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The Italian Law Journal: Challenges and Opportunities

Guido Calabresi*

An Italian Law Journal, published biannually online in English, with an advisory board comprising not only of the most distinguished of European Scholars, but also of significant ones from Brazil, China, Japan, and the United States, and focusing on private law! One can only imagine what – formalist, totally 19th Century Code centered, but still very great – Italian scholars of not so long ago, would be saying about the enterprise! And yet, it is precisely because of the importance of that Italian tradition – and its need to influence, and be influenced by, more modern and frequently functional scholarship – that this Journal is so interesting and presents so many intriguing challenges and opportunities.

As its sponsor, SISDIC, well recognizes, and has reflected in its recent Congresses, private law inevitably affects the structure of a society (its 'system building', public side[1]) as well as the private relations of people living in that society. Torts Law, for example, not only determines how many accidents there will be and what economic activities will be encouraged and discouraged, but also how individual members of a society relate to each other. Too often even distinguished modern scholars accept only one aspect of this field.[2] What is needed is scholarship that understand the importance of both and their interconnectedness.

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[1] For a now classical critical view of this role of private law, see I. Englard, 'The System Builders: A Critical Appraisal of Modern American Tort Theory' 9 *Journal of Legal Studies*, 27 (1980).

[2] Compare J.C.P. Goldberg and B.C. Zipursky, 'Torts as Wrongs' 88 *Texas Law Review*, 917-918 (2010), with R.A. Posner, 'Instrumental and Noninstrumental Theories of Tort Law' 88 *Indiana Law Journal*, 469 (2013).

To describe and study that interconnectedness, then, is the first challenge and opportunity for the Journal. The second is to make available to the many legal scholars who do not read Italian the particular insights found in Italian Legal Scholarship. This is why the plan to have each issue contain a classical work of Italian legal culture is so exciting to me. Just as the Italian Constitutional Court was one of the first to come up with the concept of 'Laws heading toward Constitutional invalidity' – a notion now widely accepted as of great utility and significance in public law – so the insights and legal 'inventions' of classical Italian private law scholars should influence and help shape private law scholarship across the world. But this will only happen if those classics are presented in ways that can be understood in distant lands with different legal traditions.

That creates a challenge as well as an opportunity. It is not enough to translate Italian classics into a language accessible to foreign scholars. The context in which a particular 'classic' was written must also be made clear if its insights are to have full effect. Comments to the translated work by current scholars, explaining both its private (relational) and public (structural) significance may well be needed. And, of course, the writing of such comments will present a great opportunity for their authors and, in due course, for their readers. But even more is needed, which is why the other planned Sections of the Journal are so promising and intriguing. I look forward to all of them, but perhaps especially to *Malebolge: Thoughts and Polemics*. For in that Section, one can truly hope that current Italian legal culture will make its mark.

All this is what the Journal aspires to. I rejoice in being part of the enterprise and wish the Italian Journal the greatest success and fondest welcome worldwide!

Criticism. From the Outskirts of a World Without a Centre

Pasquale Femia*

Abstract

On February 1433 at the university of Pavia the humanist Lorenzo Valla attacked the eminent jurist Bartolo da Sassoferrato, arguing that contemporary legal thinking was intellectual garbage. Jurists, all bartolians, forced him to leave the university. Symbol of a division that has never really been resolved, this story provides two dialectical images for an exercise in counter-narcissism for legal scholars. Valla and Bartolo show us the salvific upheaval of legal thought: to be ashamed of the established power.

In the transnational context, the Italian difference is the political primacy of conflict: without a centre, the world still maintains many outskirts. Refreshing its reflection in the corners of the world, legal science frees itself from the mortal danger of paranoid relationships with reality. Criticism is the method to build transnational legal scholar networks: only the weapons of criticism can release self-subversive energy in law.

> *The margin in question is the one produced early in modern Western culture between cultural patrimony and its transmission, between truth and its modes of transmission, between writing and authority*
>
> G. Agamben, *Project for a Review*[1]

I. February 1433: Valla, Bartolo and the anti-moral of history

In February 1433 the humanist Lorenzo Valla heavily criticized legal scholars in what has become the harshest attack of Early

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[1] G. Agamben, 'Project for a Review', in G. Agamben, *Infancy and History. Essays on the Destruction of Experience*, translated by L. Heron (London-New York: Verso, 1993), 143.

Modern Age.[2] 'Squawking geese', 'beasts' to be kicked out of the way, jurists – as Valla went on – are uncouth, they do not understand the purity of Latin; they understand nothing at all of classical Roman law, and it is not worth dealing with their works.[3] He specifically criticized Bartolo da Sassoferrato, who had died in 1357. Valla called Bartolo a drunkard, a dunce, a crazy man, a beast. His real target, though, were the Bartolists: all the legal scholar class who at the beginning of the XV century had built their own academic hegemony[4] around Bartolo's myth (*nullus bonus iurista, nisi sit bartolista*); so, jurists were omnipresent in the position of power. They had switched from being '*iurisconsulti*' to '*legulei*'.[5]

Jurists reacted so strongly that Valla was forced to leave the University of Pavia, perhaps even risking his own safety.[6] Bartolo has had his defenders[7] and it is not necessary to add our testimony here. The humanist and the jurist share the religion of text, but their tools of interpretation are opposite: the humanist's text is a repertoire of ancient wisdom, lost purity, on which the critical spirit can be

[2] L. Valla, *Epistola contra Bartolum* (1433), critical text in M. Regoliosi, 'L' "Epistola contra Bartolum" del Valla', in V. Fera and G. Ferraú eds, *Filologia umanistica per Gianvito Resta*, II (Padova: Antenore, 1997), 1501-1571 (text at 1532-1570); M. Speroni, 'Lorenzo Valla a Pavia: il *libellus* contro Bartolo' *Quellen und Forschungen aus italienischen Archiven und Bibliotheken*, 453-467 (1979). The *Epistola contra Bartolum* is published in O. Cavallar, S. Degenring and J. Kirshner eds, *A Grammar of Signs. Bartolo da Sassoferrato's Tract on Insignia and Coats of Arms* (University of Berkeley, California: Robbins Collection Publications, 1994), 179-200.

[3] '*Bestie enim sunt*': L. Valla, *Epistola contra Bartolum* n 2 above, 1533; G. Rossi, 'Valla e il diritto: L'Epistola contra Bartolum e le Elegantiae. Percorsi di ricerca e proposte interpretative', in M. Regogliosi ed, *Pubblicare il Valla. Proposte di ricerca e ipotesi interpretative* (Firenze: Polistampa, 2008), I, 507-599; B. Clavero, 'Blasón de Bártolo y Baldón de Valla (a propósito de una gramática de signos)' *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, 573-616 (1996).

[4] M. Regoliosi, 'L'Epistola contra Bartolum' n 2 above, 1503-1510; M. Ascheri, *The Laws of Late Medieval Italy (1000-1500): Foundations for a European Legal System* (Leiden-Boston: Brill, 2013), 348.

[5] '*Quod si fecerint (ut spero et opto) non legulei, sed Iurisconsulti evadent*' [If they do this (as I hope and prefer), they will become not pettifoggers, but jurists]: L. Valla, 'Elegantiae', book III, *Praefatio* [*Laurentii Vallae Elegantiarium Latinae Linguae Librii Sex* (Lugduni: Apud Seb. Gryphium, 1544), 159]. Valla's harsh criticism follows the Model of Cicero's orations: M. Regoliosi, 'L' Epistola contra Bartolum' n 2 above, 1536, 1542-1543; G. Rossi, 'Valla e il diritto' n 3 above, 527, note 47.

exercised without any reverence; the jurist's text is sanctified to the point of fetishism, it is intangible, though debated using any method of argumentation which is socially acceptable in order to put the fragments back together again into new unities of meaning for the solution of social conflicts. Freedom of conscience and thought, on one hand; vision of the structures of the political order, on the other. It is not a battle between bad humanists and good jurists, between intelligent educated humanists and uncouth corrupted jurists; nor it is a clash between shallow chattering intellectuals versus honest workers of order. Refereeing a match fixed in favor of your own team is unfair and, above all, silly.

The Pavia quarrel between Valla and his colleagues is the symbol of a division that has never really been resolved, and not by chance the academic institution was where that division started out: rival kinds of knowledge in a single arena.[8] Valla's invective is just the peak of a long-standing conflict. That February 1433 created a fracture that not even the later movement of legal humanism would be able to heal: the mutual indifference, the conviction that educated men could shamelessly ignore the law and that the jurists could carry out their own arguments as if human and social sciences had nothing to say. There is nothing more stupid and hideous than a jurist willing to deal exclusively with 'formal legal issues'; and nothing is more stupid and presumptuous than a philosopher or a sociologist who boasts of ignoring the law as being a pseudoscience for corrupt

[6] G. Rossi, 'Valla e il diritto' n 3 above, 564.

[7] G. Kisch, *Gestalten und Probleme aus Humanismus und Jurisprudenz* (Berlin: De Gruyter, 1969), 117-124; F. Calasso, 'Bartolo da Sassoferrato' *Annali di storia del diritto*, 472-520 (1965); S. Lepsius, 'Bartolo da Sassoferrato', in I. Birocchi, et al eds, *Dizionario biografico dei giuristi italiani* (Bologna: il Mulino, 2013), I, 176-180. On Valla's side, but excessively, G. Mancini, *Vita di Lorenzo Valla* (Firenze: Sansoni, 1891), 78-83. From a philosophical point of view, M. Manzin, *Il petrarchismo giuridico. Filosofia e logica del diritto agli inizî dell'Umanesimo* (Padova: Cedam, 1994).

[8] C. Dionisotti, 'Filologia umanistica e testi giuridici fra Quattro e Cinquecento', in B. Paradisi ed, *La critica del testo. Atti del Secondo Congresso Internazionale della Società Italiana di Storia del Diritto* (Firenze: Olschki, 1971), I, 194-195, 202: Valla as '*bestia nera*' [mortal enemy, literally 'black beast'] for all legal scholars. D. Quaglioni, 'Tra bartolisti e antibartolisti. L'Umanesimo giuridico e la tradizione italiana nella *Methodus* di Matteo Gribaldi Mofa (1541)', in F. Liotta ed, *Studi di storia del diritto medievale e moderno* (Bologna: Monduzzi, 1999), 185-212.

people. Logic and dialectic do not prevent the jurist from being criminal and false; the clear classical nature of humanist good-thinking does not prevent Valla from evoking book burnings[9] and his philological expertise does not make him doubt that Bartolo's treatise, which he criticized, is apocryphal.[10]

As jurists, instead of replying, we should wonder why non-jurists do not bear us, why they believe it would be sufficient to label our discussions as savagery after a fast and superficial reading.[11] The critical spirit of Valla the humanist – the destroyer of the hegemonic claims which are contained in the false text of the Donation of Constantine – totally ignores the political work of Bartolo the jurist,

[9] '*Nonne indignum est* (...) *et egre nobis ferendum, quod tot ineruditissimi libri et ineptissime scripti non modo non iniiciuntur flammis in publico positis* (...)?': L. Valla, *Epistola contra Bartolum* n 2 above, I, 1, 1532. Mariangela Regoliosi observes that this passage descends from multiple classical commonplaces: M. Regoliosi, 'L' Epistola contra Bartolum' n 2 above, 1532, note 1. The desire for book burnings is grounded in Valla's sacral conception of Latin: *Latini sermonis sacramentum est*. See E. Garin, *L'umanesimo italiano. Filosofia e vita civile nel Rinascimento* (Bari: Laterza, 1952). Valla's interest about law is only a linguistic one, according to G. Rossi, 'Valla e il diritto' n 3 above, 585. On natural law and justice see L. Nauta, *In Defense of Common Sense. Lorenzo Valla's Humanist Critique of Scholastic Philosophy* (Cambridge, Massachusetts-London: Harvard University Press, 2009), 160-163; R. Fubini, *Umanesimo e secolarizzazione da Petrarca a Valla* (Roma: Bulzoni, 1990), 386-392.

[10] G. Rossi, 'Valla e il diritto' n 3 above, 550-551. The *Epistola contra Bartolum*, however, is still worth attention for the critique of scholastic medieval syllogism, according to the logic of common sense: M. Regoliosi, 'Valla, Lorenzo', *Dizionario biografico dei giuristi italiani* n 7 above, II. On Valla and legal Humanism see D. Maffei, *Gli inizi dell'Umanesimo giuridico* (Milano: Giuffrè, 1956), 37; R. Orestano, *Introduzione allo studio del diritto romano* (Bologna: Il Mulino, 1987), 607, note 47. The relationship between Humanist and Jurist has, naturally, many sides: M.P. Gilmore, *Humanists and Jurists. Six Studies in the Renaissance* (Cambridge, Massachusetts: Harvard University Press, 1963); D.R. Kelley, 'Civil Science in the Renaissance: Jurisprudence Italian Style' 22 *The Historical Journal*, 777-794 (1979); D.R. Kelley, 'Jurisconsultus Perfectus: The Lawyer as Renaissance Man' 51 *Journal of the Warburg and Courtauld Institutes*, 84-102 (1988); F. Calasso, 'Umanesimo giuridico', in F. Calasso ed, *Introduzione al diritto comune* (Milano: Giuffrè, 1951), 181-205.

[11] Valla narrates having read Bartolo's Treatise *De insigniis et armis* suddenly overnight; immediately afterwards writes his *Epistola contra Bartolum*. He focuses, however, on the non-legal section of the Treatise; a section which is probably apocryphal. Valla's knowledge of juridical medieval culture appears casual and cursory: G. Rossi, 'Valla e il diritto' n 3 above, 590.

who deals with the harshest conflicts of his times, writing about interdictions, reprisals, city factions, forms of government and, above all, tyranny.[12]

Perhaps humanists hate the idea that the person is reduced to a function of order, the constant claim that actions should repeat themselves according to a pre-fixed normative model in order to be legal: the exhibited seriality of law opposes itself to the hidden seriality of humanistic culture, which lives by infinite narrative structures and variations, as *ars est celare artem*. Certainly, humanists criticize our (supposed, increasingly weaker) direct and privileged relationship with power; theirs, in contrast, is a conflictual one: sometimes as servants in a close relationship, and more often (from the Romantic fracture onwards) as prophetic outsiders in a constitutively marginal or subversive relationship.

Is this the war between the discursive universe of the '*It has always been*' (The Order) and the discursive universe of the '*Always new*' (The Marvellous)?

There is no answer, not even a moral of the story in the dispute between Valla and Bartolo. For us it is just a chance to unveil the inner subversion beneath 'The Order' and the constant structure within 'The Marvellous',[13] trying to realize that the organizing

[12] Usually, Valla's polemics look like a one man show. See, eg: '*Qui non tantum adversus mortuos scribo, sed adversus etiam vivos, nec in unum alterum ve, sed in plurimos, nec contra privatus modo, verum etiam contra magistratos* (public officials)': L. Valla, *De falso credita et ementita Constantini Donatione* (1440), I, 1. Among Bartolo's most celebrated Treatises: *De bannitis* (1354), *De repraesaliis* (1354), *De guelphis et ghibellinis* (1355), *De regimine civitatis* (1356), *De tyranno* (1356). The Treatise *De insigniis et armis* was written in 1357, year of his death: G. Rossi, 'Bartolo da Sassoferrato alle origini della moderna trattatistica giuridica: note di lettura sul «Liber Minoricarum»' *Studi umanistici piceni* (additional issue), 19 (2012). See, above all, the critical edition of the Treatise *On Tyranny*: Diego Quaglioni, *Politica e diritto nel Trecento italiano. Il 'De tyranno' di Bartolo da Sassoferrato (1314-1357). Con l'edizione critica dei trattati 'De Guelphis et Gebellinis', 'De regimine civitatis' e 'De tyranno'* (Firenze: Olschki, 1983); and the following debate: O. Cavallar, 'Il tiranno, i *dubia* del giudice ed i *consilia* dei giuristi' *Archivio Storico Italiano*, 265-345 (1997); O. Cavallar, 'Geografia della tirannide. Una proposta di lettura per alcuni degli ultimi trattati bartoliani', in J. Barthas ed, *Della tirannia: Machiavelli con Bartolo. Atti della giornata di studi – Firenze, 19 ottobre 2002* (Firenze: Olschky, 2007), 3-46; D. Quaglioni, *Machiavelli e la lingua della giurisprudenza. Una letteratura della crisi* (Bologna: il Mulino, 2011), 57-75.

[13] S. Greenblatt, 'Invisible Bullets: Renaissance Authority and His Subversion' 8

principle of the discourse is only the astonishing criticism of perception. With these fragmented perceptions we will finally reach the salvific upheaval of legal thought: to be ashamed of the established power (on the way of self-subversion).

II. Valla and Bartolo together: dialectical images instead of programs

We do not expect to heal the fracture between humanists and jurists with our work. Neither do we want to announce a program: programs are wishes, it would be better not to talk about them. Instead, we want to restart from the images, from the two apparently irreconcilable figures of Valla and Bartolo. We would like to look at them to protect ourselves from the mortal danger of a narcissistic projection into the past. Jurists love to represent themselves in an old fashioned way: this is a bad habit which started when classicism and conservatism mingled, shown in the distorted identification with the colleagues from the past centuries. Modern jurists envy their authority, crave it, look for legitimacy in their formulas (eg *lex mercatoria*). These are symptoms of scientific weakness, consoling practices, strategies to hide cultural crises: though legality cannot be found in pretense, it is a constructive engagement.[14]

May the effigy of this Journal be a therapy: let's mirror ourselves in a dual image, a disturbing – not comforting, not narcissistic – image of conflict, of division, of contempt; something that calls for the everlasting need of a clash between discursive closeness and communicative openness. We are not a phalanx of legal doctrine, we do not want to convert anyone, nor drag anyone into our battles. We would just like to invite everyone, readers and authors (interchangeable roles), to practise daily the exercise of counter-mirroring in the dialectical image of Valla

Glyph, 40-61 (1981); F. Moretti, 'La grande eclissi. Forma tragica e sconsacrazione della sovranità' (1979), in Id, *Segni e stili del moderno* (Torino: Einaudi, 1987), 50-103. Stephen Greenblatt has brilliantly studied the ambiguous balance between authority and subversion in Lorenzo Valla's Treatise *On pleasure* (*De voluptate*): S. Greenblatt, *The Swerve. How the World Became Modern* (New York-London: Norton, 2011), 222-224.

[14] P. Perlingieri, 'Il principio di legalità nel diritto civile' *Rassegna di diritto civile*, 164-201 (2010).

and Bartolo, the ones we have chosen, our protective gods against their will, inseparable friends/foes.[15]

III. The Italian difference

What can Italy offer in this trend common to all Western legal systems? Italy, as most countries are, is an outskirt of the Empire without place,[16] where the political primacy of conflict has appeared.[17] Power grows, rules, legitimates itself by running along transnational communicative channels.[18] There is no centre, there is no place; however, non-places have their outskirts too – they are

[15] W. Benjamin, 'Das Passagen-Werk', in R. Tiedemann and H. Schweppenhäuser eds, *Gesammelte Schriften* (Frankfurt am Main: Suhrkamp, 1991), II, 591-592. M. Regoliosi, 'Ritratti di Lorenzo Valla', in G. Lazzi and P. Viti eds, *Immaginare l'autore. Il ritratto del letterato nella cultura umanistica. Convegno di Studi, Firenze, 26-27 marzo 1998* (Firenze: Polistampa, 2000), 207-213. This sort of unlikely friendship between Valla and Bartolo has a chance in our future. François Rabelais kept both in mind in the tenth chapter (Book One, 1532) 'Of that which is signified by the colours white and blue' of *Gargantua and Pantagruel*: 'Is not the night mournful, sad, and melancholic? It is black and dark by the privation of light. Doth not the light comfort all the world? And it is more white than anything else. Which to prove, *I could direct you to the book of Laurentius Valla against Bartolus*' (italics added, translated by T. Urquhart of Cromarty and P.A. Motteux) available at http://ebooks.adelaide.edu.au/r/rabelais/francois/r11g/book1.10.html (last visited 23 March 2014). See L. Valla, *Epistola contra Bartolum* n 2 above, VI, 30-39, 1562. We would imagine the two enemies in this darkness walking (and questioning, quarrelling…but, for the first time, in this purely fictional time, listening to each other) and together searching the light. Is this the moral of the story? Absolutely not: they should have in mind, obviously, different, incommensurable, images of light. And the quarrel goes on…

[16] A. Negri and M. Hardt, *Empire* (Cambridge, Massachussetts: Harvard University Press, 2000), XII, 335 (It 'is no longer possible to demarcate large geographical zones as center and periphery'). But the delocalization of power makes us all a peripheral multitude; 'the space of non-place creates neither singular identity nor relations; only solitude, and similitude': M. Augé, *Non-Places. Introduction to Anthropology of Supermodernity*, translated by J. Howe (London-New York: Verso, 1995), 103.

[17] D. Gentili, *Italian Theory. Dall'operaismo alla biopolitica* (Bologna: il Mulino, 2012); A. Negri, *La differenza italiana* (Roma: Nottetempo, 2005), 22.

[18] A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts* (Frankfurt am Main: Suhrkamp, 2006).

mainly receptive territories,[19] corners of the world imitating global noise. We can look at the centre of the non-place only from the outskirt.[20] Something escapes, something dark remains for the bare lives living in the thousand centres of a world without a centre; something cannot be perceived by those who grow up producing themselves within a stream of discourses which receives and consumes everything, as long as everything runs according to the meaning which is built in the shapes of an indisputable domain;[21] something is never understood in the global universe, a world interpreted and never shaken by itself:

> *…daß wir nicht sehr verläßlich zu Haus sind*
> *in der gedeuteten Welt*
> (R. M. Rilke, *Duineser Elegien*, I, 12-13)[22]

[19] U. Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance' 10 *Indiana Journal of Global Legal Studies*, 383-448 (2003).

[20] M. Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne: Eine theoretische Betrachtung und eine Interpretation des Falls Brasilien* (Berlin: Duncker & Humblot, 1992); H. Brunkhorst and S. Costa eds, *Jenseits von Zentrum und Peripherie. Zur Verfassung der fragmentierten Weltgesellschaft* (München und Mering: Rainer Hampp Verlag, 2005).

[21] U. Mattei and L. Nader, *Plunder: When the Rule of Law is Illegal* (Malden, Massachusetts-Oxford-Carlton: Blackwell, 2008), 196-210.

[22] '…that we are not really at home in / our interpreted world', translated by Stephen Mitchell [R.M. Rilke, *Duino Elegies and the Sonnets an Orpheus* (New York: Vintage, 2009), 3]. 'Interpreted world' seems the best translation for '*Die gedeutete Welt*' of the first Duino Elegy. Other choices: '*elucidated* world' [R.M. Rilke, *Duino Elegies and Other Selected Poems*, translated by L.P. Gartner (Bloomington: AuthorHouse, 2008) 1]; '*translated* world' [R.M. Rilke, *Duino Elegies and The Sonnets to Orpheus*, translated by A. Poulin jr. (New York: Mariner Books, 2005), 5]; '*signposted* world' [R.M. Rilke, *Duino Elegies*, translated by Peter Cohn (Evanston: Northwestern University Press, 1998) 21]; among Italian translations: 'mondo *interpretato*' [R.M. Rilke, *Elegie duinesi*, translated by M. Ranchetti and J. Leskien (Milano: Feltrinelli, 2006) 3]; 'mondo *già interpretato*' [R.M. Rilke, *Elegie duinesi*, translated by F. Rella (Milano: Rizzoli, 2004) 43]. Perhaps the finest translation is Furio Jesi's 'mondo *significato*' (signified world): F. Jesi, *Esoterismo e linguaggio mitologico. Studi su Rainer Maria Rilke* (Messina: D'Anna, 1976) 65. See G. Agamben, 'Vocation and Voice' 10 *Qui parle* 93 (1997); F. Rella, *Negli occhi di Vincent. L'io nello specchio del mondo* (Milano: Feltrinelli, 1998) 37; R. Walisch, *„daß wir nicht sehr verläßlich zu Haus sind in der gedeuteten Welt": Untersuchung zur Thematik der gedeuteten Welt in Rilkes „Die Aufzeichnungen des Malte Laurids Brigge", „Duineser Elegien" und spätester Lyrik* (Würzburg: Königshausen & Neumann, 2012) 226-240. Rilke's *gedeutete Welt* is a world astonished under the

This *something* is the poison of the present day, the hidden foulness of order, its violence, its oppression, its hypocrisy.[23] Herds of jurists living by the law to cause pain by calling it justice; networks of coherent, calculating, reasonable discourses, and always guardians of the scandal of human misery and its hardest inability of transcendence.

Jurists shamelessly have their hands dirty with power. Will the legal science be able to return them their decency, or will it just be one of the many masks of power itself?

Like morality and theology, law has a paranoid relationship with reality.[24] It comes from it and interacts with it; though their relationship is sick. Dissent is immorality, is sin, is illegality. Facts oppose the discourse which envelops and founds norms; and even before the opposition could open to criticism, these paranoidly oriented systems reject them, labelling them in a negative way. Facts, sooner or later, make the law – they make it and, above all, they destroy it. However, their work does not appear on the outside: discourses pretend to change by themselves, not under external pressure. Therefore, the constitutive form of the relationship between world and paranoid system is hypocrisy. This way the legal

pressure of too many meanings, which offer themselves as real things: 'Under these influences a totally different conception of things has formed in me, certain differences have appeared that separate me from people more than anything that has gone before. *A transformed world. A new life full of new meanings. At the moment it is rather hard for me, because everything is too new. I am a beginner in my own relationships*': R.M. Rilke, *The Notebooks of Malte Laurids Brigge*, translated by B. Pike (University of Illinois: Dalkey Archive Press, 2008) 53 (italics added). The last passage in German: '*Eine veränderte Welt. Ein neues Leben voll neuer Bedeutungen. Ich es augenblicklich etwas schwer, weil es alles zu neu ist. Ich bin ein Anfänger in meinem eigenen Verhältnissen*': R.M. Rilke, *Die Aufzeichnungen des Malte Laurids Brigge*, I (Leipzig: Im Insel Verlag, 1910) 105; Id, *Werke. Kommentierte Ausgabe in vier Bänden* (M. Engel, U. Fülleborn, H. Nalewski and A. Stahl eds.), III (Frankfurt am Main - Leipzig: Im Insel Verlag, 1996) 505.

[23] S. Chignola, *'Etwas Morsches im Recht. Su violenza e diritto'*, available at *www.uninomade* (last visited 9 January 2012); W. Benjamin, 'The Critique of Violence', in P. Demetz ed, *Reflections. Essays, Aphorisms, Autobiographical Writings*, translated by E. Jephcott (New York: Schocken, 1986), 286: 'in the exercise of violence over life and death more than in any other legal act, law reaffirms itself. But in this very violence something rotten in law [*etwas Morsches im Recht*] is revealed'.

[24] P. Femia, 'Against the "Pestilential Gods". Teubner on Human Rights' 40 *Rechtsfilosofie & Rechtstheorie*, 260-274 (2011).

system – perhaps not the most powerful among paranoid systems, but certainly the most difficult to escape from – assures the paradoxical condition of a change that occurs uniquely because the legal system is allowed to act under the mask of continuity.[25]

For a very long time law has worked as an enunciating machine (*dictio*). It has enunciated juridical qualifications (*iurisdictio*) according to the code legal/illegal. It has assured stability of the images of the world, it has given a huge power to jurists, legal priests of order. Though nowadays power speaks other languages, all related to economics: production, finance, investments, incomes, growth, employment, wealth and poverty have become the lexical architecture of happiness and tragedy. The mortal god of the market, convinced by the discursive autopoiesis of its own immortality, appears as the premise of any order, as the measure of the value of any public policy.[26] What is the point of 'fulminating with voidness' (some still write like this) a contract under national law, if the global financial system still lives thanks to that contract? How many minutes would a constitutionally founded legal system resist if contracts (legal contracts – who knows why no one uses the word 'blessed with validity'), which private citizens use to finance public debt, were fulminated with scepticism by financial speculation? A contract declared illegal under the national legal system can still be concluded and enforced; a State declared unreliable by the transnational economic system can only dissolve into disorder (or recover, *in extremis* – as a system, not as a State – from its own compulsive autopoiesis).[27]

Every day the State, this magnificent paper god of each positivist jurist, holds out its hand in order that some private citizen finance it, by buying its bonds. The private sector finances the public one and so the private sector has bought the public one; every day financial markets give an example of a magnificent public beggar living on trust. Every day a solitary and well organized crowd of individuals

[25] G. Teubner, *Law as an Autopoietic System* (Oxford-Cambridge: Blackwell, 1993).

[26] About the institutional framework of the conservative legal school, see S.M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008).

[27] G. Teubner, 'A Constitutional Moment? The Logics of 'Hitting the Bottom'', in P.F. Kjaer, G. Teubner et al eds, *Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart, 2011), 9-51.

reduced to rapacious functions of their wish – as infinite as the fear of becoming poor – gives the State money in order to make profits (ie taking collective resources away and expropriating public wealth to the benefit of private wealth).

IV. Transnational critical networks to train jurists on shame

All these things are disturbing, we do not like to hear about them. Jurists (and so moralists and theologians, and basically, anyone else) can turn their backs disdainfully on their fate of insignificance, clinging to the emblems of a power as shallow as the scabbard of Melville's *Benito Cereno*;[28] they can look for individual ways of salvation by offering the economic god the same services they offered the political god in the past. Instead they can cross the frontier of order and find a new function, make legal science the model of a new science of counter-hegemony for the protection of weak people. It is for weak people that justice was born.[29]

Law is a language of its own. Today it is a babel of dialects, where hegemonic dialects try to establish themselves as universal languages. Under these conditions law is a local phenomenon. It seems hard to imagine a world which is built according to the Kantian utopia of cosmopolitan law:[30] too many differences, too much influence of local power (which is not destroyed, but only ordered by global power), too many subversive forces triggered by the global economic system which needs differences in local governments, as each difference gives an opportunity of greater exploitation.[31] However, if statutes and, at least in part, the other sources of law are not cosmopolitan, indeed structures and cultures

[28] P. Femia, 'Benito Cereno in Bucovina', in A. Febbrajo and F. Gambino eds, *Il diritto frammentato* (Milano: Giuffrè, 2013), 23-115.

[29] A. Prosperi, *Giustizia bendata. Percorsi storici di un'immagine* (Torino: Einaudi, 2008) 170-175.

[30] P. Kleingeld, 'Kant's Cosmopolitan Law: World Citizenship for a Global Order' 72 *Kantian Review*, 72-90 (1998); S. Benhabib, 'The Law of Peoples, Distributive Justice, and Migrations' 72 *Fordham Law Review*, 1761-1787 (2004). Above all D. Zolo, *Cosmopolis. La prospettiva del governo mondiale* (Milano: Feltrinelli, 1995).

[31] D. Harvey, *The Enigma of Capital: And the Crises of Capitalism* (Oxford: Oxford University Press, 2010), 184-214.

will be transnational.[32] Using the plural, because there is not a mainstream thought, but a single need for an infinite criticism of the present day.

Law should become a system able to overwhelm the paranoid pride of *dictio* – of the qualification and disqualification of rights and wrongs, of the wish to teach the world how to think about what occurs to the world itself – and able to open cognitively, admitting the flexibility of the sources of law, accepting a conception of legal validity as a reversible process, which is not totally formalized in immutable procedures.[33]

Finding out the *ratio* of norms is not enough, but we need to understand the policy of regulation; *regula* has no sense (and even if it had, it would be useless), whereas the policy of *ius* has; not fragments of orders to obey or to disobey if they are not advantageous, but coherent (or to be made coherent through criticism) complexes of directives to be evaluated analyzing the results of their application.

Validity no longer depends on what norms say, but on what norms do; on the results they produce. A legal system based on democratic discussion accepts the idea of reviewing its own contents forever. It does not work under Nihilism:[34] it annihilates itself. It preserves a destructive potential on the inside, the ability to demolish current norms in order to make other norms.[35] This kind of system, then, does not have just one language, it cannot impose the infinite repetition of identicalness in its orders, it cannot say 'You shall have no other law before me'. As there is no discourse that regulates, but a multitude of communicative networks able to regulate.

The law, like the world, is fragmented into many communicative

[32] P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008), 17-19.

[33] N. Luhmann, *Law as a Social System*, in F. Kastner et al eds, translated by K.A. Zeigert (Oxford: Oxford University Press, 2004), 106 ('[T]he legal system operates in a normatively closed and, at the same time, cognitively open way'); N. Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' 13 *Cardozo Law Review*, 1427 (1992).

[34] G. Perlingieri, 'Sul giurista che come «il vento non sa leggere»' *Rassegna di diritto civile*, 385-413 (2010).

[35] P. Femia, 'Segni di valore', in L. Ruggeri ed, *Giurisprudenza della Corte europea dei diritti dell'uomo e influenza sul diritto interno* (Napoli: Edizioni Scientifiche Italiane, 2012), 83-156.

networks.[36] A supranational legal science does not exist, an overworld does not exist, nor does a superior point of view to observe law. Legal science is just one of the many communicative networks able to order; it deals with the reality of human suffering, not with the heavenly destinies of ideas; it is located in a place whose structures of power it decomposes and recomposes; it is a criterion to connect national debate on local regulatory experience with networks which have the same function in other countries.[37] A superscience, therefore, does not exist; what exists is a continuous contamination between all the scientific networks.

We hope that these processes of hyper-communication between scientific networks will grow and so create a critical power to fight the cultural hegemony of possessive individualism, which has colonized the economic discourse and therefore every corner of the world.[38]

If power really is the shame of man – as Elsa Morante, a great Italian novelist, said[39] – then we want to teach jurists shame. And we would like to add that inequality is the shame of human communities. Unequal distribution is a scandal and law should not be complicit in it. It is not easy to get rid of the repetition compulsion: law helps to represent the ontology of order in this compulsion. This is why law works perfectly when everything has to stay as it is, when disputes should be resolved by ensuring that everyone stays in the same social position belonging to him or her

[36] G. Teubner, *Constitutional Fragments: Societal Constitutionalism in the Globalization* (Oxford: Oxford University Press, 2012); C. Crea, *Reti contrattuali e organizzazione dell'attività d'impresa* (Napoli: Edizioni Scientifiche Italiane, 2008), 189-199.

[37] An interesting case is brilliantly examined by A. Federico, 'Il trasporto di cose', in G. Gitti, M.R. Maugeri and M. Notari eds, *I contratti per l'impresa* (Bologna: Il Mulino, 2012), I, 325-342.

[38] A. Fischer Lescano, 'Postmoderne Rechtstheorie als kritische Theorie' 61 *Deutsche Zeitschrift für Philosophie*, 179-196 (2013); A. Fischer Lescano, 'Critical Systems Theory' 38 *Philosophy & Social Criticism*, 3-23 (2012); G. Alpa, 'Lo snobismo degli economisti e il rifiuto del dialogo con i giuristi (a proposito dell'introduzione alla versione italiana, 'Impresa, mercato e diritto' di R.H. Coase)' *Economia e diritto del terziario*, 745-749 (1996).

[39] Elsa Morante appropriately wrote that power is the 'dishonour' of man: E. Morante, *Piccolo Manifesto dei Comunisti (senza classe né partito)* (Roma: Nottetempo, 2004), 7.

before the dispute.[40] Law retributes, it does not distribute. Even when law explicitly takes on the task to achieve social justice – and therefore distributive, not retributive, justice – it cannot actually change the predetermined distribution plan; even when it distributes, it retributes; it does not really distribute, because it goes by a fixed order: therefore, it is not open to the tragic uncertainty of the becoming,[41] but to the fixed order of the distributive procedures. It is embedded in the comforting repetition of a path, transforming the disordering power of equality into the entitlement to the right to a distributive procedure; ie into the retribution of distributive rights.

Only the weapons of criticism can release innovative and self-subversive energy in law[42] Accepting the risk of uncertainty, as order is not repetition, but an infinite production of sense ever new. Kafka has taught us to hesitate before the doors of law, in the sense of Italian *legge* (law as a statute).[43] Il *diritto* (law as a whole), though, is an infinite network of doors watching each other, opening each other. Our doors are open, we have educated them to transience. Cross our doors, and dissipate them.

Greetings
Da una camera accanto della vita
Quasi una voragine distante[44]

Sfondare la parete nera.
Rompere in alba la sera.
È il sogno del morituro?
Il voto del nascituro?[45]

[40] About the balance between justice and welfare, G. Calabresi, 'About Law & Economics: A Letter to Ronald Dworkin' 8 *Hofstra Law Review*, 553, 557 (1980).

[41] G. Calabresi and Ph. Bobbit, *Tragic Choices* (New York: W.W. Norton & Company, 1978), 39.

[42] G. Teubner, 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' 72 *Modern Law Review*, 1-23 (2009); P. Femia, 'Infrasystemische Subversion', in M. Amstutz and A. Fischer-Lescano eds, *Kritische Systemtheorie. Zur Evolution einer normativen Theorie* (Bielefeld: Transcript Verlag, 2013), 305-325.

[43] G. Teubner, 'The Law Before its Law: Franz Kafka on the (Im)possibility of Law's Self-reflection' 14 *German Law Journal*, 405-422 (2013).

[44] G. Giudici, *Da una camera accanto*, in Id, *Eresia della sera* (Milano: Garzanti, 1999), 65 (*From a next room of life* / *almost a chasm far*).

[45] G. Caproni, 'Sfondare la parete nera', in Id, *Res amissa* (Milano: Garzanti, 1991), 178 (*Rifting the black wall* / *Breaking evening in dawn* / *Is the dream of the dying man?* / *The vow of the not even born?*).

Constitutional Norms and Civil Law Relationships

Pietro Perlingieri*

Abstract

This essay provides a critical account of the long-established scholarly views according to which constitutional norms have a merely programmatic nature, inapt to be directly applied in private law relationships and hence to be utilized as hermeneutical tools when interpreting statutory law. Instead, as this essay shows, courts make use of constitutional norms extensively, applying them not only indirectly – that is in the presence of statutory norms – but also directly. Thus, the Constitution is integral part of the law controlling private relationships, making them functional to the general values that mould the whole legal system. This perspective encourages the re-reading of civil law precepts in the light of the Constitution, as well as the complete fulfilment of constitutional legality.

I. Re-reading statutory law from a constitutional perspective: a preliminary clarification. The juridical (not political) nature of the constitutional norm and its place within the theory of the sources of law

In the late Sixties, more openly than in the past,[1] legal

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[1] See, in general and particularly, R. Nicolò, 'Diritto civile', *Enciclopedia del diritto* (Milano: Giuffré, 1964) XII, 907 ff; M. Giorgianni, 'Il diritto privato e i suoi attuali confini' *Rivista trimestrale di diritto e procedura civile*, 399 ff (1961) and on specific topics see, for all, U. Natoli, *Limiti costituzionali dell'autonomia privata nel rapporto di lavoro*, I, *Introduzione* (Milano: Giuffré, 1954) 46, 85 ff; L. Campagna, *Famiglia legittima e famiglia adottiva* (Milano: Giuffré, 1966), 3 ff; U. Majello, *Profili costituzionali della filiazione legittima e naturale* (Napoli: Morano, 1965), 10-11.

scholars[2] pointed to the 're-reading of the civil code and statutes in the light of the Republican Constitution' as an inevitable methodology for overcoming the gap between theory and practice, with a view to adjusting old categories and concepts –vigilantly combining pedantry and creativity– to the needs of a conflictual and participatory society, which was rapidly changing. Private law doctrines began to take on different contents and meanings,[3] of fundamental importance not only for the reform process, but also for a more balanced application on the part of practitioners, raising a number of delicate questions of constitutional legitimacy.[4] This new approach, while boasting many advantages, was not supported by an adequate understanding of the all-embracing role that the Fundamental Chart played in the theory of the sources of private law, with particular regard to the effect of the Constitution's norms and principles into private relationships.[5]

[2] P. Rescigno, 'Per una rilettura del Codice civile' *Giurisprudenza italiana*, IV, 224 (1968); P. Perlingieri, 'Produzione scientifica e realtà pratica: una frattura da evitare' *Rivista di diritto commerciale*, I, 475 (1969).

[3] For several examples see P. Perlingieri, 'Scuole civilistiche e dibattito ideologico: introduzione allo studio del diritto privato in Italia' *Rivista di diritto civile*, I, 438-439 (1978).

[4] Cf for example, among the most recent: Corte Costituzionale 16 April 1975 no 87, *Giurisprudenza costituzionale*, I, 807 (1975); Corte Costituzionale 30 October 1975 no 234, ibid, I, 2223 (1975) on the topic of family law; Corte Costituzionale 27 March 1974 no 82, ibid, I, 675 (1974) on the law of succession; Corte Costituzionale 15 January 1976 no 2, ibid, I, 12 (1976); Corte Costituzionale 7 July 1976 no 155, ibid, I, 1007 (1976); Corte Costituzionale 20 December 1976 no 245, ibid, I, 1885 (1976) for property rights and ownership in particular.

[5] Italian scholars are inclined to exclude the direct relevance of constitutional norms in civil law relationships and pay very little attention to this issue. See P. Rescigno, 'La famiglia come formazione sociale', in *Atti dell'incontro di studio su* 'Rapporti personali della famiglia', *Quaderni del Consiglio Superiore della magistratura* (1980); P. Rescigno, 'Diritti civili e diritto privato', in VVAA, *Attualità ed attuazione della Costituzione* (Bari: Laterza, 1979), 242 ff; R. Quadri, 'Applicazione della legge in generale', in A. Scialoja e G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1975), 260 ff; N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' *Rivista di diritto civile*, I, 150, (1979). On the contrary, regarding such relevance, see P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1972), 131, and *passim*; see below following footnotes; P. Perlingieri, 'Scuole civilistiche' n 3 above, 414 ff; M. Bessone and E. Roppo, 'Diritto soggettivo alla salute, applicabilità diretta dell'art. 32 della Costituzione ed evoluzione della giurisprudenza' *Politica del*

It follows that the formula for re-reading statutory law through constitutional lenses needs to be clarified, taking care to avoid allowing it to take on or potentially give rise to ambiguity.

To this end, it is vital to overcome the uncertainties that still pervade many scholarly positions, pertaining to the nature (not merely political, but fundamentally juridical) of constitutional norms,[6] as well as to their internal relationships.[7] What needs to be underlined is, on the one hand, the Constitution's position of supremacy in the hierarchy of normative sources and, on the other, the hierarchical position of values in the framework of the Constitution's philosophy.

At the conclusion of a long journey, which began with the now distant in time yet courageous doctrines elaborated by the French *Conseil d'État*, some peculiar features of the Constitution, such as its

diritto, 767 ff (1974); P. Stanzione, C*apacità e minore età nella problematica della persona umana* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1975), 368. On the topic, among public law scholars, see G.M. Lombardi, *Potere privato e diritti fondamentali*, I, (Torino: Utet, 1970), 26 ff, and *passim*; now, very explicitly, L. Montuschi, *Rapporti etico-sociali*, in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli, 1976), 146 ff; see also, of late, the mention made by G.Volpe, *Foro italiano*, IV, 276 (1979); as regards German scholarship, very sensitive to the issue of *Drittwirkuntg* or of *Sozialwirkung*, see, in addition to the authors cited at n 45 below, T. Ramm, *Einführung in das Privatrecht. Allgemeiner Teil des BGB*, I, (München: C.H. Beck, 1969), 77-78 and now, particularly, H.P. Schneider, 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' *Diritto e società*, 216-217 (1979). See, moreover, A. Wolter, *Diritto civile polacco*, italian translation (Camerino-Napoli: Edizioni Scientifiche Italiane, 1976), 72 ff and P. Perlingieri, *Introduzione to A. Wolter*, ibid, XVIII.

