HUMAN RIGHTS IMPLICATIONS OF EUROPEAN DEVELOPMENTS IN THE LEGAL CONCEPTUALISATION OF THE PERSON

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Though nowadays it is common to say that the "person" is entitled by law to fundamental rights and freedoms, it must be noted that, historically, the first 'rights' developed in relation to the "person" were economic in nature. These were then followed by the development of civil rights, subsequently political rights and finally fundamental rights or human rights as referred to in this day and age. However, it is sometimes unclear how far human rights are applicable to relations between individuals. Case law relative to the European Convention of Human Rights sometimes appears to suggest that human rights can be directly applicable between individuals. On the other hand, it is more appropriate to say, in this context, that human rights are indirectly applicable meaning that the State's Convention obligations also include a duty to take into consideration the legal relationships of individuals between themselves, thus creating a *"secondary positive obligation"*. Moreover, though there may not be one specific legal formula linking fundamental rights to the legal relations between individuals, the interpreter of the law can and sometimes has to enquire as to whether it is possible or mandatory to make this link at an interpretative level. In considering these legal relations between individuals, private law will be of the essence, even though human rights can be said to have their roots in public law. The concept of "person" must figure in any model of European private law and, just as national civil codes often start off by providing provisions in relation to the natural person, so should any European Code, which could then describe the extent of the

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* Translated by Anne Thompson. The Author is particularly grateful to Miss Anne Thompson for her kind and useful assistance in translating and editing this article and to professor Hugh Collins for his invitation to participating in the debate.

meaning of "person" be he/she merely the contracting party or, more extensively, a person with human dignity. In further comparing European laws to national laws, one may be inclined to argue that just as national Constitutions prevail over all other national law, so should the European Constitution prevail over all other laws at the European level. Hence, elevating these rights to the level of rights guaranteed by the Constitution for Europe would be a further step toward a modern statute of the rights of the person.

1. Will European constitutional law have an impact on the 'European Civil Code'?

To speak of a 'person' in the legal world is to invite the problems inherent in some very diverse concepts and meanings. Today we are accustomed to regard the person as dignified by his entitlement to fundamental rights, but we should not forget that the idea of a person, understood as a human being who is inherently the owner of rights and obligations, is the outcome of a long and eventful journey. A journey that has, so to speak, been the reverse of what one would rationally have expected. It would be reasonable for the fundamental rights (such as those of life, health and liberty) to come first, and to be followed by political, then economic and then civil rights.

But if we follow the traces of history, the idea of innate rights, belonging to the person as such, comes into being in the Seventeenth Century; but in codes and statutes the rights that are the first to be asserted are the economic rights, then the civil rights, then the political rights; and finally the human or fundamental rights. And even here there are differences between the various concepts of the categories of rights of the person underlying the meta-legal (philosophical, sociological and religious) views of the person, not to mention the differences in the concept of a right, or claim, and so on.

Since we have the concept 'person subject to the law' (*'soggetto di diritto'*) is it necessary also to have the concept of 'person' (*persona*) to organise legal relations? Why did the concept of 'person' begin to make its timid appearance in the Nineteenth Century and why is it only now that it has erupted into continental legal culture, to the extent of being regarded as essential to a model legal system that is democratic and inspired by the founding values of any civil society?

Terminology, as always, has a great deal to tell us about history and about the concepts that are reflected in the creation of legal rules and in the theoretical elaboration of legal categories. But the legal system of a country also offers useful pointers to an understanding of the spirit of its legal history.

In European private law, one of the most difficult tasks is to unify the concept of the person, that is, to discover convergence between those legal systems that explicitly focus on it – such as the French, the German and the Italian legal systems – and those legal systems that presuppose it, but do not explicitly locate it as their foundation, as is the case with the common law. A brief summary of these concepts may be a useful means of explaining the stratification of these theories, their political tendencies, and their transpositions into legal terms in the course of legal history; and of highlighting the way in which the concept of the person has become second nature to every civil code: not only the codes of the Eighteenth and Nineteenth Centuries but also to a future European civil code.

Whatever meaning one prefers to assign to the expression 'European private law': whether it is a *convergence* of the national legal systems, according to the meaning proposed by Basil Markesinis; whether it is a *common core* of the legal systems of the Member States, according to the meaning pursued by the 'School of Trento'; whether it consists of the results flowing from the *acquis communautaire*, as the researches of various study groups would have it; or whether it is the subject matter that Ole Lando and Hugh Beale, Christian von Bar and their respective groups are attempting to *codify*[1]: inevitably the legal concept of "person" must figure in any of these models. It is not an easy matter, however, to identify a single definition that will satisfy all the learned legal writers involved in these research programmes. Moreover, in order to arrive at a worthwhile definition, it seems essential to consider private law and public law jointly in the European dimension. Since *convergence* is a matter of fact and the *common core* is an exercise germane to comparative law, it will be worth examining the question in more depth in the light of the other models of study.

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[1] For a survey of the meanings of 'European private law' see G. Alpa, 'European Private Law: Results, Projects, Hopes' in *Eur.Bus.L.Rev.*, (2003), 379-403.

