Essays

On Abuse of Rights and Judicial Creativity

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Abstract

The abuse of rights doctrine, which has received renewed attention in the judicial and scholarly debates, raises the fundamental tension between the formal attribution of a right and the concrete exercise of that right. In this article, the Author argues that the abuse of rights paradigm should not be reduced to asking only whether conduct is legal or illegal. That divide is simplistic, because *any* legal entitlement may be used as a screen to conceal arbitrary ('abusive') behavior, thus unreasonably impairing others' legitimate expectations. Moving beyond the distinction between common-law and civil-law traditions, the Author vigorously defends the autonomy of judges, highlighting that the art of interpreting the law always entails a certain degree of creativity, to be exercised with the utmost rigor.

I. Abuse of Right: A Paradigm in the Process of Jurisdictionalization of the Law. Beyond the 'Formal Validity' Criterion, in Search of the 'Legality of the Case'. Effects of an Anti-Formalistic Methodology. The Courts' Effort in Placing a New Doctrine in the Framework of Continuity

The abuse of rights doctrine, which has recently returned to the judicial and scholarly spotlight,[1] is a paradigm (or at least a symptom) of the growing

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[1] This renewed attention is mainly due to the so-called Renault case (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'), which provoked a fracture inside the Supreme Court, as the judge who authored the final decision is different from the judge rapporteur. The judgment has stirred up extensive scholarly debate: in particular, see commentaries by C.A. Nigro, 'Brevi note in tema di abuso del diritto (anche per un tentativo di emancipazione dalla nozione di buona fede)' *Giustizia civile*, I, 2547 (2010); F. Macario, 'Recesso *ad nutum* e valutazione di abusività nei contratti fra imprese: spunti da una recente sentenza della Cassazione' *Corriere giuridico*, 1577 (2009); C. Romeo, 'Recesso *ad nutum* e abuso del diritto' *Contratti*, 1009 (2009); A. Palmieri and R. Pardolesi, 'Della serie 'a volte ritornano': l'abuso del diritto alla riscossa' *Foro italiano*, I, 85 (2010); M. Barcellona, 'Buona fede e abuso del diritto di recesso *ad nutum* tra autonomia privata e sindacato giurisdizionale' *Giurisprudenza commerciale*, II, 295 (2011); F. Salerno, 'Abuso del diritto, buona fede, proporzionalità: i limiti del diritto di recesso in un esempio di *jus dicere* per principi' *Giurisprudenza italiana*, 809

jurisdictionalization of today's legal environment.[2] That development has shifted legal analysis from the origin of norms to their actual use as a function of what has been termed the 'legality of the case'.[3] Because the abuse of rights doctrine focuses on the application of norms to facts, it can blend facts and norms to foster ethics and shared values in a way that would be impossible if one were to focus only on the norms in the abstract. In the crucible of decision-making, once facts and norms are blended together it is impossible to restore the precise identities of the original elements as they were before the merger.

It has been noted, quite appropriately, that the wavering attention towards the 'abuse of rights' formula – a flexible tool enabling lawyers to introduce equitable instances into a system made of formally posited prescriptions – is linked to periods in history characterized by a widespread quest for anti-formalistic methodological approaches.[4] The argumentative process whereby, through interpretation, the deontic status of a conduct is reversed (eg, by limiting the exercise of a formally allowed freedom) is the clear byproduct of an anti-formalistic methodology. Once rules are considered inherently limited by principles that legitimize their application to concrete problems, the law breaks the crust of formalism and meets reality, despite the fact that those principles, at certain times in history (especially the ones we live in), may appear to be conflicting, immeasurable, indefinite.[5]

(2010); A. Gentili, 'Abuso del diritto e uso dell'argomentazione' *Responsabilità civile e previdenza*, 354 (2010); M. Orlandi, 'Contro l'abuso del diritto' *Rivista di diritto civile*, 147 (2010); M.R. Maugeri, 'Concessione di vendita, recesso e abuso del diritto', C. Restivo, 'Abuso del diritto e autonomia privata. Considerazioni critiche su una sentenza eterodossa', G. Vettori, 'L'abuso del diritto', in S. Pagliantini ed, *Abuso del diritto e buona fede nei contratti* (Torino: Giappichelli, 2010); F. Galgano, 'Qui suo iure abutitur neminem laedit?' *Contratto e impresa*, 311 (2011); P. Rescigno, ' 'Forme' singolari di esercizio dell'autonomia collettiva (i concessionari italiani della Renault)' *Contratto e impresa*, 589 (2011); F. Addis, 'Sull'*excursus* giurisprudenziale del 'caso Renault' ' *Obbligazioni e contratti*, 245 (2012). It is noteworthy that several monographs on this topic were published right before the Renault case: see M. Messina, *L'abuso del diritto* (Napoli: Edizioni Scientifiche Italiane, 2004); M.P. Martines, *Teoria e prassi sull'abuso del diritto* (Padova: Cedam, 2006); C. Restivo, *Contributo ad una teoria dell'abuso del diritto* (Milano: Giuffrè, 2007).

[2] On the general theory implications, see N. Lipari, 'I civilisti e la certezza del diritto' *Rivista di diritto e procedura civile*, 1115 (2015). Some commentators have doubted the jurisdictionalization of the law. See, eg, C. Castronovo, *Eclissi del diritto civile* (Milano: Giuffrè, 2015), 87, speaking of 'creative courts and submissive scholars', and maintaining that 'values such as solidarity, substantial equality, social function, protection of the human being reveal themselves as deforming mirrors of otherwise uncomplicated and inherently coherent private law concepts'. More recently, see L. Ferrajoli, 'Contro la giurisprudenza creativa' *Questione giustizia*, 2016, who (§ 6) contests any form of equitable assessment assuming that 'what is evaluated, understood and judged is not the principle, but the individual and specific features of the case under scrutiny'.

[3] See F. Viola 'La legalità del caso' *La Corte costituzionale nella costruzione dell'ordinamento attuale*, I, *Principi fondamentali*, Proceedings of the 2nd SISDiC National Congress, Capri 18-20 April 2006 (Napoli: Edizioni Scientifiche Italiane, 2007), 315.

[4] G. Pino, 'Il diritto e il suo rovescio. Appunti sulla dottrina dell'abuso del diritto' *Rivista critica del diritto privato*, 26 (2004). See G. Fransoni, 'Abuso ed elusione del diritto' *Libro dell'anno del diritto 2015* (Roma: Treccani, 2015), 407.

[5] Obviously, such an approach may give rise to doubts and criticism. See, for all, A. Gentili,

As a result, abuse of rights should be studied as the paradigm of lawyerly reflection as practical science. And it should not be surprising that courts, even if immersed in a wholly different context, will keep on construing their decisions on the basis of well-established paradigms. If we look at the reasoning in the Renault case, for example, we can appreciate the effort made by the Supreme Court in supplanting what the Court itself called the 'formal attributive frame of a right', when it subjected an apparently clear contract clause to strict constitutional scrutiny. As always happens when a revolution of ideas occurs, in order for an apparently subversive outcome to be more easily accepted, there is a tendency to explain it as the natural development of deep-rooted and shared concepts. In the Renault case, the Court tried to explain and justify an unprecedented conclusion by making it appear to be the inevitable consequence of a coherent stream of previous decisions.[6] Such an approach is not new at all. Indeed, the more a judgment is placed within a conventional frame of argument, the more likely it will gain acceptance. The Court attempted to follow this pattern in the Meroni case, which endorsed the idea that a creditor's expectation could be impaired by a third party, and not only by its debtor. The Court did the same again when it finally concluded that the infringement of a 'legitimate interest' – and not only that of a 'subjective right' – could constitute the basis for a damages action. In both instances, the Supreme Court stressed the signs of continuity instead of those signaling a sweeping change. The legal system never takes sudden diversions; it always evolves along a stream of continuity, which needs to be carefully explained.

II. The Essential Role of Courts, Beyond the Common Law/Civil Law Divide. From *Jus Positum* to *Jus in Fieri*: The Paradigmatic Role of the Abuse of Rights Doctrine. Pointlessness of Seeking a Formal Legislative Ban on Abusive Behaviors

What we need is a profound reconsideration (without any fear) of the role of judges in applying the law.[7] One possibility is to reject the outdated

'Il diritto come discorso', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 2013), 371 who found the abuse of rights theory 'inconclusive' .

[6] See the formally impeccable remarks by F. Addis, *Sull'*excursus *giurisprudenziale del 'caso Renault'* n 1 above, 245.

