Essays

Constitutional Axiology and Party Autonomy

Fabrizio Criscuolo*

Abstract

The Italian Constitution is based on strong values of personalism and solidarity. As a matter of fact, autonomy, freedom and right of self-determination are not absolute values, but values among other values. The contract, as source of rules governing economic relations, should be subjected to a test of worthiness (*meritevolezza*) according to the constitutional values where principle of party autonomy is combined with good faith principle.

I. Introduction. Constitutional Values and the Tension Between Freedom and Solidarity

In the 2016 Constitutional Case Law Report, presented on 9 March 2017, the President of the Italian Constitutional Court, Paolo Grossi, recalled the comments made by Piero Calamandrei at a meeting with university students in Milan more than sixty years ago: 'the Constitution', the renowned jurist observed, as if he was stating a self-evident matter,

> 'is not a machine which, once set in motion, will keep moving on its own. The Constitution is a piece of paper, if I let it fall it doesn't move: in order to let it move one needs to add fuel every day; one needs to add commitment, spirit, desire to keep these promises, a sense of one's own responsibility'.[1]

Never before has a renewed scientific and civil commitment been as urgent as in recent years, since the current redistribution of powers and sovereignty, as well as the longest and most destructive economic crises in history have forced Europeans to call into question the very foundations and cohesion of our communities.[2]

* Full Professor of Private Law, University of Rome 'La Sapienza'.

[1] For the full text of the report, see https://tinyurl.com/ycxnglhe (last visited 25 November 2017).

[2] A suggestive notion of crisis has been developed by S. Romano, according to whom crises result from inability of the State as an institution to keep pace with changes that lead to the disintegration of the State (see S. Romano, *Lo Stato moderno e la sua crisi* (Milano: Giuffrè, 1969), 23). On the other hand, the encouragement offered by I. Ciolli, 'Crisi economica e vincoli di bilancio' (2012), available at https://tinyurl.com/y8fxl5rr (last visited 25 November 2017) is

 DOI 10.23815/2421-2156.ITALJ ISSN 2421-2156

This call must be felt in particular by my own generation. We were educated against the backdrop of the debate conducted by scholars in the 1960s and 1970s concerning the direct efficacy of constitutional rules and principles within interpersonal relations. Thanks to this debate, even from a methodological perspective, it had been indicated the essential need to create a framework of values and a project of justice around which the very forms of cohabitation within our legal community could be built.[3] This is because the truly irrefutable fact against which we must measure ourselves is that of the resounding contradictions of an age which, on the one hand, feels ever more keenly the necessity to implement the project of justice that has never entirely been implemented. On the other hand, despite the widespread proclamations of and references to the essential need to realise those values, a historical process with apparently inevitable determinism has made us aware of the inadequacy (including as a result of serious and undeniable mistakes committed in the past) of instruments and resources that are indispensable in order to give tangible effect to principles expressed by those values.

These contradictions appear to be even more paradoxical if it is considered that this sense of impotence pervades us precisely at a time when the case law of the Constitutional Court and of the Court of Cassation, with particular reference to the specific subject matter of this study, appears to endorse the viewpoint, which had previously attracted a large number of objections based not only on ideological but also on other considerations concerning the relationship between constitutional axiology and party autonomy.[4] In fact, there have been numerous

largely meaningless, according to whom crisis represents an opportunity for change, enabling us to choose what to hold on to from the legal tradition and what to change. Similarly see G. Pitruzzella, 'Crisi economica e decisioni di governo' *Quaderni costituzionali*, 29 (2014), for whom economic crisis and chance are coextensive terms.

[3] The reference method chosen is to revisit the civil law in the light of the Constitution and to apply directly fundamental principles. On the role of the Constitution in the theory of sources of civil law, see P. Perlingieri, 'Produzione scientifica e realtà pratica: una frattura da evitare', in Id, *Scuole, tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1989), 24-25; Id, 'Norme costituzionali e rapporti di diritto civile' *Rassegna di diritto civile*, 111 (1980); Id, 'Salvatore Pugliatti e il "principio della massima attuazione della Costituzione" ' *Rassegna di diritto civile*, 807 (1996); Id, 'Valori normativi, e loro gerarchia' *Rassegna di diritto civile*, 787 (1999); Id, 'Complessità, e unitarietà dell'ordinamento giuridico vigente' *Rassegna di diritto civile*, 199 (2005); Id, 'Giustizia secondo Costituzione ed ermeneutica. L'interpretazione c.d. adeguatrice', in P. Femia ed, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 3. The case law asserts the 'phenomenon of revisiting the institutes set forth in the codes in order to ensure compliance with the overriding principles laid down in the subsequently adopted republican Constitution', Corte di Cassazione 24 September 1999 no 10511, *Foro italiano*, I, 1929, 1938-1939 (2000); see also Corte di Cassazione 23 May 2003 no 8188, *Diritto e giurisprudenza*, 104 (2004); Corte di Cassazione-Sezioni unite 13 September 2005 no 18128, *Danno e responsabilità*, 411 (2006).

[4] See P. Perlingieri, *Il diritto civile secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 326. On the constitutional 'coverage' for party autonomy, see A. Liserre, *Tutele costituzionali dell'autonomia contrattuale* (Milano: Giuffrè, 1971), passim; M. Nuzzo, *Utilità sociale e autonomia privata* (Milano: Giuffrè, 1975), 13; G. Alpa, 'Libertà

rulings by the highest courts in recent years that have confirmed the view that the unitary nature of the system finds its highest expression in the principles laid down in the Constitution, and in particular through the focus on the role of general clauses and the requirement of good faith within contracts. The conception of this role had provoked a much lively debate,[5] specifically between those who, striking a balance between interests and values that was not always reasonable, performed (and in some ways still continue to perform) the role of the true guardians of legal certainty.

However, within a plural and fragmented context and against a backdrop characterised by an irreducible contrast between ultimate values,[6] courts have also not been unaffected by the general disorientation when, ruling for example on questions that are commonly defined as ethically sensitive in the name of self-determination freedom, have promoted the idea of a model that is difficult to classify under rights of freedom (or, as some prefers to define them, civil rights) and social rights, falling somewhere between individuality and inderogable duties of solidarity. Indeed, the disorientation of the private citizen in cases in which life comes into conflict with freedom is entirely understandable, or when the right to health conflicts with the interest in work, or when the aspiration for freedom and justice clashes with the principle of peaceful cohabitation and security. However, in order to assert that our epoch perceives the Constitution as a bundle of stale and useless rules and has even misplaced the meaning of its set of values, within a context which has been significantly defined as a 'process of dissolution of the very idea of the Constitution',[7] would seem to be particularly far-fetched!

There is no doubt that a reflection on the current relationship between the

contrattuale e tutela costituzionale' *Rivista critica di diritto privato*, 35 (1995); P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 495; L. Mengoni, 'Autonomia privata e Costituzione' *Banca borsa e titoli di credito*, I, 1 (1997).

