Competition of Legal Systems and Harmonization of European Private Law

New Paths in a Comparative Perspective

Guido Alpa

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Preface

Sorted by chapters, the essays collected in this book are the result of some research carried out in recent years on fundamental rights, on European and Italian contract law, and lawyer's role in contemporary society. Arguments woven between them, because the fundamental rights – as stated in article 6 of the Treaty on European Union – are the same principles upon which rests the entire E. C. law, encoded in many written national constitutions or statute laws, and pervade all legal relations, including relations governed by private law. They invest the contract law as well, i.e. the ancient realm of freedom, particularly freedom of contract, involving jurists of every profession: the legislator, the judge, the lawyer and the academic professors.

"*Ius est realis et personalis hominis ad hominem proportio*": with these sharp words, Dante explained the essence of the law in the De Monarchia. The fundamental rights of today are the manifestation of an interpretation, according to which the whole legal system is centered on the human being, considered as persona, since the law was forged for the man, not the man for the law. Hence the aspiration to identify ethical values in the rule of law, and the tendency to make those rules general enough to go beyond national borders, so that they become supranational. This is just an attempt to establish general principles concerning contracts, and gradually extend to other legal relations, embracing the whole legal system, in a European dimension: the Draft Common Frame of Reference, then the Feasibility Text, and now the Regulation (or the directive?) on sales represent the latest experiments, that we hope will be finally translated into a sort of civil code, which is the first segment of a larger organization of private law in most of the Countries, adhering to the European Union.

In this process, and in this economic, social and political context, what role could be outlined for lawyers? Normally, they are seen as legal experts, who study the various ways and forms to protect rights and interests. Nowadays, lawyers are asked more: to cooperate for the development of the legal system more explicitly, to testify their role as "guardians" of rights and therefore of the law itself, on the basis of a cultural preparation, rich of expertise and practical experience, strong tradition and ethical principles, which must preside over their role.

In this sense, it is necessary to juxtapose the social responsibility of entrepreneurs with the social responsibility of intellectual professions, in order to build a proper lawyers social responsibility.

Rome, 18 July 2013 *Guido Alpa*

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Chapter 1
Fundamental Rights

1. Fundamental Rights and the Role of Lawyers

In an essay published a few years ago, Stefano Rodotà stressed that "the nature of rights (…) appears fundamental and fragile at the same time, permanently undermined as it is by waves of repression and restoration aimed at doing away with or restricting the very tools that should provide every citizen with the greatest room for autonomous development".[1] This remark, dating to more than ten years ago, concerned the situation in Italy at that time, although it might apply to several other countries too. Unfortunately, it depicts the current situation as well. Indeed, there is growing concern over the lot of fundamental rights, jeopardised by the episodes of intolerance that have been occurring during the past decade or so and by the emergence of political plans aimed at allowing individual interests to prevail over the general interest, national identity over citizens' rights, Colbertism in economics, and self-centredness over solidarity.

Lawyers are quite familiar with these occurrences and often suffer directly from their disastrous effects, whenever they take care of protecting freedom – personal freedom, freedom of speech, freedom of movement, right to work, the equal treatment of women and men, the protection of children, and so on and so forth.

Also from a formal and juridical standpoint, that assertion has been confirmed by a multitude of cases settled by courts at all latitudes. Those cases have stirred controversy among highly experienced jurists, in that fundamental rights have no boundaries: from the rulings of the Supreme Court of the United States on Guantanamo detainees to those of the Hague Court on crimes of genocide, from the rulings of the Strasbourg Court on fair trial or the distinctive traits of religious beliefs to those of British judges on the protection of personal data, not to mention the more strictly political issues that have been hitting the headlines in Europe over the past few months.

Rodotà's assumption is founded on three shared premises in the current juridical culture: that (i), unlike what rationalists presume, the process of fundamental rights is neither linear nor is it gradually expanding, but grows and shrinks following a sinusoidal path, depending on places and times in history; (ii) unlike what realists maintain, fundamental rights have not been the expression of the middle class, but have become deeply entrenched especially in multi-class States; (iii) unlike what some political scientists believe, fundamen-

[1] From *Libertà e diritti in Italia dall'Unità ai giorni nostri,* Roma, 1997, pp. 7-8.

tal rights are not a measure of the level of democracy in a given society, for they are the very essence of democracy.

There is a fact in our country that is meaningful on the one hand and painful on the other hand: nowadays, there are still episodes of intolerance, anti-Semitism, attacks on misfits, slavery in undeclared employment and forced prostitution, and, on top of that, the issue of "refusals of entry" at our borders.

Our meeting today is not intended to cover these issues from a merely scientific point of view, although the juridical, economic, and social investigation of their underlying problems entails difficult decisions by institutions and society.

I consider it important to stress the distinction between institutions and society, in that, regarding fundamental rights, a gap and different speed of response between the former and the latter are often perceived.

Hence, we wish to complement that analysis with an investigation of operating approaches in order to check how fundamental rights are actually protected also in those areas where they are routinely advocated.

The reason why fundamental rights are dealt with at our conference today is because the institutional role of the Bar, as a pillar of the system of judicature, lies in the defence of rights, by which I mean the rights of private individuals and, above all, fundamental freedoms as well as civil, economic and social rights.

The protection of rights is not confined within the geographical boundaries of a State or country: in addition to international agreements or EU directives enabling legal practitioners to exercise their profession freely within the boundaries of the European Union, European lawyers represented by the CCBE as well as those who have joined several international organisations have made a profession of faith, as testified by the committees and working groups that are active in those organisations.

This profession of faith was enshrined in the Convention between Lawyers of the World, signed in Paris on 6th December 2008, whereby lawyers have committed to protecting fundamental rights *wherever* they are trampled on.

Fundamental rights refer to widely-shared concepts, although the complexity of their definition and techniques of protection may hinder their actual defence.

The first issue concerns an agreed-upon definition: do adjectives related to rights connote them in terms of their classification, recognition, or level of protection? Despite their different historical origins and techniques of protection, the fact of referring to them as "human" rights, rights "of the man", or fundamental rights does not change their intrinsic meaning nor modern societies' commitment to ensuring the adequate protection of a "person".[2]

The second issue concerns their scope of application: human rights are "universal in terms of their definition, but their enforcement is dependent on

[2] Patrono, *Studiando i diritti*, lesson n. 12, Turin, 2009, p. 127 ss.

local cultures".[3] As a matter of fact, there are differences between the areas in which human and fundamental rights are recognised and protected in Asian countries, under the Universal Declaration of Human Rights and New York Covenants, the Strasbourg Human Rights Convention, the Charter of Nice, the common principles of constitutional law, the Arab Charter on Human Rights.[4]

The fundamental rights as recognised and enshrined in these charters and those recognised and enshrined in codified and uncodified constitutions may overlap or not correspond perfectly.[5] As is known, the British Human Rights Act of 1998 restricts the scope of application and interpretation of the European Convention on Human Rights. In order to avoid any mismatch between the text of the Italian Constitution and international treaties on fundamental rights, in its rulings No. 348 and 349 of 2007, the Italian Constitutional Court interpreted Article 10 of the Constitution as implicitly encompassing human rights, whose content is constantly being redefined by the Strasbourg Court.[6]

In any case, even in countries where the "bill of rights" is not included in the constitution, but forms part of a transposition law, fundamental rights can be protected differently from legal systems where they are recognised in constitutions that include a "bill of rights": e.g. in Norway, assisted reproduction is permitted, *de facto* families are protected, marriage between homosexuals is accepted, living wills are allowed.

Another issue concerns the nature of these rights, which are values in law, ethics, and religion. However, there is a debate over whether they are intrinsically relative or timeless and spaceless, inherent in the person and fundamental to "citizens' rights" and the legal capacity of the individual.

This results in two consequences:

i) fundamental rights are indivisible, although the bill of rights might lead one to consider the simultaneous protection of all of them unnecessary;[7]
ii) fundamental rights are not negotiable, meaning that they cannot be disregarded by agreement.

This thought would seem to hide a contradiction in terms: if fundamental rights are the expression of freedom – including freedom to negotiate –, they cannot "circumscribe" freedom to negotiate itself. This contradiction, however, is fallacious: because fundamental rights are, as such, not negotiable, they cannot evaporate, be extorted or restricted despite any free and firm will of their holders, in that they are protected even *against* their holders' will.

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3 Viola, *Diritti umani e globalizzazione del diritto*, s.l., 2009, p. 14.

4 Andò, *Mediterranean Security and Human Rights After the Cold War,* Padova, 1997.

5 Ferrajoli, *Quali sono i diritti fondamentali*?, *"A tutti i membri della famiglia umana", per il 60° anniversario della Dichiarazione universale,* Milano, 2009, p. 61 ss.

6 Luciani, in *Giur. Cost*., 2009.

7 Pinelli, *Le clausole sui diritti umani negli accordi di cooperazione internazionale dell' Unione,* Astrid website.

With regard to remedies for breach of rights, the argument is different, as this aspect concerns the principle of effective protection of rights.

One of the most controversial issues related to fundamental rights is their effective protection. Having a look at the file prepared by the Department of Research in defence and foreign policy of the Italian Senate (16th parliamentary term, April 2009, No. 11), we can perceive the enormous wok done in this field by the United Nations Council on Human Rights (27th March, 2009), by the Office of the High Commissioner for Human Rights of the United Nations, the European Parliament, by the European Union Agency for Fundamental Rights, and by non-governmental organisations. However, this is a sign of the threat to human rights in every country, and the difficulty in introducing the culture of human rights in countries where they have not been formally recognised yet, or they are just protected on paper.

The coding of fundamental rights in a written form, however, is a very significant mark of the progress of a legal system. In this respect, I consider Dicey's theory arguable: it suggests that fundamental rights exist because they are judicially built and that the only way to recognise them is by judicial means, in that their enunciation would be coupled with their effective protection.[8]

Clearly, this theory has a cultural origin, which is affected by the environment where it was formulated, for the British system of common law has no written constitution, and because at the time when it was formulated, human rights had not yet been codified by the Human Rights Act (1998). The construction of fundamental rights cannot await the creative evolution of case law, nor can it be confined to courts, because human rights concern the dimension of the person itself, in every situation: hence in contracts between private individuals, in the administrative sphere of institutional relations, and even in legislation – should any statutory law be enacted, introducing restrictions to their entitlement or exercise.

It is clear, however, that case law – which is now acknowledged in Italy as one of the sources of law as well as one of the sources of interpretation – is essential with regard to the actual protection of individual rights.

Courts that enforce fundamental rights – the Hague Court, the Strasbourg Court, the Luxembourg Court, in addition to Constitutional and Supreme Courts – have played a major role, which reflects the complexity as well as the viability of direct protection by judicial means, and the high degree of confrontation involved in the protection of these rights.[9]

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8 Bilancia, *I diritti fondamentali e la loro effettività,* on the Web site of the Italian Constitutionalists' Association; Santoro, *Rule of Law e "libertà degli inglesi". L' interpretazione di Albert Venn Dicey,* in *Lo Stato di diritto*, a cura di Pietro Costa e Danilo Zolo, Milano, III ed., 2006, p. 173 ss.

9 Cassese A., *I diritti umani oggi*, Roma-Bari, 2009, p. 91 ss.

Another key issue – which links fundamental rights to the person's identity and to citizens' rights in a broad sense[10] – concerns the protection of fundamental rights in any multicultural society. This issue is extremely topical and appears not so much in multi-ethnic societies – like all the societies we are now familiar with, where different peoples, minorities, and ethnic groups live together – as in societies that beside being multi-ethnic, are seeking reference models to set the rules of their life in common.

Should rules be the same for everybody – regardless of their ethnicity – or should they be respectful of the different cultures? There is an intense debate about this and the political arena itself is faced with considerable controversy. Solutions cannot be found in the case law of courts because – based on the experience drawn from the rulings of the Strasbourg Court, the House of Lords, the French *Conseil d'Etat*, and the Italian Council of State on the distinctive traits of a religious profession –, although the underlying reasoning is the same, it leads to opposite conclusions.

As a result, the definition of fundamental rights takes into account both the respect for one another's rights, and a restriction on personal abuse: our societies (at least to ensure the primacy of human rights over the needs of different cultural communities) will never allow infibulation, segregation, slavery, polygamy, the subordination of one sex to the other, nor the marginalisation of misfits.

"What can we do?" – wonders Antonio Cassese in the conclusions of his book on human rights. His answer is that fundamental rights will take "a long time" to get established, first of all because they entail a cultural process; then because they are affected by a continuous stream of political and institutional events, and eventually because they are waiting to be set into an appropriate legislative and case-law framework.

Instead, my question is: "what *should* we do?", what should we do in our capacity as jurists and, above all, as legal practitioners?

As was noticed, "rather than to an international rule or "regime" of judges, the globalisation process seems to be leading to the establishment of mercenary, biased, legal "expertocracies" that strategically exploit the opportunities and resources of a *litigation society*".[11] With respect to fundamental rights, "merchants of law" have limited room to manoeuvre; at most, they are on the side of those who suppress rights, in order to resist their enforcement, while we wish to do exactly the opposite, that is to encourage their assertion.

As was mentioned at several past workshops held by the Italian Bar Council, fundamental rights are weak and poor, although they belong to everyone of us, not just to the weak or the poor. Therefore, today's complex societies really need

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10 Moccia, *I giuristi e l' Europa*, Roma-Bari, 1997.

11 Portinaro, *Oltre lo Stato di diritto. Tirannia dei giudici o anarchia degli avvocati*? in *Lo Stato di diritto*, cit., p. 397.

a "class of skilled, resolute, and unbiased jurists", more so than in the Hegelian national civil societies.[12]

This is the reason why the training courses for articled clerks and refresher training courses for lawyers, as well as the conferences and workshops promoted by our Council have often been focusing on fundamental rights as a preferred and challenging topic for any legal practitioner who wishes to exercise our profession (if not with passion at least) in compliance with its ethical principles.

2. Ethics and Responsibility. Fundamental Principles and Civil Society in Italy

2.1. The Lawyers' Code of Ethics until the approval of the professional law (r.d.l. 27.11.1933 n. 1578)

That lawyers – and prosecutors – had to abide by ethical principles, transcendent of the legal regulations of professional behaviour, consisting of the diligent application of the technical regulations of a procedural nature and of the interpretation of substantial law, was such a widespread and consolidated conviction to be considered almost obvious, and therefore such as not to need declarations or official positions on the part of representatives of the Bar.

This is testified by the records of the first Italian juridical congress, held in Rome between the 25th of November and the 8th of December of 1872. The fifth congressional thesis, voted upon and approved, regarded the practice of the profession of lawyer and prosecutor and the need for a representation of the category.[13] In his comprehensive, cultured, in depth report, Cesare Norsa reconstructs the meaning of the legal profession, its place in the institutional history of the United States before its unification, its medieval tradition, its being rooted in the juridical culture, and, only in passing, is reference made to the *decorum* of the profession, and, instead, much more to its being necessary in connection with the defence of rights and therefore to the essence itself of civil society.

A large part of the report is dedicated, instead, to legal fees, because – this is one of the fundamental aspects that has traversed the history of the legal profession – the fee was a *quid pluris,* not a "right" but a custom connected to the client's gratitude. This conviction was so rooted, and not only Italian but European, that it even helped fashion the toga, which is the emblem with which the lawyer "wears" his role, defends his mission, demands respect and commits to observing the rules of professional ethics. It is a detail that immediately leaps to one's attention when observing the toga of French lawyers, who till today conserve a small purse worn behind their shoulder: it was so inappropriate to

12 Portinaro, *op.cit.,* p. 400; Preterossi, *Autorità*, Bologna, 2002.

13 *Records of the first juridical congress,* by Guido Alpa, Bologna, 2006.

ask for a fee that the lawyer, even though he expected a sign of gratitude from the client, did not want to acknowledge its value. Congressional acts transform the custom into a right of the lawyer, but contained within the limits of his competence and the advantage that is brought to the client by winning the trial. A possible advantage, recognized with an extra fee for winning the case (palmario), since the quota lite (conditional fee agreement) is considered highly dishonourable.

Also the first law on this matter, that goes back to 1874, does not contain specific references on the subject of professional ethics. And the entry in the *Italian Digest,* "Lawyers and Prosecutors", by Camillo Cavagnari ed Emilio Caldara, (1893-1899), now reprinted in the series of the History of the Bar Association in Italy by the National Legal Council,[14] makes reference to the obligations of lawyers insisting on the "method" of exercising their role, and, that is, on the duty to oppose unjust or reckless litigation and to diminish litigation, on the duty to attend to the client's interests, on the duty to precisely inform the client and not to make unfounded promises, on the duty to observe professional secrecy, on the duty to oppose illegal requests on the part of the client, on the duty to show respect to the judges, on the duty to pay taxes to the tribunals, on the duty to compensate the damages caused by the client.

It is not a circumscribed list of duties, nor a sort of classification of reprehensible behaviour in which a lawyer must not indulge, but rather of principles, derived from the legal procedures and from ancient wisdom, hereby reproduced in an encyclopaedic and synthetic form for the benefit of readers. Readers who are, so to speak, educated, belonging to the group of lawyers, to the "class", as, at that time, it was preferred to define this category of lawyers, taken from the intellectual, dominant bourgeoisie.

The ethical rules in some way were confused with the juridical ones, but they were so well-known that further documentation is not necessary: those belonging to that class knew them *naturaliter (by nature)*. And on the other hand it was, by common opinion, a noble profession assisted by a consecrated tradition. Even though it must not be concealed that over the course of time this profession gathered more stinging criticism than obsequious appreciation.

"Sine causidicis satis felices fuerunt futuraeque sunt urbes", wrote S. Antonino in part III of his *Summa*. And yet this Dominican monk of phenomenal intellect (1389-1459), son of a notary, acclaimed moralist, consulted by landowners and tradesman on the fairness of their business practices, according to his contemporaries knew the Decree of Graziano by heart, and was an expert in civil law. It was not, therefore, law as a science – theoretical and practical – to command his resentment, but the bad habits of lawyers, of those attorneys that played on the subtleties to draw out the cases and divert the judge from the simplest and most natural resolution of the controversy.

[14] Bologna, 2004.

The denigration of lawyers goes back a long way and expresses itself even in the words of the saints. They must have had their good reasons, but in reading the pages of the works that talk about attorneys it seems that this is the most persistently attacked category over time and space. He who knows and uses law frightens he who does not: his weapons are dangerous because they are the fruit of intelligence, because they use words rather than arms, because they are bent on resolving questions by means of a judge's sentence that falls on the litigants like a stone.

From here the precepts that invite lawyers to be honest: another saint, Alfonso de' Liguori, indicated a few; Ashaver Fritsch listed them under the form of "sins"; in the 1600s Cardinal De Luca criticized *legal style,* even though the *Dottor Volgare and the Theatrum veritatis* are a monument to the wisdom of law: each page exudes attention towards the competent lawyers who made good use of it in their allegations, opinions and defence. In the 1700s, Lodovico Antonio Muratori placed the crafty expediencies of the men of the forum within the representation of the "defects of jurisprudence", next to the quibbling of doctors and the abstruseness of the laws; Francesco Rapolla instead dedicated himself to the education of the jurist indicating the virtuous works; Giuseppe Aurelio De Gennaro unmercifully described the vices of those who defend in trials.

The most corrosive scenarios emerge from the pages of Tomaso Piazza and of Alessandro Manzoni. The first, a mannerist, plays at reconstructing the avid and rascally psychology of the dishonest lawyer, the second – who too was a jurist – underlines its proximity to power, and to the vices that literature in the 1700s had so abundantly written about.

Thus, instead of ethical regulations it was preferred to speak of "etiquette". The most widespread work is the *Etiquette of Lawyers* by Vincenzio Moreno (1809-1852) which appeared in Naples in 1843, and again in 1938 by D. Galdi and now reprinted by the Order of Lawyers of Taranto and the local advocacy School Foundation. The title may appear strange, because it is a work of legal ethics, but, in reality, Moreno does not deal only with behaviour that lawyers must observe within the realm of practicing their profession; he has at heart the image of the Bar and the rectitude of colleagues, and therefore dictates suggestions to them even in the way they should act, dress, live in society. This, so as to avoid the common people from confusing the unreliabe lawyers with the real ones.

It is an extraordinary work, both in its style which is fast-flowing and alluring, and its contents which reflect a controversial past but also many problems that are still current.

It is, first of all, an epoch document, refulgent in legal literature which, comparable to French works, as that of Dupin, extremely famous in Italy too, they dedicated themselves to educating young lawyers, giving them advice of an ethical nature, in addition to information towards the practice of the profession. It is then a merciless photograph of the conditions in which the Bar found itself in the middle of the 1800s in the Kingdom of the Two Sicilies: the high number

of those practicing the legal profession, abusive practice, the tendency towards pompous eloquence, the scarce preparation of the lowest classes of the category, to which taking advantage of the insipience of the clients was accompanied.

At that time, three categories of legal professionals existed: the *lawyers,* dedicated to counselling, writing, arguing, the *prosecuting-lawyers,* who prevalently carried out judicial activities, the patrons, who carried out the chancellery operations. But next to these professions, collateral professions then flourished, that "legal population", as Moreno defines it, which swarmed with *solicitors, advisors*, *pseudo-lawyers,* the "people of the courts", dedicated to fulfilling tasks that were not always on the up and up and that constituted a real and proper " social disaster".

The Legislator of the 1700s had attempted to put order into this ocean of operators, by means of various regulatory interventions, all, however, revoked or rejected; after the Napoleonic conquest many things were remedied, but at the time in which Moreno wrote, the situation had once again become alarming. Hence his anxiety in suggesting rules of ethics and rules of experience to those, wanting to be lawyers in the highest sense of the office, who had to distinguish themselves from the crowds invading the tribunal courts.

This is an extraordinary work because it announces many ethical precepts ahead of their times and that we still find in the lawyers' Code of Ethics today, such as those that regard the relations with the clients, relations with colleagues and with the judge. But another two aspects are found in it that do not touch the question of ethics itself, but, instead, *aesthetics* and *philosophy* and make up the most original section. Aesthetics in the literal sense, that is the image that the lawyer must give of himself, in leading a life which is honest, reserved, unclamorous and healthy. Philosophy concentrates mainly on the most frequent issues dealt with in the area of civil law (from leases to the division of inheritances, from the drawing up of contracts to donations and wills) and the issues inherent to the study and preparation of cases, of judgements and of negotiating texts. The considerations that can be read are of immediate impact and of great usefulness, in addition to being up to date. In this last part, Moreno is acute, to the point of appearing like the Baltasar Graciàn of law. From his experience he draws, so to speak, the *"tricks of the profession"*, but in the good sense of the term; Moreno is an honest, rigorous lawyer who has the category to which he belongs at heart, and in his teachings he combines juridical wisdom with behavioural ethics. The epilogue, too, is up to date, because, once a lawyer has absolved his "*office",* he underlines, it is exactly this that renders him "full of that urbanity, which is the first and most certain sign of social civility, the urbanity of professions".

In this context the need to reconstruct the legal profession from a regulatory point of view is born, and, within the discipline, to redesign, by principles, the canons with which the behaviour of an attorney must comply.

2.2. The general principles and their application until the approval of the Lawyers' Code of Ethics in 1997

It is only with the professional law (r.d.l. 27.11.1933 n. 1578), with which the first regulatory organization of the subject matter of 1874 is reformed, that the foundations of the code of ethics is indicated: foundations that are quite evanescent, if one is to consider them only from a technical point of view, but extremely eloquent if one considers them in the political, institutional and social context of that epoch. Article 11 states, in fact, that "the lawyer cannot, without just cause, refuse his office", to underline the social function that the lawyer carries out in the defence of rights and therefore, we would say today, to protect the freedom and interests of the person, and article 12 which states that "the lawyers must fulfil their office with dignity and with decorum, as befits the stature of the function they are called to exercise in administering justice"

The implementation regulation, approved by r.d. 22.1.1934, n. 37, sets the basis for the application of the general clauses of dignity and decorum, subjecting the lawyers that do not conform their behaviour to this principle to disciplinary proceedings. Moreover, the law foresees that these principles be solemnly enounced in the oath that must be pronounced before practicing the profession (art. 12 c.2) which states: "I swear that I will fulfil my professional duties with loyalty, honour and diligence for the purposes of justice and the superior interests of the Nation".

In this way, a procedure is created which is made up of measures-decisions of the territorial Orders and of sentence-decisions of the National Legal Council, the summital organism of the Bar, to which the lawyers, sanctioned with the punishments foreseen, may appeal (going from a warning, to being censored, being suspended, being cancelled from the Bar, being disbarred). The measures of the Orders are of an administrative nature, those of the National Legal Council are of a jurisdictional nature.

After all, what the legislator does is write, in the tables of the law, that which was the common experience of those belonging to the legal profession, the ethical values that ran through and constituted its soul, as can be deduced from literature – less, indeed – on the memories, suggestions, teachings that in the form of a vademecum the elder lawyers wrote for the benefit of their younger colleagues. Among these pages, the writings of Piero Calamandrei distinguish themselves for their elegance, intellectual vigour, and also moral

strength. He, in 1921, complained about the excessive number of lawyers enrolled in the registers (!), and, in fact, entitling his essay published in the series of the Voce di Prezzolini "Too many Lawyers", he complained about the fact that the rampant number of these professionals was to the detriment of the ethical values on which the profession was supposed to be founded.

But the operation of writing and "officially entering" the rules, accompanied by the jurisprudential procedure of the Orders and of the National Legal Council wound up taking on a much higher valence than that of the simple reorgani-

zation of the rules in question. On the basis of the founding principles of dignity and decorum, rules which were no longer of only a factual content, but of true and proper juridical rules, began to consolidate themselves; these had a formal vestiture and an ethical content.. And while the Orders, non-economic public institutions, continued to be considered (as they still are today) administrative institutions that issue administrative measures, the National Legal Council acquired the rank of judge, a judge equal to the ordinary civil judge, surviving the ban on special judges decreed by the Constitution.

Hence, the diatribe, then, on the nature of the ethical norms intended for the lawyers, on the nature of the decisions of the National Legal Council, on the role exercised by the jurisprudence of the National Legal Council

The solution was given on the basis of a precious analysis carried out by Angelo Falzea, master of civil rights and in the '80s authoritative member of the National Legal Council. A sentence by the Joint Sections of the Supreme Court (n. 1030 of 1076) had deduced from the professional law the conviction that it was not in contrast with articles 2, 3, 102, 111, and 113 of the Constitution, centering the rationale for the decision (ratio decidendi) on the citizen's right to defence. And even earlier, a sentence of the Constitutional Court (n. 109 of 1970) had acknowledged the function of jurisdictional organism to the National Legal Council. On the basis of a series of stringent argumentations, which is not important to cite here, Angelo Falzea incontrovertibly outlined the thesis that "when the National Legal Council, in its disciplinary functions and in the management of professional registers, exercises its jurisdictional function, it does not act as a special judge in applying the legal regulatory system, but rather as an (ethical) judge in the application of the ethical regulatory system that governs the activity of the legal profession".[15]

The position of the Constitutional Court has not changed since then. The Supreme Court, despite its function which must guarantee an exact interpretation and observance of the law, maintained a wavering position[16] but now it has settled itself on this line.

2.3. The Essential Contents of the Lawyers' Code of Ethics

The essential contents of the behavioural rules are collected at the end of the last century. The first edition of the legal code of ethics goes back to 1997, updated then in 1999, in 2002, in 2007. I will cite only the preamble, that states:

> "the lawyer exercises his activity in total freedom, autonomy and independence, in order to defend the rights and interests of the individual, guaranteeing his

15 *On the jurisdictional functions of the National Legal Council, in Rass. Forense, 1984,* p. 279.

16 Well analysed by Perfetti, *Course in legal deontology*, Padova, 2008.

> own knowledge of the law and thereby contributing towards the actualization of the order for the purposes of justice. In exercising his function, the lawyer controls the conformity of the laws with the principles of the Constitution, in respecting the Convention towards the protection of human rights and of the Community order; guarantees the right to freedom and safety and the inviolability of defence; insures the regularity of judgement and of contradictory debate. The deontological norms are essential towards the realization and protection of these values".

These words summarize the "mission" of an lawyer: lawyers – as Angelo Falzea wrote in Rassegna Forense[17] – unlike the other two categories of iuris prudentes, the scientists and the judges, are the juridical auxiliaries of the citizens, those who know the law and comfort the action of subjects possessing scientific knowledge derived from juridical science and with empirical knowledge derived from jurisprudential experience; and, since they facilitate the fulfilment of the juridical order, they are the juridical auxiliaries of the law.

Principles articulated in formulas of a general nature and model canons follow. In other words, the principles are always derived from ordinary law, that refer to the application of dignity and decorum in order to identify disciplinary illegalities, the canons typify some behaviours, but do not exhaust the application in a closed universe.

2.4. The Code in the entirety of the sources: the Constitution, community law, constitutional and legitimacy jurisprudence, the procedures of independent administrative Authorities

From the end of the '90s till today a conspicuous jurisprudence of the National Legal Council has been developing, which integrates the rules of the code and constitutes a complementary extension of it. At the end, one can say that the ethical rules of the legal profession are expressed by advocy law, by the code of ethics, and by the jurisprudence of the National Legal Council.

The scenario, however, began to complicate itself following the approval of some directives of the European Union, following the application of the principles of competition on the part of the guaranteeing Authority of the sector (AGCM-guaranteeing authority of competition and market), following the c.d. discipline of liberalizations, following the approval of the directive regarding services.

In addition to the normative fabric one must take into consideration the initiatives of the independent administrative Authority and the jurisprudence of the Court of Justice.

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17 1989, pp. 5-29.

The AGCM promoted two cognitive investigations regarding all professions, including the legal profession, notwithstanding the fact that it is recognized constitutionally and is governed by rules that, as has been stated, reflect ethical and juridical principles, connected with "life as an asset "bene della vita" made up of the tutelage of the rights of an individual.

