: having lost the influence of the Romanist sources along the way, the two categories are not historicized, but rather assumed as a 'given a priori' that no longer fits the complex legal reality that is the result of modernity. The two categories are portrayed as a tendential model, but their boundaries are quite uncertain.

Many other contributions written by the illustrious masters should be taken into account. Think of Ugo Natoli and Alberto Trabucchi, who only recently passed away, and of the masters who are still working today, such as Michele Giorgianni and Angelo Falzea, Rodolfo Sacco and Pietro Rescigno, not to mention all those – and there are still many – who work in the country's universities. Current masters of civil law or commercial law, comparative law or philosophy of law will be mentioned in the concluding pages of this brief profile.

Schools once easily identifiable by their method and university location, real poles of attraction for civil law scholars and real centres of professional training and dissemination of knowledge, have expanded, branched out, in an alternation of presences and methods, initiatives and directions that make Italian civil law one of the most prestigious groups of jurists known even abroad. It is now possible to speak of generations of scholars who have succeeded one another, handing down knowledge and guiding the academic careers of their students.

In a history of civil law, it would also be necessary to mention those who, due to their multifaceted talent, wrote about civil law even though they were not professors in this field, such as Francesco Carnelutti or Piero Calamandrei. And those who, as senior magistrates or famous lawyers, dedicated themselves to their studies, making a scientifically appreciable contribution. But the culture of civil law in our country is eminently academic, even if its protagonists have distinguished themselves in the bar or have started their profession by serving in the judiciary. But there are exceptions, which mainly concern magistrates and lawyers who, without academic titles, contribute to the process of legal science.

And a careful history should point out the contribution they made by playing important roles in the institutions of the country (from Parliament to the Government, from the management of bodies to the presidency of administrative bodies, such as members of the Constitutional Court or of the Superior Council of the Magistracy).

In order to highlight the main features of the revolution in civil law studies in our country, it is therefore appropriate to identify a number of themes that, in a "transversal" way, allow us to briefly review this last four-year period.

6. The "seasons" of civil law doctrine

The description of the "seasons", methodological trends, acquisitions and fashions of civil law doctrine in the last fifty years would also deserve a very in-depth analysis. They can be revisited in a number of works, in conference proceedings and now in a complete 'fresco' of the history of twentieth-century legal science. It is sufficient here to recall the debate fuelled by Pietro Trimarchi's pages on the relations between legal rules and economic reality, the debate on codification by principles and general clauses opened by Stefano Rodotà, the

debate on the 'alternative use of law' promoted by Pietro Barcellona, the choral reflections on the reform of family law, the debate on 'decodification' provoked by Natalino Irti, the discussion on the method of civil law studies promoted by the 'Rivista critica del diritto privato'. Civilists also participated in the legislative reforms – particularly important was the reform of the regional system and then that of the entire administrative apparatus. But the season became more complicated with the arrival on the scene of Community law, analysed in detail by Nicola Lipari, which calls for a complete review of the same categories of civil law, and of new technologies that have imposed reflections on bioethics and the protection of personal data and the globalisation of markets, which imposes a review of the legal categories of mature capitalism, initiated at its beginnings by Francesco Galgano, and on the protection of the economic interests of consumers and savers, and therefore, in general, on the role of the person in the civil law system, investigated by Pietro Perlingieri both in its constitutional and community profiles.

The boundaries of civil law have thus once again been redrawn, with the new relations with public law, the role of the 'market' and the current tasks of civil law as key points.

For the constitutional structure of our country, for its juridical organisation, the approval of the new constitutional text is obviously of capital importance. The fracture between the constitutional legislation of the Kingdom and the constitutional legislation of the new Republic is profound, while there is a solid continuity in the apparatus and in the administrative action and, at least for the branches of law other than constitutional law, the continuity is also manifest in the orientations of doctrine and jurisprudence.

This, despite the fact that the previous system, based on the Statuto albertino, was very different from the system designed in the Republican Constitution a hundred years later.

Chapter V

The Beginning and the End of Human Life

Index: 1. Legislation, Representative Cases, Difficult Solutions. – 2. Legislative Solutions: The Case of the Embryo. – 3. Current Italian Regulations. – 4. An Open Problem: Self-determination and Advance Directives on Medical Treatment – The Biological Will. – 5. Uncertainties Facilitate the End of Life. – 6. Who Should Decide? – 7. The Living Will.

1. Legislation, Representative Cases, Difficult Solutions

One of the most interesting aspects of the law is the translation, into legal terms, of the facts of human life: its beginning, its progression through joys and sorrows, and its end. The civil code does not contain instructions that define birth or death, as these facts are presumed where it is necessary to establish when the legal capacity is acquired or in what moment inheritance proceedings should begin.[1] But in many cases, and with the advent of sophisticated technologies that have revolutionized research and its application in the field of biology and medicine, we wonder whether the law should be entrusted with such a delicate and onerous task, laden as it is with responsibility – or whether it should be left to ethics, to philosophy or to religion. It is still a much debated problem.[2]

First of all, the jurist asks if it should be the legislator – and which one – who deals with the matter. Alternatively, we might consider the judge, who from time to time takes up the case brought before him. And it would be a hard case, one of the difficult cases for which a solution[3] may be based on highly debatable evaluation criteria. Or we might think of the deontological codes of the doctors and the biologists, since it is they, of all the professionals involved, who deal with the body, with cells, with treatments.

The Western world has not been inert. Solutions have been proposed, not only by the national legislations, but also by the European Union in the form of directives, and by the international agreements, in particular the Oviedo Agreement.

2. Legislative Solutions: The Case of the Embryo

However the solutions are not adopted by a world authority.

Each country follows its own logic, policies, ethics and legal codes; there are countries where a prevailing culture of laity keeps the religious mentality in check. Then there are other countries, like ours, where particularly today, there is an evident outlook, shared by all

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1 Rescigno (P.), *Il codice civile*, Roma-Bari, 2001.

2 Stefano Rodotà, in his book *La vita e le regole* (Milan, 2006) discusses the matter extensively, covering the legal questions regarding embryos, cloning, genetics, pain and death. He also asks how far the law can be pushed to give the answers society requires.

3 As Calabresi teaches us in *Scelte tragiche*, II ed., Milan, 2005.

the parties and remaining dose to the opinions of the Catholic Church, that recommends only moderate intervention.

On 4 April 1997 in Oviedo, the Council of Europe approved a more comprehensive agreement for "The protection of human rights and the dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine". Article 2 of the convention proclaims the primacy of the human being over the interest of science or society; articles 5-9 codify the principle of consent for medical treatment; articles 11-14 state the principle of respect for the person in relation to genetic research; interventions seeking to modify the genes are permissible only for treatment purposes; article 18 prohibits the creation of human embryos for research purposes.

On 6 July 1998 the European Parliament and the Council approved a directive on the protection of biotechnological inventions that also concerns the embryo. The *considerando* specifies that the patenting of technologies cannot involve the human body, including its germinal cells and genes, and that the isolated parts of the body can be used only with respect for the dignity of humankind, and for public order and morality. It then established that where parts of the body are concerned, patentability is permissible only with the consent of the person who has donated the sample. Lastly, patentability is excluded in the case of embryos used for industrial and commercial research. The ban is reiterated in articles 5 and 6 of the directive.

In another resolution in 2000, the Parliament specified that human dignity and the value of every human being are values upheld by member states; that medical research is necessary but must be conducted within strict ethical and social limitations; that the use of embryos in medical treatment be limited when use can be made of stem cells; that human cloning – the use of genetic technology to reproduce human cells – is prohibited; that artificial insemination techniques must not produce an excessive number of embryos.

The EU Charter of Fundamental Rights, approved in Nice on 18 December 2000, upheld the principle of dignity, declaring a ban on "making the human body and its parts as such a source of financial gain" and the prohibition of "the reproductive cloning of human beings".

So, there are clear and precise limits on the production, use and patenting of embryos. But it is equally clear that the production of embryos – even in limited numbers – is permitted by EU bodies for diagnostic, therapeutic and scientific research purposes.

The various legal models used by the national systems to regulate the use of embryos does seem to be compatible with these rules. This is the case in restrictive systems as well as the more liberal ones. Each member state can make its own choices. But – it should be repeated – the more liberal models are not reproached as long as they stay in line with the general principles expressed in the documents referred to above.

3. Current Italian Regulations

The Italian model is not informed by principles of freedom and responsibility. Rather, it is informed by the limits and prohibitions found in law No. 40 of 19 February 2004.

Law No. 40 of 19 February 2004 lays down "norms in the matter of medically assisted procreation", and in truth it is not a law destined to regulate the legal status of the embryo. Its aims are different – they are intended to resolve "reproductive problems deriving from human sterility or infertility". The embryo is a means for resolving these problems, which could equally be resolved in other ways. But this is a very particular means, because in order to fulfill the intended purpose of this law, the embryo must be first created, then treated; the

modalities of treatment must be established, and it must also be established who will make decision regarding the treatment, and what happens to unused embryos.

The law gives some answers to these questions but does not resolve all the issues. We must also ascertain whether the answers are plausible. To do this it is necessary to conduct some preliminary operations. First, the text must be read to identify rules concerning the embryo. Then the structure of the rules must be systematically analyzed, and finally they must be critically evaluated.

Let us begin with the terms used, which are numerous and must be attributed with meanings. The text at various times makes reference to the following:

> (i) *conceived child*, (art. 1 para. 1); (ii) *unborn child*, (iii) *born*, (arts. 8 and 9) to which is recognized the status of legitimate offspring. Disavowal of paternity and maternal anonymity are prohibited. The newborn is registered at the centers authorized for the application of assisted procreation techniques (art. 11 para. 1); (iv) *gametes*, with regard to objectives, which would include support for research on cryopreservation (art. 2 para. 1); with regard to their donation by the party who produces them and who denies any blood relationship with the newborn (art. 9 c. 3); with regard to the prohibition, for procreation purposes, if they belong to parties unconnected with the couple requesting assistance through procreative techniques (art. 12 para. 1); with regard to the prohibition on commercialization (art. 12 para. 6); with regard to selection for eugenic purposes (art. 13 para. 3 lett. b); with regard to the prohibition of the fertilization of a gamete of different species and to the prohibition of the production of hybrids and chimere (art. 13 para. 3 lett. d); with regard to their cryopreservation, which is permitted (art. 14 para. 8); (v) *cell and nuclear genetic patrimony*, as both the subject and the result of human cloning, which is prohibited by art. 12 para. 7; (vi) *embryo*, which, insofar as it is "formed", is required, as is the newborn, to be registered in the appropriate authorized center (art. II para. 1); it cannot be used for commercial ends (art. 12 para. 6).

These are largely provisions that impose prohibitions, with the effect that the protection of the embryo appears to be an indirect consequence: they concern the prohibition of experimentation (art. 13 para. 1); the prohibition of research whose purpose is not the protection of the health and development of the embryo subject to treatment for procreative ends (art. 13 para. 2); the prohibition of the production of embryos for research and experimentation (art. 13 para. 3 lett. a); the prohibition of eugenic selection (art. 13 para. 3 lett. b); the prohibition of splitting (art. 13 para. 3 lett. e); the prohibition of cryopreservation (except in the case of postponement of the operation for reasons linked to the woman's health, ex art. 14 para. 3) and suppression (art. 14 para. 1); the prohibition of the production of excessive numbers of embryos (art. 14 para. 2).

Despite the frequent mentions, the embryo is not defined: so reference must be made to the technical-scientific definition if we are to assign a meaning to this term.

In civil law the embryo is protected more than the unborn child, because the conceived child acquires its rights only at birth; and more than the fetus, because the fetus can be suppressed if the requirements for the application of abortion law exist.

But since the conceived child, embryo and fetus all refer to the same "person", *i.e.*, the subject that, once conceived and developed in the fetus, might then come to the light of day, this discipline would appear to be illogical, incongruous and indeed foolish, because it extends different kinds of protection to the same "person" depending on its age and stage of

development, quite apart from the fact that it creates a superior legal status for the embryo and an inferior one for the fetus.

There is also a direct conflict with abortion regulations, besides a conflict with the following: the aim of protection of the life and health of persons who could be cured via treatment using embryos; the purposes of research and scientific experimentation, to further the development of biotechnology and medicine; the procreation law regarding sterile couples who request the help of outside donors for fertilization; the procreation law for widowed or single women, or minors (cohabitants); with the law on same-sex couples' access to the techniques.

4. An Open Problem: Self-determination and Advance Directives on Medical Treatment – The Biological Will

Law No. 578 of 29 December 1993 defines death as the cessation of encephalic functions. But the problem lies not in the verification of this moment, but rather in understanding whether, in the event that the person is in a situation moving irreversibly towards certain death, and can only be kept alive artificially by treatment that maintains respiratory and alimentary functions, the treatment can be suspended with the result that the person in fact survives; and if the person, not wishing to receive this treatment when it evolves into "futile medical care", is capable of refusing the treatment. For this wish be expressed in an instance when the person is capable of understanding and wishing, we need to have recourse to advance directives, applied in that instance when the person's state of health renders him no longer capable of expressing the wishes.

The provisions of article 32 of the Constitution state that everyone has the right to refuse medical care.

The debate on the legal and ethical import of "advance directives" issued by the sick person regarding future medical care, especially in the case when the treatment is administered to a patient who has lapsed into a state of legal or natural incapacity, has reopened in this country in a particularly complex political, cultural and social phase. The dust had only just settled on the controversy surrounding the abrogative referendum on law No. 40 of 2004 concerning fertility treatment[4] – with an overall rejection of any change in the law – when further areas of conflict emerged. Proposals were made for a review of the abortion law, the introduction of rules on the adoption of embryos, the strengthening of the ban on anticonception prescription drugs; all done in a determined attempt to reverse the years of progress towards the laity of the state and in civil rights, by now occupying a reasoned and shared position. Themes that were considered definitively resolved, and therefore abandoned, were once again revived. The absoluteness of fundamental rights, based on divine origins, was proclaimed, ethical relativism was condemned; initiatives supporting the individual's freedom of choice in biological matters were opposed. In other words, the gap between scientific and bioethical positions had widened: science follows its course towards new discoveries (regarding the use of stem cells, the use of embryos, and on delayed aging) whereas bioethics

[4] Theme of the book entitled *La fecondazione assistita*, published in Milan (2005) by the Fondazione Veronesi and the Fondazione Corriere della Sera, with a preface by Veronesi, introduction by de Tilla and pieces contributed by Rescigno, Quadri, Celotto, Balestra, Ferrando, Patti and Bellelli.

has taken the opposite direction, turning back and taking the fundamentalist stance, which gives precious little space to research, personal freedom, life and dignified death.

It is certainly oversimplifying the scenario to say that science and bioethics are mutually conflictual: indeed, scientific positions are varied and bioethical interpretations are not univocal; however, if we look at the Italian situation – somewhat anomalous in comparison to other EU countries – the contrast here seems to be the most appropriate paradigm for describing how things really are in this phase of history. Today, science – meaning medicine, biology and philosophy – is prevalently favorable towards the protection of the person, so that it does consider life as being synonymous with conception and does not consider death as being synonymous with the failure of all option for artificial feeding. On the other hand, bioethics is now largely oriented towards the identification of the embryo as a person, and holds the view that initiatives that seek to curtail palliative treatment, avoid futile medical care or discontinue artificial life support care are merely different forms of euthanasia, and should therefore be banned without exception.[5]

Linguistic convention expresses this problem in terms of legitimacy and efficacy of the "biological will" and refers back to futile medical care; sometimes, it is intentionally linked to passive euthanasia, in order to imply a moral dimension and an evaluation of non-legitimacy.

In terms of legal philosophy and positive law, it can be described with the use of another formula: the principle of self-determination (which matches with the principle of responsibility theorized by Hans Jonas), according to which only the subject (*i.e.* the sick person) has the right to decide the fate of his own body, his life and the treatments he may accept or refuse in seeking to alleviate pain and keep himself alive. I do not want to expand the topic of self-determination to include the matter of choosing exactly when to end life, because then we have to bring in the issues of suicide, euthanasia in its various forms, and so on. It will be sufficient to review the doctrine, jurisprudence and the special implementing legislation of article 32 of the Constitution, concerning the right to health, and then the doctrine and jurisprudence on article 5 of the civil code concerning acts of disposal of one's own body, and again the illustration of the rules, both constitutional and European, that define the person as the holder of every right that concerns them, in order to arrive at solutions to all open questions regarding the principle of self-determination. However, positions today are divided so for some issues we need to pick up the thread of the debate.

For the sake of illustration, the debate can be divided into three phases.

5. Uncertainties Facilitate the End of Life

On 29 January 1976, after discussing the report prepared by the Commission for social and health problems, the Assembly of the Council of Europe adopted the *Recommendation on the rights of the sick and the dyings.*[6] A text that summed up the general principles shared by all the European countries had already remarked on the need to intervene on the advances made in medicine, in order to ensure that the "rapid and continuing progress" of medical sci-

[5] Veronesi and De Tilla, *Nessuno può decidere per noi*, Milan, 2006. See contributions of Viola, Spagnolo, Bompiani, Mori, Palmaro, in *Testamento di vita. Presentazione*, on the site www.portaledibioetica.it; and see also the *Manifesto di bioetica laica*, by Flamini, Massarenti, Mori, Petroni, Il Sole 24 Ore of 9 June 1996; *Questioni di bioetica*, edited by Rodotà, Rome-Bari, 1997.

[6] See text in www.portaledibioetica.it.

ence would not create problems for and pose threats to "fundamental human rights and the integrity of sick people", The premises of the *Recommendation* are very reasonable, considered and moderate: they recognize that medicine, in becoming more "technical" runs the risk of losing its "human" face; that doctors should respect "the will of the sick person with respect to the treatment he or she has to undergo"; that every person should be granted the right to dignity and integrity, to information and proper care; that the medical profession, being of service to mankind, must devote itself to the protection of health, the treatment of illness and injury, the alleviation of suffering, "with respect for human life and the human person"; that "the prolongation of human life should not in itself constitute the exclusive aim of medical practice"; that the doctor "has no right, even in cases that seem to him to be desperate, to intentionally hasten the natural course of death"; that "the prolongation of life by artificial means depends on factors such as the availability of efficient equipment": that doctors are often in a delicate situation when a long prolongation of life is possible, especially in cases where all cerebral functions have irreversibly ceased; that doctors cannot be compelled to act against their conscience in relation to the right of the sick not to suffer unduly.

A few years later the Sacred Congregation for the Doctrine of the Faith (on 5 May 1980) issued its *Declaration on Euthanasia*[7] in which it emphasized that "human life is the basis of all goods". It countered euthanasia with the protection of life, but permitted the use of analgesics for pain relief, despite advising that consciousness ought to be maintained in preparation for the meeting with Christ at the end of human life and the beginning of eternal life. The Congregation however qualified these conditions with the proviso that "today it is very important, at the moment of death, to protect the dignity of the human person", even if it meant disagreement with the technologies that encourage medicine to do all it can to prolong life. So the problem was expressed in a way that took the lay argument and turned it on its head: not so much the decision to interrupt treatment in order to preserve dignity, but rather to interrupt treatment when it no longer provides, or is unable to provide, the expected results. To put it in the words of the *Declaration*: "If there are no other remedies, it is permitted, with the patient's consent, to have recourse to the means provided by the most advanced medical techniques (…) and it is al so permitted to interrupt these means, where the results fall short of expectations".

The *Declaration* adds a very precise qualification: "It is also permissible to make do with the normal means that medicine can offer. Therefore one cannot impose on anyone the obligation to have recourse to a technique which is already in use but which carries a risk or is burdensome. Such a refusal is not equivalent to suicide: it should be considered as a simple acceptance of the human condition, or a wish to avoid the application of a medical procedure disproportionate to the results that can be expected, or a desire not to impose excessive expense on the family or the community. With the imminence of inevitable death whatever means are used, it is permissible in conscience to take the decision to refuse forms of treatment that would only secure a precarious and burdensome prolongation of life, so long as the normal care due to the sick person in similar cases is not interrupted. In such circumstances the doctor has no reason to reproach himself with failing to help the person in danger".

Both documents raise issues that concern the community, but it is the *Declaration* that tackles the problem of the disparity of treatment linked to patients' economic resources. The *Recommendation* looks at the problem situation arising when the patient finds he is incapable of deciding; therefore it is up to the member states to create commissions of enquiry to

[7] See text in www.portaledibioetica.it.

examine the problem of "written *Declaration*s made by legally competent persons, authorizing doctors to abstain from life-prolonging measures, in particular the case of irreversible cessation of brain function".

6. Who Should Decide?

After more than fifteen years the problem is more acute, owing to the progress made in technology, which allows medicine to prolong the life of the patient indefinitely, even though he may be unconscious, may have lost vital brain functions and is wholly dependent on artificial feeding. The terms of the problem laid out with a certain candor in the above mentioned two documents – shift further: medicine can be more daring because treatments once considered experimental are now "ordinary"; medical care aims to not only alleviate pain and hardship but also to pro long life ("life" here meaning only respiration and alimentation and not wakeful consciousness); other parties, such as judges and kinsfolk, appear on the scene; while on the legislative level there is no sign, at least in this country, that solutions will be dictated. The mass media, perhaps in order to spice up the debate, tend to talk more about passive euthanasia rather than interruption of futile medical care damaging to the dignity of the person. So far, so one talks of wasting money or making tragically tough decisions because the scarcity of resources means care cannot be assured for all; the idea of the welfare state persists, and there is still a deep-rooted conviction that that community must step in when the individual is unable to provide for his own medical care.[8]

The parliamentary bills presented in these years have not had much luck. However, in the space of a few months, The National Bioethics Committee (instituted in the Presidency of the Council of Ministers) did approve three important documents: one on the *Definition and verification of death in human persons* (15 February 1991), the other on *Assistance to terminal patients* (6 September 1991), and the third on *Bioethical questions relating to the end of human life* (14 July 1995).[9]

The first two documents express opinions considerably different from that of the third, although we won't dwell on it here. It is understandable that with changes in the Committee membership and in the climate (also the political one) over the years, ethical evaluations also evolve, confirming the principle of relativity inherent to judgments of this nature. In particular, the first two opinions show a certain willingness to bring into consideration the psycho-physical aspects of life, and therefore in its "qualitative" dimension, while the third is more doubtful.

With regard to the biological will, the third opinion specifies that the Committee "recognizes the undoubted moral worth of advance directives for treatment, but harbors reservations when these directives acquire the character of actual life testaments; these reservations are especially grave with regard to certain versions of these directives, which now appear to be increasingly common (…). It is the opinion of the NBC that these directives are not to be

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[8] It has been a certain few academics-sociologists, doctors, jurists, political figures and research and cultural groups that have reprised the theme. At a conference organized by *Politeia* in Rome, in March 1990, Senator Luigi Manconi proposed the presentation of a draft bill to the scientific community and the institutions. The document met with widespread support. A debated and revised version of the proposal carries my name: the text is found in Iapichino, *Testamento biologico e direttive anticipate. Le disposizioni in previsione dell'incapacità*, Milan, 2000, p. 77, n. 39.

[9] See the text in www.governo.it/bioetica/testi.

recognized as having an irrefutable value, but rather one of mere orientation of the behavior of those who care for the patient".

This argument falls between the position that condemns futile medical care on the one hand and passive euthanasia on the other. But apart from where it lies in relation to the other opinions, which is helpful in interpreting it from a meta-juridical standpoint, the argument appears to be at odds with existing regulations.

7. The Living Will

While the Italian legislator continues to shy away, more and more action is being taken in other EU countries, which adopt as models the laws introduced in North America.[10] US and Canadian sites teem with information on living wills; they offer models and point out the advantageous aspects. They have even led to the beginnings of a new professional sector, involving lawyers, doctors and religious representatives, giving guidance, advice and practical help to clients in need of it.[11] Two cases emerging from the USA have been discussed the world over: the case of Nancy Cruzan and that of Terry Schiavo.

When the Council of Europe issued its first Recommendation, it was in a very different context to that of its next intervention with a text entitled *Protection of the human rights and the dignity of the terminally ill and the dying*: this was *Recommendation* No. 1418, adopted by the Assembly on 25 lune 1999.[12]

The entire text is informed by the principle that the dignity of man cannot be overrun by technology and medicine, which, while striving to pro long the lives of sufferers, may seem indifferent to the pain and loneliness of the dying and their kin. Recalling the Oviedo Agreement principles on the rights of mankind and on human dignity in the application of biology and medicine, the Recommendation emphasizes the need to: guarantee the patient reasonable care against suffering; carefully evaluate the measures by which the patient's life can be artificially prolonged; educate and offer psychological support to health care professionals and relatives. But it also registers the absence of a supportive environment, the lack of funds and resources for the care of the dying and the fear of the social burden of illness, suffering and death. The final proposals are much more thorough and detailed than the schematic solutions of 1999. They call on the participation of not only the scientific community and the political institutions, but also the bodies that have a role in organizing the final phase of the lives of the terminally ill.

This Recommendation devotes considerable attention to the role of the sick person, who must in the first place be properly informed, must be protected in the observance of his or her wishes, protected from unwanted treatment or therapy, and protected through conformity with any instructions or living will that rejects specified forms of treatment. The Recommendation also states the importance of ensuring that the legal representative of the patient makes "surrogate decisions based on advance personal statements of will or assumptions of will only if the will of the person has not been expressed directly in the situation"; it insists that the will of the patient be respected even if it does agree with the general value judgment present in society or with the recommendations of doctors.

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[10] On this subject see Iapichino, *op. cit.*, p. 25 ss.

[11] The most significant sites include: www.uslivingwillregistry.com; living will-Wikipedia, the free encyclopedia; www.agingwithdignity.org.

[12] See text in www.portaledibioetica.it.

While the shared principles of the European countries promote the idea of self-determination of the patient, the Catholic church has taken a more rigid stance: the Pontificia Accademia per la Vita issued a document at roughly the same time as the Recommendation, asserting that the arguments against futile medical care were ambiguous instruments, used to usher in concealed forms of euthanasia.[13]

The principal of self-determination is considered in a narrower sense, subordinate to the value of life, which must in any case be lived, as man cannot be its "absolute master".

And while recognizing that efforts must be made to avoid futile medical care of the terminally ill and dying, the Pontificia Accademia makes a distinction between ordinary care (including nutrition and hydration, even if artificial), palliative care, aimed at relieving pain, and extraordinary or hazardous treatment. Only in the latter case is the patient's own volition admitted.

The same classification is found in the latest relevant document approved by the National Bioethics Committee, entitled *L'alimentazione e l'idratazione di pazienti in stato vegetativo persistente*, published on 30 September 2005.[14] The Committee focuses on medical care, specifically on deciding when treatments should be administrated and when they should be withdrawn. It considers the former necessary and the latter non-legitimate. This is in view of the fact that treatment designed keep the patient alive is now considered by medical science to be perfectly normal and in harmony with society's accepted civic values, giving each of us the moral obligation to "look after the weakest".

With regard to advance directives, the NBC, referring back to its previous opinion, expressed in 2003[15], believes that they are lawful and binding, but should be taken into consideration only if they apply to extraordinary treatment. In all other cases, says the Committee, the doctor is bound to non-observance of the directives, despite the wishes of the patient, and must proceed with the prescribed treatments.[16] This opinion has been contested on the grounds of its scientific basis and its consistency with the previous statement on advance directives, of December 2003.

In this regard, the NBC had in fact declared that "every person has the right to express their wishes in advance, in relation to all medical care and treatment about which the person can lawfully express a current wish".

A series of bills on this matter are currently going through parliament. We still await a response from the legislator; these gaps are perceived very clearly by the citizenry, as evidenced by the Welby case, which will be dealt with in the chapter on difficult cases.

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[13] *Il rispetto della dignità del morente. Considerazioni etiche sull'eutanasia*, edited by Vial Correa and Sgreccia, in *www.portaledi bioetica.it.*, 9 December 2000.

[14] See the text on the website of the Presidency of the Council of Ministers. The title translated into English is *The feeling and hydration of patients in a persistent vegetative state*.

[15] Dichiarazioni anticipate di trattamento, 18/12/2003.

[16] Il parere è stato approvato a maggioranza.

Chapter VI

Individual and Social Community

Index: 1. Basic Rights in the Community System. – 2. Fundamental Rights as the New Founding Principles of the European Union. – 3. The Notion of Person in the Civil Codes: The "Subject of Rights". – 4. Identities. – 5. Differences. – 6. The "Virtual" Person and Personal Data. – 7. The Family at the Present Time. – 8. The *De Facto* Family. – 9. Family Unions.

1. Basic Rights in the Community System

Fifty years on from the Treaty of Rome, jurists ponder the role of the founding principles of the European Union.[1] In the case of economic laws there seems little doubt as to the answer: the law of competition and the four freedoms represent a well defined architecture.[2] Even if the content of these laws has evolved over time and this evolution has not been uniform, the rules of the treaty have not been applied evenly, so that the regulations for free competition of persons are evenly matched and to the fore, while the free circulation of capital and services seems to hang back.[3]

But if you look at fundamental rights, the questions become even more complex.

"Where is Europe going?" asks a well respected German constitutionalist[4] and "In what ways have fundamental right hypertrophied and in what ways have they evolved?" ponders another renowned Austrian constitutionalist.[5]

In recent years the literature on fundamental rights has grown to huge proportions, almost resembling a long river proceeding slowly towards the estuary of universal recognition; and yet a dose and careful reading of the most recent essays on the subject, avoiding temptations towards rhetoric, would convince us of the opposite.

The facade of the European model appears compact and battle – hardened on the defense and fundamental rights front, but behind this there lies a fragile and incomplete

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1 Alpa and Andenas, *Fondamenti dei diritto privato europeo*, Milan, 2005; Broekman, *A Philosophy of European Union Law*, Leuven, 1999; Alston, & Bustelo and Heenan (pubs.), *The EU and Human Right*s, Oxford, 1999; Markesinis (pub.), *The Gradual Convergence*, Oxford, 1994; Schermers, *The European Community and the European Convention on Human Rights: The Effect on National Law Learning from Europe - with Emphasis on the European Convention on Human Rights*, ibid., p. 169 and following. An interesting historical reconstruction of the European Union is found in: Castronovo, *L'avventura dell'unità europea. Una sfida con la storia e il futuro*, Turin, 2004; on the philosophical-political aspects of European unification, see Scoditti, *La costituzione senza popolo*, Bari, 2001; for an in-depth analysis of the jus-publicists, see the collected essays by Zagrebelsky, *Diritti e Costituzione nell'Unione europea*, Rome-Bari, 2003.

2 Tizzano, *Il diritto privato dell'Unione europea*, 2 ed., Turin, 2005.

3 Così Andenas, *Fondamenti*, cit., part III.

4 Boeckenfoerde, *Diritto e secolarizzazione. Dallo Stato moderno all'Europa unita*, ltalian translation by Preterossi, Rome-Bari, 2007.

5 Winkler, *Hipetrophien und Mutationen der Grundrechte*, from it *I diritti umani tra politica filosofia e storia*, edited by Barcellona e Carrino, t. I, *Il diritto dell'uomo nella prospettiva europea*, Naples, 2003, p. 313 and following.

structure, and this will be so until the concluded ratification of the – perhaps it would be more realistic to say – of a European constitution.

This is not to say that the path from 1957 to now has been of no use or devoid of significant phases in the construction of founding principles for the European framework of fundamental rights.

The preamble of the 1986 Single European Act pledges Community support for the European Human Rights Charter. The Maastricht Treaty of 1993 considers fundamental rights as enshrined by the European Charter in a way similar to the general principles of Community law. Even the 1995 Charter for workers' social rights confirms this interpretative line. The 1997 Amsterdam Treaty even stresses that respect for human rights and fundamental freedoms together with the principles of freedom, democracy and the state of rights are common principles among the member states.

Finally the Nice Charter of December 2000, stating the fundamental rights of the European Union, seemed to seal the definitive recognition of these rights, which constitute the depiction of the modern person in the realm of (Western) law.[6]

The affirmation of these rights in the Community system was first seen in jurisprudence following the decisions of the Court of Justice, which, beginning with the Stauder case of 1969[7], represented the first steps along the road to recognition of fundamental rights. Despite the absence of a written declaration, the court held that fundamental rights, originating in the legal systems of the member states, were innate to the general principles of Community law, immanent within it and therefore directly applicable. In other words the Court imagined that by taking a path contrary to the ordinary one – which goes from the top of Community law (positioned above the member states' systems) down to the national systems and starting instead from the bottom, from the fundamental laws or constitutions of each EU state, it could rise towards a uniform, shared band of laws qualifying as fundamental. But really, this vision was based on a fiction al scenario, if we bear in mind that in 1969 the United Kingdom had not yet ratified the European Convention of Human Rights, and that the direct application of constitutional provisions on fundamental rights – the so-called Drittwirkung – to relations between private individuals was only then taking hold in Germany and not at all in France.

However, the Court of Justice can be said to have done an excellent job if in view of that fact that the list of fundamental rights singled out is guaranteed.[8] This whole discussion

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[6] In the wide ranging literature, see *La Carta europea dei diritti. Atti del Convegno di Genova del 16-17 marzo 2001*, edited by Costanzo, Genova, 2002; Pernice, *The Charter of Fundamental Rights in the Constitution of the European Union*, Walter Hallstein-Institut, Paper 14/12.

[7] Case C-29/69, *Stauder v City of Ulm*.

[8] In 1974 the Court of Justice established that fundamental rights form part of the general legal principles it is bound to safeguard and that in the protection of such rights it must refer to the constitutional traditions common to the member states. In this matter there can be no legitimacy for any measure incompatible with the fundamental rights recognized and protected in the constitutions of these states (Court of Justice, ERT, Recc. 1991, p. 1-2925, point 41). Among the single main fundamental rights the Court of Justice has so far recognized the following:
- human dignity (Casagrande, Recc. 1974, p. 773);
- principle of parity (Klockner-Werke AG, Recc. 1962, p. 653);
- ban on discrimination (Defrenne/Sabena, Recc. 1976, p. 455);
- freedom of association (Federazione sindacale, Massa…, Recc. 1974, pp. 917, 925);
- religious and confessional freedom (Prais, Recc. 1976, pp. 1589, 1599);
- protection of the private sphere (National Panasonie, Recc. 1980, pp. 2033, 2056 and following.);
- medical secret (Commission/Federal Republic of Germany, Recc. 1992, p. 2575);

arising from the ratification of the European Convention of Human Rights (ECHR) by the European Community, resolved by a negative opinion from the Court of Justice, demonstrates how, despite widespread awareness of fundamental rights and the knowledge of their necessary actionability, the question existed – and still exists – as to whether such rights could be protected only before the Court of Human Rights in Strasbourg, or also before the Court of Justice in Luxembourg or before both and with what effects.

The approval of the Nice Charter has not resolved the problem.