[5] Initially, the case law adopted a stance of rejection towards the direct applicability of the principle of good faith 'because litigants expect (...) courts to motivate their own judgments by detailed citation of legislation' (G. De Nova, 'Relazione al seminario tenuto a Pisa nel 1983', in Id, *Nuovi contratti* (Torino: UTET, 2nd ed, 1994), 24). See Corte di Cassazione 16 February 1963 no 357, *Foro padano*, 1284 (1964), with critical note by S. Rodotà, 'Appunti sul principio di buona fede'. For a detailed examination of the case law from that period, see also U. Natoli, 'L'osservanza dei principi generali e principi fondamentali davanti alla Corte di cassazione', in Id et al, *Scritti in memoria di Domenico Barillaro* (Milano: Giuffrè, 1982), 345; Id, 'L'attuazione del rapporto obbligatorio e la valutazione del comportamento delle parti secondo le regole della correttezza', in Id, *Diritti fondamentali e categorie generali. Scritti di Ugo Natoli* (Milano: Giuffrè, 1993), 669; Id, 'L'attuazione del rapporto obbligatorio' (1961), I, in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1984), 33.

[6] These values were significantly defined as 'gods at war' by M. Weber, 'Politics as vocation', in H.H. Gerth and C.M. Mills eds, *From Max Weber* (New York: Oxford University Press, 1972), 152-153.

[7] G. Pitruzzella, 'La necessità del dialogo costituzionale', in R. Balduzzi ed, *La Carta di tutti. Cattolicesimo italiano e riforme costituzionali (1948-2006)* (Roma: Editrice Ave, 2006).

system of values of the Constitution and the power of private individuals to regulate their own interests[8] would be premised, on the one hand, regarding an assessment of the topical relevance and the relative content of the idea that is commonly expressed in the notion of the 'sovereignty of the Constitution',[9] and, on the other hand, suitable further study of the current role performed by autonomy within the sources of rules governing interpersonal relations, including above all those that are economic in nature, with a view to identifying the rule that fits in most closely with the relevant facts.

In line with the objectives and aims of this study, the discussion will start from an analysis of the most significant decisions of the Constitutional Court over the last ten years and will be focused on the value which these judgements have also in relation to the scope for action that has been recognised by different courts and tribunals.

II. Autonomy and the Sources of Rules Governing Economic Relations. Equity, Good Faith and Private Regulation

A first set of decisions to recall, for explanatory reasons, such as orders no 248 of 2013 and no 77 of 2014,[10] concerns the widely debated and crucial

[8] Regarding the power of private persons to create objective rules of conduct in conjunction with other legal sources, see V. Roppo, *Il contratto del Duemila* (Torino: UTET, 2002), 6, in line with a tradition which includes, amongst others, A. Passerin D'Entreves, *Il negozio giuridico – Saggio di filosofia del diritto* (Torino, Giappichelli, 1934), 14; Salv. Romano, 'Autonomia privata' *Rivista trimestrale di diritto pubblico*, 853-855 (1956); L. Ferri, *L'autonomia privata* (Milano: Giuffrè, 1959), 6, 41, 247; S. Rodotà, *Le fonti di integrazione del contratto* (Milano: Giuffrè, 1969), 86; E. Pergolesi, *Sistema delle fonti normative* (Milano: Giuffrè, 3rd ed, 1973), 98; San. Romano, 'Autonomia', in Id, *Frammenti di un dizionario giuridico* (Milano: Giuffrè, 1983), 27; F. Criscuolo, *Autodisciplina. L'autonomia privata e il sistema delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2000), 47.

[9] The notion of the 'sovereignty of the Constitution' is proposed by G. Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia* (Torino: Einaudi, 1992), 8. According to A.K. Sen, 'Mercato e morale' *Biblioteca della libertà*, 22 (1986); Id, *Etica ed economia*, Italian translation (Roma-Bari: Laterza, 1988), 8, 30, every constitutional value should be construed as a 'weak value', and even those comprising the unchangeable 'hard core' are subject to balancing.

[10] Both Corte costituzionale 24 October 2013 no 248 and Corte costituzionale ordinanza 2 April 2014 no 77 are available at www.giurcost.org. S. Pagliantini, 'L'equilibrio soggettivo dello scambio e l'integrazione tra Corte di giustizia Corte costituzionale ad ABF: "il mondo di ieri" o un *trompe l'oeil* concettuale' *Contratti*, 854 (2014), now in Id, *Nuovi profili del diritto dei contratti. Antologia di casi e questioni* (Torino: Giappichelli, 2014), 132, 135, 158; F. Astone, 'Riduzione della caparra manifestamente eccessiva tra riqualificazione in termini di "penale" e nullità per violazione del dovere generale di solidarietà e di buona fede' *Giurisprudenza costituzionale*, 3770 (2013). E. Scoditti, 'Il diritto dei contratti fra costruzione giuridica e interpretazione adeguatrice' *Foro italiano*, I, 2036 (2014).

Adopting a critical stance compared to that taken by the Court in the rulings mentioned above, see G. D'Amico, 'Applicazione diretta dei principi costituzionali e integrazione del contratto' *Giustizia civile*, 247 (2015); Id, 'Applicazione diretta dei principi costituzionali e nullità della caparra confirmatoria "eccessiva" ' *Contratti*, 927 (2014). For a similar argument see also R.

question of the possibility of a review of the transactional equilibrium according to the Italian law in order to realise a general interest that is detached from any individual legal provisions of a contract.[11]

More specifically, the question brought before the Court for review concerned a supposed unreasonableness within Art 1385 of the Civil Code insofar as it does not expressly provide for any power of courts to reduce on an equitable basis the amount that a party that is not in breach may withhold (or require the other party to repay in an amount double the original sum) in the event of a breach by the other party in cases in which the amount agree as a deposit is very high compared to the overall value of the transaction.

There is no doubt that the backdrop to the referral order concerning such a question was a long and now settled dispute concerning the scope of the provision laid down in Art 1384 of the Civil Code[12] which, when interpreted to

Pardolesi, 'Un nuovo super-potere giudiziario: la buona fede adeguatrice e demolitoria' *Foro italiano*, 2039 (2014).

[11] The fundamental studies in this area include those by L. Raiser, which have been collected in the volume: C.M. Mazzoni ed, *Il compito del diritto privato. Saggi di diritto privato e di diritto dell'economia di tre decenni* (Milano: Giuffrè, 1990), on which cf P. Perlingieri, 'Una "preoccupazione" attuale. Spigolando tra i saggi di Ludwig Raiser' *Rassegna di diritto civile*, 253 (1992). Within the Italian literature, see G. Marini, 'Ingiustizia dello scambio e lesione contrattuale' *Rivista critica di diritto privato*, 257 (1986); A. Barba, 'Libertà e giustizia contrattuale', in Id et al, *Studi in onore di P. Rescigno* (Milano: Giuffrè, 1998), II, 11; F. Volpe, 'I Princípi Unidroit e l'eccessivo squilibrio del contenuto contrattuale (*Gross disparity*)' *Rivista di diritto privato*, 40 (1999); Id, *La giustizia contrattuale autonomia e mercato* (Napoli: Edizioni Scientifiche Italiane, 2004), passim; G. Vettori, 'Autonomia privata e contratto giusto' *Rivista di diritto privato*, 21 (2000); C. Caccavale, *Giustizia del contratto e presupposizione* (Torino: Giappichelli, 2005).