[6] On this issue, see A. Trabucchi, 'Significato e valore del principio di legalità nel moderno diritto civile' *Rivista di diritto civile*, I, 8 ff, 15 (1975); critically, P. Perlingieri, 'Scuole civilistiche' n 3 above, 414 ff and ibid further bibliographical references; on the normative relevance of constitutional principles see, for all, the pages of P. Barile, *La costituzione come norma giuridica. Profilo sistematico* (Firenze: Barbera, 1951), 44-45.

[7] Remark also recently made by R. Quadri, 'Applicazione della legge in generale' n 5 above, 254, who wittily wonders: '*Si è poi sicuri [...] che in seno alla stessa Costituzione scritta non conflittino valori differenti e incompatibili gli uni rispetto agli altri, in modo da rendere confuso il quadro del sistema dei valori costituzionali?*' (Are we sure that within the written Constitution itself different and incompatible values do not conflict one another, so as to render the framework system of constitutional values confused?).

rigidity and supremacy amongst the sources of law, allow us to acknowledge today the legally binding nature of its articles.

With respect to values, which form the basis of the legal system, they are by definition identifiable by means of an accurate historical and systematic interpretation of the Fundamental Chart, from which it may be inferred that the free development of the human person is to be deemed superior to any concurrent economic interest (eg right to private ownership and freedom of enterprise).[8] Even on the basis of a summary analysis, an existentialist conception that respects dignity along with the needs and civil rights of man (Art 2) ought to prevail over a productivist perspective: to illustrate, freedom of enterprise is restrained when it takes place 'in such a way as to cause damage to the human security, freedom and dignity' (Art 41, para 2).[9]

We will not dwell upon these aspects now, as they will be analysed in the following lectures, but suffice it to say that there is a qualitative difference between the pre-republican and contemporary political-constitutional orders, wherefrom it is indisputable that the change in the values that mould the basic tenets of the system has had a profound influence upon its institutions, even on the more technical ones, seemingly neutral with respect to the ideologies of history.

In order to understand how such an influence has arisen, it is necessary to focus in greater depth on the actual interplay between constitutional norms and statutory laws, bearing in mind the actual meaning of the pre-eminence of the former over the latter. With respect to this, two different scholarly views can be identified.

[8] On this specific issue, see, P. Perlingieri, *Introduzione alla problematica della proprietà* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1970), 21 ff; P. Perlingieri, *La personalità umana* n 5 above, 175, *passim*; for an application in the field of condominium, F. Ruscello, *I regolamenti del rapporto condominiale* (Camerino-Napoli: Edizioni Scientifiche Italiane, interim edition, 1979), 129 ff; now, from a critical perspective, A. Barbera, *La libertà fra diritti e istituzioni*, in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli, 1975), 68; furthermore, see A. Baldassarre, 'Recensione a P. Perlingieri, La personalità umana nell'ordinamento giuridico', *Diritto e società*, 1090 ff (1973).

[9] This particularly significant aspect has been stressed, among others, by P. Perlingieri, *La personalità umana* n 5 above, 251, 383, *passim*; P. Perlingieri, *Introduzione alla problematica della proprietà* n 8 above, 65, *passim*; G. Napolitano, 'Recensione a A. Liserre, Tutele costituzionali dell'autonomia contrattuale, *Rivista trimestrale di diritto e procedura civile*, 326 (1972).

II. Lack of generalization and ambiguities in considering constitutional norms as 'outer limits' to statutory laws, as if the latter were the expression of a separately definite system

Earlier scholarship regarded constitutional norms as a 'limit' or 'check' on statutory law.[10] Accordingly, statutes were argued to be the expression of a wholly independent system, legitimate as long as it does not clash with a constitutionally protected interest, whilst the constitutional precepts were seen as having a residual and exceptional range of application, with no direct influence on the interpretation and implementation of statutory rules.[11] The very idea of constitutional norms as outer limits on statutes seems to imply that there are two separate and wholly independent systems: the constitutional and the statutory, the former placing itself outside the latter. Quite on the contrary, the unitary nature of the legal system requires that the constitutional norms, and their underlying values, be seen as general principles, relevant and binding in any context.[12]

Such a line of thinking – as has been observed[13] – was followed by the majority of scholars, especially civil lawyers, and was considered particularly suitable for preserving, not only in formal terms but also functional and foundational, the greater part of 'private' law.

However, whilst it cannot be denied that some constitutional norms aim to limit the scope of statutory laws, this cannot be considered the sole function of the constitutional norm. It happens

[10] See, on this issue, N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 150, according to whom constitutional norms would simply set a programme (for example, the social function of private ownership) and would provide exclusively 'the criterion for evaluating the constitutional legitimacy of statutory norms'; G. Tarello, *Sullo stato dell'organizzazione giuridica* (Bologna: Zanichelli, 1979), 5-6, 9.

[11] See, for all, R. Quadri, 'Applicazione della legge in generale' n 5 above, 261-262, for further bibliographical references.

[12] See, among others, P. Perlingieri, *Profili istituzionali del diritto civile* (Camerino-Napoli: Edizioni Scientifiche Italiane, 2nd ed, 1979), 81; P. Perlingieri, 'Scuole civilistiche' n 5 above, 414 ff (with further bibliographical references), and N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 144 ff (although reaching different conclusions).

[13] G. Tarello, *Sullo stato dell'organizzazione giuridica* n 10 above, 6.

quite often, indeed, through the *riserva di legge** mechanism, that the Constitution confers upon the legislator the task of fixing a 'maximum limit' for the statutory restriction of a right (eg Art 13, para 5), at times providing for the related guarantees (Art 15, para 2), as well as the conditions whereby rights and obligations can be exercised or performed (Art 23). It follows that the norms that establish rights are interpreted widely, while norms that impose obligations, duties and liabilities are subject to a rather restrictive approach.[14] Such a conception is equivocal and arbitrary since it does not adequately consider the multiplicity and heterogeneity of rights, which are hardly separable from the idea of a complex 'subjective legal situation' where, to a lesser or greater extent, some concurring deontic aspects coexist.[15] By assuming that constitutional norms operate as outer limits on statutory laws, the legislator becomes the principal, if not exclusive, addressee of constitutional law. The function of the Constitution is thus reduced to that of delineating the rules of the game, and is deprived of the promotional capacity that historical-political arguments and its very nature as a Basic Law seem to confer upon it as a matter of priority.

Moreover, the idea of constitutional norms as mere limits drives them outside the circle of the relevant authorities that courts are supposed to consider when resolving disputes, since statutory law, through the 'subsumption' method, would remain the only applicable source – subject of course to constitutional scrutiny, yet always under the conditions and limits provided.[16]

In summary, this first scholarly position may be defined as advocating separate readings of the code and of its complementary provisions, on the one hand, and of the Fundamental Chart, on the other, whereby it is only in exceptional and incidental situations that

* Translator's note: When a given matter is governed in Italian law by the 'riserva di legge' principle, it means that any norm purporting to regulate that matter has to consist in either a Parliamentary law or an act having the same force as a law: within the hierarchy of the sources of law, it has to be a 'primary source', ie placed immediately below the supreme source, which is the Constitution.

[14] G. Tarello, ibid.

[15] See, for all, P. Perlingieri, *Profili istituzionali* n 12 above, 177 ff.

[16] See for the criticized perspective, N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 150; and now N. Irti, *Decodificazione e leggi speciali* (Milano: Giuffré, 1979), 71, 92.

they converge: that is, when a statutory rule is struck down as unconstitutional.

III. The constitutional norm as an expression of general legal principles which must be adhered to when interpreting statutory law. Rejecting the potential objection based on Art 12 of the Italian Civil Code's preliminary rules, and its alleged provision for a hierarchy of hermeneutical tools. The dynamic and historical nature of the legal system: logical-systematical hermeneutics and constitutional values

From a different perspective, the pre-eminence of the constitutional norm over statutes is acknowledged not only, and not simply, as a limiting factor, but also as expressing general legal principles, which have to be accounted for when statutes are interpreted.[17] Thus, the choices made at the supreme level of the sources of law are reflected in the hermeneutics, contents and meanings of statutory norms. In acknowledging the superiority of the 'starting from general principles' argument over any other hermeneutical argument,[18] such a tendency ends up reflecting itself in the constitutional interpretation of statutory law. This idea directly contradicts the one previously presented because, being moved by the need to fulfil constitutional legality, it is inclined to bend the hermeneutic tools to the primary goal of implementing fundamental values. Article 12 of the Italian Civil Code's preliminary rules is by no means an obstacle:[19] it allows for recourse to the 'general principles

[17] For an effective in-depth analysis G. Tarello, *Sullo stato dell'organizzazione giuridica* n 10 above, 6 ff; for German literature, even though with only reference to the so-called fundamental rights, H.P. Schneider, 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' n 5 above, 216. Contrary to the operativity of constitutional principles also at the level of interpretation is the opinion expressed by R. Quadri, 'Applicazione della legge in generale' n 5 above, 261-262.

[18] G. Tarello, *Sullo stato dell'organizzazione giuridica* n 10 above, 6; G. Tarello, 'Gli argomenti retorici dei giuristi nell'interpretazione del diritto' *Rivista di diritto civile*, I, 706 ff (1978).

[19] In marked and strong opposition, see R. Quadri, 'Applicazione della legge in generale' n 5 above, 252 ff, and *passim*; see furthermore, N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 149 ff according to whom '*le norme*

of the legal system' as a subsidiary and residual technique in respect of the application of a 'specific provision' or recourse to *analogia legis*.[20]

The alternative is clear: if the general principles referred to under the heading of Art 12 are those at the level of statutory law, then the resort to these principles, in a residual fashion where there are doubts as how to interpret a given rule, seems to comply with the hierarchical order of sources. If, on the other hand, the principles recalled therein include those of constitutional standing, then Art 12 would be wholly or partially unconstitutional, as it would hinder the interpretive recourse to a hierarchically superior source, thereby introducing a blatant anomaly into the system.[21] In fact, the former hypothesis is grounded on some historical evidence and also on the idea that it would be impossible to treat principles that are profoundly different, whether by nature or hierarchically, on an equal footing,[22] as this would constitute an unjustified

attuatrici, già suscettibili di analogia legis, esprimono i principi generali utilizzabili in sede di analogia iuris non già le norme costituzionali, che esigono il tramite delle norme attuatrici' (Implementation norms, already subject to *analogia legis*, express general principles applicable on the grounds of *analogia iuris*' unlike constitutional norms whose implementation requires statutory norms).

[20] See the in-depth analysis offered by R. Quadri, ibid 194 ff; and for a clear synthesis on the state of case law and scholarship, see V. Rizzo, 'Sub art. 12 c.c.'s preliminary rules', in *Codice civile annotato*, I, P. Perlingieri ed (Torino: Utet, 1979).

[21] Perplexities arise from the statement by R. Quadri, ibid 249, according to whom '*la norma 'suprema' sull'interpretazione si situa necessariamente al di sopra della Costituzione*' (The 'supreme' norm on interpretation is necessarily situated above the Constitution); in criticism of this concept, see C. Mortati, 'Costituzione (Dottrine generali)' *Enciclopedia del diritto* (Milano: Giuffré, 1962) XXII, 178 ff; also L.M. Bentivoglio, 'Interpretazione (dir. intern.)' ibid, 314-315 (1972). On the remarks made in the text above, see P. Perlingieri, 'Intervento alla tavola rotonda di Bari su 'Tecniche giuridiche e sviluppo della persona'' *Diritto e giurisprudenza*, 176 (1974); P. Perlingieri, 'Sull'eguaglianza morale e giuridica dei coniugi' ibid 487. It must be noted that when the fascist legislator wanted the principles of the *Carta del Lavoro* to come into play not only in the application of *analogia iuris* – that is, when *analogia legis* was not enough to resolve a case – but also in '*ogni fase del processo di interpretazione ed applicazione del diritto*' (Any step of the process of interpretation and application of law), this was set forth, in the absence of a rigid hierarchy of normative sources, in Art 1 of legge 30 January 1941, no 14; on this issue, see N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 143.

[22] For such a distinction cf L. Lonardo, *Meritevolezza della causa e ordine pubblico* (Camerino-Napoli: Edizioni Scientifiche Italiane, interim edition, 1978), 69 ff.

transposition.[23] However, the reasons (which are *inter alia* technical) for re-reading statutory law in the light of constitutional values can be inferred from the weaknesses of the basic precepts underlying the hermeneutical methodologies that, for reasons that are more expository than conceptual, distinguish literal interpretation from logical interpretation,[24] as if a single statutory rule could be understood in isolation without systematic knowledge.[25] A renewed approach in this respect makes it possible to move beyond a mere reading of the *littera legis*, to abandon the obsolete search for the *esprit de loi*, thus avoiding the attribution of subjective and discretionary meanings to statutory norms: the value judgement, which is a constant element of the activity of an interpreter of the law, will have a fixed point to hold on to in constitutional norms, hence reducing, albeit partially, the sphere of discretion.[26] Undoubtedly, the systematic nature of interpretation, in itself comprising the cognitive process which results in every norm being placed within a complex but unitary legal system, cannot be but inspired by constitutional norms.[27]

[23] On this issue, yet without the usual clarity, R. Quadri, 'Applicazione della legge in generale' n 5 above, 284-285; from a different perspective, tending to diminish the function and role of the constitutional norm, see N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 149 ff.

[24] It has been made clear that it is a nonsense to pose a problem of prevalence of the logical upon the grammatical interpretation, and also to make a distinction between two types of interpretation: literal and logical; the idea of one being separated from the other rests on the pretension of '*conoscere il fine di una norma, prima di sapere che cosa essa vuole, scambiandosi il risultato dell'interpretazione con un suo presupposto*' (Knowing the aim of a norm before understanding what it wants, thus mistaking the result of the interpretation with a prerequisite of it): R. Quadri, ibid 268, to whom the quoted words belong.

[25] On the so-called systemacity of interpretation see, for all, G. Lazzaro, *L'interpretazione sistematica* (Torino: Giappichelli, 1965), 127 ff; N. Bobbio, *Teoria dell'ordinamento giuridico* (Torino: Giappichelli, 1960).

[26] Diffusely, in this regard, L. Lonardo, *Meritevolezza della causa* n 22 above, 119 ff and 123 ff.

[27] See, for example, C. Mortati, 'Costituzione (Dottrine generali)' n 21 above, 183, according to whom '*ogni contrasto della legge rispetto ai principi impone la sua disapplicazione (o, secondo i casi, il suo annullamento), così come giustifica la pretesa dei soggetti i cui interessi riescano da esso lesi ad ottenere una pronuncia in tal senso*' [Any conflict of a statute with the principles implies its non-application (or, depending on the case, its voidability), just as it justifies the

It would be futile to attempt to dismiss the systematic criterion in the interpretation of legal provisions by suggesting that this would change the sense of those very provisions in 'a perennial interplay of transfigurations and metamorphoses',[28] as it is precisely here where the dynamics and the historicity of the legal system become manifest and can potentially impact upon reality.[29]

It would in fact be an illusory and vain ambition to think that a judge may have had in the past and will in the future have the mere task of 'ascertaining whether the facts correspond to the abstract models the legislator has fixed',[30] denying him the chance to balance conflicting interests and values by immersing himself in 'the world of facts and of social, political, economic and moral evolution'.[31] Without dwelling upon the mere reading of a single provision – Celso would say on the *aliqua particula* – it is necessary to appraise it within the logic of the system, and this requires acumen, balance and particular sensitivity.[32] Even if such an approach does not guarantee the perception of the system's 'highest coherences' – as has been acutely observed[33] – legal research should seek to acquire a systematic character, influenced by the all-encompassing nature of knowledge: these prerogatives are grounded on the very scientificity

pretension of the persons whose interests have been infringed to obtain a favourable judgment].

[28] R. Quadri, 'Applicazione della legge in generale' n 5 above, 254; the illustrious author, however, could not but write that *'le norme giuridiche si confermano, si arricchiscono, si evolvono, in un processo di continua storicizzazione*' (Legal norms confirm, enrich themeselves, and evolve in a process of continuous historicization), 249.

[29] Private law scholars have always been aware of this: see, for all, R. Nicolò, 'Riflessioni sul tema dell'impresa e su talune esigenze di una moderna dottrina del diritto civile' *Rivista di diritto commerciale*, I, 177 ff (1956); see, more recently, among others, P. Perlingieri, 'Scuole civilistiche' n 3 above, 436-437. Scholars also mention the 'circularity of the relationship between *norm* and *fact* (from which the norm derives)': see V. Crisafulli, *Lezioni di diritto costituzionale*, I, (Padova: Cedam, 1962), 14.

[30] R. Quadri, 'Applicazione della legge in generale' n 5 above, 255.

[31] R. Quadri, ibid.

[32] In this sense, see P. Perlingieri, 'Produzione scientifica e realtà pratica' n 2 above, 471 and bibliographical references in note 77 below.

[33] R. Quadri, 'Applicazione della legge in generale' n 5 above, 254.

of research and, with particular regard to law, constitute an effective tribute to the principle of legality.[34]

IV. The constitutional norm as a justification for statutory law. The perceived risk of constitutionalization of all branches of the law and the retreat of traditional hermeneutical rules: critical remarks. Clarifying the meaning and scope of the principle of constitutional legality and its fundamental role in preserving the unitary nature of the system, as well as the hierarchical organization of the sources of law; hermeneutical rules as expressions of the structure and logic of the legal system, not of the jurist's abstract reasoning

The fundamental norm reveals itself as a justification for the statutory norm: the latter has to harmonize itself consistently and reasonably with the former, following a sort of expansion, or development, in a way that is almost deductive, albeit historically conditioned. It has been observed that this might entail a cultural manoeuvre resulting in the 'constitutionalization' of all branches of the law, that is the 'hyper-interpretation' of the Constitution, consequently loosening the 'culturally accepted hermeneutical rules' and the 'control by social culture on the norms' meanings',[35] so as to produce 'a high level of instability in the legal system, as well as strong legal uncertainty'.[36]

It must be observed, in truth, that when swift social transformations and radical changes in life occur, they are not always surrounded by monolithic certainties. Besides, the modern state cannot refrain from expressing the full potential of the legal system

[34] From a comparative perspective, resorting to the *global intellection of the system* ('una intellezione globale del sistema') is deemed necessary by M. Ancel, *Utilità e metodi del diritto comparato*, italian translation (Camerino-Napoli: Edizioni Scientifiche Italiane, 1974), 46 ff; on this topic, also, P. Stanzione, *Introduzione a M. Ancel*, ibid XXII.

[35] G. Tarello, *Sullo stato dell'organizzazione giuridica* n 10 above, 7.

[36] G. Tarello, ibid 7-8; likewise, R. Quadri, 'Applicazione della legge in generale' n 5 above, 252 ff, *passim*.

in its entirety,[37] and not simply what is mostly desired or desired by the most. In this sense, the Constituent itself – in addition to specifying that the principle of legality has been set forth not only for the judge and for his defence (Art 101, para 2), but for all citizens without exception – stipulated that the Judiciary has 'the duty to be loyal to the Republic and to *abide by the Constitution and its laws*' (Art 54, para 1); a commitment which is also solemnly recalled in the promulgation formula, where it is perhaps more vigorously affirmed: 'The Constitution shall be loyally obeyed as the *fundamental law of the Republic* by all the citizens and by the organs of the State'. It is thus misleading to single out the legislator as the exclusive addressee of Constitutional norms; likewise, there is no point in highlighting their allegedly political (non-juridical) nature. The principle of constitutional legality[38] is an anchor; it is a mandatory pathway to follow for the interpreter who intends to find, with a humble spirit, a unifying factor in the interpretation of laws. This can be achieved, on the one hand, by overcoming the myth of a misconceived certainty of the law which, although daily contradicted in the court rooms, continues to stand out hypocritically in defence of conservative needs and, on the other, by definitively setting aside the contrary myth of destabilizing the system by means of a classist interpretation of the law.[39] It is necessary to rescue the system's uniformity swiftly, by putting the concept of constitutional legality into operation, that is by expressing the full potential inherent in the legal system, through a renewed positivistic approach which must not be identified with mere subservience to law. However, it has been ascertained that

[37] On the conception of a systematic legal system see, in particular among civil law scholars, Salv. Romano, *Ordinamento sistematico del diritto privato*, I, *Diritto obiettivo, diritto soggettivo* (Napoli: Morano, 2nd ed, n.d.), 15 ff, *passim*.

[38] Cf now L. Lonardo, *Meritevolezza della causa* n 22 above, 129 ff, 139 ff.

[39] Even though from a different perspective see, among others, U. Cerroni, 'Il problema della teorizzazione dell'interpretazione di classe del diritto borghese', in P. Barcellona ed, *L'uso alternativo del diritto*, I, *Scienza giuridica e analisi marxista* (Roma-Bari: Laterza, 1973), 3 ff; L. Ferrajoli, *Magistratura democratica e l'esercizio alternativo della funzione giudiziaria* ibid, 113; for a critique see, among others, P. Perlingieri, 'Scuole civilistiche' n 3 above, 423 ff and ibid further bibliographical references.

positivism can be appreciated only for its historical content and that its choice as a method remains a political and ethical one.[40]

Constitutionalizing the law is required not only to guarantee the unitary nature of the system and foster respect for the hierarchy of its normative sources, but also to obviate the risk of degeneration within a system entirely dependent on formal obedience to statutory law: 'the Fundamental Law in fact not only guarantees predetermined forms and procedures set forth by the State, it also comprises substantive normative elements'.[41] Its aim is not to destroy existing interpretive techniques, but rather to adjust them in line with primary values, rejecting the idea that only official practices (by courts, notaries or administrative bureaucracy) should be relied upon, since they too can be subjected to constitutional review.[42]

As regards the loosening of society's control over the meanings of culturally accepted norms and rules of interpretation, this can be easily countered by the argument that if law is culture, it is nonetheless true that official culture could not affect the actualization of the legal system's values without breaching legality itself. This would be historically objectionable, all the more so given that constitutional legality confers a higher and more qualified protection to humans and their related existential prerogatives. The hermeneutical rules in themselves must be expressions of the structure and logic of the legal system, and not of the abstract logic of the jurist.[43] This is confirmed

[40] Thus, P. Perlingieri, ibid 425 ff for references on this topic in the literature; see, however, the seminal pages of A. Baratta, 'Il positivismo e il neopositivismo in Italia', in R. Orecchia ed, *La filosofia del diritto in Italia nel secolo XX*, *Proceedings of the XI National Congress* (Napoli, Oct. 4-7 1977), II, (Milano: Giuffré, 1977), 21 ff.

[41] H.P. Schneider 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' n 5 above, 218.

[42] This was, at the time, the wishful intention expressed by P. Calamandrei, 'La funzione della giurisprudenza nel tempo presente' *Rivista trimestrale di diritto e procedura civile*, 270 (1955), who invited the courts to make use of a 'constitutional sensitivity'.

[43] Differently see, for all, F. Carnelutti, *Metodologia del diritto* (Padova: Cedam, 1939), 25-26; see, also, V. Crisafulli, 'I principi costituzionali dell'interpretazione ed applicazione delle leggi', in *Scritti giuridici in onore di Santi Romano*, I, *Filosofia e teoria generale del diritto. Diritto costituzionale* (Padova: Cedam, 1940), 675 ff; on this topic see also G. Tarello, 'Il 'problema dell'interpretazione': una formula ambigua' *Rivista internazionale di filosofia del diritto*, 349 ff (1966) now in G. Tarello, *Diritto, enunciati, usi* (Bologna: Il Mulino, 1974), 389 ff.

by the explanations given with respect to Art 12 of the preliminary provisions to the Italian Civil Code but also by objective historical-comparative evidence.[44]

V. The issue of the direct relevance of constitutional norms to interpersonal relationships. The so-called indirect application of constitutional principles, mediated by statutory rules, results in the combined application of both. It is not just about interpreting a statutory provision: it is about determining the applicable norm

While the re-reading of statutory law in the light of fundamental norms, within the twofold meaning referred to above (as mere interpretation driven by constitutional principles and as a functional justification of statutes) might embody a helpful and workable methodology which could be deployed constantly, it does not seem to be able to exploit the full potential of constitutional norms. Having abandoned the idea that such norms have the legislator as their only addressee and that they do not solely aim to impose normative limits or establish political programmes, it is then necessary to face the question of their direct relevance for interpersonal relationships, with specific regard to those relating to private law.

According to prevailing German scholarship,[45] constitutional norms ought to be applied indirectly, via statutory rules, whether they are expressed by way of general clauses or through specific and

[44] It is useful to consider the insights on the varying conceptions of the subject-matter and contents of socialist civil law: see, for example, I. Markovits, *Il diritto civile tra socialismo e ideologia borghese nella Repubblica democratica tedesca*, italian translation (Camerino-Napoli: Edizioni Scientifiche Italiane, 1978), 71 ff, 139 ff; on this issue, also, P. Stanzione, *Introduzione a I. Markovits*, ibid XXXVI, and XLIV ff. On the historical grounds of the application of law see, among others, L. Bagolini, 'La scelta del metodo nella giurisprudenza (Dialogo fra giurista e filosofo)' *Rivista tri mestrale di diritto e procedura civile*, 1063 ff (1957).

[45] Cf, on this subject, H.C. Nipperdey, 'Grundrechte und Privatrecht' in *Festschrift Molitor* (München-Berlin: Beck, 1962), 17 ff; G. Dürig, 'Grundrecht und Zivilrechtssprechung' in *Vom Bonner Grundgesetz zum gesamtdeutschen Verfassung*, *Festschrift Nawiasky* (München: Isar, 1956), 157 ff and, to a wider extent, W. Leisner, *Grundrechte und Privatrechte*, (München-Berlin: Beck, 1960), *passim*, and 113 ff.

detailed propositions. But this type of application, rather than being indirect, constitutes a coordinated ('combined') application of both constitutional and statutory norms, according to the logical scheme of the *combinato disposto*:[46] more than the expression of mere interpretation of a statutory rule, it reflects the search for the norm itself.[47] What emerges is the inconsistency of the mechanism based on mere 'subsumption', as it erroneously posits the logical and chronological precedence of interpretation before qualification, neglecting the fact that both are aspects of a unitary cognitive process aimed at selecting the applicable norm.[48] Consequently, although the

[46] See, for example, C. Mandrioli, *L'assorbimento dell'azione civile di nullità e l'art. 111 della Costituzione* (Milano: Giuffré, 1967), 3 ff; and furthermore, although aimed at the constitutional evaluation of a 'body of norms', G. Chiarelli, 'Processo costituzionale e teoria dell'interpretazione', in *Studi in memoria di T. Ascarelli*, V, (Milano: Giuffré, 1969), 2856; this orientation belongs to that line of jurisprudence interpreting statutory norms in the light of the Constitution. Particularly significant, for example, is the statement of reasons by the Tribunale Superiore delle acque, 3 May 1965 no 9, *Tribunale Superiore delle acque pubbliche*, II, 232 ff (1966) which, picking up the teachings of the Corte costituzionale itself (8 April 1958 no 6, and also 26 January 1957 no 24), points out that *'non deve darsi carico della eccezione di illegittimità costituzionale se non dopo aver proceduto all'analisi della disposizione, essendo noto che il dubbio che la norma non sia conforme alla Costituzione può prospettarsi solo dopo che si è chiarita la portata della disposizione in contestazione e si è accertato che l'eventuale contrasto con i precetti costituzionali è conseguenza necessaria dell'applicazione della norma, la quale non è suscettibile di altra applicazione, di per sé aderente alla Costituzione'* (A question of constitutionality must be raised only after having analyzed the statutory provision, as it is well known that the doubt about a provision not complying with the Constitution can arise only after having cleared up its scope and having ascertained that the possible conflict with the constitutional precepts is a inevitable consequence of the application of the norm, which is not subject to any other interpretation, in itself adherent to the Constitution).

[47] On interpretation as 'definition of the normative case' R. Quadri, 'L'interpretazione dei negozi giuridici nel diritto internazionale privato', in *Studi critici di diritto internazionale*, I, *Diritto internazionale privato* (Milano: Giuffré, 1958), 242-243, and now in R. Quadri, 'Applicazione della legge in generale' n 5 above, 230, 239, 247 ff, examining the issue of how to indentify the applicable norm; also L.M. Bentivoglio, 'Interpretazione del diritto e diritto internazionale' (Università degli Studi di Pavia, 1953) XXXIII, 230; L.M. Bentivoglio, 'Interpretazione (dir. intern.)' n 21 above, 314 ff.

[48] Recently, on this issue, P. Perlingieri, 'Interpretazione e qualificazione: profili dell'individuazione normativa' *Diritto e giurisprudenza*, 826 ff (1975), now in P. Perlingieri, *Profili istituzionali* n 12 above, 199 ff; more in-depth V. Rizzo,

constitutional norm seems to be employed here as a hermeneutical tool aimed at making sense of a statutory rule, it actually becomes an essential part of the final norm regulating the concrete relationship.

It is important not to be misled by the expression 're-reading', used in this context; it does not express merely a subsidiary way of interpreting statutes, nor does it exhaust itself in a constitutionally sound reading of black-letter law.[49] Even though scholars are generally inclined to consider resorting to the constitutional norm only in doubtful cases, ie as a matter of last resort, the Fundamental Law – which lays down principles of general relevance – qualifies as substantive law, and not simply as an interpretive tool. Recourse to the Constitution is hence justified, just like any other legally binding norm, as it expresses a normative value which cannot be ignored.

VI. Compatibility of this assumption with the exclusive role attributed to the Constitutional Court in monitoring the legitimacy of all legislative acts having the force of law, with a view to their possible 'elimination'. The constitutional norm in the judges 'and other interpreters' discretionary evaluations: different levels, mirroring different functions

The most serious objection against the idea that the constitutional

Sull'interpretazione dei contratti (Camerino-Napoli: Edizioni Scientifiche Italiane, interim edition, 1976), 56 ff and ibid further bibliographical references.

[49] This is connected to the long standing issue of the subject-matter of interpretation – norm or article –, which is particularly relevant in the field of constitutional interpretation: see, for all, T. Ascarelli, 'Giurisprudenza costituzionale e teoria dell'interpretazione' *Rivista di diritto processuale*, 351 ff (1957); G. Chiarelli, 'Processo costituzionale' n 46 above, 2854 ff; V. Crisafulli, 'Le sentenze interpretative della Corte Costituzionale', in *Studi in memoria di T. Ascarelli* n 46 above, 2886 ff, and, in a wider perspective, now R. Quadri, 'Applicazione della legge in generale' n 5 above, 216, underlines that the '*norma agendi non può essere identificata con il 'testo' e cioè con un complesso di segni linguistici, dalla cui interpretazione si ottiene il significato*' (*Norma agendi* cannot be identified with the text, that is with an group of linguistic signs, from the interpretation of which we derive a meaning); see, furthermore, G. Tarello, 'Il 'problema dell'interpretazione' n 43 above, 353 f; N. Lipari, 'Il problema dell'interpretazione giuridica', in N. Lipari ed, *Diritto privato. Una ricerca per l'insegnamento* (Bari: Laterza, 1974), 78 ff.

norms may have a direct effect on private law relationships continues to be the exclusive nature of the role entrusted to the Constitutional Court in reviewing the constitutionality of laws (Art 134 Constitution).[50] The special status of such review and the related proceedings is grounded on the general interest in 'eliminating', once and for all and *erga omnes*, any law that is found to be unconstitutional (Art 136, para 1, Constitution; Legge 11 March 1953 no 87, Art 30).[51]

However, the task of ascertaining whether a constitutionality complaint is not *prima facie* groundless rests with the common interpreter. Unquestionably, when a judge is faced with a legal provision that appears unlikely to comport with the Constitution and its application is crucial for the resolution of the case at issue, he is expected to suspend the ongoing proceedings and refer the matter to the Constitutional Court for *certiorari*; conversely, in the presence of a provision that does not stand out as manifestly illegitimate, or that is irrelevant for the case under examination (Legge 11 March 1953 no 87, Art 24), the judge is not under any obligation to refer it to the Court. In either case, the judge clearly exercises a broad discretionary power. It is up to the judge to decide whether the incompatibility of a statutory rule with one or more constitutional precepts is absolute and impossible to be amended: in such a case, the inconsistency and/or contradiction is of such a degree and is so intense that, were the illegitimate statutory rule to be applied, the corresponding constitutional precepts would inescapably be disregarded. However, it is always for the judge to decide the converse, where, for example, a statutory rule is not absolutely and irremediably incompatible with one or more constitutional norms, but is simply 'non-conform', due for instance to defective coordination, entailing a merely functional shortfall which may be resolved by way of interpretation.

With respect to the first hypothesis, it is still unclear whether the question concerning the illegitimacy of a statutory rule which entered into force before the Constitution was adopted ought to be referred to the Constitutional Court or could instead be resolved, more simply, by applying the long-standing hermeneutical norms regulating

[50] On this topic, see R. Quadri, 'Applicazione della legge in generale' n 5 above, 260 ff.

[51] See C. Mortati, *Istituzioni di diritto pubblico*, II, (Padova: Cedam, 9th ed., 1976), 1415 ff.

conflict of laws over time (Art 15 of the Italian Civil Code's preliminary provisions), hence reaching the conclusion that the conflicting statutory rule ought to be regarded as having been implicitly abrogated.[52] At any rate, in cases involving a statutory norm, the judge has to decide whether and to what extent it is compatible with the Constitution. The two terms of comparison are not fixed and immutable, but depend on the interpretation provided. The functional inadequacies of statutory rules, having regard to the specific facts of the case, may always be superseded within the framework of the legal system as a whole, from which the interpreter is expected to draw the applicable norm, without having to refer the issue to the competent Court. Indeed, the basic legal institutions laid down and regulated by statutory law are normally qualified in accordance with the constitutional principles and values:[53] suffice it to mention private ownership, freedom of enterprise and contracts.[54]

Despite the existence of a control mechanism such as that

[52] See, however, Corte Costituzionale 14 June 1956 no 1, *Giurisprudenza costituzionale*, 7 (1956); Corte Costituzionale 27 January 1959 no 1, *Foro italiano*, I, 186 ff (1959); Corte Costituzionale 27 January 1959 no 4, ibid 177 ff. On this subject cf R. Quadri, 'Applicazione della legge in generale' n 5 above, 346-347; C. Esposito, 'Illegittimità costituzionale e abrogazione' *Giurisprudenza costituzionale*, 829 ff. (1958); V. Crisafulli, 'Incostituzionalità o abrogazione?' ibid 271 ff (1957); S. Pugliatti, 'Abrogazione', *Enciclopedia del diritto* (Milano: Giuffré, 1958), 151 ff; E.T. Liebman, 'Invalidità e abrogazione delle leggi anteriori alla Costituzione' *Rivista di diritto processuale civile*, II, 161 ff (1956); VVAA, 'Dibattito sulla competenza della Corte costituzionale in ordine alle norme anteriori alla Costituzione' *Giurisprudenza costituzionale*, 261 ff (1956). See also E. Ondei, 'Può il giudice ordinario dichiarare abrogata una norma di legge per effetto della Costituzione?' *Giurisprudenza italiana*, IV, 49 ff (1970); G. Marzano, 'Sul preteso potere del giudice ordinario di dichiarare abrogata una norma di legge per contrasto con la Costituzione', ibid 92 ff (1972).

[53] The most accurate line of scholarship is aware of this: see, among others, U. Majello, *Profili costituzionali della filiazione legittima e natural* n 1 above, 11, and note 12, who specifies that '*la ricostruzione sistematica della legge ordinaria, sulla base dei principi costituzionali, rappresenta un'operazione preliminare e necessaria, idonea ad esprimere un giudizio di incostituzionalità per tutte quelle norme che restano fuori dal sistema*' (The systematic reconstruction of statutory legislation, based on constitutional principles, represents a preliminary and necessary operation, suitable to express a judgment of unconstitutionality for all those norms which place themselves outside the system).

[54] See text and footnotes in the following paragraph.

entrusted to the Constitutional Court, interpreters are enabled to apply constitutional norms directly, with the sole limit – due to the general interest in repealing the illegitimate provision from the body of laws – that if, upon thorough examination, the unconstitutionality of a statutory provision is patent, the question must be referred to the Constitutional Court. The existence of different judicial levels mirrors the co-existence of diverse functions which, far from conflicting with one another, join together to form a productive connection which of course renders the common judge subject to the principle of constitutional legality, but also makes him responsible for its interpretation.[55]

This view is also endorsed in the Constitutional Court's jurisprudence. Urged on by the need to avoid dangerous gaps in the system, out of the many possible interpretations of a statutory provision, the Court picks the one that, in its opinion, best adheres to the Constitution. But this does not have a binding effect upon anyone and, according to numerous commentators,[56] does not even bind the judge who referred the constitutionality question to the Constitutional Court. The same approach has been followed by the Supreme Court of Cassation when examining the alleged violation or false incorrect application of constitutional norms by common judges, even in cases in which this is the sole ground of appeal.[57] Therefore, the peculiar mechanism of constitutional review, which aims to expunge

[55] For an analysis of the judge's concurrent exercise of control over the conformity of legislative options with the Constitution and over an effective application thereof, see L. Lonardo, *Meritevolezza della causa* n 22 above, 139.

[56] Thus, V. Crisafulli, 'Le sentenze interpretative' n 49 above, 2877 ff, wherein further bibliography. On this issue, recently, see N. Picardi, 'Sentenze integrative della Corte costituzionale e vincolo del giudice' *Giustizia civile*, I, 1110 ff (1979) and ibid further bibliographical references, in addition to those contained in P. Perlingieri, 'Scuole civilistiche' n 3 above, 434, especially note 133; see also G. Zagrebelsky, *La giustizia costituzionale* (Bologna: Il Mulino, 1977), 188 ff Even in the different German constitutional system, in the presence of a question of constitutionality (*Verfassungsbeschwerde*) raised in the hypothesis of violation of fundamental rights, the German Constitutional Court has tried to remit to the court of first instance the interpretation of mere law also with reference to its implications on the ground of fundamental rights: see H.P. Schneider, 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' n 5 above, 215 f.

[57] As to Art 37, para 3, Constitution, see Corte di Cassazione 14 June 1976 no 2188, *Giustizia civile*, I, 1210 (1976).

illegitimate provisions from the system, is no obstacle to the direct application of constitutional norms in relations between private parties, irrespective of the co-existence of specific statutory rules.

VII. Confirmations from relevant case law and scholarship. References to employment and penal law, as well as to civil and criminal procedure. Private law examples of constitutional norms being applied either in the presence or in the absence of specific statutory rules

Such a perspective is confirmed by a significant body of case law and literature. Whilst employment law – which is among the liveliest and most dynamic sectors of the legal system – is supported by a wide array of modern statutory provisions (for the most part inspired by the driving force of collective bargaining), it has made ample use of constitutional norms and in particular of Arts 4,[58] 19,[59] 21,[60] 36,[61] 37,[62]

[58] This was rightly observed by G.M. Lombardi, *Potere privato e diritti fondamentali* n 5 above, 31, referring to precedents.

[59] For a direct application of Art 19, although in connection with Arts 2 and 3, para 1, and Art 3, para 1, and 36, para 3, of the Constitution itself see respectively Pretura di Napoli, 9 December 1976, *Diritto e giurisprudenza*, 594 (1977) and Pretura di Roma, 27 May 1975, *Diritto ecclesiastico*, II, 185 (1976).

[60] Meaningful are a number of decisions delivered before the passage of Legge 20 May 1970, no 300 (so-called 'Statute of workers'): see, for example, Tribunale di Ferrara, 8 June 1968, *Rivista giuridica del lavoro*, II, 270 (1968) and also 13 August 1969, ibid 747 (1969).

[61] Cf M.L. De Cristofaro, *La giusta retribuzione* (Bologna: Il Mulino, 1971) for a thorough analysis of case law and scholasrhip. On the judge's power to supplement salaries, see Corte di Cassazione 8 July 1972 no 2299, *Massimario del Foro italiano*, 701 (1972) and on the *iuris tantum* presumption that minimum contractual wages fulfill the provisions set forth in Art 36, see for example, Corte di Cassazione 7 October 1970 no 1849, ibid 585 (1970). Courts furthermore apply Art 36 Constitution to any type of employment relationship: to collective employment [Corte di Cassazione 6 April 1973 no 949, ibid 275-276 (1973)], to part-time work [Corte di Cassazione 29 January 1970 no 189, *Foro italiano*, I, 760 (1970)]; where the employer is a public body [for a public law perspective: Tribunale amministrativo regionale del Lazio, 28 July 1975 no 549, *Repertorio del Foro italiano*, v. Giustizia amministrativa, 1223, no 847 (1975); under civil law, see Corte di Cassazione 5 November 1973 no 2875, *Massimario del Foro italiano*, 808 (1973), or is not bound by collective agreements due to its not being associated to any bargaining unions [Tribunale di Ravenna 14 July 1975, *Foro italiano*,

40,[63] etc. The same result has been achieved in the most varied sectors: thus, for example, the right to an appeal, with respect to a number of court decisions not expressly mentioned as being eligible for appeal to the Supreme Court of Cassation, was eventually acknowledged through direct application of Art 111 Constitution;[64] it

I, 233 (1976)]. Article 36 Constitution is also used as grounds for the principle of equal treatment in an employment relationship: accordingly, Pretura di Milano, 13 March 1975, *Orientamenti della giurisprudenza del lavoro*, 365 (1975). On this issue, indeed very controversial, see L. Angiello, *La parità di trattamento nei rapporti di lavoro* (Milano: Giuffré, 1979), 57 ff Ultimately, the same norm has been utilized with reference to the nature and the amount of seniority indemnity: Tribunale amministrativo regionale del Lazio, 14 July 1975 no 295, *Repertorio del Foro italiano*, v. Impiegato dello Stato e pubblico in genere, 1462, no 963 (1975).

[62] Article 37 Constitution, in both its first and third paragraph expresses a precept of equal legal treatment of women and minors, for equal amounts of work, compared to that established for the male-adult-workers. On the first hypothesis see Corte di Cassazione 11 September 1972 no 2731, *Massimario del Foro italiano*, 834 (1972); on the second one, see Corte di Cassazione 14 June 1976 no 2188, *Giustizia civile*, I, 1210 ff (1976), according to which the word '*garantisce*' (guarantees) in the third paragraph of the article under consideration clearly outlines 'the extent and limits of a 'perfect' subjective legal situation. No additional provision is, indeed, necessary in order to grant the minor the same remuneration as the full aged person, if the former performs the same work as the latter' ('*l'estensione e i limiti di una posizione soggettiva perfetta. Nessuna disposizione integrativa è, infatti, necessaria per riconoscere al minore la stessa retribuzione del maggiorenne, se di costui svolge pari lavoro*'). And this holds 'even if, hypothetically, productivity is lower' ('*anche se, in ipotesi, sia inferiore il rendimento*'). See, among others, G.M. Lombardi, *Potere privato e diritti fondamentali* n 5 above, 30 ff.

[63] On the different types of strike (articulated, 'work to rule' or 'white', chessboard-style, etc) Courts make assessments of legitimacy or illegitimacy in relation to Art 40 Constitution, which is explicitly or implicitly considered to be '*precettivo e di immediata attuazione*' (preceptive and immediately enforceable): see, for example, Corte di Appello Milano, 20 November 1964, *Foro italiano*, I, 1315 ff (1965); Corte di Cassazione, 3 May 1967 no 512, ibid 958 ff (1967); Corte di Cassazione 10 February 1971 no 357, *Massimario del Foro italiano*, 115 ff (1971); Pretura di Recanati, decreto-ordinanza 12 August 1971, *Foro italiano*, I, 247 (1972); Corte di Appello Venezia, 29 April 1972, ibid 2319 (1972); for further references, see P. Perlingieri, 'Scuole civilistiche' n 3 above, 411 and note 21.