[7] A. Gambaro, 'Abuso del diritto, II, Diritto comparato e straniero' *Enciclopedia giuridica* (Roma: Treccani 1988), I, 2, highlights that the skepticism towards the abuse of rights doctrine reflects the concern that judges not be eventually vested with too much power. Moreover, E. Navarretta, 'Il diritto *non iure* e l'abuso del diritto', in N. Lipari and P. Rescigno eds, *Diritto civile*, IV, *Attuazione e tutela dei diritti*, III, *La responsabilità e il danno* (Milano: Giuffrè, 2009), 260, rightly observes that the power entrusted to courts, according to the abuse of rights doctrine, should not be considered of an extra-juridical nature, because it is the essence of decision-making to assess the conduct 'through evaluative parameters capable of intercepting the axiological strength of the sets of interests at stake'. Otherwise, it has no less rightly been noted

presumption that the absence of a theory on abuse of rights under the common law (as well as classical Roman law) is explained by the very nature of the interpretative tools used in that system,[8] whereas in other systems black-letter law is what severely circumscribes the horizon of relevant sources. The abuse of rights doctrine clarifies that the 'subsumption' process, the merely logical application of a given norm, is no longer, in contemporary legal thinking, the most suitable method for detecting the applicable law.[9] In checking whether a claim is well-founded or conduct is lawful, the judge allocates rights and duties, and does it by looking not at pre-established, abstract models of subjective rights, but at the peculiar features of the case.[10]

It is widely accepted, witnessing a substantial move away from legal positivism, that the abuse of rights doctrine exists at the intersection of formal legal equality and the interpreter's power to question it:[11] a sort of 'super-legality concurring and dominating formal legitimacy, if not a return to natural law'.[12]

that 'the abuse of rights is by-and-large the product of the operation of (different) intertwined legal sources within a single system': thus R. Sacco, 'L'esercizio e l'abuso del diritto', in Id, *Trattato di diritto civile, La parte generale del diritto civile, Il diritto soggettivo* (Torino: Utet, 2001), II, 320. For the idea that the power to sanction an abuse was amongst the judge's prerogatives see P. Rescigno, 'L'abuso del diritto' *Rivista di diritto civile*, 213 (1965). In my opinion, the problem's scope should not be restrained to the abuse of rights. In this respect, always vivid is the warning by L. Mengoni, *Ermeneutica e dogmatica giuridica* (Milano: Giuffrè, 1996), 89, according to whom it is necessary to avoid that, in applying the law, there would 'remain irrational traces of non-cognitive elements originating from the judge's pre-comprehension'. I cannot tackle here the issue of the intimate connection between the new role of judges and the function of scholarship as a source of law: I can only refer to N. Lipari, 'Dottrina e giurisprudenza quali fonti integrate del diritto' *Rivista trimestrale del diritto e procedura civile*, 1 (2017). For a significant analysis see P.G. Monateri, 'Abuso del diritto e simmetria della proprietà (un saggio di Comparative Law and Economics)', in G. Furgiuele ed, *L'abuso del diritto. Diritto privato 1997* (Padova: Cedam, 1998), 93.

[8] See A. Gambaro, *Abuso del diritto* n 7 above, 2. For an account of the reasons which led the Italian legislature not to codify a clear-cut ban on abuse of rights, see V. Giorgianni, *L'abuso del diritto nella teoria della norma giuridica* (Milano: Giuffrè, 1963), 5. See S. Pugliatti, 'Libro della proprietà', in M. D'Amelio ed, *Commentario al codice civile* (Firenze: Sansoni, 1942), 140, on the pointlessness of a specific rule prohibiting abuse of rights.

[9] See A. Kaufmann, 'Il ruolo dell'abduzione nel procedimento di individuazione del diritto' *Ars interpretandi*, 321 (2001).

[10] Likewise, see A. D'Angelo, 'La buona fede', in M. Bessone, *Trattato di diritto privato*, XIII, *Il contratto in generale* (Torino: Giappichelli, 2004), IV, 63. See also M. Barcellona, 'L'abuso del diritto: dalla funzione sociale alla regolazione teoricamente orientata del traffico giuridico' *Rivista di diritto civile*, 487 and fn 56 (2014); F. Piraino, *La buona fede in senso oggettivo* (Torino: Giappichelli, 2015), 362; G. Meruzzi, *L'*exceptio doli *dal diritto civile al diritto commerciale* (Padova: Cedam, 2005), 349; T. Dalla Massara, *Dal dolo generale alle moderne teorie sull'abuso del diritto*, Presentation at the conference on *L'abuso del diritto*, Brescia University 26-27 June 2015.

[11] See P. Rescigno, *L'abuso del diritto* (Bologna: il Mulino, 1998), 129 and 134.

[12] Thus P. Rescigno, n 11 above, 45. See M. Rotondi, 'L'abuso del diritto' *Rivista di diritto civile*, 269 (1923); S. Riccobono, 'L'influsso del cristianesimo sul diritto romano', in Id et al, *Atti del congresso internazionale di diritto romano* (1933) (Pavia: Prem. tipografia successori F.lli Fusi, 1935), II, 61; F. Calasso, *Medioevo del diritto. Le fonti* (Milano: Giuffrè, 1954), I, 324; G. Fassò, 'Dio e la natura presso i decretisti e i glossatori' *Il diritto ecclesiastico*, 138 (1956); U.

The abuse of rights doctrine frees the judge (who must always start from the *jus positum* and build on it) from the pretentious idea that he is subject to an unalterable, pre-established meaning of a precept.

Our legal system has endured a profound transformation (actually, a nebulization process), as its sources have increased in number and complexity. Such a transformation is furthered through the constitutionalization of hermeneutics, which undoubtedly puts the judge at the center of the stage. All this has facilitated the emergence of doctrines such as the abuse of rights. The criteria utilized by judges in filling the 'spread between strict law and real law'[13] need to be acceptable both in theoretical and in social terms, thus showing one of the essential features of contemporary legal thinking: a *jus* constantly *in fieri*, not restrained by the formalities of a single prescription.

The role of the interpreter being necessarily linked to a plurality of factors, it is absolutely irrelevant whether the law explicitly prohibits abuse of rights. This is why I deem unimportant, except for its symbolic value, the fact that the abuse of right doctrine has been formally recognized by Art 54 of the Charter of Fundamental Rights of the European Union.[14] The abuse of rights principle,

Gualazzini, 'Abuso del diritto, diritto intermedio' *Enciclopedia del diritto* (Milano: Giuffrè 1958), I, 163. As to the relationship between law and ethics, see G. Pino, *Il diritto e il suo rovescio* n 4 above, 45.

[13] Thus A. Gentili, 'Abuso del diritto, giurisprudenza tributaria e categorie civilistiche' *Ianus*, 10 (2009). See R. Sacco, n 7 above, 310, employing the 'de-qualification' criterion. Two opposite ways of conceiving the law are here in conflict. Those who reject the idea that an abuse of rights may actually occur, consider the phrase an 'oxymoron' (M. Orlandi, 'Contro l'abuso del diritto', in S. Pagliantini ed, *Abuso del diritto e buona fede nei contratti* n 1 above, 99). On the other side, those who believe that any prescriptive norm can be understood solely in connection with the principles, maintain that the formal attribution of a right should never be considered conclusive, as it is yet to be ascertained whether its exercise is in fact consistent with the principles governing the overall network of relevant relationships. Though referred to a different historical context, see P. Rescigno, *L'abuso del diritto* n 11 above, 129, highlighting that the abuse of rights doctrine brings about a reaction against the 'mounting de-humanization of legal relationships'. Such a need has become even more evident today. Lawyers would give up their fundamental mandate if, in this very moment of great inequalities and dramatic conflicts, they confined themselves, in the name of strict formalism, to the mere ratification of decisions taken elsewhere on the grounds of power relations. The positivistic attribution of a right is always a starting point in view of the realization of an interest that inevitably implies a plurality of subjects beyond the one who, of that right, is identified as the holder. In favor of a 'legislation by principles', see S. Rodotà, 'Ideologie e tecniche della riforma del diritto civile' *Rivista del diritto commerciale*, 83 (1967).

