Essays

Sustainability and Civil Law

Enrico Caterini*

Abstract

The legal system shifts its parameters. Democracy is not only a decision-making instrument, it is also a value. The mandatory commitment of social relations imposed the need for all of us to ensure 'the minimum subsistence', with no avoidance for any of us to fulfil the duty of solidarity. Sustainability has become the social analysis of law.

I. Introduction

The gauge of the legal system shifted the importance of its main parameters, ie the individual and the State. The centrality of the individual has had an impact on the market that is no longer a conforming element, rather an element of differentiation. The issue at stake is not the pursuit of the interest as such, but the 'common' interest, thus sustainable development. The mandatory commitment of social relations imposes the need for all of us to ensure 'the minimum subsistence', with no avoidance for any of us to fulfil the duty of solidarity. Fundamental rights are detached and independent from market rules while their expansion depends on the economy. The distribution of sovereignty is functional to a more comprehensive fulfilment of the individual. Democracy is not only a decision-making instrument it is also a value. Sustainability has become the social analysis of Law.

II. What Is a Democracy System?

Democracy must be considered in its several aspects,[1] since it results from the combination of the founding values of the Italo-European legal system. Not only is it a decision-making method but above all the substance that gives shape to a variety of philosophical conceptions of life.

However, democracy cannot be arbitrarily defined. It implies a balance of the values that are recognized and guaranteed by both the national and European

* Full Professor of Private Law, University of Calabria. Translation by F. Zolli and E. Calabrese (paras 9 and 15).

[1] See U. Scarpelli, 'La persona nella filosofia giuridica moderna', in P. Femia ed, *SISDiC - Storie dal fondo* (Napoli: Edizioni Scientifiche Italiane, 2017).

fundamental laws.

The Welfare State – based on the rule of law – stems from this process as well.

Theories such as personalism, solidarism, egalitarianism, labourism, autonomism, liberalism all require a fair balance so as to develop an intrinsically democratic society.

Therefore, the interpretation of law must ensure that human dignity[2] is preserved as a fundamental principle and an inviolable limit.

In this Italo-European context, there is a need to harmonise the values of the human being and the free market, since both of them are granted at national and supranational level.[3]

The primacy of the human person gives emphasis to the problem of equality. Equality cannot be achieved by standardising people. Everyone should be treated differently in order to effectively guarantee his or her own right to freedom and dignity.

Formal equality, a cornerstone of western civil law, is basically a legal fiction[4] and thus it has been called into question. Every person is an indivisible whole and as such must be considered by the law.

In contrast, free-market economy defends the principle of formal equality, as it is based on the standardisation of human behaviour so as to make them measurable and predictable. People are objectified, they are only the means to an end, which is increasing the production.

Nonetheless, if human dignity is placed at the heart of the European legal system, sustainable development becomes possible. This in turn involves the sustainability of the European civil law.

III. Individualism and Solidarism

The constitutions and the treaties explicitly lay down the human rights that characterise the national and European institutions.[5] The human being therefore takes on a systemic role as an individual and part of the society. The legal system should defend the individual from the State and from the market.[6]

[2] See, E. Caterini, 'L'«arte» dell'interpretazione tra fatto, diritto e persona', in M. D'Arienzo ed, *Il diritto come "scienza di mezzo". Studi in onore di Mario Tedeschi* (Cosenza: Pellegrini, 2017), I, 469-498.

[3] A.M. Poggi, *I diritti delle persone. Lo stato sociale come Repubblica dei diritti e dei doveri* (Milano: Mondadori, 2014).

[4] A. Luna Serrano, 'Le finzioni nel diritto', in A. Palazzo ed, *Quaderni di diritto e processo* (Perugia: Università di Perugia, 2008).

[5] See P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008).

[6] P. Perlingieri, 'Produzione, beni e benessere', in N. Lipari ed, *Crescita, benessere e rapporti civili. Lo sviluppo oltre la crisi*, Atti del 9° Convegno Nazionale in ricordo di Giovanni Gabrielli, 8-9-10 maggio 2014, Royal Continental Hotel, Napoli (Napoli: Edizioni Scientifiche Italiane, 2014), 509.

Historically, individualism contrasted with solidarism and celebrated the freedom and self-determination of men, seen as stand-alone entities detached from the social context. Neo-individualism has, however, a different connotation: it focuses on the idea of human person, defending it against the unbearable intrusiveness of modern technology[7] in order to uphold the value of human dignity.[8]

Human beings are not mere self-sufficient individuals; they are members of a community. This belonging is what gives them a true meaning. Thanks to relationships and social interaction, the mortality of men turns into the eternity of mankind.

In this perspective, the Welfare State based on the rule of law must guarantee both the inviolable and social rights. The distinction between them is purely theoretical, since in practice they form a continuum. The inviolable rights of the individual are social rights as well.[9]

Neo-individualism also aims to stem the migratory phenomenon and protect national identity. However, this trend is in clear contrast with the universal human values. Thus, the inability of the institutions to deal with the problem of immigration becomes a national and European axiological issue.

IV. The Minimum Core Content

Not only the public and private institutions, but also the individuals, both citizens and foreigners, look at the human being as the ultimate goal of their actions.[10] The human person is thereby the general interest of the whole legal system, going from a quantitative dimension to a qualitative one.

The Latin motto *primum vivere deinde philosophari* has a great legal significance as well. Alongside the inviolable rights, it is indeed necessary to recognise the fundamental duties of men, as no society can exist without them: they are essential to effectively providing everyone with a fair and balanced freedom.

The essence of this freedom is the minimum core content, whose purpose is to uphold the value of human dignity. Every right has an economic and social cost as it involves a democratic balance of different interests and values. Specifically, both the individual and social rights can be economically conditioned or unconditioned, depending on whether they are influenced by the rules of the

[7] See P. Barcellona, *Dallo Stato sociale allo Stato immaginario. Critica della ragione funzionalista* (Torino: Bollati Boringhieri, 1994).

[8] U. Galimberti, *Psiche e techne. L'uomo nell'età della tecnica* (Milano: Feltrinelli, 1999).

[9] See, E. Caterini, 'Il «minimo vitale», lo stato di necessità e il contrasto dell'esclusione sociale' *Rassegna di diritto civile*, 1129-1173 (2016).

[10] P. Perlingieri, 'I diritti umani come base dello sviluppo sostenibile. Aspetti giuridici e sociologici', in Id, *La persona e i suoi diritti. Problemi di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2005), 71.

market or entirely guaranteed by the social community: while the former relate to the status of citizen (Art 3 of the Italian Constitution), the latter more generally relate to the status of human person (Art 2 of the Italian Constitution). There is no conflict but continuity between the two statuses.[11]

Were the minimum core content subject to the logic of the market, the natural consequence would be social injustices and imbalances, all the more so as the inviolable rights include not only the positive and negative freedoms, freedoms to and freedoms from, but also the social rights. Among the latter, the rights which ensure a free and dignified life are the most important ones.

The beneficiary of the minimum core content must nonetheless respect the fundamental duties[12], whose impact on people's lives is enhanced by the need for sustainability.

The republican institutions are responsible for correcting social injustice without impinging beyond measure on the individual and collective liberties, which are the essence of the human person: the principle of horizontal subsidiarity does not prevent the State from taking action, it means indeed that the actions of private citizens are harmonised by the public authority in order to achieve the common good.

The inalienable rights to social security include the rights to health, education, housing, knowledge and access to employment, all of which are fundamental duties as well. However, the social rights have both an inviolable content, consisting of those rights and duties[13] inherent in the status of human person, and a disposable content, linked to the rules of the market.

