Essays

The Civil Wrong Between Private Relationships and Social Order

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Abstract

A new approach to the functions of liability allows the observation of civil wrong from two different perspectives: the relationship between the wrongdoer and the injured party and the system of values in its natural aspiration to stability. The unjust harm caused by the wrongdoer may entail the reinstatement of the victim's property and the concomitant protection of important social interests. The Roman tradition, the law-making process of the Middle ages, the experiences of some European countries and the recent case law evolution show the continuous swinging of civil liability between the compensatory function for the damage caused and the punitive sanction for the wrongful conduct.

I. The Need for Effective and Full Protection of the Human Person

The civil liability system is influenced – more than any other sector of private law – by the deep economic transformation and the ceaseless social and cultural changes of our times. The technological revolution, the organization of a complex IT system, and the use of sophisticated means of wealth production have caused greater fragility of human persons, exposing their psychological and physical well-being to previously unthinkable aggressions and exponentially increasing the need for their effective and full protection.[1] The passage from a simple social structure, based on the movement of goods that are essential for survival, to a complex organization built on relentless market development, has already led to a new understanding of the concept of damages.

A different approach to the problem of infringement of absolute and immediate legal situations[2] and, in particular, of rights having the individual as

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[1] The insights of outstanding legal theory highlight some dramatic aspects of the historical period we are witnessing, especially with respect to the negative consequences of efficiency-driven human conduct: P. Perlingieri, 'Mercato, solidarietà e diritti umani', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 251, states that over the last decades efforts have been focused more on raising the average level of wealth than on organizing an institutional structure of just society that may be able to forestall the proliferation of harmful events.

[2] The expression civil liability indicates the instrument through which a system responds to the infringement of an interest to be preserved, by imposing an obligation for the wrongdoer to compensate for the damages caused to third parties. Traditionally, the infringement of a

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an objective and subjective reference point,[3] is necessary because of new and pervasive human behaviors that are the result of an ever-changing society, very often detached from any value-based paradigm. Profit maximization, the pursuit of economic efficiency, mass production and distribution are dramatic drivers, not only at the market level, but also in terms of civil liability, that may encompass a very heterogeneous range of harmful events. Thus, societal metamorphosis leads to a remodulation of opinion regarding the aims of liability and the functions it has to fulfill, representing a break with past approaches that do not conform to a modern idea of the relationships between private parties or between a private party and a public entity.

The revision of the liability theory requires rigorous study to be carried out taking into account the specificity of each situation and the strong historical and philosophical implications of the basic question, deserving insight by the jurist who needs to consider the past, be accountable to the urgencies of today, and be oriented towards the future. The awareness that liability is intertwined with several areas of knowledge and the certainty that non-contractual civil wrong involves not only strictly legal, but also ethical issues,[4] can provide the basis for a set of considerations useful in providing suitable solutions to practical problems.

II. Liability: Obligation to Guarantee, Undertake a Commitment and Ensure a Result

To outline the boundaries of civil wrong in the current legal system, it is useful to start from reflection on the concept of liability, encompassing the multiple dimensions of the social sphere: politics, law, philosophy and morality. Analysis of the term liability can help understand the main issues related to non-contractual damage. The term generically makes reference to the notions of 'guarantee', 'undertake a commitment' and 'attain a result'.[5] The underlying

creditor's interest to obtain compensation, as a consequence of a debtor's failure to comply, does not fall within this scope. Subjective legal situations are distinguished according to some elements that become criteria for the identification of the rules of liability applicable in the event of infringement. Credit-related situations, characterized by lack of immediacy and relativeness, trigger the protection mechanisms laid down in Art 1218 of the Italian civil code. Rights *in rem* and existential situations, in contrast, are based on absoluteness and immediateness, insofar they can be exercised towards anyone and without third-party mediation. Despite the substantial difference of the underlying interests, situations *in rem* and rights *in personam* have convergence points in several theories on aquilian liability, making it necessary to draw a demarcation line – that is increasingly blurred, indeed – between material and non-material damages.

[3] On the human person as the holder of rights and the objective reference point of the legal relationship, see P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Napoli: Jovene, 1972), 188.

[4] See G.P. Calabrò, 'Presentazione', in Id, *La nozione di responsabilità tra teoria e prassi* (Padova: CEDAM, 2010), XI, who argues how complex the notion of liability is and how many areas of human knowledge it involves.

[5] P.B. Helzel, 'La nozione di responsabilità baricentro tra etica, diritto e politica', in G.P.

consideration is that liability is not the response to a generic demand from third parties; if this were the case, it would be placed within the intellectual sphere of knowledge saturation, thus depleting the term of its natural significance of promise, or better, fulfillment of a duty.

In the hypothesis of balance disruption, the response consists of an attempt to remedy the disruption to the order of human relations and, therefore, a restorative action to the rift, division or divide caused.[6] The idea of a loss of value connected with the disruptive event, is implicitly (and positively) confirmed by the response of the liable party. In this perspective, liability as a human response aiming at the restoration of a disrupted balance, represents the divide between good and evil, which is to say value that is intended to make up for loss.[7] The need for the liable party to respond to the occurrence of certain events is not a generic promise, but a commitment to engage in conduct that becomes unavoidable because of the other party's expectations[8] and the social need for restoration of balance.

It is clear that the concept of liability assumes the occurrence of events that go beyond the delimited sphere of the individual. Several entities are needed to concur to liability; in fact, one cannot respond and undertake a commitment towards oneself,[9] at least not in the sense of being aware of the significance of a duty (that is morally and legally meaningful) to engage in a rule-compliant behavior. It is evident that the existence of rules is closely linked with the need for maintaining a balance, which means also harmony and stability of social relations.

Thus, response[10] and commitment should take place in a relational context

Calabrò ed, *La nozione di responsabilità tra teoria e prassi* n 4 above, 14, has carried out a thorough lexical analysis of the term liability. The meaning of this concept is, according to the author, exchange of collateral, promises and commitments.

[6] For the meaning of the term see C. Maiorca, 'Responsabilità' *Enciclopedia del diritto* (Milano: Giuffrè, 1998), XXXIX, 1004. For further information see M. Zanatta, 'Figure della responsabilità nel mondo greco', in Id and F. Bianco eds, *Responsabilità e comunità* (Cosenza: Pellegrini editore, 2007), 11, who noted that the response implies the renewal of the commitment and of the promise made, as well as of the guarantee provided.

[7] M. Zanatta, n 6 above, 12.

[8] The notion of liability as the undertaking of a commitment that cannot be avoided is the basis of the assumptions by M. Cacciari, 'Intervento introduttivo', in Id, *Sulla responsabilità individuale* (Bergamo: Gorle, 2002), 11.

[9] In this respect, see W. Schulz, *Le nuove vie della filosofia contemporanea: responsabilità* (Genova: Marietti, 1988), 118.

[10] As previously pointed out liability implies a response. Thus, a relation between apparently different terms, such as response and liability, is established. On this subject see the enlightening contribution by G. Steiner, *Vere Presenze* (Milano: Garzanti, 1989), 135: being liable to the primary motion of semantic trust means in the full sense of the term, accepting the obligation to respond to those who question us. Also in the German language there is a close connection between liability and response: A. Da Re, *Filosofia morale* (Milano: Bruno Mondadori, 2003), 155, notes the intimate connection between the terms *Verantwortung* and *Antwort*. See also E. Levinas, *Totalità e infinito. Saggio sull'esteriorità* (Milano: Jaca Book, 1992), 174.

that gives meaning to the conduct of the liable person and to third parties' expectations for a new behavior, which can safeguard their own interests.[11] The relationship among multiple entities, that is the communicative dimension of society, is the fundamental pre-requisite of liability. The reciprocity of human behavior justifies the existence of the liability-triggering act and the implementation of related remedies.

Liability is important within a context that is at the same time subjective and collective. Private relationships, social relations and obligation to respond to certain actions are the key elements of the issue. From a general point of view, thus, liability is the basis for the reinstatement of a disrupted order because of an event caused by men, considered in their capacity to understand the scope and consequences of their actions, and it is the requirement of a rebalancing solution that can affect both the sphere of legal relations and the more intimate sphere of the moral conscience of individuals. Ethics and law, being fundamental pillars of society, represent the content of liability.[12]

[11] According to S. Pugliatti, 'Autoresponsabilità' *Enciclopedia del diritto* (Milano: Giuffrè, 1959), IV, 452; Id, *Responsabilità civile* (Milano: Giuffrè,1968), II, 11, liability in its positive dimension recalls the concept of relation, as there is the possibility for the wrongdoer to face the consequences of his/her conduct because of the damages caused to the victim. It is a legal effect that – as confirmed by the core dimension of liability, ie injustice – is applied to the sphere of typical relations.