[14] Art 54 (whose text is basically symmetrical to that of Art 17 of The European Convention on Human Rights, and is recalled today by Art 1 of the EU Treaty, as amended by the Lisbon Treaty, ratified in Italy through legge 2 August 2008 no 138) reads as follows: 'Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein'. It is hard to imagine that a court, called on to balance a conflict of such kind, will resort to different argumentative techniques based on whether it is has to apply this very provision or another. In favor of a differentiated approach, justifying a different interpretive methodology at the European level, see F. Galgano, 'Qui suo iure abutitur neminem laedit' n 1 above, 319. Trenchant R. Sacco, n 7 above, 317: 'in

inevitably projected into reality, evades all attempts of formalization.[15] From this point of view, it makes no difference whether the abuse is sanctioned by a legislative text,[16] because – as correctly noted – the abuse of rights doctrine mirrors 'the very history of the law trying to measure itself (…) as a whole of 'reasons' that coexist within a system'.[17] Taking the legal system as a whole, it is unavoidable that the concrete exercise of a formally attributed right might reveal itself to be incompatible with the fundamental value for the fulfillment of which that right was in the first place granted and, hence, ensured legal protection.

III. Difficulties in Reducing the Abuse of Rights Doctrine to an Abstract Scheme. The Foundative Nature of Argumentation. The Inevitability of Judicial Creativity: A Glimpse on Gadamer's Theory on the Creative Role of Interpretation in Perfecting the Law. Judicial Creativity and Due Process (Art 101 Italian Constitution). Meanings of the 'Law-in-Action'

The abuse of rights doctrine confronts a fundamental tension between the formal attribution of a right and the concrete exercise thereof.[18] It is thus based

order for the abuse of rights doctrine to gain a stable place within the legal system, there is no need for legislative action'. On the overall problem in the European context, see F. Losurdo, *Il divieto dell'abuso del diritto nell'ordinamento europeo* (Torino: Giappichelli, 2011), 107, 123; M. Pandimiglio, 'L'abuso del diritto nei trattati di Nizza e Lisbona' *Contratto e impresa*, 1076 (2011); G. Alpa, 'Appunti sul divieto dell'abuso del diritto in ambito europeo e sui suoi riflessi negli ordinamenti degli Stati Membri' *Contratto e impresa*, 245 (2015). On the EU Court of Justice's case law, see N. Lettieri et al, *L'abuso del diritto nel dialogo tra corti nazionali ed internazionali* (Napoli: Edizioni Scientifiche Italiane, 2014), 62. For a comparative outlook, see A. Las Casas, 'Tratti essenziali del modello dell'abuso del diritto nei sistemi giuridici europei e nell'ordinamento comunitario', available at https://tinyurl.com/yad4kxfy (last visited 15 June 2017).

[15] See M. Rotondi, *L'abuso del diritto* n 12 above, 116 and 207, describing the abuse of rights primarily as a 'sociological phenomenon', not a properly legal one. Different arguments but same outcomes in D. Messinetti, 'Abuso del diritto' *Enciclopedia del diritto* (Milano: Giuffrè, 1998), Agg II, 19.

[16] A growing number of national jurisdictions are recognizing by statute the abuse of rights doctrine: Germany (§ 226 BGB), Portugal (Art 334 Civil Code), Switzerland (Art 2 Civil Code), Greece (Art 281 Civil Code and Art 25, § 3, of the 1975 Constitution), The Netherlands (Art 13 Civil Code), Spain (Art 7 Código Civil: Título Preliminar). Generally, see M. Gestri, *Abuso del diritto e frode alla legge nell'ordinamento comunitario* (Milano: Giuffrè, 2003), 24; G. Vettori, 'L'abuso del diritto. *Distingue frequenter*' *Obbligazioni e contratti*, 168 (2010).

[17] Thus, clearly, U. Breccia, 'L'abuso del diritto', in G. Furgiuele ed, *L'abuso del diritto* n 7 above, 84.

[18] U. Breccia, n 17 above, 5. For an account on the different question pertaining to the 'abuse of freedom of contract', see R. Sacco, 'L'abuso della libertà contrattuale', in G. Furgiuele ed, *L'abuso del diritto* n 7 above, 217. Hence, outside the scope of the general perspective take in this article are also the hypotheses related to consumers contracts based on Art 33 of the Italian consumption code (see F. Astone, 'L'abuso del diritto in materia contrattuale. Limiti e controlli all'esercizio della libertà contrattuale' *Giurisprudenza di merito*, 8 (2007)), the law on asymmetrical business contracts (see F. Macario, 'Abuso di autonomia negoziale e disciplina dei contratti tra imprese: verso una nuova clausola generale?' *Rivista di diritto civile*, 663 (2005),

on the assumption that any right, formally recognized in abstract terms, should always face the reality of its concrete application in specific contexts,[19] because in some instances that right could be used as a screen to conceal arbitrary behaviors or to introduce into the system such weighty negative effects as to justify a limitation on the ability to exercise the right.[20]

Abuse of right is becoming more commonplace, and therefore the issues raised by the doctrine cannot be dismissed as exceptional.[21] Abuse of right is needed more and more frequently to deal with cases in which different interests intertwine, each susceptible of being qualified in terms of freedom or duty, hence raising attributive problems when they come to a crossing point.[22] Despite the different formulas utilized by legal scholars,[23] the abuse of rights paradigm should not be reduced to the area of unlawfulness or illegality,[24] because an abuse is never referable to a single, abstract scheme; the actual way in which a right is exercised ought to always be weighed against correlated interests, which are seldom definable *ex ante*.

Undoubtedly, the elasticity and vagueness of the abuse of right doctrine, the flexibility of the relationship between a rule's attributive content and the actual exercise of the right stemming therefrom, underscore the importance of

in particular legge 18 June 1998 no 192, G. Sbisà, 'Controllo contrattuale esterno, direzione unitaria e abuso di dipendenza economica' *Contratto e impresa*, 815 (2015)) A. M. Benedetti et al, *I ritardi di pagamento nelle transazioni commerciali. Profili sostanziali e processuali* (Torino: Giappichelli, 2003), 4, there an explicit reference to the conception of abuse). More in general, see S. Pugliatti, 'Esercizio del diritto, diritto privato' *Enciclopedia del diritto* (Milano: Giuffrè, 1966), XV, 622; and also V. Frosini, 'Diritto soggettivo' *Novissimo Digesto italiano* (Torino: Utet, 1960), V, 1049.

[19] R. Sacco, *L'esercizio e l'abuso del diritto* n 7 above, 316, rightly observes, in the context of a thorough comparative analysis, that an abuse is usually sanctioned because an 'exclusive intent to harm' was detected, or the infringement of public morality, or an exercise departing from the right's inner function, or a situation in which the importance of the sacrificed interest outweighs the one related to the right being exercised.

[20] See, generally, G. Levi, *L'abuso del diritto* (Milano: Giuffrè, 1993).

[21] U. Breccia, n 17 above, 13. For an application of the reasonableness principle, see G. Silvestri, 'L'abuso del diritto nel diritto costituzionale' (presentation at the conference held in Firenze on *L'abuso del diritto*, 11-12 February 2016) 2 *Rivista AIC*, 1-12 (2016). See P. Caretti, 'L'abuso del potere legislativo o del problema dei limiti del legislatore', in G. Furgiuele ed, *L'abuso del diritto* n 7 above, 126.

[22] See B. Celano, 'Principi, regole, autorità' *Europa e diritto privato*, 1081 (2006), who described a typical abuse of right situation as a separation between two assessments: the one *in abstracto*, and the other *in concreto*. See also B. Celano, 'Come deve essere la disciplina costituzionale dei diritti', in S. Pozzolo ed, *La legge e i diritti* (Torino: Giappichelli, 2002), 89.

[23] Thus U. Natoli, 'Note preliminari ad una teoria dell'abuso del diritto nell'ordinamento giuridico italiano' *Rivista trimestrale del diritto e procedura civile*, 18 (1958).