[64] Among others, the following court decisions have been deemed appealable to the Court of Cassation under Art 111 Constitution: the decree-order rejecting the petition by the general partner in a limited partnership to be admitted to take part in the pre-bankruptcy agreement with creditors [Corte di Cassazione 15 December 1970 no 2681, *Foro italiano*, I, 43 ff (1971)]; the decree-order of admission to the aforesaid pre-bankruptcy agreement [Corte di Cassazione 7 February 1975, no 462,

has been highlighted that the right to due process is one which the judge has the power and the duty to guarantee whilst exercising his judicial powers pursuant to Art 24 Constitution;[65] moreover, Art 97 Constitution has been considered to express 'behavioural rules for the public administration'.[66] Not to mention the in-depth constitutional studies carried out by criminal law scholars and also by procedural specialists who, starting from Art 3, para 2, and Arts 24, 25, 26, 27 and 112, paved the way for a sweeping critical review of existing statutes and their interpretation.[67]

ibid 216 ff (1976)]; the decision cancelling the bankruptcy agreement [Corte di Cassazione 18 July 1973 no 2103, *Massimario del Foro italiano*, 607-608 (1973)]; the bankruptcy court's decree which, on the premise that the precautionary sequestration, issued by the delegated judge (Art 146/3 bankruptcy law), cannot be validated according to the provisions of the code of civil procedure, but is subject to the claim laid down in Art 26 of the bankruptcy law, rejected the claim filed against the precautionary measure [Corte di Cassazione 9 August 1973 no 2300, *Giustizia civile*, I, 1848 ff (1973)]; the bankruptcy court's ruling on the claim filed against the order of the delegated judge which sets the plan of partial distribution of the assets, rendering it enforceable [Corte di Cassazione 25 May 1973 no 1554, ibid 1716 ff (1973)]; the decision (unappealable) of the bankruptcy court on grounds of opposition to the statement of liabilities in a dispute not exceeding the competence of the *pretore ex* Art 99, paragraph 6, bankruptcy law [Corte di Cassazione 25 October 1973 no 2737, *Massimario del Foro italiano*, 768 (1973)]; decisions of the Corte dei Conti based on reasons only concerning jurisdiction [Corte di Cassazione-Sezioni unite 12 February 1973 no 408, ibid 111 (1973)]; decisions of the Tribunale Superiore delle acque pubbliche, issued both at first instance and on appeal, either based on the reasons listed in Art 200 Testo Unico no 1775 of 1933, and on any other breach of law [Corte di Cassazione-Sezioni unite 2 February 1973 no 311, *Giustizia civile*, I, 560 ff (1973)]. Among legal scholars, see, for all, C. Mandrioli, *L'assorbimento dell'azione civile di nullità e l'art. 111 della Costituzione* n 46 above, 20 ff.

[65] Concerning the pre-bankruptcy agreement procedure, see, for example, Corte di Cassazione, 24 March 1976 no 1042, *Giustizia civile*, I, 864 (1976) on the interpretation of Art 24 Constitutional given by the Constitutional Court, firstly in the decision of 2 July 1970 no 141 and then in that of 20 June 1972 no 110.

[66] See, for example, Consiglio di Stato, 14 April 1970 no 278, *Consiglio di Stato*, I, 591 ff (1970); but see S. Cassese, 'Imparzialità amministrativa e sindacato giurisdizionale' *Rivista italiana di scienze giuridiche*, 47 ff (1968); on the preceptive nature of the norm laid down under Art 97 Constitutional see A.M. Sandulli, 'Nuovo regime dei suoli e costituzione' *Rivista di diritto civile*, I, 294 ff (1978), who, however, regards it as one of the most neglected within the Constitutional Chart.

[67] See, for all, M. Chiavario, *Processo e garanzie della persona* (Milano: Giuffré, 1976), 5 ff, *passim*; and for some examples, G. Conso, *Costituzione e processo penale*

Now, focusing on sectors traditionally considered to be the privileged domain of private law scholars, it can be stressed that the application of constitutional norms, including Art 2 in particular, has produced a number of widely innovative effects, especially in the contexts of parenting and adoption, and fostering arrangements intended to protect the best interests of children.[68] The same can be argued with respect to family law disputes, especially when balancing the interests of the family against those of its members. There, the fundamental provisions of Arts 2, 3, 29 ff Constitution show that a merely economic approach is insufficient and hence – facilitated by a renewed regulatory framework, but not only by that – priority is given to the existential needs of the person. To illustrate, these articles were applied to identify the notion of marital fault in separation

(Milano: Giuffré, 1969), 388-389; R. Provinciali, *Norme di diritto processuale nella Costituzione* (Milano: Giuffré, 1959), 151 ff.

[68] Particularly significant to this orientation are the decisions by the Tribunale dei minori di Bologna, 26 October 1973, *Giurisprudenza italiana*, I, 2, 546 ff (1974) which, concerning the application of Arts 330 and 333 of the Civil Code, grounds on Art 2 Constitution the necessity to '*educare non in termini precettivi ma per fare l'uomo capace di opzioni libere e coscienti, per conquistare, nella cultura, il mezzo della libertà*' ('educate not in preceptive terms but aiming at rendering the person capable of free and conscious choices, in order to achieve freedom by means of culture'); Tribunale dei minori di Bari 9 September 1975, *Diritto di famiglia e delle persone*, 147 ff, 149 (1976), affirming on the basis of the same article its own competence when dealing with the primary interest of protection of the minor and when preventing the latter from any prejudices; Tribunale dei minori dell'Emilia-Romagna, decreto 23 January 1978, ibid 900 ff (1978) deeming reviewable, in the interest of the minor, the opposition (made by the parent who recognized a natural child) to the integration of the child in the 'legitimate family' of the other parent, judging unconstitutional the opposite interpretation of Art 252 Civil Code [whereas other courts have only raised a question of constitutionality: Tribunale dei minori di Firenze ordinanza 22 April 1977, ibid 502 ff (1977); Corte di Cassazione 8 November 1974 no 3420, *Giurisprudenza italiana*, I, 1, 826 ff, 832-833 (1976), with a note by M.E. Poggi, 'Criteri e finalità dell'affidamento nell'adozione speciale', who affirms that all measures concerning adoption must aim at guaranteeing the protection of dignity, autonomy and free development of the person, based on Arts 2, 29 and 30 Constitution; and, in the end, of Corte di Cassazione 17 January 1978 no 203, *Foro italiano* I, (1978) on the issue of adoptions]. For further references on this topic cf G. Battistacci, 'Affidamenti ed adozioni', in *Atti dell'incontro di studio sui Rapporti personali della famiglia* n 5 above, and A. Germanò, *Potestà dei genitori e diritti fondamentali dei minori*, ibid.

proceedings,[69] and also to classify the duties of parents responsible for the upbringing, maintenance and instruction of adult children.[70]

Such an approach is destined to produce even more remarkable results, not to speak of its use in rectifying many questionable overlaps between financial interests and existential values that have characterized numerous private law institutions. For example, interdiction has been historically explained on the grounds of incapacity to 'provide for one's own interests' (Art 414 Civil Code), meaning economic interests (see also Art 415, para 2, on incapacitation). Despite the clearly economic nature of the interests accounted for by these rules, the code has arbitrarily impaired the interdicted person's legal capacity also in connection with non-economic choices, by prohibiting, for example, to enter into a valid contract of marriage (Art 119 Civil Code)[71] or recognize a natural child (Art 266 Civil Code), etc.[72]

Within this framework, many attempts of a similar kind have followed: given the absence of a specific statutory rule, instead of resorting to the 'general principles' which may be inferred from the civil code or its complementary provisions, it has been argued that constitutional norms should be directly applied. Particularly illustrative,

[69] See V. Carbone, 'Separazione e divorzio: profili sostanziali e processuali', in *Atti dell'incontro di studio sui Rapporti personali della famiglia* n 5 above, and ibid references to precedents; with regard to the equality principle contained in Art 29, para 2, Constitution, see Corte di Cassazione 19 May 1978 no 2470, *Giustizia civile*, I, 1401 (1978).

[70] In relation to Art 30 Constitution see Corte di Cassazione 9 January 1976 no 38, *Diritto di famiglia e delle persone*, 95 ff (1976).

[71] On this issue, see B. Pannain, 'Interdizione e capacità al matrimonio', *Diritto e giurisprudenza*, 509 ff (1978).

[72] In this sense the prevailing scholarship: cf, for all, A. Cicu, 'La filiazione', in F. Vassalli ed, *Trattato di diritto civile* (Torino: Utet, 1969), III, 2, 171, 198, and U. Majello, 'Della filiazione', in *Commentario al Codice Civile* A. Scialoia and G. Branca eds (Bologna-Roma: Zanichelli, 1969), 145 and there for further bibliography. The possibility of extending the hypothesis *ex* Art 266 to the hypotheses of mental impairment is controversial. For the affirmative thesis, among others: M. Stella Richter and V. Sgroi, 'Delle persone e della famiglia', in *Commentario al Codice Civile* (Torino: Utet, 1977), 2, 191; F.D. Busnelli, 'L'incapacità di intendere e di volere nel riconoscimento dei figli naturali' *Foro padano*, I, 946 ff (1962); *contra*, Tribunale di Napoli 25 February 1964, *Giurisprudenza italiana*, I, 269 (1966), with well known critique by M. Bessone, 'L'incapacità di intendere e di volere nel regime dei mezzi di impugnazione del riconoscimento dei figli naturali'; Corte di Cassazione 8 October 1970 no 1869, *Repertorio del Foro italiano*, v. Filiazione, 865, no 15 (1970).

in this regard, is the overcoming of the debate on the alleged *numerus clausus* of personality rights, such as the right to a name, to one's image, to physical integrity (Art 5 ff Civil Code),[73] which tended to leave out any other existential manifestation of the person, in particular the so-called fundamental rights, which are undoubtedly relevant for private-law relationships.[74] The fact that the Constitution contains numerous provisions concerning civil rights (to health, to education, to a free and decorous existence, etc), civil liberties,[75] along with an open clause providing protection for the full development of the human person (Art 2),[76] means that the idea of a *numerus clausus* of personality rights must be rejected and the very

[73] See, however, A. De Cupis, *I diritti della personalità*, I (Milano: Giuffré, 1973), 25-26 who speaks about '*parziale costituzionalizzazione dei diritti della personalità*' (partial constitutionalization of personality rights).

[74] On this topic P. Perlingieri, *La personalità umana* n 5 above, 174 ff, 368 ff. Article 1 of the Bonn Constitution guarantees the fundamental rights '*come immediatamente applicabili*' (as directly applicable) so that, as duly stressed by the Constitutional Court itself since from the *Lüth* case (Bundesverfassungsgericht 15 January 1951, *Entscheidungen des Bundesverfassungsgerichts*, Bd. 7, 198 ff, 203 ff) and by scholarship (H.P. Schneider, 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' n 5 above, 221), each judge when interpreting and applying civil law norms must pay attention to their possible 'modifications' resulting from their connection with the 'body of norms on fundamental rights', which is 'constitutional objective law'.

[75] In this regard, see Tribunale di Bari, 26 November 1964, *Foro italiano*, I, 140 (1965) interstingly applying Art 13, paras 1 and 2, Constitution to specify the sphere of operativity of the right to a name.

[76] See, recently, T.A Auletta, *Riservatezza e tutela della personalità* (Milano: Giuffré, 1978), 39 ff, and moreover C.M. Bianca, *Diritto civile*, I, *La norma giuridica*, *I soggetti* (Milano: Giuffré, 1978), 157 ff; G. Criscuoli, 'L'opposizione del marito all'aborto voluto dalla moglie: dai casi 'Paton' e 'Danforth' all'art. 5 della legge n. 194 del 22 maggio 1978' *Diritto di famiglia e delle persone*, 242 ff (1979). German scholars have talked of an extensive interpretation of the right to free development of personality (Art 2 Abs 1 GG) so as to create 'a system of values and rights without gaps': G. Dürig, 'Sub Art 1 Abs', in Th. Maunz, G. Dürig and R. Herzog eds, *Grundgesets Kommentar*, Bd. I (München: Beck, 1971) I, 8; for a critical account of the constitutional case law which substantially endorsed this view (lately, Bundesverfassungsgericht 1 March 1978, *Entscheidungen des Bundesverfassungsgerichts*, Bd. 47, 327 ff, especially 369; previously, the said Court 2 May 1967, ibid Bd. 21, 362 ff, especially 372) see H.P. Schneider, 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' n 5 above, 209; K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Karlsruhe: Heidelberg, 9th ed., 1976), 127.

role of the human person in the system should be reconsidered from a qualitatively different perspective, by extending not only the scope of available protection but also its objective relevance.[77] The different existential needs of the human person such as, for example, information and access to its sources,[78] privacy,[79] change of sex,[80] mental other than physical integrity,[81] find a reliable normative

[77] See paragraph 1 above and related footnotes.

[78] See, in a general perspective, A.M. Sandulli, 'Libertà d'informazione e mass-media nell'odierna realtà italiana' *Diritto e società*, 71 ff (1978) but more amply, A.M. Sandulli, 'La libertà d'informazione' *Il Diritto delle radiodiffusioni e delle telecomunicazioni*, 477 ff (1977); N. Lipari, 'La libertà di informare o diritto ad essere informati?', ibid 1 ff (1978); C. Chiola, 'Azionabilità dell'interesse all'obbiettività dell'informazione', ibid 581 ff (1978); C. Chiola, 'Libertà d'informazione e disciplina della radio e della telediffusione' A*nnali della Facoltà di giurisprudenza dell'Università di Genova*, 217 ff (1977). With regard to the lively debate which has recently arisen on the issue of access to radio and television programmes (regulated by Legge 14 April 1975 no 103 about 'New norms on radio and television broadcasting') see, for all, A. Reposo, 'La natura giuridica della Commissione parlamentare per i servizi radiotelevisivi' *Diritto delle radiodiffusioni e delle telecomunicazioni*, 553 ff (1978) and C. Chiola, 'L'accesso dei gruppi alle trasmissioni radiotelevisive', ibid 212 ff (1976). Further, on this subject, see Corte Costituzionale 6 December 1977 no 139, *Giurisprudenza costituzionale*, I, 1441 (1977) with a commentary by C. Chiola, 'Sentenza d'irrilevanza per accesso a Tribuna politica', ibid 1553 ff.

[79] See, for example, Corte di Cassazione 20 April 1963 no 990, *Foro italiano*, I, 877 ff (1964) and, of recent and more explicitly, Corte di Appello Milano 17 July 1971, *Giurisprudenza italiana*, I, 2, 202 ff, especially 205 ff (1972); Corte di Cassazione 27 May 1975 no 2129, *Giustizia civile*, I, 1686 ff, especially 1693 ff (1975); now, on this issue, T.A. Auletta, *Riservatezza e tutela della personalità* n 76 above, 39 ff, 45, and a hint in P. Perlingieri, *La personalità umana* n 5 above, 382; more diffusely, G. Piazza, 'Sul diritto alla riservatezza', in *Considerazioni su casi pratici di diritto privato* (Napoli: Jovene, 1971), 125 ff.

[80] Cf P. Perlingieri, 'Note introduttive ai problemi giuridici del mutamento di sesso' *Diritto e giurisprudenza*, 833 ff (1970); and now P. D'Addino, 'Mutamento volontario di sesso ed azione di rettificazione' *Rassegna di diritto civile*, 220 ff (1980), and there for references to the most recent court rulings. In this sense also the German Constitutional Court, Bundesverfassungsgericht 11 October 1978, *Foro italiano*, IV, 272 ff (1979); differently, Italian Constitutional Court, 1 August 1979 no 98.

[81] Cf P. Perlingieri, 'La tutela giuridica della 'integrità psichica' (A proposito delle psicoterapie)' *Rivista trimestrale di diritto e procedura civile*, 763 ff (1972); L. Bruscuglia, *Infermità mentale e capacità di agire. Note critiche e sistematiche in relazione alla legge 18 marzo 1968, n. 431* (Milano: Giuffré, 1971), 57-58; F.D. Busnelli and U. Breccia, 'Premessa', in VVAA, *Tutela della salute e diritto private* (Milano: Giuffré, 1978), 4-5.

foundation in the constitutional provision purporting to protect the human person as such, with the consequence that such needs are regarded as actionable and enforceable rights directly affecting interpersonal relationships.

Analogous reasoning can be proposed with respect to certain *de facto* relationships, such as unmarried families. Thanks to Art 2 Constitution, a serious and stable *more uxorio* cohabitation – which is already relevant in itself for certain specific purposes (eg Art 317 *bis* Civil Code was introduced in 1975 in order to regulate the exercise of parental authority by cohabiting partners) – has taken on a far-reaching legal relevance, as a social formation capable of furthering the personal development of its members.[82] Obviously, there exists a hierarchy even among social formations: unmarried families are protected in a manner 'compatible' with the needs of families founded on marriage and, in particular, of legitimate filiation (Art 29 ff Constitution).[83]

Examples of the direct application of constitutional norms may be detected, also, in the theory of obligations, wherein judgements based on values are undoubtedly less common than in other branches of civil law. The assumption that the law of obligations, as a demanding sector for its intense technicality and depth of speculation, is also ahistorical and value-free must be rebutted.[84] Even a superficial historical-comparative survey would enable us to highlight how, despite the formal preservation of the classical doctrines of the law of obligations, these have radically altered their original function, due to a structural change in both basic economic relationships and the legal system's

[82] On this issue, see F. Prosperi, *La famiglia non fondata sul matrimonio* (Camerino-Napoli: Edizioni Scientifiche Italiane, interim edition, 1978), 77 ff, and *passim*, to refer to for further bibliographical references; see, furthermore, P. Perlingieri, 'Sui rapporti personali nella famiglia' *Diritto di famiglia e delle persone*, 1253 (1979).

[83] See, among others, F. Prosperi, ibid 84 ff; P. Perlingieri, ibid; see, however, S. Puleo, 'Concetto di famiglia e rilevanza della famiglia naturale' *Rivista di diritto civile*, I, 385 ff (1979).

[84] See, indeed, P. Perlingieri, 'Recenti prospettive nel diritto delle obbligazioni' *Vita notarile*, 1027 ff (1976); P. Perlingieri, *II fenomeno dell'estinzione nelle obbligazioni* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1971), 48-49; accordingly, P. Stanzione, *Introduzione a I. Markovits* n 44 above, XXXIII, and S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffré, 1964), 2-3, and there ample bibliographical references.

ideology.[85] This may be easily noticed, also within our system, in respect of the so-called 'filling up' of general clauses, such as diligence, good faith, fairness, public policy, exonerating cause, etc. Consider, for example, the requirement of diligence applicable to performance under an employment relationship, as clarified by Art 2014 Civil Code; similarly, the 'measures' which – according to Art 2087 Civil Code – the entrepreneur is obliged to take in order to 'protect the physical integrity and moral personality of employees' must not be interpreted in a production-focused or efficiency-oriented sense, but from the perspective of constitutional solidarity,[86] and must hence be more sensitive to motivations of a humanitarian kind and respectful of personal needs.[87] Moreover, the notion of non-imputable (exonerating) cause, which the legislator resorts to with respect to the doctrine of the supervening impossibility of performance of an obligation (Art 1256 Civil Code), must be construed broadly so as also to take into account the exercise of constitutional rights and duties. This has a significant influence – as already pointed out elsewhere[88] – on the critical issue of labour strikes being the cause of the non-fulfilment of an obligation taken on by the entrepreneur towards third parties.

Besides, in order to define the notions of 'unjust damage',[89] civil wrong,[90] liable persons,[91] and for the purposes of controlling not only

[85] See, n 44 above.

[86] Sharp remarks are in the pages by R. Cicala, 'Produttività solidarietà e autonomia privata' *Rivista di diritto civile*, II, 287 ff (1972); see, also, P. Perlingieri, *Introduzione alla problematica della proprietà*, n 8 above, 21 ff, 25-26, 65 ff.

[87] In this perspective, concerning Art 2087, see P. Perlingieri, 'La tutela giuridica della 'integrità psichica' (A proposito delle psicoterapie)' n 81 above, 769; and also N. Lipari et al, 'Il problema dell'uomo nell'ambiente', in N. Lipari ed, *Tecniche giuridiche e sviluppo della persona* (Roma-Bari: Laterza, 1974), 19 ff; A. Cataudella and M. Dell'Olio, 'Il lavoro e la produzione' ibid 225 ff; concerning Art 2104 see P. Perlingieri, '*Intervento alla tavola rotonda di Bari' su 'Tecniche giuridiche e sviluppo della persona'* n 21 above, 177-178.

[88] P. Perlingieri, 'Sciopero e situazioni soggettive dell'imprenditore verso i terzi' *Rivista di diritto civile*, I, 663 ff (1976); P. Perlingieri, *Dei modi di estinzione delle obbligazioni diversi dall'adempimento* (Bologna: Roma, Zanichelli, 1975), 466 ff.

[89] See, on this issue, Corte di Cassazione 26 June 1973 no 1829, *Giurisprudenza italiana*, I, 1, 1412 (1973).

[90] See, for example, Corte di Cassazione 21 December 1967 no 3003, *Foro italiano*, I, 644 (1968), grounding on Art 21 Constitution the right of any person to resort to the press in order to criticize situations, acts and behaviours; Corte di

the formal legality (*liceità*) of a contract clause (or of the overall contractual setting) but also its eligibility for legal protection (*meritevolezza*), courts are inclined to consider constitutional norms as privileged parameters. For example, it has been asserted that Art 41 is a 'norm regulating inter-personal relationships', thus constituting a legal basis for entrepreneurs to enter the market and resist any form of boycott;[92] that the XII transitional provision of the Constitution – as a logical consequence of applying the fundamental principles of democracy, sovereignty of the people and full development of the human person – excludes from the controls of *liceità* and *meritevolezza* those associations that, regardless of their nature and name – are in truth fascist organizations;[93] that according to Art 37, para 3, any collective labour agreement or individual employment contract that makes provision for lower pay for children compared to adults in relation to the same work is null and void.[94]

The constitutional system may finally make sense of several tendencies within case law which are grounded essentially on common sense and opportunity, rather than on thorough and balanced reasoning. It has correctly been held with regard to alimentary obligations that the right to receive alimony is justified only where the claimant is in a state of necessity and is unable 'to secure his own proper nurturing' (Art 438, para 1, Civil Code) or to produce sufficient income through his work, and certainly not when, despite having the capability and the possibility to earn a living, he just prefers to receive maintenance.[95] This conclusion can clearly be

Appello di Milano, 9 September 1975, *Diritto d'autore*, 57 (1976), conceding that freedom of information and critique does not encounter limitations but for those founded on other constitutional precepts, in particular on the duty to refrain from offending one's honour, reputation and dignity; similarly Corte di Cassazione 16 October 1972, *Giustizia penale*, II, 344 (1973).

[91] Tribunale di Napoli, 19 November 1977, *Giustizia civile*, 1901 (1978), which on the grounds of Art 28 Constitution deems the executive power directly liable for the illegitimate fact by the officer who is personally liable.

[92] Corte di Cassazione 26 June 1973 no 1829, *Giurisprudenza italiana*, I, 1, 1417 (1973).

[93] Tribunale di Roma, 16 June 1973, *Giustizia penale*, I, 291 ff. (1973).

[94] Corte di Cassazione 14 June 1976 no 2188, *Giustizia civile*, I, 1210 (1976).

[95] According to an already consolidated orientation the state of necessity of a person claiming for alimony '*si concreta non soltanto nell'attuale mancanza di mezzi di sostentamento, ma anche e soprattutto nell'impossibilità per l'alimentando*

derived from the Constitution, where it is solemnly stated that the Republic is founded on labour (Art 1); in addition to establishing a right (Art 4), this is also an expression of social solidarity, which is a primary duty of each citizen (Art 2).

VIII. Concluding comments, useful to overcome the traditional juxtaposition of public law and private law, favouring the foundation of a 'constitutional civil law'

Therefore, within the framework of both the so-called indirect application – in cases involving specific statutory provisions, general clauses or express principles – and the so-called direct application – thus defined due to the absence of any intermediary statutory norm

di poterseli procacciare col proprio lavoro, nei limiti consentiti dall'età, dal sesso, dalle condizioni di salute, dalla posizione sociale, etc., sì da far sorgere una sua incolpevole carenza lavorativa' (Consists not only in an actual lack of means of support, but also and above all in the impossibility to earn them with a job's proceeds, within the restraints due to age, sex, health conditions, social position, etc which give rise to a situation of blameless unemployment): Corte di Appello di Firenze 3 July 1958, *Giurisprudenza toscana*, 56 (1959); see, moreover, Corte di Appello di Napoli, 18 October 1969 no 3119, *Diritto e giurisprudenza*, 727 ff (1970) and in editor's note, see more precedents; Corte di Cassazione 23 March 1968 no 923, *Repertorio del Foro italiano*, v. Separazione dei coniugi, 2440, no 38 (1968); Corte di Cassazione 22 June 1976, no 1487, ibid 2319, no 26 (1967); more recently Corte di Appello di Bari, 12 July 1973, ibid 2109, no 46 (1974); Corte di Cassazione 24 March 1976 no 1045, *Foro italiano*, I, 1218 ff (1976), according to which *'il coniuge legalmente separato ha diritto agli alimenti solo se non è in grado di adempiere l'obbligo di trovarsi un lavoro o si trovi in situazione d'invalidità, intesa come impossibilità di trovarsi un'occupazione confacente'* (The legally saparated spouse is entitled to alimony only if unable to perform the duty to find a job or if on disability, meant as impossibility to find a suitable job); on the ability to work see, also, Corte di Cassazione 17 April 1972 no 1210, *Repertorio del Foro italiano*, v. Separazione dei coniugi, 2620, no 37 (1972). It is significant that in legal scholarship, those who analyzed the state of necessity under different perspectives, suggesting an ample interpretation of it, have referred to Art 4, para 2, Constitution and not to Arts 1 and 2: see G. Provera, 'Degli alimenti', in A. Scialoja e G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1972), 77, text and note 8. To be pointed out, also, G. Provera, himself, ibid 74, note 1, who resorts to Art 38, para 4, Constitution to describe the state of necessity. Cf D. Vincenzi Amato, *Gli alimenti. Struttura giuridica e funzione sociale* (Milano: Giuffré, 1973), 220 ff, who highlights the defects in such a perspective, insisting on the connection with social security.

– constitutional norms end up being applied in any case. It is not so much a matter of direct or indirect application, the different premises of which are not always easy to identify, but rather, with or without sufficient statutory authority, a question of the effectiveness of constitutional norms on personal and socio-economic relationships. The constitutional norm becomes the primary justifying reason – though not the only one – for the legal relevance of the aforementioned relationships, constituting an integral part of the normative environment within which, in a functional perspective, they develop. Thus, it is not always and not only a mere hermeneutical rule, but a norm of conduct, capable of affecting the very content of subjective legal situations and their interplay, rendering them functional to the new values.

Ample and thorough studies – especially on (real) property rights and private enterprise – have confirmed the fertility of this perspective. However, it is necessary to raise awareness about it, in order to overcome the residual conceptual resistances and atavic prejudices that are rooted in generic hesitations and potential misunderstandings imputable to a type of legal culture and education that, instead of looking for logical-normative justifications and drawing them from the system in force, proves to be too code-oriented, and is accustomed to reduce legality to mere compliance with codes, ascribing them a constitutional nature and function,[96] and exalting the logical mechanism of 'subsuming' the concrete fact into a normatively-framed abstract case.[97] In view of the above, the direct relationship between the interpreter and the constitutional norm must be construed in such a manner as to ensure that the latter is not understood in isolation from the rest of the legal system, and also to avoid any unjustified duplication aimed at isolating the constitutional norm, thus substantially reaffirming the unitary nature of the legal system while overcoming the traditional juxtaposition

[96] Regarding the overcoming of this attitude see, among others, M. Giorgianni, 'Il diritto privato e i suoi attuali confini' n 1 above, 399 ff and in a consequent hyper-evaluation of 'special' legislation N. Irti, 'L'età della decodificazione' *Diritto e società*, 613 ff (1978); N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 141 ff.

[97] See, indeed, B. Grasso, *Appunti di teoria dell'interpretazione* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1974), 11, and 19 ff.

between public and private.[98] Accordingly, it would be an arbitrary limitation to acknowledge the direct relevance of constitutional norms for interpersonal relationships – or, as German scholarship puts it, a constitutionally-oriented interpretation[99] – mostly or exclusively with reference to fundamental rights, on the one hand, or public law statutes, on the other.[100]

The research programme before private law scholars is composite and suggestive, and aims to achieve conspicuous objectives – only a minimal part of which have already been met – requiring a commitment over more than one generation. This means that the private law system has to be more receptive to the fundamental principles and to the existential needs of the person[101] by: re-defining the basic tenets and scope of legal doctrines, with special regard to those specifically crafted in the private law environment, by re-designing their functional profiles in an attempt to revitalize the aforementioned control based more on legal worthiness (*meritevolezza*)[102] than on formal legality (*liceità*); testing and adapting traditional techniques

[98] On this topic, see P. Perlingieri, *Profili istituzionali* n 12 above, 28, 32 ff; P. Perlingieri, 'Scuole civilistiche' n 5 above, 414 ff and there at note 41, the most signicant bibliographical references. In relation to the 'autonomia collettiva' (power to make collective labour agreements), always floating between public law and private law, G. Napolitano, *Contrattazione collettiva e interpretazione* (Camerino-Napoli: Edizioni Scientifiche Italiane, interim edition, 1977), 29 ff.

[99] S. Haak, *Normenkontrolle und Veriassungskonforme Gesetzesausegung des Richters. Eine rechtsvergleichende Untersuchung*, (Bonn: Röhrscheid, 1963), 1, cited by R. Quadri, 'Applicazione della legge in generale' n 5 above, 261, note 20.

[100] R. Quadri, ibid 261.

[101] See the attemps in Eastern Germany in the period starting from the Conference of Babelsberg in 1958: in this regard, see, diffusely, I. Markovits, *Il diritto civile tra socialismo e ideologia borghese* n 44 above, 75 ff, and especially 192 ff, with essential bibliographic references. Generally, see M. Giorgianni, 'Il diritto privato e i suoi attuali confini' n 1 above, 402, suggested that the '*modificazione della struttura del sistema*' (change in the structure of the system) implied '*una valutazione, non più soggettiva, ma oggettiva o meglio 'contenutistica' del diritto privato*' (an evaluation, no longer subjective, but objective or rather 'content-based' of private law).

[102] For some hints see, for example, A. Lener, 'Ecologia, persona, solidarietà: un nuovo ruolo del diritto civile', in N. Lipari ed, *Tecniche giuridiche e sviluppo della persona* n 87 above, 333 ff; P. Perlingieri, *'Intervento alla tavola rotonda di Bari su 'Tecniche giuridiche e sviluppo della persona'* n 21 above, 177-178, and with reference to newer types of activity P. Perlingieri, 'Relazioni pubbliche e persona umana' *Diritto di famiglia e delle persone*, 825 ff (1972).

and notions (from the subjective legal situation to the legal relationship, from capacity to standing, etc),[103] in an effort to modernize the theory of interpretation and its tools.[104] Many of the studies carried out along these lines note that the path is flourishing with interesting results, which are destined to give private law a new face, thus contributing – in the meaning specified above – to the foundation of constitutional civil law.[105] Moreover, this is the path that ought to be followed in order to counteract the fragmentation of legal knowledge, and the insidious, excessive subdivision of the law into a multitude of branches and specializations[106] which, should they predominate, would inevitably turn the jurist, locked within his microcosm, into an over-specialized yet uncritical professional, endowed with sophisticated technical skills but insensitive to society's overall mission, especially when the latter, expressed in the Supreme Law of the State, is clearly in contrast with pressure groups and power structures.

[103] On subjective legal situations and especially on the interplay thereof, see P. Perlingieri, *Profili istituzionali* n 12 above respectively 166 ff, 220 ff, 262 ff and P. Perlingieri, *Dei modi di estinzione delle obbligazioni* n 88 above, 29-30, 40 ff; now, also for a practical application, F. Ruscello, *I regolamenti del rapporto condominiale* n 8 above, 75 ff, 86 ff; on the role of capacity, see P. Stanzione, *Capacità e minore età nella problematica della persona umana* n 5 above, 137 ff; and, particularly on the issue of unborn babies, the thick essay by G. Criscuoli, 'L'opposizione del marito all'aborto voluto dalla moglie' n 76 above, 184 ff, 225 ff and there for further bibliographical hints.

[104] See L. Lonardo, *Meritevolezza della causa* n 22 above, Chapter II.

[105] For the use and the meaning of this expression, see P. Perlingieri, 'Scuole civilistiche' n 5 above, 414 ff.

[106] For a different (and resigned) vision, N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 151-152. The excessive fragmentation in legal studies was already pointed out by the author of the present article in the opening lecture held in Camerino: P. Perlingieri, 'Produzione scientifica e realtà pratica: una frattura da evitare' n 2 above, 469-470.

Essays

Data as Tradeable Commodity and New Measures for their Protection

Alberto De Franceschi / Michael Lehmann*

Abstract

Information, particularly important, significant and relevant information, as illustrated by current Big Data or Wikileaks and Prism or more recently Tempora, is today's 'digital gold'. From an economic perspective it is therefore relevant to know whether and what kind of data content can be protected. The key question to be answered is therefore whether data can be recognised in law as 'protectable rights'. In the digital world, data are in fact an important 'res intra commercium', namely tradeable goods, the legal protection of which even today remains the subject of considerable debate.

More recently, the problem of deleting data in the internet and the 'right to be forgotten' has been discussed in connection with search engines and social networks, such as Facebook, Instagram or – most recently – Google. Such discussion now informs the background of impending EU regulations for the general protection of data.

A. Data as tradeable commodity

I. The role of information in contemporary society

The collection and transmission of information is currently practiced in all industrialized countries.[1] The most relevant operative applications in this sector are Databanks (eg Big Data),[2] files, especially those which have not only merely the ability to organize

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data but also which elaborate data: by combining and selecting information in accordance with different criteria and requirements, these files aim to produce 'final information',[3] which can be utilised in the market for entirely different purposes.[4]

The concept of information connotes not only a result but also a relationship between the giver and recipient of the information.[5] Thanks to the concept of information it is also possible to define the informative content as well as its communication (the so called 'informative relationship' between two or more parties). In practice, information is the subject of contractual relationships[6] even if sometimes such information is only treated as a 'good' if connected to the provision of material support services.[7]

[1] In relation to the fundamentals of the information economy, cf G.I. Stigler, 'The Economics of Information' 69 *Journal of Political Economy*, 213 (1962); E. Mackaay, *Law and Economics for Civil Law Systems* (Cheltenham: Edward Elgar Publishing Ltd., 2013) 300; R. Van den Bergh and M. Lehmann, 'Informationsökonomie und Verbraucherschutz im Wettbewerbs- und Warenzeichenrecht' *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil*, 588 (1992).

[2] Cf *Der Spiegel* 20/2013, 65; *FAS* 9 June 2013, 1, 10; V. Mayer-Schönberger and C. Cukier, *Big Data: A Revolution That Will Transform How We Live, Work and Think* (New York: Houghton Miffling Harcout, 2013) *passim*; T. Weichert, 'Big Data und Datenschutz' *Zeitschrift für Datenschutz*, 251 (2013); J. Wolf, 'Der rechtliche Nebel der deutsch-amerikanischen "NSA-Abhöraffäre"' *Juristenzeitung*, 1039 (2013); C. Zieger and N. Smirra, 'Fallstricke bei Big Data-Anwendungen – Rechtliche Gesichtspunkte bei der Analyse fremder Datenbestände' *Multimedia und Recht*, 418 (2013). On the question of 'ownership' cf also J. Schneider, *Handbuch des EDV-Rechts* (Köln: Otto Schmidt Verlag, 4th ed, 2008) 550; T. Hoeren, 'Dateneigentum – Versuch einer Anwendung von § 303a StGB im Zivilrecht' *Multimedia und Recht*, 486 (2013).

[3] Regarding the so called 'informazione risultato', see P. Catala, 'Ebauche d'une théorie juridique de l'information' *Revue de droit prospectif*, 24 (1983).

[4] Cf P. Perlingieri, 'L'informazione come bene giuridico', in P. Perlingieri ed, *Il diritto dei contratti fra persona e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003) 353.

[5] V. Menesini, 'Il problema giuridico dell'informazione' *Il diritto d'autore*, 438 (1983); regarding the means of information transmission, see S. Lepri, *Le macchine dell'informazione* (Milano: ETAS Libri, 1982) 147; P. Catala, n 3 above, 19; R. De Meo, 'Autodeterminazione e consenso nella profilazione dei dati personali' *Diritto dell'informazione e dell'informatica*, 587 (2013).

[6] S. Rodotà, *Elaboratori elettronici e controllo sociale* (Bologna: Il Mulino, 1973) 20.

[7] P. Barile and S. Grassi, 'Informazione (libertà di)', *Novissimo Digesto Italiano*

Several agreements have information as their subject, especially when it is transmitted in non-magnetic form.[8] The transfer of knowledge contained in data can take place with or without the transfer of exclusive rights or with or without temporal or local limitations on its disposition. It is also possible to set limits on the ability to transfer data to third parties.

II. Data as a protectable commodity and right

Recognition of a need for the normative protection of information as a 'good' is considerably widespread in Italian legal culture.[9] Indeed, information is increasingly the subject of commercial negotiations.

The question as to whether information can be treated as a 'good' as well as whether information can be the subject of a contractual obligation and the means by which such information can be protected is the subject of intense debate in the Italian literature.[10] Information can be considered by the legal system differently depending on the situation. In our opinion, an express legal provision is not necessary to support the cathegorization of information as a 'good'. Some scholars – even if they acknowledge that information can be the subject of contractual obligations – dismiss the notion that information can be treated as a 'good'.

(Torino: Utet, 1983) App. IV, 214. Cf U. De Siervo, 'Investigazione privata' in *Enciclopedia del diritto* (Milano: Giuffrè, 1972) XXII, 678; G. Giacobbe, 'La responsabilità civile per la gestione di banche dati', in V. Zeno-Zencovich ed, *Le banche dati in Italia. Realtà normative e progetti di regolamentazione* (Napoli: Jovene, 1985) 130.

[8] S. Schaff, 'La nozione di informazione e la sua rilevanza giuridica' *Diritto dell'informazione e dell'informatica*, 450 (1987), considers that information 'can be used billions of times, can lose its economic value [...] or its practical value (become obsolete), but nonetheless remain usable'.

[9] Cf ibid 452; A.M. Sandulli, 'La libertà d'informazione', in A.M. Sandulli ed, *Problemi giuridici dell'informazione: atti del XXVIII. Convegno nazionale di studio: Roma, 9-11 dicembre 1977*, (Milano: Giuffrè, 1977) 2; P. Perlingieri, n 4 above, 351, which emphasises that the concrete value of the information results from its concrete role in the social dynamics.

[10] Cf V. Zeno-Zencovich, 'Cosa', *Digesto delle discipline privatistiche. Sezione civile* (Torino: Utet, 1989) IV, 453.

Information can be protected only in an indirect way: namely as a consequence of the protection of much wider interests (eg professional secrets, trade secrets, privacy secrets).[11] The main reason given for not treating information as a good is based on the conviction that the concept of 'good' is inherently connected to the notion of exclusive use.[12]

In contrast to the abovementioned opinion, it is contended in other literature that the concept of a 'good' presupposes something which is capable of being the 'subject of rights' (Art 810 of the Italian Civil Code)[13] and that such rights are not necessarily exclusive, as is typically the case with proprietary rights.[14] In this regard, a remarkable effort has been made to adapt the traditional concept of a 'good' in so far as it forms the subject of a contract, especially in cases where the subject of the contract is an intangible good such as a software, which previously had not been adequately categorized.[15] Italian jurisprudence is on the other hand certainly more cautious in extending the categories of 'goods' to new subject matter emerging from social developments.[16]

In our opinion, the above illustrated development as well as the wide formulation of Art 810, Civil Code allows information to be included within the scope of the article. In any case, the use of

[11] Ibid 453.

[12] Ibid 455, at n 102; D. Messinetti, *Oggettività giuridica delle cose incorporali* (Milano: Giuffrè, 1970) 36.

[13] Cf Art 810 Codice Civile: '*Sono beni le cose che possono formare oggetto di diritti*'.

[14] Cf S. Pugliatti, 'Beni (teoria gen.)', *Enciclopedia del diritto* (Milano: Giuffrè, 1959) V, 173, who underlined that 'the Italian *Codice civile* of 1865 defined the concept of good referring to the subjective patrimonial right par excellence: the property; but it has already been mentioned that such reference doesn't exclude other rights'; see also A. Iannelli, *Stato della persona e atti dello stato civile* (Napoli: Edizioni Scientifiche Italiane, 1984) 62.

[15] P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006) 723; M. Giorgianni, 'Il diritto privato e i suoi attuali confini' *Rivista trimestrale di diritto e procedura civile*, 391 (1961). Cf *amplius* P. D'Addino Serravalle, 'Article 810 codice civile', in *Codice civile annotato con la dottrina e la giurisprudenza*, G. Perlingieri ed (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2010) vol III, 7.

[16] See eg Corte di Cassazione 20 January 1992 no 659, *Giurisprudenza italiana*, I, 2126 (1992) wich refused to qualify as good the *know how*; cf Corte di Cassazione

information doesn't necessarily require exclusive utilization. It has already been made clear in relation to intangible goods, that they can be used by a plurality of subjects.[17] Information today is relevant to the person entitled to its use because of the uses that it can be put to. Its particular characteristic consists not necessarily in it being exclusive but rather in its ability to satisfy the interest of more than one subject.[18]

According to German law, it is also indisputable that data are not 'things' within the meaning of the §§ 90 ff of the German *Bürgerliches Gesetzbuch* (*BGB*). They are, however, also not legal rights, and therefore do not fall within the classic civil law notion of a 'subject'; from a sales law point of view, they could, however, be treated as 'other subjects' as defined in § 453 para 1, Alt. 2 of the *BGB*, on the basis that the leading authorities have already been willing to recognise software as such.[19] Moreover, the German Imperial Court had already held in 1914 that the delivery of electrical energy was subject to sales law.[20]

In any case, the categorization of information as a 'good' is necessary in order to recognise its social significance and utilisation value. On the other hand, an express legislative provision is ultimately not necessary to be able to define information as a 'good'.[21]

III. The Directive Consumer Rights

For the first time in EU law there are now provisions which expressly protect data as such and give special treatment to the commercial use of data in sales law. Directive 2011/83/EU in

3 December 1984 no 6339, *Nuova giurisprudenza civile commentata*, I, 554 (1985), which considered 'goods' the television channels.

[17] D. Messinetti, 'Beni immateriali 1) Diritto privato', *Enciclopedia giuridica* (Roma: Treccani, 1988) V, 5.

[18] Ibid 7.

[19] W. Weidenkaff, 'sub § 453 BGB', Rn 8, *Palandt Kommentar zum BGB* (München: C.H. Beck Verlag, 73nd ed, 2014), 709.

[20] *Entscheidungen des Reichsgerichts in Zivilsachen*, 86, 12, 10 November 1914.