In the first place, this is because of the nature of the Charter, which is a non-legally binding political act; it is true that the Charter is now applied by the Court of Justice[9] and by national judges as though it were binding, but in the view of many experts, the Court of Justice was not created for the defense of human rights, and it is therefore inevitable that it would be forced to privilege economic interests subordinate to the Treaty, rather than the interests of the *person*. And so its competence in the matter is back in discussion.[10]

In other words, many experts believe that fundamental rights could be considered the fifth pillar of the Community, but not a load-bearing pillar. And in common parlance the "fifth column" is only a sham support when not actually unreliable.

Then where is Europe going? According to Bockenforde the expansion of the four freedoms, which constitute the pillars of the single, integrated market existing in economic competition with other markets, comparable with the American, the Russian and the Chinese, "leads to the emanation of an capitalistic industrial and intensively competitive society no longer subject to the intervention of the social state.[11] At Community level we witness the birth of "a *pure economy*, its liberation from the *social* market economy".[12]

If this is so, can we restore a role to the Nice Charter, so that it stands as a symbol of a Europe different from the one that emerged from the 1957 Treaty, and is effectively, as Václav Havel defined it, a community of values and cultures that re-admits industrial freedom, democracy, the state of rights and civil society?[13]

• right to property (Hauer, Recc. 1979, pp. 3727, 3745 e ss.);
• professional freedom (Hauer, Recc. 1979, p. 3727);
• trading freedom (Intern. Handelsgesellschaft, Recc. 1970, pp. 1125, 1135 e ss.);
• economie freedom (Usinor, Recc. 1984, p. 4177 e ss.);
• freedom of competition (France, Recc. 1985, p. 531);
• respect for family life (Commission/Germany, Recc. 1989, p. 1263);
• right to effective judicial protection and to a fair trial (Johnston/Chief Constable of the Royal Ulster Constabulary, Recc. 1986, p. 1651 and following, p. 1682; Pecastaing/Belgium Recc. 1980, p. 691 and following, p. 716);
• inviolability of the domicile (Hoechst AGI Commission, Recc. 1989, p. 2919);
• freedom of opinion and of the press (VBVB, VBBB, Recc. 1984, p. 9 and following, p. 62).

9 The opinion was given on 28 March 1996.

10 De Witte, *The Past and the Future Role of the European Court of Justice in the Protection of Human Rights, in The EU and Human Rights*, cit., p. 859 and following.

11 *Op.cit.*, p. 181.

12 *Op.cit.*, p. 182.

13 *Op.cit.*, p. 201.

2. Fundamental Rights as the New Founding Principles of the European Union

The problem is crucial because the codification of human rights at national level is now not enough, especially with the imminent Europeanization of economic and social relations and the launch of the codification of European citizenship.[14]

As the borders of the EU expand and as competition at global level becomes ever harsher, then recognition at European level, by the EU (not only because of the effect of European Convention ratification by states, bringing them to the condemnation of human rights violation) becomes a compelling necessity.

In other words we cannot entrust human rights only to a jurisprudential application of the Nice Charter, as long as it formally remains a non-binding political document.

Nor can it be considered satisfactory the affirmation that human rights – having their origins in a pre-state law, natural law – are sufficient unto themselves and have no need to be transformed into rights recognized by the positive system since they would be degraded and subject to the changeable will of the (national) legislator.

The fact that fundamental rights already belong, as unwritten law, to the "primary law" of the EU ought to push us towards another step forward: Hasso Hofmann very perceptively points out that if it is true that the objective of every political association is the preservation of the natural and unalienable rights of man, as the *Declaration* of 1789 claimed, then the Nice Charter becomes a milestone on the road towards the creation of a European federation.[15]

From here arises the idea of incorporating the Nice Charter into the Treaty of Rome as an intermediate step on the road to the final ratification of the European Constitution.

This would not be an expensive operation. If we go along with Isaiah Berlin's notion of bipartition, the rights recognized by the Charter are largely rights of abstention aimed at the recognition of the freedoms obtained through the authorities' abstention from their violation, rather than rights claims, which would entail an economic cost.

This proposal could appear to result from an authoritarian, antidemocratic view of European citizenship, seeing that every modern constitution has not been octroyed, but won by the people.

And yet a charter of rights ought to be the founding slab of a community and therefore approved by single states rather than imposed from on high. But if the innovative aspects of the Nice Charter are not so implicative with regard to the constitutional principles already recognized in the single systems of the member states, then the Nice Charter cannot really be considered a genuine new constitution.

3. The Notion of Person in the Civil Codes: The "Subject of Rights"

The introduction of fundamental rights into the body of private law is the result of adaptations that have developed in the course of time: it has been a rough and difficult path.

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[14] On this point Hofmann, *I diritti dell'uomo, la sovranità nazionale, la Carta europea dei diritti fondamentali e la Costituzione europea*, from it *I diritti umani*, cit., p. 127 and following.

[15] *Op.cit.*, p. 137.

The civil codes of the nineteenth and twentieth centuries open, usually, with provisions regarding the physical person, often followed by orders concerning the legal person. So, a "model code" destined for use in the European sphere could also proceed in this manner, for systematic reasons and because a code that regards relations between private persons cannot exclude the configuration of the legal position of the person. Even at the time, Portalis, when presenting the rules in the Napoleonic Code, declared that the code was centered on and dedicated to the person. His warning is still valid today. Dealing with the person in legal terms means establishing when a being is a "person", when life begins and when it ends, when the person can execute valid legal acts, and so on. Moreover it is clear that the concept of the person varies depending on the epoch and the cultural and political contexts that give rise to the norms.

The legal notion of person must also be historicized. For Portalis, quite apart from any affirmations of a general nature, the person was the "citoyen", he was the owner, he was the contractor, he was the subject responsible for the unlawful act, he was the trader. In the legal language of today, person is the consumer, the saver, the professional; but in general, person is the subject that holds rights and duties. An examination of Community norms, the acts of the Community bodies and the work of these bodies, reveals that very often, reference is made to the rights of the person, even if the latter is not defined; the impression given is that the person is depicted in a fragmented fashion; only some aspects of it are graspable, and the fragments are not conjoined in a conjoined framework.

When "person" is spoken of in the sphere of law there is a clash of widely differing definitions. Today we are used to considering the person as a holder of fundamental rights but we should not forget that the idea of person meant as human being in itself the holder of rights and duties is the outcome of a long and tortuous journey. It is a roundabout journey compared to what one might rationally read. From a rational and systematic perspective, the first thing to be laid down should be fundamental rights (such as life, health and freedom) then political rights, then economic rights and then civil rights.

If we follow the footsteps of history, the idea of innate rights of the person as such begins in the seventeenth century, but the normative documents show that economic rights were affirmed first, then dvii rights, then political rights and finally human or fundamental rights. And in this regard there remain differences between the various concepts of rights categories concerning the person (besides the very notion of right, subjective right, claim right and so on), which accompany the meta-juridical perspectives (philosophical, sociological and religious) through which the person is considered.

With Pufendorf, the essence of the person is revealed in its human dignity – that characteristic that must be recognized in every individual whatever his social role. Unlike Holmes and Grozio, Pufendorf does not justify but condemns slavery. His ideas traverse and pervade French legal culture, becoming a driver for the refoundation of civil law.

In the period when Pufendorf wrote his essential work on the law of nature and of nations (published in 1672) Domat followed with his Loix civiles in 1689.

Domat can be assumed to be the prototype of the model of legal reasoning with regard to the conception of the person (Lib. Prel., title II, section II). He in fact distinguished two states of the person – taken to be the complex of qualities of a human being – as natural and civil. The natural aspect concerns the gender, birth and age of the person; the civil is instead determined by the "arbitrary laws" of men, and is conditioned either by the Roman tradition (freedom, citizenship, family) or by local laws (in France this meant a distinction, in persons, between nobles and the poor, ecclesiastics, citizens and plebeians, free or servile status. The

latter however was not a personal condition but was instead linked to the domicile or the nature of wealth possessed.

Whilst however admitting that slaves did not exist in France, Domat describes their condition in terms of Roman laws. In the 1796 Italian language edition of the Loix civiles published in Naples, the commentary in its pages declared that in the Kingdom there were no slaves other than the Turks, "taken while in the act of piracy"; they can be sold, but their legal circulation is admissible only within the bounds of the Kingdom; they may be freed, but even if free, they must not cross the borders, on pain of being put back into slavery.[16]

Although noteworthy, Domat's concept is not without its flaws in the eyes of today's jurists.

The keystones for the constitution of the notion of person in the past – Roman law, medieval law natural law, pre-Napoleonic civil law – seem to wobble because they are the product of hypostasis or antihistoric operations, anachronisms which the jurist echoes to justify supremacies. Tradition is an instrument for justifying the present and for defending the need for its continuity with the past, in other words, to conduct operations that are ideologically oriented but not made explicit.

The fact that the notion of person is codified in some experiences does not imply the ingress of individual guarantees, nor does it mean that experiences containing rules and treatments on persons present advantages or merits superior to those it lacks. What counts is the application of those rules and those treatments.

Nor should emphasis be placed on concepts of the person that emerge from the codes. As has been previously indicated, in the Napoleonic Code the person is considered in its guise of property owner, and in the commercial code in its role of *marchand*.

4. Identities

There is thus a gap, in the conception and the discipline of the person, between the models of the civil codes and the new needs of a modern society. These needs were supposed to be met with the articulation of the fundamental rights recognized in the constitutional charters – and now in the Nice Charter – and even with the supersession of the formal and (apparently) neutral conception of the person through the legal construction of identities.

The constitutions of the post-war period – particularly the Italian Constitution of 1948 and the German Basic Law of 1949 – marked the transition of the notion of the individual as an abstract subject of law to that of the individual as "person", The terminology used or the formulas from whose interpretation this great innovation was extracted signal a genuine turning point in the continental legal culture. Article 2 of the Italian Constitution recognizes and guarantees the inviolable rights of man, as both a single entity and in the social groupings where his personality is composed.

The Italian Constitutional Court has made much use of article 2, often in connection with article 3, which states the principle of equality. This, with regard to fundamental freedoms, the right of association, freedom of thought, the rights of family members and the right

[16] *Le leggi civili nel loro ordine naturale di Gaio*: Domat, counsel of the King in Clermont, translation from the French, III pub., T I, Naples, 1796, p. 188.

to health. The person is thus understood not in abstract but in concrete mode with regard to the needs of biological life and associative life.[17]

5. Differences

There are themes that for the moment have not received the attention they deserve from scholars of private law: the identification and classification of individuals, identity through criteria that are racial and ethnic in their legal profiles. In current studies this categorization process of individuals is relevant only to the constitutional framework and international law. Now the classification of individuals according to this evaluation index has revealed its complexity in cases where identity is connected to migratory phenomena. Alongside the profiles already indicated there emerge questions of public order and even criminal aspects. But there are also positive sides, where this identity is linked to the economic role of immigrants; and it is this case that we see a strengthening of the connection between these qualifications of the individual and the relations of private law.

This is a chapter that can be added to research I began many years ago, concerning the legal construction of the individual identity. I asked myself how jurists who had put their science and their capacity at the service of power – to identify the persons and to construct the differences between the persons – had in reality contributed to the creation of an unjust, oppressive, cadastral and closed society. And it is this very through line that runs down through the centuries, showing us just how obsessive the jurists were in their need to juxtapose what was with what appeared to be – to paraphrase Stefano Rodotà.

By way of example, the rules of the pre-unitary states, and again before that in the eighteenth and seventeenth centuries, were so detailed they established the way people dressed and the colors they could choose: those from the humbler classes could choose dark colors (grey, brown, black) corresponding to the mendicant orders; even the number of buttons was regulated, meaning that buttons were an index of a higher social position, so people from a lower social order could not wear garments adorned with buttons.

One of the historically most persistent criteria in the classification of individuals was religious membership. The manifestation of religious membership symbols, seals and colors was then one of the most widely adopted practices in society, that to our eyes would not seem so terribly oppressive; the Jews, even in Renaissance and Enlightenment society, were obliged to wear clearly visible marks that would make them immediately distinguishable. The yellow star was not an invention of Nazism; as far back as the seventeenth century the Papal States obliged the Jews on certain days, at certain hours, on certain occasions, to wear a yellow cap precisely so they could identified; the appearance had to correspond with the reality. Obviously it was a highly imaginative construction with which the jurists put their genius at the disposal of power to achieve this end: isolate the "others" and make them recognizable with external markings, since nothing, without those symbols, would distinguish them from their consociates.

This is the context relevant to the regulation of distinguishing criteria based on racial origin. It should be remembered that racial discrimination in Italy began well before the anti-Semitic laws of 1938; the colonial laws of the early twentieth century created differenc-

[17] See now Celotto, *Costituzione annotata della Repubblica italiana*, Bologna, 2006; Iudica, Alpa, *Costituzione europea e interpretazione della Costituzione europea*, Napoli, 2006; *L'identità nell'orizzonte del diritto privato*, edited by Zatti, Padova, 2007.

es between citizens through ethnic origin a difference that was observable since politically linked with the organization of the colonialist state.

Today however the question presents itself in different terms; no longer for reasons of persecution or criminalization but rather as a social and political phenomenon, as a response to immigration, to the protection of religious minorities, to the expression of values not shared by the entire community.

The early regulatory interventions are sporadic, occasional and incomplete. First there were the immigration rules that introduced the notion of racial difference (the so-called Martelli law) and then the Turco-Napolitano law (denominated single text on emigration, No. 40 of 1998). This regulation is quite innovative and is of interest to the jurist because firstly, it attempts a definition of discrimination in a positive sense creates a distinction between direct and indirect discrimination; in the second place it connects racial identity with profession of a religion while normally, even in reference to a community, racial identity is considered a state in itself, not linked with other connotations. It is even more advanced than international agreements such as the UN convention, which states that racial identity is not in itself a cause of discrimination: therefore discrimination for reasons of ethnic origin does not constitute an unlawful act requiring intervention by the authorities: discrimination in itself is of no consequence if not linked to violation of human rights; so racial discrimination that does not entail al so the violation of human rights, according to the UN rules, would not be an unlawful fact.

Community directive 43 of 29 lune 2000 is full of gaps; it continues to use the notion of race without defining it and introduces the distinction between direct and indirect discrimination, albeit leaving ample space for the national legislators.

Also, the latest two Reports on fundamental rights in EU states (2005 and 2006) highlight how in many member countries anti-discriminatory regulation is still well away from completion and implementation.

6. The "Virtual" Person and Personal Data

Unlike the private sphere, public life is not an ambit where one can draw a line beyond which the person has a "right to be left alone"; we cannot in this case establish a kind of environment in which, beyond the single person's right to property, we also exercise the right to not be disturbed.

The gathering of information is a constant and continual practice, and affects the most hidden parts of the personality, utilizing any existing means and breaking through any borders. In our system there are no laws that regulate the gathering of information and its use and distribution by third parties. There are specific norms that govern single instances, such as the ban on collecting information on political and trade union opinions of the worker, to help try and prevent discrimination in the workplace (art. 8 of the workers' statute) or norms that prohibit the use of information on the political and religious opinions of armed forces members in order to prevent discrimination (art. 17 of the 1978 rules on military regulation).

Recently however, the need has arisen for appropriate laws to give citizens the right to know about information being gathered about them, the right to ascertain the accuracy of the information, and therefore the right to rectify incorrect data, and the right to oblivion – the erasing of the information on the data cards after a certain period of time. The use of electronic instruments makes the question even more delicate, exposing the single individual to harm on an intimate level: his personal identity and the privacy of his opinions, which is not easily preventable. This has been amply demonstrated in recent cases of espionage and

information dossiers on employees of large firms or the public administration, or figures from the world of politics or culture.

The regulation of personal data archives is governed by several normative sources and is collected and organized systematically in the "Privacy Code" (legislative decree n. 196 lune 30th, 2003).

Article 1 of the Privacy Code states the general principle that "everyone has the right to protection regarding personal data about them".

This right is recognized also by the Nice Treaty, which, distinguishes between the right to confidentiality, in article 7, and the protection of data on the person, in article 8.

As for the specifically stated rights of the person (art. 7), they correspond to rights established by agreements and directives in this area, based on the regulations that some countries (such as France, Germany, Great Britain) had already succeeded in introducing. They concern: the right of the individual to have free access to data about him or her; to be informed of the identity of the holder of the data bank, of the person in charge of it and of the aims and modalities of use of the data; to obtain confirmation of the existence or otherwise of data about him, the acquisition of data, the knowledge of the logic and aims of its use; to be able to request its cancellation, its transformation, anonymously, or the blocking of data used illegally; to obtain its bringing up to date, the amendment or extension of the data; to know the identity of the subjects to whom the data has been transmitted; to oppose, for legitimate reasons, the use of the data and its communication to third parties for commercial ends; to be compensated for asset (art. 15 para. l) and moral damage (art. 15 para. 2).

As regards the actual data, the cited law expresses the general rule stating that it can only be acquired with the express consent of the person concerned. But the picture is more complex because there are derogations and additional responsibilities.

In fact the Privacy Code distinguishes between:

(i) data that can be collected and treated without the consent of the person concerned; this can relate to data collected or held: through legal obligation, through the fulfilling of obligations deriving from a contract to which the person is bound or through the acquisition of pre-contractual information requested by the latter, or through the fulfillment of a legal obligation; likewise, consent is not required for data originating from public registries, lists, acts or documents accessible to the general public; also, data used for scientific or statistical research, provided that it is anonymous; and al so data acquired for the carrying on of the jobs of journalism, or economic analysis pertinent to industrial or business secrecy; consent is not required when data collection is necessary for the protection of life and the physical wellbeing of the person concerned or of third parties; if consent is unobtainable due to the circumstances the person finds himself in; and again, for the completion of investigations by public authorities and authorized persons and to defend or promote a right by judicial means;

(ii) sensitive data; used for revealing racial and ethnic origin, religious, philosophical or other convictions, political opinions, membership of parties, trade unions, or associations or organizations of a religious, philosophical political or trade union nature. This grouping also includes personal data capable of revealing a person's state of health or sexual activity; the treatment of this data however requires the prior written consent of the person and the authorization of the privacy authority; the use of this category of data by public bodies is allowed only through authorization by express provisions of the law, specifying the nature of the data, the practicable operations and the public interest objectives pursued;

(iii) data regarding health, can be treated by healthcare supply professions and by health authorities, with the person's consent, without authorization of the privacy authority, but only for ensuring the physical health and safety of the person if these purposes concern a third party or the community, the person's consent can be replaced by prior authorization of the authority; health data can be disclosed to the person only through a doctor designated by the person or holder; distribution of the data is prohibited, except in the event of prevention, judgment, or suppression of crimes.

The protection of personal data is governed by administrative and jurisdictional measures. The former category is the competence of the privacy authority, and the relative procedure is regulated. In the latter case, the ordinary judicial authority is competent. The sanctions can be criminal, administrative and civil (art. 15). In particular, an amply worded rule, closely following art. 2043 of the Civil Code states that "whosoever occasions damage to others by effect of the treatment of personal data is obliged to pay compensation, in accordance with article 2050 of the Civil Code: So, a distinction can be made between: responsibility of a contractual nature, which pertains to the relation between the person concerned and the holder of the databank, where this relation has intervened by means of transactional consensus; and extra-contractual and objective responsibility, regarding the person or third parties, and ascribed to "whosoever" (not only the holder or responsibility bearer but also to any third party). The reference to article 2050 does not mean this activity is dangerous, but serves only to reverse the burden of proof, and to therefore favor the victim.

The experience conducted by the privacy authority for personal data has been positive.[18]

7. The Family at the Present Time

The relationship between individual and community also passes through the family, this "natural society" that, being based on marriage, is assigned a special position by article 29 of the Constitution. The reality of today's world indicates the existence of types of family quite different from those the Founding Fathers were thinking of: apart from single people,

[18] Rodotà, *Intervista su privacy e libertà*, edited by Conti, Laterza, Rome-Bari, 2005, p. 153, 10 euro. With an effective image, Rodotà depicts the "second body" of the person, which is not the mystical body of the King, but the digital body that coexists with the physical body in all of us, regardless of social class, cultural background or lifestyle habits. It is a body we have not chosen but have enrobed ourselves with, by virtue of the information networks formed by the digital trails we leave behind us. The Italian experience, which the Authority itself has helped create, is endowed with abundant values but also perils. It took some time for the new form of the privacy regulations to be accredited. The privacy authority has brought in order, clear directions and simplification. Even though Italian society seems to be afflicted with a sort of squint: while it takes heed of this great good, it indulges fully in televisual voyeurism. Big Brother has changed from being an Orwellian warning to an apartment mini-drama! However when the system began to function, receiving consensus and approval – many are the examples that Rodotà offers in this palatable reconstruction of the chronicles of privacy in Italy – September. Il happened and later, terrorism in Spain, the United Kingdom and other western countries. Now the alternative is quite drastic, as the recent debate in parliament confirmed. Must security mean restrictions on freedom, or can an intermediate path be found? The reply from the Italian parliament has been the latter. We, as westerners, cannot bow to terrorism and give up our rights, but we can cooperate to put up with some functional limitations to help beat crime. But since we are talking about our rights, what is needed is critical awareness, dialogue and discussion: in the end we need to participate in the choices that affect our freedoms.

there are still "patriarchal" families with several generations living together, there are nuclear families consisting of a married couple with perhaps a single child, families where the parents are separated or divorced maybe after having had children, and who have then gone on to make other families producing other children; families of persons of different gender not united in marriage, families of persons of the same gender (the constitution makes no mention of this, but being related to social formations, these families can be dealt with by article 2 of the Constitution).

The legislator is – only now – bringing the norms up to date in the matter. And yet there have been many shifts in family law, often in dose succession, because the family evolves in haste, having to keep up with the evolution of society. The authoritarian family of the 1942 code was remodeled in the 1960s by the Constitutional Court into a family that was more respectful of the rights of its members; then the system was revolutionized by the legislative reform of 1975.

Thirty years have passed since the introduction of the reform, which (then) gave this sector of the law[19] a modern, liberal character, based on civil rights.

The turnaround was radical: "an arrangement almost identical to that inaugurated by the Napoleonic codification, has been taken by the reform and replaced by another" in contrast with the original model: almost two centuries had passed and Italian society had, with much strain, finally acquired new and more appropriate cultural models, embraced the principles of equality and reciprocal respect between spouses, and a more human and friendly rapport with the children. The mask of law projected an image of the family totally divorced from reality. With the reform, lay principles and realistic values supplanted the "idealistic, rural and Catholic matrix" that colored the existing law up till then.

Today the rights of the single components are recognized within the family structure; the individual rights of the spouses are no longer sidelined; cohabitation as an alternative to marriage is of considerable prominence; the property independence of the married person has increased; progress has been made in the strengthening of the rights of children – which are, moreover, now protected by international agreements. The law, applied by judges with often creative solutions designed to bridge the gaps in the reform, has ended up not only reflecting the existing reality, but actually pointing the direction for its positive evolution.

Beyond the thorny issues that the Italian situation comes up against (one example is artificial procreation), many problems remain unresolved. Two are worth mentioning here. On the processual plane, the legislative unification of competences in the matter of minors; and on the constitutional plane, the role of the Regions.

The first point involves the solemn responsibilities of the legislator, who has not yet arranged for the unification of judicial competences. The second point is simply political in nature.

It is true that the family, originating in the civil system, is a subject reserved for the state. But many Regions have begun to deal with them, for reasons connected to social security. And the demarcation line between the two spheres, so precise on paper, can in reality become vague. The fear is that we may again see the regionalization of a series of relations that the reform intended to keep under unitary regulation. The state that existed for the codifiers of 1942 was an authoritarian one, whereas the state of today is built on civil rights. And the Regions cannot introduce discriminatory laws by stealth, variable according to the latitude of the relations.

[19] Sesta, *Diritto di famiglia*, 2nd ed., Padua, 2005.

The European Union has also meddled in the matter, especially with regard to family law and labor law. It is not uncommon to think of a "European' family law: the mobility of persons, the circulation of cultural models, and legislative transplants are all factors that militate in favor of more uniform regulation that works across national (and subnational) borders. And in fact in this area of the creation of a European private law, there are already some research groups attempting to ascertain whether this is really a realistic and feasible goal.

8. The De Facto Family

Setting aside some sporadic and marginal moves by the legislator, the construction of the legal aspects of the family based not on marriage but on couples who cohabit as though they were married, owes to the jurisprudence of the Constitutional Court.

There are basically two types of intervention: one that brings disadvantages the couple, and one that benefits them. It is strange to note that often, the sentencing models used to recognize the legal relevance of the family in fact resolve in the penalization of cohabitation.

The favorable kinds of intervention are ostensibly very rare and have largely taken place in recent years. They can be categorized thus:

- decisions that extend the provisions of the law on the duration of rental contracts for dwelling structures or on the succession of rental contracts, to cohabiting couples.[20] An example in this regard is the Constitutional Court sentence (of the "additive" type), with which recognition was given to the legitimacy of art. 6, para. 1 of law 392 of 27 July 1978, (in fact the 'fair rent' law) "in the part in which there is no inclusion, among the persons entitled to inherit the titularity of the lease contract t in the event of the death of the tenant, deceased tenant who has leased the cohabitation arrangement, in favor of the ex-cohabitant, when there are natural offspring.[21] However, non-legitimacy has not been declared because of differences of treatment between legitimate family and natural family (indeed, the Court makes it clear that there remains "in any case a difference in the condition of the spouse from that of the cohabiting partner"), but because of opposition to article 47 of the Constitution, which institutes a subjective right to a habitation;
- decisions that admit compensation for damages to the cohabiting partner of the victim killed;[22]
- decisions that extend insurance benefits (particularly hospital care) to the cohabitant of the insured party;[23]
- decisions that validate the registration of a property to the cohabitant during the course of the cohabitation arrangement, considering it as the payment of a patrimonial entity in compensation for a job of work done;[24]
- decisions that ignore a cohabitation arrangement in order to have the woman qualify as head of the household and therefore be entitled to a bigger payout.[25]

[20] T. Genova, 12-3-1979, in *Giur. mer*., 1979, I, p. 912 (with some contrasting precedents).
[21] Sent. 7-4-1988, n. 404, in *Foro it*., 1988, I, c. 2515.
[22] T. Verona, 3-12-1980, in *Resp. civ. prev*., 1981, p. 74.
[23] T. Genova, 17-12-1979, in *Dir.fam. pers*., 1981, p. 159.
[24] T. Bari, 21-1-1977, in *Giur. it*., 1978, I, 2, c. 254.
[25] Cass., 9-4-1971, n. 1053, in *Temi*, 1973, p. 57.

It is useful to remember al so the EU Court of Justice sentence that recognized the relevance of the de facto obligation instituted by a worker with his cohabitants, and therefore held that "the member state that allows the unmarried partner of one of its citizens to live on its territory, and who in turn is not one of its citizens, must attribute the same advantage to the non-married partner of a worker, citizen of another member state employed on its territory".[26]

The interpretations of these jurisprudential models proposed in doctrine are manifold. A distinction can also be made between pronouncements that resolve relations within the couple, and pronouncements that regard the couple against the marriage-based family.

With regard to relations within the couple, pronouncements are so few and far between that they barely constitute a category in themselves: what is worth noting however, is the sentence of the Pisa court, on 20 January 1988[27], which stated that "should one of the cohabiting couple acquire a property in their own name only, the other partner cannot, on cessation of the relationship, consider him/herself to be holder *pro indiviso* of the property, except in the case where there is exhaustive, ritual proof of the existence of an indirect donation, or of indirect representation, or of spontaneous and aware fulfillment of a natural obligation".

The Constitutional Court has pronounced many times on the *de facto* family. Obviously, it has asserted the prevalence of the legitimate family over the de facto family, and has awarded the legitimate family the privilege of full protection: art. 29 "recognizes in the legitimate family a higher dignity, owing to the traits of stability and certainty and to the reciprocity and equivalence of rights and duties, that originate only through marriage[28], but it has stated precisely how the de facto family can be included among the social formations protected by article 2 of the Constitution, and therefore worthy of "constitutional dignity".

For example, in sentence No. 237 of 18 November 1986, on the legitimacy of the exclusion of the cohabiting partner from the category of next of kin towards whom the exclusion of punishability works (amongst others) for the offence of aiding and abetting (ex articles 307, para. 4. and 384 Civil Code) the Court observes – as *obiter dictum* – that "a consolidated relationship, although *de facto*, does not appear – from a summary enquiry – constitutionally irrelevant when regarding the importance conferred on the recognition of social formations and to the consequent inherent manifestation of solidarity (art. 2 Constitution)".

The Court also holds that art. 29 of the constitution does not in itself "deny dignity to natural forms of relationship different from the legal structure of marriage".[29]

It remains however a form of partnership the Court believes precarious.

For example, in sentence 423 of 7 April 1988, which rejects the doubt on the constitutional legitimacy of art. 649 of the Penal Code in the Penal Code, to the detriment of the cohabitating partner, observes that a distinction must be made between conjugal partnerships, legal separation between married partners, and de facto families. The latter group is by its nature "based on everyday affection, at any time annullable by either of the parties".

But such *de facto* cohabitation is made equal to the situation created when the cohabitants are united in religious, non-registered marriage. For the purpose of cohabitation understood as the common use of a dwelling, the Court observes that, though the situation of the spouse remains different from that of the cohabiting partner, as far as article 3 of the

[26] Sent. 17-4-1986, in *Foro it*., 1987, IV, C. 293.
[27] In *Dir. fam. pers*., 1988, p. 1039.
[28] Sent. 26-5-1989, n. 310.
[29] Sent. 26-5-1989, n. 310.

Constitution is concerned it makes no sense, i.e., it is not reasonable; it does not provide for the succession of the rental contract of the deceased cohabitant.[30]

With the same sentence, the Court held as illegitimate the norm that does not provide for the possibility of succession of the rental contract when there is a cessation of cohabitation (even more so when there are children).

But the Court is not driven to admit an equivalence of treatment simply and purely for succession purposes between *de facto* couples: the relationships between the two partners, in the Court's view, cannot create rights and duties (e.g., beyond those of succession, the alimony obligation and the fidelity obligation) because that would contradict the very nature of the cohabitation arrangement, which is a *de facto* relationship that by definition falls shy of legal qualifications of reciprocal rights and duties". On the other hand, with attributions made in life, *i.e.*, with attributions declared in the will, the *de cuius* can (within the limits of the necessary succession and without affecting the share destined to the spouse) benefit the *de facto* cohabitant.

Recent jurisprudence tends, in certain aspects, to equate *de facto* cohabitation with marital partnership.

First of all, it is held that the cohabiting couple is stable when the cohabitation arrangement lasts at least two years[31], while it is ruled out that a long engagement can be considered as cohabitation.[32]

While not purporting the simple analogous extension of the provision of art. 143 of the Civil Code to the *de facto* family, the judges nevertheless show a particular regard for the cohabiting partner (usually the woman) found in the weaker economic situation.

It is therefore held that in the course of the cohabitation arrangement there is legal relevance attached to the contribution brought by one of the cohabitants to the other, for the conduct of the family situation[33] that the constitution of a charge-free usufruct for the cohabitant be considered legitimate, also as a means of compensation for the contribution the partner has brought to the family life[34]; that there be no repetition, on the part of the heirs of the deceased cohabitant, of the sums conferred by this to the other partner in the course of common life, provided that the sums are not disproportionate[35] that it be possible to attribute to the cohabitant – to whom the children have been entrusted after the cessation of the cohabitation arrangement – the right to reside in the family dwelling, even if the property of the other cohabitant[36] that it be possible to attribute reversibility pension to the cohabitant[37], even if the wife is still alive, if she finds herself in a more favorable economic situation than the other one.

One of the sectors where, since the 1950s, compensation for damages to the cohabiting partner has been sought, concerns damage to alimony credit.[38]

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30 Const. Court, 7-4-1988, no. 404.
31 Trib. Brescia, 10-4-2003.
32 Trib. Milano, 13-7-2001.
33 Trib. Torino, 11-6-2002.
34 Trib. Savona, 7-3-2001.
35 Court of Monza, 18 Nov. 1999.
36 Cass., 26 June 2004, no. 11975.
37 Cass., 10 Oct. 2003, no. 15148.
38 Ad. es., v. Cass, 28 Mar. 1994, no. 2988.

It is ruled out instead that the cohabitant has the right to maintenance or foodstuffs[39] and that it can occur in the rental contract.[40] On the other hand there is controversy surrounding the issue of whether the alimony payment can be maintained[41] or not[42] in the case where, after the divorce the ex-spouse assignatory begins cohabiting with another person.

9. Family Unions

Social relationships have involved in such a way that the legislator must take account not only of the de facto family of different sex persons, but also of the that of persons of the same sex; in this regard, rather than "family", the preferred expression is family union.

Some legislator of European states have opted for full marriage status between persons of the same sex. Others have gone for the recognition of civil unions between same-sex persons.

The European parliament approved a resolution condemning discrimination, existing in member states, against homosexuals, and expressed the wish for legal recognition of homosexual "unions".[43] Some municipalities have introduced – for General Registry reasons, to aid the allocation of public housing or for other motives – a register of "civil unions", There are also bills of this type going through parliament, based on the recent French regulations for the so-called Civil Solidarity Pact.

Now intervention from the legislator is anticipated, which is nevertheless contested by those who believe that the elevation of the *de facto* family to normed status could threaten the integrity of the family founded on marriage.

This is obviously an ideological use of normative purposes, which is quite another thing.

But such as it is, this is one of the realities, or of the images of reality that can be seen through the kaleidoscope of private law.

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39 Trib. Napoli, 8 July 1999.
40 Const. Court 11 June 2003, no. 204.
41 Cass., 8 Aug. 2003, no. 11975.
42 Cass., 12 Dec. 2003, no. 19042.
43 Res. 8 Feb. 1994; critical commentary of Schlesinger in *Corr. giur*., 1994, p. 393. For a wide ranging comparative research, see *Matrimonio, matrimoni*, edited by d'Usseaux and D'Angelo, Milan, 2000.

Chapter VII

Tradition Revisited: Ownership

Index: l. Introduction. – 2. Ownership as a Polyhedral Concept. – 3. Ownership and Ownerships. – 4. *Excursus Storico*. – a. Dominium Directum *and* Dominium Utile. – b. *The Modern Conception of Ownership: The* Code Civil (1804). – c. *The Unitary Conception of Ownership*. – d. *Ownership and Ownerships*. – e. *The Prevalence of Special Legislation*.

1. Introduction

Ownership, contract, and liability are the fundamental institutions of private Iaw, central in the treatment of the subject and in the conception of private law as "the right of private persons".

Ownership because it assigns the individual ownership over assets, contract because it provides a tool that allows direct use of them, and liability because it safeguards the individual (and his assets) from external attacks, or in other words, civil wrongdoings.

These institutions are the hub around which the science, the legislation, and the jurisprudence of civil law are formed.

Yet over the years, even these institutions have been invested with an extraordinary normative and jurisprudential production at all levels, so that today it has become somewhat difficult to underline the more significant aspects.

Here the tale becomes more compelling, but al so more difficult, because it covers historical as well as economic perspectives, from a tradition-derived ideological system to European values, and from comparison to practical issues. Let's then begin with ownership.