[24] See C. Castronovo, 'Abuso del diritto come illecito atipico?' *Europa e diritto privato*, 1056 (2006). C. Scognamiglio, 'Buona fede e responsabilità civile' *Europa e diritto privato*, 350 (2001), rightly observes: 'it is at least questionable, from a methodological point of view, the effort to seek to explain how the "injustice" parameter works (in civil liability law) through an even more complicated concept, that is abuse of rights'. See F. Busnelli and E. Navarretta, 'Abuso del diritto e responsabilità civile', in G. Furgiuele ed, *L'abuso del diritto* n 7 above, 171.

adequate argumentation on the part of the interpreter, whose viability can be assessed only with regard to a given social environment. In this respect, one ought to keep in mind that the legitimization of legality should not be assumed as a part of a self-sufficient rationality, morally neutral, inherent in the form of the law.[25] The interpreter's discretion is especially apparent because the law today arises from interaction between the legal system and its environment, where the moral-cultural sphere plays an essential role.[26]

Scholars seem to agree, albeit with some reservations, on the importance of argumentation in the application of the law. Indeed, certain authors, though conceiving of argumentation as a formal source of objective law,[27] end up sharing the most rigorous frontiers of deductivism, that the very idea of 'judicial creativity' should be sharply rejected.[28] Others, concerned with preserving the certainty of law and the judges' sole obedience to formal law, try to distinguish between different argumentative forms.[29]

Personally, I am persuaded that case law should be included among the sources of law.[30] And I do not believe that a 'creationist' conception of legal argumentation is incompatible with the rule of law (*état de droit*) paradigm.[31] Without lingering now on a theme that is too vast to be exhaustively dealt with here, it nonetheless needs to be emphasized that the rule of law does, of course, impose limits on the legal system, but this does not mean that the law ought to

[25] J. Habermas, *Morale, diritto, politica* (Torino: Einaudi, 1992), 16.

[26] Thus L. Mengoni, 'La questione del diritto "giusto" nella società postliberale' *Fenomenologia e società*, 11 (1998). See G. Zaccaria, 'L'abuso del diritto e la filosofia del diritto' (presentation at the Florence convention, 11-12 February 2016) *Rivista di diritto civile*, 744 (2016).

[27] See A. Gentili, *Il diritto come discorso* n 5 above, 3.

[28] ibid 317 in this case referring to 'interpretive libertinage'. But see A. Proto Pisani, 'Brevi note in tema di regole e principi', in D. Dalfino ed, *Scritti dedicati a Maurizio Converso* (Roma: Roma Tre-Press, 2016), 494.

[29] Thus, L. Ferrajoli, *Contro la giurisprudenza creativa* n 2 above, §§ 5 and 6.

[30] Far in times but probably not yet sufficiently metabolized are the lucid reflections by L. Lombardi Vallauri, *Saggio sul diritto giurisprudenziale* (Milano: Giuffrè, 1967), 371, who spoke of 'inevitable courts' creativity'. Before that, see G. Capograssi, *Il problema della scienza del diritto* (Roma: Giuffrè, 1939), now in *Opere* (Milano: Giuffrè, 1959), II, 379, who maintained that the legal science (conceived of in a broad sense as a reflection on the legal experience, hence including court opinions) is 'the only true source of law' (385). On this point, I allow myself to refer to N. Lipari, *Dottrina e giurisprudenza quali fonti integrate del diritto* n 7 above, 1; see, also, Id, 'Introduzione', in C. Perlingieri and L. Ruggeri eds, *L'incidenza della dottrina e della giurisprudenza nel diritto dei contratti* (Napoli: Edizioni Scientifiche Italiane, 2016), 11. Always enlightening the reflexions by G. Gorla, 'Dans quelle mésure le giurisprudence et la doctrine sont-elles des sources de droit' *Foro italiano*, 241 (1974), and by R. Sacco et al, 'La dottrina, fonte del diritto', in Id et al, *Studi in memoria di Giovanni Tarello*, II, *Saggi teorico-giuridici* (Milano: Giuffrè, 1990), 457, who correctly noted: 'all that affects interpretation is a source' (hence, including courts and scholars). More recently, see also V. Ferrari, 'L'interpretazione e i canoni ermeneutici dell'esistenza', in D. Dalfino ed, *Scritti dedicati a Maurizio Converso* n 28 above, 270; S. Cotta, *Il diritto nell'esistenza* (Milano: Giuffrè, 1991), 65, emphasizing the privileged role of case law.

[31] *Contra*, L. Ferrajoli, n 2 above, § 6.

be considered in isolation, resistant to any interpretive incursion.[32] Quite the contrary. If we recognize that a norm is the result of interpretation, and that interpretation draws its plausibility from the level of acceptance by the community,[33] then it could be maintained (just like Gadamer did) that the task of interpretation is the 'materialization of the law in a particular case', that is, its application. And that interpretive process can be synthetized as the *creative perfecting* of the law.[34]

In sum, the limitations on the 'sovereign' required by the rule of law need not be derived solely from formal prescriptions (which are, after all, just a series of words). Rather, they can be derived from shared values as well. Sovereignty today receives a type of legitimization based on the concrete function that it serves: that of a 'neutral' intermediary of a pluralist society, characterized by polytheism of values, multiplicity of beliefs, valorization of differences.

Obviously, 'creativity' is an ambiguous term. Courts' creativity, just like the lawmaker's creativity, is not the fruit of fate. Courts' creativity, however, presupposes that the legislator has made the first move. Indeed, in a legal system such as ours, in solving a legal problem, one cannot avoid referring to a rule or to an argumentative criterion, which is always derived from a formal source.[35] In this sense, and only in this sense, the principle expressed in Art 101 of the Italian Constitution ('judges are subject only to the law') can be fully understood. Such a principle not only insulates the judges from the influence of any other branch (other than the legislative one), but aims also at making explicit (in the framework of a system based on *ius positum*) that the application of law to facts necessarily includes a normative element, even if that normative element is not reflected in a written source. This does not mean that interpretation is completely independent of positive law. The process of identifying the 'law' involves the construction and detection of legal sources,[36] and interpretation

[32] One of the most advanced positions in the field of anti-formalistic interpretation is embodied by G. Zaccaria, *L'arte dell'interpretazione. Saggi sull'ermeneutica giuridica contemporanea* (Padova: Cedam, 1990).

[33] On the inter-subjective structure of legal reasoning see E. Pariotti, *La comunità interpretativa nell'applicazione del diritto* (Torino: Giappichelli, 2000), 191. See C. Perelman, *Logique juridique. Nouvelle rhéthorique* (Paris: Dalloz, 1976), 173, observing that no legal order is possible outside '*de solutions acceptables par le milieu, parce que conforme à ce que lui paraît juste et raissonable*'. Also, see R. De Ruggero, *Tra consenso e ideologia. Studi di ermeneutica giuridica* (Napoli: Edizioni Scientifiche Italiane, 1977), 186.

[34] Thus H.G. Gadamer, *Verità e metodo* (1960), Italian translation by G. Vattimo (Milano: Bompiani, 1983), 382. On the creative role of judges when applying legal principles see A. Gentili, 'L' "ordinamento delle pretese giuridicamente perseguibili" ' *Rivista di diritto civile*, 685 (1998). See T. Viehweg, *Topica e giurisprudenza* (1953), Italian translation by G. Crifò (Milano: Giuffrè, 1962), 105, 58.

[35] See N. Lipari, *Le fonti del diritto* (Milano: Giuffrè, 2008), 9.

[36] As correctly suggested, today it is not simply a matter of being able to draw a norm out of a legal precept, but rather to detect the relevant source, that is to construe the source: N. Lipari, 'Diritto e sociologia nella crisi istituzionale del postmoderno', in V. Ferrari et al, *Conflitti e diritti nelle società transnazionali* (Milano: Giuffrè, 2001), 667; G. Zaccaria, 'Trasformazione

provides a necessary mediation between that law and society's normative values.

The law should not be considered as an abstract or immutable matter. Rather, it should be studied in terms of effectiveness, that is, by allowing the interpreter to find a meaning that fits a certain historical and social context. This is the sense accompanying the Italian Constitutional Court's constant references to the 'living law',[37] which obviously do not abandon the principle that the judge is subject only to the law. The process of ascertaining what is 'living' inevitably implies a certain degree of creativity. That is why it could be argued – recognizing the central role of argumentation in the application of the law – that the norm is 'posited' not because it was formally promulgated, but because it is concretized in a specific situation. In law-application, starting from a formal precept, interpreters define the course of conduct that appears to be the most plausible, understandable, and acceptable according to the legal system as a whole, not just to a single, isolated rule.

IV. Constitutionalization of Private Law: Placing the Human Person at the Center. Principles, Rules, and Rights in the Context of Judicial Interpretation. Law and Justice in the Positivistic Era and Today

From this perspective, the time-honored debate among private law scholars concerning the place of the abuse of rights doctrine is destined to settle down. It has been argued that 'the abuse of rights doctrine is redundant', but it can be

e riarticolazione delle fonti, oggi' *Ragion pratica*, 118 (2004). On the interpretation of Art 101(1) Italian Constitution, see also G. Costantino, '*Governance* e giustizia. Le regole del processo civile italiano' *Rivista trimestrale di diritto e procedura civile*, 51 (2011).