In the current European legal system, a decisive role is played by the loyal cooperation among the supreme courts. They developed the theory of multilevel protection of fundamental rights and the doctrine of counter-limits[14] to leave the Member States a national margin for decision against the European institutions.

This distribution of competences among the law sources must not, however, affect the primary value of the human being: the whole institutional framework is not an end in itself, but rather the means to achieve the self-determination of peoples. The Member States agree to transfer part of their sovereignty to the European Union to universally uphold human dignity, and they are worthy of protection only when they preserve peace and justice, which is to say the fundamental human rights. The constitutional guarantees provided by the Member States serve this same purpose.

When the social and territorial inequities affect even the minimum core

[11] E. Cimbali in an unpublished manual of 1882 edited by P. Fiorentini, *Enrico Cimbali e la funzione sociale dello Stato moderno. Due manoscritti inediti* (Catania: Giuseppe Maimone, 2007).

[12] The constitutional conception originated from the «codice di Camaldoli», 1943-45, see M. Dau, *Il codice di Camaldoli* (Roma: Castelevecchi, 2015).

[13] V. Russo, *Pensieri politici* (Milano: Feltrinelli, 2000).

[14] P. Perlingieri, 'Diritto comunitario ed identità nazionali' *Rassegna di diritto civile*, 530-545 (2011).

content, the institutions fail to provide freedom and justice and therefore they do not fulfil their role.

The decline of the fundamental rights to life and welfare has coincided with the halt in the European integration process, although the causes are still not clear, and has led to a divide among the national legal systems. The European Union has consequently lost its way.

The status quo requires the harmonisation of the national constitutions in order to develop a unitary system focused on the human person. As stated in Art 6, para 3, Treaty of the European Union (TEU), 'the constitutional traditions common to the Member States' are the cultural background that gives life to the fundamental rights, which 'shall constitute general principles of the Union's law'.

V. Inviolable Rights and Fundamental Duties

The divide between the inviolable rights and the fundamental duties distinguishes the market economy, focused only on the individual liberties, from the social market economy, which instead combines market rules and social justice.[15] Liberalism encourages the economic competition, enhancing the logic of productivity;[16] the economic and social inequalities and the minimum core guarantee of freedom and dignity, have no relevance at all.

It is the fundamental duties that introduce a proper idea of justice. That proper idea of justice emphasizes men as social beings and members of communities. And that emphasis implies the concept of sustainability. The assessment of the sustainability of acts and relationships is essential for determining whether or not they are worthy of protection, since the unsustainable ones damage the human person and the society, as well as the social market economy.

The Italo-European legal system guarantees contracts, debts, responsibilities, cohabitations, companies, ownerships, entities, institutions as long as they are sustainable; what promotes self-preservation of the human being is upheld by the law. The growth and welfare of a community are therefore measured by qualitative criteria along with the quantitative ones.[17]

In recent years, a legal fracture has occurred in Europe, leading to a lack of coordination: the European Union has proclaimed its sovereignty over the market, while the Member States have kept their authority over the social economy and rights. This institutional competition largely depends on current sovereign debts, since the highly indebted States have inevitably reduced the rights to social security. The Italian Constitutional Court stated, however, that also sovereign

[15] See, E. Caterini, 'La tutela giuridica del consumo nell'economia sociale di mercato europea. Dal globalismo ai globalismi', in A. Amatucci et al eds, *Scritti in onore di Vincenzo Buonocore* (Milano: Giuffrè, 2005), II, 1007-1024.

[16] P. Perlingieri, 'Diritto dei contratti e dei mercati' *Rassegna di diritto civile*, 877-900 (2011).

[17] See R.F. Kennedy, *Sogno cose che non sono state mai* (Torino: Giulio Einaudi, 2012).

debts must be sustainable, in accordance with the principle of solidarity, which involves an implied responsibility towards future generations.

The migratory phenomenon has raised the issue of the minimum core content of the social rights, widening the concept of sustainability, but this issue cannot be solved simply by denying or halting the migratory flows.

Europe is now excessively concentrated on enterprises, markets and consumers at the expense of the human person, so much so that even the European budget aims almost entirely to build a competitive cohesive free market, which overlooks the social rights guaranteed by the treaties and constitutions. The principle of conferral of competences (Art 5 TEU), which staunchly defends national prerogatives, has allowed only the moderately indebted countries to ensure the rights to social security, while the highly indebted ones have impoverished the weakest in society. This is the meaning of the term two-speed Europe.[18]

Nonetheless, it is unacceptable that the enhanced cooperation among a minimum of nine Member States leads to social inequalities and unsustainability.

VI. Sustainability and the Democratic Control Over the Economy

The principle of sustainability demands social and democratic control over the economy.

Economic enterprise has a social value only if commutative and distributive justice are brought under control, which specifically means the just distribution of risk, resources, income, obligations and the guarantees inherent in the minimum core content among the weakest in society. Every right – be it real or personal, individual or collective – and every duty call for democratic supervision, which is an imperative and essential component of the protection of the human being.

Art 11 of the Italian Constitution, to this end, limits national sovereignty. There can be no justice among peoples unless the social and economic conditions are evened out in order to achieve the common good: the European public and private economic policies must therefore make the economy sustainable and accessible to the weaker economic entities as well as non-economic ones, and must also avoid market concentration.

Democracy, which is not only a method but, above all, substance, confers the power of knowledge on the people accessing the market and imposes the duty of transparency on the economic operators; the principle of democracy must always be respected, both when making legal agreements or transactions and when assuming responsibilities or obligations.

There is no knowledge without transparency and no sustainable market without democracy: contracts, obligations, responsibilities, companies, entities,

[18] See European Commission, *White Paper on the future of Europe. Reflections and scenarios for the EU 27 by 2025*, available at www.eur-lex.europa.eu.

public and private institutions are sustainable as long as they are democratic.

VII. A Sustainable Market in the European Union

The power of the European Union to coordinate economic, social and employment policies (Art 5 TEU), the legal provision of social guarantees and the measures taken to promote social inclusion, education, training and health are the means to ensure respect for human dignity, freedom, democracy, equality, the rule of law and protection for human rights (Art 2 TEU). At the same time, it is necessary to build a sustainable market based on balanced economic growth, social economy, full employment, social progress and environmental protection (Art 3, para 3, TEU).[19]

The objectives of the European Union stem from the principles laid down in national constitutions and give emphasis to the minimum core content, which provides every human person (not simply every citizen) with a free and dignified life.[20] Although the Treaty of Lisbon clearly makes the economic growth conditional upon the achievement of minimum social objectives, in order to achieve the social market economy provided for in Art 3 of the TEU, the European Court of Justice tends to give precedence to economic enterprise over the social rights, weakening their content and increasing the risk of social dumping.

The decline of social justice calls for promotional measures of the European Union based on the principles of conferral, subsidiarity and proportionality.

In the European legal system, the national fundamental rights are deeply integrated with the supranational ones, and this has widened the degree of protection of human rights and has redefined the concept of limitations of sovereignty provided for in Art 11 of the Italian Constitution. Any limitation that may allow European law to breach the fundamental principles of the constitutional system or human dignity is unacceptable, according to the doctrine of counter-limits.

The common basic principles are the cornerstone of Europe, which means that both limitations and counter-limits aim to coordinate rather than to divide the national and European legal systems so as to increase the protection of human rights.[21]

[19] The so-called Brundtland Report, see World Commission on Environment and Development, *Il futuro di noi tutti* (Milano: Bompiani, 1988), 32-78 and 321-381 considers sustainable development the 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

[20] P. Ridola, 'Diritti fondamentali e "integrazione" costituzionale in Europa. Tra passato e futuro: questioni di metodo comparativo nella costruzione di un diritto costituzionale europeo', in A. Cerri et al eds, *Il diritto fra interpretazione e storia*, Liber amicorum *in onore di A.A. Cervati* (Roma: Aracne, 2010), IV, 181.