In 1997 and in 2009 the Authority decided that the codes of ethic are an obstacle to the free exercise of a professional activity – equated to that of a business – and that they are, therefore, an obstacle to free competition which is to be removed there where it is a restriction to entering the market and to the behaviour of professionals.

In particular, it affected the rules that prohibit advertising, the rules that require the professional to abide by the fees, that exclude recourse to the conditional fee agreement and, in addition, the rules that incorporate the principles of dignity and decorum expressed by the fundamental law of 1933. This, on the basis of equating professions to business activities

There is no point in going back here to the bitter and complex theme of the distinction between liberal professions and business activities. It is, however, worth insisting on the impact that the c.d. liberalization discipline had on the contents of the legal code of ethics.

2.5. The conflict between the Code and the liberalization discipline

As has already been stated, the regulation of the legal profession in Italy – until 2006 – was founded on a complex typology of sources: on the Constitution (art. 24), which guarantees everyone the right to defend their rights and legitimate interests; on special laws, in particular the royal decree law 27 November 1933 n. 1578, which reformed the discipline of the National Legal Council (CNF), a non-economic public institution, and of the Association of Attorneys, the CNF was recognised as having the power to pass laws of an ethical nature which are binding for all attorneys, established that the CNF have the faculty to propose mandatory minimum and maximum fees to the Justice Minister; on the civil code, which regulates the intellectual professions, distinguishing them from business activities, rules are established regarding professional compensation, the conditional fee agreement is forbidden(arts. 2229-2238); on the ethical rules (that before 1997 were elaborated on the basis of the decisions of the CNF, and then in 1997 the CNF itself, collected in a "code" with which all attorneys must comply). The code confirmed the ban on the conditional fee agreement, the ban on commercial advertising, the principle that the attorney's fee must not be disproportionate.

While two rulings related to Italian legal fees were pending in the community seat, (then finalized with the sentence cd. Cipolla Macrino, C94/04 and C-202/04), the Italian Government radically intervened on the juridical terms of the compensation issue, by means of the decree Law of July 4th 2006,

converted into law on August 4th 2006, n. 248 (proposed by the Minister of Industry). The proposed repeal of all the norms that foresee fixed or minimum fees had a great influence on legal fees. Both because one part of legal fees, that related to the cd. "rights", is, in fact, established with fixed prices, and because the most important part of legal fees, that related to honoraries, foresees, in fact, minimum fees that cannot be derogated. The entire debate about the compatibility of these predictions with economic freedom and with community law is swept away by means of an act of the legislator which was absolutely sudden and, it cannot be forgotten, unexpected, if one consults the electoral program of the centre-left which did not foresee measures of this kind at all.

Moreover, the decree removed the cd. ban on the conditional fee agreement, foreseen by the civil code, that is the principle by which the attorney cannot ask, in compensation for his work, a "quota" of the amount that is possibly awarded to the client by the judge (which is what takes place elsewhere, especially in anglo-saxon countries). This prohibition has been an unsurpassable barrier between the interests of attorneys and the interests of the clients, in the widespread conviction that such a reasonable detachment could be in the interest of justice, even before being in the interest of the attorneys (who, instead, at times, could have taken advantage of this.) But the Italian legislator had no intention of taking upon himself social needs which were the basis of rules that were consolidated. This does not prevent observers, and, in the first place, attorneys, necessary interpreters of the law, from advancing doubts regarding the constitutionality of these improper ways of regulating the interests underlying the client-attorney relationship. From this, the auspice that these rules be revisited, an auspice that the category expresses towards those who today hold the responsibility of administering justice.

Following the decree, the CNF issued a circular by means of which it attempted to give an interpretation of the new rules compatible with the text of the code of ethics, and subsequently it changed some rules of the code, preserving, however, the discipline of "information" (that still does not take on the name of "advertising"), the ban on disproportionate compensation, the ban on making oneself becoming the accepter of the reasons of the dispute.

Among the aims of the new rules, which have changed the face of the discipline of the legal profession, reasons were highlighted such as the liberalization of markets, the promotion of competition, the abolition of obstacles towards the modernization of professions, and the defence of consumer interests.

The functional link that connects the legal professional service with the exercise of the right to defence, and that, moreover, seems to be able to justify restrictive measures of competition, is completely neglected by the decree. It does not give adequate importance to the circumstance that the cancellation of mandatory fixed or minimum fees, the introduction of the possibility of stipulating fees which are benchmarks towards the achievements of the results pursued, the liberalization of advertising, can lead to very serious consequences with respect to the legal profession, relating to the rectitude of the relationship

between the client and the counterpart; this constitutes not only an essential component of the professional ethics of the attorney but an indispensable condition of the effectiveness of the right to defence. In brief, it seems that with respect to the user of the legal professional service, the virtuous resources of liberalization and of competition cannot fail to harmonize themselves with the safeguard of adequate standards regarding correctness and professional honesty and of the technical qualification of the performance, which must be able to be appreciated by the client without the deformation caused by commercial manoeuvres having a downward trend or by advertising messages which are out of any form of control: to use an expression which is dear to me, from deceptive information. Ultimately, it is necessary to be aware of the fact that the main and particular interest of the user of the legal professional service does not lie in the commercial quality of the service rendered, but in its ability to achieve the objective of insuring the right to defence, and that, in the area of the legal profession, the fundamental criteria which must preside over competition among professionals is that linked to the effectiveness of the fundamental rights of the user recognized by art. 24 of the Constitution.

Within this framework, the provisions of Decree Law n. 223 bring up further perplexities, that elevate the costs of expenses related to justice (art. 21) and that introduce restrictive provisions regarding the means of payment to professionals (art. 35). This involves provisions that seem to cause serious bias to the effectiveness of the right to defence, which art. 24 of the Constitution guarantees independently from the patrimonial conditions of the client.

The importance regarding the possible contrast of art. 35 of D.L. n. 223 with the freedom of economic initiative (art. 41 of the Constitution) or with "the right to the freedom of self-determination regarding the personal and patrimonial choices of the citizen" instead deserves a more problematic evaluation, in so much as it introduces "vexatious provisions on the means of payment". Presented as "measures with which to contrast fiscal evasion and elusion", these provisions could turn out to be justified, because they are coordinated with social benefits, evoked by art. 41, co.2 of the Constitution as a limitation of private economic initiative, or considered to be a means of control in order to address or coordinate private economic activity to social ends (art. 41, co. 3 Constitution).

In addition, the configuration of power, recognized to the AGCM by art. 14 of the D.L. under examination, to officially deliberate the adoption of protective measures "in urgent cases, due to the risk of serious and irreparable damage to competition", brings about further perplexities. The protective measures adopted can be renewed "if necessary and opportune", and are assisted by the expectation of administrative sanctions in case of non-compliance on the part of the business. That of protective powers of the independent Authority is, in general, a controversial problem. The solution is, in large measure, conditioned by the recognition of the jurisdictional nature or not of the independent Authorities, configuring the protective power as a typical attribute of the jurisdic-

tional function, essentially preordained towards the conservation of the rights of the parts concerned while awaiting judgement.

As far as the AGCM is concerned, some doctrinal trends have recognized in its characteristics and in the nature of its functions, specificities that can be assimilated to the position of a judge, with particular reference to the guarantees of independence, to the functions of judgement and to the para-jurisdictional methods of the proceedings being taken into examination in front of it.

Moving on from this premise, it was concluded that the combination of powers and procedural rules would concur in defining the AGCM as an entity possessing a substantially, if not formally, jurisdictional nature.

This conclusion is not shared, however, by other doctrinal trends, and not only because of the difficulty of coordinating such a defined entity with the constitutional ban to establish special judges. It was observed that "the concentration of investigative and decisional functions at the head of the same entity appears to be typical of traditional administrations, which are called upon to assume decisions following an investigational proceeding, in accordance with the constitutionally guaranteed principle of impartiality", decisions subject then to jurisdictional control. It was added that the AGCM does not function as "a judge called upon to settle disputes between private individuals", since the purpose of the antitrust intervention is not that of "protecting a competitor vis-à-vis another, in as much as, instead, of protecting the market, in the sense of protecting the collective interest towards the preservation of the competitive structure of the markets."

The latter, is a position that seems to be shared by the jurisprudence of the Council of State, according to which the AGCM, even though it is "constituted around a central nucleus represented by an activity of juridical qualification of acts and facts with regard to material rules that govern the market", and even though it is endowed with "a more highly accentuated degree of independence compared with other authorities", does not, however, have "a position of detachment as far as interests are involved", that is, the private interests of businesses and the public interest of defending competition rights (cfr. Council of State sec. I, 27 April 1988, n. 988).

In light of the overview of opinions which have been summarized, it seems, moreover, that the attribution of protective powers to the AGCM brings up delicate issues as to its compatibility with the configuration of the Authority itself. In any case, it would be desirable that the exercise of such powers be better defined, with reference to the extreme generalness of the formulation of the situations that can authorize the adoption of protective measures or their renewal, to the lack of debate and of tools of opposition to the measures.

The need for a more rigorous configuration of the supervisory power, both from the point of view of the proceedings and that of its content, does not, in fact, fail, where one accedes to the thesis of the administrative nature of the AGCM, resulting, instead as being imposed by a correct observation of the

precepts of legality and the impartiality of the public administration according to art. 97 of the Constitution.

As already mentioned, in virtue of these powers, the Authority has initiated the second "cognitive investigation" to verify whether the professional orders had adapted the ethical codes to the new discipline, and thus suppressed the provisions concerning the ban on advertising, the ban on the conditional fee agreement and the application of fees.

The National Legal Council was summoned by the Authority and was asked to make further changes to the code of ethics; on certain aspects, related to the information placed on internet and to the terminology utilized, the CNF acquiesced; instead, it resisted on comparative advertising, stating that there are no reasons for suppressing the ban, considering the fact that "intellectual operations" are one thing and "business operations" are another; the latter are comparable, the former are not.

The most conspicuous evolution took place within the code of ethics, which originally contained a truly restrictive precept: "Any form of advertising regarding professional activities is forbidden" (art. 17, text of 1997) in compliance with the conviction that the promotion of one's activity in one's own form of the commercial activities, was totally incompatible with the decorum of the legal profession.

With the changes made to the code of ethics (up to the last one which goes back to the 14th of December 2006) the logic of the norm was profoundly revised, and today the attorney can choose the most suitable means with which to make the existence and characteristics of his/her professional activities known, but "the content and the form of the information must be coherent with the purpose of the tutelage of the trust of the community and respond to the criteria of transparency and truthfulness". With this innovation the National Legal Council wanted to create a turning point in the cultural as well as juridical reconstruction of the limits to the advertising activities of attorneys, anchoring to it the foundation which was not already or, in any case, no longer only to the canons of decorum and the image of the profession, but rather to the different objective of the protection of the trust of the clientele.

Without a doubt, in this case, we are literally in the presence of a public interest, referable to the indistinct prevalence of the associates, while in the case of professional decorum, even though the same can definitely find regulatory coverage expressed in the professional order, the connection to an interest which is not referable to the community of attorneys rather than to the citizen is less trustworthy.

Essentially, having the trust of the community is definitely a public good that belongs to everyone, while the decorum and the image of the profession are values that interest primarily the attorneys themselves.

On the other hand, the law on liberalizations has revoked the

> "ban, even partial, on making use of informational advertising regarding professional qualifications and specializations, the characteristics of the service offered, in addition to the price and total costs of the performance in accordance with the criteria of the transparency and the truthfulness of the message, the enforcement of which is verified by the m".

It is evident that the combination of these provisions necessitate an interpretative activity and, above all, need to be "positioned" within the discipline of the profession, in harmony with the other principles that govern it.

The National Legal Council, on its part, has, on many occasions, confirmed that the decorum and the dignity of the profession as limits to carrying out promotional activities are inalienable, that cannot be subject to liberalization processes. It is up to the Council of Legal Orders, holders of the disciplinary function in the first instance, to verify that the member specifically carry out his/her activity in a way that responds to these ethical standards. These concepts were recently reiterated in the report given during the inauguration of the judicial year of the CNF in 2008 and again in 2009 and 2010.

Pronouncements were made by the CNF, before and after the arrival of the state regulations in 2006, in which that lack of requirements, regarding dignity and honorableness in the methods of offering professional services, was identified. This is the case of itinerant legal services or those rendered at home, as a way of reaching the client in a more direct way.

In the courts, the CNF, in fact, considered the conduct of an attorney ethically relevant, when he/she "offers near and future tentative professional collaboration (trial basis), in addition to working at the home of the client, insuring seriousness, professionality and availability regarding costs too" it being a suggestive practice that captivates attention in a manner which does not comply with decorum (sent. 31 December 2007, n. 268). The same can be said for a case that goes back to November 2001 in which the Council expressed itself negatively on the hypothesis of an attorney that intended to set up a camper and make it his office, thus carrying out his profession itinerantly.

In terms of the contents of promotional communication, the commitments aimed at containing the cost of services within a limit or restricting it to a fixed price stand out for their frequency, significantly in times of high cost of living and the pathological duration of court trials, or even more to attend to certain procedures (especially within the realm of out of court jurisdiction) for an all-around compensation or in a predetermined time period.

The theme is extremely delicate since the code of ethics protects the client in a very clear way when it comes to declarations that are untruthful and the same can be said for excessively "optimistic" committals as to how the case is going.

As has been said, the legislator also abolished the ban on the conditional fee agreement, the historical function of which has always been that of putting a healthy barrier between the interests of the client and the personal interests of the attorney. Long discussions were had within the ambit of a seminar on

this and on other themes connected to fees – which was then transformed into a permanent observatory – on the cost of legal services, the results of which we published in our magazine;[18] on that occasion it was highlighted how the calculation of the costs, as they are promulgated by the Institutes consulted by the European Commission, are methodologically incorrect, because they do not take into account the ontological specifics of the professions considered and of the specifics of the juridical orders involved (including, among other things, the cost of judicial expenses that differ from nation to nation, as do the timings regarding justice.)

Getting back to the question of the image of the attorney and of the way in which he/she can lawfully inform clients of his competencies, the indications that come to lawyers from the most recent practices is, therefore, that of a greater area of freedom for communication and marketing regarding the legal office, but with constant attention to the transparency and compliance of the promotional activity with the standards established towards the protection of the clientele.

Not always do we have unfavourable winds coming from Europe: the c.d. Bolkestein directive, n. 123 of 2006, if read carefully, contains norms that, at least on the theme of advertising, are not at all hostile towards us, expressly retrieving the concept of professional decorum.

Consideration n. 100 states: "It is necessary to suppress total bans on the question of commercial communication for regulated professions, revoking not the bans related to the contents of commercial communication but instead those bans that, in general and for a specific profession, prohibit one or more forms of commercial communication, for example the absolute ban on advertising on one specific means or means of communication. As far as the contents and the modalities of commercial communication are concerned, it is necessary to encourage the operators of the sector to elaborate, in compliance with community law, behavioural codes at the community level."

Therefore, there is respect for the deontological autonomy of professional organizations. But there is more: art 24, with the heading of "Commercial communications issued by the regulated professions", states:

1. The member States suppress all the total bans in the area of commercial communications for the regulated professions.
2. The member States ensure that the commercial communications that are issued by the regulated professions comply with professional rules, in accordance with Community law, regarding, in particular, independence, dignity and the integrity of the profession in addition to professional secrecy, respecting the specificity of each profession. The professional rules, on the subject matter of commercial communications, are non-discriminatory, justified by imperative reasons of general and proportionate interest.

18 Rassegna Forense, 2012 (edited by the Italian Bar Council).

For some time now, the total ban is no longer in force: the present limits are justified by public interest towards the protection of the trust of the clientele, and, in any case, remain inalienable principles – this is underlined by the directive itself – independence, dignity and integrity of the profession professional secrecy, and the respect for the specificity of each profession.

2.6. The projects regarding the reform of legal discipline and their reflections on the Code of Ethics

The legal profession is presently the object of reform: a text inspired by a modern conception of the profession is pending in the Senate and it confirms the role of the Legal Orders, and the CNF, the regulatory power in matters of ethics, remedies the negligence regarding the selection of who has access to the profession, imposes continuous training activities, reintroduces minimum fees and the ban on the conditional fee agreement. There is discussion, however, – on the basis of some amendments – whether its more opportune to replace the general principles of the code with a typification system of disciplinary illegalities, as takes place for the deontology of the magistrate. Typification obeys the criteria of legal certainty, but implies the completeness of the taxonomic classification of behaviours. It is an antithetical model to that which tradition, on which the conception itself of the legal function is woven, has entrusted us with, it is highly risky, because the description of behaviours should be updated from one moment to another according to needs and new realities.; in addition it reverses the same conception of deontology that has been described till now, because it transforms it from an ensemble of precept-values into the Shirt of Nessus (an unbearable torment) where everything that is not prohibited is legitimate.

Very differently from the moral law of Kant, which is "within us", it presumes to further formalize a sector which has become a tangle of regulations, but it would deprive the CNF of rendering accomplished ethical justice, since its duty must end with the simple registration of the unapproved behaviour to the "compartment " contemplated by a text which will no longer be a "code" but rather a more rigid list of the case in point.

3. New developments in the Italian law on the use of embryos in artificial procreation

3.1. Is the embryo a person?

To provide a complete definition of the person it is necessary to identify the moment at which, from a legal point of view, the person comes into existence.

2004 is an important date for Italian legal writers. It is the twentieth anniversary of the publication of the Warnock Report,[19] which started the debate in Italy about artificial procreation (or assisted conception)[20] and posed the problem of the need to define the legal status of the embryo and to legislate to protect it.[21] It is also the year in which the Law on Medically Assisted Procreation *(Norme in materia di procreazione medicalmente assistita)* (Law No. 40 of 2004), was passed, after troubled debates, by Parliament, constituting a complete departure from the intentions of the draft consolidated Law presented to the previous legislature and indeed from actual practice. The new Law contains important rules on the uses of the embryo[22] which, in a sense, provide a kind of constitution or statute of its rights for this "entity" which is so difficult to define.

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19 The Warnock Report, drafted by the Commission on Human Fertility and Embryo Research, 1984, provided a framework of 'recommendations' reported in *Procreazione artificiale e interventi nella genetica umana,* Atti del Convegno di Verona 2-3-4 October 1986, (Padua, 1997) p 357; its story is recounted by its Chairperson, Mary Warnock, in her Introduction to *A Question of Life* (London, 1985). Mary Warnock, now Baroness Warnock, has continued her involvement in the problems of bioethics and the legislation dealing with the techniques of artificial procreation. She has published explanatory books and in some ways has altered her original opinions: see *Making Babies: Is there a Right to Have Children?* (London, 2002).

20 This debate came to a head at a conference in Genoa, of which the proceedings were collected by G. Ferrando in *La procreazione artificiale tra etica e diritto,* (Padua, 1987); see also Ferrando's earlier *Procreazione artificiale: verso una regolamentazione per legge,* in *Pol.dir.,* 1986, p 501 ff.. The contributions of Stefano Rodotà defined the boundaries of the debate, made intellectuals think, and stimulated legal writers to form opinions: *Per un nuovo statuto del corpo umano,* in *Bioetica,* edited by Di Meo and Mancina, (Roma-Bari, 1989), p 41 ff.; *Questioni di bioetica,* (Roma-Bari, 1993); *Tecnologia e diritti,* (Bologna, 1995). During the same years see A.Trabucchi, *Procreazione artificiale e genetica umana nella prospettiva del giurista,* in *Riv.dir.civ.,* (1986), I, p 495 ff.; Patti, *Verità e stato giuridico della persona,* ibid., 1988, I, p. 231 ff.; Ascone e Rossi Carneo, *La procreazione artificiale: prospettive di una regolamentazione legislativa nel nostro paese,* (Naples, 1986). A comprehensive reconstruction of the situation is offered by Lenti, *La procreazione artificiale. Menoma della persona e attribuzione della paternità,* (Padua, 1993). On the subject of biotechnological research v. the essays collected and introduced by C. M. Mazzoni, *Etica della ricerca biologica,* (Florence, 2000).

21 See especially the proceedings of the conferences organised by Politeia: *La bioetica. Questioni morali e politiche per il futuro dell'uomo,* edited by M. Mori, (Milan, 1991); *Quale statuto per l'embrione umano. Problemi e prospettive,* edited by M. Mori, (Milan, 1992); and the essays collected in *Bioetica. Rivista interdisciplinare,* 1, 1993.

22 On the debate in the Italian parliament and the questions that preceded the text of the Law as definitively approved, there is an abundant literature, mostly circumstantial, published in the press and on the Internet; but see the essays collected in *Testimonianza. I diritti dell'embrione,* (2000), no. 412.

Consulting the calendar and making the conceptual link between the two events is not merely a feat of memory. Between the two dates is the whole history of the biomedical, ethical and legal debate in Italy, which got under way with a lively, open and fascinating discussion – full of hope – in expectation of a legal enactment that would be satisfactory to all. It then dragged on through doubts and second thoughts, as well as through many attempts at regulation, with more and less support; but few people would have imagined that the outcome (at least as it appears to be today) would be Law no. 40 of 2004. The new Law, of which an analytical description follows below, prohibits the provision of assisted procreation to single women and reserves the procedure to heterosexual married or unmarried couples; it prohibits the use of the semen or egg-cells of donors, the creation of multiple embryos, and the use of embryos or gametes in order to achieve aims not connected with procreation, e.g. to cure illnesses, as well as their use for commercial purposes or cloning.

3.2. Legislation and solutions throughout Europe

Only seven years ago, surveys of assisted procreation in Europe listed Italy among those countries in which techniques were practised to reach the goal of giving a child to people who could not have one naturally. Many countries, Italy not among them, had, according to these surveys, introduced legislation to govern the means of reaching this goal. The United Kingdom, the Netherlands and Spain had enacted legislation to permit a woman of an age at which women are usually capable of procreation, to subject herself to treatment for assisted conception. Our own situation was one of fact, not law, in which the donation of the gametes and egg-cell, and 'micromanipulation' of the gametes were allowed. Italy did not, according to the surveys, practise the selective reduction of fertilised embryos for the purpose of preventing multiple births. Nor did Italy permit research on embryos as an end in itself, but it permitted both the preservation of embryos by freezing them and the destruction of supernumerary embryos.

The present situation in Europe generally is varied.

The German model (governed by the *Gentechnikgesetz* of 1990) is apparently restrictive: the formation of embryos is only permitted for procreative purposes. The principle of human dignity prevails, and applies from the moment of fusion of the nuclei of the cells of the fertilised ovocyte; the embryo is defined as the 'human ovarian cell which from the moment of the fusion of the nuclei is capable of development'.

The English model by contrast is apparently permissive: in the Human Fertilisation and Embryology Act 1990[23] the embryo is regarded as an object (rather than a subject) and the logic of ownership is applied to it, so that dona-

[23] On which see Douglas, in *Family Law,* 1991, p. 110 ff.

tion of gametes is permitted subject to the consent of both donors. This contrasts with United States case law, in which there are judgments (such as *Davis* v. *Davis*[24]) in which the embryo is regarded as an 'unborn child'. In any event, less rigid restrictions are imposed under the English legislation: the embryo can be formed for purposes other than procreation, under a licence for research (as set out in Schedule 3 of the Act), in order to promote advances in the treatment of infertility, to increase knowledge about the causes of congenital diseases, or about the causes of miscarriage, to develop more effective techniques of contraception, to develop methods for detecting the presence of gene or chromosome abnormalities in embryos before implantation; and for such other purposes as may be permitted by future secondary legislation.

The French model on the other hand appears to be a compromise; human dignity is protected from the beginning of life (Article 16 of the Civil Code); forming embryos for purposes other than procreation is forbidden; all forms of commercialisation of and experimentation on embryos are prohibited (Law 94-654 of 1994); the conception of embryos by means of *in vitro* fertilisation is forbidden; the keeping of them must not exceed five years; subject to consent, the embryo may be used for the artificial insemination of other couples; the couple need not be legally married; the mixing of seminal liquids is forbidden; medical operations on the embryo are subject to authorisation.[25]

The fundamental principles common to all these models are that:
(i) the embryo must not be treated as a *thing*,
(ii) the embryo's identity as an individual precludes any operation upon it that would be unthinkable for a human being.

3.3. Principles and guidelines laid down by the European Institutions

A further step towards the convergence of these models has been taken by the intervention of the European institutions. They have been engaging in discussions between themselves and with the various national legislatures and have been attentive to the organisations that have been formed and mobilised in each national civil society. Essentially, they have been trying to act together in this field. The Council of Europe and the European Parliament have concerned themselves particularly with the embryo.

In its Recommendation no. 1046 of 1986, the Council of Europe set itself the problem of restricting the use of embryos, permitting their diagnostic, therapeutic and scientific uses and excluding industrial or commercial uses, as being

[24] Davis v. Davis: Case no. E-14496, Circuit Court for Blount, Tennessee, Aug. 10, 1989.

[25] On this point see Carusi, *Le nuove leggi francesi sulle biotecnologie,* in *Riv. dir. Civ.,* (1996) II, p. 537 ff.

contrary to human dignity. This principle was repeated in its Recommendation no. 1100 of 1989.

The European Parliament expressed the same view, when dealing with the techniques of genetic engineering and *in vivo* and *in vitro* artificial insemination in its Resolution of 16 March 1989; in another Resolution of 28 October 1993 it expressed an opinion against the cloning of human embryos; and by three further Resolutions it expressed itself, again restrictively, on human cloning (on 15 January 1998, 30 March 2000 and 7 September 2000). Resolutions are merely persuasive, but Member States are invited to follow their prescriptions. In any case, a clear principle emerges from these Resolutions: in addition to all the restrictions concerning the protection of human dignity, the use of embryos is to be permitted only if it is made for the purposes of procreation or for *diagnostic*, *therapeutic* or *scientific* purposes.

Subsequently the Council of Europe drew up a Convention 'for the protection of Human Rights and the dignity of the human being with regard to the application of biology and medicine: Human Rights and Biomedicine'. It was adopted in Strasbourg on 19 November 1996 and opened for signature at Oviedo on 4 April 1997.

This text is particularly important and worth examining in detail.

The Convention consists of a Preamble in which the precursors of the new legislation are mentioned: namely The United Nations' Universal Declaration of Human Rights of 1948, The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, The European Social Charter of 18 October 1961, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 16 December 1966, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981, the Convention on the Rights of the Child of 20 November 1989 and Recommendation 1160 on the preparation of a Convention on Bioethics of 1991. The Preamble stresses the need for international cooperation in biology and medicine and the urgent necessity to guard against the dangers to human dignity arising from the misuse of biology and medicine.

In the text of the Convention, certain general principles are laid down, such as that the interests and the welfare of the human being must prevail over the sole interest of society or science (Article 2); a code of conduct must be established for medical treatment (Articles 3-9) including provisions as to the consent of the person to be treated; the right to respect for one's private life in relation to information about one's health is asserted (Article 10); and in the context of the human genome there is a prohibition against discrimination based on genetic characteristics; there are measures to safeguard persons volunteering, and those unable to volunteer, to be used in scientific research; and there are rules on the extraction of organs for the purposes of transplants and a prohibition against making a profit from the use of any part of the human body.

These and other provisions are manifestly aimed at the protection of human dignity and rights.

Among these, Article 18 makes two provisions about the embryo. One is that where the law permits *in vitro* research on embryos, the law must ensure adequate protection for the embryo. The other prohibits the creation of embryos for the purposes of research.

The Convention thus provides a general framework within which the signatory States are to make their enactments;[26] and to some extent it takes account of the various legislative provisions that have been gradually enacted in the principal European States.

Among the latter it is worth noting the French intervention, which is set out in two measures: Law no. 94-653 of 29.7.1994, renewing Articles 16.16-1 to 6-12 of the French Civil Code) and Law no. 94-654, enacted on the same date, on the use of the human body. The former Law confirms the dignity of the person and the respect due to any human being from the beginning of life; it affirms the right of each person to his own body and restricts operations on the person and the human species; the second is concerned with transplants and assisted conception. A lively debate has started among French legal writers about these innovations.[27]

On 6 July, 1998, the European Parliament and the Council of Ministers approved Directive 98/44/EC on the legal protection of biotechnological inventions – which also relates to the human embryo. In the recitals it specifies that "patent law must be applied so as to respect the fundamental principles of safeguarding the dignity and integrity of the person" (recital 16) and that in the then state of patent law "the human body, at any stage of its formation or development including germ cells, or the simple discovery of one of its elements... cannot be patented". In recital 17 it acknowledges the need to encourage research and medicinal production by means of the patenting system. In Article 5 it proceeds to provide that "an element isolated from the human body or otherwise produced by a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention"; but in Article 6 (since patenting implies commercial exploitation) that such inventions "shall be considered unpatentable where their commercial exploitation would be contrary to *ordre public* or morality"; and that certain processes, including processes for cloning

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26 It is interesting to note that as of September 2004, the UK and Germany have not signed the Convention; and France and Italy have signed it but not ratified or brought it into force.

27 For the debate among French legal writers see e.g. B. Mathieu, *La dignité de la personne humaine: quel droit? quel titulaire?,* in *Dalloz,* (1996), chron., 281; C. Philippe, *La viabilité de l'enfant nouvaeau-né,* ibid., *chron.,* 29; J. Hauser, *Un nouveaù-né: l'enfant conventionnelle?,* ibid., *chron.,* 181; Ch. Byk, *La recherche sur l'embryon humain,* in *Sem. jur.,* (1996), 3949.

human beings, or the uses of human embryos for industrial or commercial purposes, shall be considered unpatentable.