The *acquis communautaire* does not treat the person as a single concept but fragments that concept according to the legal positions the person assumes in the context of legal relations between individuals. In other words, it treats the person as a citizen, a worker, a consumer, a saver, a user of the environment, and as the owner of personal data.[2] These are admittedly facets which, when reconstituted as if they were the tesserae of a mosaic, restore the image of the person. But, as has been pointed out in legal commentary, in the first phase of its formation the trend of the *acquis* was the achievement of the single market. It obeyed a functional logic, which was corrupted by the prevalence of economic interests over every other different kind of interest. Thus, the person was treated as *homo oeconomicus,* the manufacturer or recipient of goods, services and capital. Taken in this reductive sense, the *acquis communautaire* has nevertheless been useful for the development of European Community law as also for the development of some national laws, such as the Italian, in which the culture of consumer protection had not been particularly significant. One should add, however, that the *acquis communautaire* is now acquiring new goals, which are a long way from the functional logic either of the law or of economics, since the new European Union texts reflect the growing awareness in the national cultures of the meta-legal values relating to the person.

The plans for a European Code or Codes do not appear to contain any statement of the legal status of the person. They are dedicated to the drawing up of rules to harmonise and unify the laws of contract, of civil liability, of the other sources of obligations and of single contracts relating to sales, services, personal guarantees, the transfer of property and insurance. Thus they remain in the domain of property and economics and are not concerned with the legal implications of the Constitution for Europe. They do not even lay down rules for the interpretation of the law that would form

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[2] In the now vast literature I would like to point out certain Italian contributions which have the merit of being systematic: Rossi (L.S.), *'I cittadini, Gli stranieri'*, in Tizzano (ed.), *Il diritto privato dell' Unione europea,*Torino (2000), I, 97-147; Livi, Macario, Paganelli, Masucci, Chiné, Picardi, Porcelli, *I soggetti,* in Lipari (ed.), *Trattato di diritto privato europeo,* Padova (2003), I, cap.II, 293-603.

an explicit link between the text of the Constitution and the text of the Code. In other words, to the eyes of the continental legal commentator they show a major legislative deficiency. But how is one to remedy it?

Since in the continental legal culture the rules of the Constitutions prevail over all others, one is entitled to suppose that the same must hold good for the rules of the Constitution for Europe compared with all the other rules, principles, *frames, restatements,* or actual Codes.

And one is also entitled to suppose that the same techniques should be used for linking and interpreting the rules of the Constitution for Europe and the other legal rules of lesser rank. This is the phenomenon known (even in Italy) as *Drittwirkung.*

The principle that the rules of Constitutions are directly applicable to legal relations between individuals has now gained acceptance and cannot be given up. Similar phenomena have shown themselves even in those countries, such as the United Kingdom, which do not have a written Constitution but have introduced a law on Human Rights.[3] Will the application of the Constitution(s) be vertical or horizontal? Will uniform methods or a variety of methods be used?

The question directly affects the legal boundaries of the person, who has a legal face in the (draft) Constitution for Europe and ought to have a face also in the European Civil Codes.

But we should not overlook the fact that the Constitutional dimension of the person involves also another phenomenon: it requires interpretation certainly, but an interpretation that is 'axiological', or based on value judgments.

In Continental Europe, the Constitutions not only fulfil the function of dictating the political, administrative and legal organisation of a Country, they not only enshrine a list of rights of the person, but they fulfil another important function: they constitute for the interpreter of the law a list of values from which he must take his inspiration in the interpretation and application of the law. A judge, who is an interpreter of the law, must take account of these values at all times; and when he considers that

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[3] The Human Rights Act 1998.

the law to be applied is in conflict with them, he has a two-fold choice: either he must bend the meaning of the law to achieve an 'adjusted' interpretation, adjusted, that is, to the rules of the Constitution, or he must refer the question of the legitimacy of the legal provision to his (own) Constitutional Court. The list of Constitutional values acts as a guide to the interpretation of the law.

In this way, the Constitutions have also a didactic function: the construction of the science of law, of legal reasoning, of the elaboration of the fundamental principles on which a legal system is based, finds in the Constitution an immediate, certain and necessary reference. And if the Constitution for Europe (like almost all the Continental Constitutions) enumerates the values of the dignity of the person, equality and solidarity, likewise these values permeate legal relations between individuals, through the application of the law.

The Constitutional aspect of legal relations between individuals thus affects the way in which the drafts of a European Civil Code should be drawn up. This effect can be seen at various levels:

(i) in the text, with its laying-down of rules about the person;
(ii) in the content, with its provision of rules to ensure that proper attention is paid to the values of the person; and
(iii) in the interpretation, in which the rules of the Codes are adapted to the values enshrined in the Constitution.

This means that the rules of the Codes should not become entrenched behind the individual aspect of the person but must also deal with his social aspect. This prospect concerns all the areas of private life and in particular the area of contract law.

But the rules of contract law also cannot escape axiological interpretation, nor can they express only choices of a technical nature, asserted to be 'neutral', nor can they express only an individualistic (and thus egotistical) conception of relations between individuals. This conception, dictated as it was by the rules of the market, characterised the statutory Codes of the Nineteenth Century, but was called into question in the Twentieth and no longer seems appropriate to the 'Codes' of the new Millennium.