[21] S. Pagliantini, 'Diritto giurisprudenziale, riconcettualizzazione del contratto e principio di effettività', in E. Caterini et al eds, *Scritti in onore di Vito Rizzo. Persona, contratto, mercato*

The 'conditions of equality with other States' (Art 11 of the Italian Constitution) are the essential legitimising premise of the supranational actions intended to restore the violated human rights. The coordination of economic, social and employment policies is justified by the verticalization of national powers and makes the enhanced or multi-speed cooperation reasonable.

Sovereignty is no longer a strictly national concept, but rather the means to achieve social equality and the integration among the European peoples and to ensure the sociocultural development of the human person. When it fails to do so, the European institutions are allowed to take action under the principle of subsidiarity (Art 5, para 3, TEU and Art 352 Treaty on the Functioning of the European Union (TFEU)), which states that

> 'in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (Art 5, para 3, TEU).

However, it is quite clear that Europe has still not met the objectives set out in Art 3, para 3, TEU

> ('The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced')

and referred to in Art 120 TFEU concerning the European economic policy.

The ultimate aim is to uphold human dignity (Art 2 TEU), which fully (if not exclusively) expresses itself in the right and duty to work. Labour is the foundation of the Italian democratic Republic as well as a right granted to everyone 'according to personal potential and individual choice' (Art 4 of the Italian Constitution); it provides common ground between the human dimension and the economic one, without the latter prevailing over the former.

The European objective of full employment protects work in all of its forms, not only subordinate work (Art 36 of the Italian Constitution), and ensures its

e rapporti di consumo (Napoli: Edizioni Scientifiche Italiane, 2017), 1401.

dignifying function in all contexts.

VIII. The Sovereign Debts

The issue of sovereign debts cannot be solved at national level, as the unbridgeable social gap between the European peoples is a sign of a far more widespread crisis.[22]

Art 136 TFEU allows the European Council to adopt measures specific to those Member States whose currency is the euro in order to strengthen the coordination and surveillance of their budgetary discipline and sets out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

The European Council Decision 199/2011 established the European Stability Mechanism to deal with the severe national financial crises that the euro area Member States are unable to overcome autonomously. The legitimacy of the procedure establishing the European Stability Mechanism (ESM) was called into question in *Pringle* v *Ireland*, but the European Court of Justice determined that the ESM Treaty is compatible with EU law.

The purpose of the ESM is to provide financial assistance to the Member States under strict conditions in order to safeguard the financial stability of the Euro area: Art 13 of the ESM Treaty sets out in detail the procedure for granting stability support in the form of a financial assistance facility, whose content and conditions are included in a memorandum of understanding between the ESM and the ESM Member concerned.

Some have welcomed this financing mechanism as a step towards the development of solidarity among the European peoples, but this seems to be a questionable belief. The ESM, as a legal person that provides loans, operates under the economic logic of reciprocal contracts, so that it actually focuses on debt payment rather than debt sustainability. In other words, social progress is given no importance at all.

The permanent bailout fund may be used for loans (lasting at most thirty years), purchase of national bonds, recapitalisation of banks and other financial institutions and for precautionary financial assistance. A prior assessment of the reliability and creditworthiness of the State concerned is always required.

The ESM, on the other hand, aims to balance the budgets but overlooks past debts, which is to say that it acts on the effects rather than the causes of the crisis. Greece, Portugal, Cyprus and Spain, whose economies have been devastated by the credit crunch driven by the US sub-prime mortgage crisis, have asked the ESM for financial aid and have received it, but at the same time they have had

[22] R. Cisotta, 'Disciplina fiscale, stabilità finanziaria e solidarietà nell'Unione europea ai tempi della crisi: alcuni spunti ricostruttivi' *Il Diritto dell'Unione Europea*, 57 (2015).

to cut salaries and pensions, which has led to a decrease in the social rights of citizens. The ECJ determined, however, that this social unease must not be ascribed to the ESM, but to national institutions.

IX. The Nominalistic Principle as a Technical Principle

In the Civil Code, the principle of nominalism, that is a principle of law related to the monetary rule of law, aims at protecting the Italian economic and fiscal policy. The latter restricts the autonomy of individuals with a view to maintaining the constant balance of financial obligations tied to a monetary and numerical parameter. Currency is indeed a means for stabilizing markets.

Hence, the Constitution provides for the need to protect savings (along with the value of currency) and to counteract devaluation to support general economic policies.

However, Europe's monetary policies should primarily operate to the advantage of small savings and of their purchasing power. To this end, the Constitution guaranteed small savings access to investment forms such as capital goods or capitals, in lieu of fixed-income investments, because the latter are normally drastically affected by inflation or economic crises. The Constitution's guarantee is based on the nominalism-based principle that

> 'the subject of obligation is not a matter of the materials of which coins are made, rather a quantity adjusted to the value attributed to them'.

The principle fulfils the need to represent money debts under the form of constant and defined entities. This is also true when reference to monies with intrinsic value is inferred from the debt instrument. In this case, the real value will be expressed in the form of a numerical value as a result of the commutation of the value-based debt into a sum of money.

The code sets forth the 'natural fecundity of money' resulting in the need for credit increase. For this reason, Art 41 of the Code of Commerce was extended to all certain, liquid and exigible civil debts for which interest is automatically accrued.

Art 820 para 3 of the Italian Civil Code establishes for any legal fruit a functional link between the utilization of the asset and the benefit originating from it. This establishes that the consideration for the utilization derives from the nature of the legal relationship whose corresponding potential changes as the measure of the civil fruit does. As a consequence, the interest rate, that is the legal fruit of the monetary obligation, varies according to the economic value of the legal relationship. The quantification of interest rates relates to the variability of the asset utilization value. Thus, the crises originating from the deviations due to the spread between currency and value also have an impact on the excess of public debt. The connection between devaluation and crisis had already emerged in the discussion of Art 47 of the Italian Constitution during the Constituent

Assembly. The severe monetary devaluation affecting Italy and Europe before the two World Wars had been represented as the plague for small savings of weak social classes. It then became an issue of social policy that spared the middle class that was able to use devaluation to its own advantage. Luigi Einaudi was the first to raise the issue of the gold clause. He proposed the introduction of a clause, affirming, 'to this end, the respect for the gold clause is ensured'. Among the reasons for this proposal was the need for effective protection of savings. Such a clause would also expose the State-Debtor and generate a reduction of interest rates, as well as greater loyalty towards creditors in case of insolvency, as a consequence of extraordinary and unforeseeable events. For Einaudi, a State acting as an honest debtor that admits its inability to pay is always better than a State that repays its creditors with devaluated currency, even though the latter has the same nominal value of the debt. His proposal was rejected and, in any case, its limit was that it exclusively relied on negotiating autonomy and, thus, it was a choice left only to creditors with a strong bargaining power. This clause would have left the choice between the value-based debt and currency-based debt to the financial autonomy of individuals and would have ensured *protection* to some savings only. This would favour strong creditors without any discrimination among different kinds of debt producing obligations.

On the contrary, it is the nature of the obligation that should axiologically set the distribution of a risk deriving from the fluctuation of the ratio between currency and value.

This alters the parameters of distinction between currency-based debt and value-based debt and re-establishes the content of the nominalism principle that becomes a technical principle to accomplish an equal distribution of the risks originating from the fluctuations of financial markets. Hence, the source of obligations will indicate the essential interest on which the principles of effective protection and risk distribution rest.

