

The Loss of a Right Within the System of Private Punitive Remedies

Francesco Longobucco*

Abstract

Moving from the intent to govern general clauses more rigorously than in the past, the following research assumes that the loss of a right may result, *stricto iure*, from the application of a civil penalty, provided for by the legislator or conventionally determined. Thus, it does not seem that the use of the objective good faith, as in the German theory of *Verwirkung*, may lead the interpreter to rule the loss of the right irreparably, without adequate review of the *voluntas legis* or where no explicit dismissive intention of disposable situation can be found. On the contrary, the loss of a right seems to be, more properly, a heteronomous penalty only for the cases characterized by conducts of misuse of powers.

I. The Loss of a Right as a Case of *Renonciation Tacite*

In the Italian system the loss of a legal situation or of a whole legal relationship mostly depends on the parties' intentions (the most relevant examples being the withdrawal, the termination of contract by mutual consent, the unilateral termination, the renunciation). In other cases, it depends on a specific legal provision. Consider the failure to perform a contract and the remedies against it; the ways, other than performance, to settle an obligation, in which either the parties' intentions or the objective fact (Art 1256 Civil Code) determine the termination of the relationship. Finally, limitation and prescription periods – which revolve around the passage of time – may also cause the loss of a right.

This articulated scenario begs the question: is there a grey area in which the termination of legal subjective situations may occur for reasons other than explicit renunciation or expiration of the limitation period? This question generates anxiety and concern in modern lawyers, particularly as the predictability and certainty of the legal system would be potentially impaired should the loss of a right be permitted without limitations. Pushing the limits of termination would result in permitting the loss of a right in unforeseeable circumstances, even in cases in which the parties did not mean to lose the right or a given limitation period has not expired.¹

* Associate Professor of Private Law, Roma Tre University.

¹ See F. Festi, *Il divieto di 'venire contro il fatto proprio'* (Milano: Giuffrè, 2007), 140-142, especially 243, which argues that connecting the loss of the right to the failure to exercise it in

These understandable concerns are symptomatic of the conclusions reached by Italian courts on the issue. An emblematic Court of Cassation decision reads that

‘a delay in the exercise of the right, even where it is attributable to the holder and it is such as to create the debtor’s reasonable expectation that the right will no longer be exercised, cannot determine the rejection of the application for the exercise of the right itself, unless there has been an unequivocal renunciation and, obviously, unless the limitation period has expired’.²

Thus, a delay in the exercise of the legal situation is relevant only in the event of renunciation or expiration of a given limitation period.

The issue outlined before immediately requires an analysis of the orthodox view which notoriously focuses on the varieties of objective good faith and, in particular, on the loss of a right due to the unfair delay in its exercise.³ This is the so-called *Verwirkung* theory, which German courts widely use in their decisions. Where a party delays the exercise of a right (even before the limitation period has expired) and thus triggers a reasonable expectation in the other party that the right will no longer be exercised, the former may lose its right due to the judicial application of the good faith clause.⁴ This theory has gained currency in

an undetermined period of time would entail conferring on courts the power to establish deadlines arbitrarily and without review.

² In such way, Corte di Cassazione 15 March 2004 no 5240, *Foro italiano*, 1397 (2004), with commentary by G. Colangelo; F. Astone, ‘Ritardo nell’esercizio del credito, Verwirkung e buona fede’ *Rivista di diritto civile*, 603 (2004). Opinion later worked on by Id, *Venire contra factum proprium. Divieto di contraddizione e dovere di coerenza nei rapporti tra privati* (Napoli: Jovene editore, 2006); L. Racheli, ‘Ritardo sleale nell’esercizio del diritto (*Verwirkung*): tra buona fede, abuso del diritto e prescrizione’ *Giustizia civile*, 2179 (2005).

³ Monographs on the issue, although with different approaches, were authored by F. Ranieri, *Rinuncia tacita e Verwirkung. Tutela dell’affidamento e decadenza da un diritto* (Padova: CEDAM, 1971). Later in Id, ‘Verwirkung et renonciation tacite. Quelques remarques de droit comparé’, in D. Bastian, *Mélanges en l’honneur de Daniel Bastian. Droit de sociétés* (Parigi: Librairies techniques, 1974), I, 427; Id, ‘Eccezione di dolo generale’ *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1991), VII, 311, and, more recently, in Id, ‘Bonne foi et exercice du droit dans la tradition du civil law’ *Revue de droit international et de droit comparé*, 1055 (1998). As well as, by S. Patti, *Profili della tolleranza nel diritto privato* (Napoli: Jovene editore, 1978), 5 (later in Id, ‘Abuso del diritto’ *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1987), I, 1; Id, ‘Verwirkung’ *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1999), XIX, 722.

⁴ German scholarship on the issue is wide. See W. Siebert, *Verwirkung und Unzulässigkeit der Rechtsausübung: ein rechtsvergleichender Beitrag zur Lehre von den Schranken der privaten Rechte und zur exceptio doli (§§ 226, 242, 826 BGB), unter besonderer Berücksichtigung des gewerblichen Rechtsschutzes (§ 1 UWG)* (Marburg: Elwert, 1934). On which, recently for the Italian translation of the pages 83-106 see L. Di Nella and A. Addante, ‘Lineamenti della dottrina dell’inammissibilità dell’esercizio del diritto nell’ordinamento tedesco sulla base del diritto comparato’ *Rassegna di diritto civile*, 274 (2006). *Verwirkung* has also penetrated Swiss scholarship and case-law (see, *inter alia*, E. Merz, ‘Die Generalklausel von Treu und Glauben als Quelle der

Spain too, where the *retrato desleal* theory has been developed,⁵ as well as in common law jurisdictions through the so-called *estoppel* (*by representation* or *by acquiescence*).⁶ These developments shed light on the peculiar aptitude of good faith and fair dealing to determine the loss of a right in private relationships.

Italian scholars' approach to the study of *Verwirkung* – in order to explore its possible transplant in the legal system through the application of objective good faith – is indicative of a tendency to stick to undisputed system categories (namely, renunciation). Thus, they have brought the *Verwirkung* within the *fictio* of the so-called tacit renunciation,⁷ thereby emphasizing the intentions behind the loss of a right.⁸

Filippo Ranieri's analysis – which draws on the first German decisions concerning the loss of a right due to unfair delay in its exercise (in the context of the law of obligations, and then labor law, trademark and copyright law) –⁹ highlights that continental legal systems contain functional equivalents to the German doctrine of *Verwirkung*.¹⁰ His analysis focuses on French and Italian case-law to show that, while continental courts nominally pay deference to the principle of renunciation as an always voluntary act that cannot be presumed, they are sometimes ready to apply the doctrine of tacit renunciation (or acquiescence) to a right because they need to protect a party where the other party's action or omission has generated an expectation or reliance on the loss of its right. Regardless of the definitions used, this doctrine represents an application of the same *ratio decidendi* underlying German decisions on *Verwirkung*.¹¹ Accordingly, tacit renunciation amounts to a mere *fictio* to protect – through the paradigm of objective good faith – the party's reliance on the loss of a right

Rechtsschöpfung' *Zeit für schweizerisches Recht*, 360 (1961). In Italy see, in addition to the authors cited in the footnote above, and *inter alia*, V. Tedeschi, 'Decadenza' *Enciclopedia del diritto* (Milano: Giuffrè: 1962), XI, 778, and also fn 47, who places *Verwirkung* based on the prohibition of *venire contra factum proprium* in an intermediate position between limitation period (based on the combination of non-activity with time) and the so-called acquiescence (whose effect depends on the party's conduct, on which, *amplius*, see Id, 'L'acquiescenza del creditore alla prestazione inesatta', in E. Allorio et al, *Studi in memoria di F. Vassalli* (Torino: UTET, 1960), II, 1580.

⁵ Recently, see M.N. Tur Faúndez, *Prohibición de ir contra los actos propios y el retrato desleal* (Cizuz Menor, Navarra: Aranzandi, 2011); in case-law, *inter alia*, see Tribunal Supremo 12 December 2011 no 872.

