ARTICLES

THE CONSTITUTIONALISATION OF PRIVATE LAW IN ITALY

GUIDO ALPA

This article explores the impact of the Italian constitution, through its guarantees of fundamental human rights, on the legal relations between private persons which are the traditional subject of private law. A distinction is made between various modes of application of the constitutional rules and this is illustrated by reference to leading cases in which these constitutional rules were applied. Particular attention is focused on the role of constitutional argumentation in implementing the principle of non-discrimination, developing the rights of personality, constructing the concept of biological damage in personal injury cases and in specific parts of the law of obligations. It is concluded that the Italian system for applying constitutional norms is fairly coherent and differs from other systems inasmuch as it does not directly protect freedom of contract under the constitution. The boundaries between private and constitutional law are being redefined as a result of this process of constitutionalisation of private law.

1. Preliminary remarks

Before dealing with certain aspects of the constitutionalisation of private law, a few preliminary remarks are in order, for the benefit of those who are not familiar with the Italian legal system. The Italian system is based on a written Constitution (1948), on ordinary laws (including the codes and especially the Civil Code of 1942) and on special laws. Case-law has for only a few years been regarded as a source of law, secondary to actual legislation. The Constitution (1947-1948) consists of a bill of rights and legal rules on the organisation of the state and the constitutional authorities,

one of which is the Constitutional Court. Private law, in the strict sense, is the law governing relationships between private persons, and in the wider sense, the law governing private persons in civil and commercial contexts and in their relationships with public bodies. The bill of rights deals with the fundamental rights, or liberties.

The Constitutional Court (pursuant to Articles 134-137 of the Constitution) determines, *inter alia*, disputes relating to the constitutional legitimacy of laws and other enactments having the force of law, made by the state or by the regions. Application to the Court can only be made by an ordinary or administrative judge, who refers to it a matter which he has been asked to decide, either on its merits or with regard to its constitutional lawfulness. There is no provision for private persons to apply to the Court directly. This means that the Court does not revise the judgements of other courts, but makes a pronouncement as to the constitutionality of a legal provision which the referring judge is considering, with a view to applying it to the facts before him; but as to the constitutionality of which he has expressed reasonable doubts. For a long time it used to be argued that the provisions of the Constitution were directed *only* to the legislator; but for several decades now, it has been generally agreed, partly as a result of the evolution of the case law of the Constitutional Court, that the provisions are aimed at *everyone*. Thus, at least in part, wherever possible, they also apply to legal relations between private persons.

Generally, when one talks about the provisions of the Constitution applying to legal relations between private persons, one is making several assumptions:

(i) That the legislator, when attempting to regulate matters of private law, has complied with the Constitution.
(ii) That those provisions of the Constitution that relate to matters of private law apply to legal relations between private persons.
(iii) That legal interpretation must be carried out in accordance with the Constitution; that is, that legislation on private law is to be interpreted in the light of the rules of the Constitution. This is done on the basis of general principles such as in the case of the general terms "public order", "good practice", "honesty and good faith", "fairness", "unjust wrong", etc; and

by the use of general formulae, such as "the nature of things", "actual circumstances", and of standards of evaluation such as diligence, honesty, etc.

(iv) That private persons spontaneously comply with the rules of the Constitution in their dealings.

It is in these various meanings that we speak, in Italy, of the Constitution *directly* applying, or applying *indirectly* or by mediation; or of its *effects upon third parties*; or of its applying *vertically* or *horizontally*.

These are particularly significant questions in regard to the fundamental rights. Many of the fundamental rights relate to the legal relationships dealt with by private law. The Constitution elevates to the level of fundamental rights of persons, whether natural or legal, (*diritti soggettivi*), some of the interests (or values) relating to persons, such as equality, dignity, solidarity, health and work. It codifies some of the fundamental liberties, such as personal liberty, freedom of association, religious freedom, and so on. All of these are matters of private law in the wider meaning stated above. A further distinction is made, between those provisions of the Constitution that confer importance upon fundamental rights (as recognised and protected by the Constitution and in other binding legislation such as the EC Treaties or the international Declarations or Conventions on human rights) and those provisions of the Constitution that do not relate to such rights. In the Italian legal system, the so-called economic rights, such as the right of ownership, the right of the individual to carry on business, freedom of contract, the right to leave one's assets by will, etc. are not treated by the Constitution as fundamental rights but as limited by considerations of public policy.

On the basis of the above summary, we can state that:

(i) Any legal provision that conflicts with these values (or principles) can be declared to be unconstitutional. This means that the values (or principles) act as *prohibitions*, which the legislator must observe, and as *boundaries* within which the power to legislate must be exercised.

(ii) The judge, who is subject (only) to the law, must apply the rules of the Constitution, as it is the basis of the entire legal system. Thus he is not at liberty to discriminate between public and private legal relationships when deciding whether

to allow or exclude the application of the rules of the Constitution to them.

(iii) The question of compliance by private persons with the values (or principles) of the Constitution as expressed in its various provisions, in the regulation of inter-personal legal relations, is more complex and problematical.

One fundamental question is whether freedom of contract can be exercised in a way that ignores the Constitution or is actually in conflict with it. After all, private persons must comply with the law, and therefore also with the Constitution, when regulating the legal relations between them, and restrictions upon private persons are a matter of legal significance and have effect only to the extent that they are lawful. Consequently, in the event of non-compliance with the rules of the Constitution by private persons, it will be necessary to establish whether this non-compliance affects the validity of their legal relationship and whether the rules of the Constitution can supplement those purporting to govern their relationship. If a law that has permeated their legal relationship is held to be unconstitutional, the question is, whether it can be judged to be so by the ordinary judge, or whether it is only the Constitutional court, on the basis of the opinion of the competent ordinary judge in his referral to it, and on the basis of its own opinion, that can establish the unconstitutionality of the law and thus the application of the principle expressed in its judgement to the legal relationship between private persons, through the medium of the competent, ordinary judge.

One must also bear in mind that the expressions "directly apply" and "indirectly apply" are still clouded with ambiguity. The facts of many cases are classified either in the first or in the second category; and in the various legal systems, the nomenclature, the analysis of the system and the evaluation of the effects of interpretation (or application) of the Constitution are not uniform but very diverse. There are differences, in the various legal systems, between the concepts of direct application as dealt with in doctrinal writings and decided cases; and each legal system must be considered separately. A particular model is never simply transplanted from one system to another and this process will give rise to attitudes of rejection, or to a marginal and problematical acceptance, or substantial adaptations. Bearing this

in mind, there are at least three different models to which the Italian model can be compared: the German model, and, based upon it, the English[1] and the French. The Italian model is close, but not identical, to the German model. Although the two models have aspects in common, such as the structure of the system, the written nature of the Constitution (long and rigid) and a Constitutional Court; in the German model the private individual has direct access to the Court and the Court has powers to overturn the decisions of ordinary judges. These are features which the Italian model, as already stated, does not share. The French model is still under construction. The English, in view of the non-existence (so far) of a written Constitution, has fallen back on the fundamental rights recognised and protected by the European Convention on Human Rights and on the Human Rights Act of 1998.