[21] P. Perlingieri, n 4 above, 348.

relation to the rights of the consumer[22] expressly protects 'digital content' which is defined in Art 2, no 11 (Definitions) as 'data which are produced and supplied in digital form'. Pursuant to Art 9 and Art 16 (m) of the Directive, consumers are also precluded from exercising their usual withdrawal rights where digital content is supplied on-line pursuant to long distance and off-premises

[22] Directive 2011/83/EU of 25 October 2011, Official Journal EU 3 L 304, 64 on Consumer Rights. About the directive 2011/83/EU, see in the Italian literature eg G. D'Amico, 'Direttiva sui diritti dei consumatori e Regolamento sul Diritto comune europeo della vendita: quale strategia dell'Unione europea in materia di armonizzazione?' *I Contratti*, 611 (2012); G. De Cristofaro, 'La Direttiva 2011/83/UE del 25 ottobre 2011 sui 'diritti dei consumatori': l'ambito di applicazione e la disciplina degli obblighi informativi precontrattuali', in A. D'Angelo and V. Roppo eds, *Annuario del contratto 2011* (Torino: Giappichelli, 2012) 30; S. Mazzamuto, 'La nuova direttiva sui diritti dei consumatori' *Europa e diritto privato*, 861 (2011). Cf for the Italian implementation, decreto legislativo 21 February 2014 no 21 'Attuazione della direttiva 2011/83/UE sui diritti dei consumatori, recante modifica delle direttive 93/13/CEE e 1999/44/CE e che abroga le direttive 85/577/CEE e 97/7/CE' (Gazzetta Ufficiale Serie Generale 11 March 2014 no 58), available at http://www.gazzettaufficiale.it/eli/id/2014/3/11/14G00033/sg (the explanatory note to the draft of the implementation provisions is available at http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0059_F001.pdf&leg=XVII): in this regard see eg S. Pagliantini, 'La riforma del codice del consumo ai sensi del d.lgs. 21/2014: una rivisitazione (con effetto paralizzante per i consumatori e le imprese?)' *I Contratti*, 796 (2014); G. De Cristofaro, 'Il recepimento della direttiva 2011/83/UE nell'ordinamento italiano (il d.lgs. 21 febbraio 2014, n. 21, di riforma del codice del consumo)' *Le Nuove leggi civili commentate*, forthcoming (2015); A. De Franceschi, 'Transposition of the consumer rights directive – Italy' *Journal of European Consumer and Market Law*, 123 (2014). Cf in addition the German implementation law 'Gesetz zur Umseztung der Verbraucherrechterichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung', of 20 September 2013, Bundesgesetzblatt I, 364, 2, available at the website of the German Federal Ministry of Justice and Consumer Protection (http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gesetze/BGBl_Verbraucherrechterichtlinie.pdf?_blob= publication File): for an overview of the new provisions see C. Busch, 'Transposition of the consumer rights directive – Germany' *Journal of European Consumer and Market Law*, 119 (2014); C. Wendehorst, 'Das neue Gesetz zur Umsetzung der Verbraucherrechterichtlinie' *Neue Juristische Wochenschrift*, 577 (2014), K. Tonner, 'Das Gesetz zur Umsetzung der Verbraucherrechterichtlinie – unionsrechtlicher Hintergrund und Überblick' *Verbraucher und Recht*, 443 (2013); M. Schmidt-Kessel, 'Verträge über digitale Inhalte – Einordnung und Verbraucherschutz' *Kommunikation und Recht*, 475 (2014).

contracts.[23] Digital contents are also defined in Recital 19 as follows: 'data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means'.[24]

IV. The WIPO Copyright Treaty (WCT)

By referring to a 'tangible medium', which excludes off-line supply, the above mentioned EU Directive finds itself in good company with the WCT of 20 December 1996,[25] to which 90 States are signatories. The doctrine of exhaustion under US copyright law also assumes that para 109 of the Copyright Act deals with tangible copies, which can furthermore be contractually more comprehensively dealt with.

The above follows because the agreed statements in relation to Articles 1, 6 and 7 WCT, although only relevant to content protected by copyright law, also refer to data which are able to be commercialised in tangible form, for example, on CD-ROM's or DVD's. It is true that the agreed statements in Art 1, para 4 of the WCT (Relationship to the Berne Convention, as amended on 28

[23] C. Perlingieri, 'La protezione del cyberconsumatore secondo la direttiva 2011/83/UE' *Le Corti Salernitane*, 526 (2012); M. Lehmann, 'E-Commerce in der EU und die neue Richtlinie über die Rechte der Verbraucher' *Computer und Recht*, 261 (2012); A. De Franceschi, 'Informationspflichten und "formale Anforderungen" im Europäischen E-Commerce', *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil*, 865 (2013).

[24] Recital 19 of Directive 2011/83/UE specifies also that: 'Similarly to contracts for the supply of water, gas or electricity [...] contracts for digital content which is not supplied on a tangible medium should be classified, for the purposes of this Directive, neither as sales contracts, nor as service contracts. For such contracts, the consumer should have the right of withdrawal unless he has consented to the beginning of the performance of the contract during the withdrawal period and has acknowledged that he will consequently lose the right to withdraw from the contract'. For the details of this withdrawal right, cf M. Lehmann, n 23 above, 263; R. Schulze and J. Morgan, 'The Right of Withdrawal', in G. Dannemann and S. Vogenauer eds, *The Common European Sales Law in Context* (Oxford: Oxford University Press, 2013) 294.

[25] See http://www.wipo.int/treaties/en/ip/wct/ (last visited 20 January 2015).

September, 1979)[26] expressly provide that the reproduction right as set out in Art 9 of the Berne Convention, and the exceptions permitted thereunder, 'fully apply in the digital environment, in particular to the use of works in digital form'. The agreed statements, however, make it clear in relation to Art 6 (Right of distribution) and Art 7 (Right of rental) that the expressions 'copies' and 'original and copies' as used in these articles refer exclusively to fixed copies, 'that can be put into circulation as tangible objects'. It needs to be borne in mind that the WCT was established in 1996: in other words, at a time when neither 'streaming' nor 'cloud computing' were discussion items. The same applies to the Directive on the harmonisation of certain aspects of copyright and related rights in the information society ('Info-Directive')[27] which was enacted as European law by agreement under the WCT. In this respect it is appropriate to also refer to Recital no 33 of the Database Directive,[28] wherein the legal doctrine of exhaustion as understood at the time was also applied to the sale of data on a tangible medium: '... the question of exhaustion of the right of distribution does not arise in the case of on-line databases, which come within the field of provision of services [...] unlike CD-ROM or CD-i, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line services is in fact an act which will have to be subject to authorization where the copyright so provides'. Under European law at that time every on-line activity was consequently classified as a service.[29]

[26] For the English version see http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (last visited 20 January 2015).

[27] Directive 2001/29/EC of 22 May 2001, Official Journal L6, 71 of 10 January 2002; cf in addition S. von Lewinski, in M.M. Walter ed, *Europäisches Urheberrecht* (Wien-New York: Springer, 2001) 689, 699.

[28] Directive 1996/9/EC of 11 March 1996 on the legal protection of databases, Official Journal EC 77/20 of 27 March 1996.

[29] Cf instead others: J. Reinbothe, 'Europäisches Urheberrecht und Electronic Commerce', in M. Lehmann ed, *Electronic Business in Europa* (München: C.H. Beck, 2002) 367, 386. See also M. Schmidt-Kessel, L. Young, S. Benninghof, C. Langhanke and G. Russek, 'Should the Consumer Rights Directive apply to digital content?' *Zeitschrift für Gemeinschaftsprivatrecht*, 10 (2011).

V. The draft Common European Sales Law (CESL)

In comparison, data are handled in a materially more up to date and technologically oriented manner in the new draft CESL.[30] Digital content is defined in Art 2(j) of the CESL as 'data which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software...'.

It is significant that, pursuant to Art 5(b) of the draft CESL, digital data are fundamentally put on the same footing as any other object that might be purchased, irrespective of whether they are delivered on-line or off-line or made available for downloading. The result is that, in cross-border EU commercial transactions, digital data are treated as tradeable goods and legally protectable under sales law in the same manner as other goods.

This also applies to laws relating to interference in the performance of obligations, as illustrated by Articles 106-122 (Buyer's remedies) of the CESL. Consistent therewith are also the new Art 59, para 1, lit. o) of the Italian Codice del consumo[31] as well

[30] COM (2011) 635 final, backed by the European Parliament on 26 February 2014: see http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0159. Cf M.B.M. Loos, 'The regulation of digital content B2C contracts in CESL' *Journal of European Consumer and Market Law*, 146 (2014); B. Zahn, 'Die Anwendbarkeit des Gemeinsamen Europäischen Kaufrechts auf Verträge über digitale Inhalte' *Zeitschrift für Europäisches Privatrecht*, 82 (2014); M. Lehmann, n 23 above, 262; M.B.M. Loos, N. Helberger, L. Guibault and C. Mak, 'The regulation of digital content contracts in the Optional Instrument of contract law' *European Review of Private Law*, 729 (2011); D. Staudenmayer, 'Der Kommissionsvorschlag für eine Verordnung zum Gemeinsamen Europäischen Kaufrecht' *Neue Juristische Wochenschrift*, 3491 (2011); M. Basile, 'Un diritto europeo della vendita come secondo regime a carattere facoltativo?' *Giustizia civile*, 75 (2013). With specific reference to E-Commerce, see eg T. Haug, 'Gemeinsames Europäisches Kaufrecht – Neue Chancen für Mittelstand und E-Commerce' *Kommunikation Recht*, 1 (2012). See also Europe Economics, *Digital content services for consumers: assessment of problems experienced by consumers (Lot 1), Report 4: Final Report*, 74 (2011); this report is available at http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf (last visited 20 January 2015).

[31] See new Art 59, para 1, lit. o), *Codice del Consumo*: 'The withdrawal right

as § 356(5) of the German *BGB*,[32] which both implement the Directive on consumer rights.

Accordingly and despite their technical nature, data are to be treated as commercial goods and subject in every way to sales law, irrespective of whether in the course of trade they are embodied on a tangible medium or intangibly, for example, in a digital network.

Digital content comprising electronic signals are now treated in commercial law in the same manner as they have long been treated economically.[33]

VI. The Court of Justice of the European Union: UsedSoft v Oracle

The Court of Justice of the European Union has come in its ground breaking decision *UsedSoft* v *Oracle*[34] to a similar conclusion,

according to articles from 52 to 58 for distance and off-premises contracts is excluded relating to: […] the supply of digital content which is not supplied on a tangible medium if the performance has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his right of withdrawal'.

[32] See new § 356, para 5, *Bürgerliches Gesetzbuch* (*BGB*) introduced by law of 20 September 2013, n 22 above: 'With regard to a contract for the supply of digital content which is not supplied on a tangible medium, the right of withdrawal expires even if the trader has started with the performance of the contract, after the consumer…'.

[33] Cf Communication of 11 October 2011, COM (2011) 636 final, 9: EU-Commission has also in the meantime formulated the principle of equal treatment and handling in connection with the draft sales law as follows: 'In order to take into account the increasing importance of the digital economy, and to ensure that the new regime is 'future-proof', digital content contracts will also fall within the scope of the new rules. This means that the Common European Sales Law could also be used, for example, when buying music, films, software or applications that are downloaded from the internet. These products would be covered irrespective of whether they are stored on a tangible medium such as a CD or a DVD'.

[34] Case C-128/11 *UsedSoft GmbH* v *Oracle International Corp*. (European Court of Justice Grand Chambre 3 July 2012) available at www.eur-lex.europa.eu; for a particularly detailed analysis see H. Zech, 'Vom Buch zur Cloud' *Zeitschrift für Geistiges Eigentum*, 368 (2013); M. Grützmacher, 'Endlich angekommen im digitalen Zeitalter!? Die Erschöpfungslehre im europäischen Urheberrecht: der gemeinsame Binnenmarkt und der Handel mit gebrauchter Software' *Zeitschrift für Geistiges Eigentum*, 46 (2013); see also M. Senftleben, 'Die Fortschreibung des urheberrechtlichen Erschöpfungsgrundsatzes im digitalen Umfeld' *Neue Juristische*

although the decision of course only directly addressed the problem of exhaustion with respect to the sale of software. However, in line with the principle of a single European market, the court fundamentally treated data which a user finally transfers on an outright basis as tradeable goods to be dealt with in a manner akin to property under commercial law.[35] Although this argument was initially derived by the Court of Justice of the European Union from the Directive 2009/24/EU on the legal protection of computer programs,[36] it must also be applied to other digital contents (data in electronic form) which in EU cross border transactions are handled and sold like goods in respect of which 'ownership'[37] can be transferred.[38]

Wochenschrift, 2924 (2012); A. Ohly, 'Anmerkung zu EuGH v. 3 July 2012, Rs. C-128/11, Usedsoft/Oracle' *JuristenZeitung*, 42 (2013); R. Hilty, 'Die Rechtsnatur des Softwarevertrages' *Computer und Recht*, 625 (2012); J. Schneider and G. Spindler, 'Der Kampf um die gebrauchte Software – Revolution im Urheberrecht?' *Computer und Recht*, 489 (2012); R. Hilty, K. Köklü and F. Hafenbrädl, 'Software Agreements: Stocktaking and Outlook – Lessons from the UsedSoft v Oracle Case from a Comparative Law Perspective', 44 *The International Review of Intellectual Property and Competition Law*, 263 (2013); in the USA the general principle of international exhaustion continues to apply, cf 17 USC (United States Code) para 109 (a), 'First Sale' doctrine, *Kirtsaeng* v *Wiley, Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil*, 672 (2013); see also Bundesgerichtshof 17 July 2013 – I ZR 129/08 – *UsedSoft II* (referral back to the Oberlandesgericht, the Higher Regional Court, in Munich).

[35] See point 61 of the judgment *UsedSoft GmbH* v *Oracle International Corp.*: 'It should be added that, from an economic point of view, the sale of a computer program on CD-ROM or DVD and the sale of a program by downloading from the internet are similar. The on-line transmission method is the functional equivalent of the supply of a material medium'; similarly M. Lehmann, in U. Loewenheim ed, *Handbuch des Urheberrechts* (München: C.H. Beck, 2nd ed, 2010) 1866 (12).

[36] Directive 2009/24/EG of 23 April 2009, Official Journal EC L 111/16 of 5 May 2009.

[37] See point 46 of the judgment *UsedSoft GmbH* v *Oracle International Corp.*

[38] See also T. Hoeren and I.I. Försterling, 'Online Vertrieb "gebrauchter" Software', *Multimedia und Recht* 642, 647 (2012); J. Schneider and G. Spindler, n 34 above, 497; T. Hartmann, 'Weiterverkauf und "Verleih" online vertriebener Inhalte Zugleich Anmerkung zu EuGH, Urteil vom 3 Juli 2012, Rs. EUGH Aktenzeichen C12811 C-128/11 – UsedSoft/Oracle' *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 980, 984-989 (2012); also M. Grützmacher, n 34 above, 81 ff; L. Kubach, 'Musik aus zweiter Hand – ein neuer digitaler Trödelmarkt?', *Computer und Recht* 279, 283 (2013); N. Malevanny, 'Die UsedSoft-

The foregoing also applies where there is a download from the 'cloud',[39] in other words, when in the course of cloud computing data are sold on an outright basis to a buyer to both use and own.[40] In practice, a data set in this context is commercially treated as a good and should therefore be classified and treated as such under commercial law principles.

The Directive on consumer rights[41] and the imminent Common European Sales Law,[42] the Court of Justice of the European Union[43] and the Commission[44] have clearly indicated that the EU law in the future will develop in the following manner in relation to the commercial handling of data in digital form: data in the form of digital content are considered as tradeable commercial goods. When data usage rights are the subject of an outright sale, there is a transfer of both sale or gift objects and rights. From a contractual and property law perspective, the laws relating to the sale or gifting of

Kontroverse: Auslegung und Auswirkungen des EuGH-Urteils' *Computer und Recht* 422, 426 (2013); affirmative with regard to at least computer games and otherwise open J.P. von Ohrtmann and C. Kuß, 'Der digitale Flohmarkt – das EuGH-Urteil zum Handel mit Gebrauchtsoftware und dessen Auswirkungen' *Betriebs-Berater*, 2262, 2264 ff (2012); possibly also M. Rath and C. Maiworm, 'Weg frei für Second-Hand-Software? EuGH, Urteil vom 3 July 2012 – C-128/11 ebnet Handel mit gebrauchter Software', *Wettbewerb in Recht und Praxis* 1051, 1055 (2012). Contra view: J. Marly, 'Der Handel mit so genannter "Gebrauchtsoftware"' *Europäische Zeitschrift für Wirtschaftsrecht* 654, 657 (2012); H. Hansen, 'Keine Erschöpfung beim Online-Vertrieb von eBooks', *Gewerblicher Rechtsschutz und Urheberrecht – Prax*, 207 (2013); possibly also N. Rauer and D. Ettig, 'Urheberrecht: EuGH trifft Grundsatzentscheidung zu "gebrauchter" Software' *Europäisches Wirtschaft- und Steuerrecht* 322 (2012). Cf *contra* Landgericht Bielefeld 5 March 2013 Beck-Rechtsprechung 07144 (2013).

[39] See also R. Hilty, n 34 above, 625.

[40] M. Lehmann, in G. Meents and J.G. Borges eds, *Cloud Computing*, (München: C.H. Beck, 2014) chapter 5, at note 73 (to be released); see also M. Lehmann and A. Giedke, 'Cloud computing – technische Hintergründe für die territorial gebundene rechtliche Analyse' *Computer und Recht*, 608 (2013); A. Giedke, *Cloud computing: eine wirtschaftsrechtliche Analyse mit besonderer Berücksichtigung des Urheberrechts* (München: VVF, 2013), *passim*; H. Zech, n 34 above, 368; M.C. De Vivo, 'Il contratto ed il cloud computing' *Rassegna di Diritto civile*, 1001 (2013); A. Ohly, n 34 above, 43; R. Hilty, n 34 above, 633; N. Malevanny, n 38 above, 426.

[41] See n 22 above.

[42] See n 30 above.

[43] See n 34 above.

[44] See n 33 above.

objects apply. These principles can as a consequence also apply to the transfer of intellectual and industrial property in digital form.[45] In copyright law, for example, these principles should also be taken into account in relation to the work being undertaken in the third round of reforms to Italian as well as to German copyright law.[46]

B. Databanks

I. The protection of databanks and data

Under EU law, personal data can only be gathered legally under strict conditions, and for a legitimate purpose. Furthermore, persons or organisations which collect and manage personal information must protect it from misuse and must respect certain rights of the data owners which are guaranteed by EU law. Conflicting data protection rules in different countries can compromise international exchanges. Individuals might also be unwilling to transfer personal data abroad if they were uncertain about the level of protection in other countries. Therefore, common EU rules have been established to ensure that personal data enjoy a high standard of protection everywhere in the EU. The EU's Data Protection Directive no 46 of 1995[47] also foresees specific rules for the transfer of personal data outside the EU to ensure the best possible protection of data when it is exported abroad. Such a directive aims at ensuring a functioning internal market and effective protection of the fundamental right of individuals to data protection. Nevertheless, the minimum harmonization character of the afore mentioned directive has led to an uneven level of protection for personal data, depending on the country where an individual lives or buys goods and services.

In this scenario, the protection given to electronic databases under the European database Directive,[48] to databank works

[45] M. Lehmann, n 23 above.

[46] Cf in addition T. Dreier and G. Schulze eds, *UrhR, Kommentar* (München: C.H. Beck, 4th ed, 2013) 53; about the legislative regulation of the trade in used software.

[47] Directive 1995/46/EC of 24 October 1995, Official Journal EC L 181, 31 of 23 November 1995.

[48] Directive 1996/9/EG of 11 March 1996, Official Journal EG L 77/20 of 27 March 1996; cf in addition S. von Lewinski, in U. Loewenheim ed, n 35 above, 1038,

pursuant to § 4 of the *UrhG* (German Copyright law)[49] and to non-creative collections of data pursuant to § 87a of the *UrhG*,[50] does not extend to the protection of individual datum, but fundamentally rather to the protection of the databank scheme, its structure and retrieval system. Recital 23 of the Directive in any event makes it clear that the creation and the operation of databank software does not fall under the protection of the Databank Directive but instead is only protected by the Computer Program Directive 91/250/EEC, now also Directive 2009/24/EU.[51] In Art 1, para 2 of the Database Directive a databank is defined as a 'collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'.

The Court of Justice of the European Union[52] has furthermore in its British-horse-racing-board-decision determined that in relation to non-creative databanks, only investments in the means which enable existing information to be captured and collected in a databank can be protected. Protection does not however extend to the production of the elements themselves, namely datum, which can then be collected together in a databank: 'The purpose of the protection by the *sui generis* right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database'.[53]

at note 16; M.M. Walter ed, *Europäisches Urheberrecht – Kommentar* (Wien-New York: Springer, 2001) 689.

[49] T. Dreier, in T. Dreier and G. Schulze eds, n 46 above, 151.

[50] Ibid 1254.

[51] Directive 2009/24/EU of 23 April 2009 on the legal protection of computer programs, Official Journal EU L 111/16 of 5 May 2009.

[52] Case 203/02, *The British Horseracing Board Ltd e.a.* v *William Hill Organization Ltd* (European Court of Justice Grand Chambre 9 November 2004) available at www.eur-lex.europa.eu. See the critical comment of M. Lehmann, 'Rechtlicher Schutz von Datenbanken – Pferdesportdatenbank' *Computer und Recht*, 10 (2005); see also A. Wiebe, 'Europäischer Datenbankschutz nach "William Hill" – Kehrtwende zur Informationsfreiheit?' *Computer und Recht*, 169 (2005); confirmed in Case 444/02, *Fixtures Marketing Ltd* v *OPAP*, [2004] ECR I-10549; the same also applies to databank works, Case 604/10, *Football Dataco Ltd*, [2012] ECR I-0000; cf fundamentally M. Leistner, *Der Rechtsschutz von Datenbanken im deutschen und europäischen Recht* (München: C.H. Beck, 2000), *passim*.

[53] Case 203/02, n 52 above; cf in addition also T. Dreier and G. Schulze eds, n

This *dictum* has significantly confined the *sui generis* protection of databases in Europe, even though in one of the predecessors[54] of this Directive, it was originally contemplated that the results of data mining (data mining, being the collection of data), collected and last of all, the datum itself, should all be legally protected.[55] Given that the value of Big Data is constantly increasing[56] it makes sense that the costs of generating data should also be taken into account.[57] Although of course legally bound to do so, the German Federal Court (*Bundesgerichtshof*) has unfortunately accepted this verdict.[58] Only certain investment costs[59] are taken into account in determining whether legal protection under § 87a of the *UrhG* is available:[60] the costs incurred in the collection and arrangement of already existing data, the costs incurred in presenting the data and the preparation of a databank technical infrastructure, as well as the maintenance, care and servicing of such.[61] Investments in the creation of content, in other words, datum from which a databank can subsequently be compiled do not qualify for legal protection; of sole relevance is the

46 above, section 87a, 13; D. Thum, in A.A. Wandtke and W. Bullinger eds, *UrhG* (München: C.H. Beck, 4th ed, 2014), section 87a, 36.

[54] Cf J.J. Gaster, 'Zwei Jahre Sui-generis-Recht: Europaischer Datenbankschutz in der Praxis der EG- Mitgliedstaaten', *Computer und Recht*, 38 (2000).

[55] Likewise M. Leistner, n 52 above, 149; S. von Lewinski, n 27 above, 770.

[56] See n 2 above.

[57] M. Lehmann, n 52 above, 16.

[58] Bundesgerichtshof 1 December 2010 – I ZR 196/08 – *Zweite Zahnarztmeinung II*, *Gewerblicher Rechtsschutz und Urheberrecht*, 724 (2011); Bundesgerichtshof, 25 March 2010 – I ZR 47/08 – *Autobahnmaut*, *Gewerblicher Rechtsschutz und Urheberrecht*, 1004 (2010). In the Tele-Info-CD, decision of 6 May 1999, *Computer und Recht*, 496 (1999), the *Bundesgerichtshof* extended the databank protection rights under § 87a of the *UrhG* to all collections of telephone data as well as the telephone data itself.

[59] Bundesgerichtshof 21 July 2005 – I ZR 290/02 – *Hit Bilanz*, *Computer und Recht*, 849 (2005), with case commentary by U. Wuermeling.

[60] In relation to the difficulties in drawing the boundaries cf T. Hoeren, n 2 above, 35; J. Gaster, ' "Obtinere" of Data in the Eyes of the ECJ – How to interprete the Database Directive after British Horseracing Board Ltd et al v William Hill Organisation Ltd' *Computer und Recht international*, 129 (2005); A. Wiebe, n 52 above, 171.

[61] Bundesgerichtshof 22 June 2011 – I ZR 159/10 – *Automobil-Onlinebörse*, *Computer und Recht*, 757 (2011). Cf in connection therewith also § 87a *UrhG*: 'wesentlich geänderte Datenbank' ('fundamentally changed database').

facilitation of systems for the storage and processing of data, not the data collection as such.[62]

These copyright aspects of databank protection are therefore ineffectual for the protection of data per se.

Competition law protection given to data and data collections against immediate service transfers which directly contravene such laws, as demonstrated in the Tele-Info-CD-decision of the *BGH*[63] (under the old German Competition Law, namely the *UWG*) is however questionable. Protection in this area requires a competition law characteristic which is particularly worthy of protection. The hurdle to showing such a characteristic is not high where the service which has been taken over simply involved, for example, the making of a copy, or in layman's terms, the plagiarising of a competitor's telephone index.

II. No protection for information

It is necessary to distinguish between the protection of data in electronic form and the potential protection of information per se, for which fundamentally throughout the world no legal means of protection exists, according to the principle of 'free access to information'.[64] Although as Art 39 of TRIPS has already shown, it is possible under certain circumstances and within narrow confines for protection to be given to unpublished information, secret know-how, such as for example pursuant to §§ 17 ff of *UWG* for competition law reasons.[65] This is however the classic exception, which justifies the basic rule.

[62] D. Thum, n 53 above.

[63] Bundesgerichtshof, 6 May 1999 – I ZR 199/96 – n 58 above, 496, 500, with commentary by U. Wuermeling. An immediate transfer of service can also happen where only the content of or the information contained in data is acquired, for example, where a telephone directory is transcribed.

[64] Cf generally in addition A. Büllesbach and T. Dreier eds, *Wem gehört die Information im 21. Jahrhundert?* (Köln: Otto Schmidt, 2004) *passim*.

[65] Cf also Art 1, para 1, EU Reg. no 772/2004, Second Technology-Transfer-GVO, of 27 April 2004, Official Journal EU 2004 L 123/11. Cf the overview of know-how protection by C. Musiol, in G.N. Hasselblatt ed, *Münchener Anwaltshandbuch Gewerblicher Rechtsschutz* (München: C.H. Beck, 3rd ed, 2009) 908; A. Mittelstaedt,

III. The right 'to be forgotten' in the internet

More recently, the problem of deleting data in the internet and the 'right to be forgotten' has been discussed in connection with search engines[66] and social networks, such as, for example, Facebook,[67] Instagram[68] and Google.[69] Indeed, a particular aspect of the right to privacy[70] consists of the prerogative to conceal information about ourselves.[71] Reflections about this prerogative have more recently lead to further development of the right to be forgotten, even in the internet.[72]

The basic idea of Mayer-Schönberger,[73] which has been further developed, was that even in the internet there should not be an

in W. Erdmann, S. Rojahn and O. Sosnitza eds, *Handbuch des Fachanwalts, Gewerblicher Rechtsschutz* (Köln: Carl Heymanns, 2nd ed, 2011) 1003.

[66] Cf in addition the Google-decision of the Bundesgerichtshof of 14 May 2013 – VI ZR 269/12 – *Computer und Recht*, 459 (2013), as a consequence of which search engines are obliged at the request of an affected person to remove certain links. Search algorithms must be set up so that privacy breaches can be avoided.

[67] See K.N. Peifer, 'Persönlichkeitsrechte im 21. Jahrhundert – Systematik und Herausforderungen' *JuristenZeitung*, 853 (2013).

[68] N. Nolte, 'Zum Recht auf Vergessen im Internet', *Zeitschrift für Rechtspolitik*, 236 (2011); C. Kodde, 'Die "Pflicht" zu Vergessen', *Zeitschrift für Datenschutz*, 115 (2013).

[69] Cf Case C-131/12 *Google Spain SL and Google Inc.* v *Agencia Española de Protección de Datos (AEPD), Mario Costeja González* (European Court of Justice Grande Chambre 14 May 2014) available at www.eur-lex.europa.eu.

[70] See eg A. Baldassarre, 'Il diritto di privacy e la comunicazione elettronica', *Percorsi costituzionali*, I, 49 (2010).

[71] See on this point G. Finocchiaro, 'Identità personale (diritto alla)' in *Digesto delle discipline privatistiche*. *Sezione* civile (Torino: Utet, 2010), 722; M.R. Morelli, 'Oblio (diritto all')' in *Enciclopedia del diritto* (Milano: Giuffrè, 2002), VI, 848; V. Zeno-Zencovich, 'Identità personale', *Digesto delle discipline privatistiche*. *Sezione civile,* (Utet: Torino, 1993) IX, 294; A. Thiene, 'La tutela della personalità dal neminem laedere ad suum cuique tribuere' Riv. dir. civ., 351 ss. (2014).

[72] Also called, in the Italian literature, '*diritto all'oblio*'. See eg A. Baldassarre, n 70 above, 49; S. Rodotà, *Il diritto di avere diritti* (Bari: Laterza, 2013) 406: 'the right to be forgotten is the right to govern our own memory'. In the Italian jurisprudence, see also Corte di Cassazione 5 April 2012 no 5525, *Nuova giurisprudenza civile commentata*, X, 836 (2012), with case commentary by A. Mantelero; on the same case see also T.E. Frosini, 'Il diritto all'oblio e la libertà informatica' *Il diritto dell'informazione e dell'informatica*, 910 (2012).

[73] V. Mayer-Schönberger, *Delete – The virtue of Forgetting in the Digital Age* (Princeton and Oxford: Princeton University Press, 2009), 16.

eternal digital memory. Instead, there should be a 'gradual forgetting',[74] thereby reflecting the natural and biological memory loss of humans. All information in the internet should be subject to a certain 'end date'.[75] The legal means by which the right to be forgotten is to be achieved is the subject of considerable debate.[76] Suggestions have included a 'digital eraser', a right of withdrawal or a recall right, such as set out in § 42 of the *UrhG* (Right of recall based on altered opinion). From a constitutional point of view, the outcome needs to mirror Art 5 (freedom of expression) of the *Grundgesetz* (German Constitutional Law) and also provide for the possibility of an '*actus contrarius*', namely the deletion of personal information from the internet.

Within this framework, on 25 January 2012 the European Commission proposed a draft regulation for the general protection of data,[77] which is intended to replace the data protection Directive of 1995[78] and is also supposed to introduce a regulation which will lead to 'a right to be forgotten'.[79] In particular, Art 17 ('Right to erasure') of the above mentioned proposal for a regulation

[74] Ibid 199.

[75] Ibid 201.

[76] O. Pollicino and M. Bassini, 'Diritto all'oblio: i più recenti spunti ricostruttivi nella dimensione comparata ed europea', in F. Pizzeti ed, *I diritti nella rete della rete* (Torino: Giappichelli, 2013) 185; S. Rodotà, n 72 above, 406, which defines it as: 'the right to govern our own memory'; M. Mezzanotte, *Il diritto all'oblio. Contributo allo studio della privacy storica* (Napoli: Jovene, 2009) 81; G. Finocchiaro, 'La memoria della rete e il diritto all'oblio', *Diritto dell'informazione e dell'informatica*, 391 (2010); F. Di Ciommo and R. Pardolesi, 'Dal diritto all'oblio in Internet alla tutela dell'identità dinamica. È la rete, bellezza!' *Danno e responsabilità*, 710 (2012). Cf also the Italian leading case regarding online archives: Autorità Garante della Protezione dei Dati Personali, 11 December 2008 (document web no 1582866).

[77] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final. 2012/0011 (COD), Bruxelles, 25 January 2012.

[78] Directive 1995/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal EC L 181, 31 of 23 November 1995; cf in addition C. Runte, in M. Lehmann and J.G. Meents eds, *Handbuch des Fachanwalts Informationstechnologierecht* (Köln: Carl Heymanns Verlag, 2nd ed, 2011) 1065.

[79] Cf Section 17(1) of the draft general data protection legislation in the EU. Cf O. Pollicino and M. Bassini, n 76 above, 191.

'elaborates and specifies the right of erasure provided for in Art 12(b) of Directive 95/46/EC and provides the conditions of the right to be forgotten [...]'. It also integrates the right to have the processing restricted in certain cases, avoiding the ambiguous terminology 'blocking'.[80]

Even more recently, in the Google-decision the European Court of Justice clarified that: 'according to Art 12(b) and subpara (a) of the first paragraph of Art 14 of Directive 95/46, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name link to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful'.[81] The Court observes in this regard that, when appraising the conditions for the application of the mentioned provisions, it should *inter alia* be examined whether the data subject has the right that the information in question relating to him personally should, at a particular point of time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject.[82] After the mentioned ECJ decision, Google

[80] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final. 2012/0011 (COD) Bruxelles, 25 January 2012, 8. Cf eg S.C. Bennett, 'The "Right to Be Forgotten": Reconciling EU and US Perspectives', 30 *Berkeley Journal on International Law*, 161 (2012).

[81] Case C-131/12 *Google Spain SL and Google Inc.* v *Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, n 69 above para 88. Relating to the request for a preliminary ruling, see eg C. Piltz, 'Spaniens Don Quijote: Google gegen die Datenschutzbehörde – Überlegungen zu den EuGH-Vorlagefragen' *Zeitschrift für Datenschutz*, 249 (2013).

[82] Case C-131/12 *Google Spain SL and Google Inc.* v *Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, n 69 above, para 96; cf also para 97 of the judgement, where the Court adds that: 'As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such list of results, those rights override, as a rule, not only the

created a webpage, where, if outdated content from a website is still appearing in Google Search results, a data subject can ask Google to update or remove the page.[83]

IV. The right of privacy

The protection of the right of privacy in Germany[84] in particular has gained some relevance within the context of commercial use of private information. Recently the German Supreme Court (*Bundesgerichtshof*) ordered Google to program and design its search engine in such a way, that infringement of privacy rights do not occur; in the decision Autocomplete/Google[85] the court required the search algorithm of any internet intermediary[86] to be designed so

economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question'.

[83] See https://support.google.com/webmasters/answer/1663691?hl=en (last visited 20 January 2015).

[84] In general see H. Sprau, 'Sub § 823 BGB', Rn 83, *Palandt Kommentar zum BGB* (München: C.H. Beck Verlag, 73nd ed, 2014) ('*Allgemeines Persönlichkeitsrecht*'), 1385; G. Spindler, 'Datenschutz- und Persönlichkeitsrechte im Internet – der Rahmen für Forschungsaufgaben und Reformbedarf' *Gewerblicher Rechtsschutz und Urheberrecht*, 996 (2013); H.P. Bull, 'Grundsatzentscheidungen zum Datenschutz bei den Sicherheitsbehörden' *Neue Zeitschrift für Verwaltungsrecht*, 257 (2011); K.N. Peifer, n 67 above, 853; cf Bundesgerichtshof 14 May 2013, n 66 above, 459.

[85] Cf Bundesgerichtshof 14 May 2013, n 66 above, 459.

[86] As to the general civil responsibility of intermediaries cf C. Czychowski and J.B. Nordemann, 'Grenzenloses Internet – entgrenzte Haftung?', *Gewerblicher Rechtsschutz und Urheberrecht*, 986 (2013); M. Lehmann, in G. Meents and J.G. Borges eds *Cloud Computing*, n 40 above. More recently, about the concept of 'intermediaries whose services are used by a third party to infringe a copyright or related right', see Case C-314/12 *UPC Telekabel Wien GmbH* v *Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH* (European Court of Justice Grand Chambre 27 March 2014) available at www.eur-lex.europa.eu para 40: 'Article 8(3) of Directive 2001/29 must be interpreted as meaning that a person who makes protected subject-matter available to public on a website without the agreement of the rightholder, for the purpose of Article 3(2) of that directive, is using

as to enable references to previous research activities of customers to exclude any incorrect additional references which could infringe the privacy rights of a natural person.[87]

As to the question of jurisdiction in the case of a violation of privacy rights in the internet, the ECJ has decided in the case of Martinez,[88] that a plaintiff can bring an action in his or her domicile, where the centre of his or her personal and economic interests is present; the plaintiff can also claim damages for this violation.

C. Conclusions

Digital content comprising electronic signals are now treated in commercial law in the same manner as they have long been treated economically, namely as valuable commercial goods.

The Directive on consumer rights and the imminent Common European Sales Law, the Court of Justice of the European Union and the Commission have clearly indicated that the EU law in the future will develop in the following manner in relation to the commercial handling of data in digital form: data in the form of digital content are considered as tradeable commercial goods. When data usage rights are the subject of an outright sale, there is a transfer of both sale or gift objects and rights. From a contractual and property law perspective, the laws relating to the sale or gifting of objects apply. These principles can as a consequence also apply to the transfer of intellectual and industrial property in digital form.

At the same time, the need for privacy laws to protect individuals

the services of the internet service provider of the persons accessing that subject-matter, which must be regarded as an intermediary within the meaning of Article 8(3) of Directive 2001/29'. Cf also Case C-131/12 *Google Spain SL and Google Inc.* v *Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, n 69 above, para 41 and 60.

[87] If one uses the name of a person as a search topic, infringing references, which violate privacy rights, must be deleted; eg the name of Bettina Wulff, ex-wife of the former German President Wulff, may not be linked with an escort service.

[88] Joined Cases C-509/09 and C-161/10 *Martinez*, [2011] ECR I-10269 *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil*, 47 (2012).

‘against’ the circulation of information about them has become clearer. Discussion about the abovementioned prerogative has recently lead to the development of a ‘right to be forgotten’, even in the internet, which right will be expressly acknowledged in the forthcoming EU regulation for the general protection of data.

Essays

The Procompetitive Interpretation of Italian Private Law

Francesco Longobucco*

Abstract

This paper investigates the opportunity of a Procompetitive interpretation of Private Law through an interdisciplinary analysis of Competition Law with Contract Law. The purpose of the research is to demonstrate that the traditional Civil Law might be differently considered and interpreted in the specific market where contractual obligation arises. Under this point of view, for example, it is necessary to adopt a new approach to the traditional notion of legal 'consideration' of the contract, to the ancient rule '*in pari causa turpitudinis melior est condicio possidentis*', to the doctrinal category of 'protection obligations' (*Schutzpflichten*). All these institutions of Private Law show a full regulatory efficiency in the perspective of Antitrust Law, so that studying nowadays Contract Law requires the interpreter to value both the single contract and the whole complex environment of market where each single contract is made. The final aim of this suggested method is to make Economy and Freedom of Contract more consonant with the value of Human Person.

I. Competition Law and Contract Law between interaction and interdisciplinary analysis

The Procompetitive interpretation of Private Law is a current topic in European literature who has recently focused attention on the incidence of Competition Law[1] upon the classic institutions of

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[1] For a more complete analysis see V. Donativi, *Introduzione alla disciplina*

Private Law, particularly upon contract law[2] and, more generally, upon the law of obligations.[3]

In this prospective Italian scholars have concentrated particular interest on the phenomenon of '*subjugation of the modern contracts to anticompetitive*' purposes,[4] since it turns out that many antitrust cases, such as prohibited agreements and abuse of dominant position, can take a contractual nature. The basic idea of these studies is the necessity of an interdisciplinary analysis of Competition Law with Contract Law. All too often, in fact, who studies Contract Law ignores competition rules and market regulation. Also who usually studies Competition Law sometimes ignores the fundamental relationship between market regulation and mandatory or dispositive norms proposed by the common law of contracts.[5]

Therefore the traditional notion of Freedom of Contract becomes more complex and articulated, since it means not only freedom to regulate own economic interests, but also requires the individual

antitrust nel sistema legislativo italiano (Milano: Giuffré, 1990); A. Frignani, R. Pardolesi, A. Patroni Griffi, L.C. Ubertazzi eds, *Diritto antitrust italiano, Commentario alla legge 10 ottobre 1990, n. 287* (Bologna: Zanichelli, 1990); V. Mangini and G. Olivieri eds, *Diritto antitrust* (Torino: Giappichelli, 2012); M. Libertini, 'Concorrenza', in *Enciclopedia del diritto* (Milano: Giuffré, 2011) Annali III, 197.

[2] This aspect is well underlined by G. Alpa and V. Afferni eds, *Concorrenza e mercato* (Padova: Cedam, 1994); M.R. Maugeri and A. Zoppini eds, *Funzioni del diritto privato e tecniche di regolazione del mercato* (Bologna: Il Mulino, 2009); G. Olivieri, 'Iniziativa economica e mercato nel pensiero di Giorgio Oppo' *Rivista di diritto civile*, 509 (2012); J. Busche, *Privatautonomie und Kontrahierungszwang* (Tübingen: Mohr Siebeck, 1999), 319; B. Fages and J. Mestre, 'L'emprise du droit de la concurrence sur le contrat' *Revue trimestrielle de droit commercial*, 75 (1998); B. Montels, 'La violence économique, illustration du conflit entre droit commun des contrats et droit de la concurrence' *Revue trimestrielle de droit commercial et de droit économique*, 417 (2002).

[3] For more details see M. Chagny, *Droit de la concurrence et droit commun des obligations* (Paris: Dalloz, 2004); F. Dreifuss-Netter, 'Droit de la concurrence et droit commun des obligations', *Revue trimestrielle de droit civil*, 387 (1990).

[4] These words are by A. Genovese, 'Disciplina del rapporto obbligatorio e regole di concorrenza', in G. Olivieri and A. Zoppini eds, *Contratto e antitrust* (Bari-Roma: Laterza, 2008), 137.

[5] A. Zoppini, 'Autonomia contrattuale, regolazione del mercato, diritto della concorrenza', in G. Olivieri and A. Zoppini eds n 4 above, 22.

contract to participate in the dynamic competitive dimension. The final result, more or less shared by Italian authors, is that the traditional Civil Law might be differently considered and interpreted in the specific market where contractual obligation arises. The inner destination of the contract to market regulation has an evident effect upon the Procompetitive interpretation of the contract itself and, more generally, upon the acts and behaviors of individuals and businesses. Competition Law becomes a sort of '*general clause*'[6] of European Civil Law.

II. Consequences on both Contractual Functions and the traditional concepts of Civil Law: the case of '*bonos mores*' (remedy of restitution)

Consider first the traditional notion of legal 'consideration' of the contract. It has been demonstrated that Competition Law supports the prevalent thesis according to which legal 'consideration' of the contract identifies not only the single contract type but also the concrete function of the negotiation of a contract.[7] As a consequence it is necessary to rethink the notion of gross unfair advantage and the remedy of restitution, since the abstract formal justification of the contract makes way for the concrete economic reason of the single case and the latter sometimes might well diverge from the former.

This has clearly been demonstrated by the *case Courage*,[8] which has undermined the force of the ancient rule '*in pari causa*

[6] This expression is used by C. Osti, 'L'obbligo a contrarre: il diritto concorrenziale tra comunicazione privata e comunicazione pubblica', in G. Olivieri and A. Zoppini eds n 4 above, 36.

[7] M. Libertini, 'La causa nei patti limitativi della concorrenza tra imprese', in G. Olivieri and A. Zoppini eds n 4 above, 89; see, also, U. Breccia, 'Articolo 1325 c.c.', in E. Navarretta and A. Orestano eds, *Dei contratti in generale* (Torino: Utet, 2011), 248.

[8] Case C-453/99 *Courage Ltd. v. Crehan*, E.C.J. 20 September 2001, *Foro italiano*, 75 (2002), with note of A. Palmieri and R. Pardolesi, 'Intesa illecita e risarcimento a favore di una parte: 'chi è causa del suo mal .... si lagni e chieda i danni''.

turpitudinis melior est condicio possidentis'.[9] It concretely happened that a small operator of a pub (Mr Crehan), according to a contractual term imposed by the supplier (Courage Ltd), had been forced to indefinite supplies of beer at a not competitive price. The above-mentioned rule '*in pari causa turpitudinis melior est condicio possidentis*' was applied at first instance by the High Court in order to deny Mr Crehan damages for violation of Art 81 of the EC Treaty. The Court applies the rule in question arguing on the basis that the participation of Mr Crehan to an unlawful agreement in terms of competition had made it impossible for the same Mr Crehan to claim for damages. But the European Court of Justice has appropriately considered Mr Crehan as the 'weaker contractual party' – inevitably forced to accept the illegal anticompetitive clause in order to receive the supply of beer – and has acknowledged damages in favour of him.