⁶ Outlined in the statement of an English court of 1862: 'a man shall not be allowed to blow hot and cold to affirm at one time and deny at another making a claim on those to whom he has deluded to their disadvantage and founding that claim on the very matters of the delusion' (available at <https://tinyurl.com/y6pbub6x> (last visited 28 May 2019)).

⁷ This is the idea behind the analysis by F. Ranieri, *Rinuncia tacita* n 3 above, 78. In Spain some believe that it may amount to a conventional *novación extintiva*: see Tribunal Supremo 13 September 2016 no 530.

⁸ F. Ranieri, *Rinuncia tacita* n 3 above, 126.

⁹ *ibid* 14, 31 (the *leading cases* RG 5 July 1923 and RG 27 January 1925 are here reported at page 17) and, for an analysis of Swiss law, see page 36.

¹⁰ F. Ranieri, *Rinuncia tacita* n 3 above, 72.

¹¹ *ibid* 106; F. Ranieri, 'Eccezione di dolo' n 3 above, 327-329, especially fn 100.

which the other party's conduct generated.¹²

At the same time, when German courts interpret *Verwirkung* as a legal effect depending on unfair conduct¹³ and associate it with objective good faith and abuse of rights, they seem to have the party's renunciation in mind.¹⁴ Indeed, they have never accepted a case of loss of a right which did not meet the requirements for a tacit renunciation (eg rights which are not subject to renunciation or belong to incapacitated parties), or for a legal act of the right holder.¹⁵ Filippo Ranieri's analysis ends with a realistic conclusion on the law applied in France, and in Italy to a certain extent, that is continental jurists are familiar with the prohibition of *venire contra factum proprium*, at least as an implicit *ratio decidendi* behind many judgments.¹⁶

II. The Italian Courts' Restrictive Position About Receiving the *Verwirkung* Theory

As far as Italian courts are concerned, they are reluctant to accept the German *Verwirkung*. While courts have adopted less formalistic views in support of a generous application of objective good faith in the context of work dismissal¹⁷ and termination of guarantees,¹⁸ they tend to have reasonable concerns for the plain transplant of an institution which is substantially alien to the Italian civil code,¹⁹ along with the unsupervised use of objective good faith and the escape to general clauses (*Flucht in die Generalklauseln*), as well as the absolute unpredictability

¹² Here the paradigm of objective good faith becomes relevant. See, in particular, F. Ranieri, 'Eccezione di dolo' n 3 above, 327; Id, *Rinuncia tacita* n 3 above, 122.

¹³ See, in particular, with a view to downplaying the role of party autonomy W. Flume, 'Rechtsgeschäft und Privatautonomie', in E. v. Caemmerer et al, *Hunder Jahre deutsches Rechtsleben. Festschrift für den deutschen Juristentag* (Karlsruhe: Müller, 1960), I, 135; Id, 'Das Rechtsgeschäft und das rechtlich relevante Verhalten' *Archiv für die civilistische Praxis*, 71 (1962), cited by F. Ranieri, *Rinuncia tacita* n 3 above, 29, fn 23).

¹⁴ F. Ranieri, *Rinuncia tacita* n 3 above, 122.

¹⁵ *ibid* 46.

¹⁶ F. Ranieri, 'Eccezione di dolo' n 3 above, 327.

¹⁷ See Corte di Cassazione 28 November 1992 no 12475, cited by M. Del Conte, *Le dimissioni e la risoluzione consensuale del contratto di lavoro* (Milano: Egea, 2012), 46; conforming also Corte di Cassazione 28 April 2009 no 9924, *Centro Elettronico di Documentazione (CED) Cassazione* (2009).

¹⁸ See Tribunale di Milano 3 January 2000, 'Fideiussione e mandato di credito' *Repertorio del Foro italiano*, 22 (2001).

¹⁹ A limited application has been found in Art 48 of regio decreto 21 June 1942 no 929, concerning trademarks, insofar as a challenge against the patent is prohibited where the trademark has been publicly used in good faith for five years without objections. According to F. Ranieri, *Rinuncia tacita* n 3 above, 118, this rule balances the protection of third parties' reliance with legal certainty and makes the burden of proof easier for the application of *Verwirkung* doctrine in case law. In a similar vein see E. Bonasi Benucci, *Tutela della forma nel diritto industriale* (Milano: Giuffrè, 1963), 57; M. Rotondi, 'La mancata difesa del marchio e l'art. 48 R.D. 21 giugno 1942 n. 929' *Rivista trimestrale di diritto e procedura civile*, 74 (1968).

in the loss of a right. Indeed, such fears are not even foreign to part of the German scholarship contrary to the *Verwirkung* theory which, has been strengthened both by the interpretation of the good faith clause and the abuse of rights theory.²⁰

In a decision concerning the failure to perform a loan for the purchase of cars, the Court of Cassation considered that a two-year delay to bring an action for the restitution of undue money (within the limitation period) did not amount to an abuse of right which the court could review of its own motion. Consequently, it held that a delay to exercise the right does not violate the principle of good faith in contract performance, albeit attributable to the right-holder and such as to generate the debtor's reasonable expectation that the right would no longer be exercised, and it constitutes no ground for denying the judicial protection of the right, unless that delay would result from an unequivocal renunciation. This decision was grounded on the idea that a party's mere delay in the exercise of a right (in that case, the right to bring legal proceedings against the other party's failure to perform the contract) may amount to a violation of the principle of objective good faith in contract performance only if it does not satisfy a party's interest, considering the limitations and aims of the contract, and only if it damages the other party.²¹ Moreover, where a working mother appealed the order which excluded her from the lists of farm workers, lower courts have ruled that she was not under an obligation to inform the Italian National Social Security Institute (INPS) about that appeal, given that Italian law does not recognize the *Verwirkung* principle (or the unfair delay in the exercise of a right).²²

Other decisions regarding different cases rule out that delay entails tacit renunciation to a right because a failure to act or a delay in the exercise of a right are not *per se* sufficient expressions of an intention to dismiss the right.²³ It is equally suggested that, in order for any rights to expire due to the holder's

²⁰ It is worth reminding, with a view to warning against the equitable use of objective good faith in case law, J.W. Hedemann, *Die Flucht in die Generalklauseln* (Tübingen: Mohr, 1933); W. Flume, *Richter und Recht* (München-Berlin: C.H. Beck, 1967). Despite being a minority opinion, see also E. Wolf, *Allgemeiner Teil des BGB* (Köln-Berlin: Vahlen, 2nd ed, 1976), 89, who rejects, in particular, *Verwirkung* on the ground that it runs contrary to the legal rules on prescription periods.

²¹ This way, Corte di Cassazione 15 March 2004 no 5240, n 2 above. See also Corte di Cassazione 9 August 1997 no 7450, 'Opere pubbliche' *Repertorio del Foro italiano*, 504 (1997).

²² Arguing this way Tribunale di Vallo della Lucania 2 March 1990, *Nuovo diritto (II)*, 769 (1990).