2. The Italian model of *Drittwirkung*

The case law produced by the Italian Constitutional Court is vast, dating as it does from 1956, the year the Court was set up. It is not possible within these pages to run through the entire output of its decisions on matters relating to private law.[2] It is appropriate, therefore, to exclude from our consideration the Court's interventions in the vast areas of family, inheritance and property law, and to devote some time instead to some aspects of the Italian style of *Drittwirkung* in relation to the rights of the person and legal relationships of obligation. It is also appropriate to point out that at least since the Sixties, and particularly since the Seventies, even ordinary judges, whether deciding as to facts or as to lawfulness, have started to apply the provisions of the Constitution. This

---

[1] See the introductory essays in Markesinis' collection *The Impact of the Human Rights Bill on English Law,* Oxford, 1998. On the bearing of the Constitution upon relationships between private persons, see Markesinis, *Comparative Law – A Subject in Search of an Audience,* in *Modern Law Review,* 1990, pp. 10 ff.

[2] A recognition effected egregiously by Cerri in *La Costituzione e il diritto privato* (The Constitution and private law) in *Trattato di diritto privato* (A Treatise on Private Law) directed by P. Rescigno, [Vol] I, Turin, 1987, pp. 47 ff; and [Vol] XXI, 1991, pp. 697 ff.

interpretative technique is easily apparent from the computer databases of court judgements.

2.1 The status and principle of equality

A fundamental principle of the Italian Constitution is the principle of equality (Article 3).[3] This principle has come to be established as a protected situation of the legal or natural person and it is possible to trace various applications of it in the case law relating to the Constitution. One of these specifically relates to the prohibition against discrimination and the concomitant right of the legal or natural person, to equal treatment in the like circumstances. When comparing circumstances, none of those qualities or distinguishing characteristics indicated, for the purpose of protecting the individual, in Article 3, clause 1 of the Constitution (sex, race, language, religion, political opinions, or personal and social circumstances) may be used as grounds for discrimination. Another application consists in perceiving equality as a limitation upon every aspect of the power to legislate: the power must be exercised according to the standards of coherence and reasonableness.[4] In the Italian legal system, as we shall show below, the principle of equality is held not to affect freedom of contract to the extent of making it legitimate to directly apply Article 3 of the Constitution to restore the balance between reciprocal prestations in a contract.[5]

---

[3] "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. It is the duty of the Republic to remove those obstacles of an economic and social nature which, really limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country."

[4] In the legal culture of private law the pages dedicated by Pietro Rescigno to this problem are still without parallel. Among the vast, learned, output of this master, one may be permitted to refer to Chapter II of the first volume of the *Trattato di diritto privato* (Treatise on Private Law) edited [directed] by him, Turin, 1982.

[5] The declaration of nullity of terms imposed by the stronger party to the contract on the weaker party is dealt with in ordinary law. In the [context of the] rules of the Civil Code the individual - exceptional - circumstances are defined in which at the behest of one of the parties it is possible either to reduce the performances required by the contract to parity [equity] or to order rescission or termination [of the contract] on the grounds that it is excessively onerous. It is only since EC

However, this assumption does not always hold. The statutes by which people inaugurate corporations (or clubs) are also described as contracts. They are contracts of association; and even the rules or statutes by which the internal life of a society is regulated (its rules of membership) or by which individuals join it, are negotiated legal documents. Can these manifestations of private autonomy be affected, if they are in conflict with the provisions of the written Constitution? This problem has not been directly resolved, but it has been touched upon in a judgement of the Constitutional Court relating to the power given to the Jewish Communities to tax all their respective members, by the Royal Decree of 30th October 1930, no. 1731 (now amended by the Agreement between the Jewish Communities and the Italian State of the 27th February 1987). Membership of the Communities was obligatory, according to the then legislation, which has now been repealed,. The Communities were entitled to levy tax from any ethnically Jewish individual, even if he did not practise the Jewish religion or follow its precepts. The legislation was not discriminatory at the time it was introduced. On the contrary, it was the Communities themselves who requested it from the Italian state, so that they could have greater power to claim the payment of taxes from their registered members. The Constitutional Court, in its judgement of the 30th July 1984, no. 239[6] found, however, that this legislation was in conflict with Article 3 of the Constitution. This was because the obligation to pay the financial contribution depended on the fact of being Jewish and resident in the relevant territory. Thus, it constituted discrimination on the basis of race and religion. This legislation was also lambasted on the grounds that it ran contrary to the principle of freedom to form or join associations under Article 18 of the Constitution, inasmuch as that principle also implies the freedom *not* to join or belong to associations. To state this in the words of the Court:

> "to oblige a person to belong to a Community merely because he is Jewish and resides in the territory pertaining to that Community, when his membership is not accompanied by any manifestation of a wish to belong, is

---

[6] In *Foro Italiano* (Italian Forum), 1984, I, 2397, with a note by N. Colajanni.

in breach of the freedom of association that is protected by Articles 2 and 18 of the Constitution."

The most frequent interventions of the Constitutional Court concern the application of the principle of equality at work, with particular regard to parity between the sexes and the protection of the working woman. Moreover, on the issue of economic or business activity carried on by private persons and its relationship with their status and citizenship, it is also worth noting the judgement of 30.12.1997 no. 443.[7] It declared the unconstitutionality of legislation which prohibited businesses having an establishment in Italy from using, in the manufacture and marketing of their products, ingredients that were permitted by EC law to businesses having establishments in other member states of the EC.

The foregoing examples are illustrations of *indirect* applicability: they indicate an acceptance that issues of constitutionality can have a bearing on a legal relationship that is normally governed by private law. There has as yet been no instance of *direct* application. A hypothetical example of this could be the question whether rules of membership could validly exclude a member of a society, on the basis of one of the criteria of discrimination listed in Article 3, clause 1 of the Constitution.[8] On those facts, no constitutional issue would arise, for submission to the Constitutional Court – unless one wished to impugn the rules of the Code, which in any case is silent on the freedom to make written rules of membership. Rather, the question would be one for submission to an ordinary judge, asking him to order that the clause in the rules of membership that contained a criterion of discrimination was null and void.

Another hypothetical question is whether discrimination may operate, not so much as against a person who already has the status of member, as against a potential member, that is, one who would like to belong to a society but does not possess the required characteristics, where these characteristics include discriminatory factors that are condemned by the Constitution. Here we see two

---

[7] Judgement of 30.12.1997, no. 443, in *Foro Italiano*, 1998, 697, [note by] Cosentino.

[8] "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions [or] personal and social conditions."

values in conflict with each other. One is the right of the persons who are already members of a society freely to determine which rules are to govern the functioning of their society (Article 18). The other is the principle of equality and, if you will, the principle of free development of the personality in the context of social groups (Article 2).[9] In practice, the problem can be resolved by admitting to the society only individuals who have been co-opted, that is who have been invited to become members. But this solution cannot be said to be satisfactory: it evades the basic question rather than resolving it. A society that excluded one of its members for reasons conflicting with Article 3 would be committing an unlawful act. It is a different story in the case of a person wishing to become a member of a society, because a society cannot be compelled to accept everyone who wants to join. The matter has been addressed only in doctrinal writings and does not appear to have been submitted to the Constitutional Court.