In the final decades of the Twentieth Century, constitutional law – especially the Italian and the German – showed evidence of the

necessity of considering the values pertaining to the person in the contractual relation, when the person is placed in a position of inequality with the other contracting party. Memorable judgments on the dignity of the person have ratified limitations to that freedom of contract that would be the means of violating this fundamental value. And even in the case law of the lower courts' decisions on the merits and on legitimacy there are judicial pronouncements which, applying the principles of good faith, equivalence of consideration, public order, just cause and abuse of the law, tend to guarantee the values relating to the person, which are assured by a real 'contractual justice' which takes its inspiration from the principle that goes with dignity, namely the principle of solidarity Now it is precisely the drawing-up European Civil Codes that would make it possible to make use of provisions that would be the same for all and that would explicitly be able to link the values of the person to the control of the financial transaction achieved by means of the contract.

But this is a new chapter in the process of the integration of the European Union and its configuration and destiny are still to be explored. It is sufficient to have summarised the long history and development of the concept of the person, to see how the European dimension – starting with the process of the constitutionalisation of private law which has been seen in some national experiences – is a determining factor in the modernising elements being added to the European Civil Codes. The process encounters many problems, among which are the origin of the person and the now received concept of 'life'. It is a prospect in which legal definitions overlap with ethical, social and political.

2. The individual in the Civil Codes of (Member) States The 'beneficiary of rights' (*soggetto di diritti*)

The Civil Codes of the Nineteenth and Twentieth Centuries generally start with provisions relating to the natural person, which are followed, in many cases, by provisions concerning the legal person. Even a 'model code' intended to be used in the European context should therefore proceed in that way, both for the sake of good order and because a code governing relations between individuals cannot exclude a description of the legal position of the *person*. Portalis (1746-1807), in his introduction to the rules

contained in the Napoleonic Code, stressed the fact that the Code was centred on the individual and dedicated to him. His admonition is still valid today. To deal with the person in legal terms means establishing when a being is a 'person', when his life begins and when it ends, when the person can take valid legal actions, and so on. It is clear, moreover, that the conception of the person varies according to the epoch and the cultural and political climate sustaining the law.

Even the legal concept of the person must therefore be placed in its historical context. For Portalis, apart from statements of a general nature, the person was a *'citoyen'*, he was the owner, the contracting party, the individual responsible for the unlawful act, the merchant.

It is with Pufendorf that we discover the essence of the person in his *human dignity*, that characteristic feature that must be recognised in every individual, whatever his social role. However, in contrast with Holmes and Grozio, Pufendorf does not justify but condemns slavery. His ideas haunt and pervade French legal culture, which becomes a real trigger for the re-establishment of civil law.

In the same period in which Pufendorf wrote his seminal work on the law of nature and of peoples (published in 1672) Domat wrote his *Loix civiles*, which was not published until 1689.

Domat can be taken as a prototype of the model of legal reasoning as to the conception of the person (Lib. Prel., tit. II, section II). He divides the state of the person – that is, the complex of *qualities* of a human being – into the natural and the civil. The *natural* state pertains to the sex, birth and age of the person; the *civil* state on the other hand is determined by the 'arbitrary laws' of men; it springs either from the concepts of status created by the Roman legal tradition (of liberty, citizenship and family) or from local laws. In France he considers the division of persons into noble and low-born, ecclesiastical, citizens and plebeians, free or in servitude, the latter however not being a condition of a person but linked to his home or the nature of his assets.

While admitting that there are no slaves in France, Domat describes their condition according to Roman law. Even as late as 1796, in an Italian language edition of his *Loix civiles* published in Naples in that year, there is a commentary on the pages where he states that in the Kingdom of the Two Sicilies there are not known

to be any slaves except the Turks who have been 'taken in the act of piracy'; they can be sold but their free circulation is legally permitted only within the borders of the Kingdom; they can be freed; but even when freed they cannot cross the borders without royal authority, on pain of being again enslaved.[4] Although it is remarkable, Domat's conception – to the eyes of legal commentators of today – is not without defects.

Several flaws are noticeable in his conception of natural law: the first is the confusion of the laws of nature with civil laws or legislation; the second is the separation of natural from civil law; the third is the hypostasisation of (social) status. More specifically: birth out of wedlock – with the attendant acquisition of the status of 'bastard', limiting the rights of succession – should not be considered as a condition deriving from nature. It is obvious that the natural fact of birth does not confer any distinction as to the inherent rights of the person, except that of equality. In Domat's assessment, the legal construction of the person seems to be a distillation of categories, prejudices and social conditioning, which codify *objective* inequalities. It thus consists in an interpretation of the external data in accordance with preconstituted models. It does not distinguish that which is called natural from that which is superimposed on nature; or rather, it attributes to that which is called 'natural' a selective function, apparently carried out according to the canons of preconceived social convictions.

One cannot understand therefore how the distinction between the laws of nature and civil laws can be drawn. Domat describes first what he calls natural laws and juxtaposes them with civil laws, which are indeed 'arbitrary'; but he does not say that the former are better than the latter, that they constitute the ideal model of the latter or be its corrective.

Finally, the notion of status, which is drawn from Roman law – where Domat laments the absence of a definition – is not clarified as to its origins and its causes. Status is not regarded by him as a legal instrument, a social selector, a mainstay of society; but rather

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[4] Le leggi civili nel loro ordine naturale di Giovanni Domat, avvocato del Re in Clermont, translated into Italian from the French, III ed., T I, (Naples 1796), 188.

as a fact of nature, impressed on the natural order, and therefore coming from the Creator who imposed this order on the world.