²³ See Corte di Cassazione 20 January 1994 no 466, 'Contratto in genere' *Repertorio del Foro italiano*, 481 (1994); Corte di Cassazione 27 June 1991 no 7215, 'Obbligazioni in genere' *Repertorio del Foro italiano*, 37 (1991); Corte di Cassazione 15 December 1981 no 6635, 'Contratto in genere' *Repertorio del Foro italiano*, 281 (1981). It has been said that, when it comes to explicit termination clauses, the tolerance on the creditor's part, which may substantiate in a negative or positive conduct, does not determine the termination of the clause due to a change in its contractual regime, nor a tacit renunciation occurs where the creditor, at the same time or after the tolerance, shows the intention to avail himself of the clause in the event of further delay in the performance (this way, Corte di Cassazione 31 October 2013 no 24564, 'Contratto in genere' *Repertorio del Foro italiano*, 481-482 (2013)).

non-exercise, Art 2934 Civil Code requires the lapse of a period of time, regardless of the holder's good faith.²⁴

III. The Loss of a Right as a Case of 'Qualified Tolerance'

There have been endeavors to build a *Verwirkung* doctrine without considering intention, but rather assessing the objective good faith arising from the right-holder's conduct. Indeed, a German scholar pointed to the party's 'qualified tolerance' (*Duldung*) generating expectations in the other party.²⁵ This theory does not consider *Verwirkung* an exception to the principle that the right's holder inertia can determine the loss of a right only where a limitation or prescription period expires. To that end, it is required that the right-holder undertakes a specific conduct under the circumstances, while mere inertia would not be sufficient.²⁶

It is submitted that the party's failure to exercise a right either where the other party interferes with the enjoyment of a real or absolute right or where the other party fails to correctly perform an obligation, may amount to the party's tolerance, where the party did know about that interference or failure to perform.²⁷

Salvatore Patti remarked that, although Italian courts have felt compelled to consider the conflict of interests determined by tolerance (which appears to be a misguided view, because it tends to apply fictional intentions rather than the principle of good faith),²⁸ it is necessary to deny any relationship between the German *Verwirkung* and tacit renunciation (thus any subsequent association of tolerance with *iuris et de iure* presumptions of renunciation).²⁹

This theory dismisses the idea of tacit renunciation and praises an attribution of legal effects, based on the principle of good faith, to conducts that have triggered an expectation in the other party. Accordingly, the German *Verwirkung* is closely connected with the applications of tolerance because the focus would not be on renunciation, but only on the right holder's conduct under the circumstances. The aim of judicial scrutiny consists of finding the other party's reliance, justified by

²⁴ Corte di Cassazione 26 May 1999 no 5099, *Diritto e giurisprudenza agraria e dell'ambiente*, 399 (2000), with critical commentary by F. Sesti.

²⁵ See, in particular, E. Riezler, *Venire contra factum proprium: studien im römischen, englischen und deutschen Civilrecht* (Leipzig: Duncker & Humblot, 1912), 146.

²⁶ S. Patti, '*Verwirkung*' n 3 above, 724.

²⁷ This is said by S. Patti, '*Esercizio del diritto*' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1991), VII, 660.

²⁸ *ibid* 660.

²⁹ It is known that a tacit renunciation in German law meets two hurdles: one consists in the fact that a unilateral renunciation does not determine the loss of a right, which requires a contract under § 397 BGB; the other can be found in § 119 BGB which makes it possible to challenge an agreement due to a mistake irrespective of third parties being aware of it, which, when claimed by the right-holder to challenge the legal relevance of his inertia, may paralyze the application of *Verwirkung*.

the right holder's previous conduct, such scrutiny having an objective nature irrespective of the (explicit or tacit) intentions of the right holder.³⁰ This would ultimately show that *Verwirkung* is not a legal act (*negozio giuridico*) because it has *ex lege* effects. Even where German courts consider the unfair delay (*illoyale Verspätung*) relevant, they only do that where that delay has generated an expectation in the other party, and not on the ground that the party did want to delay the exercise of the right in order to get a better benefit.³¹

The consequence of the expectation generated by the other party's tolerance is that *Verwirkung* can determine either the extinction of a right (its effects being equated to the expiration of a limitation period, but its nature and function being different),³² or the mere limitation of a right (on the ground of *Unzumtbarkeit*, that is something which cannot be demanded).³³

IV. The Limits of the Previous Theories: For a New Reconceptualization of the Issue

This debate has shed light on the complexity of the issues around the loss of a right.

The two perspectives – the former belonging to Latin systems such as the Italian and French systems, which focuses on the intentionality of tacit renunciation (*renonciation tacite*) justifying the other party's expectation,³⁴ the latter belonging to the German system, which is based on the objective scrutiny *ex fide bona* of tolerance, justifying the other party's expectation too –³⁵ have at least two points in common, albeit grounded on different premises.

The first point in common is their non-heteronomous nature. While the intentional and autonomous dismissal of a right is inherent to tacit renunciation, the act of tolerance justifies the other party's expectation only if the tolerating party is cognizant.³⁶ Hence, it is suggested in the latter case that the right-holder consciously and intentionally dismisses his right through his tolerance, while knowing about the consequences of his conduct; so, the effect the *Verwirkung*

³⁰ S. Patti, *Profili della tolleranza* n 3 above, 120.

³¹ See, on the matter, *ibid* 115.

³² S. Patti, *Profili della tolleranza* n 3 above, 109, and there fn 17, with regard to the German scholarship objection to associate *Verwirkung* with a sort of reduced prescription period. Also, F. Ranieri, *Rinuncia tacita* n 3 above, 126, warns against a prescription *de facto*.

³³ *ibid* 119.

³⁴ F. Ranieri, *Rinuncia tacita* n 3 above, 125, argues, in a way which is quite similar to S. Patti's perspective, that the idea that the loss of a right may occur only through an act of will has hindered the recognition of the principle that a loss of the right may occur, irrespective of the right-holder's intention, where he has determined in the other party a justified reliance that the right would no longer be exercised.

³⁵ *infra, retro*, § 3.

³⁶ Cases decided by German courts show that parties knew about the actual development of the relation: in this sense, see S. Patti, *Profili della tolleranza* n 3 above, 107.

takes does not seem to be heteronomous, ie imposed by the legislator.³⁷

The second point in common is that a finding of *Verwirkung*, which may be on request or *ex officio*, has a relational nature.³⁸ Such finding is based on the violation of objective good faith within the relationship between the parties; thus, it is not an absolute finding because it concerns both parties' conduct and, ultimately, the performance of their relation (Art 1375 Civil Code). It follows that *Verwirkung* is often found where a party's action or omission³⁹ also amounts to a real failure to perform an obligation.⁴⁰

It is quite clear that the so-called evaluative good faith may be used to correct conducts in the contractual relation. In both the aforementioned perspectives, the function of *Verwirkung* is associated to justice in the specific case, which is so typical of the *ex fide bona* review. Therefore, the reason behind the institution can be found in the equitable function of the loss of a right.⁴¹

It is thus necessary to ponder these inputs, considering the hurdles to transplant foreign models in the Italian system and the risks associated with easy generalizations and with the acceptance, *sic et simpliciter*, of solutions developed by German scholars based on the general clause of good faith.⁴²

Along these lines, this paper seeks to determine whether the Italian legal system contains that grey zone (which we discussed above) stretching between the intentional dismissal of a right and limitation/prescription periods (subject to a term). However, it will first have to examine the codified elements that may warrant the loss of a right.⁴³ After that, it will give these elements a legal qualification, and determine their *ratio essendi* and function (consisting in punishing misuses of power, as it will be discussed below). Finally, it will explore the issue of whether the loss of a right may be subject not only to law, but also to

³⁷ This is supported by P. Cisiano, 'Atto non negoziale di autonomia' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET: 2003), Agg I, 168.

³⁸ Unlike prescription periods which, as is well known, cannot be established by the court on its own motion. On the matter, with references to German scholarship, see S. Patti, *Profili della tolleranza* n 3 above, 119, and there fn 39.

³⁹ F. Festi, *Il divieto* n 1 above, 27, accepts that positive conducts may be relevant too.

⁴⁰ See L. Pascucci, *Ritrattazione della volontà risolutoria e reviviscenza del contratto* (Torino: Giappichelli, 2013), 174.

⁴¹ See P. Gallo, 'Estinzione dei diritti', in G. Gabrielli ed, *Commentario al Codice Civile* (Torino: UTET, 2016), 513, according to whom, thanks to *Verwirkung*, German courts have applied much of the discretion that the law gave them in the field of prescription periods. This is a relevant element, although complicated questions arise; to what extent is it appropriate that courts apply equity, ie justice to the specific case, to the detriment of law in the strict sense? What has to be accepted is that, after legal positivism and the exegesis school, most recent scholars have increasingly appealed to equity.

⁴² These risks are highlighted by F. Carusi, 'Correttezza (Obblighi di)' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), X, 713; C.M. Bianca, 'Dell'inadempimento delle obbligazioni', in A. Scialoja e G. Branca eds, *Commentario al Codice Civile* (Roma-Bologna: Zanichelli, 1967), 75; V. Pietrobon, *L'errore nella dottrina del negozio giuridico* (Padova: CEDAM, 1963) 90.