By another Resolution of 7 September 2000 on Human Cloning, the European Parliament specified that human dignity and the value of each person is and should be the constant aim of the legislative activity of the Member States; and that medical research resulting from advances in knowledge of human genetics is necessary but must be carried on within rigorous ethical and social limits. It refers to a proposal by the UK Government to permit therapeutic cloning, which involves the creation of human embryos solely for research purposes. It calls upon all member states to reaffirm the ban on patenting or cloning human beings; it urges the use of stem cells taken from adult subjects; and it calls for the adoption of techniques of human artificial insemination that do not produce an excess number of embryos.

Finally, the Charter of Fundamental Rights of the European Union, approved at Nice in December 2000, now the European Constitution (art. II-3) includes in its provisions as to the 'right to integrity of the person' a prohibition against 'making the human body and its parts as such a source of financial gain' and a prohibition against 'the reproductive cloning of human beings'.

Thus there are clear and precise restrictions upon the production, use and patenting of embryos.

But it is equally clear that the production of embryos – albeit not in excessive numbers – is permitted by the EC authorities for diagnostic, therapeutic and scientific research purposes.

However, the new Italian legislation on the status of the embryo does not follow this process of convergence. The Italian model is not informed by the principles of freedom and responsibility. It is informed by restrictions and prohibitions.

3.4. The new Italian Law

The Italian Law of 19 February 2004, no. 40 contains 'Rules governing medically assisted procreation' and is not actually intended to regulate the legal status of the embryo. Its purpose is rather to 'enable the solution of reproductive problems deriving from human sterility or infertility'. The embryo is one of the means of solving these problems, which could also be solved in other ways. But the Law is all about a particular method, because in order to reach the goal that the Law aims to achieve, it is necessary first of all to create an embryo, then to process it, and to establish the manner of its processing, and also to establish who must take the decisions inherent in the processing, and finally to decide the fate of any embryos that have not been used.

The Law gives some answers to these questions but does not resolve all of them.

The whole of Chapter VI is devoted to the embryo; but it consists mainly of prohibitions, so that the protection of the embryo appears indirectly. There is a prohibition against experimentation on embryos (Article 13 paragraph 1); a prohibition against research not intended for the protection of the health and for the development of the particular embryo that is the subject of the processing for the purposes of fertility (Article 13 paragraph 2); a prohibition against producing embryos for the purposes of research and experimentation or any purposes not specifically permitted by the Law (Article 13 paragraph 3 letter a)); a prohibition against any form of selection of embryos for eugenic purposes (Article 13 paragraph 3 letter b)); a prohibition against cloning by transfer of the nucleus, and against premature fission etc. of an embryo even for the purposes of procreation (Article 13 paragraph 3 letter c)); a prohibition (Article 14 paragraph 1) against the preservation of embryos by freezing (except temporarily, for reasons of a sudden crisis in the health of the prospective mother, pursuant to Article 14 paragraph 3) and against the destruction of an embryo (Article 14 paragraph 1); and a prohibition against the production of supernumerary embryos (beyond the number three) (Article 14 paragraph 2).

Although the embryo is mentioned many times in this Law, "embryo" is nowhere defined: one has therefore to refer to its technical, scientific definition to be able to assign a meaning to the term.

From the mere enumeration of the above prohibitions, it is apparent that this is not a well-organised piece of legislation: not only is the embryo not defined as an entity, or even treated as equivalent to a person (except perhaps in passing, in Article 1 paragraph 1, where the rights of the "*concepito*", the "subject" or "person" conceived, are referred to), but the rights that the title of Chapter VI would lead one to expect – 'Measures to protect the Embryo' – are not defined in it.

The irrationality of this Italian Law on assisted procreation emerged only weeks after it had been passed, in a case brought before the Court of First Instance of Catania.[28] Two spouses had for a long time been trying to have children, using a permitted technique of assisted conception. Several times the wife had been subjected to the painful and distressing procedure, but, mainly because of the husband's low fertility and also because of physical complications in the wife's reproductive organs, these attempts had failed. The spouses had then discovered that they were both afflicted by thalassemia, an hereditary disease. During the course of their latest attempt, the Law on assisted procreation came into force; and, as indicated above, it is very restrictive. Since the assisted conception procedure had been started and consent for its continuance had also been signed, together with a declaration that they had been properly informed, the spouses applied to the judge for an emergency order that the doctor at the medical centre to which they had gone to have the operation, do not implant diseased but healthy embryos in the wife's uterus. However, the Italian

28 Ord. (judgment of) 3 May 2004.

legislation does not permit selection, even for the purposes of predetermining the genetic characteristics of the embryo, nor does it permit the preservation of the egg-cells by freezing (except temporarily), or their destruction: all the egg-cells produced in the course of the operation must be implanted in the uterus of the would-be mother. Thus, it is not possible to sort out the healthy embryos from the diseased ones and the doctor is obliged to implant any diseased ones in the uterus also. Nor is it possible for spouses who have given their informed consent, to revoke that consent. Consequently, the judge refused to make the order applied for, leaving the mother with a difficult choice: either to continue the pregnancy, thus running the risk of bringing a child with thalassemia into the world, or to have an abortion, always supposing that the requirements for obtaining it were satisfied. Abortion, in the Italian legal system, can be freely effected if within three months of conception, but after this time limit a pregnancy can only be terminated for serious reasons of the health of the mother, not that of the foetus (Law no. 194/1978).

The judge, in his reasoned judgment, examines the rights that are in conflict, and refers to the Italian Constitution[29] (but not to the Charter of Fundamental Rights signed in Nice and not to the provisions of the international Conventions). The conflicting rights in the case, as described by the judge, are: the right of the embryo to life; the right of the mother and father to procreation; and the right to collective health for the good of society. So, in this conflict of rights, the judge, treating the embryo as equivalent to a person (even though the Law does not explicitly so provide), found that the embryo's right to be born prevailed, and that neither the mother nor the father had the right to choose between the embryos produced from their bodies, or to permit only the healthy ones to complete their development.

Thus, if a child is consequently born, he will not be able to claim damages against his parents, or against the doctor, because all of them have acted in accordance and compliance with the law. Even if it were possible to overcome the problem of the existence of a right to be born healthy, and the problem of the causal connection between the event of his birth and the disease (the child would not have been able to be born except in those conditions, otherwise he would not have existed), the child would still have no right to damages because the conduct of the parents and the doctor would have been lawful. Possibly, the legislature could be sued in damages for not having allowed diseased embryos to be cured.

The question is complicated by other questions concerning human life, such as, specifically, the birth of genetically diseased children. We are in a difficult area of the law, in which judicial findings sometimes conflict with each other

[29] Specifically to Article 2, which recognises and guarantees the inviolable rights of man (i.e. of the person), individually and in a social context, and reminds the person of his (social etc.) responsibilities.

and sometimes differ from ethical assessments. The '*affaire Perruche*', decided by the French judges, is a typical example.

3.5. Does a person have the right to be born healthy?

The *affaire Perruche*, decided by the French *Cour de Cassation*, sitting in plenary session on 17.11.2000, is one of the "problem cases" on which learned legal writers have tested their most sophisticated techniques of imaginative interpretation. It is indeed a case that lends itself to an enquiry into how the resources of the law answer the requirements of justice, in a society which in one way is multiplying the demands of the person and in another is preoccupied with mediating between rights and interests that are in conflict with each other. But the case also lends itself to a discussion as to whether all the problems of the person can (or should) be made the subject of legislation and if so, which models (Italian or foreign) are to be considered satisfactory. There are models that claim an absolute respect for the techniques of formalism without any reference to "values" and others that are ready to incorporate into legal rules, fundamentally assumed ethical and moral values. In its peculiarity, and because of the dramatic twists it presents, the case also lends itself to an enquiry into how to practise the 'art of judging' and to a comparison of the reactions of the judiciaries of different countries when faced with similar facts.

The procedural developments of the case may be reconstructed by reading the account of Consigliere Pierre Sargos,[30] the pleadings of the Advocate General to the *Cour de Cassation* Jerry Sainte-Rose[31] and the numerous commentaries by learned legal writers.[32]

Greater problems are posed by the extreme brevity of the reasoning in the judgment of the *Cour de Cassation* sitting in plenary session, whose main function is to check the legal correctness of the judicial reasoning of the courts below.

Here therefore are the main events in the proceedings.

(i) By its judgment of 13.1.1992, the *Tribunal de Grande Instance d'Evry* found that a doctor and a pathology laboratory were liable in damages to a pregnant woman, who had applied to them find out whether she had the antibodies of German Measles. The court found that both were in breach of contract for having given her incorrect information, which convinced her that it was possible to carry the pregnancy to term without damage to the not-yet-born child; it found further that damages should be paid both to the child, for damage to his physical integrity, and to the parents.

30 In *Sem.jur.,* 10438, (13.12.2000), no. 50, p 2293 ff.

31 Ibid., p 2302 ff.

32 E.g. Chabas, *Note*, ibid., 2309.

(ii) By its judgment of 17.12.1993, the Court of Appeal of Paris, to whom the doctor had appealed, on the grounds that the error was to be attributed, in his submission, only to the laboratory, held that the doctor also was in breach of contract (for breach of an obligation to provide all the means at his disposal) and that he was jointly and severally liable with the laboratory and with both their insurers, to the mother and to the father, since the mother, in reliance on the erroneous result, had decided not to terminate the pregnancy, whereas she would have decided to terminate it in the event of danger to not-yet-born child, which intention was well known to the doctor.

(iii) The pronouncement in the judgment at first instance that the defendants were jointly and severally liable to the parents became unappealable, since it amounted to *res judicata*.

(iv) The Court of Appeal did, however, reverse the pronouncement in the judgment at first instance, concerning liability to the child: according to the appeal judges, there was no chain of causation between the damage suffered by the child and the wrongs (torts) found to have been committed. It held that the effects of the German Measles did not derive from the error of the doctors but rather from the fact that the mother had contracted the illness at the beginning of her pregnancy; and because the mother's decision to carry the pregnancy to term could not, of itself, amount to an actionable wrong against the child, recoverable in damages, since the effects of the German Measles were constitutionally inherent in the person and absolutely irreversible.

(v) On being seised of the question, the first section of the *Cour de Cassation*, in its judgment of 26.3.1996, reversed the judgment given on appeal, only on this question of causation. It held that the wrong diagnosis had led the parents to believe that the mother was immune to German Measles and that the child had consequently no *chance* of suffering the devastating consequences of the disease. The case was therefore sent back, on the single point of the causal connection, to the Court of Appeal of Orléans, which, however, by its judgment of 5.2.1999, refused to follow the principle of law declared by the *Cour de Cassation* and decided that there was no causal connection between the tort of the doctor (and the laboratory) and the damage suffered by the child.

(vi) On a fresh appeal to the *Cour de Cassation*, the *Cour*, now sitting in plenary session, held:

a) that the wrongs (torts) which the doctor and the laboratory were held to have committed in their performance of the contracts entered into with the pregnant mother had led her to rely on the exactness of the information and on her own immunity and thus had prevented her from exercising her own right to terminate the pregnancy in order to avoid giving birth to a handicapped child; and

b) that the child was entitled to obtain compensation for the damage resulting from his handicap and caused by the torts found to have been committed.

(vii) The parties were referred to another appeal judge to establish the quantum of damages.

The extreme brevity of the text of this final judgment of the *Cour de Cassation*, which consists of a few lines of reasoning, does not satisfy the learned legal writer, though he is aware that French judgments are concise. But the legal logic with which the Court arrived at the result is one thing; its effect is quite another.

In order to examine this final judgment it is necessary to dismiss certain matters, even though they are worth considering: the placing of the judgment in its context of learned legal writing and case law, for example, and also in the cultural context of the time. Then, there are doubts about the legislation referred to in it (Article 1165 of the French Civil Code, on the effect of a contract on third parties, and Article 1382 on unlawful wrongs (torts)); and then again about the failure to reconstruct the causal connection, though it was evidently held to have existed; moreover the appeal judges (deciding on points of law) say nothing about the nature of the damage for which they say compensation should be paid.[33]

It is essential to limit the scope of the enquiry. Considering the circumstances in which the case arose, it is scarcely necessary to point out that the damage was neither inflicted directly by the doctors on the physical integrity of the pregnant woman, who had contracted German Measles before submitting herself to the tests, nor was it inflicted directly on the foetus, to whom the German Measles was transmitted by the mother, nor was it damage suffered by the parents for non-termination of a pregnancy resulting from errors in sterilisation of the husband or the wife. Of all of these, our case law by now has copious examples.

3.6. Italian case law on medical malpractice and assessment of damages.

The circumstances of the *affaire Perruche* are well- known to the Italian observer, since our national experience by now has registered numerous cases dealing with similar facts. In its judgment of 16.2.2001, no. 2335, the Italian Court of Cassation found in favour of compensation for the physical and psychological damage suffered by a new-born baby on the occasion of a caesarean section, for

[33] From a comparative point of view see B. Markesinis, *Réflexions sur l'affaire Perruche et la nécessité d'un recours accru au droit étranger par les juridictions nationales,* Revue trimestrielle de droit civil, 2001, janvier-mars, p. 77 ff.; A. Verbeke, *Contract and Torts in a Comparative Perspective,* www.jurawelt.com.

asphyxia and subsequent episodes of apnoea, with a consequent loss of working capacity and loss of the amenities of life, and also for the loss and damage suffered by the parents in terms of expenses and moral suffering; the liability of the doctor was founded on negligence (*colpa lieve*) pursuant to Article 1176 of the Italian Civil Code.

In its judgment of 9.8.1985, the Court of First Instance of Padua found that compensation was payable for (extra-contractual) loss and damage suffered by a mother because a doctor had failed to inform her that an operation to terminate her pregnancy had been unsuccessful; and similar decisions were given by the Court of Appeal of Bologna in its judgment of 19.12.1991 and by the Court of Cassation in its judgment of 8.7.1994, no. 6464.

Other decisions have found that parents could sue in damages, for medical malpractice, consisting in a wrong diagnosis and consequent failure to inform a mother about the malformations of her unborn baby, which led to the fundamental impossibility of her procuring an abortion; judges have highlighted the fact that in such a case it is the mother whose interests are infringed by the damage: namely her right freely to choose to terminate the pregnancy: but it is thought that an action brought by the father would also be admissible, since he would have been involved, if not in the mother's decision, at least in its shared consequences. Some judgments have found a doctor liable for not having informed the parents of the fact that their foetus had malformations and would be born with Down's Syndrome.

However, in similar cases the Court of Cassation has found that for the purpose of proving a causal link between the conduct of the medical professionals and the damages complained of by the mother (or both parents) it is necessary to prove that the conditions laid down by law for termination of the pregnancy are fulfilled. The right found to be infringed is the right of the mother to terminate the pregnancy. In the Court of Cassation's judgment no. 12195 of 1998 compensation for the loss and damage suffered by the father is described as 'indirect damages'.

In its judgment of 23.2.1995, the Court of First Instance of Cagliari awarded (contractual) damages to a mother for having given birth to a healthy but unwanted child following an unsuccessful operation to terminate the pregnancy.

Further, in its judgment of 20.10.1997, the Court of First Instance of Milan awarded (extra-contractual) damages to both parents on the grounds that, following an incorrect operation to sterilise the husband, their right to conscientious and responsible procreation had been infringed. It should be stressed, however, that the Court considered the damaging event to have been not so much the birth of the child – since life is an immeasurable good, and bearer of joy to the parents, and such as to compensate for the drawback of having to maintain a child – but rather the infringement of a right of personal freedom belonging to the parents. The joys of paternity and maternity likewise provide compensation in themselves, of which the judge must take account when evaluating the *compensatio lucri cum damno* (set-off of gain against loss and damage).

As to the nature of the loss and damage, case law is divided; but this is another question that is beyond the scope of this article. In any case, these problems are not germane to the purpose of understanding the innovation in the judgment of the plenary session of the Court of Cassation in the *affaire Perruche*.

3.7. New challenges concerning the *affaire Perruche*.

This innovation consists in the *locus standi* acknowledged by the final judgment to exist in the child. Of course, the innovation is relative, given that the first judgment on the merits in the same proceedings had already found in favour of damages payable to the child, as had the first section of the *Cour de Cassation*.

The case can be stripped down to its essentials and, taking it as an hypothesis for teaching purposes, and overstepping the boundaries of its facts, the challenges can be summarised in a few questions. The parents' right to damages, agreed to by the Italian judges subject to the remarks and limitations described above, can be taken as read; but one wonders:

a) whether from a methodological point of view, the problem can be exhausted in the discussion of the existence of the causal connection, or whether there can or must be other factors in the evaluation;
b) whether, under the rules of law, the child is entitled to claim damages;
c) for what loss and damage; and
d) against whom.

At this point further questions arise:

a) whether the child can claim in damages against the doctor and the laboratory on the grounds that he came into the world handicapped, even though that condition was not caused directly by the defendants but only by a combination of two factors: one being the error in the information that would otherwise have determined the decision to terminate the pregnancy and the other, the mother's continuance of the pregnancy in ignorance of that error;
b) whether a child is entitled to sue his mother for having knowingly decided to carry the pregnancy to term;
c) whether he is entitled to claim damages from the father as well as the mother.

Probably the only case recorded in Italy whose *ratio decidendi* is really relevant to that of the *Perruche* case is the much-discussed one concerning a baby girl with hereditary syphilis, long ago decided by the Court of First Instance of Piacenza on 31.7.1950.[34] This is because in all the judgments so far mentioned and in others that could be mentioned, damages are always claimed by one or both parents but not by the child.

34 In *Foro it.,* (1951) I, 987.

The Court of First Instance of Piacenza awarded damages to the child, and overcame the problem of the causal connection with these words:

> 'life is a great gift, an immense gift. Now, transmitting by the act of generation (…) a diseased condition which transforms this great gift into an immense unhappiness is unlawful, contrary to the law, and is not the proper conduct of a person on whom the legal system imposes a duty to recognise and elevate this gift'.

The strength of the criticism of most commentators, which (with the exception of a few favourable opinions) has greeted this judgment, has been sufficient ever since to dissuade children born handicapped from starting actions in damages in Italy against their parents. It should however be pointed out on the facts, that the infection of syphilis had been transmitted from the father to the mother and that she was possibly not aware of it and in any case (at the time) did not have the right to an abortion. We have to remember that abortion has been legal in Italy only since 1978.

The similarities of the French case and the Italian case decided by the Court of Piacenza, mentioned above, are not completely coincident.

The *Perruche* case also was an action in damages, but the action was not against the parents but against the doctors and the laboratory, so that it is not possible on the basis of that case, to pose the question whether parents are immune from being sued by their children for having caused them to be born in a disadvantaged condition, or the question whether damages should not be awarded because to do so would infringe the right of the parents to procreation or the right of the mother freely to choose to terminate a pregnancy. However, even if the old Italian case was somewhat different from the *affaire Perruche,* the question of the causal link remains open. The alternatives, simple but obvious, are 'being' and 'non-being': living with the affliction of an incurable handicap or not being afflicted by it and consequently not being born. The choice between these alternatives, where there is medical liability, does not arise in either the old Italian or the new French case, because in both the child has been born and is condemned to live in disadvantaged conditions. The words of the judges of the Court of First Instance of Piacenza, at the distance of half a century, still seem (extraordinarily) up-to-date, even though, strictly speaking, they do not offer an adequate reasoning in the strict sense.

Today those judges, pilloried by some, respected but criticised by almost everyone,[35] would enjoy quite another sort of consideration.

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[35] See the careful reconstructions of the history of this in Patti, *Famiglia e responsabilità civile,* (Milano, 1984), p 112 ff., where there are references to the German and American legal experiences; Zeno Zencovich, *La responsabilità da procreazione,* in *Giur.it.,* (1986), IV, 113, with further comparative references; and for other instances compare von Bar, *The Common European Law of Torts, I,* (Oxford, 1998), 581 ff.; and *Un bambino non*

To resolve the matter, are we to follow a line of strict legal reasoning or a line which accommodates the principles underlying that reasoning?

It is possible to reach opposite conclusions using the formal method or using reasoning grounded on values, or underlying principles.

On strict, formal legal reasoning, it appears clear that 'the concept of life as of incomparable value' is a non-legal concept 'superimposed on a purely formal concept'. If we distinguish between the moment of the damaging act and the moment it shows its consequences, it is possible to overcome the difficulty of the causal connection even in rigorously formal terms.[36] But these considerations apply in the context of extra-contractual liability. If the question is put in the contractual context, either we must consider that the mother entered into a contract with the pathology laboratory for diagnostic services and a contract with the doctor for medical services, and that both contracts can be construed as including an obligation to protect the third party (the foetus); or we must consider that the legal effect of these contracts is specifically that services are to be provided in favour of the foetus, whose condition in the uterus is to be ascertained. In either case, it is impossible to deny that the interests of the foetus-to-be-born have a bearing on the matter, just as it is impossible to deny that the absence or inexactitude of information affect the foetus at least indirectly. On this construction, the problem that there can be no right not to be born does not arise, nor does the question whether there is a right to be born healthy: the problem that arises is that of the difficult condition in which the baby finds itself when born, by reason of the absence or inexactitude of information: the baby has been born in the only condition in which it could have lived, that is, afflicted with a handicap. The doctors' error is mirrored in the tragic condition of the child that has been born.

To be sure, if one makes a distinction between factual and legal causality, it is apparent that the error of the doctors was a contributing cause (*concausa*), but not the only cause (the mother could have decided not to have an abortion). If the doctors had not erred, the admitted fact of the child's tragic condition would not have given him grounds to sue his mother, because there would have been no fault (*colpa*) attaching to her; she would only have freely made the choice to procreate, which choice is not open to criticism and should not be governed by the possibility of a claim from the child in damages.

If, on the other hand, we take the line of reasoning that accommodates the values or principles underlying it, we might agree with those jurists who have remarked that the idea that a birth is always a 'precious gift' (a recurring theme in judgments in decided cases), 'highlights the value of human life and its right

voluto è un danno risarcibile?, edited by Ant. D'Angelo, (Milano, 1999), where there are essays and opinions by Lupoi, Canale, Busnelli, Lipari, Ruffolo, Cendon, Passio, Brunetta d'Usseaux, Ant. D'Angelo, Bregante, Ferrando, De Matteis, Spallarossa and Monateri).

36 According to Rescigno, *Il danno da procreazione,* in *Riv.dir.civ.* (1956), I, 634.

to be protected, in such a way as to obscure the need to evaluate the connection between the event of the birth and the person of the parent: which connection can make one see the birth as an event whose significance is not unequivocal – but as the bearer on the one hand of "gifts" and on the other of difficulties'; so that 'to connect birth and motherhood in a single fate and a single estimation really adds to the sort of confused priorities that acknowledge the value of human life only if it is "wanted"'.[37]

The parents can thus be acknowledged to have suffered loss of a capital nature as well as biological and natural damage in the strict sense; since damage cannot be duplicated, the child can only be acknowledged to have suffered moral damage.

Is this a just and equitable decision? Or is it one that holds doctors, hospital managers and insurers, all of them persons subject to the law, liable for a loss that should 'lie where it falls' or at least be absorbed by the insurance system? How far should we follow the logical and formal line of argument? And if we do not follow it, are we not stepping *tout court* into the quicksands of 'free law'?

Pietro Rescigno, commenting on the old Italian judgment, concluded his essay on the question of loss and damage caused by procreation with the penetrating observation that '… the theme of the not-yet-born child, in the peculiarity of this case, reveals the law's incoherence. It is this contradiction that explains the painful uncertainty of the judge and the bitter anxiety of the reader'.

But it is precisely with that painful consciousness and from that point of departure that we must start the reasoning again today.

4. CESL, Fundamental Rights, General Principles, Rules of Contract Law

4.1. The ambiguity of the term "principle"

A very interesting phenomenon has occurred in the last few decades: the increasingly more frequent (but less and less perceived) use of the term "principle". Its use is to be fund both in national and EU legislation as well as in the projects for the harmonisation of European law. In national legislation, a "permanent debate" can be noticed in which principles are confirmed by a long-standing tradition, as is the case with the legal culture that has established itself in Italy,[38] Germany,[39]

[37] Rescigno, *op.cit*.

[38] For a historical review of the term "general principle" and its corresponding expressions, see Alpa, *I principi generali*, Milano, 1993 (2d ed.2006); Guastini, *Le fonti del diritto e l'interpretazione*, Milano, 1993.

[39] From the wide palette of literature on the matter, see Alexy, *Theorie der juristischen Argumentation*,1978, trad.it., Teoria dell'argomentazione giuridica, a cura di M.La Torre, Milano, 1998.

and Austria.[40] These countries have a long tradition of investigating and enforcing Roman Law, hence the *regulae iuris* (the rules of law listed in book L of Justinian's Digest) – which are one of the first examples of principles of law written in the form of brocards (legal maxims)[41] – as well as investigating natural law as opposed to positive law and the "logical" conception of the legal system according to rationality principles. Therefore, we can find rules concerning the interpretation of the law in statutes and civil codes, general principles in status and civil codes, general clauses and other devices to adapt the law to any kind of circumstances. Usually, general principles corresponded (and in some cases still correspond) to *analogia legis*.

With regard to the British legal culture, a "renewed interest" is to be noticed in our days: after Jeremy Bentham's *Principles of Morals and Legislation*, this terminology migrated to critical studies on logic and philosophy. In the U.S. legal culture, the matter can be said to be more "complex" in that the issue has been recently examined mainly in Ronald Dworkin's analytical philosophy of law. Dworkin explained that principles are to be taken seriously, maybe because of the debunking arguments held by the founders of legal realism.[42] In the French civil law, one may say that this terminology has been "discovered" only in recent years: with the exception of François Gény's writings[43] – which have always been viewed with mistrust by formalists, while being much appreciated in Italy –, the use of this terminology and its practical application has been more frequent in administrative rather than French civil law.[44]

In this panoply of references, the term "principle" has multiple meanings, which grow in number if one considers the contexts in which this word is used with reference to the attempts of harmonisation, unification, and codification of European private law.

Here are a couple of examples: in the "Principles" of European Contract Law (PECL) by Ole Lando and Hugh Beale, the expression refers to the "general rules of contract law" (art. 1:101(1) and the same holds true for the Unidroit Principles (Preamble, paragraph 1).

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40 Bydlinsky, *Juristische Methodenlehere und Rechtsbegriff*, Monaco, 1991.

41 Stein, *Regulae juris. From juristic rules to legal maxims*, Edimburgo, 1966.

42 Dworkin, *Taking Rights Seriously*, 1977, trad.it. *I diritti presi sul serio*, trad.it. a cura di F.Oriana e G.Rebuffa, Bologna, 1982; Benditt, *Law as Rule and Principle*, Stanford, 1976

43 Gény, *Méthode d'interprétation et sources de droit privé positif*, Parigi, 1899.

44 Boulanger, *Principes généraux du droit et droit positif*, Etudes offertes à G.Ripert, Paris, 1950,t.I, p.51; Léauté, *Les principles généraux relatives au droit de la defense,* Rev.soc. Crim., 1953,. 47; Vedel e Devolvé, *Droit administrative*, Paris, 12e ed., p.474;Morvan, *Les principles généraux du droit et la technique des visas dans les arrets de la Cour de Cassation*, Recherche de l' Université Panthéon-Assas.

In the Draft Common Frame of Reference, the term may include either provisions that have not the force of law or definitions, and general rules.[45] What is important, however, is the stance taken in the introduction: the underlying fundamental principles of rules are the expression of clashing values, are not in order of priority and are only quoted by way of example. In a first list, the following principles are mentioned:

> "justice, freedom, *protection of human rights,* internal market development, solidarity and social responsibility, freedom, security and justice, protection of consumers and other weak parties, preservation of cultural and linguistic plurality, rationality, legal certainty, predictability, efficiency, reasonable reliance, and appropriate risk accountability".

Apart form the specific mention of human rights in some rules – which will be explained below –, even if the principles are not set in any hierarchical order, the authors of the DCFR cannot have thought of human rights as a group of rights clashing with other rights in a text aimed at systematically regulating contracts, without them having a significant role. On the contrary, pursuant to Article 1-1:102(2), the rules set in the DCFR "have to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws".

In the *principes directeurs* drafted by the Association Henri Capitant and the Société de Législation comparée (in 2008),[46] a distinction is made between guiding principles and other principles, which are considered as general rules shared by EU Member States. This collection of principles therefore rectifies the list of principles included in the PECL and new rules are suggested as model contract rules to imitate, to draw on, or to be looked at as instruments for problem solving purposes. These are some of the guiding principles mentioned: (i) freedom of contract, (ii) certainty of transactions, and (iii) fairness. The latter term is translated in the commentary on the DCFR, which quotes the *Principes contractuels communs*, by using three distinct expressions: "good faith, fair dealing and cooperation".[47]

Fundamental rights are not mentioned.

Fundamental rights were lost also in later attempts to harmonise rules of contract law, which relied on simple, synthetic, and partial texts.

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45 *Principles, Definitions and Model Rules of European Private Law.Draft Common Frame of Reference*, Outline edition, edited by Von Bar, Clive, Schulte-Noelke, Munich, 2009, p. 9; for a discussion of these techniques, see Alpa and Andenas, *Fondamenti del diritto private europeo*, Milano, 2005.

46 Projet de cadre commun de reference. *Terminologie contractuelle commune,* Paris, 2008 ;*Principes contractuels communs*, Paris, 2008.

47 *Principles*, cit., p.14.

The text that marks the transition between the DCFR general rules on contracts (Book II) and the draft Regulation on a Common European Sales Law is called **Feasibility Study for a Future Instrument in European Contract law**[48] (July 2011). This text either does not mention fundamental rights, it sets only some general principles like reasonableness (Article 4), freedom of contract (Article 7), good faith and fair dealing (Article 8). The general or constitutional principles accepted in EU law or national Constitutions are not even referred to in the interpretation of the text, for which a *closed system* is suggested: "This instrument is to be interpreted and developed autonomously and in accordance with its objectives and the principles underlying it" (Article 1 (1)), without recourse to national laws (Article 1(2)).