2. Ownership as a Polyhedral Concept

The representations of the Court of Strasbourg and the new constitutional texts approved at Community level the Nice Charter, incorporated into the Treaty for the European Constitution, seem to mark a return to the conception of "full" (if not absolute) ownership of the holder, leaving aside all limitations that may result from social exigencies, in particular the controversial but connoting formula of its social function. This line has gradually been consolidated with regard to, above all, the measure of the expropriation indemnity, which now approaches (if not matches) the saleable value of the goods.

This is only one aspect of the changes taking place. But we should also consider the regulation of rents and leases, where the rules approach or even match market values, which are chosen by private autonomy as a benchmark to determine the usage of compensation owed to the holder of the asset. The new regulation of intellectual property is heading in the same direction.

From the point of view of the impact of new technologies on goods and services, we are witnessing a concurrent yet significant phenomenon: in the case of movable goods, even at the most vital level, service prevails over the circulation of the ownership of the good. In other words, the forms of use, translated into as many contractual relations like leasing, light lease, rental or hiring, tend to substitute the purchase of the good, not only for fiscal reasons, but also because of practicality and economic convenience. Since they are vulnerable to obsolescence, office furnishings, office equipment, and machinery used in production processes are leased or rented rather than purchased.

Consumer goods purchase methods have also changed: even in Italy, observers record a more widespread and expanding use of consumer credit, to the point that the purchase of

the good goes is accompanied by credit supplied by the finance institution for the purchase of the good from the supplier.

These are all indications of a new landscape that is having an effect on the regulation of ownership and the use of goods.[1]

From a point of view of the theoretical construction of property law, doctrine has particularly favored the perspectives of comparison and economic analysis.

From a regulatory point of view, a sporadic succession of legislative measures have been passed by parliament on issues like expropriation, compulsory purchase, construction and urban planning, cultural and environmental assets, and agricultural property. From a jurisprudential angle, constitutional jurisprudence has taken new paths, as have the Supreme Court and administrative judges. Furthermore, attention has been focused on group ownership, fiduciary property and trust, and on property deposited as collateral.

So how has the notion of ownership changed? Despite the fragmentation of the institution in properties made compliant by the legislator, Salvatore Pugliatti and Stefano Rodotà believe there has been an expansion of so-called proprietary logic in sectors where only the contract once stood: these are the new properties in which new aspects of the economic reality are raised to protected interests with proprietary remedies. Furthermore, comparison with other foreign models highlights the considerable relativity of both the concept and the regulation of property, whose characteristics seem to gradually diverge from the Roman conception, which still stubbornly rooted in Italian culture and judicial practices. Another feature that was intentionally underlined in the doctrine is the modular and more flexible use of the proprietary screen, above all concerning phenomena like trust fiduciary ownership of property collateral.

The economic analysis of property law reveals further aspects of this institution: its substantial disregard of the needs of the market, which requires more versatile models and, as a result, its dismemberment into property rights, entitlements, and rules of dvii liability. Therefore a combination of petitory remedies, injunctive remedies, and compensation actions appear, which legal economists suitably exploit to create economic efficiency.

The constitution al regulation of property has not formally changed since 1948, but its interpretation has, both in doctrine (the most recent change is less sensitive to the social function formula) and in jurisprudence, especially constitutional law, which seems to confirm the trend documented at the time by Giovanni Tarello (the Constitutional Court being more sensitive to civil law than to property law), consisting of: the establishment of limitations on the right to property in ratio to third party rights; and of limitations to the economic content, evidenced here by the equating of acquisitive occupation with expropriation proceedings, and therefore in the legitimacy of a compensation payment to the owner rather than full, satisfactory amends for damages.

On the remedial level stand both the concept of comparison – where we tend to find the integration of petitory and compensational remedies – and court procedural practices. On the other hand, the nature of the institution could not be fully comprehended if we were limited to considering only substantive law. It was also necessary to insist on ownership transfer techniques and relations between ownership and possession – the benchmarks of comparison in this topic, as Rodolfo Sacco has shown us and as Salvatore Patti has argued in the pages of this journal.

The survey on group ownership reconnects to the regulation of manager relations and therefore to the most vital sector in Italy today from all points of view: normative, economic

[1] The situation has changed in the twenty years since I collected the volume of material together with Mario Bessone. The new edition of the volume, edited by Andrea Fusaro, documents these new trends. Alpa, Bessone, Fusaro, *Poteri dei privati e Articles of Association della Property*, t. I e II, Rome, 2004.

and social – the intermediation and movable assets sector. This is perhaps the newest *facet* – at least for jurists – that often lends itself to studying or thinking of ownership through the categories of yesteryear, tending to describe the institution in its version traditionally linked to immovable assets or real estate.

All in all, even that right – "the terrible right" as the French revolutionaries defined it – which appeared to be the most unshakeable, after having encountered a complex era during which social demands abounded, now seems to recompose itself in new forms, while maintaining its original consistency.

But this was not always so. Indeed, during the 1970s, the opposite thesis prevailed, strongly limiting the contents of this ultimate subjective right in favor of collective interests.

3. Ownership and Ownerships

In today's language, expressions are used as synonyms – like ownership, possession, belonging, use, assets, enjoyment, and so forth. However, each of these expressions is assigned a precise technical definition in legal language, thereby differentiating between them and referring to different situations, whether on account of the contents or the powers assigned to the subjects who own them. So, for example, a person who buys an automobile can do what he wishes with it (resell it, keep in a garage, drive it for his job, lend it, give it away, destroy it): he is in fact the owner; but if he lends it to another person, who becomes the user, or borrower, or possessor, he divests himself of a right: that of enjoying the asset. But does not lose ownership; on the contrary, he who uses the asset, uses it as though (apparently) he were the owner, but he cannot resell it, or give it away, or destroy it. Then there are subjects who enjoy the asset (transported passengers, for example): they do not boast any subjective position, if not of mere enjoyment. This is the division of the several positions that differ from the original one, which is more complete and more complex – that of ownership.[2]

It becomes very clear that the concept of ownership (equated with concept of "private law", or of "legal person") is not immutable over time; neither is it absolute, but instead is relative. It assumes contents that, from time to time, the ideology of the time, collected in the norms, attributes to it. It is historically determined, in continuous evolution, and even differs in its geographic coordinates. "The concept of ownership", observed a jurist at the end of the last century, "the most important patrimonial right, is also the one that has undergone the most changes in accordance with the various political and social conditions and the variety of philosophical systems that have dominated the field."

4. Excursus Storico

Ownership, as intended today, is the result of a long historical process in which the content of the law is modeled by the socialpolitical and economic evolution of different countries; the legal form that expresses it therefore undergoes notable modification.

It is a serious error to interpret the expressions of "dominium" or "possession" of Roman law by applying our categories to them. Beyond the terminological affinity (or identity), their contents are somewhat different from those of the Middle Ages, from those of the early 19th century, and from those of today.

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2 Grossi, *La proprietà e le proprietà nell' officina dello storico*, Naples, 2006.

a. Dominium Directum *and* Dominium Utile

This process that invests the notion and regulation of ownership set down roots as early as the 14th and 15th centuries and is directly connected to feudal law: the fragmentation of the owner's powers into just as many faculty-rights, which may pertain to subjects other than the owner. Today this distinction is no longer relevant for essentially two reasons: (i) the disappearance of feudal law, dissolved by the French Revolution (with the decree of 15 March 1790 abolishing the seigniorial regime); (ii) the conceptual definition of ownership and of the owner's faculty, from which follows the unitary right of ownership, that lesser secured rights (usufruct, use, occupancy, etc.) are not a fragmentation of the right to ownership, but instead have their own autonomy and reinforce the right of ownership, limiting it, so they are not born of the break-up of faculty (considered autonomous rights), but derive either from voluntary fact of the owner or from statutory provisions.

In net contrast, the 14th and 15th centuries witnessed the onset of parallel rights exercised on the object by the owner, considered the holder of the object, exercising absolute dominion (*dominium directum*) on the property; and by other subjects who use it, or exercised useful dominion (*dominium utile*). However, this is a doctrinal creation that had a troubled and difficult life.[3] In the 16th century, the feudatory, the emphyteuta (the lessee), and superficiary (person who possesses the right to the surface or is entitled to the surface) were often associated with the owner (and evidence of this opinion can also be found in current legal jargon where the *superficiaria* "property" is mentioned); some, like Cuiacio, strongly disagree with the new conception, defining dominium utile as an aberrant interpretation of Roman sources; others, like Dumoulin, on the other hand, consider the feudatory, the emphyteuta, and the superficiary as "owners", Zasio speaks of "degrees" of ownership, which expand gradually until they include full dominion. Still in the 18th century, Pothier distinguishes between absolute dominion and useful dominion, but tends to consider the useful dominion as a true form of ownership.[4]

b. *The Modern Conception of Ownership: The* Code Civil (1804)

There are those (like Arnaud and Scozzafava) who trace the modern conception of ownership back to Pothier, considering it an abstract notion that constitutes a subjective right that will pass into the Civil Code: but instead sources seem to speak in favor of the thesis that Pothier, linked to consuetudinary law, limiting the discussion in his Treatise to the situation of that era, still considered dominium as a notion divided into many rights. Even the definition of ownership dictated by article 544 of the Civil Code must not be overrated.[5] The first half of the 19th century instead witnessed the separation of the discipline of ownership law and petitions of "possessive individualism": commerce and industry did not tolerate weights and fragments of ownership law, and instead postulated a unitary notion, free of weights, that allowed a rapid and safe legal circulation of goods. However, the medieval model continued to remain in the subconscious of French and Italian jurists of the second half of the 19th century: despite the fact that regulatory texts legitimized a unitary notion of ownership, the interpreters rushed to justify their subjective positions, which we call lesser secured rights, like faculties separated by dominium and in contrast to it: "19th-century legal doctrine – therefore Italian doctrine as well – demonstrates that it had neither the capacity nor the opportunity to structure a legal model that perfectly matched the philosophical-political model, to clarify and establish the ownership issue on a legal level

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3 Grossi, *Il dominio e le cose*, Milan, 1992, p. 247.
4 Grossi, *op. cit.*, p. 426 and following.
5 Grossi, *op.cit.*, p. 440.

as it had been clarified and fixed in political science and sociological programmes; it demonstrates it that it was taken for granted by that highly significant complex of choices that, in the sphere of relations between man and material goods, had been accomplished by the medieval experience."[6] The cultural legacy handed down by Medieval jurist can be still traced in the Civil Code where, next to the emphatic definition of ownership, one finds the enunciation of the faculty of ownership, thereby encoding a contradiction: if the right to ownership is a unitary and absolute whole, how is it then possible to distinguish, identify and number different faculties within this law; even more evident is the legacy of the Medieval tradition in the Austrian Civil Code (ABGB) where the system of secured rights (§ 354 and following) distinguishes between the right to substance and the right to gains, which results as being a less complete ownership; however, ownership is proclaimed as a "right", in deference to the doctrine of natural law, which envisions ownership as symbol of liberty, an unalienable right of the person himself.

The Exegetic School also feels the impact of medieval tradition: resorting again to Pothier, it distinguishes between perfect ownership (that which pertains to the owner) and imperfect ownership (that which pertains to the person entitled to individual faculties). To overcome the text of article 544 of the Civil Code, they resort to a simplistic reasoning; the owner has many faculties, and can therefore transfer one or more of them to third parties, stripping himself of full ownership (Laurent). This is a conception that penetrates even Italian post-unitary legal culture; it reads article 436 of the 1865 Civil Code in the same way that French jurists of the time read article 544 of the *Civil Code*.[7]

c. *The Unitary Conception of Ownership*

The turning point towards the construction of a unitary concept of ownership and the consideration of secured rights intended as "limits" to absolute ownership grew in Italy following the arrival of the German Pandectist culture. As early as the beginning of the 19th-century, Thibaut had criticized the notion of divided ownership emerging from the French legal culture; the Pandectists, in constructing ownership as subjective right, an expression of the dominion of the individual and his will (not divisible but unitary and absolute), finally reformed the conception of ownership that had been defended up to that moment.[8] Even early 19th century Italian jurists used the Pandectist filter to standardize their definition, considering ownership as a unitary and absolute subjective right. Even now, article 832 of the Italian Civil Code can be read from this perspective.

d. *Ownership and Ownerships*

However, at the time of the First World War, Filippo Vassalli, a great jurist of the Pandectist school, realized that beyond the unitary notion, ownership was not governed in special legislation (and especially in war legislation) as a whole: It was, depending on the type of asset and the social programmes of the legislature, modeled, limited, and configured into many different types. The fragmentation of ownership (from ownership to ownerships) however, carne about for a variety of reasons and with different logical processes. It was initially intended as a complex of differentiated faculties and attributed to different subjects (owner, emphyteuta (lessee), etc.); now the differentiation no longer concerned the convergence of formal ownership and user ownership, but rather the nature of the property itself and its limits; the differentiation

6 Grossi, *op. cit*., p. 443.
7 Grossi, *op. cit*., p. 508.
8 Grossi, *op.cit.*, p. 558.

did not concern the faculty, but rather the limited powers attributed to the owner, according to whether he is the owner of an asset destined to residential leasing, to accumulation, to be used as a hotel, or if it is an asset of historic, artistic, archaeological, environment interest, etc.[9]

e. *The Prevalence of Special Legislation*

However, it is not historically correct to rely solely on the literal formulation of laws to underline their differences; even if they are different in their formulation, the 19th century normative model and that of the current Civil Code are not so divergent and the legislative policy followed by the 1942 codifier, although favoring "dynamic" ownership in the text of article 832, it followed the 19th-century model at least in part.

The difference, instead, can be found in two fundamental aspects: the first, concerning not the ownership of the Civil Code, but rather that of the special laws that began to be introduced with World War I; the second, which is also connected to World War I, regarded the social function of ownership and appeared in Italy only following the advent of the republican regime and the ratification of the Constitution.

The outbreak of World War I saw the intense growth of legislation dictated by wartime needs. These laws also concerned ownership: norms were introduced to extend (for the first time) real estate leasing contracts for residential use with capped rents, thereby preventing owners from terminating or withdrawing from contracts and increasing rental fees. Owners were obliged to tolerate the cultivation of uncultivated lands by tenants. Norms were introduced to increase the number of public servants and to regulate assets of historical and archaeological interest.

This led to the conclusion that, precisely because there were different special laws that granted special regulation to objects of ownership depending on their physical nature or their importance for the economy, we could no longer speak of a unitary concept of ownership, and therefore of property, but more precisely, we must consider an articulated notion of ownership; there are as many different statutes, or governing principles of ownership, as there are ownerships (or types of property). Wartime legislation shattered the unitary and monolithic concept of ownership. Destined to disappear with the end of wartime events for economic and social reasons, it became a permanent condition of ownership; the idea of the co-existence of multiple ownerships was therefore consolidated and now we must speak of ownerships. Here again we must conclude that ownership is a relative concept. There is the ownership of moveable goods, different from that of immovable goods; there is the ownership of agricultural assets, governed by a statute different to that of construction assets; assets of historical, artistic, or archaeological interest have yet another regulatory system, as do other assets like residential buildings, landscape and environmental assets, hotel property with restrictive regulations, quarries and bogs, etc. Even the Civil Code, when compared to the model of absolute ownership, dictated by article 832, offers examples of different ownership statutes. The 1942 Civil Code in fact states many laws that summarize or refer to the special legislation for individual assets or categories of assets: the ownership of public property (articles 812 and following), agricultural property, construction property, and so ono The ownership of immaterial goods, precisely because it is connected with the running of a business, is not regulated in Volume III, but rather in Volume V (articles 2569 and following).[10]

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[9] Rodotà, *Il terribile diritto. Studi sulla proprietà privata*, Bologna, 1981.

[10] Galgano, *La globalizzazione nello specchio del diritto*, Bologna, 2005; Ferrarese, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Rome-Bari, 2006.

Chapter VIII

Tradition Revisited: Contract

Index: 1. The Contract in Today's Society: The Factors of the Evolution of Contract Law. – 2. Judicial Control and the Rules of Jurisprudence. – 3. International Conventions and Praxes. – 4. The Significance of Sources of Hetero-regulation. – 5. New Praxes for Concluding the Contract. – 6. New Technologies. – 7. Beyond the Dogmas. – 8. The "Europeanization" of the Contract. – 9. Community Initiatives to Harmonize and Standardize Contract Law. – 10. The Harmonization of Contract Law.

1. The Contract in Today's Society: The Factors of the Evolution of Contract Law

Legislative rules on contract have generally withstood the innovations introduced by the standard procedures of economic and commercial relations in particular. Certainly, the model adopted for the new codification was an already timeworn model: it was an individually-based model, in spite of the fact that most of the contracts then were stipulated through forms or conclusive behaviors; it was a model that safeguarded the entrepreneur rather than the consumer; it was a model that took into account commercial practices, but not everyone's.

It was thus that doctrine, having sensed the need to work towards the exegesis of the laws contained in the new codification, entrenched itself in formal work, neglecting the economic-social reality that the model was called on to operate in.

Jurisprudence was obliged to bridge the gaps: it fulfilled this task by creating new principles, sub-regulations, crypto-guidelines; a jurisprudence that over the years grew bigger, to the point that it a mere review, the most recent, filled a good six volumes.[1] It became a match for the jurisprudence of civil liability.[2]

2. Judicial Control and the Rules of Jurisprudence

Judicial control, invoked by doctrine as a panacea to remedy all the regulatory shortcomings of the Code, worked for better and for worse: for better, it created a balance of interests (public/private; economically powerful parties/economically weak parties); for worse, operating disorganically, often confused, and always, in any case – due to the nature of control itself – a posteriori and sporadic.

The legislator, aware of the insufficiency of judicial control, intervened increasingly in the regulation of contract, indeed of contracts: agricultural contracts, leasing, banking contracts, insurance contracts, and so on.

This type of control worked as it should have, for better and for worse: for better by restoring balance to the relationship between services, and for worse by creating the conditions for alternative markets.

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1 *I contratti in generale*, edited by Alpa and Bessone, Turin, 1990.

2 Even in this case, five volumes were necessary: *La responsabilità civile*, edited by Alpa and Bessone, Turin, 1987.

3. International Conventions and Praxes

Due to the effect of international conventions designed to protect the interests of businesses that operate on several national markets, and in order to protect consumers who no longer receive goods and services from entrepreneurs operating on only one national market, and due to initiatives of the economic categories involved, rules were introduced that tend to:

- standardize the regulations of the various Nations;
- regulate contracts ab extra, going beyond national regulations.

This phenomenon can be verified in travel contracts, franchising, supply and subcontracting contracts, engineering contracts, and so forth.

Even where actual legal regulations did not intervene, the force of praxes did: we have also experienced the introduction of contracts from abroad, from which the structure, the most common clauses, the methods conclusions, and even the *nomen* of the contract (leasing, factoring, franchising, engineering, catering, countertrade, swap, etc.) have been borrowed.

Doctrine did not remain impervious to these innovations: on the contrary, it sought to go beyond and embark on a wretched undertaking – it set out, considering the results of the standardization of sales contracts, to draft uniform regulations for contracts in general.[3]

In addition to Community regulations, many Community directives have obliged the legislatures of the member states to adapt their internal legal systems to the rules of Community law: this has occurred in consumer contracts, civil liability exemption clauses, sales concluded outside of commercial premises, consumer credit, public works tenders, public supply tenders, etc.

This became a cascade of interventions, for both sectoral and standard contracts.

4. The Significance of Sources of Hetero-regulation

Today, what stands out most is the conception, as yet not sufficiently theorized, that sees in the contract a moment or phase of the transaction process in which:

- the legislator fixes the rules of content and behavior (e.g., contracts for the purchase of moveable securities);
- trade associations intervene (e.g., A.B.I. (ltalian Banking Association), for banking contracts; SUNIA (National Tenants Association) and Assoc. Proprietari (Owners Association) for residential leasing contracts) to establish contents;
- rules are established on preventive information of the contracting parties (regulation of advertising messages, figures to be communicated to investors and consumers);
- the parties are assisted at the conclusion of the contract (e.g., agricultural contracts, fair rent extension agreements, although the Constitutional Court, in sentence 309 of 1996, considered article Il of the extension agreements law to be non-legitimate);
- the weak contracting parties are assisted during the implementation of the contract;
- means are provided to resolve disputes other than procedures before ordinary judicial authorities.

[3] Farnsworth, *Closing Remarks*, in *American Journal of Comparative Law*, 1992, p. 699.

5. New Praxes for Concluding the Contract

Today new "aggressive" techniques are used to convince the potential contracting party, as are new techniques for concluding contracts: think of door-to-door contracts, mail-order contracts, contracts concluded by fax, radio and television, and above all, contracts concluded with the aid of IT and other remote methods; but al so consider the diffusion of automatic distributors of consumer products (which give rise to the conclusion of contracts "automatically", as was said even at the beginning of the century).

Therefore, there is evidence of a crisis in the general regulation of contracts and in traditional contract theory: some even speak of the "death" of the contract.[4]

6. New Technologies

At the same time, the general and special contract sector is constantly evolving, also on a national level. This evolution is due to several driving factors. The market, especially during this new phase, is increasingly exposed to the effects of new technologies and is reaching beyond national borders; regulatory texts withstand the impact, but everywhere now opinions are voiced that the rules might benefit from or even require a radical revision: both the Dutch and German models of the civil code are somewhat significant examples. There is an ongoing revision of the dogmas handed down by tradition, and the impact – if this word can be used – of the new sources (not only Community law, but other regulatory sources, self-regulation and the creativity of jurisprudence, and even international sources) compress the texts of codes and special laws, making any tentative standardization an illusion, as legal regulations – on any level – must gradually adapt to an increasingly accelerated evolution. From here arise the aspiration to identify general principles, common values, and directions that, without striving for a geometric reconstruction, can restore a minimum of certainty to all operators.

7. Beyond the Dogmas

Due to the driving factors mentioned above, it has been said that the revision of dogmas handed down by tradition is an irreversible trend. Consider, for example: (i) surpassing the dogma of contract neutrality regarding the status of the parties (the consumer, the investor, the subcontractor, the minor, the cohabitant); (ii) surpassing the dogma of informative symmetry of the parties; (iii) surpassing the dogma of the contract founded on the agreement intended as the expression of personal will; (iv) surpassing the dogma of contractual freedom concerning contents; (v) surpassing the dogma of the cause; (vi) surpassing the dogma of the form, now established with protective intentions; (vii) surpassing the dogma of the subjective equivalence of services and the intervention of corrective equity; (viii) surpassing the dogma of "contract law" and introducing unilateral forms of withdrawal for protective purposes; overcoming the dogma of absolute grounds for invalidity, with the inclusion of the hypothesis of relative grounds for invalidity and with an increase in the hypotheses of relative grounds for invalidity; (ix) surpassing the dogma of the subjective nature of the contract and

[4] Gilmore, *La morte del contratto*, translated by A. Fusaro, Milan, 1987.

introducing its objectification; (x) surpassing the dogma of the *sacertà* – or sacredness – of the contract with the legitimation of the corrective interventions of the judge.

This revision process was sustained by the changes in direction of jurisprudence, with which the dogmas were brought to heel, or at least those tendencies consolidated and stratified over time were inverted. The panorama was vast, and touched not only the jurisprudence of legitimacy and constitutional jurisprudence, but also the jurisprudence of the lower courts as far as that of the Justice of the Peace, as well as arbitrary jurisprudence and the provisions of organisms charged with the out-of-court resolution of "lesser" disputes.

By way of example, take into consideration:

(i) in contractual clauses, the legitimization of the "if and when"[5] clause, the keeping of the arbitral clause,[6] the automatic reduction of the penal clause,[7] the control of the abusive clauses that can be detected automatically,[8] in the most common banking and insurance contracts;[9]

(ii) in atypical contracts, swap contracts;[10]

(iii) the use of good faith in withdrawal from the contract;[11]

(iv) the significance of good faith in reciprocal non-fulfillment that leads to the resolution of the contract[12] and the burden of proof in non-fulfillment issues.[13]

Questions regarding willingness to take on an obligation and regarding "agreements" that cannot be qualified as actual contracts are increasingly common: consider family agreements in *de facto* separations, in consensual, pre-divorce separation,[14] generosity of "cohabitation use",[15] gentlemen's agreements,[16] contractualized social contacts,[17] the rough draft of the contract,[18] and the letter of intents.[19]

Consider again the appearance of contractual moral damages, sometimes painted as biological damage deriving from the breach of contract, sometimes portrayed as existential damage.[20]

But resistance to change can still be found: in the world of a jurisprudence based on contractual good faith, interpretive good faith is still considered a subsidiary criterion for the

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5 Cass. 22 March 2001, n. 4124, I Contratti, 2001, 861.
6 Cass. 16 November 2000, n. 14860, ibid., 2001, 329.
7 Cass. 24 September 1999, n. 10511, in *Corr. giur*., 2000, 68.
8 EC Court of Justice, 27 June 2000, C-240-244, Contracts, 2000, 943.
9 Court. Rome, 21 January 2000, ibid., 2000, 561; Court of Rome, 28 October 2000, ibid., 2001, 435.
10 Cass. 7 September 2001, n. 11495, ibid., 2002, 27; Court of Milan, 27 March 2000, ibid., 2000, 777; Appeals Milan, 26 January 1999, ibid., 2000, 219; Court Turin, 10 April1998, ibid., 1999, 45.
11 Cass. 22 November 2000, n. 15066, ibid., 2001, 791; Cass. 26 September 2000, n. 12724, ibid., 2001, 231; Cass. 14 July 2000, n. 9321, ibid., 2000, 1111.
12 Cass. 24 March 1999, n. 2788, ibid., 1999, 986.
13 Cass. United Sections, 30 October 2001, n. 13533, ibid., 2002, 113.
14 Cass. 20 March 1998, 2955, ibid., 1998, 472.
15 Cass. 24 November 1998, n. 11894, ibid., 1999, 470.
16 Cass. 24 March 2000, n. 9662, ibid., 2001, 118.
17 Like the contract of medical personnel for the ASL (Public Health Care System): Cass. 22 January 1999, n. 589, ibid., 1999, 999.
18 Cass. 22 August 1997, n. 7857, ibid., 1998, 113.
19 Cass. 14 May 1998, n. 4853, ibid., 1998, 574.
20 For example, Court. Milan, 2 July 1998, ibid., 1999, 39; Court. Venice, 24 September 2000, ibid., 2001, 535.

interpretation of the contract,[21] reiterating the effectiveness of the abominable "*in claris non fit interpretation*" principle.[22]

8. The "Europeanization" of the Contract

The Europeanization of the contract is generating other phenomena that are just as interesting: in contrast with the liberalistic conception of contractual autonomy, the following are always more common: hetero-standardization, with the prescription of behaviors prior to and subsequent to the conclusion of the contract, which implicates (in accordance e with good faith and appropriacy) the parties acting to prevent damage to the counterparty, the analytical determination of the minimum content of the contract, the written form of the contract text, the use of the weaker party's language, the monitoring of the abuse of contractual power, the sanctioning of conflicts of interest, furthermore, concepts that were unusual in continental tradition appeared, like "reasonableness", while august concepts like cause (which seems to have had the same fate as consideration) became less popular: the thesis of the admissibility of the partial termination gained ground, and the cases of "adaptation" of the contract to unexpected circumstances increased together with the renegotiation clause, the stabilizing intervention by the judge (based on the so called principle of proportionality), the proposal to extend the powers of the judge in cases of hardship; modifications were made to the conclusion techniques of particularly complex contracts, along with the phases of letters of intent, of due diligence, and of closing.

All in all, the contract sector is a highly productive and permanently operational workshop in which the values of profit and efficiency are appreciated, as well as personal values; the objectification of the contract keeps pace with the contracting of relationships; the evolution of negotiation procedures and the regulation of the contract then becomes not only a mirror of the market, but also a mirror of society.

9. Community Initiatives to Harmonize and Standardize Contract Law

Since 1989, the European Parliament and the European Commission have each approved resolutions and communications on the elaboration of a European "code" of civil law, especially on European contract law.

The Commission issued a Communication (dated 11 October, 2004, COM (2004) 651 def.) on "European Contract Law and the revision of the acquis: the way forward." This was the first step the second concerns the standard clauses – for going ahead with the previously announced plan of action. This was an activity in line with the Action Plan on consumer protection strategies for the period 2002-2006.

To initiate the drafting of a Common Frame of Reference (CFR), beginning with the improvement of the acquis, the Commission has noted:

- that the directives contain legal terms that are not defined or are defined with excessively generic expressions;

[21] Cass. 18 May 2001, n. 6819, ibid., 2001, 1083.

[22] Since 1967, see Cass. 3 May 1967, n. 836.

- the identification of areas where the directives do not resolve the problems raised by the praxes;
- the existence of notable differences among the directive implementation regulations;
- the registration of inconsistencies in Community legislation in the sphere of contracts.

The Communication emphasizes the need to make the community consumer protection directives more coherent by verifying whether they have truly reached the goal of eliminating internal market barriers and whether they have simplified the law; and whether their implementation could have succeeded in attaining a minimum level of the desired harmonization of the relative laws. The observatory should involve not only the literal texts available, but al so case law, self-regulation, the levels of adaptation to new laws by their recipients, consumer expectations, and market development.

So here is an important role that the CFR could play, extendable by the possible use by the parties as laws applicable to the contract, to be indicated in the arbitral clause for use by arbitrators, or used as a model by national legislators.

For standard clauses, the measures are still at a very early stage.

In addition to the circulation of specific information, the Commission is also rightly concerned about the problem of these initiatives' compatibility with the laws of competition, with the different solutions provided by the models of national economies, and with the balancing of the economic interests involved.

Although the European Parliament has for twenty years expressed considerable favor towards the codification of contractual laws on a Community level, despite the turnover of its members and changes in political trends, the Commission appears to have taken a more cautious standing. With regard to all the different options indicated in the 2001 Communication, given that the evidence of the acquis and the applications in member nations ruled out the possibility that the system of contractual rules should be conserved in the situation it is in today, and given the apparent certainty that everyone would support the improved writing of legislative texts, the choice between a gradual shifting towards standardization, even through the drafting of principles – and the adopting of a code (even if only a model) came down in favor of the first proposal. This implies a thorough job of reorganization of regulation, of control of its implementation, and of simplification of contractual relations through standard models.

A conference held on 18 and 19 March 2005 by the Institute of European and Comparative Law of Oxford and by Clifford Chance, on the theme of harmonization of European contract law and its impact on the legal system of the Union member states, as well as on business and professions related to the legal system, produced information, facts, and perspectives of great interest. A Clifford Chance study on a sample of 175 businessmen found that 65% of the interviewees were in favor of the European Commission and European Parliament proposal for the harmonization of contract law, even though considered the improvement of current legislation a greater priority. However, the study also brought to light the difficulties linked with harmonization; difficulties that are exacerbated by linguistic and cultural differences, differences in national legal systems, the rapid changes taking place in them, and the differences inherent by fiscal regimes.

In fact, the scenario of contract law in Europe is changing rapidly: Holland is recodifying its entire civil and commercial law, separately approving parts of the new code, divided into books; Germany has recently completed an integral modification of the book on obligations; France has instituted a commission for the revision of the Napoleonic code. New models are strongly influenced by the Principles elaborated by the Unidroit for international commercial contracts and the Principles of the Lando-Beale Commission for the elaboration

of a "civil code-model" to be adopted, either selected as a law by the parties for their operations or, on a Community level, through a standardized regulatory instrument.

Along the way, the differences between national models are diminishing thanks to the natural "convergence" of legal systems and, in particular, to the influence of Community Iaw, which operates not only through the acquis, created by means of the general and sector directives, but also through expansion in sectors related to principles, regulations and general clauses, drawing from regulations and directives that become the breeding ground where innovation can take root. The jurisprudence of the Court of Justice, which also functions as judge of the exact and correct interpretation of national and Community law, facilitates the gradual convergence of national systems. But – surprisingly – even the gaps between remedies for fulfillment and sanctioning breaches of contracts is closing: a significant indication for those who work in the law and find remedies in the systems of member states like unilateral recess, partial fulfillment, specific performance, and the adaptation of the contract to new circumstances.

This is an ongoing process that meets with multiple tensions, both inside and out. The tensions within the single systems – that we are also familiar with in our system – concern: (i) the adaptation of current national laws to innovations (terminological, conceptual and regulatory) brought on by community law; (ii) the insertion of community laws into the codes, where existing, because they do not blend well with current regulations; and where they do not exist, because they oblige case law to change its "precedents": (iii) the dual system of interpretative rules, due to the fact that national regulations obey the acquired hermeneutic rules and Community regulations obey the hermeneutic rules established by the Court of Justice. External tensions concern: the differentiation of law between B2B and B2C contracts; (ii) the contrast between legal systems; (iii) the contrast between contractual models circulating in the praxes of economic relations; (iv) the application of the fundamental principles of the Nice Charter – incorporated into the Treaty for the European Constitution – to relations (also transactional) between private parties.

10. The Harmonization of Contract Law

The harmonization of contract law for the moment calls for the specific definition of legal terms and the identification of common general principles, but should al so arrive at the standardization of the most frequently used contractual models. However, there are still some general questions that must still be answered. One is the difference between B2B and B2C contracts: in the first category, operators have requested increased freedom of action, in keeping with the principle of contractual autonomy. Even professionals are following suit, since transactions between commercial operators depend on ability, shrewdness and the skill of the lawyer in defending the interests of his client. In the second category, a reduction in imperative provisions was requested. Another fact to be considered is that the drafting of common rules cannot be considered as a merely technical operation, in that it involves political, economic, and social evaluation, which every formulation activity must take into account.

In spite of the difficulties, there are many positive signs in this process: it is a fact, confirmed in Oxford in the report of Sir John Vickers, Director of the Office of Fair Trading, that the evolution of the law of competition and the accompanying evolution of consumer law, whether on Community level or internal level, underwent a parallel development, with no contrasts; rather, both benefited from the harmonization of contract law. Even the wait for the final approval of the directive on unfair practices facilitates this sort of regulatory integration, postulating a greater transparency of the behaviors of the operators (amongst them-

selves and in relation to the consumers), and this goes hand in hand with the transparency required by the directives on electronic commerce, on payments, and on consumer contracts, aimed at reaching a fairer wording of contractual texts.

Chapter IX

Tradition Revisited: Tort

Index: 1. Civil Liability, Unlawful Act, Damages. – 2. The Traditional Model: "No Liability without Negligence", "No Liability without Infringement of an Absolute Subjective Right". – 3. Aspects of civil liability in the European context. – 3.1. Methodological premises. – 3.2. Protection of the individual in his physical dimension. – 3.3. Protection of the person in its virtual dimension. – 3.4. Environmental protection. – 3.5. Protecting the economic interests of investors. – 3.6. Protection of competition and damages for breach of market rules. – 3.7. Plans to unify the rules on civil liability.

1. Civil Liability, Unlawful Act, Damages

Now we come to civil liability. Here, the passage from the rules of a "paleo-industrial" economy of the economy of mass relations to new technologies is more evident and the story becomes easier.