⁴³ *infra*, *amplius*, §§ 5 fol.

private transactions *poenae nomine*,⁴⁴ which would make it a legal remedy within the diverse context of private civil penalties.

V. The Loss of a Right in the Italian Civil Code: The General Case of Art 1015 Civil Code (the Misuse of the Usufructuary)

The first step towards an exact systematization of the issue at hand within the Italian legal system consists of examining some cases provided for by the civil code, in which a forced loss of a legal situation occurs. This analysis seeks to determine whether those provisions share the same *ratio*, which may be used to establish a common framework.

Starting with real rights, Art 1015 of 1942 Civil Code (already Art 516 of 1865 Civil Code) connects the loss of the right of usufruct to the abuse the usufructuary made through specific conducts, such as the transfer of the assets, their deterioration or destruction due to the failure to repair them.

The list of the ‘abusive’ conducts is indicative and not exhaustive. Any conducts by the usufructuary presenting a relevant degree of severity and capable to impair the right of ownership may be found to be abusive. This occurs where the property is irreparably and permanently damaged and its value severely declined. Think of the case of the alteration made by the usufructuary of the economic destination, which the literature has drawn from Art 981 Civil Code. On the contrary, where the court deems the situation less serious, the other remedies laid down in the second paragraph of that article may be used. They tend to not have a punishing nature, but to modify the legal relation through the provision of adequate security and compensation for damages.

According to the traditional view, the *ratio* behind the provision lies in the general prohibition of the abuse of rights. In other terms, the abuse of the right of usufruct consists of breaking the limits to its enjoyment and results in possible usufructuary’s conducts related to the ways it enjoys the right.⁴⁵ The view at hand believes that an inherent limitation to the right represents the violation of the principle of fairness and of the good faith clause,⁴⁶ which in most serious circumstances would lead to the loss of the real right. The loss results from a judgment that may even hold the usufructuary liable for damages under Art 1218 Civil Code. In order to prevent the usufructuary from keeping abusing the right, thereby increasing the damage in the period between the application and the damage, the owner may claim a seizure of the assets. The loss of the right effected by the judgment would result from the application of objective good

⁴⁴ *infra*, § 9.

⁴⁵ See A. Lamanuzzi, *L’abuso del diritto nei rapporti di godimento di cosa altrui* (Bari: Cacucci, 2005), 110, contending that the abuse of right by the usufructuary requires that a specific relation between usufructuary and owner exists.

⁴⁶ *ibid* 117.

faith to the contract.

However, a different interpretation of the provision appears feasible. The wording ‘abuse of usufruct’ is correct where it relates to the deterioration of the property in usufruct (indeed, the usufructuary must respect its economic destination: Art 981 Civil Code); the wording ‘abuse’ is not correct where it relates to the transfer of the property in usufruct (the French Civil Code does not provide for this situation). The latter conduct, strictly speaking, amounts to a misuse (as an excessive use), ie the exercise of a power which actually does not exist, because the usufructuary transfers a right (the ownership) which he does not hold.⁴⁷

This distinction primarily draws on the *discrimen* between abuse of rights and misuse of powers, which will be thoroughly discussed in the conclusion, and provides the courts with a fixed and reliable criterion to determine the severity of the conduct which may justify an adequate civil remedy.

In this context, the loss of the right of usufruct can be considered a private penalty which results in the loss of the power in the event of its misuse (eg in the above-mentioned event of transfer of the property by the usufructuary).⁴⁸ In the different scenario of abuse of rights in the strict sense (think about the alteration of the economic destination of the property in usufruct, such as the impairment or destruction, which affects the content of the right), the remedies available to the courts should be different and less invasive, namely precautionary measures.

The two classes of active conducts – on one hand, the transfer of property, on the other the impairment/destruction thereof – can be conceptualized in

⁴⁷ This correct intuition is owed to P. Rescigno, ‘L’abuso del diritto’ *Rivista di diritto civile*, 259 (1965) (later in Id, *L’abuso del diritto* (Bologna: il Mulino, 1998), 95), who believes that conducts under Art 1015 Civil Code actually amount to misuses of powers, ie conducts falling outside the right’s content, so that these cases are not subject to tort rules under Art 2043 Civil Code, as the misuse of power would require, but to the termination of right, as explicitly provided for by law. Limiting the misuse of power to the sale of property, P. Perlingieri and P. Femia, *Nozioni introduttive e principi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2004), 142, and, G. Palermo, ‘L’usufrutto’, in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 2002), II, 8, 139. Remarking that the transfer must concern the ownership, on which the usufructuary has no power T. Carnacini, ‘Sull’ abuso dell’ usufruttuario’ *Rivista trimestrale di diritto e procedura civile*, 468 (1978). Arguing that the usufructuary transfers the assets and not the mere usufruct on them, A. De Cupis, ‘Usufrutto (Diritto vigente)’ *Enciclopedia del diritto* (Milano: Giuffrè, 1992), XLV, 1124.

⁴⁸ See, *inter alia*, D. Barbero, *L’usufrutto e i diritti affini* (Milano: Giuffrè, 1952), 523; F. De Martino, ‘Usufrutto, uso e abitazione’, in A. Scialoja e G. Branca eds, *Commentario al Codice Civile* (Roma-Bologna: Zanichelli, 1978), 75, 338; R. Nicolò, ‘Dell’usufrutto, dell’uso e dell’abitazione’, in M. D’Amelio and E. Finzi eds, *Commentario al Codice Civile* (Firenze: Barbero, 1942), 637; L. Bigliazzi Geri, ‘Usufrutto, uso e abitazione’ *Enciclopedia giuridica* (Roma: Treccani, 1994), XXXII, 275; L. Luchini, ‘Abuso dell’usufruttuario e responsabilità extracontrattuale’ *Responsabilità civile e previdenza*, 214 (1998); G. Venezian, ‘Dell’usufrutto, dell’uso e dell’abitazione’, in P. Fiore and B. Brugi eds, *Trattato di diritto civile* (Torino: Eugenio Margheri - Unione tip. Editrice torinese, 1936), V, 2, 865. In case law, the punitive nature of the remedy is supported by Tribunale di Trani 3 March 1953, *Giurisprudenza italiana*, I, 293 (1953); Tribunale di Brescia 29 March 1954, *Giurisprudenza italiana*, I, 799 (1954); Corte di Cassazione 2 March 1976 no 699, *Giustizia civile - massimario*, 308 (1976).

different ways. The first case is independent from the relationship between owner and usufructuary as it relates to conducts falling outside the usufructuary's powers. The loss of a right ensues from the objective fact – regardless of any subjective elements of the conduct – of a conduct falling outside the usufructuary's power. Such effect is a heteronomous penalty imposed by the legislator, which does not result from the parties' failure to perform their obligations; it is indeed a case of misuse of powers. By contrast, where the right of usufruct is abused (think of the alteration of the economic destination, or the destruction of the property), as it has been observed above, the court should be given some leeway to find the most adequate remedies under the circumstances, which may be less severe than the loss of the right (eg compensation for damages).

Once the punitive nature of the provision in question has been clarified, it is possible to argue for the non-exceptional character of Art 1105 Civil Code, and thus its extension to the complex system of real and personal rights of enjoyment. To be fair, courts and scholars have advocated for such extension based on objective good faith through a systematic and analogical interpretation of Arts 833, 1015, para 1, and 1375 Civil Code. For example, courts have accepted that the principle laid down in Art 1015 Civil Code may apply not only to usufruct, but also to the other two real partial rights of enjoyment, namely use and housing, based on the explicit reference within Art 1026 Civil Code (limit of compatibility), by phrasing arguments based on objective good faith.⁴⁹ While enjoying properties belonging to third parties, even the holder of a right of easement may abuse and violate the limits of his right where the ways it is exercised run contrary to the act originating the right or, in any case, to good faith (basing this argument on Art 1063 Civil Code). Another example is personal rights of enjoyment (eg lease) in the event of a change in the property's destination, non-use, or delay in its return. In these scenarios, the loss of the right does not really ensue from a judgment on the loss of the right, but from a judgment on the termination of contract due to the failure to perform it.