The settlement, in its effective essence, in view of the (occasional or institutional) entitlements and of the sequence of the legal transactions of a financial operation, will determine a financial obligation of value or of currency based on the reasonable balance of interests and values that bind the parties in a specific relationship and the nominalism principle will effectively and concretely protect the interest that will be more protected by the constitutional order.[23]

This interpretation explains why some savings are guaranteed while others are under the decimation of markets and why some credits are privileged and others run the risk of a totally non-remedial extinction.[24]

Therefore, also the gold clause or other value clauses, though being related

[23] See P. Perlingieri, *Le obbligazioni tra vecchi e nuovi dogmi* (Napoli: Edizioni Scientifiche Italiane, 1990).

[24] E. Caterini, 'I privilegi, il principio di legalità costituzionale e le classi di creditori' *Rassegna di diritto civile*, 390-413 (2015).

to the negotiating autonomy do not deserve protection in themselves, but they require a functional alignment to the principles set forth by the Constitution that guarantees the protection of the value of some credits while excluding others.

Currency and price stability are not substantial values *per se*, above all when they are jeopardized by devaluation processes as well as by market or government crises; in these cases, the protection of savings is even more a nominal protection, apart from guaranteed savings. The latter, being a type of ownership, can only be identified with what is set forth and protected by Art 42 of the Italian Constitution and thus, it is subject to a different level of Constitutional protection based on the existential or property function of the provision.

As a consequence, the financial obligation deriving from a financial transaction should be the result of the type of debt, the person entitled and the reference markets. This will have an impact on the so called 'fecundity' of the money and on the extent of protection of the financial obligation. Currency stability can be ensured in some functions, but not for all of them. The protection of savings envisaged by the Constitution cannot be equally guaranteed for all forms of savings, but it is based on a certain level imposed by the Constitution itself. The bail-in mechanism is in line with the perspective outlined above. The definition of a prioritization of the entitlements affected by losses is a first response. However, what better responds to the circumstances outlined above is the setting of a threshold for guaranteed savings. Art 96-*bis* of the Consolidated Banking Act sets what deposits are entitled to reimbursement in the case of compulsory administrative liquidation of the depository bank and raises the threshold of one hundred thousand euros guaranteed in the case of natural-person creditor that has greater availability of proceeds deriving from tenancy property rights, of rights originating from divorce allowances, pensions, severance indemnities, disability or death; or also insurance or compensatory indemnity arising from personal damages including crimes or unfair detention. The legislative choice aims at discriminating the nature of savings taking into account their existential function, generally indicated in a deposit threshold of one hundred thousand euro which is increased for special causes. In these circumstances the protection of small savings or of savings specifically protected by entitlement cannot be expressed through the nominalism principle, that is insufficient *per se*, but it requires recourse to the principle of effectiveness and, thus, to the preservation of 'guaranteed' savings.

Art 48 of the Consolidating Banking Act, entitled 'financing of businesses guaranteed by transfer of ownership of a property subject to a condition', instead introduced the *Patto Marciano* in our legal system. In particular, it established that the financing concluded between an entrepreneur and a bank or another authorized party is guaranteed by the transfer of ownership of property, or of another property interest, also of third parties, in favour of the creditor. The transfer is suspended and subject to the condition of non-performance by the debtor. In the case of ownership transfer, a technical expert will assess the

difference between the value of the property and the amount of the credit, based on some objective and pre-determined requirements. This provision envisages compliance with Constitutional values, as the special protection of the bank institution should be balanced with the interests primarily protected by our legal system. In fact, para 3 states that

> 'the transfer of ownership cannot be agreed upon with reference to properties fitted out for residential use of the owner, his/her spouse or relatives and relatives in law within the third degree of kindred'.

Even tax debts in favour of the tax collection agency can be paid in seventy-two/one-hundred and twenty instalments (based on an ordinary or extraordinary plan), when the objective and temporary difficulty of the debtor, or the debtor's difficulty to comply connected to the economic crisis, makes the debtor's exposure higher than twenty per cent of his/her income, or higher than ten per cent of the production value. The observation of the objective difficulty, in combination with debt solvency in the period of debt re-scheduling, makes the financial obligation strictly dependent on its function.

To sum up, financial obligations from saving are value-based or currency-based according to the type of obligation and of the guaranteed or recognized nature of the saving itself, thus, the Constitution guarantees the effectiveness of protection of (main or accessory) financial obligations with high axiological value that are also protected from events of financial market crisis. The nominalism principle is a technical principle and, as such, it refers to the various functions of financial obligations arising from savings.

Also, sovereign debt should be considered as a financial obligation whose distribution of the state risk should take into account the nature and value of the obligations. The European power of coordination of economic and monetary policies that aims at rebalancing excessive debts may require the institution of a real-estate fund that should include the available public goods with a view to capitalizing debts and protecting creditors-savers based on the above-mentioned prioritization.

Conversely the right of people to self-determination, enshrined in Art 1 of the United Nations Charter, is considered an international customary principle automatically transposed into Art 10 of the Italian Constitution as a fundamental right. Tolerance towards excessive discrepancy among the European public debts converts the EU into an instrument that generates subjugation and dependence of some Member States on others and, above all, of some peoples with *effective* fundamental rights and others with *declared* fundamental rights.

X. Immigration, the Right and Duty to Work

The social legal system based on the rule of law and on the social market economy is effective only if it guarantees the minimum core content, making no

distinction between citizens, foreigners and stateless persons when it comes to their needs for healthcare, knowledge, housing and minimum income, and ensuring that they respect the fundamental duties.

Every human person has the right and duty to work and, more precisely, to choose it freely according to their personal potential: labour is the main solidarity instrument granted by fundamental laws and allows human beings to contribute to social progress and also to fulfil themselves in the society.

Therefore, upholding the right to employment may be considered the first step towards ensuring the minimum core content to the poorest.

Things have become considerably more complicated nowadays because of the current migratory flows. When the inviolable rights of men are concerned, the principle of reciprocity stated in the Italian law is inadmissible and anachronistic.[25]

Art 78 TFEU guarantees international protection to nationals of third countries and sets out the principle of non-refoulement; however, this protection may be granted exclusively for political reasons, while humanitarian protection covers a wider range of cases, including when a person is in a situation of vulnerability due to economic reasons.[26]

As the Tribunal of Milan has recently stated, the rights to health and nutrition are inherent in the status of human person, since they stem directly from the rights to life and physical integrity, and therefore the poor are entitled to humanitarian protection, according to constitutional and international law. In other words, nationals of third countries must be granted the minimum subsistence figure, namely the right to a free and dignified life, if they are denied it in their country of origin. Famine jeopardises human dignity and this is unacceptable.

Immigration has raised the issue of democracy in terms of cultural and religious integration: in a democratic society based on pluralism (Art 2 TEU), both the exclusivism of Saint Cyprian and Barth and the inclusivism of Rahner seem inadequate. What may indeed be necessary is to focus on inter-religiosity as an approach that can bridge the gap between different religions[27] and place the human person at the heart of the whole system of values.

XI. The Political Parties

General interest is no longer a monopoly of public law.[28] Art 118 of the Italian Constitution allows citizens, both as individuals and as members of associations, to carry out activities of general interest on the basis of the principle

[25] P. Perlingieri, 'Interpretazione assiologica e diritto civile' *Le Corti Salernitane*, 465-495 (2013).

[26] E. Caterini, 'Il «minimo vitale»' n 9 above.

[27] V. Mancuso, *Io e Dio. Una guida per i perplessi* (Milano: Garzanti, 2011); P. Flores D'Arcais and V. Mancuso, *Il caso o la speranza? Un dibattito senza diplomazia* (Milano: Garzanti, 2013).