[12] Approaching the issue of non-contractual liability requires a reflection on the close relationship between two spheres: law and ethics. In the early years of the last century some authors wrote that between law and ethics there are indissoluble bonds, a continuous spiritual exchange of forces and a constant influence. Such a process of penetration and incorporation increased with the evolution of civilization, see F. Ferrara, *Trattato di diritto civile italiano* (Roma: Athenaeum,1921), I, 26. Law is one of the most significant expressions of the culture of a society; ethics is the foundation supporting any choice we make and it is what enlightens any type of social or legal rule from the inside. Through law, situations and relations are disciplined, and though law we settle our world which, because of its extreme variety, needs to be regulated, composed and harmonized. Law has, thus, an adjusting function and a regulating ability. Without order there is no unity and unity is the fundamental requirement of balance. Disharmony as the absence of law or incapacity of the law to fulfill the needs of the human being gets worse whenever there is no ethical justification for human conduct. Ethics, as a branch of philosophy, focuses its attention on the rationale that assigns a moral substrate to human conduct in order to sort them into good, just or lawful conducs or into unjust or morally inappropriate behaviors. Ethics implies the obligation to find the most intimate and profound meaning of existence and of human actions, as well as the obligation to carry out projects of solidarity and justice. In this respect see A. Lasso, 'Centralità della questione etica e rilevanza dell'interesse non patrimoniale nella regolamentazione del mercato', in C. Martinez Sicluna Y Sepulveda ed, *L'etica nel mercato* (Padova: CEDAM, 2011), 116. In the current society, ethics is not a complex system of rules, but a primordial and essential need for justice. Such a primeval need occurred before any need for settlement or evolution of legal science. Further analysis of such reflection is possible by reading the contribution by G. Auriti, *Il valore del diritto* (Sant'Atto di Teramo: Edigrafital, 1996), 18. On the matter see also A. Dal Brollo, *La moralità del diritto: assiologia del diritto nel pensiero di Lon L. Fuller* (Milano: Giuffrè, 1986), *passim*. Recently, D. Castellano, *Ordine etico e diritto* (Napoli: Edizioni Scientifiche Italiane, 2011).

III. The Evolution of Liability and the Philosophical Contribution

Because of the complexity of the concept of liability, it is useful to examine some features highlighted by philosophical studies. The analysis of the evolution of liability – that is a transversal phenomenon that encompasses several areas of human experience – may lead to some conclusions on the civil wrong. Philosophy has, over time, highlighted the indissoluble bond between liability and liberty. The connection between the two concepts, however, does not prevent them from being intrinsically deemed as two opposing forces.[13]

On the one hand, there is the freedom of individuals, that is their ability to self-develop and self-determine; on the other hand there is the collective power to raise obstacles to human conduct, binding individuals not to trespass the limits outlined by superimposed rules. The first sphere is home to an individual strength aiming towards the exercise of freedom; the second sphere involves a social power aiming to bind and restrain human action.

The ground of individual freedom of action is very stratified: on the first layer, there is freedom, as an unhampered strength; at the second level there is freedom as the power to express one's own will; next, there is a layer where freedom lives as the ability to move towards the desired goals; and finally, there is the free possibility to aim at an end involving third parties, beyond the limited dimension of individual goals.

Within the social sphere it is possible to identify several levels corresponding to those in the individual sphere: the harmonized social aggregate, bound together by a centripetal cohesive strength; the system as the expression of an order; the aggregate aiming to achieve the objective of security; and the social structure moving towards the accomplishment of the needs of the co-members.[14] Considering these layers, the relationship between freedom and rules is evident.[15]

[13] G. Limone, 'La coscienza morale tra libertà e responsabilità' *Quaderni del Dipartimento di Scienze giuridiche Seconda Università di Napoli*, 9 (2012).

[14] G. Limone, n 13 above, 10.

[15] The idea of freedom as lack of rules is irrelevant. The development of a complex and articulated system of rules and the progressive awareness of their need, for the purposes of civilized coexistence, led many to consider ancient ideas of freedom obsolete, as they are currently incompatible with the evolution of history. In England an idea of freedom emerged which was in contrast with that inspired by republican principles. The author was Thomas Hobbes and the theory was based on the principle of the lack of rules. The theory was bound to become the prerequisite for an absolutist vision of the State. According to T. Hobbes, 'Leviathan or the Matter Forme and Power of a Commonwealth, Ecclesiasticall and Civill', in A.R. Waller ed, *The Matter, Forme and Power of a Commonwealth, Ecclesiasticall and Civill* (Cambridge: University Press, 1904), 1588, natural right is the liberty each man has of using his natural faculties as he wishes to preserve his nature, his life, and, therefore, the liberty to do anything which, based upon his judgment and reason, he will consider suitable to pursue a given purpose. Liberty means the lack of external impediments, which impediments may take part of a man's power to do what he would, but cannot delay him from using the power left to him, according to his judgment and reason. John Locke's assumptions run diametrically contrary. As noted by M. Merlo, *La legge e la coscienza. Il problema della libertà nella filosofia politica di John Locke* (Milano: Polimetrica,

If it is true that no freedom exists without rules, it is also true that rules are not external entities through which freedom is disciplined, freedom being a principle implemented through the means intrinsic to the rules, which have the same nature as freedom.[16]

In its centuries-old history, the concept of freedom – emphasized here for its connection to liability – was analyzed from different perspectives, with fundamental differences, based on the historical context, from ancient times until today. Currently, the concept of freedom is approached from a social-political perspective that has become dominant in a society oriented towards modernity and progress. In this evolutionary perspective, in fact, the idea that freedom is not simply doing whatever one wants is increasingly well-grounded. In a state or superstate system, ie a complex society disciplined by rules made at different levels, freedom lies in the possibility to produce those changes that are allowed by multilevel rules.[17] It is basically freedom within the law, rather than from the law, the latter being considered as the expression of wide and different regulatory powers. The basic idea is that one is free notwithstanding one's duties, but as a result of the latter and by virtue of their order-establishing power.[18]

In this understanding of freedom, the key element lies in 'doing', or dynamic action, rather than in 'wanting', with further insight into positive and negative freedom, investigated by the philosophical science with complex and refined results. Therefore, the issue of freedom is not so much debated within a metaphysical framework, but in a legal and ethical one.

Similarly to that of freedom, today the related concept of liability should be radically revised, since the action of private and public entities is affected by new elements that were unknown in past times. The omnipotence of technology leads to the inability to predict the consequences of the effects of free human action.[19] Today, as a consequence of the huge and dominating development of instrumental power, the maximum potential of action corresponds to the minimum ability to predict:[20] the more the ability to pursue economic efficiency

2006), 102, according to the English author, where there is no law there is no freedom: for liberty is to be free from violence from others. The end of law is not to abolish or restrain, but to preserve and enlarge freedom.

[16] The idea whereby rules are not external limitations to freedom, but reasons justifying the attribution of freedom to individuals, affects – according to common approaches – the entire system of private law relations. Suffice it to mention the limitations to property, to business activity and to the wider concept of contractual freedom. The social function of property, the social utility of business and the legal limitations to contractual freedom can provide a chance to reflect on the relationship between freedom and rules.

[17] C.L. de Montesquieu, *Lo spirito delle leggi* (Milano: Rizzoli, 1967), 204.

[18] ibid 210.

[19] On the topic, see P.B. Helzel, n 5 above, 26, who affirms that technology has today become the supreme power that allows men to set themselves free from their state of inferiority in comparison with nature.

[20] According to H. Jonas, *Il principio di responsabilità. Un'etica per la civiltà tecnologica* (Torino: Einaudi, 1990), 91, progress and technology provided human action with completely

and utility objectives increases and speeds up, the more the possibility to predict the consequences of their achievement decreases. Currently, the ability to predict is fundamental, or even vital, if we consider that the purpose of human action should be the common interest and the general utility.