However, an indiscriminate extension needs clarification. Only a conduct amounting to misuse of power and not a generic appeal to objective good faith (which could apply only to abusive conducts) could justify the extension of the legal removal of the entitlement – considering the same requirements and needs for protection – to cases other than the misuse of usufruct, ie all the real and personal rights of enjoyment.

⁴⁹ See Corte di Cassazione 27 March 1970 no 854, 'Usufrutto' *Repertorio della giurisprudenza italiana*, 3736 (1971). In scholarship see G. Pugliese, 'Usufrutto, uso e abitazione', in F. Vassalli ed, *Trattato di diritto privato* (Torino: UTET, 2nd ed, 1972), 854; L. Bigliazzi Geri, n 48 above, 312. Recognizing the abuse of the right of use, M. Trimarchi, 'Uso (diritto di)' *Enciclopedia del diritto* (Milano: Giuffrè, 1992), XLV, 930; with regards to the right of housing, S. Orlando Cascio, 'Abitazione (diritto civile)' *Enciclopedia del diritto* (Milano: Giuffrè, 1958), I, 102. Lately, see A. Lamanuzzi, n 45 above, 121.

VI. The Loss of a Right in Contract Law: The Case of Art 1956 Civil Code (the Misuse of the Guarantor)

Turning to contracts, it is interesting to point to the extinction of the guarantee and, particularly, the scope of Art 1956 Civil Code.

This article is also generally construed in a relational perspective, through a constant association with the violation of fairness and objective good faith,⁵⁰ so that the duty to monitor imposed on creditors in Art 1956 Civil Code results in a rule to run credit activities fairly and prevents conducts amounting to abusive granting of credit.⁵¹

Yet, the term used in the article in question, ie the ‘release’ of the guarantor, appears quite atechanical. It does not relate to a sort of *exceptio doli*, as it has been recently remarked,⁵² or to a ‘releasing contractual violation’,⁵³ as supported by a body of case-law, which is evocative of a direct failure to perform on the creditor’s part. Rather, it concerns a real extinction of the guarantee.

Accordingly, also in this situation a construction of the article in a relational perspective is not convincing at all. As observed on the misuse of usufruct above, it seems that a conduct consisting in failing to inform the guarantor falls outside the theory of abuse of rights and the application of objective good faith. On closer inspection, failing to inform the guarantor, in the event of a guarantee *in fieri*, seems to constitute an omission which falls outside the creditor’s powers; otherwise, the nature of the guarantee will be jeopardized. In other words, the duty to inform and obtain the guarantor’s consent does not amount to a mere duty *ex fide bona* thus it does not influence the failure to perform the contract; instead, it is a limit to the guaranteed credit from the outside, whose violation determines the loss of the guarantee in his favor. It is not a case of abuse of rights (*rectius*: abusive granting of credit) as it is in traditional literature, but of misuse of powers, resulting in the legal loss of the entitlement to the guarantee.

⁵⁰ There is plenty of case law on the matter: Corte di Cassazione 22 October 2010 no 21730, *Corriere giuridico*, 510 (2011), with commentary by F. Rolfi, ‘Fideiussione *omnibus* ed obblighi di buona fede del creditore’; Corte di Cassazione 11 January 2006 no 394, *Contratti*, 922 (2006); Corte di Cassazione 29 October 2005 no 21101, *Contratti*, 775 (2006), with commentary by A. Angiuli, ‘La fideiussione “*omnibus*” tra silenzio del fideiussore e scorrettezza del creditore’; Corte di Cassazione 9 March 2005 no 5166, *Giurisprudenza italiana - massimario*, (2005); Corte di Cassazione 14 June 1999 no 5872, *Contratti*, 922 (1999); Corte di Cassazione 1 July 1998 no 6414, *Giurisprudenza italiana - massimario*, (1998).

⁵¹ Lately, Corte di Cassazione 2 March 2016 no 412, and Corte di Cassazione 9 August 2016 no 16827, *Contratti*, 1077 (2016), with commentary by A.A. Dolmetta, ‘Sulla “speciale autorizzazione” del fideiussore ex art. 1956 c.c.’.

⁵² See the significant considerations by F. Rolfi, ‘Fideiussione *omnibus*’ n 50 above, 514, who clarifies the scope of the provision and argues that the *exceptio doli* under art 1956 Civil Code plays a wider role, because it applies to the events in the obligation covered by the guarantee. Arguing for the *exceptio doli* see also A.A. Dolmetta, ‘Sulla “speciale autorizzazione” del fideiussore’ n 51 above, 1084.

⁵³ Corte di Cassazione 9 August 2016 no 16827 n 51 above; Corte di Cassazione 21 February 2006 no 3761, *La giurisprudenza del bollettino di legislazione tecnica*, 476 (2006).

This opinion is supported by a couple of reasons, which it is worth discussing below.

Firstly, para 2 of the article in question provides for the nullity of any preventive waiving to the guarantor's release. Not even the guarantor could avoid the change of circumstances following a conduct amounting to misuse of powers (thus, determining the extinction of the guarantee); on the contrary, it would be possible if the duty to inform concerns objective good faith or the performance of contractual obligations through the creditor's waiving to challenge the failure to perform the contract. As a consequence, the loss of the right is a heteronomous penalty imposed by law, thus unavailable in the event of conducts which fall outside the individual's powers. This also suggests that the forced loss of the entitlement can occur in cases other than an explicit or tacit renunciation because the article explicitly provides for the nullity of any voluntary renunciation.

Secondly, courts have remarked that, even in trial, the guarantor cannot avail himself of the penalty consisting in the loss of the right. Extinction under Art 1956 is not an exception in the strict sense and courts can establish the loss of the guarantee (actually, the Court of Cassation held the 'nullity' of the guarantee) on their own motion at every stage and level of the proceedings.⁵⁴

In conclusion, in light of the arguments phrased above, upon abandoning the perspective revolving around the mere failure to perform the obligation and good faith leading to the abuse of rights, Art 1956 Civil Code seems to open up to a new interpretation within the system, ie the loss of a right resulting from misuse of powers, which it is here discussed.

VII. The Loss of a Right in Succession Law: The Case of Arts 527, 493, 494, 505 Civil Code (the Loss of the Power to Waive the Inheritance and the Loss of the Benefit of Inventory)

Even in the context of succession law, the loss of a right seems to adopt a punitive function, which is independent from the paradigm of objective good faith and the abuse of rights.

Firstly, consider Art 527 Civil Code, under which the prospective heirs who removed or hid assets belonging to the hereditary mass lose their power to waive the inheritance and are considered purely and simply heirs (while a waiver of the inheritance would have no effect).

It has been correctly observed, probably with less discussion compared to the situations examined above, that the article concerns a loss with a punitive

⁵⁴ On this matter, see Corte di Cassazione 3 July 2015 no 13759, unpublished, which construes Art 1956 Civil Code as a particular case of (supervening) nullity of the guarantee due to the difficult satisfaction of credit. The nullity of the guarantee can be established in any at every stage and level of proceedings.

function,⁵⁵ irrespective of any imposed deadlines. The fraudulent possession of hereditary assets is a conduct amounting to misuse of powers, which the prospective heir does not have power to take without previously accepting the inheritance (explicitly or tacitly), even more so in the event he waived the inheritance. This conduct justifies the loss of the right to waive the inheritance while he becomes a pure and simple heir.

As in the case of an *omnibus* guarantee discussed above, the waiver of the inheritance is irrelevant because the prospective heir becomes a real heir *ipso iure* for the operation of the article in question. This gives further support to the thesis concerning the heteronomous and imposed nature of the loss of the right (to waive the succession) subject to conducts that the prospective heir has no power to take.

