University of Malta

Faculty of Laws

Ph.D. thesis

THE CONSTITUTIONALISATION OF PRIVATE LAW IN ITALIAN AND MALTESE LAW OF OBLIGATIONS: A BRIDGE BETWEEN LEGAL TRADITIONS?

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ABSTRACT

The research aims to analyze the ongoing process of constitutionalisation of Private law in several European countries, whose potential for expansion may lead to a progressive convergence of the Civil and Common law traditions, possibly leading to the constitutionalisation of private law in any legal system and the generation, aside from Common and Civil law systems, of a "third family" with autonomous characters.

The thesis is developed in five chapters, dealing with various regulatory and sistemi aspects:

1) Fundamental rights – structure of the system – sources of the law – comparing different techniques for applying constitutional rules in the relationships between private citizens.

2) The evolution of contract and tort law in Italy in relation to French, German and other European legal systems. This chapter looks at how (a) contract law evolved from the 19th century dogmatic approach to the modern constitutionalization of private autonomy (Italian system, European system) and (b) tort law developed under the influence of human rights to embrace concepts such as *danno biologico* and *danno esistenziale.*

3) The role of general clauses and judicial oversight in standardizing and harmonizing the exercise of subjective rights in different national legal systems; with particolar reference to the institute of abuse of rights, as an instrument to adjust the system to the supreme value of human rights.

4) The characteristics of English contractual and liability. The impact of the recognition of fundamental rights in the legal system and the prospects for rapprochement with respect to models of civil law: towards the road of the "hybridity".

5) The development of the Maltese legal system: from a juridical anomaly to a member of the “third legal family”; the Civil/Common law divide as an obstacle to the constitutionalisation of private law in relation to Maltese contract and tort law. The prospects of Constitutionalisation of Maltese Private law.

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List of Abbreviations

ECHR	-	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	-	European Court of Human Rights
ECSC	-	European Coal and Steel Community
EEC	-	European Economic Community
TEU	-	Treaty on European Union
TFEU	-	Treaty on the Functioning of the European Union
BGB	-	Bürgerliches Gesetzbuch (German Civil Code)
Cost.	-	(Italian) Constitution
Corte Cost.	-	(Italian) Constitutional Court
Cass.	-	(Italian) Cassation Court
App.	-	(Italian) Court of Appeal
art.	-	Article
co.	-	Article's subsection
c.c.	-	Italian Civil Code
c.p.	-	Italian Criminal Code
EU	-	European Union
EC	-	European Community
US	-	United States (of America)

INTRODUCTION

This research aims to analyze the ongoing process of constitutionalisation of Private law in several European countries; whose potential for expansion may lead to a progressive convergence of the Civil and Common law traditions. In fact, since almost all modern States have adopted democratic Constitutions, the supreme rights of the individual have acquired concrete regulatory importance. They have "formally" entered the hierarchy of the sources of law, and recourse can be made directly to them in regulating legal relationships. Therefore, these rights are no longer mere declarations of principles having "programmatic" effectiveness and obliged to function as mere guidelines for the legislator. This process has recently intensified with the advent of European Community law, which – starting from an initial commercial orientation – has over the last decade placed human rights at the foundation of the system and, thanks to the Lisbon treaty, endowed them with a direct regulatory function. Within this perspective, fundamental rights have become the common denominator of legal systems which – despite their branching off into several systems and subsystems – find a common axiological foundation in the primacy they give to the individual. Following this cultural orientation - that in several continental countries had already led to the promulgation of the Constitution after World War II - even the English law system, for the first time in history, has written a document comparable to its value to a fundamental Law.

The Human Rights Act - adopted in 1998 and entered into force in 2000 - has, in fact, incorporated the fundamental rights enshrined in the ECHR (Section 1), which are now directly protected by the English law system and likely to be invoked in the regulation of legal relations.

It is sufficient, however, the legislative recognition of the fundamental rights to guide the process of constitutionalisation of private law, overcoming the obstacles arising from the dogmas of traditional doctrine and the statutory requirements of the "global" business?

The answer to this question – that we are going to face in the course of the research - involves a detailed analysis of the different methodologies developed by doctrine and European case law, and the attempt to elaborate a general theory which allows the extension to every national legal system, so as to facilitate the gradual rapprochement.

In this sense, it should be noted the positive role of the European law, which, setting the objectives to be achieved by the EU member states, has encouraged the movement of interpretative techniques of individual systems argument schemes, favoring increasing convergence.

The maturation of a "common legal consciousness", based on shared values, is, therefore, a prerequisite for overcoming the "distance" existing between the traditional models of "civil law"

and "common law", against which the horizontal effectiveness of Human Rights plays a preparatory instrumental role.
If, therefore, we take the acquired positive features of fundamental rights as a given, the focus shifts to finding the best method to allow them to have a concrete impact on private inter-subjective relationships. For this purpose various methodologies and technical approaches have been developed. They substantially converge on an approach which encourages the adaptation of legal systems to the social contexts in which they are implemented through an interpretative approach based on the primacy of constitutional values. A critical role in this approach has been played by the contribution from jurisprudence and doctrine; above all German doctrine, with the theory of the *Drittwirkung*, in its double approach, *i.e.* the *direkte Drittwirkung* – which renders human rights applicable by directly invoking a constitutional rule in the Private law scenario – and the *indirekte Drittwirkung*, which operates through a constitutionally orientated interpretation of private law rules in the light of the supreme values of the system.
This second method is the one adopted by the Italian Supreme Court in order to give rise to the process of constitutionalisation of private law.
In some ways, however, it is the object of particular attention in the English system, in which, following the entry into force of the Human Rights Act, it is laying the need to encourage the horizontal effect of fundamental rights.
In this sense, the Section 3 of the Human Rights Act plays an important role, which enshrines the '"interpretative obligation" to the European Convention for the Protection of Human Rights, requiring all of the UK courts to interpret and apply the ordinary and secondary legislation in the light of the fundamental values covered by the ECHR.
This method - which clashes with the resistance of those who believe it could lead to injury of parliamentary sovereignty - had an initial recognition in jurisprudence (see *R.v. Schayler* [2002]; *Douglas v. Hello* [2001]; *Campbell v. Daily Mirror* [2002]), opening to an initial, but nevertheless significant, convergence of the English system with the systems of some continental countries that have since accepted the horizontal effect (direct or indirect) of the fundamental values in relations between individuals (Germany and Italy).
At this point, the question we must ask is this: are there, at the present time, the conditions and elements to develop a theory and a methodology leading to the constitutionalisation of private law in any legal system? If so, can be prospected the development of a method leading to rapprochement between the traditions of civil law and common law, so that they converge in a "third family" with autonomous characters?

Once the development of fundamental human rights law and its direct applicability to the regulation of private law relationships have been clarified, this research will explore the impact of these trends on two macro-sectors of civil law: contract and tort law. The necessary starting point will be to identify the role played by general clauses in Civilian codes, as instruments used by the courts to introduce flexibility by allowing them to adjust legal systems to ensure respect for fundamental human rights values in the regulation of private inter-subjective relationships. A related development has seen the institute of Abuse of Rights achieve recognition as a vehicle for controlling the exercise of subjective rights, which are no longer seen as giving an absolute power to their holders but as tools which should be wielded in conformity to the values of substantive justice and social solidarity. As regards contract law, we will outline the evolution of Italian law departing from the Civil Code of 1865, followed by the Civil Code of 1942, until the current paradigm which stresses party autonomy and originates from the direct application of constitutional rules was reached. Particularly interesting in this perspective is the general analysis of the common principles of European contract law with reference to consumer law, which had originally been developed to protect competition and implement a single market, and which in its current dimension (commencing with the Treaty of Nice and concluding with the Lisbon Treaty) finds its main objective in the protection of the human dignity. As for the field of tort law, we will follow the Italian jurisprudential orientation which – in the application of the fundamental rights – has remarkably widened the category of non-patrimonial damage, by developing the concepts of biological and existential damage.

During this research it is necessary to refer to the acquisitions of the English common law system, outlining the divergence profiles from the continental systems and possible solutions to set out a gradual rapprochement.

In this consideration, it should be outlined how the Anglo-Saxon experience in contract matter differs considerably from that of the Roman tradition countries, in several respects, resulting primarily from ideological and functional assumptions basing the law system, also influenced by the original sociology and anthropology connotation of the different European population.

In the context of the Civil law systems, in fact, the influence of liberal ideology - the legal expression of the juridical enlightenment that spread revolutionary principles of liberty, equality and fraternity, the whole continental context, as contrast to monarchical absolutism - has led to an exaltation of the role of "will", configuring the relationships between the private sector as an area of freedom granted to individuals against the absolute power of the state.

In this way the contract was to pose as essentially a "static case" freed from the objective demands of the market.

This situation has not found a precise match in the context of common law, which inhered to a social system strongly influenced by economic and commercial issues, resulting in not building the discipline of the contract as exclusive expression of the contrast adjustment between State and Individual but focusing on "relational" profiles related to the carrying out of the negotiation relationship, understood as tool for achieving the highest individual profit.
Therefore, notwithstanding that even the English system is based on the principle of *pacta sunt servanda*, it far less undergoes the influence - than is the case in the context of civil law systems – of the voluntary dogma, which identifies the basis for the contract in the binding agreement, intended as the fusion of the opposing will of the parties.
So, unlike what happens in the continental legal systems (France, Italy, Malta), in which the content of the contract is "crystallized" at the time of its conclusion – without the possibility that it can be changed (or rather adaptated) during the course of the negotiating relationship - in the system of common law is paying more attention to the dynamic and relational profile of the contract, at first meaning it as a "relationship" between the parties, rather than as a "static agreement."
Shifting the focus from the context of contract law to the civil liability (tort law) the differences are even clearer: in continental legal systems - inspired by the Roman tradition - the liability system is characterized by a tendency to recognize the centrality of the subjective element for the affirmation of responsibility and for the exclusive function of the compensation as a means to "repair" the damage; into the common law, the civil liability system is characterized by a more intense "preventive" function aimed at preventing the outset verification of the damage, through the provision of tools to play the role of "deterrent" (think of the punitive damages) in relation to prejudicial behavior and broader forms of "objective" accountability.
This situation has led to the traditional conflict in contracting between the systems of common law and the civil law, which differences in the past seemed unbridgeable.
However, in the historical context - in which the demands of the market have reached a "global" dimension and at the same time the Human Rights are recognized as supreme values of all democratic systems in the world – a new “challenge” attracted the attention of the interpreter: can you re-connect the different legal systems by finding a "third way" that allows to achieve a balance between tradition and innovation? What method can be used for this purpose and what is the relationship between the interpreter and the legislature in this process?
To find an answer to these questions it is necessary to overcome the rigid opposition between Common law and Civil law, looking towards "alternative" solutions that emerge from the comparative analysis of the different legal models and the identification of "common values" that can lead to the standardization process.

Under the first aspect, it must be re-evaluated the concept of "hybridity", which traditionally has qualified those systems that had the coexistence of common law profiles with civil law profiles.
In fact, when in the past has been attributed little importance to these systems - denying any character of originality - in recent times they have taken a leading role, putting themselves as "autonomous model", in which the traditional legal approaches (civil law / common law) tend to blend into a harmonious system, with an individuality of its own and autonomous characteristics.
At this point, it is of fundamental interest to examine the potential that the concept of "hybridity" has in the overall process of harmonization of national legal systems, even in the context of the European Union.
Can the "hybrid" systems represent the model of choice in which the process of rapprochement between the different legal traditions must strive?
From this question comes the second aspect of the present research: the values that can lead to the rapprochement between the traditions of civil law and common law.
In this regard, as to be outlined how has been reached in the universal context, after the Second World War, the proclamation of the supreme value of the human person and his dignity, shared by all democracies in the world and solemnly consecrated in all modern constitutions.
Accordingly, the Human Rights are the main point of sharing at global level among the different legal systems and, therefore, could be the "vehicle" able to lead to the gradual rapprochement.
From these premises it follows the basic intuition that is wanted to be developed in this research: the Human rights - as shared on a universal level - can lead the process of standardization of the different national legal traditions, finding their own fertile ground in the "hybrid" systems, in which the convergence between models of different derivation has already achieved the cultural sensitivity needed to create a "third legal family" with profiles of autonomy.
Is this objective possible? Or does the "hybrid" systems meet ideological obstacles? Can the process of constitutionalization of private law encourage the achieving of such a result, reaching the balance between human values and the demands of the market?
The focus of this research –despite its elaboration in terms of a universally valid general theory- will initially lie on the Italian legislative and regulatory experience; which will be conceived as an “ideal-type” of a Civilian system, various characteristics of which converge with Maltese private law. It will also focus more generally on the European experience, in the light of the attention which is increasingly being paid by EU law-makers to the harmonization of Private law. Reference will be made, for comparative purposes, to the different national systems. The investigation will be conducted by taking into consideration recent doctrinal and jurisprudential developments, with the aim of reaching a new understanding of traditional legal institutions.

Then the research will concentrate on the Maltese legal system, which is a good example of how Common and Civil law principles can coexist. On the one hand the Constitution, particularly in codifying human rights, reflects the precision and detail of English statutory drafting and the Common law is an important source of Maltese Public law. On the other hand, as in Continental jurisdictions, Maltese written law also has its own codes and statutory legislation which goes beyond a mere restatement of the law. The hybrid character of the Maltese system will also be analysed from a procedural standpoint where, even if judicial decisions are not formally binding, the courts progressively establish *jurisprudence constant* on a particular point; thus balancing between a more Continental and a more Common law orientation while preserving elements associated with the latter such as the *ratio decidendi*/*obiter dictum* distinction. The central question here will be to explore how the process of Constitutionalisation of Private law in Malta compares to Italy and to ask to what extent differences in the Maltese trajectory can be ascribed to the hybrid and explicitly mixed character of the legal system. In other words has the mixed character of the system facilitated or created obstacles to the Constitutionalisation of Private law and how does this compare with the Italian experience?

It will be appropriate also to relate the specific characteristics of the Maltese system with those arising from other hybrid legal systems, such as Louisiana and Quebec. In these countries, in fact, the problems related to the source are inseparable from the problems concerning the interpretation. Since the legislature can act more effectively on the sources than on interpretation, it may happen that he will create roman sources while the interpreter is working as a common lawyer.

Through this comparative analysis will seek to determine whether it is possible to identify a "general model" of mixed legal system, highlighting their profiles compatible with an "opening" to the recognition of the impact of fundamental rights on the statutory regulation of civil relations.

The aim of this research project is, in general terms, to review the development of the above mentioned private law institutes with particular reference to Italy and Malta so as to assess and chart the emergence of an interpretative approach which renders them functional to the implementation of the fundamental values set forth in the European legal system as a consequence of the approval of the Lisbon treaty. Through this method, and by adopting an axiologically orientated explanatory approach, it should be possible to bridge the differences emerging from the different national legal traditions and to develop a shared juridical conceptualization of private law institutes through the sharing of the fundamental values of the protection of the individual.

CHAPTER I

FUNDAMENTAL RIGHTS, SOURCES OF THE LAW AND APPLICATION OF CONSTITUTIONAL RULES IN THE RELATIONSHIPS BETWEEN PRIVATE CITIZENS.

This chapter will deal with the institutions that regulate the "horizontal relationships", which means the situations that are created between subjects that the law places on the same level.
In this sense, the horizontal relationships of our interest are those between citizens.

SECTIONS: 1 - Fundamental rights; 2 - Fundamental rights in Italy; 3 - The European provision of fundamental rights; 4 - Fundamental rights and founding treaties; 5 - Sources of Law; 6 - Sources of European Union law; 7 - The Sources of Law in the Italian System; 8 - Different techniques for applying constitutional rules in the relationships between private citizens

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The "fundamental rights" are the result of value-choices that, in terms of the political, legal and institutional framework, a community does, identifying them as the axiological vertices in the system of sources of law and as evaluation parameter of human conduct.
In European legal systems the apex of the sources of law is identified in the Constitution, the fundamental law of each State, from which derives legitimacy to consider the limitations of sovereignty, allowing the effects arising from supranational sources in the internal system, as is the case EU law, characterized, after the Treaty of Lisbon, by the common recognition of rights of the person as the legally binding and hierarchically primary fundamental.
There is no uniformity, however, in the application method, which spreads apart between an immediate apply of the fundamental rules in the relationship between individuals (*Direkte Drittwirkung*) and an indirect incidence (*Indirekte Drittwirkung*).
In the Italian system, based on the fundamental norm of Art. 2 of the Constitution, which refers generally to the "inalienable rights" without specifications, the indirect incidence tends to dominate and the application method resolves in the adoption of a rule of interpretation of private law in the light of fundamental rights.
In some ways, however, it is the object of particular attention in the English system, in which, following the entry into force of the Human Rights Act, it is laying the need to encourage the horizontal effect of fundamental rights.In this sense, the Section 3 of the Human Rights Act plays an important role, which enshrines the '"interpretative obligation" to the European Convention for the Protection of Human Rights, requiring all of the UK courts to interpret and apply the ordinary and secondary legislation in the light of the fundamental values covered by the ECHR.

CHAPTER I

Section 1

FUNDAMENTAL RIGHTS

Fundamental rights are the basis of the protection of the individual. Although the provision of the same is rather homogeneous at international level, their application may vary according to the legal system of reference.

SUMMARY: 1. Conception; 2. Four theses on fundamental rights; 3. Fundamental rights and property rights; 4. Fundamental rights and substantive democracy; 5. Fundamental rights and citizenship; 6. Fundamental rights and guarantees; 7. Constitutionalism as a new paradigm of law

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1. Conception

"Fundamental rights" are all those subjective rights universally due to "all" human beings in as much as they have the status of persons, or of citizens, or of persons capable of acting."Subjective right" means any positive (to performance) or negative (to non-injury) expectation ascribed to a person by a legal norm. "Status" means the condition of a person provided for by a positive legal norm as a prerequisite for his or her suitability to be the holder of legal situations and/or the author of the acts in the exercise of these rights.

This definition is a theoretical in the sense that although it is stipulated with reference to the fundamental rights positively enshrined by laws and constitutions in today's democracies, it disregards the fact that these rights are formulated in constitutional charters or in fundamental laws, and even the fact that they are enunciated in norms of positive law. In other words, it is not a dogmatic definition, that is, formulated with reference to the rules of a concrete system, such as the Italian or Spanish Constitution, for example.Based on this, we will say that the rights ascribed by a legal system to all natural persons as such, either as citizens or as capable of acting, are "fundamental". Nevertheless, we will also say, without our definition being in any way invalidated, that a given legal system, for example a totalitarian one, lacks fundamental rights. The provision of such rights by the positive law of a given system is, in short, a condition of their existence or force in that system, but it does not affect the meaning of the concept of fundamental rights. Even less important is their provision in a constitutional text, which is only a guarantee of their observance by the ordinary legislator: also fundamental,for example, are the rights of defence ascribed to the accused by the Code of Criminal Procedure, which is also an ordinary law.

Secondly, our definition is a formal or structural definition, in the sense that it does not consider the nature of the interests and needs protected by their recognition as fundamental rights, and is based solely on the universal nature of their imputation. It isunderstood as “universal” in the purely logical sense and as an approximation of the universal quantification of the class of the subjects who own them. In fact, personal freedom, freedom of thought, political rights, social rights, and the like are protected as universal and therefore fundamental. But if these rights were alienable and therefore virtually non-universal, as would happen for example in a slave society or an entirely mercantilist society, they would not be universal or therefore fundamental. Conversely, if an absolutely futile right were established as universal, such as the right to be greeted in the street by one's acquaintances or the right to smoke, it would be a fundamental right.

The advantages of such a definition are obvious. Insofar as it is independent of factual circumstances, it is valid for any legal system, regardless of the fundamental rights provided for or not provided for therein, including totalitarian and pre-modern legal systems. It therefore has the value of a definition belonging to the general theory of law. As it is independent of the goods or values or substantial needs protected by fundamental rights, it is also ideologically neutral. It is therefore valid whatever the shared legal or political philosophy: positivist or naturalistic, liberal or socialist, and even illiberal and anti-democratic law.

However, this “formal” nature of our definition does not mean that it is not sufficient to identify fundamental rights as the basis for legal equality. Thanks to it, in fact, the universality expressed by the universal quantification of the (types of) subjects who own these rights is configured as their structural connotation, which, as we shall see, entails the inalienable and indissoluble character of the substantial interests in which they consist. In fact, in the historical experience of constitutionalism, these interests coincide with freedoms and other needs on whose guarantee—won at the cost of struggles and revolutions—depends the life, survival, equality, and the dignity of human beings. Nonetheless, this guarantee is realized precisely through the universal form that comes to them from their stipulation as fundamental rights in constitutional norms superordinate to any decision-making power. If they are normative of “all” (the members of a given class of subjects), these rights are not alienable or negotiable, but correspond, so to speak, to non-contingent and unalterable prerogatives of their holders, and to as many limits and constraints that are impassable to all powers, both public and private.

It is clear, on the other hand, that this universality is not absolute, but is related to the arguments with reference to which it is predicated. The concept of “all” whose rights make it possible to predicate equality is in fact logically related to the classes of persons to whom their ownership is normatively recognized. If the intention of equality depends on the quantity and quality of the

interests protected as fundamental rights, it is therefore on the extension of these classes, that is, on the suppression or reduction of the differences in status from which they are determined, that the extent of equality, and therefore the degree of democracy in a given system depends.
These classes of subjects have been identified, in our definition, by the statuses determined by the identity of “person” and/or “citizen” and/or “capable of acting”, which, as we know, have been subject, in history, to the most varied limitations and discriminations. “Personality”, “citizenship” and “ability to act”, as conditions of equal ownership of all (different types) of fundamental rights, are consequently the parameters of equality as well as of inequality *en droits fondamentaux*. This is demonstrated by the fact that their assumptions can be—and historically have been—more or less extensive. While they were very restricted in the past, when the majority of natural persons were excluded by sex, birth, wealth, education, or nationality, they progressively extended without, however, reaching today, at least as far as citizenship and the capacity to act are concerned, a universal extension to all human beings.
Today, citizenship and the ability to act have remained the only differences in status that still define the equality of human beings. They can therefore be taken as the two parameters - the first surmountable, the second insuperable - on which we can base two major divisions between fundamental rights. One parameter is between the rights of the personality and the rights of citizenship belonging respectively to all or only to citizens, and the other one is between primary (or substantial) rights and secondary (or instrumental or autonomous) rights belonging respectively to all or only to persons capable of acting. When we criss-cross the two distinctions, we get four classes of rights: first, human rights, which are the primary rights of people, belonging indiscriminately to all human beings, such as (according to the Italian Constitution), the right to life and integrity of the person, personal freedom, freedom of conscience and expression of thought, the right to health and education. Then, public rights, which are the primary rights granted only to citizens, such as (always according to the Italian Constitution), the right of residence and movement within the national territory, the rights of assembly and association, the right to work and the right to subsistence and welfare of those who are unable to work. Third, civil rights, which are the secondary rights ascribed to all human persons capable of acting, such as negotiating power, freedom of contract, freedom to choose and change jobs, entrepreneurial freedom, the right to take legal action and, in general, all the rights of power in which private autonomy is manifested and on which the market is based. Then fourth, we have political rights, which are finally the secondary rights reserved only for citizens capable of acting, such as the right to vote, the passive electorate, the right of access to public offices and, in general, all the rights of power in which political autonomy is manifested and on which representation and political democracy are based.

However, both our definition and the type of fundamental rights based on it have a theoretical value that is completely independent of concrete legal systems and even of modern constitutional experience. Whatever the system in question, "fundamental rights"–according to human, public, civil and political cases - are in fact all those rights universally attributed to classes of subjects determined by the identity of "person" or "citizen" or "capable of acting". In this sense, at least in the West, fundamental rights have always existed, since Roman law, although for the most part limited to very restricted classes of subjects[1]. However, it has always been these three identities – as a person, as a citizen, and as an actor - that have provided, despite the extraordinary variety of discrimination on grounds of sex, ethnicity, religion, wealth, class, education and nationality, with which they have been defined from time to time, the parameters for the inclusion and exclusion of human beings among the holders of rights and thus for their equality and inequality.
Thus, in ancient times inequalities were expressed, first of all, through the denial of the same identity as a person (to slaves, conceived as things); and only secondarily (with the various ineligibilities imposed on women, heretics, apostates and Jews) through the denial of the capacity to act, or of citizenship. Subsequently, having affirmed the value of the human person, inequalities were only exceptionally defended by denying the identity of the person and legal capacity. Consider the indigenous peoples who were victims of the first European colonisations, and slavery in the United States even in the last century. On the other hand, these inequalities were maintained above all by restrictions on the ability to act on the basis of sex, education and income: *optimo iure* subjects, even after 1789, have for so long remained only male, white, adult, citizen and landlord subjects. Today, after the ability to act has been extended to all, with the sole exception of minors and the mentally ill, inequality essentially passes through the state-like mould of citizenship, the definition of which hinges on national and territorial affiliations, and represents the last major normative limitation of the principle of legal equality. In short, what has changed with the progress of law, apart from the guarantees offered by codifications and constitutions, are not the criteria - personality, capacity to act and citizenship - on the basis of which fundamental rights are attributed, but only their meaning, at first restricted and highly discriminatory, then increasingly widespread and tendentially universal.

2. Four theses on fundamental rights

The definition of "fundamental rights" proposed here could establish four theses, all of which are, in my opinion, essential to a theory of constitutional democracy.

[1] Pugliese,*Appunti per una storia della protezione dei diritti umani*, 1989, 619-659.

The first thesis concerns the radical difference in structure between fundamental rights and property rights: the first belongs to one class of subjects, and the other to each of their holders to the exclusion of all others. This difference has been concealed, in our legal tradition, by the use of a single word – “subjective right” - to designate subjective situations that are heterogeneous and in many respects opposing: inclusive rights and exclusive rights, universal rights and singular rights, indissoluble rights and available rights. It is, moreover, explained by the different theoretical origins of the two categories of rights: the philosophy of natural law and contracts of the 17th and 18th centuries as regardsfundamental rights; and the civilistic and Roman tradition as far as patrimonial rights are concerned.

The second thesis is that fundamental rights, corresponding to the interests and expectations of all, form the basis and parameter of legal equality and therefore of what I will call the “substantial”dimension of democracy, prejudicial to its own political or “formal” dimension based instead on the powers of the majority. This dimension is none other than the set of guarantees ensured by the paradigm of the rule of law. It is modelled on the origins of the modern state on the protection of the rights of freedom and property only, and can well be extended - after the constitutional recognition as “rights” of vital expectations such as health, education, and subsistence - also to the “welfare state”. It has in fact developed in this century without the forms and guarantees of the rule of law, but only in those of political mediation and today, also for this reason, is in crisis.

The third thesis concerns the supranational nature of most fundamental rights today. One can see how our definition provides the criteria for a typology of such rights within which “citizenship rights” form only a subclass. Many of these rights are in fact conferred by the same state constitutions regardless of citizenship. Above all, then, after their formulation in international conventions transposed by the state constitutions or in any case signed by the States, they have become supra-state rights: external limits and no longer only internal to the public authorities and are normative bases of an international democracy far from being implemented, but normatively prefigured by them.

Finally, the fourth—and perhaps the most important—thesis concerns the relationship between rights and their guarantees. Not unlike other rights, fundamental rights consist of negative or positive expectations that correspond to obligations (performance) or prohibitions (injury). I agree to call these obligations and prohibitions primary guarantees; and the obligations to repair or sanction violations of rights, that is, violations of their primary guarantees, can be called secondary guarantees. But both the obligations and prohibitions of the first type and the obligations of the second, although logically implied by the normative statute of rights, are in fact, not only often

violated but sometimes are not even normatively established. Against the thesis of confusion between rights and their guarantees, which means denying the existence of the former in the absence of the latter, I will support the thesis of their distinction, by virtue of which the absence of the relevant guarantees is equivalent to a failure to comply with the rights positively stipulated and therefore consists in an undue gap that it is the task of the legislation to fill.
These four theses contradict, from the same point of view, the current conception of fundamental rights as it results from its many and heterogeneous contributions and ancestry. To this end, it may be useful to recall four classic places where the theses, which will be rebutted here, are supported.
The firststep is found inChapter II of John Locke's Second Treaty on Government of 1690, where Locke identifies in life, freedom, and property the three fundamental rights whose protection and guarantee justify the social contract[2]: an association, this between freedom and property, which will be taken up by Article 2 of the Declaration of Human and Citizen Rights of 1789: "The purpose of any political association is to defend the natural and unwritten rights of man. These rights are freedom, property, and resistance to oppression".
The secondstep is taken by the German public prosecutor of the last century, Karl Friedrich von Gerber, who in a monograph of 1852 on "public rights" stated that these are nothing more than "a series of effects of public law", rooted "not so much in the legal sphere of the individual, but rather in the abstract existence of the law"[3]. Precisely, they are "organic elements constituting a concrete state" and therefore, from the point of view of individuals, "reflected effects" of state power[4]. It is a thesis that will be taken up by the entire public law of the late nineteenth century - from Laband to Jellinek, from Santi Romano to Vittorio Emanuele Orlando 9 - and that contradicts not only the naturalistic legal paradigm of fundamental rights as a logical and axiological prius, founding and unfounded, with respect to the state artifice, but also the constitutional paradigm, which, while positive about these rights, has configured them as constraints and limits to all public authorities, which are the basis of their legitimacy and not themselves legitimated by them.
The third step is not by a jurist or a philosopher but by a sociologist, Thomas Marshall, who in his classic 1950 essay *Citizenship and Social Class*, rediscovered for some years by political science as the most accredited doctrine of fundamental rights, distinguishes the set of these rights into three classes: civil rights, political rights, and social rights, all conceived as rights not of the person or of personality, but of the citizen or citizenship. "Citizenship", Marshall writes, "is a status conferred

[2]J. Locke, *Second Treatise of Government* (1690)
[3] K.F. *Gerber, Über offentliche Rechte* (1852)
[4] Id. , *Grundzüge eines Systems des deutschen Stuatsrechts* (1865)

on those who are full members of a community"; and "conferred by that status", he adds, are the rights and duties on which the equality of "all those who possess it" is based[5].
The fourth step is found in Hans Kelsen, who configures subjective law as "a simple reflection of a legal duty" and states: "having a right means having the legal capacity to participate in the creation of an individual rule, that individual rule by which a sanction is ordered against an individual who - according to the court's ruling - has committed the offence, has violated his duty"[6]. It is a widespread thesis today, which is resolved in the identification of fundamental rights with their guarantees and in particular with those that I have called their "secondary guarantees", that is, with their actionability in court: "a law formally recognized but not justiciable - that is, not applied or not applicable by the judicial bodies with defined procedures - is *tout court*, a non-existent law", asDanilo Zolo[7]states,for example.
I will therefore develop my four theses based on a critical analysis of these four steps. On the basis of these, it will be possible to show how the constitutionalisation of fundamental rights by rigid constitutions has produced in this century a profound paradigm shift in positive law compared to the classic view of legal paleo-positivism.

3. Fundamental rights and property rights

We begin with the first of the four questions here. What are fundamental rights? Life, freedom, and property, Locke responds in the aforementioned passage; freedom, property, and resistance to oppression, affirms Article 2 of the 1789 Declaration, which in Article 17 reaffirms the character of "sacred and inviolable right" of property. Similarly, although Marshall has expanded the catalogue of fundamental rights, he includes both freedom and property in the same class - that of civil rights. The admixture in the same category of figures as heterogeneous as the rights of freedom on the one hand and the right to property on the other, the result of the juxtaposition of the doctrines of natural law and the civil and Roman tradition, is therefore an original operation, carried out by the first liberalism, which has conditioned up to the present day the entire theory of rights, and with it the rule of law. At its base, there is a misunderstanding due to the polysense character of the term "right of ownership": which means - in Locke as in Marshall - at the same time the right to become owner and to dispose of their property rights, which is an aspect of legal capacity and the ability to act attributable to the class of civil rights, and the concrete right of ownership of this or that property. A confusion, as it is easy to understand, which in addition to being the source of a serious theoretical misunderstanding has been responsible for two opposing misunderstandings and two consequent

[5]T.H. Marshall, Citizenship and Social Class (1950)
[6] H. Kelsen, Reine Retchslehre (1960).
[7] Zolo, La strategia della cittadinanza in La cittadinanza cit., p. 33

political operations: the valorisation in liberal thought of property as a right of the same type as freedom and, on the contrary, the devaluation in Marxist thought of freedoms as discredited as "bourgeois" rights on a par with property.

Now, if we analyse these two figures – "freedom", and "property", or more generally "fundamental rights" and "patrimonial rights" - we discover that there are four structural differences between them, capable of generating, within the domain of rights, if we want to continue using the same word to designate such different situations, a great division: that, precisely, between fundamental rights and patrimonial rights. These are four differences which do not take account of the content of the two classes of rights and which only concern their form or structure.

The first difference is that fundamental rights - freedom rights such as the right to life, civil rights, including the right to acquire and dispose of property, such as political rights and social rights - are "universal" rights (*omnium*), in the logical sense of the universal quantification of the class of subjects who own them; where property rights - from property rights to other rights in rem andcredit rights - are individual rights in the same logical sense that for each of them there is a specific holder (or several joint holders, as in co-ownership) to the exclusion of all others. The former are therefore recognized to all their holders in equal form and size; the latter belong to each in different ways, both in quantity and quality. The former are inclusive and form the basis of legal equality, which, as Article I of Declaration of 1989 says, is precisely equality in law-*égalité en droits*. The others are exclusive, that is to say *excludendialias*, and are therefore at the root of the legal inequality, which is also an *inegalité en droits*. We are all equally free to express our thoughts, equally immune from arbitrary arrest, equally autonomous in disposing of our property and equally entitled to health and education rights. But each of us is the owner or creditor of different things and to different degrees: I own this dress of mine or the house in which I live, that is, objects different from those of which others and not I own.

This solves many apparent aporiae. When we speak of the "right to property" as a "right of citizenship" or "civil right", as well as the rights of freedom, we allude elliptically to the right to become owners connected (as well as the right to become debtors, or creditors, or entrepreneurs or employees) with the legal capacity, as well as the right to dispose of property assets connected (as well as the right to dispose of a claim or to be obliged to provide a service) with the capacity to act. This means civil rights, which are undoubtedly fundamental because they are due to everyone, in the first case as persons and in the second case as capable of acting. But these rights are completely different from the real rights on specific goods, thanks to them acquired or alienated; just as the patrimonial right of credit to compensation for damage actually suffered is different from the fundamental right of immunity against injury of others. On the other hand, if we assume that all

universal rights are fundamental, that is, those recognised to all as persons or citizens, social rights also fall within them, whose universality is not excluded, by the fact that the concrete services which, depending on their economic conditions, each one has according to them the right to claim are inevitably different and with a specific content[8]: inevitably there are also different thoughts which each one can express according to the freedom of expression of thought.
The second difference between fundamental rights and property rights is related to the first, and is perhaps even more relevant. Fundamental rights are indissoluble, inalienable, inviolable, intransigent, and very personal rights. On the other hand, property rights are available rights, by their very nature - from private property to credit rights - that are negotiable and transferable. Property rights accumulate, while on the other hand, fundamental rights stay the same. You cannot become legally freer, but you can become legally richer. Having an object consisting of a patrimonial asset, patrimonial rights are acquired, exchanged, and sold. Freedoms, on the other hand, are not exchanged or accumulated. The former are altered and perhaps extinguished by their exercise: the latter remain unchanged, whatever their exercise. One can consume, sell, trade in, or lease an item of property. On the other hand, the right to life, or the rights to personal integrity, or civil and political rights are not consumed, nor sold.
The unavailability of fundamental rights is therefore tantamount to their being taken away from political decisions as well as from the market. Because of their active unavailability, they are not alienable from the subject who owns them: I cannot sell my personal freedom, or my right to vote, and much less, my own contractual autonomy. By virtue of their passive unavailability, they are not expropriable or limited by other subjects, beginning with the State. No majority, however overwhelming, can deprive me of life, freedom, or my rights of autonomy. This is clearly a difference linked to the first, that is to say, to the singular nature of property rights and to the universal nature of fundamental rights. Patrimonial rights are singular in that they can be the object of exchange in the sphere of the market, as well as - for example in the Italian legal system on the basis of the third paragraph of Article 42 of the Constitution - of expropriation for public utility. Fundamental rights, on the other hand, are universal in that they are excluded from this sphere because no one can deprive oneself of them, or be deprived of them, or be impaired by them, without thereby their ceasing to be equal or universal and, therefore, fundamental.
The result is that our formal notion of a fundamental right is validated: life, personal freedom, or the right to vote are fundamental not so much because they correspond to vital values or interests, but because they are universal and indissoluble. So much so that, if the disposition of a fundamental right were allowed - for example, admitting slavery, or in any case the alienation of liberties, or

[8]J. Barbalet, *Citizenship. Rights Struggle and Class Inequality* (1988)

perhaps of life, or of the right to vote - they would also be (degraded to) patrimonial rights. For this reason, with an apparent paradox, fundamental rights are a limit not only to public authorities but also to the autonomy of their holders: not even voluntarily can one alienate one's own life or freedom. But it is a limit, if we want to be paternalistic, which is logically insuperable. The paradox, in fact, would happen if it were missing and fundamental rights were alienable. Since in such a case, the freedom to alienate one's freedom to alienate would also be alienable, with a twofold result: that all fundamental rights would cease to be universal, that is, belonging to all in equal form and measure; and that the freedom to alienate all of one's rights - from the right to life, to civil, and political rights - would entail the triumph of the law of the strongest, the end of all freedoms, and of the market itself and, ultimately, the denial of the right and the regression to the state of nature.
The third difference is, in turn, a consequence of the second and concerns the legal structure of rights. Patrimonial rights, as just seen, are available. In contrast with fundamental rights, they are therefore subject to events, that is, events that are intended to be constituted, modified, or terminated by legal acts. This means that they have the right to be involved in acts of negotiation or, in any case, in singular measures: contracts, donations, wills, sentences, administrative measures, from which they are produced, modified, or extinguished. On the other hand, fundamental rights are immediately entitled in the law, in the sense that they are all *ex lege*, that is, conferred by general rules of a usually constitutional rank.
More simply, while fundamental rights are norms, property rights are set by norms. The former are identified with the same rules or general rules that attribute them. Freedom of expression of thought, for example, is laid down in Article 21 of the Constitution of Italy, and is none other than the norm expressed by it. The latter, on the other hand, are always singular situations, arranged by acts that are singular in their turn and prepared by the norms that provide for their effects: the ownership of my clothes, for example, is not arranged, but laid down by the rules of the Civil Code as an effect provided for by the sale and purchase which regulated them. We can call rules of the first type as thetic norms, which immediately provide for the situations with which they are expressed. They include not only those norms that ascribe fundamental rights but also those that impose obligations or prohibitions, such as the norms of the penal code and those of road signs. I will instead call hypothetical norms the norms of the second type, which do not ascribe or immediately impose anything, but simply predispose legal situations such as the effects of the acts provided for by them. They include not only the norms of the civil code, which predispose patrimonial rights, but also those which predispose civil obligations such as the effects of negotiated or contractual acts. The former express the nomostatic dimension of the order; the latter belong to its nomodynamic dimension. So much so that while property rights always consist of situations of

power the exercise of which consists in acts of disposition, which in turn produce rights and obligations in the legal sphere of one's own or others' (contracts, wills, donations and the like), the exercise of rights of freedom always consists of mere conduct, as such without legal effects in the sphere of other subjects.

Finally, there is a fourth difference, which is also formal and no less important for understanding the structure of the constitutional state governed by the rule of law. While property rights are, so to speak, horizontal, fundamental rights are vertical,in a double sense. First of all, in the sense that the legal relations maintained by the holders of patrimonial rights are inter-subjective relations of a civil nature - contractual, inheritance, or similar - while the relations maintained by the holders of fundamental rights are public relations, that is, relations of the individual with (only or also) the State. Secondly, and above all, in the sense that while property rights correspond either to the general prohibition of non-infringement in the case of rights in rem or debt obligations in the case of personal rights or credit, fundamental rights, where they are expressed in constitutional provisions, correspond to prohibitions and obligations on the part of the State, the violation of which is a cause of invalidity of the laws and other public measures, and compliance with which is, on the contrary, a condition of the legitimacy of the public authorities. “The declaration of rights contains the obligations of the legislators”, states Article 1 of the section “duties” of the French Constitution of year III. It is precisely in this set of obligations, that is, the limits and constraints placed on the protection of fundamental rights, that the public sphere of the constitutional state of law resides - as opposed to the private sphere of property relations - and what I initially called the “substantial” dimension of democracy.

4. Fundamental rights and substantive democracy

This brings me to my second thesis, which I intend to develop here. In what sense do fundamental rights express the dimension that I have called “substantial” of democracy, as opposed to “political” or “formal”? And in what sense do they incorporate prejudicial and more important values than those of political democracy? In what sense, then, are the result of their misunderstanding, which is equivalent in fact to their denial as constitutional constraints to the public power, the thesis of Gerber that qualifies them as “reflected effects” and those of Jellinek and Santi Romano who consider them as the product of a self-obligation or self-limitation of the State, or as potestative concessions which are always revocable or limitable?

The answer to these questions, even though it concerns the contents of fundamental rights, that is, the nature of the needs they protect, is largely due to the analysis that precedes their structural characteristics: universality, equality, unavailability, their *ex lege* conferral and their usually

constitutional rank, and therefore superordinate to the public authorities as parameters for the validity of their exercise.
Precisely because of these characteristics, in fact, fundamental rights, unlike other rights, are configured as substantial constraints imposed by law - to guarantee the interests and needs of all stipulated as vital, or precisely "fundamental" (life, freedom, survival) - as well as majority decisions as the free market. The universal, inalienable, indissoluble, and constitutional form of these rights is revealed, in other words, as the technique - or guarantee - prepared to protect what is considered "fundamental" in the constitutional pact: that is, of those substantial needs whose satisfaction is a condition of civil coexistence and at the same time the cause or social name of that artifice that is the State. To the question "what are fundamental rights?", if on the level of their form one can answer a priori, listing the structural characteristics that I have previously illustrated, on the level of content - that is, of what goods are or must be protected as fundamental - one can answer only a posteriori: when one wants to guarantee a need or an interest as fundamental, one takes them away from the market and from majority decisions. No contract, as has been said, can dispose of life. No political majority can dispose of freedoms and other fundamental rights: to decide that a person is condemned without evidence, or deprived of personal freedom, or of civil, or political rights or, again, left to die without care or in poverty.
Hence we have the "substantial" connotation imprinted by fundamental rights to the rule of law and constitutional democracy. In fact, "substantial", that is, relative not to the "form" (to the who and the how) but to the "substance" or "content" (to what) of the decisions (i.e. to what is not lawful to decide or not to decide), are the norms that ascribe - beyond and perhaps against the contingent will of the majorities - the fundamental rights: both those of freedom that impose prohibitions, and those of society that impose obligations on the legislator. The current conception of democracy as a political system based on a series of rules that ensure the omnipotence of the majority is therefore denied. If the rules on representation and on the principle of majority are formal rules on what can be decided by the majority, fundamental rights circumscribe what we can call the sphere of the undecidable: of the non-decidable that, that is to say, of the prohibitions corresponding to the rights of freedom, and of the non-decidable that, that is to say, of the public obligations corresponding to social rights.
This identification of the paradigm of the "rule of law" with the "substantial" dimension of democracy may certainly appear singular, if for no other reason than the multiple ideological uses that have worn out the expression "substantial democracy" in the past[9]. And yet it is precisely with the substance of the decisions that have to do with the obligations and prohibitions imposed on

[9] M. Bovero, La filosofia politica di Ferrajoli, in Le ragioni del garantismo, cit., pp. 403-406.

legislation by the fundamental rights stipulated in the rules on production that we can therefore call "substantial" (those, for example, contained in the first part of the Italian Constitution): which, unlike the rules that I have called "formal" (those contained in the second part) and which dictate the conditions of their validity, establish the conditions of their validity. If, in fact, the formal rules on vigour are identified, in the democratic state of law, with the rules of formal or political democracy in so far as they govern the provision of decisions that ensure the expression of the will of the majority, the substantive rules on validity, by making the substance (or the meaning) of the same decisions subject to respect for fundamental rights and the other axiological principles established in them, under penalty of invalidity, correspond to the rules with which we can characterise as substantive democracy.

The paradigm of constitutional democracy is nothing more than the subjection of the right to the right generated by this dissociation between vigour and validity, between mere legality and strict legality, between form and substance, between formal legitimacy and substantial legitimacy or, ifyou like, between the Weberian "formal rationality" and "material rationality". By virtue of the recognition of this dissociation, what Letizia Gianformaggio has called the "presumption of regularity of acts carried out by power" in the positive systems is no longer valid[10], especially if they are politically democratic: since the formal principle of political democracy, relating to who decides and how to decide - in other words the principle of popular sovereignty and the rule of the majority - is subordinate to the substantial principles expressed by fundamental rights and relating to what is not lawful to decide and what is not lawful not to decide.

The fundamental rights enshrined in the constitutions - from the rights of freedom to social rights - thus operate as sources of invalidation and delegitimization, as well as of legitimization. For this reason, their configuration as "organic elements of the state" and "reflected effects" of state power in Gerber's passage referred to here, and more generally in the doctrine of public rights elaborated by German and Italian public law of the last century, represents a reversal of their meaning and expresses a profound misunderstanding of constitutionalism and of the model of the constitutional state of law. These rights exist, it is true, as positive legal situations since they are laid down in the constitutions. But precisely for this reason they do not already represent an always revocable self-limitation of sovereign power, but on the contrary, a system of limits and constraints above it; therefore not "rights of the State" or "for the State" or "in the interest of the State", as Gerber and Jellinek wrote, but rights to and, if necessary, against the State, that is, against public powers, whether democratic or majority. What is more, fundamental rights, as has been shown in the preceding paragraph, are not predisposed by norms such as the effects of singular acts of precept,

[10] L. Gianformaggio, Diritto e ragione tra essere e dover essere, in Le ragioni del garantismo, cit., p. 28.

but are themselves rules, and have a retroactive effect on the nature of the relationship between subjects and the constitution. It follows that these rules, that is to say, the substantive part of the Constitution, are, as it were, “holders”, as well as recipients, of all the persons to whom fundamental rights are ascribed. Hence, this explains their non-modifiability by the majority. Those rules are in principle absolutely rigid because they are nothing more than the same fundamental rights established as inviolable, so that each and every one is a holder of these rights.

In this respect, we can well say that the paradigm of constitutional democracy is a child of contractual philosophy, in a double sense. In one sense, the constitutions are nothing more than social contracts in written and positive form: foundational pacts of civil coexistence historically generated by the revolutionary movements with which they have been imposed from time to time on the public authorities, otherwise absolute, as sources of their legitimacy. In another sense, the idea of the social contract is a metaphor of democracy: of political democracy, since it alludes to the consent of the contracting parties and is therefore valid for founding, for the first time in history, a legitimation from below rather than from above of political power; but also a metaphor of substantial democracy, since this contract is not an empty agreement, but has as clauses and together as cause and reason precisely the protection of fundamental rights, the violation of which by the sovereign legitimizes the rupture of the pact and the exercise of the right of resistance.

In this way, the theoretical origins of fundamental rights are revealed to be very different from the civil and Roman origins of patrimonial rights. If it is true that fundamental rights are nothing more than the content of the constituent pact, we must attribute to Thomas Hobbes, theorist of absolutism, the invention of their paradigm. This paradigm is that expressed by the right to life as the inviolable right of all, on whose protection depends the justification for overcoming the *bellum omnium* of the state of nature and the construction of “that great Leviathan, called a State (in Latin *civitas*), which is but an artificial man, albeit of greater stature and force than the natural, for the protection and defence of which he was conceived”[11]. In short, with Hobbes, the configuration of the State as a public sphere established to guarantee peace and, at the same time, fundamental rights, was born.

This public sphere and this role of the State as guarantor, limited by Hobbes to the protection of the right to life alone, have since expanded historically, extending to other rights that are sometimes affirmed as fundamental: to civil rights and freedom, by the work of the Enlightenment and the liberal revolutions from which the first declarations of rights and the nineteenth-century constitutions were born; then to political rights, affirmed with the progressive enlargement of suffrage and political capacity; then, again, the right to strike and social rights in the constitutions of

[11] Leviathan, (1651), tr. it. by M. Vinciguerra, Leviatano, Laterza, Bari 1911, Introduzione, p. 3.

this century, up to the new rights to peace, the environment and information claimed today and still not all constitutionalized. Always, fundamental rights are affirmed as laws of the weakest as an alternative to the law of the strongest that applied and would apply in their absence.
The history of constitutionalism is the history of this progressive widening of the public sphere of rights. It is not a theoretical story, but a social and political one, since none of these rights ever fell from above, but all of them have been conquered by institutional breakdown: the great American and French revolutions, then the nineteenth century revolts for the statutes, and finally the workers', feminists', pacifists' and ecologists' struggles of this century. All the different generations of rights, we can well say, correspond to as many generations of revolutionary movements: from the liberal revolutions against the royal absolutism of the past centuries, up to the constitutions of this century, including the Italian one of 1948, born from the Resistance and the repudiation of fascism as a founding pact of constitutional democracy. This history also includes the extension, albeit embryonic, of the constitutionalist paradigm to international law. Even in the history of international relations, in fact, with the institution of the UN and the international charters on human rights, an epoch-making rupture has taken place: the rupture of that ancient régime international born three centuries ago by the peace of Westphalia, founded on the principle of the absolute sovereignty of States and arriving at its failure with the tragedy of the two world wars.

5. Fundamental rights and citizenship

This internationalisation of fundamental rights is the third argument given at the outset, and which I would now like to address. After the birth of the UN, and thanks to the approval of international charters and conventions on human rights, these rights are no longer "fundamental" only within the States in whose constitutions they are formulated, but are supra-state rights to which the States are bound and subordinated also at the level of international law; no longer citizenship rights, but rights of persons regardless of their different citizenships.
Yet it is precisely this change that risks being ignored by a significant part of today's political philosophy. Two years after the Universal Declaration of Rights, Thomas Marshall, in his essay *Citizenship and Social Class,* has flattened out on citizenship all the variegated set of fundamental rights, which he distinguished in the three classes of civil rights, political rights, and social rights all called, without distinction, rights of citizenship. Such a thesis, which contradicts all modern constitutions - not only the Universal Declaration of Rights of 1948, but also most of the state constitutions that confer almost all of these rights on "people" and not only on "citizens" - has been relaunched in recent years, just as our wealthy countries and rich citizens have begun to be threatened by the phenomenon of mass immigration. In short, when it came to taking fundamental

rights seriously, their universality was denied, and their entire catalogue was made dependent on citizenship, regardless of the fact that almost all, with the exception of political rights and certain social rights, are attributed by positive law - both state and international - not only to citizens but to all people.

At the basis of this operation there is a distortion of the concept of “citizenship”: understood by Marshall not as a specific subjective status in addition to that of “personality”, but as the assumption of all fundamental rights, including those of the person, starting with the “civil rights” that in all advanced systems do not belong, despite the name, to the subjects as citizens but only as persons. Citizenship thus replaces equality as a basic category of the theory of justice and democracy. For Marshall, this replacement and the anchoring of the entire set of fundamental rights to citizenship were perhaps dictated by the desire to provide a more solid theoretical foundation for welfare policies. Its aim - and this is undoubtedly its progressive aspect - was to offer, through this category, a theoretical basis for social rights with a view to overcoming, in a social-democratic sense, the old liberal-democratic models that were being implemented in the countries of advanced capitalism in those very years. On the one hand, therefore, the category of equality was abandoned at the very moment when the quality of person and universal ownership of rights had been solemnly recognized, not only by the new post-war state constitutions but also in the Universal Declaration of 1948, to all human beings on the planet. But on the other hand, the assumption of social rights as binding and imperative as the classic rights of freedom was worth giving a new depth to the quality of democracy. Even in Marshall's time, on the other hand, the processes of globalization and world integration and the migratory phenomena had not reached the point where they had stridently contradicted human rights and citizens' rights.

It is more difficult to understand the meaning of the operation fifty years after Marshall's essay. On the one hand, in fact, as we have seen, many current theorists of citizenship have come to deny or at least question the nature of “rights” of social rights and thus abandon, in the face of the crisis of efficiency and legality of the welfare state judged irreversible, the idea of a welfare state based precisely on rights rather than on the discretion of the apparatus. On the other hand, faced with the parallel crisis of the nation state and of state sovereignty, to which citizenship is connected, it seems even less legitimate today to decline fundamental rights in state terms. The sovereignty of even the strongest countries, together with the limits imposed on it by the stipulation of rights, has in fact been displaced in supra-national fora. At the same time, the growth in interdependence and the combined inequalities between rich and poor countries and the phenomena of migration and globalisation warn us that we are moving towards world integration which will also depend on law if it is developed under the banner of oppression and violence or instead of democracy and equality.

In these conditions, the category of citizenship is in danger of founding, much more than a theory of democracy based on the expansion of rights, a regressive idea and in the long run illusory of democracy in one country alone, or rather in our rich countries of the West, at the expense of non-democracy in the rest of the world[12]. This results in a definitive qualification of fundamental rights and of our own model of democracy, whose credibility is entirely linked to their proclaimed universalism. As we all know, these rights have always been universal only in words: if, as a rule, since the French Declaration of 1789, they have always been rights of the person, in fact they have always been rights of the citizen. This is because in fact, at the time of the French Revolution and then throughout the last century and the first half of this century, up to the Universal Declaration of 1948 and the years in which Marshall wrote, the dissociation between "person" and "citizen" was not a problem, since our countries were not threatened by migratory pressure. But today it would be a very sad failure of our models of democracy, and with them the so-called values of the West, if our normative universalism were to be denied at the very moment in which it is put to the test.

It is clear that in the long term - in which interdependencies, integration processes and migratory pressures are destined to increase - this antinomy between equality and citizenship, between the universalism of rights and their state boundaries can only be resolved, due to its increasingly unsustainable and explosive character, by overcoming citizenship, the definitive de-nationalisation of fundamental rights and the correlated de-nationalisation of nationalities. But it is also clear that if we want to gradually and peacefully achieve these results and at the same time give immediate answers to what is already today the most serious problem of humanity and the greatest challenge to democracy, politics and, even before, political philosophy should support these processes, becoming aware of the irreversible crisis of the old categories of citizenship and sovereignty, as well as the inadequacy of that weak remedy to their discriminatory value that until now has been the right of asylum.

The right of asylum has a flaw of origin: it represents, so to speak, the other side of citizenship and sovereignty, that is to say, the state limit imposed by them on fundamental rights. Traditionally, moreover, it has always been reserved only for refugees for political, racial, or religious persecution, and not also for refugees for injuries to the right to subsistence. These narrow assumptions reflect a paleo-liberal phase of constitutionalism: in which, on the one hand, the only fundamental rights recognized were the political and negative freedom rights whose violations were the victims of only small elites perceived by the liberal elites of the host countries as "similar" and, on the other hand, emigration for economic reasons took place mainly within the West from European to American countries, for the benefit of both.

[12] A. Bellamy, Tre modelli di cittadinanza,in La cittadinanza, cit., pp. 237

Today, these assumptions of the old right of asylum have changed. Today's European constitutions and international charters of rights have added to the classic negative rights of freedom a long list of positive human rights - not only to life and freedom, but also to survival and subsistence - by disengaging them from citizenship and also making their enjoyment the basis of modern equality *en droit* and human dignity. There is therefore no reason why those assumptions should not be extended to the most serious violations of these other rights: to economic refugees as well as to political refugees. Instead, the restrictive thesis prevailed, further emptied by the recent laws on immigration, which are even more restrictive. The result is a closure of the West that risks provoking not only the failure of the universalistic design of the UN, but also an involution of our democracies and the formation of their identity as a regressive identity, cemented by the aversion to the different and by what Habermas has called "chauvinism of well-being"[13]. There is in fact a deep connection between democracy and equality and, conversely, between inequality in rights and racism. Just as equality in rights generates a sense of equality based on respect for the other as equal, so inequality in rights generates the image of the other as unequal, that is, inferior anthropologically precisely because legally inferior.

6. Fundamental rights and guarantees

The theoretical-legal arguments usually used in response to the thesis of the supranational character of human rights, be they of freedom or social, are of a realistic nature. The rights written in the international charters would not be rights because they had no guarantees. For the same reason, according to many philosophers and political scientists, social rights would not be rights if they lacked adequate jurisdictional guarantees. This is the fourth thesis, classically formulated by Hans Kelsen, which I proposed at the beginning to refute: beyond his proclamations, even of constitutional rank, an unguaranteed right would not be a right at all.

This brings us to the fourth question that was raised at the outset, and which prejudges any discussion of rights, whether of national or international law: that of the relationship between rights and their guarantees. It is clear that if we confuse rights and guarantees, the two most important achievements of twentieth-century constitutionalism are legally disqualified: the internationalisation of fundamental rights and the constitutionalisation of social rights, reduced one to the other, in the absence of adequate guarantees, to mere rhetorical declamations or, at most, to vague political programmes that are legally irrelevant. This would be enough to advise against identification and to justify the distinction, in theory, between rights and their guarantees: theoretical definitions are

[13] Habermas, Recht und Moral. (Tenner Lectures), (1989)

stipulatory definitions, the acceptance of which depends on their suitability to meet the explanatory and operational purposes pursued with them.
But this is not the main reason - necessary and sufficient - for distinguishing conceptually between the subjective rights, which are the positive (or performance) or negative (non-injuries) expectations attributed to a subject by a legal norm, and the corresponding duties that constitute the guarantees also dictated by legal norms: whether these are the obligations or prohibitions related to them, which form those which in § 2 I have called primary guarantees, or the obligations of second degree to apply the sanction or to declare null and void the violations of the first and which form what I have called secondary guarantees. What makes this distinction necessary is a much more fundamental reason, intrinsically linked to the positive and nomodynamic nature of modern law. Within a nomostatic system, as is morality and as would be a system of natural law based solely on the principles of reason, relations between deontic figures are purely logical relations: given a right, that is, a positive or negative legal expectation, there exists an obligation or prohibition corresponding to it on the part of another subject; given a positive permit, permitted conduct is not prohibited and therefore there is no prohibition on the part of another subject; given an obligation, omission is not permitted on the part of compulsory conduct and there is therefore no negative permit on the part of the other, while there is a positive permit on the part of the other. In these systems, the existence or non-existence of such deontic figures is implied and deduced from the existence of those assumed as "dates". Consequently, there are no antinomies or gaps in them: where two rules are in contradiction with each other, one of the two must be excluded as non-existent, even before it invalidates. This is the meaning of the natural law principle*veritas non auctoritas facit legem*: in the absence of formal criteria for identifying existing law, the only criteria available are logical and rational criteria of an immediately substantial type, that is, linked to what the norms say.
This is not true in nomodynamic systems of positive law. In these systems, the existence or non-existence of a legal situation, that is, of an obligation or a prohibition or a permit or a legal expectation, depends on the existence of a positive rule that provides for it, which in turn is not deduced from that of other norms, but is induced, as an empirical fact, by the act of its production. It is therefore quite possible that, given a subjective right, there is no corresponding obligation or prohibition - even if it should exist - because of the (undue) non-existence of the rule providing for it. Just as it is possible that, given a permit, there exists - even if it should not exist - the prohibition of the same conduct because of the (undue) existence of the rule that provides for it. In short, gaps and antinomies are possible and to some extent inevitable in exhausted systems. It follows that in these conditions, expressed by the legalpositivist principle *auctoritas non veritas facit legem*, the

theses of the theory of law, such as the definition of subjective law as a legal expectation corresponding to an obligation or prohibition, are - not unlike the definitions of prohibition as not allowed by the commission, and obligation as permission of omission, and even by the logical principle of non contradiction - theses of a deontic or normative nature, not on being but on having, to be of the law of which we speak.