2.2 Human rights and the rights of personality

As has happened in Germany and is happening in France, it is in the context of the rights of the personality that we see the highest incidence of application of the provisions of the Constitution. It is by applying these provisions that ordinary judges have created new rights, such as the right to privacy (Article 2 of the Constitution), the right to personal identity (Article 3 of the Constitution), the right to health (Article 32 of the Constitution),[10] and the right to enjoy a healthy environment (Articles 9[11] and 32 of the Constitution).

---

[9] "The Republic recognises and guarantees the inviolable rights of man, as an individual, and in the social groups where he expresses his personality, and demands the fulfilment of the inviolable duties of political, economic and social solidarity."

[10] "The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo particular health treatment except under the provisions of the law. The law cannot under any circumstances violate the limits imposed by respect for the human person."

[11] "The Republic promotes the development of culture and scientific and technical research. It safeguards the landscape and the historical and artistic heritage of the nation."

The Constitution has been applied in the field of civil liability: the breach of those rights that are founded directly on the commands of the Constitution leads to the grant of remedies to prevent such breaches, or remedies in damages, and is actionable by one private person against another. In recent years, many judgements of the Constitutional Court have defined and described these rights.

On the question of the right not to be deprived of one's name, there is an interesting judgement on the connection between Articles 22[12] and 2 of the Constitution. A person has a separately defined right to his name, which is a distinguishing means of assessing him. This right is linked to the right to personal identity (considered as physical identity, but also as an ideal or conceptual identity). The question considered by the Constitutional Court concerned Article 65 of the Royal Decree of 7 July 1939, no. 1238. This article was held to be unconstitutional as to the part which dealt with the possibility of rectification of the documents relating to civil status. There was no provision in the Decree for the right, held to be valid in the circumstances of the case, to retain a surname. A child had been given the surname of his supposed father; a subsequent judgement found that the natural father was a different person; according to the Decree there was no option for the child to retain his original surname even though that surname had already become an autonomous distinguishing sign of his personal identity. In this case, the Constitutional Court remarked that it is certainly true that among the rights irrevocably belonging to the person, Article 2 of the Constitution includes, recognises and safeguards the right to personal identity. The Court defined this right as:

> "the right to be oneself, which is the right to respect for one's image as a participant in social life, together with one's patrimony of acquired ideas and experiences, and those ideological, religious, moral and social convictions, that differentiate and at the same time define the individual...Personal identity thus constitutes an asset in itself, irrespective of the personal and social

---

[12] "No one may be deprived, for political reasons, of legal status, citizenship [or] name."

> circumstances of the person, or his virtues or defects, so that everyone is allowed to have the right to have his individuality preserved. Of the many forms it takes, the first and most immediate factor distinguishing a person's identity is obviously his name. It is separately stated to be an asset that is the subject of an autonomous right in the next article of the Constitution, Article 22. It acquires the character of a distinguishing and identifying sign of the person in his social relationships with others. Now, since the legal rules governing names are a product of needs having both a public and a private nature, the public interest in ensuring the accuracy of the register of births, marriages and deaths is satisfied when a document recognised to be untrue is rectified. Once a person's family relationships are verified and certain, it is of no consequence, for the purposes of the public interest, if he retains the name he previously bore, as does any other person of the same name."

Similarly on the question of rights in a name, the Constitutional Court has declared Article 262 of the Civil Code to be unconstitutional, because it did not allow for an illegitimate child to retain the name originally given to him by the official of the civil state, in circumstances where the (illegitimate) child had been subsequently recognised by his natural father and his original surname had become an autonomous distinguishing sign of his personal identity.[13]

In regard to *copyright,* the Constitutional Court has decided that the Italian Society of Authors and Publishers (S.I.A.E.) was not abusing a dominant position.[14] Article 180 of Law no. 633 of 1941 grants to the S.I.A.E. exclusive management of the rights to make commercial use of the works protected by copyright. The judgement, which has been much criticised, found that the enormous circulation of imaginative works make the mediating and protective activity of

---

[13] Judgement of 23 July 1996 no. 297, in *Foro Italiano*, 1997, I, 11.

[14] Judgement of 15 May 1990, no. 241 in *Foro Italiano*, 1990, I, 2401, with a note by Nivarra.

the S.I.A.E. almost always indispensable in practice. This is especially true for foreign works, in respect of which permission for their commercial use can usually be obtained only through the S.I.A.E., which is linked to the foreign Societies of Authors by mutual agency contracts. The fact that its mediation is virtually irreplaceable means that the S.I.A.E., which is the exclusive owner of the right to mediate, exercises a virtual monopoly over the management of the rights to make commercial use of the works protected by copyright. This in turn means that it enjoys the power of controlling the users and the market in the manner characteristic of the holder of a monopoly. Moreover, since this is an exclusive right that is permitted by law, the Court stated that:

> "the S.I.A.E. must be held to be under an obligation to contract, and prohibited from arbitrary discrimination, as confirmed by Article 2597 of the Civil Code, with the consequences set out by law. Likewise, the appointment of the S.I.A.E. complained of, must be construed in the light of Article 41 para.2 of the Constitution, as intended to protect the user and the consumer against the abusive exercise of its power on the part of the holder of the monopoly".

On the other hand, the judgement concludes:

> "Since the reason for allowing the S.I.A.E. to have this exclusive right consists, not only in the protection of the rights of its authors, but also in its function of promoting culture and in the dissemination of original works of a creative nature, there is no doubt that the S.I.A.E. might fail to discharge its duties to the full, if it were not bound to contract with all users and to guarantee them equality of treatment in the like circumstances, not putting or allowing any of them to be placed in an advantageous or disadvantageous position."

The Court has also considered the hire of compact discs. The particular case concerned a complaint by authors, performers and producers against distributors and hirers. It turned on the prohibition which could be construed from the Law on Copyright (rights of

authors) but was then made plain in the Legislative Decree of the 16th November 1994, no. 985, which brought EC Directive100/1992 into force in Italy. The competing interests in question were, on the one hand, artistic and scientific freedom, copyright in intellectual property, and the rights to development of the human personality under Article 2 and of culture under Article 9 of the Constitution. On the other hand, there were the right to engage in a private business enterprise and freedom of contract. The judgement of the Constitutional Court had to balance these two interests. The Constitutional Court found that the former outweighed the latter, and therefore held that it was constitutionally lawful to prevent the hiring of a copy of a compact disk that had been lawfully acquired by a private person.[15]

2.3 Biological damage (personal injuries) and the right to health

The concept of *biological damage* has been constructed on the basis of Articles 3 and 32 of the Constitution. It was already appearing in the judgements of judges on questions of fact from 1974 onwards and is now a deciding factor in the assessment of damage to the person. As there are no detailed rules either in the Civil Code or in special legislation, to guide the judges' assessment of this damage, this is based on the principle of equitable evaluation [*equo apprezzamento*] (Article 2056 of the Civil Code). Recourse has therefore been had to the constitutional rules, in order to award compensation for damages arising from injury to the physical and psychological integrity of the person, independently of his capacity to earn and his capacity to work, whether general or specific. The application of the provisions of the Constitution (by constitutional argument) has become an essential means of justifying this new method of assessing personal injuries.[16] The cases on biological

---

[15] Judgement of 6 April 1995, no. 108, in *Foro Italiano*, 1995, I, 1724, with a note by Caso.