What are the functions of civil liability? Traditionally, there are four: (a) the affirmation of state jurisdiction; (b) sanction; (c) prevention; (d) compensation.

When damage has been determined, civil society, which prevents recourse to private vendetta, to arms, to private solutions of conflicts between private parties, cannot but deal with the question directly: the damage can be compensated only if the legal system allows it. From here, if damage can be compensated, the imposition of a sanction can be contemplated. In the primordial Roman epoch, the sanction consisted of imposing the same damage suffered by the victim onto the party who inflicted the loss (the so-called law of retaliation); but in later periods, and in any civil society, the sanction is of an exclusively pecuniary nature; the damage that the agent must repair is a damage that can be measured in money.

Connected with the sanction is the preventive function of civil liability. Fearful of the sanction, private parties will do anything possible to avoid damage, the propagation of damages in society. Finally, civil liability tends to restore the damage, giving the victim a sum of money as compensation for the damage unduly suffered.

Today, civil liability no longer discharges these functions: the damage can be liquidated and indemnified even without resorting to a judge, on the basis of conventions previously stipulated between the agent and the potential victims; often the damage is liquidated through arbitration, or by means of recourse to special commissions, which operate outside of the procedure. The pecuniary nature of the sanction no longer has the same intimidating effect that it may have had once, nor are things resolved in an efficient damage prevention system. Often, it is more convenient for the damaging party to cause damage rather than acquire costly damage prevention tools (for example, industries that pollute the environment prefer to indemnify the owners of nearby premises rather than install costly purification plants or modify their production process.[1]

Recourse to insurance for civil liability in the sector of motor vehicles, defective products, workplace injuries and dangerous activities thwarts the preventive effectiveness of

[1] Trimarchi, *Rischio e responsabilità oggettiva*, Milan, 1961; Rodotà, *Il problema della responsabilità civile*, Milan, 1964; Comporti, *Esposizione al pericolo e responsabilità civile*, Naples, 1965.

liability: the private party has greater freedom, and there is the fact that the damage will be compensated for by a third party (the insurer) in any case.

The main function today is indemnification: the laws of civil liability are interpreted in order to extend compensation as much as possible to all the victims. This function is strictly connected to private insurance; in some sectors it is connected to social insurances (against illness or injuries); in some countries a social insurance system for all damages has been introduced: the indemnifiable damages are compensated not by the damaging party, but by a guarantee fund fuelled by tax withholdings (as happens in New Zealand).

The civil liability system is founded on a widespread rule – so widespread as to be commonly perceived as a general liability clause: article 2043 of the Civil Code, according to which any willful or culpable act that causes unjust damage obliges the perpetrator of the act to compensate for the damages.

2. The Traditional Model: "No Liability without Negligence", "No Liability without Infringement of an Absolute Subjective Right"

This rule codifies two principles that have evolved over the course of many centuries: the principle "no liability without negligence" and the principle according to which the damage perceived is born of the "infringement of a right" that is absolutely subjective. The history of the codification of the past century demonstrates that at any time, even if differing in culture, tradition and legal concepts, these two principles have stood intact. The reasons for this phenomenon are quite clear and legal science has studied them thoroughly. They are both economic and ideological.[2]

The economic reasons concern the creation of damages in society. Every human activity causes damages to a neighbor, a competitor, or the community in general; the damages are a necessary consequence of an industrial society; accidents, when machines are not perfect, materials used when still unfinished, incompetent workers, technicians not yet sufficiently versed in the refined rules of the science or technique, are numerous and, in any case, can be happened upon very easily. If all damages created were indemnified, economic operations would become overly burdensome; businesses would be weighed down by debts to compensate the victims; the drive towards profits would be discouraged as they would in any case be curtailed by the indemnities. Such a prospect has given rise to the rule that only the damage caused by the damaging party's negligence can be indemnified. If the damaging party committed no unlawful act (for example, expertise and ordinary diligence), if the victim cannot prove such unlawfulness in court, there can be no liability, and therefore no compensation.

This rule was highly useful to businesses that were still "in the start-up phase" during the last century: in a period when industrialization was dawning, it was not possible to obstruct progress by imposing overly rigorous liability laws. One symptomatic example is the conflict between the landowners and railway companies during the first decades of the past century in England. Should the landowners who drew economic advantage from agriculture

[2] For the reconstruction of the civil liability system, see Franzonì, *Fatti illeciti*, in *Comm. cod. civ.*, Bologna-Rome, 1993; Ponzanelli, *La responsabilità civile. Profili di diritto comparato*, Bologna, 1992; Alpa, Bessone, Zeno Zencovich, *I fatti illeciti*, 2a ed., Torino, 1995; Visintini, *Trattato breve della responsabilità civile*, Padua, 1996; Alpa, *La responsabilità civile*, Milan, 1999.

have prevailed, when complaining of the damages caused to their crops by the fires ignited by the sparks from the passing locomotive s, or should the railway companies that connected the cities to the ports, and to the mines, thereby favoring commercial trade and the industrialization of the country have prevailed, even if they did cause some damage to the landowners? The courts ruled in favor of the railway companies; the damage suffered by the landowners did not derive from any negligence, but merely chance.

Another rule has also had an important influence on the economy: if all damages were indemnified, the area of compensation would have expanded indefinitely: instead, it was confined (where there was negligence) to damages deriving from infringement of subjective rights, or interests that the legal system considers more important, like the interests of the physical person (life, integrity) or the interests of ownership (damage to things).

From an ideological point of view, the principle «no liability without negligence" can be traced back to the tradition of natural law; obligations can be imposed on man only if they derive from his voluntary acts (willful or culpable unlawful acts); at the same time, the sanction serves to repress behaviors believed to be morally reprehensible. The other principle can also be easily explained; only the interests belonging to the classification of values of a 19th century society can find protection in the legal system: the interest involving life or physical integrity, but above all the interest in protecting property. Therefore, only the infringement of an absolute subjective right was indemnifiable.

With the advent of the advanced capitalist societies, the ideologies of civil liability changed: today these regulations are no longer considered as bearers of sanctions or moral reprimands; businesses are well able to shoulder the damages deriving from their activities (damages to workers, to neighbors, to the environment' to consumers); there are exceptions to the principle of negligence, and exceptions to the principle of interests worthy of safeguards established in absolute subjective law.

The current face of civil liability has changed considerably since 1942 thanks to the contribution of doctrine and jurisprudence. As regards the spectrum of protected interests, it is possible to obtain compensation for damages for the violation of legitimate interests, pursuant to Court of Cassation sentence 500 of 1999. Objective liability has been extended by both legislative interventions (determined by the influence of community law, as has occurred in manufacturer liability and environmental liability) and by effect of the orientation of jurisprudence. As far as personal damages are concerned, the onset of the notion of biological damage, introduced by judges of merit, approved by the Court of Cassation and by the Constitutional Court and then by the legislature, has guaranteed that the person can obtain an appreciable pecuniary reward in the case of temporary or permanent physical injuries.

Instead, no progress has been made in the harmonization of rules on reparation of personal damage on a Community level, despite the widely varying range of assessment criteria among the legal systems of the member states.

3. Aspects of civil liability in the European context

3.1. Methodological premises

At least three different perspectives need to be considered when considering the development of the tort system in the European context: (i) the definition and application of rules of civil liability dictated directly by the Treaty establishing the Union (TFEU) for damage caused by its institutions or by its servants in the exercise of their functions (Art. 340);

(ii) the definition and application of rules concerning the liability of States for breach of Union rules, according to the general rules of the Treaty (Art. 4) and the principles developed by the Court of Justice; (iii) the definition and application of rules derived from European sources defining typical torts.

In the latter case, on which I would like to make a few remarks, the rules may be laid down in regulations or directives. In other words, the rules of the European Union or the principles drawn up by the Court of Justice do not always identify all the requirements of the unlawful act, i.e. the criterion of imputation (intent, fault, risk), the interest harmed, the causal link between the act and the harmful effect, the damage. There are cases in which some elements are provided for and the others are left to the national courts, and cases in which the case configured by the European rules is complete but the national legislators are given a degree of freedom to fill in the regulatory gaps.

In both situations we find ourselves faced with divergent interpretations by judges and jurists in general who, reasoning with their own culture, do not follow the same path to solving the problems posed by the texts.

The terminology used in the Union's legislative texts corresponds – more or less – to that of the national legislators or judges, but the national rules are not always uniform and therefore not unambiguous. For this reason, efforts have been made to standardise the rules on civil liability, and the models proposed to break the deadlock are still current. But time is running out, standardisation is slowing down, while European Union law is changing faster and faster.

Generally speaking, two phenomena that have gradually taken hold in recent decades must be taken into account: the "Europeanisation" of national laws and the "constitutionalisation" of European Union law.

The first phenomenon is the result of several factors.

In the European sphere, both through the normative technique of regulations and directives, through the judgments of the Court of Justice, through attempts at standardisation and above all through the circulation of models and ideas, and hence the formation of a European legal culture, a common framework of values is being defined, in which civil liability, understood as the set of rules designed to defend protected interests, occupies a privileged position. The person, property, the environment, savings, competition, to consider the 'objects of protection', or consumers, savers, creditors, workers, family members, to consider the 'subjects' of protection, outline the scope of these rules, arranged according to a scale of values that appears uniform in all legal systems. Indeed, English lawyers have even spoken of the 'Europeanisation of tort law' and of a 'European private law' system.

The constitutionalisation of European law resulted from the adoption of the Nice Charter, which became a legally binding document following the Lisbon Treaty in 2009. Here, the values of the individual are exalted as the pivot of the entire Union order; they are used to regulate relations between private individuals in the same way as the Drittwirkung of the constitutional rules in the various European states (particularly in continental Europe).

3.2. Protection of the individual in his physical dimension

If we consider the interests protected, we must first of all consider the physical person, and therefore the protection of physical integrity. The liability of the producer of consumer goods for damage caused to consumers and bystanders by products distributed on the market is particularly significant here.

The 1985 Directive No. 374 is more than thirty years old, and although strengthened by the 2001 Product Safety Directive No. 95, it has not had an effect that is considered entirely satisfactory by consumer associations. In fact, a recent BEUC document highlighted the most significant gaps or discrepancies in the text. It is clear that the producer's liability is based on business risk, and is therefore of an objective nature, but there are still too many doubts as to the exact nature of the liability. The scope of the regulation is limited to products that are tangible in nature, and does not extend to digital products. In addition, the compensable damage does not include non-material damage, which is particularly serious in a system (such as the European one) in which the moral integrity of the person and his or her suffering are considered the subject of a fundamental right.

Some of BEUC's proposals can be endorsed. Others are open to discussion.

BEUC calls for the removal of the limitation of liability for defects that were not known at the time the product was released (risk of development). This is a very complex issue, because it seems difficult to use insurance, since the risk is not easily calculable. The experience of asbestos damage (asbestosis) is emblematic in this respect.

The BEUC is also calling for relief in terms of proof. Indeed, proof of defect is not easy for the consumer, and an acceptable facility might be to consider a product as defective if it is dissimilar to those of the series to which it belongs. The possibility of obtaining all documentation concerning the product, including studies on its harmfulness, also seems a useful suggestion. It also seems useful to remove the deductible for damages of less than EUR 500. I have my doubts, however, about the removal of the ten-year limitation period, because products now become obsolete more quickly than they did thirty years ago in an increasingly fast-changing and innovative market.

I also agree with the suggestions concerning the extension of the directive on injunctions to product defects and the establishment of an information system (like RAPEX for dangerous products) concerning the genuineness and harmlessness of products placed on the market.

However, the directive has not specified the rules applicable to the liability of the supplier, to whom the injured party may turn when neither the manufacturer nor the importer is identifiable, so that in the various legal systems the national courts apply rules derived from national law to the supplier which may vary from one system to another (sometimes favouring contractual liability and sometimes extra-contractual liability).

3.3. Protection of the person in its virtual dimension

In the society of communication, telematics and information technology, the person cannot be considered only in his physical dimension. His virtual dimension must also be protected.

There are two major innovations in this area: the approval of a Regulation on the protection of personal data, which replaces the directives on the subject, and the draft regulation on e-privacy (Com(2017) 7 final communication from the commission to the european parliament and the council Exchanging and Protecting Personal Data in a Globalised World).

The regulation, which has been in the pipeline since 2012, improves the legislation on the subject, because, among other things, it includes the right to be forgotten among the rights that are protected by the data controller, it is concerned with the "profiling" of users, also in order to prevent or limit solicitations to purchase and unfair commercial practices, and specifies in detail the remedies for violation of the provisions concerning the collection, storage and use of personal data (Regulation (EU) 2016/679 of the European Parliament and

of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

From this point of view, the Regulation is at the forefront of the protection of the "digital person" and is a guarantee for the movement of data abroad. It is well known that one of the reasons why the European Union could not sign the TTIP with the United States was due to the reluctance of the American negotiators (reflecting the requests of the economic operators) to accept more restrictive rules on data protection than those recognised for American citizens.

The recitals of the Regulation explain the purpose of the new rules, which are worth mentioning.

On the subject of remedies, the regulation provides for a provision that seems to me to be straightforward and that places a presumption of guilt on the controller (but it could be debated whether this is not objective liability). Evidence to the contrary is admitted, but this concerns the fulfilment of the obligations or the non-attributability of the damage (Art. 82).

3.4. Environmental protection

The environmental protection directive (2004 No. 35) has created many problems in its interpretation and application due to misunderstandings caused by the polluter pays principle. Since in the economic analysis of the law the principle is understood in a literal sense, and therefore the operator who is willing to repair the damage caused is considered authorised to pollute, in some States, such as Italy, it was considered sufficient to impose on the polluter the obligation to compensate the damage in a pecuniary way, i.e. compensation "in equivalent". On the other hand, the Court of Justice, and before it the Commission, have specified that the primary obligation is to restore the site, and not to pay sums of money. This has led to a dispute between the Italian State and the Commission, and to the correction on several occasions of the Italian text implementing the directive.

In its judgment of 4 March 2015, the Court, in a case involving Italy, stated that <Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which, where it is impossible to identify the party responsible for the contamination of a site or to obtain remedial measures from that party does not allow the competent authority to require that preventive and remedial measures be carried out by the owner of that site, who is not responsible for the contamination, who is liable only to reimburse the costs relating to the measures carried out by the competent authority up to the market value of the site, as determined after those measures have been carried out.

In other words, the Italian legislator (with the Environmental Code) has established that the restoration of the site is to be carried out by the public administration, and that the owner of the area must reimburse the costs.

Liability should be of an objective nature, although interpreters are not all convinced of this solution.

3.5. Protecting the economic interests of investors

Other cases of liability concern the banking, financial, and accounting sectors. In these cases, it has been held at Community level that the liability of the operator is based on fault: indeed, there is no reason to distinguish the producer of goods from the producer of

services (for the purposes of liability), nor to consider that the producer of a service performs an intellectual professional activity involving not the assumption of a business risk but fault in the performance of a personal service.

The liability regime should be uniform, and not differentiate, on the production side, operators according to their specific tasks, since the consumer and user side is exposed to risks and damages on an equal footing. It is true that in these cases the damage is not physical (as in the case of damage to health in the event of defective products or environmental pollution), but the type of interests affected – economic interests – is no less important than those protected more intensively.

The damage suffered by savers in recent years as a result of the severe economic crisis in the West was largely caused by banking and financial activities. Proving the fault of the damaging party in many cases is difficult, so that the reversal of the burden of proof, when the relationship is not contractual, but extra-contractual, should be a universally recognised rule.

By contrast, this is not the case for the liability of auditors and audit firms. Directive 2014 No. 56 (which amended Directive 2006 No. 43) introduced several innovations and strengthened the professional obligations of auditors, public authority controls and sanctions, but in the area of liability it simply referred back to national rules.

Article 30 ("Systems of investigation and sanctions") states:

1. Member States shall ensure that there are effective systems of investigations and sanctions to detect, correct and prevent inadequate execution of a statutory audit.
2. Without prejudice to national civil liability regimes, Member States shall provide for effective, proportionate and dissuasive sanctions against statutory auditors and audit firms, where statutory audits are not carried out in accordance with the provisions adopted pursuant to this Directive and, where applicable, Regulation (EU) No 537/2014.

Also in the area of financial activities, things have not changed with the approval of the 2014 Directive No. 65 (so called Mifid II). The Directive (which came into force on 3 January 2018) aims to develop a single market for financial services in Europe, in which transparency and investor protection are ensured.

Operators must act in the best interests of the client, ensure proper information for investors, highlight potential conflicts of interest between the parties and prepare an adequate representation of the risks to the investor, identifying the investor's profile. This is the assessment of the suitability of the product to the needs of the saver.

But there are other reforms on the table: a Regulation on the prudential requirements of investment firms (COM 2017 790 final) and a Directive on the prudential supervision of investment firms (COM 2017 791 final).

The issue of liability has remained open, so that in Italy there is a debate as to whether the investor can claim nullity or annulment of the investment contract or compensation for damages.

3.6. Protection of competition and damages for breach of market rules

Competition law, as originally conceived in the Treaty establishing the European Economic Community and subsequently transposed into the TFEU, goes beyond the mere object of study in which legal and economic interpretation can be carried out in parallel. It is a set of rules in which economic and legal assessment are coessential, mutually interfering and inseparable.

This can be seen in the rules of the Treaty that prescribe correct conduct in the internal market (Articles 26 et seq. and 101 et seq.) and the rules of the Charter of Fundamental Rights of the European Union – a legal text that is now on a par with the Treaties – that deal with economic relations, in particular Article 16 on the freedom to conduct a business and Article 38 on the protection of privacy.

and Article 38 on consumer protection. Thus, when dealing with problems relating to the violation of competition rules (in terms of antitrust torts) and the detrimental consequences arising therefrom (in terms of antitrust damages), this intersection must necessarily be taken into account.

But there is more: both antitrust torts and antitrust damages are conceived in such a way as to combine factors of EU law and factors of domestic law. It would be simpler if the whole legal construction, with its rules of interpretation, were to be resolved in its entirety within the Community framework, because it would be sufficient to keep in mind the meaning of typically Community terms and concepts to solve the problems. Where there is maximum harmonisation and almost 'complete' regulation, it is easier to apply EU law and integrate it with domestic law if the Community legislator has reserved some space for it.

Reserved for it. If, on the other hand, the Community legislature regulates only one aspect of the case, application becomes more complicated, more uncertain, and, since the level of maximum harmonisation has not been reached, it lends itself to diversification in line with national models. As a result, the protection of protected interests varies from one legal system to another. Inequalities can therefore arise, both on the side of the interests of infringing undertakings (more or less intensely affected by damages for breach of antitrust law) and on the side of the interests of competing entrepreneurs and consumers (more or less intensely facilitated by the satisfaction of damages suffered).

The cases are unfortunately manifold. This has been seen in the hypothesis of damage resulting from the violation of Community rules by the State, in particular by national courts, and in the case of producer liability, mentioned above.

More. The directive on unfair terms (13/1993/EC) is more detailed and precise, and leaves less room for manoeuvre to the domestic legal system – and therefore to the national judge – (e.g. in assessing the preservation of the contract in the event of the clause being declared null and void), thus ensuring a more uniform application of EU law.

However, in its interpretation the implementation by national legislators and its application by national courts has led to diverging solutions. Entrepreneurs are exposed to uniform treatment as regards the identification of terms deemed unfair, but not all legal systems have given unequivocal answers in this respect.

In the case of antitrust, the choice made by the Community legislator was both less courageous and less invasive than it might have been, because it regulated only some of the elements of the offence and left the determination of other elements to the national courts.

In other words, it regulated certain aspects of the damage, but not the entirety of the tort, probably on the assumption that it was sufficient to demonstrate, on the basis of economic market data, that competition had been distorted in order to be able to say that the tort had been committed and therefore that the damage caused could be determined. Not that tort and damage are conceptually separable: they are separable from a regulatory point of view, and also in Community programmes, where the legislation on the subject has been the result of successive stratifications, making use of all types of sources of law (regulations, directives, decisions, opinions).

In fact, in matters of competition, the Community legislator has drawn on all the sources of law: the Treaties (Articles 101 and 102), the implementing regulations, the case

law of the Court of Justice, and now the directive. This directive approved by the European Parliament and the Council on 26 November 2014 (Directive 2014/104/EU) essentially deals with the criteria for determining damages, but then expands to include detailed regulation of the burden of proof, and the economic criteria for calculating damages, leaving instead the national court to ascertain the existence of two other requirements: the requirement of unfairness and the requirement of causal link.

It should also be stressed that the legislator's aim was twofold: on the one hand, to clarify the way in which damage resulting from the violation of antitrust rules is to be compensated, and on the other, to strengthen private enforcement, the use of private remedies, as public control is deemed insufficient.

The directive deals with the final segment of the hermeneutical process that leads to the definition of the damage and its determination, it is part of the line of legal policy that turns to the action of private individuals – precisely private enforcement – to control the regular course of the markets on the basis of the principle of competition, alongside public enforcement, presupposes the sharing of some basic concepts for the configuration of the tort resulting from the violation of antitrust provisions.

Provisions which the Treaties, the regulations, the orientations of the Court of Justice, the decisions of the Commission already constitute a compact corpus of regulations, in which are reflected the rules of the national systems which had anticipated the antitrust discipline, and introduced it following the accession to the Union (as happened, with much delay, in our Country).

But, in truth, the title is both brachyological and reductive, because in reality the discipline concerns aspects of substantive law and aspects of procedural law, and goes far beyond the simple determination of damages, affecting the elements of the antitrust offence which are worth examining carefully.

It is hardly worth mentioning that the proposal of the Directive (of 11 June 2013 (COM(2013) 404 final) had aroused great interest and a considerable literature, both Italian and foreign, had been collected on it, which had followed step by step its genesis, started with the Green Paper [COM(2005) 672 final] and the White Paper [COM (2008) 165 final], in which the debate on the subject was carried out with the participation of the European Parliament and the Council.], in which issues of general interest were debated above all, i.e. the advisability of using remedies promoted by private parties to enforce competition rules, the type of remedies to be promoted, the entry of collective actions: Recommendation 2013/396/EU and Communication 2013/401/fin. of 11 June 2013), to which is added the Resolution of the Presidents of the European Competition Authorities, entitled "Protection of information contained in leniency practices in the context of civil actions for damages", of 23 May 2012, which also bears witness to the close cooperation between the Central Authority and the National Authorities on this matter, the circularity of initiatives, models of action and sanctions, all measures aimed at achieving a fully competitive single market.

Moreover, the Union's competences cannot be called into question, either on the basis of Articles 101 and 102 of the TFEU or on the basis of Articles 103 and 104, which allow the Union to take measures directly affecting the domestic law of the Member States.

The contents of the directive are substantial, because it gives ample space to cooperation between private parties and public authorities, introducing a kind of "rewarding disclosure" that allows the company that has violated the rules to denounce the other parties involved in the case in exchange for immunity from fines or a reduction thereof (the so-called "leniency programmes"). The directive deals with the regulation of evidence, its disclosure, the acquisition of documents and exemption from the obligation to produce them, the acqui-

sition of information, and at procedural level it is concerned with resolving in a definitive manner a long-standing controversy concerning the relationship between the investigations carried out and the measures adopted by the national authorities and the judicial proceedings brought by the persons affected by the sanction before the competent court. In this sense, the decisions of the National Authorities, if final because, when challenged, they have been confirmed in court, have binding effect and constitute the basis of the action for damages. However, national decisions are not directly effective outside their own borders, and in proceedings brought before the courts of another Member State they may be subject to review with new evidence.

The directive also deals with limitation periods, the quantification of damages, the passing-on of damages and the out-of-court settlement of disputes caused by infringements of competition rules.

However, not all the problems opened up by damages have been resolved, so that at the time of the directive's emergence critical positions were already being expressed, mainly due to the disappointment of seeing problems still being debated that the directive could have definitively resolved.

Perhaps it was self-restraint, due to the application of the principle of subsidiarity, that kept the Community bodies from laying down a comprehensive regulation of antitrust offences.

Since the directive also deals with the passing on of damage, the fate of the so-called downstream relations, which have arisen as a result of the infringement or are in any case affected by the violation of the rules, must also be examined. It is precisely here that clarification or a decisive indication of the remedy to be envisaged would have been desirable, in order to avoid a situation whereby injured parties belonging to different countries, but harmed by the same antitrust act or conduct of the same economic operator, are exposed to different national rules and thus obtain different compensation.

The categories affected are in fact different: competing entrepreneurs, damaged by the abuse of a dominant position or by agreements, or suppliers, or employees, or consumers, and each of them is the bearer of interests that are not homogeneous.

There were also other problems to be solved. In the various legal systems there was no combination of rules on jurisdiction between the competition authorities and the national courts: in the event of an appeal against the Authority's administrative measure, would the national court have had to carry out further investigations to ascertain whether the competition rules had been infringed, or was the investigation already carried out by the Authority and assessed as sufficient to establish the infringement? How could all these requirements be combined if not by two mutually coordinated paths?

The European Union has opted for a combination of public enforcement and private enforcement remedies.

But the directive has dealt with only some aspects of damages, focusing on calculation methods (and thus favouring an economic perspective), thus neglecting the legal aspects of this complex case.

Following the analytical theory of the tort we should identify in the configuration of the antitrust tort some fundamental requirements:

(i) the subjective requirement, dictated by fault or intent, or imputation by business risk;
(ii) the injury of the protected interest (the unjust damage);
(iii) the causal link;
(iv) direct damage resulting from the infringement of the rules on the protection of competition;

(v) damage resulting from the infringement connected with acts of negotiation concluded by the injurer with third parties who claim to have suffered damage.

Obviously, the capacity to understand and act on the part of the injured party is assumed; while the qualification of the competition rules is not irrelevant, to establish whether its violation implies the non-observance of mandatory rules, of public order, of economic public order, to understand whether the "downstream" negotiation acts are valid, are null and void, whether compensation is due and how it can be calculated, also taking into account the "translation of the damage". It is also necessary to verify, in the event there are several co-authors of the damage, how the problem of co-responsibility or joint liability can be resolved.

As for the injured party, reference should be made to the notion of undertaking under Community law and, more specifically, of the undertaking as understood in the context of competition law. In turn, the protected interest implies the ownership of the interest and therefore the identification of the categories of injured parties.

The identification of the requirements brings with it the distinction of competences and roles: in other words, must the national judge who has to quantify and liquidate the damage resulting from the violation of antitrust law reconstruct all the elements of the tort, or are some of them already defined or determined by other authorities, national or Community?

As can be seen, the antitrust offence presents strong analogies with another figure of offence which is articulated in the same components – Community and national – and therefore one could follow, as in the past, the same model of reasoning to delineate its contours. In fact, state liability for violation of Community rules implies that the violation must be ascertained in the light of Community law, and so must the damage to the interest of the injured party (which may be a right established by Community law directly in the hands of the victim), while the damage and the causal link between the violation and the damage must be proven by the victim and ascertained by the judge.

The Directive clarifies competences and roles. Here the national court, i.e. the 'court of appeal' – according to Article 2 in the definitions – 'shall have the power, following the lodging of an ordinary appeal, to review decisions issued by a national competition authority or judicial decisions taken in respect of such decisions, regardless of whether that court has the power to find an infringement of competition law'.

Thus, the infringement may concern either rules of Community law or rules of national law corresponding to those of Community law (Article 2(1)(3)).

The infringement can be ascertained either by an administrative authority (the Garante) or by an administrative judge (seized to review the administrative measure), but the ordinary judge has the power of review.

Damage is defined by Community law, but its quantification is a matter for national law.

But let us come to the problems of civil liability.

(i) The directive does not specify whether the injured party must prove fault or fraud on the part of the undertaking which has infringed the antitrust rules. The Community legislator probably considered that strict liability for infringement of the law was implicit, but did not even consider the question of strict liability, since the infringement is intentional (with all the consequences that damage resulting from a malicious act entails in terms of foreseeability).

If the antitrust behaviour has been ascertained by an administrative act or by a ruling of the administrative judge, it will be up to the defendant company to prove the inapplicability of the antitrust discipline, the existence of exemptions, and any circumstance that excludes that the infringement took place.

The burden of proof is – due to the type of case – reversed.

If the injured party applies directly to the ordinary courts to obtain compensation for damage, proof of the infringement is facilitated by the rules on disclosure (Article 5 et seq.) and the evidence that the courts may acquire and disclose under Article 5 et seq. of the directive. It is therefore not necessary to demonstrate the existence of a subjective requirement, because what matters is the result, the effect of the conduct, for the purposes of the application of the competition rules and therefore of the penalties connected with its infringement.

Since this is a typical case, the general rules on tortious acts do not apply.

(ii) But proof of a causal link between the conduct and the harm suffered is required.

(iii) As to the interest affected, this is closely linked to the purpose of the rule infringed, and thus to the protective aims of the discipline. Recital 11 states that 'according to the case-law of the Court of Justice of the European Union (Court of Justice), any person may seek compensation for damage suffered where there is a causal link between that damage and an infringement of competition law'.

This is a question of the acquis communautaire, explains recital 12, which repeats: "any person who has suffered damage caused by such an infringement may claim compensation".

But what is the interest affected? And what is the definition of "any person"?

Recital 13 states that "the right to damages shall be granted to any natural or legal person, consumers, undertakings or public authorities, regardless of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not a competition authority has established the infringement beforehand". And the damage consists of actual damage, loss of profit (recital 12) and loss of opportunity (recital 13).

In order to identify the persons who have standing it is therefore necessary to check whether the directive lists them or gives sufficient indications to qualify them. The expression "any person" is not in itself decisive.

Aside from the general statement (consumers, businesses, public authorities), the directive gives many indications: for example, recital 43 refers to the conditions under which goods or services are sold, to supplies in the event of a cartel between purchasers (and thus includes the category of suppliers), and to direct and indirect purchasers.

The following can therefore be considered as legitimate:

(i) the competing entrepreneur, who as a result of the antitrust behaviour has suffered pecuniary damage related to the profitability of his company (as is the case for damage from slavish imitation, from dumping, from denigration of products, etc.);

(ii) the "weaker" entrepreneur who participated in the commission of the offence because of his relations with the stronger entrepreneur; the entrepreneur who suffered the abuse of a dominant position or the abuse of economic dependence; the suppliers; here too, it is a question of either loss of income or damage to assets;

(iii) consumers and users, in which case one may speak of a limitation of freedom of contract or, as the case may be, of damage to their assets by having to pay a higher price than would have been the case if there had been no abuse, or in general anti-competitive conduct;

(iv) the public authority, with respect to the relationship established with the undertaking or undertakings that committed the antitrust infringement.

There are also cases in which the right held by the injured party is not only the generic right (although now considered a fundamental right) of contractual freedom, but a different right, such as copyright. And some authors have spoken of the interest of the market under-

stood as "common good". However, if we are in the presence of a "private" enforcement and the remedy is of private law, the requirements of private law must be observed.

In particular, it is necessary to identify, from the point of view of unjust damage, the type of private interest affected – which varies according to the category to which the injured party belongs – and to demonstrate the causal link.

But the causal link is not dealt with in the Directive. In Article 17, concerning the quantification of damages, it contains a provision, referring to the proof of the causal link, according to which "infringements consisting of signs are presumed to cause damage. The infringer is entitled to provide evidence contrary to this presumption'. The presumption of damage implies a presumption of liability and in any event a link between the damage suffered by the victim and the conduct of the agent. In addition, the recitals refer to loss of chance, another aspect of damage which implies a causal link assessment and the calculation of the probability of loss of profit opportunities.

The causal link is decisive in cases where the injured parties belong to the category of consumers who acquired goods or services from contracts 'downstream' (from the cartel, agreement, practice, de facto conduct of the undertaking or undertakings which distorted competition), that is to say, indirect purchasers, and consumers who with indirect purchasers, and consumers who have suffered the detrimental effects through collateral relations concluded with undertakings other than those that have infringed the rules (so-called umbrella customers, already mentioned).

With this, so to speak, reduced regime, the directive leaves it to the assessments of the national judge to ascertain the causal link, which, as is well known, constitutes one of the techniques for selecting compensable damage and above all for attributing liability.

Several types of problem then arise.

First of all, it must be ascertained whether the gaps can be filled by references to the dicta of the Court of Justice. However, the Court of Justice does not lay down precise rules in this respect.

The research carried out also with a view to drafting the text of the directive has shown that the systems of the Member States are inspired by models of causality which do not converge. There are systems in which there is no differentiation between causation in fact and causation in law. There are others in which factual causation is established first and then causation is selected. Some require proof of a direct link, others select damage on the basis of the criterion of its foreseeability. Hence the attempts to codify uniform criteria for selecting damages, which are still at the proposal stage.

The situation is made difficult by the fact that the orientation of the Court of Justice is not unequivocal and the plans to standardise the rules of civil liability and hence of legal causation differ.

To solve all these problems it would be necessary to have a uniform civil liability regime at Community level.

3.7. Plans to unify the rules on civil liability

Scholars of comparative law maintain that the various models prevailing in national legal systems already express a tendency to converge. But the process is very slow and full of pitfalls, since it requires the cooperation of doctrine and jurisprudence, but also a particular sensitivity of national legislators. The acquis communautaire is also rather limited in this area, being intended to regulate rather narrow fields. And as we have seen, the rules diverge from sector to sector.

Ongoing research, the results of which are gradually being published, shows how far apart the various systems are and how useful it would be, conversely, to achieve uniformity of terminology, concepts and general rules.

A number of treatises have already illustrated to jurists the peculiarities and difficulties offered by a reconnaissance of the written and jurisprudential rules of civil liability.

Current research is welcome and is the result of analyses coordinated by J. Spier, H. Koziol, U. Magnus, B. A. Koch. They concern the limits of civil liability, the expansion of civil liability, tortiousness, causality, damages, strict liability, as well as the attempts at codification promoted by the European Group on Tort Law based at the University of Gerona and by the Study Group for the drafting of a European civil code coordinated by Christian v. Bar.

In both cases they are documents in progress, which are interesting because they obey different systemic logics.

The proposals of the study centre of the University of Gerona, which have been brought together in the working group coordinated in Vienna by Prof. Koziol, identify a number of fundamental principles (PETL) arranged in an order very similar to that chosen by the Italian legislator for the codification of the rules of civil liability (articles 2043-2059 of the Italian Civil Code).

Liability for damage caused to third parties is attributed on the basis of fault, or the exercise of dangerous activities, or the fact of auxiliaries (art. 1.101); the damage that can be compensated is of a financial and moral nature (art. 2.101); the protected interests concern the person, property, the violation of contractual relations, damage inflicted voluntarily (art. 2. 101 et seq.); the burden of proof rests on the injured party, but the judge is given the power to alleviate it when proof is too difficult or costly; the causal link is based on the condicio sine qua non, but a distinction is made between competing, alternative, potential and minimal causes (arts. 3.101 ff.); liability is attributed by taking into account the foreseeability of the damage, the nature and value of the protected interest harmed, the basis of the attribution, the extent of the ordinary risks of life, the purpose of the rule violated (art. 3. 201 ff.); the basis of liability is guilt, but there are cases of presumption of guilt and strict liability (art. 4.101 ff.); in particular, there is strict liability in the case of carrying out abnormally risky activities, and in cases where special national laws provide for it (art. 5. 101 ff.); special rules are provided for liability for damage caused by minors and incapacitated persons and for auxiliaries (art. 6.101 ff.); the framework concludes with rules on exemptions and items of indemnifiable damage.