This is one consequence of the fact that competition economic rules too often intersect also ethics and morality ('*bonos mores*'), as in the case of an agreement to boycott a contractor[10] or even in the case of sums of money paid repeatedly by the entrepreneur to an employee of the client in order to always get new contracts, so as to alter the rules of competition.[11] Also in France, in the case of a franchise agreement, it was assumed the unjustified enrichment if only one party to the contract had an advantage of non-compete clause.[12] This implies that the ancient principle '*pacta servanda sunt*' is no more strictly essential to the existence of the market but it

[9] About the general attitude of European Private Law to modify the traditional concepts of Civil Law culture see – most recently – A. Gentili, *Il diritto come discorso* (Milano: Giuffré, 2013), 248.

[10] Corte di Cassazione 26 June 1973 no 1829, *Massimario del Foro italiano*, 526 (1973).

[11] Tribunale di Milano 12 February 2001, *Foro padano*, 619 (2001). See also the comment of A. Albanese, 'Immoralità, illiceità e soluti retentio' *Corriere giuridico*, 865 (2005).

[12] See F. Dreifuss-Netter, n 3 above, 387, who emphasizes that '[i]l est important d'y insister car une partie de la doctrine a cru voir, dans l'abus de dépendance économique une révolution par rapport au droit commun des obligations'. On the same theme – in Italy – A. Frignani, *Factoring, leasing, franchising, concorrenza* (Torino: Giappichelli, 1983), 245; R. Pardolesi, *I contratti di distribuzione* (Napoli: Jovene, 1979), 325 and 330.

allows the evolution of the market itself to models of increasing complexity and productivity. At the same time the recent rules on abuse of economic dependence show a strong impact upon ordinary Contract Law.

III. Law of Obligations and Procompetitive Interpretation: *Schutzpflichten* (‘*protection obligations*’) within the concrete market contexts

Under the same profile it is nowadays necessary a general re-interpretation of the Law of obligations in a Procompetitive way. For example, it could be possible to use the German doctrinal category of ‘*protection obligations*’ (which supplement the main performance), in order to guarantee a more competitive market by first preventing and then repairing the abuses of economic asymmetry. In fact ‘*protection obligations*’ or so-called *Schutzpflichten*, from the specific point of view of the German Civil Code,[13] are not contractual obligations but rather legal secondary obligations deriving from Law and Good Faith (so not from Freedom of Contract and Party Autonomy).[14] They are rather protection and loyalty duties imposed to the parties by law or judges (not by the parties to the contract themselves) according to good faith clause, just as to renegotiate a long-term commercial contract,[15] not to abruptly terminate the

[13] In this specific perspective see C-W. Canaris, ‘Ansprüche wegen “positiver Vertragsverletzung” und ‘Schutzwirkung für Dritte’ bei nichtigen Verträgen’, *Juristenzeitung*, 475 (1965); on the specific point I would refer to F. Longobucco, ‘Obblighi di protezione e regole di concorrenza nella contrattazione di (e tra) impresa (e)’ *Contratto e impresa/Europa*, 56 (2010).

[14] This category is not pacifically accepted in Italian Private Law: see, for example, L. Bigliazzi Geri, ‘Buona fede nel diritto civile’, in *Digesto delle discipline privatistiche* (Torino: Utet, 1988), Sezione civile, II, 171. Most recently, about the relationship between freedom of contract and good faith, see M. Grondona, ‘Gravità dell’inadempimento, buona fede contrattuale, clausola risolutiva espressa, poteri del giudice sul contratto: per una difesa antidogmatica dell’autonomia privata e alla ricerca di un criterio di giudizio’, available at www.consiglionazionaleforense.it /site/documento6366.html.

[15] F. Macario, ‘Adeguamento e rinegoziazione del contratto di appalto privato’, available at http://appinter.csm.it/incontri. Lastly see, also, C. Crea, *Connessioni tra contratti e obblighi di rinegoziare* (Napoli: Edizioni Scientifiche Italiane, 2013), 123 ff.

contractual relationship,[16] to have any other behavior directed towards realizing fair dealing in the single contractual context, which show a possible regulatory efficiency in the perspective of Antitrust Law.

Therefore the conduct of the debtor and creditor might be supplemented, through the general clause of good faith, by some relevant obligations arising from the position of each party in the market. In this perspective judges, especially in France, usually refer to the mentioned category of '*protection obligations*' by aiming to assure the objective economic balance between performance and counter-performance in the contract and, only indirectly, to protect the weaker party.[17] In this way also the economic balance of the single contract is functional to avoid the distortion of competition of the whole market in which the same contract is made.[18]

It follows that Private Law (specifically the category in question of '*protection obligations*') shows all its regulatory efficiency in the perspective of Antitrust Law. In fact judges are called to verify the conformity between the single private contract and the characteristics of the market in which the contract itself is done. This by analyzing a lot of factors, such as the location of the supplier and competitors, the market position of the purchaser, the presence of

[16] Corte di Cassazione, 18 September 2009 no 20106, *Foro italiano*, 95 (2010), with note of A. Palmieri and R. Pardolesi, 'Della serie 'a volte ritornano': l'abuso del diritto alla riscossa'; F. Macario, 'Recesso *ad nutum* e valutazione di abusività nei contratti tra imprese: spunti da una recente sentenza della Cassazione' *Corriere giuridico*, 1577 (2009); E. Giorgini, 'Recesso *ad nutum* secondo ragionevolezza' *Rassegna di diritto civile*, 586 (2010).

[17] See M. Chagny, n 3 above, 772.

[18] For a practical application of this observation – referring the general theme of 'business network contracts' – I would refer to F. Longobucco, 'Abuso di dipendenza economica e reti di imprese' *Contratto e impresa*, 390 (2012). In the same perspective see also the observations of G. Teubner and M. Amstutz eds, 'Vertragsnetze: Rechtsprobleme vertraglicher Multilateralität', *Krit. Vierteljahr. für Gesetzg. u. Rechtswiss.*, Sonderheft, 103-290 (2006); in Italy, where the phenomenon has been regulated by legge 9 April 2009 no 33, see F. Cafaggi ed, *Il contratto di rete. Commentario* (Bologna: Il Mulino, 2009) and C. Crea, *Reti contrattuali e organizzazione dell'attività di impresa* (Napoli: Edizioni Scientifiche Italiane, 2008), *passim*.

barriers to entry, the degree of maturity of the market, the nature of the product, etc.[19]

In this context parties to the contract might be forced by the judge, in accordance with the general clause of good faith, to renegotiate a long-term commercial contract. They also might be forced not to abruptly terminate the contractual relationship, so that the validity of the termination of the contract should be assessed having regard to the concrete market conditions existing outside the private contract. Parties to the contract might even be forced by judges to have any other behavior directed towards realizing not only good faith and fair dealing in the single contract or the equilibrium of the individual agreement, but also to regulate the same market in which the private contract is placed.[20]

IV. 'Contractual Externalities' and Consumer protection: the Private Enforcement of Antitrust Law

As a result of this situation, studying nowadays Contract Law requires the interpreter to value the whole complex environment of market where each single contract is made. In other words the single contract reveals its inherent '*cognitive limits*', as a category by itself, and economic phenomena cannot only be understood through the category of contract but also referring to the general '*way of doing contracts*' in the market, that is to the '*series of contracts*' the single entrepreneur is able to conclude with the consumers.[21]

Consider for example, under this point of view, the well-known problem of the contracts done by the entrepreneurs with the single consumer just in order to realize an anticompetitive price fixing agreement (the so-called '*Folgeverträge*' or '*ancillary contracts*' or '*tools contracts*'). While the single contract stipulated with the

[19] A. Zoppini, 'Il contratto asimmetrico tra parte generale, contratti di impresa e disciplina della concorrenza' *Rivista di diritto civile*, 515 (2008).

[20] F. Longobucco, n 13 above, 41.

[21] In this specific sense see the words – set out in italics above in the text – of P. Femia, 'Nomenclatura del contratto o istituzione del contrarre? Per una teoria giuridica della contrattazione', in G. Gitti and G. Villa eds, *Il terzo contratto. L'abuso di potere contrattuale nei rapporti tra imprese* (Bologna: Il Mulino, 2008), 215.

consumer is formally unobjectionable, at the same time it is vitiated from the outside, by valuing the '*externalities*' of the contract itself, because of being part of a superior anticompetitive design. Therefore the abusive exercise of economic power by the entrepreneurs might justify damages in favour of the injured consumer who should claim for antitrust damages.[22] In fact the contract is clearly detrimental to the consumer who is a '*third party*' (*victim*) with respect to the antitrust infringements or cartels.[23] As an important consequence it is not possible to evaluate the antitrust agreement without considering its effects upon the general market and especially upon consumers' interests, since the antitrust cartel is normally against third parties and a source of damages for them (the consumers).

V. Freedom of Contract and balancing test: the regulatory efficiency of Private Law in the perspective of Antitrust Law

So it has been demonstrated that the use of the classic institutions of Private Law might realize the purpose of market regulation together with the Public Enforcement of Antitrust Law. In fact the regulatory attitude of Private Law derives from the osmotic relationship between market rules and Contract Law.[24] Therefore it is

[22] About this particular problem see, in Italy, M.R. Maugeri, *Violazione di norme antitrust e rimedi civilistici* (Catania: Ed it, 2006); E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza* (Napoli: Jovene, 2008). I would also refer to F. Longobucco, *Violazione di norme antitrust e disciplina dei rimedi nella contrattazione 'a valle'* (Napoli: Edizioni Scientifiche Italiane, 2009). In the other countries see V. Emmerich, *Kartellrecht* (München: C.H. Beck, 7th ed, 1994); E. Langen and H-J. Bunte eds, *Kommentar zum deutschen und europäischen Kartellrech, Band. 1, Neuwied, Kriftel* (Berlin: Luchterhand, Rn. 219), 158; M.S. Gal, 'Harmful Remedies: Optimal Reformation of Anticompetitive Contracts' 22 *Cardozo Law Review*, 91 (2000); R. Houin, 'Les consequences civiles d'une infraction aux regles de concurrence', in *Annales de la Facultè de Droit de Liège*, 28 (1963).

[23] I would still refer to F. Longobucco, ibid 49-51; see, also, F. Longobucco, 'Profili evolutivi del principio *fraus omnia corrumpit* tra "contratto in frode al terzo" e "contratto in danno di terzi" *Rassegna di diritto civile*, 712 (2012). M. Onorato, *Nullità dei contratti nell'intesa anticompetitiva* (Milano: Giuffré, 2012), 87 and note 155.

[24] For a first introduction see A. Komninos, 'Introduction', in C.D. Ehlermann

very opportune to avoid sectoral approaches to Competition Law in order to promote the rights of the 'weaker subjects' of the market. The interplay between Private and Public interests becomes decisive to make Economy and Freedom of Contract more consonant with the value of Human Person.[25] This conclusion becomes stronger under the assumption that Antitrust Legislation might be analyzed and interpreted through balancing the various interests of the different actors of the market (both entrepreneurs and consumers).

and I. Atanasiu eds, *Effective Private Enforcement of EC Antitrust Law, European Competition Law Annual 2001* XXIV ff (Oxford: Hart Publishing, 2003); J. Lewer QC, 'Effective Private Enforcement of EC Antitrust Rules Substantive Remedies: The Viewpoint of an English Lawer', ibid 109; Mar. Monti, Effective Private Enforcement of EC Antitrust Law, ibid 3; W. Van Gerven, 'Enforcement of EC Competition Rules in the ECJ – Courage v. Crehan and the Way Ahead', in J. Basedow, *Private Enforcement of EC Competition Law* (The Netherlands: Kluwer, 2007), 19.

[25] I refer to the famous *Case Omega*: cf Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH c. Oberbürgermeisterin der Bundesstadt Bonn*, E.C.J. 14 October 2004, *Raccolta*, I-5659 (2004). For an in-depht examination about this recent relevant issue see T. Ascarelli, *Teoria della concorrenza e dei beni immateriali* (Milano: Giuffré, 3rd ed., 1960); G. Oppo, 'Diritto dell'impresa e morale sociale', *Rivista di diritto civile*, 36 (1992); L. Raiser, 'Funzione del contratto e libertà contrattuale', in L. Raiser ed, *Il compito del diritto privato. Saggi di diritto privato e di diritto dell'economia di tre decenni*, Italian translation (Milano: Giuffré, 1990); P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006); N. Irti, *L'ordine giuridico del mercato* (Roma-Bari: Laterza, 5th ed, 2004); S. Grundmann ed, *Constitutional Values and European Contract Law* (The Netherlands: Kluwer Law, 2008), 3.

Essays

Children Born Out of Wedlock: The End of an Anachronistic Discrimination

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Abstract

After a historical and comparative overview regarding the discrimination of children in the perspective of the European Court for Human Rights, the aim of the paper is to examine an important shift that international standards and conventions have recently brought about in the Italian landscape of filiation: the Italian law reform 2012-13, which is designed to abolish the legal disabilities of all children born from both married and non-married parents. The analysis takes into account the implications entailed by other interventions of the Italian legislator that regulated the variations of society, gradually overcoming the use of obsolete terms. In this study, we ask the question if the combination of old and new legal reforms has entirely resolved the problems tied to the children's legal status.

I. An overview regarding the discrimination of children in the European perspective

From the 1800s until the early mid 1900s, in many European countries, an unequal treatment of children on the basis of the child's birth prevailed.

In the majority of these jurisdictions, if the children were born within wedlock, only the father was the legal holder of parental responsibilities, on the assumption of his superiority to the mother.[1] On the contrary, if the children were born out of wedlock, parental

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[1] The married parents were placed on equal footing – with automatic and equal parental rights over their children – in Italy in 1948, in Germany in 1949, in the Netherlands in 1947, in France in 1970, in Spain in 1978, in Greece in 1983.

responsibilities belonged to the mother, with the exclusion of the father.

One argument for the discrimination was that illegitimacy was instrumental in buttressing the institution of marriage; it was thought that an illegitimate child brought disgrace on the mother and her family and could not be recognised as a member of her family.

During the second half of the twentieth century, the distinction between children born to married and unmarried parents was gradually abandoned in almost all the European jurisdictions, especially, due to the influence of the European Convention on Human Rights[2] and its applications by the European court in Strasbourg.[3]

According to Art 12 of the European Convention on Human Rights, 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'. This norm was initially interpreted as an expression of the concept of family based on marriage and, thus, non marital children were considered morally unacceptable.

We have to go back to 1979 to find the first case addressed by the European Court for Human Rights with a new approach referred to non marital children. At that time, the European court of Strasbourg made the ruling *Marckx against Belgium*,[4] according to which, the Belgian law infringed the right to private and family life (Art 8, taken in conjunction with Art 14, of the European Convention) when precluded inheritance rights for illegitimate children.

[2] The European Convention on Human Rights and Fundamental Freedoms was signed by the member States of the Council of Europe in Rome on 4 November 1950 and was ratified by the Italian State with a law enacted in 1955.

[3] G. Ferrando, 'Genitori e figli nella giurisprudenza della Corte Europea dei diritti dell'uomo' *Famiglia e diritto*, 1049 (2009); V. Zagrebelsky, 'Corte, convenzione europea dei diritti dell'uomo e sistema europeo di protezione dei diritti fondamentali' *Foro italiano*, IV, 353 (2006); J. Long, 'La Convenzione europea dei diritti dell'uomo e il diritto italiano della famiglia', in P. Zatti ed, *Trattato di diritto di famiglia* (Milano: Giuffré, 2006), 1.

[4] Eur. Court H.R., *Marckx v. Belgium*, Judgment of 13 June 1979, *Rivista di diritto internazionale*, 233 (1980). For a comment, see F. Uccella,'La giurisprudenza della Corte europea dei diritti dell'uomo su alcune tematiche del diritto di famiglia e suo rilievo per la disciplina interna' *Giurisprudenza italiana*, IV, 128 (1997).

The illegitimate child was Alexandra Marckx, daughter of Paula Marckx, an unmarried woman who recognized and adopted the child in accordance with the Belgian civil code, under which no legal bond between an unmarried woman and her child resulted from the mere fact of the birth.

Article 8 of the European Convention makes no distinction between legitimate and illegitimate children and provides that: 'Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the protection of the rights and freedoms of others'.

With the decision *Marckx against Belgium*, the European court of Strasbourg confirmed that Art 8 applies both to 'illegitimate' and 'legitimate' family and established that the protection of family life out of marriage had to be extended over the strict area of relationships between parents and child, involving also other relatives, with consequent rights of succession between grandchildren and grandparents. Hence, children born out of marriage could not be considered strangers to their parents' family, having the same inheritance rights as children born within the marriage.

Nevertheless, in various European countries, relationships with non marital children were not protected to the same extent as marital family relationships. In particular, they were precluded from inheriting because considered threatening pretenders to the family's property.

In Great Britain, discriminating treatment regarding illegitimate children by the common law progressed for a long time. As a result, the United States, Canada and Australia followed suit.[5]

In time, the traditional rule condemning these children was discarded in Great Britain, but an unmarried father could only acquire parental rights through specific means enumerated by

[5] C. Retter, 'Introducing The Next Class Of Bastard: An Assessment Of The Definitional Implications Of The Succession Law Reform Act For After-Born Children' *Canadian Journal of Family Law*, 147 (2011).

Children Act in 1989; these means were, basically, marriage or a court order.[6] Eventually, with the Children Act 2002, parental responsibility was given to all those unmarried fathers who registered the birth of their children on the basis of a formal agreement with the mother.

Looking at other decisions released by the European court of Strasbourg, we notice an interesting French case: *Mazurek against France* in 2000 resulted in the violation of Arts 8 and 14 of the Convention by France, which discriminated children born out of wedlock, by giving them only half of the inheritance given to legitimate children.[7]

Article 14 (Principle of discrimination) of the Convention provides that: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

In the case *Mazurek against France*, upon his mother's death, his brother, (the legitimate son) wanted to give him only a quarter of their mother's estate and thus, Mazurek made several attempts to assert inheritance rights in the national courts. The French Court of Cassation refused Mazurek's appeal, who, then, decided to resort to the European court of Strasbourg, claiming the same right of succession as the legitimate child. The court of Strasbourg found a violation of the Convention's principle of discrimination, because France had treated people in the same situation differently, without justifiable reasons.

This decision induced the French legislator to enact law no 1135 on 3 December 2001, in order to establish the equality between legitimate and natural children; but only after the *Ordonnance* no 2005-759 dated 4 July 2005,[8] the different terminology was definitively cancelled in the law 2009.

Under the German law 1969, children born out of wedlock were

[6] See, generally, Rt. Hon. Mrs Justice Hale, DBE, 'The 8th ESRC Annual Lecture 1997' 20 *Journal of Social Welfare and Family Law*, 125 (1998).

[7] Eur. Court H.R., *Mazurek v. France*, Judgment of 1 February 2000 (App no 34406/97), available at www.hudoc.echr.coe.it.

[8] In general, see S. Patti and M.G. Cubeddu, *Introduzione al diritto di famiglia in Europa* (Milano: Giuffré, 2008), 359.

still discriminated, at multiple levels.

With the German Reform 1997 the situation changed, but a disadvantage remained with regard to illegitimate children born before 1949. Even if recognized by their parents, those children could not be their statutory heirs. This unjust regulation induced the European court of Strasbourg to grant the request of *Brauer against Germany* in 2009.[9]

Mrs Brauer was born in 1948 out of marriage and immediately recognized by her father. She lived in the former German Republic until 1989, while her father lived in the Federal Republic of Germany. Both before and after the reunification of Germany, father and daughter had had regular contact. When the father died in 1998, Mrs Brauer applied for a certificate of inheritance attesting that she was entitled to at least half of her father's estate. The application was unsuccessful and she made an appeal to the European court of Strasbourg: she claimed that her exclusion from any entitlement to his estate was disproportionate. The court did not find any ground on which such discrimination could be justified and, therefore, declared the violation of Art 14 of the Convention, taken in conjunction with Art 8.

Despite this progress, the exclusion from inheritance of children born out of marriage before 1949, remained in force in Germany until law 12 April 2011, where eventually their legal status became equivalent to that of children born within marriage.

II. The initial developments of the Italian family law in the field of filiation

Like other European nations, the Italian society has evolved gradually.

The first step towards the non-discrimination of illegitimate children was made in 1948 by the proclamation of the Constitution, according to which parents have the same rights and obligations with

[9] Eur. Court H.R., *Brauer v. Germany*, Judgment of 28 May 2009 (App no 3545/04); Eur. Court H.R., *Anayo v. Germany*, Judgment of 21 December 2010 (App no 20578/07), both available at www.hudoc.echr.coe.it.

respect to their children, even if born out of wedlock (Art 30 Constitution).

Nevertheless, the old text of the Italian civil code – dated 1942 – reflected archaic prejudices and discriminated children of unmarried parents in several ways.

Firstly, they were punished with the legal name of 'illegitimate' or 'adulterine' and were precluded from inheriting property from their parents.

Secondly, they were deemed to be 'nobody's children' and the civil code did not recognize a relationship with them except when parental rights and duties were conferred through legitimisation by subsequent marriage between the mother and the father.

In order to fight against this unjustifiable situation, the member States of the European Council signed in 1975 the European Convention on the Legal Status of Children born out of Wedlock,[10] according to which maternal affiliation of every child born out of wedlock should be based 'solely on the fact of the birth of the child' (Art 2). This Convention served as a frame of reference and inspiration for national legislators and the adoption of certain common rules concerning children born out of wedlock contributed to a harmonisation among the laws of the member States.

Thus, the content of family law has been transformed in all European systems, included Italy, adopting a more child law-centred approach on an international scale.[11] This legal evolution is also due

[10] The European Convention on the Legal Status of Children born out of Wedlock was signed by the member States of the Council of Europe in Strasbourg on 15 October 1975. This Convention aims to achieve total equality between children born in wedlock and those born out of wedlock in respect of relations with their parents, integration into each parent's family and inheritance rights.

[11] G. Piepoli, 'Individuo e gruppi sociali. Il gruppo familiare', in N. Lipari ed, *Diritto privato. Una ricerca per l'insegnamento* (Bari: Laterza, 1974), 173; P. Rescigno, 'Il diritto di famiglia a un ventennio dalla riforma' *Rivista di diritto civile*, I, 109 (1988); V. Roppo and A.M. Benedetti, 'Famiglia, III) Famiglia di fatto', *Enciclopedia giuridica* (Roma: Treccani, 1999) vol XV, 1; M. Dogliotti, 'Famiglia di fatto', *Digesto discipline privatistiche*, *Sezione civile* (Torino: Utet, 1992) vol VIII, 188; E. Del Prato, 'Patti di convivenza' *Familia*, 959 (2002); A. Scalisi, 'La famiglia nella cultura del nostro tempo' *Diritto di famiglia e delle persone*, 701 (2002); C.M. Bianca, *La famiglia, Diritto civile* (Milano: Giuffré, 2014) vol 2.1, 3; P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 673; F. D'Agostino, 'Riconoscere

to the fundamental role played by the authority of the case-law and the dialogue between the European court of Strasbourg and the Italian courts, in order to safeguard the human rights and improve the tools for their protection.[12] Through this method,[13] which aims at approaching different judgements in giving interpretations of the norms, in accordance with the European Convention for Human Rights, the promotion of the system's consistency and its compliance with the Constitution can be achieved.

As first great Italian family reform, the law dated 1975 abolished the legal designation of 'adulterine' and 'illegitimate' children and made the possibility of the unmarried couples to obtain parental responsibilities under certain conditions to become a reality.

Since then, the Italian State guaranteed the recognition of paternity and maternity through adequate legal means based on mandatory provisions.[14] From that moment on, the filiation of every child born out of wedlock could be established by voluntary acknowledgement or judicial decision. As a consequence, the child acquired the status of 'natural recognized' child and both parents had the same responsibilities towards him, as if he was born in wedlock.

The acknowledgment always requires a public form as it must be included in the birth certificate or made by a specific declaration written in the Registry of Civil Status or in a will or in another public document. If nobody acknowledges the child, he results to be a 'child of no one' without any kinship relation, but he can initiate a legal action to ascertain maternity or paternity even against the will of the concerned parent.

le convivenze?' *Iustitia*, 1 (2006); F. Prosperi, 'La famiglia nell'ordinamento giuridico' *Diritto di famiglia e delle persone*, 790 (2008); A. Palazzo, 'Matrimonio e convivenze' *Diritto di famiglia e delle persone*, 1300 (2009).

[12] Reference is made to a prominent school of thought. In particular, see P. Perlingieri, *Leale collaborazione tra Corte Costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008), 54-64; L. Ruggeri ed, *Giurisprudenza della Corte Europea dei Diritti dell'Uomo e influenza sul diritto interno* (Napoli: Edizioni Scientifiche Italiane, 2009), *passim*.

[13] P. Perlingieri, 'Il principio di legalità nel diritto civile' *Rassegna di diritto civile*, 164-201 (2010).

[14] R. Pane, 'Il nuovo diritto di filiazione tra modernità e tradizione', in R. Pane ed, *Nuove frontiere della famiglia. La riforma della filiazione* (Napoli: Edizioni Scientifiche Italiane, 2014), 17.

In spite of the achievement obtained through the Reform 1975, the status of children born out of wedlock was still inadequate and required further expansion of the regulations.

Precisely, the Reform was not totally in compliance with the Italian Constitution, that claims the principle of parental responsibility for the solely fact of procreation.

The Reform 1975 did not remove all the discriminations, because the general rule of legal equality between children, regardless of the status of their parents, was subjected to some exceptions.

Firstly, a disadvantage was that children born out of marriage could be obliged to take the settlement of their inheritance in the form of equivalent value if the children born within marriage so desired and chose to give them the money or some real estate property.

Another privilege was granted in favour of the legitimate children.

Even if both legitimate and natural children inherited in the same parts from their parents, the natural children were only heirs from the single parent who made the acknowledgement, but not from his entire family (eg they could not inherit from natural grandfathers, natural siblings, natural cousins, etc).

For this reason, 'natural children' remained in an unfavourable legal position in comparison with 'legitimate' children. Even though the Reform 1975 was an important stage in the civil progress, the real equality between children was reached almost forty years later.

Principles of European Family Law regarding Parental Responsibilities drafted in 2001 facilitated the task of the Italian legislator, as they could be used as a frame of reference.[15] According to Art 3:5 of these Principles, children should not be discriminated on grounds such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, sexual orientation, disability, property, birth or other status, irrespective of whether these grounds refer to the child or to the holders of parental responsibilities.

[15] These principles have been drafted by the Commission of European Family Law, which was established in September 2001 with the scope to provide the most suitable means for the harmonization of family law within Europe. See www.utrechtlawreview.org.

III. The results of the latest Italian family law reform: a unique status of children and a wide notion of parentage

The attention recently paid by the European Union to the increasing need for judicial cooperation in private law produced in 2003 the European Regulation no 2201 on 'Jurisdiction and Recognition of Judgments', that provides uniform rules for the enforcement of national decisions relating to marriage, separation, divorce, annulment and parental responsibilities.

Furthermore, important modifications to the Italian civil code came into operation when legge 8 February 2006 no 54 ('Separation and joint custody of children') entered into force in order to maintain the relationships between children and parents after separation, divorce, marriage annulment or dissolution of *de facto* couples.[16]

After this law, concepts like 'authority' and 'guardian' have been left behind opting for the broader concept – used in many international instruments[17] – of 'parental responsibility', that must be always exercised for the children's benefit in accordance with their personalities. It consists of a collection of rights and duties, such as raising, taking care, education, maintenance, determination of residence, administration of properties and representation of the child in legal matters.

In the frame of the previous regulation, if the parents were not married and lived separately or if they were married but separated or divorced, the children usually remained in the care of the mother, because normally they were living with her, while in the current legal system parents have joint custody, whether they are married or not, whether they live together or not and regardless of where the children live. Cooperative parenting is the norm fixed by the Reform 2006: it applies in every case, unless the judge decides otherwise for special reasons favourable to the child.

[16] On the point see L. Rossi Carleo, 'La separazione e il divorzio', in M. Bessone ed, *Trattato di diritto privato* (Torino: Giappichelli, 1999) vol IV, 238.

[17] See, for example, the Convention on the Rights of the Child (1989), entered into force on 2 September 1990; the Hague Child Protection Convention (1996), entered into force on 1 January 2002. Today the notion of parental responsibility is defined by Art 2, no 7, of the Council Regulation (EC) no 2201/2003 of 27 November 2003 concerning 'Jurisdiction, Recognition and Enforcement of Judgements in Matrimonial Matters and Parental Responsibility'.

In fact, according to the current text of the civil code, in order to give one parent the sole custody, a specific judicial order needs to be made. In proceedings regarding the separation of married and unmarried couples, shared responsibility is considered the best choice, so beneficial to children that it is preferred to the exclusive custody even when parents are in continuous conflict.[18] The objective is to guarantee the right of the child to dual parenting, that is to have a direct relationship and contact with two parents and not only with one.

After the Reform 2006, the annulment of a marriage and the partnership break-down have no effect on the attribution of parental responsibilities and no influence on the quantity and quality of children's rights. In prospect of simplicity and uniformity, the judicial competence has been unified in the hands of the ordinary court in all proceedings concerning the maintenance of all children – including those born out of wedlock – in the family crisis (thus depriving the court of minors).

Following this trend, all the pre-existent disparities between 'legitimate' and 'natural' children have been removed by the legislator during the last two years in a European perspective.

On 10 December 2012 Italian Parliament enacted an historic reform titled 'Legal Provisions on the Recognition of children born out of wedlock',[19] that we call 'Reform 2012-13'. This recent intervention starts with legge 10 December 2012 no 219 and ends

[18] For a comparison with the Shared Parental Responsibility Act 2006 in Australia, see H. Rhodes, 'The dangers of shared care legislation: why Australia needs (yet more) Family Law Reform', 36 *Federal Law Review*, 279 (2008). With reference to Spanish family law, see T. Picontò Novales, 'The Equality Rights Of Parents And The Protection Of The Best Interest Of The Child After Partnership Breakdown in Spain' 26 *International Journal of Law, Policy and the Family*, 378 (2012).

[19] Legge 10 December 2012 no 219 (in Gazzetta Ufficiale 17 December 2012, no 293), titled 'Regulations regarding the recognition of natural children'. See M. Bianca, 'Tutti i figli hanno lo stesso stato giuridico' *Nuove leggi civili commentate*, 507 (2013); A. Palazzo, 'La riforma dello status di filiazione' *Rivista di diritto civile*, 245 (2013); F. Prosperi, 'Unicità dello "*status filiationis*" e rilevanza della famiglia non fondata sul matrimonio' *Rivista critica di diritto privato*, 273 (2013); M. Sesta, 'I disegni di legge in materia di filiazione: dalla diseguaglianza alla unicità dello status' *Famiglia e diritto*, 962 (2012).

with decreto legislativo no 154 issued by the Italian Government on 28 December 2013.

As amendments to the civil code, labels such as 'natural' and 'legitimate' children, which suggested notions of superiority and inferiority, have been cancelled. Every child is simply a 'child' without any privilege in case of married parents and both the father and the mother have automatic and equal parental responsibilities over him.

In particular, a child born out of wedlock has the same right to his father's and mother's succession of any other member of their family, as if he had been born in wedlock.

In the current text of the civil code, children have a unique legal status and the circumstances of their birth are not relevant. These amendments mirror the profound change in family structures that leads governments in many countries, including Italy, to legislate in favour of the interest of the child, which has become the paramount consideration.

If we compare the Italian legal system with others, we notice the delay of the legislator, that should have intervened many years before. This delay is due to the slow process of transformation that was implemented during a long and complex cultural revolution. In fact, it took a long time to amend several articles of the Italian civil code, making them compliant with the Italian constitution.

Subsequently, the terms 'legitimate' and 'natural' children have been replaced by the denominations of children born 'inside marriage' and children born 'outside marriage'.[20]

The persisting use of these latter terms depends on the necessity that still remains to regulate the procedure of recognizing children born outside marriage.

On one hand, if the mother is not married, the filiation can be established by the acknowledgement or the judicial action.

Like the ante-reform regulation, each parent of a child born outside marriage remains free (even though morally obliged) to decide to recognize that baby as his or her own child. If only one parent makes the acknowledgement, he or she has the sole parental responsibility. On the contrary, when both the mother and the father

[20] M. Paradiso, 'Unicità dello stato di filiazione e unificazione delle denominazioni' *Nuove leggi civili commentate*, 589 (2013).

recognize maternity and paternity, they take on parental responsibility together.

On the other hand, if the mother is married, there is still a legal presumption regarding paternity, as every child is considered her husband's child: precisely, the husband is presumed to be the father of the child born during marriage, until proven otherwise. All means of evidence, both biological and scientific, may be used in this legal proceeding.

A questionable point was represented by the possibility for the married woman to avoid the presumption of paternity through the acknowledgement of children procreated with different men. In the past, despite the openings of the jurisprudence, there were disputes in case-law regarding the issue, but today, after the Reform 2012-2013, a mother can acknowledge a child conceived out of wedlock with a man other from her husband.

IV. The increasing importance of the child as rights holder

The Italian Reform 2012-13 represents the fruit of a major effort to innovate the children's regulation.

The new article introduced in the civil code (Art 315 *bis*) envisages a real statute of children's rights. The first is the child's right to be morally – and not only materially – assisted by the parents.

If one parent does not look after his child, he can be condemned to damages, even if in the meantime the obligation has been fulfilled by the other parent.[21] This is the position of the recent Italian case-law,[22] according to which, when a father does not acknowledge immediately a child (born out of marriage) and paternity is ascertained subsequently during adolescence, his legal duties are considered existent since the time of the birth.

[21] For a comparison among three European Civil law countries, see H. Xanthaki, 'The judiciary-based system of child support in Germany, France and Greece: an effective suggestion?' *Journal of Social Welfare and Family Law*, 295 (2000).

[22] Corte di Cassazione 10 April 2012 no 5651, *Giurisprudenza italiana*, 1 (2013); Corte di Cassazione 20 December 2011 no 27653, *Giustizia civile Massimario*, 1796 (2011); Corte di Cassazione 3 November 2006 no 23596, *Foro italiano*, I, 86 (2007).

As expressly provided by the Reform (new Art 337 *septies* Codice Civile), the child's right to be assisted by both parents does not end when he reaches the adult age, but continues until he becomes independent of the family. The prominent jurisprudence[23] is characterized by the growing conviction that only an unjustified refusal of work, expressed by the child over eighteen, is able to extinguish the parents'obligation of maintaining him.

Another important child's right provided by the Reform is the right to be heard – when he has the capacity of understanding and willing and if he is older than twelve – within all proceedings concerning care, adoption and any other issue relating to his position.[24] In fact a direct or indirect meeting with the child allows the judge to assess his personality and enhances his ability to make a correct judgement.

Article 12 of the United Nations Convention on the Rights of the Child gives children the right to express their views freely in the proceedings affecting them, but expressing views is not an obligation for children, so they can refuse to be heard. Among the methods of hearing children, we remember: accounts of a child's views through a report provided by an expert, a written communication by the child

[23] P. Morozzo della Rocca, 'Il mantenimento del figlio: recenti itinerari di dottrina e giurisprudenza' *Famiglia e diritto*, 385 (2013).

[24] See Corte di Cassazione 10 June 2011 no 12739, *Famiglia e diritto*, 37 (2012), with comment of F. Tommaseo, 'Per una giustizia 'a misura del minore': la Cassazione ancora sull'ascolto del minore'. In jurisprudence, see, among others, P. Stanzione, 'Potestà dei genitori e diritti fondamentali del minore' *Rassegna di diritto civile*, 460 (1980); E. Quadri, 'L'interesse del minore nel sistema della legge civile' *Famiglia e diritto*, 80 (1999); F. Bocchini, 'L'interesse del minore nei rapporti patrimoniali' *Rivista di diritto civile*, I, 277 (2000); C.M. Bianca, 'Il diritto del minore all'ascolto' *Nuove leggi civile commentate*, 592 (2013); A. Finocchiaro, 'L'audizione del minore e la convenzione sui diritti del fanciullo' *Vita notarile*, I, 834 (1991); A. Palazzo, *Contributo alla ricostruzione della tutela del principio di vita*, in A. Palazzo and I. Ferranti eds, *Etica del diritto privato* (Padova: Cedam, 2002) vol II, 96; R. Pane, *Le adozioni tra innovazioni e dogmi* (Napoli: Edizioni Scientifiche Italiane, 2003), 125; A. Sassi, 'La tutela civile nei contratti con prestazione medica', in A. Palazzo, A. Sassi and F. Scaglione eds, *Permanenze dell'interpretazione civile* (Perugia: Iseg, 2008), 377 and 407; L. Lenti, *Il consenso informato ai trattamenti sanitari per i minorenni*, in S. Rodotà and P. Zatti eds, *Trattato di biodiritto* (Milano: Giuffré, 2011), 420.

to the court, a representation of the child by a lawyer and a direct confrontation between the judge and the child.

Also during the normal family life, the child with sufficient awareness has to be listened before taking decisions which may affect them.

The idea is that the child is the chief protagonist of his own interests and, even if he does not have full capacity until the age of eighteen, he enjoys a plethora of rights which demand respect and protection:[25] the right to freedom of thought, to be protected from drugs, exploitation and torture, to education, to development and to an adequate standard of living, to know his identity and true paternity, to respect for his family life.

A central role is attributed to the wishes of the child approaching the age of majority:[26] in particular, the child born out of wedlock, when adolescent, is considered capable to decide about his legal relationship with the parent. In fact, as provided by law, an acknowledgement of a child who is fourteen years old (sixteen, before the Reform 2012-13) is not effective without his consent.

A modern meaning of the minor's competence emerges in the legal system: it coincides with the capacity for rational choice, which is not absolute, unchangeable and necessarily tied to the age, but relative, alterable and strictly related to the maturity, skill and ability of understanding.[27]

According to the Italian case-law, teenagers with a concrete attitude for a reasonable decision can exercise the rights available to

[25] G. Ferrando,'Il controllo giudiziale sulla potestà dei genitori' *Nuova giurisprudenza civile commentata*, 21 (2004); P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 12 above, 944; F. Ruscello, 'La potestà dei genitori', in M. Sesta and V. Cuffaro eds, *Persona, famiglia e successioni nella giurisprudenza costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 429; A. Palazzo, 'La filiazione', in A. Cicu, F. Messineo and L. Mengoni eds continued by P. Schlesinger ed, *Trattato di diritto civile e commerciale* (Milano: Giuffré, 2007), 544.

[26] F. Carimini, 'Il binomio potestà-responsabilità: quale significato*?*', in R. Pane ed, *Nuove frontiere della famiglia, La riforma della filiazione* n 14 above, 116.

[27] For the concept of incompetence in the *common law*, see E. Jackson, *Medical law, Text, Cases and materials* (Oxford: Oxford University Press, 2010), 216; A.E. Morris and M.A. Jones, *Medical Law* (Oxford: Oxford University Press, 2011), 203; F. Burton, *Family law* (Padstow, Cornwall: TJ International Ltd, 2012), 277; J. Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' 69 *The Modern Law Review*, 299 (2006).

adults different solutions with regard to the personal sphere, provided that their choice is not irrational and harmful.

We can think about the right to consent to medical treatment: the law does not simply impose on doctors the task of hearing the child, but leaves him the decisions regarding personal health: when the child is a mature minor, with sufficient understanding, the parents' right to consent to medical care is replaced by the minor's right to make his own choices.

The only exception to this principle is when those choices might be life-threatening, starting from the assumption that a child – even though approaching adult age – has no right to refuse a life-saving treatment. The analysis of the jurisprudence and case-law shows that the child is free to choose religion, but not to refuse a life-saving blood transfusion on religious grounds. The right to refuse a medical treatment is abrogated if the child seeks to make a decision that might harm him: in this case the parents cannot oppose, while the doctors apply to the court asking for an approval.

As discussed above, the child has the right to maintain contact with relatives, regardless of being born in or out of wedlock.

The relationship between child and relatives shall not be obstructed without sufficient grounds; particularly, parents cannot deny grandparents access to their grandchildren, considering that grandparents are primary caregivers for their grandchildren in many situations, such as divorce, death, inability, or incompetence of the couple. This can be also observed in cases where the basic family unit is the extended family, with two or three generations helping each other in nurturing the children and caring for the elderly.

Without any doubt, grandparents have great benefits on their grandchildren's lives in terms of stability and, for this reason, the Italian legislator provides that grandparents can initiate a judicial action to protect their visitation right.

V. Critical remarks

The new dispositions have been effective for some time, but it is already possible to evaluate their first impact on society.

The Italian Reform 2012-13 simply deals with parental responsibility and does not take into consideration the issue of

regulating *de facto* couples.[28] This lack of domestic law might depend on the tendency to keep the children's and the couple's regulations separate one from the other and might be linked with ethical concerns and religious canons of the Roman Catholic doctrine; nevertheless, times are mature for a legislative intervention and this topic remains one of the most important requirements in the scenario of the modern family law.

The Reform 2012-13 can be seen as a ringing declaration of the right of all children to the same legal treatment, as they cannot be disadvantaged for the circumstances of their birth. To summarise, it extends the effects of the acknowledgement of a child born out of wedlock even to the relatives of the parent that has acknowledged the child. Through this novelty, the relationship with grandparents (or siblings, uncles, hunts etc) is guaranteed also to the child born out of marriage, who can inherit from them. As a consequence, the parenthood is defined in a broader sense than in the past legal framework, where the children born out of wedlock, if recognized, became relatives only of the person who acted the recognition and not of his own family.

Family law in Europe is facing the challenge of privatisation, offering family members the possibility to assess their relationships freely.[29]

Nevertheless, the Italian legislator does not accept the freedom of regulating parental status. The family is mainly considered a matter of nation states' sovereignty: even though partners can regulate some of their reciprocal duties in the area of property, this freedom disappears in the field of parental responsibilities. In fact, when the agreement involves children, couples must respect mandatory rules, as this matter is not considered exclusive to the private sphere, but

[28] On the issue see, in general, F. Prosperi, *La famiglia 'non fondata' sul matrimonio* (Camerino: Edizioni Scientifiche Italiane, 1980); F.D. Busnelli e M. Santilli, 'La famiglia di fatto', in G. Cian, G. Oppo and A. Trabucchi eds, *Commentario al diritto italiano della famiglia* (Padova: Cedam, 1993) vol IV, 757; V. Franceschelli, 'Famiglia di fatto', *Enciclopedia del diritto* (Milano: Giuffré, 2002) vol VI, 369.

[29] P. Zatti, 'Familia, *familiae* – Declinazione di un'idea, I, La privatizzazione del diritto di famiglia' *Familia*, 11 (2002); M. Sesta, 'Diritti inviolabili della persona e rapporti familiari: la privatizzazione arriva in Cassazione' *Famiglia e diritto*, 370 (2005).

dependent on protecting the child's welfare and, therefore, a topic of public interest that must be safeguarded by both individuals and groups.

A specific issue that could be renewed by the Reform 2012-13 regards the attribution of children's surname, which reflects a male chauvinist concept of family that is not coherent with the social evolution. In fact, if children are born in wedlock, they take the surname of the father.[30] A better solution would have been approaching the different regulations and allowing parents to identify the surname of their future child in a joint statement.[31]

In case of birth out of wedlock, they have the surname of the parent that first recognizes them – often the mother: the surname of the father will be given in substitution, added or put before, only with the consent of the mother and, in case of opposition, with the authorization of the judge.