[16] An exhaustive and well-set-out bibliography on the subject of biological damage [personal injuries] is contained in Bargagna-Busnelli's book, *The evaluation of damage to health*, Cedam, 1988; this is a bibliography edited by Ponzanelli, divided into two parts of which the first deals with the period from 1974 to 1985 and the second with the period from 1985 to 1987. Each of the two parts is divided into

damage constitute an interesting database of evidence, a sort of court laboratory providing the opportunity to engage in two types of, as it were, preliminary examination: of the uses of constitutional argumentation and of general principles in judicial reasoning. This examination makes it possible to trace the developments in the case law on civil liability, which has combined the general provision of Article 2043 of the Civil Code with the provisions of the Constitution.

This combination of Articles 3 and 32 of the Constitution and Article 2043 of the Civil Code has enabled judges to order the payment of compensation for a head of damage caused by accidents resulting in personal disablement, not only to claimants who have been actually earning an income, but also to others. In addition, it has led many courts to order payment of identical sums for identical personal injuries, without having regard to the victim's socio-economic category, but only his age and sex. A judgement of the Court of Cassation (the highest court of appeal in Italy) of the 11th February 1985, no. 1130, states the fundamental principle on this matter: "the right of every individual not to be physically or psychologically damaged is guaranteed and protected by our legal system as a primary and absolute right." The Court proceeds, in an *obiter dictum*, to specify that damage wrongfully caused to the physical and psychological integrity of the following must also be compensated: a new-born baby, an infant, a student, a housewife,

---

three sections, dealing respectively with monographs, articles and notes on judgements. The following are particularly recommended: Alpa, *Biological damage*, Cedam, 1987 and Busnelli-Breccia, *The Protection of health and private law*, Giuffré, 1980, in addition to Bargagna-Busnelli, *op. cit.* Among the many commentaries on the judgement of the Constitutional Court no. 184/1986, see those by Ponzanelli and Monateri, published in *Foro Italiano,* 1986, I, 2053 ff. and 2976 respectively. Also see the note, signed A.F., published in *Giur. it.*, 1987, I, 1, 392. Finally see that of Alpa, 1986, I, 546 ff. On the subject of biological damage the following can be read: Cass. [Judgement of the Court of Cassation], 16.1.1985, no. 102 (note by Giusti) and Cass. 11.2.1985, no. 1130 (note by A.G.), at pages 385 and 377 respectively; in part II, also 1985, see Busnelli, *Damage to health* (197); in part I of 1986 are Trib. Verona [Judgement of the Court of Verona], 4.3.1986, with note by Alpa (525) and Cass., 14.7.1986, no. 184, with note by Alpa (534); see finally in part I of 1987, Cass., 11.11.1986, no. 6607, with note by Ferrando (343).

a pensioner, a convicted prisoner, a person in hospital, a person without legal capacity, a person incapable of work, and so on. This is because, from a biological point of view, the damage constitutes an impairment of the physical and psychological wholeness of the person. The evaluation of the biological head of damage is separated, in financial terms, from that of the victim's former and potential future earnings.

In the first decade since 1974, this new trend, which commenced with a judgement of the Court of First Instance of Genoa, excited a lively debate between those who insisted on equality and those who insisted on consideration of the surrounding circumstances as differentiating one victim from another. The Constitutional Court and the Court of Cassation have intervened several times in this field, with the result that the new method of evaluating damage has been upheld. Indeed the Constitutional Court took the opportunity, in its judgement of the 27th October, 1994, no. 372, to specify that nervous shock is admissible as a head of damage in our legal system, subject to certain limitations:

> "Biological damage, like any other wrongful damage, is recoverable only as a wrong actually caused by an injury. Secondly, in the particular circumstances under discussion, a narrow interpretation of Article 2059 of the Civil Code in conjunction with Article 185 of the Penal Code does not pass the test of the practical argument that it would be irrational to make a decision distinguishing, among the consequences of the psychological shock suffered by the (victim's) relative, that which is merely subjective damage to his morale from that which affects his health, so as to allow compensation only for the first...Damage to health, in these circumstances, is the final stage of a pathogenic process that was generated by the same disturbance of psychological equilibrium that is adduced as evidence of damage to morale. Rather than manifesting itself in a state of anxiety or obvious distress of mind, this pathogenic process can, in the case of people having a certain predisposition (such as a weak heart, weak nerves etc.) degenerate into a permanent physical or psychological trauma. The consequences of such a trauma must be measured in damages in terms of the loss of personality

> and not simply as *pretium doloris* (the price of pain) in strict terms."

In the evaluation of the damage to the person, Articles 3 and 32 of the Constitution therefore serve to delimit the area of damage for which compensation can be obtained. On some occasions, however, the Constitutional Court has also made use of Article 2 of the Constitution. This provision expresses the so-called personal principle. Our fundamental, written, Constitution chooses the person as the point of reference for its rules. In the context of the Constitution, the person is understood not so much as an individual whose right not to be physically injured must be protected by means of compensation in damages, but rather as a centre of interests and owner of rights, both as an individual and as a member of social groupings, which support and fulfil his personality, together with his political, economic and social functions.

The Constitutional Court has used Article 2 to state that the provisions in the Laws on air transport, passed in ratification of the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955 (Laws no. 841 of 1932 and no. 1832 of 1962) are in conflict with the Constitution. The case concerned the quantitative limits to the recoverable damages following a finding of the liability of an air carrier. The judgement is based on a comparative evaluation of the interests involved. In the opinion of the Court, there must be a legislative solution:

> "[that is] apt to ensure an equitable satisfaction of the interests in question: and so, the [argument for the] limitation is supported on the one hand by the need to avoid unduly restricting the scope of the carrier's economic initiative, and on the other on the grounds that this limitation is based on criteria that, for the purposes of attributing liability or deciding whether the limitation under discussion exists, include suitable specific safeguards of the entitlement claimed by the person suffering the damage."

The Court states that the rules of the Convention are out of date. Where they limit recoverable damages, they appear to have become inconsistent with the new system of values introduced by the Constitution:

> "in the terms in which it is put, the rule which in the face of personal injuries – and even, as here, in the face of the loss of human life – would exclude the possibility of complete reparation of the damage, does not have the assistance of an appropriate right. It therefore breaches the guarantee established by Article 2 of the Constitution for the inviolable protection of the person."