Eventually, the draft Regulation introducing a Common European Sales Law (CESL) sets out some "general principles" in its introductory provisions, such as (i) freedom of contract, (ii) good faith and fair dealing, and (iii) cooperation. This text too is a closed system: it does not mention fundamental rights nor the general rules including the values of EU provided by the Charter of fundamental rights.

This varied culture – underlying the different linguistic, cultural, and technical backgrounds of the authors of the texts – is therefore reluctant to any strict use of the term "general principle", although it does not reject it, but accepts it. The term is accepted not as a technical and scientific term to be used cautiously and knowingly, but as a versatile term with an indistinct conventional meaning, a sort of proposition phrased in general words, referring each time to a value, a rule, a line of interpretation, and so on. Every jurist can understand the meaning of "principle" and feels that he/she can use it in the most different ways. Because language, fashion, and practice cannot be controlled, the meaning of the word "principle" must be checked each time in order to fully understand the meaning referred to by its author.

This term is appreciated differently depending on each jurist's culture and background. For instance, I do not know whether the evolution of "general principles" in the Italian legal culture since the late XIXth century is known outside Italy. This evolution went beyond the mere investigation of the formal legal meaning of these principles, to gain an insight into their ideological and practical meaning.

Jurists who refer to a written text find it difficult to accept the idea that it is useful to draft general provisions with a very wide scope, that vaguely describe the case in point. Thus, they tend to make a distinction between specific detailed rules and general rules – i.e. the enunciation of a broad case in point. They also tend to distinguish between general rules and general principles, which result from logical inductive reasoning by drawing the general enunciation from a set of specific rules. Jurists who pay accurate attention to the letter and spirit

48 To be found in *Towards a European Contract Law,* edited by Schulze and Stuyck, Munich, 2011.

of legal rules also make a distinction between the *supreme* principles of *State* legal systems and those that are derived from other contexts. They also ask themselves whether there is a difference in role between the general principles expressly laid down in legal provisions and those inductively drawn from those provisions without being explicitly mentioned.

This is due to the fact that in some legal systems, like the Italian one, the civil code, the Constitution, and other important legal texts (that may be qualified as the "Tables of the Law") often use the term "principle" thus binding the interpreter much more closely than legal systems in which principles are seldom mentioned in legal texts, are derived from the interpretation of the majority of authors (logic, axiology, hermeneutics, etc.) or are considered by these authors as "guiding rules" for harmonising an area of a national or supranational legal system, or a system in its early stage of development like "European private law". Jurists who are less closely bound by legal texts mentioning principles can thus afford a higher degree of freedom and latitude in devising, manipulating, listing, and classifying "principles".

These are only some of the issues that Italian jurists have long debated for more than a century. This debate reached one of its peaks at the Academy of the Lincei, at a conference held in Rome from 27th to 29th May 1991, during which distinguished scholars in several branches of knowledge identified, classified, and discussed principles both from a philosophical and historical perspective and from a legal and practical point of view, with regard to the different branches of law.[49]

4.2. General principles "in context"

During the twenty years from 1991 to this day – at a pace that is unusual in legal culture – there has been a tremendous amount of studies, lines of thought, legal texts, projects, jurisprudential trends that have deeply modified legal experience both at a national and European (not only geographically speaking) level. This experience cannot be ignored. In particular, I am referring to the experience that has served as the breeding ground for the new legal culture, thus becoming crucial for jurists and irreversible.

There are basically three cultural events or trends that have gradually established themselves and have changed the meaning and role of general principles: (i) the eventual collapse of the distinction between private law and public law; (ii) the introduction of the Charter of Fundamental Rights of the European Union; (iii) the use of the principles laid down in the European Convention on Human Rights by the European Court of Justice as well as by many constitutional

[49] Proceedings of the Academy of the Lincei (96) conference on: *General Principles of Law* (Rome,27th-29th May, 1991), Rome, 1992.

and supreme courts. Here, the term "principles" stands for the formulation of human rights that the European Union has complied with.

While legislative texts are accurate, the texts of judgments, decisions, rulings, and, often, legal literature are general or superficial, so that the terms "general principles", "values", "fundamental rights", "human rights" are used interchangeably.

Thanks to these cultural events and trends, the universe of principles has grown richer and newer, showing an amount of vitality that was absolutely unimaginable in the late XIXth century, when the debate on principles in their modern sense was launched.

The new millennium marked a very significant turning point – which had an impact on the evolution of EU law and on the process of harmonisation of national legal systems – with the establishment of common values, the redefinition of the relationships between citizens and EU institutions, and the development of a body of common rules (*acquis communautaire*) in which the unifying principles of consumer contracts are set out.[50]

As a result of the underlying link between fundamental rights and general principles that has supported this process, the EU legislation cannot be enforced if it clashes with general principles (hence with fundamental rights) and national authorities, judges, or governments cannot enforce national rules derived from EU law without applying general principles and, as a consequence, fundamental rights.[51]

4.3. Fundamental rights as general principles: the two distinct processes of the European Charter and European Convention

The Charter of Fundamental Rights of the European Union, the case-law of the European Court of Justice and the decisions of national constitutional courts form the basis of positive law upon which the argument that *fundamental rights are general principles* rests.

From a formal point of view, if one just considered the letter of the Charter, the controversial point could be whether fundamental human rights should be taken as "principles" of law as such. What might be inferred from the Preamble

50 *EC Consumer Law Compendium.The Consumer Acquis and its transposition in the Member States*, edited by Schulte-Neolke, Twigg-Flenser, Ebers, Munich, 2008; *Common Frame of Reference and Exixting EC Contract Law*, edited by Schulze, Monaco, 2009; *I* "Princìpi" *del diritto comunitario dei contratti. Acquis communautaire e diritto privato euorpeo*, Torino, 2009.

51 This is the argument I held some years ago in *L'applicabilità della Convenzione europea sui diritti dell'uomo ai rapporti tra privati*, in Eur.dir.priv., 1999, II, p. 873; Wade, *Horizons and Horizontality* (2000) 11 LQR 217.

of the Charter is that fundamental rights are *values* that are based on the principles of democracy and the rule of law.[52] The Preamble states:

> "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".

In another passage of the Preamble, the values and principles quoted above seem to be referred to as fundamental rights:

> "To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter".

The most relevant passage, though, concerns the nature of these values/principles/rights:

> "Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations. The Union therefore recognises the rights, freedoms and principles set out hereafter".

These are not emphatic statements merely aimed at depicting a perfect picture of the Charter: fundamental rights are (or express) principles that have legal force, that entail responsibilities and duties vis-à-vis the State or the European Union and bind also private parties in their legal relationship.

In 2007, a European Parliament Resolution gave legal force to the Charter, although the European Court of Justice and national courts had autonomously decided, long before that, to consider the Charter as a binding instrument and to draw on it in order to solve issues and settle disputes.[53] The Charter immediately became part of the "law in action" and combined its political force with its legal force. Stefano Rodotà has been the first Italian jurist connecting legal force to the Charter which he himself contributed to draft.[54]

Moreover, Article 2 of the Consolidated version of the Treaty on European Union, as amended by the Lisbon Treaty, proclaims:

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52 Rodotà, *La Carta come atto politico e come atto giuridico,* in *Riscrivere i diritti in Europa*, Bologna, 2001.

53 Celotto e Pistorio, *L'efficacia giuridica della Carta dei diritti fondamentali dell'Unione europea* (case-law review 2001-2004), *Giur.it*, 2004.

54 Rodotà, *La Carta*, cit., p.111.

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

Article 6 states:

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

Let me emphasise again the legal force of the Charter – acquired, as it were, in the field of national courts' decisions, then laid down in the 2007 resolution, and again enshrined in the TEU –, which means that its provisions are legally binding, must be enforced by EU and national courts, and can be applied both in vertical relationships (i.e., vis-à-vis States) and in horizontal relationships. I shall come back to this point further below.

Human rights, recognised and listed in the European Convention on Human Rights, were also recognised by the Treaty of Lisbon.

As a matter of fact, **Article 6, paragraph 3**, of the amended Treaty states:

> "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

This wording better clarifies the text of the 1992 Maastricht Treaty, which provided that "the Union respects fundamental rights (…) as general principles of Community law".

On the basis of this dual formal recognition, one might argue that, by now, the principles in the Charter and those in the Convention are part of an organic whole.

And yet the issue is more complex than it is sometimes described.

This issue was also echoed at the aforesaid Academy of the Lincei conference. Rodolfo Sacco addressed it – with reference to principles in general – when he mentioned the Treaty establishing the European Economic Community (former Article 215, paragraph 2), which included principles among the *sources* of EU law (principles are secondary rules of law on which the EU legal system is founded).[55] Angelo Falzea emphasised the high axiological nature of fundamental principles,[56] which, "despite their strong ideality, are rules of positive law". As regards the principles included in the Constitution of the Italian

55 Sacco, *I principi generali nei sistemi giuridici europei*, in Atti, cit., p. 163.

56 Falzea, *Relazione introduttiva*, ibid., p. 25.

Republic, and insofar as they are recognised by the international community, Pietro Rescigno maintained that they might even be considered as limiting national sovereignty.[57] Giorgio Oppo and Luigi Mengoni acknowledged fundamental rights as having the status and role of general principles. Oppo stressed that general principles rule our behaviours even in the sphere of private autonomy: "freedom, equality, and ("political, economic, social") solidarity are supreme values [quoting Article 3 of the Italian Constitution] and the supreme principles derived from them are the equal autonomy of partners and agents' accountability for the active and passive consequences of behaviours".[58] Mengoni identified inviolable rights with general principles, although he made it clear that they should be seen in comparison with the other principle-rules, because the Constitution is a "table of values" that often have opposite meanings and therefore need to be balanced out. He then restated Ronald Dworkin's distinction between rules and principles with regard to their role: rules can only be strictly complied with, principles direct the interpretation of law;[59] the difference between the former and the latter lies not in their structure but in their effects.

All the aforesaid authors thought that principles should also be enforced *horizontally*, meaning that they could apply not only to relationships between citizens and the State, or between citizens and EU institutions, but also to relationships between private parties, hence to contract law. This conclusion is not unique among EU law interpreters, nor among civil law and common law lawyers.

In order to understand how fundamental rights / general principles can produce horizontal effects, the analysis must take place step by step.

Hugh Collins is right when he maintains that these issues can be understood more clearly if your background is one in which the distinction between private and public law has lost its centuries-old prominence, and one in which the process of constitutionalisation of private law has established itself.[60]

It is impossible to generalise.

One thing is the contexts in which the constitutionalisation of private law occurred before the establishment of a common EU law system. The driving models in this process leading to a new civil law system and its modernisation

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57 Rescigno, *Relazione conclusiva*, ibid., p. 341.

58 Oppo, *L'esperienza privatistica*, ibid., p. 227.

59 Mengoni, *I principi generali del diritto e la scienza giuridica*, ibid, p. 325.

60 Collins, *The Impact of Human Rights Law on Contract Law in Europe* (edited by Andenas, Andrew and Tamaruya), Legal Studies Research. Paper Series, University of Cambridge, Paper No. 13/2011. See also *Constitutional Values and European Contract Law*, edited by Grundmann, Alphen aan den Rijn, 2008; Hesselink, Mak, Rutgers, *Constitutional Aspects of European Private Law: Freedoms, Rights and Social Justice in the Draft Common Frame of Reference,* Center for the Study of European Contract Law, Working Papers, Series No. 2009/05.

in the light of the fundamental values of society were the Italian model – where the private law constitutionalisation process was launched in the early 60's, after the entry into force of the Constitution of the Italian Republic (1948) –, the German model, which also took shape in the same years (with the 1949 Law), and the Spanish model, which developed immediately after the introduction of the new constitution in 1978.

Another thing is the contexts in which the human rights/principles enshrined in the European Convention were upheld first by acknowledging the effect of international conventions and then by fully transposing them into their national constitutional systems or as national legislation rules as was the case with the Human Rights Act in Britain, just to mention a few examples.

Another thing is the contexts in which social values have made it possible to go beyond the formally egalitarian middle-class concept of protecting the relationships between private parties, and focus on human values rather then just focusing on the protection of consumers, workers, or savers/investors (which generally calls to our mind a more economic and financial perspective), as well as on discrimination and disparity based on gender, language, religion, ethnic origin, etc.

4.4. Fundamental rights as general principles of contract law in the case-law of the Court of Justice

This section deals with the fundamental rights enshrined in the Charter, although this obviously involves the debate on the recognition at a European level of common principles on human rights to be found in Member States' constitutions. This also involves the link between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, as well as the so called dialogue between courts, the multi-level protection of fundamental rights, and the harmonisation of the decisions of the courts that, in their different jurisdictions and with different scope of action, deal with fundamental rights.

Courts' judgments prove that fundamental rights stand for general principles, which are presented each time in the form of human values.

Experience teaches us that – regardless of more or less rigorous and technically correct formulations –, the law plays its role through values/principles/rights and that a principle can be legitimated by courts in their office of interpreting the law *(ius dicere),* and in their doing so, fundamental rights become "law in action".

The labour market, hence the employment contract, has been the target most frequently hit by the Court of Justice of the European Union on grounds of general principles like the principle of equality (meaning here the equal treatment of men and women as regards pensions), which is a fundamental right recognised by all modern constitutions as well as by the first declarations of

rights. This can be interpreted also in the opposite way, that is the application of the principle of non discrimination. This is not the right venue for a review of the most sensational cases, like the Bartsch case (of 13th September 2008, C-46/07), or the cases regarding the applicability of the principle of human dignity (C152/82 of 13th November 1990) or the cases concerning the principle of free movement of workers. In the field of contracts, the Omega Spielhallen case (C-36/02) is a good example, in which a game was prohibited because it simulated the killing of human beings using laser devices.

More recently, in the field of insurance contracts, the ECJ ruled that Article 5, paragraph 2, of Directive 2004/113/EC on the principle of equal treatment between men and women is invalid, hence the terms and conditions of insurance policies that discriminate between men and women, on grounds of age, are void (C-236/09).[61]

A careful analysis of the impact of fundamental rights on courts' decisions should include the decisions of the European Court of Human Rights and the decisions of Supreme Courts as well as those, of course, of Constitutional Courts. Within the framework of this paper, though, reference can be made to the collections of cases before the Strasbourg Court dealing with human rights violations. However, it should not be forgotten that the Strasbourg Court tends to consider fundamental rights less as general principles than as strong individual defences that parties are entitled to claim vis-à-vis the States of which they are nationals or guests, thus obtaining compensation from the infringing State as remedy to a breach.

4.5. The dilemma before modern law-makers

Is it possible to design an autonomous body of rules, also in the form of a Regulation, which evades the principles enshrined in the Charter of Fundamental Rights, hence does not include the Charter principles among its (guiding) principles?

There are different ways to include the Charter principles among the principles of European Contract Law, the principles of the Common Frame of Reference, and those of the Regulation on a Common European Sales Law:

(i) the easiest way is to directly refer in the text to those principles, even without quoting them;
(ii) the most natural way for a jurist who prefer to interpret a legal text rather than rewrite it, is to consider any legal text (from PECL to the CESL Regulation) as having necessarily to be interpreted and enforced in the light of

[61] A rich and scholarly collection of commented cases was edited by Cosio and Foglia, *Il diritto europeo nel dialogo delle Corti*, Milano, 2012; on the same subject, see also *Giurisprudenza della Corte europea dei diritti dell'uomo e influenza sul diritto interno*, edited by Ruggeri, Napoli, 2012.

the principles of the Charter (and the Convention, which stands as a body of general principles);

(iii) the most traditional way consists in considering fundamental principles as mandatory rules that must be enforced anyway.

In all the aforesaid cases, these rights/principles/rules are directly applicable to the relationships between private parties.

Authors have differing positions, though.

As regards freedom of contract, for instance, Collins argues that the solution can be boustrophedonic: if more emphasis is placed on a person's freedom to contract (like the freedom to accept working time arrangements that are contrary to health protection standards), then other freedoms can be curtailed. If more emphasis is placed on dignity, any working rules that are contrary to health and rest time should be turned away and contract agreements should be considered as contravening fundamental rights.

Hans Micklitz[62] stressed that fundamental rights should also include social rights, although the latter are not secured: "the expansion of social rights does not help to overcome the narrow boundaries of the EU competence on The Social". In a wider analysis focusing on a review of EU law sources, Micklitz considered the combination of a European Constitution and European Civil Code as the framework that can truly lead to an integrated market in which not only individual rights but also collective rights are relevant and the principle of solidarity is fully acknowledged alongside the principle of dignity.

In a narrower and more cautious perspective, Olga Cherednychenco rather referred to the complementarity of fundamental rights and contract law. In the conclusion of a recently published essay, she wrote: "it is obvious that the complementarity between fundamental rights and contract law can only be achieved if the ECJ refrains from interfering in such cases by means of the fundamental rights review of the provisions of the CFR or the interpretation of the general clauses contained therein".[63] However, the relevance of fundamental rights in European private law – hence their direct applicability to contractual relationships – is not denied by the author, who raises an additional point thereon: in view of this assumption, the issue is not so much the recognition of fundamental rights in contract law, as *the scope* of their protection when parties' opposing interests require an acceptable degree of balancing. In this respect, the author makes a distinction – taking into account the different models existing in European countries – between a direct effect, a strong indirect effect, and a weak indirect effect.

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62 Micklitz, *Failure or Ideological Preconceptions-Thoughts on Two Grand Projects: The European Constitution and the European Civil Code*, EUI Working Papers.Law 2010/04, p. 5.

63 Cherednychenko, *Fundamental Rights, Policy Issues and the Draft Common Frame of Reference for European Private Law*, in ERPL, 2010, vol.6, p. 63.

Now we have come to the point. If one moves from the assumption that the Charter of Fundamental Rights underlies the European Community legal system, rather then referring to the complementarity between fundamental rights and European contract law, one should rather refer to the subordination of the latter to the former, as was rightly argued by Chantal Mak at the end of a broad and accurate comparative analysis.[64]

After all, the controversy about the direct or indirect effect of fundamental or inviolable rights that was experienced in countries like Italy and Germany where the constitutionalisation of private law has taken place, was replicated with many similarities also regarding the rules of the European Convention on Human Rights and interpreters' difficult choices are due to several reasons: because the European Convention is an international act that is not directly applicable to domestic law, because *dignity* is not expressly mentioned in the Convention as the underlying value of the whole system of human rights and freedoms, because human freedoms include freedom of contract, which can be viewed as strengthening or restricting human rights.[65]

As a consequence, the dilemma before modern law-makers lies in the following: with a view to the correct and certain application of law, is it more appropriate to disregard fundamental rights in contract law provisions and protect them by means of interpretation or to mention them so that their protection is ensured regardless of the interpretation given? This implies, of course, a prerequisite: that freedom of contract cannot go so far as to legitimise the infringement of fundamental rights.

Following the suggestions of many members of their working group the Authors of the DCFR preferred to expressly mention fundamental rights, even if their protection is not far-reaching and the only remedy available for their contractual infringement is damages rather than contract invalidity.

The wording used in the *principes directeurs* of the new draft bill to reform contract law in the code civil supervised by François Terré[66] is a balanced solution, whereas fundamental rights were disregarded in the previous version by Pierre Catala. As a matter of fact, Article 4, paragraph 2, of Titre I Des Contrats states:

> "On ne peut porter atteinte aux libertés et droits fondamentaux que dans la mesure indispensabile à la protection d'un intérèt sérieux et légitime."

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64 Mak, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationship in Germany, the Netherlands, Italy and England*, Alphen aan der Rijn, 2008.

65 See Brownsword, *Freedom of Contract, Human Rights and Human Dignity*, in *The Foundations of European Private Law*, edited by R. Brownsword, H.-W. Micklitz, L. Niglia and S. Weatherill, Oxford and Portland, 2011, p.192.

66 *Pour une réforme due droit des contrats,* sous la direction de Francois Terré, Paris, 2009.

This wording suggested by Georges Rouhette[67] was welcome by Carole Aubert de Vincelles,[68] who emphasised that its specific application is to be found in Article 59 of the draft bill, which deals with the content of the contract.

Thus this discussion is not over: it is widely open!

67 Rouhette, *Regard sur l'avant-projet de réforme de droit des obligations*, in Rev.dr.comp., 4/2007, p. 1393.

68 Aubert de Vincelles, *Les principes généraux relatifs au droit des contrats*, in *Pour une réforme de droit des contrats, sous la direction de François Terré*, Paris, 2009, p. 115.

Chapter 2
European Contract Law

1. New Paths of Private Law

For several years I have participated in the meetings of Study Group for a European Civil Code, coordinated by Christian von Bar. This work has been a real training ground not only to understand the importance and the influence of comparative law in the evolution of legal forms of economic and social relationships, but also to deal with the problems of harmonisation of principles and the standardization of law. I have promoted this initiative to Italian and European lawyers. Now that I see the end of this work, for now a text only in outline, I am satisfied with it; and within the limits of the time I have been allocated, I would like to go over my reasons for this assessment. The work is the result of the researches done by three different groups: besides the Study Group, the aspects concerning consumer law were examined by the Acquis Group (Research Group on EC Private Law) leaded by Hans Schulte Nolke and Gianmaria Ajani; and the core of contract law is based on the Principles of European Contract Law, drafted by the commission leaded by Ole Lando and Hugh Beale. The text of the Draft Common Frame of Reference has been edited by Christian von Bar, Eric Clive and Hans Schulte-Nolke.

The DCFR pursues the aim of guaranteeing uniform principles on the subject of contracts in general and obligations in general, specific contracts, civil liability, unjustified enrichment, *negotiorum gestio* (benevolent intervention in another's affairs) and trusts, and it comprises the principles pertaining to the *acquis communautaire* on consumer law as well as terminological and notional definitions. It is the result of the process taking place in which the national legal systems are coming closer together, not only with regard to the Community directives passed, but also in the sector of general rules concerning the "common core" of civil law. Similar efforts are also being made in the fields of family law, insurance law and procedural remedies. It is not a simple restatement of the law in force, rather it proposes to introduce innovative rules to meet the needs of a modern and complex society like the one in which we operate. It does not sacrifice national models, rather it subsumes their shared principles, employing a terminology which is adaptable to different local contexts.

1.1. The frame of the DCFR

The text of the Draft cannot be considered in a reductive way as a simple "toolbox" which jurists, lawyers, judges and legislators can make use of to perform

their tasks and achieve their aims. In the first place it is a precious casket in which the cultures, trends and policies belonging to the European countries' national experience and to Community experience converge. It is not without reason that I use the expression "experience" rather than "legal rules" or "legal systems", because: it is necessary to take account not only of the text but its cultural origins and then of its practical application, since, as we know, legal texts have an actual life, which feeds on cases which see them "in action", on the additions of the interpreter and on the environmental conditions, so to speak, in which they are applied.

Seen from this perspective, then, the DCFR is a document which, for now, can only be examined superficially: we know how it originated, we know the aims it proposes, we know what its literal meaning is. In the next months, when the six volumes of commentary are published (with a total of over six thousand pages) we will be able to find out what its cultural roots were and the meaning that its authors wanted to give it. But we will only be able to understand it fully when it begins to be used in academic studies, in decision models and in legislation models. The other side of the coin has yet to be sculpted: and it will be sculpted by time, which is a great sculptor as Marguerite Yourcenar said, observing how the text is used.

In other words, for now it is only possible for us to see one side of the coin; a side which we can appreciate partly through the advance information collected in the studies which the authors of the Draft have begun to publish.

External observers have not, however, been idle. There has been an increase in seminars and opportunities for reflection, on the function of the "codes" in contemporary society, on "contractual justice" and on the economic aspects of the proposals for European contract law codification.

Two important conferences followed one another over a few weeks, the one in Rome, last September, under the patronage of the Italian Bar Council and the other in October, at the Sorbonne, under the aegis of the French European Commission presidency. On those two occasions many jurists expressed their opinions on the Draft's choices and on the contents of the rules which it contains.

In order to discuss the Draft jurists must carry out three complex operations.

The original text was written in English, and this will also be the case for the commentary prepared by the authors. The use of this language is not neutral, it presents positive and negative aspects, in other words it comes at a price. It is a known fact that legal texts are never translated literally, because the translation of a text from one language to another implies a conceptual translation, in which the nuances, the authentic meaning, the "flavour" of the words, the concepts, the figures of speech that are typical of every national culture, are lost. Law by its nature is a product of national cultures, as the experts on legal realism, sociologists and anthropologists of law have taught us.

Community law is no exception to this rule, because the regulations, the directives and the other sources of law are translated into the national languages and therefore imply the "conversion" of English and French terms (the languages in which the texts are initially written) in a context which is normally different to the original one; and comparative law is no exception either, because the jurist, however cosmopolitan he may be, has a "stamp", a kind of original sin, a mindset which he carries with him wherever he goes and whichever text he examines. Maybe, if we had all studied Roman Law alone, we could speak a lingua franca, Latin, and understand each other immediately in our use of terms and concepts, as occurred throughout the Middle Ages and the Renaissance; moving further along in time, a similar phenomenon occurred for the French language and law, from the end of the eighteenth century and for the first half of the nineteenth century in association with the Code Napoléon, or for the study of the Pandects and for the German language, from the second half of the nineteenth century to the 1940's.

However, today we live in a very different world, we have crossed national borders, even the Nòmos has been separated from the Earth; a universally known language is required, precisely the one I am using. The English language necessarily brings with it the ideas of common law, and an extraordinary experience of a pragmatic nature and of case law. But precisely for this reason further mediation is needed which goes beyond a simple literal translation.All these problems were discussed in a book – *Fondamenti di diritto privato europeo*[1] – written by Mads Andenas and myself, comparing the different models of legal system of the European continent: just writing the book we became aware that a "European private law" needs a European set of terms, notion and principles. We could perceive also that it was true what sir Basil Markesinis was predicting since many years, i.e. a great silent phenomenon of gradual convergence was going on. And that it was a choice left to the European legislator to let it develop gradually or to improve it through legal instruments. In any case, the interpreter's task is very hard.

The first operation therefore consists in understanding to what extent the English terms either correspond to their English meanings or allude to a non-autochthonous meaning, as the authors claim. This is why the definitions are useful: agreed or "stipulative" definitions, like those offered by the authors in their comments, or binding definitions, if they are offered by the Draft text itself. Indeed, in appendix to the text one finds a long list of definitions of the terms used in the formulation of the rules.

Are these "suggestions" which the interpreter can take into account, but without being obliged to agree with them? Or are they binding meanings for the interpreter? The issue of the binding nature of the definitions contained in a legal text is an ancient problem: the answer depends not only on the "legal strength" of the text, in other words on its position on the scale of sources of

[1] Milan, 2005.

law – to think in Kelsenian terms – but also of its authoritativeness. Legal hermeneutics teaches us that the freedom of the interpreter is not unlimited, but we also know that the interpreter does not tolerate excessive limitations and that, despite the definitions, interpretation overflows, it goes beyond, it adapts, it conforms, it shapes, in other words it "manipulates" the text. And this is how it should be, because the text has a life of its own, it is not conditioned by the intentions of its author, its meaning does not remain unchanged over time.

The second operation consists in translating the terms into the interpreter's own language: it is a necessary operation if one wants to share the text with jurists from each country of the Continent; it is an operation which on the one hand is psychologically spontaneous, and on the other hand complex, because the term, the notion, even the principle may not find its equivalent in the language and in the panorama of notions and concepts belonging to national experience. Therefore it is necessary either to create "new" terms, concepts and principles, or to proceed with similitude, absorption, fiction.

The third operation consists in a comparision with national experience, to check whether the choices made by the authors are better than those made by the legislators, judges, interpreters of a given system. Otherwise how would it be possible to persuade legal practitioners to abandon their system in order to substitute it with another? And would it be possible to impose a new system with a binding instrument?

By posing some of these questions I am already performing a manipulation: I am treating the Draft *as if it were* a civil code, which it is not, because the idea of a "code" belongs to bygone times; but it is true that, for those like me who come from a background of over two centuries of codified law, it is entirely natural to see the image of a new code in the Draft: a modern, flexible, tendentially systematic code, open to changes.

1.2. The objections to a "Europeanization" of private law

Whether or not it is a code, the DCFR does, nonetheless, constitute the most significant result of the "Europeanization" process of private law. Rather than waiting for national systems to spontaneously converge towards a "common law" built on practice and case law, with the circulation of ideas and models which contribute to maturing a shared concept of choices and concrete solutions, the authors of the DCFR proposed to set down in a text "negotiated" among academic experts from all the European countries, principles deemed acceptable and shareable also by legal practitioners. Thanks to the method used by the European Commission which supported this decision, the text was discussed with the stakeholders, representatives of businesses, consumers and professionals. The competence of the European Union to deal with this material was contested, the purely academic origin of the work was contested, the feasi-

bility of a decision which would impose a new model on all legal practitioners, on all economic practitioners, on all its users, was contested.

Reasons of economic and social usefulness, of uniform treatment of EU citizens and of appropriateness and modernity of the text support this undertaking. They are arguments which can be used to face other, more substantial objections to the "Europeanization" process of private law.

The first is a direct objection, and concerns the general intention of the processes underway.

This aversion also emerged during the discussion held in some seminars that I organised on behalf of the Italian Bar Council: it stems from the fear that national identities will be suppressed for the benefit of an insipid model, a kind of Harlequin costume, which would end up marginalizing the aspects which characterize the models upon which the distinguishing features of the various systems are built. It is easy, however, to answer this objection, not only with arguments of an economical nature, which favour the harmonisation of the rules in order to facilitate market integration, but also with arguments of a political nature, given that a uniform model would guarantee an equal status to all the legal systems, to all the citizens and to all the jurists in the European Union. And if the harmonisation models were welcomed in non-EU countries too, a uniform system for the whole Continent would be created, and so, crossing the borders, it would not be necessary to change stagecoach horses, to use Voltaire's metaphor on particularistic law. From the point of view of Italian law, I can assure you that the benefit would outweigh the cost, given that Italian law, like the Italian language, are these days little known abroad, and Italian law is rarely chosen by the contracting parties as the law of the contract, hence both the law and the language are recessive. Professionals, consumers, lawyers and judges would therefore be greatly helped if they could use a common regulatory text rather than having to apply foreign texts.