Let us then revisit Kelsen's notion of “subjective law”. Kelsen operates not one, but two identifications or reductions of the subjective right to imperatives corresponding to it. The first is that of the subjective right to the duty of the subject in a legal relationship with its holder, that is, to what I have called the primary guarantee: “there is no right for someone”, he says, “without a legal duty for someone else”. The second is that of the subjective right to the duty which, if it is breached, falls to a judge to apply the sanction, that is, to what I have called the secondary guarantee: “the subjective right” consists “not in the presumed interest, but in the legal protection"[14]”

Well, these identifications are theoretical theses, certainly no more true than the logical-deontological equivalences between permission of the commission and not prohibition, between permission of the omission and not obligation, between prohibition and not permission of the commission, and between obligation and not permission of the omission. But like these, they can be denied, or rather violated, by the reality of the law.

It is, in fact, possible that in a positive legal system there are de facto antinomies, that is, contradictions between rules, beyond existence, which in turn is a fact, of criteria for their solution; that in addition to freedom, and therefore the right to freely express one's thoughts, there is, as for example in Italian law, the criminal prohibition of contempt or other crimes of opinion. In such cases we cannot deny the existence of conflicting rules, that is, in our example, the existence of the permit and the prohibition of the same behaviour: it can only be said that the rules on crimes of opinion are invalid rules, even if they exist (or are in force) until they are annulled by the Constitutional Court. The principle of non-contradiction, namely the prohibition of antinomies, is, in short, a regulatory principle in relation to positive law.

Similarly, it is quite possible that there is in fact no obligation or prohibition related to a subjective right and, moreover, that there is no obligation to apply the sanction in case of violation of both: that there are, in other words, primary gaps, due to the failure to stipulate the obligations and prohibitions that constitute the primary guarantees of subjective law, and secondary gaps, due to the failure to establish the bodies obliged to sanction or invalidate the violations, or to apply secondary guarantees. But even in such cases we cannot deny the existence of the subjective right stipulated

[14] Kelsen, Teoria cit., p. 76-77

by a legal norm: we can only complain about the gap that makes it a “paper right”[15] and affirm the obligation to fill it by the legislator. The principle of completeness, that is, the prohibition of gaps, is also, like the principle of non-contradiction, a theoretical regulatory principle.

All this is probably obscured, in Kelsen's theory, by the fact that in it patrimonial rights are assumed as paradigmatic figures of subjective law. In such cases, in fact, the theoretical definition of subjective law as an expectation to which a duty corresponds does not raise any problems, especially with regard to primary guarantees, since it does not seem to be a normative thesis but corresponds exactly to what is actually happening: “a contracting party”, writes Kelsen, “has a right against the other only if the latter has a legal duty to behave in a given manner towards the former; and the latter has a legal duty to behave in a given manner towards the former only if the legal system provides for a sanction in the event of contrary behaviour”[16]. But this is depends on the fact that these rights, as we have seen, are not arranged but pre-disposed by hypothetical rules such as the effects of contracts, which are always, simultaneously, the sources of the correlative obligations that form the primary guarantees. And it depends, on the other hand, on the age-old jurisprudential tradition of civil law which has always closely associated the patrimonial rights to the right of action as a technical specification to activate secondary guarantees.

The case of fundamental rights is different - of all, and not only of social and international rights - which as I have shown are immediately (arranged by) thetic norms. In this case, the existence of the relative guarantees - of the primary ones and even more of the secondary ones - is by no means taken for granted, depending on their express stipulation by means of positive law rules which are quite distinct from those that ascribe the rights. In the absence of criminal law, for example, there would be no primary guarantee, by virtue at least of the principle of criminal law, of any of the rights protected by it, starting with the right to life. In the absence of the rule on the prohibition of arrest without a justified warrant by a judicial authority, there would be no primary guarantee of personal freedom. Even more evidently, in the absence of rules on jurisdiction, there would be no secondary guarantees for any right. But, of course, it would be absurd to deny that only the existence of rights, in the presence of the rules that provide for them, would be denied, rather than, more correctly, the existence of their guarantees in the absence of the rules that prepare them.

In short, it is the nomodynamic structure of modern law that imposes, by virtue of the principle of legality as a rule for the recognition of positively existing norms, the distinction between rights and their guarantees: to recognize that rights exist if and only if they are normatively established, just as the guarantees constituted by the corresponding obligations and prohibitions exist if and only if they

[15] Ibid., 78
[16] Ibid., 82

are also normatively established. This applies to (negative) freedom rights as well as (positive) social rights, to those established by state law as well as to those established by international law. If we do not want to fall into a paradoxical form of realistic natural law and if we do not want our theories to fulfil legislative functions, we must admit that the rights and norms that express them exist inasmuch as they are positively produced by the legislator, be it ordinary, constitutional or international.

The consequence of this distinction between rights and guarantees is of enormous importance, not only theoretically but also metatheorically. Theoretically, it implies that the link between expectations and guarantees is not an empirical link but a normative link, which can be contradicted by the existence of the former and the non-existence of the latter; and that therefore the absence of guarantees must be considered as an undue gap which is the duty of the public authorities, both internal and international, to fill in; just as the violations of rights by the public authorities against their citizens must be conceived as undue antinomies which must be sanctioned as unlawful acts or annulled as invalid acts. From a metatheorical point of view, it involves a role that is not purely descriptive but also critical and normative for legal science with regard to its object: critical with regard to the gaps and antinomies that it has the task of detecting, and normative with regard to the legislation and jurisdiction on which it imposes their completion or repair.

Another issue is the practical feasibility of guarantees. Certainly, the constitutional enunciation of social rights to positive public services has not been accompanied by the elaboration of adequate social or positive guarantees, that is, by techniques of defence and justiciability comparable to those learned from the liberal or negative guarantees for the protection of the rights of liberty. The development of the Welfare State in this century has largely taken place through the simple widening of the spaces of discretion of the bureaucratic apparatus and not through the establishment of techniques of guarantees appropriate to the new rights. Even less have guarantees been put in place in support of human rights under international charters, which are marked by almost total ineffectiveness. But this only means that there is an abysmal gap between norms and reality, which must be bridged or at least reduced as a source ofnot only of political but also of legal delegitimization of our legal systems.

A distinction must be made between technical feasibility and political feasibility. At a technical level, there is nothing to suggest that social rights cannot be guaranteed in the same way as other rights because the acts required to satisfy them would inevitably be discretionary, non-formalised and not subject to judicial control and coercion. First of all, this thesis does not apply to all forms of legal *(ex lege)* guarantees which, unlike the bureaucratic and potestative practices of the welfare and clientelary state, can well be achieved through free, compulsory, and even automatic services.

These include free and compulsory public education, equally free health care, or the minimum guaranteed income. Secondly, the argument that these rights are unjustifiable is contradicted by the most recent legal experience, which, through various means (emergency measures, actions for damages and the like), has seen their forms of judicial protection broadened, in particular as regards the rights to health, social security and equal pay. Thirdly, beyond their justifiability, these rights have the value of guiding principles of the legal system, widely used in the resolution of disputes by the jurisprudence of the constitutional courts. Above all, new guarantee techniques can be well developed. There is nothing to prevent, for example, the establishment at a constitutional level of minimum budget quotas for the various chapters of social spending, thereby making it possible to check the constitutionality of finance laws. And nothing would prevent, at least on a technical-legal level, the introduction of guarantees of international law: such as the establishment of an international penal code and of a correlative jurisdiction over crimes against humanity; the introduction of a jurisdictional control of constitutionality on all acts of international bodies and perhaps on all those of States for violations of human rights; finally, the imposition and regulationof economic aid and humanitarian interventions, in the form of guarantees, in favour of the poorest countries.

Completely different, even if it is often confused with the first one and perhaps charged to it, is the question of the political feasibility of these guarantees: at the domestic level and, even more distant and difficult, at the international level. Of course, the satisfaction of social rights is expensive, as it requires the collection and redistribution of resources, and is incompatible with the logic of the market or at least involves limits to the market. Equally certain is that taking internationally proclaimed human rights seriously requires that we question our standards of living, which enable the West to be prosperous and democratic at the expense of the rest of the world. Certainly, moreover, the current liberal wind, which has made the absolutism of the market and the absolutism of the majority a new ideological creed, does not augur well for the willingness of the wealthy classes, mostly within our rich countries, and in a minority compared with the rest of the world, to see themselves limited and bound by rules and rights informed by the principle of equality. But let us say, then, that the obstacles are of a political nature, and that the challenge open to democratic forces is precisely political, and that today more than ever it consists in the fight for rights and their guarantees. What is not allowed is the realistic fallacy of the flattening of the law on the fact and the deterministic fallacy of the identification between what happens and what cannot but happen.

7. Constitutionalism as a new paradigm of law

The four theses developed so far make it possible to conceive constitutionalism - as it has come to take shape in this century in democratic state systems with the generalization of rigid constitutions and, in perspective, in international law with the subjection of states to human rights conventions - as a new paradigm, the result of a profound internal change in the paleo-giuspositivist paradigm. The postulate of classical juridical positivism is in fact the principle of formal legality, or if you want, of mere legality, as a meta-standard of recognition of the laws in force. According to it, a legal norm, whatever its content, exists and is valid only by virtue of the forms of its production. This statement, as we know, has provoked a paradigm shift with respect to pre-modern law: the separation between law and morals, that is, between validity and justice, by virtue of the entirely artificial and conventional character of existing law. The legality of a norm no longer depends, in modern law, on its intrinsic justice or rationality, but only on its positivity, that is, on the fact of being "placed" by a competent authority in the forms envisaged for its production.
Constitutionalism, as it results from the positization of fundamental rights as limits and substantial constraints to positive legislation, corresponds to a second revolution in the nature of law that is expressed in an internal alteration of the classical positivistic paradigm. If the first revolution was expressed in the affirmation of the legislator's omnipotence, that is, of the principle of mere legality (or formal legality) as the rule of recognition of the existence of norms, this second revolution was achieved by affirming what we can call the principle of strict legality (or substantive legality): that is, by the submission also of the law to the constraints, which are no longer only formal but substantial, imposed by the principles of fundamental rights expressed by the constitutions. And if the principle of mere legality had produced the separation of validity from justice, and the cessation of the presumption of justice of the existing law, the principle of strict legality produces the separation of validity from force and the cessation of the a priori presumption of validity of the existing law. In a system with a rigid constitution, in fact, for a rule to be valid as well as in force, it is not enough that it be issued in the forms prepared for its production, but it is also necessary that its substantive contents respect the principles and fundamental rights established in the constitution. Through the stipulation of what in §4 I called the sphere of the undecidable (of the undecidable which, expressed by the rights of freedom, and of the undecidable which is not expressed by social rights), the substantive conditions of validity of laws, which in the pre-modern paradigm were identified with the principles of natural law and in the paleopositivist paradigm had been removed from the purely formal principle of validity as positivity, penetrate again into legal systems in the form of positive principles of justice stipulated in norms superordinate to legislation.
There is a moment in history in which this paradigm shift can be placed. It was in the aftermath of the catastrophe of the Second World War and the defeat of Nazi-fascism. In the cultural and

political climate in which today's constitutionalism was born - the UN Charter of 1945, the Universal Declaration of Rights of 1948, the Italian Constitution of 1948, the fundamental law of the Federal Republic of Germany of 1949 - it is understood that the principle of mere legality, if it is sufficient to guarantee against the abuses of jurisdiction and administration, is insufficient to guarantee against the abuses of legislation and against the illiberal and totalitarian involutions of supreme decision-making bodies. The meaning of "constitution" as a limit and constraint to public powers, stipulated two centuries ago in Article 16 of the Declaration of Rights of 1789, is therefore rediscovered: "Every society in which neither the guarantee of rights,nor the separation of powers, is ensured, has no constitution". In short, the value of the constitution as a set of substantive rules aimed at guaranteeing the division of powers and the fundamental rights of all has been rediscovered - not only at the state level but also at the international level: that is, precisely the two principles that were denied by fascism, and which are itsthe negation.

We can express the paradigm shift in law produced by the rigid constitutionalisation of these principles, affirming that legality is, on the basis of it, marked by a double artificiality: no longer only of the "being" of law, that is, of its "existence" - no longer derived from morals nor found in nature, but precisely "placed" by the legislator - but also of its "having to be", that is, of its conditions of "validity", also positive at the constitutional level, as a right on law, in the form of limits and legal constraints to legal production. It is not a question of a failure or a crisis in the separation between law and morals that took place with the first legal positivism but, on the contrary, of a completion of the positivist paradigm and of the rule of law as a whole: thanks to this double artificiality, in fact, not only the production of law, but also the choices with which it is planned are positivised by legal norms, and even the legislator is subject to the law. Therefore, positive legality in the constitutional state of law has changed its nature: it is no longer only (mere legality) conditioning, but to itself (strict legality) conditioned by also substantial constraints relating to its contents or meanings.

The result has been an internal alteration of the classical legalpositivist model, which has involved both law and discourse on law, that is, jurisdiction and legal science. The strict legality, precisely because it is conditioned by the constraints of content imposed on it by fundamental rights, has in fact introduced a substantial dimension as much in the theory of validity as in the theory of democracy, producing a dissociation and a virtual gap between the validity and force of the laws, between having to be and being of the law, between substantial legitimacy and formal legitimacy of political systems.

On the other hand, this gap - which forms a physiological trait (albeit beyond certain pathological limits) of constitutional democracy, its greatest value and its sign of recognition as well as its

greatest defect - has also changed the nature of jurisdiction and legal science. Jurisdiction is no longer the judge's subjection to the law, but it is also a critical analysis of its meaning in order to control its constitutional legitimacy. And legal science is no longer, if ever it has been, a simple description, but it is also a critique and design of its own object: criticism of invalid law, even if it is in force because it is in contrast with the constitution; reinterpretation in the light of the principles established in the constitution of the entire normative system; analysis of the antinomies and gaps; elaboration and design of the missing or inadequate guarantees imposed by the constitutional norms.

The consequence of this is a responsibility of the juridical and political culture, which is all the more demanding the greater this gap, and therefore the task of accounting for the ineffectiveness of the constitutionally stipulated rights. There is an epistemological paradox that characterizes our disciplines: we are part of the artificial universe that we describe and help to build it in a much more decisive way than we think. It therefore also depends on the legal culture that rights, according to Ronald Dworkin's beautiful formula, are taken seriously: since they are nothing more than normative meanings, whose perception and social sharing as binding is the first, indispensable condition of their effectiveness.

CHAPTER I

Section 2

FUNDAMENTAL RIGHTS IN ITALY

The Italian legal system recalls respect for the fundamental rights of the person in the hierarchically most important legal text: the Constitution.
It also generally recognizes the rights of the individual, guaranteeing their respect but also providing for their limits, based on the highest "collective interest".
As we will see later on, it is precisely on the basis of the forecasts regarding fundamental rights that the entire system of sources of law is based.

SUMMARY: 1. The Albertine Statute; 2. The Constitution of the Italian Republic; 3. Individual rights; 4. Guarantees of constitutional rights; 5. Limits and restrictions

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1. The Albertine Statute

The Albertine Statute is an obtuse constitution, that was granted by the sovereign (Carlo Alberto, king of Sardinia in 1848), and even if declared "perpetual" and "immutable", very soon became considered as a flexible constitution, freely modifiable by the Parliament, which thus assumes the functions of a perpetual constituent.
As far as the rights of liberty are concerned, given the enunciation of the principle of formal equality, they are codified with a normative technique which, after the affirmation of the right, refers back to the legislator the determination of the limits of its exercise (with a reserve of law which, in addition to lending itself to easy abuses by the legislator, rapidly involves, tending to coincide with the principle of formal legality). In some cases, a reserve of jurisdiction is also established to better guarantee individual freedoms, but its scope is drastically limited by the lack of independence of judges from the executive.
In the historical evolution, following a first phase in which, even in the presence of often restrictive interpretations of freedoms, there is a substantial balance between guaranteeing principles and statist principles, a functional conception of rights is affirmed with the fascist dictatorship, which, without proceeding to their negation, profoundly limits its scope, subordinating them to the superior interests of the nation.

2. The Constitution of the Italian Republic

Article 2 of the Constitution states that "the Republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social groups where his personality takes place, and requires the fulfilment of the mandatory duties of political, economic and social solidarity". This rule, together with that contained in Article 1 ("Italy shall be a democratic Republic founded on work. Sovereignty belongs to the people who exercise it in the forms and within the limits of the Constitution") defines the current form of State, and has a particular importance on a systematic level. The first article also states the worker principle (of socialist inspiration), which says that the dignity of a man is given by work and not by sex, race, religion, property, social class, political opinion, and so on. This principle is stated in the first paragraph, and indicates a prevalence on this point of a conception that then defined itself as "left-wing" against the principle that gave precedence (before the right to work) to the protection of individual freedom and the protection of property (a conception that then defined itself as "right-wing"), analogous, for example, with the Anglo-Saxon tradition.

The subject of the statement ("Republic") is valid for indicating both the State-apparatus and the State-Community. The term "man" used here lends itself, however, to two possible interpretations. Part of the doctrine maintains that it is synonymous with "citizen", a Constitution being a political act that presupposes the status of citizenship, and otherwise losing the meaning of the provision in Article 10 paragraph 2 ("the legal condition of the foreigner is regulated by law in accordance with international rules and treaties").

This thesis is opposed above all by considering the individualist and universalist principles present in the constitutional text, and expressed in the same Article 10, paragraph 3 ("a foreigner, who is prevented in his country from effectively exercising the democratic freedoms guaranteed by the Italian Constitution, has the right of asylum in the territory of the Republic, according to the conditions established by law"). With a more pragmatic approach, the solution to this problem of interpretation can however be considered irrelevant, given the quantity and quality of international standards governing human rights (among which the Universal Declaration of Human Rights of 1948 assumes particular importance, and the European Convention for the Protection of Human Rights of 1950) adopted after the Constitution was already in force, and therefore considered superfluous in Italy, even if the facts have wronged this wish, given that Italy has been condemned many times for violations of human rights, such that Italy, if not with much delay and reluctance, has had to change its laws to comply with those convictions.

Another particularly sensitive issue is that of the classification of Article 2 as an open or closed rule. In the first case, Article 2 would introduce into the system rights which were not provided for in the

constitutional text, and which have emerged from the economic, social and political evolution of the community (that is, from the material constitution). In the second case, a closed rule would not be possible. Given the fact that the configuration of a new right entails, in a contemporary constitutional system, also the configuration of a new obligation, to be borne not only by the State but also by private individuals, it is preferable to consider the thesis that sees in Article 2 a rule with an open case, as explicitly stated by the Supreme Court in its judgment of 10 May 2001, no. 6507.
Article 3 of the Constitution, on the other hand, sets out the two principles of formal equality ("all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions") and substantial equality (*"it is the duty of the Republic to remove obstacles of an economic and social nature, which, by effectively limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country"*).
The principle of formal equality has been very thorough and has taken on the value of a criterion to whose control all the will of the legal system is subject. The addressee of Article 3 is, in the first instance, the legislator, who must consider all citizens equal. The legislator must equalise equal legal situations and distinguish between different legal situations, without ever taking as a criterion for diversification those set out in Article 3(1).
The discretion of the legislator in diversifying legal situations must be halted in the face of these criteria set out by the constituent. Initially, the criteria of discretion of the legislator in diversifying the different legal situations were considered unquestionable, without prejudice to the prohibitions imposed by the Constitution, as reiterated by Law 87 of 1953, which in Article 28 says, "The control of legitimacy cannot have as its object the exercise of discretion of the legislator".
In its first judgments, the Constitutional Court showed its respect for this discipline (Judgment No. 28 of 1957), then completely overturned this opinion by declaring in Judgments No. 7 of 1973 and No. 7 of 1975 that, in the exercise of the legislature's discretion, a fundamental reasonableness must be found. The legislator can equalise and diversify, but within the limits of reasonableness and other constitutional principles. A choice of the legislator must be evaluated against two requirements of validity: a purpose must be identifiable in the law, and which purpose must be a constitutionally appreciable. The Constitutional Court acts as a review of these two validity requirements.
The Constitution was intended as "rigid", that is, not easily modifiable, in contrast with the easy modifiability established with the Albertine Statute. However, the Constitutional Court, invested with the power of syndication over the laws (being able to annul the statutes) and therefore of being the guardian of the interpretation of the Constitution, in the name of "reasonableness", has adopted

over time a form of interpretation, defined by the jurists as *"evolutionary"*, which often goes beyond the sphere reserved for the legislator, adapting to the times and to new unforeseensituations. In fact, in addition to deleting individual parts of a law, the Constitutional Court also adopts "interpretative" repeals when it leaves a rule alive, while declaring it unconstitutional *"in the part in which it provides that ..."* and therefore innovating or limiting its scope, or when it declares it unconstitutional "in the part in which it only ...", thereby creating new legislative rules.
Another problem that has arisen in recent years is that the Constitutional Charter guarantees rights only to (Italian) citizens, while millions of EU citizens reside in Italy, for whom it is international treaties (perhaps it would be better to say inter-EU) that guarantee the same fundamental rights as Italian citizens, but also millions of foreign citizens of non-EU citizenship, many of them in a legal manner (that is, with a residence permit in Italy) and some in an illegal manner (defined as illegal), even to whom the Convention on Human Rights guarantees fundamental rights, even though the European Court of Human Rights (ECHR) has on several occasions sanctioned Italy for breaching this convention. It seems appropriate to many that a revision of the Constitution (which has been mentioned for years) also addresses this problem, equating the rights of at least regular foreign residents in Italy to those of citizens, although it would be appropriate that the Constitution expressly guarantees fundamental human rights to all those who for whatever reason are in Italy, as Italy has undertaken to do by signing and ratifying international conventions.

3. Individual rights

Depending on their structure, sometimes rights can be classified as **absolute** (when they can be asserted against any person), **relative** (when they can be asserted only against particular persons; in the cases under examination, mainly the State) or **functional** (when their exercise is an instrument and not the achievement of the good of life).
Absolute rights include the classic rights of freedom (personal freedom, freedom and inviolability of the home, freedom of movement and residence, freedom and secrecy of correspondence, freedom of expression of thought), as well as the right to life and psychophysical integrity, the right to retain citizenship and legal capacity, the right to name and image, matrimonial and family rights, property, real rights and rights of succession.
Relative rights (or performance rights) include social rights, rights to omissive behaviour and the right to equal treatment.
Finally, functional rights include political rights, the right to self-protection (among these, the only one that enjoys express constitutional recognition is the right to strike) and the right to judicial protection.

4. Guarantees of constitutional rights

A guarantee can be defined as any instrument for the protection of certain interests against the possibility of offence, an instrument that, as far as fundamental rights are concerned, the Republic undertakes to prepare by virtue of the provisions of Article 2 of the Constitution.

The guarantees, in turn, can be jurisdictional, when they presuppose judicial proceedings (and these will be direct or indirect), or non-judicial, when, even if they take place internally, they do not presuppose it.

Indirect judicial guarantees consist of the independence (which pertains to the jurisdictional office, and is both organic and functional), third party status (which relates to the person of the judge) and impartiality (which is a modal requirement relating to judicial activity) of the judge, as well as naturalness and preconstitution, which are accompanied by the prohibition of the establishment of extraordinary and special judges.

Indirect jurisdictional guarantees are those that, already drawn from the case law of the Constitutional Court, have been made explicit by the constitutional legislator in the reform of Article 111, which now expressly provides in our legal system the principles of *due process* (contradictory, reasonable duration, obligation to state reasons).

Non-jurisdictional guarantees, on the other hand, are given by administrative appeals, by participation in administrative procedure, by independent administrative authorities, by the civil liability of the public administration and its employees, by the procedural inability to use illegal evidence.

Unfortunately, over and above the high-sounding principles, in practice these principles are often disregarded, so much so that Italy has been condemned on numerous occasions by the European Court of Human Rights (ECHR) precisely because of the violation of the fundamental rights that the Constitution should guarantee, achieving the less-than-honourable state record with the highest number of convictions among all the Member States of the European Union, with the Italian Republic disbursing even considerable sums in favour of private applicants, without this having served to remedy the persistence of situations of violation of the fundamental rights of Italian citizens, so much so that appeals (and convictions) are constantly on the rise. The most recurrent convictions are for the disproportionate length of judicial procedures (civil trials, criminal trials, bankruptcy procedures), the state of Italian prisons (the ECHR defines them as places of torture due to overcrowding beyond all limits, and because of the condition of the buildings), violations of the right to property by public bodies. And so far the ECHR has not wanted to deal with the abuse of pre-trial detention both in terms of the extension of time and in terms of the fact that a large part of

those who have suffered it are then recognized as innocent by the judges themselves, neither the disproportionate use of telephone tapping nor of the biblical time it takes to obtain acts or administrative concessions which require only a few days abroad, nor of the very long periods of prescription for criminal offences or tax investigations.

5. Limits and restrictions

As far as the right to rights is concerned, in addition to recalling what has been said *above* with regard to the concept of "man" referred to in Article 2 of the Constitution, attention must also be drawn to that of "capacity". It cannot be resolved simply in the civil category, but while reaffirming the principle that all natural persons are subjects of law, and therefore as such potential centres of imputation of subjective legal situations, it should be noted that, for the rights consisting in the performance of material activities, it must be traced back to natural capacity, that is, the concrete capacity for self-determination in relation to the material activity itself (with the limits, for a minor, deriving from the exercise of parental authority, until this is expressed in measures with educational capacity), while for the rights consisting in the performance of legal acts it corresponds to the capacity to act determined for them.

As far as the limits of the rights of liberty are concerned, they must necessarily be traced back to those provided for by the constitutional text, or to those permitted by it (for individual rights) or necessary for the achievement of the related function (for functional rights), the statement being extremely ambiguous, although endorsed by the jurisprudence of the Constitutional Court, that the legislator would be free to set limits of exercise but not of content, since it makes no sense - with regard to the rights of liberty - to make a distinction between the exercise and content of the same.

As regards the suspension of constitutional rights to be adopted in a state of emergency, a case not provided for by the current Constitution, considering the uselessness of some of the proposed instruments (such as the legislative delegation, the state of war, a constitutional law and, in the event of extreme rupture, dangerous sources *extra ordinem*), the instrument of the emergency decree must be considered preferable, with an interpretation perhaps more in keeping with the intent of the constituent of the *extraordinary hypotheses of necessity and urgency*.

CHAPTER I

Section 3

THE EUROPEAN PROVISION OF FUNDAMENTAL RIGHTS

The European text on fundamental rights has the merit, among many others, of making their knowledge homogeneous and, through its application, asking for respect for all EU countries.

SUMMARY: 1. Proclaimed rights; 2. European Constitution and Reform Treaty

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The *Charter of Fundamental Rights of the European Union* (also known as the "Nice Charter") was solemnly proclaimed the first time on 7 December 2000 in Nice and a second time, in an adapted version, on 12 December 2007 in Strasbourg by the Parliament, the Council, and the Commission. With the entry into force of the “Lisbon Treaty”, the *Nice Charter* has the same legal value as the Treaties, under Article 6 of the Treaty on European Union, and is therefore fully binding on the European institutions and the Member States and, at the same level as the Treaties and Protocols annexed thereto, as the summit of the European Union order. It responds to the need expressed at the Cologne European Council (3 and 4 June 1999) to define a group of rights and freedoms of exceptional importance and faith guaranteed to all citizens of the Union.

1. Proclaimed rights

The Charter sets out the rights and principles to be respected by the Union when applying Community law. The implementation of these principles, however, is also entrusted to national regulations. The text of the Charter begins with a preamble and the 54 articles are divided into 6 chapters whose titles set out the fundamental values of the Union:

- ***Dignity*** (Art 0-5)

  Historically, the theme of dignity has been deepened by Stoicism which, by virtue of the participation of the human *logos* in the divine one, affirmed the identity of the virtues in men regardless of social class and sex so that every human being was free to engage in the search for wisdom that implied indifference towards the body and its pains.

  Christianity has taken up the Stoic conception of human dignity, claiming that every man is a reflection of the image of God. The question of human dignity was then examined in depth during the Renaissance, when the question took on polemical features against the doctrine of the Church, accused of having promoted the devaluation of the earthly world. During the

Renaissance, man was considered a being of indeterminate nature, able to make his own choices of life in absolute autonomy.

Dignity in its early conceptions had nothing to do with today's meaning, being on the contrary connected to the exercise of public office: an aristocratic, elitist meaning that remains in the term "dignitary" and that opposes the democratic sense that characterizes this term today.

So for Thomas Hobbes dignity is not an intrinsic value of man but only the "public value" of man that is attributed to him by the State[17].

So also for Montesquieu dignity denotes the distinction proper to the aristocracy and opposes equality in this sense. Émile Littré in his *Dictionnaire de la langue française* attributes as the first meaning of the term "dignity" that of "eminent function in the State or in the Church" and only as a fourth meaning that of "respect that is due to oneself".

In Kant's moral philosophy, dignity is recognized to every man as a rational being and therefore worthy of always being considered as an end, never as a means: "Act in such a way as to treat humanity, both in your person and in that of every other, always also as an end and never simply as a means."[18]

In other words, man must have the capacity to act morally above the sensitive determinations of his will, which must be free from the inclinations of desire and carnality. Kantian dignity goes beyond respect for life as a sensitive and suffering life: on the contrary, it is respect for human freedom, for man as a supersensitive being.

- ***Freedom*** (Art. 6-19)

  It means the condition whereby an individual can decide to think, express himself and act without constraint, resorting to the will to design and implement an action, through a free choice of goals and tools that he considers useful to achieve it.

  According to a concept that is not only Kantian, freedom is a formal condition of choice that, when it is transformed into action, into concrete action, will necessarily be affected by the conditioning that comes from the real world, subject to the necessary physical laws, or by determining situations of another nature.

  With regard to the field in which free choice is made, we speak of moral, juridical, economic, political, thought, metaphysical, religious freedom, and so on.

  Isaiah Berlin says: "The essence of freedom has always been the ability to choose how you want to choose and why you want to choose, without constrictions or intimidation, without an immense system swallowing us up; and the right to resist, to be unpopular, to stand up for your

[17] Hobbes, *Leviathan*, Chap. X ,

[18] Kant I., Fondazione della metafisica dei costumi' in *Scritti morali*, trad. by Chiodi P., UTET, 1995, 88

convictions just because they are yours. True freedom is this, and without it there is never freedom of any kind, nor even the illusion of having it"[19].

Therefore, from a psychological point of view, we can understand freedom as perceived by the subject: *negatively*, as the absence of submission, slavery, coercion for which man considers himself independent, or *positively* in the sense of autonomy and spontaneity of the rational subject: with this meaning, voluntary human behaviour is based on freedom and is qualified as free.

- ***Equality*** (Art. 20-26)

  Social equality - which applies to the rights and duties of the person, considered in terms of justice - is an ideal that gives everyone, regardless of their social position and origin, the possibility of being considered on a par with all other individuals in every context. It is an ideal present, at least as such, in all civilised countries, as a demand for equal individual and social dignity for all.

  Social equality is therefore a situation where all individuals within specific isolated societies or groups must have the same state of social respectability. At the very least, social equality includes equal human and individual rights under the law. Examples are security, voting rights, freedom of speech and assembly, and property rights. However, it also includes access to education, health care and other basic social rights, as well as equal opportunities and obligations.

  Sexual gender, sexual orientation, age, origin, caste or class, income and property, language, religion, belief, opinion, health or disability must not result in unequal treatment. An open problem is horizontal inequality, the inequality of two people of the same origin and ability. In the contemporary world, then, "the boundaries of social equality are moving forward: after the important conquests of social rights, linked to the struggles of emancipation of workers and the construction of modern welfare states, an action plan for further emancipation is opening up today, which has more subtle and deeper characteristics: those of the effective practicability of social rights formally enshrined and the full deployment of individual capacities still compressed or under-utilised for a large part of the population. In these terms, the "universalistic" nature of the new policies, as policies for the promotion of the capacities and empowerment of all citizens, is evident. The universalistic principle is therefore constitutive of the approach of these new policies"[20].

- ***Solidarity*** (Art. 27-38)

[19] Berlin I., *Four Essays on Liberty*, Oxford UP, Oxford, 1982, tr. it. *Quattro saggi sulla libertà*, Feltrinelli, Milan, 1989

[20] M. Paci - E. Pugliese (ed), *Welfare e promozione delle capacità*, Bologna, Il Mulino, 2011, pp. 25-26.

It indicates the ethical-social commitment in favour of others, that is, an attitude of benevolence and understanding that manifests itself to the point of expressing itself in an active and free effort, aimed at meeting the needs and discomforts of someone who needs help.
The European Union's prerogatives also include the principle of solidarity, the aim of which is to safeguard and promote the well being of European citizens through the fulfilment of economic, political and social obligations by the governments of the Member States of the Union.
The “Lisbon Treaty” of 2007 (which entered into force in 2009) amended the “*Treaty establishing the European Community*” (now called the “Treaty on the Functioning of the EU”) by introducing a solidarity clause (Article 222) which requires European states to act “in a spirit of solidarity” by all possible means, including military ones, in the event of a request for aid for terrorist attacks, or for natural or man-made disasters (solidarity interventions are established by the Council of the European Union acting by qualified majority or unanimously in the case of military operations).

- ***Citizenship (***Art. 39-46)

It is the condition of the natural person (called citizen) to whom the law of a State recognizes the fullness of civil and political rights. Citizenship, therefore, can be seen as a *status of* the citizen, but also as a legal relationship between citizen and state. Those who do not have the citizenship of a State are called foreigners if they have the citizenship of another State, or stateless persons if they do not have any nationality.
In sociology, the concept takes on a broader meaning and refers to the individual's membership and ability to act in the context of a given political community.

- ***Justice*** (Art. 47-50)

It is the virtuous order of human relations in function of the recognition and institutional treatment of the behaviour of a person or of several persons married in a given action according to the law or against the law. For the exercise of justice, there must be a code that classifies behaviour that is not allowed in a certain human community, and a judicial structure that translates the dictates of the law into subsequent legal action.
Beyond the institutionalized judicial action, which operates with a codified and impositive justice, there is a sense of justice, sometimes defined as natural because it is considered innate, which commits each individual to hold towards his fellow men or groups, in ordinary or extraordinary situations, to use criteria of judgment, and of consequent behaviour, responding to justice in the sense of honesty, fairness and not detrimental to others. It is in this sense that justice becomes a moral virtue, therefore private and not codified and institutionalized, which is

however of enormous axiological significance, on the basis of which behavioural rules are observed that concern oneself and others in duties and expectations.

Justice, for oneself, for others and for everyone else, is however translated into a duty and a right that involves anyone belonging to a certain community, in a reductive sense, and every human person in general, in a broad sense. Justice is the constant and perpetual desire, translated into action, to recognize to each person what is due to him; this is the office, deontological and inviolable, that the magistrate in charge must implement in the places designated to do justice: the courts. Justice, which is always carried out as the will of the people, is also repressive action, a legitimate power to protect the rights of all, and therefore to render to everyone, in the circumstances recognized, to grant justice by listening to requests for it and in the name of it by granting what is right when it is due and to whom it is due.

The denial of justice, that is, the failure to apply the criteria of justice, is injustice, with different degrees of seriousness of its implementation to the detriment of one or more persons.

The seventh chapter (Articles 51 to 54) is represented by a series of 'General Provisions'that specify the link between the Charter and the European Convention on Human Rights (ECHR).

The rights contained in the Charter can be classified into four categories:

1. The *common fundamental freedoms* present in the constitutions of all the Member States;
2. The *rights reserved for citizens of the Union*, in particular the right to elect their representatives to the European Parliament and to enjoy common diplomatic protection;
3. *Economic and social rights*, those which are linked to labour law;
4. *Modern rights*, those deriving from certain technological developments, such as the protection of personal data or the prohibition of eugenics and discrimination of disability and sexual orientation.

2. European Constitution and Reform Treaty

The Charter was included as the second part of the draft European Constitution, so that when it was ratified, the Charter would also become binding. After the failure of the ratification of the Constitution, a debate began on whether the Charter should be included in the new treaty.

However, the United Kingdom and Poland obtained at the Intergovernmental Conference that they would be excluded from the scope of the Charter. The Czech Republic, just before ratification, also obtained an opt-out from the Charter.

On the other hand, Article 6 of the Lisbon Treaty not only gave the Charter the same legal value as the European Treaties, but also included the EU's accession to the ECHR. However, Opinion No 2/13 of the Court of Justice of the European Union set out a number of obstacles to the proposed

Accession Treaty submitted for its opinion, with the result that the negotiation process has come to a standstill.

CHAPTER I

Section 4

FUNDAMENTAL RIGHTS AND FOUNDING TREATIES

This section explains the regulatory and training process of the reference texts in relation to fundamental human rights, as well as the responsibilities for EU members regarding compliance with the provisions contained.

SUMMARY: Human rights in the first case law of the Court of Justice; Reactions of the Italian and German Constitutional Courts; The new jurisprudential orientation of the Court of Justice; The turning point of the Maastricht Treaty and the innovations introduced by the Amsterdam Treaty; The Hypothesis of Community Accession to the ECHR; The Hypothesis of Community Accession to ECHR II; The Charter of Fundamental Rights of the European Union; The Content of the Charter and Its Relationship with the ECHR; Member States' responsibility to ECHR bodies

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Originally, the Treaties establishing the European Communities (ECSC Treaty - Paris of 18 April 1951, EEC Treaty and Euratom Treaty - Rome of 25 March 1957) did not contain any reference to fundamental rights.

The only exceptions were certain individual freedoms (freedom of movement - Article 39 EC Treaty, freedom of establishment - Article 43 EC Treaty, freedom to provide services - Article 49 EC Treaty) enshrined in the Treaties in so far as they were necessary for the establishment of the common market.

In view of the transfer of powers from the Member States to the Community, the absence of a system of protection of fundamental rights at Community level proved to be such as to expose individuals to the risk of a reduction in protection, since the forms of protection of human rights guaranteed by the national constitutions or international agreements to which the Member States were parties did not apply to the Community.

Human rights in the first case law of the Court of Justice

As a first step since the entry into force of the Treaties, the Court of Justice has held that the fundamental rights guaranteed in the constitutions of the Member States are irrelevant at Community level.

Examples of such a jurisprudential orientation can be found in the following judgments:

- Stork (1959);

- Ruhr Coal Sales Offices (1960);
- Sgarlata (1965)

The Community jurisdictional body was concerned with affirming the autonomy and primacy of EC law over national law, whereas it considered that the strictly economic nature of the supranational legal system would in fact prevent the emergence of conflicts between Community acts and fundamental rights.

Reactions of the Italian and German Constitutional Courts

It was precisely the affirmation of the principle of primacy by the Court of Justice, however, that alarmed the Italian and German Constitutional Courts, which feared that the application of Community law could result in a violation, even if only occasional, of the fundamental rights consecrated in the Constitutions of their respective States.

Both Courts stated that the constitutional rules protecting the fundamental rights of the human person could not be derogated from and that the acts adopted by the Community institutions should also respect them.

The new jurisprudential orientation of the Court of Justice

The solution proposed by the two Courts represented an "attack" on the unitary nature of Community law. If an act of the institutions were found to be contrary to the fundamental rights protected by the Italian or German Constitution, it would no longer have been applicable in Italy or Germany, even though it would have remained applicable in the other Member States of the Community.

In order to remedy this situation, the Court of Justice has decided to recover, by way of case-law, the protection of human rights in situations where Community law is relevant and not only domestic law.

In particular, it stated that fundamental human rights are part of the general principles of EC law which the Court guarantees to be observed (Stauder judgment, 1969) and that, since there is no catalogue of human rights to be protected in the EC Treaties, the rights recognised are those derived from the constitutional traditions common to the Member States (see Internationale Handelsgesellschaft Judgment, 1970) and the ECHR (see Rutili Judgment, 1975).

The turning point of the Maastricht Treaty and the innovations introduced by the Amsterdam Treaty

With the Treaty of Maastricht (TEU) of 7 February 1992, the issue of the protection of human rights was finally recognised on a regulatory level.

Indeed, the case law of the Court of Justice is formalised in Article 6 of the EU Treaty.

This Article, having established in paragraph 1 that the Union is founded on the principles of liberty, democracy and respect for human rights (...) principles which are common to the Member States, sets out in paragraph 2 that the Union shall respect fundamental rights, which are guaranteed by the ECHR and which derive from the constitutional traditions common to the Member States, as general principles of Community law.

The Treaty of Amsterdam introduces different forms of guarantee depending on whether it is a question of protecting fundamental rights infringed by a Member State in breach of Article 6(1) or by a Community institution in breach of Article 6(2).

The sanctioning mechanism for the protection of Article 6(1) is set out in the subsequent Article 7 of the EU Treaty, which provides:

The Council may find that there has been a serious breach of the principles laid down in Article 6(1) by a Member State and may suspend that State from exercising certain rights.

The sanctioning mechanism for the protection of Article 6(2) is set out in Article 46 of the EU Treaty, according to which: The ECJ is competent to verify the conformity of actions taken by the EC institutions with respect to fundamental rights.

The Hypothesis of Community Accession to the ECHR

Even after Maastricht and Amsterdam, the EU did not have its own written catalogue of fundamental rights. In the doctrinal debate two hypotheses have been put forward:

- The accession of the EU to the ECHR;
- The elaboration of an EU Charter of Fundamental Rights

As for the *first hypothesis*, accession would have had several advantages, making it possible:

- To replace the generality and occasionality of the references used by the ECJ with the substantial respect for the rights contained in the ECHR;
- To submit the Community to the control mechanisms established by the ECHR (which provide for the intervention of the European Court of Human Rights whenever an individual, and not just a State, brings an action for an alleged violation of the rights guaranteed by the Convention);

- To extend the remedies open to individuals within the EC legal order, enabling them to challenge the legality of Community acts, including those of general application, which infringe fundamental rights.

The Hypothesis of Community Accession to ECHR II

In its Opinion 2/94, adopted on 28 March 1996, the Court declared that the Community had no competence to accede to the ECHR, adding that such accession would only be possible through a revision of the Treaties.

The opinion in some way helped to put an end to the hypothesis of accession to the Convention, while it gave new impetus to the idea of giving the EU its own *Bill of Rights*.

The Charter of Fundamental Rights of the European Union

On the basis of the system of protection of human rights that emerges from the community, it is easy to verify that the Court has a decisive role: the absence of a written catalogue of rights to be protected means that it is up to the Court to identify which rights it considers fundamental in the light of common constitutional traditions and international treaties and to outline their content and scope.

This could make the system less transparent, even if the Community judiciary has so far provided an adequate response to the need to protect fundamental rights.

In any case, in order to remedy these problems, the Cologne European Council of 3-4 June 1999 decided to provide the Community with its own catalogue of human rights. To this end, it shall promote the drawing up of a Charter of Fundamental Rights of the European Union.

The drafting of the text is entrusted to a specially created body, the Convention, composed of 15 representatives of the Heads of State and Government, 1 representative of the Commission, 16 members of the European Parliament and 30 members of the national parliaments.

On 7 December 2000, at the opening of the Nice European Council, the Charter was solemnly proclaimed by the Council, Parliament, and the Commission, without it being given binding legal force.

The Content of the Charter and Its Relationship with the ECHR

The Charter still lacks binding force. However, the solemnity of the drafting process and the extent of consensus that its text has received have made it a privileged interpretative tool for reconstructing the scope of fundamental rights protected within the Community.
The Court of First Instance has repeatedly referred to certain articles of the Charter (see Judgment in Jégo-Quéré, 2002), whereas the Court, which has been more cautious in the past, has only recently begun to refer to them (see Judgment in Parliament v. Council, C-540/03, 2006).

The Charter is condensed into 54 articles:

Dignity (1-5) - Solidarity (26-38)
Freedom (6-19) - Citizenship (39-46)
Equality (20-25) - Justice (47-50)

In particular, Article 52(3) defines the relationship between the Charter and the ECHR, establishing that the level of protection afforded to those rights in both texts may not be lower than that guaranteed by the ECHR, considered in the light of the case law of the European Court of Human Rights. This is without prejudice to the possibility that the Charter may establish a higher level of protection or that it may protect rights, which are not protected at all by the ECHR (see Article 53).

Member States' responsibility to ECHR bodies

The Community's failure to formally accede to the ECHR has left unresolved problems relating to the responsibility of Member States before the ECHR bodies as a result of the activities of the EC institutions or of activities carried out by Member States in implementation of Community rules.
The problem seems to have been tackled organically only recently, with the *Bosphorus v. Ireland* judgment, adopted by the European Court of Human Rights on 30 June 2005.
In it, the Court states that Member States, which have transferred certain sovereign powers to the EC, are not exempt from the obligation to respect the rights protected by the ECHR.
However, it does not intend to exercise its control over any activity undertaken by a State in implementation of its obligations under its membership of the EC.
In this respect, it distinguishes between two hypotheses:

- The cases where there is no discretion on the part of the Member State, which merely implements EC acts: the Court considers its intervention unnecessary since it starts from the assumption that the EC protects fundamental rights in an equivalent way to that of the

ECHR. Only if the contrary is proven will the State remain responsible and the Strasbourg Court intervene accordingly.

- Cases where there is a margin of discretion for Member States in implementing EC obligations: the Court holds Member States fully responsible and therefore liable for a breach of the ECHR.

CHAPTER I

Section 5

SOURCES OF LAW

Knowledge of the sources of law is necessary in order to know the genesis, structure and function of legal systems. Although most systems have points in common about the sources of law, these, as will be seen below, can differ, even macroscopically, between different systems.

SUMMARY: Jurisprudence; Sources in different legal systems; International sources; National sources; Customs ; Books of Authority

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Sources of law are defined as the roots and mainsprings of laws. They are compulsory rules that allow a state to exercise authority and jurisdiction over its territory.
The term “source of law” may also at times mean the sovereign or the seat of power which gives rise to the law’s validity.

Jurisprudence

What is seen as an authentic source of law may depend on the choice of jurisprudential analyses. While tyrants such as Kim Jong-un govern with *de facto* power, critics would point out that strictly speaking his power does not stem from a *de jure* (or legitimate) source. After WWII the statement “I was only obeying orders” was not considered a valid defence at Nuremberg, and the victors punished Nazis for violating “universal and eternal standards of right and wrong”.
For a long time, customs have been the foundations for principles of law. Among the early unwritten sources of law, we findthe divine right of kings, natural and legal rights, human rights, civil rights, and common law. Canon law and other forms of religious law are the foundations of law arising from religious practices and doctrines or from sacred texts. This is a particularly important source of law in instances when state religion exists. Other sources or modifiers of law are historical or judicial precedent and case law. Finally, legislation, rules, and regulations, are tangible and enforceable sources as codified forms of the law.

Sources in different legal systems

Within the civil law systems, the appropriate code, whether it is the civil or criminal code, is the sole source of law. On the other hand, common law systems have several sources that combine to form “the law”. Civil law systems, however, often assimilate ideas from common law and *vice-*

versa. Scotland, for example, has a hybrid form of law, while South Africa combines common law, civil law, and tribal law.

A state normally has a **central national legislature** as the ultimate source of laweven if it may comply with international law, may have a written or federal constitution, or may have regional legislature. Even if a written constitution may be seen as the prime source of law, the state legislature could amend this constitution by following the rules and procedures laid down for doing so. International law may supersede national law, but international law is mainly made up of ratified conventions and treaties. However, what has been previously ratified may later on be denounced by the national parliament. Even if local authorities may have the impression of having the democratic mandate to pass by-laws, this delegated legislative power is precisely that: delegated by parliament. What parliament gives, parliament may later decide to take away.

England, as the supreme archetype of a common law country, follows a hierarchy of sources:

- Legislation (primary and secondary)
- The case law rules of common law and equity
- Parliamentary conventions
- General customs
- Books of authority

International sources

International Treaties

Even if governments may sign International Conventions and Treaties; normally[7] these still need to be ratified in order for them to be binding.Moreover, most conventions require a stated number of signatories to ratify its final text so that it comes into force. Then, an international convention could also be coded and integrated into statutory law (as in the case of the Hague-Visby Rules in Carriage of Goods by Sea Act 1971; and the Salvage Convention in the Merchant Shipping Act 1995).

The European Convention on Human Rights of the Council of Europe is enforced by the ECHR in Strasbourg.

European Community Law

The European Union presents a special example of international law. The nations forming part of the EU agree to adopt all EC Law (the *acquis communautaire*), which are: treaty provisions, regulations, directives, decisions, and precedents. Member States have to follow "Brussels" as well as the binding precedent decisions of the Court of Justice of the European Union (or CJEU) in Luxembourg. Brussels, however,should act and legislate in accordance with the EU treaties, and the CJEU's supremacy is limited only to matters of EU law.

National sources

Legislation is the primary source of law and is composed of declarations of legal rules by a competent authority. Legislation is enacted for many reasons: to regulate, to authorize, to enable, to proscribe, to provide funds, to sanction, to grant, to declare or to restrict. A parliamentary legislature enacts new laws, such as Acts of Parliament, and amends or repeals old laws. Then, this law-making power by legislature may be delegated to lower bodies. In the UK, this delegated legislation includes Statutory Instruments, Orders in Council, & By-laws. The legislation enacted by lower bodies may be challenged if there is irregularity in the process of legislation. Moreover, such delegated power may also be withdrawn by legislature when deemed necessary.

The nation's Constitution usually restricts and delimits the powers exercised by most legislatures, and Montesquieu's theory of the separation of powers typically restricts a legislature's powers to legislation. While the legislature has the power to legislate, the courts have the power to interpret statutes, treaties, and regulations. In a parallel manner, whileparliaments draft the law, the executive decides on the legislative programme. The usual procedure followed is that parliament introduces a bill, which goes through a required number of readings, committee stages and amendments, then it is approved, and becomes law, or properly speaking, an Act.

Judicial precedent (otherwise know as***case law***, or judge-made law) is founded on the doctrine of *stare decisis*, and mostly associated with jurisdictions based on the English **common law**, but the concept has also been partly adopted by civil law systems. The accumulation of principles of law deriving from centuries of decisions is what is known as precedent. These judgements arising from important recorded cases become significant source of law. When there is no specific law provision on particular matters, especially given the complexity and constant change in actual life, the judges have to depend on first principles and their own sense of right and wrong in deciding cases and disputes. From this, authoritative precedent decisions are then looked to as guides in subsequent cases of a similar nature. English law defines a judicial precedent as a judgement or decision of a court of law cited as an authority for deciding a similar state of fact in the same manner or on the same principle or by analogy. Another definitions states that precedent is,"a decision in a court of justice cited in support of a proposition for which it is desired to contend".

Precedent is more flexible and adaptable, as compared to other sources of law, and could enable a judge to apply "justice" rather than "the law".

Equity is a source of law that is more characteristic of the law in England and Wales, as well as fot other extra EU countries, like Australia, New Zealand and Canada. Equity arose from the case law developed by the Court of Chancery, which no longer exists presently. Equity prevails over

common law, but finds discretionary application. Equity has mainly been applied in the following areas: trusts, charities, probate, & equitable remedies. Among the more known equitable maxims is: "He who comes to equity must come with clean hands".

Parliamentary Conventions (mainly found in the UK and isnot to be confused with *International Conventions)* are strictly speaking not rules of law, but breaching them could amount toa breach of law. They are typical in the English legal system, and compensate for the UK's lack of a single written constitution. Parliamentary conventions usually govern relationships, such as that between the House of Lords and the House of Commons; between the monarch and Parliament; and between Britain and its colonies. As an example, after the Finance Act 1909, the House of Lords lost its power to obstruct the passage of bills, and now may only delay them. The prerogative powers are governed by convention, and 2010 saw the abolition of the monarch's power to dissolve Parliament. Finally, Britain traditionally considers its colonies as self-governing (although one can see that in the past, they were rarely given universal suffrage), and rarely interfered with the internal government of the colony.

Customs (England & Commonwealth Nations)

A "General Custom" is normally an unwritten source of law, but if a practice can be shown to have existed for a very long time, such as "since time immemorial"(1189 AD), it becomes a source of law.

A "Particular Custom" (or "private custom") may attain the force of law when a person, or a group of persons has obtained a recognised usage because of constant and prolonged usage, as in the case of an easement.

Books of Authority (England mainly)

Up until the 20th century, English judges could examine "books of authority" among which both Coke and Blackstone were frequently cited, as valid guides for adjudication.[17] In the past, the practice has been to cite only authors who are dead and gone but this old practice is no longer followed and at present notable legal authors may be cited, even if they are still alive.

CHAPTER I

Section 6

SOURCES OF EUROPEAN UNION LAW

The European Union, as a macrostructure of its members, also presents a system of sources of law aimed at creating legal acts to be applied to individual members.

SUMMARY: Primary law; Hierarchical relationship between treaties and sources of secondary Community legislation; Intermediate sources; Secondary Community legislation; Absence of a hierarchy of sources; Future prospects: The Lisbon Treaty

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The sources of European Union law, to be understood in the common meaning of facts or acts to which the legal system links the emergence of legal norms, include:

- Primary law;
- Fundamental rights;
- General principles of Community law;
- International agreements;
- Secondary legislation.

Primary law

At the top of the legal system are the founding Treaties, as supplemented and amended over the years by various conventional instruments (treaties, protocols, conventions and acts).

From a formal point of view, the EC and EU Treaties are international agreements subject to the rules of general international law.

The Court of Justice has significantly stated that the EEC Treaty (now EC Treaty):

- Constitutes the constitutional charter of a community based on the rule of law;
- Contains some basic rules, which cannot formally be revised (e.g. those concerning the jurisdictional system) [Court of Justice, Opinion 14-12-1991, No 1/91, ECR 1991, 6079, p. 21].

Hierarchical relationship between treaties and sources of secondary Community legislation

The Treaties take precedence over Community secondary legislation.

The EC and EU Treaties cannot be amended by secondary Community legislation, but only in accordance with the revision procedures that have been laid down.

Ordinary revision procedure under Article 48 of the EU Treaty:

- Initiative of the Member States or the Commission;
- Draft revision submitted to the Council, which, after consulting the European Parliament and, where appropriate, the Commission (and the European Central Bank in the case of institutional changes in the monetary area), shall decide by a simple majority;
- In the event of a favourable opinion, a conference of the representatives of the governments of the Member States shall be convened in order to determine by common accord the amendments to be made;
- Adoption of a final text containing the text of the Treaty transposing the agreed amendments;
- Ratification by the Member States in accordance with their constitutional requirements.

Certain provisions of the Treaties allow for a **simplified revision procedure** (e.g. Article 22(2) of the EC Treaty, which authorises the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to adopt provisions to supplement the rights of Union citizens under Articles 18 to 21 of the EC Treaty).

Intermediate sources

A number of intermediate sources may be placed between primary and secondary legislation.

Intermediate sources are a heterogeneous category and allow the gaps left by primary or secondary legislation to be filled.

They include:

- Fundamental rights;
- General principles of Community law;
- International agreements.

Fundamental rights

The Court has held that fundamental rights, as they result from the ECHR and the constitutional traditions common to the Member States, form an integral part of the general principles of law, which it guarantees to be observed.

The Court selects fundamental rights: incorporation is not automatic, but applies to those which are most compatible with Community law.

A Community act that is contrary to fundamental rights can only be identified in the light of Community law.

General principles of Community law

General principles of Community law: it is not easy to identify their precise place in the hierarchy of sources [see lesson 6]. This is an issue not expressly addressed by the Court.

They tend to be on the same level as primary Community law.

Principles of general international law: the imperative norms of general international law (*ius cogens*) are mandatory under the Treaties, otherwise general international law is derogable under the EC Treaty (e.g. the principle of reciprocity, specific to public international law, does not apply in Community law and, in particular, there is no possibility for a Member State to rely on that principle and invoke any failure by another Member State to comply with the Treaty to justify its failure to fulfil its obligations).

International agreements

International agreements are in an intermediate position between the EC and EU Treaties and secondary legislation.

They are subordinate to the Treaties and superordinate to secondary Community law.

The primacy of international agreements over secondary Community law is apparent, inter alia, from Article 300(7) of the EC Treaty, according to which they are binding on the institutions and the Member States.

Secondary Community legislation

Secondary Community legislation: these are the acts that the institutions may adopt under the Treaties.

Typical acts referred to in Article 249 of the EC Treaty: they may be binding (regulations, directives and decisions) and non-binding (opinions and recommendations).

Atypical acts: these are acts which, although emanating from the Community institutions, do not fall within the typical acts listed in Article 249 of the EC Treaty.

Absence of a hierarchy of sources

The Treaties do not provide for a hierarchy between sources of secondary Community law.

Any conflict must be resolved according to the criteria of speciality and succession of rules over time, without regard to the issuing authority and the procedure adopted.

The Declaration annexed to the Maastricht Treaty highlighted the need to reconsider the classification of Community acts in order to establish an appropriate hierarchy between the different categories of norms, but did not find application.

Future prospects: The Lisbon Treaty

The Lisbon Treaty has a significant impact on the system of sources.

In relation to primary law, in particular, we recall:

- The abolition of the pillars;
- The current title of the Treaty on European Union remains unchanged (TEU), while the Treaty establishing the European Community takes on the new name of Treaty on the Functioning of the European Union (TFEU);

- The provision that the two Treaties have the same legal value;
- Recognition of the single legal personality of the Union;
- The binding effect of the Charter of Fundamental Rights (Article 6 TEU), even if it is not incorporated into the Treaties or reproduced in a protocol or declaration annexed to the final act.

In relation to secondary legislation, significant changes are envisaged, without altering the current legal instruments and their names and avoiding, in particular, replacing "regulations" with "EU laws" and "directives" with "EU framework laws". This preserves the names of the typical acts referred to in Article 249 of the EC Treaty and their distinction between binding (regulations, directives and decisions) and non-binding (recommendations and opinions) acts.

Nevertheless, the Lisbon Treaty states that acts (regulations, directives and decisions) adopted under the legislative procedure, ordinary or special, are legislative acts, through which political responsibilities are assumed and, therefore, the fundamental choices are made (Article 289, no. 3, TFEU). In other words, the procedure adopted reflects on the legal position of the act in the hierarchy of derived sources, at the top of which the legislative acts emerge.