[28] G. Vecchio, 'I partiti. Autonomia associativa e regime europeo di democraticità nella partecipazione politica', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2016), II.

of subsidiarity, so that they play a significant role in achieving the Italo-European objectives.

When it comes to the forms of association, one cannot fail to mention political parties. Although in the Italian legal system they are not considered legal persons, they can determine national policies through democratic processes (Art 49 of the Italian Constitution).

Legge 21 February 2014 no 13 has given great importance to their statutes, which have indeed become proper legal sources. Statutory rules are set out in accordance with the laws and the Constitution[29] and recognise the value of the human person by guaranteeing principles such as transparency and participation of minorities, which underlie the public administration activity too.

As well as being rules of general interest and public order, they are the benchmark for assessing political behaviour and the economic activities carried out to finance political initiatives.

Moreover, the statutes and financial statements of parties are monitored by an *ad hoc* commission provided for in Legge 13/2014.

Two essential features may therefore be ascribed to parties: the purpose of general interest and the democratic function, which is needed to fulfil that purpose.[30] All their financial resources, which can be obtained by self-financing as well, have to be used to achieve the political and social institutional objectives laid down in their statutes, and their budgets have to respect the principles of clarity, truthfulness and transparency.

Political parties are ideological and cultural entities that express democracy through democratic methods and may provide individual benefits while upholding collective interests, so that they become proper social institutions, whose activity is based on knowledge, participation and the supervision of decision-making.[31]

XII. Nation-State and Human Person: Their Impact on Civil Law

All the European legal systems have undergone deep changes in the last decades, and therefore many traditional legal concepts seem outdate nowadays. First of all, the idea of a Nation-State founded on a common cultural and religious identity and provided with absolute sovereignty appears outmoded.

The globalisation of markets has made individual States unable to control the

[29] E. Caterini, 'Proprietà', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2005), III.

[30] G. Azzariti et al, *Partiti politici e ordinamento giuridico in ricordo di Francesco Galgano* (Napoli: Edizioni Scientifiche italiane, 2015), in particular see the contributions of D. Memmo, 'Il ruolo dei gruppi intermedi dalla costituente ad oggi e il contributo di Francesco Galgano alla collocazione dei partiti politici nel sistema giuridico', 1; P. Femia, 'Politica e libertà di contratto. I partiti politici nel pensiero di Francesco Galgano', 25.

[31] G. Vecchio, *Le istituzioni della solidarietà. Il sistema delle associazioni nel codice civile e nella legislazione speciale* (Napoli: Edizioni scientifiche italiane, 1998).

economy.[32] Factors such as the global economy, immigration and supranational organisations need to be taken into consideration in order to understand current society; the conflict between intercultural dialogue and legal codification[33] that we are witnessing today represents the conflict between the new social demands and a law that does not always reflect them.[34]

As pointed out by the Italian Court of Cassation, multiculturalism is an essential component of modern society but must not undermine the principles and values upon which a certain legal system is based.[35] It may therefore be said that there are some inviolable limits to be respected in promoting the integration among different cultures.[36]

Judges are responsible for ensuring a coherent interpretation of fundamental values and legal institutions in order to avoid a worrying axiological fragmentation and, in carrying out this task, they can apply general clauses of law such as sustainability, which has social and economic implications as well as legal implications.[37]

The concept of human person has a significant impact on civil law.[38] Human

[32] G. Calabrò, *Il bisogno dello Stato. Alla ricerca dell'ordine perduto* (Pisa: Pacini, 2017).

[33] P. Barcellona, *Dallo Stato sociale allo Stato immaginario. Critica della "ragione funzionalista"* (Torino: Bollati Boringhieri, 1994).

[34] R. Ajello, *Dalla metafisica alla socialità. La rivoluzione moderna e le ambiguità italiane* (Napoli: Istituto Italiano per gli Studi Filosofici, 2015).

[35] G. Baumann, *L'enigma multiculturale* (Bologna: il Mulino, 2003).

[36] V. Mancuso, 'Vorrei individui pensanti', in M. Vergottini ed, *Martini e noi. I ritratti inediti di un grande protagonista del Novecento* (Milano: Piemme 2015); E. Scalfari and Pope Francis, *Dialogo tra credenti e non credenti* (Torino: Einaudi, 2013); V. Mancuso, *Obbedienza e libertà. Critica e rinnovamento della coscienza cristiana* (Roma: Fazi, 2012).

[37] S. Trentin, *La crisi del diritto e dello Stato* (Roma: Gangemi, 2006), however the book dates back to 1934 and is prefaced by F. Geny.

[38] Personalism is the philosophical school of thought that gathered politicians, philosophers, legal experts, scientists, pedagogists, artists, laic and religious representatives focussing on modern constitutionalism centred on the value of the individual. It developed legal systems with some notions that have not yet disclosed their potential. People like Hannah Arendt, were part of it; she denominated the individual as 'plural individual', as well as Lelio Basso who started from Marxism to reach the concept of class struggle to confirm the full dignity of all human beings; Carlo Bo who – criticizing Croce's Hegelianism and Gramsci's Marxism – supported the advent of the 'issue of the individual'; Norberto Bobbio who, after the Italian neo-idealism addressed to laic personalism based on the historical and social concept of the individual as a person per se and in relationship with the others; Dietrich Bonhoeffer started his reflection on Christ as an individual and Christ in the world that becomes shape of man; Helder Pessoa Camara who founded his Catholic personalism on the process socialization of the individual; Giuseppe Dossetti, who enhanced social entities in lieu of the State assigning them different tasks: the first are the spaces where human personality develops while the State is instrumental to human beings; Giuseppe Flores D'Arcais who considered education as a tool for training individuals of value and Christian faith as the full conscience of the ontological existence of man; Agnes Heller who reinterprets Marxist philosophy and transforms historical materialism into the theory of the individual's emotional needs among which he includes instincts, affection and any human contingency that contributed to the development of a new social anthropology; Adriano Olivetti, who combines plants, persons and beauty thus making working places unaccomplished chimeras; Riccardo Orestano who combated against formalism and dogmatism to invite us to 'reflect on

beings are complex entities they are unique in their diversity and cannot be treated as an indistinct mass of individuals. Therefore, the principle of formal equality, according to which all men are equal before the law, shows its hypocrisy. In contrast, substantive equality focuses on the differences between men in order to overcome them, giving emphasis to their basic needs and putting social progress before economic progress.

Formal law, which evens out differences and is fragmented into numerous specialisms, cannot be effective. The legal system needs a substantive and unitary law to protect human dignity and recognise men as social beings.

The concepts of society and human person are inextricably linked; without the one, the other has no meaning.

XIII. Competitiveness and Sustainability

Contracts, responsibilities, properties and the other legal institutions of the European civil law are sustainable if they have a social purpose.

Due to the inadequacy of Nation-States as political institutions, it is up to legal systems to achieve this social purpose by using various means, including the principle of horizontal subsidiarity.

In the European legal framework, the concept of sustainable development implies a balance to be struck between monetary and economic stability and social stability, which is defined by full employment, social progress and environmental protection (Art 3, para 3, TEU).

The clause of conditionality provided for in Art 3 of the ESM Treaty legitimises the economic aid aimed at safeguarding the euro area's financial stability, but it appears to overlook the principles and values laid down in the Charter of Fundamental Rights of the European Union. The European Court of Justice (ECJ) has declared the restrictive measures imposed on the debtor Member States compatible with the Charter, although they have actually subordinated social stability to monetary and economic stability.