The draft drawn up by Christian v. Bar is closer to the German model of the B.G.B. (§ 823 ff.) It insists on damage to a legally relevant subjective situation, which is substantiated by the injury of a series of listed interests, corresponding roughly to the type of interests normally protected in civil liability matters. The criterion of imputation is fault or wilful misconduct, but special rules are laid down for damage caused by employees, members of a group, property, defective products, the environment, the circulation of vehicles, dangerous things; the picture is completed by a series of detailed rules concerning imputability, solidarity, contributory negligence, remedies and items of damage.

The area of civil liability is an extraordinary laboratory for the jurist who cultivates national law, comparative law, European Union law or European private law. The emergence of personal values in the area of civil liability is a guarantee of progress and stability. But a great deal of effort is still needed from lawyers to achieve a satisfactory level of protection of the interests affected. Hence the importance of international congresses such as this one held in Madrid, which I am proud to have been able to attend.

Chapter X

Traditional Remedies

Index: 1. Rights, fundamental freedoms and regulation of the contract. – 2. Fundamental rights as "general principles". – 3. Fundamental rights as general principles of contract law in the case law of the Court of Justice. The role of fundamental freedoms. – 4. Human rights in the European Convention. – 5. The dilemma of the modern legislator. – 6. The contribution of the analysis of comparative experience. Germany, Holland and Israel. –

1. Rights, fundamental freedoms and regulation of the contract

If we look at the legal literature on private autonomy, in particular on contractual autonomy, in our experience from the angle of the protection of fundamental rights and freedoms, we discover a multiform landscape, with orientations that are in opposition to each other, or at least side by side, but certainly not uniform. The conception of private autonomy is still fragmented. There are those who tend to limit the boundaries of private autonomy to the national sphere, especially in the code, but at the same time promote its flexibility, adaptability and varied use, underlining the freedom to contract in areas that were once very reluctant to entrust private individuals with regulatory power, as happens with family agreements, inheritance pacts, parasocial pacts, agreements aimed at separating the ownership of the right from its management, and as happens when one thinks of the freedom to configure new types of contracts and new clauses. There are those who rely on the practice and creativity of jurisprudence, and therefore let substance prevail over form (in a legal-realistic way), and shape the content with forms already prepared or with tools delivered by an old and tested tradition. There are those who make use of comparisons to propose transplants and adaptations, or exalt the attempts to standardize rules – on an international or European level – in order to simplify definitions, concepts and above all to clarify unequivocally the scope and limits of the freedom of operators. These three approaches have stratified over time, but none of them has managed to prevail or oust the other two. The most recent approach – whose outlines have yet to be clearly defined – has been affirmed by taking into account the principles of the Constitution and then the principles of European law. But we must not ignore also the direction that, anchoring the discourse to the distinction between public and private law, is completely insensitive to constitutional values, and more inclined to give prominence to the economic content of relationships, seeking to reserve to private law a sphere of full autonomy, only veined by regulatory models distinct for sectors and not extended to all sectors.

The most recent direction is the least investigated, if we look at the domestic situation. It draws nourishment from many sources, normative, jurisprudential and doctrinal, which are interpreted in such a way as to devalue the distinction between public and private law, emphasize the values contained in the normative formulas, facilitate the harmonization of national systems, and favor the interpretative orientations of the Constitutional Courts, the Court of Justice of the European Union and the European Court for the Protection of Human Rights. In this sense, the distinction between fundamental rights and human rights is practically evanescent, while the distinction between (fundamental) rights protected by the Charter of Nice and fundamental freedoms proclaimed by the Treaties of the European Union remains clear. In this regard, quantitatively speaking, there appear to be many contributions

from foreign experiences concerning rights, while contributions dealing with freedoms are rarer; on the contrary, in most cases, the contributions, while distinguishing the two areas, unite them in a unitary systematic consideration.

If we look at this phenomenon from the outside, the Italian model is (not ignored, but) occasionally examined, while the German model is central, summed up in a term that is at the same time a notion, a concept, an achievement and a promise – I am referring to Drittwirkung. The English model appears interesting, but it has two peculiarities, operating on the level of constitutional values incorporated in the Human Rights Act of 1998 with which the United Kingdom has implemented the European Convention on Human Rights but has almost ignored the rights incorporated in the Charter of Nice, because (according to most) they are intended to operate in the field of public law. The least advanced model in this field seems to be the French model, where only recently has the implementation of fundamental rights begun to be discussed in the area of contract law.

It is for this reason that the Italian model is more appreciated if it is placed within a framework of comparative references, from which guidelines can be drawn for the interpreter, when the problem of the applicability – direct or indirect (horizontal or vertical) – of fundamental rights and freedoms to contractual relations arises.

2. Fundamental rights as "general principles"

The European Charter of Fundamental Rights, the jurisprudence of the European Court of Justice and the pronouncements of the national constitutional courts are the basis of positive law that has accredited the thesis according to which fundamental rights are general principles, as stated in art. 6 of the Treaty of Lisbon.

From a formal point of view, if we stop to consider only the letter of the Charter, it could be discussed whether the fundamental rights of the person are to be understood as "principles" of law as such. Reading the Preamble of the Charter, it would appear that fundamental rights are values based on the principles of democracy and the rule of law. The text reads as follows:

> Conscious of its spiritual and moral heritage, the Union is founded on the indivisible and universal values of human dignity, freedom, equality and solidarity; it is based on the principle of democracy and the principle of the rule of law. It places the person at the center of its action by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

In another passage of the Preamble the values and principles seem to be transformed into fundamental rights: «To this end it is necessary to strengthen the protection of fundamental rights, in the light of changes in society, social progress and scientific and technological developments, by making those rights more visible in a Charter».

But the most relevant passage concerns the nature of these values/principles/rights:

> The enjoyment of these rights gives rise to responsibilities and duties to others as well as to the human community and to future generations. Therefore, the Union recognizes the rights, freedoms and principles set forth below.

It is not a question, therefore, of emphatic statements that exhaust their function in painting the ideal image of the Charter: fundamental rights are or express principles that have

legal value, that give rise to responsibilities and duties towards the State or the Union and towards others.

In 2007, a Resolution of the European Parliament gave legal value to the Charter, even though the Court of Justice and the national courts had for some time been determined independently to consider the Charter binding and to draw inspiration from it in resolving questions and deciding disputes. The Charter immediately became part of the body of "living law". The Charter immediately became part of the body of "living law", and added legal value to its political value.

More. The Treaty of the European Union has been amended by the Treaty of Lisbon with the addition of Article 1a which states:

> The Union is founded on the values of respect for 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 characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

And Article 6 states:

> The Union recognizes the rights, freedoms and principles enshrined in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted on 12 December 2007 in Strasbourg, which has the same legal value as the Treaties.

If the legal value of the Charter is reaffirmed – acquired, so to speak, in the field in the jurisprudential application of the Courts, then affirmed with the 2007 resolution, and now again sanctioned by the Treaty – this means that those provisions have a binding nature, must be applied by Community and national judges, and can be applied not only in vertical relations (i.e. towards States), but also in horizontal relations. We will return to this point in a moment.

For their part, human rights as recognized and classified in the European Convention have received further recognition in the Lisbon Treaty.

In fact, art. 6, c.3 states:

> The fundamental rights, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and of Human Rights and Fundamental Freedoms and resulting from the constitutional traditions common to the Member States, are part of the law of the Union as general principles». This formula better clarifies the text of the Maastricht Treaty of 1992, according to which «the Union shall respect fundamental rights (…) as general principles of Community law.

It could be observed that the principles of the Charter and the principles of the Convention now form a whole, on the basis of this double formal recognition.

But the problem is more complex than how it is sometimes represented.

The issue had also received echoes during the Lincei conference held in Rome in 1991. Rodolfo Sacco had spoken about it – with regard to principles in general – citing the Treaty establishing the EEC (the then art. 215 c. 2), which by tabulas inscribed principles among the sources of community law (principles are legal rules of second degree founding

the community order); Angelo Falzea had stressed the high axiological nature of the fundamental principles that "even with their strong ideality are rules of positive law"; Pietro Rescigno about the principles included in the Constitution of the Italian Republic, and to the extent that they were recognized by the international community, had theorized that they could constitute a limit to national sovereignty. Above all, Giorgio Oppo and Luigi Mengoni had recognized the rank and role of general principles in fundamental rights. Oppo had underlined that the general principles govern behavior even in the field of private autonomy: <the highest values are (…) those of liberty, equality and solidarity ("political, economic, social") [citing art. 3 of the Italian Constitutional Charter] and the first principles that follow are those of equal autonomy of the members of the community and of the attribution to the agent of the consequences, active and passive, of behaviour". Mengoni identified inviolable rights with the general principles, specifying however that they must be coordinated with the other norms-principles, because the Constitution is a table of values that often have opposite meanings, and therefore they must be balanced. Ronald Dworkin's distinction between rules and principles was reaffirmed with regard to their function: rules admit only a slavish observance, principles guide the interpreter; these and those are norms that differ not in structure but in their effects.

All the authors cited considered that the principles should also be applied horizontally, that is, they could be applied not only in relations between the citizen and the State, or between the citizen and the institutions of the European Union, but also in relations between private individuals and therefore also to the discipline of the contract. This conclusion is not univocal in the doctrine of Community law, nor in the orientation of the interpreters of civil law and, in general, of European law.

In order to reason about the production of horizontal effects from fundamental rights/general principles it is necessary to proceed by successive segments.

Hugh Collins is right when he argues that one can better understand these issues when one comes from experiences in which the distinction between private and public law has lost its centuries-old relevance, and when in those experiences the process of constitutionalization of private law has taken hold.

But generalizations cannot be made.

The experiences in which the phenomenon of the constitutionalization of private law took place, even before the formation of a common European law, are one thing. The leading models of this way of building the new civil law and modernize it in the light of the founding values of society have been precisely the Italian model, with the process of constitutionalization of private law that begins not from 'entry into force of the Republican Constitution (1948), but from the early sixties, the German model, which also' is outlined in the same period of years (the Basic Law is 1949), and the Spanish model that starts immediately after the introduction of the new constitution of 1978.

It is another matter to consider the experiences in which human rights/principles of the European Convention have been accepted at first from the point of view of the effectiveness of international conventions and then as an integral part of the constitutional order, or in the form of internal norms as happened with the Human Rights Act in England, just to recall the first examples that come to mind.

There are still other experiences in which social values have made it possible to go beyond the formally egalitarian bourgeois conception of relations between private individuals to give access to the values of the person, and not only therefore to the protection of the con-

sumer, the worker or the saver (which always refer to a universe of an economic-patrimonial nature) but also to discrimination and differences of sex, language, religion, ethnicity, etc.

3. Fundamental rights as general principles of contract law in the case law of the Court of Justice. The role of fundamental freedoms

I am dealing here with the fundamental rights contained in the Charter, but obviously the discussion covers the entire debate on the recognition in the European context of the common principles regarding the person that are widespread and recognized in the constitutional charters of the member countries. It also involves the relationship between the Union Charter and the European Charter of Human Rights, as well as the so-called dialogue between the Courts, the multilevel protection of fundamental rights, and the coordination of the pronouncements of the Courts, which, with different competences and with a different range of action, deal with the matter of fundamental rights.

It is precisely the pronouncements of the Courts that show that fundamental rights are understood as general principles, presented from time to time in the form of personal values.

Experience teaches us that, beyond the more or less rigorous and technically correct formulas, the function of law is expressed through values-principles-rights and that the legitimation of a principle can be effected by judges in their ius dicere activity so that they in so doing fundamental rights become "living law".

The labor market, and therefore the employment contract, has been the target most frequently hit by the Court of Justice of the European Union on the basis of general principles such as the principle of equality (here in the form of equality between men and women in pension treatment), a fundamental right recognized by all modern constitutions, and the first declarations of rights. The text can also be read in the opposite sense, that is, as an application of the principle of non-discrimination. It is not the case here to review the most striking cases, such as the Bartsch case (of 13.9.2008, no. C-46/07), or cases involving application of the principle of personal dignity (C152/82 13.11.1990) or cases concerning the principle of free movement of workers. In the field of contracts, the Omega Spielhallen case (C-36/02) is exemplary, in which games using electronic instruments in which human figures acted as targets were prohibited (C-36/02).

More recently, in the area of insurance contracts, the Court of Justice has ruled that Article 5 n. 2 of Directive 2004/113/EC on the principle of equality between men and women is invalid and, therefore, clauses contained in insurance policies that discriminate against women, due to age, with respect to men, are null and void (C-236/09).

A careful analysis of the impact of fundamental rights on the jurisprudence of the courts should include the jurisprudence of the European Court of Human Rights and the jurisprudence of the Supreme Courts, as well as, of course, that of the Constitutional Courts. But in the economy of this report we can refer to the collections that have accompanied the evolution of the Court of Strasbourg on the subject, without forgetting, however, that that Court tends to consider fundamental rights more than as general principles as strong subjective positions that individuals have the right to claim against the States of which they are citizens or guests, obtaining, however, as a remedy to the violation, a sentence of compensation from the violating State.

The Strasbourg Court has dealt with fundamental rights by outlining the meaning of human dignity.

Particularly significant are the cases Kreil (2000), Schmidberger (2003), Omega (2004), K.B. (2004), the terrorism case (2005), Richards (2006), Tadao Maruko (2008).

Case 148/13 dealt with the question of whether a non-European citizen who, if returned to his country of origin, would suffer restrictions on his personal liberty and even more severe penalties as a homosexual could be deported. The Court held that the return was not admissible in light of art. 4, par. 3, lett. c), of the Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, and art. 13, par. 3, lett. a), of the Directive 2005/85/EC, on minimum standards on procedures in Member States for granting and withdrawing refugee status. And in the case 571/10 the Court has ruled that national law, if aimed at maintaining an anti-discriminatory treatment, must be disapplied.

The solutions proposed by the Court cannot always be considered "progressive" in the sense of affirming protection at all costs. In other words, the orientation of the Court can sometimes appear to be oscillating, and perhaps objectionable, as happened with the non-accession of the European Union to the Convention on Human Rights on the basis of an opinion (the second) of negative tenor issued by the Court of Justice (Opinion 2/13 of 14 December 2014).

However, fundamental rights are taken seriously, and are "in action". The categories configured at the time for domestic constitutional rights and for law of jurisprudential origin can therefore also be applied to fundamental rights. The Europe of law has become the Europe of rights, and now the Europe of the Courts.

But the doctrine has warned the interpreter that he might be tickled by the idea of extending the catalog of rights or of systematizing rights in a mechanical way.

However, even at this level of analysis, and in this area, the diatribe between ius litigatoris and ius constitutionis has opened up. In other words, the question is whether one should give protection to the right and thus create the remedy (ubi ius, ibi remedium) or whether one should give entry to the remedy to protect the right (ubi remedium, ibi ius).

The principle of dignity has aroused the most emphatic appreciation – it has been spoken of as the "jewel in the crown" – but has raised the most disarming perplexities even in the cultural context where it has grown in the most luxuriant forms: it has been described as the most elusive concept in German constitutional law. The positions that have emerged in doctrine are the most disparate. In a somewhat maximalist way, Jan Smits, noting the ambiguity of the concept, has proposed to delete it from the table of reference values; on the contrary, Stefano Rodotà on fundamental rights, extended to the world of communication, information technology, personal data, biotechnology, has taken them as the basis of a new human anthropology. Ingolf Pernice considers them, even as considered in Article 6 of Lisbon, the point of support of the whole community order, John Aldergrove has spoken of it as an empty box, which can be made interpretative manipulations (as are those that allow the general principles, according to the teaching of John Tarello). But I believe that dignity, like all fundamental rights, must be taken seriously. After all, the legality of the internal system is measured on the notion of dignity of the Italian Constitutional Charter, and the same legality of the EU system uses the same meter, as Pietro Perlingieri points out. It does not regret the emphasis of a scholar at the University of Montreal who speaks of dignity as a Trinitarian concept, as it relates to the person and therefore to its organic, physical and symbolic dimension. The dignity that opens the European Charter of Fundamental Rights has a strong

symbolic meaning and identity: it reminds us – indeed, it warns us – that the European Union does not aspire only to an economic integration, but outlines a capitalist development model that places the person at its center, and in this consists its raison d'être.

The Court of Justice, however, has not taken an unequivocal stance.

As is well known, the Charter of Rights is equivalent to the Treaties of the Union. Therefore, since there is no supremacy of the Charter with respect to the Treaties, as happens with national Constitutions with respect to other laws, this means that the rights protected by the Charter must be balanced with the rights protected by the Treaties, in particular with the right to competition. And in order to verify the compliance of national rules with the Treaties, freedom of competition is the fundamental value that the Court follows.

For the Treaties it is preferred to speak of "freedom" (of movement of persons, goods, services, capital). It is debated, however, whether the fundamental freedoms provided for by the Treaties can also be treated in the same way as the fundamental rights protected by the Charter: that is, they can be applied directly to relations between private individuals. If the content of the norm is not detailed and precise, this operation is not allowed. It will be up to the private individual, whose right is protected, to claim compensation from the State for the fact that his right has been violated.

This principle was formulated in the case of the Association de Médiation Sociale. The (French) law stipulated that only companies with a certain number of employees could express a union representative; in the case of one company that number was not reached and therefore union representation could not be expressed. The issue, raised before the judges of merit, was resolved in an unfavorable way to the trade union association that had defended the workers. The question of preliminary ruling was raised in the Court of Cassation and the Court confirmed that – as stated in the notice – the provisions of Directive 2002/14 prohibit the exclusion of certain categories of workers from the calculation of the company's workforce. The effect of such an exclusion is to deprive workers of the rights conferred by Directive 2002/14, thereby depriving the latter of its useful effect. Next, the Court examines whether Directive 2002/14 may be relied on by trade unions in order to challenge the incorrect transposition of that directive.

To that end, the Court points out that a directive has direct effect in all cases in which the relevant provisions are, from the point of view of their content, unconditional and sufficiently precise. The Court finds that that is the case here, since Directive 2002/14 provides that Member States may not exclude certain categories of workers from the calculation of staff numbers. However, the Court notes that the dispute is between private parties (with the result that the trade unions cannot rely on the provisions of Directive 2002/14 as such against the AMS) and, moreover, that the national law cannot be interpreted in a manner consistent with the directive. On the basis of these premises, the Court then examines whether Article 27 of the Charter, alone or in conjunction with the provisions of Directive 2002/14, can be invoked by referring to Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees.

The Court points out that, in order for Article 27 of the Charter to be fully effective, it must be specified by provisions of European Union law or national law. The prohibition on excluding a particular category of workers from the calculation of an undertaking's workforce cannot be inferred, as a directly applicable legal rule, from the wording of Article 27 of the Charter. In other words, Article 27 of the Charter is not in itself sufficient to confer on individuals a right which can be invoked as such. The Court concludes from this that the same assessment is also required if that article is read in conjunction with the provisions of Directive 2002/14 (Case C- 176/12).

In other cases, however, the Court has applied the fundamental right directly: this was the case with Kukukdeveci (19.1.2010, C-555/07). Here the reasoning took another route to arrive at the positive result. It was recognized that the right invoked belongs to the sphere of fundamental rights recognized as principles and therefore they are applicable horizontally. In the case in question was an employment relationship in which the employer had given notice of dismissal to the employee in violation of the principle of equality and non-discrimination.

The Court ruled that "European Union law, in particular the principle of non-discrimination on grounds of age, as expressed in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that, for the purposes of calculating the period of notice of dismissal, periods of employment completed by an employee before reaching the age of 25 years are not to be taken into account". And, further,that:

> It is the task of the national court, before which a dispute between private individuals has been brought, to ensure compliance with the principle of non-discrimination on grounds of age, as expressed in concrete terms in Directive 2000/78, disapplying, if necessary, any contrary provision of national legislation, irrespective of the exercise of the power it has, in the cases provided for in the second paragraph of Article 267 TFEU, to refer a question to the Court for a preliminary ruling on the interpretation of that principle.

Therefore, here it is not a question of requesting compensation for damages from the State in default, but the situation of the private relationship in contrast with the European discipline remains intact. On the contrary, the national judge must disapply the internal rule in contrast with European law, and thus restore the original private-law relationship.

But there is a third way to solve the problem. On the part of the national court which detects a discrepancy between domestic and European law, it is always possible to raise the question of preliminary ruling before the European court. This is how it was decided in the case A and B (11.9.2014, C-112/13).

In this case it is made clear that all three paths are correct and the national court must be deemed free to choose one.

However, not all the norms placed to protect the fundamental freedoms protected by the Treaties have the same hardness, that is, the same strength.

The strongest is the freedom of movement of persons; here, however, a distinction must be made between movement within the Schengen area and outside of it.

Equally strong – after a period of uncertainty – has been the movement of goods, which has been recognized as having horizontal effectiveness. The Fra.bo case is an example of this. It concerned a dispute between the Italian company Fra.bo and a German certification association, which had found that the company's product did not have certain characteristics required by German law. The Court ruled that «Article 28 EC must be interpreted as applying to the standardization and certification activities of a private body, where national law considers products certified by that body to be in conformity with national law and this has the effect of hindering the marketing of products lacking such a certificate».

The freedom to provide services is also protected, allowing both establishment and direct operation in each Member State.

As regards the free movement of capital, the Court of Justice of the European Union, with sentence 23/10/2007 no. C-112/05, has established that domestic law must not hinder the movement of capital, even when the "capital" is expressed in shares of a company.

4. Human rights in the European Convention

The attention that must be given to the European Convention for the Protection of Human Rights, in a commentary on art. 1 of the European Charter, is not out of place, both because, as pointed out above, the Strasbourg Court has the primacy in the construction of human rights in their modern sense, and because the violation of human rights is, unfortunately, a frequent practice even in member countries of the European Union whose constitutions enshrine the values of the person.

The jurisprudence of the Strasbourg Court, which should be read according to the criteria of English case law, as suggested by the judges themselves who create it, is in fact very rich. The Court has elaborated the meaning of the rights recognized by the Convention but has also "dialogued" with national judges. Moreover, the Court has had the merit of "dialoguing" with national judges and, therefore, the concrete, direct application of the principles enshrined in the Convention has promoted their knowledge and respect in a much more consistent way than would have happened if they had been entrusted only to the initiative – albeit tireless – of the Strasbourg judges.

An extensive research conducted in some countries of the Union on the application of the principles contained in the ECHR by national judges has shown that despite the fact that in these countries there was already a constitution guaranteeing fundamental rights, the application of the ECHR has had disruptive effects. Given the results, there are authors who consider the Strasbourg Court as the constitutional court of Europe. On the other hand, if we look at the numerous pronouncements condemning the Italian State, this statement is not entirely peregrine.

There are many cases that have caused an uproar, such as those relating to due process, which even led the Italian legislature to amend the text of the Constitution (art. 111 Const.), to introduce a specific remedy for compensation for damages suffered by victims of delays in the administration of justice (the so-called Pinto law), or as those on the acquisitive occupation, which led the legislature to change the discipline of 'expropriation and to recognize the acquisitive occupation an adequate compensation in order to better protect the right of property.

Among the most striking of these is that of December 1, 2009, no. 903, regarding discriminatory treatment in the event of transfusion of infected blood. This is the case of G.N. and others. Or the case of Khalafia and others v. Italy. In another case, the conviction was due to the fact that the Authority had entrusted the daughter of a Nigerian migrant to an Italian couple for adoption, with the consequent prohibition of the mother to resume contact with her daughter (case Akinnibosum v. Italy); we must also recall the conviction for wrongful imprisonment of a Venezuelan migrant extradited from Greece (case Gallardo Sanchez v. Italy); the conviction for not having had the right to remain in the custody of an Italian migrant (case Gallardo Sanchez v. Italy); the conviction for not having had the right to remain in the custody of an Italian migrant (case Akinnibosum v. Italy). Italy); the sentence for failure to commute the imprisonment with house arrest of a detainee who was in very serious health conditions (Contrada v. Italy); the sentence for three same-sex couples who were prevented from forming a family for each of them in the form of civil union or marriage (Oliari v. Italy).

However, the implementation of the principles of the ECHR is not unequivocal and our Court has developed the theory of "counter-limits", so that "in the event of a conflict between a domestic rule and a rule of the European Convention, the national judge must (…) proceed to an interpretation of the first one in accordance with the conventional one", but the rule of the ECHR has no direct application and therefore, where it detects the contrast, the judge must raise a question of constitutionality with reference to articles 10 and 117 of the Constitution.

With sentence no. 317 of November 30, 2009, on the default of the defendant, the Court took the reasoning further, stating that the application of the ECHR must result in a "plus of protection" for the entire system of fundamental rights, so that "the ECHR norm, at the moment in which it goes to integrate the first paragraph of art. 117 of the Constitution, repeats from it the principle of the protection of fundamental rights. Const., this repeats its rank in the system of sources, with all that follows in terms of interpretation and balancing, which are the ordinary operations that this Court is called in all judgments within its jurisdiction.

5. The dilemma of the modern legislator

Is it possible to construct an autonomous body of legislation, even in the form of a Regulation, that is not subject to the principles enshrined in the Charter of Fundamental Rights, and therefore does not include the principles of the Charter among its principles (including those of a directive nature)?

There are several possible ways to include the Charter principles among the principles of European contract law, among the principles of the Common Frame of Reference, among the principles of the Sales Regulation:

(i) the simplest is by direct reference, even without their reproduction;
(ii) the most natural for the jurist, who prefers to interpret the text rather than not rewrite it, is to consider each text (from the PECL to the Regulation) as necessarily interpreted and applied in the light of the principles of the Charter (and of the Convention, which counts as a set of general principles);
(iii) the most traditional one is to consider the fundamental principles as imperative norms, and therefore as norms which in any case must be applied.

In all these cases, the application of these rights/principles/rules to relations between private parties can be direct.

In doctrine, however, there are different positions.

For example, Hugh Collins, with regard to freedom of contract, maintains that the solution can be bustrofed: if greater importance is given to the freedom of the individual to bind himself, then other freedoms can be limited, such as the one which, in the matter of work, imposes the observance of a timetable which does not respect health; if greater value is given to dignity, the working rules which are contrary to health and rest should be disapplied and the contractual agreements considered contrary to fundamental rights.

Hans Micklitz points out that among the fundamental rights it is necessary to take into account also the social rights, and that these are not safe: «the expansion of social rights does not help to overcome the narrow boundaries of the EU competence on The Social». And in a broader reasoning that proposes a review of Community sources, Micklitz sees in the combination of a European Constitution and a European civil code the framework in which it is possible to give rise to an integrated market in which not only individual rights but also

collective rights are relevant and the principle of solidarity is fully recognized alongside the principle of dignity.

In a more reductive and cautious perspective Olga Cherednychenco prefers to speak of complementarity between fundamental rights and contract law: «it is obvious (she says in conclusion of a recent essay) – thaat the complementarity between fundamental rights and contract law can only be achieved if the ECJ refrains from interfering in such cases by means of the fundamental rights review of the provisions of the CFR or the interpretation of the general clauses contained therein». But the relevance of fundamental rights in the context of European private law and therefore of their direct application in contractual law relationships is not denied by the author, who then raises a further question: given this assumption, the problem is not so much in their recognition within contract law, but to what extent the protection of fundamental rights should be pushed, when the conflicting interests of the parties require an acceptable balance. In this sense, the author distinguishes, taking into account the different models established in European experience, a direct effect, a strong indirect effect, a weak indirect effect.

But here we come to the point. If we start from the assumption that the Charter of Fundamental Rights is at the basis of the entire Community system, instead of complementarity between fundamental rights and European contract law, we must speak of the subordination of the latter to the former, as Chantal Mak rightly argues, as a result of extensive and accurate comparative research.

At the end of the day, the whole problem of the direct or indirect effect of fundamental or inviolable rights that we have seen in the experiences of constitutionalization of private law, as they have developed in Italy and Germany, has been reproduced with many similarities also for the rules of the European Convention on Human Rights and the difficult choices of the interpreters are due to various reasons: To the fact that the Convention is an international act that does not apply directly in the domestic legal system, that the text did not explicitly mention dignity as a value that supports the whole complex of rights and freedoms of the person, that the freedom of the person includes contractual freedom and this can be seen as an enhancement of (or a limit to) personal rights.

The French doctrine has particularly deepened the aspect of the obligations assumed by the states inforza the ECHR. These are obligations of a negative nature – respect for the freedoms of private individuals in which the State must not interfere – and obligations of a positive nature, which require States to strive to protect the protected freedoms: two cases are emblematic in this regard, the Affaire linguistique belge and Marckx v. Belgique.

In the first case, decided on 23.07.1968, the applicants, parents of French-speaking children living in certain areas of Belgium with a Dutch-speaking majority, had claimed for their children the possibility of access to teaching in French. The ECtHR ruled that denying children access to French-language schools with special status that had been set up in six municipalities bordering the city of Brussels solely because the children were not residents of those municipalities constituted a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights and Article 2 of Protocol No. 1 (right to education). However, the Court also held that the Convention does not guarantee a child the right to a state or state-subsidized education in the language of his or her parents.

In the second case, decided on 13 June 1979, the EDU Court held that the right to form a family (art. 8) and the right not to be discriminated against (art. 14) were violated in a case where, according to the Belgian Civil Code, a child born of a woman who had not come forward but was recognized by her mother only after the registration of her birth could not be treated, as a natural child, differently from legitimate children.

And the trend that is recognized in favor of the Court is in the sense of a progressive expansion of its powers, obtained by expanding the meaning of the rights protected.

Hence the orientation in favor of the horizontal application of the Convention.

There are many cases to be counted. In particular, with regard to Article 8, the cases of X and Y v. Netherlands, 26 March 1985; Stubbings and others v. United Kingdom, 22 October 1996; and with regard to Article 9 (freedom of thought), Otto-Preminger Institut v. Austria, 20 September 2003; Scientology v. Germany, 7 April 1997.

What must always be remembered, however, is that the Court proceeds (as happens in common law) for cases circumscribed to specific cases, without deriving general principles from the reasoning. Yes, the change in the factors that make up the case may lead to decisions that are apparently contradictory. It is precisely the "challenge of contextualization" that the interpreter must accept.

The dilemma of the modern legislator thus lies in this: is it more appropriate, for the purposes of the correct and certain application of the law, to ignore the fundamental rights in the provisions governing the general discipline of the contract, and protect them by interpretation, or to mention them in such a way that, whatever the process of interpretation, their protection is guaranteed? Obviously, this implies a fundamental choice and that is that freedom of contract cannot go so far as to legitimize the violation of fundamental rights.

The drafters of the DCFR have preferred, on the basis of suggestions made by many members of the group, to include mention of fundamental rights, even if this is not a broad protection and if the remedies granted for their contractual violation consist in compensation for damages rather than in the nullity of the contract.

Among the Principes Directeurs of the new contract law reform project directed by François Terré, an intermediate formula was foreseen, while in the previous version, by Pierre Catala, fundamental rights were ignored. In fact we read in art. 4 al. 2 of Titre I Des Contrats:

> On ne peut porter atteinte aux libertés et droits fondamentaux que dans la mesure indispensabile à la protection d'un intérèt sérieux et légitime.

The proposal, coming from Georges Rouhette, was appreciated by Carole Aubert de Vincelles, who underlined how it could then receive specific application of art. 59 of the project on the content of the contract.

But as will be seen in the description of the French model, the legislator did not give prominence to fundamental rights when reforming the third book of the Code Napoléon, so that in order to include them in the contractual discipline it is necessary to refer to public order, provided that this general clause can contain them.

6. The contribution of the analysis of comparative experience. Germany, Holland and Israel

In the German experience, the principle of freedom of contract has not been codified expressly in the BGB, as the conviction of its existence and protectability was accepted in an indefectible and universal way, given that this principle is proper to every market economy; it was, however, included in the Weimar Constitution of 1919, at par. 152; this provision, given the conception of the time, had a weak value, because such rules were considered not prescriptive but merely programmatic. The fundamental law of Bonn of 1949 does not expressly

mention freedom of contract, even though in private literature it (and private autonomy) is given great prominence; there are, however, rules which are said to be linked to freedom of contract, such as the guarantee of property (par. 14), freedom of employment (par. 12), freedom of association (par. 9) and the general clause for the protection of the person (par. 2).

The German doctrine considers that, given these normative references, even if indirect, freedom of contract has constitutional coverage. This is because – observes Flessner – (i) the guarantee of property implies the recognition and protection of the exercise of the faculty of disposition, which takes place through negotiation instruments such as, for example, sales, leases, contracts, etc. This is because – observes Flessner – (i) the guarantee of property implies the recognition and protection of the exercise of the faculty of disposition, which takes place through negotiation instruments such as, for example, sales, leases, transport, credit guarantees (but it could be argued that it is one thing to guarantee the ownership of the asset, quite another to guarantee the constitutional guarantee of the negotiation instrument used to dispose of it); (ii) the guarantee of employment implies the protection of work and, therefore, of the employment contract, as well as of the contractual relations which are established between companies, and between companies and consumers (but it could be argued that the protection of employment concerns the right to work or to undertake rather than the negotiation instruments through which it is carried out); (iii) the freedom of association implies the negative freedom not to associate (but it could be objected that the guarantee covers the association, not the negotiating instrument, such as the associative contract); (iv) the general liberty placed as a guarantee of the person (here the matter is more complex because even among us there are authors and decisions which link contractual liberty to the general principle of self-determination and therefore to the exercise of personal liberty; in Switzerland, for example, the connection was used to deem illegitimate the prohibition of entry into a cinema imposed by the manager on a journalist).

In any case, the prevailing doctrine considers that in Germany freedom of contract enjoys constitutional protection.

The problem then arises of the limits to legislative action aimed at restricting or circumscribing it. Here, as in other similar cases, the principle of proportionality is followed, according to which the legislative power may restrict fundamental rights only in pursuit of legitimate ends and by legitimate means. This principle is applied in an alternating way: sometimes the Constitutional Court checks the purposes of a public nature that have animated the legislative intervention, other times it looks in detail at the text supposedly in contrast with the constitutional dictate. An example of the first orientation is the decision of July 20, 1954 concerning the regulation of compulsory financing that entrepreneurs in every sector had to pay in support of the coal and steel industry, in exchange for shares and bonds of mining and metallurgical companies.

The Court considered the measure legitimate, given the appreciable purposes pursued by the legislature. The discretionary power of the legislator served as a smokescreen for the Court's interventions in the areas of price controls (November 17, 1958), the fixing of medicine prices (October 31, 1984), compulsory membership of old-age social security systems (most recently sentence of May 31, 1988) and so on, including legislation on housing and consumer protection (January 8, 1985; June 4, 1985; February 12, 1989; February 14, 1989).