To sum up, the cornerstones of the construction of the concept of the *person* in the past (Roman law, medieval law, natural law and pre-Napoleonic civil law) are the results of hypostases or anti-historical operations: anachronisms to which the legal commentator harks back in order to justify primacies, immunities and privileges. Tradition is used to justify the present and to argue for the need for its continuity with the past; in other words, to engage in operations whose ideological orientation is not made plain.

The fact that in some national legal traditions the concept of the person is codified does not therefore mean that individuals' rights are protected; nor does it postulate the superiority of those national traditions that contain rules and treatises on the person over those that have none. It is the results of the application of such rules and treatises that count.

Nor should one over-emphasise the conceptions of the person that emerge from the Codes. As stated above, in the Napoleonic Code the person is treated in his capacity as owner, and in the *Code de Commerce* in the role of *marchand*.

The Austrian Civil Code of 1811, whose first chapter is dedicated to the law of the person, and specifically to the rights relating to social status and inter-personal relations, includes certain rules which represent the cornerstones of Seventeenth Century 'natural law'. Paragraph (§) 15 relates to the rights of the person in connection with his social status, to inter-personal relations and to the status of the family; § 16 refers to the 'personality', acknowledges that every human being has 'innate rights' and abolishes slavery or ownership in a human being; § 17 presumes rights to extend except where there is evidence that they have been restricted; and § 18 acknowledges that everyone has – subject to the conditions laid down by the law – the capacity to acquire rights. The Code does not say what the natural rights are 'or that they are to be apprehended by the light of reason alone' but at least it gives one to understand that a human being – because he is a person – cannot be the subject of rights and thus preserves his quintessential freedom. This Code, however, is to be regarded not so much as a forerunner of the modern theories of the person but rather as the mirror of an antique society, which mirror is poorly adapted to the economic needs of a modern industrial society.

A century later, the Swiss Civil Code seems to be an updated version of the Austrian Code. It does not mention natural rights but, in contrast to the Napoleonic Code and the German Civil Code, which allude to the person only in the title but do not make it the subject of pronouncements, it opens with a proclamation of the universality of civil rights.

It should not escape us, however, that apart from the rhetoric of the Civil Codes of the past, the person is encapsulated in apparently neutral formulae and in formal categories. The Civil Codes reflect the needs of a bourgeois society which only considers only those persons subject to the law (*soggetti*) who are economically prosperous, legally free, who undertake reciprocal obligations on a level playing field, according to the rules of an individual ethics, and whose legal relations are symbolised and to a large extent also actually realised in accordance with the model of the individual contract. The legal order, like the economic order, has the task of guaranteeing the *person* the *maximum freedom* consistent with the freedom of every other person *sui iuris*. But the person as such has validity in the world of law only insofar as he fulfils a social role.

3. Remarks on the English common law

The common law does not offer a systematic picture of the discipline of the person, treated as such, but irregular facets of it. In the legal literature one does not find manuals or treatises or even sections of works dedicated to the 'law of persons', except in the texts dealing with Roman law. There is talk, certainly, of the person (*natural person*) in the manuals dealing with individual areas or aspects of private law, but these are only incidental descriptions. On the subject of contract law, there are the rules as to natural capacity and the contracts of minors; in family law, legal relations between parents and children or between spouses; in the law relating to legal medicine and bioethics, the rules relating to birth and death, the embryo and the foetus; in the law of torts, the protection of certain rights that in continental jurisdictions form part of the discipline of the person since they relate to his attributes, that is, the 'rights of the personality' such as honour and reputation (expressed in the common law by way of libel and slander, defamation), confidentiality (expressed as privacy), and the

religious or lay, in joint or individual ownership, with matrimonial, monogamous or polygamous regimes.

It does not follow that the legal component that denotes the model of identification will also correspond to the opinions expressed by all those belonging to the community concerned; it may be shared only by a minority, or only by a minority that has imposed itself on the majority.

After the Second World War two significant processes evolved in parallel: the emergence of fundamental rights acknowledged as belonging to the individual in the supra-national Charters and Conventions on Human Rights and the emergence of human rights acknowledged in some continental constitutions. In both cases the problem arose, whether the rules concerning human rights were applicable to relations between individuals.

4.1 The Universal Declaration of Human Rights.

The basic text of which to enquire whether human rights can be linked with legal relations between individuals is the Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations in 1948. Here one does not find, in the catalogue of human rights, a provision referring to contracts, or to the principle, which better expresses the power to undertake obligations (or not to undertake them), of *freedom of contract*. Looking at the letter of the law, therefore, the answer to the enquiry must be in the negative, since Article 2 of the Declaration provides that *'Everyone is entitled to all the rights and freedoms set forth in this Declaration'*. Since freedom of contract is not specifically proclaimed, one must conclude that it does not constitute a fundamental right (or right of man, or human right, or inviolable right).

However, the interpreter of the law can fill these gaps (in a scientific sense, not in a political or evaluative sense) by bearing certain considerations in mind. Only some of these are listed below.

There is mention in the list, of freedom and equality (Article 1). Thus, one considers that these expressions relate to the public law position inherent in the relationship between the individual and authority, and not to private legal relations between individuals.