The second objection attacks this process from the viewpoint of "social" policy: consumer law is considered as a law belonging to "ordoliberal" systems, seemingly aimed at protecting the weakest sectors of society but actually concerned with guaranteeing the protection of strong interests; the convergence of fundamental rights and consumer rights in a European contract law would end up giving priority to strong interests to the detriment of weak interests. One could, however, answer that the balance between economic and social interests at stake will never affect fundamental rights, which constitute the inflexible core of relationships between individuals.

Moreover, it is these instruments of standardization that guarantee the protection of fundamental rights, as provided by the Draft in its introductory provisions.

And from the viewpoint of Italian law I can confirm that the initiatives to benefit the consumer have increased protection of the right to health, have strengthened the bargaining position of the individual and have allowed judges

to check economic operations with greater powers compared to those which the civil code allowed.

The third objection involves the fear that the harmonization process is too timid and sacrifices the protection standards already reached at national level. This seems to me to be the most convincing objection: yet considering some national models, like the French one, the English one and the German one, I do not think that this will be a risk.

However, I would like to add that these objections, like others which have emerged during thirty years of discussions, tend to only take account of the editorial component of regulatory processes. But we know very well – as the exponents of legal realism have taught us – that legal phenomena, cultural trends and the practice of applying the rules, are complex phenomena, of which the textual component is just one of the many aspects to be considered. Equally important, perhaps more so, is the creation of the rule, which reflects the mentality, the culture, the social environment, even the mood, of the interpreter. Therefore, with respect to one text, jurists who have different training do not react univocally; the Draft may have a propulsive function, and where its rules could seem less advanced than the national ones, it can be interpreted and adapted in order not to produce negative effects.

One should not, then, go too far in assigning a text a sacred value.

One example says it all. The Italian Constitution is one of the first and most modern constitutions in the post-war period. Despite coming into force in 1948 it is highly protective of civil rights, given the catalogue of individual and collective rights it contains. In some ways it is even more progressive than the Nice Charter, where it distinguishes between fundamental rights and economic rights, or where it awards the collectivity, as well as individuals, the protection of rights relating to "social groups". Therefore one could think that it offers Italian citizens greater – and better – protection than that which is provided by constitutions which do not contain a "bill of rights". And yet, this is not the case if one thinks of the present situation in which the legislature has prohibited the use of stem cells, it has introduced a status for embryos, it has limited access to artificial procreation, it chose not to grant legal status to de facto couples and it has suppressed the use of living wills. These are all issues which could be dealt with in a secular and positive way on the basis of the constitutional text in force, and instead they have been resolved by the Italian legislature in a completely negative way.

1.3. The DCFR, the Nice Charter and consumer law

The first text of the Draft has been published last year. The second – the "outline edition" – has been published a few months ago. To fully understand its importance it needs to be placed in the context of the evolution of private law. The Draft came to attention by coming into existence with other important

documents: on 12th December 2007 the Charter of fundamental rights, signed in Nice in 2000, was solemnly proclaimed, awarding the Charter legal status and no longer only political status (C 303 /01) GUC 303 of 14.12.2007, 1); on 8th October 2008 a proposal for a Community directive on consumer contracts was published (COM 2008, 614/4).

According to traditional interpretation, the Nice Charter, as a document of constitutional importance, should not involve civil law and relationships between individuals, because constitutions primarily concern relationships between the citizen and the State. Therefore the document should not regard the field of interest of civil law and the civil law scholar. This interpretative model has been abandoned for half a century now in Germany and in Italy, for thirty-five years in Spain and for a few years in Great Britain and in France. In the first place the discussion concerned fundamental rights as recognised and guaranteed by national constitutions; it then spread to constitutional principles shared by Member Countries of the European Union; then to subjective legal positions protected by the European Charter of Human Rights signed in Rome in 1950 and applied by the court based in Strasbourg; and then to the application of that Charter by the European Community Court of Justice based in Luxembourg; further still it spread to the application of the Nice Charter by that Court; and finally to the importance of fundamental rights in the context of relationships between individuals in Community rules and in national rules of Community origin.

Even where written constitutions do not exist, but there are laws which recognize fundamental rights, or where the European Charter of Human Rights signed in Rome in 1950 has been absorbed, the problem of applying fundamental rights to relationships between individuals has been resolved in a positive way. For its part, the European Court of Justice has, for many years, applied fundamental rights as belonging to the entirety of universally recognised general principles of law; recently it has applied the Nice Charter as if it were a document which already has legal status. Even where the written constitutions contain a bill of rights, fundamental rights have been strengthened by recognizing the binding nature of the European Charter of Human Rights. Recently this hermeneutic operation was carried out by the Italian Constitutional Court, with decisions nos. 348 and 349 of 2007. From this it can be hoped that the Court can be invested with the issue of the constitutionality of the recent laws which I mentioned before.

We are therefore dealing with a complex cultural, political and practical process, as an outcome of which – in the law in books and in the law in action – fundamental rights have taken on a vital role which pervades all relationships, of all types.

Alongside this process is the process of legally protecting the rights and interests of consumers. Here too we find different regulatory models in the national legal systems, which have introduced actual "consumer rights codes", as occurred in France, in Italy and as they are planning to introduce in Luxem-

bourg; or there are general laws, like in Spain; or ad hoc rules have been added to existing civil codes, as occurred in Germany. On a Community level the *acquis* concerning relationships between individuals has particularly developed in the sector of relationships with consumers. In order to avoid overlapping and grey areas, at Community level there has been a proposal for a general content directive to regulate, in a systematic way and at the highest level of harmonisation, contracts which have a professional as one party, and the consumer as the other. In this way the issue discussed at national level of relationships between general contract law and consumer law has been raised to a Community level. That is, whether the latter constitutes a specification of the former or a derogation of the former, or whether the latter tends to spread over the former, partially replacing it, or whether "radiating" over it, it constitutes an evolutionary factor.

The application of fundamental rights in relationships between individuals, the formation of a consumer rights code in the field of contracts and the drafting of a common frame of private law rules, are processes which for now are moving in parallel, they intersect in several places, but they seem destined to merge.

1.4. Fundamental rights and the DCFR

And so we come to one of the crucial aspects of private law, also reflected by the Draft, the issue of applying fundamental rights to relationships between individuals. In actual fact, the Draft is not only aimed at the Member States of the European Union, but it is only natural to consider it in the light of Community law, also considering the interest that it has aroused in the Community bodies.

Among the European Union's objectives, the European Charter of fundamental rights establishes human dignity (art. 1-2) as a basic value and specifies that sustainable development in Europe is based on a "a balanced economic growth and price stability, a highly competitive *social* market economy, aiming at full employment and *social progress*" (art. 1-3). The Charter recognizes and guarantees the rights of the individual to physical and mental integrity (art. II- 63), reaffirmed in the form of health protection (art. II-95), respect for family life (art. II-67) and personal data (art. II-68) and it specifically provides for "a *high level* of protection" for the consumer (art.II-98).

Therefore, it is necessary to distinguish between the demands of citizens which concern fundamental rights recognized in the Member Countries' constitutions and reaffirmed, in an even more extensive way, in the European Charter, and the so-called "economic rights", which are found on the same level as the rights of the "professional". The Resolution on consumer rights and interests of 1975 dealt, even then, with both categories of rights, but today the perspective has changed: even in Community law (which constitutes a legal system in itself, not assimilable to the national legal systems) it is now possible to use the formal

categories which distinguish the sources of law and order them according to a priority, as occurs in the national legal systems.

And since it is inconceivable that EU policies conflict with the fundamental rights recognized by the European Charter, the fundamental rights become a *limit* to Community action in this sector. Therefore art. 153 (ex 129) of the EC Treaty – which imposes on the Community the task of "contributing" to the protection of the health, safety and economic interests of consumers, and of considering their needs, must be reread in the light of the European Constitution provisions. Like national constitutions for which an interpretative process of "direct application to relationships between individuals" was created, the European Charter of fundamental rights also implies the direct application of the provisions contained within in to relationships between individuals.

What are the remedies for the violation of fundamental rights in an economic operation with a contractual legal guise?

Normally the regime of remedies is entrusted by Community law to the national systems and their application to national judges. However, in the case of violation of the principle of non-discrimination (which, naturally, does not exhaust the list of fundamental rights) the principles in which the *acquis* on consumer law has been consolidated (Acquis Principles) provide for compensation of economic and non economic loss (art. 3:201 (2)); on the other hand the DCFR provides for the application of remedies for "non performance" (art. III.–2:104); if the non-performance cannot be excused it is also possible to request "specific performance" (III.–3.101), or compensation, including non economic loss: III.–3.701).

The DCFR is therefore more advanced, from the perspective of protection of the individual, than the Acquis Principles. But this is, however, a sector which can only partially coincide with that of consumer protection in general, because from a contractual perspective it should not be possible (in my opinion) to take into account previous behaviour, which takes place in the precontractual phase, or in the case of a simple social contact which did not result in a contractual relationship. In other words, if the violation occurred before the contract was concluded, there is only room for compensation, but not for "specific performance" which would entail obligatory conclusion of the contract.

1.5. Consumer rights

In considering the responses to the Green Paper on the *acquis* concerning consumers (of 8.2.2007) as a whole, the Directorate general on the health and protection of consumers revealed that most of the interlocutors showed a propensity for adopting a general instrument aimed at the horizontal harmonisation of the rules on both cross-border and national contracts, an instrument which could entail greater legal consistency in the specific sectors considered. The majority (with 62%) is in favour of an instrument which introduces full

harmonisation, this is a position shared by the European Parliament, by the organization representing businesses (at least for some essential aspects, like the definition of consumer and professional), while most of the consumer associations are in favour minimum harmonisation. The notion of consumer should be maintained within the most circumscribed limits, concerning the natural person. Disagreements persist over the application of the good faith clause, which bodies representing business are opposed to. The negotiation of individual terms should, according to most people, exclude unfairness tests; the combination of the black list and the grey list of unfair terms is welcomed, while most interlocutors are against extending the unfairness test to terms which define the contract content and price. More articulated were the responses to questions on remedies for non-performance of information obligations; in most cases withdrawal is considered appropriate, this is accompanied by other remedies for individual types of breach. Instead, there are no univocal positions either on general remedies to contractual non-performance or on compensation.

Following the consultation the European Commission drafted a proposal for a European Parliament and Council directive on "consumer rights" [COM (2008) 614/4 of 8.10.2008]. The text provides fifty articles and several annexes comprising comparative forms and tables. The *exposé des motifs* includes sixty-six recitals and covers over twenty pages: the directive is aimed at revising the *acquis communautaire* on consumption, at simplifying the legal framework in force, at improving the functioning of the internal market and at resolving problems posed by the conclusion of transnational contracts. In this regard provisions were introduced on the choice of the applicable law with regard to contractual obligations (the so-called "Rome I Regulation" n.593 of 17.6.2008). However, the Commission acknowledged that the application of the Regulation, which allows the consumer to invoke national rules (art.6), does not rule out the possibility of interpretational conflicts which could hinder the circulation of goods and services. This led to a very important decision, consisting in getting around the problem of the applicable law by providing uniform contractual rules concerning the relationships between professionals and consumers so that in every national legal system of the European Union the same rules can apply. This result is obtained – in accordance with the Commission's intentions – by carrying out two operations: the drafting of a single text which coordinates the Community directives on the relationships between professionals and consumers, and choosing the level of harmonisation, described as "complete" or "total" and "targeted" (ciblé).

This is a very important decision because, until now, Community consumer law was entrusted to "minimum" directives, which, having established a "minimum common denominator" consisting of mandatory principles to be implemented in all the national legal systems, allowed individual legislatures to raise the level of protection. This system had the advantage of not lowering the protection of rights in the legal systems in which it was stronger compared to the legal systems offering less protection of civil rights, and at the same time of

allowing the latter to gradually adapt to the stronger models, in the sectors considered on different occasions. However, two negative aspects were found: the legal treatment of relationships with consumers ended up being different, and the level of protection they were guaranteed varied from country to country. Complete harmonisation, proposed by the Commission, is pressed for by professionals, who currently have to face significant transactional costs due to the variety of applicable rules, and by consumer associations, who on each occasion should advise their members on which law, of the two in consideration, is the best to apply to the contract. This, however implies a kind of restriction of the sector, whose evolution will exclusively depend – if the proposal is approved – on Community legislature, which will therefore limit domestic decisions.

The proposal does not concern all of the sector's directives, but just those covering some types of methods of concluding contracts (contracts concluded away from business premises, distance contracts) and some areas concerning content (unfair terms and sales guarantees). The outcome is a "mini consumer code" which regulates, according to the definitions and scope (arts. 1-4), information (arts. 5-7), withdrawal rights (arts. 8-20), some aspects of sales (arts. 21-29), contract terms (arts. 30-39) and aspects regarding application of the directive (arts. 40-50).

Art. 43 establishes that if the "applicable law" is that of a Member State's legal system, consumers cannot waive the rights conferred on them by the directive. This implies that the rules are imperative and that the fundamental difference between a directive like this, leaning towards complete harmonisation, and an actual regulation is scant, mainly consisting in legislative technique (implementation of principles, for the one, immediate enforcement, for the other), and in implementation times.

Another important choice involves the definitions of "consumer" and "professional", in which the sector of "liberal" work has been included. To tell the truth, this is simply a clarification, given that the notion of "professional" already included the businessman and the professional who carries out intellectual work, as defined in the civil code.

Some of the notable new elements are the obligations imposed on intermediaries acting on behalf of consumers, the uniform time limits for withdrawal rights, the imposition of risk of loss or damage of goods during delivery on the trader, the provision of a list of contract terms described as unfair and a list of contract terms that are presumed to be unfair in the absence of proof to the contrary, to be provided by the professional.

Rules which have remained outside the scope of the directive, despite being included in the *acquis communautaire*, regard unfair commercial practices, labelling, product safety, the liability of the manufacturer, tourism services, consumer credit and remedies. Nothing is said about the directive concerning services, which must be implemented by the Member States by December 2009, even though a partial overlapping of the rules is possible, especially as far as information and contract terms are concerned.

The directive will certainly also have an impact on the drafting of uniform principles regarding contracts, sources of non-contractual obligations and the discipline of sales.

At the same time two important works have been published: a compendium of the directives concerning consumer contracts and the progress of their implementation in the Member Countries, and a systematic reconstruction of the *acquis communautaire* on the matter. We are therefore moving towards a "codification" of Community consumer law.

The DCFR does not have a section dedicated to consumer law as part of its structure. Rather, it has followed the model of the BGB and has included special rules within the general structure concerning all private law relationships, thus relationships between consumers, relationships between professionals and consumers, and relationships between stronger and weaker parties: indeed, there are rules which try to rebalance the asymmetry of contracts when one of the parties is a "weaker" consumer, or a "weaker" professional.

The Draft marks, then, the expansion of consumer law into the field of general contract law, thus legitimizing the idea that today it is no longer relevant to talk about "consumer contracts" but it is necessary to talk about "asymmetrical" contracts, that is to say, about contracts that are regulated by taking into consideration the situation in which one party finds himself in a minority position compared to the counterpart, even if this does not involve a party ascribable to the category of consumers, minors, the naturally incompetent and so forth. I will return to this point shortly.

1.6. The drafters' choices

In order to appreciate, on the one hand, the enormous effort made by the authors, and on the other hand, the basic choices which they made in writing the Draft, it is necessary at this point to go into some details. Naturally, this is a brief analysis, given that the Draft is composed of ten books and an appendix containing definitions; each book is composed of dozens of rules, the definitions go on for dozens of pages; really, each rule, each definition deserves a comment; when the annotated edition is published, it will be possible to go on to make a more thorough analysis.

Even though, as I mentioned at the outset, the aims are different, comparison between the Draft and the codes in force is inevitable: for my part, the comparison will involve the Italian civil code, introduced in 1942, amended for the section on family law and succession in 1975, and updated on many other occasions. Unlike that which happened in Germany, or that which is happening in France and in Spain, there are no official projects in Italy to reform the law of obligations and of contracts; however in 2005 a "consumer code" was introduced, a sector-specific code in which the provisions on almost all relationships with consumers, including of course the implementation rules for the directives

on contracts and consumers, were brought together. Initially, the implementation rules for the directive on unfair terms and those for the directive on sales guarantees were added to the civil code, but in 2005 those rules converged in the sector-specific code.

I will not dwell upon the structure of the Draft, even though it would be interesting to understand the reasoning behind the positioning of the rules on obligations, which are placed after (Book III) rather than before contract rules (Book II) while, since the contract is one of the sources of obligations, we would expect a different choice. Also of interest are the rules on the "acquisition and loss of ownership of goods" (Book VIII), which in the Italian civil code are spread out in the book on property and in the other books, with regard to the discipline of individual contracts or the protection of rights; in the same way one can understand the emphasis placed on the "proprietary security rights in movable assets" (Book IX), which in the Italian civil code are just hinted at, given that one of the aims of the Draft consists in providing rules to encourage the integration of the internal market and the circulation of goods and services by giving certainty to relationships, confidence to businesses and protection to users. Instead, what is completely new for the Italian jurist are the rules on "trusts" (Book X), which in Italian law are either replaced with legal rules concerning trust agreements (*negozio fiducario*) or they derive from the international convention on this matter, as it is claimed that it also contains substantive law provisions.

There are many new elements on the subject of contracts. I will only dwell on a few of them, choosing those which may appear more important in the eyes of an Italian jurist.

The rules on contractual freedom, found at the beginning of book II, were the subject of extensive analysis during the seminar organised by the Italian Bar Council, which I mentioned before, but also in a seminar held at the Law Faculty of the University of Rome, La Sapienza.

In these two seminars the limits of contractual freedom were examined, understood as those involved in the relationship between mandatory and non mandatory rules, in the relationship between the legitimization of bargaining power and the abuse of bargaining power, and in applying the principle of transparency and the principle of good faith and fairness.

However, there are two aspects which are the most striking – I would say in a positive sense – to the Italian jurist, who in the Draft finds many rules which are congenial because they are already provided for by the civil code, on contract interpretation, on simulation etc.

I am referring to "pre-contractual duties" and to "unfair terms".

As I pointed out a few moments ago, Book II of the Draft contains rules on contracts in general, but within each institution it distinguishes between (i) rules aimed at regulating contracts concluded by contracting parties who are not qualified, (ii) rules aimed at regulating contracts concluded by consumers, (iii) rules aimed at regulating contracts concluded between "weak" profession-

als, and (iv) rules aimed at regulating contracts concluded by "weak" consumers. The first group of rules is not, however, neutral, as one may think at first sight. Because despite being aimed at all contracting parties, these rules contain correctives based on transparency of the contract, on good faith and fair behaviour, and on the prohibition of contractual abuse, which meet both the demand to "moralize" the market, and the demand to accommodate social needs which would not be fully met by the free play of the forces concerned.

Now then, Chapter 3 of Book II concerns the subject of "Marketing and pre-contractual duties" (II.–3:101-3:501). This subject is completely new with respect to the civil code which (the first of the modern codes) contains specific rules on the subject of negotiations and precontractual liability (arts. 1337-1338). In connection with the general principles relating to the application of the general "good faith" provision in the phase prior to contract conclusion and the obligation to inform the other party of the causes of the invalidity of the contract, Italian jurisprudence has completed the statutory provision by establishing the extra-contractual nature of the liability for violation of these provisions and the extent of the reimbursable loss contained in the so-called *pre-contractual liability* (reimbursement of the costs sustained during the negotiations and payment of the profits lost through not concluding other contracts. Obligations in the precontractual phase are therefore limited and not standardized: they particularly concern the suspension of negotiations without justification, but do not concern the obligation to disclose facts and circumstances, except for the causes of invalidity of the contract.

The fulfilment of precise precontractual information obligations concerning the list of data and the provision of explanatory notes and documents is only provided for by specials laws on contracts with the consumer and contracts concluded by banks, by insurance companies and by financial brokerage companies with their clients.

On the other hand the Draft raises the information obligations of businesses to a general rule (to be complied with vis-à-vis anyone, as the text says "another person") in the case of the sale of goods, assets and services: it does not specify in detail the information which must be given, but it employs a general clause, based on the reasonable expectation ("… reasonably expect …") of the counterpart, and takes account of the standards of quality and performance, described as "normal" under the "circumstances" (II.–3:101).

In the case of the counterpart also being a business, the violation of this duty corresponds to the failure to provide information which would be expected taking account of "good commercial practice"). Certainly, this is absolutely new in our experience, where negotiations between professionals are normally entrusted to the free market, except, precisely, for special rules.

The Draft also regulates precontractual information obligations with respect to the consumer who we may describe as "average" (II.–3:102) and the particularly disadvantaged consumer (II.–3:103); it provides rules on information provided in real time and by electronic means (II.–3:104, 3:105). It also

provides that the price, the name and the address of the business are provided (II.-3:107, 3:108).

On a general level, it provides that the information is clear and precise, and expressed in a plain and intelligible language (II.–3:106). This too is very new: in our legal system such a principle has not been codified; similar rules only apply to consumer contracts by virtue of the Community directive on unfair terms.

A similar principle is provided by the draft regarding terms which have been prepared by one party and submitted to the other (II.–9:402). In this case too, with a provision which is mandatory for the parties (II.–9:401) the terms must be drafted and communicated in a clear, simple and intelligible way.

In the case of breach of the precontractual obligations the penalty is the right to damages for loss ("loss") (II.–3:501), which goes beyond the simple *precontractual liability*. When the commentary is published it will be necessary to check whether the authors ascribe this case to the area of extra-contractual liability, rather than to that of contractual liability, with all the consequences that arise from this on the subject of the burden of proof and the limitation period of the legal action for damages. The choice of the authors, however, is clear: a contract concluded in breach of the precontractual obbligations is in itself valid, and not rescindable; on the other hand, in the case of "unfair" terms the term is not binding (II.–9:408).

Recent jurisprudence from the Italian Court of Cassation, on the other hand, provides for termination of the contract, if the information obligation is provided for by law, with the resulting compensation for contractual damage; but there are decisions which apply the remedy of nullity, with the resulting restitutions.

The Draft also provides special rules when the contract is concluded with the consumer (II.–3:102).

Another example of raising consumer rights to the level of general legislation is provided by the application of the principle of invalidity of the terms prepared by one party and submitted to the counterpart.

First time among modern codes, the Italian civil code provides rules on the standard terms drafted by one party and imposed to the other, without making distinctions of status; the terms are not invalid if they are approved by being specifically signed (art. 1341 para.2).

In the DCFR instead the terms are submitted to the scrutiny of "unfairness", that is "significant disadvantages" imposed on the contracting party through conduct contrary to good faith and fair dealing (II.–9:404), it does not make a difference whether the counterpart is a consumer or otherwise.

However, if the counterpart is a business, the Draft extends protection to it also and this goes beyond Community law itself which reserves this protection to the consumer only. The Draft, then, does not reflect, at least from this point of view, the tendency of the national legal systems nor the tendency of Community law; here it neither works as a restatement nor as a reflection of Community law, but accommodates the demands of certain academic opinion

and certain bodies (such as the English Law Commission) which had expressed their wish for the "moralization" of the market in the drafting of terms and in their imposition through controlling the abuse of bargaining power. In the case of contracts between businesses reference is not made to disadvantages but rather to serious breach of good commercial practice, good faith and fairness ("… grossly deviates from good commercial practice, contrary to good faith and fair dealing": II.–9:405). It is not exactly a test of abuse, since commercial practice is legitimized, in so far as it is "good", but the use of good faith and fairness in drafting the contract, in the appraisal of the individual clauses and in the comparison of them with clauses applied in normal practice, is however an important step forward.

The text has a number of implications, and it would be possible to continue this analysis for pages and pages. As we can see, the Draft is truly playing a driving role in the academic world and in the legal culture of every country, and it involves those whose who practice the legal professions: it is therefore a training ground in which jurists today test themselves in order to prepare the law of tomorrow.

2. Private law remedies in E.U. law

2.1. Rules on remedies, rules on private law relations including remedies, rules on private law not referred to remedies

The implementation of the principle of effectiveness, combined with the principle of subsidiarity and the principle of the national lawmaker's primary competence and the preliminary recourse to the remedies envisaged by the national trial system as against the E.U. lawmaker's competence and the operation of the remedies envisaged at E.U. level for the infringement of E.U. rules, shapes the discipline of remedies envisaged by the national system: they are both remedies regarding E.U. law infringements – on which there exists wide literature – and remedies concerning the private law relations regulated by the E.U. system on matters falling within its competence. In this paper I will tackle the latter aspect.

Nevertheless, in each of these two sectors, the rules on remedies and their implementation by judges are entrusted to internal law, provided that it safeguards the protected interests adequately, otherwise the E.U. system sets in to assist us. Hence, in this regard, the recourse to E.U. remedies is only residual.

This hierarchical order is well-consolidated in the European Court of Justice case law: recently it has been reaffirmed by the judgment of September 20, 2001, case C-453/99, Courage; the judgement of July 13, 2006, case C-295/04, Manfredi; the judgment of March 13, 2007, case C-432/05, Unibet (London) Ltd, Unibert International Ltd/Justitiekansiern.

In particular, with this last judgment, the Court reaffirmed that "the principle of effective judicial protection of an individual's rights under Community

law must be interpreted as meaning that it does not require the national legal order of a Member State to provide for a free-standing action for an examination of whether national provisions are compatible with article 49 of the E.C. Treaty, provided that other effective legal remedies, which are no less favourable than those governing similar domestic actions, make it possible for such a question of compatibility to be determined as a preliminary issue, which is a matter for the national court to establish".

By the judgment of October 26, 2006, case C-168/05 Mostaza Claro / Centro Movil Milenium SL) the Court had the opportunity of underlining that "according to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)". Some old precedents had already expressed this principle: significant cases in point are the judgment of the case C-45/76, Comet v. Produktschap and the judgment of the case C-33/76, Rewe-Zentralfinanz v. Landwirtschaftskammer.

Hence the possibility of envisaging three different options:

(i) E.U. instruments designed to specifically regulate the remedies regarding the protection of individuals' rights and interests, both in the cases when they are protected individually and in the cases when they are protected collectively;
(ii) E.U. instruments designed to establish substantive law provisions regarding the relations with individuals, including rules on remedies;
(iii) E.U. instruments designed to establish substantive law provisions regarding the relations with individuals not directly envisaging rules on remedies and, hence, leading to the automatic referral to the remedies provided for by the internal system, with specific reference to the case under consideration or applicable to it, or to the infringement of E.U. law rules with the consequent State responsibility for failure to envisage the remedy.

In the first case E.U. rules shall be adapted to the trial system, but can introduce new remedies or new conceptions of the remedies existing at national level. The most evident example is the Directive 98/27/EC of May 19, 1998 on injunctions for the protection of consumers' interests, with which[2] action for an injunction

[2] (2) whereas current mechanisms available both at national and at Community level for ensuring compliance with those Directives do not always allow infringements harmful to the collective interests of consumers to be terminated in good time; whereas collective interests mean interests which do not include the cumulation of interests of indi-

were envisaged in article 2. (The provision reads as follows: "1. Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by qualified entities within the meaning of article 3 seeking: a) an order with all due expediency where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement; b) where appropriate, envisage measures such as the publication of the decision, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement; c) insofar as the legal system of the Member State concerned so permits, an order against the losing defendant for payments into the public purse or to any other beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time-limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions"). The directive was implemented with Law No. 39 of March 1, 2002 (which added paragraph 5*bis* to article 3 of Law no. 281 of 1998) and now its provisions are included in the articles 139-140 of the Consumer Code (Legislative Decree No. 206 of September 6, 2005 and subsequent amendments). The provisions introduce remedies which add to the general actions for an injunction and the urgent proceedings under articles 669 and 700 of the Code of civil procedure.

In the second case, the most evident example is the Directive No. 13/93 EC of April 5, 1993 on unfair terms in consumer contracts which, in article 6, lays down that

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viduals who have been harmed by an infringement; whereas this is without prejudice to individual actions brought by individuals who have been harmed by an infringement; (3) whereas, as far as the purpose of bringing about the cessation of practices that are unlawful under the national provisions applicable is concerned, the effectiveness of national measures transposing the above Directives including protective measures that go beyond the level required by those Directives, provided they are compatible with the Treaty and allowed by those Directives, may be thwarted where those practices produce effects in a Member State other than that in which they originate; (4) whereas these difficulties can disrupt the smooth functioning of the internal market, their consequence being that it is sufficient to move the source of an unlawful practice to another country in order to place it out of reach of all forms of enforcement; whereas this constitutes a distortion of competition; 6) whereas those practices often extend beyond the frontiers between the Member States; whereas there is an urgent need for some degree of approximation of national provisions designed to enjoin the cessation of the abovementioned unlawful practices irrespective of the country in which the unlawful practice has produced its effects; whereas, with regard to jurisdiction, this is without prejudice to the rules of private international law and the Conventions in force between Member States, while respecting the general obligations of the Member States deriving from the Treaty, in particular those related to the smooth functioning of the internal market."

"1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms."

Article 7 reads as follows:
"1. Member States shall ensure that, in the interests of consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.
2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms."

The implementation of the Directive, which took place at first with Law No. 52 of 1996 and subsequently with the drafting of the Consumer Code and the inclusion in that text of the provisions envisaged by the civil Code (articles 1469 bis-sexies) in articles 33-38, has raised two issues of extraordinary relevance: (i) the adjustment to the internal legal system of the remedy designed to deprive of their effects the contract terms defined as unfair terms, at first identified in *relative and partial ineffectiveness* and subsequently in *relative and partial nullity* (article 36); (ii) the introduction of special actions for an injunction, which legitimise the associations of consumers, professionals and the Chambers of Commerce to initiate legal actions to inhibit the use of the general contract terms defined as "unfair terms".