[12] The objections concerned the alleged exceptional status of Art 1384 of the Civil Code based on the consensualist dogma and the principle of the intangibility of agreements reached between private parties, which resulted in a refusal to countenance external *ex post* controls. For a similar argument, see G. Stolfi, *Teoria del negozio giuridico* (Padova: CEDAM, 1947), XXVIII; Id, 'Il negozio giuridico è un atto di volontà' *Giurisprudenza italiana*, IV, 41 (1948). On the dogma of will, see also M. Giorgianni, 'Volontà, diritto privato' *Enciclopedia del diritto* (Milano: Giuffrè, 1993), XLVI, 1046; G.B. Ferri, *Il negozio giuridico* (Padova: CEDAM, 2nd ed, 2004), 43. On the private law status of the interests protected see also Corte di Cassazione 24 giugno 1993 no 6991, *Massimario del Foro italiano* (1993), 1073. The irreducibility is justified on the basis of the reference within the legislation to the 'ability' to reduce on an equitable basis by F. Carresi, 'Il contratto', in A. Cicu and F. Messineo eds, *Trattato di diritto civile commentato* (Milano: Giuffrè, 1987), XXI, I, 254. Cf also G. De Nova, 'Clausola penale' *Digesto delle discipline privatistiche, Sezione civile* (Torino: UTET, 1988), II, 381; F. Galgano, *Diritto civile e commerciale* (Padova: CEDAM, 3rd ed, 1999), II, 503; F. Criscuolo, 'Autonomia negoziale e autonomia contrattuale', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2004), 272; Id, 'Equità e buona fede come fonti di integrazione del contratto. Potere di adeguamento delle prestazioni contrattuali da parte dell'arbitro (o del giudice) di equità' (note concerning the judgment of the Court of Milan of 9 January 1997) *Rivista dell'arbitrato*, 71 (1999). There were also contrasts within the case law: some judgments continued to hold that the penalty could not be reduced *ex officio* (Corte di Cassazione 30 May 2003 no 8813, *Repertorio del Foro italiano*, 445 (2003), 'Contratto in genere', no 445), whilst others argued the opposite (Corte di Cassazione 23 May 2003 no 8188, *Nuova giurisprudenza civile commentata*, I, 553 (2004), with note by R. Palasciano, 'La riducibilità *ex officio* della clausola penale tra equità delle sanzioni e principio della domanda'; Consiglio di

the effect of precluding the existence of any power for a judge to rebalance the agreement on its own authority, has always represented one of cornerstones of the arguments made by proponents of the contractual equilibrium and the principle of proportionality between performance and counter-performance.[13]

However, with reference to that provision, and rejecting the views of those who have argued that it should be construed systematically, since the very first rulings of the Court of Cassation that acknowledged the existence of an *ex officio* power to reduce the penalty on an equitable basis,[14] it has been argued that the rule laid down in Art 1384 has exceptional status,[15] with the evident aim of limiting the impact of a line of case law, which was considered by some even to be subversive.[16]

A question was raised in this regard as early as 2006 concerning the applicability by analogy of Art 1384 (as interpreted within the case law of the Court of Cassation referred to above), this time to the rules governing the

Stato 4 June 2004 no 3490, *Repertorio del Foro italiano*, 486 (2004), 'Contratto in genere', no 486), until the Cassazione-Sezioni unite 13 September 2005 no 18128, *Corriere giuridico*, 1534-1535 (2005), with note by A. Di Majo, 'La riduzione della penale *ex officio*'.

[13] Proportionality must be understood not as an equivalence between performance (on this issue see R. Lanzillo, 'Regole del mercato e congruità dello scambio contrattuale' *Contratto e impresa*, I, 309 (1985)), but rather as a prohibition on an unjustified imbalance between rights and obligations resulting for the parties from the contract. Concerning this matter, see P. Perlingieri, 'Equilibrio normativo e principio di proporzionalità nei contratti' *Rassegna di diritto civile*, 334-356, 335 (2001); F. Criscuolo, 'Autonomia negoziale e autonomia contrattuale' n 12 above, 272-280; Id, 'Principio di proporzionalità, riduzione ad equità della penale e disciplina della multa penitenziale' *Rivista dell'arbitrato*, 385 (2006). Any merely economic imbalance between contractual performance is excluded as irrelevant, unless it is excessive, by G. Biscontini, *Onerosità, corrispettività e e qualificazione dei contratti. Il problema della donazione mista* (Napoli: Edizioni Scientifiche Italiane, 1984), 47; F. Macario, *Adeguamento e rinegoziazione nei contratti a lungo termine* (Napoli: Jovene, 1996), 146; F. Galgano, 'Squilibrio contrattuale e mala fede del contraente forte' *Contratto e impresa*, 417 (1993). Provision is also made to this effect by Art 3.10 of the Unidroit Principles, which refers to 'Gross disparity', see G. Alpa, 'La protezione della parte debole di origine internazionale (con particolare riguardo al diritto uniforme)', in M.J. Bonell and F. Bonelli eds, *Contratti commerciali internazionali e Principi Unidroit* (Milano: Giuffrè, 1997), 225; F. Volpe, 'I principi Unidroit e l'eccessivo squilibrio del contenuto contrattuale' *Revista Doutrinària*, 66 (2000); F. Casucci, *Il sistema giuridico 'proporzionale' nel diritto privato comunitario* (Napoli: Edizioni Scientifiche Italiane, 2001), 412.

[14] By judgment of Corte di Cassazione 24 September 1999 no 10511, *Contratti*, 118 (2000), asserting that if the institutes laid down in the Codes are to be re-read in order to ensure compliance with the overriding principles contained in the subsequently adopted Constitution, this requires the possibility of a reduction by courts to be considered 'no longer on an exceptional basis, but rather as a simple aspect of the normal control which the legal system may perform over acts of private autonomy'. However, see also Corte di Cassazione 23 May 2003 no 8188, *Nuova giurisprudenza civile commerciale*, I, 553 (2004).

[15] See on this matter R. Sacco and G. De Nova eds, *Il Contratto* (Torino: UTET, 1993), II, 168. See contra recently I. Tardia, *Interessi non patrimoniali e patti sanzionatori* (Napoli: Edizioni Scientifiche Italiane, 2006), 335. Within the case law, cf Corte di Cassazione 27 October 2000 no 14172, *Giustizia civile*, I, 104 (2001); Corte di Cassazione 30 May 2003 no 8813, *Repertorio del Foro italiano*, 445 (2003), 'Contratto in genere', no 445.

[16] R. Calvo, 'Il controllo della penale eccessiva tra autonomia privata e paternalismo giudiziale' *Rivista trimestrale di diritto e procedura civile*, 297 (2002).

deposit paid as compensation for withdrawal pursuant to Art 1386, after it had been argued within arbitral proceedings that the court had a power to intervene in order to assess whether the fee agreed upon between the parties in the event of withdrawal by either was reasonable. An authoritative arbitral tribunal, comprised of Enrico Giliberti, Antonio Briguglio and Mario Paccoia, had issued a lucid and well-argued award, which gave me cause to argue in that year's *Rivista dell'arbitrato*[17] that an interpretation that was capable of appreciating the axiological potential of the mechanism of reduction on an equitable basis, and hence its systematic scope, along with the inclination to introduce a new basis into the system for assessing protected interests was fully consistent with the system inspired by constitutional values and the principles of EU law, also in view of the anticipated move beyond the subjective variable upon which legislation derived from EU law is still based.