[37] Just a few bibliographical suggestions: A. D'Atena, 'Interpretazioni adeguatrici, diritto vivente e sentenze interpretative della Corte costituzionale', in Id et al, *Corte Costituzionale, giudici comuni e interpretazioni adeguatrici. Atti del Seminario svoltosi in Roma – Palazzo della Consulta, 6 novembre 2009* (Milano: Giuffrè, 2010), 337. Amongst others, see: G. Alpa, 'Il diritto giurisprudenziale e il diritto vivente. Convergenza o affinità di sistemi giuridici' *Sociologia del diritto*, 47 (2008); O. Poggeler, *Tradizioni e diritto vivente* (Padova: Cedam, 2003); G. Broggini, 'Comprensione e formazione del diritto: storia e diritto vivente' *Jus*, 139 (1997); C. Esposito, 'Diritto costituzionale vivente', in D. Nocilla ed, *Capo dello Stato ed altri saggi* (Milano: Giuffrè, 1992); L. Mengoni, 'Diritto vivente' *Digesto delle discipline privatistiche*, (Torino: Utet, 1990), VI, 445; A. Pugiotto, *Sindacato di costituzionalità e 'diritto vivente'* (Milano: Giuffrè, 1994); E. Resta, *Diritto vivente* (Roma-Bari: Edizioni Laterza, 2008); G. Zagrebelsky, 'La dottrina del diritto vivente' *Giurisprudenza costituzionale*, 1148 (1986). It would be pointless to recall here the publications by Paolo Grossi, current President of the Constitutional Court, all directed to the same goal of highlighting court creativity as the most advanced frontier against 'legolatria' (in particular, see *L'Europa dei diritti* (Roma-Bari: Edizioni Laterza, 4th ed, 2009), 140, especially 153): on his cultural itinerary, see the recent works by G. Alpa, 'Paolo Grossi, alla ricerca di un ordine giuridico' *Contratto e impresa*, 377 (2016), as well as by N. Lipari, 'Paolo Grossi ovvero del diritto come storia' *Rivista trimestrale di diritto e procedura civile*, 755 (2011). See also N. Irti, *Un diritto incalcolabile* (Torino: Giappichelli, 2016), 196-206, and F. Benatti, 'Tra dottrina e giurisprudenza, l'interpretazione delle norme di legge' *Banca, Borsa e Titoli di Credito*, 384-386 (2016).

legitimately used 'in order to fight socially harmful behaviors and fulfill higher values'.[38] To be sure, the application of the abuse of rights doctrine is a symptom of the new role entrusted to courts in mediating the transition from a system based on *a priori* identifiable law to one in which legal statements can be appraised only when they are applied to the peculiarities of a concrete set of facts.

We have to get used to doing away with our old categories, which we have too often used as a cage within which to constrain reality.[39] It has been rightly stated that the constitutionalization of the law, especially through the principle of protection of the human person as such (forming the basis of pluralism), makes the law less generalizable.[40] The heterogeneity of human nature precludes, in itself, the possibility of construing a 'subjective right' as an abstract paradigm, applicable in any context, always in the same manner. When applying the law to a concrete case we need to reaffirm equality in diversity. From this point of view, the doubts concerning the allegedly contradictory nature of the abuse of right doctrine[41] are destined to fade away, considering that the prescriptive force of a subjective right is not inherent; rather, it reveals itself at the intersection between the prescriptive and the argumentative dimensions.[42] What appears to be legitimate in one case may prove abusive in another,[43] because it is only through application that the prescriptive scope of the law can be uncovered.

[38] In this sense R. Sacco, *L'esercizio e l'abuso del diritto* n 7 above, 373, but see also C. Salvi, 'Abuso del diritto, diritto civile' *Enciclopedia giuridica* (Roma: Treccani, 1988), I, 1. The same substantial conclusion reached by G. Pino, *Il diritto e il suo rovescio* n 4 above, 60. Besides, it should not be forgotten that, in the contemporary judicial experience, it is not just the result that matters, but the way through which it is achieved. In this light, it is crucial to recognize – and to this extent the doctrine of abuse of right seems to be the paradigm – a double discretion to judges: that of 'the choice of the criteria of evaluation among those abstractly available (and that are not predetermined by the formula)' and its 'application to the concrete case' (in this sense G. Pino, n 4 above, 56).

[39] In relation to the Aristotelian idea of category and the Kantian one and regarding its impact on jurists' way of thinking, see N. Lipari, *Le categorie del diritto civile* (Milano: Giuffrè, 2013), 11.

[40] In very clear and convincing terms F. Viola, *La legalità del caso* (Napoli: Edizioni Scientifiche Italiane, 2007), 320.

[41] Argument that has an authoritative heritage: see F. Santoro Passarelli, *Dottrine generali del diritto civile* (Napoli: Jovene, 6th ed, 1966), 77, in the view of a subjective judicial position that, by definition, cannot affect interests outside those of the parties' relation, which is nowadays an opinion in crisis. In the same sense see L. Carraro, 'Frammenti inediti di Dottrine generali: il rapporto giuridico' *Rivista di diritto civile*, 20 (2016), according to which 'beyond the scope of the interest for whose protection the power is conferred, the exercise of power is not abusive but impossibile'.

[42] See F. Viola, n 40 above, 322. With a different wording, it is recognized the need that 'the judicial content of the subjective right shall be determined and integrated by the interpreter so that to guarantee the full compatibility with the auxiological dimension of the legal state system' (in this sense N. Gullo, 'L'abuso del diritto nell'ordinamento comunitario: un (timido) limite alle scelte del diritto' *Ragion pratica*, 181 (2005)).

[43] In the same sense, albeit starting from different grounds R. Sacco, n 7 above, 324, notes that, wherever abuse is concerned, 'injuries to victim's interest for sure exist. However, that interest is protected against the injury in relation to the peculiarities of the conduct of the agent'.

Critics of the abuse of right doctrine have argued that it would be illogical, let alone illegal, to limit the exercise of a right when the right itself contains no explicit limit on its exercise.[44] But once it has been made clear that the law should not simplistically be reduced to *jus positum*, that argument loses much of its foundation.

Any consideration of the abuse of rights doctrine is, hence, tied to the principles and values forming the basis of the legal system.[45] In the incessant search for a balance among principles, rights, and rules, the role of judicial interpretation is of fundamental importance. And the abuse of rights doctrine is a paradigmatic example showing that powers are not given to citizens regardless of the effects that they, when exercised, will eventually produce. Rather, they implicitly contain limits precisely because their effects may end up contradicting the principle (and, therefore, the underlying value) in light of which the powers were originally granted.

I am well aware of the fact that our legal culture, influenced by positivistic models, has not yet seriously interiorized the constitutionalization of legal discourse, which construes the concept of unlawfulness in terms of violation of principles rather than of rules. If one abandons the positivistic archetypes, then such a renewed methodology should not scandalize, considering that, as it has been correctly noted, the role of courts is to determine the indeterminate.[46] And I think it is not incorrect to maintain that principles matter more than rules, since 'behind all rules there is always a principle'.[47] If principles can be inferred from the Constitution, then they shall necessarily prevail over statutory law, as well as over any other lower principle simply mirroring a set of recurring rules. In other words, we should accept the idea that the law enacted by the legislator may be illegitimate, which is a concept that Hans Kelsen considered an inherently contradictory one.[48] Judges have the power to check the constitutionality of rules, hence they are asked to adjust the content of the statutory provision to constitutional principles, notwithstanding the apparent specificity of the former and the allegedly general nature of the latter. As has been said, principles cannot be used to foresee legal consequences; principles are balanced, not applied, in

[44] In this sense, instead, M. Orlandi, *Contro l'abuso del diritto* n 1 above, 147.

[45] See M. Atienza and J. Ruiz Manero, 'Abuso del diritto e diritti fondamentali', in V. Velluzzi ed, *L'abuso del diritto. Teoria, storia e ambiti disciplinari* (Pisa: Edizioni Ets, 2011), 33, who notes that there are actions that, at first sight, appear to be allowed by a permissive rule, but that then result forbidden in the name of principles that reduce the scope of the rule itself.

[46] See T. Endicott, *La generalità del diritto* (2000), Italian translation by V. Bortolotti (Modena: Mucchi, 2013), 45.