Then, there is a reference (in Article 2, paragraph 1) to the prohibition against discriminating against individual human beings

on the grounds of sex or other criteria; in counterpoint to this prohibition is the entitlement to equal protection of the law, against discrimination (Article 7). The matter of discrimination directly affects the right to work and thus the contract of employment, since it relates to the equality of treatment of persons of the opposite sex or of different sexual orientations from those practised by the majority, of persons belonging to ethnic or religious groups or professing political opinions or speaking languages different from those of the majority.

The right to life, liberty and security of person, and the prohibition against slavery and servitude (Articles 3 and 4), can also affect the contractual relationship: servitude and slavery relate to it and to marriage, at least when marriage is regarded as a contractual bond; life and security can come into consideration for those contracts in which life and security can be compromised or where the health, life or security of oneself or others is at risk. The right (in Article 6) to recognition as a person before the law can affect a contract wherever there are distinguishing criteria available, such as the name, even the ideal image, personal data collected by computer etc.

The right to matrimonial freedom affects contracts where marriage is considered to be a contract (Article 16) and the same is true of freedom of association, which affects the contractual tie inherent in membership of an association (Article 20). Then the economic and social rights (Article 22) must be considered.

On this view, questions as to the identity of the fundamental human rights, the legal configuration of the person and the applicability of the values enshrined in the Constitutions, to legal relations between individuals, overlap and give rise to a diversity of solutions,[11] as a consequence of our diverse cultures and legal systems. However, the direct applicability to legal relations between private individuals, of the provisions contained in the Universal

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[11] The most recent occasion for discussion of this view was offered by a conference organised by Alfredo Mordechai Rabello and Peter Sarcevic at Jerusalem in September 1994. See the proceedings now published by the Hebrew University (Jerusalem, 1998).

Declaration of Human Rights, remains in doubt. The provisions seem rather to be meant to be used as reference models to evaluate the totality of the definition of the person, perceived as the owner of fundamental human rights.

4.2 *The European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.IX.50 as amended by Protocol 11)).*

A no less problematical fate has been reserved for the European Convention on Human Rights. The question of the direct applicability of the rules of the Convention, which acknowledge and enshrine human rights, is still under discussion, and this problem is linked to the recognition of the fundamental human rights in the European Community context.

In that context, discussion has centred on the interpretation of the new rules introduced by the 1999 Treaty of Amsterdam, which (in Article 1 paragraph 8) amended what is now Article 6 (formerly Article F) of the Treaty on European Union, to state that 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States', thus stating these rights as principles of Community law and consequently making them directly applicable to relationships between individuals.

The case law of certain Courts of the States that are signatories to the European Convention on Human Rights and of the Court of Justice of the European Communities, and the rules set out in the Treaty on European Union as amended by the Treaty of Amsterdam, seem to confirm the possibility of directly applying the Convention to legal relations between individuals, with particular reference to the safeguarding of private life, the right to abortion and the right to freedom of expression.

The authors who have written about the problem refer to the question of *Drittwirkung*, specifically in the German legal experience,[12] and to the question whether the EC directives are

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[12] D. Spielhagen, *L'effet potentiel de la Convention européenne des droit de l'homme entre personnes privées* (Brussel, 1995), 26.

applicable only vertically or also horizontally. The idea has, however, been put forward that the German concept of indirect applicability is not the same as the applicability of its rights acknowledged by the European Convention on Human Rights.[13] In the former, reference is made primarily to determination of the content of the general clauses of good faith and public policy, whereas, in the context of the European Convention on Human Rights, this notion would refer rather to the theory of the positive obligations imposed on the public authorities, which is resolved in the liability of the State for breaches of the fundamental rights of individuals.

But it is not out of the question that one may speak of *direct* applicability of the European Convention on Human Rights to relations between individuals.[14] Many arguments have been adopted to this effect.

One of these is that it follows from the intention expressed by the States that signed and ratified the European Convention on Human Rights, that 'it is possible to impute obligations deriving from international law, to the States that have signed the Convention and ratified it for the individual';[15] another argument refers to the case law of the International Court of Justice at the Hague, according to which 'the fundamental rights of the person create obligations *erga omnes*";[16] reference is made to the intention expressed in the text of the Convention;[17] and in particular in the declarations in the Preamble;[18] it is also thought that the provisions of the Convention are an expression of public policy and therefore are binding on individuals;[19] and it is argued that – like the

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[13] M. M. Hahne, *Die Drittwirkung in der Europeeischen konvention zum Schutz de menschenrechte und Grundfreiheiten* (Heidelberg, 1973), 26.

[14] Spielmann, *L'effet* cit., 30.

[15] Spielmann, *L'effet* cit, 31.

[16] M. Forde, *Non-Governmental Interferences with Human Rights*, B.Y.I.L., (1985), 265.

[17] Forde, *Non-Governmental* cit.

[18] M. A. Issn, *La Convention et des devoirs de l'individu,* La protection internationale des droits de l'homme dans le cadre européen (Paris, 1961), 190 ff.

[19] Spielmann. *L'effet* cit., 45, a commento della decisione dell'App. Bruxelles, 25-2-1988 J.L.M.B.,1989, 1132.

Universal Declaration of Human Rights – the provisions of the Convention are applicable both against the public authorities and against single individuals.[20]

A literal interpretation of Article 1 of the Convention cannot be unequivocal, since the English expression, that the High Contracting Parties *shall secure* to everyone within their jurisdiction the rights and freedoms defined in the Convention appears stronger than the French expression *reconnaissent* (shall acknowledge that they exist). Thus, different meanings can be given (and thus opposite solutions to the question of direct applicability) according as one ascribes more importance to the wider meaning of the English or the more restrictive meaning of the French.