CHAPTER I

Section 7

THE SOURCES OF LAW IN THE ITALIAN SYSTEM

The Italian system of sources of law has its pivot in the Constitution, the reference legislative text from which the general principles that must be placed at the basis of the rules derive (or can be inferred).

SUMMARY: The system of sources; Basis of the source system; Relationships between sources ; The hierarchy of sources; Antinomy and criteria to be adopted; The Italian Constitution; International sources; The law and other acts having the force and value of law; *Rules of organisation of constitutional bodies; Regulations of the executive power;* The regional law; *Collective agreements;* Sources *extra ordinem*; Atypical sources; Interpretation

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The sources of law are divided into sources of knowledge and sources of production.
By *sources of knowledge*, we mean the set of documents that provides legal knowability of the norm and are, therefore, the documents that collect the texts of legal standards, such as the Official Journal.
"Sources of production" means acts and facts that are capable of producing legal standards. The sources of production are divided into *sources-act* and *sources-fact*.
"Sources on production", on the other hand, define the subjects and processes by which legal rules are produced in an order. They are therefore aimed at organizing the system of sources and for this reason they are in relation of instrumentality with the "sources of production".
For example, the source on the production of the decree-laws is Article 77 of the Constitution, while the decree-laws themselves are the source of production.
Normally, the concept of source-act coincides with that of written law, while that of source-fact coincides with unwritten (customary) law, represented by the category of uses and customs. In reality, the one between sources-act and written right is not an identity, as there may be cases of sources of law to which the relative written right does not correspond (like the *unexpressed* or *implicit principles*, for example).
By *source-act* we mean voluntary legal acts attributable to specific subjects and imply the exercise of a power attributed to it (*normative acts*), while the *source-facts*, although not attributable to voluntary actions, are accepted by the legal system in their objectivity, *normative fact (in other words, mere legal facts).*

The system of sources

The expression "*system of sources"* indicates, in their reciprocal connections, the rules intended to organize the sources of law, that is, the so-called *rules on production*, which have no autonomous value, but instrumental with respect to the *rules of production*.

"**Production sources**" or "**recognition rules**" regulate the training processes of production sources, indicating who is competent to adopt them and how they are adopted. Production sources also produce legal standards of particular relevance, regulating skills and procedures in the formation of law and the legal order. We note that among the sources of production, the Constitution is fundamental, to which, directly or indirectly, the validity of all the productive sources of law in our system goes back. *The legal system, in fact, results from the joint operation of* production rules *and* rules on the production of the law*, the latter having the function of identifying the sources of the legal order, determining the criteria of validity and indicating the criteria of interpretation.*

The ***sources of law***, considering the qualities of the power or function that expresses the act, can be defined as ascending processes of political integration in the sphere of the legal system.

In the Italian legal system, there are many spaces in which it is possible for these processes of integration to take place, which can be an expression of representative democracy (law of the Parliament), direct democracy (referendum), or social democracy (collective bargaining), just as they can take place at national level (again, law of the Parliament), regional level (regional law), or local level (municipal or provincial regulations).

Exceptions to this general scheme are cases in which the integration process is prolonged in other sources, and therefore in other processes (legislative decrees), as well as the possibility that, to operate as sources, acts are the expression of particular and not general political processes (legislative decrees).

Finally, the form of the sources is determined by the type of function of which they are an expression, that is, in other words, by the legal power that produces them, with a principle of independence of form from content.

There are, however, some exceptions to this principle, directly provided for by the Constitution: thus, some matters are reserved to the law, that is, to a specific act, the so-called reservation of law, also providing, in some cases, the predetermination of some content that the law must have, in which case we speak of reservation of *reinforced* law.

Basis of the source system

The heteronomy of juridical norms is usually affirmed as a fundamental element, for which these are imposed on the will of the subjects to whom they are addressed, and are not put into practice by

the latter; but, on pain of *regressus ad infinitum*, one must admit that the first authority cannot base its legitimacy on another constituted authority, and must therefore recognize that heteronomy derives from autonomy.

The first authority, from which the others derive, is referred to as the "material constitution". It consists of a system in force in itself, independently of any voluntary act, and which is based on the set of legal and social relationships generated by a set of rules valid on the basis of relations of force, whether material or spiritual (this is the so-called normative fact, which, although endowed with a different normativity with respect to the normative act, must nevertheless be kept distinct from the mere political fact).

The "legal constitution", on the other hand, is a normative act, a rule laid down voluntarily, on the basis of the principle of material constitution, so that, for example, the Italian system is a system with a written constitution.

If it makes no sense, with regard to the material constitution, to speak of its legitimacy, since only the different concept of existence is applicable to the material constitution, the formal constitution, on the other hand, is legitimate insofar as it is appropriate to the material constitution, that is, under normal conditions, placed at the top of the system the principle of effectiveness, insofar as it is an effective constitution.

For the sub-constitutional sources, on the other hand, the concept of legality is used (a concept on which, through the *Grundnorm*, Kelsen, in his *Pure Doctrine of Law*, tries to base the entire legal system), which consists in the adequacy to the criteria set for the production of law by the norms on the sources.

From the point of view of validity, therefore, it can be affirmed that the constitutional sources (and the *extra ordinem* sources) are valid in so far as they are legitimate, that is, endowed with effectiveness, and that the sub-constitutional sources are valid, in so far as they are legal, and therefore endowed with effectiveness.

Relationships between sources

The plurality of sources, and in any case the inexhaustibility of the source considered individually, entails the need for the relationships between the sources to be regulated. The regulatory principles of these relationships are:

- Abrogability;
- Non-retroactivity.

The principle of the abrogability of sources means that a norm produced by a source cannot be declared to be exempt from abrogation by future manifestations of the same source, since it is impossible for a power to attribute an effectiveness that it originally did not have.
The principle of abrogability is not affected by the rules laid down by concluded and non-renewable regulatory powers, that is, for our legal system, the republican form, resulting from the institutional referendum of June 2, 1946, and the Constitution as a whole, resulting from the constituent power. In this regard, however, it must be stressed that the fundamental and essential determinations are unchangeable, precisely because the source is exhausted, while the constituted power of constitutional revision can modify the rules of application of these determinations.
Repeal may be *expressed*, *tacit* or *implicit* and, as a "fragment of a rule", its effects consist in circumscribing over time the regulatory effect of the rule repealed from the moment of entry into force of the repealing rule.
As regards the principle of non-retroactivity, the law provides only for the future (Art. 11 of the *Preliminary Provisions*). Although this principle is not constitutionalised and can therefore be derogated from by the ordinary legislature, it is, in the view of the Constitutional Court, a general principle of the system, the derogations from which are therefore subject to a review of reasonableness.
The Constitution is our most important source of legislation, all other sources of law must respect the principles contained in it. A particular expression is used to describe the Constitution, that is, it is said to be the "Law of Laws", precisely to emphasize that its principles must be respected by all other laws.

The hierarchy of sources

The relationships between the sources, considered on the basis of their systematic position, can be divided into three levels:

- Level 1: constitutional sources (constitution, constitutional law, and constitutional revision laws, Community regulations, Community directives);
- Level 2: legislative sources, also known as primary sources (laws, law decrees, legislative decrees, Abrogative Referendum);
- 3rd level: regulatory sources, also called secondary sources (Government Regulations, Local Authorities Regulations, customs and uses).

The hierarchical relationship, a consequence of the principles of the rule of law and their expansion, is substantiated in the **legality** that exists in the hypothesis of plurality of processes of political integration (consider, for the Italian system, and of the European, state and regional processes). In

addition, the adoption of a third criterion is of considerable importance, if there is a contradiction between homogeneous sources (equal hierarchical rank, equal competence): the chronological criterion, according to which the subsequent law repeals the previous law that is in contrast.

Constitutional sources

At the first level of the hierarchy of sources, the Constitution, the constitutional laws and the regional statutes (of the regions with special status) are placed. The Constitution of the Italian Republic, which came into force on 1 January 1948, is composed of 139 articles and 18 transitional and final provisions: it dictates the fundamental principles of the system (Articles 1-12); it identifies the fundamental rights and duties of the subjects (Articles 13-54); it dictates the discipline of the organization of the Republic (Articles 55-139). The Italian Constitution is also defined as long and rigid: “long” because it does not limit itself to “regulating the general rules of the exercise of public power and the production of laws”, it also touches on other matters[2], “rigid” because to modify the Constitution, a so-called *aggravated* procedure is required (see Art. 138 of the Constitution). There are also limits to the constitutional revision.

Primary sources

In accordance with Article 10 of the Constitution, the Rules deriving from international treaties, followed by Community directives and regulations. International treaties, with special reference to counter-terrorism treaties and the North Atlantic Treaty (NATO), and the sources of EU law with binding effect, in particular regulations or directives. The former have immediate effect, the latter must be implemented by each country belonging to the European Union within a given period of time. To these were added the judgements of the European Court of Justice “declaring” Community Law (Const. Court Judgment no. 170/1984).

- Primary sources are also the ordinary laws, the regional statutes (regions with ordinary statutes), the regional laws, and those of the autonomous provinces of Trento and Bolzano. Ordinary laws shall be adopted by Parliament in accordance with the procedure laid down in Articles 70 *et seq* of the Constitution, and then be promulgated by the President of the Republic.
- Parliamentary regulations
- The last primary sources are the acts having the force of law (in the order of law decrees and legislative decrees)

Secondary sources

Below the primary sources are government regulations, followed by ministerial, administrative and prefectural regulations, and those of other territorial public bodies (regional, provincial and municipal).

- Then there is case law, in particular the judgments of higher courts.

Tertiary sources

At the last level of the hierarchical scale, customs and habits are placed. This is produced by the constant repetition over time of a given conduct; only customs *secundum legem* and *praeter legem*are obviously admitted, not therefore those *contra legem.* Constitutional customs, which sometimes regulate the relations between the supreme organs of the state, deserve special mentionbecause they consist of repeated behaviour over time to overcome certain deficiencies in constitutional rules.

Antinomy and criteria to be adopted

The term "antinomy" means the provisional contrast between standards; in order to determine which of the two conflicting rules is to be applied, the system adopts three criteria:

- The **hierarchical** criterion, for which the higher-ranking rule modifies or repeals the lower-ranking rule; consequently, the lower-ranking rule cannot modify or repeal the upper-ranking rule;
- The **speciality** criterion, for which the special rule takes precedence over the general rule;
- The **chronological** criterion, for which the most recent rule amends or repeals the previous rule of the same rank.

The Italian Constitution

The Constitution is the fundamental source of the State (*Fons Fontium*). It is an act produced by the constituent power, that is, by the absolute, sovereign and concentrated political power, which, for reasons not logical, but of constitutional politics, is defined as extraordinary and unrepeatable, consuming itself in a single act of exercise.

Within the constitutional text one can distinguish between an "essential constitutional content", in which the typical and, as such, unrepeatable product of the constituent power consists (what, making a distinction in relation to the normative quality, the jurisprudence of the Constitutional Court calls "supreme principles of the Constitution"), and an "instrumental constitution", which is modifiable by the constituted power of revision.

A further distinction can be made between the constitutional rules, as these can be:

- With direct effect (that is, immediately binding on all legal entities);

- With indirect effectiveness, which can be further subdivided into:
- Deferred-effectiveness rules;
- Rules of principle;
- Policy rules.

The norms of principle and the programmatic norms, in particular, constitute a basis defined by the Constitution and therefore removed from the political debate, representing a constraint, as well as an end, also negative for the legislator, and embodying in their structure the modalities of expression of constitutionalism in a pluralistic society.

Laws of constitutional revision and constitutional laws

These are sources provided for by Article 138 of the Constitution, which envisages an "aggravated" procedurewith respect to the ordinary legislative procedure. A double deliberation is, in fact, necessary on the part of the two chambers, one at a distance of no less than three months from the other, requiring for the second deliberation the absolute majority of the members of the college (and not the majority of voters), with the possibility, if the superior majority of two thirds is not reached, that the completion of the act is subject to the outcome of a confirmatory *referendum* (within three months of the publication of the provision) for the protection of minorities.

This particular procedure configures a constituted, continuous, and inexhaustible power, even if exceptional. With the same procedure, the Statutes of the Regions with special autonomy are adopted, but these do not consist of revision laws, but of laws implementing the Constitution.

International sources

International and internal law coexist on parallel levels, being the expression of distinct processes of political integration. Therefore, in order for international standards to become part of the domestic legal system, it is necessary to verify what is indicated by the term "adaptation", which may be automatic or special.

Automatic or general adaptation is provided for in Article 10 of the Constitution, which provides that "the Italian legal system shall conform to generally recognized norms of international law" (i.e. international customs).

The special adaptation, however, used for international treaty law, may consist:

- In the simple "execution order", which operates directly only in relation to treaties containing *self-executing* rules;
- In the ordinary special adaptation, that is, in domestic regulatory acts necessary to implement international standards that are not *self-executing*.

As a result of adaptation, international standards take on the same hierarchical position in the internal legal order as the sources that operate it.
A particular position is presented, in the framework of international law, by the law of the European Union, since the Treaties and the sources deriving from them enjoy a particular constitutional coverage (Art. 11: “Italy [...] allows, on an equal footing with other States, the limitations of sovereignty necessary for a system that ensures peace and justice between Nations"), by virtue of which they present a particular active force, comparable to that of the constitutional norms, consisting in a definitive limitation of the sovereign rights of the State, and a strengthened passive resistance, prevailing, by virtue of the distribution of competence made by the Treaties, the Community norms over the internal ones, even later (the principle of the*primauté*). For this reason, rules are said to be *interposed* because they stand in the way of the Constitution and the other primary sources. The jurisprudence of the Constitutional Court has endorsed the practice whereby European Union law can also derogate even Constitutional laws as long as they are not fundamental and unchangeable rules such as fundamental rights, constitutional revision, and the democratic nature of the Italian legal system.
By similarity of procedure, the sources provided for in Articles 7 and 8 of the Constitution, that is, the Lateran Pacts and the agreements governing relations between the State and, respectively, the Catholic Church and the other religious denominations, can also be included in this category (although the particular effectiveness of the Lateran Pacts must be stressed, which can only derogate from the constitutional rules, except for the limit of the supreme principles of the system).

The law and other acts having the force and value of law

The strength and value of the law can be deduced on the basis of three profiles: the hierarchical one, the one of competence, and that of the legal regime (the latter having more political attention).
The **ordinary law** represents the normal or ordinary act in which the process of political integration is expressed, the ordinary act of the sovereign, who acts in constituted ways, as opposed to the Constitution, which is instead the extraordinary act of the sovereign acting in constituent ways.
In particular, according to Article 71 of the Constitution:
The initiative of the laws belongs to the Government, to each member of the Chambers and to the bodies and entities to which it is conferred by constitutional law
The people exercise the initiative of the laws, through the proposal, by at least fifty thousand voters, of a project drafted in articles.
In the social state under the rule of law, there is a multiplication of the functions performed by the law. Therefore, in addition to laws consisting of general and abstract norms, there are laws-

provision, contract laws, incentive laws, planning laws, laws of principle and framework laws, procedural laws, laws of finance.
In addition, according to Article 70 of the Constitution:
The legislative function is exercised collectively by the two Chambers.
However, although it is up to the Parliament (which has no right of disposition over it), the legislative function can also be exercised by the Government. It can in fact be delegated, on the basis of Article 76, thus determining the existing position of a law (legislative decrees) by the Government, having the Parliament indicated the subject, time limits, and scope of competence in a previous law delegation. Moreover, it can be directly exercised by the Government, in extraordinary cases of necessity and urgency (Article 77 of the Constitution), asking, however, on pain of ineffectiveness *ex tunc* of the act, the conversion into law within sixty days (decrees-laws).
Another source with the force and value of law, albeit with the significant limits deriving from the constitutional text and from the jurisprudence of the Constitutional Court, is the abrogating *referendum* provided for by Article 75 of the Constitution.

Rules of organisation of constitutional bodies
The organisational regulations of the constitutional bodies derive from the organisational autonomy of the same, thus enjoying both a logical and, in the text of the Constitution, a legal basis.
Long defined as a particular and non-objective right, they must be more correctly considered as sources of primary rank to which, by virtue of the principle of competence, the regulation of certain sectors is reserved.
Among them, the regulations of the Constitutional Court and the parliamentary regulations are of particular importance, on which the Constitutional Court has declared itself incompetent to judge the principle of the unquestionability of *interna corporis*.

Regulations of the executive power
Executive regulations are traditionally distinguished between government regulations on the one hand and ministerial regulations on the other. The first, contemplated in Article 1 of the Preliminaries, are analytically regulated by law no. 400 of 1988 and, within the hierarchy of the sources, have a secondary rank. They are of six types:

1. *Implementing regulations*: they are adopted to facilitate the application of laws, acts having the force of law and Community regulations.

2. *Implementation and integration regulations*: they are issued in cases where rules of primary rank lay down a discipline of principle which, in order to produce its effects, requires a detailed discipline.
3. *Independent regulations*, which regulate, precisely, areas not governed by law and on which there is no absolute reservation of law, (on whose constitutional legitimacy authoritative doctrine has raised serious doubts);
4. *Organisational regulations*, which normally govern the functioning of public administrations;
5. *Delegated or delegating regulations*.

Government regulations are always approved by a decree of the President of the Republic.
Ministerial and interministerial regulations, on the other hand, are considered third-degree sources since they are subject not only to the Constitution and the law but also to other government regulations, adopted by the government as a whole. These regulations are approved by ministerial decree (which, however, does not necessarily have a regulatory nature, as it can also be qualified as a mere administrative act).
They are secondary sources-act, which, in addition to the Constitution, must comply, under penalty of illegality, also with the law (principle of legality). In particular, in the event of non-compliance of a regulation with higher-ranking sources, two cases can be found in jurisprudence and doctrine:

- The regulation complies with the law, but the law is unconstitutional. In such a case, the illegality is reflected by the law in the regulation and leads to the declaration of illegality of the regulation;
- The rules are not in accordance with the law. In such a case, the administrative courts may annul the regulation on the ground that it is flawed, without taking a decision on the legislative act from which the regulation takes effect.

The regional law

Article 117 of the Constitution, as amended by the reform of Title V of the Constitution (Law No. 3/2001) identifies three types of legislative competence:

1. The exclusive competence of the State [paragraph 2];
2. The competence shared between the State and the Regions (both, in the matters expressly indicated) [paragraph 3];
3. The exclusive competence of the Regions, in all matters not listed (principle of residuality) [paragraph 4].

Regional laws are completely equivalent to state or ordinary laws, which is why they are placed together with them among the primary sub-constitutional sources.
A particular position is taken, then, by the Regional Statute, adopted by an aggravated procedure (double deliberation and possible *referendum*), and the only regional legislative act that can still be challenged in advance (within thirty days) by the State.

Collective agreements

According to Article 39 of the Constitution, collective labour agreements should have been a source of "hybrid" law, presenting, for their formation, the body of the contract and, for their *erga omnes* effectiveness, the soul of the law. But Article 39, which is an authorization rule and not a binding one, has not yet been implemented.
Collective agreements are therefore generally recognised in our legal system as having only *inter partes* effect, which is only derogated from when, as a transitional measure, they have been transposed into Presidential Decree, or are used by the judge to determine a minimum standard *pursuant to* Article 36 of the Constitution.
Although they are not yet operative sources of law, if they are stipulated by registered trade unions (so-called *collective agreements under public law*), they acquire, in accordance with Article 39 of the Constitution, compulsory effectiveness for all those belonging to the categories to which the contract refers.

Sources *extra ordinem*

Extra ordinem sources, consisting of facts and not normative acts, are based directly on the material constitution; therefore, the criterion of legitimacy and not that of legality applies to them.
Among these, we must remember:

- Conventional rules, that is, the general involuntary and necessary consequences of particular voluntary acts (including the neocorporate evolution of the system of government through so-called consultation);
- Customs, that is, the conventional rules that are stabilised, objectified, and deployed over time and in legal consciousness (by presenting the characteristics of *diuturnitas* and *opinio iuris ac necessitatis*);
- The rules of constitutional correctness, that is, public morality, the violation of which has no consequences (otherwise, these would be conventions).

As far as the relationship between formal and material sources is concerned, although they are usually described in terms of mutual exclusion, it must be more correctly stated that they are on a level of mutual integration.

Atypical sources

The *atypical source* is any source with specialized expertise, which presents negative or positive variations in relation to its active or passive force, approved by a process that presents external or internal variants.

Atypical sources include Constitutional Court rulings and referendums. Both are provided for in the Constitution, and have in common the legal effect of eliminating existing rules from the legal system (as abrogating laws normally do) but are devoid of all the other general features of the legal norm, so they would not be “sources” in the technical sense.

Given the plurality of sources and the consequent plurality of norms, which are subject to different regimes, it is necessary to admit a plurality of regulatory types with “differentiated formal force”, that is, with different active force (capacity to repeal previous norms) and different passive force (resistance to standards produced by supervening sources).

Atypical sources can be identified by the so-called procedural variants (e.g. reinforced laws), by the reserve of competence (e.g. regional statutes, where there is an internal limitation of the sovereignty of the State) and finally by the “hybridisation of different types” (e.g. community sources and laws implementing the Lateran Pacts).

These are atypical sources because the laws of amnesty (which extinguish a crime) and pardon (which extinguish or reduce a sentence), which must obtain a two-thirds majority in both chambers, have been approved by a reinforced procedure. An atypical source is the Budget Law (provided for by Article 81 of the Italian Constitution), which cannot be entirely repealed but only amended by means of corrective measures that can only be adopted at certain times of the year. The law authorising the ratification of international treaties is also atypical, merely formal because it can only be adopted by ordinary procedure and not by innovative legal system: it concerns only relations between constitutional bodies, authorising the President of the Republic to ratify.

All the matters provided for by Article 75, paragraph 2 of the Constitution (constitutional matters, budget and tax laws, authorizations to ratify international treaties, amnesty and pardon laws) are atypical because they cannot be abrogated by a primary source such as the abrogating referendum.

Interpretation

The term interpretation refers to the eminently practical activity of finding in the order the appropriate rule for the fact to be regulated, that is, to move from the disposition (ordering in power) to the norm (ordering in progress).

This activity is regulated by Articles 12-14 of the preliminary provisions of the Civil Code (so-called Preliminary Provisions), which have a double value: in static moments, in fact, they act as a limit with respect to the interpretative activity, to be transformed into instruments that extend it into moments of social dynamism. However, part of the doctrine is of the opinion that preliminary provisions do not have a real positive effect in the legal system in that they merely transpose and fix in provisions those activities which would in any case be carried out by the legal operators in the interpretation of the provisions of the law.

There are, first of all, rules on interpretation placed outside of the positive law, which apply to everyone, including the legislator (*in applying the law one can attribute to it no other meaning than that made clear by the meaning of the words according to their connection*), that is, the rules of interpretation proper to the linguistic institution in which the text to be interpreted is written.

In addition, the following techniques have been adopted in the face of a regulatory gap:

- The intention of the legislator (the so-called *ratio*, which may be subjective, that is, the intention of the historical legislator; or objective, that is, the intention of the historicised legislator);
- Systematic interpretation, with a single standard inserted in a unitary normative system, in which its meaning can be enriched (and there will be an extensive interpretation) or narrowed (and there will be a restrictive interpretation);
- Analogical interpretation, which can be adopted if an interpreter does not find in the system a rule suitable for the practical case, and therefore will have to find one through an analogical process: either between rules that regulate similar cases, or that regulate similar matters (the latter, however, is absolutely excluded from the list of options for the interpreter of the criminal law);
- The construction of principles.

In conclusion, the analogies can be of the type: *analogia legis* (facts similar to other facts) or *analogia iuris* (when there is no analogy, then the interpreter derives a norm from the legislator).

CHAPTER I

Section 8

DIFFERENT TECHNIQUES FOR APPLYING CONSTITUTIONAL RULES

IN THE RELATIONSHIPS BETWEEN PRIVATE CITIZENS.

This section aims to highlight both the cases of violation of fundamental rights and the remedies envisaged for restoring such violations.

SUMMARY: Remedies in case of breach of fundamental rights; The dissolution between the public sphere and the private sphere from the fundamental rights' perspective; *Drittwirkung*; Horizontal application of the echr; The English model of *drittwirkung*; English cases on violation of privacy; The horizonal application of the charter of fundamental rights of the european union; The application of fundamental rights in private law; The protection of fundamental rights through the general clauses; Fundamental rights from the perspective of remedy.

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1. Remedies in case of breach of fundamental rights

This part of the research intends to analyze the issues related to fundamental rights in a new perspective, which will consider the effectiveness of protection available in case of violations. Indeed, the connotation of effectiveness is among the decisive notes of the legal order, representing the rules only as derivative and a secondary aspect of this prerogative. The effectiveness of protection should be judged not by a simple historical investigation, which recognizes and describes in it its happening, but commensurate with legislative consciousness, in order to be approved or disapproved, accepted or rejected, judged as compliant or not compliant. The legislative consciousness, as it evaluates the facts, needs a criterion of judgment that is deducible, precisely, from the fundamental norm.[21] The key to understanding the legal reality in this respect is the legal-private-tradition in its current dissolution of boundaries between public and private. It is a change which requires the use of a more elastic and flexible notion of law, as well as more attentive to the needs of the person, because a comprehensive and unified dimension which finds its strength in the personalist principle is at stake. The application of fundamental rights in private party litigation involves issues as constitutional law, governed by private law. The issue in question is therefore addressed from the point of view of contract law, in order to understand how it can justify the influence and impact of public law in this area, and determine what the dynamics of integration between the fundamental rights and the contract law could be.[22] The main dilemma concerns the

[21] N. Irti, Significato giuridico dell'effettività, Napoli, Editoriale Scientifica, 2009, 15 ss.
[22] C. Mak, Fundamental Rights in European Contract Law, Kluwer Law International,

method by which the rights in question can actually detect the inter-relationships, with respect to which different principle settings and operating techniques have been formulated (for example, direct preceptive efficacy or axiologically-oriented interpretative method), substantially converging in the result. In this sense, the contributions of German doctrine and jurisprudence, which first initiated a legal order to ensure compliance with the social reality, through an exegetical method marked by the primacy of fundamental values, have played an important role.[23]

Even if an explicit normative formula combines the formula "relations between private individuals" and "fundamental rights is not found, the interpreter can perform some verification operations to ascertain if at a hermeneutic level the conjugation is possible, whether it has been carried out, and whether the results, taking into account the written texts that treat the relationship or, without treating it, lend themselves to an interpretation in the perspective outlined by the phrase, and whether the judgments of the judges who have posed the problem, have solved it in a positive or negative sense, and have given doctrinal guidelines on the matter.[24] The perspective and comparative method represent, in this sense, an essential contribution. Then the answer to the horizontal applicability of the discipline inherent in the fundamental rights to private relationships depends on a number of responses to a set of questions, which gradually become increasingly urgent and necessary. The main issues are:

1. The legal connotation of the fundamental right (and in particular whether the right at issue can be considered subjective and therefore can be operated directly in relations between private individuals);
2. The re-determination of the contract (and in particular of its members, to be achieved via a purely interpretative approach, turning its essential requirements in value-free oriented sense, and verifying that its functionality, in terms of dynamism, points to the implementation of fundamental values.)[25]

With regard to the first question, one can point out, for example, the value given to dignity, which is considered a constitutional principle, and not an independently operated precept, by the majority of national states, except for Germany.[26] Moreover, the answer aimed to be sought is whether these indeterminate values, such as to involve certain connotations substantial equality, can disrupt the discipline of the contract. In this sense, the configuration of fundamental rights as "general

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[23] P. Laghi, L'incidenza dei diritti fondamentali sull'autonomia negoziale, Introduzione, Padova, Cedam, 2012.

[24] G. Alpa e M. Andenas, Fondamenti del diritto privato europeo, Trattato di diritto privato, G. iudica e P. zatti (a cura di), Milano, Giuffrè, 53 ss.

[25] P. Laghi, cit.

[26] See Omega (Case 36/02 [2004], ECR I-09609 (ECJ).

principles" could be one of the ways to affirm the horizontal applicability of the matter under examination.

With regard to the second question, in addition to how, one also notes the doubt as to when one can resolve contractual disputes on the basis of the fundamental rights, and what would be the added value of this application compared to the balance of the "traditional" interests of private law, among which in the first place the principle of freedom of contract emerges. Compared to how, the crucial controversy about the relationship between *jus litigatoris* and *ius constitutionis* emerges: the question is whether to give protection to the law creating the remedy (*ubi jus, ibi remedium*), or if the remedy should be given entry to protect the right (*remedium ubi, ibi ius*). To verify the level of protection of fundamental rights, or rather their effectiveness, it is essential, however, to practice concrete operational rules. From this point of view, the study of the general clauses of private law, such as access valves to the integration of negotiating rules, and the criteria guiding in the performance of relationship with substantial size, is of particular importance, where the disabling prescription could play a decisive role.[27]

Of no small importance then, is the analysis of the function performed by the current legislation on non-pecuniary damage, when there has been an infringement of a constitutional right.[28] From the point of view of fundamental rights' effectiveness, the system of civil liability, it is said, acts as the guardian of these values.

2. The dissolution between the public sphere and the private sphere from the fundamental rights' perspective

After the Italian Constitution' entry into force, except in exceptional cases,[29] and for a long time, the interaction between constitutional and statutory law has been minimized.

The underlying reasons can be identified in matters of legal sensitivity or concern that private law would undergo a sort of ideologicalization, in light of constitutional principles. Thus, the "programmatic" conception of the constitutional provisions prevailed, such as to make their self-application impossible, or rather implausible. This orientation weakened the principles of the Charter, intended as guidelines for the legislator, inseparable from a preceptive efficacy that could directly establish the jurisdictional claim. In this context, socialist legislation aimed at implementing the principle of substantive equality in private law relationships has played a key role, and it was in the seventies that the phenomenon known as the process of constitutionalisation of private law

[27] P. Laghi, cit.
[28] On the need to ensure full reparation for the damage, see Cass. Civ., May 31, 2003, n. 8828.
[29] For example, the case law n. 838 of 1949 and No. 2696 1953 of Cass. Civ., in order to ensure that workers have a sufficient salary to lead a decent existence for themselves and their families, have equipped Article 36 of the Constitution with a prescriptive efficacy.

started. In this process, private law is released from an abstract and formal position of subordination, to be used in an operation of concrete balancing of the interests involved (logical individualistic and solidarity). So in the current historical and political context, the axiological summit of the system can be identified in the inviolabile rights of the person, placed at the top of all democratic constitutions, as a precondition of the regulatory action of the legal system.[30] As has been authoritatively stated: "the contrast between public and private law is in meltdown, and maintains a more ideological than practical value."[31]

The impossibility of opting for the absolute primacy of the public sphere or the private one, constituting the connective tissue legal experience, for Pugliatti, can be found, independently of the theoretical and methodological reasons, also in virtue of reasons of the historical and legal matrix from which one must infer the existence, not the theoretical predictability, of an inescapable commingling of private law and public law. "This mixture, in fact, works in the first place, through a careful analysis of the existing body of law and the principles underlying it, in the direction that private law is grafted, by supplementing, on public law. The rights of freedom, to those of the personality and the rights to judicial protection correspond to the fundamental interests and values of human life, as an individual and as a component of the politically organized community or society.Since the whole juridical experience rests its structural foundations on both these elements, hinging around an authoritarian public dimension and an equally vigorous eminently private, spontaneous and creativematrix, of a legal nature, the coexistence of the two dimensions, the public and private, while remaining inevitably different and partially autonomous, can not but be necessary and unavoidable for the very survival of every organized social structure, and can only take place historically, according to the lines of a constant and incessant porous and dialogic relationship, made of reciprocal interpenetration and concessions, without ever being able to reach the radical elimination of one of them."[32]

With respect to the relationship between contract and the Constitution, one can recognize different opinions, including that which does not consider autonomy in the pure state, but rather an autonomy created and adequate by the regulation.[33] In this regard, the relationship between freedom of private initiative and sanctioned limits, Article 41 of the Constitution could be a good argument. The idea that comes out is that contract and the Constitution are a single juridical design[34], and in this context, the rights of personality, pertaining to private law, represent the direct testimony. On the

[30] L. Mengoni, Diritto e tecnica, in Riv. trim. dir. proc. civ., 2001, 7.
[31] G. Alpa e M. Andenas, cit., 7 ss.
[32] S. Pugliatti, (voce) "Diritto pubblico e diritto privato", in Enc. del dir, XII, 1964, 719 ss.
[33] C. Castronovo, Autonomia privata e Costituzione europea, in Eur. e dir. priv, 2005.
[34] G. Vettori, Il diritto dei contratti fra Costituzione, codice civile e codici di settore, Remedies in contract, The Common Rules for a European Law, G. Vettori (a cura di), Padova, Cedam, 2008.

other hand, it would seem to make no sense to distinguish between a breach of fundamental rights caused by the state apparatus, in the exercise of the related prerogatives, and the same violation imputable, instead, to private citizens, who acted due to the attributions recognized by the positive law (or from the Common Law).
Moreover, as has been authoritatively observed, in order to support the current mix between the public and private sphere, also from the European point of view, European private law is not in opposition to European public law, but finds its most natural integrations: European law, to be understood in a broad sense, recomposes, in fact, in all its elements: economic, social, identity, the juridical conception of the person.[35] As argued by Rodotà[36]: a rethinking of private law in this unique perspective is ultimately inevitable, otherwise the risk would be that of a two-speed Europe, that is, a "constitutional" Union, founded on fundamental rights and a Union of "private persons" that is instead anchored on the market logic.

3. Drittwirkung

As described in the first part of the research, the original phase of elaboration and the recognition of fundamental rights have been addressed to the conception of these as suitable instruments to deal with external influences, that is, those by public authorities. Looking, so to speak, defensive, the emphasis has since begun to move to the different profile of the super-individual protection, thus leading to an understanding of fundamental rights as protection precepts (the so-called *Schutzgebotsfunktion* of Fundamental Rights).[37] In this respect, fundamental rights must be considered, while also relevant to the status of the individual, as a guarantee of the person not only to the state but also in the relations between individuals, that is, relations between private individuals.
German lawyers have developed theories concerning the direct applicability of the constitutional norms in horizontal relations (private/private), elaborating the figure of the so-called *Drittwirkung*, with which indicates precisely the effectiveness (*Wirkung*) of the constitutional rules in relation to third parties (*Dritten*) unrelated to the relationship between the individual and public authority, that is, the traditional paradigm of reference in the field of fundamental rights. Furthermore, he German jurists themselves made a distinction between a *direkte Drittwirkung*, direct applicability of constitutional rules where the lower-ranking rules do not provide effective protection against fundamental rights, and an *indirekte Drittwirkung*, in which the applicability of rights in word in

[35] G. Alpa e M. Andenas, cit., 199 ss.
[36] Rodotà S., Il Codice civile e il processo sostituente europeo, in Rivista critica del diritto privato, 2005.
[37] G. Resta La disponibilità dei diritti fondamentali e i limiti della dignità (note a margine della Carta dei diritti), in Riv. dir. civ., 2002, 801 ss.

horizontal relations is allowed in order to fill the general clauses contained through the constitutional principles. Practically, this conceptual elaboration occurred through the German Judge in the Luth case of January 15 1958[38] the operation of direct or indirect applicability may depend on a whole series of elements of the legal system that is considered. In particular, the nature of the right to be protected, the role assumed within the legal system by the Constitutional Court, the legal tradition of belonging, and again from the recognized nature of the ECHR. The direct effect could be considered as the expression of the force of the rights in question on the contract, suitable to influence the fate of the contractual regulation. Inversely, the indirect effect would be advocated by those who support the supremacy of the interests of the contractual parties (regardless of the influence of fundamental rights in the relationship between individuals), and by those who rely on a clearer distinction between the public and private sectors, that is, that part of the doctrine that does not share the unprecedented contamination between the two sectors. By applying the indirect theory, private parties would not be direct recipients of such values and therefore there is no need to pay attention to the influence of such interests in interpreted relations. The distinction between direct and indirect applicability would conceal, from this perspective, a different legal-political matrix, that is, the supremacy of the public over private or vice versa.[39] If one strictly limits the sphere within which private entities can pursue their own interests with respect to the "common good" pursued by society, fundamental rights, reflecting the shared values, would have little space in contract law. The influence of these rights in legal relations will be determined by the limits imposed on the private sphere. If we recognize the reflection of public values on the rules of conduct that the contracting parties must respect, fundamental rights will have an important role to play in the area of contract law. The problem in question has caused mixed reactions by the interpreters within the Italian law system. Faced with the undoubted substantial usefulness of the institution in terms of protection of human rights, the perplexity of those who consider a direct application of Constitution in relations between citizensas eccentric may be considered.[40]
On the other hand, there is no lack of people who consider that the operation would arbitrarily risk and discretionally expand the judges' prerogatives, and give them legislative powers. These objections, as has been observed, overlook an assumption about fundamental human rights, namely the fact that the recipient of the constitutional norms of our legal system is not only the legislature but also the interpreter.[41] Then, it was the Constitutional Court itself that applied these theories,

[38] E.J. Eberle, Free Exercise of Religion in Germany And The United States, 78, Tul. L. Rev. 1023 (2004)
[39] C. MAK, cit., 45 ss.
[40] M. R. Morelli, Materiali per una riflessione sull'applicazione diretta delle norme costituzionali da parte dei giudici, in Giust. civ., 1999, 4.
[41] G. Comande', Diritto Privato Europeo e diritti fondamentali, Torino, Giappichelli, 21 ss.

claiming only its own power on the constitutional legitimacy judgment.[42] The change of perspective is, finally, to be assessed on a concrete and operational plan: “if a small town is not allowed to discriminate, why should a large corporation be allowed to”[43] especially where private entities take charge of functions which were previously performed publicly? Since many basic services (water, gas, electricity, transport, mail) are provided by private companies, the rules of contract law should be aligned with the constitutional principles. This aspect becomes even stronger and more practical when you consider that many of these private services were previously exercised by state agencies. It becomes necessary, therefore, to observe the phenomenon of the protection of fundamental rights through a global point of view, that is, that which allows to have a “spatial” vision, “a vision, especially in today's world, that corresponds to the condition of those who are called to the effort to stay above the local reference horizon, constantly straining toward an elsewhere of the law.”[44]Furthermore, on the horizontal effectiveness of the constitutional norms in the relations between citizens, it is difficult not to give a positive solution, where, in fact, it reflects the fact that the major threats to the rights of the individual may come from individuals or private groups with positions of economic,social, and intellectual hegemony. Here we have the situation where fundamental rights may become a parameter of validity of private situations, directly protecting situations that otherwise would not receive protection, because they are not provided for in a chief provision of a law, or indirectly, through an interpretation of private standards through the general clauses, to penetrate the reference values of the society in the context of civil law, or through the technique of a combined disposition, with provisions of another nature (constitutionally oriented interpretative method), to provide the argument to support the discipline of private law in order to outline a complex legal framework from which to derive the specific rule for the given case. It is said, however, that now the main problem lies elsewhere: not whether fundamental rights may have an impact on relations between private parties (it is a question already answered in the affirmative), but to what extent this will happen. In other words, the real question today is not whether there is a relationship between fundamental rights and private law, but how this relationship manifests itself. The answer to this question could affect the future of private law, both at the national and the European level.

The line between the relationship of subordination or complementarity between fundamental rights and private law is not always clear. The distinction in question is a matter of emphasis. It is claimed that, depending on the impact of fundamental rights on the relationships between individuals, the

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[42] M. R. Morelli, cit.

[43] A. Barak, Protection of Human Rights in Provate Law, A. Barak (a cura di), Book to Klinghofr on Public Law, Sacher Institute, 1993, 207

[44] L. Moccia, Comparazione giuridica, diritto e Giurista europeo: un punto di vista globale, in Riv. trim. dir. proc. civ., 2011, 767 ss.

relationship tends to take on a form of subordination or complementarity (of private law to the fundamental rights). In the case of subordination, fundamental rights do not just affect private law. Fundamental rights govern it by enjoying a priority over private law values, weakening, therefore, its ability to regulate relations between individuals, and turning it into a promotional tool of the rights in question. In contrast, the complementary relationship between fundamental rights and private law implies that, beyond the hierarchical superiority of the standards of fundamental rights, the rules that characterize the private sphere cannot be deleted. In other words, fundamental rights would affect private law, and in turn, private law would influence the way in which the fundamental rights affect it. Then, at the heart of the distinction between subordination and complementarity, there is the question of which body of law substantially determines the outcome of a private dispute: whether it is the discipline on fundamental rights or private law. If in Germany there is a trend towards the subordination of private law to fundamental rights, in particular regarding contract law, in Dutch and English law, there is a tendency to consider the relationship in terms of complementarity.

Unlike Germany, it is not possible to establish a clear "substantial" hierarchy between fundamental rights and private law in Italian law, and the matter is left in the hands of the courts and case law. The definition of the relationship between fundamental rights and private law, in terms of subordination or complementarity, would not only determine the kind of relationship that exists between them in a particular legal system, but also the opportunity to engage in an open debate on the extent to which private law in general, or of a particular branch, should be constitutionalized.[45] This debate would be much more transparent if ordinary constitutional or national courts, whose words on the question of the relationship between fundamental rights and private law is effective, followed the proposed differentiation, as compared to hiding behind the traditional labels of the direct horizontal or indirect effect.

4. Horizontal application of the ECHR

The problem of the application of the fundamental rights enshrined in the ECHR to horizontal relations was the subject of attention and study by both lawyers and the courts, in a multi-level view (national, supranational, European). As regards the horizontal applicability of the ECHR, it can be asserted that by means of positive obligations (obligations to do), the horizontal effect of the provisions of the ECHR has been consecrated, and the State is called upon to act as guarantor for all established relationships within all the internal legal order. The matter was observed in the same

[45] O. Olha, Fundamental Rights, Policy Issues and the Draft Common Frame of Reference for European Private Law, in European Review of Contract Law, 2010, 39 ss.

terms in which the horizontal applicability of the fundamental rights of the Constitutional Charters in the relations between citizens was addressed. Although referring to *Drittwirkung* with reference to the ECHR, some jurists have stated that the problem cannot be resolved through the proposed solutions, in the first place, in the German experience where mention is made of the contents of general clauses. With reference to the direct applicability of the ECHR, it seems that this issue can be substantiated in the obligation of national courts to apply the law of the ECHR to the relationship between citizens.[46] In order to support direct applicability, the arguments adopted by the jurists have been numerous and included the reason why the states have signed the Agreement,[47] and the same rationale underlying the ECHR[48] and its contents that recall the general clause of public order[49] and those of his Preamble,[50] the cases have been resolved by the Hague international jurisprudence in favor of such applicability, or the alleged direct applicability of the universal Declaration of 1948.[51] By then, there was a discussion with respect to extensive or restrictive readings, to which the Convention was submitted, for example Article 1 of the ECHR allows a more or less favorable interpretation to the problem of the applicability according to whether reference is made to the English translation, "the High Contracting Parties shall guarantee to everyone the rights and freedoms defined in the Convention"; or the French: "the High Contracting Parties Contracting recognize everyone's rights and freedoms defined in the Convention."[52]

However, while not all provisions of the Convention and its Protocols can be considered directly applicable, certainly there are some destined toward this possibility. These are the labor standards, freedom of movement, freedom of marriage, privacy and other fundamental rights, as well as the provision governing discrimination and the right to property. In some cases, the national courts have found a positive solution to the problem. Recall, for example, the case decided by the Court of Appeals in Brussels on 25 February 1988 that denied the suspension of electricity supply to the debtor because it was a measure contrary to human dignity; or the Dutch cases in which the judge deemed null and void the clauses of leases of properties, which discriminated against the tenant on the basis of ethnic origin, religious beliefs, or nationality.[53] The third Civil Chamber of the French Court of Cassation in a judgment of 6 March 1996, which was called upon to interpret a lessor's

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[46] D. Spielmann, L'effet potentiel de la Convention européenne des droit de l'homme entre privées, Bruxelles, 1995, 26 ss.

[47] Ibid.

[48] M. Forde, Non - Governmental Interferences with Human Rights, B. Y. I. L., 1985 265 ss.

[49] D. Spielmann, cit.

[50] M. A. Eissen, La Convention et des devoirs de l'individu, La protection internationale des droits de l'homme dans le acdre européen, Parigi, 1961, 190 ss.

[51] W.J. Ganshof Van Der Meersch, La Convention Européenne des Droits de l'Homme atelle le cadre du droit interne une valeur d'ordre public?, Bruxelles, Manchester, 1968

[52] G. Alpa, M. Andenas, *Fondamenti di diritto privato europeo* (2005), pp. 58 ss.

[53] Ibid.

personal enjoyment clause in order to guard against the occupation of apartments leased by an incongruous number of people[54] said that "clauses of a lease cannot, by virtue of Article 8 of the ECHR, have the effect of depriving the tenant the possibility of hosting his guests."[55] The ECHR has also sometimes expressed a positive opinion on the possible application of ECHR rights in relations between individuals, especially with regard to issues pertaining to the rights of personality, or in contracting in the field of job discrimination.[56] It is true that none of the provisions of the ECHR are directly contractual on matters. However, its provisions as a whole, and through the interpretation of evolution and effectiveness of horizontal recognition by the Strasbourg Court, are likely to influence the formation and content of private law contracts.

Generally speaking, in our legal system, the legal relevance of the direct effect of the ECHR in the inter-relationships does not appear clearly, with the exception of the wide scope given to Article 6 of the ECHR in cases of liquidated damages due to the excessive duration of the process, which is right now enshrined in Italian law with the noted *Pinto Law*. In the field of horizontal applicability of the ECHR, one should also note the recent judgment of the Civil Cassation Court (Third Chamber) of 30 September 2011, which ruled: "the final judgment of the Court of Human Rights has preceptive immediate effects similar to a formal judgement, and must be taken into account by the internal judge, who has the obligation to comply with that decision in deciding the dispute." The Italian administrative case law, in the Council of State decisions, Section IV, March 2, 2010, n. 1220 TAR Lazio, Section IIa, May 18, 2010 n. 11984, noted that the ECHR standards come to benefit from the same warranty status as the Community rules: no longer, therefore, international standards and interposed parameter of constitutionality of national legislation pursuant to Article 117 of the Constitution, but EU rules, by virtue of the Lisbon Treaty, which in the light of the primacy of Community law, legitimizes the non-application of internal rules which conflict with them.

Therefore, in light of the foregoing, it would seem possible to grant the ECHR also the nature of private law source, especially thanks to the work of the Strasbourg Court which has built up over time an autonomous right to protect subject positions, including those that an individual may invoke against another. This result was possible through the logic of the Convention, in which there is no room for the system of law proper of national legal systems, and where the dogmatic distinctions between public law, civil, commercial, and administrative lose relevance in the face of the concrete

[54] The landlord is already partly protected against such eventuality by Art.1728 and following, which establishes the general obligation to use the rented property with the diligence of a good father.

[55] S. Praduroux, L'attualità del contributo della Convenzione europea della salvaguardia dei diritti dell'uomo e delle libertà fondamentali nell'evoluzione del diritto privato italiano e francese, in Riv. crit. del dir. priv., 2003, 705 ss.

[56] D. Spielmann, cit.; G. Alpa, M. Andenas, cit.

and effective protection of rights, which must be protected in a democratic state. As part of this overall concept of the rights and freedoms adopted by the Convention, the Strasbourg judges gave life to a constructive case law, this assisting a qualitative and quantitative enrichment of the catalogs of rights enshrined in the ECHR, which has allowed the Court to approach private law issues that at first glance seem unrelated to the provisions of the Convention.[57]

5. The English model of *drittwirkung*

The models taken into account in verifying the horizontal effectiveness of fundamental rights are manifold. They are emblematic cases of legal systems in which there is no explicit expression of these principles and values in a Constitution, and where the phenomenon appears to reflect a policy choice even if not expressed. An example is the jurisprudence of English law, that even before the adoption of the Human Rights Act, did not fail to take into account the ECHR in order to substantiate its reasoning in cases governed by its decisions. In fact, although in England an International Treaty must first be incorporated through an Act of Parliament before it may be invoked before the national courts, the Convention has managed to influence certain decisions through a presumption of conformity with the domestic law of the supranational source. The United Kingdom has ratified the ECHR in 1952, without introducing it, however, into domestic law. This closure probably depended on the English political-constitutional tradition, based on the belief that fundamental rights were already well protected by English common law, from *the Magna Carta Libertatum*, to the philosophical schools of Mill and Locke, and the Bill of Rights of 1688.
In general, there was a fear of attributing to the courts, through a Bill of Rights, an overly independent power in the assessment of cases. It was only in 1966 that Britain signed two optional clauses of the ECHR, which ratified the right of individual petition, and the jurisdiction of the ECHR. Since that time, the UK has for several times been held responsible before the Court of Strasbourg,[58] for which Parliament was forced to develop certain disciplines, such as regulations on the treatment of the mentally ill and prisoners, or even on immigration and personal freedom. Meanwhile, various movements aimed at incorporating the Convention into domestic law developed in the country. It was primarily the Conservative Party that expressed its opposition to the incorporation of the Convention, while a marked change of opinion began to spread in the early nineties in the Labour Party with the leadership of Blair. Therefore, as a result of the party's victory in 1997, the English Parliament adopted in 9 November 1998 certain fundamental rights and

[57] S. Praduroux, L'attualità del contributo della Convenzione europea della salvaguardia dei diritti dell'uomo e delle libertà fondamentali nell'evoluzione del diritto privato italiano e francese, op. cit.
[58]The Strasbourg Court condemned the UK in some cases for violation of the Convention: for example, in the case of eligibility for the dismissal of employees who had refused to join trade unions.

freedoms of the ECHR. The Human Rights Act came into effect on October 2, 2000. In it are incorporated the Convention rights under Articles 2, 12, and 14, those of the first Protocol under Articles 1, 2, and 3, and those of the sixth protocol under Articles 1 and 2 referred to in Articles 16 and 18 of the Convention. It has been said that the Act constitutes a true bill of right, eligible to be applied as a set of standards to be considered on par with constitutional provisions, which has recognized new powers for the judiciary to ensure internal protection of fundamental rights, without thereby limiting the sovereignty of Parliament; and that through its entry into force, it has accomplished a sort of Europeanisation of English law. The new possibility on the part of the British citizen to appeal directly to the national courts instead of the Strasbourg Court was considered a relevant novelty.[59] Pursuant to sections 3 and 4 of the Act, the judge has the obligation for all provisions that came into force before and after 1998, to interpret the legislation in accordance with the ECHR. With regard to subsequent legislation, the Act, under section 19, requires a declaration of compliance with the ECHR (Statement of Compatibility), and in the event that this bill is in conflict with the Convention, a justification is required on the reasons why it still intends to adopt the legislation. In light of the respect for parliamentary sovereignty, and with regard to the new interpretative criterion of compliance with the ECHR, to which the courts are subjected, it must operate "as much as possible," but the internal standard cannot be set aside and the judge may issue the so called "Declaration of Incompatibility."[60] This is a constitutional change in effect, which power is left only to the House of Lords and other superior courts.[61] However, there is not obligation to eliminate such incompatibility between the law and the ECHR.

As to remedies for infringement of a fundamental right, the individual may denounce the violation, promoting a judgment. To remove the above-mentioned incompatibility, a change in legislation is necessary, however, so the judge cannot do anything else but adopt all the provisions relating to this case. It is precisely on this aspect that the English system discusses whether it is possible to talk about the horizontal applicability of the Act, or rather, whether it is more correct to speak of "direct horizontal effects." The expression "vertical and horizontal effects" refers to whether the Act produces its effects only in disputes between subjects belonging to the Public Administration and private subjects, or even in disputes between private parties. The answer to this question assumes a particular value from the point of view of the effectiveness of the protection of fundamental rights brought to the United Kingdom by the law in question.The proponents of the theory of the vertical effects of human rights norms refer in principle to the classical liberalism political philosophy to justify its application only to the relations between the state and individuals. They argue that there is

[59] M. E. Marino , Diritti fondamentali e diritto contrattuale nell'esperienza inglese, in Econ. e dir. del terz., 2004
[60] Ibid.
[61] Ibid.

a strict division between public and private spheres and that the provisions for the protection of fundamental rights have the primary purpose of protecting the privacy of the individual from the unlawful intrusion of public authorities. On the other hand, the opposite horizontalist position believes that the rules on fundamental rights come from the legislative will, namely the regulatory power of the state, just like any other provision that governs society. It is from this parallelism that human rights standards are also invocable in relations between private individuals.
However, in the Human Rights Act (HRA) of 1998, no disposition affirms the direct horizontal effectiveness of the provisions contained therein, so much so that the parties who perform functions attributable to the private area anyway are not the direct recipients of the obligation to act in a manner compatible with the ECHR. In the Act, there is no reference to private commercial companies.[62] The horizontal application was, however, derived from the interpretation of Section 6. Although it claims that the requirement of consistent interpretation relates only to Public Authorities, paragraph 3 states that the courts are included in this category. Therefore, the applicability of the HRA to disputes between private persons was indirectly obtained through interpretation and analogy, referring to indirect horizontal effects. Courts and courts are considered Public Authorities and as such are obliged not to act contrary to the principles of the ECHR. Therefore, no court will fail in this duty: both in disputes between the state and private entities, and in private party litigation. The courts are, therefore, to play a very delicate task, which is to ensure the progressive development of the common law in a manner consistent with the ECHR. The consequence is that in spite of disputes, the parties cannot directly invoke the violation of a right under the ECHR. The latter may be indirectly applied to private relations thanks to the interpretation of Section 6, paragraph 3. According to authoritative doctrine, in fact, rulings, albeit indirectly, declared the possibility of applying the rights of the Convention to relations between individuals. Commentators, however, disagree about the extent to which the ECHR may affect the legal relations between individuals. Bamforth argues that the application of the HRA can affect the development of the common law. Phillipson also claims that the application of the HRA could affect private party litigation only in cases where the common law already operates in this sense, not creating new actions. Clayton and Tomlinson also argue that Section 6 requires the judge to develop the common law in a manner that is not incompatible with the ECHR. However, this requirement is purely negative, “the judge is not obliged to develop the common law in line with the rights of ECHR; the prohibition requires the judge to act in a way that is not compatible with the Convention rights.” Hunt believes, however, that this requirement is positive and that the only limit

[62] D. Pattinson, D. Beyleveld, Horizontal applicability and horizontal effect, Law Quarterly Review, 2002.

is to create new actions: “where there is no action, and there is therefore no law to apply, the courts cannot invent new actions, this would embrace the full horizontality” Otherwise, Raphael asserts that there is no constraint on creating new actions.

Against this background and diverging views on the matter, the English model arises somewhat halfway between the direct and indirect applicability of the Act, since it is not possible, it seems, to believe that the source recalled finds a direct application, above all due to the fact that its provisions are not addressed to individuals in an explicit and regulated manner. However, the express inclusion of the English courts among the HRA recipients implies that the judge must observe the rules contained in it in the context of the decision relating to individuals, not intervening incisively in the horizontal relationship, but trying to “modernize and enhance” the Common Law based on the European Convention.[63] It is for this reason that there has been talk of indirect horizontal effect of the Act: the declaration of incompatibility (Declaration) by the judge, as a denunciation of the lack of protection of fundamental rights in the internal lawwas one of the strongest arguments to the order to support this thesis, albeit through a softer version than strong. Another issue closely related to the concept of public authorities referred to in the HRA, concerns the compatibility or otherwise of such a definition with a private company with public functions, and thus the reading and extensive or restrictive interpretation of some of the provisions contained in the same Act.[64] At the stage of the approval of the law, the ministers have repeatedly stressed that the term “public authority” should be developed by the judges in a flexible manner, on a case-to-case basis.

In particular, the Minister of the Interior declared that in the drafting of Section 6, the government decided that “the best approach would be the reference to the concept of a public function,” which seems to be the basis of the threefold distinction between the commonly understood public authorities, organizations with a mixed public and private function, and private organizations.

However, to determine whether a body is “public” and therefore amenable to judicial review, the courts often use a variety of criteria relating to the source of power and the nature of its functions.[65]

It has also been rightly said that in order to solve the question of direct or indirect applicability of the HRA, it is necessary to shed light on the nature of human rights. The purely vertical effect presupposes that rights exist only to defend the interests of citizens against state power, while the full horizontal effect assumes that the purpose of rights is to protect the interests that are fundamental, and therefore must be protected from all actors, whether public or private. There

[63]In the Mendoza Ghaidan case, the House of Lords had interpreted the meaning of Section 3 of the HRA arrangement of the Rent Act on the definition of family member, to ensure that the arrangement conforms to the ECHR.

[64] G. Alpa, I diritti fondamentali e la loro efficacia “diretta”, intervento al convegno “La Costituzione europea: valori, principi, istituzioni, sistemi giuridici”, Salerno 5-7 maggio 2005

[65] N. Bamforth, The True Horizontal Effect of the Human Rights Act 1998, in Law Quarterly Review, 2001.

would also be a need to clarify the purpose of solving the problem, the role of the state: the vertical effect assumes that the state has a moral obligation to refrain from violating the freedoms of citizens through its actions, while the horizontal effect entails a stronger moral obligation, that is to provide repair mechanisms as a result of violations of citizens (private subjects).[66] The latter argument led Wade to conclude that: “the citizen is entitled to expect that his human rights will be respected by his neighbor and his government.” In general, the English courts have repeatedly held that the remedy offered by the HRA is a type of parallel remedy that should be developed separately with the Act. The Strasbourg jurisprudence has been used as a springboard for new ideas, for example, claims for compensation, and as a crosscheck to the conclusions already reached. Therefore, the main question to be answered is on what the respective roles of the Strasbourg Court and the national English courts in this area should be. Although the introduction of the values of the ECHR has been a means for modernizing the Common Law, this phenomenon has never been expressed evenly, to the detriment of legal certainty.

6. English cases on violation of privacy

Before 1998, not a single decision of the English courts recognized a remedy for the violation of the Privacy Act to a British citizen, due to the negligence of the legislature in failing to provide such remedies, and the consequent impossibility of creative intervention of the jurisprudential kind. For example, in *Kaye v. Robertson*, a famous actor had been photographed and interviewed by reporters in a hospital room after a serious surgery. The journalists claimed to have obtained the permission of Mr. Kaye to carry out the interview, but the data showed that the man was not in a suitable condition to give informed consent. Mr. Kaye tried in vain to prevent the publication of the interview and its images, and the resulting violation was set up based on libel, slander, violation of the person, and of passing off. Although it was a blatant and serious violation of his privacy, Mr. Kaye was unable to obtain any injunction against the newspaper. In 1998, a law on the press came into force in England, known as the Data Protection Act, which established that the data and the details of a private or confidential information may be published, except in cases where reasons of public authorities impose an obligation of confidentiality. Afterwards, in this context the incorporation of the ECHR with the HRA has achieved significant progress, which has been welcomed, especially in light of the fact that the Parliament had never expressly ruled out a wider interpretation of the guarantees of confidentiality, to render the interpretation of the law in conformity with the ECHR.