[47] In this sense A. Gentili, *Il diritto come discorso* n 5 above, 464. The statement that 'every norm posits a principle' is due to V. Crisafulli, 'Per la determinazione del concetto dei principi generali del diritto', in G.B. Funaioli ed, *Studi sui principi generali dell'ordinamento giuridico fascista* (Pisa: Arti grafiche Pacini Mariotti, 1943), 240.

[48] See H. Kelsen, *Teoria generale del diritto e dello Stato* (1945), Italian translation by S. Cotta and G. Treves (Milano: Edizioni di Comunità, 1952), 158; Id, *La dottrina pura del diritto* (1960), Italian translation by M.G. Losano (Torino: Einaudi, 1966), 298.

the sense that, on a case-by-case basis, the one that is considered the most important or the most appropriate will eventually prevail.[49]

Courts have often referred to the principle of solidarity embodied in Art 2 of the Constitution as shaping every interpretative process. And this is so even if, for instance, at the time when a contract was concluded the parties had in mind to regulate a completely different set of interests. According to a formalistic way of thinking, the reference to a principle outside of a contract's original structure is deemed to surreptitiously alter the law.[50] However, this is not the case when the binding strength of the living law is found beyond the formal structure of a single provision.[51] This is why it is wrong to criticize the Renault case[52] by saying that good faith in the execution of contracts is not what the parties had originally agreed upon; actually, the duties of good faith and fair dealing shape every negotiation from their very beginning, expressing the fundamental principle of solidarity embodied in Art 2 of the Constitution.[53]

Similar considerations, although in a different context characterized by a higher degree of axiological convergence, can be extended to other prominent positions such as that assumed by Norberto Bobbio who, while recognizing that not all principles can be inferred from express provisions – especially those grounded on 'ideas and moral beliefs emerging in the society (which is in constant evolution), not yet embodied in positive law' –, ended up accepting

[49] See R. Dworkin, *I diritti presi sul serio* (1977), Italian translation by N. Muffato (Bologna: il Mulino, 1992), 93. In the same sense see R. Alexy, *Teoria dei diritti fondamentali* (1994), Italian translation by L. Di Carlo (Bologna: il Mulino, 2012), 106.

[50] In this sense A. Gentili, n 5 above, 467. It is by now entered into judicial awareness the idea of a proportionality among performances, which therefore leads the contract away from the principle of *pacta sunt servanda*: see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 380; Id, 'Equilibrio normativo e principio di proporzionalità nei contratti' *Rassegna di diritto* civile, 334 (2001); F. Casucci, *Il sistema "proporzionale" nel diritto privato comunitario* (Napoli: Edizioni Scientifiche Italiane, 2001). On the issue of justice in contracts see most recently N. Lipari, *Intorno alla "giustizia" del contratto* (Napoli: Editoriale scientifica, 2016).

[51] It is recognized also by A. Gentili, n 5 above, 469, fn 77.

[52] See *supra* n 1.

[53] See, among many judgements, Corte di Cassazione 6 December 2012 no 21994, *Contratti*, 680 (2013); Corte di Cassazione 19 May 2009 no 11582, available at www.dejure.it. In recognizing the importance of the principle of solidarity in private parties' negotiations, the role of private autonomy should not be denied, but it needs to be acknowledged that it cannot be exercised without any reference to constitutional principles. In this view, the abuse of rights doctrine takes on a general dimension. For a completely different perspective, see A. Cataudella, 'L'uso abusivo dei principi' *Rivista di diritto civile*, 761 (2014). See D. De Caria, 'La nuova fortuna dell'abuso del diritto nella giurisprudenza di legittimità: la Cassazione sta "abusando dell'abuso"? Una riflessione sul piano costituzionale e della politica del diritto' *Giurisprudenza costituzionale*, 3627 (2010). In general terms see also G. Bognetti, *Costituzione economica e Corte costituzionale* (Milano: Giuffrè, 1983), 251, who denies that the Constitution tends to sacrifice the individual interest for the benefit of the public and sustained that the limitation of individual economic freedoms was a by-product of later legislation and practice, contrary to the original spirit of the Constitution. To my humble opinion, this is an anti-historical way of reading the legal experience.

'the controversial principle of the prohibition of abuse of rights', which 'did not emerge from this or that rule, but from the auscultation (…) of ethical and political needs typical of a certain society, against declining opinions'.[54] Basically, the theorist of positivism felt the need to use unwritten values to limit written provisions, in order to ensure that solutions reflect instances and values emerging after the rule's enactment.

Today, the same criterion requires an even greater articulation. From a practical point of view, a legal solution is likely to be accepted not only because of the inherent strength of a single provision, but due to the persuasiveness of the reasons provided by the interpreter and on the degree to which those reasons reflect widely shared values. Based on all these assumptions, the reference to general principles[55] no longer fills the gaps in the system, but becomes the expression of the continuous adaptation of formal structures to ethical, social, and political principles, which are the basis of peaceful coexistence.[56] The abuse of rights doctrine becomes one of the many instruments through which 'justice pursuant to the law' meets its own limits, but at the same time 'justice beyond the law' discovers its outer rules.[57] Faced with the specific features of a concrete case, and outside the conditioning limitations of a methodology based on pre-confectioned circumstances ('*fattispecie*'),[58] we become aware of the fact that a

[54] In this sense N. Bobbio, 'Principi generali del diritto' *Novissimo Digesto italiano* (Torino: Utet, 1966), XIII, 891.

[55] On these issues see, most recently, N. Lipari, 'Intorno ai "principi generali del diritto" ' *Rivista di diritto civile*, 28 (2016).

[56] See U. Natoli, *Note preliminari ad una teoria dell'abuso del diritto* n 23 above, 23. The already mentioned opinion (see n 39 above), according to which the abuse of right doctrine, despite being formally legitimate, turns out to be redundant (as basically the same results can be achieved through the general notions of civil liability law), is not, should we merely proceed on the basis of exclusively formal paradigms, referable only to that doctrine, but can be easily extended to a number of other doctrines which, more and more common in the current age of constitutionalization of private law, in which the hermeneutical process requires to bring together rules and principles. Indeed, while rules hint at institutions, principles draw attention to values; the former is mainly described by formal standards, the latter depends on a-formalistic elements. Understandably, some authors have considered 'the prohibition of abuse of right as a path less arduous than others (…) in fighting harmful practices and enforcing high values' (cf R. Sacco, *L'esercizio e l'abuso del diritto* n 7 above, 373). When recognizing that the interpreter, faced with the peculiarities of a case, is called on to weigh the underlying values against (or adapt that specific event to) a broader social context, we have abandoned the hypostasis of formalism, acknowledging that a new right has been crafted in relation to the peculiarities of the case at issue, linking together the horizon of the past with that of the present (assessed in the light of the needs and values of the society at the time of application) (thus M. Vogliotti, *Tra fatto e diritto. Oltre la modernità giuridica* (Torino: Giappichelli, 2007), 204).

[57] See F. Viola, n 40 above, 327.

[58] On this matter see N. Irti, 'La crisi della fattispecie' *Rivista di diritto processuale*, 41 (2014); Id, 'Calcolabilità weberiana e crisi della fattispecie' *Rivista di diritto civile*, 36 (2014); most recently see also Id, *Un diritto incalcolabile* (Torino: Giappichelli, 2016); N. Lipari, *I civilisti e la certezza del diritto* n 2 above, 1123. Against keeping old models see instead A. Cataudella, 'Nota breve sulla "fattispecie" ' *Rivista di diritto civile*, 245 (2015). Obviously reference to general clauses excludes the individual case paradigm. It has been correctly pointed out by J. Esser,

law based on immutable forms does not exist.

V. The Sensitive Case for Argumentation. Resistance of Old Categories and the Need to Supersede Them. Argumentation as a Means to Adapt the Text to the Context

Obviously, such an approach requires the utmost rigor in developing the argumentative process. The criticized length of certain judgments handed down by the Joint Chambers of the Italian Supreme Court is probably the direct effect of the heightened level of rigor required. Evidently, if the courts were allowed to focus only on one statutory provision, their task would be much easier.

One of the difficulties is to deal with non-consolidated interpretative tools, sometimes even brand new ones; and this often causes some tensions or clashes. Moreover, it is quite common to frame the qualification process within well-known paradigms. For example, it has been argued that the abuse of rights doctrine is in a broad sense part of analogy – an analogy of a special kind, which, in setting aside a provision *in abstracto* applicable to a specific case, tends to apply a different rule according to its inner rationale.[59] However, once we agree to abandon reasoning based on pre-confectioned circumstances ('*fattispecie*'), the analogy assumes a different connotation,[60] as the law actually applied is derived directly from the principles.