Not all the provisions contained in the Convention are applicable to legal relations between individuals. Those which are certainly applicable, according to the proponents of direct applicability, are those concerning forced labour (Article 4), freedom to marry (Article 12) and the provisions as to the fundamental freedoms. There is some dispute as to whether the provision on respect for private life is also directly applicable (Article 8); though in Italy the question is resolved by its application in the case law on the right to privacy.[21] It is generally thought that Article 1 of Protocol no. 1 on the right to ownership and Article 14 of the Convention which provides the principle against discrimination are directly applicable.

In the case law of the Countries that have ratified the Convention, learned legal writers point out a number of significant cases; though for obvious reasons these are quite rare.

Among the Belgian cases, reference is made to the decision of the Judge of Peace of Tubize who refused to execute a judgment ordering a mother with children in her care to vacate a dwelling house, because she was in difficult financial circumstances and could not have found adequate shelter in the winter;[22] to the

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[20] W.J. Ganshof van der Meersch, *La Convention Européenne des Droits de l'Homme a-t-elle dans le cadre du droit interne une valeur d'ordre public?* (Bruxelles & Manchester, 1968).

[21] See now G. Alpa and B. Markesinis, *Il diritto alla privacy nell'esperienza di common law e nell'esperienza italiana*, Riv. trim. dir. proc. civ., (1997), 417.

[22] Juge de paix de Tubize 27-10-1981, J.J.P., 1982, 171, commented on by Spielmann, *L'effet* cit., 45.

judgment of the Court of Appeal of Brussels, which refused to suspend the power supply to a debtor on the grounds that it was a measure contrary to human dignity;[23] and to the judgment of the Civil Court of First Instance of Brussels, that a term in a contract providing that the losing party should pay all the costs of the other party, was contrary to public policy.[24] Other Belgian cases relate to the right to dismiss an employee for behaving in a manner contrary to the values upheld by his employer's organisation. This question is well known in our own legal system as the safeguarding of the so-called orientation organisation, whose right to dismiss employees for opinions, behaviour or religious beliefs incompatible with its own aims is under question.[25]

Among the Dutch cases, the significant ones are those concerning direct applicability to relationships of obligation. These are cases in which conditions in letting contracts for buildings were held to be void because they discriminated against the lessee on the basis of ethnic origins, religious beliefs or nationality.[26]

The case law of the European Court of Human Rights in Strasbourg offers examples of direct application in the sector of the rights of the personality, while, with regard to relationships of obligation, the judgments are almost exclusively concerned with contracts of employment.[27]

The conclusion drawn by learned legal writers from the whole picture of these references, is not so much that the European Convention on Human Rights is directly applicable, as that it is *indirectly* applicable, and that this translates into the liability of the State to the individual who suffers the breach of a fundamental right in the context of a private legal relationship, or the obligation of the national judges to apply the law of the Convention to the

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[23] App. Bruxelles, 25.2-1988 cit.

[24] Trib, Bruxelles, 23-11-1967 J.T., (1967) 741.

[25] In favour of the organisation see for example Pret. Roma 23-5-1994, Riv, it. dir. lav., 1995, 11, 624; Triti. Roma 29-7-1987, Dir. lav., 1987, II, 501. In favour of the employee see for example Pret, Milano 24-7-1987, Dir. lav., 1987, III, 498; Pret. Milano, 8-1-1980, Riv. giur. lav., 1981, II, 205.

[26] App. Arnhem, 25-10-1943, NJ., 1949, 331, 612, cit., Spielmann *L'effet* cit., 57.

[27] See the survey of cases cited for the various European countries by Spielmann, *L'effet* cit., 79.

legal relationships between individuals: this obligation becomes a *secondary positive obligation.*[28]

5. The concept of the person in the written Constitutions and in the EC legislation.

With the Constitutions that followed the Second World War – in particular the Italian Constitution of 1948 and the German Fundamental Law of 1949 – we see the transition from the notion of the individual perceived as the abstract subject whose rights are recognized to the notion of the 'person' per se, as such. The terminology used and the formulae which are the means to understanding this great innovation signal a major turning-point in continental legal culture. Article 2 of the Italian Constitution acknowledges and guarantees the inviolable rights of man, both as an individual and in the social formations in which his personality is exercised.

The Italian Constitutional Court has made extensive use of Article 2, often in conjunction with Article 3, which states the principle of equality. This is with regard to the fundamental freedoms, the right of freedom of association, freedom of thought, the rights of members of a family and the right to health. The person has thus come to be understood not in the abstract but as a real person, with biological and social needs.

Similar and perhaps more significant, is the case law of the German Constitutional Court.

In the EC context there has been lengthy discussion as to whether the principles acknowledged in the national Constitutions already form a kind of European constitutional law. But there has also been discussion as to whether the fundamental human rights could be amalgamated into EC law and whether the EC should be a signatory to the European Convention on Human Rights so as to make them its own in a formal manner.