The judgement was criticised in doctrinal writings. These pointed out that it was not correct to make a comparative evaluation of the interests involved, in merely financial terms. They also noted that the judgement flouted the international regulation of air transport, whose economic effects the Court had completely ignored. In our legal system, they said, there exists no right to *complete* compensation of the victim; in other words it is not possible to identify in the system an absolute and unconditional right of the injured party to recovery of *every type* of damage to the person. Still less was there a right to *integral* compensation for the entire loss suffered, such that this right should be included among the inviolable rights of man. The Court's reasoning, which doubtless constituted the *ratio decidendi* of the entire judgement, would be understandable if the rule in the law ratifying the Warsaw Convention had *completely* excluded compensation for damages; which it did not.

After considering the question of damage, the Court went on to consider the criteria for assigning liability:

> "the general rule, for non-contractual as for contractual liability, is that only damage wrongfully caused through the fault of the person causing it is recoverable from him."

In the absence of fault, the loss or damage must be borne by the person suffering it. Without concerning itself with the opinion now held by doctrinal writers and by ordinary judges, that there are instances of strict liability, the Court observed that:

> "it is certainly true ... that the modern trend is in favour of undervaluing the requirement of fault, but this is happening exceptionally and with specific implications (such as the imposition of a quantitative limit on the

amount of damages) and does not undermine the general principle of "no liability without fault." [17]

The Constitutional Court has also intervened on the subject of the damages payable to people who were injured by allergic reactions to vaccinations against poliomyelitis (pursuant to the Law of the 30th July 1959, no. 695). The Law of the 25th February 1992, no. 210, which reformed the matter, did not provide for compensation in the cases where the damage had been inflicted while the former law was still in force (Judgement no. 27 of 1998).[18] Thus it was unconstitutional. The Constitutional Court has returned to this argument several times (see Judgement no. 258 of 1994[19] and also Judgement no. 118 of 1996).[20]

With regard to the damage suffered by a passive smoker, it has been recognised that the infringement of his rights falls within the circumstances of Article 2043 of the Civil Code and gives rise to an obligation to pay compensation for the damage, including damage constituting a potential impediment to the activities by which the human person achieves self-realisation. This pronouncement was made in the course of a judgement finding Article 1 of the Law of 11 November 1975 no. 584 to be in accordance with the Constitution. Complaint had been made against the article for not having provided that smoking should be prohibited not merely in hospital wards but in other areas of hospitals, as well as in the places where postal services were provided, and inside restaurants. In its Judgement of 7 May 1991, no. 202,[21] the Constitutional Court ruled that the Article was not unconstitutional. The ruling was based partly on the fact that the new legislation was not retroactive, and therefore did not make it possible to claim damages against smokers who had caused damage to the victims of passive smoking before it came into force.

---

[17] Medina, *La dichiarazione di inconstituzionalità della limitazione di responsabilità del vettore aereo internazionale* [The declaration that the international air carrier's limitation of liability was unconstitutional], in *Dir. mar.* [Journal of maritime law], 1986, 2149.

[18] In *Foro Italiano,* 1998, I, 1370.

[19] In *Foro Italiano,* 1995, I, 1451.

[20] In *Foro Italiano,* 1996, I, 2326.

[21] In *Foro Italiano,* 1991, I, 2312, with notes by Pardolesi and Ponzanelli.

Although it relates to an admittedly unlikely possibility, in this case also, the judgement contains several pronouncements on civil liability and shows how Article 2043 of the Civil Code is to be interpreted in the light of the principles of the Constitution. Thus, the Court specified that:

> "it must be considered that a person can be held liable in civil damages for his conduct only if at the time when he engaged in that conduct, there was in existence a specific legal obligation, confirmed by a provision of legislation and ascertainable by him. In the judgement of this Court [*a quo*], there can only be a specific actionable wrong, consisting in failure to comply with a provision imposing a rule of conduct, if the provision was in force and ascertainable at the time in question. Following the prevailing trend in decided cases and supposing liability to be founded on fault –even if a sufficient affirmation of the existence of that psychological element (fault) could be founded on the (mere) fact of failure to comply with a legislative provision– it must be necessary expressly to specify the relevant legislation, which must be in force at the time when the event took place."

To justify its reasoning the Constitutional Court used the European Convention:

> "Even the European Convention on Human Rights (Articles 5, 6 and 7) is construed as meaning that for a court correctly to find that a (particular) breach of a general duty confirmed by a provision in legislation is actionable, it is essential that the provision should have been ascertainable at the relevant time...The citizen must know what behaviour the provision requires, especially if a restriction on one of his liberties is involved."

The judgement is important where it underlines that:

> "an infringement of the right to health (Article 32 of the Constitution) *is enough on its own* to found a claim in damages under Article 2043 of the Civil Code. Article 32 of the Constitution in conjunction with Article 2043 of the Civil Code imposes a primary, general prohibition against damaging health."

For the avoidance of doubt, the Court confirmed that the recognition of the right to health as a fundamental right of the person and as a primary asset, protected by the Constitution, *is fully operative even in the relationships governed by private law*. In the words of the judges of the Constitutional Court:

> "since it must be accepted that infringement of the subjective right guaranteed by Article 32 of the Constitution includes cases catered for by Article 2043 of the Civil Code, there can be no doubt as to the obligation to pay damages for infringement of that right. In other words, when Article 32 of the Constitution is combined with Article 2043 of the Civil Code as aforesaid, it follows that the wrong is unjust and consequently actionable in damages."

It should be noted that recoverable damages relate not only to damage to (material) assets but also to all the damage that potentially prevents the self-realising activities of the human person.

The individual is protected against himself by judgement no. 180 of 1994, which makes the use of a helmet obligatory even for adults riding motor cycles. Moreover, as regards experimental treatments, the Court has found that in the minimum content of the right to health, aspects must be also be included that must be satisfied when the interested parties are in disadvantaged financial circumstances.[22]

Article 32 of the Constitution has also been applied directly to employment contracts, to allow a worker's state of health to be (compulsorily) ascertained with regard to the AIDS virus (Judgement no. 218 of 1994). Here too, there are conflicting interests to be balanced: the interest of the infected employee in keeping his state of health confidential and thus protecting his privacy; and the interests of the persons who, in the course of the work he carries out, might come into direct contact with him. The law protecting AIDS sufferers gave precedence to privacy; but the Constitutional Court reversed this ranking of values, giving precedence to the health of third parties.

---

[22] Judgement of 26.5.1998, no. 185, in *Foro Italiano,* 1998, I, 1713, with note by Izzo.