In this context, the principle of prudence is highly relevant, implying an unavoidlable rethinking of the concept of liability in its legal, political and ethical meanings. In conjunction with liability, freedom refers to the aim pursued by the action of a single person or a group of people holding specific interests. In particular, it should be considered that some unlawful, liability-triggering conduct could have an impact on the social order and on the living conditions of future generations. It is difficult, yet essential, to find a principle that may be the foundation of a human behavior that is inspired by the freedom to make ever-different choices. Human conduct is endowed with value if it is driven by principles suitable to ensure the preservation of an order or the establishment of a new balance that excludes interpersonal and social conflicts.

Although freedom and liability act on different spheres, the connection between these two dimensions is evident when human behavior is seen in relation to regulatory provisions. Freedom is the natural way of individuals of expressing themselves; liability is the consequence of failure to comply with binding rules. Powers, provisions and values identify the sense of human experience, within which the legal and moral limitation of compliance is the reason that justifies the attribution of areas of freedom. The observation that the theme of liability lies within the space between rights and duties, in the galaxy of subjective situations having the human being at its core, is consistent these considerations.[21] Liability and freedom are only apparently in conflict: only the one who is free will be able to be liable and only the one who is really liable will be able to be completely free. If liability assumes a condition of freedom, the exercise of freedom within the boundaries of law presumes liability.

These observations pave the way to a further consideration, which could logically precede the analysis of the role of civil liability within the system of private-law relationships.

It has been highlighted that the institutional function of liability is strictly related to mechanisms of justice within intersubjective relations.[22] On the other hand, in the Italian legal system, compensation for damages is genetically an expression of a specific form of justice.[23]

new spheres that were not in the orbit of the human power and desire before.

[21] Refer to the observations by G.P. Calabrò, n 4 above, XII.

[22] According to G. Palombella, 'La collocazione del risarcimento del danno tra giustizia ed etica' *Diritto e questioni pubbliche*, 247 (2003), civil liability, like law as a whole, pursues ethics and ethics is nothing but the values that are to be protected.

[23] ibid 255. The definition of injustice is the foundation of the institution of compensation for aquilian damage. To licitly cause a damage to third parties is fairly normal, it being part of daily competition of life and market. On the contrary, injustice is the necessary prerequisite of

Freedom and justice, therefore, become the parameters upon which the meaning of human conduct and its concrete feasibility should be assessed. Admitting the existence of a link between liability and justice means acknowledging that the above-mentioned institution may be placed in a critical context, enhancing the scopes of substantial equity, social politics and balance.

IV. Interests of the Injured Party and Stability of the Value System

The exercise of freedom by individuals[24] and restraints to their spontaneity and rationality, respect for hierarchically ordered rules, the relational dimension of human experience, the implementation of social justice programs and the effectiveness of protection are crucial points to consider when reflecting on civil wrong.

The duality of the spheres in which civil wrong has an impact is the most relevant cultural aspect, mainly for the identification of the function of remedies deployed by the law system. On one side, there is the subjective sphere of the damaged party; on the other, there is the social system,[25] affected by the harmful effects of behaviors contrary to the fundamental principles supporting it. Thus, intersubjective relations and the systemic sphere are portions of the vast reality on which the analysis of civil wrong can be developed. Reference to the system, in its natural aspiration to stability and balance, is useful when attempting to assess the issue of liability not only from the perspective of the injured party, but also in the perspective of limiting harmful conduct contrary to rules protecting essential values.

The attention to the injured party leads to the assessment of remedial measures only in the perspective of making whole the property affected by the civil wrong; reference to the system, whose basic principles have been destabilized by unlawful conduct, shifts the focus to aims that are different from the simple reinstatement of the economic order of the victim. In the first case, the protection provided by the law is detached from the consideration of the content of the wrong and of the methods through which the damaging conduct is carried out, aiming at assuring that the property of the injured party is sufficiently restored, based on quantitative calculations. In the second case, the guarantee of the social

liability: injustice triggers liability and it is a concept depending on a legal determination.

[24] P.B. Helzel, n 5 above, 23, underlines the relational dimension in which the liable party operates. The individual is liable for his/her own actions towards the party affected by his/her harmful conduct, but also towards the society that is based on peaceful values.

[25] The dualism 'injured party/society', considered for the identification of the function of civil liability in the current legal system, reflects the philosophical assumption of the part/whole relation that is at the basis of any approach to the discipline of human contacts. The whole is the product of the parts. Individuals produce the whole. The resulting overall order is the product or the effect of the construction of the parts.

order, through an in-depth reading of the fact and the wide-ranging consequences produced by the fact, disregards algebraic calculations and reduces the interest in the property to the benefit of the enhancement of the needs that are in line with the system's values.[26] In the latter case, civil liability can re-discover its role of control of social dynamics, especially when it aims to discourage behaviors that are not in line with the basic rules of peaceful living.

This dualism recalls the perpetual clash between private law and public law.[27] The reinstatement of the victim's property is an issue involving the private law principles governing the settlement of contingent interests involved in the harmful event.[28] By contrast, the re-establishment of the social order is commonly considered to be an exclusive task of public powers. Indeed, the relationship between individuals and institutions and between private power and authorities needs to be revised in the light of the new needs of a society aimed at overcoming traditional distinctions.[29] Bearing this in mind, it appears useful to examine the relationship between the need for property reinstatement and those of system rebalancing in those legal systems focusing on the central issue of the function

[26] See F. Quarta, *Risarcimento e sanzione nell'illecito civile* (Napoli: Edizioni Scientifiche Italiane, 2013), 12.

[27] The approach to be used is the ultimate dismantling of the barriers between public and private. The private-public dichotomy is no longer relevant in a system aspiring to the unity of jurisdictions, the rules to be imposed and the remedies to be applied. As maintained by S. Pugliatti, *Gli istituti del diritto civile* I (Milano: Giuffrè, 1943), III, the rational structure of law system rests on the coexistence of public and private, however, the two dimensions cannot be considered as separated and opposing; Id, 'Diritto pubblico e diritto privato' *Enciclopedia del diritto* (Milano: Giuffrè, 1964), XII, 696. On the overcoming of the strict separation between private law and public law see U. Cerroni, 'Sulla storicità della distinzione tra diritto privato e diritto pubblico' *Rivista internazionale di filosofia del diritto*, 335 (1960); M. Giorgianni, 'Il diritto privato e i suoi attuali confini' *Rivista trimestrale di diritto e procedura civile,* 401-418 (1961); M.S. Giannini, 'Diritto amministrativo' *Enciclopedia del diritto* (Milano: Giuffrè, 1964), XII, 866; R. Nicolò, 'Diritto civile' *Enciclopedia del diritto* (Milano: Giuffrè, 1964), XII, 914; P. Donati, *Pubblico e privato: la fine di un'alternativa?* (Bologna: Cappelli, 1978). For further insight, see also some contributions that have animated the debate on the shifting boundaries of private law: N. Irti, 'Diritto civile' *Digesto discipline privatistiche, sez. civ.* (Torino: UTET, 1990), VI, 143; Id, *La cultura del diritto civile* (Torino: UTET, 1990), 58; P. Grossi, *La cultura del civilista italiano. Un profilo storico* (Milano: Giuffrè, 2002), 147. In the debate on the gradual abandonment of the classical distinction between public law and private law, the principle of horizontal and vertical subsidiarity has primary relevance: I. Populizio, 'Materiali per uno studio sociologico della distinzione tra pubblico e privato' *Società e diritto*, 7 (2012). On this topic, it is fundamental to make reference to a theory according to which public and private interests are not physiologically conflicting and must be present in any legally relevant activity: P. Perlingieri, 'L'incidenza dell'interesse pubblico sulla negoziazione privata', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 59.

[28] P. Rescigno, 'La tutela della salute ed il danno alla persona. Considerazioni sulla raccolta e un contributo specifico', in F.D. Busnelli and U. Breccia eds, *Tutela della salute e diritto privato* (Milano: Giuffrè, 1978), XIII.

[29] On the unity of the law system see T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* (Milano: Giuffrè, 1959), 72. On the matter refer to P. Perlingieri, 'Produzione scientifica e realtà pratica: una frattura da evitare' *Rivista di diritto commerciale,* 455 (1969).

of civil liability.[30]

V. Functional Profiles of Liability in Roman Law

The investigation of the function of non-contractual liability, in particular of the compatibility between the reinstatement of the injured party's property and the protection of societal interests, can draw significant insight from reference to the principles of the discipline of civil wrong in Roman law.[31] Roman law is based on the relationship between liability and obligation.