In 2013 and in 2014, after the definitive seal of approval was granted to that viewpoint, the Constitutional Court reiterated (this time in relation to Art 1385 of the Civil Code) that there was no need for the law to make explicit the scope for intervention by courts when confronted with a negotiated clause that reflects a settlement of opposing interests. This settlement is not fair and is skewed against one of the parties as such a clause would violate Art 2 of the Constitution with regard to the requirement to comply with inderogable duties of solidarity, a principle

> 'which is incorporated directly into the contract along with the principle of good faith, which is vested with normative force, thereby requiring the contractual relationship to protect also the interests of the other party to the negotiation'.[18]

Reference is thus made once again, also by the Constitutional Court, to the principle of good faith and the capacity of the principles that are attendant to it to supplement or set aside the position negotiated by the parties.[19]

[17] Cf F. Criscuolo, 'Principio di proporzionalità, riduzione ad equità della penale e disciplina della multa penitenziale' *Rivista dell'arbitrato*, 385 (2006).

[18] See Corte costituzionale ordinanza 2 April 2014 no 77 n 10 above which reports in the final section, between inverted commas, the assertions made by the Court of Cassation in the renowned judgments 24 September 1999 no 10511, *Corriere giuridico*, 68 (2000), 20 April 1994 no 3775, *Giurisprudenza italiana*, I, 852 (1995) and 18 September 2009 no 20106, *Nuova giurisprudenza civile commentata*, II, 319 (2010).

[19] A suppletive function of good faith to contracts is recognised by E. Betti, *Teoria generale delle obbligazioni* (Milano: Giuffrè, 1953), I, 90; L. Mengoni, 'Obbligazioni "di risultato" e di "mezzi" (studio critico)' *Rivista di diritto commerciale*, I, 368 (1954); C. Varrone, *Ideologia e dogmatica nella teoria del negozio giuridico* (Napoli: Jovene, 1972), 234; P. Carusi, 'Correttezza (obblighi di)' *Enciclopedia del diritto* (Milano: Giuffrè, 1962), X, 710; C.M. Bianca, 'La nozione di buona fede quale regola di comportamento contrattuale' *Rivista di diritto civile*, I, 205, 211 (1983); G. Panza, *Buon costume e buona fede* (Napoli: Edizioni Scientifiche Italiane, 2013), 237; S. Rodotà, *Le fonti* n 8 above, 113. See contra A. Di Majo, *L'esecuzione del contratto* (Milano: Giuffrè, 1967),

This provides the opportunity to reiterate that, far from having those subversive tendencies that still evoke fear in many of us, the reference to good faith enables us to appreciate to the full how the very constitutional system of party autonomy expresses – and indeed encourages – the application of principles that seek to afford priority protection to the contractual parties' interest in performance, by ruling in relation to rules applicable to compliance with the obligations taken on. It must be clear that, within the perspective also of the Constitutional Court, the rebalancing of the positions of the contractual parties does not seek to require the parties to submit to arrangements to which they did not consent, having precluded their applicability, but only to that which appears to be in keeping with the full implementation of an economic programme according to an inherent market criterion, but which also ensures that the implementation will occur in a manner that is in keeping with the goals of the legal system. In this regard it is important to reiterate that this viewpoint cannot be reduced to the idea that good faith within performance may go so far as to establish a new goal in its own right, but rather to the different stance that good faith has the task of shaping the means (the conduct of the parties) with reference to the specific aim which the transaction seeks to achieve.

It is almost superfluous to repeat in this regard that the required conduct must be established with reference to the specific individual circumstances and that the assessment of the manner in which the contract is implemented must be carried out not in abstract terms at the time the obligation is established but rather with reference to the specific moment of performance, at which time the dialectic of interests is definitively established.[20] Whenever there is any distance between the planned activity under the contract and the realisation of the specific interests of the parties, that distance must include space for intervention by courts in the sense that they be required to assess whether the means are consistent with the specific ends and whether or not the conduct required can be enforced. Moreover, when giving specific effect to the abstract rule of conduct according to an assessment of adequacy, the Constitutional Court reiterates that the court must filter the values which the individual transactional programme is called upon to implement. Good faith thus becomes the reference for evaluating the specific enforceability (or not) of aspects of performance that are capable of rendering performance more beneficial for the obligee, subject to the requirement to refrain from aggravating the position of the obligor, filling the gap between

367, 375; Id, 'Delle obbligazioni in generale', in A. Scialoja and G. Branca eds, *Commentario al codice civile* (Bologna-Roma: Zanichelli, 1988), 302-303, 316.

[20] The specific circumstances of the case may have impinged upon the function of the contract and the interests furthered by it, thereby rendering essential a review by courts as to which interests deserve to be protected, see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comuntiario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 346. For a similar argument, see Corte d'Appello di Milano 29 December 1970, *Foro padano*, I, 277 (1971).

the neutral obligation of the obligor and the specific interest of the obligee.[21] Anything that runs contrary to the principle of good faith and the values attendant to it (which acts as a measure for determining that which is due) ultimately lies outside the area of that which is due, or outside of the obligation.[22]

The new contents thereby identified must inevitably reflect that which the parties should or could have envisaged in accordance with the above-mentioned goals. This is because an essential pillar of the axiology of the system of party autonomy is not only that the obligation must be consistent with that which was agreed to, but also that the rule of conduct imposed by the legal act must be knowable in advance, having regard to the specific subjective and objective circumstances of the overall matrix of interests. In other words, the risk associated with the overall transaction must be foreseeable, with the result that any conduct conducive to the full realisation of the interests underpinning the contractual provision will have mandatory status even if not expressly required under contract.

In spite of the clear rulings by the Constitutional Court and the Court of Cassation, various doubts and objections continue to be raised. Although the highest courts have ruled on the issue, some authoritative commentators still continue to point to the almost subversive seriousness of the system of consequences implied by them.

However, the clarity within the court rulings referred to deprives of any foundation the most frequent objection, which argues that the recourse to good faith as an instrument for *ex post* control vests courts with an almost arbitrary power, giving rise to unacceptable and highly dangerous uncertainty.[23] In fact, in line with the arguments set out above, courts have limited themselves in applying intra-systemic criteria for assessment (as the general clause manifests itself through these), which by contrast apply to the positive system at its highest levels, as such criteria must by definition dispel any uncertainty or arbitrary action.[24]

On the other hand, as has been significantly asserted by a first commentator

[21] Citing G. Romano, *Interesse del debitore e adempimento* (Napoli: Edizioni Scientifiche Italiane, 1996), 135.

[22] Concerning this argument see also F. Criscuolo, *Autonomia negoziale* n 12 above, 287.

[23] The possibility of any arbitrariness on the part of the courts within the review according to the requirement of good faith within contract is also excluded by G. Alpa, 'La completezza del contratto: il ruolo della buona fede e dell'equità' *Vita notarile*, 611 (2002).

[24] In fact, the substantive content of good faith may be traced back to the values underlying the legal system, including in particular the principle of solidarity governed by Art 2 of the Constitution (cf on all points S. Rodotà, *Le fonti* n 8 above, 68; the systematic value is stressed by G. Recinto, 'Buona fede e interessi dedotti nel rapporto obbligatorio tra legalità costituzionale e comunitaria' *Rassegna di diritto civile*, 271 (2002)). The case law has also followed this approach. Cf Corte di Cassazione 5 November 1999 no 12310, *Società*, 303 (2000); however, see also Corte di Cassazione-Sezioni unite 25 November 2008 no 28056, *Massimario Giustizia civile*, 1681 (2008); Corte di Cassazione 18 September 2009 no 20106, *Responsabilità civile*, 345 (2010), with note by A. Gentili, 'Abuso del diritto e uso dell'argomentazione').

to deal with the suppletive effect of general clauses,[25] the need for certain solutions is not one which courts must consider, as it is a value to be defended at the level of the underlying choices that impose binding direction on the policy objectives of the legislation.[26] And here we might be halted, if anything, by another type of objection, which was considered albeit briefly at the outset: are we certain that, in an epoch that is marked by the contradictions mentioned above and by the failure by politics to provide a vision for a coherent project for society, that these choices are clear and above all endorsed? Is it clear that the formal principle also has the backing of social sentiment?