In contrast, all the legal institutions of the European civil law should have two coexistent essential features: competitiveness and sustainability. While the

reflections' of the right to be aware of the historical nature of institutions; Pietro Perlingieri who gave positive substance to personalism in the Constitution, indicating the bonds among law and culture, sociality and historical aspects, and the systemic unity of the legal system. A real cultural and political project around which a school of thought developed. It stressed the concept of law as having a noble and socially equal role as against the neo-idealistic ideas that considered law as a property of educated barkers. Others should also be mentioned such as Ferdinand Max Scheler, Luigi Sturzo, Jean Lacroix, Giorgio La Pira, Lorenzo Milani, and Jacques Maritain who affirmed that 'there are more things in the individual that philosophy is able to grasp', he criticized the pursuit of the Ego in freedom and autonomy as tools that generated the dominion of man over forces such as the State, opinion etc., and sought for personology in human dignity that he identifies in his own soul. For a more detailed recognition on Personalism see A. Pavan ed, *Enciclopedia della persona nel XX secolo* (Napoli: Edizioni Scientifiche Italiane, 2009).

former relates to the logic of profit, the latter relates to social justice.[39]

The notion of sustainability has also redefined the function of the rule of law, which is no longer seen as an end in itself, but rather the means to achieve the fundamental values of democracy, equality, solidarity, freedom and human dignity.

XIV. Market and Contract Sustainability

The sustainability of the European internal market requires a balance between economic growth and social justice,[40] in accordance with the notion of corporate social responsibility.[41] Therefore, companies should act to improve their social impact and focus on the European objectives of development, innovation, training, production quality, gender policy and environmental protection.

As far as the environment is concerned, the self-regulation of enterprises becomes particularly important, as environmental violations may compromise the human rights laid down in the European Convention on Human Rights. In this case, individuals are entitled to apply to the Strasbourg Court, even when no explicit legal provision exists. An example of environmental violations may be excessive noise pollution, which can significantly affect people's wellbeing.

To strike a balance between private economic interests and collective social interests should be the ultimate aim of sustainable development. Deceptive and wrongful business practices such as unfair competition and abuse of a dominant position are prohibited by the law as they damage consumers and competitors, undermining the above balance.[42]

In recent decades, great attention has been paid to the protection of consumers and subordinate workers against companies, both at national and European level: the fundamental human rights are the basis of contractual relationships and establish a connection between efficiency and human dignity, ensuring that the enterprises' need for increasing the production does not prevail over the respect for the human person.[43]

[39] E. Caterini, 'Il diritto «giurisprudenziale» e l'«arte» del diritto nel pensiero di Francesco Carnelutti', in G. Tracuzzi ed, *Per Francesco Carnelutti a cinquant'anni dalla scomparsa* (Padova: CEDAM, 2015), 71; Id, 'L' "arte" dell'interpretazione tra fatto, diritto e persona', in G. Perlingieri and M. D'Ambrosio eds, *Fonti, metodo e interpretazione*, Primo incontro di studi dell'Associazione dei Dottorati di Diritto Privato, 10-11 novembre 2016, (Napoli: Edizioni Scientifiche Italiane, 2017), I, 25.

[40] U. Comite, Accountability *e bilancio sociale nei tribunali* (Padova: CEDAM, 2013); G. Rusconi, *Il bilancio sociale delle imprese. Economia, etica e responsabilità d'impresa* (Roma: Ediesse, 2013), passim, where they explain the theories of the *stakeholder*, social responsibility and *accountability*.

[41] P.L. Scandizzo, 'Il mercato e l'impresa: le teorie e i fatti', in V. Buonocore ed, *Trattato di diritto commerciale* (Torino: Giappichelli, 2002), VI, 141.

[42] E. Caterini, 'La terza fase del "diritto dei consumi" ' *Rassegna di diritto civile*, 320-337 (2008).

[43] E. La Rosa, *Tecniche di regolazione dei contratti e strumenti rimediali. Qualità delle regole e nuovo assetto dei valori* (Milano: Giuffrè, 2012).

Therefore, it may be said that sustainability relates to contracts as well. More precisely, contracts are sustainable if the contracting parties have equal bargaining power, so that none of them can impose its conditions on the other. This would lead to blatant social inequalities that the legal system does not accept.[44]

Fair contracts, namely sustainable contracts, meet the demands of welfare society, a model of community in which not only the State, but also companies and civil society organisations are responsible for fulfilling social needs.[45]

Beside equal negotiation, the sustainability of contracts involves the respect for the principle of non-discrimination. For example, in Italy it is common practice for property owners not to rent houses to homosexual couples or immigrants, as shown by the Italian case law. If on the one hand it seems necessary to uphold the right of each party to freely choose its counterparty, on the other hand it seems equally necessary to avoid that contractual freedom that results in discriminatory behaviours, which clearly contrast with human dignity and the principle of equality. The solution to this issue may be once again to balance the competing interests in the way that best ensures social justice.

XV. Tort and Sustainability

The obligation arising from tort is based on the statutory reservation of Art 23 of the Italian Constitution, and on other constitutional rules that intervene in each particular case. The reservation aims at restraining the limitations to the personal freedom and freedom of property arising from binding legal effects. Although the reservation is relative, it is necessary to distinguish between a 'statutory' reservation and a reservation of 'legality'.[46] This difference points out that when the obligation is directly connected to existential situations the autonomy of the statutory reservation is limited through the application of regulatory provisions; whereas, when the obligation restrains patrimonial freedoms, the reservation widens its scope and allows an autonomist intervention providing for rules and principles. This has an impact on the contents of the regulation on obligations arising from tort. Since the discipline of torts is characterized by patrimonial effects, as a consequence of circumstances that have an impact on both existential situations and patrimonial situations,[47] it is evident that such effects should be taken into account in their potentially dual nature.

In addition, Art 23 of the Italian Constitution endeavors to protect the limitations of personal freedoms and patrimonial freedoms concerning the action

[44] M.L. Chiarella, *Contrattazione asimmetrica. Segmenti normativi e costruzione unitaria* (Milano: Giuffrè, 2016).

[45] P. Perlingieri, 'Diritto dei mercati e dei contratti' *Rassegna di diritto civile*, 877-900 (2011).

[46] E. Caterini, 'Proprietà' n 29 above. The expression 'reservation of legality' should be interpreted as a reservation pertaining regulations containing principles.

[47] P. Perlingieri, 'Le funzioni della responsabilità civile' *Rassegna di diritto civile*, 2504-2511 (2011).

of a person that has committed the potential tort; thus, the topic of statutory reservation and reservation of legality does not only concern the effects of the act, once it has been qualified as tort, but also the qualification of the act itself as such. It is important to be clear in this respect. The theoretical debate on the proper construction of Art 2043 of the Italian Civil Code provides a not very persuasive alternative[48] when the damage is classified as 'wrongful' rather than defining an act as a 'tort' or 'wrongful action'. The consequences of the two opposing views would have an impact of the legal characterization of the rule of the code that could be interpreted as primary or secondary; however, it should be borne in mind that the sense of the reservation envisaged by the Constitution should be primarily referred to human behaviour and, as a consequence, to its effects.

Based on this interpretation, the issue still remains undefined. In fact, it could include the following: an unlawful conduct causing wrongful damage; an unlawful conduct not causing damage; an unlawful conduct causing damages that could be refundable without being wrongful (based on the theory of business risk), or a non-illegal conduct producing wrongful damage.

Thus, it is important to attempt a reorganization of the ill-posed issue, by including the parameter of sustainability in the argument.