Still on the subject of direct application of the provisions of the Constitution relating to the person, in the course of research carried out a few years ago, I was able to record instances of the use of the general terms, *dignity* of the person, and *solidarity* as well as the use of the yardstick of *social conscience* to measure the relationship between the individual and the group.[23]

2.4 Legal relationships involving obligations

Legal relationships involving obligations, which are governed by Articles 1173 ff. of the Civil Code, are not directly covered by the Constitution. The Constitutional Court has indicated in several judgements that freedom of contract is not directly protected by the Constitution, because it is merely instrumental in exercising the economic freedom governed by the Constitution in Article 41[24] (Judgement 7 of 1962). A complex picture of the limits to individual autonomy emerges from the case law of the Constitutional Court: the quest for profit is legitimate and therefore although price regulation is permissible the law must not be used to restrict economic initiative (Judgement no. 144 of 1972); limitations to economic initiative can only be imposed by laws (Judgement no. 4 of 1962) and this does not mean that all such laws will be constitutionally legitimate. It is legitimate for the state to intervene to suppress private monopolies (Judgement no. 59 of 1960); its intervention aimed at suppressing the obstacles to free competition can take the form of the imposition of a public monopoly (Judgement no. 255 of 1974); the public interest may be expressed by declarations of (state) planning, but the plans must not be too rigid or arbitrary (Judgement no. 46 of 1963); agreements in restraint of competition may be suppressed in order to safeguard the public (collective) interest (Judgement no. 223 of 1982).

---

[23] Alpa, *L'arte di giudicare*, [The art of making judgements], Roma-Bari, 1997.

[24] " Private economic initiative is free. It cannot be conducted in conflict with public weal [the public interest] or in such [a] manner [as to] damage safety, liberty and human dignity. The law determines appropriate planning and controls so that public and private economic activity is given direction and coordinated to social objectives."

One of the first judicial pronouncements made by the Constitutional Court of the general principles regulating legal relationships which involve obligations was made on the 1st April 1992, in its Judgement no. 149.[25] The question before it related to the legislation governing property leases (the Law of 25 November 1987, no. 478), Article 2 of which provided that the tenant was exempt from liability in damages to the landlord for his delay in giving up possession, but made no provision for the landlord or the court to verify whether the tenant actually had any difficulty in finding suitable alternative accommodation. The provision had been enacted in derogation of the rule set out in Article 1591 of the Civil Code, which though it allows the possibility of damages being payable in addition to sums equivalent to the rent, during the period of delay in vacating, does not make any distinction as to the tenant's circumstances, or mention the question whether he can find alternative accommodation. The Constitutional Court had previously stated that the provision for temporary exemption from liability did not conflict with the principles of the Constitution.[26] However, in Judgement no. 149, the Court changed direction, on the basis of the following reasoning:

> "the limits of constitutional legitimacy are a consequence ... of the nature" (of the provision under discussion). [It is] "a rule [provision of legislation] expressing a value judgement based on the balancing of two conflicting interests, both of which are given importance by the Constitution. It is characteristic of the constitutional values (or principles) that they be weighed against each other, so that it is impossible to predetermine once and for all which one should be placed above the other. The priority to be given to one over the other, where the task of balancing them is not left to the judge on a case-by-case basis, but is to be operated by the law in the form of an abstract rule,

---

[25] In *Foro Italiano*, 1992, I, 1329.

[26] Especially with Article 42 para 2 of the Constitution; see the Judgement of 24.1.1989, no. 22, in *Foro Italiano*, 1989, I, 959, with note by Piombo. Subsequently [the Constitutional Court] found the said provision to be lawful, in numerous judgements: see the note in *Foro Italiano*, 1992, I, 1329 referred to above.

> must be made to depend on certain typical conditions, as have a legal effect in the particular circumstances. In the absence of such conditions, the outcome of the comparative evaluation cannot be the same."

The Court goes on to state that a rule of this type will be unconstitutional

> "to the extent that it does not reserve the right for the person, whose interest has been postponed, to prove that, in the particular case, the conditions are not fulfilled which alone would justify the precedence given to the opposing party's interests, in the balancing carried out pursuant to the rule. The rule complained of [Article 2 of the above Law] in fact precludes the landlord from offering any evidence to the contrary, without taking account of the fact that his rights can lawfully be restricted, only to the extent actually necessary for the purposes of supporting the tenant's economic activity [business]. Where the tenant needs a period of time in which to find another suitable property for the exercise of his business. If these condition is not fulfilled, that is, if and as soon as the tenant gains possession of another property or could have done so with reasonable diligence, the denial to the landlord [of his right to] payment of damages for [any] further delay in vacating the premises constitutes a breach of the protection of the right to ownership provided by the Constitution."

On the question of the duration of a contract of lease and the inheritance of it on the death of the tenant, the Constitutional Court has, in an extremely courageous judgement, extended the right to inherit a residential tenancy even to a cohabiting couple living as husband and wife when the cohabitation can be defined as stable.[27] The basic premise of the judicial reasoning is consideration for the family the cohabiting parties have established:

> "in 1975 the legislator wished to protect not only the nuclear family or the family of relatives but [also] the

---

[27] Judgement of 7.4.1988, no. 404, in *Foro Italiano,* 1988, I, 2515, with note by Piombo.

> group of cohabitees living together in an extended group including non-relatives (since heirs can include non-relatives), relatives no matter how distant, and even relations by marriage. It is clear that the legislator wishes to make itself the interpreter of that duty of social solidarity that consists in preventing anyone from being homeless and that finds expression here in the regulation of the inheritance of contracts of lease; the aim of which is to avoid rendering homeless, immediately after the death of a tenant, as many categories of person [as possible], even outside the circle of the legitimate family, provided they were habitually living with [the deceased at the time of his death]."

The Court took account, in its examination of the matter, of the actual (albeit not legitimate) family as a grouping in which the personality of the individual finds expression (Article 2) and of the fundamental need for a home (the so-called *right to a home*). It had a field day criticising the decisions made by the legislator when regulating housing, which ignored the actual (albeit not legitimate) family, despite the wishes expressed in doctrinal writings, which had relied not so much on the protection of the family as on Article 2 of the Constitution and the right to a home as an absolute right of the person. In analysing the earlier court judgements, the Constitutional Court remarked that:

> "at the beginning of the eighties there was a trend in doctrinal writings and in court judgements for perceiving the right to a home as an absolute right of the person, which was always bound to make the position of the tenant take precedence over that of the landlord. It was suggested that the example of French and German law be followed, so as to enable residential tenancies [to continue] for an indefinite time, subject to termination by the landlord only for a legitimate reason."

This represents a departure from the Constitutional Court's previous position. This had been that the stability of a residential situation did not constitute independent and unfailing grounds for exercising inviolable rights under Article 2 of the Constitution, even though the Court recognised the home as a primary asset to be

adequately and effectively protected, because of its fundamental importance in the life of the individual.

However, the right to a home does not have unlimited protection. The Constitutional Court considered the matter afresh[28] in relation to the constitutionality of the legislative provisions inflicting forfeiture of the right to an allocation of cooperative housing and concomitant loss of credit benefits in the event that the person to whom the housing had been allocated did not immediately proceed to occupy it (Article 98 of the Consolidated Law of 28 April 1938, no. 1165, and the Law of the Province of Bolzano, of 2 April 1962, no. 4). Here, however, the Court declared that the law was in accordance with the Constitution, provided the principle was respected that *performance cannot be compelled*, which principle has constitutional status. In other words, forfeiture and revocation do not operate if the person concerned is temporarily in difficulties. As a general principle, the Court specified that:

> "the interest of the creditor (or obligor) in the performance of the duties held to be an obligation must be placed, in the order of precedence which the provisions of the Constitution, or of ordinary law, give to the values that govern the matter before us. When, in respect of a particular performance, the rights or interests of the creditor [obligor] come into conflict with a right or interest of the debtor [obligee] that is protected by the legislation, or actually by the Constitution as a pre-eminently meritorious right [*merito*] or one which is in any case superior to the one that is advanced in support of the creditor's claim, then [debtor's] non-performance, to the extent strictly necessary for the satisfaction of the interest whose merit is pre-eminent, appears to be legally justified."