Whilst I return to this matter below in the concluding section, all of this introduces an entirely different type of problem, which has nothing to do with the most common objections that continue to arise largely without reference to our specific times, in particular where there is spurious discussion of effects that supposedly result from a ruling concerning a situation of imbalance, discussing (full or partial) invalidity rather than the imposition of a duty to renegotiate, at all times in order to avoid breaking the taboo of a rebalancing ruling by courts.

In this regard we cannot avoid endorsing the arguments of whose who, even recently, have calmly repeated the warning of which we were all previously fully aware that, when reaching beyond the border of the specific individual case and raising the problem of interpretation and the imputation of supplementary provision on the basis of constitutional principles, we must all without major ado get used to new paradigms without delay and depart from the framework that so heavily conditioned our thinking.[27] Moreover, our scholars have been telling us for some time that this use of general causes was destined to overturn the principle that each case should be regulated by the specific contractual terms agreed to, so much so that it is difficult to understand how it could be possible that what now appears to be an essential feature of everyday experience should still arouse such resistance and repulsion.

On the other hand, the inadequacy of the principle that each case should be regulated by specific contractual terms agreed to has been objected above all with reference to the experience of an epoch in which features and functions of acts of party autonomy – of all acts – appear to us to have profoundly changed, in the sense that natural and moral freedoms to decide to act in the manner that

[25] See S. Rodotà, *Le fonti* n 8 above; Id, 'Le clausole generali', in G. Alpa and M. Bessone eds, *I contratti in generale* (Torino: UTET, 1991), I, 400, who – after having observed that 'the fact the general clause is destined to operate within the framework set out by other provisions is not a sufficient argument in order to (...) differentiate it from other types of legal norm', endorsing the assertions made by K. Engisch, *Introduzione al pensiero giuridico* (1968), Italian translation edited by A. Baratta (Milano: Giuffrè, 1977), 197 – discerns 'the true meaning of general clauses (...) within the sector of legislative technique'. See *contra* L. Mengoni, 'Spunti per una teoria delle clausole generali' *Rivista critica di diritto privato*, 10-11 (1986).

[26] See F. Criscuolo, 'Equità e buona fede come fonti di integrazione del contratto' n 12 above, 75-76.

[27] Cf N. Lipari, *Intorno alla giustizia del contratto* (Napoli: Editoriale Scientifica, 2016), 8.

most closely reflects needs of the individual can no longer be regarded as the mere expression of a fact, as a simple prerequisite for the legal rule.[28] This is because it was clarified some time ago that, within the post-modern age, the law cannot be accounted for purely in normative terms, an approach premised on positivism focused on state legislation,[29] and that, for reasons which are now taken for granted, regulations governing economic transactions can no longer be established by law but are increasingly set forth in bodies of rules proposed by operators themselves[30] with the result that, to use Enzo Roppo's expression, 'contracts create practice, practice generates use and use creates the norm'.[31] Within an epoch of crisis of sovereignty, propelled forward by the dynamics of digital society and the international economy, heteronomous regulatory power has portrayed itself as performing (also as a result of the blind trust placed by operators in the capacity of the market to self-regulate) and party autonomy is being increasingly called upon to perform a structural role of organising social sub-systems, detaching itself from schemata and axioms which, whilst having once been potentially suitable to explain the structure of phenomena, now represent a legacy that is unsuited to appreciating the functioning of such phenomena, within a dimension marked by increasing relationality.

The normative value of the contract, its suitability for performing a regulatory function, and its status as a source amongst sources inevitably ends up being highlighted, even though this requires us to reflect on the use of private power and on the guarantees of its correct exercise, and it is clear that all of this must occur within the context of equilibria that ensure first and foremost the proper operation of democratic institutions.

Thus, it is precisely in this regard that the notion of law, in which fundamental values underpinning the legal order drives us towards achieving results that are consistent with a juridified project of justice, not only must not create alarm but

[28] For a similar argument, see E. Betti, 'Teoria generale del negozio giuridico', in F. Vassalli ed, *Trattato di diritto civile* (Torino: UTET, 2nd ed, 1950), XV, II, 38. However, see also V.M. Trimarchi, *Atto giuridico e negozio giuridico* (Milano: Giuffrè, 1940), 42, who asserts that, before being a legal fact, a legal transaction is a social fact; L. Cariota Ferrara, *Il negozio giuridico nel diritto privato italiano* (Napoli: Morano, 1948), 54, 61; F. Messineo, *Manuale di diritto civile e commerciale* (Milano: Giuffrè, 9th ed, 1957), I, 461; A. Cataudella, *Sul contenuto del contratto* (Milano: Giuffrè, 1966), 147; R. Scognamiglio, *Contributo alla teoria del negozio giuridico* (Napoli: Jovene, 2nd ed, 1969), 100.

[29] A warning to this effect was provided, along with others, more than twenty years ago by President P. Grossi in his publication, 'Un diritto senza Stato (la nozione di autonomia come fondamento della Costituzione giuridica medioevale)' *Quaderni fiorentini*, XXV, 268 (1996).

[30] Consider for example the *lex mercatoria*, that is how international commerce imposes uniform contractual models which, along with customary practice and the enforcement mechanisms of the International Chamber of Commerce, create new rules devised by entrepreneurs in order 'to regulate in a uniform manner (...) the relations established within the economic unity of the markets', see F. Galgano, Lex mercatoria – *Storia del diritto commerciale* (Bologna: il Mulino, 1993), *Prefazione*.

[31] V. Roppo, *Il contratto del Duemila* n 8 above, 6, who rightly speaks of 'rules created through contract'.

also represent the only available option that is compatible with a correctly pluralist vision of our society, within a context and in an area in which it is increasingly more difficult to lay down rules with *a priori* effect, whilst by contrast it appears to be much more suitable to justify them with reference to arguments that may be said to be commonly endorsed, and as such in no way arbitrary.[32]

III. Legal Form and Guarantee Function for Giving Effect to Protected Interests

A second strand of decisions, including in particular judgments no 7 and no 283 of 2005,[33] traced out a passage which is highly significant in providing an adequate account of the function which formal requirements must perform under our system of contractual law and above all in rejecting the adequacy and proportionality of the sanction of fundamental nullity whenever that consequence appears to be unreasonable, with a view to the effective realisation of the interest underlying the imposition of the formal restriction, including under contract.[34]

The first judgment concerned the contractual form decided upon by the parties for a transport contract in relation to a provision which, in stipulating that a contract would be void if it did not fulfil a formal prerequisite, first held that there had been an unreasonable difference in treatment compared to contracting parties who chose to conclude verbal contracts, and secondly that – in the words of the judgment under examination, which the Constitutional Court has also used in support of similar decisions – 'the means used by the law

[32] In general, on the relationship between legal norm and the specific facts of the case, see A. Cataudella, 'Note sul concetto di fattispecie giuridica' *Rivista trimestrale di diritto e procedura civile*, 433 (1962). Within the German literature, see W. Flume, 'Rechtsgeschäft und Privatautonomie', in E. von Caemmerer and E. Friesenhahn (eds), *Hundert Jahre Deutsches Rechtsleben. Festschrift Deutscher Juristentag 1860-1960* (Karlsruhe: Müller, 1960), I, 135.