Classifying a fact or an act as unlawful, implies the solution given by the balance between patrimonial or existential legal situations within the scope of the entitlement of the parties to the relationship or the fact. Such a balance implies an evaluation based on the hierarchy of the values stated by the Constitution, both when existential situations are at stake and when patrimonial situations are in conflicts with one another. In other words, an act is unlawful when the restriction on the freedom of the damaged party – deriving from the *sub judice* action – is not reasonable *vis-à-vis* the likewise restriction of the action of the party causing the damage.

However, in the evaluation of the restrictions that affect the freedom of the legal spheres involved, it is necessary to consider the justifying reasons – in other words, the functions that lead the assumed restricting action and the action opposing such restriction. These grounds will allow reasonable balancing.

Wrongful damage derives from such consideration, as the mere loss of property is not an indication of anything, and not even of an unlawful conduct. Therefore, Art 2043 of the Italian Civil Code should not be literally interpreted in a way that would separate the classification of damage as 'wrongful' and actions as 'unlawful'. The damage is wrongful insofar as the action classified as unlawful is wrongful. The fact that the legal system envisages compensatory measures even in the absence of such reasoning, will in any case depend on the evaluation of reasonable balance which takes into account legal situations that are opposed based on a justice parameter that is no longer of retributive justice, rather than of distributive justice. Suffice it to mention the regulation on the damage caused

[48] P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Milano: Giuffrè, 2017).

by an incompetent person.[49] In this case, it is the judge that is entitled to establish fair compensation for the injured party, whenever the latter was unable to obtain the compensatory measure from those who were appointed to monitor the incompetent person. Such a provision encompasses explicit consideration of the economic conditions of the parties, whereby fair compensation has no longer the remedial function of the injury suffered. The objectively wrongful act committed by an incompetent person is devoid of this connotation because of the absence of the unlawfulness of the conduct; despite that, it produces an unlawful damage whose effect could be both the refund obtained by the person appointed for monitoring the incompetent person and the fair compensation with a redistributive function. The latter cannot exclude a punitive function, thus a punitive one, imposed on the assets of the incompetent person. In all the hypotheses considered, the wording 'wrongful fact' or 'wrongful act' will be used in the awareness that the adjective encompasses several functions implying just as many effects.

On the other hand, the fact that, in a more strictly economic perspective the compensatory measure is not limited to the remedial function, can be inferred from Art 2058 of the Italian Civil Code, stating that the judge has to choose between compensation by equivalence and specific compensation, excluding the latter when it turns out to be unreasonably costly. The use of the adverb ('unreasonably') does not exclude the imbalance between the damage suffered and the compensatory measure, it just prevents excessive imbalance, thus the consequence of a wrongful effect depending on the measure of the imbalance, not on the unbalance itself. The non-excessive imbalance of the compensation may imply a sanctioning function. The recent guidance of the Cassation Court recognises the inherent and ontological punitive function and the deterrence function of civil liability, provided that a balanced dosimetry is taken into account in the quantitative evaluation of the damage.[50]

The aspect that we will subsequently try to explain is when tort can be reasonably compensated through civil penalty. In the meantime, another hypothesis should be outlined. Let us think about the occupation of uncultivated land made in a state of necessity for the purpose of fulfilling the primary needs of a community in emergency conditions, it being an occupation made in the absence of the envisaged legal conditions. This act should be considered lawful, because it lacks any unlawfulness; however, since it will imply the carrying out of farming activities, the typical and lawful risk arising from that should be borne by the entrepreneur. Therefore, the damage originating from lawful occupation of land could imply compensatory measures that should be borne by the organized and regular business, since a damage of this kind can be considered

[49] E. Caterini, 'Il «minimo vitale»' n 9 above, 1.

[50] M. Grondona, *La responsabilità civile tra libertà individuale e responsabilità sociale* (Napoli: Edizioni Scientifiche Italiane, 2017).

as a business cost. The hypothesis highlights the limit of objective liability arising from business risk. In this case the balance poses the primary value of the existential situation to the vital minimum, which – despite being effective by means of a business activity – makes the patrimonial limitation of an abandoned property fully reasonable. There is no injustice, nor tort, thus no compensation is due. The two cases highlight the role of the sustainability of the tort and of its effects. In fact, it is necessary to consider that tort cannot be objectively assessed, since subjective interferences can be sometimes essential because of the interests arising from it and of the balance stated above. The need for an individual to guarantee a vital minimum for himself and his family, according to the jurisprudence of the Court of Cassation, justifies the illegal occupation of uninhabited accommodation. The above, without prejudice to the balance between the state of necessity of the occupier and the potential inviolable rights of the owner of the occupied property, such that the occupation itself should be 'sustainable' only when the property right on the property is not concretely exercised in the dynamic phase. Unavoidability and relevance of danger become parameters to assess the conduct that aims at balancing conflicting interests and concurrent values. The objective element of fault, different from culpability, is evaluated on the basis of behavioural standardization. Negligence, malpractice, imprudence, breach of rules and ignorance of the same are weighted based on abstract behaviour, fiction and expected conduct. This is not always compatible with the protection of the individual. It is not an abstract concept, the effective protection of a person's dynamic personality implies full consideration of the individual's concrete contribution to the commission of the fact, especially when an organic relation is established between the interest and the interest holder.

Let us consider the issue of ignorance of the law. The constitutional interpretation of Art 5 of the Italian Criminal Code poses the conditions of excusability of the error, excusability of ignorance and inevitability of ignorance as conditions, thus personalizing criminal liability. If this is allowed for criminal liability, which is personal, why should this be uncritically excluded from civil liability? It all depends on the function of civil liability, which is – in turn – bound to the personalist principle. Admitting a preventive function of the civil liability, it is recognised that it depends on the deterrence capacity that it has towards the individual. Once the awareness of unlawfulness of the conduct is excluded, also the generically preventive function is completely neutralized.

On the other hand, the fault itself, as objectively construed in the sequence of the elements that form the circumstances of the unlawful act, has different legislative interpretations. Fault in its ramifications is, in some cases, considered less strictly, while in others the evaluation is based on its threshold of severity. The above-indicated parameters of de-responsibilization in the case of free provision of services (Arts 1710 and 1768 of the Civil Code) or of particular technical difficulties (Art 2236 of the Civil Code) are not different methods of

categorizing the conduct required to evaluate the concrete behaviour of the acting party. Such parameters express the effective relevance of the sustainability of the unlawful act in the presence of unavoidable subjective qualities. In the case of professional liability, some objective situations within the framework of the institutional purview of the debtor are present, ie some interests will be better satisfied though an owner of the debt having concrete technical solvency such that the creditor could hold him to the debt. There is no raising of the threshold of non-liability, rather a concretization of the threshold in respect of the qualities of the parties involved. The same is true – although in an opposite direction – for an authorized agent acting on a free basis. In this case, the law envisages a lower level of diligence by the agent, however, his or her personal qualities cannot be neglected when the mandate will imply legal acts whose effective importance will be directly linked to existential situations of the principal or when the contract concerns, for example, human organs to be used for human transplantation.

In such circumstances the element of fault highlights the connection between the protected interest and the value of the individual, as well as the constitutional impracticability of the interruption of such connection. The sustainability of the unlawful act goes beyond the gap between fiction and reality and includes the individual in the balance.