The heir may also lose the benefit of inventory under Arts 493, 494 and 505 Civil Code.⁵⁶ Such loss does not relate to the loss of a right due to the inertia lasting for a given time (which is a limitation in its own right), yet again to a specific penalty that the law imposes on heirs with a view to protecting hereditary creditors and legatees, when the heir who had previously accepted the inheritance with the benefit of inventory acts in a certain way.

In particular, the benefit may be lost before or after acquiring it. For the purposes of this essay, it is more interesting to explore the losses of the benefit after its acquisition. For instance, it is worth considering the loss resulting from dispositions of the hereditary assets (Art 493 Civil Code) without a judicial authorization, omissions or lies in the inventory (Art 494 Civil Code), failure to comply with the procedural steps during liquidation (Art 505 Civil Code). These conducts, which are prohibited for the benefited heir, do not amount to a mere failure to perform the obligations with creditors and legatees, but constitute a misuse of powers since they fall outside the powers conferred by the law upon the heir with benefit. In these cases, the heir's good faith is presumed until proven otherwise. However, it is not a case of objective good faith, because once more the unfair conduct is not relevant for the purposes of the loss, but only for the duty imposed on creditors and legatees to provide evidence of the party's bad faith.

According to some scholars, also the failure to provide a guarantee (Art 492 Civil Code) would justify the loss of the benefit, whereas the law remains silent

⁵⁵ Highlighting the punitive nature of the provision, see F. Messineo, *Manuale di diritto civile e commerciale* (Milano: Giuffrè, 1962), VI, 456; G. Azzariti and G. Martinez, *Successioni per causa di morte e donazioni* (Padova: CEDAM, 1979), 82; C. Giannattasio, 'Delle successioni', *Commentario al Codice Civile* (Torino: UTET, 1971), II, 245. *Contra*, L. Ferri, 'Successioni in generale', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1980), 137.

⁵⁶ On the punitive nature of such provisions, see B. Thellung De Courtelary, 'Volontaria giurisdizione e successione *mortis causa*' *Enciclopedia diritto* Cendon, (Padova: CEDAM, 2000), 295, and, before, N. Stolfi, *Diritto civile*, VI, *Il diritto delle successioni* (Torino: UTET 1934), XII, 151.

on the matter;⁵⁷ according to others, it would only warrant an attachment order or other precautionary measures under Art 700 Code of Civil Procedure.⁵⁸ Since the failure to provide guarantee does not amount to a real case of misuse of powers, it would be better to avoid the *extrema ratio* of the loss of the right and opt for a less severe remedy.

That the loss of the benefit of inventory may be relied on only by the deceased's creditors and by legatees, under Arts 505 - last para - and 509 Civil Code, in order to let the heir keep on the liquidation although he may have incurred the loss, depends on the peculiar nature of the liquidation procedure, and on the desirability to avoid the confusion of patrimonies may harm creditors and legatees. In these circumstances, the loss is clearly balanced by the interests of those who rely on it, highlighting another shade of the issue, ie the remedial soul of the loss of a right, which rests with an assessment made by the protected party.

VIII. The Loss of a Right in Family Law: The Case of Art 330 Civil Code (the Loss of Parental Responsibility)

The loss of a right occurs also in the context of family law. Consider the classic case of the loss of parental responsibility under Art 330 Civil Code, which determines the extinction or loss of the entitlement to the legal situation. The court can establish the loss as an irremediable option, considering the child's right not to suffer a material injury.⁵⁹ In a similar vein, consider Art 384 Civil Code concerning the removal of the guardian, especially in the event of conducts running counter to scope of guardianship: it is self-standing that, in this clear case of misuse of powers, the loss of the guardian's powers amounts to a penalty for conducts which fell outside its powers.

Turning back to Art 330 Civil Code, although the punitive construction of the provision has lost momentum, it is suggested that, with a view to protecting only the minor's interest, the loss of parental responsibility results from objective acts and conducts, irrespective of the author's intention or negligence. Those acts or conducts are not only merely abusive, but they are also not even included within the parent's powers. Accordingly, where Art 330 Civil Code mentions the abuse

⁵⁷ L. Ferri, n 55 above, 384, refers to preservation orders.

⁵⁸ A. Cicu, 'Successioni per causa di morte. Parte generale. Delazione e acquisto dell'eredità', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale*, (Milano: Giuffrè, 2nd ed, 1961), 290; G. Grosso and A. Burdese, 'Le successioni. Parte generale', in L. Vassalli ed, *Trattato di diritto civile* (Torino: UTET, 1977), XII, 473.

⁵⁹ See, within this perspective, M. Sesta, 'Il controllo giudiziario sulla potestà', in M. Bessone ed, *Trattato di diritto privato IV, Il diritto di famiglia* (Torino: UTET, 1999), III, 247; A. Bucciante, 'La potestà dei genitori, la tutela e l'emancipazione', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1997), 4, 661; G. Villa, 'Potestà dei genitori e rapporti coi figli' *Il diritto di famiglia*, in G. Bonilini e G. Cattaneo eds, *Trattato* (Torino: UTET, 1997), III, 307; in case law see Corte d'Appello di Bologna 11 May 1988, *Diritto delle persone e della famiglia*, I, 602 (1989).

of (parents') powers,⁶⁰ it is necessary to consider the most serious cases (eg abandonment or sexual assault), as well as the parents' abuse of their legal usufruct (cf Arts 324 and 326 Civil Code on the transfer of the usufruct itself)⁶¹ as a lack of power on the parent's part, which determines its extinction. By contrast, in the least serious cases different measures will suffice, such as an order to remove the parent from the family home (Art 333 civil code). All these measures will have to be taken by giving due consideration to the circumstances of each individual case.

The loss of a right is characterized by its reversible nature, since parental responsibility, as it is known, can be reinstated (Art 352 Civil Code). This is justified by the need to protect the minor and secure him their parent.

On the other hand, it has been observed that, in case of control of private powers, the functions behind the power are not related to the concept of abuse, if not in a diverted or conventional sense. The original function of the power is preserved *a priori* by the relevant provision, through specific duties of conduct imposed on the person having that power.⁶² This opinion adds that the form of control, the specific exercise of power, is inherent to its structure, and has the sense and form of an obligation.⁶³ This contributes to downplaying, in keeping with the analysis so far developed, the role of good faith and abuse of control of family powers, dragging it onto a more objective assessment of the conducts' compliance with the legislative framework, thereby warranting the scrutiny that the exercise of power remains within what the law permits the acting party.

IX. The Loss of a Right as an Exercise of Party Autonomy: For a Theory of a 'Punitive Extinguishing Agreement'

The source of the loss of a right can be found not only in the law, but also in the parties' intention. It is possible, as in the legal situations examined before,

⁶⁰ Art 330 Civil Code has been construed as encompassing two cases of termination, the violation of the imposed obligations and the abuse of powers; see M. Cerato, *La potestà dei genitori. I modelli di esercizio, la decadenza e l'affievolimento* (Milano: Giuffrè, 2000), 150; P. Verellone, 'Il controllo giudiziario sull'esercizio della potestà', in P. Zatti ed, *Trattato di diritto di famiglia*, II, *La filiazione*, edited by G. Collura, L. Lenti and M. Mantovani (Milano: Giuffrè, 2002), 1043.

⁶¹ Arguing for the application of Art 1015 Civil Code to the termination of parental responsibility M. Dogliotti and F. Gallo, 'Genitori e figli: l'usufrutto legale' *Famiglia e diritto*, 309 (2007); *contra*, M. Gennaro, 'Usufrutto legale dei genitori' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1999), XIX, 579.

⁶² This way, D. Messinetti, 'Abuso del diritto' *Enciclopedia del diritto* (Milano: Giuffrè, 1998), II, 20, who cites, at fn 35, P. Rescigno, 'L'abuso del diritto' n 47 above, 248, who summarizes the complexity of function in the violation of specific obligations, which protect the interests that the law seeks to achieve. On the contrary, A. di Majo, 'Delle obbligazioni in generale', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1988), 347; Id, *La tutela civile dei diritti* (Milano: Giuffrè, 4th ed, 2003), 410, seems to advocate for the use of objective good faith to control so-called private powers (criticizing public law techniques, such as legitimate interests and procedures).