Wrongful acts, in fact, constituted sources of obligation and gave rise to the so-called civil wrong primary obligation.[32] In classical Roman law, acts harming private interests were held as so serious as to cause the offender to be subject to retaliation by the injured party or the group to which it belonged;[33] subsequently, however, harmful acts were considered to be sources of the obligation to pay a sum of money, by way of private penalty, the amount of which could be determined on the basis of the precise amount of the damage suffered, or could be increased according to the specific seriousness of the act committed. Basically, the liability deriving from unlawful acts was connected not only to the claim for damages by the victim, but also to the application of penalties to the wrongdoer. In fact, compensation for the damage was combined with the imposition of a financial penalty that had to be paid to the injured party or to anyone else who requested conviction of the offender.

Notwithstanding the dual nature of the remedy, private civil wrong in the Roman system, unlike public civil wrong, was bound to impact mainly the subjective relations between the wrongdoer and the damaged party, as the harmful conduct did not cause an offence to the social order. Since the wrongful act did not incorporate the features of a civil wrong against society, it was perceived as an offence to the individual and gave rise to an individual reaction that was totally unlimited at an early stage and later, at a more evolved stage, exactly proportionate to the offence suffered.

Private acts punished by the law, therefore, were not considered as harmful

[30] F. Quarta, n 26 above, 16, notes that the choices regarding the type and intensity of applicable rebalancing remedies are justified by the specific cultural context in a given historical period.

[31] According to some authors, Roman law did not distinguish between contractual and non-contractual damage: S. Perozzi, *Istituzioni di diritto romano* (Roma, Athenaeum, 1928), 160.

[32] Literature on non-contractual liability in Roman law is immense. Reference here is made only to some of the most significant contributions: C. Ferrini, 'Delitti e quasi delitti' *Digesto italiano* (Torino: UTET, 1926), IX, 727; L. Bove, 'Danno (diritto romano)' *Novissimo digesto italiano* (Torino: UTET, 1957), V, 142-143; B. Albanese, 'Illecito (storia)' *Enciclopedia del diritto* (Milano: Giuffrè, 1970), XX, 50.

[33] On non-contractual liability profiles in classical Roman law, see P. Voci, *Risarcimento e pena privata nel diritto romano classico* (Milano: Giuffrè, 1939), passim; C.A. Cannata, *Per lo studio della responsabilità per colpa nel diritto romano classico* (Milano: Giuffrè, 1969), passim.

to the public interest.[34] The unlawful act (source of obligation from a dual perspective: the compensation of the damage and the imposition of a private penalty) did not envisage the application of sanctions for the alteration of the social order. In the strict distinction between the private sphere of relations and the scope of public relations, Roman law provided the injured party with several protection means, also combinable with each other, capable of ensuring satisfaction of the injured party's claims from several perspectives. Indeed, during the development over time, public prosecution increasingly overlapped with private in several cases, sometimes competing with it. Frequently, in fact, penalty and compensation did not have alternative functions, but they could be applied simultaneously.

Compensation for damages was aimed at reinstating the injured party's economic situation, affected by the commission of the unlawful act, and could be implemented in specific form or by equivalence. In the first case, the offended party was provided with the thing that the party causing the damage had not given or had taken; in the second, a sum of money was given to the injured party as compensation for the damage suffered. The choice of either the former or the latter method of compensation depended on the specific provisions of law and the situation. By contrast, the private penalty did not have any compensatory function, since it was a remedial instrument with punitive function not aimed at the reinstatement of the injured party's property, but at the prosecution of the offender through a sanction consisting in the payment of a sum of money, which was often considerable. The material sanction applied to the wrongdoer was commensurate with the gravity of the committed act and with the extent of the suffered prejudice. The parameters used for the application of the punitive measure were related to the harmful relevance of the act and the specific impact of the conduct on the sphere of the involved parties.

The quantitative evaluation of the penalty based on the gravity of the act against the injured party shows how, in ancient times, the impact of the harmful conduct on the offender-offended relationship was the only crucial element in the judgement determining the damage. Full protection was guaranteed to the injured party, who claimed monetary compensation regardless of the demonstration of the intolerability of the act as a social harm. The judgement was based on the relevance of the economic loss suffered rather than the declaration of unfitness

[34] See V. Arangio-Ruiz, *Istituzioni di diritto romano* (Napoli: Jovene, 1987), 363-364, who affirms that when studying civil wrong-related obligations in Roman law, the concepts suggested by modern ideas should be disregarded. The distinction between private law and public law is fully affirmed in Roman law. In modern law, civil wrong is considered a breach of a rule protecting the general interest, therefore the actions of private parties have an impact not only on the intersubjective relations, but also on the entire system order. Roman law, by contrast, separates the acts that social conscience deems worthy of penalty into two wide categories: public civil wrongs and private civil wrongs. Public civil wrong, as a genuine infringement of the social order affecting the entire community, gives rise to public prosecution; private law, in contrast, is felt as an offence to the individual and it justifies an individual reaction.

of the act with reference to the need for stability of the social system. Therefore, the firmly-rooted will to distinguish between private offences and public civil wrongs was perpetuated. The application of the measure for punitive purposes was detached from the intention to reestablish a superior order, transcending the legal spheres of the actors in the harmful event. Punishment was only intended to ensure greater relief to the injured party. The monetary sanction for punitive purposes was a measure to punish serious conduct that had relevance both for its psychological implication[35] and for the specifically harmful effects caused on the sphere of the injured party. The remedies envisaged in the classical age, despite their functional diversity, aimed to ensure the re-establishment of an order considered altered within the economic relation between victim and offender.[36]

In the post-classical age, private penalty was abolished and the sanctioning-punitive measure was replaced by the solelycompensatory remedy,[37] applied according to the provisions enshrined in the aquilian law. Therefore, punitive measures for damages, typical of the early stage of Roman law, were replaced by a remedial instrument, whose main function was to restore the assets of the injured party.[38]

VI. Civil Liability in the Interpretation of the Middle Ages

Some authors who study the historical evolution of civil wrong have noted that the current system of non-contractual liability is based on the legal theory constructed in the Middle Ages.[39] A concept of injury that is fairly close to the modern interpretation was developed in the Middle Ages. Significant endeavors were made to carry out a process of emancipation of civil liability from criminal law and generalization of the imputation criterion based on fault.

[35] In Roman law, imputability took various forms depending on the different ages. At an early stage, a particularly reductive idea of imputability prevailed, since only the willfulness of the harmful act was taken into account, this being inferred from the causal link between the behavior of an individual and the injury to another. In Roman law, a class of *mens rea*, different from willfulness, was malice, that was the most serious form of imputability. According to E. Betti, *Istituzioni di diritto romano* (Padova: CEDAM, 1947), 239, malice incorporates something more than willfulness of the act producing the injury to another. Malice envisages the harmful consequences and the awareness of the wrong done to another. Such observations are the basis for the reflection on the function of civil liability, which requires an analysis of the problems in the light of the act committed, the consequences caused, and also the subjective conditions of the person causing the injury.

[36] In the current system, endowing liability with a sanctioning function means admitting that the compensatory measure enshrines the social purpose to discourage conducts that are particularly harmful for the entire community.

[37] In the Justinan law, it is possible to identify a functional duality of the compensation for damage as a penalty and a compensatory measure: on the matter, see U. Ratti, 'Il risarcimento del danno nel diritto giustinianeo' *Bollettino Istituzioni diritto romano*, 169 (1932).

[38] See P. Voci, *Istituzioni di diritto romano* (Milano: Giuffrè, 1954), 412.

[39] P. Fava, *La responsabilità civile* (Milano: Giuffrè, 2009), 30-36.

There was also a medieval attempt to refer to the Roman-law tradition on the matter of the remedy in the form of punishment, understanding civil wrong as a wrong under two perspectives: viciousness and effect. The first would consist of the reproachability of the act; the second, in contrast, is the damage caused by the harmful conduct. In particular, viciousness corresponds to punishment, while the effect corresponds to the restoration of the damage. The equal weight attributed to the reprehensible conduct of the wrongdoer and to the injury inflicted to another demonstrates how the issue of liability has, since its origin, been addressed in terms of punishment and restoration.