[66] Ibid.

Douglas v Hello[67]

Just six and a half weeks after the entry into force of the HRA, a marriage ceremony was celebrated between the celebrities Michael Douglas and Catherine Zeta-Jones.

The world-famous film stars had sold the exclusive photographic rights to their billionaire wedding to Ok Magazine. However, a rival rogue tabloid (Hello) had managed to procure some unofficial and unauthorized photographs, which it then published. The Zeta-Jones claimed that the publication had damaged her image and her earning ability as a film actress because the photographs showed the public that she was fat and out of shape. The case highlighted was considered by the judges in several respects: first, whether the photographer was an intruder, the actors could not base the affirmation of their right on a breach of confidence, that is, a breach of the duty of confidentiality which is based on trust, as in this case, since there was no pact or relationship of trust between the parties. The question is whether the celebrity is master of his image, and if privacy can be susceptible of protection regardless of breach of confidence. With respect to the situation described the leading judge said: "the English case law and custom evolved in the sense of recognizing a right of privacy worthy of protection not only in case of breach of confidence, but also in the case of illegal trespassing in another's private sphere, and the HRA has only given a final impetus." By then emphasis was given on the positive law, stating that although Article 1 of the ECHR has not been incorporated in the Act, on the other hand Article 6 exists, which requires the Public Authorities, including the courts, to act in accordance with the Convention.

This would lead to the implicit recognition that the right to privacy enshrined in the ECHR should be considered equally relevant with respect to private parties, as well as public authorities. The leading judge spoke of the need to find a balance between the right to privacy and the right to freedom of expression provided under Article 10 of the ECHR. He also stated that in the present case, the marriage of the actors would be far from being considered a private event, as in fact most of the rights of the couple to their privacy and confidentiality had been sold as part of a commercial contract. Thus, the balancingdescribed above has not allowed the issuance of an injunction to prevent the publication of the photographs. In the literature, it has been claimed that the case law in question has paved the way for the future adoption of an indirect horizontal applicability model of the HRA. Primarily, with reference to this case, there has been much talk of direct horizontality, connoted by a strong element, as much as an indirect horizontality, connoted by a weak element. Through the application of the first, the private parties could have asserted their rights under the

[67]Douglas v Hello! Ltd (No.1) [2001] Q.B. 967; [2001] 2 W.L.R. 992; [2001] 2 All E.R. 289; [2001] E.M.L.R. 9; [2001] 1 F.L.R. 982; [2002] 1 F.C.R. 289; [2001] H.R.L.R. 26; [2001] U.K.H.R.R. 223; 9 B.H.R.C. 543; [2001] F.S.R. 40; Times, January 16, 2001; Daily Telegraph, January 9, 2001; Official Transcript.

ECHR before the courts, and the latter would be obliged to directly apply Article 8 of the ECHR. The scope of the privacy would, to that effect, be determined by the standard of the Convention as interpreted by the European Court of Human Rights. It has been said that this possibility, although convenient, as it helps to promote a culture of human rights in the UK, it is not easy to reconcile with the interpretative obligation imposed on the judiciary by section 3 of the HRA.
Through indirect horizontal applicability, the parties could not, however, rely directly on Article 8 of the ECHR in order to protect their privacy, but could only rely on the so-called breach of confidence, interpreted in light of the right to privacy in Article 8 of the ECHR. This perspective, although easier to reconcile with the text of Section 3 of the HRA, was, however, considered uncertain. It was pointed out, in fact, that the question here is related to when a law can be interpreted in line with the rights of the Convention, and the scope of the ECHR. Does Section 6 of the HRA give rise to a duty or a power to create new actions in common law? Through the establishment of breach of confidence, could one create a new privacy tort? The only situation in which the courts would be unable to protect the rights guaranteed by the Convention with the development of the common law is where such a development would require more a change than an increase in common law.[68]

Campbell v Mirror Group Newspapers Ltd[69]

The *Campbell v. Mirror Group Newspapers Ltd* case is analogous to the one above, putting into play the same balance between the Article 8 and Article 10 of the ECHR.
The Daily Mirror published some photographs portraying a supermodel during her sessions with Narcotics Anonymous, revealing her temporary state of addiction. The supermodel asked, therefore, for compensation for damages alleging a breach of confidence. In this case, the balance made involved on the one hand the private life of a famous individual, which is necessarily exposed to a certain advertising, and on the other hand, the public interest in information. Since Miss Campbell denied her attendance at the Narcotics Anonymous session by lying deliberately, the newspaper was entitled to show the public that the actress had lied. However, the court emphasized the fact that the magazine had overstepped the limit. The news that could be published would, in fact, show that Naomi Campbell had lied about her drug addiction, but the intrusion into her private life, perpetrated by publishing photographs concerning the details of the moments during the therapy

[68] A. Young, Case Comment Remedial and substantive horizontality: the Common Law and Douglas v. Hello!, in Public Law, 2002
[69] *Campbell v Mirror Group Newspapers Ltd*, [2004] UKHL 22; [2004] 2 A.C. 457; [2004] 2 W.L.R. 1232; [2004] 2 All E.R. 995; [2004] E.M.L.R. 15; [2004] H.R.L.R. 24; [2004] U.K.H.R.R. 648; 16 B.H.R.C. 500; (2004) 101(21) L.S.G. 36; (2004) 154 N.L.J. 733; (2004) 148 S.J.L.B. 572; Times, May 7, 2004; Independent, May 11, 2004.

sessions, constituted aspects that the actress was entitled to maintain private. The satisfaction of the public interest in information requires, therefore, further details. The press had thus exceeded the margin of appreciation to which it was entitled under Article 10 of the ECHR, so much as to have disproportionately violated the rights of the top model in a disproportionate manner, in accordance with Article 8 of the Convention. The House of Lords ruled in favor of Ms. Campbell with a majority of three to two.
With respect to the present case, there was talk of a suitable test to demonstrate a reasonable expectation of privacy regarding the published facts, and it was observed that its particular formula should be used with caution. For example, the expression "highly offensive" is indicative of a more severe test of private information than a reasonable expectation of privacy. Secondly, the "highly offensive" formulation, in deciding whether or not the information is private, involves considerations relating to the degree of intrusion into private life, and the extent to which publication constitutes a matter of public interest. This case has become a landmark in the field of privacy, since it announced the creation of a new offense: the abuse of confidential information with respect to the breach of confidence highlights the substantial nature of the information. Therefore, in light of the foregoing, although protection is currently offered to information for which there is reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship, it can be concluded that in the UK, breach of confidence became the vehicle through which greater consideration to the rights and values of the ECHR was given.

7. The horizonal application of the charter of fundamental rights of the european union

Article 51 of the Charter of Fundamental Rights of the European Union establishes its applicability to the Union and its Member States, but not to citizens. Therefore, if its vertical vocation is obvious, that is, in relations between private individuals and Union, or between private entities and member states, several doubts were advanced with respect to its horizontal effect in relations between individuals. However, it has been noted that the "legal" argument does not seem to be particularly convincing because the wording of Article 51 could easily be reconnected and narrowed in its implications, to the particular function performed by this provision: a reference to citizens, keeping in mind this function, would have proved useless and rather problematic on the editorial level.[70] The first point to consider concerns rights of a private nature to which the EU Charter of Rights confers

[70] V. Sciarabba, Tra fonti e corti. Diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali, Padova, Cedam, 2008, 157 ss.

the nature of fundamental rights:[71] human dignity, the right to integrity of the person, the protection of confidentiality, respect for family life, the protection of personal data, freedom of enterprise, equality between men and women, children's rights, consumer protection, the principle of proportionality, and the abuse of rights are certainly relevant in this regard.
The Charter has worked as a reference point in the interpretation of national laws, both internally, and therefore nationally, and then externally, that is, on a supranational level. The Italian Constitutional Court has for example, made reference to Article 7 ("although without legal effect")[72] to protect private and family life in relation to the extent of interceptions between persons present, and has used the Article 9 to censure that it is reasonable to expect celibacy or widowhood as a requirement for access to public offices.[73] Moreover, as regards the third chapter of the Charter dedicated to equality, the Court of Justice of the European Union has decided on a number of cases of discrimination, such as the illegality of the dismissal of a transsexual for a reason related to gender reassignment.[74] The fifth chapter relating to citizenship would also appear in the field of private law if one only considers the implications of common rules on the allocation and division of property. Hence, not only the claim not to bind the fundamental rights of the person to state citizenship, so to speak, that in addition to being contrary to the principles of the ECHR, would represent a selfish vision of society, but the idea of the so-called differentiated citizenship is also a possible key to identifying and legitimizing a new multilevel structure of private law that is hinged on the pivot of values and fundamental rights, to a level of transnational diffusion that proposes the centrality of the subject in a plurality of spaces, characterized by a plurality of normative sources , national and supranational, and connoted by the grafting of European import principles.[75]
Given the importance of consumer legislation at the European level, another issue to be resolved could affect the possible influence of the Charter of Fundamental Rights of the European legislation in consumption. From the judgment of 14 February 2008 in Case C-244/06 Dynamic Medien, one can see that fundamental rights may affect the decisions of the Court of Justice in the field of electronic commerce. The question referred for a preliminary ruling relating to limitations on the free movement of goods (Art. 28 and 30 TEC), was raised in relation to a German law prohibiting the sale in Germany through the internetof video supports from other countries, which have

[71] L. Azzena, Le forme di rilevanza della Carta dei diritti fondamentali dell'Unione europea, U. DE SERVIO (a cura di), La difficile Costituzione europea, Bologna, Il Mulino, 2002, 276 ss
[72] Constitutional Court 24 April 2002, n. 135, in Foro it., 2004, 390.
[73] G. Vettori, La lunga marcia delle Carta dei diritti fondamentali dell'Unione europea, disponibile al sito internet http://www.personaemercato.it/editoriale/la-lunga-marcia-dellaCarta-dei-diritti-fondamentalidell%E2%80%99unione-europea.
[74] Case C-117/01.
[75] L. Moccia, La "cittadinanza europea" come "cittadinanza differenziata" a base di un sistema "multilivello" di diritto privato, relazione al convegno internazionale dal titolo "Il diritto privato regionale nella prospettiva europea", Macerata, 30 settembre - 1 ottobre 2005.

undergone the tests required by the German legislation to protect children, regardless of whether the video media have undergone the tests in another member State, to a control aimed at protecting minors. In particular, the question was made in a dispute between Dynamic Medien Vertriebs GmbH and Avides Media AG, two German companies, regarding the sale in Germany by the latter through the internet,, of the video supports from the United Kingdom.

The Court held that this national legislation does not infringe the Community rules on the free movement of goods, as justified by the need to protect minors which, in addition to being sanctioned in various international instruments (UN International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations December 19, 1966; UN Convention on the Rights of the Child), which it takes account in applying the general principles of Community law, is recognized by Article 24 of the Charter of Fundamental Rights of the European Union. The protection of the child is a legitimate interest, which, in principle, imposes a restriction on a fundamental freedom guaranteed by the EC Treaty such as the free movement of goods (Judgment of 12 June 2003 in Case C-112/00 Schmidberger). With reference to the proportionality of the restrictive measure, the Court confirms that it is not necessary that the restrictive measures taken by the authorities of a Member State to protect the rights of the child correspond to a conception shared by all member countries, compared on the level or the details of that protection, since such a conception may vary from one member State to another as a function of moral or cultural considerations, and therefore must be recognized by the countries themselves within a certain margin of discretion.

With regard to digital content and the role of fundamental rights in this area, Article 36 of the Charter could play an important position in order to define the positive standard for access to such content in Europe[76] (in correlation with the Community acquis in the area of universal services), thus affecting, even if only indirectly, the legislative initiatives being developed in this field (the proposed regulation on sale, or the Common European Sales Law-CESL), or through judicial review the legislation on cross-border contracts of digital content for consumers.[77] A further aspect to be analyzed in relation to the effect of the Charter in the private sector concerns the problem of availability: what is important is not so much to understand if the unavailability is an unavoidable attribute of fundamental rights, but rather to analyze the so-called gray areas.[78]

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[76]Article 36: Access to services of general economic interest. The Union recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

[77] C. Mak, Fundamental Rights and Digital Content Contracts, Amsterdam Law School Research Paper, in Centre for the Study of European Contract Law, in Working Paper Series, 2012/06.

[78] K. Stern - M. Sachs, Das Staatsrecht der Bundesrepublik Deutschland, Band III/2, Allgemeine Lehren der Grundrechte, München, 1994, 887 ss.

The Bill of Rights provides in this regard, a useful observation, where in Article 3, which recognizes the fundamental right to physical and mental integrity of the person, there exists the prohibition on making the human body and its parts a source of financial gain. First, there is a need to point out the possible horizontal application of this rule in relationships between private persons, and second, there is an absence in the Charter of a similar limitation as regards the immaterial attributes of personality, such as the personal data of those who receive autonomous protection.[79] In this case, the European legislator has referred to the principle of self-determination of the person concerned, but differently from Article 3, as there is no mention of the limits to the exercise of such right.[80]

Concluding on the issue of eligibility of direct application of the principles of the Charter in private relations, while advancing the idea of a part of the doctrine that a correct *Drittwirkung* system may operate only in relation to the rights and not the principles, and that the Charter is lacking an explicit reference to any such hermeneutical operation, it does not seem so difficult to overcome the formalism of this approach by questioning the very nature of the principles.

8. The application of fundamental rights in private law

The distinction between rules and principles was the subject of a complex theoretical and legal debate that recalls the long discussion on the programmatic and preceptive norms of the Italian Constitution. On the one hand, this sharp distinction was the result of fear of potential *gouvernement des juges*, considered "an old specter that is haunting Europe and the world."[81] On the other hand, it was considered that this distinction might be useful in legal terms only if it were understood better, in particular by excluding that immediate and direct consequences could be extrapolated from the standard to legitimize subjective positions that can be directly exercised in court. Following this line of interpretation, the principles can be used judicially only through the hermeneutic activity that the judge performs with respect to the rules, paying special attention to the legal dimension of the case,[82] and using the purpose of any previous judgment.[83] Therefore, according to this logic, the activity of the judge is not creative, but is only reflective of the right, using the rule of construction derived from the case. Currently, the dominant theory in the Italian doctrine, but also in other countries, is that which had been developed by Norberto Bobbio

[79] G. Resta, cit., 801 ss.
[80] Ibid.
[81] A. Pizzorusso, Una Costituzione "ottriata", E. Paciotti, (a cura di), La Costituzione europea, Roma, Meltemi, 2003, 47 ss.
[82] E. Ghiozzi, Postmodernismo giuridico e giuspositivismo, in Riv. trim. di dir. e proc. civ., 2006, 801 ss
[83] G. Zagrebelsky, Diritto per: valori, principi o regole?, in Quaderni fiorentini per la storia del pensiero giuridico moderno, 2002, 865 ss

following the line of Kelsen, which is that the general principles are legal norms with a general character, extracted inductively by the rule of positive law.[84].
It was thus authoritatively affirmed: “the principles are also norms, but with characteristics different from the written ones, on the other hand, if the principles are drawn from the standards through a process of generalization and subsequent abstraction, that norm is not born as a rule; all the more true, for the fundamental principles expressed "(ALPA, the case law, by Mario Bessone; Published by Giappichelli, Torino pp. 296). Furthermore, the constitutional principles “end up assuming the role of bulwark of the conceptions that each national constitutional tradition has of democracy, and of the most sacred values that fill it with content: secularism, solidarity, fundamental rights, and so on, almost a contemporary version, (neo) constitutional, of the old liberal idea of checks and balances.”[85] The life of the assumption that depends on the objectives that the interpreters want to achieve through a particular legal postulate, the same could be considered as an abstract line or as a rule, or principle, we agree with the opinion according to which the technical logic of balancing could constitute as a mode of application of the principles.[86]
As distinct from the argument of Dworkin,[87] the principles are positivized values and do not differ from the rules, if not for the content. In fact, they are generic and general rules. For example, the principle of equality is characterized by greater uncertainty than the rules that prohibit unfair dismissal. On the other hand, the principles have less weight than rules because their contribution to legal argument tends to be variable, while the contribution of the rules are basically stable.[88] The weight of a standard may depend on a number of factors relating to hierarchy of sources, to the hierarchical axes accredited in the juridical culture of reference, and to the relevant circumstances in the context of the application of the rule.[89] With respect to the formulation of the principles, it might be added as well that they can be explicitly or implicitly inferred from the norm. “If the clarifications carried out are correct, then the principles of the category cannot be regarded as an empty box, and the most immediate consequence is that, to maintain its explanatory power, legal positivism must recognize the role of moral argumentation in rights reasoning.”[90]

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[84] N. Bobbio, (voce) “Principi generali di diritto”, in Novis Dig. It., vol. XIII, Torino, Utet, 1966, 893; G. Alpa, I principi generali, Trattato di diritto privato, G. Iudica e P. Zatti (a cura di), Milano, Giuffrè, 2006, 3 ss.
[85] G. Pino, “La lotta per i diritti fondamentali”, Europa Integrazione europea, diritti fondamentali e ragionamento giuridico, Identità, diritti, ragione pubblica in Europa, I. Trujillo e F. Viola (a cura di), Bologna, Il Mulino, 2007, 109-141.
[86] L. Mengoni, I principi generali del diritto e la scienza giuridica, in AA. VV., I principi generali del diritto, in Atti del convegno dei Lincei, Roma, 1992, 325.
[87] R. Dworkin, Law’s Empire, Fontana Press, London, 1986, 40 ss.
[88] G. Pino, Principi e argomentazione giuridica, http://www.unipa.it/gpino/Pino,%20Principi%20e%20argomentazione%20giuridica.pdf.
[89] Ibid.
[90] Ibid.

The moment of the interpretation and application of the rule is intended more as a "moment internal to the production process of the rule," so that "the imperative abstract in the law becomes positive, that is a positive rule of a historically positive community, only thanks to the incarnation made by teachers, judges, workers."[91] This statement requires the "elaboration of principles, of large ordering frames, robust theoretical frameworks capable of retaining a broken actuality"[92], and a new impetus of the Civil Code through coordination with Constitutional law. Indeed, within a legal culture that is increasingly constitutionalizing, the use of this interpretive argument leads to a rethinking of the relationship between law and morality, and of that between law and politics. Mediating between the dichotomy of politics and law is essential in the study of the subject of fundamental rights. Although they can be considered as the expression of political choices for the protection of certain values of society, at the same time, they represent the rules of the legal system. In fact, it is only by an analysis that considers such elements extraneous to the law in the strict sense, that one can understand the intensity of the impact of fundamental rights in the sphere private law. By qualifying fundamental rights as principles, one can render their horizontal applicability possible.
Article 51, paragraph 1 of the Charter of Fundamental Rights of the European Union establishes the distinction between "rights" and "principles": individual rights are respected, and the principles are observed. Even in Europe context, the discourse may be valid, in the sense of giving importance to the principles, implemented by legislative and executive acts, through their interpretation. Then there are the cases in which the Charter has not only enucleated the principle, such as environmental protection or the right of the disabled, but has also regulated the principle and the right in the same provision, as in the case of equality between men and women.[93] The distinction in question has therefore the merit of clarifying the relevance of the principles, making the horizontal application of the Charter in relations between private individuals desirable.[94] Finally, Article 47 of the Charter of Fundamental Rights of the European Union plays a general principle existing in Europe: the creation of effective remedies that are available to individuals. This is a principle that could allow a new reading of the function of contract law, namely that of implementing principles and values through the construction of rules.

[91] G. Vettori, Il diritto dei contratti fra Costituzione, codice civile e codici di settore, op. cit.
[92] P. Grossi, Introduzione, Tradizione civilistica e complessità sistema, F. Macario e N. Miletti (a cura di), Milano, Giuffrè, 2006, XIII.
[93] G. Vettori, La lunga marcia della Carta dei diritti fondamentali dell'Unione europea, op. cit.
[94] L. Mengoni, I principi generali del diritto e la scienza giuridica, op. cit., 318 ss.

9. Fundamental rights from the perspective of remedy

As has been authoritatively stated: “It is not possible to obtain any knowledge of the content of a subjective situation apart from the analysis of concrete remedies available to the holder.” (Mattei, Inhibitory Protection and Compensation Claims. Contribution to the Theory of Property Rights, Milan, 1987). The theme of the remedies must be viewed through the comparative perspective, able to assign different solutions to similar problems arising in different jurisdictions, in order to answer the question whether, in terms of protection of rights, a perspective different from that traditionally based on the category of law presents a higher degree of effectiveness. The question necessarily draws a comparison between the civil law and the common law systems. In the first system, after the identification of a law attributing a right, there follows the recognition of the procedural instrument best suited for its protection, with the exception of those methods through which the remedy precedes the right, as for example in Italian law’s *cognitio extra ordinem*[95]. The so-called method essentialist, that has characterized the legal scienceof continental Europe, has not traditionally defined the concept remedy autonomous from the law, making it susceptible, therefore, of being employed according to a multiplicity of meanings.[96]

Contrariwise, in the common law system, in which the notion of remedy is common and familiar language, one can roughly say that a remedy constitutes a concrete response that the law ensures against a wrong received, constituting a cure for the wrong.[97] The reason for the clear contrast between the two systems, in terms of rights and remedies, depends on the so-called form of action of the English medieval tradition, which involved a distinct procedure (writ) for each claim. Just as the concept of wrong is used in a broad sense in English legal language to indicate the injury of a protected interest, that of remedy, although widely used, has never been defined in clear and unambiguous terms,[98] that concept being understood as any legal action and any instrument of protection. To think in terms of remedies means placing the remedy's availability in the protected interest, which will then be identified by the judge, and no longer by the legislator. The remedial perspective is characterized by a clear rejection of the forms, and the operations directed towards the recognition of the remedy are substantiated in finding the unlawfulness of the conduct of the

[95] A. Di Majo, La tutela civile dei diritti, Milano, Giuffrè, 2003 e Il linguaggio dei rimedi, in Eur. e dir. priv, 2005, I, 341-363.

[96] Adar, Yehuda and P. Sirena, La Prospettiva Dei Rimedi Nel Diritto Privato Europeo (The Concept of Remedies in The European Private Law) (2012). 58 Rivista Di Diritto Civile 359-387, 2012.

[97] F. H. Lawson, Remedies of English Law, Butterworths, 1980

[98] D. Laycock, D. Laycock, Modern American Remedies — Cases&Materials, 1 a ed., 1985, A. Burrowss, Remedies for Torts and Breach of Contract, 1987; D. Harris, Remedies in Contract and Tort, 1 a ed., 1988; M. TLBURY, Civil Remedies, Sydney, 1990.

responsible person. [99] A common point between the two criteria of reasoning lies in the judgment of relevance, recognized in the interests that are protected.
Moreover, the most efficient protection in terms of effectiveness depends on which of the two protection modalities of a given interest is faster than the requirements at stake. However, in both cases the approach does not affect the protection aspect.[100] The attention to remedies tends to "skip certain passages of the law of obligations and contracts, shortening, so to speak, the distances of the means of protection than the interest and/or the good that is intended to be protected."[101] In this distinction, the constitutional principles are particularly important: "the necessary correspondence (two-way) between protected interest and a remedy"[102] requires the construction of a rule that is respectful of the ordinary norms and of the ordering principles of the subject that must, in the sentence or in the provisions legislation, be rigorously identified and specified as the premise of a controllable solution based on the parameters offered by the law and by the Constitution.[103] In the Draft Common Frame of Reference (DCFR), the notion of remedy "loses its own dogmatic reason, identifying itself in any instrument through the which the legal system protects the rights it recognizes and attributes to the subjects. Precisely because the right of remedies is now a sector organically and consistently governed by the legal system, it is constituted not only by punctual rules, but also by general principles, which are at its base and unify itIf one takes into account one of the most important and most characteristic basic principles of the entire private law, namely that of good faith, it may be noted that it was formalized by the DCFR in terms that explicitly extended to include these remedies."[104] Therefore, as has been authoritatively affirmed, the civil law theorist is ready for a sort of "regenerationthrough the development of institutes on the subject of invalidity and negotiating rebalancing. In general, it is possible to formulate concrete rules that are the manifestation of the previously known remedies or those that need to be redefined in these areas. The general clauses play, from this point of view, a very important role.

10. The protection of fundamental rights through the general clauses

The general clauses are able to express their potential and gain content and concretization from an orderly constitutional context, or in any case, express stable and shared values. Otherwise, it would

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[99] G. Vettori, Il diritto dei contratti fra Costituzione, codice civile e codici di settore, op. cit.
[100] U. Mattei, I Rimedi, in Il diritto soggettivo, nel Trattato di diritto civile, dir. da R. Sacco, Torino, Utet, 2001
[101] A. Di Majo, cit.
[102] E. Navarretta, La complessità del rapporto fra interessi e rimedi nel diritto europeo dei contratti, intervento al convegno svolto a Firenze il 30 marzo 2007 "Remedies in contract. The common rules for a european law", Padova, Cedam, 2008
[103] G. Vettori, Diritto contrattuale europeo, rimedi di «terza generazione» e diritto del lavoro, in Giorn. di dir. del lav. e di rel. ind., 2008
[104] P. Sirena, cit.

be difficult to justify these external intrusions in contractual relations by qualified interpreters, that is, the judges.[105]

In light of this phenomenology, the agreements between the parties are no longer valid as the foundation of the contract, but as a part of the regulation on which the judge exercises his interpretive power. With reference to the structure of general clauses, authoritative doctrine[106] has highlighted two types. The first type are formulated with a different technique from those casuistic ones, general as "the central core of the case is defined generically with the aid of a summary category, for the implementation of which the judge is referred from time to time to models of conduct or valuation standards in force in the social environment, so that its discretion is complementary to the case, not the production of concrete rules of decision." The second type is "incomplete standards, devoid of their own case, intended to be reflected in the operational areas of other regulations. They impart to the judge a directive for the formation of the decision rule of the single case, referring to social standards identified as ideal types of behavior in the axiological sense, so that he argues the rule of decision from ethical and social points of view outside the legal system."

With regard to the function of the general clauses, recent case law has thus ruled: "The relationship of the law, especially the legitimacy in carrying out the *nomofilachia* function of the Court of Cassation, assumes even more significance in the system of sources in line with the increased awareness of judges to operate in a regulated directions system which, while being of civil law and, therefore, not only based on principles generated, as is the case in countries of the common law (England, United States and others), characterized by the constraint that assumes a determined jurisprudential ruling for the subsequent decisions, are configured as semi-open because it is based not only on legal provisions regarding sectors and detailed disciplines, but also on the so-called general clauses, namely regulated directions of indications of values, expressed in generic formulas (good faith, solidarity, social function of property, profit, social enterprise, centrality of the person) that knowingly the Legislator transmits to the interpreter to allow him, in the ambit of a wider discretion, to update the right, also by identifying (where allowed, as in the case of personal, non-mandatory rights) new areas of protection of interests. In this way, with obvious application of the typical hermeneutical model of the *interessenjurisprudenz* (the so-called jurisprudence of interests, as opposed to the *begriffsjurisprudenz* or jurisprudence of concepts as an expression of an exasperated legal positivism), one avoids the risk inherent in the so-called closed system (entirely codified and based on the textual data only of the legislative provisions without any room for

[105] C. Castronovo, Autonomia privata e Costituzione europea, op. cit., 55 ss
[106] L. Mengoni, I principi generali, op. cit., 323.

autonomy for the interpreter), the lack of immediate adaptation to the evolution of time, and the risk that involves the so-called open system, which puts the creation of said norms to the judge on the basis also of socio-juridical parameters (ethical order, social conscience, etc.) whose evaluation can become arbitrary and uncontrolled.

The interpretative role of the judge, his limitations, his *vis expansiva* are therefore functionally connected to the constitutional order of our system as a rule of law also characterized by the Rule of Law (that is to say from the principle of legality). By means of a constant dialectic with extra juridical reality, and international law, the general clauses, therefore, are confronted with dogmatic axioms, and transmit an evolutionary ability and relativity necessary to maintain consistency with the order.[107] For those that concern the clause of good faith in particular, it deals with the specification of the binding duties of social solidarity protected by the legal system: its role is that of general directness.[108] The consideration of this principle involves issues related to contractual justice.[109] The invitation is to find a link between constitutional principles and private rules. In this regard, Article 1366 and following, of the Italian Civil Code, could be considered a norm suitable to filter the needs of the concrete case with the fundamental rights and freedoms: the use of good faith would allow one to go back to the general principles of the law. The value in question is, therefore, in its ability to adapt to the needs of reality, perfectly in accord with the legal codes marked by special laws and constitutional roots. In this regard, there is a triumph of rules aimed at regulating the contract in general, rather than rules aimed at settling individual contractual types,[110] and that the content of the contract, an evaluation is worked out in the first place, no longer directed to the element essential the contract will or the cause, but to the general clause of good faith, allowing one to identify the effective power positions of the parties.[111] Good faith would prove, therefore, not subject to the market, but becomes a valid means to define the relationship between use and abuse of contractual autonomy, because it is able to reflect the complexity of the legal and factual context,

[107] S. Rodotà, Le clausole generali nel tempo del diritto flessibile, in AA. VV., Lezioni sul contratto, raccolte da A. Orestano, Torino, Giappichelli, 2009, 106 ss.

[108] P. Barcellona, Buona fede e abuso del diritto di recesso ad nutum tra autonomia privata e sindacato giurisdizionale, in Giur. comm., 2011, 295; F. Galgano, Qui iure suo abutitur neminem laedit?, in Contr. e impr., 2011, 311; G. D'amico, Recesso ad nutum, buona fede e abuso del diritto, in Contr., 2010, 11.

[109] In the German experience, the Federal Constitutional Court has derived from the principle of individual freedom in Article 2 of the Basic Law the need to protect the contractual determination of the weakest subject where there is a disparity in bargaining power. The use of the courts of the general principle of good faith and opposition to the *mores facie* has been so legitimized in order to achieve incisive control of the content of the contract to the point of declaring a possible nullity.

[110] P. Sirena, La categoria dei contratti d'impresa e il principio della buona fede, in Riv. dir. civ., 2006, 424 ss.

[111] F. Macario, La Commissione e le "opzioni" per l'armonizzazione del diritto europeo dei contratti: alla ricerca dei "principi comuni" ("opzione II"), in Diritto privato europeo, fonti ed effetti, materiali del seminario dell'8-9 novembre 2002, raccolti da G. Alpa G., R. Danovi , Milano, Giuffrè, 2004, 106.

to satisfy the needs of the fundamental values of the person.[112] Then, the point of connection between the constitutional order and the private sphere can express itself also in the rules of the civil code, which establishes the invalidity of businesses that are contrary to mandatory standards or public order.[113]

The use of such tools in judgment could result in effects similar to the so-called *Drittwirkung*.[114] The variability and adaptability of their contents with respect to the needs of society raises them, in fact, to the category of principles. Specifically, public policy must be understood as the social order, which in the legal-naturalist conception protects certain fundamental positions of the individual, and which detects its individualistic connotation, that is, in the relations between citizens. Moreover,the social order cannot but recall the importance of respect for fundamental rights, which, from this point of view, would rise to general interest in the context of private relations, to limit private autonomy in the sense that this autonomy should not be conflict with this principle. One part of the jurisprudence has made an interesting distinction between internal public order and international public order: the first is composed of he fundamental ethical social principles of the community in a given historical moment and the immanent principles of the most important legal institutions. The second, it has been said, consists of the universal principles of the protection of fundamental human rights. On the relationship between public order and morality[115] the minority doctrine holds that when ethical judgment involves a fundamental value of the legal system, the opposition to good morals and public order may coincide, while the majority believes that between good morals and public order still exists a substantial ontological difference, and a different criterion of evaluation inasmuch as "one pertains to the notion of social morality, while the other remains anchored, instead, to the fundamental principles of the order."[116] Moreover, "while public order expresses political choices of the legislature, the principles of morality are, however, of extralegal nature as they arise from social reality."[117]

With respect to the incidence in the Italian legal system of public order, the clause in question is referred to in many articles of the Civil Code. First, Article 1343 provides that the cause is unlawful

[112] E. Navarretta, Buona fede oggettiva, contratti di impresa e diritto europeo, in Riv. dir. civ., 2005, 537.
[113] V. Crisafulli, Diritti di libertà e poteri dell'imprenditore, in Riv. giur. lav., 1954, 70
[114] P. Perlingeri, Il diritto civile nella legalità costituzionale, Napoli, Edizioni scientifiche, 1991, 459 s.
[115] From the point of view of comparative doctrine and jurisprudence, the French doctrine, unlike the Italian, found public order, based on social policy and morality, on an ethical basis, a unitary concept. Then, the German Civil Code, BGB, focuses its attention exclusively on morality: in this context *gute sitten* represents a kind of behavior derived from a moral duty that is the reflection of a reality that in change always tries to adapt to core values that make up the order architecture. In the common law system, however, on doubts the possibility of finding a precise appropriate category to describe good customs, sometimes using the notions of lawlessness and public policy.
[116] F. Di Marzio, I contratti in generale, Torino, Giappichelli, 2006, 249 e ss.
[117] V. Roppo, Trattato di diritto privato, Il contratto, Milano, Giuffrè, 2001, 399 e ss.

when it is contrary to the mandatory norms of public order or morality.[118] Therefore, Article 1418 and following establishes the nullity of the contract as contrary to mandatory law or unlawfulness of the cause, due to its opposition to public policy. However, Article 5 provides that “acts of disposition of one's body are prohibited when they cause a permanent diminution of physical integrity or are otherwise contrary to law, public order or morality.” Finally, Article 1354 provides for the nullity of the contract to which is attached a condition, suspension or termination, contrary to mandatory law, public order or morality. As a conclusion to these issues, in Italian private law the place of emergence of fundamental rights, which limits the autonomy contract, should be primarily on the on the contract’s denounced nullity as being contrary to mandatory law, public order and morality. However, from a verification of the table of values that the legal system would like to promote through the denunciation of the commitments assumed by the contract in violation of ethical rules, the results provided have so far been unsatisfactory.[119]

[118]Unlike the mandatory provisions have the advantage of the obligatory nature; public order and morality share the nature of general clauses.
[119] G. SMORTO, *Autonomia contratuale e diritto europeo* [Working Paper].

CHAPTER II

THE EVOLUTION OF CONTRACT AND TORT LAW IN EUROPE. THE IMPACT OF FUNDAMENTAL RIGHTS IN THE LEGAL SYSTEM AND THE PROSPECTS FOR RAPPROCHEMENT WITH RESPECT TO MODELS OF CIVIL LAW: TOWARDS THE ROAD OF THE "HYBRIDITY".

The legal institutions of contract and civil liability have had a profoundly different development in Europe over the years. The search for a more homogeneous system, both in the stipulation of contracts and in the relative tort law, represents a search for "hybridization of systems", the main topic of this research.

SECTIONS: 1 - Contract and Tort Law; 2 - Breach of contract in English law; 3 - Contractual liability; 4 - Tort and Contract in comparison

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This chapter looks at how (a) contract law evolved from the 19th century dogmatic approach to the modern constitutionalization of private autonomy (Italian system, European system) and (b) tort law developed under the influence of human rights to embrace concepts such as *danno biologico* and *danno esistenziale.*

In the Italian legal system, the contract is configured as a negotiating agreement with a patrimonial content. The Civil Code of 1942 elaborates the general discipline and some special disciplines related to typical case.

The distinction between typical and atypical contracts, still present in the regulatory text, tends to be superseded by the doctrine and jurisprudence through the enhancement of the criterion of worthiness of protection, calibrated on the elements of reasonableness and proportionality.

From the conception of the contract as a direct expression of the will of the parties, that relied almost completely on the dogma of the will and the inviolability of private autonomy within the limits of worthiness, it's switching to a vision of the negotiation rules as the result of the convergence of sources beside the point of private will.

Also with regard to civil accountability, that the Italian code builds on the Romanistic principle of *neminem laedere*, recognizing a central role to fault as a criterion for attribution of accountability, the doctrine and jurisprudence have denounced the inadequacy of the code.

The interpretative elaboration has identified additional criteria for attributing accountability that, in front of a detrimental act deserving compensation, it may also be "with no-fault". In some cases, but

in a controversial way, it’s also configurable the objective accountability, that overtakes the concept of unjust prejudice as *damnum datum iniuria* towards assessment of damage injustice from the point of view of the victim and, therefore, regardless of the agent conduct.

Established in jurisprudence is the rule that compensation is closely anchored to the damage that has to be remedied, because it must not be solved in an enrichment for the damaged. This prevents, in the Italian system, the transposition of settings, proper of common law systems, that give to the civil accountability not only a compensation function for damages, but also deterrence one with the ability to configure the "punitive damage".

Throughout this section it is necessary to refer to the characteristics of the system of English common law, outlining the profiles of divergence from the continental systems and possible solutions to start a gradual rapprochement.

In this regard, it should show up as the Anglo-Saxon experience in contract differs considerably from that of the countries of the Roman tradition, in several respects, resulting primarily from ideological and functional spaces based ordering, also influenced by the original connotation sociology and anthropology of the different peoples of Europe.

In fact, the strong influence of English into economic issues and trade, you did not build the discipline of the contract as exclusive expression of the will of the individual, emphasizing by contrast profiles "relational" related to the performance of the negotiation relationship, understood as tool for achieving the highest individual profit.

Therefore, notwithstanding, even the English system is based on the principle of pacta sunt servanda, it undergoes an influence far less - than is the case in the context of civil law systems - the voluntary dogma, which identifies the basis for the contract binding agreement, meaning the fusion of opposing the will of the parties.

So, unlike what happens in the legal continental (France, Italy, Malta), in which the content of the contract is "crystallized" at the time of its conclusion - that may be affected without changes (or rather adaptations) during the course of the relationship negotiations - in the system of common law is paying more attention to the dynamic profile and relational contract, I mean the same as the first "relationship" between the parties, rather than as a "static agreement."

Shifting the focus from the context of contract law to the civil liability (tort law) the differences are even clearer: in continental legal systems - inspired by the Roman tradition - the liability system is characterized by a tendency to recognize the centrality of the subjective for the affirmation of

responsibility and for the exclusive function of the compensation as a means to "repair" the damage; into the common law, the civil liability system is characterized by a more intense feature "preventive" aimed at preventing the outset verification of the damage, through the provision of tools to play the role of "deterrent" (think of the punitive damages) with respect to behavior prejudicial and broader forms of accountability "objective".

This basic situation has led to the traditional conflict in contracting, including the systems of common law and the Civil law jurisdictions, whose differences in the past seemed unbridgeable.

However, in the historical context - in which the demands of the market have reached a "global" dimension and at the same time the Human Rights are recognized as supreme values of all democratic systems in the world - is at the interpreter is responsible for investigating about the possibility of a rapprochement between traditional systems of civil law and common law., which tends ultimately to a mixed or hybrid model in which the two different components come together in a relationship of balance.

CHAPTER II

Section 1

CONTRACT AND TORT LAW

SUMMARY: 1 - The contract in the Common Law system (Classification; Common Law contract requirements; Contractual invalidity); 2- *Tort Law* (Types; On non-contractual tort/delict)

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1 - The contract in the Common Law system

The contract in common law is not subject to a specific and unambiguous definition as instead provided by the Italian legislator in Article 1321 (The contract is the agreement of two or more parties to establish, regulate, or terminate a patrimonial legal relationship between them).

In general, the *contract* must be distinguished from:

- A *promise,* which is a preparatory element to the formation of the contract and expresses the declaration of the parties to assume a legal obligation.
- The *agreement* that is the accord between the parties.

According to Professor Patrick Atiyah[120] (*Essays on Contract*), the contract is based on its fundamental core which is the *bargain*: a negotiation between the parties that can produce an *agreement*of an exchange of promises with a subject matter (*consideration*), and is moreover subject to economic evaluation.

1.1 - Classification

Contracts can be divided into

- *Contracts of record*: legal obligations that binds the parties by judgment of the courts. They are enforceable measures of the judicial authority, and can be Recognisances or Judgments of a Court of Record.
- *Contracts under seal*: literally contracts with a seal. These are contracts that require a written and solemn form, that of the *deed*, which requires the presence of witnesses and delivery to the other party. In this case the *consideration* may be missing, so such acts are often used for unilateralcontracts for donations, or for waivers of a right and are free of charge.
- *Simple contracts*: as the name suggests, these are simple contracts subject to the general rules.

[120] Atiyah P., Essays on Contract, Clarendon Press, 1986.

Depending on the execution mode:

- *Transaction contracts*, if instantaneous, for example, that which covers buying and selling an asset.
- *Relation contract*, if of duration, for example that covering an employment relationship.

Based on the *consideration*:

- *Executed contracts*: contracts whose obligations have already been fully or partially performed.
- *Executory contracts*: contracts whose obligations are still unfulfilled.

The distinction is relevant since the courts apply many provisions on contracts in different ways, depending on the stage of performance of the contract reached by the parties.

1.2 - Common Law contract requirements

The *Agreement* is reached when the offer and acceptance are exactly the same.

The offer is the offeror's promise to assume a specific obligation towards the counterparty and may be brought to the attention of the addressee in oral, written, or conclusive form. An offer to the public is an offer, which must contain all the information necessary for the conclusion of the contract to any undefined addressee. In Common Law, the goods on display in shops are not offered to the public, but are an *invitation to offer*. In Italy, however,it is the opposite.

Acceptance must take place within a period of time that may be fixed by the offeror; in the event of acceptance after the deadline, the offeror may reserve the right to accept but may notify the offeree accordingly. If the acceptance is different from the offer, there is a counter-proposal.

In addition, all statements of fact are deemed to be known to the recipient when they reach his address unless he proves that he was unable to receive them for reasons not attributable to him (as is the case in Italy in Article 1335). An exception to this principle is the Mail Box Rule: in the case of acceptance by post, this is deemed to have been adequately communicated on the date on which the offeror completes the letter (the postmark being taken as proof). The risk of non-delivery therefore lies with the provider. The revocation of the offer can be made as long as before the acceptance of the offeree (in the mail box rule before the letter is filled in). Withdrawal of acceptance is excluded in the mail box rule, while in other cases it must persuade the offeror before the declaration of acceptance (which is difficult to achieve).

In addition, an offer may be withdrawn under these conditions:

- Non-acceptance or rejection of the offeree

- Expiry of any time limits set by the proposer, failing which, reasonable time limits shall be deemed to have been observed
- Failure to comply with a suspensive condition

The parties in the pre-contractual negotiation are bound to respect the *duties of disclosure*, the pre-contractual duties.

In addition, there are situations where the circumstances or the nature of the words used mean that an invitation to treat is an offer as in the case where attached to an object there is the word *special offer*: 10 euros only to the first 10 customers. In fact, this represents a specific offer that can only be accepted by the first 10 customers.

The ***certainty*** expresses the willingness of the contracting parties to actually want to create legal links between them. They can regularly stipulate that the agreements have no legal value even if the contract is *fair*, that is, it is valid and meets all legal requirements. That's the case with the *Gentlemen's Agreements*.

It may also happen that the contract does not have objective certainty in the definition and execution of services, i.e. there is an excessive vagueness of terms and therefore the *intention to create a legal relation* would be lacking. In this case it is flawed by uncertainty and therefore invalid.

Problems in this respect may arise from the *contract to make a contract*, corresponding to the English preliminary contract. This as its own contractual figure is unknown under English law, but is admissible because the parties would refer to a contract already formed by filling the certainty with the previous act.

Letters of Intent or *Letters of Interest* are pre-contractual communications between the parties with which they exchange information, formulate summaries of the points examined and therefore have no binding value (uncertainty). Or they can be considered contracts in the true sense of the word, and therefore wrongly called letters of intent. The problem is therefore transferred to the subjective sphere of the contracting parties and is resolved by case law on a case-by-case basis through ad hoc “construction”.

The ***consideration*** shall express the counter performance provided by the counterparties. It is a fundamental requirement in common law because a contract cannot be imagined without an exchange of services between the contracting parties. Unilateral contracts, i.e. contracts with

obligations on only one of the parties, are contracts without consideration and therefore, under English law, it is possible to assume them only through the written and solemn form of contracts under seal. The consideration is remotely similar to the "Causa" in civil law systems, i.e. the ultimate objective reason for a contract typified by the Italian legislator.

The consideration can be executed: where the consideration is unilateral on the part of the sole promisor. When the promissory performs the service requested by the promissory, the performance constitutes a constraint for the promissory and there is *executed consideration*. If, for example, Tizio promises Caio to pay 100 euros if he returns the lost suitcase to him, when Caio finds it and returns it to him, Tizio is bound by the promise and will have to pay 100 euros.

The consideration can then be *Executory*: When the two parties make mutual promises about a future exchange and the consideration of one is the guarantee of performance for the other. When one party fulfils its obligation, its consideration becomes executed, when the other party also fulfils its obligation there is *discharge by Performance*, i.e. the contract is fulfilled.

It should also be noted that if one of the services subject to consideration has already been fully performed before the promise, it cannot be considered binding under the principle *past consideration is no consideration*.

The ***object*** is the service that one party is obliged to perform in favour of the other or the right that is transferred from the contract, and as in Italy (Articles. 1346 *et seq*.), must be:

- Legitimate, i.e. not contrary to mandatory rules;
- Possible, i.e. execution must be possible without excessive costs for the counterparty;
- Determined or determinable in relation to quantity and quality.

The ***form***, in most cases, is left to the discretion of the parties under the principle of the Freedom of Contract.

Exceptions are contracts under seal and certain *ab substantiam* forms. Contracts under seal have already been discussed, while*ab substantiam* forms are contracts that must be drawn up in writing under penalty of nullity (*Void Contracts)*. These relate to contracts for the transfer of movable property for guarantee purposes and Consumer Credit Agreements. Finally, contracts for the

transfer or use of real estate are required in writing but as a requirement for legal action (*Forma ad Probationem*) and therefore are not null and void. The form is the legal structure of the contract.

1.3 - Contractual invalidity

Incapacity of Contracting Parties

Contracts with minors: contracts concluded by those who fall into this category are only binding if they deal with *necessaries*, i.e. acts aimed at maintaining their social status (e.g. purchase of clothes, food). The other acts that are not part of this set are instead voidable by the minor in the course of his or her minor age or within a reasonable time after the completion of majority. Mental Illness and *Drunkness*: in principle, the sick, the natural and legally incapacitated, and the drunk are those who are in a state of incapacity due to their fault (drunkards or drug addicts). In both situations, the negotiations they have concluded are valid and binding unless the other party was not aware of the state of incapacity and therefore a wilful intent can be recognised. In this case, the contracts may be cancelled at the request of the injured party. Furthermore, contracts with persons who are subject, under the Mental Health Act of 1953, to asset conservation instruments with a judgment adopted by the court are not binding and have no effect on the subjective legal sphere of the person concerned.

Misrepresentation

The object of misrepresentation is the communication of false information to the other party on the contractual transaction that has been put in place, such as to induce or have led to the formation and declaration of its consent in a decisive manner. The misrepresentation can be *innocent* in the case where there was unknowingly the communication of such news;*negligent* in the case of negligent omission or failure to verify the truthfulness of the information; *fraudulent* if it occurred with the knowledge and with intent to harm the interests of the other party. In any case, the misrepresentation must have as its object an essential character of the contract (a fact) and not a statement of intention. The remedies are first and foremost a Rescission for Misrepresentation, i.e. cancellation of the contract at the request of the injured party. This is granted at the time when the contract has not yet been performed or if the injured party has the opportunity to repeat the service received. It must also be requested within a reasonable time after the conclusion of the contract. The rights of third parties who have acquired for valuable consideration and in good faith are reserved (not, however, in the case of a void contract, null and void). Damages are always connected to Rescission (even in cases where they are not granted).

The *damages* can be requested through several means.

- *Damages for fraud at common law*: this is for fraud misrepresentation and is an action in tort (of a non-contractual nature and therefore even if the contract has not been concluded the party is liable for non-contractual tort).
- *Damages for negligence at common law*: this is similar to the first but responds to negligence misrepresentation and the claimant has the burden of proving the special relationship with the other party.
- *Damages under Misrepresentation Act* 1967 and *Damages in Lieu under MisrepresentationAct*: These are actions granted by the enactment of the Misrepresentation Act (a statute law). The first is granted for fraud and negligence and allows, compared to the common law ones, an easier proof for the plaintiff (proof only of the existence of the contract and the false news) while the second action is granted only for innocent misrepresentation and does not provide for the possibility of cumulation with rescission (for which the victim chooses either the damages or the cancellation).

Finally, if there is a *serious misrepresentation*, i.e. if it is serious and affects a condition of the contract, a termination for breach of condition (termination) may occur, which means the termination of the contract (not the cancellation). This allows the accumulation not only of the reliance on and restitution damages but also of the *expectation damages* (i.e. damages for loss of profit) for the victim of misrepresentation. If the misrepresentation strikes instead a warranty (for example, a *breach of implied warranty of authority*, that is, where an agent is a *falsus procurator* claiming to act in the name of a non-existent principal) there is only compensation for damages without termination against the party who committed the violation.

2 - *Tort Law*

A tort, in law, is that particular delict consisting in the violation of a rule protecting a private interest to which a civil sanction follows.

In the common law systems, the so-called punitive damages add an afflictive element to the compensatory nature of civil sanction and areaimed at reintegrating the damage suffered by the person having the protected interest.

Following the commission of a tort or delict by a person, the latter is liable for the *civil liability* or duty of a person to be subject to the civil penalty. The term, however, is also used with a broader meaning, to indicate the entire legal institution constituted by the rules that, in a given system, regulate the civil offence.

2.1 - Types of Tort

Within the general category of tort a distinction is made:

- The *tort of a contract*, consisting in the violation (*breach*) of an obligation which the offender had towards the person who suffered the damage, an obligation which often but not necessarily derives from a contract (so that the name traditionally used is reductive);
- The *non-contractual* (or *Aquilian) tort*, in which, on the other hand, the duty violated is different from a pre-existing obligation of the injured party towards the injured party. In some civil law systems (e.g. France and Spain), non-contractual civil offences are divided into *offences* and *almost offences*; in others, this distinction has not been accepted or maintained and is referred to as *illegal acts* (e.g. in Italy), or *unlawful acts* (e.g. in Germany and Switzerland) even though, strictly speaking, any offence, including criminal offences, can be considered as having been committed and, except in cases of strict liability, as having been committed unlawfully.

2.2 - On non-contractual tort/delict

Various jurisdictions adopt different criteria to identify which duty, if breached, constitutes a non-contractual tort:

- In most civil law systems, any damage caused by negligence is illegal. In these jurisdictions, which follow the French model, the duty infringed is, therefore, the prohibition to cause such damage, imposed by a general rule (principle of *atypicality*).
- In Germany, damage caused by fault in breach of an absolute right is unlawful. In this system, therefore, the duties violated are only those related to a right in rem or another absolute right (such as a right of personality) attributed by a specific rule (principle of *generic typicality*);
- In Italy and Albania, the Civil Code contains a general rule similar to that of the legal systems where the principle of atypicality applies, but which limits the possibility of compensation to *unjust* damages only. The Italian doctrine and jurisprudence first understood unjust damage as damage to an absolute right and then aligned itself with the principle of generic typicality. Now, however, they understand it as damage to an interest worthy of protection according to the legal system, adopting, therefore, a principle of atypicality, even if delimited.
- In the common law systems there is a series of *torts*, each with its own discipline, based on a precedent that recognizes the relative action (principle of *specific typicality*), even if the *tort of negligence*, which follows the violation of an absolute right and is therefore similar to the typical generic tort of the German system, has ended up assuming an increasingly widespread role. It should also be kept in mind that, in the absence of precedents, the judge may consider an injured interest worthy of protection, thus recognizing a new action for *tort* (which introduces an aspect of atypicalness in the system). In any case, the duty of care breached is a *duty of care* of the injuring party towards the injured party.

It follows from what has been said that the traditional criterion of distinction between contractual and non-contractual tort, dating back to the Savigny, according to which the former would result in the violation of a relative right and the latter in the violation of an absolute right, is not appropriate for a system such as the Italian one based on the principle of atypicality, except to configure each interest that in this way is protected as falling on an object of absolute right of the injured party.

CHAPTER II

Section 2

BREACH OF CONTRACT IN ENGLISH LAW

This section specifically concerns the provisions regarding the legal institutions of contract and tort law, with a particular focus on the common law reality.

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Before dwelling on the comparative analysis of the breach of contract between the systems of civil law and common law, it seems appropriate, albeit necessarily in a synthetic way, to define the notion of contract in the English system.

It is good to premise that the concept of "contract" according to common law does not totally coincide with that of our civilistic system.

In the English legal system, in order for a promise to give rise to a legal obligation, it is required that it be the subject of an exchange, that is to say, it must include the consideration. A classic definition of a common law contract is "agreement supported by a consideration".

Consideration may be defined ascompensation, given or promised, to obtain the commitment from the other party; it does not constitute the consideration or the cause of the contract as understood in Italian law.

Consideration consists essentially of a sacrifice or a burden which is economically assessable and which, in turn, is the counterpart to another service or promise of service, which is also economically assessable.

In the Oxford Dictionary of Law, consideration is defined as: "an act, forbearance, or promise by one party to a contract that constitutes the price for which that party buys the promise of another".

It is very interesting to note, from a linguistic point of view, that there is a wide range of terminology for indicating the contract.

The English speak of agreement, deed, and covenant. But each of these terms has nuances that distinguishone from the other. Agreement is the general term used to identify a meeting of wills between two or more parties ("a manifestation of assent by two or more people to a course of action"), which can be used as a synonym for 'contract'when it contains the elements ("an agreement is normally enforceable only if it meets the requirements of a contract").

By deed we mean the formal written act ("the legal document which has been signed, sealed, and delivered by the person making it"). Covenant, on the other hand, better represents the content of a contract ("agreement or undertaking to do something or not to do something contained in a deed or contract").

But what happens when the parties do not fulfil the contract? Unforeseen circumstances for which the debtor is not responsible may make the performance of the service due to him unlawful, impossible, or pointless and may therefore lead to the termination of that contract, to the exclusion of the debtor's liability. The common law system has developed the so-called doctrine of frustration, which has no counterpart in civil law systems, according to which the cases of non-performance due to circumstances that have arisen are not attributable to the debtor (instances of frustration), to which the courts link the termination of the contract. It can be divided into different categories depending on the cause on which the non-performance depends. It should be noted that the doctrine of frustration is practically applied in a very elastic manner.

One of the causes of frustration of the contract is the illegality, which, after its conclusion, affects either the object of the service, or the performance of the service itself. This may be, for example, a legislative act prohibiting the performance of a particular service or an administrative act.

Another cause is the material destruction of the object of performance, such as the fire in the famous *Taylor v. Caldwell* case, which made history in the doctrine of frustration. In this case, the actors had obtained from the defendants the use of a music hall to organize concerts, but before the start of the performances the building was destroyed by fire. The question of law concerned which of the parties, the owner or the organiser, had to bear the damage for non-use of the property. The English Court decided that nothing was due to the owners of the building arguing that, if the achievement of the purpose of the contract is subsequently made impossible by a cause beyond the control of the will, and to which one cannot resist, then the contract is extinguished and the parties are released from their obligations.

Another cause of termination of the contract for frustration is the failure ofoccurrence bythe assumption constituting "the real basis of the contract".

This principle emerges from the famous historical case *Krell v. Henry.*K. leased to H., for the two days destined for the festivities for the coronation of Edward VII, a room whose window, facing the Pall Mall avenue through which the royal procession was to pass, would have allowed him to attend the procession. Both parties agreed on the purpose of the lease, but their intention did not result

from the contract; part of the price was paid at the time of conclusion and the rest was to be paid after the ceremony.

However, since the coronation had been postponed due to an illness of the sovereign, the contract was deprived of its substance and, despite the landlord's claim to payment of the entire agreed price, it was declared terminated on the grounds that “the Coronation procession was the foundation of this contract”.

The English system, however, provides for the inapplicability of the doctrine of frustration in some specific cases. One of these occurs when the contractor, whose performance has become impossible due to a circumstance that has arisen, has concluded the contract by making a specific commitment to perform it in any case by bearing on himself the responsibility for any non-performance, whatever its cause. Another case arises where the cause of the non-performance, which arose, constituted a risk inherent in the contract from the time of its formation, a risk that the parties knew or ought reasonably to have known.

Another case is when the contracting party invoking frustration, alone or together with the other party, has given rise to the occurrence of a circumstance that makes it impossible to perform the contract and substantially alters its functionality. In such cases, we speak of self-induced frustration.

The effect of the application of frustration is the automatic termination of the contract and the discharge of the parties from their contractual obligations. Originally, the common law system did not provide for the return of sums paid. However, the Law Reform Frustrated Contracts Act of 1943, which established the obligation to repay the sums paid unless otherwise agreed, modified this strict principle.

Other rules apply to cases of non-compliance for which there is liability.

The term breach of contract is generally understood to mean the contractual non-fulfilment attributable to the debtor's wilful misconduct or fault.

A distinction is made between actual and anticipatory breaches. Actual breach is the actual or already implemented breach. This occurs when, on the agreed date of expiry, the objective fact of non-execution of the contract for a reason attributable to the liability of the debtor contractor occurs.

Such non-performance can be absolute, fundamental, or vital breach, when the non-performance is so serious as to radically affect the balance of the relationship; the non-performance must be such “that goes to the root of the contract”.

Where, on the other hand, there is a relative non-performance or defective performance, the non-performance is not such as to alter the balance of the contractual relationship.

An anticipatory breach is a default that is earlier than the time of the debt's pre-established maturity. This occurs when there is an explicit declaration by the debtor that he does not want to fulfil his contractual commitment on time, and this is referred to as explicit repudiation.

Or it occurs when the same debtor, always before the expiry of the time of performance, behaves in such a way as to be incompatible with his willingness to comply with the commitment made.

An important note to make is that the non-performance never constitutes a breach of contract for which the debtor can be held liable when such conduct is performed in good faith and has a legitimate excuse. It has been stated: “there is no breach when non-performance of a contract is justified by some lawful excuse”.

Obviously, the contractual creditor suffers damage as a result of non-performance.

If such damage is not economically assessable, the creditor shall only be entitled to damages for nominal damages on an indicative basis.

If, on the other hand, the damage is economically assessable, the remedies offered by common law that can be exercised as an alternative are: compensation for the damage or the right to reimbursement of the value, *quantum meruit*, which means “so much as the thing is worth”, of what the creditor has performed in favour of the defaulting party.

In order for the damage to be regarded as recoverable, it must first be a direct and immediate consequence of the non-performance. The Court carries out the so-called “test of remoteness damage”, according to which compensation for damage which is “too remote”, i.e. in terms of causality, too far from the fact of non-performance, is excluded.

The damage must then be foreseeable at the time of the conclusion of the contract.