In the framework of a constantly evolving society it is difficult to establish, if one fails to look at the peculiarities of the concrete case at issue, why an entitlement was originally assigned to one subject.[61] When applying the law, we either enable the holder of an entitlement exercise his or her interest freely (as long as he or she does not betray that entitlement's original paradigms), or we consider it interconnected with other interests directly or indirectly affected by its exercise, and leave with the judge the task of assessing, case by case, the actual scope of that right. Hence, one cannot maintain that the formal attribution of a right makes it useless – or 'irrelevant' – to assess how that right was actually

Precomprensione e scelta del metodo nel processo di individuazione del diritto (1972), Italian transaltion by S. Patti and G. Zaccaria (Napoli: Edizioni Scientifiche Italiane, 1983), 57, that in that case 'the judge is disenchanted regarding the existence of a ready-made legal provision and is faced with the duty to "understand the rule in the right way", and needs to show it in the judgment'.

[59] See A. Gentili, *Abuso del diritto, giurisprudenza tributaria e categorie civilistiche* n 13 above, 13.

[60] For an attempt in this sense see N. Lipari, 'Morte e trasfigurazione dell'analogia' *Rivista trimestrale di diritto e procedura civile*, 1 (2011).

[61] And this regardless of the habit (accepted by our legislature long time ago) of inserting in the first article of each law a sort of programmatic statement of the purposes in light of which it is assumed that it was enacted. If it was allowed a more detailed analysis of the point in this context, it will be easy to verify how the implementation ends in heavily contradicting those indications of principle.

exercised, on the ill-founded assumption that once an entitlement is granted, it is inherently unlikely to impair the interests of any counterparty.[62] All abuse of rights cases decided by the courts demonstrate the exact opposite: in most instances, a right's holder, convinced of having legitimately exercised a right in accordance with a formally recognized model, is eventually found to have directly affected, if not damaged, one or more counterparties.

That is why, in my opinion, the abuse of rights doctrine reflects today's most essential feature of the legal discourse. The abuse of rights doctrine has been criticized as 'subversive' because 'statutory provisions always provide the structure of the regulated case', but 'hardly ever tell the function of the rule'.[63] But if we concede that formal precepts arise out of a confrontation between text and context, where the text is inevitably static and the context historically dynamic, then the argumentative application of the doctrine is unexceptional. Apart from the need – as explained above – to overcome the theory based on *fattispecie*, the juxtaposition of structure/function only reproduces, *mutatis verbis*, that of text/context, which describes the law itself, in continuous evolution. As correctly noted, if we resort to the juxtaposition between structure and function, we reintroduce the alternative between 'static' and 'dynamic',[64] which is absurd in the legal context, because the law, by definition, can never be considered static. Even if the legislature spelled out the function pursued by means of a certain precept (and this is an attitude that more and more often characterizes the approach of our legislature), this would not modify the place and role of interpretation; the judge would nonetheless remain free to apply it also for different purposes (historically supervened or not foreseen). In any case, apart from the versatility of the term 'function', those precepts need to be verified *in concreto*, in their capacity to achieve certain goals, beyond a merely stated program. Therefore, the relationship between the structure of a statutory provision and its function *in concreto* cannot be limited by the fact that a precept declares the intention of achieving a certain purpose (often for purely political opportunism).

It is useless to recall in this context that there is no perceptive value to the statement, embodied in Art 12 of the preliminary rules to the Civil code (*Preleggi*), that interpretation shall take into consideration the 'intention of the legislator'.[65] Whatever that intention may be and however intention may be identified, the process of implementing the law is inevitably connected to the relationship between text and context; such a relationship reasonably leads to the supersedence of some of the traditional paradigms on which the distinction

[62] In this sense instead L. Carraro, *Frammenti inediti di Dottrine generali: il rapporto giuridico* n 41 above, 20.

[63] In this sense A. Gentili, *Il diritto come discorso* n 5 above, 460.

[64] See G. Giannini, 'Struttura' *Enciclopedia filosofica Bompiani* (Gallarate: Bompiani, 2006), 11, 11190.

[65] See Art 12 of the preliminary rules to the Civil code (*Preleggi*).

between *civil law* countries and *common law* countries has been commonly based.[66] We should realize that the prohibition of abuse of rights inevitably entangles law-enforcement and argumentation, despite all concerns about the degree of discretion enjoyed by interpreters.[67]

VI. Abuse of Rights and *Détournement* of Law: Insights from Tax Law. Peculiarities of the Application of Constitutional Principles in Contract Law. Favoring a Generalized Notion of Abuse. Conclusions on the Courts' Role

If we consider the abuse of rights doctrine as a paradigm of the new role entrusted to courts in implementing the law, we cannot automatically refer it to institutions that are still understood through the lenses of the theory of *fattispecie*. Paradigmatic, in this respect, is the relation between abuse of right and *frode alla legge* (*fraude à la loi*).[68]

[66] See N. Lipari, *Le fonti del diritto* n 35 above, 8, 154.

[67] See G. Pino, *Il diritto e il suo rovescio. Appunti sulla dottrina dell'abuso del diritto* n 4 above, 55; see also P. Comanducci, 'Abuso del diritto e interpretazione giuridica', in V. Veluzzi ed, *L'abuso del diritto. Teoria, storia e ambiti disciplinari* n 45 above, 19. It is clear that on the slippery ground of these arguments it is not possible – as instead done many times in the past – to be content with formulas synthetized in maxims, unrelated to the circumstances of the tried case. When, for example, the Supreme Court states (Corte di Cassazione 7 May 2013 no 10568, *Repertorio Foro italiano*, no 11 (2013) followed by Corte di Cassazione 25 January 2016 no 1248, *Foro italiano*, I, 1290 (2016)) that 'abuse of right cannot only be found in the fact that a party of the contract behaved in a way that was unapt to protect the interests of the other party, every time the conduct pursues a lawful result through legitimate means, being instead possible whenever the holder of a subjective right, albeit without formal prohibition, exercises it in an unnecessary manner and disrespectfully of the duties of good faith and fair dealing, causing a disproportionate and unjustified sacrifice of the counterpart, and for the purpose of obtaining different and further results from those for which those powers or rights were given', it clearly uses an ambiguous form of argumentation. On the basis of exclusively formal or logic models, it would not be easy to distinguish between a conduct unapt to protect the counterparty's interest and another contrary to the principles of good faith and fair dealings. For an abstract evaluation of the abuse, regardless of intersubjective dynamics, see C. Restivo, *Contributo ad una teoria dell'abuso del diritto* n 1 above, 184. See F. Piraino, *La buona fede in senso oggettivo* n 10 above, 410 (considering abuse of right a concretization of good faith in an evaluative function). It is fundamental, in my opinion, not to stick only with a qualificative formula. See P. Rescigno, *Abuso del diritto* n 11 above, 26.

[68] See, most recently, M. Gestri, *Abuso del diritto e frode alla legge nell'ordinamento comunitario* n 16 above, especially 54. The distinction between the level of abuse of right and that of *frode alla legge* is considered marked in U. Breccia, *L'abuso del diritto* n 17 above, 14. There are however some scholars who underline an alleged similarity between the purposes of the two normative techniques, assuming that both are headed to prevent an inappropriate use of legal institutions: see F. Audit, *La fraude à la loi* (Paris: Dalloz, 1974), § 199; P. De Vareilles-Sommieres, 'Fraude à la loi' *Encyclopedie giuridique Dalloz – Repertoire de droit International* (Paris: Dalloz, 1998), II, § 53. Some authors ended up even considering *fraud à la loi* as a particular application of the theory of abuse of right: see L. Josserand, *De l'esprit des lois et de leur relativité (théorie dite de l'abus des droits)* (Paris: Dalloz, 2nd ed, 1925), 161. M. Gestri, n 16 above, 196, maintains that in the EU legal system within the general concept of abuse of right,

Of course there is an evident connection between abuse of right and *frode alla legge*. Both doctrines tend to avoid the realization of an illegal result contrary to the principles of the legal system, even though the situation appears to be formally legitimate. However, while in the case of *frode alla legge* – which can be qualified subjectively or objectively[69] – the evasion of a legal provision is identifiable, in merely structural terms, by comparing an abstract scheme to one implemented in practice, abuse of right involves an analysis of different factors, some of which are not standardized and do not stem from the same source. What is formally legitimate may become abusive not necessarily and not only in relation to the holder's situation, but also by reference to the impact on third parties' interests. A comprehensive evaluation of the context leads one to define as abusive, and therefore sanctionable, a behavior that appears legitimate when viewing the text in isolation. While *frode alla legge* requires a statutory provision,[70] the abuse of rights doctrine does not. (As noted, the hermeneutical process for detecting an abuse is the same both in the legal systems expressly accounting for it and in those that are silent about it). In other words, *frode alla legge* has its own definite structure, whereas abuse of rights is grounded on very diverse reasons: a lack of interest by the right's holder or even an intent to harm, an action not in line with objective good faith, a deep imbalance between the interest of the holder and that of the counterparties, a clear departure from the institutional purpose for which the conferral was made, and the infinite results potentially obtainable from the various combinations of these criteria or models. A legal provision favoring one or the other of such models[71] would not prevent the judge, in a particular case, from detecting an abuse, for whatever reason, using an alternative model.