The key elements of Medieval interpretation that marked a departure from classical and post-classical Roman jurisprudence are a drift towards the marginalization of the afflictive nature of liability, the broadening of the specificity of the injury, and the consideration of fault as the fundamental subjective prerequisite of liability for unlawful acts. Sources from this period on the subject of civil wrong, rejecting the punitive idea of multiple harms, testify to the shift towards the compensatory principle, the emancipation of the action from the original criminal matrix and the connection of liability with the free choice of the individual, as well as with awareness of the volitional act.[40] Medieval and modern law, in fact, consolidate the model based on liability as a consequence of behavior supported by free will and awareness.

A subsequent stage of jurisprudential evolution, originating from the combination of classical law and Christian thought, privileged the idea that the production of unjust harm should give rise to an obligation of restitution, both in the event of the taking of assets of another, or in the event of injury to personal integrity, be it physical or moral. Restitution had a compensatory purpose insofar as it was a functional means to restore the value of equality infringed upon by the unlawful act.[41] Thus, it was necessary to distinguish the obligation to compensate for damages through restitution from the obligation to be subject to a penalty that was applicable only if the act incorporated the features of criminally relevant behavior. Restitution implied the need to consider the exact damage caused. Therefore any surplus was in contrast with the compensatory principle based on the restoration of equality. The compensatory-restitutionary instrument was, thus, aimed at implementing forms of proportional justice, with a view to restoring equity between the amount paid and the amount received,

[40] On the attribution of liability for acts committed with free and aware will, see the contents of the *Decretum Gratiani*. The work by Gratian was studied by several authors, who have, also recently, focused their attention on the subjective element of the imputation: C. Larrainzar, 'Le radici canoniche della cultura giuridica occidentale' *Jus Ecclesiae*, 23 (2001); Id, 'La ricerca attuale sul Decretum Gratiani', in E. De León and N. Álvarez de las Asturias eds, *La cultura giuridico-canonica medioevale. Premesse per un dialogo ecumenico* (Milano: Giuffrè, 2003), 45.

[41] In the liability for damage, the injustice caused was expressly considered a form of inequality between the wrongdoer and the victim.

between injury and remedy.[42]

The rejection of punitive damages and the separation of the civil wrong from the criminal domain are the basic theoretical insights of the Middle Ages. A breach of the obligation not to cause harm entailed an obligation to compensate for the injury caused through mere restitution of the assets taken. The compensation for damages through restitution was intended to reestablish the situation that would have existed without the harmful event. The reparatory purpose of compensation, the need to reinstate equality in the legal relationship affected by the unlawful act and the triumph of commutative justice have since then contributed to shaping the new non-contractual liability law.

VII. The French Experience and Compensation for Damages as a Ground of Public Order

The non-neutrality of civil liability with respect to the principles of a legal system with its own specificities can be confirmed by analysis of the experiences of other legal systems. Today, an insight into the function of liability can be drawn through a comparison of the approaches of the French, German and English systems. An analysis of civil-law systems and common-law structures confirms the flexibility of the discipline *vis-à-vis* the specificity of the values emerging in each case and reveals the theory of liability as an expression of the cultural identity of a system.

In France, the building of the civil liability system has gone through several phases: attempts to unify the *responsabilité délictuelle* with the *responsabilité contractuelle* overlapped with efforts towards the prohibition of the accumulation of liabilities, followed by the more recent observation that the widening of the contractual content could cause a convergence of the various functions, because of ancillary protection obligations. In this case, in fact, contractual liability would take on a truly reparatory purpose, in addition to payment as the fulfillment of compensatory claims, similar to non-contractual liability.

In an attempt to set aside the classical Roman law interpretation of non-contractual liability, Art 1240 of the *Code Civil*[43] enshrines the principle that any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred to compensate the other for it.[44] An initial generalization of the

[42] P. Fava, n 39 above, 38.

[43] Art 1240 replaces Art 1382 of the *Code Civil* after the *Ordonnance* no 131 of 2016, '*portant réforme du droit des contrats, du régime général e de la preuve des obligations*'.

[44] Italian authors attempted an analysis of the most significant aspects of non-contractual liability in the French system. In particular, see G. Alpa, 'Profili della disciplina dell'illecito nella evoluzione dell'esperienza francese' *Responsabilità civile e previdenza*, 481 (1975); G. Alpa and M. Bessone, *Atipicità dell'illecito. Profili dottrinali* (Milano: Giuffrè, 1980), 247; P.G. Monateri, 'Responsabilità civile (diritto comparato)' *Digesto discipline privatistiche, sez. civ.* (Torino: UTET, 1988), XVII, 12; F. Ferrari, *Atipicità dell'illecito civile. Una comparazione* (Milano: Giuffrè, 1992);

principle of liability for fault was followed by an effort of the jurisprudence and the legal theory to identify new criteria for imputation of liability. Currently, the French system is characterized by a plurality of hypotheses for the imputation of liability. For example, the special focus on damages caused by business activities and the lively debate prompted by the theory of risk led scholars to theorize a binary system of fault and hazard.

The system of liability is based on an atypical general clause, followed by a series of specific provisions for aggravated or objective imputation. It is worth taking note of the lack of reference to the unjust nature of the harm caused within the central provision on the compensable damage. The *Code Civil* contains a formula envisaging the subjective criterion for attribution of liability, the applicable remedy, as well as the qualification of the damage to be compensated.

The provisions constituting the French civil wrong system suggest that compensable damages should be the direct consequence of a negligent act. The issue, however, is not resolved by acknowledging the need for a link between a negligent conduct and a harmful consequence. With reference to compensatory damages, in fact, there has been an increasingly sharp divide between the letter of the law, linking compensation to proof of the existence of a damage originating from a negligent act, and the interpretations by courts and legal theorists, according to whom only damages caused to the rights of the injured party can be compensated. Having abandoned the idea that the relevant damages are only those originating from the infringement of subjective rights, legal protection was extended to any subjective situation relevant for the system, ie any situation susceptible of protection that may be brought to court.

The French debate on the function of liability resulted in the affirmation of the compensatory principle of the integral reparation, according to which reparation should be complete and should not exceed the extent of the damages caused.[45] In non-contractual matters, compensation is considered as a rule of *ordre public*.

The principle based on the need for integral reparation – as it is not covered by any constitutional provision – can be derogated by the legislator by means of regulatory provisions aiming to pursue public interests rather than restoring the balance of the property ratio between the parties involved in the harmful event. The reparatory purpose imposes careful evaluation of the damage.

G. Ponzanelli, *La responsabilità civile. Profili di diritto comparato* (Bologna: il Mulino, 1992); G. Visintini, 'La tecnica della responsabilità civile nel quadro dei modelli di civil law' *Nuova giurisprudenza civile commentata*, 51 (1995); V. Zeno-Zencovich, 'La responsabilità civile', in G. Alpa, M.J. Bonell, D. Corapi, L. Moccia and V. Zeno-Zencovich eds, *Diritto privato comparato. Istituti e problemi* (Bari: Laterza, 1999), 271; F. Tortorano, *Il danno meramente patrimoniale (Percorsi giurisprudenziali e comparazione giuridica)* (Torino: Giappichelli, 2001), 84; M. Serio, *Studi comparatistici sulla responsabilità civile* (Torino: Giappichelli, 2007), 54.

[45] Y. Chartier, *La reparation du prejudice dans la responsabilité civile* (Paris: Economica, 1983), 150; G. Viney and B. Markesinis, *La réparation du dommage corporel. Essai de comparaison des droits anglais et français* (Paris: Economica, 1985), 45.

The jurisdictional authority has wide discretionary power in the determination of damages, as well as in the choice of the measures to repair the injury caused.

The compensatory-reparatory function, traditionally attributed to civil liability, has only recently been questioned, particularly in regard to the economic analysis of law and the precautionary principle.[46] Recently, the widely promoted idea of the preventive functions of civil liability law led to the delicate issue of the introduction of punitive damages in the system. In considering this issue, it became evident that the need to reinstate the integrity of the injured party's property cannot neglect the basic purpose of the system, that is to encourage actors to refrain from behaviors that are a hindrance to the fulfillment of values upon which the social order rests.[47]

VIII. The German System and Compensable Damage

The investigation of civil wrongs in the relation between offended-offender and social order can be further analyzed by making reference to the German experience that – without being thoroughly dealt with across its complex evolution – provides useful insight into the functions of civil liability.