[33] See respectively Corte Costituzionale 14 January 2005 no 7, *Foro italiano*, I, 979 (2005), and Corte Costituzionale 15 July 2005 no 283, *Massimario di giurisprudenza del lavoro*, 736 (2005), with note by A. Vallebona, 'La gabbia non è sistema: la conversione legale dei lavori atipici invalidi non è costituzionalmente necessitata'.

[34] Consider for example Art 36, para 1, of the Constitution which, by way of exception to Art 1419, para 1, of the Civil Code, provides for the validity of contracts from which vexatious clauses have been removed, irrespective of whether the contractual terms as altered are consistent with the wishes of the parties (see on this issue A. Di Amato, *L'interpretazione dei contratti di impresa* (Napoli: Edizioni Scientifiche Italiane, 1999), 222). See also P. Perlingieri, 'Riflessioni sul "diritto contrattuale europeo" tra fonti e tecniche legislative', in Id, *Il diritto dei contratti fra persone e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003), 487; E. Capobianco, *Contrattazione bancaria e tutela dei consumatori* (Napoli: Edizioni Scientifiche Italiane, 2000), 167; however, see also S. Polidori, *Discipline della nullità e interessi protetti* (Napoli: Edizioni Scientifiche Italiane, 2001), 195-196; V. Rizzo, 'Contratti del consumatore e diritto comune dei contratti', in R. Favale and B. Marucci eds, *Studi in memoria di V.E. Cantelmo* (Napoli: Edizioni Scientifiche Italiane, 2003), II, 627; M. Pennasilico, 'L'interpretazione dei contratti del consumatore', in P. Perlingieri and E. Caterini eds, *Il diritto dei consumi* (Napoli: Edizioni Scientifiche Italiane, 2004), I, 145, 165.

were excessive having regard to the declared end'.[35]

In the second judgment, the question concerned a provision stipulating the fundamental invalidity of a part-time employment contract due to the failure to respect the requirement of form *ad substantiam,* holding that it was unreasonable insofar as – as stated in the judgment – the violation of an overriding rule regulating 'the content of the part-time employment contract that had been posited precisely in order to protect workers against vexatious clauses' had the effect of releasing the employer from any contractual obligation, thereby frustrating precisely the protective aim which the provision under examination was supposed to achieve. All of this – the judgment continues – can be avoided by an interpretation informed by constitutional law, which moreover was already endorsed by the Court in an important precedent from 1992 (on the reduction of working hours)[36] on the grounds that blanket invalidity due to a formal defect does not provide an adequate remedy for balancing the interests that are to be protected, whereas the consequences of classifying the relationship 'as a normal employment relationship, in view of the inefficacy of the contractual term choosing the special contractual type' is better suited to this goal.[37]

The rulings under examination reiterate that any law setting forth the consequences of violations of the rules on legal or contractual form must be conducted having regard to the function of the individual formal provisions within the context of the overall body of rules governing individual contracts. Thus, the crucial issue is that the focus must lie on the requirements underlying formal constraints, giving consideration to their merit, reasonableness, adequacy and compatibility with different solutions, in the light of the values and objectives that characterise the system.[38]

In other words, compared to an analysis that is centred essentially on Arts 1325, para 4, and 1418 of the Civil Code,[39] it is considered that a functional type of assessment will be more appropriate, as each legal form is an expression of its own specific function, of its own legally relevant rationale.[40] Within this perspective, it is not the sanction of nullity that enables us to classify the protected value or interest but, adopting a diametrically opposed perspective, it is the

[35] See for example Corte Costituzionale 4 February 2003 no 26, *Foro italiano*, I, 681 (2003).

[36] See Corte Costituzionale 11 May 1992 no 210, *Foro italiano*, I, 3232 (1992), with note by A. Alaimo, 'La nullità della clausola sulla distribuzione dell'orario nel *part-time*: la Corte costituzionale volta pagina?'.

[37] ibid.

[38] P. Perlingieri, *Forma dei negozi e formalismo degli interpreti* (Napoli: Edizioni Scientifiche Italiane, 1987), 41.

[39] Cf N. Irti, Idola libertatis. *Tre esercizi sul formalismo giuridico* (Milano: Giuffrè, 1985), 42-44; B. Grasso, 'La forma tra regola ed eccezione' *Rassegna di diritto civile*, I, 50 (1986).

[40] P. Perlingieri, *Il diritto civile* n 20 above, 425; however, see also Id, *Forma dei negozi* n 38 above, 45; Id, 'Note critiche sul rapporto tra forma negoziale ed autonomia', in Id et al, *La forma degli atti nel diritto privato, Studi in onore di M. Giorgianni* (Napoli: Edizioni Scientifiche Italiane, 1988), 100.

axiological foundation to the legislative provision that gives rise to the consequence that is most consistent with the system.

In fact, it must be noted that the justification for formal requirements may be found in the requirement to protect aspects of contractual activity, which may differ and vary from case to case, focusing in some cases on subjective aspects of the legitimation, capacity and classification of the contracting party, and in other cases on the very function of the contract, and in others still on the subject matter of the transaction.[41]

On the other hand, the constitutional justification for formal requirements can only be found in the suitability of the formal type – and the consequences of the violation of formal requirements – for giving effect to the protected interest.[42] A formal requirement is never a purpose in itself but rather, according to long-standing principles, constitutes a 'means to a goal',[43] which can be assessed in two different ways: on the one hand by considering whether there is logical congruence between form and substance, between instrument and objective, and on the other hand by making a value judgment with the purpose of identifying the current foundation for the provision in what Emilio Betti described in terms of a 'relationship of principle-consequence'.[44]

It is thus that the form becomes a guarantee in the service of values and it is on this that the refusal of any *a priori* judgment concerning the exceptional status of formal requirements must be based.[45] On the other hand, such

[41] The form may be related to one or more aspects, depending upon the rationale of the rule providing for it (P. Perlingieri, *Forma dei negozi* n 38 above, 44). See regarding this issue also Id, *Il diritto civile* n 20 above, 426.

[42] To adjust the expression used by N. Bobbio, 'L'analogia nella logica del diritto' (Torino: Istituto giuridico della R. Università, 1938), 104, it is necessary to identify the 'sufficient reason' for the formal requirement. From the same perspective, see in particular M. Giorgianni, 'Forma degli atti, Diritto privato' *Enciclopedia del diritto* (Milano: Giuffrè, 1968), XVII, 999; A. Luminoso, *Il mutuo dissenso* (Milano: Giuffrè, 1980) 318; and very clearly D. Barbero, 'A proposito della forma negli atti giuridici (L'efficacia del testamento olografo nonostante l'incompletezza della data)' *Ius*, 441 (1940).

[43] D. Barbero, n 42 above, 443.

[44] E. Betti, *Interpretazione della legge e degli atti giuridici* (Milano: Giuffrè, 1971), 169. In the same sense, Corte Costituzionale 14 July 1971 no 174, *Foro italiano*, I, 2465 (1971); Corte Costituzionale 27 June 1986 no 176, *Rassegna di diritto civile*, 1069 (1986), with note by P. Perlingieri, 'La forma legale del licenziamento individuale come 'garanzia' '.