This principle that *performance cannot be compelled* finds confirmation by the highest courts, both ordinary and administrative. Having set out this principle, the Court continues, remarking that:

---

[28] With its judgement of 3.2.1994, no. 19 in *Cons. Stato*, 1994, II, 150.

"there is no doubt that [if] a person cannot fulfil the legal requirement for continuing to benefit from the public contribution to [his] home loan, which requirement is actual, continuous and stable occupation of his home by him, [and if he cannot fulfil it] because he needs to be with and to help his father, who is seriously ill and incapable of an independent existence, in another city, [then] that [person's] case fulfils the conditions for mitigation by the higher duty of social solidarity. [This higher duty] is defined in Articles 2 and 29 of the Constitution as not subject to derogation and [it] is capable of amounting to reasonable justification for non-fulfilment of the aforesaid requirement. The application of this principle is not restricted to the context of the state's legislation. As it involves categories [definitions] and meritorious rights that are of constitutional importance and as it is a general principle concerning the obligations involved in legal relationships as such, it is universally applicable in the [entire system of] legislation and therefore must not be ignored, even in the interpretation of regional or provincial laws."

The Constitutional Court has several times stated its position on *long-term employment contracts*, in its Judgements nos. 311 of 1995, 822 of 1988, 349 and 36 of 1985 and more recently, in its Judgement of 31 May 1996 no. 179[29] relating to a question concerning the insurance of work and against work-related illnesses. On this subject, it has confirmed that:

"in our constitutional system the legislator is not debarred from making enactments that unfavourably modify the rules on long-term [work] contracts."

But it specified that

"the said enactments, however, like any other legislative precept, must not go to extremes so as to make an irrational ruling, or arbitrarily affect the fundamental

---

[29] In *Giur. cost.* 1996, 1660.

> [legal] situation created by earlier laws, so as to betray the citizen's trust in that stability of the legal system that is a fundamental and indispensable feature of the legal state."

On the question of *prescription* (the statutory extinction of rights by lapse of time), the Court, examining Article 2941 item 7 of the Civil Code, specified that the principle of the suspension of prescription operates in favour of anyone who finds himself in circumstances that prevent him from exercising his rights and therefore justify his failure to do so.[30]

The Constitutional Court has considered the issue of the *surrogation* of the I.N.P.S. (the government body in charge of social insurance against invalidity etc. for private, not state, employees) to the rights of the assisted person, where he is entitled to payment of damages arising from the civil liability of a private person for a road traffic accident. In its Judgement of 6 June 1989, no. 319,[31] the Court declared Article 28 paras 2,3 and 4 of the Law of 24 December 1969, no. 990 to be unconstitutional. This was because this law purported to entitle the I.N.P.S. to obtain reimbursement of expenses incurred by it for services rendered to the injured party as a consequence of such an accident. In the event of the insufficiency of the sum insured through the I.N.P.S., to cover the damages caused by the accident, the I.N.P.S. would be able to demand reimbursement of the shortfall, from the civil liability insurer to itself, to be withheld or deducted from the sums owed to the insured; thereby limiting the victim's right to the payment of the damages owing to him. Since, the Court observes: "in our legal system the right of a person not to be injured can be described as a 'fundamental right of the individual' which the Republic is enjoined to protect" (Article 32 of the Constitution); in the event of injury: "the particular definition of, and protection afforded by, this right impose on the legislator the duty to legislate suitable measures to ensure the fullest [possible] compensation [in the event of its infringement]." A similar decision was given in regard to Article 1916 of the Civil Code, which relates

---

[30] Judgement of 24.7.1998, no. 322, in *Foro Italiano,* 1998, I, 2617.

[31] In *Foro Italiano,* 1989, I, 2695.

to private insurance, and Article 10 paras. 6 and 7 and Article 11 paras. 1 and 2 of the Decree of the President of the Republic no. 1124 of 1965 which relate to public insurance. The judgement dealt with the passages in these items of legislation which allowed an insurer to claim from the person liable in damages, the shortfall between the amount it had paid out in damages for biological damage (personal injuries), and the amount covered by its own insurance, thus depriving the victim of that amount.[32]

On the subject of *insurance cover for liability for damages arising from road traffic*, the Court anticipated the bringing into force of the EC Directive of 30 December 1983, no. 84/5 on the question of insurance cover including members of the insured person's family. In its Judgement no. 188 of 1991,[33] the Court declared that Article 4 (b) of Law no. 990 of 1969 was unconstitutional, insofar as it purported to exclude from the benefits of compulsory insurance cover for his personal injuries, the insured person's spouse, his legitimate, natural and adopted ascendants and descendants, and his adopted relations, relatives and relations by marriage to the third degree, if living with the insured or maintained by him. In its judgement no. 301 of 1996, the Constitutional Court, this time applying the Law no. 142 of 1992 with which the legislator brought the said Directive into force, found that Article 4 (a) of the said Law was not unconstitutional, to the extent that it only excluded the driver from cover. The Court's finding was based not only on the necessity to bring the domestic legislation into line with EC legislation, but also on the provisions of Article 32 of the Constitution. The Court stated that:

> "the decision made by the legislator in 1992, [which was] grounded in the necessity to comply with the EC source of the law, forms part of this development and should be viewed positively, as reinforcing the protection of health that is guaranteed by Article 32 of the Constitution. This protection has, on the question under consideration, been undergoing a gradual process of accommodation [into the

---

[32] Judgement of 18.7.1991, no. 356, in *Foro Italiano,* 1991, 2967 and judgement of 27.12. 1991, no. 485, in *Giur it.*, 1994, I, 162.

[33] In *Foro Italiano,* 1991, I, 1981.

> legal system] which [process] has come to completion in the new formulation of Article 4 of Law no. 990 of 1969. But precisely because of this, it [the decision] cannot act as a *tertium comparationis* [third element for comparison] for the purposes of deciding whether the legal provision previously in force and which has been impugned, was constitutional. That provision had its own, appropriate grounding in the connection already stated, based on Article 2054 para.3 of the Civil Code, between exclusion from cover and the class of persons who were nevertheless liable in any event for road traffic accidents. This is enough to hold it immune from the alleged vices of unconstitutionality. Nor is any negative reflection cast on its reasonableness by the context of legislation that has been created since the reform of the law relating to families, [although] the referring [judge] seeks to rely upon that, underlining in particular [the] favour with which the legislator has treated the institution of joint ownership of assets [*comunione dei beni*] as the legal property regime of the family. Indeed it is obvious that once such a regime has been established [i.e. joint ownership], the spouses cannot escape the legal consequences that the law connects to co-ownership of each asset, whatever the source of its establishment; and liability under Article 2054 para.3 of the Civil Code is indeed one of these consequences."