The question was resolved by the Opinion of 28-3-1996 given by the European Court of Justice in answer to the question whether signature by the EC of the European Convention on Human Rights

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[28] Così Spielmann, *L'effet* cit., 88.

was compatible with the EC Treaty.[29] The opinion made it clear that given the text of the EC Treaty then in force, the EC did not have competence to sign the Convention. Only an amendment to the text would make it possible, even though the judges considered that respect for human rights constituted a prerequisite for the legitimacy of the acts of the EC.[30] The opinion has been criticised but it has been remarked on the one hand that the classic fundamental human rights do not relate to EC law and on the other hand that the opinion would not prevent the drawing up of a *bill of rights* at EC level.[31]

It is important for our purposes to draw attention to the replacement first paragraph of Article 6 (formerly F) of the Treaty on European Union:

> *'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.* (The first paragraph of Article F formerly reads: *'The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.')*

The new text seems not so much ambiguous as restrictive, despite the appearance that the new formulation reinforces respect for human rights in the EC context.

It has been pointed out that the new text has a noticeably political meaning, inasmuch as in Article 49 (formerly Article O) it makes the accession of new Countries to the Union dependant on their respect for human rights as set out in Article 6. But it has been observed that the amendments that have been introduced 'fall short (...) of the expectations that had been growing on the subject'.[32]

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[29] Opinion 2/94 of 28-3-1996, ECR, 1996, I, 1759. The opinion was given on the basis of the Text of the 1992 Treaty of Maastricht.

[30] Thus paragraph 34, of the Opinion cit.

[31] By L. Betten and N. Grief, *EU Law and Human Rights* (London and New York, 1998), 120.

[32] A. Tizzano, *Il trattato di Amsterdam* (Padova 1998), 38.

Admittedly a procedure has been introduced (by Article 7) for the disciplinary sanction of States that persistently breach the principles that protect human rights in Article 6(1). But the procedure is exclusively within the competence of the Council of Ministers, the European Court of Justice being excluded. The Court of Justice may apply the principles of EC law which acknowledge the fundamental human rights implicitly; but it may not appeal to an EC catalogue of such rights, nor do individuals have specific recourse directly to the Court for breach of their rights.[33]

On the other hand, certain rights of the personality are reinforced, such as the rights relating to personal data, certain rights in relation to access to the acts of the EC and the rights of consumers and savers.

6. The Charter of Fundamental Rights of the European Union ('the Charter') and the draft Constitution for Europe

When it first appeared, the Charter of Fundamental Rights of the European Union, approved at Nice in December 2000 ('the Charter') was considered, at least in the statements made by its proponents in Nice in December 2000, as a text whose value and contents were purely *political.* In reality (in legal reality, that is: in the imaginary world of terms, concepts, instruments and especially legal *symbols*) the process of institutional innovation has taken a different course. In the first months of examination and interpretation of the Charter, both the judges of the European Court of Justice and some national judges treated it as a document having legal effect. To use the words of an illustrious writer on constitutional law, Costantino Mortati, here too, a phenomenon of 'actual constitution' materialised at Community level. Already, therefore, the Charter acts as a list of values, a picture of general principles, or programme of action for the EU *as if* it actually had legal effect. This function will be reinforced when the Constitution for Europe comes into effect.

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[33] Tizzano, *Il trattato* cit., 41.

This kind of reasoning, which uses formal arguments but contains implied political value judgments, is second nature to the Italian or German learned legal writer. In modern constitutional experience, however, there is no shortage of situations very different from this model. In France, the venerable Declaration of the Rights of Man originating in the Revolution is considered by most people to be a political document and the French Constitution as a legally relevant document which is intended only to delineate the institutional structure of the State. In the United Kingdom, a written text with the function of 'Bill of Rights' has been introduced with the Human Rights Act of 1998, in which the European Convention on Human Rights signed at Strasbourg in 1950 is reproduced with some mutilation; and the constitutional structure rests on the democratic tradition of the Country, but has an habitual nature, not being entrusted to a written text. In the experience of almost all other countries, including the Italian, the (written) constitutions consist of both the commandments of fundamental rights and provisions delineating the structure of the state.

The Constitution for Europe is closer to the Italian and the German models.

The preliminary draft presented by Giscard d'Estaing would provide in Article 2 a list of the European Union's values, including respect for human dignity, equality and solidarity, the fundamental rights. These are the cornerstones of democracy, of the rule of law and of tolerance.

In reality, Article 2 as formulated might be sufficient to guarantee to all citizens the respect for the fundamental rights, but the incorporation of the Charter into the Constitution (in Part II) has the merit of listing all the rights of personality now acknowledged as belonging to individuals, distinguishing, where necessary, the rights acknowledged to belong to all from the rights only acknowledged to belong to European (EC) citizens.

The draft Constitution for Europe presented on 28 October 2003 thus gives a sufficiently clear response to the questions put in the Declaration of Laeken. Are we to consider that the response is full and complete?

Does the Charter, and now the draft Constitution for Europe, enhance only the individual dimension of the person, treating him as a single entity who claims rights from the authorities, as was the case in the bourgeois Codes of the Nineteenth Century, or does

it also emphasise his social dimension, as many of the Twentieth Century constitutions do?

The draft Constitution for Europe maintains its focus on the social dimension of the rights of the person and of his social groupings. The mention of the principle of solidarity, already present in the Charter, enhances the social role of the person, and safeguards the collective interest and not only the egotistical, individualistic positions to which today's fashionable free market philosophy would otherwise inexorably lead.