The unitary discipline of compensable damage is the central element of the German system of liability, which, unlike the French and Italian systems, does not envisage differentiated regimes in relation to the different sources of civil wrong. An exclusively patrimonial perspective regarding damage gave way to the requirement of compensation as a means of protection in situations involving the individual as the expression of fundamental values. The evolution of the concept of damage is, in fact, marked by the consideration of non-patrimonial interest as the core element within the legal system. The unity of the liability system, the non-patrimonial interest and the relevance of the compensatory remedy as a function of greater interests are the key elements in the construing of civil wrong.

The evolution of the concept of damage is marked by several events ultimately leading to the principle of 'no liability without fault'.[48] The principle of fault, therefore, is central to the German law of torts and § 249 BGB, in its current version,[49] establishes the principle of total reparation, according to which

[46] On the precautionary principle and on the preventive function, see in particular: J.P. Desideri, 'Le principe de précaution dans la recherche scientifique' *Droit et Patrimoine*, 88 (2000); A. Guegan, 'L'apport du principe de précaution au droit de la responsabilité civile' *RJE*, 147 (2000).

[47] P. Sirena, *La funzione deterrente della responsabilità civile alla luce delle riforme straniere e dei Principles of European Tort Law* (Milano: Giuffrè, 2011), VIII.

[48] On the relevance of the principle of fault in the German law of contract and the German law of torts, see H. Stoll, 'Il risarcimento del danno nel diritto tedesco', in S. Patti ed, *Annuario di diritto tedesco 2001* (Milano, Giuffrè, 2002), 174.

[49] On the process of modernization of the German law of obligations, G. Cian, 'Significato e lineamenti della riforma dello Schuldrechts tedesco' *Rivista di diritto civile*, 1-12 (2003); Id,

the tortfeasor is bound to fully compensate the harm suffered by the injured party because of the harmful event. The restoration of the *ex-ante* situation through restitution does not exclude the possibility of implementing the integral reparation of the damage by equivalence.

The discipline of German law regarding civil liability gives preference to the freedom of action of the individual, whose only limit lies in the negligent action causing damage to certain goods. Reference is to typically identified goods-interests. Unlike the Italian and French systems, that do not identify typical harmful acts, in the BGB only those actions comparable to the abstract cases typically covered by the provisions on aquilian liability are considered unlawful. With reference to civil liability, the following should be pointed out: in accordance with § 823 BGB, the protection obligation arises as a consequence of negligent breach of a provision aiming to protect an individual's interest. In other words, a non-contractual liability arises in case of non-adherence to protection rules, which, in relation to their content and purpose, are not intended to protect a general interest, but interests of an individual or limited categories of individuals.

The rise of a duty of care,[50] as behavior that is instrumental to the protection of the interest of individuals, progressively led to a contractualization of the aquilian liability. The 'spillover' of contractual rules into other areas, such as tort law, was not particularly hindered because the German system has always admitted the accumulation of liabilities.

The impact of harmful conduct on the subjective spheres and the fact that duties of care[51] are not to be required from anyone show that tort is particularly relevant with reference to offended-offender relations. The specific content of duties of care and their connection with non-contractual liability demonstrate the impossibility of extending the effects of the remedies to relations that are

La riforma dello Schuldrechts tedesco: *un modello per il futuro diritto europeo delle obbligazioni e dei contratti?* (Padova: CEDAM, 2004), 35; R. Favale, 'Perturbative dell'adempimento e Pflichtverletzung alla luce della riforma del diritto delle obbligazioni in Germania', in Id and B. Marucci eds, *Studi in memoria di Vincenzo Ernesto Cantelmo* (Napoli: Edizioni Scientifiche Italiane, 2003), I, 711; C.W. Canaris, *La riforma del diritto tedesco delle obbligazioni* (Padova: CEDAM, 2003); G. De Cristofaro, *La riforma del diritto tedesco delle obbligazioni. Contenuti fondamentali e profili sistematici del Gesetzzur Modernisierung des Schuldrechts* (Padova: CEDAM, 2003); A. Di Majo, 'La Modernisierung del diritto delle obbligazioni in Germania' *Europa e diritto privato*, 367 (2004); A. Diurni and P. Kindler, *Il codice tedesco "modernizzato"* (Torino: Giappichelli, 2004); S. Patti, 'Luci ed ombre sulla riforma dello Schuldrecht', in Id, *Annuario di diritto tedesco 2003* (Milano: Giuffrè, 2005); U. Falk, 'La riforma del diritto tedesco delle obbligazioni: una valutazione critica' *Rivista critica di diritto privato*, 501 (2005).

[50] Duties of care should be connected with the concept of diligence: A. Di Majo, 'Delle obbligazioni in generale', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1988), 122; Id, *La responsabilità contrattuale* (Torino: Giappichelli, 2007), 26.

[51] Italian authors showed great interest in duties of care. In particular, see: F. Benatti, 'Osservazioni in tema di doveri di protezione' *Rivista trimestrale di diritto e procedura civile*, 1342 (1964); C. Castronovo, 'Obblighi di protezione e tutela del terzo' *Jus*, 123 (1976); Id, 'Obblighi di protezione' *Enciclopedia giuridica* (Roma: Treccani, 1990), XXI, 1; L. Lambo, *Obblighi di protezione* (Padova: CEDAM, 2007).

beyond the relation between the injured party and the party responsible for the injury. Social order, thus, is not within the scope of the protective effect. Compensatory protection is limited to the restoration of balance in the relationship between individuals.

IX. The Evolution of Torts in Common-Law Systems and the Sanction of the Harmful Conduct

Common-law systems reflect different features. The English experience provides further insight into the theoretical changes regarding the relevance of tort between the injured party-tortfeasor relationship and the social order. In the English system, the only evolution is represented by the writs.[52]

The difficult adventure of the transition away from the criminal matrix of tort has profoundly influenced the history of the function of civil liability.[53] The process for the construction of the category of torts was long and hard.[54] This process, started in a context characterized by the close connection between substantive law and protective procedural instruments, has its origins in the action of trespass,[55] providing ground for legal action each time an undue interference in the personal sphere or in the property of third parties occurred. Originally, it had a strictly criminal nature, as the wrongful act was considered of such gravity as to alter the peace of the kingdom. It was regarded as a severe infringement, that is a material act of force of such relevance to destabilize public order.

The whole system of writs is constituted by three types of trespass (to person, to chattels, to land), corresponding to the wounding or mistreatment of a person, the taking or destruction of movable assets, and the violation of the borders of the property of another. The remedy for these cases had a punitive nature, applying a penalty aimed at sanctioning the unlawful conduct of the offender.

Subsequently, around the 1350s, the action of trespass on the case replaced

[52] The writ was a necessary instrument for the protection of rights. A subjective right could be deemed to exist only if there was a writ able to make it actionable.

[53] The English system of liability has, sometimes, gone towards the adoption of instruments typical of the European Tort Law: R. Petruso, 'L'armonizzazione del diritto inglese con il diritto europeo: una verifica giurisprudenziale' *Europa e diritto privato*, 679 (2008).

[54] On the evolution of torts in common-law systems, see M. Sarfatti, 'Torts' *Novississimo digesto italiano* (Torino: UTET, 1940), XVIII, 259; P. Tesauro and G. Recchia, '*Origini ed evoluzione del modello dei torts' Novissimo digesto italiano* (Torino: UTET, 1973), XIX, 418; G. Alpa, 'Teorie e ideologie nella disciplina dell'illecito (appunti sulla evoluzione della tort liability)' *Rivista trimestrale di diritto e procedura civile*, 820 (1977); G.L. Williams and B.A. Hepple, *I fondamenti del diritto dei torts* (Napoli: Edizioni Scientifiche Italiane, 1983); G. Ponzanelli, *Antologia sull'American Tort Law* (Pisa: ETS, 1992).

[55] In relation to trespass, it is useful to refer to M.L. Ruffini Gandolfi, *Profili del "trespass to land": il tort e gli improvements del trespass* (Milano: Giuffrè, 1979); Id, 'Trespass' *Digesto discipline privatistiche, sez. civ.* (Torino: UTET, 1999), XIX, 428.

the previous form of protection. In this new approach a declaration that contained a detailed description of the facts, as well as the specification that the plaintiff had been the victim of a damage caused by the negligent or intentional behavior of another party. Ultimately, it was a general subsidiary action that could be initiated for several cases of harmful unlawful conducts.