The implementation of the Directive has led to a proliferation of different remedies in national legal systems. There exists systems where the precept of the "non-binding nature" of unfair terms was construed as implying a remedy of *absolute nullity* and its enforcement *ex officio*; there are other systems where nullity is relative and some others in which nullity is relative and partial. There are systems in which remedies are not well-defined; there are others which enable the judge – the competent administrative authority or the Ombudsman – to change, rectify and adapt the content of unfair terms according to the criteria of good faith and balancing of advantages between the parties to the contract.

The European Court of Justice established that it is a matter for the national judge to define the ways with which the term can be considered null and void (judgment of June 27, 2000, joined cases C-240/98 and C-244/98, Océano Grupo Editorial SA and Murciano Quintero) and that national judges can apply the remedy of nullity in any case and not only in the case of a term regarding jurisdiction (judgment of November 21, 2002, C-473/2000, Cofidis vs. Fredout. Furthermore, in each of these judgments (including the already mentioned Mo-

staza Claro case) the ECJ established that national judges can collect *ex officio* the evidence that the terms are unfair.

The introduction of rules designed to inhibit the use of unfair terms was made in an inaccurate way. Given the reference made by article 37 to article 137 regarding the national register of consumers' associations, the problem was raised of achieving coordination between the rules on injunctions in this specific sector and the general actions for an injunction designed to protect consumers' rights as envisaged by articles 139-140 of the Consumer Code. Jurists mainly think that there is no general/special relationship, and that the provisions enshrined in article 37 must be regarded as a reformulation of article 139.

Recently case-law has established that "even though article 37 of the Consumer Code makes reference both to the actions brought by the associations of consumers, professionals and the Chambers of Commerce, it applies only to the actions brought by the latter since the former fall within the scope of article 140. Hence, from the implementation viewpoint, the actions so brought by these subjects will be different both in terms of subjective and objective scope. Consumers' associations (such as Adiconsum) are entitled to initiate actions with a view to protecting collective rights and interests, only when registered in the list under article 137 and according to the terms under article 140 which, unlike article 37, besides injunction and the publication of the decision, envisages the adoption of corrective measures capable of eliminating or correcting the damaging effects of the infringements ascertained. Hence, the so-called injunctive class actions, under the previously mentioned provisions, on the one side aim at putting an end to the already existing illegal behaviours and, on the other, at imposing on the perpetrator of the infringement, which harms consumers' interests, an obligation of refraining in the future from behaviours, the unlawfulness of which has been ascertained." (In particular, the court ordered the defendant bank to refrain from rejecting the requests made by its current accounts holders (consumers) designed to recalculate the debt exposure after deducting the quarterly capitalisation or the actions for money had and received as a result of the debit quarterly capitalisation applied) (judgment No. 873 pronounced by the Court of Palermo, on February 20, 2008).

In the third case no remedies are envisaged and therefore the choice of the most appropriate remedies is entrusted to the national lawmaker and their implementation to the national judge. Hence, a wide range of hypotheses. The most patent example is the infringement of the pre-contractual duties of information, for which every legal order has chosen its remedy – except for the Directive on distance and off-premises sales, which directly envisages the remedy of extending the time-limit for consumers to terminate the contract. The debate is still open in legal theory and case-law and remedies such as nullity, termination or breach of contract with compensation for the damage suffered are taken on a case-by-case basis. The last solution was adopted by the joint Sections of the Court of Cassation with ruling No. 26724 of December 19, 2007.

The same holds true for unfair trade practices, for which the Directive 2005/29/EC and the implementing Legislative Decree No. 146 of August 2, 2007, now transposed into the Consumer Code (article 20 and subsequent ones), envisages administrative penalties (which, in the Italian system are a matter for the Regulatory and Supervisory Authority for Competition and Market to decide), but does not envisage anything in relation to ordinary remedies. Article 27, paragraph 15, of the Consumer Code refers to the ordinary judge's competence over unfair competition practices; however, there are jurists who question the applicability of article 2043 of the civil Code – even though it is not easy for consumers to prove the existence of a tort – or the application of remedies inherent in the vices of the will which, however, have never been favourably viewed by case-law on these matters.

2.2. The implementation of E.U. law by means of private enforcement

The impact of E.U. law on national law can be appreciated also from another viewpoint, consisting in meeting public interests, by using private enforcement remedies. In this regard, the remedy pursues two aims: the protection of the interest held by the individual and, at the same time, the protection of the general and collective interest. A case in point is the so-called *private enforcement* on antitrust matters. Here we can see the overlapping effects of the decisions taken by the E.U. authorities – Regulations (No.773/2004 of April 7, 2004 and No. 139/2004 of January 20, 2004), some European Parliament' Resolutions (A-6-0123/2009 of March 26, 2009 and A-6-0152/2007 of April 25, 2007), the European Commission's Green Paper (COM(2005) 672 final of December 19, 2005) and White Paper (COM (2008) 165 final of April 2, 2008) – as well as decisions pronounced by E.U. judges (European Court of Justice, decision of July 13, 2006, cases C-295/04, 296/04, 297/04, 298/04, Manfredi vs. Lloyd Adriatico) and the decisions pronounced by the national judges judging on points of law (Joint Sections of the Court of Cassation No. 2207 of February 4, 2005) and on points of fact. There exist also many comparative law studies and therefore we can say that there is huge literature on the subject.

This trend based on the recourse to private enforcement remedies in actions brought by subjects affected by infringements of competition rules was started by the European Court of Justice which laid down that, with a view to ensuring full effectiveness of article 81 of the Treaty, individuals and companies may initiate legal actions for compensation of the damage suffered. These legal actions may be brought both at individual or collective levels by resorting – where envisaged – to class actions or alternative dispute resolution mechanisms. Obviously these are complementary means compared to those falling within the competence and the activity of the relevant administrative authorities for market regulation and supervision.

With reference to tortious liability, in its latest Resolution the European Parliament has recommended that the principle of fault should always be complied with, subject to the fact that national regulations envisage the presumption of absolute and relative fault; that the notion of damage should be defined at E.U. level, including actual damage and loss of profits; that a uniform statute of limitations shall be envisaged, also in case of tort reiteration – however, no shorter than five years – by referring the regulation of individual actions to national legislation.

In its White Paper, the European Commission recommended the spreading of the principle established by the European Court of Justice in the Manfredi case, whereby whoever has suffered damage as a result of the infringement of competition rules may be compensated. With a view to reaching this goal, it has envisaged both collective and individual actions: class actions according to the opt-in model (whereby the benefits of the collective action – and the resulting right to compensation – only extend to those persons who expressly join the action), with information duties designed to overcome the Parties' position asymmetry and with the judges' freedom to collect evidence. In relation to the principle of fault – since we can say that the fault gives rise to a sort of "objective fault", the Commission proposed to reverse the burden of the proof: the professionals who infringe competition rules shall not be held responsible only if they can prove that their behaviours were caused by an excusable mistake. For compensation purposes, the Commission recommended, *inter alia,* that the damaged parties could "invoke for their defence the transfer of the overcharge" and that also "indirect buyers" could benefit from this protection.

These principles had already been shared by the Court of Cassation in the case regarding the agreements reached by some insurance companies on the tariffs to be charged in mandatory insurance contracts on liability for road vehicle accidents, when it admitted the possibility for consumers to bring – before the relevant Court of Appeal – actions for declaring null and void the individual contract "downstream" (namely reached following upon the agreements between insurance companies) and be compensated for damage pursuant to article 33 of Law No. 287 of 1990.

This line of decision was shared by the European Court of Justice in the Manfredi case, since the agreement reached by insurance companies -designed to exchange information and agree on practices to treat the insured parties – has a direct or indirect, as well as real or potential, effect on customers' underwriting of insurance policies. Said agreement must be considered null and void and such as to legitimise the right to ask for compensation: the national legal order shall establish the (national) judges' competence and the statute of limitations, as well as the possibility of imposing punitive damages and quantify them, always in accordance with the principles of equivalence and effectiveness. On the basis of these same principles, the European Court of Justice laid down that everybody should have the right to ask for compensation, including actual damage, loss of profits and interests.

2.3. Contractual remedies in the draft Directive on "Consumer Rights" [COM (2008) 614 final] and in the Draft Common Frame of Reference

a) The E.U. draft Directive on consumer contracts

The European Commission drafted a proposal for a Directive of the European Parliament and the Council on "consumer rights" [COM (2008) 614/4 of October 8, 2008). The text includes fifty articles and some annexes consisting in forms and comparative tables. The "explanatory memorandum" ("exposé des motifs") includes sixty-six "whereas" (twenty pages): the Directive is aimed at reviewing and revising the *Consumer Acquis Communitaire;* streamlining the current regulatory framework; improving the internal market operation and solving the problems posed by the conclusion of transnational contracts. In this respect, provisions were introduced with specific reference to the applicable law for contractual obligations (the so-called "Rome I Regulation" No. 593 of June 17, 2008). Nevertheless, the Commission has taken note that the implementation of the Regulation, which enables consumers to refer to national laws (article 6), does not rule out that such interpretation conflicts may arise as to hamper the free circulation of goods and services. Hence the very relevant choice it made, consisting in getting round the obstacles of applicable law by envisaging uniform contract rules regarding the relations between professionals and consumers so that the same rules may be applied in every Member State's national legal order. This result is reached by the Commission with two operations: the drafting of a single consolidated text coordinating the E.U. Directives on relations between professionals and consumers and the selection of the level of harmonisation defined as "full" or "total" and "targeted" ("ciblé").

This choice is particularly relevant since until that time the Community consumer law had been entrusted to "minimal" Directives, which – after establishing a sort of "lowest common denominator", consisting in mandatory principles to be implemented in all national legal orders, enabled the individual lawmakers to raise the level of protection. The system had the advantage of not reducing the protection of rights in the legal orders in which it was stronger and concurrently enable the legal orders with weaker forms of protection to gradually adapt them to the stronger models in the sectors considered on a case-by-case basis. Nevertheless, two negative aspects could be noted: the legal treatment of relations with consumers ended up by being variegated and diversified and the degree of protection provided to them changed from country to country. The full harmonisation proposed by the European Commission is called for by professionals, who currently have to face significant costs for dispute settlement as a result of the different applicable rules, and by consumers' associations, which should suggest to their members the best law to be applied to the contract (between the two under consideration) on a case-by-case basis. It implies, however, a sort of "regimentation" of the sector, the evolution of

which – in case of adoption of the proposal – will depend only on the Community lawmaker, who will hence limit internal choices.

The proposal does not regard all the Directives of the sector, but only those concerning some ways to conclude contracts (distance and off-premises contracts) and some aspects related to the content (unfair terms and sales guarantees). The result is a Consumer "mini-Code" in which, after the definitions and scope of application (articles 1-4), there are provisions on consumer information (article 5-7); right of withdrawal (articles 8-20); other consumer rights specific to sales contracts (articles 21-29); contract terms (articles 30-39) and general provisions regarding the implementation of the Directive (articles 40-50).

Article 43 lays down that if the "law applicable to the contract" is the law of a Member State, consumers may not waive the rights conferred on them by the Directive. This implies that the rules are mandatory and that the difference between such a Directive – designed to reach full harmonization – and a real Regulation is small, since it mainly lies in the legislative technique (implementation of principles in the former case, direct execution in the latter case) and implementing schedule.

Another significant choice made regarded the definitions of "consumer" and "trader", in which the sector of "liberal professions" was included. Indeed, it is a mere clarification, since the concept of "trader" already included entrepreneurs and professionals performing intellectual activities as defined by the civil Code.

The new elements include the obligations imposed on the intermediaries who conclude contracts in the name of and on behalf of consumers; uniform time-limits for the right of withdrawal; the trader's liability for any goods loss or damage during delivery; a list of unfair terms and a list of terms which are presumed to be unfair unless the trader proves otherwise.

The rules which, though included in the *acquis communautaire,* remained outside the scope of the Directive regard unfair trade practices, labeling, product safety, product's liability, tourist services, consumer credit and remedies. Nothing was said in relation to the Service Directive, which had to be implemented by Member States by December 2009, even though we can say that there is a partial overlapping of rules, with specific reference to information and contract terms.

The Directive will certainly have an impact on the drafting of uniform principles on contracts, the sources of non-contractual obligations and sales regulations.

Meanwhile two important works have been published: a digest of Directives on consumer contracts and the state of their implementation in the Member States, as well as a systematic review of the *acquis communautaire* on the matter. Hence, we are moving towards a "codification" of consumer law at E.U. level.

b) The Draft Common Frame of Reference

In 2008 the text of a draft European civil Code – vaguely defined as "Draft Common Frame of Reference" – was published. It had been prepared by an academic Committee coordinated by some academics (Christian von Bar, Eric Clive, Hans Schulte-Noelke). The text was updated in 2009.

With a view to realising the huge efforts made by the drafters, on the one hand, and the basic choices they made in preparing the Draft, on the other, we need to enter into some details. Obviously, my analysis will be concise since the Draft is composed of ten books and an appendix of definitions. Each book includes dozens of rules and the appendix of definitions is thick; each rule and each definition would deserve a comment. When the commented version is published, it will be possible to make a more in-depth analysis.

Even though the aims are different, it is inevitable to draw a comparison between the Draft and the current Codes. Unlike what has happened in Germany, or is happening in France and Spain, in Italy there are no official projects to reform the contract law and the law of obligation; nevertheless, in 2005, the "Consumer Code" was introduced, a sector code encompassing the provisions regarding almost all consumer relations, obviously including the implementing rules of the Consumer Contract Directives. Initially, the implementing rules of the Unfair Term Directive and the implementing rules of the Sales Guarantee Directive had been included in the civil Code, but since 2005 they have been merged into the sector code.

The Draft structure has some inconsistencies for Italian jurists, for example in relation to the collocation of the rules on obligations and corresponding rights (Book III), which are placed after rather than before the rules on contracts and other juridical acts (Book II), whereas a different choice could be expected since the contract is one of the sources of obligations. Interesting rules are envisaged on the "acquisition and loss of ownership of goods" (Book VIII) which, in the Italian civil Code, are scattered in the Book on ownership and in the other Books, with reference to the rules on individual contracts or the protection of rights. Likewise, we can understand the emphasis laid on the "proprietary security rights in movable assets" (Book IX), which in the Italian civil Code are just mentioned, considering that one of the Draft aims is to draw up rules conducive to the internal market integration; the free movement of goods and services by providing a certain and sure framework for entrepreneurs and consumers, as well as the protection of their rights. The rules on "trusts" (Book X) are completely new for Italian jurists: in the Italian system these rules are replaced by the case-law rules on the so-called "negozio fiduciario" or result from the international Convention on the matter since it is believed that it also includes substantive law rules.

There are many new elements on contracts. The limits to the freedom of contract are seen in the relationship between mandatory and non-mandatory

rules; the relationship between lawfulness and abuse of power in contracts and the implementation of the principles of transparency, good faith and fairness.

Nevertheless, there are two aspects which favourably impress Italian jurists, who can find many congenial rules in the Draft since they are already envisaged by the *Civil code*, such as those on the object and interpretation of contracts, simulation, etc., namely "pre-contractual duties" and "unfair terms". Book II of the Draft enshrines rules regarding contracts in general, but inside each of them it makes a distinction between (i) the rules designed to regulate the contracts concluded by non-qualified contracting parties; (ii) the rules designed to regulate the contracts concluded by consumers; (iii) the rules designed to regulate the contracts concluded by "weak" traders; (iv) the rules designed to regulate the contracts concluded by "weak" consumers. The first set of rules, however, is not neutral, as we could think at first glance, because, though being addressed to all contracting parties, these rules include correctives – based on contract transparency, good faith and fairness of behavior and the ban of abuse of power in contracts – which meet both the need to "moralise" the market and the need to satisfy social demands that, otherwise, would not be fully met by the free play of market forces.

Chapter 3 of Book II regards the "marketing and pre-contractual duties" (II.–3:101-3:501). This matter is completely new compared to the Italian *civil Code,* which enshrines (first among modern codes) specific rules on pre-contractual negotiations and liability (articles 1337-1338). Faced with the general principles related to the implementation of the general clause of "good faith" in the phase preceding the conclusion of the contract and the obligation to inform the other party of the reasons for nullity of the contract, the Italian case-law completed the rule by providing for the tortious liability resulting from the infringement of these rules and the amount of compensation included in the so-called *negative interest* (refund of the costs borne during negotiations and the profits lost for not having concluded other contracts). Hence, pre-contractual duties are limited and not typified: they regard, in particular, the unjustified breaking off of negotiations, but not the obligation to *disclose* facts and circumstances, subject to the reasons for contract nullity.

The fulfillment of precise pre-contractual information duties regarding the list of data and the transmission of explanatory notes and documents is envisaged only by special laws related to consumer contracts and the contracts concluded by banks, insurance companies and financial brokerage companies with their clients.

Conversely, the Draft regards the "business" information duties as a general provision (to be complied vis-à-vis "another person") in the case of sale of goods, assets and services: it does not identifies in detail the information to be provided, but use a general clause, based on what "another person" may "… reasonably expect …" and considers the quality standard and the service standard as "normal under the circumstances" (II.–3:101).

If "another person" is also a "business", the test to be applied is whether the failure to provide the information would deviate from "good commercial practice". Certainly this is an absolute novelty in our experience, in which negotiations between traders are usually entrusted to the free market, subject to special provisions.

The Draft also regulates the pre-contractual information duties vis-à-vis "average" consumers (II.–3:102) and consumers who are at a particular disadvantage (II.–3:103). It lays down rules on information duties in real-time distance communications and by electronic means (II.–3:104, 3:105). It also envisages the provision of information about price and additional charges and about address and identity of business (II.–3:107, 3:108).

In general terms, it envisages that the information must be clear and precise and expressed in plain and intelligible language (II.–3:106). This is another great novelty: in the Italian system such a principle has not been enshrined; similar rules apply only to consumer contracts as a result of the E.U. Unfair Term Directive.

A similar principle is enshrined in the Draft with reference to the terms not individually negotiated (II.–9:402). Again in this case, by mandatory provisions (II.–9:401) the terms shall be drafted and communicated in plain and intelligible language. Otherwise they shall be considered "unfair" and hence not binding on the parties.

When pre-contractual duties are breached, the other person has a right to damages for the "loss"(II.–3:501), which goes well beyond the mere *negative interest*. When comments are published, we shall see whether the drafters consider this specific case to fall within the scope of tortious liability or rather contractual liability with all the ensuing consequences in terms of burden of the proof and statute of limitations for actions for damages. The choice made by the drafters is clear: the contract concluded by infringing pre-contractual duties is valid in itself and cannot be terminated ("if the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties"); on the contrary, in case of "unfair" terms, they shall not be binding on the parties (II.–9:408).

On the contrary, as previously said, the recent case-law of the Italian Court of Cassation envisages the termination of the contract when the information duty is provided for by law, with the related compensation for the contract damage suffered; nevertheless there are judgments which apply the remedy of nullity of the contract with the related restitutions.

Moreover, the Draft envisages special rules and duties in case of contracts concluded with consumers (II.–3:102).

A further example of the fact that consumer law was raised to the status of general regulation is provided by the implementation of the principle of invalidity of the terms not individually negotiated and supplied by the other party.

For the first time in modern codes, the *civil Code* envisages rules on terms not individually negotiated and supplied by the other party without making any

difference of status; nevertheless, when the terms are accepted by specifically subscribing to them, they are not null and void (article 1341, paragraph 2).

In the Draft the terms are subjected to the test of "unfairness", namely terms supplied by a party which "significantly disadvantages" the other party, contrary to good faith and fair dealing (II.–9:404): there is no difference whether the other party is a consumer or not.

When the other party is a "business", the Draft extends protection also to it and goes well beyond the Community law itself, which reserves this protection only to consumers. Hence, at least from this viewpoint, the Draft does not reflect the line and orientations of national systems and Community law. It does not pose itself as a *restatement* and does not even reflect Community law, but rather meets the demands of some jurists and organisations (such as the English Law Commission) that had formulated the wish of a moralisation of the market while drafting terms and supplying them by checking possible abuses of power in contracts. In the case of contracts between businesses no reference shall be made to the terms which "significantly disadvantages" the other party, but rather to terms of such a nature that their use "… grossly deviates from good commercial practice, contrary to good faith and fair dealing". (II.–9:405). It is not really a check on abuses, considering that "good" commercial practice is regarded as lawful, but the use of good faith and fair dealing in drafting the contract, evaluating its individual terms and comparing them with the standard terms applied in common practice is a great step forward.

Furthermore remedies are suggested for contract termination, which are similar to those envisaged by the Italian civil Code.

2.4. Individual and collective remedies: class action and alternative dispute resolution

The E.U. initiatives undertaken some years ago proved essential to promote Alternative Dispute Resolution (ADR): the two E.U. Commission Recommendations (Commission Recommendation no. 257 of March 30, 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes; Commission Recommendation no. 1016 of April 4, 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes) and the E.U. Commission Green Paper of April 19, 2002 (COM 2002, 196).

Since those years, organisations and consumers' associations have promoted a series of projects on the matter. Rules have been envisaged on individual out-of-court settlements and prepared by Chambers of Commerce, professional associations (the Bar, in particular) and consumers' association themselves. One of the issues which should be tackled urgently is the drafting and adoption of alternative dispute resolution terms, which if included in "adhesion contracts" could be regarded as regarded as unfair.

By Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, the E.U. authorities stressed – as can be read in the "whereas" – that (2) the principle of access to justice is fundamental and, with a view to facilitating better access to justice, the European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States. As specified in the "whereas", this because (6) mediation can provide a cost-effective and quick extra-judicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become ever more pronounced in situations displaying cross-border elements.[3]

With a view to facilitating the implementation of mechanisms for out-of-court dispute settlement, the Italian lawmaker took actions in some specific sectors.

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[3] The Directive applies to the cases in which a judicial body refers the parties to a mediation process or in which national law provides for mediation. (13) The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. (18) In the field of consumer protection, the Commission has adopted a Recommendation establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users. Any mediators or organisations coming within the scope of that Recommendation should be encouraged to respect its principles. In order to facilitate the dissemination of information concerning such bodies, the Commission should set up a database of out-of-court schemes which Member States consider as respecting the principles of that Recommendation. (19) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable. (20) The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [4], or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

The "provisions to protect savings and regulate financial markets" enshrined in Law No. 262 of December 28, 2005 are the outcome of a regulatory process which – initially promoted to coordinate the Financial Brokerage Consolidated Act, the Consolidated Banking Law and the reform of corporate law – has taken up increasing tasks and raised savers' ever greater expectations, as a result of the financial scandals occurred in Italy over the last five years. The lawmaker has only partially met the requirements resulting from the wide and systematic project prepared at that time and has not cared about coordinating the new provisions with the other rules entered into force few months before its adoption: in particular, two «sector codes» such as the Consumer Code (Legislative Decree No. 206 of September 6, 2005) and the Private Insurance Code (Legislative Decree No. 209 of September 7, 2005). It is worth noting that also these two Codes had not been coordinated each other. Certainly, the general principles of the new law and its goals can be shared and it is equally true that the law "marks a decisive turning point not only in the ways designed to regulate the Italian financial sector, but also in Italy's legal and financial culture". Nevertheless, the comments gradually made on the text have evidences aporias, shortcomings and interpretation obscurities, which would require a corrective legislative intervention, with a view not to leaving issues of fundamental interest for savers' protection unresolved.

However, issues such as corporate governance audits, transparency in corporate relations, the relations between banks and companies, banks' conflicts of interest in providing investment services, the circulation of financial products, rules of behaviour, the out-of-court settlement of disputes and the creation of a guarantee fund constitute a set of sound measures, which are already supposed to improve the investors' situation significantly.

Reverting to unmet expectations, we can make a distinction between the matters tackled by the new rules (such as, by way of example, conflicts of interest, rules of behaviour, the out-of-court settlement of disputes) and the matters neglected by the new provisions such as, in particular, remedies in case of infringement of the legislative obligations imposed on brokers when concluding contracts with savers.

The out-of-court settlement of disputes would deserve a more in-depth analysis: article 128*bis* added to the Consolidated Banking Law obliges banks and financial brokers to «adhere» to systems for the extra-judicial settlement of disputes with consumers.

In the text no definition of *consumer* is provided.

We can certainly appreciate the fact that, apart from consumer credit, this word appears for the first time in the framework of regulations such as banking and financial rules in which the professional operator's counterpart has always been defined as *client*. Nevertheless, the definition of consumer is much controversial, not only due to the many legislative formulations enshrined in the Consumer Code and the rules not included in the Code, but also due to the

definition emerging in a wide and diversifies case-law, going well beyond the decisions taken by the European Court of Justice and the Constitutional Court.

Moreover, it is worth noting that the procedures are a matter for the Interministerial Committee for Credit and Savings (CICR) to deliberate, upon a proposal of the Bank of Italy. It is necessary to ensure the impartiality of the deciding body, the composition of which is entrusted to the CICR itself, as well as the representativeness of the subjects concerned. The aims pursued are quickness and cost-effectiveness of settlement and effectiveness and enforceability of the protection. Even though we do not want to quibble on the appropriateness of referring to an administrative deliberation the creation of said bodies, which affect interests having the nature of subjective rights, it is worth underlining that no details are provided on trial procedures, the adversary system principle, the nature of decision (which should be taken in equity, rather than in law), the inclusion of dispute settlement mechanisms in contract terms underwritten by clients, the deciding body's competence and, in particular, the nature of alternative dispute resolution (ADR), which could be merely based on conciliation, mediation or arbitration.

Pending the final text of rules regarding the introduction of collective actions – or an Italian-style class action – the issue was raised whether it is appropriate to resort to extra-judicial procedures also in these cases, as suggested by the European Commission in a workshop organised in Lisbon in November 2007. The text designed to amend article 140 bis of the Consumer Code already envisaged the introduction of an extra-judicial procedure before deciding to bring a (collective) action. The effects of these regulations have been suspended, and the text will be changed according to a bill approved by one of the two House of Parliament, which no longer envisages the recourse to alternative dispute resolution.

On the contrary the bill envisages a model of "class" action with the definition of the requirements to be met for belonging to the "class"; the enforcement of the requirements for the action admissibility; compensation for damage in the sectors in which the action can be brought (contracts covered by the provisions of articles 1341-1342, product's liability, unfair trade practices, infringement of competition rules).

2.5. Conclusions

The jurists favourable to the harmonisation of private law rules originating from the European Union, with specific reference to the *acquis communautaire* on consumer protection, and in general to the rules of European contract law, are also in favour of the harmonisation of the rules concerning remedies. The reasons are clear: the rules on remedies supplement substantive law and, in relation to judges' rites and powers, refer to trial law. It is true that in every system penalties can be imposed in case of infringements of Community law and the

protection of rights and interests can be ensured by non-strictly judicial bodies, such as independent administrative Authorities or Ombudsmen, but it is equally true that the type of remedies, the requirements for their enforcement and the effects they produce entail such an uneven and differentiated situation as to make us doubt that the same type of protection can be ensured to the so-called "protected categories", such as consumers, users and savers. In other words, with a view to providing appropriate protection, it is not sufficient to envisage only homogeneous rules establishing rights, since it is also necessary to envisage homogeneous rules regarding their enforceability and justiciability.

Therefore, at Community law level, the principle of effectiveness and the principle of subsidiarity come into conflict.

This regards the rules "at the source". The problems regarding the implementation of E.U. Directives and the remedies envisaged by national systems are even more complex. Here consumers are helped by the provisions of the Regulations (Rome I, Rome II) regarding the choice of applicable law, which is always the most favourable to consumers, and the *lex fori*, which is the most convenient for consumers. This presupposes, however, that consumers are well-informed and well-assisted from the legal viewpoint.

With reference to the remedies provided for by the national systems, the application of two general provisions exposes the subjects damaged and entitled to bring actions to remarkable uncertainties: on the one hand, the evaluation of the "adequacy" of the remedy provided for, which must be made by the national judge; on the other, its comparison with the remedy of State responsibility for infringements of E.U. rules. In the latter case, it is really so hard to get compensation that it would be advisable to envisage uniform remedies, already provided for at E.U. level, to ensure adequate protection to everybody. Here the principle of effectiveness sets in.

The assessment of the "equivalence" between E.U. and national remedies – established by the judgment of the European Court of Justice in the case C-14/83, Von Colson and Kamann/Land Nordrhein-Westfalen – affects the appreciation of collective and individual remedies. Moreover, it is not certain whether envisaging collective remedies (for example injunctions) is in itself a way to meet the legitimate expectations of the subject harmed and can therefore replace the individual remedy *tout court*. This is the sense of the judgment pronounced by the European Court of Justice in a case regarding the employees' right of information [case C-271/91, M.H. Marshall/Southampton and South West Hampshire Area Health Authority (Teaching) No. 2].

Whether the introduction of Directives aiming at reaching a high level of harmonisation is the most appropriate response is a further issue to which, in this phase, the E.U. bodies do not seem to be particularly sensitive.

Obviously the considerations made so far do not cover all the matters regarding private law remedies in a E.U. perspective. A wide sector, which has not been examined in this paper, regards the infringement of fundamental rights and contractual remedies, in particular the remedies envisaged – or envisage-

able – for the infringement of the equality principle and for discriminations. It is a topical and momentous issue that constitutional and private law academics are analysing in depth.

3. The codification of consumer law in Europe: A comparative analysis

3.1. Preamble. Consumer law in the European Union's Charter of Fundamental Rights

The constitutional dimension of consumer rights received its definitive consecration with the approval of the Charter of Nice in December 2000, and with the approval of the European Constitution in October of 2004, the latter subject to ratification by all Member Countries.