⁶³ D. Messinetti, n 62 above.

that parties exercise their autonomy in such a way as to agree on terms encompassing the loss of a right with a punitive function, ie the punitive extinction of their rights and duties. This would be a peculiar intentional regime of extinction for the purposes of Art 1321 Civil Code which must be constrained by some limits, as it will be detailed below.

Within the context of agreements with punitive function – which traditional literature has investigated⁶⁴ – one might consider the parties' agreement on a loss of a right *poenae nomine*, which would be lost in the event of conducts, possibly determined by the parties in advance, which do not amount to a mere failure to perform the obligations undertaken, but to a more serious case of misuse of the powers afforded by the contract.

One thing should be made clear: while in the legal situations examined before the outer limit to the situation is clearly set by law (consider the known scope of Art 1105 Civil Code) and then applied by courts, in this case it should be upon the parties to set the limit determining the conducts that fall outside their powers. These are neither conducts that overstep the agreement function (the so-called internal limit to the situation), as they would otherwise represent a case of abuse of rights; nor conducts in breach of the parties' duties, thereby determining the failure to perform them and resulting in compensation for damages. Instead, they are conducts that cannot be identified with the obligations undertaken by the parties and reflect the unlawful exercise of a power. In other terms, the parties may well list a series of conducts which fall outside their powers, on pain of the loss of the situation they are entitled to. The term would amount to a prohibition to act which may limit legal situations from the outside. It would not really target conducts contrary to the agreement (thus the failure to perform), but rather conducts which the agreement does not provide for. The loss would depend on a private punishing agreement, though in relation to the *modus operandi* of the legal situation analyzed before.

An example could help better understanding. The parties to a contract can list a series of particularly serious conducts that do not constitute failure to perform it. Consider the case of 'abuse' of the property on lease, which could be governed by an extensive application of the rule concerning the misuse of usufruct, as mentioned above. However, the loss of the right could also ensue from party autonomy, where the parties agree on the prohibition to act on the property in certain, serious ways, which would irremediably result in the loss of the right to enjoy that property. This situation, which the courts tend to square within the failure to comply with a general duty of care⁶⁵ and may be even inserted in a termination clause,⁶⁶ could be targeted by the parties through the loss of the

⁶⁴ It is debated whether other conventional private penalties may be added to the penalty clause, which is the most famous of private penalties, probably because of its name: E. Moscati, 'Pena (dir. priv.)' *Enciclopedia del diritto* (Milano: Giuffrè, 1982), XXXII, 774.

⁶⁵ See a recent decision delivered by Tribunale di Frosinone 27 January 2017 (unpublished).

⁶⁶ Arguing this way Corte di Cassazione 11 October 2000 no 13525, *Giurisprudenza italiana* -

right, where the parties themselves frame it as a case of lack of power *ex negotio*. This would let the parties obtain a deterrent and punitive effect for undesirable conducts without using the – functionally neutral – scheme of the failure to perform the contract, rather managing the loss with an intentional and punitive mechanism. This conclusion seems to be supported by the lower courts which do not accept the exhaustive nature of the conducts listed in Art 1015 Civil Code, thereby opening the door to a potential agreement on the punishment of conducts through a free exercise of party autonomy.⁶⁷

This theory could also apply to the so-called testamentary losses. Consider the well-known case of the prohibition to challenge the testament before a court. This agreement is traditionally brought within the resolutive condition, ie a loss from failure to perform, but on closer inspection it could be construed as an atypical testamentary clause on the *ex voluntate* dismissal of situations transferred *mortis causa*, with a punitive function.

In conclusion, the conventional loss of a right would enrich the area of so-called civil penalties, including the well-established mechanisms consisting of penalty clauses and compensation for damages. It would tackle unlawful conducts which do not constitute a mere failure to perform the contract, resulting in compensation for damages (given also that private law penalties do not always advantage the other party), but rather a real lack of power, ie the exercise of powers which the parties do not envisage in their agreement.

In contrast with the legal heteronomous and hetero-imposed situations discussed above, this would be self-imposed by the parties without a view to determining the conducts in breach of the undertaken obligations according to the most common scheme of the failure to perform the contract and, as it will be seen, the termination clause; it rather aims to establish the real limit to the power afforded by a given rule in the agreement. In this case, the parties articulate the physiognomy and content of the subjective situations which the agreement affords them, even replacing the legislator in order to better adapt the regime to their interests. This pursues a clear deterrence effect; put differently, the parties could regulate their mutual interests by listing conducts that do not really affect their own interest to terminate the agreement and seek a compensation for damages (such interest would underlie a termination); by substantiating a misuse of power resulting in the loss of the right, they seek to prevent those conducts through the conventional threat of an extreme penalty, ie the loss. Besides, even in the different context of the failure to perform, there is consensus that the penalty clause may also underpin the obligation, thereby playing a deterrent function as a private penalty.

However, where misuses of power have to be punished, the parties' self-imposition of a limit cannot be arbitrary altogether and must be scrutinized by

massimario, (2000).

⁶⁷ See Tribunale di Nocera Inferiore 6 April 2012 (unpublished).

lawyers. It follows that a clause, intended as an atypical civil penalty, which encompasses the loss with punitive function in a contract or a will, must pass the lawfulness and worthiness tests.⁶⁸ While in the legal situations discussed above it is the legislator who determines the outer limit to the situation in the event of certain conducts, where the conducts are defined by the parties and not by the law, the lawyer plays a decisive role in the review of the clause.

First of all, the clause in question must not run counter to the mandatory principles and rules of the legal system, and must only concern available situations. The issue of lawfulness appears quite delicate, because it relates to the potential conflict between the exercise of party autonomy and the regime of limitation and prescription periods (subject to time limits).

It is known that rules on limitation periods are imperative, thus the improper limitation *poenae nomine* intended by the parties (without a period) may avoid the application of the prohibition to change the legal regime of limitation periods. This fear is reasonable, but there might be a solution. On one hand, the improper, conventional limitation does not violate the law, namely Art 2936 Civil Code, because the clause does not establish (limitation or prescription) periods within which the right must be exercised. It just lists conducts amounting to misuse of powers which may lead to the punitive loss of the right. By contrast, that fear seems to be well-founded when it comes to *Verwirkung*, because the inertia for a considerable period of time (upon which *Verwirkung* is based) resembles the scheme of prescription periods more than the mechanism here discussed, which on the contrary is based on serious conducts that do not depend on time limits. On the other hand, permitting a punitive loss on a conventional basis according to a mechanism which already exists in our civil code (the paradigm is Art 1015), does not mean neglecting the prescription period, which still has to apply. Regardless of the possible loss due to misuse of powers, the legal situation keeps being subject to prescription due to non-use within the time limit provided for by law.