The other orientation, more analytical, is expressed by a decision (moreover, of the constitutionality of the challenged law), regarding limitations on the opening hours of commercial establishments, the purpose of which was to guarantee an orderly life for employees and facilitate competition. The Court ended up considering that the limitations on opening hours should not also cover vending machines for products and services (February 21, 1962).

The Court has also guaranteed the freedom to close a business, if the closure affects an entire category (the case, decided on February 9, 1982, concerned the closure of hairdressing stores on Monday mornings). A similar question concerned petrol stations, which may remain open all the time, but may only dispense fuel at night.

The Court held that the provision of the code that declares the rights deriving from matrimonial mediations, i.e. to protect the family, are in conformity with the constitutional dictate; the mediator may request that the payment of his commission be made in advance, and it is not repeatable by the interested parties.

The common view is that the Constitutional Court may interfere in contractual matters, even if the obligations have been voluntarily assumed by the contracting parties. Some cases are examples of this. The Court held that the personal guarantee requested by a credit institution from the daughter of a businessman to guarantee the debts of her father was immoral and therefore invalid, since when she was asked to sign the deed she was not an expert in such transactions and had been reassured by the officials of the financing bank; in the case in point the daughter had subsequently married, separated from her husband and had three children, whom she had to look after alone, and was in financial difficulty (October 19, 1993).

Paragraph 2 of the Basic Law has been applied in a curious case; it concerned a contract of disposition of one's body (for sexual activity) concluded by a couple not united in marriage; the contract provided that the woman would use contraceptives; however, a child was born from the sexual relations and the father was obliged to pay alimony to the mother; the Court held that the contract was invalid as immoral (17 April 1986).

The analysis of Drittwirkung in relations between private individuals is the subject of a vast literature in Germany.

The coexistence of direct and indirect application is still an open issue: the former defended by Nipperdey, the latter by Durig. There are many decisions of the German Constitutional Court that directly apply constitutional norms (in particular the dignity provided for in § 1) to relations between private individuals.

Indirect application has won over most German scholars, such as Larenz and Flume, and has come to dominate the jurisprudence of the Constitutional Court as well. The Luth case decided in 1958, which has become the banner of the literature on the subject, is significant. It concerned an activist for dialogue between Christians and Jews who had promoted the boycott of a film produced, after the war, by a director who under Nazism had behaved collaboratively, directing a film that propagated anti-Semitic theories (Suess the Jew). The matter ended up before the Court of Cassation, which confirmed Luth's obligation to pay compensation to those damaged by his boycott action. However, Luth appealed to the Constitutional Court (in Germany, even private individuals can appeal to the Court), invoking the principle of freedom of expression. And the Court agreed with him. The Constitutional Court also created the right to privacy by making use of the general clauses governing civil liability in the B.G.B.

The case of the young mother who had issued sureties in favor of her father aroused interest, and is the subject of the reflections of non-German jurists as well. Hondius used it as a reference for his analysis of the problem in the light of Dutch law. This is all the more interesting because in Holland there is a written Constitution, there is no explicit constitutional guarantee of freedom of contract, there is not even a Constitutional Court, nor has doctrine or jurisprudence constructed mechanisms for the direct applicability of constitutional law to relationships between private individuals.

The absence of judicial control of the constitutionality of laws has not, however, prevented the Dutch courts from directly applying the norms of the Constitution (revised in 1983) to relations between private individuals (so-called horizontal effects). This was the case of the child who, as the son of a Jewish father and a non-Jewish mother, had not been admitted to attend a Jewish school (the Maimonides High School in Amsterdam). Reasoning in terms of freedom of education, the Court of Cassation overturned the judgment of the Court of Appeal that had imposed admission to the objecting institution.

Freedom of contract, which together with the binding nature of the contract and the consensual principle constitutes the triad of fundamental rules in the field, is also connected, according to doctrine, with the right to property and personal freedom.

But contractual freedom finds its balance (and limits) with the protection of consumer interests.

Hondius refers to the many provisions of the new Civil Code (which came into force with some books in 1982) that offer broad protection to weak interests. In his view, constitutional coverage would not be necessary, since a text as broad, detailed, and modern as the new code would be sufficient in itself to pursue the purposes to which constitutional protection tends.

In this context, one of the most relevant experiences is the Israeli one, even if, given its general outlines, it can be considered as a western model that has equal dignity to those that have most influenced the issue, such as the German and Italian models.

Many themes of general theory, as well as jurisprudential analysis, are intertwined in the problematic addressed. Each model places them in an order congenial to its tradition and history and often resolves them with uniform remedies. It is indeed comforting to note that, even in the diversity of the models, there are aspects and nodes that are similar or even identical. This means that in the Western world, beyond the competition of systems, there is indeed the possibility of finding a common language and common solutions, and that the world of law and rights can speak to jurists on the basis of a circularity of ideas and tools that constitute its intrinsic strength.

The proof of these assumptions can be found in a very acute essay by Aharon Barak, former president of the Israeli Constitutional Court, and professor at the Hebrew University of Jerusalem. The essay, published in the Notebooks of the Yale School of Law. Being a survey prepared for jurists applying to Israeli law, it does not take into consideration the rules of the EDU Convention and those of the European Charter of Human Rights, nor the jurisprudence of the Strasbourg and Luxembourg Courts, but rather the rules applied by the Constitutional Courts and the Courts of national legitimacy of some very different foreign models. On the other hand, the theme of the application of constitutional rights to relations between private individuals is fundamental in any constitutional democracy.

The point from which Barak moves is the distinction between public law and private law: a distinction in crisis, as has been pointed out several times, also by our legal culture, because hybrid "creatures" can be found everywhere, entities or tasks entrusted to private parties but with public purposes and principles of private law that apply to administrative activity, such as good faith and fairness, reasonableness, and principles originating from public law, such as "natural justice" or the prohibition of conflict of interests, which now also apply to private law.

Even where there are no constitutions listing fundamental rights (as in Israel or the United Kingdom), fundamental rights are produced by the creativity of judges as "a light

that guides the interpretation of the law and allows for the control of the legitimacy of public acts". There are some "basic" rights such as human dignity, freedom to work, freedom of expression, freedom of movement. In the field of private law, in addition to these rights, we find as fundamental the freedom to contract, the right to a name, personal freedom. In Israel these rights, although fundamental, can be modified by ordinary laws, because they do not have a higher hardness. But can we speak of a constitutionalization of private law or of a "privatization of human rights"?

According to Barak – and according to analysts of comparative systems – this question can be answered in four different ways: (i) one can give a positive answer, and say that fundamental rights apply directly to relations between private parties (model of direct application); (ii) one can give a negative answer (model of separation of private and public law, according to which fundamental rights can be enforced only in the face of the State); the third and fourth models are in between the first two: (iii) one is the model of direct application, but fundamental rights are not protected in and of themselves, rather they are protected through doctrinal theses; (iv) the other is the 'indirect application that uses general clauses, such as good faith or public order, to protect these rights even in interpersonal relationships.

The choice of these models can be neither casual nor apodictic. There are arguments for and arguments against each of them.

The arguments in favor of the first model are simple: fundamental rights do not emanate from the will of the government, and the harm resulting from their violation can be even more serious if the violation is perpetrated by private individuals. In addition, dignity and freedom are inherent in the human person. And one cannot distinguish fundamental rights that are valid for the state and invalid for private individuals. The contrary argument is based on the fact that only the Constitution can say whether the fundamental rights also apply to private individuals, and these rights are often in conflict with each other, so they must be balanced.

The arguments in favor of the disapplication of fundamental rights to relations between private individuals focus on the freedom of private individuals, freedom of the will, freedom of action, within their sphere (contractual, testamentary etc.). This model is accepted by the Canadian Constitution, and is justified by the fact that, while the courts are required to decide with the Constitution in mind, no obligations can arise between the parties that arise from the Constitution.

And yet, if the Courts are subject to the Constitution, the courts cannot apply the law except by a constitutionally oriented interpretation.

Indirect application is supported by arguments similar to those of direct application. The difference is that in the latter, fundamental rights are already included in private law, in the form of conduct of good faith and fair dealing, reasonableness, fault, integrity of the person, public policy, and so on.

However, if fundamental rights have a constitutional status, the party with them can obtain in a private relationship, a stronger remedy: e.g., obtaining reinstatement in the workplace if unlawfully dismissed, rather than simply compensation for damages. The arguments against this are identical to those made against direct application.

We now come to the other models. The model entrusted to judges seeks to overcome the formal argument that fundamental rights are directed only to the state. But the answer is simple: judges are part of the state apparatus, so they must observe fundamental rights. But it could be argued that judges must observe agreements between private parties without intruding on constitutional principles.

If we broaden the horizon we can find a real model in each of the theoretical models outlined above. For example, the model of direct application as mentioned is found in Switzerland. Here the German-derived Drittwirkung is implemented: the relationship that binds the citizen to the constitution involves a third party, the counterpart of the citizen. Obviously, it moves from the assumption that fundamental rights have a higher status than other rights created by ordinary law.

According to Barak, Italy and Spain also follow the model of indirect application, when reference is made to civil liability to protect the health protected by the Constitution or the protection of the employment relationship. So is Japan.

In India and the U.S., this model is not accepted. In the U.S., however, an exception is made for slavery (13th Amendment).

In conclusion, Barak believes that fundamental rights have a different status from the rights created by ordinary laws; that therefore these rights do not concern only the relationship between the citizen and the state; and that application to relationships between private individuals must be strengthened even if indirect. Direct application – in his view – would create a "private constitutional law" separate from private law.

In any case, private law requires a balancing of values in light of the Constitutional Charter. The framework of private law is precisely the balancing of the values of private individuals against constitutional values.

Assuming that freedom of contract and the freedom to give content to the contract are also constitutionally guaranteed rights, they must be balanced against other fundamental rights, and the dignity of the individual takes precedence over them.

This allows fundamental rights to evolve, as they are not "absolute". Where there are no rules (as in our country, for example, with regard to the obligation of business operators to contract) the right to contract must be balanced against the right to equality and non-discrimination. While the restaurateur will not be able to refuse to serve anyone, the private individual looking for a tenant will be free to choose. The restaurant is an open store; the private home is not.

Barak identifies the discrimen between negotiable and illegitimate activities in the principle of the dignity of the person, which is the foundation of fundamental rights. His position finds solidarity in German and Italian doctrine and jurisprudence.

Barak carried out an extensive philosophical analysis of the principle of dignity, deepening the aspects also religious, but being a jurist is concerned primarily with three issues: (i) the connection of dignity as a value with dignity as a constitutional right; (ii) the limits to the constitutional law that guarantees this value; (iii) the pragmatic meaning of the term/concept/value, which becomes, in the A.'s proposal, also a hermeneutic "project".

For Italian jurists – especially for those who believe that it is still possible to speak of values in a legal perspective, and not only of "pure" norms and formal interpretation – the first connection comes naturally, so to speak. In the Italian Constitution, one of the first of the post-war period, and precisely for this reason enlightened and far-sighted, the provisions that make explicit reference to this value, transformed into a norm, are various, so that, to use Barak's perspective, this term not only alludes to a value and a right, but is also understood as "mother-right", that is, the foundation of rights, and also as a framework, that is, as the framework within which all constitutionally guaranteed rights are interpreted and applied.

Although used so frequently, it should not be assumed that the term appears in all the constitutions of the Western world. On the contrary. In the American federal constitution it is

only a value, while it is a right explicitly guaranteed in the constitutions of Montana, Illinois, Louisiana and Puerto Rico. In the Canadian constitution it is only a value. In the South African constitution it is a value and a right, but a limited one. The German constitution stands out and differs from all other constitutions, because in that text dignity is an absolute value, "intangible", therefore not only inviolable but also not subject to limits or balancing in the application of other personal rights.

And if we look at the European context, we realize that this is a value-right expressly mentioned in the European Charter of Fundamental Rights, which opens precisely with its proclamation, but not so frequently used, while it is a value and not a right explicitly mentioned in the Convention on Human Rights, however, as mentioned, is used in thousands of decisions of the Court of Strasbourg, where it is used to safeguard the rights of the person in order to ensure compensation from the state that has violated it.

Dignity is therefore also a symptom of status and is the foundation of "human" rights. Both Catholic and secular jurists agree on this conclusion. But what plans can be made to make this value not only the crowning glory of constitutions and decisions but also an instrument for the promotion of the individual?

Barak comes from a complex culture, which is intertwined with the origins of the State of Israel, with the tragedy of the Shoah and with the division of status between citizens of Jewish religion and citizens belonging to other religions: Israel is a country in which dignity is a constitutionally guaranteed right but not an absolute value. It is a relative right, which is frayed in many other rights (life, freedom of expression, privacy, etc.) balanced between them, and often in contradiction. But it is also a right that applies only from 1992 onwards, i.e. from the year in which the legislation providing for it was introduced (Basic Law). Laws prior to that year, even though they belong to a lower level than Basic Law, are not subject to review on the basis of the values of Basic Law. This explains, formally, many things that happen in that country today, but Barak, in his hermeneutic program, stigmatizes this anomaly.

Chapter XI

The Market

Index: 1. The Market and Its Rules. – 2. The Globalization of Economic Relations. – 3. Free Market and Competition. – 4. Community Law of Competition. – 5. Business Contracts, Rules and Normative Uses. – 6. From Classifications and General Categories to the Identification of Regulatory Techniques.

1. The Market and Its Rules

Some time ago I had gotten the impression that the debate regarding market rules – whether the invisible hand was enough to direct the choices and organization of the market, whether a rebalancing adjustment from the legislator was necessary, whether soft regulatory mechanisms were preferable to the application of more binding "rules" – was confined to the jurists, the economists being unyielding towards the very idea that the market be governed by juridical rules, which were themselves considered a useless if not damaging frippery, or in the words of the European Commission, actual barriers to free economic initiative. And, in a friendly controversy with some economists who had joined in the debate, I had mentioned the difficulty encountered by jurists in engaging in dialogue with them.[1] Openness to dialogue, or rather, the necessary interaction between the economic and juridical categories, which forms the basis of economic analysis of law, had been theorized and documented since the early 1960s by Pietro Trimarchi on these shores and by Guido Calabresi, in the United States. But the theme had already been considered in the 1950s by Tullio AscareIli and the private law experts or those public law specialists more alert to the themes of economics. Moving up to our own times, we can refer to the essays of Giuliano Amato, Francesco Galgano, Natalino Irti, Berardino Libonati, Guido Rossi – to cite only a few of the more prestigious experts on the matter – the jurists have never abandoned dialogue, but the dialogue has however risked remaining enclosed within the walls of juridical thought. Openness to dialogue also means admission of the structural component of juridical rules to allow the efficient functioning of the market. In his previous paper Guido Rossi warned of this, insisting that a market devoid of adequate rules or burdened by obscure rules ends up being inefficient, legitimizing, among another things, that pernicious phenomenon known as "epidemic conflict" (of interest).

Now, in his latest contribution[2] he develops the theme in a more extensively referenced framework, with his usual brilliant flair and numerous erudite quotations. He acknowledges the opportunities taken to reduce the avalanche of laws that clog up economic initiative (the "law machines" Irti speaks of in his essay on Nichilismo giuridico) but he wonders if the answer is to entrust market regulation to ethics and the deontological codes. In a globalized market where the introduction of universal rules is unthinkable, what remains are the plurality of the orderings (as Santi Romano had divined), the rules of self-regulation, the negotiated rules (i.e., the contract in substitution of the law), the general principles. But, in correcting

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1 This refers to the Italian version of the book by Coase, *Impresa, mercato e diritto*, in *Ec. dir. terziario*, 1996, No. 2.

2 Rossi, *Il gioco delle regole*, Milano, 2006, pp. 11-118.

Dworkin, Rossi warns that the elaboration of principles is not enough, because it is necessary to take into account their interpretation, the procedures with which they are applied, the mental attitudes with which they are interpreted, in other words the context in which they operate and the direction the judges intend to take (as demonstrated by the outcome of the case Arthur Andersen v. United States of 31 May 2005). Then there is the question of human rights, which must in any case be protected in a globalized world and exposed to the onslaughts of terrorism. There can be no slipping below the safeguard of minimum levels of freedom (as has happened at Guantanamo), nor can an emergency constitution be countenanced, as some North American constitutionalists have proposed. Taking cues from some excerpts from the classics, Rossi's conclusion, certainly sharable and to be reflected on, is that "if factors outside the law reach the point where they distort procedural principles, then the law fractures, or rather flies in the air, sanctioning the victory of the strongest". The quote from Rathenau (entrepreneur, moderate politician, member of the Jewish intelligentsia, supporter of assimilation and Foreign Minister under the Weimar Republic) on p. 19 is pertinent, precisely because it shows, in the reconstruction of the development of the diverse phases of modern capitalism, how the thought of Rathenau, whose works had and still have great significance to this discussion, was premonitory of a theory of enterprise that took into account not only the division of profits, but also the social interest. Rathenau was not a jurist, nor do I think this is how Rossi labels him, but a multifaceted thinker who paid for his ideas with his life. This instance demonstrates how theories, when they fall into practical life, lose their abstract nature and can become dangerous even for their creators. The assassination of Rathenau marked the beginning of the decline of liberal Germany and the irresistible rise of Nazism.

2. The Globalization of Economic Relations

The reflection on the meaning of "globalization" relates to issues raised by the information revolution, by planetary communication via the Internet, by finance and economics without bounds, by the crisis of sovereignty, by the revenge of individualism, and by the evaporation of the *Welfare State*.[3]

Anthony Giddens, mentor of Tony Blair during the happy years and champion of the "third way", defined globalization as the linking up of far-flung points on the globe, with the result that events happening in one place impact on another geographically distant place, modeling its economic conditions, its social structures and even its political institutions. Expressed thus, Giddens' formula met with success because it was simple and neutral. But it could not deliver satisfaction. The concept of globalization is not just descriptive but also prescriptive. Some, like Bourdieu, see in globalization the most complete form of modern imperialism, the imposition of a particular model of society on a universal scale. And so the same construction of the concept seems to be the result of an ideological operation, in that it tends to be accredited as the natural outcome of the evolution of technological and economic progress. It is unwittingly accepted as irreversible and irresistible, even though constructed – stresses Gallino – by the great industrial powers. It is the attitude that develops towards that model that influences reactions towards globalization. On the basis of that attitude, critics and apologists are divided and challenge each other. The apologists equate globalization with modernity and celebrate the positive effects, like the acceleration of scientific development,

[3] Zolo, *Globalizzazione. Una mappa dei problemi*, Rome-Bari, 2004.

the reinforcement of the market economy and the affirmation of individual rights. The critics instead stress the wicked effects, like the impoverishment of third World population, the destruction of the environment, the homogenization of tastes and behavior, the squeezing of state sovereignty, the implosion of national identities, and the growth of terrorism.

What is the best response? The head-on clash of the two positions nourishes the debate and therefore the critical knowledge of everyone, but ends up leveling the discourse and radicalizing evaluations. Rather than lining up with one side or another, Danilo Zolo, in a very interesting essay suggests a third line of thought, in some way owing to the reflections of Stiglitz, Beck and Sen: we do admit that globalization is an irreversible process, but we try to verify in what way this process can be steered, in order to contain its negative effects and to promote the positive effects.

The most comfortable path would be to single out the various planes in which the process manifests itself: the internationalization of markets, the information revolution, the "global culture". These diverse factors interweave, postulating new rules. And then it is up to philosophy of law to find a consistent interpretative key. As we wait for the eventual creation of a global legal system, recourse to the consolidation of fundamental rights would be worthwhile, in the sense suggested by Bobbio and Habermas. It will be the expansion of judicial power that will provide for the safeguard of individual interests; it will be "the inclusion of the other" that will vouch for diversity, even if this solution might appear to be the affirmation of a missionary and colonizing tradition pursued by the west under a new garb.

It is an answer that might appear weak: as Natalino Irti has so keenly and coherently observed, the Schmittian norm/place relation has by now been dissolved; in the meantime, the law cannot be left with the sole responsibility for the overall governance of this process. In Zolo's view, the jurists cannot shirk their responsibilities, when they set to the construction of the "global legal space", The jurists must also cooperate. But the jurists-lawyers, judges, law experts – have not let their contribution go unnoticed. We can refer, for example, to the expansion of the meaning of "individual rights" and of "minority rights", of the reformulation of "fundamental rights", of the social responsibility of businesses, the ethics of the market, and all the models – thematic and conceptual, interpretative and predictive – at their disposal to face the challenge of balancing interests that are in conflict and defending the values of the person in the globalized society.

In the light of this confluence of ideas and actions, it seems that the position that the author takes cannot be shared with respect to the lawyers. Especially in relation to the great international studies. The law firms are represented here in a way that used to apply to the multinationals that spread across national borders and decided the fate of the world. Zolo gives credit to the argument of Dezalay, who ascribes to the "law merchants" the power of imposing the new *lex mercatoria* and of thus being capable of commercializing every legal relation, of causing private law to prevail over public law, economic interests over social interests, of promoting self-legitimation rather than the recognition of the community. There than follows a conception and a structure of law as a "legal system of possibilities", a system based on contract rather than on the law – an effect of the influence of the "procedural pragmatism" of the American mould. This is a line of thought that has found some adherents in this country. But to me it seems neither correct nor realistic. The notion of globalized law certainly has its apologists and critics, but even here we can find a "third way"; in which market limits are dictated by individual and collective values. This way can be traced in the Charter of Nice, and therefore in the European model of democracy, which is not only mercantile. And why then, the debasement of private law, as though it were merely a set of rules for the creation of profit, displaying total indifference towards the values of the person?

And why demonize the role of lawyers, in the blind assumption that they are enslaved to imperialist globalization? And why consider arbitration as an instrument of "tamed justice"? Can it be realistically argued that in "global civil society" "the legal corporations privilege the interests of the most powerful and the most adulterated strategies"? The role of those that Zolo calls today's "legal Corporations" (no mention need be made of their scarce numbers, nor of the marginalization of the massed hundreds of thousands of legal studies going on in Italy, and the exponential growing number in Europe and the rest of the world) is certainly not comparable to that of the lawyers in the American Confederation of the nineteenth century. Lawrence Priedmann, describing this phenomenon, demonstrated how profoundly that system has changed in time and how it has contributed to the affirmation of constitutionally guaranteed rights. In any case, the globalization of rights permits competition among models. And the European model still seems far from the one critically commented here.

3. Free Market and Competition

The economics textbooks point to competition among economic operators as the ideal market situation: in a friction-free market the general equilibrium is perfect. Competition works through various factors:

- price (and other aspects that help "capture" customers, like quality of products and services, the transparency and fairness of contract conditions, and information on the client);
- the productive capacity and investment in the structure and organization of the activity;
- innovation.

The competitive market is therefore the opposite situation to a monopoly or oligopoly regime. In order for efficiency to be maximized, it is necessary that competitive conditions remain stable and are not contaminated or limited by the creation of monopolies, oligopolies, or by understandings among competitors attempting to distort competition, or by abuse of position by one competitor to the detriment of another.[4]

Every market has its rules: there cannot be a market without rules, because the exchanges require credibility, legal legitimacy, stability and certainty. Depending on the rules' degree of restrictiveness on freedom of action of the operators, we can talk of dirigisme or government control, of market freedom, of restrictive rules or regulation. Regulation alludes to a series of rules that, as much as is possible, are kept "light", indicative, persuasive (as in moral suasion) and that induce operators to keep the market in a competitive situation.

The culture of competition – as has been often pointed out when describing the rules of the European "Economic Constitution" – was not a factor present in the training of the Founding Fathers of the Italian Constitution, so competition is expressly not mentioned in the text. Until 1990, internal regulation was governed by the Civil Code, which however laid emphasis mainly specific microeconomy cases. It has penetrated, together with the culture of competition, because of the impact of Community law on our system.[5]

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[4] Nivarra, *La disciplina della concorrenza. Il monopolio*, in *comm. cod. civ.*, edited by Schlesinger, Milano, 1992.

[5] Amato, *Il potere e l'Antitrust*, Bologna, 1998; Id., *Il gusto della libertà. L'Italia e l'Antitrust*, Rome-Bari, 1998.

«Antitrust regulation" is a useful name to give the complex of rules designed to ensure competition and prevent cartels, i.e., agreements among operators to fix prices paid by the consuming public, and therefore the distribution of products, and to engineer anti-competitive maneuvers, etc.

The terminology and much of the rules (besides the legal and economic culture) of competition derive from the United States experience; the trusts that were battled against in the nineteenth century were in fact (secret) agreements between entrepreneurs who wanted to manipulate competition. At the end of the nineteenth century the US market was characterized by concentrations of industries (and agreements) in the oil, sugar, cotton, alcohol and especially the railroad sectors. Farmers suffered from the high prices set by the railroad companies, so Congress became aware of the need to intervene and trigger the free (maybe savage) expression of the market, with the first modern law, the Sherman Act, in 1890. It was then the fate of jurisprudence to specify the somewhat generic rules of this first act of market regulation. Doctrine was divided between those who held that the desired economic objective should be governed by perfect competition, and those (like the proponents of the so-called Chicago School) who thought that enterprise concentrations and agreements between them were not in themselves to be banned if they were instruments of greater economic efficiency.

4. Community Law of Competition

The creation of a single economic space (European Common Market, ECM, and now the European Economic Space, EES) was the first objective of the six founder member countries of the European Economic Community (EEC, then the EC and EU): France, Germany, Italy and Benelux (Belgium, Holland and Luxembourg): art. 2 of the EC Treaty sets out the goal to be achieved: (i) a common market; (ii) the harmonious development of economic activity; (iii) a different level of competitiveness. This was the background to the initiatives designed to create monetary union (first with the European Monetary System and the Ecu, and then with the Euro).

In this scenario, with customs barriers swept away and all the national enterprises (not only the strongest ones, who had already prepared themselves) find themselves before the open markets of the other member states, with freedom of access, freedom of production of goods and services, freedom of choice of the contracting parties, then the value of competition acquires central importance. In the Community lexicon, freedom also means spontaneity and therefore parity of starting positions, without help from the member states and as if the single market were an internal market (a competitive one, obviously).

Competition among enterprises, meaning their competition on equal conditions in the markets of all the member states is regarded as a condition of economic efficiency of the common market that embraces innovation and technical progress, as well as defending the interests of European consumers.

To this end, competition must therefore be solid, effective and workable. What can be considered incompatible is anti-competitive behavior, not only of single businesses but also single states that may distort the "game of competition") (arranged practices and agreements; state aid); the exploitation of a position of weakness or the dependence of competing firms (abuse of dominant position).

The antitrust regulation of the Community, which does not give a definition of competition, pursues the goal of preserving competition conditions by imposing limits that regard three hypotheses: agreements or understandings (horizontal or vertical) and practices agreed by firms to restrict competition; abuse of dominant position of a business to the detriment

of another; the concentration of businesses that can lead to the diminution of choice for consumers or abuses of dominant position. The discipline of these cases is accompanied by regulation of state aid.

The consequences of failure to abide by antitrust regulations are: the annulment of the prohibited agreements and the imposition of pecuniary sanctions.

The rules issued by the Community must be interpreted in the light of the imposing jurisprudence of the Court of Justice. A more detailed analysis of the topic is offered by courses in Community law and commercial Community law. It would also be advisable to trace the evolutionary line of Community regulation of competition.

The original conception, expressed by articles 85 and 86 of the EEC Treaty (now arts. 81 and 82 of the EC Treaty) and by rule No. 17 of 1962, was in fact based on a centralized system of controls. It is up to the Commission to authorize restrictive accords on competition and the agreed practices (art. 85, para. 3) while the application of the general rule (art. 85, para. 1) is the business of the Commission and the national legal bodies and the national competition watchdog authorities. Similarly, a system of centralized controls governed the matter of concentrations, in rule 4064 of 1989, which called on the Commission to declare the compatibility or otherwise of the operations brought to its notice.

The European Union, made up of an increasing number of member states, where a multitude of languages are spoken and where hundreds of millions of people live, has acknowledged the difficulty of managing such centralized systems. For example, since in the case of rule 17 of 1962, notification of agreements to the Commission was an essential condition to qualify for exemption from the ban on anti-competitive accords and practices, businesses had, in the course of several years, reported huge numbers of agreements to Brussels offices. So the system got clogged up and it became necessary to go back to decentralized control, based on the principle of subsidiarity which is now adopted in the division of competence among Community and national bodies.

The Commission, in the White Paper on the modernization of norms for the application of articles 81 and 82 of the EC Treaty (I999/C 132/0 l published in the Official Journal of the European Union of 12 May 1999), reviewed the entire system of controls in the common market, with which competition among enterprises in the Community is guarded against anticompetitive agreements and practices. A 2001 Green Paper [COM (2001) 745] carried out a similar review in relation to concentrations.

In both cases, as will be seen, the lines of evolution head towards the application of the principle of subsidiarity, implying the intervention of the national competition watchdogs in place of the Commission; simplification of notification and investigation procedures; reduction in the charges for notification, which, excepting the case of the specific rules that oblige the notifications of concentrations, ceased to be a necessary condition for entitlement to exemptions from the ban on anti-competitive accords and practices.

5. Business Contracts, Rules and Normative Uses

Businesses conduct their activity of production and distribution of goods and services to other businesses and to consumers through contracts. The new conceptual categories introduced by Community law have altered the traditional contract classifications. We should therefore ask if business contracts category is still a viable one.

Now we are dealing with syntagm that is doctrinal in nature and has a value of factual character, in the sense that it says simply that the contracts referred to are closed by “enterprises”; it does however have a normative value, in the extent to which one, or both, or all the

parties being "entrepreneurs" has consequences for the fate of the contract concluded. It does not go without saying however, that the classification implies rules common to all contracts included in this category. An analysis of the special legislation warns us that the common rules relate rather to sub-sectors where the category can be broken up, like the rules for banking contracts, financial intermediation contracts, insurance contracts and so ono

Nor can it be assumed that the distinction between contracts closed by professionals (to reprise the terminology of Community derivation) and contracts closed by professionals with consumers implies in each case a divarication of the norms into the sphere of internal law. We need only refer to the regulation of investment services, or the new administrative discipline of "transparency" of banking contracts to realize that in both hypotheses the counterpart of the financier or the bank qualifies as "client" without there being any special rules for consumers or for professionals.

Also on the level of behaviors in the negotiations the distinction does not always hold: to stay with the already cited example, almost all the banks have so far not issued consumer contracts that differ from those for professionals; the same forms and papers are used for both groups.

The formula "business contract" therefore has its uses but is also ambiguous in certain ways.

This ambiguity is not resolved either by the systematicity of the code or the purposes of the codifier.

As is well known, the Single Code of 1942 organizes the subject along three guiding principles: (i) the drafting of "general" rules, considered by the majority as a systematization of the general rules on the contract, despite title II of the 'book' of obligations persisting in talking of contracts "in general" and in the plural; (ii) the drafting of special rules for "single contracts"; (iii) the inclusion of particular contracts in other books of the code, in particular in the one on work, where the prominent features are employment contracts, agricultural contracts, company contracts, and consortium contracts, which are connected to various types of enterprise.

But these are only generic indications, since the sphere of single contracts refers to general categories of contract, as happens for section xvii of title III, which refers to banking contracts (which are necessarily linked to banking business) or to insurance in general, which suggests an insurance business. And again, the merging of the Civil Code and the Commercial Code avoided duplication of the regulation based on the status of the parties (the so-called civil contracts distinguished from the commercial contracts, which were similar *ex uno latere*), but did not reach an appreciable systematic level despite the intentions stated by the Report. Indeed, the undertaking of the Royal Commission Report regarding the movement of the subjects, initially intended to achieve "a better system, more responsive to the postulates of a rational and scientific system" (R.C.R p. 5) seems to have been inevitably sidelined. The Report is even dishonest when, diluting the new elements of the text, it pushes itself to confirm that "the single contracts regulated in the code are (…) all very old constructions, elaborated down through the centuries on the solid and secure basis of Roman law, so that nothing of their solidity has been lost" (R.C.R. p. 45). Fortunately the derogations of Roman law have been infinite, not only where new types have been issued, but also where obsolete classifications and principles relating back to it have been replaced.

There is no need to point out that the codicistic system had immediately petitioned doctrine for adjustments and new classifications, to take into account the special legislation where "special" contracts found and still find, fully formed discipline, or more circumscribed discipline, or simple but solid exceptions to the general rules.

Standard procedure in its turn led to the creation of many atypical types and then "socially typified" contracts. Two hermeneutic questions arise here: whether the general rules held sway over the special rules and whether it were possible to elaborate general rules concerning business contracts. Part of the doctrine has given a negative response to both questions: in the widely shared view of Giorgio De Nova, the interpreter must first construct the legal paradigm taking into account the social rules intended for each contract, and only after, in the event of gaps, should the rules be applied to the contract in general. As for the construction of the business contracts, standard practice prefers to follow the normative evolution of each special contract, without worrying too much about seeking general rules common to all contracts that relate in part to enterprise.

Nor is the ambiguity of the formula resolved by analyzing the experiences of other countries. It would seem that in the area of "business contracts", the only unifying classification derives from Community law, which centers on the figures of the "professional" and the "consumer", and sometimes obliges the interpreter to accept coarse and philologically reprehensible simplifications, as when the figure of the professional as entrepreneur is grouped with the professional who carries on an intellectual activity, or business associations are categorized along with the professional orders.

Yet more questions crop up in this discussion: whether terminologies and classifications, generally speaking the ordering criteria, must adjust to those originating from Community law, or whether they must keep their own raison d'être, as though protecting an "identity" of the normative model of which they are an expression. Whether competition between systems must occur even at this level. Or whether we must proceed in the expectation of a "natural convergence" of the systems – strongly supported by Basil Markesinis – that would itself lead, without need of external intervention (much less anything of a codificatory nature at European level) to the circulation of models, rules, solutions and remedies.

A further question arises here: whether to follow the convergence movement as it unfolds, or whether it would be useful to undertake the identification of common principles within the European space, or again decide if the best approach, for a quicker realization of a legal structure appropriate to the common market, is to plan authentic "model codes", These are the questions put by the Commission and the European parliament to the governments, the institutions, the scholars and the professionals, in the various recommendations, resolutions and communications that have come out one after the other in the past twenty years.[6]

6. From Classifications and General Categories to the Identification of Regulatory Techniques

Now we come to the pinnacle of our discourse, which involves the two poles referred to in the subtitle of our meeting: the relation between transactional autonomy and market regulation.