The Charter of Nice, now European Charter of Fundamental Rights, is used not only a as political document, but also as a legal document, and many domestic decisions and those by the Court of Justice focus on it now[4].

Among the EU's objectives, the European Charter of Fundamental Rights sets human *dignity* as a basic value (art. I-2) and specifies that the sustainable development of Europe is based "on balanced economic growth and price stability, on a highly competitive *social* market economy, aiming at full employment and *social progress*" (art. I-3). The Charter recognises and guarantees personal rights to physical and mental integrity (art. II-63), reaffirmed in the form of protection of health (art. II-95), respect for family life (art. II-67) and of personal data (art. II-68) and it specifically provides guarantees for consumers of "a *high level* of protection." (art. II-98)

It is therefore necessary to distinguish between the claims of consumers pertaining to fundamental rights, recognized in the constitutions of Member States and confirmed, in an even more extensive way in the European Charter, and so-called, "economic rights", which are located on the same level of rights that refer to the "professional." The resolution on the rights and interests of consumers in 1975 already dealt with both categories of rights, but today the perspective has changed: Community law (which is also a legal system, with peculiar aspects in some way different from national legal systems) can now use the formal categories that distinguish the sources of law and order them according to a priority, as occurs in the national systems.

In this sense the fundamental rights have precedence over the rights of an economic nature.

Since it is inconceivable that the EU's policies can disagree with the fundamental rights recognised by the Charter, the fundamental rights become a

4 Celotto and Pistorio, *L'efficacia giuridica della Carta dei diritti fondamentali dell' Unione europea (rassegna giurisprudenziale 2001-2004),* in *Giur.it.,* 2005, p. 427 ff.

limit for Community action in the sector. Consequently, art. 153 (ex 129) of the EC Treaty – which assigns to the Community the task of "contributing" to safeguarding the health, safety and economic interests of consumers and to take their needs into account, must be reinterpreted in the light of the provisions of the European Constitution. Similarly to the national constitutions for which the interpretive process of "direct application to relations between private individuals" was built, the European Charter of Fundamental Rights also involves the direct applicability of its provisions to relationships between individuals.

The elevation of personal rights – understood as "consumer" – to European Constitutional standing therefore has a double value: it is binding on agencies of the Community and the Member States, but is also binding on domestic courts. In this way, the *Drittwirkung* of recognised and guaranteed principles can occur in a direct – and not just reflected – way in relations between individuals.

The classification of the rights and interests thus confirms the distinction between rights which belong to the individual and *economic interests* that relate to the consumer. Nevertheless, in carrying out their activities professionals can not violate fundamental rights. The principle is confirmed by art. II-15 of the Charter, which forbids the exercise of any activity or performance of acts aimed at destroying the rights and freedoms recognized by the Charter.

The identification of remedies set for the consumer is more complex. The *acquis communitaire* is lacking in this point of view, and in all national legal systems the *remedies* are regulated differently. It is required therefore to distinguish the remedies that can be used at the EU level and those used at the national level. It is on this line that consumer protection organizations must commit themselves, as well as the interest groups of the legal professions that have at their core the defence of personal rights.

Each legal system has its own history and its own shape. I will propose the analysis of the Italian model in the context of the European experience.

3.2. The "consumer" as one of the protagonists present in the law

An insight of the role that the consumer would play in the world of law was already contained in a sentence of the *Relazione al Re* (*Report to the King)* (no.238) of Book V of the Italian Civil Code, the book "of labour," approved by royal decree 30.1.1941-XIX, no. 17. On that occasion when the fifth book (partly reproducing provisions of the Commercial Code of 1882) was aggregated into the new Civil Code, the Royal Commission which had the task of drafting the text and the commentary of the new provisions included a provision (art. 531, which later became art. 2597) on the monopolist's duty to negotiate. It was precisely here that the duty "on the part of all businesses, that are a legal monopoly, to contract with anyone who requests it, respecting equal treatment" was stressed. It added, "such a principle is imposed to protect the *consumer* as a necessary mitigation of the suppression of competition, taking into account that the legal

monopoly, for various and not always incidental reasons, is extending far beyond those particular sectors (such as rail transport) in which that phenomenon was traditionally considered."

It was a very valuable insight, innovative – even relative to codes and to court contributions then noted in Europe – which, however, has not been understood in all its complexity and in all its potential. It was not even understood by the doctrine and the jurisprudence of the time. Book V of the Civil Code, oriented as it was to admit *homo oeconomicus*, the protagonist of the corporative system, couldn't give prominence to those who were not, in that system, worthy of consideration, because they were an entrepreneur or a labourer. The recipient of products and services was the final piece of the system, to be considered token system terminus, so as to be considered as a "measuring stick" to evaluate the behaviour of *homo oeconomicus*, but also in the position as a spectator of actions arranged elsewhere without his contribution, except in the final moment.

In a system like that inaugurated by corporative econonomics, given to the institutional resolution of conflicts, consumer rights that didn't belong to the areas of civil law and traditional commercial law couldn't emerge independently. Consequently the consumer, as a counterpart to the entrepreneur, was mixed up with the buyer in the sales contract, with the user of public and private services, with the bank's borrower and so on. It is an outlook that even today, in a legal dimension that assumes as its own ordering criteria the nature of the single relationship established with the company, and has a reason for being, even if contractual relationships are now, one could say, "separated," depending on whether they are established with entrepreneurs or consumers.

In that context, the law didn't make concessions to those bearing the title of *consumer* or *user*, then contained in its economic confines. This is exactly why the "consumer," although considered in the *Relazione al Re*, didn't penetrate to the original text of the Civil Code.

3.3. The European Economic Community and the effect of Community law

Besides the mention of the word "consumer" in the Royal Report, Italy payed attention to consumer rights only after many years. In Italy the rights of consumers took their first citizenship with the creation of the European Economic Community. So an effective *consumer law* was born in Italy *consequently* to its roots in Community law, and given the relation of the Community and internal sources, *as an effect* of Community law. Community law moves according to the principle of proportionality and subsidiarity, promotes the harmonization of rules of national law, and takes care to provide consumers (and environmental) protection compatible with economic development of countries of the Community and functional to the integrated internal market. It is therefore a phase

of *balancing and reconciliation of interests* that are realised in the operation of different sources of law.

It is furthermore necessary to note an Italian peculiarity, the emergence of consumer rights in the regional context. Already in the Seventies of the last century regional legislation took care to fund initiatives of consumer associations and to promote lines of action aimed at protecting local consumers. They regional bodies of an advisory nature in topics concerning consumers were set up in matters relating to consumers. Regional legislation was further developed in the late Nineties.

3.4. The mention of the "consumer" in the Civil Code

In the meantime directive no. 13 of 1993 was implemented with. 6.2.1996, no. 52, and rules on unfair contract terms were included in the Civil Code in an independent heading (XIV-bis, entitled "Dei contratti dei consumatori (About consumer contracts)", in Title II of Book IV). In the same way, directive no. 44 of 1999 was implemented with legislative decree 2.2.2002, no. 24, and the rules on guarantees in consumer sales were entered into the Civil Code at § 1-bis of section II of Heading I dedicated to sales of Title III of Book IV.

It wasn't so much the rewriting of legislation that constituted the important novelty as much as the fact that *for the first time* (after the mention cited in the opening content of the *Report* of 1942) the term *consumer* appears in the code. It is a symbolic fact, of cultural importance but also meaningful from the juridical-formal point of view: this category, this way of seeing the individual, this protagonist in the market has found citizenship even in the text that consecrates relationships between private parties and enters into the provisions that are the result of an august and resurgent tradition, of a solid dogmatic culture, of a tested application.

In that moment Italian Civil Code was placed in the same line, in the same years, as other codes that have chosen to mention the consumer, such as the French *Code Civil* or the German BGB.

The doctrine saluted this innovation with satisfaction, as it was a sign of unified modernity and an option of policy of particularly important law: the consumer represents a dimension of the person, thus bearer of personal rights that make up a natural limit to the activities of enterprise.

Note, however, the difference in perspective relative to the past. The consideration of the consumer in the Italian Civil Code was not related to the development of economic relationships, nor was it provided for in Book V, dedicated to enterprise, but it was rather the result of a solidaristic conception of *contract law*: the rules that made up the legal status of the consumer in the Civil Code were included in Book IV about obligations, and in particular, introduced forms of special protection for the weaker party who had signed forms or formularies

used by the business and that was intended as a guarantee on the most common contract, for sales.

I use the past tenses of verbs, because as I will explain shortly, the choice to introduce the rules on consumer contracts in the Civil Code was then modified.

3.5. The law on fundamental rights of consumers

In 1998 a statute on the basic rights of consumers (law no. 281 of 1998) appeared, reaffirming the rights already set out in Community resolution 1975, detailing the requisites for the application of inhibitory actions and setting rules for recognition of consumer associations.

The outcome of the law of 1998 can only be positive. It is measured not so much by spreading awareness of consumers' rights considered individually, but rather on the emergence of the *collective dimension of protection*. The enormous development that consumer associations have been able to promote, the enormous activity of cultural, educational, informative and especially consultative and judicial natures that they have been able to organise, have placed the Italian situation in an equal position relative to that one can encounter in many other EU countries. The work of the Antitrust Authority must be added to this, expressed both in the sector of governing competition and in the sector of controls on advertising, and the negotiation that consumer associations have undertaken with banking and insurance associations, to draft memoranda of understanding aimed at remedying the negative effects of mass contracts and unfair conditions, of banking and insurance services lacking in adequate information, and obtaining greater market transparency.

Other independent administrative authorities qualified in specific market sectors have also improved the consumer's legal position.

Also in force were special laws regarding product labelling, advertising, the liability for defective products, product safety, etc.

3.6. Sector codes and the "Consumer Code"

In order to simplify the lawmaking system, Parliament approved law 29.7.2003, no. 229, conferring on the Government the power to draft "sector codes," that must pursue different aims. These are not only to aggregate the rules regarding entire sectors, but to make them homogenous with each other, putting them in systematic order, filling legislative gaps, eliminating contradictions and overlaps of special laws and adapting the rules to the regulations of EC law. Among the sector codes Parliament and Government have decided to introduce is a text dedicated to the rules aimed at regulating relationships between businesses and consumers.

The "Consumer Code" was introduced into the Italian legal system by legislative decree. 6.9.2005, no. 206. It constitutes one of the most significant innovations in civil and commercial legislation of the last decade. This body of rules replaces the collections that, on a doctrinal level, were promoted with the goal of collecting the scattered rules concerning consumers into a single text.[5] Its name reflects an objective conception of the matters being regulated, which is marked by the fact that the provisions organically included in this container refer to an economic act, *consumption*, around which are woven the legal relationships established by individuals in their capacity as consumers and entrepreneurs, or established by their respective associations. But even if formulated in an objective way, as happened in the corresponding code in the French experience, or for projects not carried to conclusion as in the Belgian experience, this compilation is presented as a sort of "manifesto" of consumer rights, because here all or almost all of the rules establishing rights concerning the consumer and the remedies granted him by law for enforcing them have been collected.

The Code is organized according to the technical regulations typical of the continental experiences, which first establish the law and then the technique to protect it, that is, the remedy. This is unlike what happens in *common law*, in which one thinks, reasons and operates based on remedies.[6]

Beyond the problems of finding the rules contained in special laws – that with the new "code" have been rescinded – the ministerial commission, which I chaired, and which drew up the draft text (later approved with some modifications) had to solve the delicate problem regarding the connection / coordination between the text of the sector code and the text of the Civil Code. The option was clear-cut: was it necessary to keep the rules in the Civil Code which had implemented the directives on unfair terms and guarantees in sale of consumer goods, or did they need to be transferred into the Consumer Code together with the other rules concerning the relationships between companies and consumers?

Our working group declared itself in favour of preserving the rules regarding consumer contracts and sales to consumers in the Civil Code. We considered that the interpreter, applying these rules placed in the Civil Code, could have been able to give them (as has happened in other experiences) a broad interpretation, encompassing in them as well contractual relationships entered into between professionals and subjects who, because of their position, could compared to consumers, such as small business owners, professionals who make the purchase of goods or services for mixed purposes or non-profit organizations. However, if those rules had been transferred to a sector code, the

5 Alpa, *Codice del consumo e del risparmio,* Milan, 1999.

6 Di Majo, *I rimedi,* in *Seminario di diritto privato europeo* (8 July 2005), edited by Consiglio Nazionale Forense, Milano, 2005.

rules of interpretation of the law that prevent the generalization of provisions having a special nature would have prevailed.

In any case the choice of the policy of the law was to include the consumer as a market actor but also as a weak contracting party and as an expression of an important dimension of the "person" in the Civil Code. The Civil Code always retains its symbolic image, being the most important ordinary law for relationships between private individuals.

By contrast, the Council of State has expressed the option for the removal of the provisions relating to unconscionable clauses (art. 1469 bis et seq.) and for their inclusion in the sector code.

From a systematic point of view, the option expressed by the Council of State had the merit of allowing the interpreter to find, in the sector code, the entire normative subject regarding relationships of consumers with professionals.

The Government has preferred to follow the opinion of the Council of State and to gather almost all provisions for consumers in the Consumer Code. I say "almost" because the rules on consumer credit have been included in the consolidated text, which regulates the activities of banks (legislative decree 1.9.1993, no. 385), and the rules on distance contracts for financial services are contained in a special law (legislative decree 19.8.2005, no.190). So the systematic intention was not completely reached.

The current Consumer Code is divided into general provisions containing the definitions of the subjects and objects of the code in the first part (art. 1-3); in the second part rules are set forth regarding consumer education and information, including advertising and unfair practices (art. 4-32); the third part sets forth the rules regulating consumer relationships, including unfair clauses, contracts negotiated away from business premises, distance contracts, timesharing, tourism services, public services (art. 33-101); the fourth part contains the rules on product safety, producer liability and guarantees on the sale of consumer goods (art. 102-135); the fifth part lists the rules of associations and remedies, including collective action for damages, now, however, suspended (art. 136-141 bis) and the sixth part, the final rules.

3.7. The Consumer Code in the system of sources

To reconstruct the regulation of consumer rights from the viewpoint of the sources of law we must then consider:

a) the constitutional provisions that today include the European Charter of Fundamental Rights; also, in our system, the rules of the Constitution that regard the person (art. 2-3), health (art. 32) and limits on financial freedom for reasons of security and social utility (art. 41);
b) the provisions on the European Economic Community Treaty, which at title XIV lingered on consumer protection (art. 153, formerly 129A), as well as regulations and Community directives, and the law of the Court of Justice;

c) ordinary laws, which include the sector codes, including the Consumer Code, that derogates from the Civil Code, but which can be considered complementary to it;
d) the regional laws;
e) the provisions of independent administrative authorities;
f) less important sources and customs.

Consumer law continues, however, to be affected by Community initiatives and so the national codes continue to have direct or indirect traces of them.

3.8. The original proposal for a Directive on Consumer Rights regarding contracts.

The European Commission has drafted a proposed directive for the Parliament and Council regarding "consumer rights" [COM (2008) 614/4 of 8.10.2008). The text provides for fifty articles and a few annexes made up of forms and tables for comparison. The *exposé des motifs* includes sixty-six "whereases" and extends over twenty pages: the directive is aimed at the revision of the *acquis communitaire* on consumer matters, to simplify the existing regulatory framework, to improve the functioning of the internal market and to solve problems at the conclusion of cross-border contracts. Provisions have been introduced in this regard on the selection of applicable law on the subject of contractual obligations (so-called "Rome I Regulation " no. 593 of 17.6.2008). The Commission noted, however, that the application of the Regulation, which allow the consumer to invoke national rules (art. 6), does not exclude that interpretive conflicts could arise able to hinder the movement of goods and services. Hence a very important choice, which consists in avoiding the shoals of the applicable law with the anticipation of uniform contract rules regarding relationships between professionals and consumers so that in any national code of countries of the Union the same rules can be applied. This result was achieved – in the Commission's votes – accomplishing two operations: the writing of a unitary text coordinating the Community directives on relationships between professionals and consumers, and the choice of the level of harmonization, described as "complete" or "total" and "targeted" ("ciblé").

This choice is very important because, until now, Community law in consumer matters was entrusted to "minimal" directives established to be exactly a "lowest common denominator" made up of non-derogable principles to put into effect in all the national codes, allowing individual legislators to increase the level of protection. The system had the advantage of not lowering the protection of rights in systems in which it was stronger relative to less protective codes and at the same time to allow the latter to adapt themselves gradually to the stronger models in the areas considered from time to time. However, two negative aspects have been encountered: the judicial treatment of relationships

with consumers ended up being varied, and the degree of protection provided to them changed from country to country. Full harmonization, proposed by the Commission, is demanded by professionals who currently face significant transaction costs due to the variety of applicable rules, and by consumer associations, which from time to time should suggest to their members the best law to apply to the contract between the two in consideration. This implies, however, a kind of "ossification" of the sector, whose evolution will depend – if the proposal is approved – exclusively on Community legislators, therefore limiting the internal choices.

The proposal doesn't regard all of the sector directives, but just those having as their object several types of methods of closing contracts (contracts closed outside of commercial premises, distance contracts) and some settings relating to their content (unfair clauses and sales guarantees). The result is a "mini consumer code" in which, following up on the definitions and the field of application (art 1-4), regulates information (art. 5-7), right of withdrawal (art. 8-20), some aspects of sales (art. 21-29), contractual clauses (art. 30-39) and aspects concerning application of the directive (art. 40-50).

Article 43 establishes that if the "applicable law" belongs to the system of a Member State the consumer cannot renounce rights attributable to him by the directive. This entails that the regulations are non derogable and that the fundamental difference is slight between a directive like this, aimed at complete harmonisation, and a real regulation, consisting most of all in the legislative technique (one is implementation of the principles, the other is immediate application), and in implementation time.

Another important choice concerns the definitions of "consumer" and of "professional," into which was inserted the sector of "liberal" activities. In truth it is a simple clarification, since the concept of "professional" already included the entrepreneur and the professional who carries out intellectual activities, as defined in the Civil Code.

Among the innovations indicated are obligations imposed on intermediaries acting on behalf of consumers, uniform deadlines for the right of withdrawal, the assigning of the risk of loss or damage during delivery to the seller, the anticipation of a list of clauses described as unfair and a list of terms which are presumed to be unfair until proven otherwise, offered by a professional.

The rules also included in the *acquis communitaire* concerning unfair trade practices, labelling, product safety, the producer's liability, tourist services, consumer credit and remedies were left outside the scope of the directive. Except for consumer credit, the other matters are subject to the Consumer Code (legislative decree no. 6.9.2005, no. 206 et seq. changed.), which remains intact for matters excluded and must instead be corrected for the matters covered by the directive, within the period assigned to it, when it is approved.

Nothing is said about the directive concerning services, which must be implemented by the Member States by December 2009, although partially

overlapping regulations could happen, especially regarding information and contractual clauses.

Along its way the original proposal has lost pieces of its body: now it is only a set of rules concerning distant contracts, uniformed in a more coherent text but not so innovative as originally conceived.

Besides this Directive it has been enacted a Regulation (optional instrument) concerning the law of sales, in contracts B2C and also B2B.

3.9. "Consumer law", personal rights and market protection

Questions on the reasons that support Community policy and measures aimed at protecting the consumer, as well as legislation and judiciary of the Member States of the Union, were renewed when the legislative definitions of consumer entered into the civil codes. In particular, Hans Micklitz underscored how the Community definitions insist on the purpose for which the physical person acts, whether, that is, inside or outside of his business activities. But it has also highlighted two different lines (or conceptions) of the intervention: one supposes that the consumer is a "weak subject" compared to his counterpart, the "professional;" the other considers him the "disadvantaged party" who must receive complete and transparent information in order to be able to make his choices in the setting of private autonomy. So the first line assumes values and tasks of a *social* nature, the other stays within the confines of contractual freedom, by its nature *individualist*.

If one considers the sources of consumer law one notices that they coincide in part with the sources of the law of the person and generally with civil law and commercial law, and in part they diverge. This means that consumer law constitutes less an autonomous discipline, scientifically, and an autonomous sector, by law, relative to the other rules of civil law (including commercial law) and to the "civil system," but rather constitutes a sub-specification. In other words, consumer law belongs to the thematic, scientific and regulatory area of *common law*, even if presenting with respect to it a number of exceptions, special rules and normed particular cases that set them apart.

So to the question of whether or not the regulation of consumer contracts falls within the general framework of contracts,[7] the answer is certainly positive, even if contract law is not the only area of reference.

It is also in fact necessary to consider the publicistic *coté* of consumer law, now focused on services, but also on the regulation of prices, the intervention of independent administrative authorities, trade regulation and so on.

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7 Sirena, *L'integrazione del diritto dei consumatori nella disciplina generale del contratto,* in *Riv.dir.civ.,* 2004, I, p. 787 ff.

3.10. The current debate on consumer law.

Linked to Community law, our consumer law is therefore exposed to choices driven by others. The "Consumer Code" will record its developments, since it can also be considered as a container in which can be put all the new rules regarding relationships between consumers and entrepreneurs.

It is also exposed to critical evaluations and suggestions for improvement that come from various study centres throughout Europe and from authoritative scholars who have focused their attention on this area.

Recently, some of the most important scholars of consumer law have raised fundamental questions that concern all Community regulation and its application into the national law of Member Countries.

The debate thus introduced develops on a general level, because, obviously, within individual systems the situation is varied. This variety is due to the different models adopted at a time prior to the Community production: there are models that have adopted a general framework of rules that recognize rights to all consumers, and models that not only protect the consumer but, more broadly, the weaker party; models that contain specific provisions in individual sectors; even models that have been the pattern of Community action, freely providing inspiration to it. But there are also models, such as the Italian one, that ignored the consumer, present only in a very vast literature, which had not, however, had any hold on the national legislator.

Each of these models would merit a careful analysis, taking into account not only the legislative component, but also the systems of case law, the conduct of the administrative bodies, the initiatives by the professional organizations, and systems of self-control through codes of conduct.

Taking into account this variety[8] and the entirety of Community regulations that make up the *acquis* in matters of consumer protection, it is still possible to develop some considerations of perspective, moving from the basic questions that we are invited to critically reconsider.

In a recent essay Geraint Howells and Thomas Wilhelmsson[9] have identified four policies according to which consumer law is evolving in the Community context according to the EC's lines of action: (i) the use of the paradigm focused on consumer information, in order to reduce the asymmetries of position between professionals and clients; (ii) confidence in the regulation of general clauses; (iii) the facilitation of systems of self-regulation; (iv) the approval of directives that promote harmonisation of regulations at a higher level.

The Commission's way of proceeding could involve, according to the authors, imbalance and adverse effects. It would in fact end up demolishing the evolution of national laws to the benefit of a more satisfying development for

8 For which I must refer back to Alpa, *Introduzione al diritto dei consumatori,* Rome-Bari, 2006.

9 *EC Consumer Law: Has it Come of Age?,* in *European L.Rev.,* 2003, no.4, p. 370 ff.

consumers of individual Member States and would frustrate the dialectic and profitable relationship between national systems and the Community system; at the same time, harmonization is carried to the to the maximum, rather than minimum, level, leading to the setting of limits on the development of national laws and so having as a result the containment of consumer protection instead of its elevation.

A "maximalist" policy – according to these authors – should be shared at a national level, and in any case would require an in-depth critical evaluation. In other words, this Community policy trusts internal market mechanisms, while a careful protection of consumer rights and interests may require a more incisive intervention by the Union. On the other hand, the creation of rules regarding the entire category of consumers, without distinguishing internally between the weakest consumers compared to "average" consumers would achieve the result of flattening the objectives to be reached. In conclusion, Community consumer law is deprived of the contribution of the changes introduced by the national systems, and acts as a disincentive for their development

Hans Micklitz[10] has also expressed concern about the evolution of Community law in this area. He moves from the observation that the five basic consumer rights as identified in the 1975 Resolution – health and safety, protection of economic interests, damages, education and information, and representation, – have become a reality. Some of them, such as health, have reached constitutional status. European contract law has now nonetheless attained a remarkable level. But what were the effects of Community consumer law on national laws?

He first points out that consumer law is the most significant expression of the primacy of Community law over internal law. But each system has reacted according to its own characteristics. Then the question arises whether Community law can supplant national traditions. Consumer law – Micklitz notes – is a law in motion. In the first phase, which lasted until the introduction of the Single Act, was founded on the idea of the welfare state; in the second phase, which extended until the beginning of the nineties, consumer law was incorporated in internal market law, which inaugurated the principle of the "responsible consumer." The third phase, which is now taking place, sees the transformation of consumer law in the "right of citizens." The consumer-citizen reflects the conception of a person who is "European" in the political, social and cultural sense.

Compared to these progressive forces, consumer law has been transformed from an *open* system to a *closed* one: the more recent directives, detailed and precise, are directed at maximum harmonization, and the Court of Justice itself in its decisions, has limited the possibility of national legislators to go beyond the level of protection laid down by the directives: homogeneity prevails over creativity. Moreover, the reactivity of the Community to interest groups that

[10] *De la nécessité d' une nouvelle conception pour le développement du droit de la consommation dans la Communauté européenne,* in *Mélanges en l'honneur de Jean Calais-Auloy,* Paris, 2004, p. 725 ff.

restrain the evolution of consumer law seems evident in the various directives. The coordination of this sector with that of competition law (thinking of anti-competitive and unfair practices agreements) has become technically complex. Consumer protection is seen, in the perspective of the development of competition, as a goal, but it also becomes its shield.

There are still many gaps in consumer law, such as, for example, the absence of a directive on the liability of producers of services. There is also a lack of coordination at the Community level between the systems of national courts. Micklitz also believes that the inclusion of consumer law in the area of the internal market law will diminish the development of this sector of the system, because the national initiatives that come out from the limits of the directives cannot be considered compatible with the homogeneity of the regulation postulated by the internal market. And this situation highlights a fundamental political issue: whether the regulatory policy on consumer matters constitutes a piece of the mosaic of Community policy shared (as if it were a federal state) with national legislators, or if it is subject to the exclusive jurisdiction of the European Commission. The latter alternative will prevail. Therefore it is up to the national courts – applying the guidelines, moreover, in different ways – to recover the social dimension of consumer law. But most of all – observes Micklitz – consumer law has still remained an "economic" right, while consumer policies have – or should have – an overtone of a social nature.

The influence of Community law on the national systems has led the Community to introduce regulations concerning contract law "for segments": think of precontractual information, the right of withdrawal, contract transparency, and unfair clauses. But – Micklitz wonders – to protect consumers is it sufficient to focus on contract law? Contract law, in the conception of the Commission and of the Court of Justice itself, has become a segment of competition law, and thus tends to protect the economic interests of companies rather than the interests of their counterparts. There are also differences among the national systems in the implementation phase of the directives. According Micklitz, uncodified systems have the advantage of introducing more precise rules, with an exacting pragmatic technique. There has been an attempt in Romanist systems to homogenize law of Community derivation into national law, but many gaps are highlighted. The German model systems face greater difficulties in achieving this coherence.

The evolution of consumer law toward a law of "citizens" has encountered difficulties; on the other hand the restrictive notion of consumer adopted at the Community favours these difficulties. In other words, the consumer law continues to be a "separate" law relative to the context of national laws and a law of economic dimension in the European context.

The considerations of the scholars I have quoted above are very relevant and I think one must move from their indications to identify the prospects of a consumer law that is not only inclined on the composition of economic interests among the parties in conflict, but must above all be founded on the protection

of individual rights that, in the scale of values, can neither be deferred nor treated as equivalent to rights of an economic nature.

The realisation of the "Consumer Code" could therefore be a step forward even in this shift from the dimension of simple enjoyment of goods and services to the title of a series of rights – almost as though the Code were its "manifesto" – that make up a fragment of European citizenship in an elevated sense.

4. The Common Frame of Reference and the Europeanization of Private Law

4.1. "European Private Law": definitions

One of the most interesting subjects of private law today is the proposal for a frame of rules – a "common frame", as the text, which I will concisely deal with in reference to my remarks, defines itself – aimed at introducing a terminology, a series of notions and a series of principles which at the same time constitute the "minimum common denominator" of private law practiced in the European countries, the result of the Community directives on the subject of obligations and contracts and consumer protection, but also a proposal to harmonise a considerable part of "European private law".

This branch of law, this perspective from which private law can be considered, has undefined boundaries, it is affected by different currents of thought, by a great circulation of ideas, and by various "cultural trends": in a volume published some years ago[11] with Mads Andenas we proposed various definitions of European private law, taking into account the shared values of the legal systems of continental Europe, Scandinavia and common law, taking into account the contents of the Community directives and the implementation rules introduced by the main legal systems, taking into account the attempts by academic research centres to draft "model codes", and also taking into account the various interventions made by the Community bodies in this sector since 1989, with resolutions, communications and proposals for general content directives. For several years I have participated in the meetings of Study Group for a European Civil Code, coordinated by Christian von Bar, and we have compared our ideas

This work has been a real training ground not only to understand the importance and the influence of comparative law in the evolution of legal forms of economic and social relationships, but also to deal with the problems of harmonisation of principles and the standardization of law. I have promoted this initiative to Italian and European lawyers. Now that I see the result of this work, for now a text only in outline,[12] I am satisfied with it; and within the

[11] Alpa e Andenas, Fondamenti del diritti privato europeo, Milano, 2005.

[12] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference, (DCFR), Munich, 2009.

limits of the time I have been allocated, I would like to go over my reasons for this assessment.