The solution of equal position of children born in and out of wedlock has been chosen in order to put into effect the harmonisation of family law in the European Union and to make both the father and the mother liable for supporting and maintaining children, for upbringing and care.

Nevertheless, the problem regarding the insertion of a child born out of wedlock into an existing family founded on marriage, remains also in the renewed legal system. In fact, the civil code (Art 252) still foresees a favourable position to the members of the matrimonial family: children whose father is married to a person other than their mother cannot become members of the conjugal household without the consent of the father's wife and those children born within the marriage. If they do not give consent, it's up to the judge to resolve the conflict: he shall authorize children to live all together only if it is beneficial for them, as the central scope is to satisfy their interest

[30] See Corte costituzionale 16 February 2006 no 61, *Famiglia, persone e successioni*, 898 (2006), which refused the issue of unconstitutionality of the norm that provides, in the matrimonial family, the automatic attribution to the children of the father's surname (Art 143 *bis* Codice civile). On the subject see C. Di Marco Gentile, *Il nome della persona: tra mezzo di individuazione e segno di identificazione* (Napoli: Edizioni Scientifiche Italiane, 1995), *passim*.

[31] On this point see M. Fini, 'Il cognome dei figli: il silenzio della legge n 219 del 2012', in R. Pane ed, *Nuove frontiere della famiglia, La riforma della filiazione* n 14 above, 73.

of living in a tranquil atmosphere. This norm highlights that the well-being of families founded on marriage needs to be protected if a child born out of wedlock is included inside them, but this situation is not a good reason for depriving him of fundamental rights.

A careful observer of the Italian scene can see that public opinion continues to have some prejudices against children born of unmarried parents.

In order to achieve the best practical outcomes for all children, a radical and different effort is required by the moral attitude of the society as a whole. What should become usual among people is the firm conviction that protecting the interests of the child is the first priority.

As a crucial point, we notice that the Reform 2012-13 does not offer any provision recognizing a child's relationship with one of the same-sex partners. In Italy these couples, on one hand, continue to play the role of parents after the breakdown of their previous heterosexual relationships; on the other hand, they can become parents going abroad where they access to human assisted reproduction.

As provided by Art 3 para 3 of the Treaty regarding the European Union, 'the European Union fights against the social exclusion and the discriminations and promotes the social justice and protection, the equality between women and men, the solidarity among generations and the protection of the children's rights'. In the aim of coordination among different legal systems, the European Union requires the recognition of the children's status as a necessary precondition to assert human rights to equality.[32] On these grounds, a discrimination against children on the basis of the sexual orientation of the parents should not exist.

Nevertheless, the law does not recognize parental rights of gay

[32] The human rights guaranteed by the European Convention for Human Rights and Fundamental Liberties and resulting from the common constitutional traditions of the member States are now parts of the European Law as general principles of law (Art 6, paras 2-3, of the European Charter of Fundamental Rights and Liberties). See also Art 67 of the Treaty regarding the Functioning of European Union. About the topic see N. Ferreira and P. O'Callaghan, 'Evaluating the 'New Culture' of Human Rights in Europe' *European Review of Private Law*, 657 (2008).

couples. Some Italian law courts[33] define the homosexual couples as families, but they are firm in denying them the right to adopt a child. The rationale behind reflects the opinion that children might be at a disadvantage if raised by same-sex couples, but this fact remains the most discussed point that has been criticized recently.

In June 2014, the court of minors in Rome had a radical different approach, showing Parliament the direction it should choose in reforming the law.[34]

This court declares the first stepchild adoption for a couple of lesbians who conceived a daughter – biological child of one – through assisted procreation carried out abroad. The adoption is decided because the two lesbians had lived together for ten years and one of them was the parent of the five years old child. Since immediately after the birth, the daughter had lived permanently and happily in the homosexual family, so that the principles of *favour minoris* led the court to consider the preservation of the relationship established from birth with the two women as a priority.

This ruling is influenced by an important decision issued in 2013 by the Italian Corte di Cassazione[35] with reference to case of a Muslim immigrant couple where the mother of a young son had left her male partner for a lesbian relationship. According to Corte di Cassazione, the mere fact the mother is in a gay relationship does not demonstrate any damage for the child. In conclusion, also a gay couple is able to care for children and protect their well-being.

In the same direction, the European Court for the protection of

[33] Corte di Cassazione 15 March 2012 no 4184, *Famiglia e diritto*, 665 (2012); Corte costituzionale 15 April 2010 no 138, *Famiglia, persone e successioni*, 179 (2011), where the difference between the family founded on marriage and the other kinds of free families is highlighted on the basis that Italian Constitution refers only to the marriage between a man and a woman with procreative purpose; Tribunale di Milano 12 September 2011, *Nuova giurisprudenza civile commentata*, I, 205 (2012). In recent literature see B. Pezzini and A. Lorenzetti, *Unioni e matrimoni same sex dopo la sentenza n. 138 del 2010: quali prospettive* (Napoli: Jovene, 2011), *passim*.

[34] Tribunale dei minori di Roma 30 June 2014 no 299. For the first comment see F. Caccia, ''Adozione non vietata' La coppia lesbica ottiene il sí dei giudici' *Corriere della Sera*, 20 (30 August 2014).

[35] Corte di Cassazione 11 January 2013 no 601, *Giurisprudenza italiana*, 1036 (2013), where the high Court gave the exclusive right of custody over a child to a mother cohabiting with a person of the same sex and mentioned a family centered on a homosexual couple.

Human Rights[36] asserts that the relationship of a cohabiting same-sex couple living in a stable relationship falls within the notion of 'family life', but observes that there is no standard followed in the European Union on the issue and every State has a wide margin of appreciation.

Despite the headway made by the Italian and European courts, nowadays the law-maker prefers to 'skate over' the issue of same-sex parenthood, but the delicate question shall be inevitably faced in the next future.

Some critical observations have to be made with reference to a new terminology used by the Reform 2012-13 to indicate the relationship between parents and children.

The elimination of the term 'potestà', replaced by 'responsabilità' is not an appreciable result of the Reform, because the legislator did not consider its real significance on the upbringing of children, starting from their birth until a certain age.[37]

Harmonization among various legal orders, in order to ensure an effective protection of human rights does not mean to abolish all the

[36] See Eur. Court H.R. Grand Chambre, Judgment of 19 February 2013, *Nuova giurisprudenza civile commentata*, I, 519 (2013). Here the case originated in an application (no 19010/07) against the Republic of Austria. The two applicants alleged that they had been discriminated against in comparison with different-sex couples, as second-parent adoption was legally impossible for a same-sex couple. According to the Grand Chambre, inside a same sex couples each person has the same right to adopt the child of his partner, as the couples of different sexes and 'there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention when the applicants'situation is compared with that of an unmarried different-sex couple in which one partner wishes to adopt the other partner's child'. On the same issue see J. Long, 'I giudici di Strasburgo socchiudono le porte dell'adozione agli omosessuali' *Nuova giurisprudenza civile commentata*, I, 676 (2008).

[37] Regarding the issue of parental responsibility see P. Perlingieri, 'Sui rapporti personali nella famiglia' *Diritto di famiglia e delle persone*, 24 (1979); M. De Cristofaro and A. Belvedere eds, *L'autonomia dei minori tra famiglia e società* (Milano: Giuffré, 1980), 319; P. Stanzione, 'Scelte esistenziali e autonomia del minore' *Rassegna di diritto civile*, 1145 (1983); F. Giardina, *La condizione giuridica del minore* (Napoli: Jovene, 1984), *passim*; G. Dosi, 'Dall'interesse ai diritti del minore: alcune riflessioni' *Diritto di famiglia e delle persone*, 1604 (1995); E. Quadri, *L'interesse del minore nel sistema della legge civile* n 24 above, 80; M.E. Quadrato, *Il ruolo dei genitori dalla 'potestà' ai compiti* (Bari: Cacucci Editore, 1999), 119.

different terminologies: what the European Union names 'parental responsibilities', in Italian legal language is 'potestà', while the term 'responsabilità' usually indicates the notion of 'liability', being so far from the scope of the legislative intervention.

Therefore, there was no reason to deny the concept of 'potestà', on the basis of its authoritative content; in fact, it has a positive sense of complex of powers and duties, both important in educating and bringing up children. The principle of putting the child's best interests[38] in first place entails, in some circumstances, putting aside the child's opinion and making a decision with authority; it is obvious that this 'authority' should be widely used in the first years of children's life and reduce gradually, in a flexible way, during their growth and development.[39]

VI. Conclusion

As we have seen in paragraph 4, when the Reform 2012-13 introduces in the Italian civil code a new article (Art 315 *bis*), it strengthens the bond existing between parent and child by means of a duty of cooperation:[40] while the child lives together with the family, he must contribute to its maintenance in relation to his assets, income and to his personal abilities.

Within the new context, the child has certainly more rights rather than obligations.

In particular, the Reform does not mention the child's duty to obey the mother and the father, which was a norm in the previous text of the civil code. Furthermore, it omits a specific child's duty of assisting parents during old age.

We wonder what can be the consequences of this outline for the society.

The legislator has lost the chance of resolving the serious problem

[38] L. Lenti, 'Best interest of the child' o 'best interest of children?' *Nuova giurisprudenza civile commentata*, II, 157 (2010).

[39] On the flexibility of the concept see P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1972), 34.

[40] A. Bellelli, 'I doveri del figlio' *Nuove leggi civili commentate*, 550 (2013); A. Bellelli, 'Le ragioni di sopravvivenza della norma di cui all'art. 147 c.c.', in M. Bianca ed, *Filiazione. Commento al decreto attuativo* (Milano: Giuffré, 2014), 167.

that many elderly citizens live on a limited income and public programs are not often sufficient to assist them financially.[41] In recent years, the increasing life expectancy and the growth of the Italian senior population has resulted in a need of providing care to the indigent elderly from sources other than the state. A specific norm which imposes in Italy, like some American countries,[42] a statutory duty on adult children to support their elderly parents would have been beneficial to the population, relieving the public treasury of its financial difficulties. Within a new regulatory framework concerning this subject, the filial responsibility should be avoided only when children do not have the economic means or when they demonstrate that the parent abandoned them during childhood.

Apart from the mentioned critical remarks, we can assert – on the basis of the data from this study – that the social, economic and political change of the traditional family has led to a positive convergence of the laws in the Europe with regards to the children born out of wedlock and the relationship with their parents.

The key factor running through current family law is parentage, as parental responsibilities are a consequence of parenthood, not a consequence of marital status: marriage or blood relationships alone no longer define the family[43] and the model of family life has become more complicated by divorces, remarriages and cohabitation agreements.

The most important legal criterion is that facts regarding marriage can not have prejudicial effects for the children, because

[41] S. Casabona, *Il dovere di assistenza verso il genitore in stato di bisogno. Un'indagine di diritto comparato* (Napoli, Edizioni Scientifiche Italiane, 2008), 96.

[42] There are twenty-eight states with filial responsibility statutes: Alaska, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia and West Virginia. See, eg, M. Lundberg, 'Our Parents'Keepers: the Current Status of American Filial Responsibility Laws' 11 *Journal of Law and Family Studies*, 533 (2008-2009).

[43] F. Prosperi, 'Matrimonio, famiglia, parentela' *Rassegna di diritto civile*, 389 (1983); F.D. Busnelli and M.C. Vitucci, 'Frantumi europei di famiglia' *Rivista di diritto civile*, 767 (2013); G. Ferrando, 'Il diritto di famiglia oggi' *Politica del diritto*, 39 (2008); L. Balestra, 'L'evoluzione del diritto di famiglia e le molteplici realtà affettive' *Rivista trimestrale di diritto e procedura civile*, 1115 (2010).

family responsibilities endure even when the adults'relationship does not.

One clear trend of the process is abandoning the unjustifiable discrimination towards a group of children for no reason above and beyond the way in which they came into this world. This is the objective lied down by the European Charter of Fundamental Rights and Liberties,[44] where the 'birth' is considered one of those circumstances that do not justify a different legal treatment for children (Art 21).

A further contribution to the implementation of this principle derives from the Convention of New York regarding the Rights of Disabled People,[45] which declares the children's right to be 'registered immediately at the moment of birth', the right to know their parents and to receive cure from them (Art 7).

In conclusion, today only the fact of 'birth' of a child creates family life, as a family can be founded simply through procreation.

[44] At a community-law level, the European Charter of Fundamental Rights and Liberties, signed in Nice in 2000, obtained its mandatory character – after its inclusion in the Constitutional Treaty sealed in Rome on 29 October 2004 – with the entry into force of the Lisbon Treaty in December 2009.

[45] The Convention regarding the rights of disabled people, signed in New York 13 December 2006, was ratified by Italy with Arts 1 and 2 of legge 3 March 2009 no 18.

Reasonableness

Silvia Zorzetto*

Abstract

Reasonableness is a popular notion in the current European legal thinking and jurisprudence. As is well known, its uses are widespread in all subjects though its real meaning is still open to debate. Many different interpretations and uses coexist in common parlance. In particular, its boundaries in private law with good faith, fairness, due care, proportionality, rationality, equity and similar evaluative notions have still to be clarified. According to the circumstances, legal scholars and courts construe and apply the notion as a general principle/standard/clause. A cluster of arguments in legal reasoning is also based on the notion of reasonableness, like the argument of the economic legislator as well as that against absurdity. Besides, with some theories of law reasonableness plays a broader role and is deemed an inner feature of law in general and a criterion of legal validity for all laws. The present entry illustrates the state of the art and offers a clarification of reasonableness from a semiotic perspective.

I. Introduction

It is a commonplace to talk of the notion of reasonableness as present everywhere in European law, especially in case law at upper court level. It is generally thought that references to it in national legislations including continental Civil Codes have increased over the past few decades and have spread into the fields of contract and commercial law, where mention was rare in the original civil law tradition. Moreover, this extension of the reasonable especially in private and contract law is said to depend on the increasing influence of American and English common law,[1] as well as the effect of international treaties and general customs such as the well-

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[1] A classical reference is G.P. Fletcher, 'The Right and the Reasonable' 5

known *lex mercatoria,* where reasonableness is a long-standing notion.[2]

The implementation of European directives and the projects of academics for unifying European private law and contract law are held to further the importance of reasonableness within the legal systems of member states. Such opinions tend to be partial, and contribute little to clarifying the issue.[3]

It is of course true that the reasonable is a buzz concept in continental private law and in particular in the law of obligations (both contracts and torts). The Italian context is a good example inasmuch as the reasonable has progressively extended its range of application from constitutional and administrative law to become popular in private law too. In the field of contracts it is currently applied both by the parties and the officials – judges, arbitrators and administrations – in many respects as for drafting and interpreting agreements, evaluating undertakings and performance, and checking the validity of contracts. Then, in the law of torts reasonableness is a criterion for evaluating risks and liabilities and contributes towards defining what precaution and care are due in all situations. In company law it is also applied in drafting the financial accounts which need to be based on reasonable evaluations of the corporate assets and associated with the business judgment rule as a parameter of the liability of company boards. In addition, proceedings in private matters as in criminal and administrative law are guided by principles based on reasonableness as a result of the recent reforms of the Italian Code of Civil Procedure.

However, it must be noted that the reasonable is far from being

Harvard Law Review, 949-982 (1985); Id, 'Fair and Reasonable. A Linguistic Glimpse into the American Legal Mind', in R. Sacco and L. Castellani eds, *Les multiples langues du droit européen uniforme* (Torino: L'Harmattan, 1999), 57-70.

[2] For further references see the detailed analyses of G. Weiszberg, '*Le Raisonnable en Droit du Commerce International*' available at http://cisgw3.law.pace.edu/cisg/biblio/Reasonableness.html (last visited 1 April 2014); and S. Fortier, 'Le contract du commerce international à l'aune du raisonnable' *Journal du droit international*, 315-379 (1996).

[3] For an updated general introduction see S. Troiano, 'Ragionevolezza', *Enciclopedia del diritto* (Milano: Giuffrè, 2013) Ann. VI, 763-808.

alien to the civil law tradition.[4] Both canon law[5] and the mediaeval *ius commune*[6] indicate that reasonableness (in Latin *rationalibilitas*) is deeply embedded in continental legal thinking and practice from ancient Rome onwards. Although few references to the term are expressed in the Italian, French, German and Spanish civil codes, many principles and rules as well as argumentative and interpretative techniques are somehow related to the reasonable and consequently are all very familiar to European jurists. It seems indeed reductive to consider reasonableness a concept which is simply implicit in numerous provisions of statutory law. In actual fact, the impact of the reasonable is far more substantial. As many legal scholars have remarked, both the concept of law itself and the sources of law are shaped by the reasonable according to significant doctrines and theories. And the creation of the law as well as its application are affected by the reasonable quite independently of written provisions.

Another general misunderstanding about the reasonable regards its identity in relation to legal semiotics and lexicon. As is well known, it is often lined up with a great variety of similarities conveying current evaluative notions like fairness, good faith, due care, diligence, equity, equality, rationality, proportionality, transparency, loyalty, adequacy, suitability and so forth.

Obviously the overlapping of so many notions cannot be denied, but to draw a one-by-one correspondence between each of them and the reasonable is impossible. As a concept, reasonableness is neither technical nor legal, but ordinary, linked essentially to natural languages and common sense. But, most important, it has some distinctive semiotic features that render it unique.[7]

[4] For a panorama of the uses of reasonableness in Italian law see the three volumes edited by A. Cerri, *La ragionevolezza nella ricerca scientifica ed il suo ruolo specifico nel sapere giuridico* (Roma: Aracne, 2007).

[5] Codex Iuris Canonici 1983 Canon 24 § 2 '*Nec vim legis obtinere potest consuetudo contra aut praeter ius canonicum, nisi sit rationabilis; consuetudo autem quae in iure expresse reprobatur, non est rationabilis*'. See eg E.G. Saraceni, *L'autorità ragionevole. Premesse per uno studio del diritto canonico amministrativo secondo il principio di ragionevolezza* (Milano: Giuffré, 2004).

[6] For further references see eg M. Perini, 'Reminiscenze tardo-imperiali nelle consuetudini costituzionali italiane contemporanee', in *Studi in onore di Remo Martini* (Milano: Giuffrè, 2009) III, 106-107.

[7] For an inquiry into this topic see S. Zorzetto, *La ragionevolezza dei privati. Saggio di metagiurisprudenza esplicativa* (Milano: Franco Angeli, 2008).

First, defining an action as reasonable entails offering practical justification; in other words, reasonableness serves to justify human actions, choices, decisions, etc. From this point of view it is a normative concept related to the practice of reasoning. Moreover, what is reasonable or unreasonable depends on both facts and values that are not predetermined. This means that abstract criteria of reasonableness do not exist at all and the reasonable is porous and context-dependent. Furthermore, the criteria to use the concept are evaluative and always open and defeasible in all instances. In other words, the special character of the reasonable is that according to the circumstances and in the light of a value to be chosen, it can also be reasonable to be unreasonable, unfair, insincere, false, inconsistent, irresponsible, etc. On these bases, the on-going tendency to confuse the reasonable with other similar notions needs to be halted. In particular, both the proposal to include good faith in an all-embracing notion of reasonableness and vice versa consider the reasonable as part of good faith are equally erroneous.

Such semiotic aspects are often misinterpreted and give rise to very ferocious criticisms. Sceptics accuse it of being just a meaningless *passe-partout* good for all seasons, used by legal operators and judges to mask personal opinions. Such accusations of ideology (false conscience) are in fact gratuitous and miss the real target, which is not the reasonable, but the incorrect deployment of the notion.

To sum up, the success of the reasonable in the continental system – especially in the law of obligations and contracts and initially in business matters – does not depend either on the dominance of the Anglo-American mainstream or the influence of international trade practices. Rather it is beholden to its specific semiotic features. The popular appeal of the reasonable resides in its capacity to absorb factual circumstances and be open to different values.

II. Reasonableness and rationality: the philosophical and the political views

The debate about the relation between the reasonable and the rational is extremely old and venerable. Nevertheless, most current

discussion seems pointless and never-ending as proposals operate on different concepts of rationality. However, the basic idea prevailing in contemporary philosophical thinking is that the reasonable cannot be identified with the rational. Between the former and the latter no logical or necessary connections exist. Of course, many actions and choices can be rational and reasonable at the same time. But this is only a casual correspondence since to say that doing A would be rational but unreasonable makes perfect sense. In the same way, a choice irrational in the abstract might instead be reasonable in the circumstances.[8]

In practical spheres, such as law, politics and morals, the reasonable is linked to the rational since it involves practical reasons for action. This connection with reasoning is very deep: to be reasonable means capable of ratiocination. Accordingly, it is often said that the reasonable is a human capacity or virtue. However reasonableness does not simply entail pure logical reasoning. In other words, the sole deduction is neither a sufficient or necessary condition for reasonableness.[9]

What makes an action or a decision reasonable rather than merely rational or even irrational is much disputed. For some, the reasonable lies in human nature and intuitions; for others, it involves conformity to common sense; for others again, it depends on argumentation and corresponds to the outcome that persuades interlocutors, who accept it.[10] It is also held that reasonableness is a special kind of morally oriented rationality which also involves an epistemic dimension and is persuasive.[11]

It is frequently said that the reasonable is a weaker but richer

[8] A main reference see W.M. Sibley, 'The Rational versus the Reasonable' 62 *The Philosophical Review*, 554-560 (1953).

[9] See M. Jori, 'Razionalità e ragionevolezza del diritto' *Sociologia del diritto*, 438-442 (1975), and F. Modugno, *Ragione e ragionevolezza* (Napoli: Edizioni Scientifiche Italiane, 2009).

[10] For a general introduction see eg C. Perelman, 'The Rational and the Reasonable', in *The New Rhetoric and the Humanities. Essays on Rhetoric and its Applications* (Dordrecht: Reidel Publishing Company, 1979), 117-123; A. Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification* (Dordrecht: Reidel, 1987).

[11] G. Sartor, 'A Sufficientist Approach to Reasonableness in Legal Decision-making and Judicial Review', in G. Bongiovanni, G. Sartor and C. Valentini eds, *Reasonableness and Law* (Dordrecht: Springer, 2009), 17-68.

form of rationality in comparison with logical calculus and deduction. In short, it takes place naturally in the public sphere and requires both Aristotelian *phronesis* and *prudentia*; moreover, it takes the circumstances into consideration and is defeasible by nature.[12]

In this perspective a main reference is the idea of the reasonable originally developed by John Rawls in his theory of justice and then revised for his doctrine of political liberalism. For Rawls, the reasonable is the outcome of public discussions justified in light of the criterion of reciprocity and carried on from the point of view of an impartial spectator. This view has been applied to law and in particular to the constitutional courts operating in Western democratic systems.[13] According to Rawls and his followers, constitutional courts are generally the main institutions mandated to protect constitutional rights and declare on issues of political justice. Therefore such courts must address public reason, ie their adjudication must be rendered on the sole basis of the political values offering the most reasonable understanding of the public conception of justice. So that values and principles should be balanced via a reflexive equilibrium procedure.[14]

Rawls' view has been criticised by many philosophers. For instance Jurgen Habermas proposes a radically different concept of reasonableness. He holds that the reasonable cannot be a criterion to balance values or goods since there are no rational standards for this sort of balancing. Moreover, he feels that the reasonable has epistemic connotations and is intrinsically dependent on what is morally just. This means that it plays in ethics and the practical

[12] M. La Torre, 'Sullo spirito mite delle leggi. Ragione, razionalità, ragionevolezza (seconda parte)' *Materiali per una storia della cultura giuridica*, 123-154 (2012); see also Id, 'Sullo spirito mite delle leggi. Ragione, razionalità, ragionevolezza (prima parte)' *Materiali per una storia della cultura giuridica*, 495-515 (2011).

[13] J. Rawls, 'The Idea of Public Reason Revisited' 64 *The University of Chicago Law Review*, 765-807 (1997). On this topic see the comment of G. Bongiovanni and C. Valentini, 'Reciprocity, Balancing and Proportionality: Rawls and Habermas on Moral and Political Reasonableness', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 79-107.

[14] See G. Maniaci, *Razionalità ed equilibrio riflessivo nell'argomentazione giudiziale* (Torino: Giappichelli, 2008).

domain including the law, the same fundamental role that truth plays in the theoretical sphere and descriptive discourses.[15]

These different conceptions are related to the modern background of reasonableness. It has been rightly observed that the reasonable is bound up with *Zeitgeist* of every historical period. In particular, for many philosophers and linguists the modern sense of reasonable in law emerged from the Enlightenment – going back to sixteenth and seventeenth century England – when the reasonable and the rational are held to have taken root in legal thinking.[16] A telling emblem is the English doctrine of 'beyond reasonable doubt' in criminal law.[17] While the rational is related to an ideal perfectly informed agent and is conceivable from a solipsistic point of view, the reasonable takes place in interaction and embodies the modern awareness of the uncertainty of the future, human cognitive fallibilities as well as the possibility of errors.[18]

III. Reasonableness and the Rule of Law

What is reasonable is not only determined by culture but is also deeply influenced by its philosophical and political background. As has been pointed out 'reasonableness in law and reasonableness in political theory have some obvious commonalities at the level of their deep justifications', since they both continuously refer to 'liberal,

[15] J. Habermas, ''Reasonable' versus 'True', or the Morality of Worldviews', in J.G. Finlayson and F. Freyenhagen eds, *Habermas and Rawls: Disputing the Political* (New York: Rouledge, 2011), 92-116.

[16] See in particular A. Wierzbicka, *English: Meaning and Culture* (Oxford: Oxford University Press, 2006), 106-107 and C. Hill, 'Reason and Reasonableness in Seventeenth-Century England' 20 *The British Journal of Sociology*, III, 235-252 (1969).

[17] Main references are T. Waldman, 'Origins of the legal doctrine of reasonable doubt' 20 *Journal of the History of Ideas*, 299-316 (1959); B.J. Shapiro, *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence* (Berkley: University of California Press, 1991).

[18] For a general introduction see L. Laudan, 'Is Reasonable Doubt Reasonable?' 9 *Legal Theory*, 295-331 (2003); G. Canzio, 'L'"oltre ogni ragionevole dubbio" come regola probatoria e di giudizio nel processo penale' *Rivista italiana di diritto e procedura penale*, 303-308 (2004).

egalitarian and consensus-oriented values'.[19] This view tends to be partisan though it is a fair description of the mainstream of contemporary political theory where the reasonable is frequently presented as an antidote to coercive decisions and an important guarantee of liberty and equality.

A good starting point for clarifying the uses of reasonableness in the theory of politics and law is to identify what is *not* reasonable according to some common models of government. In particular, it is useful to identify 'negatively, five possible meanings of the reasonableness of the actions of authorities starting from as many types of government who uphold the dictates of reason voluntarily'. In brief, to give a list unreasonableness may correspond to: (i) senseless, (ii) unfairness (ie the opposite of *epieikeia/aequitas*), (iii) discrimination (conflicting with the principle of equality), (iv) immorality (contrary to the precepts of *rectae rationis*), (v) inflexibility (ie a lack of sympathy).[20]

Following from this, the reasonable is indubitably a component of the Rule of Law doctrine, whenever used for avoiding the arbitrary (ie unjustified, abusive) exercise of public powers by subordinating it to well-defined and established procedures based on the reciprocity principle. As a matter of fact, the most fundamental issues of political legitimacy and decisions about the common values and principles that need to govern the community represent a very fertile ground for reasonableness.[21] According to some, the reasonable takes root mostly in constitutional systems where from an internal point of view upper courts and especially

[19] W. Sadurski, ' "Reasonableness" ' and Value Pluralism in Law and Politics', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 129-146.

[20] Original quotation: 'ex negativo, cinco posibles significados de 'razonabilidad' de los actos del poder a partir de otros tantos tipos de gobernantes que sustituyen el dictado de la razón por su propia voluntad', M. Cuono, 'Entre arbitrariedad y razonabilidad. Hacia una teoria critica del neoconstitucionalismo' 3 *EunomiЇa. Revista en Cultura de la Legalidad*, 44-60 (2012-13).

[21] With reference to Italian legal system see C. Lavagna, 'Ragionevolezza e legittimità costituzionale', in *Studi in memoria di Carlo Esposito* (Milano: Giuffré, 1973), 1573-1578; R. Bin, 'Ragionevolezza e divisione dei poteri' *Diritto e questioni pubbliche*, 115-131 (2002); L. D'Andrea, *Ragionevolezza e legittimazione del sistema* (Milano: Giuffré, 2005).

supreme courts act as guardians of constitutions precisely on the grounds of reasonableness.[22]

The Canadian Charter of Rights and Freedoms is a good example of this very close link of reasonableness with the Rule of Law doctrine, providing in Art 1 that the rights are guaranteed by the Charter 'subject only to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society'. Similar formulas are present in other legal systems, like Art 36 of the South African Constitution according to which any limits on constitutional rights must be 'reasonable and justifiable in an open and democratic society'.[23] The application of clauses as such is very significant also for private subjects and may have an impact on the enforcement of contract terms whenever they deal with public policies or interests.[24] Striking applications of such reasonable clauses regard the use of public or common good like natural resources, their exploitation by private companies and health services as well.

In the legal and political systems based on checks and balances the reasonable is an overarching idea also because it is required to guarantee loyal cooperation within the diverse institutions and draw boundaries among their respective competences and powers. A significant context is the distribution of powers between legislators and administrative bodies, and primarily agencies.[25]

[22] E. Cheli, *Stato costituzionale e ragionevolezza* (Napoli: Edizioni Scientifiche Italiane, 2011).

[23] For South African Supreme Court the limitation of constitutional rights within what is 'reasonable and necessary in a democratic society' involves weighing some values against others and, finally, an assessment based on proportionality: see N. Petersen, 'Proportionality and the Incommensurability Challenge – Some Lessons from the South African Constitutional Court' (2013) *New York University Public Law and Legal Theory Working Papers* no 384, available at http://lsr.nellco.org/nyu_plltwp/384 (last visited 1 April 2014).

[24] I. Rautenbach, 'Constitution and contracts: the application of the bill of rights to contractual clauses and their enforcement. Bredenkamp v. Standard Bank of SA Ltd 2010 (9) BCLR 892 (SCA)' 74 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 510-524, especially 516 (2011).

[25] See J.A. Pojanowski, 'Reason and Reasonableness in Review of Agency Decisions'104 *Northwestern University Law Review*, 799-852 (2010); D. Zaring, 'Reasonable Agencies' 96 *Vanderbilt Law Review*, 135-197 (2010); J.W. Boettcher, 'What is reasonableness?' 30 *Philosophy Social Criticism*, 597-621 (2004); C. Tobler, 'The Standard of Judicial Review of Administrative Agencies in the US and

An exemplary case is that of the 1984 Chevron case, where the US supreme court emphasized the authority delegated from Congress to the Environmental Protection Agency (EPA) to implement the Clean Air Act and EPA's expertise and political accountability in reaching a reasonable balance of the competing interests at stake, explaining that judges cannot reverse agency decisions unless manifestly unreasonable.[26]

A similar principle has been present in British administrative law since the 1948 Wednesbury case, where the court declared it had the power to review administrative decisions only when they are so unreasonable that no reasonable authority would ever have taken them.[27]

This idea that agency decisions and administrative policies must use their powers reasonably is very common, and is sometimes justified on the strength of distributive justice purposes. For instance, according to many, the Fair Fund provisions of Sarbanes-Oxley Act (US) provides the Security and Exchange Commission with discretion for distributing funds and the 'fair and reasonable' is the standard due to be applied; this means that reasonable categories have to be drawn among differently affected parties and in doing so it is accepted that some dividing lines might bar viable claims by investors or creditors.[28]

In conclusion, it is noteworthy that the Rule of Law doctrine along with all its corollaries, albeit devoted to the development of a fairer and more egalitarian and free society, are neither absolute nor incompatible with the persistent existence of privileges for some.[29]

EU: Accountability and Reasonable Agency Action' 22 *Boston College International & Comparative Law Review*, 213-228 (1999).

[26] *Chevron U.S.A., Inc.* v *Natural Resources Defence Council, Inc* 467 US 837 (1984).

[27] J. Wouters and S. Duquet, 'The Principle of Reasonableness in Global Administrative Law', *Jean Monnet Working Paper* no 12, available at www.jeanmonnetprogram.org/papers/13/documents/WoutersDuquet.pdf (last visited 1 April 2014).

[28] See S.M. Levy, *Regulation of Securities: SEC Answer Book*, (New York: Aspen Publishers, 2011); V. Winship, 'Fair Funds and the SEC's Compensation of Injured Investors' 60 *Florida Law Review*, 1103-1144 (2008), where is quoted *inter alia* the case *Official Comm. of Unsecured Creditors of WorldCom, Inc.* v *SEC*, 467 F.3d 73, 83 (2d Cir. 2006) (approving fair and reasonable review of distribution plan in aggregate, even though plan excluded some claimants).

The specific virtue of reasonableness consists precisely in justifying the exceptions too.

IV. The Reasonable Person

It is very frequent to try and explain what is reasonable by referring to a human stereotype: the well-known reasonable person. Despite much attention, the features of this figure are not yet clear-cut.[30] A leitmotiv in legal thinking is the judicial tendency belonging to the British common law tradition to evaluate in every field whether people's behaviour is reasonable according to the circumstances: to find 'a criterion, a measuring rod [...] the English judge more often than not appeals to the notion of reasonableness, the notion of a reasonable man, the notion of the right reason'.[31] This reference to the 'right reason' – in Latin, the '*recta ratio*' – must be correctly interpreted given that in most cases it does not involve any superior ideals of rationality but indicates common sense. For instance, a version of this figure in Anglo-American law is the man on the Clapham Omnibus who represents everyone and anyone in everyday situations.

Of course, like all models the reasonable person is only an ideal or – we can say – a legal fiction. For its supporters it is 'a useful fiction for evaluating human conduct according to the law', while for its critics it covers mostly cultural stereotypes.[32]

[29] Eg Corte costituzionale 19 July 2013 no 219, *Foro italiano*, I, 386 (2014).

[30] Some classical references are M. Moran, *Rethinking the Reasonable Person. An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003); J.R. Lucas, 'The Philosophy of Reasonable Man' 13 *The Philosophical Quarterly* 51, 97-106 (1963); E. Green, 'The Reasonable Man: Legal Fiction or Psychosocial Reality?' 2 *Law & Society Review*, 241-258 (1968).

[31] Original quotation: 'un critère, un measuring rod [...] le juge anglais fait, le plus souvent, appel à la notion de *reasonableness*, à la notion du *reasonable man*, à la notion de *right reason*' in H.A. Schwarz-Liebermann von Wahlendorf, *Introduction à l'esprit et à l'histoire du droit anglais* (Paris: Librairie générale de droit et de jurisprudence, 1977), 10; Id, 'Les notions de right reason et de reasonable man en droit anglais' 23 *Archive de Philosophie du droit*, 43-57 (1978).

[32] Original quotation: 'une fiction utile à l'évaluation de la conduite juridique humaine', W.E. Joachim, 'The 'Reasonable Man' in United States and German Commercial Law' 15 *Comparative Law Yearbook of International Business*, 341-365 (1992).

Furthermore, there are different ways of conceiving this figure. Sometimes it is construed as an anthropomorphic vision of justice, in others is a symbol of prudence and sympathy opposed to hubris and passions. It can also be an ideal model of socially acceptable conduct inspired by common sense and moderation.[33]

A communal basis of these conceptions is the intuition reflected in ordinary language that the reasonable implies in some way equilibrium. In this view a reasonable person is fundamentally capable of approaching any situation involving relationships with the others maintaining a state of equilibrium. This intuitive idea is significant since it evokes another association between reasonableness and *aequitas* or equity (ie justice as fairness). Along this line reasonableness is often conceived of as both an intellectual and a practical virtue of all humans capable of a sensible and sensitive reasoning.[34]

The reasonable person is usually compared to the rational man. While the latter is the perfect maximiser and measures all his courses of action from an economic point of view, balancing benefits and costs (a disputed application of this model is the Learned Hand Test), the former is frequently seen as a person interacting with others and interested in pursuing fair terms of cooperation.[35]

Therefore, reasonable persons are typically aware of the pros and cons of all choices. They are also conscious that beliefs might be wrong and desires cannot be satisfied at all costs. Moreover they are aware that in real society neither the liberty nor the security of people can be absolute: 'Instead of either of these extremes, legal institutions protect people equally from each other when they require each to sacrifice some liberty for the sake of the security of other'.[36]

This general idea is applied in constitutional law as well as in tort and criminal law, where the reasonable marks the dividing line between risks and chance/responsibility and luck.

[33] R. Bousta, *Essai sur la notion de bonne administration en droit public* (Paris: L'Harmattan, 2010), 195.

[34] S. Chiarloni, 'Ragionevolezza costituzionale e garanzie del processo' *Rivista di diritto processuale*, 521-539 (2013).

[35] A. Ripstein, 'Reasonable Persons in Private Law', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 253-281.

[36] Ibid.

Of course, the reasonable level of precautions is also an economic issue. Nevertheless, the distinctive feature of reasonable persons is to justify outcomes not exclusively by vested beneficial consequences, but also by the side effects of their activities on others. Besides, for reasonable persons there is no fixed scale of priority for values and interests: judgement is based on the conviction that 'in the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others' and 'some genuine and avoidable risks may be disregarded [...] not because they are mere possibilities or cost-justified', but because an important interest like liberty is at stake.[37]

Though the proposal has a general character, a significant distinction has been drawn in criminal law. To decide whether an act is reasonable or unreasonable two situations need to be considered: '(1) where reasonableness concerns events and states, including risks of which an actor is conscious, that can be justly assessed without regard to the actor's individual traits, and (2) where reasonableness concerns culpable mental states and emotions that cannot justly be assessed without reference to the actor's capacities'.[38] As the *distinguo* shows, the reasonable person can be a disembodied and impersonal ideal incorporating the prevalent values of a society and its system of adjudication or, otherwise, it can take into consideration the physical, psychological and emotional traits of individuals. Accordingly, the reasonable person can be, at the same time, the symbol of justice as equality and of subjectivity and equity.

V. Some contemporary public issues in international and European debates

For the mainstream reasonableness has been rapidly gaining worldwide acceptance in many fields of law and politics. Its success is evident especially in the most contested areas where differing values and cultures or the whole *Weltanschauung* of people seem at

[37] Ibid.

[38] P.K. Westen, 'Individualizing the Reasonable Person in Criminal Law' 2 *Criminal Law and Philosophy*, 137-162 (2008).

[39] See P. Perlingieri, '"Dittatura del relativismo" e "Tirannia dei valori"', in T.

odds.[39] Bioethical issues as well as health policies are good examples of the extended use of reasonableness nowadays for solving legal and moral disagreements.[40]

The reasonable is also a central concept in the contemporary debate about human rights and their contested universal character.[41] Many philosophers have attempted to provide a theoretical foundation for the universality of human rights in a presumed natural law or on the bases of transcendental assumptions on reasonableness.[42] Despite the differing general framework it is much discussed if the reasonable is able to fill the gaps between peoples and cultures and therefore is a positive and even essential component of a multicultural society, or if it conceals the Western point of view and therefore is a surreptitious political instrument of domination. Sometimes, as in the Canadian Province of Alberta, the relevance of reasonableness in protecting human rights is recognized in specific acts collecting judicial precedents that apply for instance the concepts of 'reasonable and justifiable discrimination and accommodation'.[43]

The principle that differential treatment is discriminatory if it has 'no objective and reasonable justification' is part of the case law of the European Court of Human Rights (ECHR) in the application of Art 14 of the Convention.

Tasso ed, *Fatto e diritto: l'ordinamento tra realtà e norma* (Napoli: Edizioni Scientifiche Italiane, 2011), 127-166.

[40] A. Friedman, 'Beyond Accountability for Reasonableness' 22 *Bioethics*, 101-112 (2008); C. Faralli, 'Reasonableness, Bioethics, and Biolaw', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 329-336; A. Santosuosso, 'Reasonableness in Biolaw: is it necessary?' ibid, 337-350; S. Hennette-Vauchez, 'Reasonableness and Biolaw' ibid, 351-362.

[41] For a first introduction see the collected papers edited by A. Sajó, *Human Rights with Modesty: The Problem of Universalism* (Leiden: Koninklijke Brill NV, 2004) and in addition the study of A. Fleras, *The Politics of Multiculturalism: Multicultural Governance in Comparative Perspective* (New York: Palgrave Macmillan, 2009).

[42] See in particular D. Boucher, *The Limits of Ethics in International Relations. Natural Law, Natural Rights, and Human Rights in Transition* (Oxford: Oxford University Press, 2009); see also M.J. Clark, 'Reasoned Agreement Versus Practical Reasonableness: Grounding Human Rights in Maritain and Rawls' 53 *Heythrop Journal*, 637-648 (2009).

[43] See *Alberta Human Rights Act* revised Statutes of Alberta 2000 Chapter A-25.5, current as of May 27, 2013, and Appendix 2, available at www.albertahumanrights.com (last visited April 9, 2014).

Perhaps one of the uppermost uses of reasonableness related to fundamental rights is the reasonable time principle stated in Art 6 of the ECHR. It is important to note that this is a corollary of the more fundamental principle of fair trial. And the Court interprets this as a general principle applicable to all proceedings, both judicial and administrative. As case law shows, what is a reasonable duration depends on the circumstances: the same time can be justified in light of the complexity of the case or instead considered overlong.

Another expression of the principle of fairness in judicial matters is provided by Art 5 of the ECHR according to which any restriction of the 'right to liberty and security' must be based on 'reasonable suspicion of having committed an offence or when it can be reasonably considered necessary to prevent him committing an offence or fleeing after having done so'.

The governance of the global economy is also a primary field where reasonableness is applied and endorsed. As has been said above, the concept is generally accepted in international trade and largely used by multinational corporations in their commercial contracts. It is also present in many treaty regulations and is a common parameter applied by international arbitral tribunals and settlement boards of international institutions. The organization of World Trade Organization and North American Free Trade Agreement are two good examples. Here the reasonable is considered a fruitful alternative to an approach openly sustaining non-discrimination rules and exceptions based on public policy interests. An approach based on reasonableness alone would not lead to explicit contrapositions of values (such as business profits versus environment protection and labour safety) which could damage the legitimacy of such institutions.[44]

Furthermore the reasonable is brought forward to solve the conflicts of laws dividing national jurisdictions. The aim is to find some common grounds for enforcing the law around the world balancing the diverse internal concerns of public order.[45]

[44] F. Ortino, 'From 'non-discrimination' to 'reasonableness': a paradigm shift in international economic law?', *Jean Monnet Working Paper* n. 01/05, available at http://www.jeanmonnetprogram.org/archive/papers/05/050101.pdf (last visited 1 April 2014).

[45] A.F. Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (Oxford: Clarendon, 1996).

In European legal system both legislation and jurists are familiar with reasonableness. Nevertheless, for some, in European case law it would be used less often rather than in national jurisdictions. Despite of that, its impact is significant especially from a political point of view.[46] Firstly, it is conceived for preserving subsidiarity and proportionality in the exercise of powers both by European and national institutions and authorities. This means that it plays a crucial role in defining the competences of political institutions and in the check and balances approach of European institutions where it contributes in improving the principle of loyal cooperation. Then, European Court of Justice (ECJ) applied it for checking the exercise of powers balancing the interests of European Union and those of member states. In addition, for European institutions (Commission and Court of Justice) the reasonable is a standard for assessing whether member states are in compliance with their obligations and for evaluating the legitimacy of national laws that derogate to European legislation. Some fields of significant applications are free trade and market competition as well as intellectual property.[47]

Moreover reasonableness is used in relation to the fundamental rights and for protecting the rights of European citizens from arbitrary exercises of powers both of national and European institutions. Good examples can be found in immigration and labour law and in the legislation about persons with disabilities.[48] In this

[46] G. Tesauro, 'Reasonableness in the European Court of Justice Case-Law', in A. Rosas, E. Evit and Y. Bot eds, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (The Hague: Asser, 2013) 307-327; A. Adinolfi, 'The Principle of Reasonableness in European Union Law', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 385-406.