The action of trespass on the case had, firstly, an essentially compensatory nature, secondly, it did not require direct action by the offender, and, further, the injured party had to allege the fault of the defendant. In this respect, the difference from the early-stage tort was considerable: in fact, in the early understanding of trespass the material nature of the conduct of the offender, who directly caused the injury, led to the assumption of its willfulness. The new form of action, aiming to ensure compensation, imposed the need to allege and prove the injury caused to the victim. More precisely, in early trespass the legal interest to be protected was constituted by the social order; in the trespass on the case[56] the remedy to be applied was exclusively aimed at providing relief to the party harmed by the negligent conduct.[57]

The evolution of procedural means spurred a more incisive evaluation of the role of the subjective element, ie the fault. The concept of willfulness, typical of trespass, was replaced by the concept of fault in trespass on the case, marking the abandonment of the traditional punitive means of protection. The punishment of the tortfeasor, for having disrupted the social peace, was replaced by the compensatory remedy *strictu sensu*. These are opposite remedial consequences, since the first is a strong reaction against conduct that is incompatible with the system, and the second is a reparation of the damage caused to the legally relevant interests of the injured party. Thus this experience of trespass is exemplary of how, in common-law systems as in civil law ones, there exists an eternal dualism between punitive and compensatory measures.

[56] In the writ of trespass on the case in assumpsit, the plaintiff alleged that the defendant had undertaken the obligation to do something and, as he/she had not performed it or had performed it incorrectly, he/she had caused a damage to the person or the property of the plaintiff. Because of the defendant's failure to comply, the plaintiff had suffered a damage for having trusted the defendant's promise; such a situation was protected both in case of non-performance and in case of incorrect performance. With these writs, based to the early-stage trespass that implied the imprisonment of the liable party or the compensation for the damage, proper compensation was ensured. The possibility of specific performance was completely denied.

[57] The alternation between traditional trespass and trespass on the case persisted for several centuries giving rise to a system of intentional and non-intentional wrongs, including, in particular, tort of negligence. On negligence see P. Gallo, *L'elemento oggettivo del tort of negligence. Indagine sui limiti della responsabilità delittuale per negligence nei Paesi di Common Law* (Milano: Giuffrè, 1988).

Tort of negligence initially had limited relevance: it was charged to individuals carrying out activities having public relevance. Subsequently, mainly as a consequence of the increasing industrialization, tort of negligence started to increase its scope. When this type of tort gained relevance, in the golden age of the English common law, it was based on five elements: the duty of care of the alleged tortfeasor towards the injured party, the breach of the duty of care, the injury, the causal connection between breach and injury, and the lack of causes of justification.

X. Civil Liability and Exclusivity of the Reparatory Function: Criticism

The Italian system, based on the centrality of Art 2043 of the Italian *Codice Civile*,[58] privileged the tendency to attribute a compensatory function to non-contractual liability.[59] Such an option is linked with the will to deprive the individuals of the power to action any violation to the social order, as private citizens are simply tutors of their own interests.[60] This theory led to a gradual exclusion of the citizens from proceedings the issue of which was not the mere reparation of the caused damages.

Giving private citizens the power to initiate an action for the protection of the social order, that is a public interest, would have implied a destabilization of the principle granting the public authorities the responsibility to protect higher interests.

The monopoly of public prosecution and the impossibility for the single citizen to intiate proceedings to sanction unlawful acts have constituted the pillars upon which the system of civil liability was construed.

The power of the State to impose sanctions led to the subordination of private citizens to the bearing structures of the State-system.

Providing private entities with the power to autonomously apply means of force, thereby delivering the sanctioning effect of the remedy to the will of individuals, rather than the public powers, would mean to make a decisive choice, of course compatible with the evolution of the legal system.[61]

XI. Wrongfulness, Subjective Criteria of Imputation and Private Sanctions

In an ever-changing legal system, it is necessary that the typical priority of the compensatory purpose of civil liability does not imply a slowdown in the implementation of essential rights and fundamental freedoms.[62] Compensation for damages[63] alone is not helpful to pursue systemically relevant objectives.[64]

[58] On the centrality of Art 2043 of the Italian *Codice Civile* in the system of civil liability, see P. Perlingieri, 'L'art. 2059 c.c. uno e bino: una interpretazione che non convince' *Rassegna di diritto civile*, 777 (2003); Id, 'La responsabilità civile tra indennizzo e risarcimento' *Rassegna di diritto civile,* 1064 (2004).

[59] The function of civil liability should be construed based on a pluralistic approach, considering the different needs emerging from time to time: P. Perlingieri, 'Le funzioni della responsabilità civile' *Rassegna di diritto civile*, 119 (2011).

[60] F. Quarta, n 26 above, 46.

[61] For further insight on these suggestions, see A. Lasso, *Le eccezioni in senso sostanziale* (Napoli: Edizioni Scientifiche Italiane, 2007), 155-156.

[62] F. Quarta, n 26 above, 52.

[63] On the compensation for damages, see R. Scognamiglio, 'Illecito (diritto vigente)' *Novissimo digesto italiano* (Torino: UTET, 1962), VIII, 169; G. Tucci, *Il danno ingiusto* (Napoli: Jovene, 1970), 30; M. Barcellona, 'Funzione e struttura della responsabilità civile: considerazioni preliminari sul «concetto» di danno aquiliano' *Rivista critica di diritto privato*, 214 (2004); A. D'Adda, 'Le

The goal of compensation is limited to the scope of private relationships, without any preventive function against conduct with a strong social impact. To acknowledge a punitive dimension of liability in some specific cases means to place the emphasis on the need to implement a key principle of the system, that is the effectiveness of protection of rights, above all, in which particularly important values are at stake.[65]

To admit the possibility to sanction or, even, to punish the reprehensibility of specific illicit conducts means a decisive change in the system of liability.[66] The punitive measure tends to a form of protection that takes the wrongfulness of the act into account. In other words, compensation *strictu sensu*, gives importance to the effect of the conduct; the punitive measure, in contrast, shifts the focus to the harmful behavior.[67]

Emphasizing the primacy of the compensatory function could lead to a flattening of damages, especially in the current social context, without the possibility to make distinctions within the various forms of wrongfulness and levels of injury. An injury caused with the purpose of obtaining unlawful profits cannot be treated like a harmful conduct detached from gainful purposes.[68] In short, the intent to cause the injury cannot give rise to the same consequences as the damage caused by negligence, imprudence or malpractice. In this perspective, therefore, it appears useful to propose a reflection on civil liability law that takes into account the subjective grounds of the prohibited behavior, the subjective grounds of wrongdoing and its impact on the sphere of social relations.

Very recently, Italian courts have highlighted that civil liability in the current system is not given only the task of reinstating the property of the injured party, as the deterrence function and the sanctioning function are also internal to the system.[69] The Supreme Court has exceeded the limits of incompatibility of punitive damages *vis-à-vis* the national public policy.[70] In particular, the Supreme

funzioni del risarcimento del danno non patrimoniale', in S. Delle Monache ed, *Responsabilità civile. Danno non patrimoniale* (Torino: UTET, 2010), 144.

[64] According to C. Castronovo, 'Del non risarcibile aquiliano: danno meramente patrimoniale, c.d. perdita di chance, danni punitivi, danno c.d. esistenziale', in G. Ponzanelli ed, *Liber amicorum per Francesco D. Busnelli* (Milano: Giuffrè, 2008), 365, the compensation deters the occurrence of wrongful actions 'precisely'.

[65] See C. Scognamiglio, 'Danno morale e funzione deterrente della responsabilità civile' *Responsabilità civile e previdenza*, 2485 (2007); E. Navarretta, 'Funzioni del risarcimento e quantificazione dei danni non patrimoniali' *Responsabilità civile e previdenza*, 502 (2008).

[66] On the relevance of the sanction in the system of liability, P. Cendon, 'Il profilo della sanzione nella responsabilità civile' *Contratto e Impresa*, 891 (1989).

[67] F. Quarta, n 26 above, 42.

[68] P.G. Monateri, 'La responsabilità civile', in R. Sacco ed, *Trattato di diritto civile, Le fonti delle obbligazioni* (Torino: UTET, 1998), 336; P. Sirena, 'Il risarcimento dei c.d. danni punitivi e la restituzione dell'arricchimento senza causa' *Rivista di diritto civile*, 532 (2006).