[45] However, the predicate of the exceptional and inderogable status of formal requirements is affected by its dogmatic setting, as it obtains independently of any inquiry into the framework of interests and values underlying those formal requirements, see P. Perlingieri, *Forma dei negozi* n 38 above, 43. The exceptional nature of formal requirements is asserted by E. Colagrosso, *Teoria generale delle obbligazioni e dei contratti* (Roma: Stamperia nazionale, 1948), 218; M. Allara, *Le fattispecie estintive del rapporto obbligatorio* (Torino: UTET, 1948-1952), 229; A. Genovese, *Le forme volontarie nella teoria dei contratti* (Padova: CEDAM, 1949), 17; E. Betti, *Teoria generale del negozio giuridico* (1943), reprint edited by G. Grifò (Napoli: Edizioni Scientifiche Italiane, 1994), 285; A. La Torre, 'La forma dei negozi risolutori' *Giustizia civile*, I, 154 (1962); R. Sandulli, 'Forma del negozio risolutorio di un preliminare di vendita immobiliare' *Giustizia civile*, 431 (1967); R. Nicolò, 'La *relatio* nei negozi formali' *Rivista di diritto civile*, 536

requirements will appear to be compliant with rules whenever they act as an instrument for furthering those values.

It is also necessary to discuss the suitability of the canon of contractual justice to contribute to shaping the arrangements for implementing the principle of conservation and the very system of contractual invalidity. In fact, in cases such as those that have come before the Constitutional Court the sanction of nullity or in any case of total invalidity and even termination have proved to be inadequate – or if you will disproportionate – where it is possible to deal with original or supervening defects using more suitable instruments. Here too, it must be reiterated once again that a balance must be struck between autonomy and heteronomy, between freedom and the law of the market, tailoring the choice of remedy to the effective implementation of the value in question.

Furthermore, the value of these rulings lies in the capacity to disseminate a new sensitivity that is capable of overcoming the old paradigms premised on certainty in order to make us aware of the fact that the law manifests itself through techniques of argumentation which lend themselves to the application of malleable principles according to shared parameters as they are recognised as being capable of responding to the calls for justice emerging from society as a whole.

IV. Pluralism and 'Mildness' Within the Constitution: Theory of Sources and Theory of Interpretation. The Sovereignty of the Constitution Within the Positivist Tradition

At this stage it becomes unavoidable to engage – albeit briefly and by way of conclusion – with what appears to me to be the true problem within times of financial crisis, and above all crisis of values, that is whether within this epoch of pluralism and the constitutionalisation of the requirement of a balanced budget the axiological foundations of social project set forth by the Constitution still expresses a pre-eminent feeling in favour of the dissemination and increasing endorsement of a culture. This culture is highly marked by individualist tendencies and misconstrued notions of pluralism, indeed. We must assess whether in an era marked by proclaimed regression of the model of sovereignty-compliance the only option that remains is to consider the law from a sociological perspective. Or whether we can still delude ourselves that it is possible to recover that autonomy of legal reflection which positivism undeniably had the merit of achieving. This is because, whilst on the one hand a certain level of awareness of the unitary nature of the social phenomenon must be noted within contemporary society (of which law is only one of multiple aspects); on the other hand – and

(1972); O. Prosperi, 'Forme complementari e atto recettizio' *Rivista di diritto commerciale*, I, 198 (1976); V. Roppo, *Il contratto* (Bologna: il Mulino, 1977), 88; A. De Cupis, 'Sul contestato principio della libertà delle forme' *Rivista di diritto civile*, II, 205 (1986).

without causing any discomfort to Josef Esser in this regard[46] – one must also appreciate the decisive reaction whenever the emphasis by which social and factual is asserted to be supreme over the normative fuels fears that the law may lose its role. This role necessarily presupposes what Esser defined as the 'representation of conceptual goals and evaluations'.[47]

This response is that, within a democratic State governed by the rule of law, featuring a hierarchy of sources with a rigid Constitution at its top, it may never be stated that there is no shared essential project of justice as an expression of constituent values and not merely of moral imperatives, albeit as legal principles of public order that have direct effect on the lives of individuals.

This is in actual fact the only way of correctly interpreting the idea, which has also been proposed by others (although with a different scope) according to which State sovereignty has been replaced by the sovereignty of the Constitution.[48] The expression is truly appropriate insofar as it overturns the relationship between individuals and the State. However, above all enables us to provide a correct account of the axiological pluralism underpinning the Constitution itself.

The project of justice under discussion can certainly not be said to be shared from a factual viewpoint; however, even if it were not shared by all (and the fragmentation, including on a cultural level, of society makes us aware of this eventuality), it would assert itself with the democratic force of legality, which avoids us having to discuss the possibility of forced imposition of a dominant model. This is the main reason why I completely reject the idea that a pluralist constitution is not followed but is realised through political debate and a pluralism of values. This conception is based on the idea that, within societies marked by a certain degree of relativism, the sole task of constitutions is to realise the preconditions for the possibility of cohabitation, and never of directly realising a predetermined project of cohabitation. Thus, as a starting point providing a guarantee of legitimacy for each member of society, the Constitution could launch competition in order to impress upon the State one particular direction or another, within the ambit of the various possibilities offered by constitutional compromise.[49] For the theory under examination, this is the precondition for democratic constitutions in an era of pluralism and self-determination, an era in which the assumption of autonomy is realised through the constitutional mechanism of the simple 'proposal' of solutions and of possible cohabitation as a 'compromise of possibilities', and not a rigidly directive project that may be taken as an *a priori* given by politics, vested with its own force from top to bottom. This is tantamount to staying that it is not the Constitution but the constitutional policy resulting from pluralist aggregations and movements that

[46] J. Esser, *Precomprensione e scelta del metodo nel processo di individuazione del diritto*, Italian translation by S. Patti and G. Zaccaria (Napoli: Edizioni Scientifiche Italiane, 1983), 29.

[47] ibid.

[48] Cf n 10 above.

[49] See G. Zagrebelsky, *Il diritto mite* n 9 above.

may give rise to specific constitutional outcomes. This is because the constitutional policy under discussion appears essentially not as the 'execution' of the Constitution but rather as its realisation through one of the multiple and changing equilibria within which it may become effective.[50] This leads to the image of constitutional 'mildness' through which one ends up asserting that none of the constitutional values or principles can be taken to have absolute value – unless one imagines a constitution that shrinks back from any claim to unity and integration, even if this is not compatible with its very own pluralist basis. The only meta-value would thus be this strange idea of pluralism which manifests itself in the requirement for the coexistence of a multiplicity of values (even if not compatible) and the desired loyal engagement between them.[51]

However, every constitutional value should thus be construed as a weak value, which is conditional and subject to balancing, including even that part of the immutable hard core of the 1948 Constitution consisting in the very republican form of the state.[52]

And yet the Constitution has been charged with a project rooted in strong and absolute values in that they are not subject to review or alteration.

It is almost obvious that the dynamics of globalised markets are barely sensitive to this project, as they are informed by forces directed at the concentration of wealth, which not infrequently lead to the subjugation of individuals. In order to gain control over these dynamics it is not sufficient to rely solely upon moral authority. In order to gain control over these dynamics the law must state its position and can – and in fact must – use coercive instruments in order to shape the conduct of individuals so as to achieve essential objectives.[53]

For this reason, while describing social rights, it is a conquest achieved by the weaker through democratic participation, predominantly in terms of social costs.[54] Moreover it represents a challenge when in particular attempting to provide a

[50] G. Vettori, 'Diritti fondamentali e diritti sociali. Una riflessione fra due crisi' *Persona e mercato*, 3-11 (2011). According to L. Mengoni, 'Persona e iniziativa economica privata nella Costituzione', in G. Vettori ed, *Persona e mercato. Lezioni* (Padova: CEDAM, 1996), 36, 'Expectations placed in the welfare state, which is founded on the personal values protected by the Constitution, cannot realistically be defined without reference to specific financial feasibility. If that limit is exceeded the welfare state will drive itself to ruin'.