Doubt remains as to the possible *fraus legis* (Art 1344 Civil Code), that is the improper limitation clause may indirectly violate the principle of non-derogation from prescription rules. To be honest, where the loss of a right is made contingent on the specific requirement of misuse of powers and is given a punitive function, there seems to be no danger of defrauding the law. It is a fact that the punitive function – and thus the specific function of the punitive agreement determining the loss – can be placed within the wide system of civil penalties and appears to be as lawful and worthy of protection as the need for legal certainty underlying prescription periods, which are structurally and

⁶⁸ From a methodological point of view, see E. Moscati, 'Pena (dir. priv.)' n 64 above, 785, contending that private penalties are in accordance with the limits themselves to party autonomy. Thus, the first problem is to establish whether the punitive function is lawful per se. If the answer is affirmative, one has to ask whether it is also worthy of legal protection under Art 1322, para 2, Civil Code. If the answer is affirmative too, then a discussion on private penalties may be carried on.

functionally different from a civil penalty. In conclusion, save for each specific agreement, it is suggested that, in theory, the conventional regime of the loss under Art 1321, contingent on serious conducts amounting to misuse of powers and pursuing a punitive function worthy of legal protection, does not run contrary to the legal regime of prescription periods and their *ratio*. This is even more true if one considers that, according to some scholars, the prescription determines a deadlock in the claim, but not a real loss of the legal situation (as it would happen in the event of payment of debt when the prescription period has lapsed).⁶⁹

Furthermore, it is no coincidence that, leaving aside the less problematic issue of real and personal rights of enjoyment, and credits, even the right to ownership, albeit theoretically not subject to a prescription period, may be subject to the so-called punitive expropriation, where it does not perform the social function prescribed by the Constitution at Art 42. This confirms that prescription periods and private loss penalties are not mutually exclusive, but can co-exist and combine with each other. Thus, absolute and real situations too, taking *erga omnes* effects, may well be subject to a punitive loss, where the use of a specific property – considering its function – amounts to a possible case of misuse of power by the owner, with a view to protecting superior and collective interests.⁷⁰

Improper (conventional) limitation clauses are not alien – in other areas – to case-law and scholarship. Think about the clauses requiring a policy-holder to inform in writing the insurance company about policies against the same risk that they later took out with other companies, and, in the event of accident, to inform all the insurers and disclose all the policies. These clauses determine an improper loss of the right to compensation due to the mere non-compliance with an obligation and do not depend on time, but the insured party still has to pay the insurance premium.⁷¹ They are accepted and subject to a review on their burden and possible unfairness (Arts 1341 para 2 Civil Code, and 33 Consumer Code), because, as it has been correctly observed, the legal regime of costly and unfair terms does not concern only the limitations depending on time, but also improper limitations where these generate a legal imbalance.⁷²

Leaving aside the issue of lawfulness, the agreement on the loss, with a punitive function, must also be worthy of legal protection, thus not arbitrary to the detriment of one of the parties. The review of the penalty clause, which may

⁶⁹ See, *inter alia*, P. Vitucci, 'Prescrizione (dir. civ.)' *Enciclopedia giuridica* (Roma: Treccani, 1991), XXIV, 20.

⁷⁰ This has been advocated for cultural assets by F. Longobucco, 'Beni culturali e conformazione dei rapporti tra privati. Quando la proprietà «obbliga»' *Politica e diritto*, 549 (2016).

⁷¹ They derogate from Art 1910 Civil Code. See, on the matter, A.D. Candian, 'In tema di clausole di decadenza "improprie" nel contratto di assicurazione' *Responsabilità civile e previdenza*, 294 (1986); G. Scalfi, *I contratti di assicurazione. L'assicurazione danni* (Torino: UTET, 1991), 184. See, in case law, Corte di Cassazione 4 August 1995 no 8597, *Giustizia civile - massimario*, 1486 (1995).

⁷² This way, P.M. Putti, 'Le clausole vessatorie', in G. Alpa ed, *Le assicurazioni private* (Torino: UTET, 2006), I, 1216.

have a unilateral or bilateral structure,⁷³ must be carried out under the circumstances and must focus on elements such as the seriousness of the punished conduct amounting to a misuse of powers, as well as on the balance between the extreme remedy consisting in the loss of the right and the punitive outcome pursued by party autonomy.

This review, as said before with regard to legal situations, has no relational nature because it does not relate to the mutual obligations undertaken by parties, but it qualifies and scrutinizes conducts which have been conventionally determined, without any reference to objective good faith and to the performance of the obligations undertaken in the agreement. Where the review has a positive outcome, the court will deliver a decision determining the loss of the right, as in the case of the legal situations discussed above. This decision requires the application of one of the parties as the court cannot rule the loss the right of its own motion, and it does not impact on the rights which third parties have acquired before the *ex negotio* loss occurs, pursuant to the traditional principles of '*possesso vale titolo*' and the registration of the application to the court for the loss.

X. Conclusions: The Loss of a Right as a Punitive Remedy for the Cases of Misuse of Powers

An attempt can be made to answer the question asked at the beginning of the present essay. There exists the possibility of terminating the legal situation in cases other than the voluntary renunciation (explicit or tacit) and the prescription/limitation of the right (connected to time). But the only way to conceptualize the loss of rights rigorously, based on the current legislative framework and on an attentive examination of the case-law, seems to consist in relating the loss to a punitive situation which removes the entitlement to the right, which is sourced either in law or in party autonomy.

This conceptual operation entails the need to govern general clauses more rigorously than in the past, especially the good faith clause, with a view to bringing them within their exact role, rather than downplaying their meaning. Thus, it does not seem that the use of objective good faith may lead the interpreter to rule the loss of the right irreparably, without adequate review of the *voluntas legis* or where no explicit dismissive intention of disposable situation can be found. On the contrary, the loss may result certainly more from the application of a civil penalty provided for by the legislator or conventionally determined, thereby pointing to the valuable function behind the situation so far outlined.

The requirements of the loss are clear too: neither the abuse of rights, as it has so far been said for the transplant of *Verwirkung* in the Italian legal system,

⁷³ The issue of the variability of the punitive agreement structure has been raised by several authors. See, in particular, E. Moscati, 'Pena (dir. priv.)' n 64 above, 786.

nor the compensation for damages or the failure to perform the contract. This is why the opinion cannot be shared that the penalty for the failure to exercise the right within a reasonable time, albeit not being determined by an express provision in the Italian system, may well be drawn from the system, through the combined provisions of Art 1175 Civil Code and Art 2043 Civil Code. The ethical rules of good faith work as criteria to select interests worthy of legal protection which, where unjustly compromised, lead to compensation for damages under Art 2043 Civil Code.⁷⁴ Indeed, compensation is a remedy against abuse of rights, whereas the loss of a right amounts to a real civil penalty seeking to tackle conducts which fall outside parties' powers because the provision or party autonomy itself do not encompass them in the rule established by law or by agreement.

Such a conclusion, as it has been remarked so far, makes it possible to dispel the doubts about the transplant, *sic et simpliciter*, of German *Verwirkung* in the Italian legal system. On one side, the loss of the right should not result from mere inertia, on the other hand it would determine a considerable decrease in the tolerating conducts which according to some scholars are extremely positive phenomena from a social point of view and the economy of proceedings.⁷⁵ Similarly, the phenomenon at hand, even where it is imposed by parties with a punitive function, makes it possible to shy away from *fictiones iuris*, like tacit renunciation, to which the Italian courts appeal.⁷⁶ As a consequence, bringing the loss of the right in the area of penalties naturally makes the exercise of private powers more certain as compared to an indirect examination of parties' intentions concerning a tacit dismissal of the right.

In this way, the *ex lege* or *ex voluntate* occurrence of a punitive loss, which results in the removal of the entitlement to the legal situation, punishes the misuse of power, ie the lack of power or the excess of its limits. Consequently, the interpreter is tasked with scrutinizing both the specific circumstances possibly leading to the punitive legal loss of the right and the lawfulness and worthiness of possible punitive agreements on the loss.⁷⁷

⁷⁴ In these terms, see D. Galli, 'Le nuove frontiere della prescrizione: *Verwirkung*, abuso del diritto e buona fede' *Corriere giuridico*, 934 (1998) (commentary to Corte di Cassazione-Sezioni unite 29 September 1997 no 9554).

⁷⁵ As it was remarked by F. Festi, *Il divieto* n 1 above, 140.

⁷⁶ *Retro*, § 1.

⁷⁷ Private law scholarship looks for the fair remedy, based on the circumstances of each specific case as being instrumental to the interests which the parties seek to achieve: P. Perlingieri, 'Il "giusto rimedio" nel diritto civile' *Giusto processo civile*, 1 (2011) (for an application, you may want to see F. Longobucco, 'Profili evolutivi del principio *fraus omnia corrumpit*' *Rassegna di diritto civile*, 712 (2012); Id, 'Circolazione di immobili abusivi e giusto rimedio civile' *Rivista giuridica dell'edilizia*, 243 (2015)). For further details, see F. Longobucco, *Eccesso di potere e perdita del diritto nel sistema delle pene civili* (Napoli: Edizioni Scientifiche Italiane, 2017), *passim*.