[69] For insights, see G. Broggini, 'Compatibilità di sentenze statunitensi di condanna a risarcimento di "punitive damages" con il diritto europeo della responsabilità civile' *Europa e diritto privato*, 489 (1999).

[70] Corte di Cassazione-Sezioni unite 5 July 2017 no 16601, *La Nuova Procedura Civile*,

Court ruled that a foreign judgment containing the imposition of punitive damages[71] can be recognized when the ruling is given in a legal system inspired by the typical hypotheses of conviction and when the ruling is given in a foreign system that has adopted criteria that are not contrary to the national public policy.[72]

The imposition of sanctions raises questions about the interpretation of law: firstly, there is a need to comply with the principle of proportionality[73] to establish a balance between the infringement of the relevant interest and the sanction; secondly, resort to the principle of reasonableness offers grounds to justify the choices made by judges with a sanctioning purpose. In particular, reasonableness is the expression of the prudent behavior of the judges, who are called to examine the specificity of the act, the identity and the universe of needs, affections and potentials of the individual. Reasonableness represents the implementation of

IV, 1-25 (2017).

[71] On punitive damages the literature is vast. See, in particular, G. Ponzanelli, 'I punitive damages nell'esperienza nordamericana' *Rivista di diritto civile*, 435 (1983); Id, 'I punitive damages, il caso Texaco ed il diritto italiano' *Rivista di diritto civile*, 405 (1987); Id, 'Punitive damages e Due Process Clause: l'intervento della Corte Suprema' *Foro Italiano*, 235 (1991); Id, 'Non c'è due senza tre: la Corte Suprema USA salva ancora i danni punitivi' *Foro Italiano*, 92 (1994); Id, 'I danni punitivi' *Nuova giurisprudenza civile commentata*, 25 (2008); Id, 'Novità per i danni esemplari?' *Contratto e impresa*, 1195 (2015); V. Zeno Zenchovich, 'Il problema della pena privata nell'ordinamento italiano: un approccio comparatistico ai punitive damages di common law' *Giurisprudenza Italiana*, 12 (1985); P. Pardolesi, 'Danni punitivi all'indice' *Foro italiano*, 1461 (2007); Id, 'Danni punitivi: frustrazione da "vorrei ma non posso"?' *Rivista critica di diritto privato*, 341 (2007); F. Benatti, *Correggere e punire dalla law of torts all'inadempimento del contratto* (Milano: Giuffrè, 2008); Id, 'La circolazione dei danni punitivi: due modelli a confronto' *Corriere giuridico*, 263 (2012); Id, 'Dall'astreinte ai danni punitivi: un passo ormai obbligato' *Banca, borsa e titoli di credito*, 679 (2015); F. Spillare, 'I danni punitivi: mito o realtà?' *Studium juris*, 1407 (2014); M. Tocci, *Il danno punitivo in prospettiva comparatistica* (Bologna: Filodiritto, 2014); M. Grondona, 'L'auspicabile "via libera" ai danni punitivi, il dubbio limite dell'ordine pubblico e la politica del diritto di matrice giurisprudenziale (a proposito del dialogo tra ordinamento e giurisdizioni)' *Diritto civile contemporaneo*, 2-23 (2016).

[72] On public policy and damages, see C. Irti, 'Digressioni attorno al mutevole "concetto" di ordine pubblico' *Nuova giurisprudenza civile commentata*, 481 (2016).

[73] On the principle of proportionality, it is necessary to refer to P. Perlingieri, 'Equilibrio normativo e principio di proporzionalità nei contratti', in Id, *Il diritto dei contratti fra persona e mercato* n 1 above, 443; N. Cipriani, *Patto commissorio e patto marciano. Proporzionalità e legittimità delle garanzie* (Napoli: Edizioni Scientifiche Italiane, 2000), 199; B. Marucci, 'Equilibrio contrattuale: un principio di continuità' *Rassegna di diritto civile*, 213 (2003). On proportionality and equity, see F. Benatti, 'Arbitrato di equità ed equilibrio contrattuale' *Rivista trimestrale di diritto e procedura civile*, 837 (1999); F. Criscuolo, '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' *Rivista dell'arbitrato*, 71 (1999). Useful is also the recall to G. Chiappetta, *Azioni dirette e "tangibilità" delle sfere giuridiche* (Napoli: Edizioni Scientifiche Italiane, 2000), 72; R. Di Raimo, *Contratto e gestione indiretta di servizi pubblici. Profili dell'«autonomia negoziale» della pubblica amministrazione* (Napoli: Edizioni Scientifiche Italiane, 2000), 188; F. Volpe, *La giustizia contrattuale tra autonomia e mercato* (Napoli: Edizioni Scientifiche Italiane, 2004), 59. On the proportionality in a European perspective, see F. Casucci, *Il sistema giuridico «proporzionale» nel diritto privato comunitario* (Napoli: Edizioni Scientifiche Italiane, 2001).

the legal system and it is a principle of assessment that needs to be anchored to fundamental principles,[74] regulatory values and their hierarchical order, in order to avoid solutions that are not in line with the principles of balance and the comparative assessment of legally relevant interests. Reasonableness bases its control activity on the legitimacy of remedies that should be adapted to the specificity of concrete situations.

Therefore, according to the principle of proportionality, the judgment is grounded in the determination of damages on the basis of the strict relation among remedy, harmed interest and extent of the damage. The principle of reasonableness, instead, guides judges in the assessment of the harmful consequences, in the light of the extreme complexity of the wrongful conduct.[75]

In conclusion, the civil liability system, built around the injustice of the damage, cannot be neutral towards the need to discourage unlawful acts. Civil liability is also a commitment to avoid the perpetration of abuses and prevent the risk that different situations are treated in the same manner. If the punitive function is set aside, non-contractual liability would be inappropriate to provide *ad-hoc* solutions to concrete problems. Civil penalty represents a thorough control on the effectiveness of fundamental rights. Assigning a monopoly over the punitive function to criminal law could lead us to emphasize the role of detention as the sole instrument to counteract acts of a certain gravity.[76] If criminal sanctions alone are left with the task of discouraging unlawful conduct, criminal law could be seen as a privileged system of rules to protect fundamental values.[77] Thus, deterrence is the goal of the entire system,[78] beyond the strict separation between public and private sphere, between criminal and civil jurisdiction.[79]

[74] On reasonableness and values, see A. Ruggeri, 'Ragionevolezza e valori attraverso il prisma della giustizia costituzionale', in M. La Torre and A. Spadaro eds, *La ragionevolezza nel diritto* (Torino: Giappichelli, 2002), 98; recently, P. Perlingieri, 'Legal Principles and Values' 1(1) *The Italian Law Journal*, 125 (2017).

[75] The links between proportionality and reasonableness are particularly important in the system of civil liability. On the relationships between proportionality and reasonableness, refer to G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 137-143. The determination of damage is, therefore, left to judges based on the principles of proportionality and reasonableness: the former is a quantitative criterion, while the latter is a qualitative one: P. Perlingieri, n 73 above, 448-449; E. Del Prato, 'Ragionevolezza e bilanciamento' *Rivista di diritto civile*, 25 (2010). For insights on the principle of reasonableness see, also, S. Patti, 'La ragionevolezza nel diritto civile' *Rivista trimestrale di diritto e procedura civile*, 5 (2012); S. Troiano, 'Ragionevolezza (diritto privato)' *Enciclopedia del diritto* (Milano: Giuffrè, 2013), Annali VI, 766; S. Zorzetto, 'Reasonableness' 1(1) *The Italian Law Journal*, 107 (2015). It's necessary to remember also E. Giorgini, *Ragionevolezza e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2010).

[76] For insights, see P. Perlingieri, 'Il diritto civile nello Stato sociale di diritto: prospettive di controllo alternativo all'intervento penale', in Id, *L'ordinamento vigente e i suoi valori. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2006), 183.

[77] See M. Franzoni, 'Civile e…Penale' *Responsabilità civile e previdenza,* 1831 (2012).

[78] On the deterrent funcion, F. Quarta, n 26 above, 216.

[79] The legal system is complex but unitary: P. Perlingieri, 'Complessità e unitarietà dell'ordinamento giuridico' *Rassegna di diritto civile*, 188 (2005).