[51] G. Zagrebelsky, *Il diritto mite* n 9 above.

[52] A possible balancing between fundamental values and budgetary principles is discussed by A. Morrone, 'Crisi economica e diritti, Appunti per lo stato costituzionale in Europa' *Quaderni costituzionali*, 92 (2014). See contra R. Bin, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale* (Milano: Giuffrè, 1992), 109; C. Pinelli, 'Diritti costituzionali condizionati, argomento delle risorse disponibili, principio di equilibrio finanziario', in C. Pinelli ed, *Nel lungo andare. Una Costituzione alla prova dell'esperienza* (Napoli: Editoriale Scientifica, 2012), 269-280; F. Gabriele, 'Diritti sociali, unità nazionale e risorse in(disponibili): sulla permanente violazione – in attuazione della parte prima (quella "intoccabile") della Costituzione' *Rivista AIC*, 13 September 2013, 16.

[53] See P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 20 above, 505, 515.

[54] See P. Barcellona, *Diritto privato e società moderna* (Napoli: Jovene, 1996), 147.

formal justification for that viewpoint by asserting that the rule laid down by Art 81 of the Constitution is also an expression of a value that should be balanced out with the requirements of solidarity and substantive equality[55] that it is the time to reassert forcefully the role and binding force of juridified values. In other words, it is time to give meaning to the slogan that calls for a 'return to the Constitution'.

The sovereignty of the Constitution means that not even economic crisis or any supposed national interest could cause these values to be sacrificed, but that social benefit which autonomy is supposed to further is an integral part of the transformation project provided for under Art 3, para 2.[56] Using words of an illustrious constitutional scholar,[57] economic efficiency is not a value in itself, thus constitutional regulation of economic relations does not have as its sole and immediate objective the pursuit of financial equilibrium but draws on these instruments in order to achieve social equality.

This is the philosophy that underlies the legal system and it is in this direction that efforts of the lawyer called upon to provide an account of its rationality must be focused, within a constant dialogue between judicial practice and legal science.

It is not therefore a tyranny of values or a 'metaphysical' conception of social debate, but rather an expression and recovery of the best and most topical tradition of positivism, within a theory of interpretation that is inspired by full respect for the theory of sources and their hierarchy.

This is why to assert that the Constitution is a body of rules that is now meaningless or that the current phase is marked by a process of dissolution of the very idea of the Constitution is to give up on our task which, on the contrary, takes on enormous importance within the ongoing search for adequate and reasonable solutions.[58]

In conclusion, I would like to recall several passages from a publication by Ludwig Raiser,[59] a supporter of the German liberal bourgeoisie with close ties to the establishment, and thus not exactly a dangerous subversive but a character who, as is known, was marked by a strong ethical-religious tension. In his publication – displaying such a level of sensitivity towards social issues of the

[55] See Corte Costituzionale 14 June 1995 no 244, *Giurisprudenza costituzionale*, 1764 (1995).

[56] A. Baldassarre, 'Iniziativa economica privata' *Enciclopedia del diritto* (Milano: Giuffrè, 1971), XXI, 603, who asserts that social utility cannot be achieved through the exercise of a discretionary power by ordinary legislation.

[57] M. Luciani, 'Economia nel diritto costituzionale' *Digesto delle discipline pubblicistiche* (Torino: UTET, 1990), V, 378. See along similar lines also M. Nuzzo, *Utilità sociale ed autonomia privata* (Milano: Giuffrè, 1975), 45; V. Ottaviano, 'La regolamentazione del mercato. I principi costituzionali', in F. Galgano ed, *Trattato di diritto commerciale e di diritto pubblico dell'economia* (Padova: CEDAM, 1979), III, 456; G. Amato, 'Il mercato nella Costituzione' *Quaderni costituzionali*, 10 (1992).

[58] P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 20 above, 56.

[59] See L. Raiser, 'Funzione del contratto e libertà contrattuale', in Id, *Il compito del diritto privato* n 11 above, 73.

contemporary age that the lines appear to have been written in the 21st Century – when addressing the issue of the relationship between autonomy and values, the great civil law scholar stated as follows: those who trust 'in a fair result produced by the simple compromise between two self-interests nurture a faith in the contractual process that is even greater than that nurtured by the first Liberal era, which at least postulated a harmony resulting from cooperation between all forms of self-interest. In reality, the compromise between opposing interests is always also a compromise between powers: success is dependent upon the equilibrium between the forces in play', such that 'contractual justice (...) presupposes action directed at protecting the socio-economic Constitution'.[60]

Furthermore,

> 'The very nature of private autonomy implies the possibility that, when governing their relations, the parties may depart from notions of functionality and justice received by the legal community. If we recognise the importance of autonomy and leave the necessary space we must accept this tension, confident that the legal order will in any case be able to assert its values. And this will happen thanks to the persuasive force that a fairer legal system can exert, and also by virtue of the instruments of coercion placed in the service of the law'.[61]

I think that we should start from the topical relevance of these teachings in order to avert the most tangible risk in a time of crisis, namely the risk of being overwhelmed by a nihilist vision of the law,[62] which would deprive us of the tension and enthusiasm necessary in order to perform our task properly, as well as depriving our children of the hope of being able to contribute to building the future.

[60] ibid 89.

[61] ibid.

[62] See N. Irti, *Nichilismo giuridico* (Roma-Bari: Laterza, 2004), VI, 37, who defines the law as a mere 'technique'. However, see also N. Irti and E. Severino, 'Le domande del giurista e le risposte del filosofo (un dialogo su diritto e tecnica)' *Contratto e impresa*, 665 (2000). For a critical treatment, see P. Perlingieri, 'Le insidie del nichilismo giuridico. Le ragioni del mercato e le ragioni del diritto' *Rassegna di diritto civile*, 3 (2005), and Id, *Il diritto civile nella legalità costituzionale* n 20 above, 123. For a critical analysis of the nihilist vision, see also L. Mengoni, 'Diritto e tecnica' *Rivista trimestrale di diritto e procedura civile*, 1 (2001); F.D. Busnelli, 'Diritto privato italiano. Radiografia di un sistema' *Rassegna di diritto civile*, 18 (2002); G. Benedetti, in P. Perlingieri ed, *Temi e problemi della civilistica contemporanea, Venticinque anni della Rassegna di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2005), 589; M.A. Cattaneo, *Diritto e forza. Un delicato rapporto* (Padova: CEDAM, 2005), 47; A. Baldassarre, 'La divisione fra «diritto privato» e «diritto pubblico»: dallo 'Staatsrecht' al 'Verfassungsrecht' e alla 'globalizzazione' ', in Id et al, *Il diritto civile oggi. Compiti scientifici e didattici del civilista, Atti del 1° Convegno Nazionale SISDiC* (Napoli: Edizioni Scientifiche Italiane, 2006), 18; N. Lipari, 'Situazioni di garanzia', ibid, 1029.