To continue with these examples of the application of the Constitution to legal relations between private persons: the Constitutional Court has frequently emphasised that the freedom of private persons to contract receives *indirect* protection from the Constitution, because that freedom is *an instrument intended to realise economic initiative*. That is why the legislation on the forced administrative winding-up (*liquidazione coatta amministrativa*: a special form of winding-up for companies of particular public significance) of insurance companies by the court has been declared by the Constitutional Court to be in conformity with the Constitution. The legislation provides that only the insurance company taking over the obligations of the one in liquidation has the right to withdraw from the insurance contract and prevents the insured from doing so

for a period of two years.[34] The case revolved around Article 2 para.1 of the Legislative Decree of the 26th September 1978 no. 576, which was converted into the Law of the 24th November 1978 no. 738. The judgement of the Court goes beyond the confines of the limited question before it to consider the limitations to the protection given by the Constitution to private autonomy [freedoms]. The arguments brought are many and various. First of all, the Court observed, the principle of equality is not considered to have been breached in any way:

> "in relation to the position of those who are insured with other [insurance] companies...because their position is wholly different and cannot be compared with the position of those who have had the bad luck or bad judgement to insure themselves with companies that were insufficiently capitalised or improperly managed and which in the end went into forced administrative winding-up. On the contrary, the law in question has the effect of putting the insured, in terms of risk cover, in the position he would have been in had he taken out insurance with a *solvent* insurance company. [Nor is the principle of equality breached] in the legal relations between the insured and the company [that has taken over the obligations of the insurer], because the derogation from the principle of formal equality between the parties to a contract in terms of the liberty to terminate it, allowing the company to retain [that liberty] and depriving the insured of it for a two-year period, is justified: first, because the company should not be deprived of the means of restoring the business to health by abandoning non-economic contracts and those that are out of keeping with legal requirements (for example, contracts with huge premium discounts, agreed in the context of tariff dumping); and secondly, because it is necessary to ensure, without an excessive sacrifice of the insured person's liberty to contract, the preservation of the assets of the business for the purposes of the public interest in production saving jobs."

---

[34] Judgement of 11.2.1998, no. 159, in *Foro Italiano,* 1988, I, 1445.

Neither did the Court consider that Article 41 para.1 of the Constitution had been breached:

> "particularly because this rule of the Constitution is designed to protect productive business, which is usually exercised in the form of a company, so that freedom of contract *per se* is only indirectly protected, as being an instrument of economic initiative. Secondly, [this is so] because, even if one admits the possibility of construing an implied general principle from Articles 41 and 42, to the effect that the Constitution protects private autonomy, the reasons of public interest set out above are sufficient, according to a criterion repeatedly affirmed by this Court,[35] to justify the extraordinary and temporary restriction imposed by Article 2 of the Legislative Decree no. 576 of 1978 upon the insured person's freedom of contract, in terms of his liberty to terminate the contract."

3. Concluding remarks

With regard to the Italian model for applying the rules of the Constitution to legal relations between private persons, this review of the case law relating to the Constitution does not bring to light any particular anomalies or reasons for criticism. Leaving aside the French model, whose construction is still in progress, and comparing the Italian with the German model, one finds similarities in the use of governing principles, general categories, general terms and general clauses. There is a greater volume of case law in Italy on the law of personality, and thus a *direct creation* of individual rights of the person. On freedom of contract, in both models the application of the Constitution is *indirect.* In the German model, which is more invasive, the Constitutional Court makes a connection between fundamental rights and the autonomy of the individual which is still not permitted in our own system. The prohibition against making this connection has been justified in Italy on the grounds that the

---

[35] Compare [see], finally, the Judgement of 23.4.1986, no. 108, in *Foro Italiano,* I, 1145.

legislator should not interfere in contracts (more or less) freely agreed upon by private persons, except where this is essential for the protection of the public interest, or the health, safety or dignity of the person. But judicial analysis in the decided cases has confined itself to justifying the powers of the legislator to ensure reasonable limitations to the freedom of contract, which would otherwise include the liberty for the stronger party to impose his terms on the weaker one.

The picture that we have drawn shows the complexity of the debate on the relationship between constitutional and private law. The complexity of this debate makes it impossible to draw definitive conclusions; but it prompts reflection on the promising changes that have marked the two disciplines of constitutional and private law over the last few decades, the models on which their respective legislation is based, the ways in which they affect each other and their boundaries. Just as the dichotomy between private and administrative law has been resolved, in several important areas the dichotomy between private and constitutional law has also been overcome. In the present situation, the invasiveness of the constitutional legislation, the *Drittwirkung* of the rules of the Constitution upon legal relations between private persons, the *Drittwirkung* of the (super-national) rules defining fundamental rights, the renunciation of sovereignty in matters that come within the competence of European Community law, the diffusion of EC law into the domestic legal system, and the globalisation of markets, make it necessary to redefine the meanings of the expressions "constitutional law" and "private law" and thus to redefine their boundaries.

Looked at from this point of view, constitutional law in the traditional sense should now only have the task of organising the state: economic and social relationships should be divided up between constitutional and EC law. Private law in the traditional sense should have the task of dealing with the (technical) legal rules of detail in the law relating to property, and with bringing EC legislation into force in the domestic system, as well as those matters that are not within EC competence, such as family, inheritance and property law. The fields of personal meritorious rights, the rights of the personality, and relationships between the individual and the group, form a collection of matters in which the traditional distinction between constitutional law, EC law, and private law has lost its

meaning, since the distinctions between them are no longer dictated by differences in the objects or subject matter of the legislation, so much as by the *order of precedence* or *competition* between different sources of law.

This result can be arrived at by a variety of different routes: (a) the formal route, concerned with the identification of the applicable legislation; (b) the hermeneutic one, concerned with the methods of interpretation to apply, and the consequent operations - the "results" obtained; (c) the methodological route, concerned with the reference to rights and values, the legislative models for comparison and the identification of the factors both internal and external to the legislation that have a bearing on it and are the driving force behind the evolution of the forms of the law. However, even a merely descriptive account of these active phenomena reveals how reductive is an analysis that is restricted only to their legal aspects, and how illusory - and therefore misleading – it is to break them down into an analysis, sector by sector, of uncoordinated material. Obviously a more complete account would have to deal with the policies behind the law enacted by the legislator and the other institutional agents, as well as with the domestic, EC and international economic situations, and with the development of social structures. The horizons terminate in this way, only to extend themselves further, affecting the very concept of law and of the role of the legal analyst as currently known to us.

Guido Alpa *is Professor of Private Law at "La Sapienza" University of Rome. He has a Dr.jur. h.c. Complutense from the University of Madrid and is Master of Grays Inn (hon.)*