It is a discourse that Hugh Collins pursued brilliantly and perspicaciously some years ago. His point of view considered the new techniques of contract regulation. His conclusions can be expressed quite briefly. He notes the gradual recession of "private" law – understood

[6] See COM (2003) 68 def.; Res.2003/C246/01; Action plan of 12 Feb 2003; in the abundant literature the contributions collected by Alpa and Danovi, *Diritto privato europeo. Fonti ed effetti*, Milan, 2004.

in its traditional sense as the domain of the will untouchable from the outside – compared with "public" law; the normative construction of the markets; the ever expanding role of the watchdog authorities involved in this process.[7] So it is a discourse that moves from the assumption that every market, whether free or potentially free, cannot disregard either rules – a theme on which Natalino Irti has led us to reflect many times – or the values of the person. It is also a theme very familiar to the Italian jurist; so familiar as to require no further elaboration or reference, except the obligatory mention of the contributions of Nicolò Lipari, Giorgio Oppo, Pietro Perlingieri, Pietro Rescigno and the input of all the colleagues that, being the authors of recent treatises on contract, or being defenders of civil rights, or for having underlined the values of equity and solidarity, or for having theorized so-called contractual justice, have tackled the problem and proposed solutions.

And yet many things have changed in this regard. Only ten years ago, in presenting some volumes on business contracts, entitled in the most analytical manner possible: *I contratti del commercio, dell'industria e del mercato finanziari*.[8] Franco Galgano observed that "the main instrument of legal innovation today is the contract. The classic conceptions do not place the contract among the normative sources; but should we continue to conceive of the contract as the mere application of the law, and not as the source of the new law, we dose the door on the possibility of understanding how the law of our time evolves". The emergence of atypical contracts, of international standard procedures, of the new *lex mercatoria* – argued Galgano – have granted the business community the power to raise themselves to the status of a "sovereign order" of which the national states "become the secular arm"; in other words, the rules of contracts – and even more so, of business contracts – would be transmitted and applied through the contractual models.

It now appears that a shift in trend may be about to happen. It is not only consumer and saver interests that have demanded *ab externo* intervention; also in some of the contracts typically governed by free negotiation between entrepreneurs we have seen models, content, and rules imposed *ab externo*. This is limitative of the contractual autonomy and the expression of a diverse conception of the contractual relation. Although innovative, the contractual relations no longer sweep through the free determination of the parties, but remain subject to rules from various sources: legislative, administrative and ethical, in a context where simple "regulation" seems to move closer to "restrictive regulation". The interests implicit in the contract, whatever the status of the parties, are no longer only "private"; they must also conform to the needs of the community, even though this may consist only of businessmen.

This trend generates complexity and generates uncertainty, at least as long as the two trends, the one described by Galgano and the one I attempt to describe in these pages, proceed side by side without canceling each other out.

The complexity can be governed somewhat by the setting out of one or more frameworks of general principles[9] and the uncertainty – which is contingent on the changeable relationship between imperative and dispositive rules, or by the judicial interpretation of the contract, or by judicial integration of its incompleteness[10] – can be governed by the hermeneutic community, i.e., by the consolidation of interpretative models designed to diminish the will of judges and arbiters.

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7 Collins, *Regulating Contracts*, Oxford, 1999.
8 Galgano, *I contratti del commercio, dell'industria e del mercato finanziario*, Torino, 1995.
9 Oppo, *Impresa e mercato*, in *Riv. dir. civ.*, 2001, I, p. 430.
10 Gambaro, *Contratto e regole dispositive*, 2004, I, p. 1 and following.

But there is more. Beyond the processes of national codification or recodification spreading throughout Europe,[11]beyond the expansive drive of Community, the need for co-ordination, clarification and simplification are felt everywhere, and have had the effect of bringing into favor new codificatory demands, new standardization techniques, new projects for normative unity that regard single sectors of the systems, single sectors of economic relations and single "peak segments" of the market.

These phenomena, for the moment fragmentary and circumscribed but not isolated, are not however dodged by contractual relations, or those that until ten years ago were imputed to the area of greater contractual freedom, precisely like "business contracts".

While it remains impossible to sketch out a complete and organic picture, it would be useful to recall some representative examples that illustrate all the aspects of an authentic turnaround in the trend.

This will not be down to the mere overcoming of the statute law-case law pairing or the authoritative rules – persuasive rule pairing (hard law-soft law), but to other means whose value is more difficult to decipher. Among these, the most evident would seem to be:

(i) intervention of regulators, i.e., "third parties" apart from the legislator and the judge;
(ii) intervention of rules on activity and conduct, rather than on the substantial relation concluded between the parties;
(iii) intervention of rules on the resolution of controversies between the parties.

It is not about interlocking stratagems and methods, but at this point we must stop professing that the complex reality we find ourselves can be fathomed by through the old categories.

[11] See Patti, *Diritto privato e codificazione europea*, Milan, 2004.

Chapter XII

Difficult Cases

Index: l. Introduction. – 2. The Civil System. – 3. State Liability for the Infringement of Community Law. – 4. The Notion of Consumer. – 5. Damage from Birth. – 6. Damage from Futile Medical Care. – 7. Same-sex Marriage. – 8. Acquisitive Occupation. – 9. Anatocism. – 10. The "Parmalat Case". – 11. Harm Caused by Smoking.

l. Introduction

Private law is an actual workshop for the jurist. This workshop is where the cases in life go: easy cases, because they can be resolved by the statement of a provision, which perfectly suits the matter under examination; or difficult case s, whose resolution depends on the careful reconstruction of the interests involved, of their weighing up according to the system of values established by the Constitution (and in matters regarding the European Union) and by Community law. How do we proceed when a case is difficult? Some representative cases follow. It cannot be assumed that difficult cases are resolved in the same manner by all jurists. The law (and therefore also private law) is not an exact science, and as we have said time and again, it evolves in time, in space, in the conception of jurists and in the perception of the public.

2. The Civil System

The Constitutional Court, in applying the original text of article 117 of the Constitution, wobbled in its definition of the boundaries of the subject (if we may put it like this) of "private law", at times identifying it with the Civil Code-regulated subjects, at other times with the institutions of civil law, and at other times conferring legitimacy on the Regions to "supplement" state discipline (still related to the Civil Code). It was the realistic registration of the creativity of jurisprudence, which depicted an unstable scenario, but without expressing favor for "regional private law".

Also, regarding the constitutional revision project deriving from the work of the bicameral Commission, in which the expression "civil system" had already appeared, I had indicated the sectors, referable by conventional definition to private law, which carne under the legislative competence of the state, either exclusively or concurrently. As regards the "civil system", I was inclined towards the meaning of "private law" intended "in its totality and complexity," ruling out the possibility of its limitation to the sphere of the civil state system (though this problem was overcome by the literal indication in the new text of article 117, which attributes this sector to the state), but expressing doubts on the optimality of the wording adopted and revealing that in some matters the Regions were already allowed to legislate, at least on marginal issues.

Article 117 of the Constitution gives the state exclusive power to legislate in the sector of the civil system. Alongside this sector there are subjects that would fall into private law but are mentioned specifically and separately (e.g., besides the civil state: citizenship, the protection of savings, competition, essential performance levels, regarding civil and social rights, weights and measures and setting of timeframes, environment, ecosysterns, cultural

heritage), so the sector of private Iaw ends up fragmentary, and its normative definition extremely uncertain. Furthermore, there are subjects that are attributed to concurrent legislation and which fall into private law as traditionally understood. So, regional normative power is not – from the point of view of the textual data – completely expunged.

There are thus two alternatives:

(i) either the "civil system" formula must mean the residual sphere of state competence, less the subjects specifically indicated;

(ii) or else it alludes to a subject that is added to those listed, and will then cover a more restricted semantic area of "private law" and will move closer to that of the "civil code" and the "institutions of civil law" in the traditional sense.

The ambiguity of the text has opened up the possibility for a multitude of interpretative proposals, on the basis of which the meaning of the "civil system" formula must be understood as:

- "complex of private law norms[1];
- "substantial law" including at least the discipline of the institutions of private autonomy[2];
- "civil law", by now more expansive than the "civil code"[3];
- "judicial orderings in civil matters"[4], "rules governing relations among *cives* regarding the person and associations, but not relations regarding *homo economicus*, which is the reserve of commercial law[5];
- "complexes of principles, institutions, norms, rules" regarding private law even when not disciplined in the Civil Code"[6];
- "norms that as a whole determine the civil system", with possible regional legislative incursions for the discipline of particular institutions or for aspects of publicistic nature"[7];
- "overall order of the single institutions of civil law and of the system that results from it," ensuring the unity of the order and open to dispensations in favor of regional intervention if rationally justified by the protection of public interests"[8];
- "properly privatistic norms" that regulate privatistic positions, activities and relations, distinct from privatistic norms "in the improper sense" for which there would be space for regional interventions[9].

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1 Pace, Parere pro veritate rendered on 19 November 2001 in favor of the National Notaries Council on the effects on professional activities – and especially on notarile activities – of constitutional law No. 3 of 18 October 200 I, bringing "*Modifications to the Title of the second part of the Constitution*".

2 Luciani, *op. cit.*, 351.

3 Patti, *Il diritto civile tra crisi e riforma dei codici*, in *Codificazioni ed evoluzioni del diritto privato*, Rome-Bari, 1999, 65.

4 Irti, *op. ult. cit.*

5 Schlesinger, op. ult.cit.e formerly Cian, *Il diritto civile come diritto privato comune (ruolo e prospettive della civilistica italiana alla fine del XX secolo*, in *Riv.dir.civ*., 1989, I, 3.

6 Carinci, *op. ult. cit.*

7 Falcon, *Il nuovo Titolo V della Parte seconda della Costituzione*, in *Le Regioni*, 2001, 5; on point 5 also Bin (R.), *Le potestà legislative regionali, dalla Bassanini ad oggi*, therein, 2001, 613 and following.

8 Bartole, *op. ult. cit.*

9 Roppo, *Diritto privato regionale*, cit.

- "norms inherent in the structure of the system" as distinct from provisions with limited application[10];
- "contrast between the limit of private law – as per the preceding doctrinal constitutional and jurisprudential experience formed in the original article 117 – and the civil system, which would allow for specific relations and nondamaging extensions to the principle of equity and reasonableness of a regional intervention"[11];
- "the complex of rules and institutions that mark out the system of private law founded on the principle of equality"[12];
- "matter of uncertain meaning that the Constitutional Court will undertake to clarify"[13].

The Constitutional Court has pronounced on the subject of: medical practices (sentence 282 of 26 June 2002, and sentence of 10 Nov. 2003), banking foundations (sentences 300 and 301 of 29 Sept. 2003), and professions (sentence 353 of 2003) labor regulation (sentence 357 of 2003). And finally, with sentence 173 of 25 April 2006, regarding the Mauriziano Hospital in Turin.

The Piemonte Regional Government, with regional law 39 of 24 Dee, 2004, intended to turn the hospital – property of the Order of St. Lazarus – into a public hospital agency, acquiring ownership without indemnity. The Court revealed that that regulation invaded the legislative competence of the state as defined by article 117 of the Constitution and therefore declared it unlawful.

3. State Liability for the Infringement of Community Law

The Court of Justice of the European Community has created a new hypothesis of state unlawfulness in infringement of Community law: the wrongful interpretation and application of Community law by the national judge.[14] The case in point concerns the Verwaltungsgerichtshof, the higher administrative judge. A university lecturer was denied a special length-of-service payment, called for in article 50 of the Austrian wages law. This norm stated that the benefit was payable to university staff who had accrued a certain period of experience in Austrian universities only. The appellant maintained that with Austrian membership of the European Union, the extent of the period should have been calculated taking into account also periods of university teaching in other countries of the Community, and that the applied principle constituted an instance of indirect discrimination. Since in Austria only the federal state is responsible for damages by the university to it employees, the state defended itself maintaining that the special indemnity requested was considered a part of the salary, while the appellant had defined it as a loyalty award and therefore discriminatory in its treatment of Austrian citizens in respect of other EC citizens. The administrative court of final instance rejected the appellant's case. In the course of the judicial review the Court of Vienna suspended the procedure and submitted some preliminary questions to the Court of Justice, casting

[10] Vitucci, *Proprietà e obbligazioni*, cit., II. Treu, *op. ult. cit.*
[11] Treu, *op. ult. cit.*
[12] Lipari, *op. ult. cit.*
[13] Germanò, *La "materia" agricoltura nel sistema definito del nuovo articolo 117 Cost., Il governo dell'agricoltura*, cit., 283 and following.
[14] Koebler c. Repubblica d'Austria, 20 September 2003, case C-224/01, in *Foro it*., 2004, IV, 4, with note by Scoditti.

doubt on the interpretation of the law according to the Community rules: it asked, among other things, that the Court clarify whether the breach of Community law could depend also on a default stemming from the sentence of a judge of final appeal and whether it would be up to the member state to designate a judge to rule on the controversy of the compensation for the subsequent damages.

In its decision, the Court ruled that:

> (…) the principle that member states are obliged to make good the damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifesto It is for the legal system of each member state to designate the court competent to determine disputes relating to that reparation.

The Court did however moderate the principle by introducing conditions, which can equally be considered limits to responsibility.

In must fact it be ascertained that what is being dealt with is an "exceptional case" where the judge has made an infringement of existing law "in a serious and manifest way"; assessment must be made of the degree of clarity and precision of the rule infringed; whether the infringement was intentional; the excusability or inexcusability of the error of law; the position taken, where applicable, of a Community institution; the court's non-compliance with its obligation to make a request for a preliminary ruling by the Court of Justice, in accordance with article 234 para. 3 of the EC Treaty.

4. The Notion of Consumer

The jurisprudence of the past twenty years reports a frequent use of the locution consumer; the sentences that refer to this locution – in that it appears as a crucial term in the *ratio decidendi*, of the interpretation and application of the settlements and of the interest being defended-number around five hundred; the majority of these concern fiscal or criminal procedures, which are topics that overstep the boundaries of this analysis. What stands out is that the expression consumer is not always used to identify the subject recipient of a provision that is to be interpreted and applied, and is not always used to delineate the party whose interest the provision is intended to protect, but is also used to achieve other ends; so the use of the term consumer is mediated or interim in order to reach a further scope.

So, when using the expression consumer, attention must be given to the context: it may be normative or decisional in nature; if normative, the *mens legis* must be ascertained, *i.e.*, to understand and illustrate the reasons that propelled the legislator to use that term, to identify the interests weighed upon, to summarily clarify the aims of the dispositions, according to the canons of teleological interpretation. If the context is decisional, reference must be made not only to the law applied, but also to the underlying conflict of interests, whether represented in court or present in the verdict of the judge or the authority responsible for the making the disposition.

In this sphere the definitions offer particular benefits: the legislative definitions – because they delineate the area of application the provisions related to; the jurisprudential definitions – because they constitute the assumption of the decision in question, as well as being a potential model for future decisions.

The terminology used and the definitions of the terms used reflect an idea, a concept of "consumer": that does not necessarily coincide with the meaning given to the term by common language. Rather, it evokes the characteristics of the person that often appears in the *mens legislatoris* or in the *mens* of the authority responsible for the settlement.

A rummage through the jurisprudence throws up not only diverse acceptions and conceptions of "consumer", but also diverse functions or roles to which the consumer turns as a representative model of the person's way of being, or of a mode of behavior or reaction, or of a mode of living in the broader community.

Such a search can only be partial; quantitatively-because it is necessarily based on sample finds, and qualitatively-because it concerns only the use of the term "consumer" and not the use of similar and corresponding terms that may be used by the legislator and the judges as an alternative to consumer, or because of cultural backwardness, or because of the influence of ideological concepts hostile to consumers and their interests. I refer in particular to the use of expressions such as "client", "purchaser", "user", "saver", "contractor", "counterparty", etc.

In these contexts at least five different acceptions of the term "consumer" can be singled out: (i) the holder of the protected interest, the infringement of which is inferred in the procedure; (ii) the holder of a protected interest, i.e., in the capacity of head of an association the consumer is a member of; (iii) the holder of an interest whose importance stems from its membership of a category, and therefore qualifies as a collective or common interest; (iv) the holder of an interest that converges with a more general or public interest, which is relevant in determining the degree of conformity or otherwise of an act or a behavior with legislative provisions; (v) the parameter to be used as the basis for the proportioning of the effects of an act or behavior, i.e., the reference model for making evaluations of the conformity of an act or behavior with legislative prescriptions.

It is clear the uses can be ambiguous, in the sense that the parameter (consumer) can validly ascertain whether the holder of the interest corresponds to the model and is therefore recipient of the provision; the interest of the single subject can participate in defining the public interest, etc.

The Constitutional Court sentence 469 of 20 November 2002 established that the consumer is a physical person, and that a body (legal person) cannot be considered as such, even if its scope is non-lucrative. So, with this definition the Court clarified the precise limits within which to interpret the entire discipline that the system disposes in favor of consumers.

5. Damage from Birth

Difficult cases become tragic[15] when they involve the interests of human life. Can coming into life constitute "damage"? In itself life is a gift. For those who have faith, it is a "gift from God"; for the agnostic it is an experience that must be lived out. But if it turns out to be a non-life, a life of pain and suffering caused by sue h severe afflictions that obliterate

[15] Calabresi, *Scelte tragiche*, Milan (reprinted), 2006.

any normal conception of life (as Peter Singer put it) is life then worth living through? And can anyone born into such conditions claim for damages from someone? Can the law respond to these expectations, which are both humanitarian and sympathetic?

The issue was tackled by us for the first time in the case of a child born with syphilis, inherited from his father. The case was commented with care and even handedness by Pietro Rescigno[16]. The issue gained attention in France with the affaire Perruche and has arisen al so in Italy.

The *affaire Perruche*, settled by the French Court of Cassation in a plenary Assembly on 17 November 2000, starts to become one of the "difficult cases" in which to exercise the most sophisticated weapons of legal hermeneutics. It is a case that helps us understand how the resources of the law respond to the demand for justice of a society that in one way multiplies the subjective situations of the person and in another way undertakes to mediate between conflicting rights and interests. But the case also enters into the discussion of whether all the problems concerning the person can (or must) be "juridified", and if so, what models (Italian or international) should be deemed appropriate. There are models that claim an autonomous space in the methods of formalism and others that are capable of incorporating their fundamental ethical and moral values into the juridical rules. The uniqueness of the case and its dramatic story makes it useful in examining how the "art of judgment" should be exercised, and how the diverse experiences constituting the scenario of legal comparison react before similar cases.

The proceedings of the case can be reconstructed by reading the report by Counselor Pierre Sargos[17], the conclusions of the Advocate General of the Court of Cassation, Jerry Sainte-Rose[18], and the many commentaries produced by doctrine.[19]

Significant difficulties beset the meager opinion of the plenary assembly, which, as court of legitimation, moves only from judgments of second grade.

The Court holds that:

(a) the negligence attributable to the doctor and laboratories in the execution of the contracts with the expectant mother had induced confidence in the accuracy of the findings and on her own immunity and had therefore prevented her from exercising her right to terminate her pregnancy in order to avoid giving birth to a handicapped child;

(b) that the child could legitimately claim compensation for damages resulting from the handicap and caused by verified negligence.

The parties were referred to another appeal judge to set the extent of the damages.

The terseness of the text of the ruling, in just a few lines of justification, does not satisfy the jurist, who may however appreciate the brevity of the sentence. But the legal-logical path the Court followed towards its ruling is one thing; the effect it had is quite another.

Considering the circumstances of the case, it is barely necessary to state that it is not about direct damage caused by the doctors to the physical integrity of the pregnant woman, who was suffering from German measles before being subject to tests; nor about direct damage caused to the fetus, infected by the mother's German measles; nor about the damage suffered by the parents for the nontermination of the pregnancy following errors in the

[16] Rescigno has collected his studies on the subject in the volume *Il danno da procreazione*, Milan, 2006.

[17] In *Sem. jur*., 10438, 13 Dec. 2000, n. 50, p. 2293 and following.

[18] Ibid., p. 2302 s.

[19] E.g., Chabas, *Note*, ibid., 2309.

sterilization of the husband and wife. There are by now numerous cases such as these in our jurisprudence.[20]

The case however can be stripped down and taken as a textbook example. Its essential points, pushing beyond the boundaries of the circumstances of the case, can be reduced to a few questions. Seeing that the parents had already seen the consolidation of their right to

[20] This refers to hypotheses well known to Italian observers, because our experience now records numerous cases falling into areas bordering on the one under examination. A ruling in favor of reparation for psychophysical damage suffered by the newborn during a Caesarian section, through asphyxiation and subsequent episodes of apnea, with consequent loss of working capacity and attitude to relational life and from the damage similarly suffered by the parents through the financial burden and moral hardship, was expressed by the Court of Cassation with sentence 2335 of 16 Feb 2001, in *Dir. e Giust.*, 2001, n. 8, p. 33 with note by Rossetti; the liability of the doctor was based on slight negligence ex article 1176 cod. civ. As regards the admissibility of (extracontractual) compensation for damages suffered by the mother, through omission of information by the doctor on the negative outcome of the operation intended to end the pregnancy, opinions were expressed by the Court of Padua in sentence of 9 August 1985 in *Nuova giur. civ. comm*., 1986, I, 115, annotated by Zatti; the Appeals Court of Bologna in a sentence of 19 December 1991, in *Dir. fam*, 1993, 1081; the Court of Cassation, in sentence of 8 July 1994, n. 6464, in *Giur. it.*, 1995, 790. On the reparability of the damage caused to both parents by lack of in formation to the mother regarding the malformations of her unborn child, in occasion of an wrongful diagnosis and consequent radical impossibility to procure abortion, a favorable decision was given by the Court of Bergamo, 16 November 1995, in *Giust. civ*., 1996, I, 867; the judges highlighted how in this regard the damaged interest is the right of the mother: the right of choice and self-determination regarding the termination of the pregnancy; but what is also considered admissible is the action brought by the father, who would have been involved, if not in the choice, then at least in participation towards it. The Court of Perugia took a similar line with the sentence of 7 September 1998, in *Foro it.*; 1999, I, 1810, because the doctor had not informed the parents of the fact that the fetus presented malformations and would have been born with Down's syndrome. In similar cases the Supreme Court has stated that to demonstrate the causal nexus between the behavior of the health officials and the damages reported by the mother (or both the parents) it is necessary to prove the subsistence of the conditions required by law to proceed with the termination of the pregnancy, sentences of 1 Dec. 1998, n. 12195, in *Guida al dir*., 1999, n. 8, The novelty instead lies in the legitimacy of action accorded to the son. Relative novelty, rather, because already in the above mentioned proceedings in favor of compensation to the son, the decision had been given by the first sentence of merit and the first section of the Cassation. 66 con note by Profita and of 24 Mar 1999, n. 2793, ibid., 1999, I, 1804). The right considered violated is the right of the mother to terminate her pregnancy. In decision n. 12195 of 1998 the damage suffered by the father is qualified as "reflected damage. Regarding the compensation of the (contractual) damage suffered by the mother to have procreated a healthy son, but not wanted, as a result of a failed interruption operation of the pregnancy, a favorable decision was taken by the Court of Cagliari in a sentence of 23 Feb 1995, in *Riv. giur. sarda*, 1995, 669 with note by Diana. Again. Regarding the compensation of the (extracontractual) damage (extracontractual) caused to the parents, as a result of the improper execution of the operation to sterilize her husband, the violation of their right to aware and responsible procreation was decided by the Court of Milan, with a sentence of 20 Oct 1997, in *Riv. It. Med. Legale*, 1999, p. 597 and following, with note by Introna. It should be remembered though, that the court considered the damage-event not so much the birth of the son – life being an incommensurable good, a bringer of joy to parents, and as such compensation for the hardship of maintaining a child – but rather the harm to a right to personal freedom allowable to the parents. The joy of paternity and maternity are equally compensatory benefits that the judge must take into account in his evaluation of the *compensatio lucri cum damno*. Jurisprudence is divided on the nature of the damage. However this is a further excessive dimension of these notes. But these are not the major problems relevant to the comprehension of the new aspects of the decision of the plenary assembly.

compensation for damages, this undertaking-shared by Italian judges with the specifications and limitations already referred to asks:

(a) from the methodological angle, whether the issue can be resolved within the debate on the subsistence of the causal nexus or whether other evaluation factors can/must intervene;
(b) whether, from the point of view of legal rules, the son can legitimately demand compensation, and
(c) for what damages and
(d) with respect to what subject.

At this point further questions arise:

(e) whether the son can target the damages action at the doctor and the laboratory for his having been born in such a wretched physical state, despite this state not having been caused directly by those persons, but by the combination of two factors: the information error impacting on the mother's decision to abort or not, and the unaware continuation of the pregnancy by the mother;
(f) whether the action can involve the mother, who consciously decided to continue the pregnancy to term;
(g) whether the claim for damages can be requested also from the father as well as the mother.

6. Damage from Futile Medical Care

The Welby issue is also a hard case: can a terminally ill patient ask the doctors to suspend treatment and proceed serenely towards the inevitable end, in order to avoid protracted suffering in a life which in any case is has become merely an antechamber to death?

There are many cases decided the in experiences of other systems that have been hotly debated by doctors, philosophers, religious leaders, jurists; it is a grave dilemma because life, as a value in itself, is something one always endeavors to save; at the same time we seek to diminish pain and offer some serenity to the sufferer, knowing that he or she cannot avoid their destiny, and we thus seek to shorten the moment of passing away.

Given that passive euthanasia is prohibited and punishable by law, the grey zone regards the decision to suspend treatment (and "futile medical care") and to refuse care on the behalf of the patient, who is adult, conscious and consenting. The most recent case in Italy concerned Piergiorgio Welby.

The research charity that had taken on Welby's case applied to the Court of Rome for an injunction that would give the attending physician permission to switch off the life-support and respiratory machines and to administer sedatives to alleviate the patient's suffering. The court rejected the appeal, with a decision lodged on 15 December 2006. The public minister challenged the decision, but then a doctor stepped forward to take responsibility for switching off the ventilator. So, with the patient's consent, the treatment was stopped. Some days later, the patient passed away.

Welby's supporters defended the action, saying that the patient was fully informed and aware, that the Constitution (articles 2, 13 and 32) permits the refusal of medical treatment, that persons have the right to express themselves on issues of life and death, that the willingness to pass from maintenance treatment to sedative treatment would not have been any less even after the administration of the sedatives.

The defendants (the charity and the attending physician) had intervened asking initially for verification of the defect of passive legitimacy (*i.e.*, that there were not grounds for

their prosecution) and in the merits, to reject the appeal; the public magistrate concluded for the inadmissibility of the appeal.

With the passive legitimacy of the charity and the doctors, the judge made a ruling based on the interpretation, of the Constitutional Court and the Court of Cassation, of so-called "informed consent", which is supported by the Oviedo Agreement (ratified by law 145 of 28 March 2001), and the medical deontology code. The judge therefore allowed a preliminary admission of the soundness of the principle of "individual and conscious self-determination" of the patient regarding medical treatment, but held that this principle "presented problematic aspects in terms of practicality and effectiveness regarding the free and autonomous individual decision to refuse or suspend life support care in the terminal phase of human life".

Despite recalling past jurisprudence, the Oviedo Charter, and other references, the judge couched the problem in different terms: the issue is considered not only from the patient's point of view, but from the doctor's also. And since current law makes no decision on the responsibility of the doctor regarding this particular patient request, since acts of disposal of the body intending to do permanent harm are prohibited by article 5 of the Civil Code, and since the penal code punishes mercy killing and assisted suicide, the judge refused authorization. And though admitting that the right exists to refuse futile medical care (especially in cases of persistent vegetative state, as the Court of Appeal of Milan had previously ruined, with a decree of 26 November 1999) he held, on the basis also of the attending physician's testimony, that there was no futile care inherent in the case, but only artificial feeding. The latter is a form of treatment that the National Bioethics Committee, in a recent statement, considered to be lawful and not subject to voluntary interruption.

In other words, the right of the patient, which the judge held to be valid, is not protected by the legal system "if, with regard to the appellant's request, it must be left to the total discretion of whatever doctor the request has been put to, to his own conscience, his subjective interpretation of the facts and the situation, his own ethical, religious and professional ideas". The judge has therefore brought the question back to the legislator, not believing he can apply the precautionary action remedy typical of a case where there is a gap in the law.

Could he have decided differently? Many believe so, because the direct application of constitutional rules to relations between private persons, the creation of subjective rights based on Constitutional provisions (in particular the rights of the person) is by now a jurisprudential practice supported by a consolidated trend and received favorably by doctrine. The "gap in the law" referred to by the judge, who had responsibly considered the fate (not of the patient, but) of the doctor, ought to be bridged by the justification related to the self determination of the patient, who in this case was adult, conscious and consenting.

7. Same-sex Marriage

Two young men went to Rome City Council in 1980 to request the publication of banns of marriage. The civil state official refused their application so they turned to the courts. The Court of Rome, in a decree of 28 lune 1980[21], 21 denied them authorization to marry. Since marriage between persons of the same sex is not recognized in law, they could not have had banns published because this is an administrative act prior to the marriage ceremony. But what was interesting was not the fact of the event itself (which was actually

[21] In *Giur. it*., 1982, I, sez. 2, c. 169 with a note by Galletto.

orchestrated by the FUORI! Group as a protest action) but the Court's justification of its refusal. The civil code's references to marriage and married life do not encompass the use of the terms masculine or feminine. Instead, it adopts neutral terms (*nubendi*-about-to-beweds, coniugi-spouses) or terms like "husband" or "wife" which denote functions but are not in themselves allusive to gender, if not for firmly established tradition in which husband and wife signify male and female gender respectively.

This creates an awkward situation for the judge, who looks initially to the lexical interpretation of the rules, and finding little help there, turns to the *Lessico universale italiano* of the encyclopedia Treccani, then even resorts to Roman sources, recalling the definition of marriage given by Modestino: "*Nuptiae sunt coniunctio maris et foerninae, consortium omnis vitae, divini et humani iuris communication*" (Digesto, 23.2.1.). And it is here that male and female finally emerge. Finally, he refers to popular consciousness, which attributes to marriage a binding meaning of man and woman. But what a struggle! It goes to show that in law nothing can be taken for granted.

8. Acquisitive Occupation

A Council of State (section IV) decision, No. 99 of 21 January 200S-backing the line taken by some sentences of the regional administrative courts[22] and some sentences and orders of the United Section of the Court of Cassation[23] proposes an interpretation of Constitutional Court sentence 204 of 2004. The theme is the allocation of jurisdictions that entrust to the ordinary judge the cognizance of issues regarding usurpative occupation, and to the administrative judge, the cognizance of issues regarding acquisitive occupation. The discrimen of the allocation is based on the notion of behavior of the public administration, the which behavior, being extraneous to the issuing of administrative acts, implies – similarly to all behavior of subjects who act in violation of legally protected interests, causing them harm – the commission of an unlawful act and therefore extra contractual liability attributable to the public administration, and punishable in accordance with article 2043 of the Civil Code. The specification is very significant because previously the discussion was whether behaviors pertaining to usurpative occupation should fall into the sphere of administrative jurisdiction, and this led to a clash of views between the Council of State, which was inclined towards cognizance of the ordinary judge[24], at least in matters of damage compensation, and the Court of Cassation, which supported the opposite position.[25]

The recent decision of the Council of State confirms the distinction between the two types of occupation that involve the irreversible transformation of the ground space: acquisitive occupation would be upheld by "valid and continuing declaration of public utility", while usurpative occupation, pursuing public interest only in mere fact, and without being

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[22] See, for example, T.A.R. Sicilia-Catania sect., 14 Jan 2005, n. 21, in *Diritto & Diritti*, *Portale giuridico*, *Diritto. it*; (on the orientation of the Regional Administrative Court (T.A.R.) Sicily-Palerrno see in this regard Giallombardo, *Apertura dell'anno giudiziario 2005*, in *www.giustizia-amministrativa.it*; T.A.R. Calabria-Reggio Calabria section, 14 Feb 2005, n. 94, in *Urbanistica Toscana.it* (cit.); following the decision of the C.d.S., see T.A.R. Lombardy, Brescia section, 26 Jan 2005, n. 53, in *Urbanistica Toscana.it* (cit.).

[23] United Sections, ord. Dec. 22 Nov 2004, n. 21944; United Sections, sentence of 14 Jan 2005, n. 600.

[24] CdS, IV, 9 July 2002, n. 3819.

[25] United Sections, ord. n. 43 of 2000.

based on a comparative evaluation expressed during the enactment of administrative procedure and by means of administrative acts, would be unlawful. With the consequence that firstly, the property transfers to public hands, and secondly, the private person could exercise not only the liability action, but also the restitutory remedy of the asset.

The Council of State followed this generalized distinction with a more thorough scrutiny of the various cases in point that can be created: (i) the case in which the declaration of public utility collapses following the nullification of the related deliberation: in such an eventuality there is no verification of acquisitive occupation, but rather a permanent wrong, with an obligation of compensation of the entire damage; (ii) the case in which the occupation is legitimate, because the declaration of public utility has not been contested, but has then become unlawful due to the *inertia* and improper behavior of the public administration: in this case what is recorded is successive behavior that has become unlawful; (iii) the case of genuine and actual usurpation, which is recorded when the declaration of public utility be null or is declared unlawful following a jurisdictional challenge.

The *ratio decidendi* rests therefore on the principle on the basis of which the administrative judge remains competent (following the decision of the Constitutional Court on jurisdiction allocation) in deciding controversies where the occupation has happened following provisions whose lawfulness are contested, while competence is attributed to the ordinary judge when the owner goes no further than assessing the damage to his assets.[26]

The line followed today by the Council of State has, with some fluctuations, has built upon the decisions of the Court of Cassation, which, given the existence of "facts of usurpative occupation", had recognized the jurisdiction of the Honorary Jurisdiction Association (A.G.O.).[27] The novelty, at least in the specification of the notion of "behavior", in the wake of the cited decision of the Constitutional Court, is that the cognizance of the ordinary judge is not limited to only the material conduct, but extends to all the behaviors damaging to the subjective law.

[26] The decision distinguishes between the behavior of the private person and the behavior of the public administration, in the sense of article 2043 Civil Code. It distinguishes between the consolidated orientation of doctrine, which hermeneutically corrects the text of article 2043, which refers to any fact (willful or culpable) converting the idiom "fact" into *act* [26], also if the acts include implicit declarations, silences, concluding behaviors, ways of fact, activities. On the basis of this assumption the positioning of behavior in the sphere of administrative law traces back to the objection operation of the public administration that produces legal effects, in the absence of administrative provisions and of express declarations of intent. In this sense the Council of State reads the cited decision of the Constitutional Court in the sense that the administrative judge remains attributed with cognizance even of the compensation demands linked to administrative acts and provisions inciting on the area of urban planning, but such cognizance is withdrawn if in the presence of mere behaviors, which are not expressions of the exercise of administrative power. It may be an instance of tacit manifestations of will, of executing or implementing behaviors, "ways of fact", and improper activities subsequent to administrative acts. And then, even if the occupation is initially sustained by the declaration of public utility that is not followed by expropriation, or followed by wrongful behavior because the public administration has virtually provoked the irreversible transformation of the land, we are in the presence of behavior harmful to the subjective right of the private person, and so the jurisdiction no longer belongs to the administrative judge.

[27] United Sections, sentence n. 9139 of 2003.

This interpretation had been proposed by authoritative doctrine.[28] Usurpative occupation, deriving from *sine titular* occupation, had been added to by doctrine, in the sphere of the competence of the ordinary judge, with the possessory controversies and actions of enunciation and maintenance related to the execution of public works.