[47] Two leading cases are the Case 8/74 *Procurer du Roi* v *Dassonville*, [1974] ECR 837 where reasonableness was used to assess the legitimacy of national rules derogating to the free trade principle; and the Case C-309/99 *J.C.J. Wouters et al.* v. *Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 where reasonableness was used to measure whether a derogating national rule was necessary to pursue the aim of market competition. About intellectual property see Case C-479/12 *H. Gautzsch Großhandel GmbH & Co. KG* v *Münchener Boulevard Möbel Joseph Duna GmbH* (European Court of Justice 13 February 2014) available at www.eur-lex.europa.eu.

[48] For instance, see Case C-335/11 *HK Danmark, acting on behalf of Jette Ring* v *Dansk almennyttigt Boligselskab* and Case C-337/11 *HK Danmark, acting on*

context reasonableness is bound up with the overarching principle of equality and therefore mostly used to avoid whatever unreasonable discrimination.[49]

Besides, as in case law of ECHR so in the view of ECJ the principle of reasonable time of judicial and administrative proceedings is a corollary of the rule of law doctrine, that is to say a general principle of European law which 'constitutes a principle of good government'.[50]

Many judicial principles and rules of procedure have been introduced for implementing such principle both in European and national legislations. In the well-known *Cilfit* case ECJ stated the *acte clair* doctrine according to which no duty of preliminary reference arises where the correct application of European law 'may be so obvious as to leave no scope for any reasonable doubt'.[51] In Italian Code of Civil Procedure two filters have been recently introduced for limiting ungrounded challenges of judicial decisions of lower courts (Arts 360-*bis* and 348-*bis* of such Code).[52] According to the aforesaid Art 348-*bis* the challenge of the first decision is inadmissible whenever no reasonable probabilities exist that will be accepted by the judges of appeal. It is very significant that though how to measure such reasonable probabilities is very disputed among legal scholars the provision has been already applied in many cases.[53]

behalf of Lone Skouboe Werge v *Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation* (European Court of Justice 11 April 2013) available at www.eur-lex.europa.eu. In Court's opinion, a curable or incurable illness entailing a physical, mental or psychological limitation may be assimilated to a disability. A reduction in working hours may be regarded as an accommodation measure which the employer has to take in order to enable a person with a disability to work. The directive requires the employer to take appropriate and reasonable accommodation measures in particular to enable a person with a disability to have access to, participate in, or advance in employment.

[49] Among the most recent cases see Case C-423/12 *Reyes* v *Migrationsverket* (European Court of Justice 16 January 2014) available at www.eur-lex.europa.eu.

[50] Case T-579/08 *Eridania Sadam v Commission* [2011] ECR II-366. For an introduction see C.H. van Rhee ed, *Within a reasonable time: the history of due and undue delay in civil litigation* (Berlin: Duncker & Humblot, 2010).

[51] S. Zorzetto, 'Le Sezioni unite civili e la giurisprudenza della Cassazione' *Rivista di diritto privato*, 408 (2010).

[52] Ibid.

[53] See Corte Appello Roma 11 January 2013, *Rivista di diritto processuale* 711

This is a clear example of how reasonableness works in concrete uses despite the lack of a common general definition.

It is also important to note that for some the reasonable time principle and the right to defence are convergent principles and no real conflicts between them can arise if they are correctly applied. In point of fact such conflicts would be just apparent because of either the length of the proceeding depends on an abuse of the latter or else supreme reasons of justice cannot be abdicated and makes by themselves reasonable the length of the proceeding.[54]

VI. The reasonable and the concept of law: the jurisprudential perspective

The reasonable is very pervasive in law and not simply because it is used widespread by legislators, officials and courts and often referred to in statutory law, regulations and case law in all fields and systems in the Western legal tradition. Its importance leads beyond the experience of individual countries.

Firstly, many legal scholars hold that the reasonable is an inner feature of law in general and so by definition an essential component of the concept of law. As a result sometimes the sense of reasonable depends on previous ideas about what the law is; other times the concept of law changes in view of the way reasonableness is conceived. In many cases the influence is reciprocal and unified in a normative conception of law as a practical domain governed by the reasonable.[55]

(2013); Corte Appello Napoli 30 January 2013, *Foro italiano*, I, 2630 (2013); Corte Appello Milano 8 February 2013, *Giurisprudenza italiana*, 1629 (2013); Corte Appello Milano 14 February 2013, *Foro italiano*, I, 2630 (2013); Corte Appello Bari 18 February 2013, *Foro italiano*, I, 969 (2013); Corte Appello Lecce 17 July 2013, *Foro italiano*, I, 2629 (2013); Tribunale Vasto 20 February 2013, *Giurisprudenza italiana*, 1629 (2013).

[54] P. Biavati, 'Osservazioni sulla ragionevole durata del processo di cognizione' *Rivista trimestrale di diritto e procedura civile*, 475-490 (2012).

[55] For an introduction see N. MacCormick, 'On Reasonableness', in C. Perelman and R. Van der Elst eds, *Les notions à contenu variable en droit* (Bruxelles: Émile Bruylant, 1984), 131-156; M. Atienza, 'On The Reasonable in Law' 3 *Ratio Juris*, Suppl. 1, 148-161 (1990).

In the second place it is common to talk of the law in action as reasonable when we take into account its long-term effects. The general idea is that reasonable outcomes gradually arise from the development of law in the legal process and as a consequence societies evolve in a natural way. This approach is sometimes depicted as descriptive and sociological but actually often it involves a general preference in the judicial system.[56]

The legal scholars following Josef Esser's hermeneutics display a different point of view. They sustain a judgment is right when it is evidently acceptable on the strength of reasonableness, and see it as the guiding light of all the judgement from the first step of pre-comprehension for finding law to the final step of giving reasons. In this view the ideal of reasonableness provides a sort of 'golden rule' open to the 'nature of things' and therefore some consider it a universal principle or a principle of natural law.[57]

From a positivist point of view, it is indisputable that reasonableness has a great impact on the sources of law in many countries, included Italy. Its effectiveness is plain as it is present in numerous statutory provisions as well as largely applied in national and international case law. In spite of that, the specific force of the reasonable is open to question in the sources of law, together with its level and range of application.[58]

A significant proposal is to include reasonableness within the general principles of law recognized by civilized nations according to Art 38 of International Court of Justice Statute.[59]

For other legal scholars in a constitutional system such the Italian

[56] See L.B.B. Colt, 'Law and Reasonableness' 37 *American Law Review*, 657-674 (1903); C.W. Bacon, *The reasonableness of the law: the adaptability of legal sanctions to the needs of society* (New York and London: G.P. Putnam's sons, 1924).

[57] In support of this view see F. Viola, 'Ragionevolezza, cooperazione e regola d'oro' VII *Ars interpretandi. Annuario di Ermeneutica giuridica. Ragionevolezza e interpretazione*, 109-129 (2002), and S. Patti, 'La ragionevolezza nel diritto civile' *Rivista trimestrale di diritto e procedura civile*, 1-22 (2012); Id, *Ragionevolezza e clausole generali* (Milano: Giuffrè, 2013).

[58] In addition to the reference in n. 4, see S. Pajno and G. Verde eds, *Alla ricerca del diritto ragionevole: esperienze giuridiche a confronto. Atti del seminario di Palermo, 11 febbraio 2002* (Torino: Giappichelli, 2004).

[59] G. della Cananea, 'Reasonableness in Administrative Law', in G. Bongiovanni, G. Sartor and C. Valentini eds, *Reasonableness and Law* n 11 above, 295-310.

one where equality is recognized as a general principle, reasonableness is a criterion of validity for all laws.[60]

This means that a law that turns out to be unreasonable is invalid and cannot be binding. To implement this doctrine at least two general questions must be answered: first, what makes a law reasonable rather than unreasonable?; second, who decides this issue and how? And it is well known that in the current Western legal tradition the supreme courts are vested *de facto* – and, more seldom, *de iure* – of the authority to say the last word. Yet the exact limits of constitutional scrutiny in this matter are still under debate in the Italian legal system, as in many other countries.[61]

VII. On the sources of law: the examples of customary rules and *soft law*

'"Legal history teaches that the reasonable is a general category and a primary element for the genesis of legal rules since ancient times and has always been a necessary condition for usages to become effectively binding customs. From the late Roman Empire through the Middle Ages and down to 18th and 19th century civil codes, *rationabilitas* has been an implicit but essential component of all customary rules in private as well as in public fields. Both local and general customary rules were then recognised as in force as long as they were considered reasonable according to secular or religious values. And jurists always played a primary role in evaluating if and how long a custom was *rationabilis* in the common opinion, ie '*communis opinio*'.[62]

[60] See A. Morrone, *Il custode della ragionevolezza* (Milano: Giuffré, 2001) and E. Giorgini, *Ragionevolezza e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2010); in addition for a recent and critical outline see A. Vignudelli, 'Valori fuori controllo? Per un'analisi costi/benefici d'un topos della letteratura costituzionalistica contemporanea' *Lo Stato*, 71-118 (2013).

[61] See A. Pizzorusso, 'Ragionevolezza e razionalità nella creazione e nell'applicazione della legge', in M. La Torre and A. Spadaro eds, *La ragionevolezza nel diritto* (Torino: Giappichelli, 2002), 45-55; A. Cerri, 'Ragionevolezza delle leggi', *Enciclopedia giuridica* (Roma: Treccani, 1994) XXV, 1-27; P. Craig, 'The Nature of Reasonableness Review' 66 *Current Legal Problems*, 131-167 (2013).

[62] In addition to the reference in n. 6, see R. Orestano, 'Dietro la consuetudine',

Obviously the customary law of merchants is one of the most influential and long-standing examples of the role of reasonableness in the creation of rules, so that the *lex mercatoria* is still an eminent, albeit contested source of law in international trade.[63] Nowadays 2010 UNIDROIT Principles contribute particularly to its diffusion. And the concept of reasonableness here plays a pivotal role; many provisions refer to 'reasonable commercial standards of fair dealing' and recall the reasonable person. In addition, the reasonable serves to make prognoses about breaches in performance or unpredicted harms, to evaluate the parties' behaviour in negotiations, and in many other respects time factors, the reliability of the parties, changing locations, etc. According to the Principles reasonableness is a source of contract law as well as of implicit obligations; it is a way of filling gaps and adapting the original terms to changes in context. Moreover, both the interpretation and validity of contracts depend on reasonableness.[64]

It is important to note that the reasonable is here deemed to be the basis not only of business usage, but also of arbitration. According to the mainstream this is the form of justice par excellence. Thus, arbitral tribunals are required to act and settle disputes in the light of reasonableness for pursuing decisions '*le plus raisonnable possible*'.[65]

Reasonableness also continues to flourish in academic projects for the harmonization of European private law and contract law. As is well known, it is a basic principle and an expression routinely used in the Principles of European Contract Law, Code Européen des Contrats, Principles of European Law, Acquis Principles and Draft Common Frame of Reference.[66]

in *Diritto, incontri e scontri* (Bologna: Il Mulino, 1981), 423-438; P.A. Bonnet, ' *"Sensus fidei" e "rationabilitas" nella consuetudine canonica"* ', in M. Tedeschi ed, *La consuetudine tra diritto vivente e diritto positivo* (Sovenia Mannelli: Rubettino editore, 1998), 61-91.

[63] See K.P. Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague: Kluwer Law International, 2nd ed., 2010). For a critical view see E. Kadens, 'The Myth of the Customary Law Merchant' 90 *Texas Law Review*, 1153-1206 (2012).

[64] See S. Zorzetto, 'Reasonableness within the Unidroit Principles: A Device to Harmonize Legal Traditions in International Commercial Contracts' *Notizie di Politeia*, 79-98 (2012).

[65] See G. Weiszberg, n. 2 above; S. Fortier, n. 2 above, 315-379.

[66] S. Troiano, 'To What Extent Can the Notion of 'Reasonableness' Help to

In these works reasonableness is closely linked to the principle of good faith and fair dealing. But it seems to have an autonomous sphere of application as a general standard for evaluating the parties' undertakings and conduct whenever a specific legal provision or a contractual term lacks. Its supporters observe that it is very flexible and consequently adaptable to all cases. For example, it allows both social and private interests to be taken into consideration, as well as general usages and the parties' practises, material circumstances and the values prevalent in the legal system according to general point of view.[67]

Finally, reasonableness is a key concept in the Common European Sales Law (CESL) approved by European Parliament on February 26, 2014. It is by nature optional, and parties can choose as it to govern their contract. Its application depends therefore on an *electio iuris*. And within the CESL the reasonable occurs in general provisions along with the general clauses of good faith and fairness and in many mandatory rules concerning the full life cycle of contracts.

VIII. Argumentation and reasonableness

Roughly speaking, the reasonable is taken for a form of practical, value-oriented rationality. Of course, this is a minimal and somewhat generic definition, but it contains a grain of truth. It is in fact a leitmotiv that reasonableness is a regulative idea for assessing actions, decisions and judgements in light of some values. And criteria and all the relevant circumstances need to be identified for a concrete application of reasonableness to be made.

One of the most influential theories of reasonableness comes from Robert Alexy, who sees the reasonable as the overarching principle of legal argumentation whenever demonstration is impossible and

Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective' 15 *European Review of Private Law*, 749-787 (2009).

[67] See L. Antoniolli, 'General Provisions' *sub* Ch. 1, in L. Antoniolli and A. Veneziano eds, *Principles of European Contract Law and Italian Law. A Commentary* (The Hague: Kluwer Law International, 2005), 69-71; E. Navarretta, 'Buona fede e ragionevolezza nel diritto contrattuale europeo' *Europa e diritto privato*, 953-980 (2012).

subjectivity (arbitrariness) needs to be avoided. For him it fulfils coherence, works towards criticism of interests, generalizability and impartiality, as well as a right balance of reasons.[68]

Then, the reasonable is the guiding principle of argumentation in the pragma-dialectical theory invented by Frans H. Van Eemeren and Robert Grootendorst. Against what they call the 'geometrical' and 'anthropological' approaches to reasonableness, they propose a conception based on critical discussion and dialectics, so that the reasonable is a problem-solving device with a procedural dimension and achieves inter-subjective acceptable solutions from the starting points of different conflicting opinions.[69]

Legal argumentation is the realm of reasonableness also in the new rhetorical approach of Chaïm Perelman.[70] He views legal argumentation as having its own logic, which is the reasonable. Thus logic/reasonable is what is persuasive for a universal audience sharing generally held beliefs and convictions. For Perelman the reasonable has an objective rather than subjective dimension in view of what he sees as its close relation to common sense.

The above mentioned theories show that the reasonable is the core of legal argumentation for pragmatic reasons, precisely because the law is a public, normative, evaluative, conflicting arena whose existence depends on general acceptance. Moreover, they show that when a legal system becomes unreasonable in the common perception, it is destined to collapse.

For this reason one of the positive features of reasonableness that is usually emphasised is its tendency to avoid legal rigidity (ie to make general rules defeasible). In this respect the dividing line with equity, namely justice as fairness, is very difficult to ascertain.

On that account many accuse reasonableness of increasing

[68] R. Alexy, 'The Reasonableness of the Law' in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 3-15.

[69] F.H. van Eemeren and R. Grootendorst, *A systematic theory of argumentation: The pragma-dialectical approach* (Cambridge: Cambridge University Press, 2004) 131-132. For a critical comment see H. Siegel and J. Biro, 'Rationality, Reasonableness, and Critical Rationalism: Problems with the Pragma-dialectical View' 22 *Argumentation*, 191-203 (2008).

[70] In addition to C. Perelman, n. 10 above, see Id, *Droit, morale et philosophie* (Paris: Librairie Generale de Droit et de Jurisprudence, 1968) and Id, *L'empire rhétorique: rhétorique et argumentation* (Paris: Librairie philosophique J. Vrin, 1977).

uncertainty. It is in fact quite common to see a trade-off between justice as reasonable fairness and as legal certainty. As it has been rightly observed in the traditional definitions, certainty and reasonableness are colliding ideals or principles: 'to achieve a great degree of certainty within a legal system is to relinquish some of its reasonableness; conversely, a gain in reasonableness carries a loss in certainty'.[71] But this view should be emended because the reasonable can increase legal certainty rather than reduce it. In point of fact, reasonableness has this direct aim since its uses cover situations where general predetermined rules are impossible or defective because of a lack of knowledge or whatever. Besides, there is a deep bond between reasonableness and legal certainty especially when legal rules give relevance to expectations. And reasonable expectations contribute to increasing legal certainty, as many cases show.[72] In addition, it must be noted that although the general concept of reasonableness is typically depicted as vague and indefinite, ambiguities and indeterminacies disappear in its concrete application.

IX. Legal arguments related to reasonableness

The immense variety of the uses of reasonableness in law cannot be contained within a complete report, just as Italian law or any of its branches show. However, it is useful to outline some of these uses to illustrate their structure and functions as well as relationships with other common argumentative or interpretative techniques.

The original application of the principle of reasonableness in Italian law is the judicial review based on the principle of equality (Art 3 of Italian Constitution). Since meting out an equal treatment may be reasonable or unreasonable, reasonableness is not the same as equality. The problem is indeed to define when equality is reasonable and when is not.

[71] S. Bertea, 'Certainty, Reasonableness and Argumentation in Law' 18 *Argumentation*, 465-478 (2004). Against the traditional view the Author construes reasonableness and certainty as compatible ideals of legal reasoning.

[72] Eg Corte di Cassazione-Sezione lavoro 15 January 2014 no 687, *Repertorio del Foro italiano*, v. *Danni civili* 15 (2014); Consiglio di Stato-Sezione V 3 August 2012 no 4440, *Rivista giuridica dell'edilizia*, 1191 (2012).

Legal scholars explain that the reasonable/equality test is triadic giving that to evaluate whether a rule is in compliance with the equality principle a *tertium comparationis* is necessary.[73]

In this context reasonableness is used first of all to scrutinise the right extension of legal provisions. The equality principle is satisfied when similar situations are ruled in the same way and the rule under scrutiny does not cover materially different situations.

When general and special rules co-exist within a same matter, reasonableness can be used to evaluate the reciprocal over- or under-inclusiveness. Here judicial control regards mainly the reasonableness of the *ratio derogandi*.[74] Such control has various possible outcomes. For example, a special rule is normally reasonable as long as it provides an alternative treatment for situations characterized by a relevant specific difference. It might however also be unreasonable to include sub-species that should be ruled differently. On the contrary, it might prove unreasonable because its extension is too narrow and excludes species that are materially similar. In addition, a general rule can be unreasonable because covers a too heterogeneous class of situations where each case should be ruled individually, each by a special rule. As a consequence, possessing some special rules and not others could be unreasonable, too.

Thus, reasonableness as equality has two functions: it is reasonable (ie justified) to treat in an equal similar situations, as well as differentiate what is different. A specific role of reasonableness is to justify both equal and differing treatment since neither equality nor discrimination can find in themselves their justification.[75]

The reasonable/equality test is routinely applied to retrospective rules for evaluating whether it is reasonable to rule *ex post* in a new or different way situations belonging to the past. In truth, the test is here being simply applied, only that a chronological rather than

[73] L. Paladin, 'Ragionevolezza (principio di)', *Enciclopedia del diritto* (Milano: Giuffré, 1997) Agg. I, 899-911; A.M. Sandulli, 'Il principio di ragionevolezza nella giurisprudenza costituzionale' *Diritto e società*, 561-577 (1975).

[74] A. Morrone, 'Constitutional Adjudication and the Principle of Reasonableness', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 215-242.

[75] Tribunale Amministrativo Regionale Sardegna-Sezione II 4 February 2013 no 84, *Repertorio del Foro italiano*, v. *Amministrazione Stato* 293 (2013) (according to the Tribunal positive actions in favour of the weaker genre are legitimate if justified on reasonable grounds).

material sphere of rules makes the difference. However, retrospective rules more often than not undergo a stricter reasonable scrutiny. That is because they endanger reasonable expectations, contradict the nature of legal rules that are reasons for actions and finally they guide *ex post* actions, which is of course impossible. It is interesting to note that the same restraint occurs in cases of overruling where courts are very careful about modifying consolidated precedents. When, *res melius perpensa*, it is unreasonable to continue to apply them, prospective overruling coordinates two opposite reasonable requirements, in order to get a fresh regulation for future cases and not frustrate the reasonable expectations of the litigants.

In many cases reasonableness is used as a constitutional principle independent from the equality principle but mingled with other unwritten principles of legal argumentation. Sometimes it overlaps the general principle of logical consistency and more frequently the principle of legal coherence.[76]

When reasonableness is used together with consistency and rationality, it is usually a standard to scrutinise not the content of official choices, but how they are justified.[77] In this field it is not applied for controlling the logical consistency of justifications and therefore finding contradictions or logical gaps. Rather, it is a standard for the general acceptability of judgments and as a consequence the reasonableness of the single judgment will depend on the criteria of acceptability applied in the circumstances.[78]

Reasonableness is also used as a teleological or instrumental standard. An action or a decision will be reasonable as long as it fulfils some preordained purposes.[79] In this respect reasonableness requires the identification both of the aims and means as well as the

[76] On this distinction between consistency and coherence see N. MacCormick, 'Coherence in Legal Justification', in A. Peczenik, L. Lindahl and G. van Roermund eds, *Theory of Legal Science* (Dordrecht: Reidel, 1984), 235-251.

[77] One of the most recent decisions among many others is for instance Corte di Cassazione-Sezioni unite 20 January 2014 no 1013, *Massimario del Foro Italiano* (2014).

[78] G. Maniaci ed, *Eguaglianza, ragionevolezza e logica giuridica* (Milano: Giuffrè, 2006).

[79] S. Celotto, 'Razionalità vs. ragionevolezza nel controllo di costituzionalità (a margine di un concorso dichiarato incostituzionale per la terza volta)' *Giurisprudenza costituzionale*, 3714-3720 (2012).

criteria for measuring the comparative efficiency of the means available. Sometimes the reasonable can lead to the same outcome as the cost-effective approach (ie principle of the minimum mean).

These uses of reasonableness are close to those related to the tests and/or principles of adequacy, suitability and proportionality.

It is well known that the interplay of reasonableness with these notions is a contentious issue in legal circles.[80] Despite the different constructions proposed, it is still open to debate if they are related by *genus et differentiam specificam* or otherwise.[81] As a matter of fact, how far they overlap has still to be defined. Sometimes they are seen as synonymous or more or less interchangeable notions and are often used jointly or in variable combinations. However, a distinction can be drawn: sometimes necessity and impossibility are the extremes of the reasonable, while in other moments the reasonable hinges on suitability and fairness.[82] On top of that, reasonableness and proportionality are seen as two corollaries of the general principle of equality. When reasonableness is used to measure the due proportion, the standard of reasonable proportion becomes a teleological/instrumental standard for determining the best means or the most cost-effective policies, but it can also be a standard saturated with constitutional values.

The balancing test is another primary way of applying reasonableness,[83] which is of course just a metaphor since no balance exists in law. However, principles, values, goods and interests are regularly balanced in light of reasonableness. Therefore, the reasonable is used as an imaginary criterion to weigh these objects. In reality the measure is obviously only a discretionary evaluation. A good example is the reasonable balancing required by the precautionary principle between the right to health and the need to

[80] P.M. Vipiana, *Introduzione allo studio del principio di ragionevolezza nel diritto pubblico* (Padova: Cedam, 1993).

[81] S. Cognetti, 'Clausole generali nel diritto amministrativo. Principi di ragionevolezza e di proporzionalità' *Giurisprudenza italiana*, 1197-1213 (2012).

[82] J. Luther, 'Ragionevolezza (delle leggi)' *Digesto delle discipline pubblicistiche* (Torino: Utet, 1997) XII, 341-362.

[83] G. Scaccia, *Gli 'strumenti' della ragionevolezza nel giudizio costituzionale* (Milano: Giuffré, 2000); Id, 'Motivi teorici e significati pratici della generalizzazione del canone di ragionevolezza nella giurisprudenza costituzionale', in M. La Torre and A. Spadaro eds, *La ragionevolezza nel diritto* (Torino: Giappichelli, 2002), 404-413.

avoid any hygienic/sanitary risks determined by the limitation or suspension of the water supply.[84]

In addition, reasonableness is used to avoid absurdities in interpreting the law and prevent aberrant judicial solutions.[85] It is like the argument *ad absurdum* according to which when more than one interpretation exists those that lead to absurd consequences must be rejected and interpreters have to choose solutions that give rise to reasonable outcomes. It is interesting to note that there are many versions of the argument depending on how relevant consequences/outcomes are. Moreover, the argument requires a repeated application wherever there is a range of more or less reasonable solutions. The most reasonable needs to be chosen, so that a second choice has to be made.

The same argument *ad absurdum* is also applied when evaluating human behaviour: for instance, disregarding all cautionary rules is arbitrary or absurd and in the end unlawful and judgement is made on a basis of reasonableness, so taking into account the concrete situation.[86]

A particular version of this argument is related to evolutionary interpretations or dynamic law-making. This means that law is sometimes innovated because, according to the bench, traditional rules or previous interpretations are considered unreasonable by the general public.

Furthermore, reasonableness can be closely linked to the argument of the nature of things, ie what mirrors the nature of things is reasonable. Properly speaking, this becomes a cluster of arguments dependent on how the nature of things is conceived. Two main references are common sense or archetypes figures.[87]

[84] Consiglio di Stato-Sezione VI 21 June 2013 no 3388, *Diritto e giurisprudenza agraria e dell'ambiente*, 718 (2013). Another application of reasonableness related to the precautionary principle was in *Monsanto* case, where the issue was the unpredictable effects on human health which may be produced by the introduction of foreign genes in foods: Case 236/01 *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri*, [2003] ECR I-8105.

[85] M. Bobek, 'Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 311-326.

[86] Corte di Cassazione-Sezione penale VI 30 October 2012 no 23817, *Ced Cassazione rv* 255715 (2013).

[87] O.P. Moréteau, 'Ragionevolezza e diritto: standards, prototipi e interpretazione

A further use is the reasonable legislator argument, which is also called the argument of the economic legislator or against redundancies. Accordingly, whenever a provision seems to be repetitive of others at a first interpretation, this needs to be re-examined in order to identify a distinct range of application for each relevant rule.[88]

Moreover, many uses of reasonableness are close to the *ad impossibilia nemo tenetur* maxim. The principle is that nobody can be obliged to do what cannot be performed. But the real application is that no obligation exists whenever pretending it would be unreasonable, ie materially impossible in relation to the context and the normal course of events and actions of everybody in the same situation as the debtor.[89]

In other uses the reasonable argument is equivalent to the *id quod plerumque accidit* maxim, where the reasonable does not call for any statistical comparison. Rather, it refers to normality, that is to say those attitudes and expectations which are deemed sound and adequate in the context. As said above, the criteria can take into account all individual circumstances, specific skills, deficiencies, vulnerabilities, and so on. But conversely they can reproduce general truisms[90] or represent the best practices provided by sciences, technology and arts.[91]

Then, many judicial presumptions are based on reasonableness. Good examples are the *homo hominis* tenets used by judges to comprehend what normal people in the same position of the claimant/the defendant would have done.[92] These presumptions are

uniforme' VII *Ars interpretandi. Annuario di Ermeneutica giuridica. Ragionevolezza e interpretazione*, 241-259 (2002).

[88] G. Tarello, *L'interpretazione della legge* (Milano: Giuffré, 1980), 369-370.

[89] Corte di Cassazione-Sezione lavoro 2 September 2013 no 20089, *Massimario del Foro Italiano*, 727 (2013).

[90] C. Alvisi, 'The Reasonable Consumer According to the European and Italian Regulations Concerning Unfair Business-To-Consumer Commercial Practices', in G. Bongiovanni, G. Sartor and C. Valentini eds, *Reasonableness and Law* n 11 above, 283-292.

[91] S. Canestrari and F. Faenza, 'Reasonableness in Biolaw: The Criminal Law Perspective', in G. Bongiovanni, G. Sartor and C. Valentini eds, n 11 above, 363-379.

[92] Corte di Cassazione 2 October 2012 no 16754, *Giurisprudenza italiana*, 796 (2013), with the comments by D. Carusi, ' "Revirement" in alto mare: il "danno da procreazione" si "propaga" al procreato?' ibid, 809-813 (2013); and G. Cricenti, 'Il concepito ed il diritto di non nascere' ibid, 813-820 (2013).

often underestimated, but the use made of reasonableness is often sophisticated, as it often requires a counter factual judgment.

Another relevant use of reasonableness is found in trials in circumstantial evidence. It is often considered relevant on the basis of reasonableness, as happens in case law in higher courts where arguments are commonly inferred from reasonable signs of proof.[93] Circumstantial evidence also reveals the narrative nature of legal adjudication where the force of the defences is measured against common sense assumptions.

Furthermore, reasonableness is applied as a principle of adjudication that allows judges to ignore manifestly irrational or absurd decisions by making general rules defeasible. This means that reasonableness is used to create specific exceptions to general rules and principles. Such rules and principles may be unwritten or expressed in written provisions at any level of law: constitutional, statutory or lower. A good example is the use of reasonableness in antitrust and competition law. A subject of much discussion is if the reasonableness test of the European Court of Justice is similar to the US courts' rule of reason. The latter has been used to establish exceptions to a rigid rule dating from the leading case *re Standard Oil Co. of New Jersey* v. *United States*, where the Supreme Court defined the scope of the Sherman Act by stating that only mergers and agreements which unreasonably restrain trade are against antitrust laws.[94] In Europe some *per se* violations have been predetermined exactly for preventing exceptions by virtue of reasonableness.[95]

It is important to note that a similar structure of reasoning is routinely applied to judicial precedents. In point of fact, in their distinctions courts identify differing rules – ie new exceptions – to the general rule followed by previous decisions. The *ratio decidendi* of the decisions is a new rule specific to the material case and justified on the grounds of the differences existing between the case at hand and those already settled.

[93] Consiglio di Stato-Sezione V 5 December 2012 no 6248, *Repertorio del Foro italiano*, v. Atto amministrativo 130 (2013).

[94] *Standard Oil Co. of New Jersey* v *United States* 221 US 1 (1911).

[95] L.S. Rossi and S.J. Curzon, 'An Evolving 'Rule of Reason' in the European Market', in G. Bongiovanni, G. Sartor and C. Valentini eds, *Reasonableness and Law* n 11 above, 405-420.

Finally, reasonableness is used to draw a distinction between actions and omissions. It is based on common sense and normative assumptions and is a heuristic and very useful classificatory device in all legal fields. As has been observed, the principle of reasonableness shows 'the normative elements that frame the category of offences committed by way of an omission in which the omission consists in a failure to perform a duty to act imposed by the criminal law on specified classes of persons'.[96]

X. Reasonableness and good faith

In contract law the relation of reasonableness with the other general clauses like good faith, fairness, equity and due care/diligence is the heart of the matter.[97] In addition, the interplay of reasonableness with the abuse of right principle is the subject of much discussion,[98] widespread in European legal thinking. In many member states such ideas are largely used in some statutory laws and jointly applied by courts.[99] Both German and Dutch case laws and their correlative provisions of civil codes are classic examples as they traditionally bring together good faith/equity and reasonableness in order to evaluate the fairness of the contractual relation and hence

[96] S. Canestrari and F. Faenza, n 92 above.

[97] In chronological order see S. Troiano, n 3 above; E. Giorgini, n 58 above; A. Ricci, *Il criterio di ragionevolezza nel diritto privato* (Padova: Cedam, 2007); S. Troiano, *La ragionevolezza nel diritto dei contratti* (Padova: Cedam, 2005); L. Nivarra, 'Ragionevolezza e diritto privato' VII *Ars interpretandi. Annuario di Ermeneutica giuridica. Ragionevolezza e interpretazione*, 373-386 (2002); C. Scognamiglio, 'Clausole generali e linguaggio del legislatore: lo standard della ragionevolezza nel d.P.R. 24 maggio 1988 n. 224' *Quadrimestre*, 70 (1992); G. Criscuoli, 'Buona fede e ragionevolezza' *Rivista di diritto civile*, 709-754 (1984).

[98] It is well known that the leading case *Renault* has heightened the debate: Corte di Cassazione Sezione Civile III 18 September 2009 no 20106, *Foro italiano*, I, 85 (2010), with a comment by A. Palmieri and R. Pardolesi, 'Della serie "a volte ritornano": l'abuso del diritto alla riscossa' ibid, 95-98 (2010).

[99] See Case C-415/11 *Aziz* v *Caixa d'Estalvis de Catalunya* (European Court of Justice 14 March 2013) and Case C-92/11 *RWE Vertieb A G* v *Verbraucherzentrale Nordrhein-Westfalen eV* (European Court of Justice 21 March 2013) both available at www.eur-lex.europa.eu. A striking example is the use of reasonableness in the Convention on the International Sale of Goods.

the opportunities and advantages/disadvantages of the parties. This generally involves considering the context rather than the personal character of the litigants, but it is not clear-cut whether and how far the specific point of view of each party or presumed purposes of the contract itself are relevant.

As is well known, the debate about good faith and reasonableness is extremely complicated and quite often affected by ideological bias. A right approach to the matter requires a semiotic clarification about the nature of such general clauses.[100] As a matter of fact, the on-going discussion about the nature of reasonableness, namely whether it is a principle or a standard or a general clause, tends towards conceptual naivety, since it moves in an apparent unawareness that semiotic features must be taken into account.

Reasonableness is an indeterminate concept that cannot be used without identifying criteria for its application, an evaluative nature and basic value that sheds light on the case. What the relevant circumstances are depends in fact on the nature of the value. In this sense what is reasonable in each single occurrence always depends both on values and facts.[101] This is why reasonableness can be included among general clauses – ie evaluative indeterminate concepts – and standards too, as all standards need criteria for their concrete application. In addition, in many uses it is also a principle that is indeterminate and evaluative according to a general definition.

On this account it is mistaken to insist on drawing a dividing line between good faith and reasonableness denoting the latter as amoral, neutral and a pragmatic standard, and the former as morally oriented and related to conceptions of common good. Of course, the origin of good faith is rooted in a legal context where social, morals and religious ideas were quite unified. And it is also true that nowadays in the Italian legal system good faith is seen as an instance of the constitutional principle of solidarity. But, reasonableness is not neutral either. It is evaluative, as said above, but its specific

[100] On this topic see especially V. Velluzzi, *Le clausole generali. Semantica e politica del diritto* (Milano: Giuffré, 2010).

[101] On this aspect see G. Scaccia, 'Valori e diritto giurisprudenziale' *Diritto e società*, 135-157 (2011).

difference is that it has no determined ethical connotation and is instead open to any values.

In conclusion, Herbert L.A. Hart's ideas on the concept still hold good: reasonableness is a typical standard for giving authorities (first of all, courts and administrative officials) express or avowed discretion. Hart's original examples were the common standard of reasonable or proper cause in malicious prosecution, reasonable care in negligent cases and reasonable rates in terms of fair return on value in financial matters.[102] As Hart observed, in such cases the problem is not the standard of reasonableness *per se*, but what is reasonable in each concrete situation. In other words, there are of course typical examples of conducts that look *prima facie* reasonable, but the immense variety of possible cases where reasonableness is called for cannot be foreseen. So, for instance, in the application of standards of reasonable care '[w]hat we are striving for is (1) to insure that precautions will be taken which will avert substantial harm, yet (2) that the precautions are such that the burden of proper precautions does not involve too great a sacrifice of other respectable interests', but how this aim of securing people against harm can be realized depends on experience. The need for reasonableness arises wherever a satisfactory formulation of rules *ex ante* is precluded due to the indeterminacy of aims and/or human situations.

[102] H.L.A. Hart, 'Discretion' 127 *Harvard Law Review*, 652-665, especially 655 and 663-664 (2013).

Hard Cases

Remedy for Fraud in *Cir vs. Fininvest*: Damages or Specific Performance?

Stefano Pagliantini*

Abstract

The Supreme Court's judgment ruling in favour of Cir's independent action for damages against Fininvest brings to an end proceedings that originated from a judicial decision setting aside the Mondadori arbitration award, a decision that Fininvest had obtained by bribing one of the judges and that had led Cir to reach an out-of-court settlement of the dispute. As far as the Supreme Court is concerned, that settlement is valid and the harm suffered by Cir is to be considered as damage arising from a criminal offence. However, different reasoning could have been employed focusing on the remedies which are related to the stipulation. Where a contract has been entered into as a result of fraud by one party to the detriment of another, the rule that the remedy of avoidance is infungible must be departed from if annulment is futile or impossible. The unpalatable alternative is that of leaving the deceived party without any protection at all.

I. Introduction

There are several tricky questions arising from the *Cir* v *Fininvest* judgment. Undoubtedly that relating to the quantification of the compensable harm is certainly one of the most challenging.[1]

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[1] Among the earliest comments, see C. Scognamiglio, 'Effettività della tutela e rimedio risarcitorio per equivalente: la Cassazione sul caso Fininvest c. Cir' *Responsabilità civile e previdenza*, I, 42-52 (2014); F. Piraino, 'Intorno alla responsabilità precontrattuale, al dolo incidente e a una recente sentenza giusta ma erroneamente motivata' *Europa e diritto privato*, IV, 1118-1177 (2013); and the contributions offered by G. Costantino, A. Palmieri and R. Pardolesi, 'In tema di corruzione di un componente del collegio giudicante e responsabilità' *Foro italiano*, I, 3121 (2013). See also A. Di Majo, 'La via di fuga nel torto aquiliano' *Europa e diritto privato*, 1098-1118 (2013); S. Pagliantini, 'Il danno (da reato) ed il concetto di differenza patrimoniale nel caso CIR-Fininvest: una prima lettura di Cass. 21255/2013' *Contratti*, II, 113- 124 (2014).

At first glance it would seem trouble-free: the amount of compensation awarded should be set so as to match actual damage and loss of profits exactly. In fact, the injured party should not be awarded 'less' – and the infringing party should not likewise be ordered to pay 'more' – than what is necessary to restore the *status quo ante*. Otherwise we would end up with a hybrid situation, with damages that do not compensate or conversely that punish and an injured party respectively defrauded or enriched.

Because of a series of complicating factors, however, it is very difficult to ascertain whether Cir obtained a measure of damages lower or higher than that which it was entitled to: ie if the compensation awarded was adequate or disproportionate.

As will be shown, according to the Supreme Court the harm suffered by Cir is a typical example of damage arising from a criminal offence.[2] By way of exception to what Art 1223 of the Italian Civil Code provides in relation to compensation for lost profits in the context of contractual liability, in this case it is the law itself that requires the court to assess the compensation for lost profits in tort on an equitable basis (Art 2056, para 2, Civil Code), ie having regard to what the court considers fair and just in the particular circumstances of the case.

However, compensation assessed on an equitable basis does not mean that damages for the compensable harm should be assessed without reference to any objective standards. It is true that the adoption of a rough standard for compensation may betray the primary goal of satisfying the victim, yet such an approach has the advantage of heightening the predictability of a damages award. Otherwise, as Atiyah observes,[3] compensation for the loss of profits in tort would turn into a lottery.

Now, in the very singular case decided by the Supreme Court, the compensable harm was held to be the difference between the amount

[2] See G. D'Amico, 'Responsabilità precontrattuale anche in caso di contratto valido? (L'isola che non c'è)' *Giustizia civile*, I, 214, n 46 (2014), earlier again, C. Scognamiglio, 'Ancora sul caso CIR-Fininvest: violazione dolosa della regola di buona fede nelle trattative, giudizio di ingiustizia e alternatività delle tutele di diritto civile' *Responsabilità civile e previdenza*, III, 704-716 (2012). See also S. Pagliantini, n 1 above, 116.

[3] See P. Atiyah, *The Damages Lottery* (Oxford: Hart Publishing, 1997), 8.

of the 'fraudulent' out-of-court settlement and the figure initially offered by Fininvest in 1990. Therefore, it could be argued that damages were assessed having regard mainly to the 'reason' why the economic loss suffered by Cir was judged to be significant harm 'caused' by Fininvest.

While nobody can profit from their own misdeeds Fininvest engaged in conduct that was not simply wrongful but actually criminal. Therefore, it is only right that the amount of compensation should fluctuate between reparation and punishment, leaving room for the coexistence of reparation and deterrence thereby excluding those outside options that Fininvest could have raised in an out-of-court settlement, since at the time the Mondadori share price had fallen because of the lawsuit.

Not any less persuasive is the view that the figure for compensation awarded to Cir was considered as the equivalent to the amount of the 'overall harm' that the latter's assets suffered, in the sense of what was required to fully restore the company's competitive capacity to do business. Once Cir signed the vitiated settlement, it lost the chance to invest 'that capital' in other commercial operations.

If that were so, the compensatory function would not be affected by any punitive connotation. The principle, confirmed by the judgment, in accordance with which punitive damages have no place in the Italian legal system,[4] would therefore remain intact.

II. Cir's harm as damage arising from a criminal offence

In the first place, the right to sign an out-of-court settlement *ex fide bona* sounds better than the right not to witness a subsequent setting aside of a favourable arbitral award.[5] However, both are hypostases.

[4] The ostracism of punitive damages by the Italian courts can clearly be perceived in Corte di Cassazione 19 January 2007 no 1183, *Foro italiano*, I, 1461-1467 (2007), with comment by G. Ponzanelli, "Danni punitivi: no, grazie' and Corte di Cassazione 8 February 2012 no 1781, *Danno e responsabilità*, VI, 609-613 (2012) with remarks again by the same G. Ponzanelli, 'La Cassazione bloccata dalla paura di un risarcimento non riparatorio'.

[5] That is the opinion of the Supreme Court, amending the Court of Appeal of Milan's judgment.

All of the Supreme Court's reasoning can be summarised by saying that the specific right of compensation granted to Cir must fall within the provision of Art 185 of the Italian Criminal Code (CP) by virtue of the rule that any behaviour constituting a crime obligates the perpetrator to compensate the injured party for the harm suffered: more specifically, the higher profit that Cir would have gained by signing the out-of-court settlement in the absence of an unfair judgment *ex corrupto*.

While it is true that the harm suffered by Cir was pure economic loss, a loss of profits engendered by an offence, it is also true that, in a system where there is no equivalent to the rule enshrined in § 826 BGB, it would be too bold to 'directly' link damages to the perpetrator's fraudulent conduct, ie without referring to Art 185 Criminal Code.

Nonetheless the *reine Vermögenschaden* claimed by Cir ought to be compensated since Art 185 Criminal Code is a 'primary rule' not subordinated to Art 2043 Civil Code so that the former can make up for the absence of the 'unjust harm' criterion contained in the latter. More specifically, Art 185 Criminal Code treats the criminal unlawfulness of behaviour as a criterion for determining the ensuing harm, as if it were a distinct requirement for being awarded compensation: because it is this 'qualified unlawfulness' that replaces the unjustness of the harm that is a *conditio sine qua non* for attaining compensation in tort. There was the precedent – albeit forgotten – of Supreme Court judgment no 1540/1995:[6] for harm caused by crime, the unjustness is *in re ipsa*, say the judges, and thus does not need to be connected to the violation of a right based on delict. It therefore becomes a matter of legal taste, and consequently not much really changes if one speaks of in terms of the unjustness of the harm that flows from the criminal conduct. Both interpretations, however, counteract a heuristic reference to the logic of *Verkerspflichten* or § 823, para 2, BGB.[7]

Sic stantibus rebus, the Court's syllogism is not wrong. It should simply be rearranged underlining that pure economic loss (the settlement signed in worse conditions due to the corruption of the

[6] See Corte di Cassazione 11 February 1995 no 1540, *Foro amministrativo*, IX, 1822 (1995).