In any case, the text could not be understood as a list of merely individual values closed to any social yearnings: human dignity is necessarily a value of *relating*, as also are *tolerance* and the *fundamental rights* (which include the right of freedom of association) and, it goes without saying, *democracy*, which cannot have, if understood in a modern sense, a merely monist dimension. But to be more precise even a *value* must be of a *relational* and *community* nature: a value has its citizenship in the awareness and life of a people only if it is shared, and complied with, not because it is printed on paper.

Arguing from the idea that a 'right' is the product of the interrelation of sources of law, sources of case law and sources of learned legal commentary, the construct or syntagma *fundamental rights and relations between individuals* can be unpacked by bearing in mind: *i)* the notion of 'fundamental rights', *ii)* the notion of the social contract, *iii)* the statements of judges who have posed the question and answered it in the affirmative (the problem exists and has a solution) or in the negative (the problem does not exist, or it does exist but has no solution), *iv)* the trends in learned legal commentary, among which distinct tendencies can be discerned, to emphasise natural law (whether religious or non-religious), positive law (whether state-based or pluralist) or realistic law.

The expression *fundamental rights,* or *fundamental human rights* in this article is intended in the widest and most generic sense, to indicate the claims or freedoms acknowledged in international texts, in the texts of the national Constitutions, in judicial practice, in supranational practice, and so on. Similarly the term *legal relationship between individuals* is used generically, as of an obligation or promise freely expressed or as a contract giving rise to civil liability. Now, considering only the written texts most frequently used in the comparison, such as the Constitutions of the

western Countries and their Civil Codes, in addition to individual special laws and international conventions and treaties, one does not find an explicit legislative formula that specifically links 'fundamental rights' and 'legal relations between individuals'. However, the interpreter of the law can enquire as to whether it is possible to make this link on an interpretative level, whether the link has been made, and what the results have been.

The Charter to some extent amplifies and updates the rights of the person. For example, it provides for a right to respect for private life (Article 7), which Italian case law had been construing on the basis of Article 2 of the Italian Constitution. This right – understood as the right to privacy – is not set out in the written Italian Constitution, but is the fruit of an interpretative process (of case law and learned commentary) which started in the 1960's. But the Charter adds to this right another right, pertaining to the protection of personal data (Article 8). This right was dawning in Italy and was ratified by the Law no. 75 of 1996 on the protection of personal data, now the Consolidated Law on personal data (Legislative Decree 2003, no. 196). To elevate this right to the level of the rights guaranteed by the Constitution is thus a further step towards a modern statute of the rights of the person.

In the same way the Charter, acknowledging the right to found a family (Article 9), goes beyond the dictate of the Italian Constitution, which treats the family as a natural grouping founded on matrimony and acknowledges the importance of an actual family only by implication, as one of the social groupings in which the personality of the individual develops (Article 2 of the Italian Constitution). The Charter not only includes among the fundamental rights of the person the right to form a family not founded on matrimony, but is open to the acknowledgement of families formed of persons of the same sex, which is not yet the case under Italian law.

Likewise in terms of the principles of equality and non-discrimination (Articles 20 – 26) the Charter extends the rights of the person as acknowledged and guaranteed by the Italian Constitution, since it inserts in the list of rights a prohibition against discrimination based on colour, genetic features, birth, disability or sexual orientation.

In addition the Charter makes some rights explicit which only

an imaginative interpretation could find in the Italian Constitution, such as the rights of the child (Article 24), of the elderly (Article 25) and of persons with disabilities (Article 26). Then in addition there are the provisions relating to protection of the environment (Article 37) and consumers (Article 38).

For protection of the environment the Italian Constitution already has a provision (Article 9, which mentions the countryside, or landscape, which by means of an wide interpretation has been applied so as to restrict the rights of the landowner and compensate the loss and damage suffered by the individual person and by the community as a result of pollution. But the word 'consumer' is not known to the Italian Constitution, and is a recent acquisition to the vocabulary of Italian lawyers, except in the judgments of the Courts at every level, as a result of EC interventions on the matter.

This process, which is moving away from the neutral concept of the individual person as beneficiary of rights (*soggetto di diritti*) towards a conception of the individual as a person deserving protection per se, is not complete.

The problems relating to the beginning of human life and its quality have still not been resolved in a uniform manner. Can the embryo be regarded as a 'person'? And does the embryo, or the foetus, have the right to be born healthy?

Only a few scraps of legislation expressed in the EC texts can be called upon to provide an answer to these disturbing questions. The Charter does give some guidance on the matter: Article 2 refers to the right to life, but this right is reserved to the individual, or 'everyone' (not the embryo); the Charter prohibits 'eugenic practices' and 'human reproductive cloning' (Article 3); and Article 35 guarantees a high level of protection for human health. But how are we to use these provisions to answer the two questions posed above?

These questions can only properly be answered in greater depth and in another chapter, which cannot be provided here. But in any case, a modern civil code cannot neglect these aspects relating to human life.

7. Conclusion

The foregoing pages put questions rather than making assertions; but it is hoped that they serve to demonstrate that the concept of

the person in the European Civil Codes cannot be ignored and that this concept must not be confined to private law because it is so closely linked with the values deriving directly from Constitutional law. Thus, the making of European private law for the future cannot but go hand in hand with the making of European public law.