The extent of the damage, the quantum, must be finalised “to put the victim, so far as money can do it, in the same situation as if the contract had been performed”. Therefore, the general principle is that of *restitutio in integrum*.

Today, after a long period of legal uncertainty, a certain factor in the determination of the quantum also involves the moral or psychological damage, “the disappointment, the distress, the upset and frustration caused by the breach”.

Another element that affects the assessment of the compensable damage is the possible presence of a contributory negligence, i.e. a contribution of liability by the creditor with respect to the event prejudicial to him.

Another aspect is the respect of the so-called “duty to mitigate damage suffered”, according to which the creditor who suffers the non-performance must take the appropriate measures not only not to aggravate the harmful effects of its prejudice but also to mitigate them.

As far as compensation clauses are concerned, the common law system distinguishes between penalties, a clause aimed at penalising the non-performing party, and liquidated damages, a clause which results in the early settlement of damages, i.e. the parties can agree in advance, at the same time as the contract is drawn up, on the determination of a sum to be paid in the event that one of the two parties fails to fulfil its obligation.

In addition to compensation for damages under the common law system for non-performance, the equity rules provide for specific performance.

The order addressed to the defaulting debtor to execute his obligation in a specific form, the so-called “decree of specific performance”, is exceptional in the English contractual system, especially because of its direct impact on the freedom of the person.

Its equitable nature means that it can only be granted if there is no “adequate remedy at common law or under statute”.

For this reason, lawyers consider the specific performance as a remedy “supplementary to the common law remedy of damages”.

The granting of the said measure, then, is subject to the impeccable conduct of the creditor, who must present himself to the Judge “with clean hands”.

This remedy is usually granted for contracts relating to the purchase of bonds or shares, while it is not granted in contracts for the sale of goods or in those *intuitu personae*.

Another remedy provided by equity, even in situations of contractual default, is injunction.

This remedyhas no corresponding equivalent in our system and can be defined as the order by which the Judge imposes an obligation to do or not to do, the violation of which constitutes a “contempt of court” crime.

The remedy in question can take the form of a prohibitory injunction when it contains the order not to do, that is, not to violate the negative commitment during its duration, such as that addressed to a

journalist who, (although fired) was still under contract with his newspaper, had begun to write for a competing newspaper (*Evening Standard v. Henderson*, 1986).

On the other hand, a mandatory injunction is defined as a measure taken to order the elimination of what has been performed or done in violation of a negative contractual obligation.

At the end of this brief excursus, it seems appropriate to return to some linguistic aspects relating to the definition of "damage" and "compensation".

Legal English, in fact, uses the term damage to understand the damage, which should not be confused with damages that indicates, essentially, but not only, the compensation.

Damage and damages are correlative, in the sense that the first causes the second.

The terminology, however, is equivocal because damages can indicate both the compensation and the plural of damage.

However to understand "restitution" it is very common to also find the term "compensation" understood as "payment made by someone to cover the cost of damage or hardship which he has caused".

CHAPTER II

Section 3

CONTRACTUAL LIABILITY

This section focuses on civil liability and its prediction in different systems, with a comparison between models, in order to highlight the natural convergence between the common and civil law systems on the subject (therefore towards another example of "hybridity").

SUMMARY: 1 - Contractual liability in Italian law; 2 - The German model; 3 - The French model; 4 - The Common Law Model; 5 - Convergence between the Common and Civil Law systems?; 6- Contractual liability: compensable remedies and damages.

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1 - Contractual liability in Italian law.

The term "contractual liability" means the set of rules relating to the obligation of the contractor, who has not properly fulfilled the performance derived from the contract, to make good the damage that this failure, in whole or in part, has caused to the other party.

In fact, if a contractual obligation (of whatever nature and that is, to do, not to do, or to give) is not respected, the law provides that the debtor is subject to liability for damages caused by his behaviourwhich does not conform to the contractual commitment assumed. In most cases, this reparation is made as an “equivalent”, in the sense that the original obligation will be replaced by the pecuniary obligation to compensate for damages. Sometimes, however, “forcible performance” or “in a specific form” are possible, through which the creditor obtains the same result as would have been achieved with the spontaneous performance of the debtor (see Articles 2930 and 2933 of the Italian Civil Code).

This type of liability, known as contractual liability because it derives from the contract (or, more precisely, from the breach of contract), differs from the so-called non-contractual liability, resulting from tort, pursuant to Article 2043 *et seq.*[121]

Contractual liability and non-contractual liability are the two different branches of civil liability. They seem different not only because of the different source from which they originate, but also because of the different legal regime provided by the law for both types of liability. In particular, they differ in the burden of proof for the claimant and the defendant in the two different actions, the

[121] Di Majo A., *Contractual liability*, Turin, 1998, 25.

applicable limitation period (ten years for contractual liability, five years for non-contractual liability), and the nature of the damages that can be compensated.[122]
In our Civil Code, the regulation of liability for breach of contract has its core in the provision of Article 1218, which provides that the debtor who does not perform exactly the service due is liable for damages if he does not prove that the default or delay was caused by impossibility of performance resulting from a cause not attributable to him.
This provision is in line with Article 1256 of the Italian Civil Code, which states that the obligation is extinguished with full discharge of liabilities for the debtor if performance becomes impossible for a reason not attributable to the debtor.
It follows from the above rules that the creditor may claim damages for non-performance on the basis of simple non-performance or incorrect performance. The debtor may, however, relieve himself of his liability by proving that his obligation has been extinguished as a result of the impossibility of performance for reasons for which he is not responsible.
More clearly, in order to achieve the liberating effect, the debtor must provide double proof, namely, on the one hand, that the performance owed by him has become objectively impossible and, on the other hand, that that impossibility is due to reasons for which he is not responsible.
Unattributable cause is, in general, any event that was not foreseeable and avoidable using ordinary diligence, pursuant to Article 1176 of the Italian Civil Code. Normally this type of event coincides with the concepts of “fortuitous case” or “force majeure”.
It seems appropriate to point out that the aforementioned diversification between contractual liability - described so far - and extra-contractual non-contractual liability (also called Aquiliana by the Roman lex Aquilia, which consecrated the principle of *neminem laedere*), even though it is founded and can be found on the level of the current discipline, has progressively lost its original importance, given the many rethinks to which it has been subject both by the doctrine and by the jurisprudence.
In this regard, the so-called “theory of cumulation between the two forms of responsibility” deserves to be mentioned, according to which the same conduct can, at the same time, integrate the violation of a contractually established precept and of the general rule of*neminem laedere*, pursuant to Article 2043 *et seq.*[123].
At the same time, it must be said that the distinction between the two cases under examination is also weakened by a phenomenon that the doctrine has defined as “osmosis” between the two forms of civil liability.

[122] P. Station, *Private Law. Institutional Features*, Turin, 2003, 250.
[123] Monateri P.G., *Cumulo di responsabilità contrattuale ed extracontrattuale*, Padova, 1999.

Through the technique of so-called “protection duties” (imported from the German model) which are derived from the principle of good faith (Articles 1175 and 1375 of the Civil Code), it is possible to extend the rules of contractual liability (generally more advantageous in terms of the burden of proof and the limitation period of the action) also to interests that are not contractual in the strict sense but which are related to the interests deducted in the contractual agreement.
The same applies to the theory of “social contact” through which the system of liability for breach of contract is applied even when formally there is no direct contractual relationship between the aggrieving party and the aggrieved party.
Finally, we cannot fail to point out the birth of many[124] “special liability” figures - such as those deriving from the exercise of dangerous activities, from the circulation of vehicles, from things in custody, from defective products and so on - with respect to which there is a sort of mixture between the two different regimes of civil liability undoubtedly oriented in the sense of creating a probative mechanism similar to that provided for under Article 1218 of the Italian Civil Code.

2 - The German model.

With regard to the analysis of contractual liability in the German legal system, it must be assumed that there is no uniform concept of non-performance and/or breach of contract in the German legal system, but that account is taken of events which may hinder the exact performance of the contract, or which prevent the creditor from realising his interest[125].
In this respect, the two poles of reference reside in the concepts of the occurrence of impossibility of performance (Unmöglichkeit) and delay in its execution (Verzug).
Compared to the first one, the German legislator has established a clearance rule for the debtor that is specular and symmetrical to that relating to his liability. In practice, the debtor is deemed to be released if the performance has become impossible due to a cause for which he is not responsible (§ 275 BGB). Instead, he will be obliged to pay damages to the creditor if the impossibility of performance is due to circumstances for which he is responsible (§ 280 BGB).
In German law, the concept of objective impossibility of provision of services (*impedimentum naturale*) is accompanied by the so-called subjective impossibility (Unvermögen), that is, a situation of impossibility of performance not related to the performance itself, but to the person of the debtor. In other words, subjective impossibility is defined as when performance is impossible for the debtor, but can be performed by other parties (§ 275, 3rd paragraph, BGB).

[124] Appropriation Authorisation G., *Special Responsibilities. Italian and foreign models*, Naples, 1994.
[125] Memmo D., *Il modello tedesco (atlas of private law)*, Bologna, 1998, 120.

Objective and subjective impossibility have a different legal treatment wherever they may originate: in fact, the first renders the contract null and void with liberating effect for the debtor, the second does not exempt the debtor from liability.
On the contrary, if the impediment cannot be attributed to the debtor, the debtor is released from all liability; on the contrary, if the impediment, whether objective or subjective, is the result of an event attributable to the debtor, the debtor is contractually liable and must compensate the creditor for the damage (§ 280 BGB).
As for the situation of delay, it is also linked to the alternative between imputable and non-attributable impediment.
Impossibility and delay are, therefore, the two main concepts around which the German system of contractual liability is based.
The limits of this model are easily recognizable in the fact that it is not able to offer the interpreter an operational rule capable of understanding the entire phenomenology of assumptions that lead back to the concept of non-performance or more generally of “breach of contract”.
It is quite elementary to find that a breach of contract occurs not only when the performance has been completely missed or when there is a delay in performance, but also when there has been an incorrect or incomplete breach of contract, with the consequent damage to the creditor. Think, for example, of the delivery of a defective or harmful thing for the user because of the lack of information about its use.
This led the German doctrine to develop the theory of the “positive Vertragsverletzung” (positive breach of contract) which is based, precisely, on the assumption that the contractual obligation can be violated, with the right of the creditor to obtain damages, not only through omission and/or delay, but also through a positive behaviour that leads to poor and/or defective performance.
Through the theory of “positive breach of contract”, which - as has just been said - had the merit of having integrated the discipline of contractual liability beyond the narrow limits of impossibility and delay, the contractual liability of the debtor was also asserted in the event of violation of the so-called “protection obligations” (Schutzpflichten) for the protection of property or persons involved in the contractual performance.
Although these duties are not explicitly and formally contained in the contractual agreement, they must be considered an integral part of it as collateral to the main obligation to perform and closely related to the exact performance of the same. Consequently, their infringement gives rise to the same type of liability as that arising from the failure to perform the main service.
In conclusion, in view of the above, it is clear that in the BGB system the debtor's liability assessment is based on the determination of two basic conditions, namely: (a) a cause of

impediment to the proper performance of the contract (impossibility, delay or so-called “positive breach of contract”); and (b) the imputability of this cause to the debtor.
It follows that the central point of the investigation into liability for non-performance of obligations is the identification of the facts for which the debtor is liable. The provisions relating to this aspect are contained in §§ 276-278 of the BGB, which lay down the criteria for imputability of non-performance.
It follows from the provisions of §§ 276 and 277 of the BGB that liability for non-performance arises from a judgment of guilt in respect of the conduct of the debtor to whom it is attributed that he did not act in that particular situation in the manner in which he could and should have acted if he had used his ordinary care and attention.
However, this general principle of liability for fault exists alongside certain rules of strict liability under which the debtor is also liable for facts and circumstances other than his own guilty conduct. The classic example of strict liability under German law (cf. Art. 1228 of the Civil Code) is the rule that the debtor is liable for the non-performance of the auxiliaries and persons whom he uses to fulfil his contractual obligation (§ 278 of the German Civil Code).
In fact, the principle of liability by fault, an expression of the Roman tradition, currently appears to be mitigated by the inverse tendency to the proliferation of forms of strict liability of the debtor, which unites the German legal system with other legal systems of the Roman area.
Turning to another specific aspect of the rules governing contractual liability, it should be pointed out that the reform of the law on obligations in 2001 has detached the termination of the contract for reasons of non-performance (so-called withdrawal from non-performance) from the assumptions underlying the compensation for damages.
At present, under German law, withdrawal and compensation are therefore based on different tracks, in the sense that while compensation presupposes that the contractor has been liable, through fault or intent, for a breach of contractual obligation (§ 280, new text, BGB), withdrawal, on the other hand, allows the creditor to dissolve the contract due to the objective fact that the consideration has ceased to exist, which may occur either when it has become impossible (cf. §§ 275 and 326, par. 5, new text, BGB), or when it is incorrect or late (§ 323, new text, BGB).
More clearly, it should be noted that the preconditions for withdrawal no longer include the culpable breach of the contractual obligation, as is the case for compensation (§ 280 BGB).
Section 323 (new text) of the BGB provides that the creditor may withdraw if he has warned the defaulting debtor to comply with the time limit or to remedy the inaccuracy. A reminder is also not necessary if the debtor has definitively refused to perform or the creditor, in the event of delay, no

longer has any interest in receiving late performance, or if special circumstances lead to the conclusion that withdrawal is the most appropriate remedy (§ 323, para. 2, BGB).
In the final analysis, therefore, the justification for the withdrawal is to be found both in the event of the impossibility of performance, which releases the debtor from his contractual obligation, and the obligation to pay compensation (§ 275 BGB), and in the event that the performance was delayed or did not materially conform to the contract and the requested party did not remedy it (§ 323 BGB).
In the latter case, the two remedies are no longer alternative but can be combined (§ 325 BGB): if the withdrawing party, therefore, can complain that the other party is also liable for a breach of the contractual obligation, he can also request both the termination of the contract and the compensation for damages[126].

3 - The French model.

Unlike the German system, the French model of liability is based on a uniform concept of "non-performance of the obligation", which includes not only cases of total failure to perform or late performance, but also cases of partial and/or defective performance and/or failure to perform ancillary services[127].
That finding is based on an analysis of the rule, which confers on the court the task of assessing whether or not the contract should be terminated as a result of non-performance (Article 1184 of the Civil Code).
It seems clear, in fact, that attributing such a task to the court means rejecting a method that refers to typified cases of breach of contract and instead assuming a system according to which it is possible to assess, on a case-by-case basis, the value of the breach and its impact on the maintenance of the contract, or on its termination.
In this context, the rule contained in the same article cited above (Article 1184 of the Civil Code) is also understood, which attributes to the non-defaulting contractor the choice between the request for "performance in kind of the contract" where possible, and the termination of the same, with the relative damages and interests.
Both remedies have a strong judicial imprint, because they refer to the constitutive powers (for resolution), and thepowers of condemnation (for performance) of the judge, which marks a significant departure from models, such as the German one, and is more inclined instead to limit the power of the judge in order to privilege the choices that, independently, the nondefaulting contractor can take.

[126] Di Majo A., *Termination and Contract Termination in the Schuldrect Reform (Europe and Private Law)*, 2004, 26.
[127] ID., *Contractual liability*, 33, 55.

With regard to the claim for damages, it should be noted that unlike the wording of our Article 1453, paragraph 1 of the Civil Code, where the compensation for damage is related to both "forced" performance and resolution, Article1184 of the French Civil Code refers to damages to the resolution only, perhaps considering implicit that, if the contractor obtains the performance, the only damages that can be compensated will be those resulting from the delay.

In reality, however, this provision must be supplemented by the provisions contained in the part of the code dedicated to obligations, which establish the principles on the basis of which damages and interest deriving from the breach of the obligation itself must be determined (Articles 1146 *et seq.* of the Civil Code).

In particular, Article 1147 of the Civil Code provides that the debtor is to be liable to pay damages and interest both in the region of the non-performance and of the delay in performance, whenever he is unable to prove that the non-performance derives from an external cause which cannot be imputed to him and that there has been no bad faith on his part.

The following article reiterates the concept by stating that damages and interest are not due if the non-performance of the obligation resulted from "unforeseeable circumstances" or "force majeure".

Traditionally, on the basis of the literal data of the code, an impediment can be ascribed to the aforementioned categories whenever, with reference to it, there is no fault of the obligor[128].

In other words, an impediment which constitutes an "obstacle imprévisible et irrésistible" rendering the performance of the debtor absolutely impossible or such that it cannot be shown that the debtor has neglected the possibility, even the slightest one, of avoiding non-performance, is considered to be liberating.

From this we can deduce the consideration that the editors of the civil code have followed the natural law approach, i.e. the principle of liability based on fault not only in relation to unlawful acts, but also in relation to breach of contract.

It is true, however, that with the passage of time, this approach has lost much of its original rigour, and there is a general tendency to affirm the opposite principle of "objective responsibility", typical of the Common Law systems[129].

4 - The Common Law Model.

The judge of Common Law, in the presence of what is defined as a breach of contract, does not ask whether or not such breach is attributable to the conduct of the contractor, but whether or not it falls

[128] Zweighert K. - Kotz H., *Introduction to private law, vol. II - Institutes*, Milan, 1998, 196.

[129] Understanding as liability without fault, the "Strict Liability" in common law.

within what was, according to the interpretation of the contract, the subject of the contractual promise[130].

From this brief initial premise, one immediately draws the distance between the German and the Franco-Italian models. In Anglo-American law, there is no reference whatsoever to the various grounds for non-performance of the contract or to the more general principle of fault as a limit to the liability of the defaulting party.

However, this does not alter the fact that the English or American judge can also question the existence of causes and circumstances in the presence of which the debtor can be considered freed from liability. The difference is that the events on which the liberating effect for the debtor depends are not sought in relation to the lack of fault on the part of the debtor, but in relation to the fact that overcoming the impediment could not reasonably be included in the subject matter of the contracting party's promise.

In essence, therefore, the difference between the Civil Law system and the Common Law system in this field consists in the fact that the Common Law sees in the contractual promise an assumption of guarantee: there is a promise by each contractor to make the other achieve the expected result with the agreement. In contrast, in civil law systems the concept of obligation overlaps with that of guarantee, so that the contractor will normally have to ensure that he simply behaves in such a way that the creditor obtains the useful result.

More clearly, we intended to emphasize that unlike the scheme of the guarantee, if you identify the performance of the contract as simply the duty to behave in a given way, a natural corollary is that you can always prove that, in that particular case, the behaviour due was not possible or payable, so that the failure to perform it is not rebuttable or attributable to the debtor.

The distance between these two approaches is slightly blurred when the Common Law judge also relies on an assessment of the contractor's conduct, it being understood, however, that this assessment is not aimed at finding grounds for exemption from liability for lack of fault, but only at investigating the subject matter of the contractual promise and what the creditor could reasonably have expected from that agreement.

With regard to the rules relating to the dissolution of the contract, it is widely held in doctrine that the Common Law system has little affinity with systems (such as the Italian and French systems) that give the penetrating judge powers of assessment with regard to the termination of the contract for non-performance.

In this regard, it should be noted that according to the Anglo-American law approach, the dissolution of the contract depends on the willingness of the parties themselves, since it is linked to

[130] Di Majo, cit., 36.

the fact that the unfulfilled promise is to be seen as a "condition", i.e. as a clause of particular importance for the achievement of the contractual purpose. This clause has a different strength and role from the "warranty", that is, the mere assumption of guarantee that arises - as mentioned above - in relation to any contractual promise and that authorizes to request only the breach of contract.
In fact, if the formal distinction between warranty and condition is maintained, it must necessarily be concluded that it is the parties who indirectly determine the causes of termination of the contract.
In reality, however, the theoretical contrast between warranty and condition does not solve, on a practical level, the problem of the substantial distinction between contractual promises that must be considered essential and promises that, not being so, do not "authorize" the termination of the contract.
It is clear that consideration of the circumstances of the case cannot be disregarded in this matter, which clearly refers to the role of the judge. It should be noted, therefore, that the mechanism of the condition, that is, of the essential and/or fundamental nature of a given clause, does not differ much from the judgment on the incidence of the breach of contract with respect to the maintenance of the entire agreement to which the Civil Law judge is accustomed and who is called upon to decide on the termination of the contract.

5 - Convergence between the Common and Civil Law systems?

A sort of rapprochement between the two juridical families is also witnessed by the widening of the sphere of action of the doctrine of frustration.
As mentioned above, in Common Law systems, unlike in Civil Law systems, the action for damages is not linked to whether or not the breach of contract was due to the fault of the debtor (strict liability principle). However, it is common to see that these systems have abandoned their very strict old positions and have gradually come up with more flexible solutions.
It has happened, that the principle of the non-derogation of contractual commitments has undergone a growing series of attenuations and exceptions through the proliferation of the hypotheses of dissolution of the contract due to the impossibility of performance or to the failure of the contractual purpose, deriving from the elaboration of the doctrine of frustration and impossibility of the contract.
Thanks to the above theories, without prejudice to the principle of strict liability, that is, of (objective) liability without fault, the principle of absolute liability[131] has been exceeded, which covers all cases in which the contract has not been able to achieve its purpose and aims.

[131] Labella Pisu L., *La responsabilità contrattuale in common law*, 128.

More clearly, in Common Law, the doctrine of the frustration of contract is responsible for offering solutions to cases in which the service proves, in fact or in law, "impossible", or in which the purpose of the contract has failed as a result of the change in the state of affairs, when such events are attributable to causes completely external and unrelated to the position of the debtor[132].

In English law frustration currently applies both in cases of impossibility, in fact and in law, and in those where the purpose of the contract is no longer the same, as well as in those where the change of circumstances has delayed or changed the performance to such an extent that performance would constitute something radically different from what the parties had intended at the time of the conclusion of the contract[133].

Unlike in England, in the United States frustration is limited to cases where the party may still receive the benefit due, but it has now become devoid of value and meaning for the purposes of achieving the party's contractual interest. In the US, a distinction is made according to whether the circumstances that have arisen make the performance impossible or more difficult (impracticability) or make the performance of the performance appear to be pointless (frustration). The first group of typical cases includes not only situations in which performance becomes completely impossible for the debtor, but also those in which the debtor can in fact still perform but the performance - in view of the changed circumstances - is exceptionally difficult and costly for him (see § 262 of the Restatement Contracts 2d 1981 USA).

6 - Contractual liability: compensable remedies and damages.

The need to provide for appropriate remedies in the event of breach of contract, i.e. where a contractor incurs a failure, late or incorrect performance of the service is common to all legal systems. In fact, in addition to compensation for damages, which is the remedy with respect to which there are major similarities, almost all legal systems also provide for the remedy of termination of the contract and compulsory performance.

The differences between the systems, on the other hand, are found, at least in theory, in relation to the "priority" given by each legislator to one remedy over another.

In Common Law systems, for example, the main remedy is compensation for damages, while the specific performance remedy is conditional on the inadequacy of the former. More clearly, in Anglo-American law it is considered that a fundamental condition for obtaining a sentence to a "specific performance" is linked to the fact that the compensation is "inadequate" for the creditor, whose interest in the performance of the contract would be difficult to convert into a sum of money.

[132] By Majo A., cit., 44

[133] Zweigert K. - Kotz H., cit., 236

In some systems of civil law (e.g. in German law), the opposite principle applies, whereby the remedy for damages can only be used if performance has become impossible.
In, § 241 BGB, the creditor - by virtue of the compulsory relationship - is entitled to demand performance from the debtor, which means that the contractual performance can always be demanded by a court in order to obtain a judgment condemning performance "in kind", except only if the performance itself has become impossible. In other words, "performance in kind" is the main remedy that must be requested whenever the material performance of the performance is still possible; only in the event of impossibility can the creditor claim damages directly.
The French model is characterised by the fact that "performance in kind" is not as general as in the German model, but is related to the object of the obligation. In fact, in addition to the general rule that reserves to the contractor, who is not in default, the option of choosing between performance in kind, where possible, and termination of the contract (Art. 1184 civil code) with the related damages and interests, there is the principle of the incoercibility of the obligations to do (and not to do). Article 1142 of the Civil Code clearly states that all obligations to do or not to do, where they remain unfulfilled, only generate the right to obtain the relative damages and interests.
Our legal system contains a similar statement of the choice reserved for the performing party between forcible performance and termination of the contract.
Article 1453 of the Italian Civil Code, in fact, states that "... when one of the contracting parties fails to fulfil his obligations, the other may, at his option, request either the fulfilment or the termination of the contract, subject in any case to compensation for damages".
It is clear from this provision not only that there is no priority for performance in kind, as in the German model, but also that the golden rule in matters of non-performance is ultimately that of compensation for damage (Article 1218 of the Civil Code).
It should be noted, however, that in Germany too, compliance in kind currently plays a more marginal role in practice than in the past, and not only that. Following the reform of the law on obligations, § 325 (new text) of the BGB states "the right to claim damages and interest is not excluded from withdrawal".
This is a kind of rapprochement with the Franco-Italian model, where the rule - as has been pointed out above - is that the contractor can request both the termination of the contract and the compensation for damages.
The general trend is therefore that the remedy for damages should cover the entire area of the contract if it is unfulfilled for reasons attributable to the contractor.
A similar address is also found in English law where there is no incompatibility between termination and compensation for damages.

Wishing to look at the problem of compensable damages at this point, the common premise of the various schemes is that the indemnification aims to "compensate" the non-defaulting part of the damage suffered as a result of the non-performance of the other.
In the Common Law systems, we speak of compensatory damages to counteract the punitive damages, that is, the so-called "punitive damages" that are a specific tool to suppress Aquilian tort (from *lex aquilia*) but not even the contractual ones. For the latter, it is not really necessary to punish or repress the conduct of the defaulting party, but rather to remove the negative and prejudicial consequences that have resulted from it. This priority does not, however, exclude the possibility that contract law may also be subject to sanctions or remedies of various kinds whose function is not that of compensation in the strict sense, but repressive-punitive, such as the penal clauses or the *astreintes* of the French system.
In order to understand the nature of the damages that can be compensated in the context of contractual liability, it must be considered that the contractual obligation is in essence a form of guarantee for the fulfilment of the expectation that the contractor has in obtaining the performance. Therefore, where it is unfulfilled, it can only result in a remedy that equates to an unfulfilled expectation and not to a *quid pluris*. In other words, compensation cannot be a means by which the nondefaulting contractor obtains advantages beyond what the contract would have assured him. Typical contractual damage is therefore what is defined as "unfulfilled expectation", bearing in mind that the legally protected interest is the expectation of the service covered by the contract and that the non-performance of the service is entitled to achieve the economic equivalent of the unfulfilled expectation.
On the other hand, it should not be overlooked that the conclusion of the contract normally involves costs to be borne by each contractor.
Well, it seems logical that the non-defaulting contractor should also be compensated for the expenses and/or sacrifices he has made for having trusted in the proper performance of the contract. The interest in such a case is for a party to be placed in the same conditions as he would have been if the contract had not been concluded. This interest in obtaining the reinstatement of the status quo ante (i.e. the situation existing before the contact) is usually referred to as 'negative contractual interest'.
The interests protected during the contractual responsibility have, therefore, a double nature: the first (the positive one) has regard to the full and correct execution of the service; the other (the negative one) is directed to the protection of the patrimonial sphere of the subject against the patrimonial damages which the contract, as a historical fact, has determined[134].

[134] Turco C., *Interesse negativo e responsabilità contrattuale*, Milan, 1993, 393.

In all legal systems it is therefore recognised that the protection of the contract extends beyond the boundary of the violation of the positive interest in the performance of the contract.
In this respect, it is important to recall in conclusion the question of compensation for those damages which are not contractually governed, in the sense that they do not fall within the scope of the contractual interests in the strict sense, but which are suffered by the person or property of the contractor during the contract or as a result of the performance of the contract.
An example of this is the case of injuries to persons or property caused by the improper performance of transport operations. Well, while it was traditionally believed that these interests were the prerogative of the Aquilianprotection, so that in such cases the so-called accumulation of the two forms of liability was allowed, now we are moving in the opposite direction to consider such interests equally included in the area of protection of the contract.
In addition to those items of compensation, there is also, therefore, that of the damage caused by failure to comply with the so-called "duties of protection" which, on the basis of both the German model of the Schtzpflichten enrich the content of the mandatory relationship.

CHAPTER II

Section 4

TORT AND CONTRACT IN COMPARISON

A comparison between tort and contract, always connected at first sight. In reality, tort law does not derive solely from the contract. Its configuration, in fact, can also take place outside this constraint, and this occurs in defense of the damaged individual interests.

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The concept of tort in the English legal system is quite complex and difficult to define, especially if one tries to constrain within the categories of our civil law system.

It is generally connected with the concept of contract, but there are substantial and considerable differences between them, even if an initial and superficialexamination may reveal similarities.

Tort is undoubtedly a civil wrong andin the opinion of common law jurists, could easily be defined as "a breach of a legal duty which affects the interests of an individual to a degree which the law regards as sufficient to allow that individual to complain on his or her own account".

The subject who commits tort is technically called a tortfeasor or wrongdoer.

Since there are various types of torts protecting different interests, but still falling within the broad definition above, it seems more appropriate to refer to the category of law of torts rather than the law of tort.

The English law of torts can be considered the paradigm of the common law system closely related to the precedent, although statute law (which is, without a shadow of a doubt, the closest form of codification in the English system) is playing an increasingly predominant role, especially in the area of consumer rights protection.

EC law also has an effect on the English law of torts.

Moreover, the English Courts (and in particular the House of Lords) are increasingly open to refer to and apply within the categories of tortsprinciples extrapolated from other legal systems.

When analysing the common traits between tort and contract, one cannot fail to highlight that:

- Both create civil law obligations;
- The non-performance of both leads to an action for damages;

- The Civil Courts have jurisdiction over disputes arising from both tort and contract.

But the differences are considerable:

- Contractual obligations are assumed by the will of the parties, while in tort there is no choice by the parties because the obligations arise as a result of and are imposed by law;
- The person who assumes a contractual obligation is bound only towards the other party, in tort, instead, erga omnes (with the limitations, however, that we will say below);
- Generally, the contractual liability is borne by the person who has not fulfilled what he had committed to achieve, instead in tort the responsibility is borne by the person who has committed what was prohibited by law or has failed to perform what should have been done by law;
- Generally, in the English system it is said that contractual liability is strict, while tort liability is based on the concept of fault. This implies that the plaintiff must provide evidence that the defendant committed the action or omitted to do so intentionally or negligently;
- As regards damages, the relief obtained by the person in an action for contractual liability is to place that person in the same situation in which he would have been if the contract had been performed, whereas in the case of tort in the same situation in which the person would have been if the tort had not been committed.

The rights and interests protected by the English law of torts are varied:

A) Personal interests o bodily integrity:

- Battery (personal injury): “the direct and intentional application of physical force to another person without lawful justification”;
- Assault (threats): “acting in such a way that someone is afraid he will be attacked and hurt”;

B) Mental integrity:

- Harassment (harassment of people): “action of bothering someone especially by continually checking on him”;

C) Personal liberty:

- False imprisonment: “an act which directly and intentionally places a total restraint upon the claimant’s freedom of movement without lawful justification”;

D) Property interests:

- Trespass (violation of property rights) to goods: “action of harming or stealing or interfering with goods which belong to someone else”;

- Trespass to land: “action of intentionally going on someone’s land without permission of the owner or putting things or animals on someone’s property without permission”;
- Conversion: “action of dealing with a person’s property in a way which is not consistent with that person’s rights over it”;
- Nuisance (harassment most used for the enjoyment of real estate): “something which causes harm or inconvenience to someone or to property”;

E) Economic interests:

- Unlawful interference with trade: “a sort of conspiracy where two or more traders get together to act so as to cause damage to the trade of another”;

F) Interests of reputation:

- Defamation: “publication of a statement which tends to lower a person in the estimation of right thinking people generally or which tends to make them avoid him”;

G) Misuse of process:

- Malicious prosecution: “tort of charging someone with a crime out of malice and without proper reason”.

After this roundup of interests that can be protected by the English law of torts, it cannot but be underlined that the tort of negligence plays a central role in the system.

It is defined as “tort of acting carelessly towards others so as to cause harm entitling the injured party to claim damages”.

Basically, this concept is based on the broader concept of breach of a duty of care.

Tort of negligence draws its inspiration from a famous precedent by Lord Atkin (*Donoghue v. Stevenson*, 1932), in which the Judge sees two essential aspects to identify this figure of tort: a reasonable foresight (foreseeability) and the limited nature of the duty based on the neighbour principle (proximity).

Lord Atkin defines the concept of neighbours: “persons who are so closely and directly affected by my act”. Therefore, “you must take reasonable care to avoid acts or omission which you can reasonably foresee would be likely to injure your neighbour”.

Basically, it is possible to speak of a duty of care whenever there is a relationship characterised by the concept of proximity or neighbourhood between the person who carries such a duty and the person in whose favour the duty is placed (proximity or neighbourhood).

In the light of the above, the majority of the doctrine that tends to see in the distinction between tort and contract a sort of similarity with the concepts of contractual liability and extra-contractual or Aquilianliability, and Article 2043 of our Civil Code seems to agree.

Even if we wanted to analyse the various cases listed above with the eye of the civil law jurist, we would think that some of them would be configured in our system as crimes (criminal offence) punished by the Criminal Code.

But it is better not to fall into the temptation of making too many parallels or comparisons with our civil law system in order to avoid distorting the essence of common law institutes and creating misunderstandings.

CHAPTER III

THE ROLE OF GENERAL CLAUSES AND JUDICIAL OVERSIGHT IN STANDARDIZING AND HARMONIZING THE EXERCISE OF SUBJECTIVE RIGHTS IN DIFFERENT NATIONAL LEGAL SYSTEMS.

The term general clause is intended to define a particular method of legislative technique almost opposite to the so-called case or regulatory method. In fact, the general clauses are incomplete cases which, although included in written rules, play the role of "safety valves" of the legal system by referring to external data useful for maturing an ad hoc evaluation of the interpreter. Thanks to them, in fact, the interpreter is given the power to help "create" the discipline of the specific case, also drawing on additional elements with respect to the positive dictation.

SECTIONS: 1 - General clauses; 2 - Judicial Oversight; 3 - Abuse of Rights; 4 - Recognition of Foreign Judgments in Malta

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The "general clauses" are abstract formulation rules which practice use is left to the interpreter by the legislature, in order to allow the judge of the individual case to fill the gap through predictive criteria of reasonableness and axiologic inspiration.

These general clauses consist of "flexible rules" that allow the jurisprudence to develop the *regula iuris* best suited to make effective the application of constitutional values and the protection of fundamental rights.

The theory of abuse of rights has imposed an axiological filter to the abstract application of the law, overcoming the dogma that the exercise of his own right can't cause damage to anyone, to the consideration that the violation of rights can occur even with acts constituting exercise of a right.

The jurisprudential development of the theory of abuse of rights meets the need to comply the legal system to the constitutional axiology, configuring the abuse of rights as unlawful and providing remedies not only compensation-type, but also incident in negotiation autonomy, in application of the principles of good faith and solidarity.

CHAPTER III

Section 1

General clauses

Our legal system is governed by a series of rules, principles and general clauses that govern the various branches of the law and are imposed on our subsidiaries in the exercise of their negotiating autonomy, and on legal practitioners in the interpretation of the same.

They are distinguished in a descriptive and abstract way, but they can sometimes overlap.

And indeed, the principles are exhaustive, have a specific content, and find their rationale in superindividual needs necessary for the maintenance of the system. They place limits on the legislator, such as the principle of legality, the relativity of the contract, the protection of third parties, the certainty of legal relations, the principle of solidarity and today, perhaps, also the fair balancing of interests.

The latter are based on the constitution or on codicidal rules.

The rules are, on the other hand, juridical norms that form the basis of the legal system, which establish specific rules, impose behavioural obligations even at the pre-contractual stage, may have as their object the validity of the contract, or impose strict prohibitions. They may also cover the interpretation or supplementing of the contractual rules.

Unlike principles and rules, general clauses do not have a specific and exhaustive content, but allow the system to adapt to the evolution of social and legal thought, and therefore, their content is changeable over time.

In fact, they represent a legislative technique that gives rise to a sort of blank clause (public order, morality, just cause, good faith) that must be filled in according to the context of reference, and often also through reference to typical principles (Article 2 of the Constitution).

The way in which these principles, rules, and clauses are understood has certainly evolved over time, given that the abstract pre-constitution of norms and civil categories is now given more space by the evolution of the social context.

In order to recover new needs, we are witnessing the attenuation of principles originally considered absolute (typicality in real rights, in guarantees; obligation of good faith that becomes binding, and so on).

In a nutshell, if the interpretative evolution of principles and rules is the result of the birth of new needs, then the general clauses, which are born precisely to fulfil the function of adapting the pre-established law, is a natural attitude of the system.

Often these clauses arise as such and then become a general principle, becoming a criterion for the guidance of associates and interpreters.

Such is the case with the good faith clause.

The latter was born in Roman law, together with equity, both common to the concepts of “humanitas” and solidarity, but which in the Civil Code developed on a different level.

The two concepts, in fact, are distinct, but which today, on closer inspection and in the light of an evolution of jurisprudence, seem to come closer together.

Good faith, understood in an objective sense (which differs from subjective good faith as ignorance of infringing the rights of others) was born as a rule of interpretation and integration of the supplementary contract, and then evolved and was elevated to a general clause and to the principle of the system pursuant to Article 2 of the Constitution.

As a rule of interpretation, it represents the point of interconnection between the subjective criterion that looks at the common will of the parties, and the objective criterion, aimed at the literal reconstruction of the agreement.

As a supplementary criterion, Article 1374 of the Italian Civil Code states, in fact, that the contract obliges to all the consequences deriving from the law, with an implicit reference to Article 1375 of the Italian Civil Code according to which it must be performed in good faith. The latter intervenes by introducing a rule of conduct aimed at protecting the interests of the other party in the pre-contractual phase, and in that of contractual execution, introducing binding obligation of loyalty and protection which are not provided for, but which are in addition to those specifically provided for, within the limits of the appreciable sacrifice.

With greater explanatory commitment, they take the form of obligations of information, tolerance, protection, and collaboration, imposing themselves on the autonomy of the negotiations, and determining the possible non-fulfilment of the same, and the birth of the right to compensation for damages and the termination of the contract.

Therefore, while initially it was intended only in terms of supplementary integration, since the judge could not intervene on the contract, today it is peacefully brought back to Article 2 of the Constitution and is therefore considered a clause and general principle having binding value, as an expression of the canons of solidarity, which would also allow the creation of renegotiation obligations of in the presence of atypical contingencies, according to a recent evolutionary approach.

It should be pointed out that good faith, traditionally, as a rule of conduct, does not determine the nullity of the contract in the event of its violation, but only the responsibility of the subject. This approach has been superseded by the now distant Joint Chambers of 2007, which, distinguishing between rules of conduct and rules of validity, have considered that only the latter, abstract and predefined, in keeping with the content of the contractual regulations, can lead to their invalidity.

Today, this distinction is no longer so clear, in the light of very recent rulings by both the Constitutional Court and the Joint Chambers (on the subject of a deposit and *claims made* clauses), which have led to its discoloration, and almost disintegrated the historic pronunciation, with the obvious reflection of the application of the approach of good faith to equity.

The latter, in fact, does not represent a general principle such as good faith, while it performs, as does good faith, an interpretative and integrative function, as a rule of the concrete case that underlies contractual justice.

The integration that the judge can make in applying the rule of fairness, however, can occur only in the presence of gaps in the contract (supplementary fairness) and only in exceptional cases can the judge impose itself on the contracting parties and intervene in a binding manner (usury, termination, manifestly excessive criminal clause in 1384 *et seq.*).

This is because, while good faith is peacefully recognised in Article 2 of the Constitution, traditional orientation does not consider fairness to be a general principle, but only a clause and rule of the specific case to which the judge may have recourse if it has not been established by the parties.

Moreover, it has always been an abstract and nebulous concept, not suitable to be elevated to a guiding principle.

Equity also has a substitute function for the rule of law (not present in good faith) by which, only where provided for by law and in the case of available rightsmay the judge decide according to

equity (Art. 113 and 114 of the Italian Criminal Code), albeit within the limits of the principles underlying the matter.

Moreover, equity, in certain cases, is elevated to the rule of validity, leading to nullity, thus further distinguishing itself from good faith.

To the detriment of the differential elements identified (constitutional foundation; binding and general value, only supplementary except for exceptions in fairness; rule of conduct and validity) several common profiles emerge, both from the point of view of interpretation, and because, in a nutshell, the duties of solidarity and good faith, in practice, still determine a fair balance of interests.

The obligations arising from the general clause are also intended, in a nutshell, to avoid disproportion and contractual injustice.

This aspect emerges in the context of a particular function of good faith, which is the limiting function of the exercise of the right.

Abuse of right is the interface of good faith, as it takes the form of a violation of the right. It is the exercise in a formally legitimate, but substantially harmful and abusive manner of the purpose for which the right has been granted. It is a way of pursuing a different end, leading to a disproportion between the excessive benefit of the other party and the sacrifice of the operator.

Indeed, it is at this time of imbalance that part of the case law has identified a similitude between the two concepts (Court of Cassation 2009, according to which good faith is functional to maintain the legal relationship in the tracks of balance and proportion).

This is also true in the case of the application of the abuse of the contractual position, which takes the form of the distorted exercise of the rights arising from the contract, or through the insertion of clauses that determine a condition of submission of one party to the other (hypothesis of unworthiness, Court of Cassation, 28 April 2017).

It can take the form of symmetrical contracts (e.g. not allowing performance, or refusal to perform under Article 1460 *et seq.*), or asymmetric contracts (contracts between consumer and entrepreneur in which unfair terms are highlighted; or in contracts between companies in which the abuse of a dominant position by one of the two is detected).

The difference in the attitude of contractual abuse in these areas lies in its remedies.

Normally, in fact, in symmetrical contracts, the violation of good faith does not lead to nullity, but the legal system does not recognize the effects of such an abuse, as the other party can experience the so-called *exceptio doli generalis*.

In particular sectors, however, such as those characterized by situations of asymmetry, abuse is a violation of good faith and fairness, as a rule of validity that leads to the invalidity of the contract or its clause (Article 9 law on subcontracting; Article 33 and 36 of the Consumer Code).

This consideration has partly changed if we only look at the recent ruling of the Joint Chambers on claims made which, in relation to mixed or impure claims that were excessively disproportionate, consider that nullity for violation of Article 2 of the Constitution applies, and therefore also those of the mandatory duties of solidarity and good faith.

The reference to the Constitutional Court's ordinances on the confirmatory deposit, which had reached similar conclusions (and therefore no longer only on the subject of asymmetrical contracts), is obvious.

It is possible that the violation of good faith, involving an unfair regulation, could become a rule of validity, and at the same time, the fair balancing of interests could lead to the identification of a general principle.

Good faith seems to become an instrument of judicial control to enable the restoration of fairness in the contract. Article 2 of the Constitution,together with equity, would thus break into the contract in a disruptive manner, attributing to the judge an orthopaedic and manipulative power, which has always been excluded by legal practitioners in such cases.

Of course, there are many criticisms of traditional doctrine and jurisprudence, as it is still difficult to arrive peacefully at such an evolutionary reading.

CHAPTER III

Section 2

JUDICIAL OVERSIGHT

The Community legal order is characterised by an effective and original system of ***judicial protection***.

The Court has consistently held that “judicial review (...) is an expression of a general legal principle on which the constitutional traditions common to the Member States are based (...) and which has also been enshrined in Articles 6 and 13 of the ECHR.

This system makes a decisive contribution to assimilating the European Communityinto a “community based on the rule of law”.

The control system within the Community is defined as “unconditional and complete”.

It is *unconditional* because it is compulsory and not subject to prior acceptance by the Member States.

It is *complete* because it involves the Community courts (the Court of Justice, the Court of First Instance and the judicial panels) and national courts. Community institutions, Member States, and individuals (natural and legal persons) cannot escape (as they can benefit) it and provides a comprehensive and effective control of the Community and national rules, as well as acts and practices.

This control is then divided into "direct" and "indirect":

Direct control (contentious jurisdiction)

- Action for infringement
- Action for annulment
- Action for failure to act
- Action for non-contractual liability of the Community
- Disability exception

Indirect control (non-contentious jurisdiction)

- Reference for a preliminary ruling: cooperation between national and Community courts

Protection of fundamental rights

- Competence in fundamental rights;
- Article 46 of the EU Treaty refers to Articles 6 and 7 of the TEU;

- Letter (d) in relation to Article 6(2) of the EU Treaty, the Court shall have jurisdiction with respect to the activities of the institutions in so far as it has jurisdiction under the EC, EAEC and EU Treaties;
- Letter (e) in relation to Article 7 of the EU Treaty, the Court has jurisdiction only over procedural (and not substantive) provisions. The control may be exercised at the request of the Member State concerned, within one month of the date on which the Council makes the determination provided for in Article 7.

Division of jurisdiction between Community and national courts

The Community Courts act on the basis of the principle of conferral of jurisdiction, expressly conferred by the Community Treaties and the Protocols annexed to Conventions adopted by the Member States pursuant to Article 293 of the EC Treaty.

Article 220 of the EC Treaty expressly provides that 'the Court of Justice and the Court of First Instance shall, within their respective areas of competence, ensure that the law is observed in the interpretation and application of this Treaty'.

Outside the jurisdiction conferred on the Community courts, the interpretation and application of the Community rules are devolved to the national courts (so-called common courts of Community law).

In the absence of an express conferral of jurisdiction on the Court, knowledge of disputes to which the Community is a party is a matter for the national courts (Article 240 EC).

Division of jurisdiction between the Community courts

The Court of Justice, which can be considered the "constitutional judge" or the "supreme court" of the Community system, is at the top of the judicial system.

The ***Court of First Instance*** is the court of first instance with general jurisdiction, since its exclusive knowledge of actions brought by individuals, both natural and legal, has been extended to actions brought by the Member States, with the exception of those still reserved for the Court of Justice and those which will be assigned to the judicial panels. It assumes the function of a judge of second instance in relation to decisions of the judicial panels.

The judicial panels set up 'at the General Court' are responsible for exercising, in certain specific areas, the jurisdiction provided for in the Treaty. On the basis of those provisions, only the Civil

Service Tribunal was set up at the time, to which powers were devolved to hear and determine, at first instance, disputes between the Community and its agents.

Judicial protection in the second and third pillars

Lack of competences in the Second Pillar (common foreign and security policy).

Competence in the Third Pillar (police and judicial cooperation in criminal matters - Article 35 EU Treaty):

- Reference for a preliminary ruling (35(1), (2) and (3));
- Action for annulment (35(6));
- Settlement of disputes between Member States and between Member States and the Commission (35(7)).

Cross-cutting jurisdiction: Community courts are entitled (on the basis of the provisions of the Community pillar) to hear of an action where there is an "invasion of the field" of the acts of Title V and Title VI of the EU Treaty within the competence of the Community.

Application of the principle of substance over form in order to verify the actual content and scope of the acts.

Forms of direct judicial control

Direct judicial control is exercised by the Court of Justice and the Court of First Instance (and the judicial panels). The following procedures constitute forms of direct judicial review of the legality of acts and conduct of institutions:

-Action for annulment pursuant to Article 230 of the EC Treaty

-Action for failure to act pursuant to Article 232 of the EC Treaty

-Incidental exceptions and limitations for the benefit of people with disability pursuant to Article 241 of the EC Treaty

-Action of the Community for non-contractual liability under Article 235 and the second paragraph of Article 288 EC Treaty

-Staff litigation under Article 236 of the EC Treaty

<u>Action for annulment</u>

The purpose of an action for annulment is to review the legality of Acts adopted by the Community institutions that are considered to be flawed or prejudicial. Jurisdiction shall be conferred exclusively on the Community judge.

Under the first paragraph of Article 230 of the EC Treaty, an appeal may be brought against Acts adopted jointly by the European Parliament and the Council, against Acts of the Council, the Commission and the ECB which are not recommendations or opinions, and against Acts of the European Parliament which are intended to produce legal effects vis-à-vis third parties.
In order to be examined for legitimacy, the Act must therefore be:
Binding: all Acts and measures that produce or aim to produce binding effects for the addressees. In principle, this applies to regulations, directives and decisions. However, the Court of Justice has held that binding effect must be established on the basis of the substantive content of the Act, regardless of the nomen iuris attributed to it or the manner in which it is communicated.
Final: the Act must not be merely preparatory, but must be capable of affecting the subjective legal position of the applicant.

Time limit for lodging an appeal and persons entitled to bring proceedings

An action for annulmentmust be brought within two months of the publication of the Act, of its notification or, failing that, of the day on which it came to the knowledge of the person concerned. A fixed period of ten days must be added to the two months.
Compliance with the time limit for lodging an appeal shall be regarded as a rule of public policy, which may be relied upon ex officio.

Persons entitled to act. Privileged applicants

The persons entitled to challenge Community acts are divided into two categories: privileged and non-privileged applicants.
Privileged applicants are:
-Member States also for Acts intended for other Member States or individuals;
-The Council for the Acts of the Commission and the Parliament;
-The Committee on Acts of the Council and of the Parliament;
-The Court of Auditors and the European Central Bank only in order to “safeguard their prerogatives” (in fact, recurrent semi-privileged).

Persons entitled to act. Unprivileged (or ordinary) applicants: natural and legal persons.

Natural and legal persons may challenge decisions addressed specifically to them, as well as Acts of which they are not formal addressees, and even regulations, provided that such Acts concern them directly (the Act must have a direct effect on the legal position of the individual, without leaving the addressees any discretionary power and without any further legislative activity, national or Community, being necessary for its application) and individually (the measure must affect them on account of certain personal qualities or of particular circumstances capable of distinguishing them from the general public, and thus identifying them as the addressees).

However, there must be a causal link between the individual situation and the measure taken.
Grounds of appeal
The following can be asserted as defects of Community Acts:
1. Lack of competence: this may be absolute (absence of power within the Community itself) or relative (absence of power within the institution).
There may be incompetence rationae materiae, ratione loci, or ratione temporis;
2. Violation of essential procedural requirements: this is the case where the procedural guarantees relating to the drawing up of Acts have not been complied with (failure to consult a body or an institution) or even where the legal basis has been incorrectly identified, where this affects the procedure for adopting the Act or where the obligation to state reasons is not complied with;
3. Violation of the law: infringement of the provisions of primary and secondary law, as well as of the general principles established in case-law and of international conventional and customary rules;
4. Misuse of power: this occurs when the power attributed is exercised by the institution for the exclusive or at least decisive purpose of achieving purposes other than those for which it was conferred or in any case by the declared purpose. Misuse of procedures may also occur under the same conditions.

Effect of the judgment setting aside the application

Precautionary suspension: The lodging of an appeal does not automatically have a suspensive effect. The application must be made by the applicant himself, justifying it on the basis of the fumus boni iuris and the periculum in mora. The President of the Court may, in exceptional cases, refer the matter to the Plenum for interim measures to suspend the contested act.

Effects of the judgment setting aside the application

On the basis of Article 231 EC, if the action is well founded, the court declares the contested measure to be ‘null and void’ and to be effective ex tunc, subject to exceptions to the principles of legal certainty and legitimate expectations.
The judgment has the force of res judicata, both in a formal and a substantive sense, and is effective from the day on which it was delivered.
The judgment shall entail an obligation on the institution, which adopted the act to take the necessary measures to comply fully with it.

The action for failure to act

The action for failure to act is a remedy for punishing unlawful omissions by Community bodies. In order to be able to bring an action for failure to act, it is essential that the institution should have failed to fulfil its obligation to act, but that no action should be brought in the event of an express

refusal, supplementing that with an autonomous act, which may be challenged under Article 230 of the EC Treaty.

Such action may be proposed to the Council, the Commission, and the European Parliament, and the Central Bank in respect of areas within their fields of competence.

The procedure may be activated by Member States, institutions and natural persons, but the latter may do so only when an institution has failed to adopt an Act which is binding on them.

The omission must be persistent throughout the procedure: if the institution takes action, the procedure laid down in Article 232 of the EC Treaty becomes devoid of purpose.

Pre-litigation phase; time limit for lodging an appeal; effects of the judgment

Pre-litigation phase

In order for the action to be admissible, the person concerned must address a 'letter of formal notice' to the institution concerned within a reasonable time, stating precisely the content of the obligation allegedly infringed and the measures required to put an end to the failure to act.

Time limit for lodging an appeal

Only if the institution before which the case is brought does not take a position within a period of two months may the action be brought within the following two months at the latest.

(If the institution responds, the appeal is no longer admissible).

Effects of the judgment

The judgment granting the application constitutes a finding of assessment only.

The institution shall be required to take the necessary measures to comply with the judgment within a reasonable time.

Any damage caused by the omission may be the subject of an action for non-contractual liability.

<u>The disability exception I</u>

The exception of invalidity governed by Article 241 of the EC Treaty is an incidental and subsidiary procedure that completes the judicial system for reviewing legality.

It is an incidental plea that the parties may raise in the course of pending proceedings in order to have anallegedly flawed regulation declared inapplicable on the same grounds as those laid down in Article 230 of the EC Treaty.

This procedure, which is formally limited to regulations, has been extended to all Acts of general application.

There must be a close link between the contested Act and the Act the annulment of which is sought. (e.g. an objection of invalidity of a basic regulation on the occasion of an appeal against the implementing Act of that regulation and as a ground for invalidity of the contested Act).

The invalidity exception can also be exercised by the individual, overcoming the preclusions of the action for annulment.

The invalidity exception II

The Court consistently rejects requests made by persons who were able to assert their grievances by means of an independent action for annulment, thereby avoiding in practice the burden of a timely appeal.

Effects of the judgment

Unlike the procedure under Article 230 of the EC Treaty, the court, by upholding the plea of invalidity, declares the measure inapplicable to the case in question and not its annulment.

The non-application of the Act therefore produces inter-partes effects and entails an obligation for the institution that adopted it to repeal or amend it (even if there does not seem to be any real obligation).

The defects of the measure are the same as those of the action for annulment.

The non-contractual liability action

This is an action brought for the dual purpose of making it possible to establish the Community's liability for the actions of its institutions in the exercise of the powers conferred by the Treaty, and to ensure that individuals are compensated for damage resulting from directly applicable legal acts found to be unlawful.

Jurisdiction of the Community courts

It shall exist and shall be exclusive where damage is caused by a Community institution or by its servants in the performance of their duties

Here, the action must be brought before the national court where the damage was caused by national bodies, including those resulting from the application of Community legislation.

The action must be brought within five years of the date in which the damage was caused.

Non-contractual liability action I

The non-contractual liability action is a remedy separate and distinct from other remedies. There is therefore no “detrimental effect” on the action for annulment (or failure to act) of the claim for damages. For this reason, the action is nevertheless admissible if it has not been preceded by an action for annulment or by an action for failure to act, unless it is used to obtain the same result indirectly.

Conditions for bringing non-contractual liability actions:

-Theillegality of the institution's behaviour

-Effective damage

-Causal link between the damage and the conduct of the institution

These requirements must be cumulatively present and in the absence of even one of them, the appeal is dismissed.
Illicit conduct on the part of the institution exists if (1) the rule infringed is intended to confer rights on individuals; (2) the violation is sufficiently serious (serious and manifest); and (3) its conduct is the certain and direct cause of the damage (causal link).

Disputes concerning personnel

This is a matter for the Civil Service Tribunal. This judicial panel shall have jurisdiction to hear all disputes relating to the employment relationship (recruitment, remuneration, social security benefits) of officials and other servants duly recruited as such.
Conditions for action:
-Subject to the prior experience of an appropriate administrative complaint
-Existence of an interest in bringing the proceedings
-The act adversely affects the plaintiff
The action may be directed either at the annulment of the act or at compensation for damages resulting from the act itself, or from the conduct of the institution in any way.
Decisions may be challenged on points of law before the Court of First Instance and, only in exceptional cases, at the request of the First Advocate General, before the Court of Justice (review).

Infringement procedure

The Court of Justice is responsible for monitoring the correct application of Community law in the Member States with a view to restoring legality.
Through the infringement procedure, the Court monitors compliance by the Member States with the obligations arising from accession to the Treaty (i.e. those arising from the Community legal system as a whole), thereby seeking uniformity in the application of Community rules.
At the same time, the Commission ensures the harmony of the Community legal system by determining, in the event of differences of interpretation, the exact scope of the provision in question and the obligations arising therefrom.
In the context of the infringement procedure, the Commission plays its role as guardian of the proper application of the Treaties and secondary legislation.It is the only Community institution entitled to act (Article 226 of the EC Treaty), in addition to the Member States (Article 227 of the EC Treaty).
The non-fulfilment, which is the subject of the procedure, may consist of active or omissive behaviour by a legislative, executive or judicial body.

Infringement proceedings under Article 226 EC Treaty

The Commission, through direct or indirect knowledge, or following a complaint from a Member State, a private individual or a Parliamentary question, shall initiate a

Pre-litigation phase:

-The Commission addresses a Letter of Formal Notice to the Member State disputing the objections and, at the same time, invites the Member State to submit its "observations" within a given period (normally two months).

-If the State does not reply or responds with insufficient defences, the Commission issues a reasoned opinion. By the latter, the Commission specifies the infractions that are deemed to have been committed, relies on the factual and legal elements which support the allegation, and orders the State to bring the violation to an end within a variable period, fixed according to the gravity and complexity of the case.

-If the State does not comply with the request within the prescribed period, the Commission may bring the matter before the Court of Justice. This is a discretionary (and not binding) power of the Commission.

Infringement proceedings under Article 227 EC Treaty and special procedures

Initiative by another Member State (when it considers that another Member State is in breach of a Community obligation):

The Member State invests the Commission in its grievances, thus starting the pre-litigation phase. In this case, the Commission must conclude the pre-litigation phase by sending a reasoned opinion within three months; otherwise the State may refer the matter directly to the Court of Justice.

Special procedures are also provided for in the articles:

-88 Par (2) EC Treaty;

-86 Par (3) EC Treaty;

-95 Par (9) EC Treaty;

-298 Par (2) EC Treaty;

-237(a) and (d) of the EC Treaty.

Effects of the judgment of failure to fulfil obligations

The judgment handed down under Article 228 of the EC Treaty is merely declaratory: the Court of Justice recognises that the State is in breach of one or more obligations.

However, the Member State is required to take all appropriate measures to eliminate the infringement as quickly as possible, including those in accordance with the principle of sincere cooperation under Article 10 of the EC Treaty.

If the State does not comply with the judgment establishing the infringement, it shall be liable for a further violation.

In that case, the infringement procedure may be repeated (again in a pre-litigation phase and in a contentious phase), but it may be concluded by a request from the Commission to the Court to order the State to pay a lump sum or penalty payment (a novelty introduced by the Maastricht Treaty). The Court of Justice has held that it is possible to combine a lump sum fine with a periodic penalty payment where the State's failure to fulfil obligations has lasted for a long time and tends to persist. A conviction in such a case shall be enforceable in national law.