The distinction between acquisitive occupation and usurpative occupation is of no little import, because in the case of usurpative occupation the private person can request reparation in specific form, i.e., the restitution of land confiscated by the public administration, together with the entire damage suffered, while in the first case he can ask only reparation by equivalence, within the limits of the reparable value in accordance with expropriation legislation. In this sense the distinction can be considered more favorable to the protection of the right of ownership, compromised by the unlawful behavior of the public administration.

The distinction also implies a certain attention towards the legal and procedural construction of the event that involves the private person concerned, since the qualification of the occupation in "usurpative" terms must be the object of the initial request.[29]

But there is more. Backing the distinction between the two types of occupation, to legitimize the institution of appropriative occupation, which the Court of Cassation believes compatible with the European Convention on Human Rights, and not affected by the decisions of the Court of Strasbourg.[30]

However on re-examining the Constitutional Court's position on the infringement of article 42 of the Constitution[31], and the decision of the Court of Strasbourg, the distinction does not seem legitimable, despite the perspicuous reasoning of the Supreme Court and the Council of State itself.

So, although the distinction may broaden the protection of the private person on the one hand, it al so legitimizes acquisitive occupation, which, as it had tried to show at the time, is a genuine *fictio iuris* that does not conform to the constitutional principles on expropriation.[32]

9. Anatocism

Interest produces interest (anatocism): but article 1283 states that – in the absence of contrary uses – due interest can produce interest only from the day of the judicial request or by effect of agreement following the due date, and when the matter involves interest that has been due for at least six months.

Anatocism practiced by banks in their relations with their debtors (clients) is disciplined by article 120 of the single banking text (legislative decree 385 of l Sept 1993).

Banking practices allow the calculation of interest not only annually, but half-yearly and even quarterly. Since the calculation of such interest can stray into the territory of usury, jurisprudence has seen fit to ascertain its compliance with the provision, and a recent tendency has established that banking practices in this matter are not normative practices, and that

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28 Virga, *Il giudice della funzione pubblica (sui confini della giurisdizione esclusiva tracciati dalla Corte costituzionale con la sentence n. 204/2004)*, in *Lex italia.it*, n. 7/8-2004.

29 Cass. 11.6.2004, n. 11096.

30 United Sections, 6 May 2003, n. 6853.

31 See the reconstruction of the orientation of the Report of the President, Giuliano Vassalli for the year 1999, § 12.

32 On this point see again Alpa, *La responsabilità civile*, cit., p. 536 and following.

the clauses relating to quarterly calculation of interest are null and void[33]. And furthermore, after the introduction of the new usury law, many banking contracts, having been issued at times when the high interest rates were conformant with practices, could have been considered usurious. In order to protect interest matured up until the introduction of the usury rules, the legislator ensured its salvation with legislative decree 342 of 1999. The law was then rescinded by the Constitutional Court and the latter was called on to rule on the law's constitutionality[34], in sentence 425 of 2000[35].

Sentence 21095 of 4 November 2004 of the United Sections of the Court of Cassation confirmed the position of jurisprudence with regard to the merits and to some section decisions of the Court itself, with the declaration of the nullity of contract clauses that provide for quarterly anatocismo.

The opinion does not regard the merits as much as the application of a general principle, on the basis of which, the clauses being the outcome of a consuetudinary practice, it is revealed that that practice had diminished, and their validity of the clauses was nullified.

The central point of the ruling stems from the definition of the expression "contrary practices". These are the basis upon which article 1283 safeguards the validity of the overriding clause. In particular, the expression "practices" was until 1999 afforded consuetudinary equivalence, with normative value. But now, on the basis of past (and heterogeneous) jurisprudence, it is defined differently by the United Sections, and so the practices, have been down graded from normative to contractual practices ex article 1340 Civil Code, and are therefore not applicable on the basis of article 1283 (to which can be added the provision of article. 115 para. 6 cited).

The "new" legal qualification (for the jurisprudence of the United Sections) is built on:

(i) a major premise (of the syllogism evoked by the judges), on the basis of which, the "contrary practices" referred to by article 1283 of the civil code are normative practices;

(ii) a minor premise, on the basis of which, regarding the calculation of anatocistic interest, the practice is no longer perceived as an imperative, in that there would be no *opinio iuris ac necessitatis* linked to the client's behavior in paying such a category interest at the bank's request;

(iii) a conclusion, in that the deduction is that the prohibition stated in article 1283 applies to contracts (of guarantee and indemnity) containing anatocistic clauses.

Quite apart from the appreciability or otherwise of the result (which can be evaluated from the perspective of the bank's interests, or from the perspective of the client's interests) the syllogistic reasoning does not seem to be correct. This is because the minor premise ought to be formulated in a manner that allows the general principle, set out in the major premise, to be applied to the specific case considered in the minor premise (in accordance with the scansion of Aristotelian logic, e.g., all men are mortal, Tom is a man/therefore, Tom is mortal).

Instead, in the reasoning set out, the major premise asserts that "the practices referred to in article 1283 of the Civil Code are normative", whereas the minor premise explains why payment of anatocistic interest is undue, since current opinion no longer considers behavior intended to clear the debt as binding. So we are not in fact dealing with a syllogism, but rather an explanation for lax requirements demanded by the preliminary dispositions of the

[33] E.g. Cass. 18-3-1999, n. 2374, in *Giur. it.*, 1999, 1221.
[34] See for example the order of the Court of Lecce, 21 Oct. 1999, in *Foro it.*, 1999, I, 3637.
[35] In *Contratti*, 2000, p. 1000.

Civil Code and by their interpretation, since in behavior enacted by the subject (the debtor) there is a recognizable opinion of compliance with a rule that is unwritten but is nevertheless considered as binding.

Leaving aside the rules of logic and rhetoric, which can be considered just one – more or less appreciable – way of constructing the opinion and developing the arguments that sustain the decision, it is necessary to ascertain the reasons that contribute to the collapse of the *opinio iuris ac necessitatis*. Also in this regard we need to recall the initial remark, which disregards the procedural particularities of the case in point, since the appellant has not denied but has accepted (even if under duress) that anatocistic interest is a transactional practice and not a normative practice, at least since 1999.

The argument is developed in the sentence in question where it is said that the clients no longer consider the anatocistic clause as binding, not because it is intended to apply a consuetudinary norm, but because it is inserted as a contractual clause in the forms provided by the bank, and these forms are not negotiable but are imposed on the client to permit access to banking services. In other words *the opinio (iuris ac) necessitatis* would translate not into an objective, external rule dictated by consistent and compliant behavior of the subjects, as much as the psychological subordination of the client who accepts imposed clauses in order to gain access to the service and who would not accept if he were free to do so, because they are disadvantageous and tend to introduce disparity of treatment between bank and client.

If the issue should arise in a contractual sphere, it certainly cannot be argued that the forms are provided by the bank, that they contain clauses more disadvantageous to the client, or that the client is persuaded to accept them because he finds himself in the regrettable situation of "take it or leave it".

But if the discussion is confined to contractual behavior, doubt is cast on the correctness of the successive arguments, on page 12 and following. It must in fact be acknowledged that the unconscionable clauses referred to in articles 1341) 1342 and 1370 of the Civil Code legitimize (if the form prescriptions are observed), the imposition of a disadvantage upon the counterparty; that the abusive clause regulation introduced (ex dir. CEE n. 13/1993) into the Civil Code in articles 1469 bis and following has only been in force since 1996; that this regulation regards only consumers and not all clients; that the same regulation faces derogations in the event of changes in contractual conditions, derogations that are aligned in favor of the proposer; that the single text provides particular rules on transparency, and on the calculation of interest, and these rules are addressed not only towards consumers but to all clients; that the single text regulates, more favorably towards the client, only consumption credit contracts.

On one hand it becomes difficult to extend the argument of the Court to all the associated subjects, and moreover having to confine it to qualifiable consumer clients; on the other hand, it must be specified that, putting the system at the disposition of the clients, and among these, specific remedies at the disposition of the consumers, the rules of the code – being legislative rules – prevail over (normative) practices.

In other words, if the argument rests on contractual rules, and is revised in view of the clients' opinion-reactions to the negotiating modalities with which bank client relations are installed, the matter goes beyond consuetudinary boundaries, and those arguments cannot be used to con test the existence or otherwise of a consuetudinary usage.

In convalidation of its own reasoning, the United Sections argue that "also in the matter of normative practices, just as with regard to norms brought in by act-sources of first order, the function accomplished by jurisprudence in the context of decisory syllogisms,

cannot be anything other than recognitive of the existence and importance of the actual rule, but not a creative function of it.

This line of argument is also refutable. Firstly, the probable majority opinion of doctrine today holds the view that the hermeneutic activity of the judge is not merely recognitive, but constitutes a complex process whereby the judge does not uncover the meaning in the normative text, but constructs, i.e., he imposes the meaning (built on the basis of the guidelines laid down by the hermeneutic community) of the norm. But creativity is also expressed in the decisory syllogism, because it serves to construct the major premise and to define the content of the minor premise.

If then there actually is no "decisory syllogism" but simply arguments intended to explain the logical-interpretative path, then its creator function is more and more emphasized. And this is true just as it was true that until 1999 the prevailing tendency was in the opposite direction to that inaugurated by the United Sections.

The mixture of objective behavior and transactional behavior testifies in favor of rather than not in disfavor of the retroactivity of the abovementioned "recognition" of a practice. This is be cause:

- the tendency that negates the arrangement of the anatocistic clauses as normative practices dates back to 1999 and was elaborated on the basis of a jurisprudence of non-uniform legitimacy, contradicted by the jurisprudence of merit;
- the jurisprudential disagreement is resolved only with the sentence under consideration, rendered by the Supreme Court United Sections;
- the dictum is valid for the future but not for the past, because, even without considering the mingling with contractual discipline and with transactional behavior, the jurisprudential "recognitive" rule produces its effects when the recognition of the existence or inexistence of a practice comes to light-so, from the day the sentence was given.

Otherwise, we should arrive at the conclusion that the jurisprudential rules set by the court of legitimacy, even if by United Sections, have a value greater than the legislative rules (in the area of contracts) and a value greater than the decisions of the Constitutional Court.

Should the dictum of the United Sections be considered as a general rule and not referred to only to the anatocistic clauses in contracts of guarantee and indemnity, and should the suggestion emerge that that the *dictum* has retroactive effect, it would then be necessary to resolve the problem of the effect of the judgment of invalidity. In this regard diverse solutions can be countenanced:

- that, having the interest clause as its object, the five-year rule be applied,
- or that, an unowned debt having been paid, the term be a ten year one.

In any case, if the matter strays out of contractual discipline, which states special rules for banking contracts and special remedies, the removal or reformulation of the clauses does not in itself imply an automatic adjustment of the contracts (and behavior of the bank) to the dictum as examined above.

10. The "Parmalat Case"

The mass media, the economic dailies, the consumer associations and savers' websites, not to mention the legal websites, all did their bit to inform the public of the events surrounding the "Parmalat case". And a very attentive public it was, consisting not only of savers who had invested in the group, but also others who – waking up to the risks inherent

in the financial market – want to turn the "Parmalat case" into an instructive phenomenon, which if studied may forewarn of the possible risks of financial investment.

But it should be made dear that-with regard to the "Parmalat group" shares the (non institutional) savers can be divided into at least three categories, depending on the situation in which they were investing at the time of the meltdown. (i) Those who had bought Parmalat shares long before news of the group's economic difficulties began to spread: this category of savers then splits into those who had advised their brokers of their propensity to risk, and those who had made no declaration; persons who had given direct orders for the purchase of shares and those who relied on brokers for the management of their assets. (ii) Those who acquired shares after the news broke, with the intention of speculating on the share prices. (iii) Those who did not voluntarily buy, but found themselves with Parmalat shares, courtesy of operations carried out by their banks or investment services.

Each of these categories receives different grades of protection, depending on their demonstrable levels of awareness of the situation in which they bought the shares, and the intentionality of their purchase.

The financial firms went about their business of dealing in Parmalat shares for the whole time before any alarming news began to circulate; some operators however did continue to deal in shares even in the following period, buying them for clients, on their request or without such advice, because the brokerage was advantageous, or worse, selling their own shares to clients in an effort to avoid losses because of the devalued share prices; in effect "dumping" the shares onto someone else's assets. Even the intermediaries should be grouped according to their liability.

The reference here is relations between the saver and the broker. But obviously there are relations "upstream" and "downstream" of these. In the former case there is the "labyrinth of the Collecchio holding companies", as expressed by Italy's most prestigious and widely read financial daily "Il Sole 24 Ore": which published an organizational chart of the group at the moment of the collapse, showing the various offshore companies.

Linked to the group, then, are the Italian and overseas financing banks, whose degree of awareness of the group's instability is being investigated; and the auditing firms who took over the group's companies. Downstream we find: the criminal judicial actions against the group's directors, auditors and funding banks, in which the "civil parties" comprised the savers and their associations who suffered losses: the events regarding the group itself, having to undergo a restructuring overhaul typical of the big businesses in crisis, and then placed in the hands of an "extraordinary commissioner"; the collapse of some of the group's operating companies and the deficit of the creditors (including the savers); the fate of the employees, which throws up not insignificant social issues; the fate of the shares of the "new Parmalat", the company that emerged from the restructuring of the group; the civil liability of the group's Italian and overseas lending banks, the possible liability of Consob, the financial market watchdog authority, for negligence in monitoring the groups financial records and prospects: the outcome of the procedures pending in the D.S.A., launched as a class action by investors resident there; the fate of the group's companies spread around other continents.

The financial labyrinth created by an originally family-run firm in the dairy sector, renowned for the quality of its food produce, then overwhelmed by reckless financial operations, has been augmented with the judicial labyrinth.

The overall picture I present here has been illustrated with admirable clarity by Guido Ferrarini and Paolo Giudici in a working paper prepared for the European Corporate Govern-

ance Institute[36] and the issue has been discussed in the contest of economic analysis of law, Francesco Denozza.[37]

Observed from outside, this labyrinth has the appearance of a real workshop for the jurist, because of the various different remedies that have been seized on in an attempt to resolve the complex issues arising from the case.

The legislator intervened with the implementation of the "market abuse" directive (2003/6/EC), inserting the relative provisions in the text of the Community law 62 of 18 April 2005. Then approval was given to the first provisions on reform of the regulation on savings, with law 262 of 28 December 2005.

So, new rules on corporate governance, on external controls on firms, on information prospectuses, on conflicts of interest.

While waiting for the outcome of the bankruptcy proceedings, which are proving to be a drawn out affair, we can take some cues from the case law regarding similar cases – though certainly not on this scale – or liability issues recorded in other affairs involving financial market operators. It is hardly worthwhile pointing out that the system of protection for savers is still under construction in this country and that it has a significant boost from Italy's membership of the European Union. So savers, like consumers before them, have benefited greatly from the application of Community law in the country's internal law.[38]

Who can savers turn to demand compensation for their losses? In the first place, the issuers, for prospect liability. Initially the judges non had not held the liability action as admissible as they thought that the reading of the prospectus could not have influenced the will of the investor who was determined to buy the shares offered to the public through the information prospectus.[39]

The approach later changed, and the liability of the issuer was confirmed, as was that of *intermediaries who participated in the allocation of the shares*.[40] There is still doubt as to whether the liability pertains to the negotiation phase (ex article 1337 Civil Code), to the contractual relation, or to the simple social contact that formed outside of the contractual relation; the latter is the solution preferred by jurisprudence, which applies the Civil Code rules for unlawfulness article 2043 and following) to the case.

With regard to the issuers, the judges hold that the investors can now al so avail of other remedies: for example, annulment of the contract undersigned by the saver by effect of the issuer's infringement of the instructions regarding information to be given to subscribers[41], or for not having informed the saver of the nature of the financial product he was being offered[42] or even for having consented to a settlement devoid of "lawsuit".[43] Doctrine is now evaluating the soundness of these remedies, which impact on contract regulation.

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36 Ferrarini and Giudici, *Financial Scandal and the Role of Private Enforcement: The Parmalat Case, Law Working Paper No. 40/2005*, May 2005, in *http://ssrn.com/abstract=7304003*.

37 Denozza, *Il danno risarcibile tra benessere ed equità: dai massimi sistemi ai casi "Cirio" e "Parmalat",* in *Giur. comm*., 2005, I, 111 and following.

38 Alpa, *Il diritto dei consumatori*, Rome-Bari, 2003; Alpa-Andenas, *Fondamenti del diritto privato europeo*, Milan, 2005.

39 Cass. 22 June 1978, in *Giur. comm*., 1979, II, 63l.

40 Court of Trieste, 13 July 1994, in *Società*, 1995,539; Court of Milan 6 November 1987, in *Giur.it.*, 1988, I, 499.

41 Court of Florence, 21 March 2005 (date of the decision).

42 Court of Brindisi, 21 June 2005 (date of the decision).

43 Court of Rome, 23 March 2005 (date of the decision).

And as for the intermediaries who offer their clients the issuers' products, another liability hypothesis, besides prospect liability, is emerging; one that is contractual in nature because it descends from the contract concluded with the saver: liability for lack of due diligence regarding the suitability of the investment, the client's propensity for risk being understood. What is involved here is the intermediaries' obligation to acquire information and to evaluate risk. This obligation stems from the rules of Consob (the principles expressed by directive 22 of 1993) and the principle of professional diligence inferable from the Civil Code, ex article 1176 para. 2, to which jurisprudence adds the general principle of correctness, referred to in article 1175 of the Civil Code[44].

But another hypothesis of unlawful conduct is taking root: liability for the banks' unlawful ranting of credit to insolvent debtors. So, with the problem solved – in a negative sense – on the admissibility of the trustee in bankruptcy's legitimization to act in respect of the lending bank[45], jurisprudence has wondered what subjects can legitimately obtain compensation for damages deriving from the heightened debt exposure of the client following the concession of credit by the bank, aware of the difficulty the debtor was falling into. The firm's financial troubles are obviously aggravated by the granting of credit, and the non-bank creditors, if not buffered by suitable warranties, as the banks normally are, risk ending up with nothing in the share-out. Since we are dealing with an unlawful act, competence lies with the judge in the place in the unlawful act has been committed[46]. The administrators are liable for the unlawful act, and the action – being based on extracontractual liability – is subject to the five-year rule.[47] So, the protected subjects are: the depositors, the bankrupt firm's suppliers, the bank shareholder, and creditors other than banks if damaged by the alteration of the principle of par *condicio creditorum*.[48] In fact this category also includes those savers who suffered damages resulting from the financial difficulty caused by the bank's illegal (willful or culpable) extension of credit to the defaulting issuer of the shares.

The liable parties should also include those responsible for internal control and auditing of accounts. But here we are shifting away from the area of those who, shall we say, "fabricated" the share, or built a paper empire, and those who assisted in this wrongful process – and those who should have ensured that this plan was not put into practice and brought to a conclusion. This would include the unions, the internal auditors and the external firms that audit the firm's accounts and books.

The problem with the causal nexus between the losses suffered by the saver and the unlawful conduct diminishes the further we go from those who "fabricated" the share or those who dealt it, or those who violated the rules of corporate governance.

Jurisprudence however does not pose any particular problems in this regard and considers the causal nexus in quite a flexible manner.

The liability of the audit company is stated by law, in the single text on financial intermediation (legislative decree 98 of 1993). The auditing firm has contractual liability for the damages suffered by the firm it has audited, and public liability for losses suffered by third

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44 Court of Mantua, 12 Nov 2004 (date of the decision).
45 Cass. 19 Sept 2003, n. 13934, in *Dir. banca e mercato fin*., 2004, p. 291.
46 Cass. 19 Sept 2003, n. 13934.
47 Appeals Court of Bari, 17 June 2002, in *Dir. fall*., 2002, II, 951.
48 Court of Foggia, 6 May 2002, in *Dir. cornm. int*., 2003, p. 561, with note by Franchi.

parties, who could be purchasers of company shares, who had trusted in the outcome of the audit to effect the purchase.[49]

There is debate whether it is possible also to affirm the liability of the supervisory or administrative bodies who, being "independent administrative authorities", could be exonerated by the fact that the regulation that institutes them and governs their activity is not directed towards the safeguard of savers but rather the transparency of the market in general[50].

It must al so be noted that jurisprudence and in particular jurisprudence of merit, cited above, seems to shift the interpretative axis from excontractual to contractual liability, and in the sphere of the latter, to liability for infringement of principles or rules not stated in the contract, but being an integral part of it, in as much as it is established by "law". The expression "law" in this case implies also the infringement of principles deriving from Community law, rules put in place by the watchdog authorities, self-regulatory rules that are regarded as convalidated by practice and therefore classifiable as consuetudinary norms. The problem then becomes something else. If the legal relevance of the damaged interest and the consequent damage are ascertained, if the causal nexus between the damage suffered by the saver and the behavior of the subject held to be liable are ascertained, if the violation of norms involving the information transmitted before the conclusion of the contract (i.e., of the invest-

[49] Cass. 18.7.2002, n. 10403, in *Giur. comm*., 2003, II 441 Court of Milan, 21.10.1999, in *Giur. it*, 2000, 554; Appeals Court of Milan, 7.7.1998, in *Giur. comm*., 2000, II, 425.

[50] Can the lack of due diligence in control of the prospectus make Consob liable. Can the lack of due diligence in the accounts of the firm quoted on the markets make Consob liable? The many questions that arise around this issue, regard first of all the scope of the violated norm, then the type of damage suffered by the savers, then the causal nexus between the damage and the lack of due diligence. An affirmative answer was given by a Court of Cassation sentence, which cannot however be considered a leading precedent because founded on a specific case in which the lack of due diligence depended on the intentional negligence of some members of the control body, Cass. 3.3.2001, n. 3132. In application of the principle of liability sanctioned by the Supreme Court, the Court of Appeal of Milan (specifying in the judicial review that "the liability of the public administration for lack of due diligence is configurable because when the law obliges the same to an active behavior, in the case in point, of vigilance, inferable by the regulations (…) that configures (…) a genuine duty for Consob to act to impede the event that materialized in damage to the savers by the omission of vigilance by the very organ of vigilance". Even if there is no unconditional duty of Consob to act always in the protection of the legal positions claimed by third parties, the court specified that the responsibility of this organization is founded where there emerge, *ictu oculi*, suspicions surrounding the veracity of the figures supplied by the finance firms, in the light of evident falsehoods detectable by documents deposited by the issuer, Appeals Court of Milan, 21.10.2003. At this point not only the rules of law enter the game, but also the considerations of economic analysis of law: in other words, what is the rational, optimal way of dividing out resources, damages and sanctions? We must bear in mind not only the damages suffered by savers – categorizing them in the way we mentioned previously – but also by the resources, in the event that they be drawn from the public purse (as in the case of the liability of Consob), they would be removed from the other savers and other uses. I have many doubts that the remedies of private law, and in particular judicial remedies, can on their own resolve the problems described, which have their macroeconomic aspect. I have many doubts also that an erratic jurisprudence, which sometimes admits and sometimes denies compensation, can represent the right answer to financial meltdowns. I have doubts also that the only rules entrusted to the market are capable of preventing financial meltdowns (the cases referred to above would tend towards the certainty of market failure). Private law and public law, self-regulation and control of behaviors and financial products by the watchdog bodies could continue to constitute an appropriate framework of measures to prevent or cure these occurrences. That is why we expect so much from the legislator, whose delay cannot but heighten our anxiety.

ment) is ascertained, then the consequences on the contractual plane are: voidness (through violation of the law), voidability (because the volition is formed on the basis of omitted or false or erroneous information), reparations for incidental fraud (where an investment is made in conditions worse than those that would have been accepted had the real situation been known), reparations for damages (for contractual non-fulfillment)? The solution ought to be formulated on the elements of the case in point, not on the basis of the effects of the remedy approved. But by now the system also seems to be tending towards the pragmatic convalidation of theoretical solutions that lead towards remedies most useful for the party that has to be protected. In the case of savers, for reasons connected to the probative burden, to simplicity, and for reasons connected to the financial outcome, the preferred option would seem to be damages compensation for contractual non-fulfillment. Even damage compensation for simple "infringement of the law" is now emerging in doctrinal thought. And it is an open perspective that merits dose attention.

11. Harm Caused by Smoking

The *Stalteri*[51] case, as the affair will be known in the annals of judicial history and will be labeled in the casebooks for student use, has not yet exhausted its procedural course. It is understood that the conclusive phase will be promoted by the losing party before the Court of Cassation. Whatever the outcome, the case will be another milestone in the evolution of public liability, particularly in the complex sector of manufacturer liability. At the beginning of the 1970s manufacturer liability in this country was the subject of academic studies but had not yet come under scrutiny in the courts: to find a case history of merit we must go beyond European shores and look to the United States experience, where mass production had obliged the judicial creation of rules that, storming the citadel of the traditional charge of liability – the negligence of the damaging party – allows the victims of a defective product to claim compensation for damages suffered. William Prosser, one of the most noted experts on the subject must take credit for having drawn the roadmap towards the storming of the citadel.

So, to be able to arrive at the attainment of a similar result in this country, we must look to: Gustavo Ghidini, who proposed in a 1970 monograph that liability be anchored to the manufacturer's product information if it emerged as erroneous or deceptive; Mario Bessone, whose essay of the same year suggested the application of risk indictment criteria borne by the manufacturer; Ugo Carnevali, whose 1974 monograph made a distinction between the criterion of negligence (confined to the phase of product planning and distribution of information to the public) and the criterion of liability without negligence (confined to the manufacturing phase); myself, in a 1975 monograph, proposing the charge of liability without negligence in all phases, applying article 2049 of the Civil Code. Directive 85/374 EEC (implemented with presidential decree 224 of 1988) followed this latter path, but with many limitations: the damaged party must furnish proof of the defect of the product, reconstruct the causal nexus between defect and damage, and must be unaware of the defect of the product and the danger it presents; if the damaged party is aware and voluntarily exposed himself to the danger, he cannot claim for damages (article 10). The normative framework therefore demands that the product be defective and that the damaged party does not emerge as negligent.

[51] Court of Appeal of Rome, 7 March 2005, n. 1015.

"Harm caused by smoking" has a history in itself: just as in the USA, it has constituted a workout gym for the intellect of jurists, because all the circumstances con spire against the damaged party: it belongs to the common knowledge that smoking is harmful to health and is one of the prime causes of pulmonary tumors; so a justification exists, in the form of acceptance of the risks. Proof of the defect is just as difficult, because the product, classified as a light drug, is taken customarily like wine or coffee. If taken in immoderate quantities, these substances can also cause damage to the health, but they are not considered defective products. Proof of the causal nexus is extremely complex, because the tumor can derive from many causes, and if linked to smoking, can stem from the consumption of different types of tobacco, and so ono So we are not talking here about a television exploding or a bunk-bed collapsing, nor a bottle shattering, not a pharmaceutical with harmful side-effects (like the Thalidomide affair in Germany), nor a blood transfusion infected with hepatitis. All cases that have nothing to do with smokers products.

This is the reason why in our experience – among the rare cases of manufacturer liability recorded in the annals of jurisprudence – precedents on harm from smoking are still very rare; and attempts to mount cases have had negative results. The same can be said for the negative results recorded in France and Germany. In the United States the affair has had an outcome differing only in part, and that in the exceptional cases (of the thousands of actions and the tens of class actions brought to court) in which: the negligent conduct of the producer was ascertained in his concealment, from the public, of the results of in-depth research on the effects of smoking; he had also put non-tobacco substances into the cigarettes, to enhance their habit-forming properties. Here is a situation not comparable with the Italian scenario, either by the facts of the case or the connotations particular to that legal system in comparison to our own. It is however significant to verify how, in an experience that includes thousands of decisions in favor of consumers, the harmful effects of smoking have had such a lukewarm welcome.

However, even the case that ruled in favor of the damaged party, decided by the Justice of the Peace of Portici on 20 November 2003, is particular, because it regards light cigarettes, a classification the judge held as deceptive for consumers.

The sentence of the Court of Appeal in Rome moves between these shallows: it resolves the problem of acceptance of risk by recourse to the information defect of the victim, resolves the problem of the product defect by recourse to a (single) analogy with blood transfusion products, resolves the problem of the causal nexus by recourse to probability; resolves the absence of information obligations (which were not called for by Iaw at the time the damage manifested itself) with the notoriety of harm from smoking, and, to resolve even the burden of proof, applies article 2050 of the Civil Code, qualifying cigarette production as "dangerous" through its being possibly damaging to the right to health. The strong point of the reasoning is provided by the technical advice relating to the causes of pulmonary tumors.

So, a decision concentrated wholly on the circumstances relevant to the case. The game however is still open: it can have the future, or it can return to the shadows of the failed efforts.

Conclusions

If we re ad Emperor Justinian's advice to the students who embarked on their legal training through the study of Institutions of Civil Law, we be might led to think that nothing has changed since the fifth century: the law is a practical science, the law requires application and study, equilibrium and meditation. We have seen how the formulas may conceal diverse meanings, how concepts and dogmas have become timeworn down the years, how private law – of geometric construction and Pandectist organization – has metamorphosed into a proteiform law, sensitive and attentive to the appeals of economics, of ethics, of the fundamental Occidental values. We have spoken of law. But the interpretation and application of law requires action in accordance with *fairness*.

Today fairness is discussed in social relations and contractual relations. The contract must be "just", compensation for damages must be "just", indemnity for expropriation must be "just"; and the process must not be too long and so it must be "just".

It isn't stated explicitly, but all the pages of this book are a reflection on this. And in concluding the discourse I would like to give the reader this very message: private law would not fulfill its essential task-the task it has performed for two thousand years-if it were not also "just" law. One of the tasks of the jurist consists of making it become just, when the legislator has not been so. A difficult task, certainly, but not impossible, as demonstrated by the creative interpretation of judges and as evidenced by the doctrine that shows sensibility for the social aspects of legal rules.

Some years ago, great interest was aroused by an essay by Jacques Ghestin, entitled "The useful and the just" in contract law.[1] The analysis was confined to contract law and brought "distributive justice" into play in this sector of law; but commentators extended the scope of the discussion to other sectors of private law. Certainly, the commotion was due largely to the fact that French culture, admirable for its critical vigor in so many areas of learning, in history and philosophy, in art and sociology, and even in theology, seemed, in the area of private law in those years, somewhat lifeless and overly formalist, focused, as it was, more on the exegesis of the norms rather than on their systematic reconstruction, in the light of new values that were gradually emerging in western society. Brilliance of exposition,

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[1] Ghestin, *L'utile et le juste dans les contrats*, in *"D"*, 1982, Chron. 1. Some years later the discussion also arose in the sphere of Italian doctrine. As first references, see Breccia, *Prospettive nel diritto dei contratti*, in *Riv. crit. dir. priv*., 2001, pages 161 and following; Collins, *La giustizia contrattuale in Europa. Lavoro presentato in occasione del tavolo rotondo su* "La giustizia distributiva nel diritto dei contratti", ivi, 2003, 4, pages 659-85; Corapi, *L'equilibrio delle posizioni contrattuali nei Principi Unidroit*, in *Europa e dir. priv*., 2002, pages 23 and following; Galgano, *La categoria del contratto alle soglie del terzo millennio*, in *Contr, Impr*., 2000, pages 919 and following: Perfetti, *L'ingiustizia del contratto e le tutele*, Milano, 2000; Schlesinger, *L'autonomia privata e i suoi limiti*, in *Giur. it*, 1999, pages 299 and following; Sacco, *L'abuso della libertà contrattuale*, in *Diritto privato*, 1997, pages 217 and following; *Equilibrio delle posizioni contrattuali*, edited by Ferroni, Napoli, 2002; *Diritto europeo e autonomia contrattual*e, edited by Alessi, Palermo, 1999; Roppo, *Contratto di diritto comune, contratto del consumatore, contratto con asimmetrie di potere contrattuale: generi e sviluppi di un nuovo paradigma*, in *Riv. dir. priv*., 2001, pages 780 and following.; Somma, *Autonomia privata e struttura del consenso contrattuale*, Milan, 2000; Vettori, *Autonomia privata e contratto giust*o, in *Riv, dir. priv*., 2000, pages 21 and following; Idem, *Contratto e concorrenza*, ivi, 2004, p. 76; Idem, *La disciplina generale del contratto nel tempo presente*, ivi, p. 313.

traditionally an established connotation of the writing of French jurists, was not matched by a constructive critique of the values and the principals of private law.

Ghestin concluded by arguing for the introduction, into the categories utilizable by the jurist, of the valuational category of the positions and the parts, so he therefore inclined towards the justice of the contract, resorting obviously to the instruments within the system. In Italy the discussion had been creeping in at least since the mid 1960s. The protection of the consumer, of the environment and collective interests, of controls on oppressive clauses, the creation of biological damage, the extensive application of rent control, were all topics that tended to introduce social evaluations as regards a formalist culture that entrenched itself behind the "purity of the legal rule and its immunity from contamination from the status of the subjects, their economic capacity, their contractual strength, and so ono Italian legal culture, particularly privatist culture, was ready to acknowledge new values deriving from the expectation of universal justice and recourse to the intervention of the judge, or whether trust should be placed exclusively on the legislator as the sole mediator of interests.

The problem was understanding whether these expectations could have been satisfied with the instruments of private law.

The basic question has been addressed by many jurists.[2] In particular, the issue was tackled on the occasion of a interdisciplinary conference organized by the University of Pisa, Umberto Breccia and Umberto D. Busnelli.

Umberto Breccia, in a context of general theory, and taking into account the complexity of contemporary society, which is reflected in the complexity of the legal system, argued that nowadays we cannot consider justice or the foundations of private law with the categories or the valuational yardstick of the Keynesian or Weberian conception, and that therefore the search for what is "just" must be regarded as a quest towards an absolute value, conducted in a given historical moment, and taking account of shared values.

Francesco D. Busnelli differentiated the historical phases that have marked out the evolution of jurisprivatist culture and its standardization: those phases of the "just" with which the parties (considered abstractly) had convened, those in which "just" was what the legislator had established, and the one, dose to us, in which "just" is what corresponds to shared values and is sometimes problematic: in other words he has adopted a beneficial relativistic criterion that persuades the jurist to consider, in his evaluations, the many factors that go beyond or transcend the text of the norm.

In every sector of private law there are conflicting interests.

They can be reconciled in different ways: through the law, through contract, through protocols of agreement established between the categories declaring the opposing interests, and through private mediation. The demarcation line of what is "just" and of what is not, is therefore changeable; it will depend on the historical circumstances, the economic dominance and on political actions and orientations.

But the rules of private law – in its grand and noble sphere expressive of institutional and community values, point towards a classification that begins with the person and extends to the market. So what the market postulates is not just, but what is just in this regard – is the protection of the person.

Because the law (and also private law) is *at the service* of the person.

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[2] For a summary report of the debate, which embraces three decades of reflection, see Alpa, *La cultura delle regole*, Rome-Bari, 2000; see also the first references of the preceding note.

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