Let us consider the recent reform as per legge 8 March 2017 no 24 in the field of healthcare liability.[51] The law regulates a kind of liability similar to that implied by business management, or business-like management, with the features of continuity and calculability in terms of costs. Despite that, the liability is not objective, but it is based on malice or fault. It is a liability resting with the organised structure which provides the services that could be delivered and their quality by means of the *Atto aziendale* (a document outlining the business organization and management of the Healthcare Unit, as well as its relationships with the local authorities). This document falls within the scope of the organizational autonomy set forth in private law and its adoption is compulsory for any healthcare manager. The provided healthcare services are categorized in the recommendations of the guidelines, apart from the specifics of the concrete case where the element of fault is generally objectivized. This is envisaged in the perspective to simplify access to compensation for the injured party preventing excessive extension of the liability for healthcare professionals; in fact excessive burden of liability for single physicians, rather than having a preventive-deterrent function, may lead to the so-called defensive medicine, ie an excessively precautionary healthcare service provision focussing its interest in fragmenting the service into superfluous conduct which however mitigates the liability of co-performers. The focus is on the

[51] G. Alpa ed, *La responsabilità sanitaria. Commento alla legge 8 marzo 2017, n. 2* (Pisa: Pacini, 2017), passim, but especially, *ex plurimis*, E. Caterini, 'Atto aziendale e responsabilità sanitaria', 76; G. Alpa, 'Dal medico all'équipe, alla struttura, al sistema', 203; D. Pittella, 'L'evoluzione della responsabilità civile in ambito sanitario', 232; L. Di Donna, 'Ripartizione dei rischi e responsabilità civile della struttura sanitaria', 283.

accuracy and suitability of the organisation where single healthcare professionals operate. By means of the reform, fault was transferred onto the administrators of the healthcare facility by means of the *Atto Aziendale* from which creditors obtain the due quality of the services as a whole. In this instance, it is worth highlighting the legislative aim of simplification to the access to compensation as a result of an unlawful (contractual and non-contractual) action and a concurrent fair distribution of the fault between the business organisation and healthcare professionals who shall not be exempted from a personal contribution considering the specificity of the case in point. The discipline of unlawful acts, with its multi-faceted functions, includes a redistributive perspective aiming at facilitating access to the compensation of the injury to existential situations, or of patrimonial situations that are essential to free and decent living. Such perspective is based on the axiological value of the person and the concretization of the subjective contribution by the tortfeasor, which needs to be evaluated through discernment and concrete fault. There are specific criteria to quantify the personal injury whenever it is impossible to convert the damage into money by means of ontological parameters. That is why quantification tables have been developed and they are considered as an instrument of 'collective fairness'. Thus, the unlawful act is even more illegal, the greater its infringing power is exercised on legal situations that are more protected by the legal system. The greater the infringing power, the more the reservation of the law should be, ie it should leave minimum space to the autonomy of the debtor. As a consequence, fault must be measured with the utmost diligence leaving narrow and well defined exemption margins; similarly, the discernment of the tortfeasor requires considerable accuracy and the full awareness of the infringed value.

An effect of the above-mentioned variables is evident in the unlawfulness of the fact or the damage, whose (either remedial or sanctioning) preventive function, is in line with the infringing power of the unlawful act. In this context, punitive damages[52] are not incompatible as a redistributive effect of an extremely reprehensible act.

To this extent, it is worth mentioning the reform of liability within the healthcare system. Leaving aside the theoretical discussion on the contractual or non-contractual nature of the liability, which is of no use in this context, the technical standards of the guidelines establish a minimum threshold of diligence also with a view to limiting discretionarily in the choice of the obligation due by the debtor. This is in line with the reservation of law, insofar as it is an activity that is potentially harmful to existential situations. However, the right to health implies several categorizations, based on the type of healthcare service; these multiple aspects correspond to a certain level of flexibility that is variable on the basis of the seriousness of the existential risk. The evaluation of diligence is left

[52] A. Venchiarutti, 'Brevi note in tema di ammissibilità dei "danni punitivi" nell'ordinamento italiano', in E. Caterini et al eds, *Scritti in onore di Vito Rizzo* n 21 above, II, 2401.

to the regulatory provisions (ie the technical and scientific skills of healthcare professionals) requiring them to act with maximum professionalism. The compensatory measure follows the level of unlawfulness. However, a technically unsound infringement of the standard of professional healthcare provision could justify a sanction detached from the mere compensation for the injury caused.

The observations above are supported by the need to regulate the state of necessity, a rule that has no feature of exceptionality, which however completes the matter of illegality. It states the primacy of the individual in the balancing mechanism resulting from an unlawful act. The provision of healthcare services raises the level of the state of necessity in that it legalizes the act that harms the psychophysical integrity, provided that the act presents the features of unavoidability and necessity. The conduct of healthcare professionals, limited to the scope of technical standard, still remains subject to the compensation fairly established by a judge, even when it diverges from the technical standard in the absence of an equally technical reason. The application of sanctions would not be inappropriate in this case. It is known that the discipline of the reform does not adopt such a solution, however the case was useful to develop the discourse on healthcare, a field that is well suited to this approach.

In conclusion, there is a strict link between unlawfulness of conduct, illegality or wrongfulness of the effects and the balance between the evaluated subjective legal situations, such a link makes one measure of compensation, and only one, sustainable in the concrete case.

XVI. Property and Sustainability

Let us now consider the relationship between property and sustainability. The ECHR upholds the right to property,[53] which is defined as everyone's right to the peaceful enjoyment of his or her possessions. On the basis of this definition, the Strasbourg Court provides a materialistic interpretation of ownership by identifying it with the possessions themselves.

Such an interpretation may be an oversimplification in some cases. Indeed, ownership has not only an economic function, related to production and trade, but also a social function, as it allows human beings to fulfil their primary needs in life. What is purchasing a home, if not satisfying personal or family needs?

As explicitly stated in Art 42 of the Italian Constitution, property must also be accessible to all. This legal provision, which may be better understood in the light of the principle of equality, aims to promote ownership, in view of its social value. To this end, laws were enacted to introduce preferential loans for first-

[53] E. Caterini, 'La proprietà nel mercato europeo secondo le giurisprudenze superiori. Paralipomeni al volume sulla Proprietà', in L. Mezzasoma et al eds, *Il controllo di legittimità costituzionale e comunitaria come tecnica di difesa* (Napoli: Edizioni Scientifiche Italiane, 2010), 375.

time home buyers.

Although it is usually defined as an inviolable right, property is subject to limitations. More precisely, it may be considered inviolable as long as it does not contrast with the greater values of social solidarity and public interest. Some examples related to the Italian civil law may be useful to clarify such a concept.

XVII. Sustainable Development and Reasonableness

Sustainable development is based on reasonableness.[54] In everyday language, reasonableness is a synonym for good sense, but in legal parlance it has a more specific and complex meaning.

When applying rules to facts, judges have to strike a balance between the competing interests involved in a certain case: reasonableness allows them to harmonise these interests and to make decisions that are consistent with justice.

If fairness refers to the principles of equality, proportionality and justice, and good faith to the principles of solidarity, cooperation and protection of the contracting parties, reasonableness refers to the interpretation and application of every general clause of law, thus establishing itself as an indispensable interpretive criterion for judges. The ability to decide reasonably and proportionally is an essential component of their cultural background and results in the ability to decide fairly and effectively.

As far as sustainability is concerned, it is both an interpretive criterion and a general clause of law. Sustainable development implies an economic growth that respects human dignity and places the human person at the heart of the European legal system. Civil law therefore acquires a fundamental social function, enhancing social cohesion along with economic cohesion. Without an effective protection of the weakest in society and their needs, the European project is destined to fail. This means that institutions cannot ignore the needs of people who experience suffering and poverty.

If Europe wants to achieve its objectives, a turnaround is necessary. Law must defend first of all the poor and the needy, upholding human dignity and the fundamental principles, instead of serving the interests of the well-off and the powerful, who aim to consolidate the *status quo*.

[54] E. Giorgini, *Ragionevolezza e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2010).