Preliminary Rulings

A preliminary ruling is an instrument of judicial cooperation between the Community courts and national courts.

It gives the national court the power, and if of last resort, the obligation, to ask the Court of Justice (and within certain limits also the Court of First Instance) for a ruling on the following questions:

- What are the correct interpretation and thus the scope of one or more provisions of Community law and, if so, doesthe correct application of a Community provision preclude the application of a national provision (reference for a preliminary ruling on interpretation)

-Whether a binding act adopted by the Community institutions or by the ECB is valid and effective (reference for a preliminary ruling as to its validity)?

The aim is, on the one hand, to ensure that Community law is interpreted and thus applied uniformly in all the Member States, so as to ensure that it is equally effective everywhere; and, on the other hand, to complete the judicial review of the legality of Community acts.

The right to request a reference for a preliminary ruling

The question of the interpretation or validity of Community law may, of course, be raised by any party to the main proceedings and, depending on the case, the court or tribunal may - or must (albeit in the latter case with limitations identified with a view to preventing abuse) - refer the case back in the manner provided for by national law.

The question cannot therefore be raised unless it takes the form of a ‘party’ to the main national proceedings. The party merely requests (in a non-binding manner) the national court, which in any event has the power to make a reference for a preliminary ruling.

The doubt as to whether or not the national court is entitled to raise the relevant question of its own motion must be resolved in a positive way, going beyond the literal fact of Article 234 of the EC Treaty, according to which the question must be raised ‘before’ a national court and not ‘by’ it (see the Cilfit judgment).

Right to participate in proceedings before the Community judge
The parties concerned, the Member States, and the Community institutions may submit their written observations to the Court. Such persons may be heard during the oral procedure, if foreseen.
The Court may request from Member States and institutions, which are not parties to the proceedings, such information as it considers necessary.

Jurisdiction

The Court of Justice has traditionally had exclusive jurisdiction to refer questions for a preliminary ruling under Article 234 of the EC Treaty, even though Article 225(3) of the EC Treaty, as amended by the Treaty of Nice, provides for the possibility of conferring jurisdiction on the Court of First Instance to hear and determine questions referred for a preliminary ruling in specific areas expressly referred to in the Statute.
However, this latter provision has not yet been implemented, as it requires an amendment of the Statute of the Court.

Subjective conditions: notion of national jurisdiction

The Court of Justice has pointed out that in order to assess whether a remitting body possesses the characteristics of a national court within the meaning of Article 234 of the EC Treaty, which is a question solely of Community law, account must be taken of a set of factors such as the legal origin of the body, its permanent nature, the mandatory nature of its jurisdiction, the contradictory nature of the procedure, the fact that the body applies legal rules, and that it is independent.
In practice, the Court of Justice has indicated the following requirements which must be met in order to be able to recognise the status of “national jurisdiction” and thus to enable a referral to be made:
-The mandatory nature of the jurisdiction;
-The task of applying the law;
-The permanent nature of the organ;
-Its constitution by law;
-The independent character and the position of third parties;
-The presence of the adversarial process in the proceedings;
-The slope of a dispute;
-The proceedings are to be concluded by a decision of a judicial nature.

The concept of national courts - exclusions

As regards arbitration panels, whereas arbitration panels are considered to be entitled to refer back those that have a public mandate and a mandatory jurisdiction, private panels have been denied this possibility by a ruling of the Court, with the latter taking a position that is rather criticised in

doctrine. The referral must, where appropriate, be made by the person before whom the award given may be challengedwithin the Member State.

Following: the notion of national jurisdiction and the Constitutional Court

Constitutional Court Order No 103 of 15 April 2008

The Constitutional Court is entitled to refer a question for a preliminary ruling within the meaning of Article 234 EC to the Court of Justice in cases of constitutionality brought primarily before it, since in such cases it constitutes a national court or tribunal, even though it is in a special position as the supreme body of constitutional guarantee in the internal legal order (in so far as against its decisions, pursuant to the provisions of Article 137(3) of the Constitution, no appeal is admissible). Therefore, when the constitutional judge defines the case (as in the case of conflict of powers between the State and the Regions), in a single and final instance, he is obliged to refer the matter to the Court of Justice for a preliminary ruling.

On the other hand, when the constitutional court is not the judge of the dispute, as in the case of an incident regarding constitutionality, it cannot make a reference for a preliminary ruling, which is given to the national court.

The 'limited' reference for a preliminary ruling: Article 35 of the EU Treaty

Article 35 of the EU Treaty provides for the jurisdiction of the Court of Justice in the field of police and judicial cooperation in criminal matters:

- On the validity or interpretation of framework decisions and decisions;
- The interpretation of conventions drawn up under Title VI of the EU Treaty;
- And on the validity and interpretation of the measures implementing them.

Such jurisdiction is subject to acceptance by the Member States: in its declaration, to be made by signing the Treaty of Amsterdam or at any time thereafter, the Member State shall state whether the reference may be made only by the courts of last instance or by any national court.

The 'limited' reference for a preliminary ruling: Article 68 EC Treaty

Article 68 of the EC Treaty extends the application of the reference for a preliminary ruling also to the interpretation of Title IV of the EC Treaty (on visas, asylum, immigration, and other policies related to the free movement of persons) and to the validity and interpretation of acts adopted on the basis of the provisions of Title IV.

Article 68 of the EC Treaty provides for a 'limited' reference for a preliminary ruling with the following characteristics:

(a) Legitimacy for the courts of last resort only;

(b) Absence of requirement;

(c) Exclusion in relation to measures adopted pursuant to Article 62(1) of the EC Treaty (concerning the crossing of borders and the maintenance of law and order and the safeguarding of internal security).

Faculty and obligation to postpone

The assessment of the need to make the reference for a preliminary ruling is normally a matter for the national court; the Court of Justice decides on its own jurisdiction and on the existence of the conditions for admissibility, but cannot refuse to rule on the basis of considerations relating to the substance of the case pending before the national court.

Under Article 234 of the EC Treaty, a national court that is not of last resort may refer a case to the Court. The court of last instance has the obligation to make the referral.

The obligation to make the referral does not apply if:

- The Court has already ruled on an identical or similar case;
- In the presence of constant jurisprudence even if there is no strict identity between the matters at issue;
- When the application of Community law leaves no room for reasonable doubt.

The matter may be declared inadmissible by the Court of Justice if:

- The dispute is manifestly fictitious, hypothetical or not supported by elements of fact or law;
- The matter has no connection with the subject-matter of the main proceedings;
- The dispute concerns Community rules that are not applicable in the present case.

Order for reference - content and appealability I

While remaining succinct, the referral decision must nevertheless be sufficiently complete and contain all relevant information so as to enable the Court, as well as the parties entitled to submit observations, to correctly understand the factual and legal scope of the dispute in the national proceedings.

The order of referral cannot be challenged under the rules of jurisdiction (Article 42 of the Code of Civil Procedure), since the verification of the legal correctness of the interpretative premises underlying the investiture of the European Court of Justice is extraneous to the control that the Court of Cassation carries out on the measures of suspension of the trial pursuant to Article 295 of the Code of Civil Procedure.

The only exception is the review that, on these premises, the judge of legitimacy exercises in the ordinary appeal against the decision taken at the conclusion of the judgment on the merits (Civil Cassation, Section III, 24 May 2002, no. 7636).

Order for reference - effects on the present proceedings II

There is no predetermined procedural “form” for the national court's decision, but it is common ground that it must be an “interlocutory” measure, capable of having a “suspensive effect”.

In fact, according to Article 23 of the Statute of the Court of Justice, ‘in the cases referred to in Article 35(1) of the EU Treaty, Article 234 of the EC Treaty and Article 150 of the EAEC Treaty, the decision of the national court which suspends the procedure and refers the matter to the Court shall be notified to it by that national court’.

Breach of the obligation to refer

The cases in which the failure to activate the referral may result in a genuine denial of justice are not those of optional referral: the question may in any case be raised again in the appeal.

The problem concerns cases where the court of last instance refuses to refer the matter to the Community judge or, even worse, substantially circumvents that obligation by resorting to the instrumental limits of the same as identified above.

The Court has recognised that the Member States are required to make good the damage caused to individuals by breaches of Community law attributable to judicial bodies. In particular, one of the factors to be taken into account for the purposes of the non-contractual liability of the State is failure to comply with the obligation to make a reference for a preliminary ruling arising from Article 234(3) of the EC Treaty.

It is also conceivable that infringement proceedings could be initiated against the Member State in question, which is responsible for infringements of Community law by national courts.

Nature and effects of the preliminary ruling of the Community judicature I

It is relevant to examine the effects of the preliminary ruling issued by the Community judge.

In particular, the declaratory nature of the decision of the European Court of Justice, its ‘internal’ effect and the obligation on the referring court to apply the Community provision as interpreted by the Court, if necessary by disapplying the national provision, which is incompatible with it, must be emphasised.

The Court's judgment also has “external” effect, that is to say, it has the effect of having a precedent and relieving the other judges of the obligation to refer cases (see the Cilfit judgment). National courts, other than the one that made the reference, remain in any event entitled to bring an action before the Court of Justice for a preliminary ruling, even if it concerns an identical question already defined in a similar case.

From a temporal point of view, that judgment has retroactive effect (with the limit of ‘exhausted’ relationships) by virtue of the extraordinary power conferred on the Community judge under Article 231(1) of the EC Treaty.

Nature and effect of the preliminary ruling of the Community judicature (2)

In particular, these effects must be examined in the light of the type of pronunciation, that is to say:
Interpretative judgment: the national court, like the other national courts, is under an obligation to apply the Community provision as interpreted by the Court of Justice and, where appropriate, to disapply the conflicting national provision.
Judgment affirming the validity of an act: the judgment is limited to the case in point and to the reasons in law relied on. The possibility to re-propose the referral later for different reasons remains unaffected.
Judgment establishing the invalidity of an act: like the judgment given under Article 230 of the EC Treaty, it has the effect of res judicata in the formal and substantive sense: the act will not be applicable.
A judgment declaring an act to be invalid does not have the effect of removing it from the Community legal order. However, the institution that adopted it must take the necessary measures to eliminate the defects found by amending or repealing it.

CHAPTER III

Section 3

ABUSE OF RIGHTS

The formula 'abuse of the right' tends to indicate an external limit to the potentially full and absolute exercise of the subjective right, the recognition of which, as taught, implies the attribution to the subject of a dual position, freedom and of strength.

As can be deduced from the etymological root of the term (ab-uti), there is abuse in the case of abnormal use of the right, which leads the behavior of the individual (in the specific case) out of the sphere of the subjective right exercised, due to the fact of placing oneself in contrast with the ethical and social purposes for which the law itself is recognized and protected by the positive legal order. Such 'abusive' behavior therefore constitutes an offense (depending on the Aquilian or contractual case, in the case of real or credit law respectively), sanctioned according to the general rules of law on the subject.

There is no norm that defines the abuse of the right, but this can be found in the connected provision of various norms.

SUMMARY: Hypothesis of abuse of rights (Article 833 of the Italian Civil Code; The case of the double sale of real estate and the improper misuse of other parties' negotiations; Articles 1175 and 1375 of the Civil Code); Abuse of rights and non-contractual liability; Remedies other than the Aquilian liability of a compensatory nature.

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As can be seen from the etymological root of the term (*ab-uti*), there is abuse in the case of abnormal use of the law, which conducts the behaviour of the individual (in the concrete case) outside the sphere of subjective law exercised, by the fact of being in conflict with the ethical and social purposes for which the law itself is recognized and protected by the positive legal system. Such ‘abusive’ conduct therefore constitutes an offence (depending on Aquilian or contractual cases, whether it is a right in rem or credit) punishable under the general rules of law in that regard.

There is no provision in the Italian Civil Code that generally sanctions abuse of rights. The legal culture of the 1930s believed that abuse of rights, rather than being a legal notion, was a concept of

an ethical-moral nature, with the consequence that the one who abused it was considered worthy of condemnation, but not of legal sanction.

This cultural context, together with the concern for legal certainty, given the great latitude of power that a general clause, such as that of abuse of rights, would have attributed to the judge, prevented that rule of the preliminary draft (Article 7) which proclaimed, in general terms, that “no one may exercise his right contrary to the purpose for which the right itself was recognized” from being incorporated into the final version of the Italian Civil Code of 1942.

In this way, the Italian code was in conflict with the legislation of other legal systems, in particular the German and Swiss, which, on the other hand, contained a repressive rule against the abuse of rights. The German model bears, in fact, the rule, the result of generalisation of the old prohibition of acts of emulation, according to which “the exercise of the right is inadmissible if it can only have the purpose of causing harm to others”. Article 2 of the Swiss Civil Code has adopted the broadest formulation according to which “the manifest abuse of their rights is not protected by law”.

The legislator of 1942 therefore preferred specific rules to a general rule, which would make it possible to sanction abuse in relation to particular categories of rights.

In the text of the Civil Code can, in fact, be found:

a) The express indication of abusive cases (Article 330, relative to the abuse of parental power; Article 1015, relative to the abuse of the right of usufruct; Article 2793, relative to the abuse of the property by the pledgee);

b) Provisions sanctioning certain acts, the rationale of which is recognizable in the need to suppress an abuse of right (Article 1059, subsection 2, which requires the co-owner, who - acting ex se - has granted a servitude, not to prevent the exercise of that right; Article 1993, subsection 2*et seq*, Civil Code, to which must be added Articles 21 of the law on credit transactions and 65 of the law on checks);

c) Provisions of greater scope, considered valid for entire categories of rights (Article 833, which, although relating to the right to property, has been used as a rule of repression of abuse of property rights in general; Articles 1175 and 1375 which, through the clause of good faith, have recently allowed the jurisprudence, at the suggestion of the most cautious doctrine, to sanction, in terms of contractual tort, the abuse of relative rights or credit).

Although in jurisprudence there is a tendency to use above all Articles 1175 and 1375 to sanction as abusive conduct contrary to the rules of fairness and good faith in obligatory and contractual relations, and although Article 833 has sometimes been held by the courts to be the expression of a general principle prohibiting the abuse of the right, there is a lively debate in doctrine as to whether the rules referred to can be regarded as general specifications of a more general principle, namely that of the abuse of rights, and immanent in the order (and for this reason not codified), or if rather they are sectorial and circumscribed, almost an exception to the general rule for which the exercise of the right is always legitimate (in accordance with the maxim '*qui iure suo utitur neminem laedit*') and cannot, therefore, be a source of responsibility.

It is clear that we arrive at opposing solutions depending on whether the need for legal certainty is favoured, that is, the need to adapt the positive data to the new values emerging in the collective consciousness (and, among these, to the principle of social solidarity in Article 2 of the Constitution - and the social function of property in Article 41 of the Constitution).

Initially, there was a discussion in jurisprudence and in doctrine, of the abuse of right, with regard almost exclusively to the field of real rights, coining the definition that we could define as classic ‘abuse of right, according to which this is considered to exist “whenever a right attributed by the law is used by its owner in a manner not suited to the economic-social function for which it has been protected, when, therefore, it is exercised to achieve purposes other than those for which the right has been recognized and conflicting with values protected by the system”[135]. In this reconstructive trend, the regulatory reference parameter was mainly Article 833 of the Italian Civil Code and the sanction imposed for the ascertained abusive exercise of the right was exhausted in the recognition of the non-contractual liability pursuant to Article 2043 of the Italian Civil Code.

In the most recent jurisprudence, there is a tendency to extend the verification of a possible abuse to the area of credit rights, identifying the criterion of verification in the general clause of good faith as per Articles 1175 and 1375 of the Civil Code, with the consequent widening of the range of means of protection, extended to include those typical of breach of contract (considering the obligation of good faith as a supplement to the content of the contract).

In the case of relative rights, it indicates the violation of the (contractual) duty of good faith: in both cases, however, it expresses a violation of the principle of solidarity referred to in Article 2 of the Constitution, of which good faith in compulsory and contractual relations constitutes application, according to the best doctrine.

[135] Martines M.P., *Abuso del diritto: la chicane del socio di minoranza*, in *Contr. e Impr.* 1998, 30.

2. Hypothesis of abuse of rights.

2. 1. Article 833 of the Italian Civil Code

In the 1960s, the Court of Cassation (Judgment No 3040 of 15 November 1960[136]) found in Article 833 the expression of a general principle of prohibition of abuse of the right to property and, more generally, of any right.

It was, in fact, admitted that "the owner could commit an offence even if from his behaviour he could portray usefulness, how many times he pursued purposes not corresponding to those for which the right of property is protected by the positive order"[137].

On this occasion, the judges of legitimacy acknowledged that the right to property could also be abused by omissive conduct, through, for example, "the failure or abnormal use of the right to act in defense of the right to remove a situation that is harmful, not only to the owner of the right itself (legitimated to act in court), but also to others".

The step forward taken by the Supreme Court was the overcoming of the principle '*qui iure suo utitur neminem laedit*': the aggrieved party responds illegally even if he has acted '*iur'*', in the exercise of his right, if he has abused it. The property was '*ius utendi*', not '*ius abutendi*'; one could, then, coin a new maxim: '*qui iure suo abutitur alterum laedit*'[138].

The innovation was also in the general scope that was recognized, in addition to the scope of the contracts, to the canon of good faith, elevated to a criterion for assessing the exercise of any subjective right, and even the right of property.

The abuse of the right was sanctioned, in this case, only in the Aquilian responsibility of the owner who had abused his right.

The reading given by the Court of Cassation to Article 833 in the aforementioned arrest of the 1960s has not, however, found practical application in subsequent years, since a sort of '*interpretatio abrogans'* of the rule in question, relegated within rather narrow boundaries, has become established in the jurisprudence of legitimacy.

In fact, it is constant that, in order for an act to be considered as *atto emulativo*—exculsively aimed at damaging others—(*id est*, abusive), the coexistence of two elements is necessary: one of a

[136] In *Foro it.* 1961, I, 256.

[137] Galgano F., *Abuso del diritto: l'arbitrario recesso ad nutum della banca*, in *Contr. and Impr.* 1998, 19.
[138] Ibid., 20.

subjective nature, consisting in the *animus nocendi* or *aemulandi*, that is, in the intention of the owner to cause prejudice or harassment to others, with the relative burden of proof to be borne by the injured party; the other element, of an objective nature, consisting in the total absence of utility that derives to the owner from the act performed, so that it is sufficient to exclude the emulative character of the act the existence of even a minimal utility, which is infinitesimal for the owner.

The described address was taken to the extreme consequences by a ruling of the Supreme Court, at the end of the 90s (Court of Cassation, Section II, No. 20/10/1997, No. 10250[139]), in which it was considered that the lack of pruning of tall trees was not an *atto emulativo*, preventing the owner of the nearby property from enjoying the view. The Supreme Judges, departing from the distant precedent of the 1960s, exclude, first of all, from the list of *atti emulativi* purely omissive behaviours, given that the term 'acts', which appears in Article 833, could only be understood as referring to positive behaviours alone.

After all, and in this the objective element mentioned above is considered non-existent, even an omissive demeanor, such as the lack of pruning of plants, involves, it is said, a usefulness for the owner, recognizable in the cost savings and psychophysical energies necessary for pruning.

The cited orientation, which has inflicted the "coup de grace on an already dying norm", is harshly criticized in doctrine, because it ends up nullifying the scope of application of Article 833 and the possibility, allowed by it, of repressing abuses by the owner: if, in fact, even a negative act, a simple *not doing it* involves a utility for the owner, a fortiori a positive act will be useful for him[140].

The doctrine, in particular, considers that in order to avoid the aberrant results of the jurisprudence, the applicative presuppositions of Article 833 *et seq.*must be reconstructed differently. Precisely, as far as the objective element is concerned, for the act to be classified as *emulativo*, an objective disproportion between the prejudice of others and the usefulness of the owner is sufficient. As for the subjective element, it is observed that Article 833 of the Italian Civil Code, in its literal tenor, does not attribute any importance to the *animus nocendi*, since the "purpose" of which the law speaks clearly indicates the objective purpose of the act. Therefore, the configurability of the *atto emulativo* is allowed even when the act was carried out not only without the intention of harming, but by mistake (thus admitting, however, a kind of strict liability of the owner for damages that have arisen to third parties from his abusive behaviour).

[139] In *Forum it.* 1998, I, 69

[140] Moliterni A. - Palmieri A. *"Dormientibus iura succurrunt": eutanasia dell'art. 833 c.c.*, nota a Cass. 10250/97, in *Foro it*. 1998, I, 73

In the same vein is that doctrinal orientation which, although it considers necessary (and sufficient) for the harmful character of the act, alongside the objective element of disproportion, in any case a subjective element, consisting not of the 'specific intent' of the owner, but of the simple knowledge, on the part of the latter, of the consequences of his own behaviour, excludes the relative onus probandi against the injured party. Evidence of such knowledge should, in fact, be deduced, presumably by means of the procedure referred to in Article 2729 of the Civil Code, on the basis of the above disproportion (here too, objective liability is substantially recognised or, with an equivalent factual formula, with presumption of the subjective element, on the part of the owner who objectively engages in conduct that causes damage to third parties in excess of the amount allowed by the profit that the owner himself draws from it).

More sensitive to the demands of doctrine, on the other hand, was the jurisprudence on the merits, which at times took up the second cited interpretative path of Article 833.

2. 2. The case of the double sale of real estate and the improper misuse of other parties' negotiations.

Jurisprudence has substantially found a hypothesis of abuse of rights in the case of the subject who, even though he has acquired a property from a common alienator, uses the instrument of registration to prevail over the first purchaser, by registering first.

The Court of Cassation has come to the recognition of the non-contractual responsibility (even if the presuppositions are controversial) of the subject in question and, therefore, substantially, to the configurability of an abuse of the right in such matter, having disregarded the operativeness in the hypothesis in question of the principle canonized in the maxim"*qui iure suo utitur neminem laedit*". Precisely, the Court of Cassation No. 79 of 8/1/82 clarified that the injustice of the damage caused to the first non-registering purchaser is not excluded from the finding that the second purchaser, whether of good or bad faith, is the first to register his right recognised by Article 2644 of the Italian Civil Code.

In fact, such a rule, being directed towards the protection of the general interest and the certainty of the circulation of certain categories of goods, cannot legitimise conduct, which is in itself unlawful because it is directed at depriving a person of a right that has already entered into his legal sphere.

It would seem, then, that the exercise of right is abusive, because the act of exercise objectively pursues an aim (not worthy of protection), which is different from that which the rule conditions the recognition and protection of the right itself.

The Court of Cassation has also found abuse of rights in the hypothesis of unjustified interruption of the negotiations, determined by the intervention of a third party who, inserting himself precisely in the other negotiations, has the best succeeding in stipulating the contract *in fieri inter alios*.

Until the 1960s, jurisprudence did not consider the behaviour of a person who enters into negotiations with others by concluding a contract "intended" for others to be anti-juridical within the meaning of Article 2043 of the Italian Civil Code, as he considered such conduct to be the exercise of a right - a cause for the exclusion of anti-juridicality - in particular the right to freedom of economic initiative enshrined in Article 41 of the Constitution.

Since the 1960s, on the other hand, there has been a case of abuse of rights in this area, based on the fact that those who interfere in *inter alios actae* negotiations intend to pursue an interest that is not worthy of protection, because it is carried out in violation of the general duty of solidarity referred to in Article 2 of the Constitution, which is also applicable in relations between private individuals.

2. 3. Articles 1175 and 1375 of the Civil Code

The enhancement of the general clause of good faith, which, as is well known, informs all contractual and bond matters, has led the most recent jurisprudence to identify cases of abuse of rights in this sector as well.

For some time the doctrine was already in agreement in recognising in the pre-contractual responsibility pursuant to Article 1337 *et seq.* the sanction for the abusive behaviour of the party that had unjustifiably withdrawn from the negotiations: it was a clear violation of the principle that forbids to '*come contra factum proprium*'.

Continuing along that line, the courts now appear to be inclined to use, for the purposes in question, also good faith in the performance of the contract. In particular, the latter is understood as the subject of an obligation that enters into the contract by integrating the content - specifying in the (negative) duty not to abuse its position in order not to unjustifiably aggravate the condition of the other party, and, it is believed, in the (positive) duty to take action to safeguard the usefulness of the other party in so far as this does not involve an appreciable sacrifice of one's own reasons - we have seen in the violation of good faith a symptomatic index of abuse of rights, sanctioned in the typical forms of contractual liability or, at times, through remedies that we could define as 'execution in a specific form'.

In this regard, a number of cases which have come to the attention of case law and which are emblematic of the interpretative approach described above may be cited.

Fiuggi's[141] case is famous. The Municipality of Fiuggi had granted a company the management of the springs, providing that the fee was related to the price of sale of bottles of mineral water. However, the concessionaire company had managed over time to keep the price fixed despite the galloping inflation, taking care to sell the bottles to a subsidiary, which would sell them at a higher price. The "clever measure", which avoided the concessionaire company from suffering increases in the concession fee, was judged to be a breach of the fee referred to in Article 1375 and, consequently, a breach of contract, capable of justifying the termination of the contract. The link with the abuse of rights was evident: "to the exception 'feci, sed iure feci', opposed by the concessionary company, it could be from the grantor, victoriously replied that of its own rights (of the right to freely fix the price of sale of the mineral water, both on its part and on the part of the subsidiary), it had abused, since it had exercised them in such a way as to prejudice the interest of the contractual counterpart"[142].

Furthermore, the parameter referred to in Article 1375 of the Italian Civil Code has allowed a judicial review of the unilateral act of the contractor carried out in execution of the contract.

Thus, with regard to agency contracts, the Court of Cassation (18/12/85 No 6475) held that the principal's right to refuse the agent's proposals must be exercised in accordance with the principle of good faith in the performance of the contract. Consequently, the preliminary refusal to carry out the agent's proposals (so-called systematic refusal), in breach of that principle, is a source of compensation for damage.

More recently, the jurisprudence of legitimacy has found abuse of rights in the conduct of the bank that unexpectedly and arbitrarily withdraws from the contract for the opening of credit indefinitely or for a fixed term, but in which the withdrawal is pactly allowed even in the absence of just cause, requiring the immediate return. The Supreme Court (21/5/97 n. 4538) has, in fact, observed that, if it is true that within the framework of the discipline dictated by the Civil Code, the bank (as well as the client) is allowed to withdraw at any time from an open-end credit line, with the only obligation to give notice to the counterparty, pursuant to Article 1845, last subsection, just as it is allowed to recede *ad nutum* with reference to cases of opening of fixed-term credit, in which the parties, pursuant to Article 1845, subsections 1 and 2, have provided for the exception to the need for just cause for the purposes of exercising the right of withdrawal before expiry, this, however, does not imply the total unquestionability of the mode of exercise of the right of withdrawal by the bank. The right of withdrawal *ad nutum* must, in fact, be considered illegitimate when, on the basis of an

[141] Cass. 20/4/94 n. 3775, in Corr. Law 1994, 566.
[142] Galgano F., Id., 22.

assessment in good faith, it appears to be completely devoid of justification and is proven by the other party.

Precisely, the bank's withdrawal is considered to be completely unforeseen and arbitrary, when it is in contrast "with the reasonable expectation of those who, on the basis of the conduct usually adopted by the bank and the absolute commercial normality of the relationships in place, have realized that they can dispose of the credit supply for the expected time and could not therefore expect to be ready at any time to return the amounts used, except on condition that they empty the very reasons for which an opening of credit is normally agreed".

In a subsequent ruling (Court of Cassation, Section I, No. 29/10/99 - 14/7/2000, No. 9321), the judges of legitimacy extended the superior principles –that is, judicial review of the legitimacy of the bank's withdrawal, according to the parameter set out in Article 1375 of the Italian Civil Code, which measures its possible unforeseen and arbitrary nature - to the hypothesis of a fixed-term credit facility relationship, in which withdrawal is permitted in the presence of a just cause typified by the parties.

According to the provisions of the first and second subsections of Article 1845 of the Italian Civil Code, in fact, in the case of fixed-term credit facilities, the bank may not terminate before the expiry of the term except for just cause, granting the customer a period of fifteen days for the return of the sums used and related accessories. Moreover, unless otherwise agreed, the rule allows the parties to derogate conventionally from the need for just cause and it is common ground that the period of fifteen days for restitution may also be derogated from.

Now, it is believed that, as the parties have the right to waive the need for just cause of withdrawal (a hypothesis referred to in the previous ruling of the Supreme Court), so they can typify the circumstances that legitimize the exercise of the right of withdrawal by the bank.

According to the Supreme Judges, the concrete verification of the possible opposition good faith of the withdrawal must be admitted all the more in the case in which the parties have not derogated from the provision of the need for just cause, but have typified some cases.

In fact, to want to recognize the judicial control even in the presence of the contractually typified cases of just cause, the recourse of which the withdrawal should be considered certainly allowed and, strictly, unquestionable, there is the risk of damaging the contractual autonomy of the parties.

The Court of Cassation replies to the objection that, considering that the need for just cause "constitutes a sort of antidote to the abuse of rights", the union on the conformity of the exercise of

the power of withdrawal with the principle of good faith, even in the presence of a just cause typified by the parties to the contractual relationship, “does not have the effect of replacing the negotiating rule with a judicial rule, with the consequent upheaval of the economy of the contract, keeping this union not to the validity of the clause, which is given as a presumption, but to the executive conduct. In fact, as has been stated on another occasion (Sentence 2503/91) on the subject of the execution of the contract, good faith is a commitment or obligation of solidarity, which requires each party to behave in such a way that, apart from specific contractual obligations and the non-contractual duty of *neminem laedere*, without representing an appreciable sacrifice on its part, it is capable of preserving the interests of the other party”.

Lastly, it was found that the exercise of voting rights at meetings of companies with share capital was improper.

Abuse, first of all, by the majority of the shareholders' meeting, which approves a resolution inspired exclusively by its own extra-social interest. The annulment of such resolutions is no longer based on the parapublicistic excess of power of the majority, but on the abuse of the right to vote. The Supreme Judges start from the premise that, “with the exercise of the right to vote, the shareholder executes the contract of the company, so that the right to vote must, in accordance with Article 1375 *et seq*., be exercised in good faith; the conclusion is that the vote expressed to achieve a non-social interest, with damage to the minority, integrates the extremes of the abuse of the right”[143].

The relevant jurisprudence[144] has also reconstructed hypotheses of abuse of rights by the minority shareholders' meeting. Shareholders representing at least one fifth of the share capital have the right to request and obtain the convocation of the meeting. According to the judges, the directors, far from having to evaluate exclusively the formal requirements of Article 2367, subsection 1 of the Civil Code, have the power-duty to reject the request of the minority, where it appears illogical, unjustified, determined by an unrealistic spirit of ‘chicane’, or by the intention of systematically hindering the smooth conduct of the company's business.

3. Abuse of rights and non-contractual liability.

Considering that, as it emerges from the jurisprudential pronouncements, to the abuse of rights the system allows to react also outside the model of Article 2043 *et seq*., it is necessary to verify when the abusive exercise of rights can be considered a source of Aquilian responsibility.

[143] Galgano F., Id., 23.
[144] Martines M.P., Id., 27.

The identification of the elements, described in Article 2043 of the Italian Civil Code, of the "unjust damage" and of the "fraud" or "fault" of the injured party, as a necessary subjective component of the injurious conduct, is above all problematic.

As regards the injustice of the damage, the indications contained in the famous judgment in Case 500/99, in which the Joint Chambers, in determining the nature of Article 2043 as a primary rule, not merely as a sanction for precepts laid down elsewhere in the legal order, entrusted to the court of merit the task of selecting the legally relevant interests, the damage of which can only constitute 'unfair' damage, may be of assistance. In order to ascertain the requirement in question, the judge must establish a judgment comparing the conflicting interests, that is to say, the actual interest of the person claiming damage and the interest that the harmful conduct of the author of the act is intended to pursue, in order to ascertain whether or not the sacrifice of the interest of the injured party is justified in carrying out the opposing interest of the author of the conduct, by reason of its prevalence.

This prevalence, however, must be ascertained in the same way as the positive law. In our case, however, once the principle '*qui iure suo utitur neminem laedit*', replaced by the opposite maxim'*qui iure suo abutitur alterum laedit*', has been rejected, it is not possible to invoke the protection of the interests of the injured party through specific provisions that recognize the ownership of a subjective right, thus resolving at the root the conflict in favour of the perpetrator of the offence, but it is necessary to have regard to the interest whose satisfaction is instrumental to the act of exercising the right. It is necessary, that is, to verify whether said interest is in any case taken into consideration by the legal system and can, therefore, be considered worthy of protection: the resolution of the conflict with the opposing interest of the injured party is, therefore, entrusted to the decision of the judge, who will have to establish if a breakage of the "just" intersubjective equilibrium has occurred, and to provide for its re-establishment through the compensation. This means that in this comparative investigation, conducted in the light of the positive law, the assessment of the requirement of illegality is concrete, to be considered relevant sub species of "injustice" of the damage under Article 2043 of the Civil Code.

It is probably to such an investigation that one wishes to allude when one repeats that the right is abused when one pursues a purpose which goes beyond the purpose for which the right itself is recognised by the law: in such a case, one tends to achieve an interest which does not appear worthy of protection and which therefore cannot prevail, by sacrificing it, over the interest of the injured party. The same idea is probably underlying the doctrinal approach which, when interpreting Article 833 of the Italian Civil Code, requires the objective disproportion between the advantage gained by

the owner and the prejudice suffered by the third party: it is symptomatic of the exceeding of the limits of protection of the law and of the fact that the interest pursued by the owner is destined to succumb to the conflict with that of the injured party.

In fact, it seems that the comparison between the opposing interests of the aggrieving party and the aggrieved is necessary even when, in the contractual field, the canon of good faith is used as a criterion for assessing the exercise of rights, capable of distinguishing between the use and abuse of one's own right (although, in such cases, the sanctioning remedies are found outside the model referred to in Article 2043 of the Italian Civil Code).

Thus, for example, with regard to the question, which has long been at issue in case-law, whether or not the conduct of a creditor acting for the partial satisfaction of his claim should be regarded as lawful, giving rise to a fragmentation of the single pecuniary claim into several questions to be put before a different and lower court than that which would have had jurisdiction to hear the whole claim, an approach adopted by the simple sections of the Court of Cassation gave a negative answer to the question 'on the basis of the finding that the general clause of good faith and fair dealing (Article 2(1)(b) and (c) of Regulation (EEC) No 1408/71). 1175 and 1375 *et seq*.) - also operating in the pathological phase following the failure or inaccurate fulfilment - prevents the legitimate conduct of the creditor from being considered, which, through an anomalous technique of fractioning the legal actions over time, arbitrarily prolongs, giving rise to a real abuse of the right, the coercive constraint to which the debtor must be subject". The reference to the precepts of Articles 1175 and 1375 of the Italian Civil Code is, moreover, supplemented, for the purposes of assessing the illegality and, therefore, the injustice of the damage, by a judgment comparing the conflicting interests, of the type described above: it is stated, in fact, that the cited conduct of the creditor causes the debtor a "prejudice, not justified by an interest objectively appreciable and worthy of protection of the creditor" (Cassation 6900/97; Cassation 7400/97; Cassation 11271/97).

Recently, the contrasting jurisprudence has been resolved by the Joint Chambers (Sentence 5/11/99 - 10/4/2000 No 108[18]), which have adopted the opposite approach, which was decided for the legitimacy of the splitting of the claim into several legal actions.

On this occasion, the supreme ordinary judges first of all considered out of place the reference to the principles of fairness and good faith: "we must not forget - they observe - that the first violation of the aforesaid principles was committed, in a hypothetical way, by the debtor, who is in breach of his obligation".

The Supreme Court therefore disputed the accuracy of the outcome of the comparative judgment on which the assessment of the abusive nature of the creditor's conduct was based. It observes, in fact, that the creditor's power to seek partial performance judicially, subject to action for the remainder, is a power “not denied by the law and corresponding to an interest of the creditor, worthy of protection, and that it does not sacrifice, in any way, the debtor's right to the defence of his own reasons”.

From the first point of view, recourse to a lower court, which is quicker in the settlement of disputes and before which the dispute costs less, even if its conclusion is not entirely satisfactory in terms of the claim, is considered to be in the creditor's appreciable interest, who can also, through this means, hope for spontaneous fulfilment by the debtor of the residual debt and, possibly, for a final assessment of the existence of the relationship from which the debt derives, with an undoubted - fully legitimate - advantage for further actions.

From the second point of view, the debtor can adequately protect himself, providing for the default of the creditor, offering him the payment of the entire amount due or, where he contests his own debt in its entirety, he can ask, with res judicata effect, for a negative assessment of the relationship from which the debt is claimed, with devolution of the entire dispute to the superior judge pursuant to Article 34 of the Italian Criminal Code.

Furthermore, in the cases examined above, which are also marked by the use of the clause of good faith, the judges clearly show that they cannot disregard an assessment of the merits of protecting the interest pursued by the perpetrator of the abstractly abusive conduct, in relation to the interest of the person adversely affected.

Thus, the extra-social interest of the majority of shareholders or the interest of the bank that suddenly withdraws from the open-end credit agreement cannot be considered worthy of protection, in the same way as the positive system, and must be considered unsuccessful with respect to the interest of the client, whose expectation of having access to the credit supply for an indefinite period of time must be protected in a preferential way, because it is reasonably based on the conduct usually adopted by the bank and on the absolute commercial normality of the relationships in place.

With regard to the subjective element required by Article 2043 of the Italian Civil Code, it is necessary to take into account the dominant doctrinal orientation which, being affected to a certain extent by the jurisprudential interpretation of Article 833 of the Italian Civil Code, considers the existence of the intention to harm as necessary, for the purposes of the abusive nature (and therefore the illegality) of the act of exercise of the right. This would result in a restriction of the scope of

application of Article 2043 of the Italian Civil Code to conduct supported by an intentional attitude, with the exclusion of culpable acts.

There is a trace of such an orientation in the common opinion that, in terms of double sale of real estate, the Aquilian liability of the second buyer-first registrant should be limited to the hypothesis of bad faith contract, being however controversial whether to integrate the latter is the intention to cause damage to the first buyer or is sufficient awareness of the previous purchase not being registered. It is reassuring, in any case, that this liability cannot be extended to constitute a culpable tort of the second purchaser, who, unaware of the previous contractual event, relies on the first legitimation of his licensor. It is therefore permissible to be faced with a hypothesis in which the scope of application of Article 2043 of the Italian Civil Code is restricted only to cases in which the anti-legal conduct is supported by the psychic coefficient of intent. It is not, in fact, permissible to excessively aggravate the legal position of the second purchaser, making it incumbent on him to verify the absence of a previous dispositiveact; also because the latter does not appear in the property registers. The above, in the event of a double disposal of real estate, which is considered by most to be an expression of abuse of rights, should be applicable to acts of abuse of rights in general.

Moreover, there is no lack of those who, starting from an objective reading of the phenomenon of abuse of the right, substantially come to find that the perpetrator of the abuse has an objective type of liability, with the consequence that the subject who has suffered prejudice from the abusive act can limit himself to proving the misuse of the purpose provided for by the rule attributing the right, according to an objective parameter of comparison, as well as the causal link between the abuse and the prejudice suffered, since it is not necessary to demonstrate an intentional or culpable attitude on the part of the perpetrator of the abuse.

4. Remedies other than the Aquilian liability of a compensatory nature.

The most recent case law, aimed at enhancing the principle of good faith in order to ascertain a possible abuse also in the contractual field, has disproved the widespread belief that the abuse of the right has no other consequence than the obligation to compensate for the damage.

Having assumed the duty of good faith pursuant to Articles 1175 and 1375 of the Italian Civil Code as a supplement to the content of the contract itself, the violation of the contract gives rise to a breach of contract, with the consequent application of the legislative remedies provided for in order to react to the latter (therefore, in addition to Article 1218 of the Italian Civil Code, also Article 1453 or 1460 of the Italian Civil Code). It is then explained how, in the case of Fiuggi, the contract

has been terminated with bad faith, granting the injured party a more adequate protection (compared to that constituted by mere compensation), consisting in the possibility of renegotiating the terminated contract under more prudent conditions.

When, on the contrary, the principle of good faith is assumed, as it seems possible to deduce from the aforementioned jurisprudential pronouncements, as a criterion indicative of a mere behavioural modality extraneous to the preceptive intent of the contractual regulation, the remedies identified by the jurisprudence against the conduct contrary to good faith and, therefore, abusive, are always of a specific type, without, however, involving the fate of the contract.

In this perspective, therefore, it is understood how the adoption of a resolution by a majority of the shareholders' meeting that has exercised its voting rights pursuant to Article 2351 of the Italian Civil Code can be understood. In order to achieve an extra-social interest, is sanctioned by the cancellation of such a resolution, such as the remedy against a request to convene a meeting, made by the minority shareholders for the spirit of chicane, is represented by the rejection of such a request or by the ineffectiveness of the convening so - abusively - made, as the consequence of the arbitrary and sudden exercise of the right of withdrawal *ad nutum* of the bank from the contract of opening credit for an indefinite period is the paralysis of the resolving effect of the withdrawal itself.

All cases in which, according to the doctrine, the violation of the duty of good faith (which constitutes an abuse of the right during the execution of the contract) is sanctioned by a sort of ‘specific execution’ of the duty in question.

This is reflected in a legislative provision expressed in Article 1359 of the Italian Civil Code, in relation to Article 1358, which requires the parties to behave in good faith while awaiting the condition. Article 1359, in fact, by pretending that the condition missed for cause was fulfilled and attributable to those who had an interest contrary to its fulfilment, gives rise to the abuse of the right thus achieved, not the general obligation to compensate for the damage, but the effectiveness of the contract[145].

Furthermore, a strong repression (because it is specific) of the abuse of the right is the denial of legal protection for those who abuse their own right, deny it concretely either in the rejection of the claim or exception or, even, in the loss of the right of which they have abused.

[145] Galgano F., *Il dovere di buona fede e l’abuso del diritto*, in *Manuale di dir. civ. e comm.*, I vol., 497.

The second model includes rules such as Article 330 of the Italian Civil Code, which sanctions the abuse of parental authority over children with the forfeiture of such authority, or Article 1015 of the Italian Civil Code, which provides for the termination of the right of usufruct for the owner who has abused it.

The first model, on the other hand, includes the case, first examined, of the action aimed at obtaining partial performance of the pecuniary claim, which, if considered an expression of abuse of rights, is sanctioned by the inadmissibility of the judicial request, as well as the case of the abusive judicial claim of a right, when the plaintiff has brought an action before the judge in the knowledge that he cannot derive any benefit, in order to harm the opponent. The sanction, even in the latter case, would theoretically consist of the rejection of the judicial request. However, it is necessary to take into account the provisions of Article 96 of the Italian Criminal Code, which provides for a liability for damages for the unsuccessful party who acted or resisted in court with intent or gross negligence.

More generally, the remedy of the *exceptio doli generalis* can be cited in this context, aimed at provoking the rejection of the claim or exception of others that the intentional exercise of a right is manifest.

According to Roman law, the *exceptio doli* was a general remedy, capable of preventing any form of abuse of rights. Its modern applications are, with regard to credit instruments, Articles 1993, subsection 2, of the Italian Civil Code, 21 and 65 of the Foreign Exchange Act, 25 and 57 of the assicuration law. These rules, while excluding the possibility of personal exceptions to the previous holders being invoked against the third party holder of the title, allow it if the holder has acted intentionally (or knowingly) to the detriment of the debtor. The so-called *exceptio doli generalis* is therefore possible, since there has been an abuse of the right, given that the exercise of the right in question (right of credit, characterised by the requirement of autonomy with respect to the fundamental relationship) goes beyond the objective purpose of the regulation which grants it protection (safeguarding the security of the trade and the entrustment of third parties).

A further legislative hypothesis of abuse of the right sanctioned with the remedy of the *exceptio doli generalis* can be found, in matters of the company, in Article 2384, subsection 2, Civil Code, which provides for the unenforceability to third parties of the limitations on the power of representation of

the directors resulting from the articles of association or the by-laws, even if published, subject to the proof that the third parties have intentionally acted to the detriment of the company[146].

The current trend in case law is in the sense of applying the remedy of the *exceptio doli generalis*, as it is based on the general clauses of correctness and good faith, beyond the aforementioned legislative cases, as demonstrated by its applications in the field of autonomous guarantee contracts.

As is well known, an autonomous guarantee contract is an atypical contract that creates a personal guarantee, such as a guarantee, which is, however, completely independent of the guaranteed relationship. The interest protected by the independent guarantee is that of the safe and timely performance of the service, not delayed by disputes about the guaranteed right. If, however, the disputes are already well-founded (because there is clear evidence that the guaranteed claim does not exist or has been extinguished), the creditor who nevertheless avails himself of the guarantee no longer realises an interest in the safe and not delayed performance, but rather in the (undeserving of protection) appropriation of an undue performance.

In line with French case-law, Italian case-law on the substance has not remained insensitive to the need to protect the guarantor against a distorted use of the independent guarantee, giving the guarantor - even in the unenforceability of the exceptions relating to the relationship between the guaranteed debtor and the creditor - the possibility of opposing the *exceptio doli* against the beneficiary who calls on the guarantee without having any rights under the main relationship or, in any case, for an unfair advantage. However, it is stated that the guarantor may, or rather must refuse payment only in the presence of documentary evidence or, in any case, of certain, obvious and indisputable proof of the non-existence of the guaranteed debt; it is also admitted that the guarantor may request urgent protection from the judge pursuant to Article 700 of the Code of Civil Procedure in the form of an injunction against the enforcement of the guarantee, i.e. through the temporary suspension of payment.

[146] Galgano F., Id., 497.

CHAPTER III

Section 4

RECOGNITION OF FOREIGN JUDGMENTS IN MALTA

For the purposes of assessing whether the Maltese system may or may not be a hybrid system of reference in European reality, it is good to dwell on one of its important provisions: the recognition of foreign sentences.

Summary: The Code of Organization; The Brussels Regulation; Foreign judgment enforcement denial in Malta.

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Considering the importance of global economy that created business relations between many countries, the legislation on recognition and enforcement of foreign judgments in most countries of the world has developed quite rapidly.

Foreign judgments in Malta are regulated by the Code of Organization and Civil Procedure and the EU legislation on the recognition and enforcement of foreign judgments, Regulation (EC) 44/2001, also known as the Brussels Regulation. Foreign judgments are recognized and enforced in Malta in both civil and commercial matters.

The Code of Organization

The Maltese Code of Organization and Civil Procedure is based on the British Judgments or Reciprocal Enforcement Act in the United Kingdom. The Civil Code in Malta states that, in cases of foreign judgments, the regulations of the European Union will prevail. Foreign judgments will not be recognized and enforced by the Maltese courts, if they fall out of the European Regulations' scope or they fail to meet the Regulations' provisions.

According to the Reciprocal Enforcement Act, foreign rulings will be enforced in Malta if they were delivered by a competent court in the country the trial had taken place and the matter was already judged by Maltese courts in the same way. The enforcement of a foreign judgment will be made only if an application for the enforcement of the judgment will be submitted. This provision from Chapter 12 of the Laws of Malta applies to judgments issued by courts in non-EU member states.

The Brussels Regulation

Chapter III in the Brussels Regulation (EC) 44/2001 sets the legal framework for the international recognition and enforcement of foreign judgments in EU countries, therefore these provisions apply in Malta also.

This way, there will be no need for a foreign court to ask for a declaration of enforceability in Malta for the recognition of the foreign judgment. The applicant for the recognition and enforcement of the foreign judgment will be required to provide certain documents that will prove his/her claim, but the Maltese court is allowed to deny the enforcement, if any requirement fails to be satisfied. The Brussels Regulation also provides legal grounds for the recognition and enforcement of foreign judgments in certain cases only.

Foreign judgment enforcement denial in Malta

The recognition and enforcement of a foreign judgment can be denied in Malta, if the rights for a fair trial have been breached or if the judgment had been made without a proper defense being assured for the defendant. A foreign judgmentcan be denied if the ruling contains any provision that contradicts the regulations of international public law in Malta. If thejudgment was obtained by fraud or contains a wrong application of the law, it will not be recognized in Malta according to Article 811 in the Civil Code of Procedure.

CHAPTER IV

FROM LEGAL PLURALISM TO A UNIFORM EU LEGAL ORDER

SECTIONS: 1 - Conceptions of “Legal Pluralism”; 2 - Legal pluralism in the European Union; 3 - Law's duality; 4 - Possibilities for a Uniform Legal Order

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In recent years, there has been a plethora of discourses in legal scholarship regarding legal pluralism. As always, the field of EU law has been on the cutting edge of this debate[147]. Here, we will briefly explain the reasons for this, as well as expound on what legal pluralism, in the various forms it takes, actually means. In so doing, we will undertake a comparison between classical notions of legal pluralism and its emerging shape in the European Union. We argue that the classical notions do not totally explain, and are conceptually diverse from, the legal pluralism that has emerged and is being established in the EU.

Bearingthis difference in mind, the core of this section will focus more intently on the European Union and the issues of governance of normative pluralism which arise from the complex and difficult relationships betweendifferent systems of supranational legality, as well as between the legal systems oftheMember States. The starting point is an analysis of the challenges that European legal pluralism in its diverse forms and degrees poses for the role of law in the European Union. It is our position that these challenges can be addressed in two different ways: through preserving European legal pluralism or through preventing it by conceiving and developing the EU legal system as a uniform and unified one. Finally, it is argued that since different models of legal pluralism evoke different underlying conceptualisationsof the European Union, the choice between the two approaches would hinge on which of these two better guarantees certainty in the allocation of rights and duties consistent with the understanding of justice which prevailsthroughout the EU as a whole.

[147] The literature is huge. In order to avoid repetition it will not be listed here, but it can be found in the footnotes that follow in the rest of this paper.

CHAPTER IV

Section 1

CONCEPTIONS OF "LEGAL PLURALISM"

a) Classical conceptions of legal pluralism

Following William Twining's approach, legal pluralism may be defined as the spectrum of legal systems, networks or orders co-existing in the same geographical space-time context[148].This approach finds its roots in empirical studies of emerging postcolonial societies conducted by legal anthropologists. These scholars revealed that a great deal of social and conflict resolution in colonial and post-colonial societieswas carried out by using traditional norms and processes not easily classifiable as law according to orthodox understandings of law and whichmay even have been in conflict with national or state law[149], identified as 'modern law' and imposed by western colonial forces. Thus, it could be said the roots of scholarship on legal pluralism were characterised by a criticism of hegemonic neo-colonial legal scholarship that disdained and disregarded indigenous law and local traditions. This may be called a post-colonial account of legal pluralism.

Research along these lines later expanded and partly shifted its focus to 'modern' societies, where legal pluralism ('strong' or 'weak' legal pluralism)[150] was said to be hidden by a common ideology of unitary positive law. Certain legalsociologistswent further along this line of thought, claiming that a systematic, homogeneous positive law, tied to a central legislator and jurisdiction, generally coincide with practices that bind the community because of their repeated practice and general acknowledgment. These practices are important insofar as they are able to consolidate, transform or even alter positive law[151]. Moreover, it could be said that binding norms in a society do not stem solely from positive law as their exclusive source, inasmuch as various social forceshave the capacity to create binding norms for the society, apart from the political process and the political legislator.[152].Post-colonial and modern statist legal pluralism, as two accounts of the theory, seemto be aspectsof the conception of legal pluralism that carriesy important implications for the state and is characterised by the way itcontradicts the idea that positive law enacted by the state is the only source of law.

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[148] W Twining, Globalization and Legal Theory (Butterworths, London, Edinburgh, Dublin 2000) 83.
[149] Ibid 84.
[150] On this see the seminal article by John Griffiths: 'What is Legal Pluralism?' published on:http://commission-on-legal-pluralism.com/volumes/24/griffiths-art.pdf
[151] E Ehrlich, Foundation of the Sociology of Law (Duncker and Humblot, Berlin 1989).
[152]L Pospisil, Anthropology of Law - A Comparative Theory (Harper & Row, Publishers, New York 1971).

Later, legal pluralism acquired an even broader formulation. It developed into an idea which states that'weak' legal pluralism within the state is only a subspecies of legal pluralism in general. This'strong' legal pluralism is based upon the idea thatthe state is not the only source of normative and legal regulations and that all legal subjects are now governed by a variety of regulatory orders that overlap, interact and often conflict with one another[153]. De Sousa Santos has described these different intersecting legal spaces as:*interlegality;*[154]where the systems are superimposed, interpenetrated and mixed in the minds and actions of individual subjects. This broader conception of legal pluralism recognizes that local, national, transnational, regional and global orders could all apply to the same situation[155]. There is sufficient evidence to show that many law-creating activities also take place beyond and within the state - on the sub-state level, that is, on the local and regional level, and not just on the level of the state itself.

However, caution must be exercised in the way jurists handlethis euphoric achievement of disengaging law from the state, that results in a hypertrophy of legal pluralisms. While legal pluralism suggests a huge internal diversity in society, whether a self-contained or an open one, which positive law tends to overlook or even suppress, legal pluralists generally downplaythe importance of positive law, as well as the formal conditions that certain norms have to fulfil to be considered law to begin with from the standpoint of orthodox legal actors. Legal pluralists have designated the jurisdiction of statist positive law as one of many semi-autonomous social fields[156] - although it is not the most important one. By doing so, they have shown that the creation of law is a dynamic process which encompasses all institutional layers of society, that is, both informal and normatively structured societal areas[157]. Then, they also emphasise how state law as an institutional normative order cooperates with, but also conflicts with, other normative orders in society.Nevertheless, those who propose legal pluralism as a panacea to the problems involved in defining law tend to overlook certain conceptual problems arising from the approach they take and often disregard the issue of when, where and how to draw distinctions between legal and non-legal phenomena and between legal orders, systems, traditions and cultures[158]. Often, legal pluralistsidentify the presence of the law in all aspects of life: in families, at working places, in

[153]Twining (n 2) 84, citing J Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later' (1989) 28 Journal of Legal Pluralism 149, 154.
[154] B de Sousa Santos, Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition (Rutledge, New York 1995) 472-473.
[155] Twining (n 2) 85.
[156] S Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1972/1973) 7 Law and Society Review 720.
[157] Ibid.
[158] Twining (n 2) 85 See also Simon Roberts, Against legal pluralism some reflections on the contemporary enlargement of the legal domain, The Journal of Legal Pluralism and Unofficial Law, volume 30, Issue 42, 1998.

favelas, in the relations among global actors, for example multinationals[159], to name some.As a consequence,'strong' legal pluralism, in relation to 'weak' statist conceptions, remains vague and directionless[160]despite having broken with the hegemonic understanding of law.As Teubner's reply to Santos clearly indicates, it leaves us confused and without clarity[161].

From a practical legal point of view, this result is rather disappointing. Instead of analysing, critically evaluating and simplifying the problems on which strong legal pluralism focuses, it tends to exacerbate them and thus ends up not resolving these practicalchallenges. Although the arguments forwarded by legal pluralism are able to remedy fundamental conceptual shortcomings in the way law is theoretically envisaged, it is our opinion that they should perform more work than justindicatingmodern societies' diversities,and the complexities that arise in the interaction of these diversities. From a practical perspective, legal pluralism should ideally also provide a roadmapfor addressing the negative consequences for legal certainty which arise from this diversity while at the same time preserving its benefits.

Most importantly, as will be pointed out, classical legal pluralism's micro-level anthropological orientation, from which it would seem that itcannot be easily separated, does not allow it to be of much epistemological or explanatory help in understanding the legally pluralist nature of the European Union. This is an important point to be made to prevent further methodological misconceptions or naïve expectations as regards classical legal pluralism's potential constructive role in research in the field of European Union.

b) Legal Pluralism in the European Union

Evidently, the European Union falls within the broad definition of legal pluralism, also defined as a concept that refers to legal systems co-existing in the same geographical space and historical moment[162]. We can in fact identify at least two distinct legal systems[163] operating simultaneously within the geographical space of the Member States of the European Union:the national system

[159]In the activities of these large multinational corporations, some scholars have even managed to locate constitutional law (sic!). See, for example, HW Arthurs, 'Constitutionalizing Neo-Conservatism and Regional Economic Integration: TINA x 2' in TJ Courchene (ed),Room to Manoeuvre? Globalization and Policy Convergence (McGill-Queen's University Press, Montreal and Kingston 1999) 17.
[160] Twining (n 2) 228.
[161]G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 Cardozo Law Review 1443.
[162] Twining (n 2) 83.
[163]And with the development of differentiated integration, there might even exist multidimensional claims towards ultimate legal authority. For a more theoretical grounding of these issues, see N Walker, 'Sovereignty and Differentiated Integration in the European Union' in Bankowski and Scott (eds), The European Union and its Order: The Legal Theory of European Integration (Blackwell, Oxford 1999) 32-33.

within eachMember State and the supranational legal order of the EU.Historically, the legal order of the Member States has been thought of as a hierarchical system with a clear and single source of ultimate legal and political authority - popularly called sovereignty - grounded in a wider political democratic system which exists for, and is created by, the people[164]. It is well known, on the other hand, that together with the legal systemsexisting within the Member States, by common consensus, the Member States have also collectively created a supranational EU legal order. In due time, it has been acknowledged that in certain limited fields[165] Member States have limited their sovereign rights within this distinct and separate legal order without havingrelinquished the autonomy of their particular jurisdictions. The legal reality within Europe is such thatautonomous legal orders co-exist, each possessingultimate legal authority,[166] which is expressed by the principle of the supremacy of EU law on the supranational side, and the invocation of sovereignty on the member-states' side.

The existence of the state and the supranational EU systems as sources of *competing plausible claims to ultimate legal authority* is whatdistinguishes European legal pluralism from classical legal pluralism.Classical legal pluralism did not foresee this kind of scenario within formal, official, law itselfand for this reason, it fails to fully account forthe existence of the European legal order. However, in order to fully understand the distinction between these two conceptions of legal pluralism, we need to clarify the character and meaning of the idea behind "plausible claim to ultimate legal authority".