[7] But see A. Di Majo, n 1 above, 1110.

judge who issued the judgment) is compensable if there is a rule – specifically Art 185 Criminal Code – which entitles the injured party to a 'merely objective remedy'.[8]

The above mentioned statement is not however *novitas*: the autonomy of compensation in tort, when arising from an offence pursuant to This norm, had been recognised as far back as the first critique on *reine Vermögenschaden*.[9] The overwhelming attention paid by the French scholars to the issue[10] is likewise not to be neglected. In France the latest trend is to *grignoter* fraud/vitiation of consent in favour of tort law whereby courts do not grant the *deceptus*, ie the deceived party, the right to demand subsequent avoidance of the contract pursuant to Art 1116 Civil Code but grant him damages in accordance with Art 1382 Civil Code.

The more authoritative literature criticises this *absorption du dol dans le giron de la responsabilité civile*. Nonetheless, it is a widespread opinion that the above-mentioned choice is the consequence of the dual nature of fraud, projected on the field of remedies. Thinking in terms of the classification of conflicts, we have here an intersection between preventive (contract) and subsequent (liability) conflict.[11]

Nihil novi, then, even if we need to make a second remark in order to avoid misunderstandings.

If the harm arises from a crime, thanks to the direct application of Art 185 Criminal Code, it is possible to treat the Court's entire

[8] See C. Scognamiglio, 'Ingiustizia e quantificazione del danno da sentenza frutto di corruzione di uno dei componenti del collegio' *Responsabilità civile e previdenza*, III, 611-620 (2010).

[9] See A. Di Majo, 'Il problema del danno al patrimonio', *Rivista critica del diritto privato*, II, 297-334 (1984).

[10] See the round table on '*L'absorption du dol par la responsabilité civile: pour ou contre?*', *Revue des Contrats*, III, 1155-1218 (2013). Amongst others see also A.-S. Barthez, 'Contre l'autonomisation de la responsabilité civile délictuelle en matière de dol ibid, 1155-1161 (2013); J. Ghestin, 'Contre l'absorption du dol par la responsabilité civile' ibid, 1162-1178 (2013); G. Lardeux, 'L'absorption du dol par la responsabilité civile' ibid, 1179-1188 (2013); P. Rémy, 'L'absorption du dol par la responsabilité civile: pour ou contre? ibid, 1195-1200 (2013); E. Savaux, 'Résister à l'absorption du dol par la responsabilité' ibid, 1201-1218 (2013).

[11] See especially P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 456.

extended comment in support of its opinion about the liability for a legally binding but unfavourable contract as merely *obiter dictum*.

Some scholars have already emphasised[12] that according to the Supreme Court the compensation awarded to Cir does not fall within Art 1337 or 1338 Civil Code. In other words, the fact that compensation lies outside the field of contract is not due to the widespread but still debated view that *culpa in contrahendo* falls within the domain of tort law. The harm stems from outside contract because it originates from an unjust judgment that serves as a harmful event.

Thus, if not pre-contractual, the inquiry as to the foundation of the liability, ie the controversial principle supported by the Supreme Court according to which the *culpa in contrahendo* principle can coexist with a binding contract, is rather worthless if not counterproductive.

The point about good faith operating as basis for compensation against unfair conduct during negotiations in reality serves as an argument *a fortiori* because if one can claim compensation when a party conceals essential information, it would be unreasonable to suppose that there is non-compensable harm in tort when compared to conduct contrary to good faith the case exhibits a '*quid pluris* … and a *quid alii*'.[13]

The atypical nature of the tort discussed by the Court should be taken seriously: accepting it in a 'weak sense' may mislead one, forgetting that the unfair pre-contractual conduct has been adjudged to be relevant only because it coincides with the subornation of the judge who then went on to issue a judgment unfavourable to CIR. The elegant notation, according to which the reasoning of the Court is a 'message in a bottle' for the next *rationes decidendi*,[14] strengthens and does not deny the sensation of a digression transcending the texture of a case revolving around a criminal offence.

[12] See G. D'Amico, n 2 above, 213.

[13] See the judgment *de quo*.

[14] See C. Scognamiglio, n 1 above, 42-52.

III. Compensation in a voidable contract as a non-fungible remedy: case law

Moreover it is correct to say, as many scholars have already emphasised,[15] that Cir would have adopted different trial strategies, the most orthodox of which would have entailed in the following order:

a) requesting that the judgment be set aside because of the judge's fraud (Art 395, subparas 1 and 6, of the Italian Civil Procedure Code);

b) challenging the out-of-court settlement pursuant to Art 1972, para 2, Civil Code for the purpose of annulling it considering that, at the time of the events, Cir was most certainly unaware of the grounds of nullity;

c) seeking restitution under Art 2033 Civil Code and compensatory damages pursuant to Art 1338 Civil Code.

However, it would have been possible also to claim (and here the Court's contrary opinion is not totally persuasive) annulment of the out-of-court settlement because vitiated by fraud: a defect in respect of which the rules governing out-of-court settlements do not contemplate an *ad hoc* challenge.

It's true that it was not a case of fraud by a third party – here the judge's fraud – under Art 1439, para 2, Civil Code. Nevertheless, there was some scope for applying Art 1439, para 1, Civil Code on the basis that Fininvest's wilful misconduct, through bribery, had obtained a decision – overturning the arbitration award – with the deliberate aim of conditioning in a more advantageous sense the subsequent out-of-court settlement. It is no coincidence that in the reasoning the out-of-court settlement in question is labelled as a 'corrupt carve up'. So a 'machination' on Fininvest's part that had stacked the deck, was plausible, and, so to speak, was *in re ipsa*.

The problem – and here the Court's reasoning is unshakable –

[15] Read, *inter alios*, M. Barcellona, 'Chance e causalità: preclusione di una virtualità positiva e privazione di un risultato utile' *Europa e diritto privato*, IV, 945-990 (2011); G. Iudica, 'Efficacia della transazione e responsabilità extracontrattuale per indebolimento di posizione negoziale' *Responsabilità civile e previdenza*, IX, 1807-1826 (2011) and previously C. Castronovo, 'Vaga culpa in contrahendo: invalidità, responsabilità e la ricerca della chance perduta' *Europa e diritto privato*, I, 1-48 (2010).

was the fact that a ruling setting aside the corrupt judgment would have proved completely 'useless' to Cir. Firstly, the 1991 shares no longer existed and, secondly, the annulment of the out-of-court settlement would certainly have had the effect of restoring the *status quo ante* but the one subsequent to the corrupt judgment and not the Pratis arbitration favourable to Cir that the judgment in question had set aside. That judgment was – as one can well imagine – *res judicata,* with the result of raising the *vexata quaestio* of the revocability of a judgment vitiated by a judge's fraud but nonetheless the product of a collegial decision. Hence, these two factors together disclosed a manifest lack of interest – by Cir – to seek annulment of the out-of-court settlement.

Now, with argumentation resembling the reasoning of the French Courts,[16] according to the Supreme Court it is admissible to discard the action for annulment and focus on the claim for damages in connection with the pre-contractual misconduct. The precedent is Supreme Court judgment no 20260/2006:[17] a borrower omitted to mention her husband's bankruptcy at the time of entering into a loan agreement on the basis that it would have been relevant only in the case of more favourable conditions. This, however, is a rather questionable precedent because a party who waives a defence of

[16] Among the leading cases see Cour de Cassation-Chambre civile I 4 March 1975 no 73-14940, *Revue trimestrielle de droit civil*, 537 (1975). *Amplius* J. Ghestin ed, *Traité de droit civil. La formation du contrat. T. 1 – Le contrat. Le consentement* (Paris: LGDJ, 4th ed, 2013), notes 1294, 1301, 1321, 1437, 1438, 1441, 1457 and 1460 and C. Guelfucci-Thibierge, *Nullité, restitutions et responsabilité* (Paris: LGDJ, 1994), notes 405, 778-781.

[17] See Corte di Cassazione 19 September 2006 no 20260, *Responsabilità civile e previdenza*, X, 2113-2121 (2007), a case on fraudulent omission *causam dans*. But see the earlier contrary Corte di Cassazione 25 July 2006 no 16937, *Giustizia civile*, I, 2717 (2006), that denied damages on grounds of pre-contractual fraud under Art 2043 Civil Code to an intending purchaser to a preliminary contract that can be annulled for having been entered into with a person lacking capacity. The only – dated – precedents for Corte di Cassazione 19 September 2006 no 20260 are Corte di Cassazione 9 February 1980 no 921, *Giustizia civile Massimario*, II, (1980), possibly (but it is very uncertain) Corte di Cassazione 11 July 1968 no 2445, *Giustizia civile Repertorio*, v. Obbligazioni e contratti, n 539 (1968) but not Corte di Cassazione 29 March 1952 no 862, where the Court reasons about wrongdoing under Art 2043 Civil Code but related to a third party in a case where annulment of a contract was not an issue.

specific performance in favour of mere damages behaves in a manner that operates as a form of affirmation of the agreement. And 'affirmation', curing the defect, erases the relevance of the previous treachery from a damages standpoint. There is, in particular, an 'affirmation for valuable consideration', implicit in the claim for damages, that urges '– *par omission – le maintien* [of the contract]':[18] but there is no trace of this hybrid figure in the Italian legal system. Either the fraud is *incidens* and the contract on modified terms is of interest or the fraud is *causam dans* and the contract may end up being useful or not to the deceived party but 'as a whole'. An overlapping of the two circumstances would be … a *hirco-cervus*. The law does not protect an interest of the deceived party that changes *ratione temporis*: an 'amphibological' interest, so to speak.

However in this case – as noted – the situation was very different: the performance of the 'voidable contract' had irreparably compromised the feasibility of restitution. An annulment of the out-of-court settlement, considering the legal and material impossibility of operating a *reductio in pristinum*, made no sense at all for Cir. As a consequence damages, due to the impossibility of repairing the harm done through specific performance, was 'the only remedy' able to assure legal protection against the harm suffered.

Avoidance, depriving of efficacy an agreement wheedled through fraud, is undoubtedly the most adequate technique to prevent or to compensate harm: yet *conditio sine qua non* is that the judgment of annulment succeeds in removing 'the loss'. And, just like in the case *de quo*, it can well happen that removing an obligation is not sufficient because it may prove to be 'useless'. Therefore, the 'uncertainty of restitution justifies granting solely the claim for damages'.

The amount of compensation will naturally be higher or lower depending on how inflexible or elastic the court evaluates the possibility of achieving *restitutio in integrum*. Damages will be highest when the court's evaluation is informed by absolute criteria, lowest if that evaluation is conducted on a relative basis. This latter option seems to be preferable, with reference to possible restitution whenever restoration would give rise to a situation not 'substantially'

[18] See A.S. Barthez, n 10 above, 1160.

different from the original one. Any performance of the contract, in reality, generally changes the order of things.

This example recalls a situation, rather common in the French experience,[19] where the buyer of real estate, deceived by the seller, has important works of renovation done by someone else. In this case avoidance of the contract clearly results more detrimental than compensation aimed at correcting the exchange.

The case of a personal computer sold as new, although second hand, is not so different, where the buyer has got someone else to install some sophisticated and costly applications on it that are not transferable to another model. In this case also there is performance, which alters the situation and consequently avoidance is far less suitable than damages. Likewise if the deceived party is a company that has planned, with reference to the acquired portfolio, a strategy of investment that can in no way be stopped, for example, because the rigged securities belong to a 'holding'. As in the cited examples, one can reasonably talk of compensation as a non-fungible surrogate of avoidance, considering the possibility in all the three cases analysed of remedying the harm solely through damages.

In this case, however, there is no tort liability that transcends its area and competes with the (typical) remedy of avoidance although this could well occur if the running of time forces one to renounce opting for annulment[20] in that the action of avoidance is statute barred. Here too there is an action for avoidance, which no longer pursuable, would leave the harm where it is. Furthermore, due to a sort of necessary conversion, where the *inertia* of the deceived party is not labelled as contrary to good faith,[21] avoidance would revolve

[19] For an acute and incisive report read J. Ghestin, n 10 above, 1177.

[20] An old issue. See, for eligibility, A. Montel, *Azione di danni per dolo e prescrizione dell'azione di annullamento del negozio* (Milano: F. Vallardi, 1933), 558, in reply to A. Motta, *L'azione extracontrattuale di danni per dolo e la prescrizione dell'azione di annullamento del negozio* (Padova: Cedam, 1932) and in *Foro Lombardo*, I, 759 (1932), which, conversely, discerned in 5-year *inertia* an incontrovertible case for affirmation.

[21] As part of that *Verwinkung* which may be relevant here as a form of early termination of action: although still, famously, it exhibits the prevalent idea that maintains that this concept is not conceptualised in the Italian system 'because in opposition to the rules governing the statute of limitations'. See R. Tommasini and E. La Rosa, *Dell'azione di annullamento. Artt. 1441 – 1446*, in F.D. Busnelli ed, *Il*

around damages still reliant on an *incidenter* finding of fraud vitiating the contract.

It is worth stressing that what is involved is an action for damages being brought when the action for avoidance is precluded because of contingent legal reasons. Damages in respect of an action for avoidance that 'cannot be' and 'must not be'. Fraud as a vitiating factor of will cannot be sanctioned on the basis of the '*seul terrain de [la] responsabilité [civile]*'.[22] Not even as lesser consequence of invalidation. Nor using the argument that the exigency of protection of the victim demands the '*plus grande latitude possible dans l'élection du mode de reparation*'.[23]

A choice between remedies depending on the actual circumstances entangles and mars the certainty of contractual relations. This equally applies to the common law experience, where the right to avoid the contract, as far back as *Clarke* v *Dickson (1858) E. B. and E. 148*, can actually be extinguished when *restitutio in integrum* is impossible. And, significantly, a possibility of restitution understood in a relative way, is the dominant view, ie not exactly the *status quo ante* but a similar situation.

In cases different from the preceding ones, some doubts can be nurtured regarding a possible annulment but with a high economic cost. The deceived party, for example, has agreed with a third party to maintain, for a certain period, a stake in the company bought for an inflated price. If the deceived party seeks avoidance, he will have to answer for non-performance that is more onerous compared to restitution of the *status quo ante*. Therefore, a choice between two remedies is lacking here in reality, which leads one to reason in terms of an economic loss, if the intention is to transfer it to the *deceptor*, ie the deceiving party, remediable only through damages. Otherwise, since avoidance of the contract is uneconomic, the deceived party will

Codice Civile. Commentario fondato da Piero Schlesinger (Milano: Giuffré, 2009), 63.

[22] But in this sense see J. Ghestin, n 10 above, 1163. In spite of 'les multiples facettes de sa souplesse pour la victime du dol', see also J. Mestre, 'Observation' *Revue trimestrielle de droit civil*, 354 (1995).

[23] In this sense O. Deshayes, 'Le dommage reparable en case de dol dans la formation du contrat' *Revue des contrats*, I, 97 (2013).

not be encouraged to file a lawsuit and would remain without protection.

It is worth noting that, in common law, if avoidance is predicated on fraudulent misrepresentation, the court's assessment of the possibility for restitution is conducted less stringently in order to protect the deceived party. The leading 1939 case of *Spence* v *Crawford* is emblematic here.

Conclusively, it seems that everything should revolve around a 'replacement' claim for damages which occurs when avoidance is precluded so as to bridge a gap in the protection (Art 24 Italian Constitution).

IV. Avoidance *v.* equivalent protection as fungible actions: the French suggestions. Compensation in any event?

If this is the state of things, there should be grounds to support the view that a voidable contract creates liability 'if cancelled by the courts' or, as in the present hypothesis, when it is not possible to proceed with *restitutio in integrum*, ie for 'inadequacy' of avoidance as a remedy. Compensation, in the former case, completes the remedy of avoidance in the manner referred to in Art 1338 Civil Code whereas, in the latter case, it may actually balance out the paradox of loss where avoidance would leave the victim's economic situation 'untouched'. Therefore it is a 'substitute'.

At this point, however, a question arises: *quid iuris* if, in this case, restitution had been possible? Could Cir have sought damages for a voidable out-of-court settlement[24] on the premise that fraud constitutes a crime? Compensation seen in this sense would become a kind of *supplementum iusti pretii*.

Notwithstanding an opinion to the contrary from more than one author,[25] it does not seem that such a claim would have been well-grounded.

[24] In an affirmative way but in general because 'the claim for compensation is autonomous and does require the prior annulment of the contract' R. Tommasini and E. La Rosa, n 21 above, 48.

[25] See C.M. Bianca, *Diritto civile 3. Il contratto* (Milano: Giuffré, 2000), 2, 174 and 664, and M. Lobuono, *Articolo 1439*, in E. Navarretta and A. Orestano eds, *Dei*

The assumption that the law of tort can function as an autonomous solution, corrective of contractual equilibrium, is not persuasive. Firstly, because the rules governing vitiation of consent are not limited to just violation of the principle of good faith, requiring in the meantime both a *quid pluris* and a *quid alii*. Secondly, because tort liability, seriously understood, is a *Jedermann Haftung*, ie the exact opposite of an obligatory relationship between parties. The image of compensation, separate from and not flowing from the remedy of avoidance, not only gives rise to 'the scenario' of a law of tort that invades the space that the law of contract has left 'free': a *responsabilité civile seule*, in the sense of 'lone' as an alternative and not cumulative to avoidance, diminishes the distinction between contractual and tort liability.

Therefore, when an action to avoid a contract is brought, it is inconceivable that there can be compensation under Art 2043 Civil Code, seeking to transform *responsabilité civile* – in accordance with the French notion[26] – into a sort of 'Northwest Passage' that sidesteps the remedy of avoidance as a solution 'against' contract: or, so to speak, a solution which, to counter residual injustice, 'completes' the system. The remedy of avoidance, if there is no irreversible change in the shareholding as by contrast occurred in the present case, is and remains 'exclusive'. It does not have an equivalent in damages. Maintaining, according to an authoritative opinion mirroring the French model,[27] that 'the structure of vitiation of consent' is similar to 'a tort'[28] without doubt eliminates harm but

contratti in generale. Commentario del Codice Civile diretto da E. Gabrielli, IV (Torino: UTET, 2011) 191.

[26] See Y. Lequette, *Responsabilité civile versus vices du consentement*, in Collectif Paris II ed, *Mélanges en l'honneur Marie – Stephane Payet* (Paris: Dalloz, 2011), 363-382. An isolated voice is M. Caffin-Moi, 'Dol dans la formation du contrat: la question delicate du prejudice reparable' *Recueil Dalloz*, 2772 (2012), in particular notes 9 and 10.

[27] The reference is to the well-known idea of R. Sacco, 'Il contratto', in R. Sacco and G. De Nova eds, *Trattato di diritto civile* (Torino: UTET, 2004), I, 620-750. In the same vein, *ex multis*, G. Marini, 'Il contratto annullabile', in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), IV, in A. Gentili ed, *I Rimedi – 1*, 396-638 and G. Afferni, *Il quantum del danno nella responsabilità precontrattuale* (Torino: Giappichelli, 2008), 187-285.

[28] In this sense, see R. Sacco, ibid, 623: and, *ex multis*, V. Roppo, 'Il contratto', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 2011), 758,

at the same time has the effect of obstructing the delicate mechanism of vitiation of consent regulated in a well-balanced manner by the combined provisions of Arts 1441 and 1444 Civil Code. Consequently, unless a case of *dolus incidens* pursuant to Art 1440 Civil Code occurs, the deceived party cannot seek in lieu of avoidance, when this would be 'efficient because working well', a pecuniary remedy in the form of the restitution of the overprice that the deceived party had been tricked into paying. '*Invoquer le dol pour conclure seulement à une reductio de prix*'[29] is not permitted: it is forbidden because, if annulment restores the deceived party to the situation that he was in before the vitiated contract, the sanction is not 'dual'; the remedy in law is just one. Whoever, in the French vein, considers only a *réfaction du contrat* claim, fails to consider that the deceived party complains of harm produced by a (validated) contract which in the meantime he demands be carried out. The logic of Art 1382 *code civil* is not transferable *sic et simpliciter* into the Italian legal system.

Naturally, it is true that the interest in disputing the contract is to be assessed at the moment of the discovery of the deception and not at the time of concluding the contract. For example, if A, because of deception on the part of B, acquires a company that is on the verge of bankruptcy and then because of unexpected turn of events the company recovers it is obvious that A will have no further interest in bringing an action for avoidance. But, that which is no less evident is that, in the example given just now, A will no longer be able to complain that it suffered harm. The unexpected circumstances have in fact cleared that loss which the deception had caused. The pre-contractual unfairness is not relevant if the deceived person does not prove that it has suffered harm.

770, who speaks about alternative remedies chosen by the damaged party. The *deceptus* can 'renounce annulment of the contract even if suitable to be annulled and demand only compensation'.

[29] See A.S. Barthez, n 10 above, 1158 and Cour de Cassation-Chambre civile III 6 June 2012 no 11-15973, *Revue des contrats*, 1180 (2012), Obs T. Genicon. See also Cour de Cassation-Chambre commerciale 23 November 1993 no 92-10284, *Revue trimestrielle de droit civil*, 354 (1995), Obs J. Mestre; Cour de Cassation-Chambre civile I 4 October 1988, *Bulletin civil*, I, 265; Cour de Cassation-Chambre civile I 14 November 1979, *Revue trimestrielle de droit civil*, 763 (1980), Obs Chabas and Cour de Cassation-Chambre commerciale 14 March 1972, *Recueil Dalloz*, 653 (1972), with a note by J. Ghestin.

The same holds true for the purchase of a signed painting by a noted artist that is later revealed as being a forgery if however the reputation of the real artist, ie the forger, has grown to the point of making the purchase worthwhile. 'Here there is no economic loss' apart from saying that the harm suffered by A consists of the lack of purchase of another painting that he could have negotiated with a different gallery owner. But then the argument changes: the deceived party, in this case, will not demand compensation for the disadvantageous condition but quite the contrary for 'the better chance that he missed out on'. His claim for compensation will thus have as its object the negative interest referred to in Art 1338 Civil Code. The choice between the possible solutions, once it is admitted, is indeed to be taken seriously: it cannot be unreasonably limited to the alternative between avoidance of contract and compensation that remedies the inconvenience or prejudicial conditions.[30] The discovery of the fraud, as indicated elsewhere, does not supply any indication as to 'which' hypothetical contract the party would have stipulated in the absence of deception: if the (no longer) vitiated one on better conditions or a different one with a third party.[31] On the level of probability, the two hypotheses 'are equal'.

A claim for mere compensation does not minimally permit '*prèjuger du choix q'aurait fait l'acquéreur 'au moment de la vente*'[32] if there had not been fraud. Holding that the choice not to seek avoidance of the contract influences and restricts the 'amount' of compensable harm, in the sense of uniquely limiting it to that corresponding to '*à la perte d'une chance d'avoir pu contracter à des conditions plus avantageuses*',[33] is a *petitio principii*. If the remedy

[30] But in this sense see, in the controversial judicial French experience, the recent Cour de Cassation-Chambre commerciale 10 July 2012, that is reported in various periodicals. See, *inter alia*, O. Deshayes, n 23 above, 91-97.

[31] See J. Ghestin, n 10 above, 1178. *Contra* Y. Lequette, n 26 above, 376-382.

[32] See J. Ghestin, n 10 above, 1178, who rightly notes one must not confuse '*le choix de conclure ou non un contrat, avec un choix postérieur, purement procédural, entre une action en annulation ou en dommages-intérets*'.

[33] See the discussed Cour de Cassation-Chambre commerciale 10 July 2012, *Recueil Dalloz*, 2772 (2012); *Revue trimestrielle de droit civil*, 725 (2012), Obs Fages, and 732, Obs Jourdain; *La Gazette du Paais*, no 285, 17 (2012), Obs Houtcieff and *Juris-Classeur périodique, édition Générale*, 1151 (2012) with a note by J. Ghestin and Obs of Serinet. But previously Cour de Cassation-Chambre civile I 25 March 2010, *Revue trimestrielle de droit civil*, 322 (2010), Obs Fages.

of compensation is autonomous, there is no contradiction in seeking performance of the voidable contract 'as is' and damages for another contract which by reason of the first contract could not be entered into. Obviously, cumulative damages for both cases is forbidden.

Naturally, the deceived party would need to furnish proof of the lost chance: the deceiving party certainly cannot be made to answer for a commercial risk that the deceived party has knowingly decided to run. But if the deceived party manages to adduce proof that the negotiation for property *x* were aborted because a less lucrative *y* was acquired, the autonomy of the remedy in damages does not nullify the harm consisting of the lost chance assuming that it was real and existed at the time that the voidable contract was stipulated. Therefore, it is loss that is a '*consequence directe de la tromperie*'.[34] The *quantum* will be equal to the difference between the negative interest and the profit which the deceived party draws from the vitiated but existing contract.[35]

V. Compensation as a *double peine*

There remains the case of the deceived party who confirms the adverse contract for non-economic reasons, for example, because the acquired property once belonged to his family: here, in fact, there are grounds which could lead one to claim compensation of the difference.[36] There is nevertheless an obstacle. Whoever confirms lends fresh consent to the deal and in doing so makes an implied cost-benefit trade-off that cannot subsequently and contradictorily be complained of. The law affords legal protection consisting of not 'confirming that contract. *Tertium non datur*.'

[34] See J. Ghestin, n 10 above, 1178 ('*un tel préjudice n'a rien d'indirect, ni d'hypothétique*').

[35] So not a *quantum* that sums the profit from the contract to the whole negative interest.

[36] The example is suggested by G. D'Amico, 'La responsabilità precontrattuale', in V. Roppo ed, *Trattato del contratto,* n 27 above, 1033, note 72. The circumstance comes back to the Principles of European Contract Law (Arts 4: 114 and 4: 117, § 2) because if a party has the right to avoid a contract but does not exercise its right to do so or has lost its right for affirmation, it may recover damages limited to the loss caused to it by the fraud.

Not only.

On closer examination, the deceived party – according to Art 1439 Civil Code – already has a *facultas eligendi*: he may choose, as has been stated, to seek annulment or to confirm the contract. Permitting compensation *extra ordinem*, the solutions become 'three'. In any event judicial correction is not limited to simply eliminating the defect with a view to achieving a '*reequilibrage èconomique du contrat purgè*'.[37] There is a second effect: the deceiving party remains party to a revised contract which originally he would never have agreed on at the 'new conditions'. Therefore this correction is in reality a 'sanction' which rewards the deceived party by placing him in a better situation to that which he would have been in if the fraud had not occurred. The judicial correction – it is plain – binds *ex post* the deceiving party, making him 'party' to a contract which in general he 'would not have chosen' to conclude. And if this is indeed the case, one must doubt that the historical intention of the Italian legislation was to inflict such punishment on a party already facing an action for avoidance while at the same time have him pay damages. Such compensation, when annulment may be possible, is in fact closely related to an action for reduction of the price: but a *quanti minoris*, as explained elsewhere,[38] is extraneous to the whole subject of vitiation of consent.

Stressing that a tripartition of solutions assures the empiric advantage of '*diversifier les sanctions du dol*',[39] depicting less rigid models of protection or ones that are '*plus pragmatiques*' than those in the civil code[40] is not convincing: for the simple reason that, if this is not a question of *dolus incidens*, for the deceiving party the risk is the annulment of contract not of a '*double peine*',[41] which would be the case if compensation were to coexist with the performance of the contract. The result of compensation being autonomous would be Art 1440 Civil Code that cannibalises Art 1439 Civil Code or that

[37] See A.S. Barthez, n 10 above, 1158.

[38] For a wide demonstration see T. Genicon, Obs Cour de Cassation-Chambre civile III 6 June 2012, *Revue des contrats*, 1180 (2012).

[39] See A.S. Barthez, n 10 above, 1161.

[40] If they are not interpreted in an evolutive way.

[41] According to the interpretation, by contrast, supported by A.S. Barthez, n 10 above.

competes with it. And this would not seem permissible, not even in the case in which the deception takes the form of criminal conduct. Notwithstanding all attempts to interpret it differently, Art 1440 Civil Code was established and remains an 'exceptional norm':[42] a *dolus causam dans*, unless the law provides otherwise, is a ground for avoidance and not for a discretionary award of damages. That which Art 1440 Civil Code codifies is still a *fictio iuris*. At the same time, the potestative nature of confirmation of contract implies that the deceiving party must accept: but as regards 'how it was' and not what it 'becomes' judicially.

Ergo, the replacement of avoidance with damages unless an express provision of law or a restitutory failure, is not up to the discretion of the courts.

VI. Combination of remedies and express statutory provisions: scholarly misconceptions

So, there are no remedies in tort law against[43] the vitiation of consent or, to be more precise, that go beyond it. It would be wrong to think, as some do,[44] of a scheme in which avoiding the contract addresses the lack of consent while damages address the illegal conduct of the deceiving party. A deceived party who chooses an *ad nutum* remedy in place of another is in reality speculating: and this potestative assessment finds no support at all under Art 1441 Civil Code *et seq*. In addition, differentiating the reasons that may induce the deceived party to prefer damages instead of avoidance, so as to distinguish between appreciable and undeserving reasons, would imply that the framework of remedies be calibrated on a too uncertain and case-by-case oscillating perspective.

We could give an example of a deceived party who has bought

[42] See L. Mengoni, ' "Metus causam dans" e "metus incidens" ' *Rivista del diritto commerciale*, I, 27-30 (1952), and then G. D'Amico, *Regole di validità e principio di correttezza nella formazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 1996), 114-353.

[43] In such a sense, on the contrary, Y. Lequette, n 26 above, 377, as the title itself suggests.

[44] See, for example, R. Tommasini and E. La Rosa, n 21 above, 47-260.

goods for 200, goods that would be worth 210 if they actually had the promised qualities but whose real value is 150. If, under Art 1440 Civil Code, we consider that the compensable amount is the difference between the estimated and real value, the sum to be paid is 60. It means that it's more economic for the deceived party to apply this norm because under Art 1439 Civil Code the deceived party would receive just a refund.

In this way, an independent action for damages is more convenient only if the action for avoidance is subject to more stringent terms. However, this would not appear to be possible because if a contract is voidable under Art 1442, para 2, and Art 2947 Civil Code, in the same way, it is not possible that an action for damages bars one for avoidance. From a different prospective, following Supreme Court judgment no 27648/2011,[45] fraud, as unfairness *in contrahendo*, gives rise to a contractual action under Art 1337 Civil Code. But, is it possible that, if the action for avoidance is barred, a deceived party could invoke an iniquity within ten years?

From outside the realm of contract, on the other hand, arguing that Art 30 para 1, of the Italian Administrative Procedure Code (CPA) embodies a rule that states that a claim for damages is separate from demolition is a partial and non conclusive assertion. This for the simple reason that, while para 1 frees, para 3 grants the administrative court the power to determine whether the failure to challenge has affected the amount of damage. So, the action could be unfounded whenever the court prudentially considers that the failure to seek annulment has affected the occurrence or aggravation of the harm. So, in detail:

Firstly: it is not an issue regarding a full autonomy.

Secondly: the claim for damages is usually understood as contrary to good faith if there is evidence that a timely application for avoidance would have excluded or reduced the damage.[46]

[45] See, for all, C. Castronovo, 'La Cassazione supera se stessa e rivede la responsabilità precontrattuale' *Europa e diritto privato*, 1227-1246 (2012) and C. Scognamiglio, 'Tutela dell'affidamento, violazione dell'obbligo di buona fede e natura della responsabilità precontrattuale' *Responsabilità civile e previdenza*, 1949-1959 (2012).

[46] There is a lot of *dicta* to this effect in various decisions. See Tribunale Amministrativo Regionale del Lazio 2 October 2013 no 8533, *Foro amministrativo TAR*, 3059 (2013). For example, Tribunale Amministrativo Regionale della Sicilia 11

Thirdly: in the rare cases which are not hindered by Art 30, para 3, the dual track of protection is set out by law.

Fourthly: significantly, the Supreme Court preliminary decision recalls Art 121 CPA for the ineffectiveness of the contract in cases of serious violations (ll. A – d). The ineffectiveness postulates an administrative court annulling the assignment: if it were so, then a prior annulment of the administrative act implies an Art 121 notwithstanding the Art 30, para 1. The autonomy of claims for damages, in the possible alternative of a specific performance, indeed should result in the right to entry of the business plaintiff in the contract spuriously assigned, without a preliminary action against the assignment. But compensation in the specific performance against the contract is not provided *per tabulas*. So, especially after the *en banc* decision of the Supreme Administrative Court ('Consiglio di Stato'),[47] that parallelism is out of date. Or, rather, it can be misleading.

Finally, considering the other issues that should lend support to the notion that compensation is separate, it is possible to consider the following:

a) Those who invoke the provisions of Art 2377, para 4, Civil Code regarding the legitimacy of shareholders to seek damages caused by a shareholders' decision not complying with law or bylaws seem to ignore the fact that the shareholders have no standing to bring an action seeking to annul the decision because they do not hold a set minimum of voting shares. Therefore, there is no cumulation of remedies. And the notion of damages as an alternative to returning to the original position is reproduced in Art 2504-*quater* Civil Code which provides that it is not possible to challenge a merger after it is

April 2013 no 1021 ibid, 1399 (2013); Tribunale Amministrativo Regionale della Puglia 6 February 2013 no 159 ibid, 648 (2013); Tribunale Amministrativo Regionale del Lazio 11 January 2013 no 247 ibid, 109 (2013) and Tribunale Amministrativo Regionale della Puglia 16 July 2012 no 1450 ibid, 2509 (2012). See S. Pagliantini, 'Tutela per equivalente di un contratto annullabile e principio di effettività: appunti per uno studio' *Le nuove leggi civili commentate*, II, 645-670 (2014).

[47] See Consiglio di Stato 23 March 2011 no 3, *Foro amministrativo Consiglio di Stato*, 826 (2011). Subsequently, but cited here only by way of example, Consiglio di Stato 31 October 2012 no 5556, *Foro amministrativo Consiglio di Stato*, 2655 (2012); Consiglio di Stato IV 30 July 2012 no 4309 ibid, 7-8, 1901 (2012) and Consiglio di Stato 2 November 2011 no 5837, available at www.dejure.it.

registered in the Company Register. This rule is then reproduced in Arts 2500-*bis* (on transformation of companies), 2504-*novies* (on demergers), 2379-*ter*, para 3 (on resolutions regarding the increase and reduction of a company's capital and bond issues) and 2434-*bis* (on resolutions approving financial statements) Civil Code.[48]

b) Those who cite damages in the case of a wrongful termination of an employment contract overlook the fact that caselaw allows claims for compensation when it is not possible to overturn the dismissal.[49] Compensation is a substitutive remedy whenever an action for reinstatement under Art 18 of the Workers' Statute is precluded. In fact, damages are assessed on the basis of the usual criteria and do not correspond to unpaid wages. Therefore, there is no 'competition' between remedies.

c) Finally, those who emphasise some principles arising from soft law ignore that Art 8.102 Principles of European Contract Law as well as Art 3.102 Draft Common Frame of Reference provide for a limited cumulation of remedies. Cumulation is in fact provided for only when it involves the *exceptio inadimpleti contractus* and the cancellation of contract, or cancellation and damages. Similar rules are provided for also by Art 29 Common European Sales Law, which states that damages do not preclude the claim for avoiding the contract grounded on fraud. However, it is not clear whether this remedy of damages is an alternative or, as it seems more likely, complementary to the remedy of avoidance. Therefore, the picture is far from clear.

In conclusion, duress as well as mistake do not have that dual nature that is typical of fraud. Therefore it is not correct to consider a claim for damages as a priority in the cases of Art 1429, subparas 1 and 3, Civil Code.[50] The *choix*, as understood by French legal scholars, goes beyond the scope of the spontaneous mistake, while

[48] See Arts 2388, 2409-*quater*, 2416 and 2447-*octies* Civil Code, also considering the reference therein contained to Art 2377, para 3, Civil Code.

[49] See Corte di Cassazione 10 January 2007 no 245, *Repertorio del Foro italiano*, v. Lavoro (rapporto), 1359 (2007), and Corte di Cassazione 10 March 2010 no 5804, ibid (2010). *Contra*, for forfeiture that produces comprehensive foreclosure, Corte di Cassazione 3 March 2010 no 5107, *Giustizia civile Massimario*, 3, 316 (2010) and, earlier, Corte di Cassazione 4 May 2009 no 10235, *Giustizia civile Massimario*, 5, 713 (2009).

[50] M. Barcellona, *Responsabilità extracontrattuale e vizi della volontà contrattuale,* 16-48, available at www.judicium.it.

fraud has a particular physiognomy. At the same time, if a person has a claim, his freedom does not end deciding whether to act or not but also includes the choice of which remedy to seek.[51]

But cumulation of remedies must be stated by an express provision of law, as is the case with Art 1453 or Art 2377, para 8, Civil Code. The latter rule is concerned with damages despite the fact that the unlawful shareholders' decision being challenged has been replaced, before trial, by another one complying with law and bylaws. The *choix* or 'discrepancy'[52] between no judgment decreeing avoidance and a claim for damages should be expressly provided for by law. And in the field of vitiation of consent, this autonomy does not seem to have been contemplated. When the deception used by one of the parties in such that, without it, the other party would not have concluded the contract, avoidance is certainly to be considered as the overriding remedy unless restitution is impossible.

Under Art 1441 Civil Code *et seq* there is no other balance struck between specific performance and damages. If restitution is possible, avoidance of the contract shapes the claim of the deceived party by allowing damages in the form provided for in Art 1338 Civil Code.

Summing up, the schedule of protection appears to be as follows: subsidiarity of compensation if annulment is not futile. So 'subsidiarity' with the variable compensation as a surrogate infungible against a loss otherwise unavoidable. A compensation allowed to make good a virtuality of protection. Significantly so regarding the legitimacy of the shareholders to seek damages when under Art 2377 Civil Code, they may bring an action for annulment. It highlights the best doctrine and the Courts do not think otherwise.[53]

[51] Corte di Cassazione 23 December 2008 no 30254, *Foro italiano*, I, 2721 (2009), with comment by I. Pagni, 'La responsabilità della pubblica amministrazione e l'assetto dei rapporti tra tutela specifica e tutela risarcitoria dopo l'intervento delle sezioni unite della Cassazione'; I. Pagni, *Tutela specifica e per equivalente. Situazioni soggettive e rimedi nelle dinamiche dell'impresa, del mercato, del rapporto di lavoro e dell'attività amministrativa* (Milano: Giuffré, 2004), *passim*.

[52] See I. Pagni, 'La responsabilità della pubblica amministrazione' n 51 above, 2724.

[53] See F. D'Alessandro, 'Il conflitto di interessi nei rapporti tra socio e società' *Giurisprudenza commerciale*, I, 11-13 (2007) and above all F. Guerrera, *La*

VII. The quantum of damages: ideas in progress

It's time to go back to the decision.

Naturally, if the logic of damages as a replacement for a futile remedy of avoidance had prevailed over the notion of an atypical tort, then Art 1440 Civil Code would have had to be applied. In that case, considering that the contract would not be removed, the *quantum* would be equal to the different economic terms that would have been freely negotiated without fraud. In fact, the compensation that 'corrects' is equivalent to compensation that 'makes good' harm that cannot be eliminated by restitution *in integrum*. When fraud causes a higher price, then compensation is designed to restore the balance between the respective contractual obligations that the fraud had upset.

According to the Supreme Court the scheme is different: the out-of-court settlement between Cir and Fininvest is valid and the harm suffered by Cir is to be considered as a consequence of the crime. There was an unlawful judgement due to the corruption (*ex corrupto*), thus weakening Cir's bargaining power and meaning that the latter is entitled to an amount corresponding to the assumed loss of profit. According to the Supreme Court, like in the previous Court of Appeal of Milan decision, if the corrupt judgment had not occurred, the disadvantageous settlement would not have been entered into but rather another agreement with a different balance would most likely have been reached.

Thus, the setting aside of the arbitration award is to be considered as the cause of Cir's weakened contractual power as the settlement offered by Fininvest in 1990 demonstrates. That proposal, which was much more advantageous for Cir, was made when the decision of the Court of Appeal of Rome had not yet been issued and was considered by the Supreme Court as being tantamount to a lost chance for Cir. As a consequence, the Supreme Court viewed the settlement proposed by Fininvest in 1990 as evidence of the loss suffered and a way to calculate the damages payable in respect thereof.[54]

responsabilità "deliberativa" nelle società di capitali (Torino: Giappichelli, 2004), 239-473. See also the fundamental Tribunale di Catania 10 August 2007, *Rivista del diritto commerciale*, II, 17 (2009).

[54] See A. Nicita, 'Scenario controfattuale e valutazione economica del danno: il caso CIR/Fininvest' *Danno e responsabilità*, 1100-1103 (2011).

So, this aspect constitutes the bulk of the problem, as it is highly controversial to determine the amount that should actually be considered as stemming from Cir's weaker bargaining power: who is to say that from among all the possible settlements, the one freely negotiated by Cir would have exactly reproduced the terms of the above mentioned settlement proposed in 1990. In this respect, it is possible to envisage various scenarios.

The first scenario could be the following. If the verdict of the Court of Appeal had been favourable to Cir, Fininvest would have certainly challenged the decision before the Supreme Court. In such a case, it is unlikely that a settlement identical to the one proposed in 1990 would have been entered into. In fact, Fininvest's appeal before the Supreme Court, due to the duration of the proceedings, would have increased the uncertainty that had already reduced the market value of the Mondadori shares. Accordingly, the above mentioned appeal could be considered as an *atout* far from being trivial. It is possible that Fininvest could well have entered into a settlement for a lower figure than the one budgeted in 1990.

And yet even that is not sure because the terms of the issue could be viewed from reverse perspective. In this regard one could imagine a second scenario where a lawful judgment would have strengthened the expectations of Cir and weakened the bargaining power of Fininvest. The Supreme Court appeal filed by Fininvest would have served exclusively to prevent the terms demanded by Cir being more disadvantageous than the ones offered in 1990. With this in mind, it is possible to argue that the appeal before the Supreme Court would have served solely to avoid a worse outcome than in 1990.

Therefore, the Supreme Court probably considered the settlement proposed by Fininvest in 1990 as the best balance between the different variables, each of which actually presented problems in terms of proof. Besides, when assessing profits in financial stocks, the loss lies not in the 'the *habere* but the *agere,* not ownership but activity'.[55] In other words, the loss is to be considered as uncertain, since the wealth that is lost is, as an intangible, uncertain itself.

[55] See M. Costantino, 'Danno ingiusto agli enti pubblici territoriali', in M. Costantino ed, *Rischi temuti, danni attesi, tutela privata*, (Milano: Giuffré, 2002), 219.

Therefore, if the kind of wealth changes, it follows that the techniques to calculate the loss will likewise change.

The debate, however, is still only in its infancy.

Annotation

One hundred eighty-five pages of reasoning are many, perhaps too many. Notoriously however, according to Wittgenstein, 'the individual case turns out to be unimportant, but the possibility of each individual case discloses something about the essence of the world'.[56] And so, at least one quality this decision has: rediscovery of the criterion that governs the competing remedies of specific performance and a claim for damages when a contract is voidable. Or valid but unpleasant because incorrect.[57] Avoidance for fraud can be addressed in terms of *atout* for an equitable modification of the contract:[58] but only if the threat is not virtual, in which case a 'different rule' is required.

[56] So L. Wittgenstein, *Tractatus logico – philosophicus* (London: Routledge, 1961), 62.

[57] See P. Femia, n 11 above, 460-755.

[58] See R. Pardolesi, 'Tutela specifica e tutela per equivalente nella prospettiva dell'analisi economica del diritto' *Quadrimestre*, 75 (1988).