The distinction between *frode alla legge* and abuse of rights is signaled by the fact that legal formalism has always considered its own approach compatible

three different meanings might be included: evasion of national law, *fraud à la loi* with respect to EU law and abuse of right in a strict sense, intended as the exercise of a right based on a EU provision but not complying with the purposes of the rule or with other general criteria.

[69] In the first sense see especially L. Carraro, *Il negozio in frode alla legge* (Padova: Cedam, 1943); Id, 'Frode alla legge' *Novissimo Digesto italiano* (Torino: Utet, 1968), VII, 647; in case law see Corte di Cassazione 7 February 2008 no 2874, *Giustizia civile*, I, 1422 (2008); in the second sense see R. Scognamiglio, 'Dei contratti in generali', in A. Scialoja e G. Branca eds, *Commentario al codice civile* (Bologna-Roma: Zanichelli, 1970), 342; C.M. Bianca, *Diritto civile*, III, *Il contratto* (Milano: Giuffrè, 2000), 265. See Corte di Cassazione 26 March 2012 no 4792, *Massimario Giustizia civile*, 401 (2012).

[70] In his classic monograph L. Carraro, *Il negozio in frode alla legge* n 69 above, 143 peremptorily states that 'the fraud is possible only with respect to cogent law'; this is an argument that cannot be reproduced with regard to cases of abuse tried in courts. Indeed, Luigi Carraro adds that the *fraud* in the tax law context is by its nature not comparable to *frode alla legge*, because what is actually evaded is 'the interest of the State in cashing the tax payment, rather than a provision enacted to protect of a social interest'; with the consequence that the *fraud* to the tax system should be included in the category of 'fraud to third parties' (173).

[71] That this fact really happened is clearly illustrated in U. Breccia, *L'abuso del diritto* n 17 above, 27.

with inhibiting fraudulent behavior.[72] Any deviation from the legal precept would entail a violation, irrespective of the actual conduct of the party. This clearly no longer holds true with respect to a case of abuse of right, which by itself does not violate or evade any provision, but rather counteracts its spirit or infringes the underlying principles.

On this basis, despite the tendency of our legislature to use the phrase 'abuse of rights' in a generic meaning[73] or as a synonym for law evasion, it is not possible, in my opinion, to properly ascribe to the doctrine a number of provisions affecting the tax system, in which the 'abuse of right' notion is often used to produce very specific effects. Rather, we should reserve the phrase 'abuse of right' for cases in which it is necessary to reconcile an abstract provision with the peculiarities of a case – the emblematic paradigm of the process of jurisdictionalization of the law.[74]

It appears to me that the suggestion to trace law-evasion (*frode alla legge*) back to an abuse of right does not give the judge any better interpretive tool. If anything, it increases the complexity of the qualification process: while *frode alla legge* emphasizes a substantial contrast with a formal rule establishing an unquestionable duty, the reference to the abuse of rights doctrine presupposes a power that, when exercised, goes beyond its inherent function.[75] What needs to

[72] See L. Carraro, '*Il valore attuale della massima* "fraus omnia corrumpit" ' *Rivista trimestrale di diritto e procedura civile*, 782 (1949).

[73] It has been noted that the use of the expression 'abuse' embodies a frequent phenomenon in the jurists' argumentation, phenomenon that might be defined as an 'institutionalization of words', so that the persistent repetition of a linguistic expression tends to 'form the conviction that in addition to the word also the "thing" indicated by that word exists' (in this sense M. Taruffo, 'Abuso del processo' *Contratto e impresa*, 834 (2015)).

[74] In the view of an important rethinking of the role of general clauses, see most recently, E. Scoditti, 'Concretizzare ideali di norma. Su clausole generali, giudizio di cassazione e *stare decisis*' *Giustizia civile*, 685 (2015), who, among other things, notes (709) that 'the general clause is not susceptible of being balanced because in the course of its concretization it meets factual circumstances only and not competing normative value too, as it happens instead in the case of constitutional principles'. It is quite possible, however, that in applying the abuse of rights doctrine, the judge, broadening the landscape to subjective spheres different from that of the right holder, ends up balancing the different interest at place. In another essay the same author assumes that the general clause is the 'ideal of a norm' similar to the transcendental concept of Immanuel Kant: Id, *Interpretazione e clausole generali*, in D. Dalfino ed, *Scritti dedicati a Maurizio Converso* n 28 above, 557. On the relevance of general clauses for the abuse of rights doctrine, as they are directed to promote, by virtue of their nature and aptitude to interpretative mediation, 'the system's ductility, already build up in accordance to models that are characterized by a formal flexibility', see D. Messinetti, *Abuso del diritto* n 15 above, 9.

[75] See G. Fransoni, *Abuso ed elusione del diritto* n 4 above, 410. It generally refers, regarding abuse in tax matters, to the 'need to grant the respect of substantial legality', A. Merone, Abuso ed elusione del diritto' *Il libro dell'anno del diritto 2016* (Roma: Treccani, 2016), 429. See L. Carraro, *Il negozio in frode alla legge* n 70 above, 75, who deemed impossibile to trace *frode alla legge* back to the abuse of rights doctrine because individual freedom can never be considered a subjective right (*diritto soggettivo*). In the same sense see already M. Rotondi, *Gli atti in frode alla legge* (Torino: Unione tipografico-editrice torinese, 1911), 135.

be overcome is the logic of *fattispecie*,[76] even in its broadest sense,[77] otherwise we would always be faced with black-and-white alternatives – to pay or not to pay taxes – which do not give the judge the power to evaluate third parties' interests, or (to resume the above mentioned picture of Bobbio)[78] to pay attention to superseding ethical and political needs, arisen after the enactment of the legal precept.

Personally I would not worry about the tendency to use the word 'abuse' in a higher number of contexts. Albeit an inevitable source of confusion, its growing use is the symptom that courts are becoming aware of the need to examine the exercise of rights *in concreto*, taking into account all of the interests potentially involved. The law thus discovers that its purpose is not to impose values, but to recognize them; that pluralism does not require blind adherence to the limiting dullness of an imposed provision, but rather a normative analysis that respects the inevitable diversity of concrete situations; and that the concept of legality should hence be reconsidered, basing it on cases decided by the courts according to socially shared values.[79] Only in that sense the law can rediscover its intrinsic morality and contradict the model – unfortunately still supported by many politicians – which tends to reduce it to an instrument in the hands of the ruling power.

[76] F. Gallo, 'La nuova frontiera dell'abuso del diritto in materia fiscale' *Rassegna tributaria*, 1327 (2015), qualifies the intervention of the legislature against tax evasion (*elusione fiscale*) as directed to offer 'a final content to abuse'. The same author has noted that the role-play, in the tax domain, between the legislator and the courts has always taken place within the framework of the logic of *fattispecie* (Id, 'Elusione, risparmio d'imposta e frode alla legge', in Id et al, *Studi in onore di Enrico Allorio* (Milano: Giuffrè, 1988), II, 2041.

[77] G. Fransoni, n 4 above, 411, correctly notes that, in the identification of the provision, the tax regulator refers to many general concepts ('objects', 'exclusive purpose of', 'not marginal', 'prevailing') in the frame of what it calls an 'evaluative integration'.

[78] See n 56 above.

[79] F. Astone, *L'abuso del diritto in materia contrattuale. Limiti e controlli all'esercizio della libertà contrattuale* n 18 above, 15 states that a 'system based on written rules is wholly unapt to regulate societies in constant evolution, because societal data evolve in such a swift manner that the written law simply cannot follow along. Hence, good faith and abuse of rights necessarily enter into play'.