This phraseconfigures sovereignty as a legal rather than a political concept, and refers to the internal legal system of a polity rather than its external relations. Sovereignty is thus conceptualised as divisible, yet requiring a finality of decision[167].It traces its originsfrom the conceptual deconstruction of the concept of sovereignty achieved by the simultaneous severing of sovereignty from the state[168] and decoupling the political and legal understandingsof sovereignty from one

[164]This nice, transparent, self-referential hierarchical structure of formal general rules produced certainty and consequential confi dence in the thus-conceived legal order. This has been so since the Peace of Westphalia. The concept of law as unity, with its faculty for providing certainty and confi dence, dates back to, and is a very reaction,to, the uncertainties and insecurities existing in Europe of that time. See SD Scott, Constitutional Law of the European Union (Pearson Education, Harlow 2002) 278.
[165] Case C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR 1.
[166]The term was coined by N Walker. See Walker (n 16) 59 - 64.
[167] Ibid.
[168]One way of defining the sovereign state is to see it as a territorial political order coupled with the legally defined position of near-absolute legislative power. Externally, the state is sovereign if there are no external limits to its internal exercise of political and legal power. MacCormick claims that these kinds of states nowadays no longer exist and, furthermore, sovereignty is not the core concept. Law does not require a sovereign in order to be law, since it is the law which determines the sovereign. See N MacCormick, 'Beyond the Sovereign State' (1993) 56(1) MLR 12.

another[169].Although law and politics are mutually constitutive[170], they are nonetheless different concepts.Law is an institutional normative system governed by the fundamental word “ought”, whereas the political world, that is, the world of power[171], is an empirical reality characterised by the word “is”. The decoupling of the legal and political conceptsof sovereignty makes it possible to transcend the historically rooted “absolute” conception of sovereignty. According to this conception, being sovereign means having absolute power, which is expressedthrough the absolute obedience of individuals and institutions within the legal and political order of a particular state. This absolute conception of sovereignty is conceptually superficial and, as has been correctly pointed out, it is also sociologically naïve[172]. Once politics as power, and law as normativity are conceptually distinguished, one can see social reality with different eyes, enabling a more sophisticated, nuanced view and moving beyondthe old-fashioned all-or-nothing approach.This means that decoupling the legal and political aspects of the concept of sovereignty is necessary in order to conceive and understand legal pluralism as such, and *a fortiori* its EU version.

Whilst EU legal pluralism on the one hand conforms to classical legal pluralism in its conviction that the state is not the only source of law (regulatory authority, and so on), nonetheless, ithas a different approach from that of classical legal pluralism. To begin with, EU legal pluralism does not operate on a micro level by giving examples of numerous other private agents located at the social grass roots who in different informal, semi-formal and formal environments supposedly also create law. It works, instead, on the macro level by stating that another structure, which is a supranational legal order that claims to be autonomous, exists on an equal footing with the state, or even trumping it by asserting equally plausible claims to ultimate legal authority.In other words, while classical legal pluralism identifies non-state sources and actors of norm creation, these are not considered as autonomous entities that are equal to states or even possessing an authority that goes beyond that of states. Even if one were to wholeheartedly endorse the stanceof classical legal pluralists who view different non-state social structures, such as families and corporationsas also being creators of‘law’; which, as we have stressed above, is in itself a contestable and somewhat implausible position from a practical legal perspective, one sees that these social structures do not claim ultimate legal authority.Even if such legal authority were to be claimed by these structures, these claims would be plausible neither in an objective nor in a subjective sense[173].On the contrary, these structures, as the

[169] Walker (n 16).
[170]N Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 MLR 343
[171]See N MacCormick, Questioning Sovereignity: Law, State and Nation in the European Commonwealth (OUP, Oxford, New York 1999) 4..
[172] Walker (n 16) 34.
[173]This distinction can be traced back to HLA Hart, The Concept of Law (Clarendon Press, OUP, Oxford, New York 1994). Hart’s conception of law based on the rule of recognition as a source of criteria of the validity of the particular

proponents of classical legal pluralism suggest, need themselves to be recognisedby thestate's positive law; which they seek to reshape so that the law is more inclusive and responsive to the whole range of diversities and of different social-norm-creation-sources in society. This can be demonstrated clearly from the following examples.

One would hardly expectthat a family, or to make it less bizarre, a favela, would one day formally claim ultimate legal authority, that is, claim that it has the right to autonomy and self-governance distinct from the state, by claiming that its law is superior to that of the state to which it belongs.Such would simply be treated as a kind of rebellion and a manifest breach of the law of the state. This isalso true of the so-called global networks, to which some forms of legal pluralism also point, such as NGOs, multinationals, and the like. These entities do not claim ultimate legal authority,but rather strive for legal recognition in the state where they operate, and in fact have to comply with the law. Amnesty International, if we were to give as an example a well-known NGO, has never claimed that "its law" supersedes the law of a certain state. On the other hand, it has often pointed out that certain states allow certain practices which violate and contradict the minimum standards of human rights protection under international law. This, however, is a different kind of claim.

A similar case is that of globally functioning "guild" organisations such as international sporting organisations. While their rules are to a great extent autonomous and states do not in principle interfere with the way they establish therules regulating games, the transactions of players and so on, they are able to operate their "autonomous rules" only insofar as these do not contravene the laws of the respective state. For example, supposing that the Federal International Football Association (FIFA) or a national football association (the Slovenian association, for example)[174] were to impose a huge fine on a Slovenian football club for the violation of its autonomous rules—ultimately leading to the collapse of the club—such a fine would infringe the fundamental constitutional right of freedom of association. Consequently, the Slovenian constitutional court would examine the FIFA decisionto ascertain its compliance with the national constitution. If the

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legal system distinguishes between the two indispensable sets of requirements - objective and subjective - for the existence of a legal system. The objective criterion is expressed in terms of the effectiveness of primary rules which is measured by the compliance (or obedience) of the individuals with them. Or in Hart's words "[so] long as the laws which are valid by the system's test of validity are obeyed by the bulk of the population this surely is all the evidence that we need that a given legal system exists." The subjective criterion is fulfilled on the level of secondary rules by the attitude of officials who have to create and comply with these rules because they perceive them as binding law, and not for whatever kind of reason in terms of compliance, as this is a case of obedience of "ordinary individuals" to the primary rules. Again, as Hart put it: the "[l]egal system's rules of recognition and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials".

[174]A similar case arose before the Slovenian Constitutional Court (case U-I-51/94, at <http://www.us-rs.si> accessed 1 October 2006). It was, however, rejected on purely procedural grounds, yet it was emphasised later that the Court's reasoning would go in the direction that we pointed to above.

FIFA decision were ascertained to be disproportionate as regards the extent of the fine, and to amount to an infringement of the constitutional right to association, the constitutional court would certainly invalidate the decision. In no way can FIFA or a national football association contend that its autonomous rules supersede the state constitution, and that the latter should therefore give way to it. Yet, in the European Union, there exist precisely these kinds of claims, pointing to the existence ofa distinct kind of legal pluralism. We shall therefore now examine how these claims have been handled and what types of responses have been given to EU legal pluralism.

CHAPTER IV

Section 2

LEGAL PLURALISM IN EUROPEAN UNION

As previously discussed,the competing plausible claims to ultimate legal authority ofthe legal orders of the Member States and of the supranational legal order are what characteriselegal pluralism in the European Union. The relationship between these two sets of legal orders became the subject of focused attention by European scholars and the broader public after the adoption of the Single European Act and the subsequent creation of the European Union by the Treaty of Maastricht. At this point, both exit and voice were lost[175], supranationalism started to bite, and the Member States, more accurately their highest courts, showed their teeth as well. The main stakeholders in the national jurisdictions have now understood that a supranational polity has been successfully constituted, that it exists alongside the Member States, and that it penetrates them even on the most fundamental level, on the traditionally sacrosanct level of their municipal law. This meant that state constitutions, according to the EU principle of supremacy, would need to give way to the tiniest supranational legal act in the event of a conflict of rules. The long-prophesiedconstitutional conflicts, although very few but nonetheless imposing, did actually happen, and one sees that most notably the German but also the constitutional courts of the other Member States,did start to assert their own supremacy, their own remaining capacity to police the boundaries and to determine the concomitant validity of the supranational legal order[176]. Given the limited space available, we willhere briefly present the types of responses to EU legal pluralism that have developed as a result of these constitutional conflicts.

By exploring the debates between constitutional and international law scholars, we can take two major approaches to understand this relationship, although it is becoming increasingly difficult to draw the line between the two. These are the hierarchical and the heterarchical approaches.

In the hierarchical approaches, which representa monist response to the challenges of EU legal pluralism, we can distinguish between the monist international law approach, the statist federalist approach, and the pluralist approach under international law. In the monist international law approach, the supranational legal order of the EU as a polity has no reasonable claimto be the

[175]For a discussion of the interplay of the interplay of notions of voice and exit, see JHH Weiler, ‘The Transformation of Europe’ (1991) 100 YALE LJ 2403, 2401.
[176]For the majority of cases, see A Oppenheimer (ed), The Relationship Between European Community Law and National Law: The Cases (Cambridge University Press, Cambridge 1994 and 2003) vol.1 and vol.2.

ultimate legal authority, because it traces its origin to the common international accord of the Member States, which remain the ultimate arbiters of the validity of EU law[177]. In the federal approach, the EU is already, or is becoming, a fully-fledged federation where EU law has its own foundations, whereas the law of the land supersedes the legal rules emanating from the legal orders of the Member States in the event of contravention[178]. Both of these views are classical and well-known expressions of monism under international or federal state law. The last example of the hierarchical approach to the relationship between the legal orders in the EU is much more nuanced and already draws heavily on the heterarchical approach. The best example is the approach endorsed by MacCormick, who states the relationship between the legal orders of the Member States and the supranational EU legal order is one of heterarchy. This means that there is a mutual recognition of the autonomous existence of both systems, which according totheKelsenian tradition, are subordinated to the overall rules and principles of international law. In the event of conflict between the two equally plausible claims to ultimate legal authority of both legal orders, the principles of international law should provide a solution[179].

Contrary to the hierarchical approaches, the heterarchical approaches recognise that both supranational and national legal orders have reasonable claims to ultimate legal authority within their respected fields. Both legal systems are autonomous, having a full, exhaustive, and definitive set of secondary rules[180]. Although autonomy can never be totally complete, and could onlyeverbe a matter of degreebecause social systems cannot be isolated from their environment[181], or from other legal orders, there is a difference of opinion among authors as regards the degree of autonomy which should be recognised for the EU supranational legal order. The difference in opinion varies according to how radical an account of legal pluralism has been adopted by the author. According to epistemic pluralism, as the most radical account of EU legal pluralism most notably pursued by Walker, the EU supranational legal order and the legal orders of the Member States are recognised as different sites, each possessing its own epistemic starting point. This means that each has its own way of knowing and understanding. In case ofconflicts between the competing claims to ultimate legal authority,one cannot point to a perspective, or a basis of historical knowledge, neither to an

[177]See, for example, T Schilling, 'Who in Law is the Ultimate Umpire of European Community Law?' Jean Monnet Working Paper 10/96.
[178]There are many examples of this account which is, however, quite diversifi ed. For a very prominent assertion in the direction of this approach, see J Fischer, 'From Confederacy to Federation: Thoughts on the Finality of the European Integration' (Speech given at Humboldt University, Berlin, 12 May 2000). See also J Habermas, 'Why Europe Needs a Constitution?' (2001) 11 New Left Review 5.
[179]See N MacCormick, 'Juridical Pluralism and the Risk of Constitutional Confl ict' in MacCormick (n 24).
[180]See B Simma and D Pulkowski, 'Leges Speciales and Self-Contained Regimes' <http://www. freewebs.com/create-future/Leges%20specialis%20and%20self-contained%20regimes. PDF> accessed 18 Dec 2005.
[181] Ibid 3.

Archimedean point, from which these opposed claimscould be reconciled; because the EU legal order and the legal order of the Member States are considered asradically different knowledge-producingentities[182].

Other authors who propose heterarchical approaches recognise the autonomy of each respective legal order, but stopshort of epistemic pluralism and try to reconcile apparently irreconcilable claims. This leads to some of them drifting,*volensnolens*, back to the monistic - non-pluralist solution. For example, there is an attempt to create a set of legal principles that would best account for the practice of pluralist relationships between the national and supranational legal orders;thus enabling the courts of last resort to find a balance between the competing conflicting claims. However, in this approach, in the case of the competing claims reflected in the so-called constitutional conflicts, the last say is still given to the national constitutional courts[183]. Similarly, but in a broader context that transcends the constitutional conflicts and the role of courts of last resort, the greater inclusion of various participants, ordinary courts, political actors, and individuals within EU legal discourse could achieve a sort of contrapuntal harmony between the competing legal orders[184]. Finally, according to Weiler,the practice of the so-called 'constitutional tolerance' could be the solution to the tense relationships between the competing supranational and national legal orders [185]. This is an example of normative pluralism as an expression of the ethics of political responsibility in Europe, founded on the mutual recognition and reciprocal respect of the national and supranational authorities[186].

A characteristic which is common toall these accounts of EU legal pluralism is that offormulating strategies of conflict avoidance to maintain a certainlevel of tranquillity or harmony in the relationship between the supranational and statist legal orders. However, to fully understand the nature of these constitutional conflicts among the legal orders in the EU, and in order to find a way to achieve the desired harmony through legal means, we need to focus on the nature and role of law in relation to the contemporary challenges posed by legal pluralism.

[182] Walker (23) 338.
[183]M Kumm, 'The Jurisprudence of Constitutional Confl ict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11(3) ELJ 299.
[184]M P Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed), Sovereignity in Transition (Hart, Oxford 2003)
[185]See JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg' in JHH Weiler and M Wind (eds), European Constitutionalism Beyond the State (Cambridge University Press, Cambridge 2003).
[186] The definition of normative pluralism is Walker's, see Walker (n 23) 337.

CHAPTER IV

Section 3

LAW'S DUALITY

Previous chapters have discussed howthe traditional understanding of law has been challenged, maybe even to an extent that requires a paradigm shift, by globalisation and attendant phenomena, and perhaps most notably by the emergence of the European Union[187]. Although the impact of these new trends is undeniable, it still seems clear that law—by virtue of some of its intrinsic qualities[188] that emanate from its dual nature—remains the cornerstone of modern society[189], and this is true even if fundamental changes have taken place in the surrounding context within which law operates.

Law possesses a dual nature and thereforeattention must be given toboth the formal and the substantive dimensions of its existence. This well-known issue has historically divided lawyers, roughly speaking, into those whoupholdpositive law, the legal positivists who have focused on and promoted the formal conception of law, and those who embrace natural law in various forms and who have emphasised the substantive conception of law[190]. As we shall demonstrate, the two accounts of law - formal and substantive - cannot be taken separately or even antagonistically. They should instead be unitedwithin the so-called integrated conception of law.

[187]For these kinds of claims within the context of the European Union, see, for example, N MacCormick (n 32):"…the interlocking of legal systems […] poses a profound challenge to our understanding of law and the legal system. The resources of theory need to be enhanced to deal with a challenge full of profound and potentially dangerous implications for the successful continuation of European integration…" In a similar vein, it was claimed that the EU challenges more than two centuries of traditional legal theory on the unity, hierarchy, systematic and internally consistent structure of law which derives its legitimacy and its origin from the state, whose will has even been personalised in the will of the demos represented in an unified institutional structure of the government. See, for example, M Wind, 'The European Union as a polycentric polity: returning to a neo-medieval Europe?' in JHH Weiler and M Wind (eds) (n 38). For very similar claims, but within the broader field of classical legal pluralism, see H Petersen and H Zahle, Legal Polycentricity: Consequences of Pluralism in Law (Aldershot, Darmouth 1995).
[188]Above all, law's capacity to contain and channel conflicts, which is also a source of the authority of law. See, D Chalmers, 'Deliberative Supranationalism and the Reteritorrialization of Authority' (comment in EUI Working Paper LAW No. 2005/12).
[189]Some would push this claim even further by contending that law is actually the only remaining integrative force of modern societies once all the metaphysical integrative forces are lost. See, most notably, J Habermas, Between Facts and Norms (MIT Press, Cambridge 1996). Habermas claims that within complex societies the only remaining tool of social integration is communicative action exercised through the means of law which, with its specifi c dual nature of coercion (ensuring effectiveness) and legitimacy (rational acceptance of law), brings security (positive law is effective and presumed to be valid) and leaves the people free as to their motives for compliance with the law. Law thus guarantees both security and freedom, and this is what holds modern societies together. 42
[190]In what follows we draw heavily on P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467.

Based on the purely formal understanding of law, legal regulation in society existsso that an order based on rules is maintained,according to which legal subjects are comprehended and actions are guided.According to the formal conception of law, the correct promulgation of rules by the competent body, their prospective temporal validity, as well as their clarity and identifiability are absolutely indispensable prerequisites for these rules to confer rights and impose duties such that the addressees of these legal rules know how to conduct themselves in order to remain compliant with the law. Moreover, according to the formal conception of law, non-compliance with legal rules is the only justifiable basis for sanctions (coercion) being imposed on the individual. Furthermore, only independent courts, which are equally accessible to all, can impose sanctions. Essentially, the certainty of the law is at the heart of the formal conception of law. All those subject to the lawshould know the following: who is subject to a law, what their rights and duties are according to the law, and who adjudicates when conflict and non-compliance arise[191].Those who advocate the substantive conception of law, whilethey also recognise the importance of legal certainty, which legal positivists posit as the paramount value, go further by highlighting the issue of the substantive goodness of a law. Legal formalists consider this to be an issue which falls within the scope of theories of social and political justice that, while they possess intrinsic value, are nevertheless methodologically unnecessary and even inappropriate in terms ofthe formal conception of law, and which should therefore be excluded[192]. Onenotes, on the other hand, that the idea that a conception of justice is embedded in law constitutes the core of the substantive conception of law. Certainty, per se, is not the only important valuefor supporters of the substantivist conception of law;butsubstantivists also acknowledge the importance of certainty in the allocation of rights and duties between individuals and the public authority, as the means which is most appropriate to achievethe conception of justice chosen by a particular community[193].

We cannot, however, isolate one conception of the law from the other. An exclusively formalist approach,which excludes a concern for substantive justice,transforms certainty into a tool of oppression, whereas an exclusively substantive approach -lackinga formal means to mediatecompetingclaims to embody appropriate conceptions of justice- would transform justice into injustice and arbitrariness. For a law to be valid, it has to be both effective (certain and enforceable) and legitimate (just). Therefore, the only viable conception of law isan integrated conceptionthatcombines the formal and the substantive dimensions. It is precisely the view of the proponents of the substantive approach that law should provide that certainty in the allocation of

[191]Ibid 469, citing J Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR. 195.
[192] Ibid. This "purification" of law has, of course, been most famously pursued by H Kelsen in Max Knight (tr), H Kelsen, Pure Theory of Law (Gloucester, Mass. 1989).
[193]Ibid 477 citing R Dworkin, A Matter of Principle (Clarendon Press, Oxford 1986).

rights and duties that is most appropriate to the chosen conception of justice within the respective community.

CHAPTER IV

Section 4

POSSIBILITIES FOR A UNIFORM LEGAL ORDER

Considering the pluralist nature of the European Union, there are great obstacles toachieving an integrated conception of law, especially considering theprominent and pervasive role that law is expected to playwithin the EU system. By default, certainty seems to be undermined by the plurality of competing plausible claims to ultimate legal authority. Secondly, we face a challenge as regards the allocation of rights and duties in accordance with the conception of justice appropriate for a certain society. The issue here is not only of not being able to talk about traditional self-contained societies[194] within the European Union, insofar as thesewere the starting points of the classical works of legal and political philosophy[195]. The issue is that it is simply impossible to speak of the European Union, offhand, as a single society or community. The EU is a multi-layered polity that, while consisting of twenty-eight different communities that are each internally differentiated, also exists ata supranational level having its own autonomous existence. Instead of one self-contained community, there are twenty-eight open communities, over and above which there exists an overarching supranational one. As a consequence, we encounter the complex issue of deciding whichconception of justice could reasonably be adopted on the supranational level which would not conflict with the conceptions of justice of the twenty-eight national communities.

Ultimately, this issue is atthe heart of European legal pluralism and is the issue behind all the (constitutional) conflicts between the supranational and national legal orders. Constitutional conflicts in the European Union are not solely about which law is to prevail: the EU law or the national one. This would be the only issue if we assumed a purely formal approach; but this as already discussed, would be untenable. If the question werepurely one of adjudicating competing

[194]We can distinguish between two types of communities: self-contained and open communities. A self-contained community is one which is autarchic, self-suffi cient, with its own primary and secondary rules which are effi cient. The relationship to the other selfcontained communities is one of co-existence, as opposed to co-operation, and contacts between these communities are regulated by legal rules stipulated by them on a consensual basis (read international law). Self-contained communities regard themselves, and are regarded by others, as sovereign, i.e. they can decide on their own and by themselves on the law and the conception of justice that will govern the relationships between the actorsin the community. A typical example of a self-contained community is the national state of the post-Westphalian world. However, as we have seen above, this kind of state has been brought to an end by the European Union, and similar processes are taking place throughout the world on account of the so-called process of globalisation. Self-contained communities nowadays thus do not exist anymore, certainly not in the European Union.

[195]See, for example, J Rawls, A Theory of Justice (OUP, Oxford 1972): "I shall be satisfi ed if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived […] as a closed system isolated from other societies." Much the same can be said for most of Dworkin's works which are limited to the confines of the American or, at best, also to English society.

rules without having to take their substance into account, it would be possible to construct a system of conflict of laws which would prioritise first one rule and secondly another one, and thus it would be easy to achieve practical certainty. However, substance is at the heart of legal rules, which reflect the conception of justice adopted in a certain society regulated by laws and hencethe choice between different rules entails strong policy considerations[196]. A mechanical approach does not resolve the issue. The problem of selecting the most appropriate conception of justice on which the allocation of rights and duties of individuals and the overall just institutional structure of the Union should be built lies at the heart of the attempt to resolve the conflicts that may arise between national and supranational legal orders in the European Union - and hence it also lies at the core of EU legal pluralism.

Bearingthis in mind, and assuming the correctness of the foregoing analysis, how does one proceed?How does one confrontthehard and fundamental questions evoked by EU legal pluralism in its various forms and degrees so as to achieve certainty in the allocation of rights and duties among individuals in a manner that best suits the most appropriate conception of justice for the European Union as well? There are two ways to approach this question: either by preserving EU legal pluralism, or by thwarting it. In other words, one can conceptualise and develop the EU legal order either as a coherentor as a unified legal order. In the first conception, the EU legal order should function as a pluralist harmonious network connectingseveral national legal orders that co-exist and co-operate without destroying or contradicting each other or the system as a whole. In the second conception, the EU legal order is a unity - as a legal order that is complete and comprehensive in itself, allowing only for a limited degree of diversity.

The underlying preconceptions as regards the nature and role of the European Union, as well as the foundations of the EU legal order[197] vary depending on whether the EU is conceived as a coherentor as a uniform legal order. The choice between these two models depends on a variety of factors: which one better fits the current EU reality (capacity of description);which can provide better tools for understanding this reality (epistemological or explanatory capacity); and which can better fulfilthe requirements posed by the integrated conception of law (normative capacity). The final choice, however, cannot simply be based on legal considerations, given our awareness of the limited capacity of law to shape society. Thus it is also important to avoid legal fetishism[198],

[196]See C Joerges, 'Rethinking European Law's Supremacy' (EUI Working Paper LAW No. 2005/12, 9) for, inter alia, the evolution of the field of conflict of laws from the "purely private law matter" to the politicisation and realisation of its general social significance.

[197]Hereby we have in mind especially the fundamental principles of EU law (supremacy, direct effect), standards of human rights protection, types of differentiated integration, overall constitutional image of the EU, etc.

[198]Hereby we paraphrase N Walker's constitutional fetishism. See Walker (n 23) 319.

particularly in the supranational context[199].. Many other factors, mostly political and economic, are socially important and have to be considered as well. The selectedintegrated conception of law presupposes a contextualised approach and such an approach is also intrinsic to the European Union itself. If we focusonly on the legal and institutional aspects, above all on the role of the judiciary, as has been perhaps done too often so far, we risk neglecting many processes that play an equally important role in the life of the Union and which cannot be overlooked by any of the competing models of EU legal order[201].

[199]Joerges (n 49) claims that in the supranational context "the wisdom and power of law are limited" and continues that "in terms of conflict resolution the law should encourage the concerned actors themselves to take up the search for problem-solving interest-mediation. It should ensure that their activities respect principles of fairness, enhance their deliberative quality and then eventually acknowledge such societal norm generation."

[201]One of such phenomena, which cannot be overlooked, is the phenomenon of new governance.

CHAPTER V

THE MALTESE LEGAL SYSTEM

SUMMARY: 1 - Maltese tradition; 2 - The Law of Malta; 3- Mixed Legal Systems; 4 - Maltese mixed legal system fields; 5 - Maltese private law; 6 - The influence of Human Rights in Maltese Civil Liability Jurisprudence

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The Maltese legal system is a mixed legal system.For a proper understanding of its development, we need to briefly outline the history of Maltese legal practice in a nutshell.Roman law as codified by the Emperor Justinian and as rediscovered, commented, developed and practiced by the greater part ofcontinental European jurists, has been the basis of Malta's legal system for many centuries.The hegemony of the *iuscommune* was further strengthened by the Order of St John during its close to three centuriesrule over Malta. Thus,the maritime code of the Consolato del Mare adopted in 1697, Grandmaster Manoelde Vilhena'sPrammatica of 1725 and the Code de Rohan of 1784 can all be considered to haveadapted Roman law to the particular circumstances of Malta.

Subsequently Maltese law underwent a revolution due to the French invasion of 1798;although this hardly established roots as French rule came to an end in 1800 after a rebellion against the French developed among the Maltese population.A further development came with the arrival of the British, who initially assisted the Maltese rebels in waging a war against the French and to whom the French garrison capitulated in 1800. The British administration, although having assured the stability of Roman law as the basis of Maltese law, introduceda very different,Common law,traditionwith them, which soon came to be established as the backbone of Maltese public law.[202] Early in the nineteenth centurythe British also introduced other legal institutions and principles such as trial by jury, the rules of evidence and the organisation of the courts itself. Later in the nineteenth and early twentieth centuries, the British administration also promoted the codification of Maltese law, ironically enough on the basis of Continental models, through the promulgation of the five codes; namely the Criminal Code, the Code of Criminal Procedure, theCode of Organisation and Civil Procedure, the Civil Codeand the Commercial Code.

Later still, the Maltese parliament, especially after Independence in 1964, further developed and expandedMaltese legislation into a hybrid legal system.[203]In 2004 the European Union Treaty, finally, was integrated into Maltese law and now forms part of the country's legal system.As stated

[202]Joseph M. Ganado, "British Public Law and the Civil Law in Malta" in Current Legal Problems, VolIII, (1950), Stevens & Sons Ltd, pgs 195-212; Raymond Mangion, Constitutions and Legislation in Malta 1914 – 1964, Volumes 1 & 2, Whitelocke Publications, 2017

[203]Sean Donlan, Biagio Ando'& David Zammit, Maltese Legal Hybridity, 27 Tul. Eur. & Civ. L.F. 165 2012

by Judge Giovanni Bonello, the Maltese legal system has never been studied in a comprehensive, encyclopaedic, let alone, inter-disciplinary manner.Professor David Attard has started to do this by publishing a series of books. These books guide students into the previously inaccessible world of Maltese law, making this close and abstruse area of law now accessible to the general public.

By virtue of its distinct history, the Maltese legal system has assumed a mixed character, taking its roots in the Civil Law (continental) family but at the same time absorbing many features of the Common Law (British) tradition.By way of demonstration, consider that the rules on theft in the Maltese Criminal Code are inspired by the Civil Law (continental) approach. On the other hand, the English law institution of the jury system has been grafted onto the Maltese Criminal Code.[204] The Maltese legal system is a showcase of the attempt to combine two great families of law.

We can identify four main ways of classifying the codified Maltese Law:

- Civil Law and Criminal Law;
- Public Law and Private Law;
- Substantive Law and Procedural Law;
- Municipal Law and Public International Law.

Civil Law deals with rights and obligations of persons, and incorporates a system of remedies in cases of breach in the observance of the law, including specific performance and damages Criminal Law, on the other hand, deals with laws that cover acts or omissions contrary to public order and society as a whole, and prescribe forms of punishment for transgressions through imprisonment or a fine.It should be noted that the distinction between civil and criminal wrongs lies not in the nature of the offence. In fact, an act may both transgress civil and criminal law and incur both a punishment in criminal law, and damages under civil law.Public Law deals with Constitutional Law, Administrative Law and Criminal Law.Private Law is concerned with protecting private rights and includes both Civil and Commercial Law.

[204]J.J. Cremona, 'The Jury System in Malta', The American Journal of Comparative Law, Volume 13, Issue 4, Autumn 1964, Pages 570–583

CHAPTER V

Section 1

MALTESE TRADITION

A central issue in contemporary academic discussions as regards the future of European law (especially of European private law) is the issue of how to deal with legal hybridity[205]. While the results of the process are difficult to predict, it is already clear that European law will evolve as a “hybrid”stemming from the intermingling of diverse national legal traditions, among which we find the civilian and common law as the major players in this process.Legal tradition, as a concept, is related to the “past”, as a set of elements and values belonging to the history of a system. In western thought, tradition has been identified with the idea of a static social order[206]. However, apart from the “static” and “closed” character that tradition has, there also exists a “dynamic” meaning[207].

Malta, whose legal system is not well known, but is worth studying, represents an interesting example of this hybridity. On a small scale, it is possible to better understand how different legal traditions can give rise to a new legal system. As will be demonstrated shortly, the simultaneous presence of diversetraditions within a single legal order affects each of the distinct legal areas within the Maltese legal system. The British common law model greatly influences some legal areas while the effect of the continental modelare more seen in others.

[205]The words "hybrid" (as related to legal systems), and "hybridity" are not easy to define. Likewise, a clear-cut distinction among mixed systems and hybrid systems is not easy at all, and will not be tried for the moment. According to the Cambridge Learner's Dictionary, the word "mixed" has to be used as to what is "made of a combination of different things", whereas "hybrid" is applied as to something new "which is made using ideas or parts from two different things". On the distinction among "mixed" and "hybrid" legal systems see para 2. On the issue of the future of European private law see Reid 2003-2004 Tulane Law Review 17.

[206] Marini 2010 www.comparazioneedirittocivile.it points out that notwithstanding the fact that tradition is usually seen as the result of a slow and spontaneous evolutionary process, it is rather the result of a selection of elements (and therefore has an artificial character): see infra. See also Marini 2011 Comparative Law Review 2-3, where the two different modes of understanding tradition, organic and semiotic, are clearly explained: in the organic perspective, "tradition means an entity that constitutes and is dialectically constituted by a whole national culture or spirit. Each entity is unique, a specific product of cultural features and of a national spirit and history" (Marini 2011 Comparative Law Review 2). According to the second perspective, "national traditions exist only as accumulated speech, a complex system of distinct and multiple elements (as a common conceptual vocabulary, a set of potential rule solutions, typical arguments pro and con, organisational schemes, modes of reasoning) as a list of elements that help us make the context more intelligible than it was before" (Marini 2011 Comparative Law Review 3). In this perspective, tradition is a set of elements which can be used by the "forces operating within the legal field". On the "structural" relationship between "law" (seen "as a means oriented to create a constructive order of the historical reality") and "narrative" ("as a means aimed to frame and explain the different looks of the historical existence") lying at the basis of the concept of legal tradition, see Costantini 2010 Comparative Law Review 1. 3

[207] On the "traditional" dichotomy among tradition/change and on how this dichotomy has been overcome, see Glenn Tradizioni Giuridiche Nel Mondo 59; Rouland Antropologia Giuridica 378.

The approach suggested aims to analyse Maltese "mixedness" by using the innovation/tradition dichotomy. This term 'innovation' underlines the changes brought about by the British government to the law of the Island[208], while the term tradition makes reference to Malta's past legal history, and may be used with an "objective" or "subjective" meaning:

a) In a first meaning, "tradition" is "autochtonous law", which pre-existed (and was autonomous from) the influences of foreign law. The legal tradition of Malta would be a source of law based on an "impure version" of Roman law, which was the *ius commune*foundation[209]. This latter resulted from the combination of Roman law principles, feudal customs, Sicilian laws and Canon law. The combination of these different legal traditions was the result of successive regimes on the Island. If Roman law could be considered as the basic fabric of Maltese law, what is considered themore original part of Maltese law was enacted during the period of government by the Knights of the Hospitaller Order[210]. The Knights acted as an efficient entry point for the diffusion of the European legal tradition into the law of the Malta. These laws introducedduring the Knights' period are based on Roman law.One cansee this clearly if one considers the Code de Rohan, neverexpressly repealed in full (and therefore with some provisionswhich can be considered to be still in force)[211], which may be seen as the precursor of modern Maltese codes[212]. It is remarkable to see the influence of Roman law taxonomies on this code. Maltese civil law does not only owe the greater part of the concepts and principles followed in the written law to Roman law, but the latter has alsogiven the supplementary law used as a source for ruling

[208] The origins of British sovereignty run from the end of French Rule to 1815. After the expulsion of the French as a result of a military alliance between the Maltese insurgents and British military forces, the British exercised de facto political control over the archipelago. The formal sovereignty continued to lie with the King of the Two Sicilies, given the British failure to restore the islands to the rule of the Knights as they bound themselves to do by the Treaty of Amiens. During this period Malta was effectively a British protectorate. Malta lost the status of protectorate and became a colony only after the 5th October of 1813, when Thomas Maitland took up the position of Governor and Commander of the island of Malta. In 1814, a VII of the Treaty of Paris recognised this change of status, providing that "the island of Malta with the dependencies thereof will be under the Sovereignty of the King of Great Britain". These are the essential historical facts concerning the transition of Malta under the control of Great Britain. The nature of this transition and of the British title over Malta are open to interpretation, as it will be seen infra in the text.

[209] See Harding History of Roman Law passim.

[210] The Knights of the Gerosolimitan Order, also known as the Knights Hospitaller, had gained control over Malta in 1530. Before their arrival, Malta was a political appendage of Sicily and the laws enacted by the Sicilian rulers also applied ipso facto to Malta. Their domination ended in 1798, with the arrival of French. On the Gerosolimitan Order, see Michallef Riflessioni Storicocritiche Sull'isola di Malta passim.

[211]In a case of 1875, the Maltese Court of Appeal held that the provision allowing reference to be made to the Roman law of the Codice Municipale di Malta (the old Code de Rohan) was still observed by the Courts of Justice of these Islands and was never abrogated, expressly or impliedly ("è conservato in osservanza nelle corti di Giustizia di queste isole e non fu abrogato, né espressamente, né implicitamente"). On the Code de Rohan see Sammut 2009 Id-Dritt Law Journal 330.

[212] A distinguished Maltese author has described this code as "a cornerstone of our legal building"; see Cremona History of Maltese Legislation 75.

casiomissi[213] (especially during the nineteenth century). Even if recourse to Roman law as a supplementary source has been notably reduced in modern times; at present, judges still sometimeslook to Roman law, but for a different purpose. They look to Roman law in order to strengthen judicial reasoning, using it as a “rhetorical device” for its prestige and appeal, or as a source of interpretation of written law.

b) The subjective meaning refers to the manner by which the present legal system is described by its present inhabitants. In this meaning, tradition is conceived as a “narrative”, as a by-product of an élite[214]. Traditions not only explain how reality is seen, but also it ought to be seen[215]. Traditions “naturalise”in the sense that they enable us to see what might not otherwise be coherently legitimised; as natural rather than constructed.

To understand the origin of Maltese "bijurality", as was explained by the Maltese political and legal élites in the nineteenth century, the meaning of tradition in the second meaning above is key. British sovereignty in Malta was founded on the supposed voluntary cessionof the archipelago by the people of Malta to the British Government[216]. This account, which may be more appropriately

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[213] A rule embodied in the Code de Rohan was that, in the case of a gap in the law, judges have to make recourse to Maltese common law. This rule was cited by De Bono Sommario di Storia passim and by Bonavita Saggio Sulla Prova Giudiziaria passim.

[214] This idea has been clearly explained by Frankenberg 2011 Comparative Law Review 4: "Traditions […] are stories that elaborate the way in which we see reality on the basis of what we have learned. Stories of traditions are told, perpetuated and shared by interpretive communities, by élites. The story of a tradition is usually an élite 'thing' which privileges and reifies a specific historical experience or learning process. Per definitionem the interpretive narrative weaving the texture of a tradition is selective. From the numerous events, issues, items, conflict resolutions of the past only a few are picked out to be recognised as worth remembering and sharing as a 'tradition'". On the importance of "narrative", as a necessary background to frame correctly legal rules and on the importance of 'narrative' as a necessary background to understand legal rules, see Monateri 2003 Transnat'l L & Contemp Probs 575.

[215] Frankenberg 2011 Comparative Law Review 5.

[216] On this aspect, see Ganado "Malta" 229-230. See also the seminal judgment Sammut v Strickland 1938 3 All ER 693. This case stemmed from the question of the validity of customs duties imposed under an ordinance made by the Governor of Malta (who represented the Empire) on certain foreign articles. At stake, there was the legitimation on behalf of the Crown to make use of legislative power to rule the Island. The issue of the existence and the width of the Crown powers involved on behalf of the judges the necessity to deal with the issue of the origins of British sovereignty and with the fact that these powers were used notwithstanding the Crown had conferred representative institutions (established with letter patent in 1921) on the inhabitants of Malta. The dispute had two possible solutions. According to one interpretation of the British public law principles (the British Settlements Act (1887) and the Foreign Jurisdiction Act (1890) were expressly recalled in the judgment), endorsed from the First Hall, sovereignty could be acquired from the Crown through conquer, cession or settlement. Since Malta was not a settled colony (the inhabitants were not English), the Crown could continue to make recourse to legislative powers. According to another interpretation (endorsed by the Court of Appeal), a distinction had to be made between cession (occurring when one State transfers its sovereignty on a territory to another State), and voluntary cession (consisting in the spontaneous transfer of the sovereignty by the general consent of the inhabitants of one State in favour of another State). According to the Court of Appeal, since Malta was not acquired by the Crown by cession, but by "compact" between the inhabitants and the Crown, and this latter had acquired the right of legislating for the inhabitants of Malta by "uniformity of usage" from 1836, the Royal prerogative was surrendered with the grant of representative institutions. The Privy Council rejected the distinction between cession and voluntary cession, since it could not find support in the British public law textbooks nor in the statutes. Even the existence of representative institutions was not considered by the Council a hurdle to the Crown's use of its legislative powers.

considered as a myth[217], is not neutral. The political aim of those élites was to acquire a privileged status for Malta within the British Empire in order to distinguish it from an ordinary colony. In this way, the people could preserve their religion, laws, and customs and obtain for themselves a high degree of autonomy and self-government, while at the same time give them the commercial advantages that arise from integration within the British Empire.

As regards innovation, if one considers only legislative changes to the legal framework, it is difficult to fully understand the process due to the important role that Maltese judges had played and continue to play in the development of the legal system.We will concentrate on a few specific cases, which are not expressly provided for by written law. In these cases, it is more evident to see thecreative function played by judges and is therefore interesting insofar as they show how the gaps in law are filled on the basis of which rules and principles. This allows an in-depth understanding of which factors influence courts in adjudication, and highlights the Maltese judicial mind-set.

Before discussing the Maltese legal system to demonstrate how different legal traditions have affected the legal system, we will briefly deal with the main approaches to the concept of mixed jurisdictions. We do this to see if Malta may be properly considered “mixed”as laid down by the most important doctrines formulated about the concept of the “mixed legal system”, and examine how these taxonomies may be usefully applied to Malta.

[217] On the importance of myth even in Western law, see Rouland Antropologia Giuridica 389. The word "myth" may seem too strong. This word aims to highlight the fact that not always what is defined as "tradition" is really rooted in the history of the system. A tradition may be "invented", i.e. it may be something new, which, for example, may deserve to give legitimacy to some conducts held by groups which hold political power. To this regard, see Hobsbawm and Ranger (eds) L'invenzione della Tradizione 3-19.

CHAPTER V

Section 2

THE LAW OF MALTA

The law of Malta incorporates continental law, common law and local traditions, such as Code de Rohan. A municipal code was enacted in 1784[218] and replaced in 1813[219]. Maltese law has evolved over the centuries and reflected the rule of the context of the time. At present Malta has a mixed-system codification, influenced by Roman law, French law-Napoleonic Code, British law-Common Law, European Union law, international law, and customary law established through local customs[220].

The current **Constitution of Malta** (*Konstituzzjoni ta' Malta*) was adopted as a legal order on 21 September 1964, and is the self-declared supreme law of the land. Therefore, any law or action in violation of the Constitution is null and void. Being a rigid constitution, it has a three-tier entrenchment basis in order for any amendments to take place.

The Constitution has been amended twenty-four times, most recently in 2020 with the entrenchment that firstly, the chief justice from now on shall be appointed by a resolution of Parliament – the legislature is appointing the member of the Judiciary – the Chief Justice. This resolution has to be supported by the votes of at least two thirds of all those members who are eligible to vote. The constitution is typically called the Constitution of Malta and replaced the 1961 Constitution, dating from 24 October 1961. George Borg Olivier was its main instigator and negotiator.

Under its 1964 constitution, Malta became a parliamentary democracy within the Commonwealth. Queen Elizabeth II was sovereign of Malta, and a Governor-General exercised executive authority on her behalf, while the actual direction and control of the government and the nation's affairs were in the hands of the cabinet under the leadership of a Maltese Prime Minister, the leader of the party that wins a majority of parliamentary seats in a general election for the unicameral House of Representatives.

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[218] Joanna Drake, P G Xuereb and Eugene Buttigieg. In Winterton and Moys (eds). Information Sources in Law. Second Edition. Bowker-Saur. 1997. Chapter Eighteen: Malta. Pages 307 to 319.

[219] Andò, Biagio (December 2011). "Mediterranean Legal Hybridity: Mixtures and Movements, the Relationships between the Legal and Normative Traditions of the Region; Malta, June 11-12, 2010". Journal of Civil Law Studies. Louisiana State University: Center of Civil Law Studies. 4 (2).

[220] Cauchi, Jacqueline Azzopardi; Knepper, Paul (1 February 2009). "The Empire, the police, and the introduction of fingerprint technology in Malta". Criminology & Criminal Justice. London: Sage. 9 (1).

On 13 December 1974, under the Labour government Dom Mintoff, the constitution was revised, and Malta became a republic within the Commonwealth, with executive authority vested in a Maltese President, who is appointed by Parliament and who in turn, appoints as Prime Minister.

The President also nominally appoints, upon recommendation of the Prime Minister, the individual ministers to head each of the government departments. The cabinet is selected from among the members of the House of Representatives. The Constitution provides for general elections to be held at least every five years. Candidates are elected by the Single Transferable Vote system. The entire territory is divided into thirteen electoral districts each returning five MPs to a total of 65. Since 1987, in case a Party obtains an absolute majority of votes without achieving a Parliamentary majority a mechanism in the Constitution provides for additional seats to that Party to achieve a Parliamentary majority (Act IV of 1987). To date this mechanism, intended to counteract gerrymandering, came into effect twice: for the Sixth and the Eighth Parliaments. A similar mechanism was introduced in 1996 so that additional seats would be given to that Party obtaining a relative majority of votes but not a parliamentary majority with only two parties achieving Parliamentary representation. This mechanism was first applied in the 2008 general election.

The *Independence Constitution* of Malta of 1964 established Malta as a liberal parliamentary democracy.[221] It safeguarded the fundamental human rights of citizens, and forced a separation between the executive, judicial and legislative powers, with regular elections based on universal suffrage. It defines Roman Catholic church as state religion[222] and provision of religious education in compulsory education.[223]

This constitution was developed through constitutional history and its evolution is partly modelled on the Italian Constitution. The constitutions of Malta fell under three main categories. These were:

Those over which the British possessed total power;

The intermediate genres of constitutions (1921-1947), where Malta had self government (the 1961 constitution was very similar to these constitutions);

the Independence Constitution of 1964.

On 27 July 1960, the Secretary of State for the Colonies declared to the British House of Commons the wish of Her Majesty's Government to reinstate representative government in Malta

[221] Supplement of the Malta Government Gazette, No. 11688 of September 18, 1964.
[222] Article 2, 1.
[223] Article 2, 3.

and declare that it was now time to work out a new constitution where elections could be held as soon as it was established. The Secretary, Iain Macleod, also notified the House of the appointment of a Constitutional Commission, under the chairmanship of Sir Hilary Blood, to devise thorough constitutional schemes after consultation with representatives of the Maltese people and local interests.

The Commissioners presented their report on 5 December 1960. The report was published on 8 March 1961. That same day, the Secretary of State declared to the House of Commons that Her Majesty's Government had taken a decision. The Commissioner's constitutional recommendations to be the basis for the subsequent Malta constitution were to be granted. The 1961 Constitution was also known as the Blood Constitution. It was enclosed in the Malta Constitution Order in Council 1961 and it was completed on 24 October of that same year.[224] The statement that the Order makes provision for a new constitution where Malta is given self-government is found on the final page of the Order in Council.

The 1961 Constitution provided the backbone for the Independence Constitution. A date was provided to guarantee this legal continuity. An indispensable characteristic of this constitution is the substitution of the diarchic system, which was no longer practicable, by system of only one Government, the Government of Malta, with full legislative and executive powers. At that time Malta was still a colony and responsibility for defence and external affairs were referred to Her Majesty's Government. There was a clear indication that the road towards independence continued and now was at a highly developed stage. It is imperative to recognise that the 1961 Constitution established most of the features of the 1964 Constitution. The British recognised Malta as a State.[225] Another important characteristic of this constitution was an innovative introduction of a chapter covering the safeguarding of Fundamental Rights and Freedoms of the Individual.[226] This is fairly significant because Fundamental Human Rights are a protection for the individual by the State. In the 1961 Constitution, Fundamental Human Rights and Freedoms are found in Chapter IV. The protection of freedom of movement was introduced only in the 1964 Constitution.

The declaration of rights of the inhabitants of the islands of Malta and Gozo dated 15 June 1802, gives a collective declaration of rights. The 1961 Constitution gave birth to what was recognised as a Parliament in the 1964 Independence Constitution. The Cabinet had the general direction and management of the Government of Malta. It consisted of the Prime Minister. The Prime Minister alone might summon it and it was this office which presided over it. Not more than seven other

[224] Supplement of the Government Gazette, 31 October 1961, No. 11.346.
[225] Section 2: 1961 Constitution – “The State of Malta”.
[226] Articles 5-17: 1961 Constitution.

ministers were members of the Legislative Assembly, and they were collectively responsible to it. This was one of the first attempts to restate some of the more important British Constitutional Conventions in the constitution. In the exercise of his powers, the Governor was to act on the advice of the Cabinet, except where he was directed to act in his discretion or on the recommendation or advice of a person other than the Cabinet.

Three elections of the promulgation of the 1961 Constitution existed.[227] This constitution included the presence of a Cabinet for the first time in Malta. The legislature was unicameral. The Legislative Assembly's normal life span was of four years. It consisted of fifty members and they were elected by universal suffrage from ten electoral divisions on the system of proportional representation by the single transferable vote. The 1961 Constitution constructed a firm foundation for a future achievement of Independence. When in 1964 Malta did in fact become independent, because the Government chose to avoid breaking all ties with the United Kingdom, there was legal continuity of the legislation, as a result of which Parliament remained functional. To a certain extent the same situation existed as regards to the legislation by the British Parliament for Malta. The Malta Independence Order itself developed into the subject of an entrenchment, since here it is declared that this evolved into an extension to the 1961 Constitution even in the sense of an amendment.[228]

Even though Malta acquired independence, there was an ongoing presence of continuity. One of them is the monarchy pre-1964 and prior 1964. The Malta Independence Order 1964 was subject to the Malta Independence Act of that same year and it is a document that holds the chief regulations that govern the constitution of a state. This document is supreme over each and every other document and all legislation is subject to it. Throughout Malta's constitutional history, the nation acquired its own constitution, and to a certain extent, the Independence Constitution is made up of certain principles that arose for the first time in previous constitutions. It can be said that the Independence Constitution has evolved from the constitution which preceded it. But one must not ignore the fact that changes have taken place in this process of evolution. The statement that the 1964 constitution is in fact a replica of the 1961 constitution with sovereignty added might be criticised by saying that some factors differ between the two constitutions. The 1964 constitution is not merely what can be defined as an improvement. It is more like another stepping-stone in constitutional history being the final step in a long series of constitutions. In fact, even though it may seem that some provisions were altered from the 1961 constitution to the 1964 constitution, some of those provisions remained unchanged until the amendments of the 1964 constitution were

[227] Article 45: 1961 Constitution.
[228] Article 50: Malta Independence Order.

made.[229] On 14 April 2014, the anti-discrimination provision of constitution is amended to include sexual orientation and gender identity.[230] In 2020, following a review by the Council of Europe's Venice Commission, the constitution was amended to reduce the powers of the Prime Minister.

The **legislature** is the Parliament of Malta, **legislation** includes codes and Acts of Parliament.[231]

The **Parliament of Malta** (*Il-Parlament ta' Malta*) is the constitutional legislative body in Malta, located in Valletta. The parliament is unicameral, with a democratically elected **House of Representatives** and the president of Malta. By constitutional law, all government ministers, including the prime minister, must be members of the House of Representatives.

Between 1921 and 1933 the Parliament was bicameral, consisting of a Senate (*Senat*) as well as a Legislative Assembly (*Assemblea Leġiżlattiva*).

The House of Representatives (*Kamra tad-Deputati*) is the unicameral legislature of Malta and a component of the Parliament of Malta. The House is presided over by the Speaker of the House. The President of Malta is appointed for a five-year term by a resolution of the House. Composed of an odd number of members elected for one legislative term of five years. Five members are returned from each of thirteen electoral districts using the single transferable vote electoral system, but additional members are elected in cases of dis-proportionality. Since 2022, 12 extra seats are provided to female candidates, as long as they fail to make up 40% of the elected members, leading to a total of 79 MPs after the 2022 election.

MPs are elected from 13 five-seat constituencies by single transferable vote. Candidates who pass the Hagenbach-Bischoff quota in the first round are elected, and any surplus votes transferred to the remaining candidates, who will be elected if this enables them to pass the quota. The lowest ranked candidates are then eliminated one-by-one with their preferences transferred to other candidates, who are elected as they pass the quotient, until all five seats are filled. If a party wins a majority of first preference votes but fails to achieve a parliamentary majority, they are awarded seats to ensure a one-seat majority, if they are one of only two parties to obtain seats. While the ranked preferential system used is technically proportional, the low number of seats per constituency (five) means that parties can only receive seats if they reach at least 16.7% of votes, so smaller parties are

[229] J.J. Cremona - THE MALTESE CONSTITUTION AND CONSTITUTIONAL HISTORY SINCE 1813 (Publishers Enterprises Group Ltd (PEG) – 1994).
[230] Constitution of Malta, Article 45,(3).
[231] Ivan Sammut. "Legislation in Malta". Karpen and Xanthaki (eds). Legislation in Europe. Hart Publishing. 2020.

excluded from representation. Consequently, Malta has a stable two-party system, with only the Labour Party and Nationalist Party having a realistic chance of forming a government.[232]

Between 1921 and 2015, the House of Representatives was housed in the Grandmaster's Palace in Valletta. Since 4 May 2015 the House of Representatives has met in the Parliament House, near the city gate of Valletta.

The Standing Orders of the House provide for the creation of eight Parliamentary Standing Committees to make parliamentary work more efficient and enhance Parliament's scrutiny functions.

The **judiciary of Malta** interprets and applies the laws of Malta, to ensure equal justice under law, and to provide a mechanism for dispute resolution. The legal system of Malta is based partially on English law and partly on Continental law, whilst also being subject to European Union law.[233]

In its pre-accession evaluation reports in 2003, the European Commission suggested that there should be reform in the judicial appointment procedure, "controlled by political bodies" (i.e. the Parliament and parties therein), to improve objectivity.[234] The Commission also pointed to the need to check the procedure for challenging judges and magistrates provided for by Article 738 of the Code of Organisation and Civil Procedure with the principle of an impartial tribunal enshrined in the European Convention on Human Rights.[235]

The December 2018 Venice Commission Opinion on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement in Malta has pointed the finger to several issues requiring reforms to ensure the independence of the judiciary in Malta which has led to a number of reforms on the appointments and removal of the Judiciary of Malta.

The judiciary is defined by the Constitution of Malta as a hierarchical system of courts,[236] with a Constitutional Court, separate Civil and Criminal Courts of original jurisdiction.[237] In the criminal court, typically the presiding judge sits with a jury of nine. The Court of Appeal and the Court of

[232] Cini, Michelle (2009). "A Divided Nation: Polarization and the Two-Party System in Malta". *South European Society and Politics*. **7** (1): 6–23; Hirczy de Miño, Wolfgang; C. Lane, John (1999). *Malta: STV in a two-party system*. p. 17.
[233] Andò, Aquilina, Scerri-diacono, Zammit, *Malta* in Palmer, *Mixed jurisdictions worldwide: The third legal family* (2011).
[234] "Comprehensive monitoring report on Malta's preparations for membership" (PDF). European Commission. 2003. p. 13. Archived from the original (PDF) on 3 January 2014. Retrieved 30 December 2013.
[235] "Regular report on Malta's progress towards accession" (PDF). European Commission. 2002. p. 17. Archived from the original (PDF) on 3 January 2014. Retrieved 30 December 2013.
[236] Chapter VIII". *Constitution of Malta*. Justice Services, Government of Malta. p. 54. Archived from the original on 6 October 2014. Retrieved 30 December 2013.
[237] "The Courts". *judiciary.mt*. Archived from the original on 5 June 2022. Retrieved 21 August 2022.

Criminal Appeal hear appeals from decisions of the civil and criminal cases delivered by the superior and inferior courts respectively. Inferior courts are presided over by magistrates with original jurisdiction in criminal and civil actions.

The highest court, the Constitutional Court, has both original and appellate jurisdiction. In its appellate jurisdiction it adjudicates cases involving violations of human rights and interpretation of the Constitution. It can also perform judicial review. In its original jurisdiction it has jurisdiction over disputed parliamentary elections and electoral corruption practices. the Constitutional Court's judgments do not have explicit erga omnes effect, and norms which have been found unconstitutional need to be repealed by Parliament. The Court is thus faced with repetitive cases due to its jurisprudence not being taken into account by the administration or even by other judges. The Venice Commission notes that "the Constitution should be amended to provide that judgments of the Constitutional Court finding a legal provision unconstitutional will result directly in the annulment of that provision without intervention by Parliament" (#78).

The organisation of the judiciary in Malta foresees a wide range of specialised tribunals:[238] these often do not enjoy the same level of judicial independence as the ordinary judiciary, which risks being undermined by their expansion, with the danger of parallel jurisdictions.[239]

The appointment the Chief Justice is made by the President of Malta following a two-thirds resolution by the House of Representatives of Malta.

Judges have security of tenure until the mandatory retiring age of 65 (or 68 if they wish to extend), or until impeachment. The Constitution also foresees that the adjudicators' salaries are paid from the Consolidated Fund and thus the government may not diminish or amend them to their prejudice.

A Judicial Appointments Committee (a subcommittee of the Commission for the Administration of Justice) composed of 5 non-judicial members which recommend appointments of judges of the superior court and magistrates of the inferior court directly to the President of Malta.

The Constitution of Malta provides for a Committee for Judges and Magistrates which shall consist of three members of the judiciary who are not members of the Commission for the Administration of Justice. This sub-committee shall have the power to exercise disciplinary measures on a judiciary member who breaches the code of ethics for the Members of the Judiciary.

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[238] "Officially appointed bodies: Tribunals". *gov.mt*. Government of Malta. Retrieved 21 August 2022.
[239] "Opinion No. 940 / 2018 (CDL-AD(2018)028) on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement in Malta". *venice.coe.int*. European Commission for Democracy Through Law (Venice Commission), Council of Europe. 17 December 2018. Archived from the original on 3 June 2022.

The constitution deals with judicial discipline by establishing a Committee for Judges and Magistrates able to commence proceedings for breach of the provisions of the Code of Ethics (Art. 101B, introduced in 2016). Although only broadly defined, these norms are accompanied by more concrete guidelines. Sanctions (warning, fines, suspensions) are meted out by a 3-member Committee for Judges and Magistrates. Yet, such committee cannot dismiss a judge or magistrate; dismissal is in the hands of the Commission for the Administration of Justice. Impeachment may be based on the grounds of proved inability to perform judiciary functions in office (whether it is infirmity of body or mind or any other cause) or proved misbehavior.

Prosecution tasks in Malta are shared between the Malta Police Force, who investigate crimes and presses charges, and the Attorney General (AG), who prosecutes the cases. Magistrates may also start ‘inquests’, originally foreseen to preserve evidence, but today rather fully-fledged investigations.

The judges are styled as "The Honourable Mister/Madam Justice".

CHAPTER V

Section 3

MIXED LEGAL SYSTEMS

We can divide the scholars who deal with this issue into two groups. On group consists of those who think that a mixed system is one in which two or more legal traditions that share some features operate simultaneously. The sharing of these common features on behalf of specific legal systems would justify grouping them into mixed jurisdictions[240], as a distinct “legal family”.

In this model, a legal system is mixed if it has three characteristics. The first characteristic is called “the specificity of the mixture”;this refers to the fact that the system is built on dual foundations of civil and common law. Another characteristic is that the existence of these dual elements should be obvious to an ordinary observer (inside that system).And finally, that this “bijurality” affects separately distinct areas of law: public law is oriented towards the Anglo-American model, whereas private law is shaped along the continental one[241]. Another approach, which is distinct from Palmer's, has been proposed and is worth considering[242]. According to this approach, it would be sufficient to consider a system as mixed if one sees the simple presence of different legal traditions (other than those of civil law and common law) within the same legal system. However, one may not consider mixed jurisdictions as a specific group with specific characteristics, since the variety of the mix present may be very different.

The different kinds of mix would depend on legal-cultural and socio-cultural affinity among the systems[243]. In the presence of a high level of legal-cultural and socio-cultural affinity, it will be

[240] The leading scholar of this group is Palmer. This approach is also followed by Reid.
[241] Palmer Mixed Jurisdictions Worldwide 7, who looks at these three characteristics as the lowest common denominators of a mixed jurisdiction.
[242] Örücü "Family trees for legal systems" 359 clearly explains her approach in the following passage: "what is necessary is an assessment of individual legal systems according to the old and new overlaps and blends and of how the existing constituent elements have mingled and are mingling with new elements entering these legal systems. Hence, the scheme proposed here regards all legal systems as mixed and overlapping, overtly and covertly, and groups them according to the proportionate mixture of the ingredients. Therefore, it is essential to look at the constituent elements in each legal system and to regroup legal systems on a much larger scale according to the predominance of the ingredient sources from whence each system is formed. Both horizontal and diachronic analyses are called for at all times. The starting point is that all legal systems are overlaps and mixes to varying degrees" (Örücü "Family trees for legal systems" 363). Fragments of Örücü's approach are developed in other works of the same author. See also Örücü 1987 Legal Studies 310; Örücü 2002 Int Comp L Quart 205.
[243] Since Örücü's survey is not limited to systems which are the result of the mixing of common law and civil law, the more general (in comparison to "mixed") word "hybrid" is preferred henceforward, since it describes better her approach. According to Örücü 's approach, hybrid systems result from the diversity between the model and the recipient: "when transmigrations occur and elements from different internal logic come together, differences are as to structure, substance or culture. Where there is a mismatch between model and recipient, history tells us that the result is

difficult to distinguish and separate the constituent elements of the new compound. This group is clearly exemplified by the Dutch legal system. When there is socio-cultural concordance and at the same time legal cultural diversity, the elements of the different traditions intermingle but maintain their separate identity. In this case a lower degree of mixing happens, as the case of Scotland shows, where a combination of common law, Romanlaw, and indigenous customary law may be found.

When different legal systems interact and manifest different characteristics on the legal-cultural or the socio-cultural levels, the resulting system is marked bylegal pluralism. This is clearly the case with Algeria.

Örücü proposes an approach called "family trees approach", which mainly consists of a deconstruction and reconstruction of "the conventionally labelled pattern of legal systems"[244]:

Legal systems would be classified according to their parentage, their constituent elements and the resulting blend, and then grouped on the principle of predominance.

She further states that[245]:

The strategy for the family trees approach would be to look at the picture as objectively and neutrally as possible with a view of discovering the ingredients and historical antecedents of each legal system together with its present blend. One methodological problem of comparative law research in determining where legal systems sit, is how to decide on what to ignore as accidental rather than vital and what as changeable rather than constant.

Hybrid systems arise from "cohabitation", and they could be "life-long", or "temporary". They could also arise from the cross-fertilisation between "adjacent trees". The combination may be overt, or covert. However, the diversity of cases of hybridity makes it impossible to construct a theory. In this sense, Malta is explicitly considered as an example of a "complicated cross".

AlthoughÖrücü's proposal could yield significant results from the comparative point of view, given that it is capable of dealing withinternal legal hybridity's complex culturalmixtures, Palmer's approach seems more appropriate in understanding the Maltese legal system. The reason for this is

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usually a 'mixed jurisdiction'" (Örücü 2002 Int Comp L Quart 212). This diversity imposes on the recipient the burden of what is called by Örücü "transposition", a term which is imported from the field of music, and aims to refine Watson's theory of legal transplants. The bulk of this proposal lies in the necessity of adapting the model to the culture and needs of the recipient: "the term 'transposition' is more apt in instances of massive change based on competing models, in that here the pitch is changed. In musical transposition, each note takes the same relative place in the scale of the new key as in the old, the transposition being made to suit the particular instrument or the voice-range of the singer. So it is in law. Each legal institution or rule introduced is used in the system of the recipient, as it was in the system of the model, the transposition occurring to suit the particular socio-legal culture and needs of the recipient)" (Örücü 2002 Int Comp L Quart 207).

[244] Örücü "Family trees for legal systems" 359.

[245] Örücü "Family trees for legal systems" 371.

founded on the Maltese legal system's grounding on a compartmentalised balance between continental and Anglo-American law that resemble those found in jurisdictions that Palmer studied. For this reason, we will adopthis approach. We have to consider, however, that the Maltese legal system has distinguishing features, which are uncommon in other "classical" mixed jurisdictions.

Given our aim, we distinguish the most significant features of the Maltese system as follows: (a) the codification of important parts of the legislative *corpus*; (b) the absence of the doctrine of binding precedent; (c) the absence of a theoretical approach to law in the sense that a doctrinal formant[246] nowadays does not exist[247].

Of theseenumerated features, only the issue of codification will be subjected to an in-depth examination.

[246] Through the use of the word "formant" this writer makes reference to Rodolfo Sacco's theory of legal formants expounded in Sacco 1991 AJCL 1. In this essay, the author deals with the fundamental issue of the way of selecting the objects to compare. According to him, the comparative law scholar should do away with the notion of legal rules which is linked with the idea of the unity of the legal system. He challenges the assumption that every legal issue can be dealt with through a single rule, which is the same for every constituent part of the legal system (constitutions, legislatures, courts, scholars who formulate legal doctrine, etc.). According to Sacco, there is no such thing as a single rule. At the outset of their search, comparative law scholars will not find a single rule, but a variety of legal material: "thus even the jurist who seeks a single legal rule, indeed who proceeds from the axiom that there can be only one rule in force, recognises implicitly that living law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges – elements that he keeps separate in his own thinking" (Sacco 1991 AJCL 22). This variety of legal formants is called "legal formants".

[247] The absence of a modern doctrinal formant makes it more difficult for a foreign observer to penetrate the internal logic of the system. Law journals (devoted basically to practitioners, and one, Id-Dritt run by the students of the Faculty of Law) are very few. Maltese scholarship gave a more important contribution during the nineteenth and the first thirty years of the twentieth century.

CHAPTER V

Section 4

MALTESE LEGAL SYSTEM FIELDS

While we intended to focus mainly on the features and the sources of private law, we note that a thorough description of the Maltese legal system also touches on other fields of law than private law.

As regards Maltese public law, Maltese scholarship[248] and several Maltese judgments[249] generally acknowledge that British common law constitutes its backbone. This resulted not so much from the formal acquisition of sovereignty over Malta (when Thomas Maitland became Governor of the Island in 1813[250], whichwas given an equal international footing under the Treaty of Paris[251]in 1814) but from the formal recognition of Malta as a British colony at the outset of the British occupation of the Island[252].Unlike other mixed jurisdictions,English law has not fully influenced

[248] See Ganado 1950 Current Legal Problems 195; Ganado "Malta" 225.
[249] A significant acknowledgement of the influence of British public law on the homologous Maltese field may be found in the area of governmental liability towards private persons. This area has been characterised by the relinquishment of the doctrine of the dual personality of State grounded on continental law principles, acknowledged for the first time in Busuttil vs La Primadauye (Prim'Aula 15 February 1894), which distinguished between acts "iure imperii" (for which the State was not liable) and acts "iure privatorum" (for which the State could be liable), and challenged afterwards in Cassar Desain v Forbes (Court of Appeal 7 January 1935) insofar as the doctrine of act "iure imperii" has been clearly rejected since it is "alien and diametrically opposed to the Public law of England", in favour of a stricter doctrine, based on British law, of "acts of State". The actual difference among these two doctrines is that the separation of powers, rooted in continental legal tradition, not only sets out the independence of judges, but also the freedom of the government and its officials from the jurisdiction of the ordinary courts. In Cassar, the issue at stake was if the Crown can be held liable in tort for a wrong committed by its servants. This last judgment is particularly significant since, "as the matter of the personality of State is a matter of public law, it is to be regulated of British public law and not of continental jurisprudence" (see Gulia Governmental Liability in Malta 11). According to English public law principles summarised in the judgment, the State is subject to the same law of private citizens, i.e. the "common law". The interesting point developed in Cassar is that "common law" was identified in the Maltese but not in the English common law. This conclusion has been grafted on the ground of the allegedly different status of Malta from that of the other colonies (on this point, see what I said above under s 1). Due to the fact that Malta was neither conquered nor ceded, the principle according to which any law seriously opposed to the principles of English law was repugnant to the law of England and therefore invalid could not find application. A different rule (for further details, see above in the text) should have to be obeyed - one providing that preexisting laws (previous to British Rule) should remain in force unless changed by the competent authority; with the result that the common law of England has no authority on the Island.
[250] See fn 4.
[251] The Treaty provided that "the Island of Malta with the dependencies thereof will be under the Sovereignty of the King of Great Britain".
[252] The origin of British sovereignty on Malta has been explained by Maltese élites as the result of a voluntary cession made by Maltese people to the British government (on this issue, see Mifsud Origine della Sovranità Inglese VI). This explanation of the origin of British Rule aimed to claim a wider independence of Maltese from the British government than that enjoyed from ordinary colonies. The reception of British law was therefore depicted not as the result of an imposition, but as the outcome of a free choice; whence the possibility of adaptation of the principles rooted in British law to a context strongly permeated from a civilian culture.

other legal areas, such as criminal law and criminal and civil procedure[253]. The codified[254] criminal substantive law could be defined as the "eclectic"product of the blended Italian and British legal traditions.

As regards procedural law, a well-known generalisation holds that the basic procedural distinction between common law and civil law systems reflectsthe opposition between the "adversarial" and "investigative" models of trial procedure[255]. The adversarial system is found in common law systems, and is marked by active parties, a rather passive judge (as he renders a decision based only on what has been produced in the proceedings) and a lay jury. On the other hand, the investigative system is characterised by the active role of judges and the absence of a lay jury. This latter element is reflected inthat in civil trials the principle of a single continuous hearing is rejected. In the system of civil law, an "episodic" trial is the norm, characterised by several hearings. Malta's civil law trial system veers more toward the investigative model than in the other mixed jurisdictions. There is, however, no discovery system and no civil jury;while judges play an active role, and the procedure is based more on the written court file rather than on the oral hearing. This shows thecontinued presence of civil law influence on civil procedure even after the British Rule began. For the most part, the rules of the Code of Organisation and civil procedure retained their civil law origins. Although the inquisitorial model is even nowadays at the root of civil procedure[256], some features of the "investigative" model have been received. Later on, statutory law introduced some changes by

[253]This is one of the peculiar characters of the Maltese system to which I was referring at the end of the previous section. On this see Ando, Donlan and Zammit, *op. cit.*

[254] On the criminal code, see Gourlay 2009 Melita Historica 109; on the issue of the model and the language for the codification of criminal law, see Ganado1949 Law Journal 211.

[255] On the distinction among adversarial and inquisitorial procedures, ex multis, see Mattei, Ruskola and Gidi Schlesinger's Comparative Law 789-790: "by 'adversarial proceedings' civil-law attorneys refer to the fact that the court is limited by the parties's claims, allegations of facts, and presentation of evidence. This does not mean, however, that the judge is a passive bystander or a mere umpire, as the traditional common-law judge. Although limited in the merits of the proceeding, the civil-law judge plays an active role with respect to the procedure. Among other things, the judge supervises the orderly evolution of the proceedings and compliance with procedural rules, making decisions within a reasonable time. This active role also implies that, in some civil-law countries, if the parties do not succeed in producing sufficient evidence, the judge may request sua sponte the production of any admissible evidence, whenever necessary for a decision on the merits" (Mattei, Ruskola and Gidi Schlesinger's Comparative Law 790). There would be a systemic difference between common law and civil law procedures concerning the role of judges to be found primarily in the coordinate-hierarchical dichotomy.

[256] During his Governorship, Sir Thomas Maitland had the aim of substituting the prevailing inquisitorial model with the investigative. His death stopped the process of reforming the existing law with norms rooted on English common law, and its replacement with a policy that local law would be left intact in areas where the introduction of common law principles was not felt to be absolutely necessary. This policy is well witnessed by the most important commentaries on the procedural law and the law of proof and evidence written among the 30s and 40s of 19th century by two leading Maltese lawyers, such as Antonio Micallef and Ignazio Bonavita who stressed the fact that the Maltese civil procedure is a mixture of law flowing from Canon law, Sicilian law, and English common law.

adopting common law procedure and evidence. One can see the combined influence of the civil and common traditions resulting in a mixed system. The same holds true for criminal procedure[257].

[257] According to Cremona 1964 AJCL 570: "the whole criminal system of the Island […] represents a felicitous fusion of continental and English elements. […] the substantive criminal law of Malta is based on the Code Napoléon […]" (Cremona 1964 AJCL 572). A significant trace of continental influence is the existence of an inquiring magistrate having the function of gathering evidence in the pre-trial phase of criminal trials in the case of offenses whose punishment exceeds a ten-year term of imprisonment.

CHAPTER V

Section 5

MALTESE PRIVATE LAW

As regards private law, the existing system was retained even after the onset of the British occupation. This arose not only because of acquiescence by the British government in Maltabut also resulted from pragmatic reasons. While British imperial interests would perhaps have benefited more from an overhaul of the legal system with the repeal of Roman law and the imposition of English common law, the colonial authorities deemed that practical disadvantages would arise from the substitution. It was clear that the autochthonous private law based on the continental system was well tested and that the distinctive character of English private law would have made the transplant difficult. Moreover, there would have been considerable opposition from the Maltese legal profession as a result of the substitution. The first proclamation of British Commissioner Cameron on the 15th July 1801, then found its inspiration from all these factors,and in fact guaranteed the protection of the rights of the Maltese people, expressly that of religion and property[258].

We have then two processes happening: the retention of private law that existed prior to British Rule on one hand, and the other, a process of codification of this private law. This process faced various challenges. First, there was the issue of which language was to be used. While at the onset, English was the language favoured by the commission initially tasked with codification (thus making it possible tointroduce English law concepts into the fabric of private law), Italian eventually became the language of choice for the process of codification. The process of codification of the Civil lawwas carried out by Sir Adrian Dingli, a Maltese lawyer appointed Crown Advocate in 1854, who enacted single ordinances into a civil code that followed the most modern civilian codes of that era. These ordinances were afterwards consolidated in the Ordinances VII of 1868, concerning the law of things, promulgated on the 11th February 1870, and I of 1873, concerning the law of persons, promulgated on the 22nd January 1874.

With the exception of citizenship and intellectual property rights, which was governed by English law, and marriage, which was governed by Canon law, the ordinances above covered the whole field of civil law. The Napoleonic Code, as the most important model for the codification, was the backbone of Dingli's civil code, together with other codes existing at the time, such as the Old Italian Code, the Austrian Code and the Code of Louisiana. As a result, certain institutions and rules

[258] See Harding Maltese Legal History 7 ff; Ganado "Malta" 228 ff; Hardman History of Malta passim.

which may be characterised as being characteristic of French law, such as indivisible obligations, the relevance *ipso iure* of legal compensation, the diligence of the*bonus pater familias* as an objective standard of liability, the principle *possession vaut titre* and so on,entered Maltese law.

Moreover, as has been stated previously, Roman law heavily influenced areas of law as regards property and succession, except in some parts of the code that covered the acquisition of ownership of movable property, the transfer of ownership following agreements, and the effect of partition[259].

In his "Appunti" (notes), which were written in Italian, Dinglidocumented his foreign sources of law, such as Roman law, the Napoleonic Code, the Austrian Code, and the codes of various Italian states[260]. This manuscript, althoughnot found in the civil code, sheds precious insight on Dingli'sworksince it allows us to understand theroots and conceptual background of the civil code.

On the other hand, we find that while certain provisions are completely new, others are deeply rooted in Roman law, and this is the substance of the Maltese legal tradition[261].

Since those times, the Maltese Code has remained fairly constant and when compared to other civil codes of other civil law orders, which have already undergone many revisions, the Maltese code still most faithfully reflects the original Napoleonic Code.

The influence of the Napoleonic Code on Maltese private law, however, does not fully explain the development of Malta's legal system. Beyond the codified private law, another powerful force has shaped its legal system: the courts.

Precontractual liability and moral damages in Malta: interpretation as examples of"law in action"

Retracing the path masterfully opened by Andò[262], we will focus on two relevant issues of private law,which seems to support the assumption that judges have played an essential role in driving the development of the Maltese legal system, thus contributing to its mixed nature.

Moral damages, as a legal issue, exemplify the Maltese judicial attitude to having recourse to equity. "Equity" in the Maltese legal context has a double meaning[263]: one, as an instrument to fill

[259] Harding History of Roman Law 40 ff.

[260] Apart from the French code, other codes were consulted such as the Civil Codes of Austria, Parma, the Two Sicilies, Canton Ticino, and Albertino.

[261] See Dingli Appunti passim. Ex multis, the part concerning the contract of sale is interesting, since it includes numerous examples of provisions which are taken from French code, from French scholarship, and provisions which are created ex novo by Dingli.

[262] B. Ando', The mélange of innovation and tradition in maltese law: the essence of the maltese mix (2012), p. 81 ss.

the gaps, but also as a tool to correct injustice or unfair results arising from the literal application of law. As regards moral damages, equity will have the second meaning.

Maltese judges have always followed that rulethat moral damages are not generally recoverable in the context of ordinary tort litigation, even if the general rule of Article 1031 of the Civil Code in force states: “Every person shall be liable for the damage which occurs through his fault”. This article does allow recoverability of various kinds of damages, as long as the legislator did not make any distinction among damages whose award is allowedand damages which are not recoverable. However, the discrepancy found between the written law (which does not limit the recoverability of damages) and the applied rule (which restricts the compensation of moral damages) may be explained by three different arguments, which have often been used jointly:

(a) The first, called the “historical” argument, invokes Roman law, which seemed to have adopted a restrictive approach resembling that followed by Maltese judges. The concept of “iniuria” in Roman law acknowledges what modern scholars call “moral damages” only in few cases. By harking to Roman law to explain the basis of a restrictive rule for moral damages, there is intent to narrowly interpret the written provisions of the Maltese code.

(b) The second anchors its reasoning on the basis of the common law influence in the realm of non-pecuniary damages[264]. Since the influence of common law inthe area of private law is not controversial at present, it is even less plausible to say that the common law restrictive approach in the realm of tort liability has affected the Maltese law of tort since the nineteenth century. To hold this view requires some proof that Dingli was influenced by English common law culturewhen he was writing the tort law provisions. This position is difficult to support since during the nineteenth century, and especially in the field of private law, the influence of continental culture was strong. Therefore, one cannot explain persuasively the origin of the rule by stating that the restrictive rule of recoverability of moral damages isfounded on the rationale of English common law.

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[263] Accordingly to what has been done by Palmer 1994 Tulane Law Review 7, as to Louisiana. These powers have been grounded by Palmer on a 21 of the Louisiana Civil Code of 1870 which allows judges to formulate a legal rule "on the basis of its fairness and social utility, as would a legislator" (Palmer 1994 Tulane Law Review 9).

[264] This is the assumption of Micallef-Grimaud 2011 JCLS 481. Micallef-Grimaud argues that the "pigeon-hole approach" typical of the English legal tradition has affected the Maltese system of civil liability since the beginning of British Rule. He invokes as evidence of his thesis Dingli's notes and the Promises of Marriage Law Act (1834). This assumption can be challenged: see the text above. On the influence of English principles on the calculation of lucrum cessans, see Cilia 2011 JCLS 331. As to the quantification of the loss of earnings, Maltese law imported since the case Butler v Heard (Court of Appeal 22 December 1967) the multiplier formula from British law. This criterion however was not applied to the letter by Maltese courts, but has been reinterpreted since it was used also in cases in which it is not applied in English law, i.e. to compensate for loss of ability to work in the abstract. As to the cases in which the recoverability of moral damages is expressly provided, see Micallef-Grimaud 2011 Id-dritt Law Journal 109.

(c) The third way is grounded on article 1045 of the Civil Code, which states the measure of damages:

[T]he damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been impelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.

This provision is a result of the combination of two provisions found in Ordinance 1868, namely Article751 that provides for cases of damages caused without malice, and Article 752, which covers damages caused maliciously. The first states that:

[T]he damage however which is to be made good by the party who has caused it without malice, consists in the real loss that the act has directly occasioned to the injured party; in the expenses which the latter may have been compelled to incur in consequence of the damage; and, if the party injured be a person who works for wages or other payment, in the loss also of such earnings.

The second states that:

[T]he damage however which is to be made good by the party who has maliciously caused it, extends, besides the losses and the expenses mentioned in the preceding article, to the earnings which the act hinders the party injured from obtaining for the future regard being had to his condition. The Court shall fix for the loss of such earnings, according to circumstances, a sum not exceeding one hundred pounds sterling.

We note with interestDingli's comment in his notes as regards this latter provision where he explained the rationale for fixing a ceiling to the recovery of damages. There was fear that without a ceiling, a wrongdoer could be exposed to indeterminate liability. In this case, the recourse to Article 1045 as foundation for a restrictive rule for the recovery of moral damages is unconvincing, since this provision covers an issue different from the recoverability of moral damages. Rather, the recourse to Article 1045 conceals the judicial creation of a new rule that tries to avoid unfair results (the impoverishment of the wrongdoer), which would flow from the application of the general provision of Article 1031 to moral damages. Dingli’s argument as a *rationale* of the restrictive rule reveals that this latter is presumably rooted in Maltese legal tradition, which pre-existed the codification of private law. Two reasons can be given why it is difficult to maintainthat this rule was newly created by Dingli: he expressly states so when he introduces a brand new rule created by him which is not grounded on foreign legal provisions; moreover, the courts have always abided by

the rule preventing the recoverability of moral damages as a well-established principle of law up until today[265].

Now that we have seen an instance of judicial equity embodied in a provision created by judges to balance the unjust result of a literal application of the provisions of codified law, we will now proceed to consider pre-contractual liability, whose admissibility is still highly controversial[266], as an instance of equity that tries to fill in the gaps in the norms.

We consider the manner by which Maltese judges confront the issue of awarding of damages arising from infractions at the negotiation stage of a contract. Often, the Courts encounter those cases arising from the hasty suspension of negotiations.

The Maltese courts have resorted to several solutions, but none of them prevails at present[267].

In some cases, by applying the doctrine of the freedom of will, which holds that no obligation arises among the parties when a contract has not been concluded, the courts have not recognized any form of pre-contractual liability. Damages only arise and can be claimed at the conclusion of a contract[268]. The rationale behind these decisions is that if pre-contractual liability were recognized against a party who interrupted negotiations, no party would be willing to enter negotiations for fear of incurring liabilities in the form of damages[269].

On the other hand, in other cases, the Maltese courts have decided in favour of the victim of pre-contractual unfairness. The justification for these decisions is varied. In some cases, courts hold that there already exists a pre-contractual agreement[270], because although the final agreement has not yet been finalized, the negotiations have advanced in a way as to have already reached an intermediate agreement. In this case, thesuspension of the negotiations constitutes a breach of a contractual duty. While this approach does not expressly and directly acknowledge pre-contractual liability as such, it allows the recovery of pre-contractual damages by treating them as contractual damages.

[265] The evidence of the existence of an implicit rule stating the non-recoverability of moral damages is given by some specific provisions which acknowledge the award of this kind of damages in specific cases.
[266] See Attard v Xuereb (First Hall Civil Court 13 October 2003); see also Bisazza Precontractual Responsibility; Xuereb 1978 Id-Dritt Law Journal 806; Scicluna Pre-Contractual Liability; Vassallo Principle of Good Faith.
[267] For a clear analysis of the two approaches, see Mallia 2000 Law & Practice 25.
[268] Mallia 2000 Law & Practice 26: "An obligation can only arise with the free and definite consent of the individual and if the said individual did not so express his consent, he was not bound".
[269] This is the rationale underlying Cassar v Campbell Preston Noe et (Commercial Court 19 November 1971); and Busuttil Pro et Noe et vs Muscat Noe et (First Hall Civil Court 28 October 1998): this latter case is mentioned in Mallia 2000 Law & Practice 27.
[270] Mallia 2000 Law & Practice 26 explains clearly this approach: "a new general principle was introduced in the law. Not only should contracting parties perform their obligations in good faith, but the protection of the other party's legitimate expectations became paramount. Thus, an agreement could be inferred from deeds and attitudes, independently if consent, if the other party legitimately and in good faith interprets those deeds and actions as meaning an agreement has been reached".

In other cases, the Maltese courts resort to tort law, by characterising unfair conduct present at the negotiation stage as an abuse of rights, which is expressly forbidden by article 1030[271]. This provision states that:

Any person who makes use, within the proper limits, of a right competent to him, shall not be liable for any damage that may result therefrom.

The holder of a right then incurs a liability whenthe proper limits are exceeded. Consequently, pre-contractual liability arises as a result of bad-faith infringement of another party's legitimate expectations.

Finally, the courts also expand the coverage of Article 993 of the Civil Code, which states that contracts must be carried out in good faith, to cover precontractual liability by providing that even at the negotiation phase, the duty of good faith also binds the parties. As a consequence, any unreasonable suspension of negotiations would be seen as an infringement of this good faith duty, as can be seen in several judgements that hold this view[272].

At present, not one of these approaches as regards pre-contractual liability has predominance and the first approach has not yet been definitely abandoned. This latter approach,which hinges on the theory of the freedom of the will,could be seen as a sign of the influence of the English traditional way of dealing with the issue of pre-contractual liability, summarised in the “all-or-nothing” approach.In this approach, only interests based in a specific contract would be protected, while law would not protect anything within the stage of negotiations.

Other solutions may be seen as having resulted from the continental influence, such as those based on the principle of the protection of reliance interests[273], which has been adopted by Maltese judges in favour of allowing an action for precontractual damages.

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[271] This provision is very wide. Its ambit of application has been defined through case law. It was used in the field of the property to fix boundaries between neighbours, in the field of abuse of power by public authorities and also as limitation on the exercise of a contractual right, in the field of human rights. For an example of the application of this doctrine to the field of pre-contractual liability, see Bezzina Noe vs Direttur tal-Kuntratti (First Hall Civil Court 12 October 2006) that awards damages to the victim to the extent of expenses incurred during negotiations (the so called negative interests).

[272] Ganado Introduction to Maltese Financial Services 50 quotes a number of judgments which support this position: Debattista v JK Properties Ltd (Court of Appeal 7 December 2005); Baldacchino v Chairman of Enemalta (First Hall Civil Court 11 October 2006); Scicluna Enterprises (Gozo) Ltd v Enemalta Corporation (Court of Appeal 25 May 2007).

[273] This shift from the legal principle of the freedom of the will of the individual to the theory of reliance has been explained by Mallia 2000 Law & Practice 26: "People began to abuse of the will theory and juggle their consent to the detriment of the lone individual consumer, who was easily led astray and had little protection from the law".

The resolution of cases involving pre-contractual liability could be seen as an illustration of the ‘pragmatic’ approach[274] of the Maltese judges who seek solutions from different legal traditions in their attempt to filling in the lacunae in their legal system.

We note the absence of a unitary judicial mind-set within the Maltese legal system. Although one could see the influence of “purists”, mainly judges who were strongly oriented towards the continental culture, the dominant trend however throughout the different periods was the influence of “pragmatists”, judges who are not of a particular legal orientation but instead combine features from the realms of common law and civil law.We can use a terminology that Palmer coins, as it is applicable to the Maltese situation, to point to a third category of jurists: the “pollutionists”. They are those strongly oriented towards British culture, and especially found among those more exposed to English common law influence in the field of public and commercial law[275].

The “purists” predominated especially during two periods, from 1814 to 1834 and from 1878 to 1939. This “purist” trend was significant after Maitland's reforms until 1834 when the British finally ceased to undertake the Anglicisation of Maltese law[276]. The second “purist”trend began in 1878 with the publication of the Keenan Report, which was aimed by the British Government to replace Italian, then the official language of law and legal education, with English and Maltese. This second trend was not only a defence of the civil law heritage from the interference of common law principles, but was also a kind of nationalist political movement engaged in a primary battle regarding the so called “language” question in order to preserve the Italian language and culture in Malta against local Anglophiles and imperialists. The “purists” had as their political aim that of the union of Malta with Italy.

The group of “pragmatists”, however, were more predominant in Malta[277] for many reasons, of which two are worth considering here.

First, even before the onset of British rule, the Maltese legal system was already derived from different sources, to begin with. The Code De Rohan, for example, was derived from various

[274] On this attitude see infra in the text.

[275] Examples of pollutionists are Felice Cremona (1905-1980), JJ Cremona, Andrew Muscat. The first two were involved in the drafting of the Commercial Partnerships Ordinance and in the Malta independence Constitution, based on common law principles. The third is Professor of commercial law and author of an important book, Muscat Principles of Maltese Company Law, with a clearly dominant common law focus.

[276] One of the most influential "purist" was Carlo Mallia. He was Professor of commercial law in 1920 and Minister of Justice in 1932. In 1926, as a member of Parliament, he presented a bill of Commercial Code drafted along continental patterns.

[277] Sir Arturo Mercieca (1898-1969), Sir Adrian Dingli (1817-1900), Sir Antonio Micallef (1810-1889), Sir Ignazio Bonavita (1792-1865), Professor Victor Caruana Galizia (1898-1968), Professor Anthony Mamo (1909-2008), Professor Joseph M. Ganado have to be considered as the most influential exponents of this group.

sources: statutes enacted by the Knights, Canon law, Roman law, rules imported from foreign legislative sources, and local custom.

Second, the "pragmatic" approach of the Maltese courts was greatly fostered and encouraged by the gradual modifications introduced by the British rulers, who did not introduce sudden changes in the Maltese legal system but only modified areas of interest to them.[278]

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[278] Palmer VV, *Mixed Jurisdictions Worldwide: The Third Legal Family*, Cambridge University Press, Cambridge 2001.

CHAPTER V

Section 6

THE INFLUENCE OF HUMAN RIGHTS IN MALTESE CIVIL LIABILITY JURISPRUDENCE.

There is no doubt that human rights have an impact on private law relationships.

As we have seen in the previous chapters, they can go so far as to modify the systems relating to responsibilities, such as the *Drittwirkung* in the German system which calls into question the State as responsible for not having prevented, through judicial or legislative methods of applying the law, the violation of a person's human rights by another person or private (non-state) actor, or the introduction, in the Italian system, of biological damage (*danno biologico*) as a type of damage different from pecuniary damage and which concerns the impairment of the constitutionally guaranteed interest of the psycho-physical integrity of the person, thus undermining the concept of compensation from the "patrimonial nature" of the damage and excluding its possible derivation from the sole violation of property right.

In the Maltese system, legal doctrine does not include institutions that refer directly to the protection of fundamental rights in the field of civil liability. Interesting articles, like the one by Judge Giovanni Bonello on the Sunday Times of Malta [279], makes the case for leaving human rights violations as a matter between individual victims and the State, thus also attributing responsability solely and exclusively to the Stateto remedy such violations, and criticizing the “horizontal effect of human right” which leads to a misattribution of responsability to private individuals, deflecting it from the State.

However, Maltese jurisprudence, also thanks to the provision of direct applicability of the main European judgments in the matter in question, has gradually replaced the purely patrimonial provision (*pro debitoris*) of liability with a more anthropocentric orientation, with new concepts of liability and damage.

Alfred J. Baldacchino vs Commissioner of Lands (Writ number 273/1993/2)

In 1993, Mr Baldacchino said the authorities had expropriated his residential property at Delimara and had offered him Lm107,000 as compensation. However, over a number of years, Mr

[279] “Misunderstanding the Constitution: can individuals be sued for human rights violations?”, Sunday Times of Malta, January 14, 2018;

Baldacchino had suffered damages as a result of construction works carried out next to his property in connection with the building of the power station.

He claimed that he had sustained damages both to his quality of life and to the value of his property. Mr Baldacchino was then informed that his land was no longer required by the authorities and was asked to sign a disclaimer of responsibility towards the authorities in question in respect of his property.

He had refused to sign the disclaimer and had requested the First Hall of the Civil Court to declare that the authorities were liable towards him in damages.

In June 2002, a judgment by the First Hall of the Civil Court had found in favour of Mr Baldacchino and had concluded that the authorities' actions in his respect had been abusive and illegal and in violation of his rights as a property owner.

That court had held the authorities liable for the damages Mr Baldacchino had sustained.

The case was then put off for an award of damages.

The First Hall of the Civil Court heard the evidence of technical experts who said that, prior to the expropriation, Mr Baldacchino's property, which consisted in a villa and swimming pool and other amenities, would have been valued at Lm750,000. Following the construction of the power station, the property would be valued to the tune of Lm200,000.

The court therefore awarded Mr Baldacchino Lm550,000 in damages.

The Bladacchino judgment clearly illustrates a kind of relationship between human rights and private law in which each body of law functions ad a parallel and alternative remedy that is available in the same kind o factual scenario; where a private person has suffered harm as a result of the quasi-delictual conduct of a State authority amounting to a violation of his human rights. The readiness of the civil court in the case to exercise its discretion to provide a remedy under ordinary law, coupled with the same court admission that the facts were “practically identical” to the Mintoff case[280] in which an exceptional remedy had been found under human right law, leave no doubt that the process of convergence is occurring in Maltese jurisprudence between the criteria for compensating a breach of the human right to property and those for compensating the patrimonial

[280] In their 1994 application the Mintoffs had claimed that their fundamental human right to enjoyment of their own property, consisting of their home known as L-Gharix in Delimara, had been violated as a result of the construction of the Delimara power station just a road's width away from their home.

damage in tort. The Court made clear that human rights violations can only constitute an "additional reason" for holding the Government liable for abusing its rights and that the element of the quasi-delictual liability subsited regardless.

While in the Baldacchino judgment the Civil court relied upon the categories of compensable damage under Article 1045 of Cap. 16 to quantiyf damages in a way similar to the Mintoff case, in the former judgment the Constitutional court had refuser to compensate for damage to movable property of the victim, stating that such damage could not be compensated on the basis of human right law but only via the ordinary law regulating the quasi-delictual liability.

The relationship between human rights and private law as construed by the Court of Appeal in the Baldacchino judgment is thus one where they contitute parallel avenues leading to similar yet distinct form of compensation for different harm forms. The result raised the question of what would happen if the court were ever faced with a similar scenario where the damade suffered by the victim involved also a "moral damage" (compensation for pain and suffering): the criteria for civil liability compensation differ significantly from those under human rights law, where Malta's Courts have traditionally affirmed the impossibility of compensating moral damage under the law of delict but admitted this possibility under human rights law.[281]

Linda Busuttil Illum Cordina vs Dr Josie Muscat (Writ number 2429/1998/1)

In *Busuttil vs Muscat*, the plaintiff sued the defendant after she underwent a procedure to reduce the appearance of veins on her face but instead ended up with noticeable discolouration and marks on her face. The defendants claimed that there was no pecuniary loss or loss of wages however the Court did not completely agree with this and pointed out that the plaintiff would have to spend money to buy make up to cover up the damage caused, and that the marks on her face could in fact affect her potential to find a job in certain industries. The most problematic issue was that the plaintiff herself did not bring evidence of patrimonial damages but instead invited the Court to liquidate the damages *arbitrio boni viri*. The Court felt that the possibility to liquidate damages in such a way was not to be used as a way to cover up negligence on any part of the parties to a case. Therefore, the Court could not award compensation for patrimonial damages where the plaintiff did not bring evidence: '*Fiċ-ċirkostanzi, għalhekk, il-qorti tista' tgħid biss illi ma saritx il-prova ta' danni patrimonjali.*' However, the Court still went on to discuss the issue of non-patrimonial

[281] Claude Micallef-Grimaud, "article 1045 of the Maltese Civil Code: is compensation of moral damage compatible therewith?", Journal of Civil Law Studies, vol. 4, n. 2, 2011.

damages, arguing that the plaintiff had suffered damages to her personal integrity which is protected under the Constitution of Malta, the European Convention on Human Rights, and the Charter of Fundamental Rights of the European Union:

It-telf li ġarrbet l-attriċi, iżda, ma huwiex biss patrimonjali. L-attriċi ġarrbet ħsara f'ġisimha u, minħabba f'hekk, ukoll fil-psike tagħha. L-integrità psiko-fiżika tal-persuna hija valur imħares kemm mill-Kostituzzjoni ta' Malta u mill-Konvenzjoni Ewropea għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali u kif ukoll mill-Karta tad-Drittijiet Fondamentali tal-Unjoni Ewropea ['il-Karta'], li fl-art. 3 – 'Id-dritt għall-integrità tal-persuna' – para. 1 tgħid hekk: 'Kull persuna għandha d-dritt għar-rispett tal-integrità fiżika u mentali tagħha.'. Din il-Karta, skond l-art. 6 tat-Trattat dwar l-Unjoni Ewropea, 'għandha jkollha l-istess valur legali bħat-Trattati', u għalhekk il-qrati maltin, għalkemm il-Karta nfisha japplikawha direttament biss 'meta jkunu [qegħdin] jimplimentaw il-liġi tal-Unjoni', huma marbuta illi jinterpretaw il-liġijiet ta' Malta b'mod konformi.

The Court proceeded to apply Article 1033 of the Civil Code which states:

Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom.[282]

It argued that this Article 1033 simply mentions damages without explicitly mentioning patrimonial damages, or excluding non-patrimonial damages, and that damages cannot be interpreted anymore as simply meaning patrimonial damages:

Wara kollox, u wkoll bla ma nqisu dak li tgħid il-Karta, il-liġi tad-delitti ċivili ta' pajjiż ewropew tas-Seklu XXI ma tistax tkompli tħalli bla rimedju lil min iġarrab ħsara fil-valuri fondamentali tal-ħajja. L-attriċi, bi ħtija tal-konvenuti, ġarrbet ħsara fl-integrità tal-persuna tagħha u għalhekk il-konvenuti huma obbligati għall-ħlas ta' din il-ħsara, kif igħid u jrid l-art.1033 tal-Kodiċi Ċivili moqri fid-dawl tal-art. 3.1 tal-Karta.[283]

The Court concluded that the nature of non-patrimonial damages meant that the liquidation of such damages had to be carried out by the Court arbitrio boni viri and proceeded to award Busuttil the sum of €5,000.

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[282] Civil Code, Article 1033.
[283] Busuttil vs Muscat (n. 9).

Another case that made reference to non-patrimonial damages, based on the findings in Busuttil vs Muscat, was Cassar vs Dragonara Casino Limited.[284] The plaintiff sued the casino, as her place of work, for neglecting to provide a safe working environment as a consequence of which she suffered personal injury. The Court noted that apart from damnum emergens and lucrum cessans the plaintiff suffered other damages, including the inability to give birth to her child in a natural way, a right which any mother is entitled to, and her inability to pick her daughter up which could affect the child in a negative way. The Court concluded that:

Illi għalhekk id-diżabilita riskontrata effettivament taffettwa l-integrita psiko-fiżika tal-attrici, liema integrita hi tutelata kemm mill-Kostituzzjoni ta' Malta, kemm mill-Konvenzjonu Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali, kif ukoll mill-Karta tad-Drittijiet Fundamentali tal-Unjoni Ewropea.[285]

The Court also made reference to Article 1033 of the Civil Code in saying that damages should not be limited to patrimonial damages anymore:

Illi ghalhekk l-interpretazzjoni tal-kliem 'tal-hsara' m'ghadhiex aktar limitata ghal ma kienet tradizzjonalment ghall-'damnum emergens' u 'lucrum cessans', izda ghandha tinkludi l-hsara kollha riskontrata – u allura mhux dik esklussivament patrimonjali – bhal ma hi dik naxxenti mit-tifrik tal-integrita fiżika tal-persuna.[286]

The Court liquidated these non-patrimonial damages that it called existential damages to the amount of €8,000, which it added to the amounts already established for damnum emergens and lucrum cessans. It is important to note that both Busuttil vs Muscat and Cassar vs Dragonara Casino Limited have been appealed which means that their recognition of non-patrimonial damages may in fact be overturned by the Court of Appeals.

In the case, human right values where used as an interpretative tool to extend courts' understanding of the requirements of civil liability and to challenge and overcome the reluctance of the Maltese courts to compensate purely moral damages. By invoking an hermeneutical approac rooted in humar rights values, the judgment attempted to avoid objections that Article 3 of the Fundamental Rights Charter could not be applied to regulate private relationships because it had not been rendered internally enforcable within Malta's dualist legal system. This approach went a step

[284] Cassar Lucianne vs Dragonara Casino Limited, Civil Court First Hall, 19 June 2012.
[285] Ibid.
[286] Ibid.

further than the Bladacchino case, because it understood human rights not only as offering a parallel legal remedy to ordinary law, which could be availed by the injured party, but also values embedded within the ordinary law of civil liability itself, which, therefore, must be inerpreted from a standpoint which respects these values. Said standpoint requires that the remedies for civil liability and for violation of human rights to be approximated to one another, such that the disparity between the kinds of damage compensable in each case would be eliminated.

Carmena Fenech & Others vs Malta Drydocks (Writ n. 1427/1997/1)

In 2004 the government took over the case as defendant instead of Malta Drydocks.

The heirs told the court that in February 1997, Mr Fenech, Carmena's husband and Dorothy's and James's father, had died.

He had started work at the Drydocks in 1959 and had remained there until he was boarded out in 1995. Through the course of his employment Mr Fenech had worked as a yard boy, skilled labourer and boilermaker and had been exposed to asbestos. He had died as a direct result of exposure to asbestos at work.

The heirs asked the court to declare Malta Drydocks responsible for Mr Fenech's death and to condemn the enterprise and the government to make good the damages they had sustained.

Mr Justice Sciberras said that in 1992 Mr Fenech had felt ill and had been diagnosed as suffering from malignant mesothelioma. He died five years later at the age of 55.

Mr Fenech's condition consisted in an enormous and rare tumour that was, however, very common in persons who were exposed to asbestos. In fact, malignant mesothelioma was caused by continued exposure to asbestos fibres.

Products made from asbestos were installed on ships as in the case, for example, of pipe lagging systems.

It resulted, from the medical evidence produced, that Mr Fenech had developed the tumour as a direct result of exposure to asbestos at the workplace. The autopsy results also confirmed this conclusion.

The court found that as Mr Fenech had been employed at the Drydocks, his employer was bound to ensure his protection. But the Drydocks had failed to do so and it had not convinced the court that it

had done whatever it could to protect Mr Fenech even though it was well known that certain works carried out in the dockyard were potentially endangering health.

Mr Justice Sciberras therefore found that the Drydocks was responsible for Mr Fenech's illness and death.

Although decided on lonely basis of ordinary law, the Camera Fenech judgment is relevant to the discussion of human rights influence in Maltese civil liability law because it paved the way for the subsequent development of a jurisprudential orientation which, while rejecting influences on private law, showed sensibility towards victims of asbestosis, in a liberal pro-victim interpretation of civil liability law which rendered the applicable compensation (under civil legislation) equivalent to the one the victim would have received under human rights legislation, revealing the covert influence of the latter body of legislation upon the former.

Furthermore, the judgment confirmed that the survivors can claim compensation both *iure proprio* (the damege personally suffered) and *iure hereditatis* (the pain suffered by the *de cuius*) through compensation for moral damages.

Brincat & Others vs Malta (60908/11, 62129/11, 62312/11, 62338/11)

On 24 July, the European Court of Human Rights announced its judgment in Brincat and Others v. Malta (the *Brincat* case).[287] This case was the result of 21 applications of former workers of the public ship repair yard exposed to asbestos. The Government of Malta was held responsible for breaching its positive obligations to protect the rights to life and the right to respect for private life. A violation of the right to life was found where the death of the employee was the result of exposure to asbestos. Where employees had suffered from different diseases, the Court found a violation of the right to respect for private and family life.

Brincat is a landmark case for Occupational Health in all the countries of the Council of Europe. For the first time, the Court found violations of two rights deduced from articles 2 and 8 that are fundamental to this sphere: the right to access information concerning risks the employee is exposed to and the right to protection from dangerous industrial activities. The reasoning of the Court in this case is particularly interesting. Compared to other "occupational health" cases, even if there have not been many of them,[288] the Court develops the content of the positive obligation of protection

[287] ECtHR, Brincat and Others v. Malta (60908/11, 62110/11, 62129/11, 62312/11, 62338/11) 24 July 2014.
[288] See ECtHR, Vilnes and others v. Norway (52806/09 22703/10) 05/12/2013 and partly ECtHR, Roche v. The United Kingdom (32555/96) 19/10/2005.

from dangerous activities and of the positive obligation to provide information about risks. It also uses a very curious reasoning in finding whether the Government of Malta knew or ought to have known about the danger of asbestos.

We'll say more about this development and illustrate the concretization of the Court's approach to matters that are closely connected to Occupational Health.

Already in 1994, in the case of Lopez Ostra v. Spain, which concerned severe environmental pollution, the Court interpreted article 8 as including the right to protection from dangerous activities.[289] The scope of the corresponding positive obligation of the States was developed in Öneryıldız v. Turkey,[290] which concerned the death of 9 relatives of the applicant, as a result of methane explosion. In this decision, the Court stated that where dangerous activities are concerned "special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks."[291]

In the *Brincat* case, the Court further specified these findings while considering the arguments of the Government. Malta stated that it had fulfilled its obligation of protection as it:

1. adopted special legislation as soon as it became aware of the problem of asbestos;

2. provided the workers with protective masks;

3. entitled workers to additional payment for work with asbestos.

The Court did not agree with all the three points of the defendant. In the Court's view, the 1987 Maltese Work Place (Health, Safety and Welfare) Regulations – adopted by the Government as a legislative framework aimed at protecting workers from asbestos – could not be considered as effective compliance with the positive obligation under the Convention. These Regulations were adopted much later than awareness of the problem of asbestos within ILO became widespread and made no reference to asbestos. There were no provisions for any practical measure that could or should have been taken in order to protect the applicants. They didn't include provisions concerning the right to access information about the dangers inherent in the workplace.

[289] ECtHR, López Ostra v. Spain (16798/90) 09/12/1994, par. 51.
[290] ECtHR, Oneryildiz v. Turkey (48939/99) 18/06/2002.
[291] Ibid, par. 71 and par. 90.

We can conclude that, in evaluating the Maltese legislative framework, the Court specified its view on due legislative measures: they must be well-timed, must contain practical measures of protection and must be implemented in practice. Moreover, the Court underlined the importance of legislation stating that "it cannot rule out the possibility*, a priori*, that in certain specific circumstances, in the absence of the relevant legal provisions, positive obligations may nonetheless be fulfilled in practice".

The Court's view on practical measures was also specified. The use of protective masks, which was regarded by the Government as a protective measure, was not considered to be sufficient to protect workers. It is interesting to notice that this consideration was based on the expert's conclusions in the national case heard by a Maltese court in 1989. This case concerned the death of a worker in 1979 who was exposed to asbestos in the ship-yard. The Court cited the findings of experts and decided that these masks were of "inadequate quality" and "did not take sufficient account of the state of scientific knowledge about the subject matter at the relevant time" (par. 112). Thus, the ECtHR made the Government understand that due practical measures of protection must correspond to the level of scientific knowledge in this field. We suppose that this is a very important point for any further "occupational cases" before the Court.

The Court's estimation of the use of compensation for the work with dangerous substances could be another interesting point in the case. Unfortunately, the Court did not express its view in substance, as the Government's general statement that employees who had worked on asbestos (after its dangers became known to the Government) were offered compensation, didn't provide any relevant information specific to the instant case (par. 115). As a result, this argument was left aside.

The positive duty of the State to provide information about the risk that the person is exposed to was deduced from article 8 of the ECHR, which guarantees the right to respect for private and family life. This wide interpretation of this article did not originate immediately but was rather the result of a slow and consequent process. We might say that it began with the "environmental" case of Guerra and Others v. Italy,[292] where the Court indirectly mentioned the right to assess risk factors connected with the activity of a nearby chemical factory. In McGinley and Egan v. the United Kingdom, the Court was more concrete and directly stated that "where a Government engages in hazardous activities … respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and

[292] ECtHR, Guerra and others v. Italy (14967/89) 19-02-1998.

appropriate information."[293] The same conclusion was reached in the later Roche v. the United Kingdom case.[294]

The most significant development of the Court's approach to the right to have access to information concerning risks a person is exposed to can be seen in the recent decision in Vilnes and others v. Norway.[295] In this decision, which concerned the occupational health of divers, the Court stated that the State's positive obligation to provide access to essential information enabling individuals to assess risks to their health and lives may, in certain circumstances, also encompass a duty to provide such information. The appropriate ways of performing this duty were not mentioned.

In the *Brincat* case, the Court took a step forward. Considering the Government's arguments, it found that neither the distribution of the protective masks nor the reference to the OHSA activities could be regarded as a due source of information. The Court also underlined that the Maltese legislation didn't establish a duty to provide information and the Government didn't undertake any studies or reports about the asbestos specifically. Thus, the Court focused again on the importance of the legislative framework and made clear that the studies or reports could be a proper way of fulfilling the obligation to provide information.

According to the Court's case law, the violation of the positive obligation of the State to protect rights under article 2 or article 8 of the ECHR might be found where the State knew or ought to know about the danger.[296] As the Court stated in Opuz v. Turkey,[297] "the scope of positive obligations under article 3 must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities." We suppose that this approach is equally applicable to the interpretation of articles 2 and 8 of the ECHR. Therefore, the point about the State's awareness of the danger to workers' health becomes a cornerstone for any "occupational health" case.

The *Brincat* case is a remarkable one because the Court found that Malta ought to have been aware of the problem of asbestos in the seventies. The Court based its conclusion on 3 main pillars: 1. The ILO Convention and Recommendation adopted in 1986[298] and NOT ratified by Malta; 2. The decision of the national case where the employer was held liable for the death of a ship-yard worker in 1979 as result of exposure to asbestos; 3. The state of scientific knowledge of the medical problems connected with exposure to asbestos.

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[293] ECtHR , McGinley and Egan v. the United Kingdom (21825/93, 23414/94) 09/06/1998, par. 101.
[294] ECtHR, Roche v. the United Kingdom (32555/96) 19/10/2005, par. 167.
[295] ECtHR, Vilnes and others v. Norway (52806/09 22703/10) 05/12/2013.
[296] See for example ECtHR, Keeffe v. Ireland (35810/09) 28/01/2014 (par. 144) or ECtHR, Öneryildiz v. Turkey (48939/99) 18/06/2002, par. 62.
[297] ECtHR, Opuz v. Turkey (33401/02) 9 June 2009.
[298] Asbestos Recommendation, R172, C 162 – the 1986 Asbestos Convention.

Although the ILO Convention on the use of asbestos was adopted only in 1986, the Court took into account ILO activities in this sphere stating that "the adoption of such texts comes after considerable preparatory work which may take significant time, and in the ambit of the ILO after having undertaken meetings with representatives of governments, and employers' and workers' organizations of all member countries of the organization".[299] Therefore, Malta as an ILO member could not be unaware of the problematic issue of the use of asbestos even before the adoption of Convention No. 162.

Considering the state of scientific knowledge of the dangers of asbestos, the Court took account of the list, submitted by the applicants, which contained references to hundreds of articles or other publications concerning the subject at issue published from 1930 onwards (par. 106). It was found inconceivable that there was no access to any such sources of information, at least, by the highest medical authorities in the country who had an obligation to remain abreast of scientific developments and advise the Government accordingly.

The ECtHR could have easily found these applications inadmissible as, strictly speaking, the national remedies were not exhausted. We assume that the Court's readiness to hear this case was dictated by a willingness to widen the "social" dimension in the interpretation of the European Convention and to attract attention to the problem of occupational health.

The legal position of the Court contained in this judgment and discussed above might strengthen the position of workers in the sphere of occupational health, specify the State's obligations in this field and, in the end, entitle employees who suffer from undue working conditions to file applications with the ECtHR

Jane Agius vs Attorney General, Minister for Home Affairs and National Security, Prime Minister (33/2014 – Civil First Hall, Constitutional Jurisdiction)

Jane Agius, the sole heir of Carlos Chetcuti, filed a Constitutional Case and claimed a breach of the State's obligation under Article 2 of the European Convention on Human Rights and the corresponding Article 33 of the Maltese Constitution. In 1995, Carlos Chetcuti had died of a pulmonary oedema after being administered a fatal dose of methadone, as part of his drug rehabilitation treatment, during his imprisonment at the Corradino Correctional Facility (prison). In 2014, the Court of Appeal ordered the Director of Prisons to pay €38, 213 in material damages to Mr. Chetcuti's heirs. Subsequently, Ms. Agius filed an application before the Civil Court, First

[299] Brincat case, par. 105.

Hall, (Constitutional Jurisdiction) and claimed a breach of Article 2 of the European Convention on Human Rights and the corresponding Article 33 of the Maltese Constitution as already proven in the aforementioned civil case. The applicant also claimed that existing laws that do not make provision for the granting of moral damages under the Civil Code (CAP 16 of the Laws of Malta) breach Article 13 of the European Convention on Human Rights (effective remedy).

The Court found that on the basis of local and international jurisprudence the applicant did not have recourse to the ordinary remedies at law and therefore had no choice other than constitutional and conventional remedies. Therefore, the Court chose to use the special powers granted to it through its constitutional and conventional competences. The Court found that the applicant was requesting moral damages for breaches of Article 2 of the Convention and Article 33 of the Constitution and that ordinary remedies for such did not exist under Maltese law and therefore only constitutional and conventional remedies where available thus allowing the request to be heard. The Court found that there had been a breach of both of Article 2 of the Convention and Article 33 of the Constitution and that the state failed to protect the life of the prison in question.

The Court refusal to award specifically non-patrimonial damages represent an important development in the judicial understanding of Article 1046 of Cap. 16,outlining the approach to be followed in order to quantify the damages due to the heirs in cases where the victim of the tort dies.

The dominant understanding of the Article 1046 is that when heirs who did not depend financially upon de deceased are awarded *lucrum cessans* damages the resulting compensation must be reduced by 50% to reflect the lack of dependency. This means that damages are not awarded purely *iure hereditatis* but compensate the harm personally suffered by the heir(s).

Effects of Human Right over Maltese Civil Liability Jurisprudence

Human Right played an increasingly important role in leading Maltese Courts to question an re-examine certain fundamental assumptions that have traditionally been made in regard to civil damages, like relegating them to a purely patrimonial nature, where pain and suffering of the victim of a delict or of a breach of contract are not to be taken into account as a separate category of compensable damage.

Human Rights have been source of values providing an interpretative tool to see civil damages in a new light, but also represented a constitutional mechanism through which decision of the ECtHR

have spurred Maltese judges to act as "system builders"[300] in a process that seems to be taking form of indirect *drittwirkung* along the same lines followed by the German Courts.

[300] Biagio Andò, "The Role of Judges in the Development of Mixed Legal Systems: The Case of Malta" in Journal of Civil Law Studies, 2011 (2), vol. 4.

CONCLUSION

The concept of Maltese "mixedness" could be understood not only by surveying the written code but also by scrutinizing the manner by which their courts decide cases. One could say that the Maltese judicial mind-set is mixed and probably had this strong inclination to "mixedness" even before the introduction of the British common law influence. The Island already had its laws derived from a mix of different sources: Roman law, Canon law, and local customs. Therefore, it was important to uncover the components behind the judicial mind-setin order to understand Maltese mixedness[301].

It is interesting to illustrate judicial *mentalité* through an example from the field of *lacunae*. In Malta, no provision exists which is similar to the Italian Article 12, paragraph two, of preliminary provisions to the Civil Code, which provides that when a case is not ruled from a specific provision, regard has to be given to provisions ruling similar cases or matters. Moreover, Article 12 provides that if these provisions are lacking, judges have to adjudicate according to general principles of law[302]. The absence of this Article within the Maltese legal framework may be explained by underlining the idea thatwhile Article 12 so to speak"closed the gates" to the possibility of adjudicating on claims on the basis of foreign legal principles and rules[303], the absence of any clear criteria given by Maltese legislator for interpreting the law and for filling the gaps (and, furthermore, on the sources of law) may be intentional, thus making it possible for Maltese courts to resort to extraneous sources. This assumption finds support in specific provisions of the ancient Code of Rohan, such as section XXXVII, which provided that judges have to decide according to the laws of the Island. In the absence of any judicial support in adjudication according to (Maltese) common law, regard has to be given to the judgments of the Supreme and reliable Courts[304]. This judicial "paranormative" power allowed by the Code of Rohan was subsequently useful in Maltese law.

A peculiarity belonging to the Maltese system is the fact that codification did not completely replace previous legislation. In the continental view of codification, codes rest on the basis - and have the effect - of making "tabula rasa" of pre-existing law. Codes represent an objective meaning

[301] On the importance of judicial mindset to assess the circulation of foreign legal principles and rules, see Markesinis and Fedtke Giudici e Diritto Straniero 21-90.
[302] Article 12 reads that "if a dispute cannot be settled by a specific provision, it shall be settled in accordance with the provisions governing similar cases or similar matters; if the case still remains in doubt, it shall be settled in accordance with the general principles of the State's legal system".
[303] Gorla I Precedenti Storici Dell'art.12 443.
[304] Section XXXVII stated (in Italian) that judges could not "use an arbitrary power, how many times it will not be regulated by what is available from the municipal laws, and in their defect by the common laws, and in controversial cases and doubts by the oppinions embraced in the Supreme and most accredited tribunals.

that results in a clear-cut rupture with the past[305]. In Maltese law, however, modernity and tradition harmonize and co-exist and shed light on the identity and substance of the Maltese legal system.

By describing the manner by which Maltese courts decide on issues not expressly covered by statutory law, we wanted to illustrate the functioning of a mixed jurisdiction, with the possibility of this finding application in other mixed jurisdictions.

It is our hope that this comparative analysis may demonstrate similarities between the approaches followed by these jurisdictions, and possible convergences at the level of applied law may result from a comparison among the mixed systems[306]. This approach, outside of the usual criteria used in analysis, may help explain the characteristics mixed legal systems “in action” share and point to possible directions to foresee their evolution. Who knows if one day we shall find that, using Palmer's words, “Mixitania rules the waves”?[307]

The purpose of the research was to evaluate whether the Maltese system, as a mixed legal system, could represent the ideal basis for the creation of the agonized "Uniform Legal System" at the European level, where it is possible to merge the provisions of the common law systems with those of civil law.

The parallelism between the Maltese legal system and the Italian legal system is already evident from the reference to Roman law foreseen in the sources of Maltese law.

As part of the research, we focused on the area of civil liability, experienced differently between the two countries: unlike Malta, where compensation is provided only following pecuniary damage, in Italy compensation is provided coverage of a more general "unfair damage" (pursuant to art. 2043 of the civil code), embracing the so-called "non-pecuniary damage" (direct consequence of an offense that causes psycho-physical suffering to the person) which then extends to "biological damage" (presumption established on an equitable basis of the personal injury) and to "existential damage" (greater damage inherent to the change in lifestyle habits and in the various relational choices that the impairment entails).

In terms of interpretation and application of the law, the ability of the Maltese system to be able to draw on the "main judgments" in the European context for the resolution of national disputes was of absolute interest. This possibility, not present in other countries, allows the judge to "update" the

[305] The codification process is depicted as a clear rejection of the 'juridical particularism' which was considered as inextricably linked to the past and valued negatively. On this issue, see Tarello Storia della Cultura Giuridica Moderna 28.
[306] According to Reid 2003-2004 Tulane Law Review 7 "a striking characteristic of mixed jurisdictions, viewed historically, is their mutual isolation".
[307] Palmer 2007 www.ejcl.org 23.

internal regulatory provisions through targeted sentences, as in the Busuttil, Fenech and Brincat cases which led to the recognition of compensation despite the actual non-existence of the provision of "moral damage".

However, although extremely innovative, this solution leads to a problem that has always been opposed in other continental legal systems: legal uncertainty.

The judgments of other European countries, in fact, although substantially based on the same principles of law, often refer to institutions of guardianship that are not present in Maltese law. Although the Maltese predisposition to substantially apply (and therefore include) such protection systems is commendable, the reverse side of the coin cannot be denied, i.e. the impossibility for the parties (and their lawyers) to predict and fully evaluate the actual consequences of the court cases.

All this derives from the de facto disappearance of the division between legislative power (creation of the law) and judicial power (interpretation of the): in fact, instead of the legislator, it is the judge who becomes the "creator of the law" through his sentences.

To date, however, the provision of a "single European legal system" is beginning to be obsolete and this is demonstrated by the doctrine which, is shifting the foundation of legal systems from the "hierarchy of sources (of law)" to the "hierarchy of principles".

There can be no doubt that in a hierarchy of principles the first place must be occupied by Human Rights: in this sense, the Maltese system, albeit with a jurisprudential production that is sometimes contradictory, has the merit of having demonstrated the right (and due) sensitivity towards the protection, even at the level of compensation, of Human Rights.

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