The DCFR pursues the aim of guaranteeing uniform principles on the subject of contracts in general and obligations in general, specific contracts, civil liability, unjustified enrichment, *negotiorum gestio* (benevolent intervention in another's affairs) and trusts, and it comprises the principles pertaining to the *acquis communautaire* on consumer law as well as terminological and notional definitions. It is the result of the process taking place in which the national legal systems are coming closer together, not only with regard to the Community directives passed, but also in the sector of general rules concerning the "common core" of civil law. Similar efforts are also being made in the fields of family law, insurance law and procedural remedies. It is not a simple restatement of the law in force, rather it proposes to introduce innovative rules to meet the needs of a modern and complex society like the one in which we operate. It does not sacrifice national models, rather it subsumes their shared principles, employing a terminology which is adaptable to different local contexts.

4.2. The frame of the DCFR

Before entering *in medias res* I would like to clarify the framework or, I should say, the *frame* for this talk. Given my training, which apart from the study of private law in the formal sense (this was the method used in Italy until the 1960's) also involves aspects of economic, political and social analysis of law, the text of the Draft cannot be considered in a reductive way as a simple "toolbox" which jurists, lawyers, judges and legislators can make use of to perform their tasks and achieve their aims. In the first place it is a precious casket in which the cultures, trends and policies belonging to the European countries' national experience and to Community experience converge. It is not without reason that I use the expression "experience" rather than "legal rules" or "legal systems", because I am an earnest assertor of "legal realism", which has found fertile ground also here in Norway and in all of Scandinavia, which is its homeland, to an equally important extent as the North American branch. Precisely in this perspective, it is necessary to take account not only of the text but its cultural origins and then of its practical application, since, as we know, legal texts have an actual life, which feeds on cases which see them "in action", on the additions of the interpreter and on the environmental conditions, so to speak, in which they are applied.

Seen from this perspective, then, the DCFR is a document which, for now, can only be examined superficially: we know how it originated, we know the aims it proposes, we know what its literal meaning is. A few months ago six volumes of commentary have been published (with a total of over six thousand pages): so we will be able to find out what its cultural roots were and the meaning that its authors wanted to give it. But we will only be able to understand it

fully when it begins to be used in academic studies, in decision models and in legislation models. The other side of the coin has yet to be sculpted: and it will be sculpted by time, which is a great sculptor as Marguerite Yourcenar said, observing how the text is used.

In other words, for now it is only possible for us to see one side of the coin; a side which we can appreciate partly through the advance information collected in the studies which the authors of the Draft have begun to publish.

External observers have not, however, been idle. There has been an increase in seminars and opportunities for reflection, on the function of the "codes" in contemporary society, on "contractual justice" and on the economic aspects of the proposals for European contract law codification.

In order to discuss the Draft jurists must carry out three complex operations.

The original text was written in English, and this will also be the case for the commentary prepared by the authors. The use of this language is not neutral, it presents positive and negative aspects, in other words it comes at a price. It is a known fact that legal texts are never translated literally, because the translation of a text from one language to another implies a conceptual translation, in which the nuances, the authentic meaning, the "flavour" of the words, the concepts, the figures of speech that are typical of every national culture, are lost. Law by its nature is a product of national cultures, as the experts on legal realism, sociologists and anthropologists of law have taught us.

European Community law is no exception to this rule, because the regulations, the directives and the other sources of law are translated into the national languages and therefore imply the "conversion" of English and French terms (the languages in which the texts are initially written) in a context which is normally different to the original one; and comparative law is no exception either, because the jurist, however cosmopolitan he may be, has a "stamp", a kind of original sin, a mindset which he carries with him wherever he goes and whichever text he examines. Maybe, if we had all studied Roman Law alone, we could speak a lingua franca, Latin, and understand each other immediately in our use of terms and concepts, as occurred throughout the Middle Ages and the Renaissance; moving further along in time, a similar phenomenon occurred for the French language and law, from the end of the eighteenth century and for the first half of the nineteenth century in association with the Code Napoléon, or for the study of the Pandects and for the German language, from the second half of the nineteenth century to the 1940's.

However, today we live in a very different world, we have crossed national borders, even the Nòmos has been separated from the Earth; a universally known language is required, precisely the one I am using. The English language necessarily brings with it the ideas of common law, and an extraordinary experience of a pragmatic nature and of case law. But precisely for this reason further mediation is needed which goes beyond a simple literal translation.

The first operation therefore consists in understanding to what extent the English terms either correspond to their English meanings or allude to a non-autochthonous meaning, as the authors claim. This is why the definitions are useful: agreed or "stipulative" definitions, like those offered by the authors in their comments, or binding definitions, if they are offered by the Draft text itself. Indeed, in appendix to the text one finds a long list of definitions of the terms used in the formulation of the rules.

The second operation consists in translating the terms into the interpreter's own language: it is a necessary operation if one wants to share the text with jurists from each country of the Continent; it is an operation which on the one hand is psychologically spontaneous, and on the other hand complex, because the term, the notion, even the principle may not find its equivalent in the language and in the panorama of notions and concepts belonging to national experience. Therefore it is necessary either to create "new" terms, concepts and principles, or to proceed with similitude, absorption, fiction.

The third operation consists in a comparision with national experience, to check whether the choices made by the authors are better than those made by the legislators, judges, interpreters of a given system. Otherwise how would it be possible to persuade legal practitioners to abandon their system in order to substitute it with another? And would it be possible to impose a new system with a binding instrument?

By posing some of these questions I am already performing a manipulation: I am treating the Draft *as if it were* a civil code, which it is not, because the idea of a "code" belongs to bygone times; but it is true that, for those like me who come from a background of over two centuries of codified law, it is entirely natural to see the image of a new code in the Draft: a modern, flexible, tendentially systematic code, open to changes.

4.3. The objections to a "Europeanization" of private law.

Whether or not it is a code, the DCFR does, nonetheless, constitute the most significant result of the "Europeanization" process of private law. Rather than waiting for national systems to spontaneously converge towards a "common law" built on practice and case law, with the circulation of ideas and models which contribute to maturing a shared concept of choices and concrete solutions, the authors of the DCFR proposed to set down in a text "negotiated" among academic experts from all the European countries, principles deemed acceptable and shareable also by legal practitioners. Thanks to the method used by the European Commission which supported this decision, the text was discussed with the stakeholders, representatives of businesses, consumers and professionals. The competence of the European Union to deal with this material was contested, the purely academic origin of the work was contested, the feasi-

bility of a decision which would impose a new model on all legal practitioners, on all economic practitioners, on all its users, was contested.

Reasons of economic and social usefulness, of uniform treatment of EU citizens and of appropriateness and modernity of the text support this undertaking. They are arguments which can be used to face other, more substantial objections to the "Europeanization" process of private law.

The first is a direct objection, and concerns the general intention of the processes underway.

This aversion also emerged during the discussion held in some seminars that I organised on behalf of the Italian Bar Council: it stems from the fear that national identities will be suppressed for the benefit of an insipid model, a kind of Harlequin costume, which would end up marginalizing the aspects which characterize the models upon which the distinguishing features of the various systems are built. It is easy, however, to answer this objection, not only with arguments of an economical nature, which favour the harmonisation of the rules in order to facilitate market integration, but also with arguments of a political nature, given that a uniform model would guarantee an equal status to all the legal systems, to all the citizens and to all the jurists in the European Union. And if the harmonisation models were welcomed in non-EU countries too, a uniform system for the whole Continent would be created, and so, crossing the borders, it would not be necessary to change stagecoach horses, to use Voltaire's metaphor on particularistic law. From the point of view of Italian law, I can assure you that the benefit would outweigh the cost, given that Italian law, like the Italian language, are these days little known abroad, and Italian law is rarely chosen by the contracting parties as the law of the contract, hence both the law and the language are recessive. Professionals, consumers, lawyers and judges would therefore be greatly helped if they could use a common regulatory text rather than having to apply foreign texts.

The second objection attacks this process from the viewpoint of "social" policy: consumer law is considered as a law belonging to "ordoliberal" systems, seemingly aimed at protecting the weakest sectors of society but actually concerned with guaranteeing the protection of strong interests; the convergence of fundamental rights and consumer rights in a European contract law would end up giving priority to strong interests to the detriment of weak interests. One could, however, answer that the balance between economic and social interests at stake will never affect fundamental rights, which constitute the inflexible core of relationships between individuals.

Moreover, it is these instruments of standardization that guarantee the protection of fundamental rights, as provided by the Draft in its introductory provisions.

And from the viewpoint of Italian law I can confirm that the initiatives to benefit the consumer have increased protection of the right to health, have strengthened the bargaining position of the individual and have allowed judges

to check economic operations with greater powers compared to those which the civil code allowed.

The third objection involves the fear that the harmonization process is too timid and sacrifices the protection standards already reached at national level. This seems to me to be the most convincing objection: yet considering some national models, like the French one, the English one and the German one, I do not think that this will be a risk.

However, I would like to add that these objections, like others which have emerged during thirty years of discussions, tend to only take account of the editorial component of regulatory processes. But we know very well – as the exponents of legal realism have taught us – that legal phenomena, cultural trends and the practice of applying the rules, are complex phenomena, of which the textual component is just one of the many aspects to be considered. Equally important, perhaps more so, is the creation of the rule, which reflects the mentality, the culture, the social environment, even the mood, of the interpreter. Therefore, with respect to one text, jurists who have different training do not react univocally; the Draft may have a propulsive function, and where its rules could seem less advanced than the national ones, it can be interpreted and adapted in order not to produce negative effects.

One should not, then, go too far in assigning a text a sacred value.

One example says it all. The Italian Constitution is one of the first and most modern constitutions in the post-war period. Despite coming into force in 1948 it is highly protective of civil rights, given the catalogue of individual and collective rights it contains. In some ways it is even more progressive than the Nice Charter, where it distinguishes between fundamental rights and economic rights, or where it awards the collectivity, as well as individuals, the protection of rights relating to "social groups". Therefore one could think that it offers Italian citizens greater – and better – protection than that which is provided by constitutions which do not contain a "bill of rights". And yet, this is not the case if one thinks of the present situation in which the legislature has prohibited the use of stem cells, it has introduced a status for embryos, it has limited access to artificial procreation, it chose not to grant legal status to de facto couples and it has suppressed the use of living wills. These are all issues which could be dealt with in a secular and positive way on the basis of the constitutional text in force, and instead they have been resolved by the Italian legislature in a completely negative way.

4.4. The DCFR, the European Charter of Human Rights, the Nice Charter and consumer law

The first text of the Draft has been published last year. To fully understand its importance it needs to be placed in the context of the evolution of private law. The Draft came to attention by coming into existence with other important

documents: on 12th December 2007 the Charter of fundamental rights, signed in Nice in 2000, was solemnly proclaimed, awarding the Charter legal status and no longer only political status (C 303 /01) GUC 303 of 14.12.2007, 1); on 8th October 2008 a proposal for a Community directive on consumer contracts was published (COM 2008, 614/4).

According to traditional interpretation, the Nice Charter, as a document of constitutional importance, should not involve civil law and relationships between individuals, because constitutions primarily concern relationships between the citizen and the State. Therefore the document should not regard the field of interest of civil law and the civil law scholar. This interpretative model has been abandoned for half a century now in Germany and in Italy, for thirty-five years in Spain and for a few years in Great Britain and in France. In the first place the discussion concerned fundamental rights as recognised and guaranteed by national constitutions; it then spread to constitutional principles shared by Member Countries of the European Union; then to subjective legal positions protected by the European Charter of Human Rights signed in Rome in 1950 and applied by the court based in Strasbourg; and then to the application of that Charter by the European Community Court of Justice based in Luxembourg; further still it spread to the application of the Nice Charter by that Court; and finally to the importance of fundamental rights in the context of relationships between individuals in Community rules and in national rules of Community origin.

Even where written constitutions do not exist, but there are laws which recognize fundamental rights, or where the European Charter of Human Rights signed in Rome in 1950 has been absorbed, the problem of applying fundamental rights to relationships between individuals has been resolved in a positive way. For its part, the European Court of Justice has, for many years, applied fundamental rights as belonging to the entirety of universally recognised general principles of law; recently it has applied the Nice Charter as if it were a document which already has legal status. Even where the written constitutions contain a bill of rights, fundamental rights have been strengthened by recognizing the binding nature of the European Charter of Human Rights. Recently this hermeneutic operation was carried out by the Italian Constitutional Court, with decisions nos. 348 and 349 of 2007. From this it can be hoped that the Court can be invested with the issue of the constitutionality of the recent laws which I mentioned before.

We are therefore dealing with a complex cultural, political and practical process, as an outcome of which – in the law in books and in the law in action – fundamental rights have taken on a vital role which pervades all relationships, of all types.

Alongside this process is the process of legally protecting the rights and interests of consumers. Here too we find different regulatory models in the national legal systems, which have introduced actual "consumer rights codes", as occurred in France, in Italy and as they are planning to introduce in Luxem-

bourg; or there are general laws, like in Spain; or ad hoc rules have been added to existing civil codes, as occurred in Germany. On a Community level the *acquis* concerning relationships between individuals has particularly developed in the sector of relationships with consumers. In order to avoid overlapping and grey areas, at Community level there has been a proposal for a general content directive to regulate, in a systematic way and at the highest level of harmonisation, contracts which have a professional as one party, and the consumer as the other. In this way the issue discussed at national level of relationships between general contract law and consumer law has been raised to a Community level. That is, whether the latter constitutes a specification of the former or a derogation of the former, or whether the latter tends to spread over the former, partially replacing it, or whether "radiating" over it, it constitutes an evolutionary factor.

The application of fundamental rights in relationships between individuals, the formation of a consumer rights code in the field of contracts and the drafting of a common frame of private law rules, are processes which for now are moving in parallel, they intersect in several places, but they seem destined to merge.

4.5. Fundamental rights, the European Charter of Fundamental Rights and the DCFR

Since 1 December 2009 the Treaty of Lisbon is in force; the Treaty includes a Part II which is the text of the Charter of Nice which is now a binding text, displaying legal effects.

And so we come to one of the crucial aspects of private law, also reflected by the Draft, the issue of applying fundamental rights to relationships between individuals. In actual fact, the Draft is not only aimed at the Member States of the European Union, but it is only natural to consider it in the light of Community law, also considering the interest that it has aroused in the Community bodies.

Among the European Union's objectives, the European Charter of fundamental rights establishes human dignity (art.1-2) as a basic value and specifies that sustainable development in Europe is based on a "a balanced economic growth and price stability, a highly competitive *social* market economy, aiming at full employment and *social progress*" (art.1-3). The Charter recognizes and guarantees the rights of the individual to physical and mental integrity (art.II-63), reaffirmed in the form of health protection (art.II-95), respect for family life (art.II-67) and personal data (art.II-68) and it specifically provides for "a *high level* of protection" for the consumer (art.II-98).

Therefore, it is necessary to distinguish between the demands of citizens which concern fundamental rights recognized in the Member Countries' constitutions and reaffirmed, in an even more extensive way, in the European Charter, and the so-called "economic rights", which are found on the same level as the

rights of the "professional". The Resolution on consumer rights and interests of 1975 dealt, even then, with both categories of rights, but today the perspective has changed: even in Community law (which constitutes a legal system in itself, not assimilable to the national legal systems) it is now possible to use the formal categories which distinguish the sources of law and order them according to a priority, as occurs in the national legal systems.

And since it is inconceivable that EU policies conflict with the fundamental rights recognized by the European Charter, the fundamental rights become a *limit* to Community action in this sector. Therefore art. 153 (ex 129) of the EC Treaty – which imposes on the Community the task of "contributing" to the protection of the health, safety and economic interests of consumers, and of considering their needs, must be reread in the light of the European Constitution provisions. Like national constitutions for which an interpretative process of "direct application to relationships between individuals" was created, the European Charter of fundamental rights also implies the direct application of the provisions contained within in to relationships between individuals.

What are the remedies for the violation of fundamental rights in an economic operation with a contractual legal guise?

Normally the regime of remedies is entrusted by Community law to the national systems and their application to national judges. However, in the case of violation of the principle of non-discrimination (which, naturally, does not exhaust the list of fundamental rights) the principles in which the *acquis* on consumer law has been consolidated (Acquis Principles) provide for compensation of economic and non economic loss (art. 3:201 (2)); on the other hand the DCFR provides for the application of remedies for "non performance" (art. III.–2:104); if the non-performance cannot be excused it is also possible to request "specific performance" (III.–3.101), or compensation, including non economic loss: III.–3.701).

The DCFR is therefore more advanced, from the perspective of protection of the individual, than the Acquis Principles. But this is, however, a sector which can only partially coincide with that of consumer protection in general, because from a contractual perspective it should not be possible (in my opinion) to take into account previous behaviour, which takes place in the precontractual phase, or in the case of a simple social contact which did not result in a contractual relationship. In other words, if the violation occurred before the contract was concluded, there is only room for compensation, but not for "specific performance" which would entail obligatory conclusion of the contract.

4.6. Consumer rights

In considering the responses to the Green Paper on the *acquis* concerning consumers (of 8.2.2007) as a whole, the Directorate general on the health and protection of consumers revealed that most of the interlocutors showed a pro-

pensity for adopting a general instrument aimed at the horizontal harmonisation of the rules on both cross-border and national contracts, an instrument which could entail greater legal consistency in the specific sectors considered. The majority (with 62%) is in favour of an instrument which introduces full harmonisation, this is a position shared by the European Parliament, by the organization representing businesses (at least for some essential aspects, like the definition of consumer and professional), while most of the consumer associations are in favour minimum harmonisation. The notion of consumer should be maintained within the most circumscribed limits, concerning the natural person. Disagreements persist over the application of the good faith clause, which bodies representing business are opposed to. The negotiation of individual terms should, according to most people, exclude unfairness tests; the combination of the black list and the grey list of unfair terms is welcomed, while most interlocutors are against extending the unfairness test to terms which define the contract content and price. More articulated were the responses to questions on remedies for non-performance of information obligations; in most cases withdrawal is considered appropriate, this is accompanied by other remedies for individual types of breach. Instead, there are no univocal positions either on general remedies to contractual non-performance or on compensation.

Following the consultation the European Commission drafted a proposal for a European Parliament and Council directive on "consumer rights" [COM (2008) 614/4 of 8.10.2008]. The text provides fifty articles and several annexes comprising comparative forms and tables. The *exposé des motifs* includes sixty-six recitals and covers over twenty pages: the directive is aimed at revising the *acquis communautaire* on consumption, at simplifying the legal framework in force, at improving the functioning of the internal market and at resolving problems posed by the conclusion of transnational contracts. In this regard provisions were introduced on the choice of the applicable law with regard to contractual obligations (the so-called "Rome I Regulation" n.593 of 17.6.2008). However, the Commission acknowledged that the application of the Regulation, which allows the consumer to invoke national rules (art.6), does not rule out the possibility of interpretational conflicts which could hinder the circulation of goods and services. This led to a very important decision, consisting in getting around the problem of the applicable law by providing uniform contractual rules concerning the relationships between professionals and consumers so that in every national legal system of the European Union the same rules can apply. This result is obtained – in accordance with the Commission's intentions – by carrying out two operations: the drafting of a single text which coordinates the Community directives on the relationships between professionals and consumers, and choosing the level of harmonisation, described as "complete" or "total" and "targeted" (ciblé).

This is a very important decision because, until now, Community consumer law was entrusted to "minimum" directives, which, having established a "minimum common denominator" consisting of mandatory principles to be

implemented in all the national legal systems, allowed individual legislatures to raise the level of protection. This system had the advantage of not lowering the protection of rights in the legal systems in which it was stronger compared to the legal systems offering less protection of civil rights, and at the same time of allowing the latter to gradually adapt to the stronger models, in the sectors considered on different occasions. However, two negative aspects were found: the legal treatment of relationships with consumers ended up being different, and the level of protection they were guaranteed varied from country to country. Complete harmonisation, proposed by the Commission, is pressed for by professionals, who currently have to face significant transactional costs due to the variety of applicable rules, and by consumer associations, who on each occasion should advise their members on which law, of the two in consideration, is the best to apply to the contract. This, however implies a kind of restriction of the sector, whose evolution will exclusively depend – if the proposal is approved – on Community legislature, which will therefore limit domestic decisions.

The proposal does not concern all of the sector's directives, but just those covering some types of methods of concluding contracts (contracts concluded away from business premises, distance contracts) and some areas concerning content (unfair terms and sales guarantees). The outcome is a "mini consumer code" which regulates, according to the definitions and scope (arts. 1-4), information (arts. 5-7), withdrawal rights (arts. 8-20), some aspects of sales (arts. 21-29), contract terms (arts. 30-39) and aspects regarding application of the directive (arts. 40-50).

Art. 43 establishes that if the "applicable law" is that of a Member State's legal system, consumers cannot waive the rights conferred on them by the directive. This implies that the rules are imperative and that the fundamental difference between a directive like this, leaning towards complete harmonisation, and an actual regulation is scant, mainly consisting in legislative technique (implementation of principles, for the one, immediate enforcement, for the other), and in implementation times.

Another important choice involves the definitions of "consumer" and "professional", in which the sector of "liberal" work has been included. To tell the truth, this is simply a clarification, given that the notion of "professional" already included the businessman and the professional who carries out intellectual work, as defined in the civil code.

Some of the notable new elements are the obligations imposed on intermediaries acting on behalf of consumers, the uniform time limits for withdrawal rights, the imposition of risk of loss or damage of goods during delivery on the trader, the provision of a list of contract terms described as unfair and a list of contract terms that are presumed to be unfair in the absence of proof to the contrary, to be provided by the professional.

Rules which have remained outside the scope of the directive, despite being included in the *acquis communautaire*, regard unfair commercial practices, labelling, product safety, the liability of the manufacturer, tourism services,

consumer credit and remedies. Nothing is said about the directive concerning services, which must be implemented by the Member States by December 2009, even though a partial overlapping of the rules is possible, especially as far as information and contract terms are concerned.

The directive will certainly also have an impact on the drafting of uniform principles regarding contracts, sources of non-contractual obligations and the discipline of sales.

At the same time two important works have been published: a compendium of the directives concerning consumer contracts and the progress of their implementation in the Member Countries, and a systematic reconstruction of the *acquis communautaire* on the matter. We are therefore moving towards a "codification" of Community consumer law.

The DCFR does not have a section dedicated to consumer law as part of its structure. Rather, it has followed the model of the BGB and has included special rules within the general structure concerning all private law relationships, thus relationships between consumers, relationships between professionals and consumers, and relationships between stronger and weaker parties: indeed, there are rules which try to rebalance the asymmetry of contracts when one of the parties is a "weaker" consumer, or a "weaker" professional.

The Draft marks, then, the expansion of consumer law into the field of general contract law, thus legitimizing the idea that today it is no longer relevant to talk about "consumer contracts" but it is necessary to talk about "asymmetrical" contracts, that is to say, about contracts that are regulated by taking into consideration the situation in which one party finds himself in a minority position compared to the counterpart, even if this does not involve a party ascribable to the category of consumers, minors, the naturally incompetent and so forth. I will return to this point shortly.

4.7. The drafters' choices

In order to appreciate, on the one hand, the enormous effort made by the authors, and on the other hand, the basic choices which they made in writing the Draft, it is necessary at this point to go into some details. Naturally, this is a brief analysis, given that the Draft is composed of ten books and an appendix containing definitions; each book is composed of dozens of rules, the definitions go on for dozens of pages; really, each rule, each definition deserves a comment; when the annotated edition is published, it will be possible to go on to make a more thorough analysis.

Even though, as I mentioned at the outset, the aims are different, comparison between the Draft and the codes in force is inevitable: for my part, the comparison will involve the Italian civil code, introduced in 1942, amended for the section on family law and succession in 1975, and updated on many other occasions. Unlike that which happened in Germany, or that which is happening

in France and in Spain, there are no official projects in Italy to reform the law of obligations and of contracts; however in 2005 a "consumer code" was introduced, a sector-specific code in which the provisions on almost all relationships with consumers, including of course the implementation rules for the directives on contracts and consumers, were brought together. Initially, the implementation rules for the directive on unfair terms and those for the directive on sales guarantees were added to the civil code, but in 2005 those rules converged in the sector-specific code.

I will not dwell upon the structure of the Draft, even though it would be interesting to understand the reasoning behind the positioning of the rules on obligations, which are placed after (Book III) rather than before contract rules (Book II) while, since the contract is one of the sources of obligations, we would expect a different choice. Also of interest are the rules on the "acquisition and loss of ownership of goods" (Book VIII), which in the Italian civil code are spread out in the book on property and in the other books, with regard to the discipline of individual contracts or the protection of rights; in the same way one can understand the emphasis placed on the "proprietary security rights in movable assets" (Book IX), which in the Italian civil code are just hinted at, given that one of the aims of the Draft consists in providing rules to encourage the integration of the internal market and the circulation of goods and services by giving certainty to relationships, confidence to businesses and protection to users. Instead, what is completely new for the Italian jurist are the rules on "trusts" (Book X), which in Italian law are either replaced with legal rules concerning trust agreements *(negozio fiducario)* or they derive from the international convention on this matter, as it is claimed that it also contains substantive law provisions.

There are many new elements on the subject of contracts. I will only dwell on a few of them, choosing those which may appear more important in the eyes of an Italian jurist.

The rules on contractual freedom, found at the beginning of book II, were the subject of extensive analysis during the seminar organised by the Italian Bar Council, which I mentioned before, but also in a seminar held at the Law Faculty of the University of Rome, La Sapienza.

In these two seminars the limits of contractual freedom were examined, understood as those involved in the relationship between mandatory and non mandatory rules, in the relationship between the legitimization of bargaining power and the abuse of bargaining power, and in applying the principle of transparency and the principle of good faith and fairness.

However, there are two aspects which are the most striking – I would say in a positive sense – to the Italian jurist, who in the Draft finds many rules which are congenial because they are already provided for by the civil code, on contract interpretation, on simulation etc.

I am referring to "pre-contractual duties" and to "unfair terms".

As I pointed out a few moments ago, Book II of the Draft contains rules on contracts in general, but within each institution it distinguishes between (i) rules aimed at regulating contracts concluded by contracting parties who are not qualified, (ii) rules aimed at regulating contracts concluded by consumers, (iii) rules aimed at regulating contracts concluded between "weak" professionals, and (iv) rules aimed at regulating contracts concluded by "weak" consumers. The first group of rules is not, however, neutral, as one may think at first sight. Because despite being aimed at all contracting parties, these rules contain correctives based on transparency of the contract, on good faith and fair behaviour, and on the prohibition of contractual abuse, which meet both the demand to "moralize" the market, and the demand to accommodate social needs which would not be fully met by the free play of the forces concerned.

Now then, Chapter 3 of Book II concerns the subject of "Marketing and precontractual duties" (II.-3:101-3:501). This subject is completely new with respect to the civil code which (the first of the modern codes) contains specific rules on the subject of negotiations and precontractual liability (arts. 1337-1338). In connection with the general principles relating to the application of the general "good faith" provision in the phase prior to contract conclusion and the obligation to inform the other party of the causes of the invalidity of the contract, Italian jurisprudence has completed the statutory provision by establishing the extra-contractual nature of the liability for violation of these provisions and the extent of the reimbursable loss contained in the so-called *pre-contractual liability* (reimbursement of the costs sustained during the negotiations and payment of the profits lost through not concluding other contracts. Obligations in the precontractual phase are therefore limited and not standardized: they particularly concern the suspension of negotiations without justification, but do not concern the obligation to disclose facts and circumstances, except for the causes of invalidity of the contract.

The fulfilment of precise precontractual information obligations concerning the list of data and the provision of explanatory notes and documents is only provided for by specials laws on contracts with the consumer and contracts concluded by banks, by insurance companies and by financial brokerage companies with their clients.

On the other hand the Draft raises the information obligations of businesses to a general rule (to be complied with vis-à-vis anyone, as the text says "another person") in the case of the sale of goods, assets and services: it does not specify in detail the information which must be given, but it employs a general clause, based on the reasonable expectation ("… reasonably expect …") of the counterpart, and takes account of the standards of quality and performance, described as "normal" under the "circumstances" (II.–3:101).

In the case of the counterpart also being a business, the violation of this duty corresponds to the failure to provide information which would be expected taking account of "good commercial practice"). Certainly, this is absolutely new

in our experience, where negotiations between professionals are normally entrusted to the free market, except, precisely, for special rules.

The Draft also regulates precontractual information obligations with respect to the consumer who we may describe as "average" (II.–3:102) and the particularly disadvantaged consumer (II.–3:103); it provides rules on information provided in real time and by electronic means (II.–3:104, 3:105). It also provides that the price, the name and the address of the business are provided (II.–3:107, 3:108).

On a general level, it provides that the information is clear and precise, and expressed in a plain and intelligible language (II.–3:106). This too is very new: in our legal system such a principle has not been codified; similar rules only apply to consumer contracts by virtue of the Community directive on unfair terms.

A similar principle is provided by the draft regarding terms which have been prepared by one party and submitted to the other (II.–9:402). In this case too, with a provision which is mandatory for the parties (II.–9:401) the terms must be drafted and communicated in a clear, simple and intelligible way.

In the case of breach of the precontractual obligations the penalty is the right to damages for loss ("loss")(II.–3:501), which goes beyond the simple *precontractual liability*. When the commentary is published it will be necessary to check whether the authors ascribe this case to the area of extra-contractual liability, rather than to that of contractual liability, with all the consequences that arise from this on the subject of the burden of proof and the limitation period of the legal action for damages. The choice of the authors, however, is clear: a contract concluded in breach of the precontractual obbligations is in itself valid, and not rescindable; on the other hand, in the case of "unfair" terms the term is not binding (II.–9:408).

Recent jurisprudence from the Italian Court of Cassation, on the other hand, provides for termination of the contract, if the information obligation is provided for by law, with the resulting compensation for contractual damage; but there are decisions which apply the remedy of nullity, with the resulting restitutions.

The Draft also provides special rules when the contract is concluded with the consumer (II.–3:102).

Another example of raising consumer rights to the level of general legislation is provided by the application of the principle of invalidity of the terms prepared by one party and submitted to the counterpart.

First time among modern codes, the Italian civil code provides rules on the standard terms drafted by one party and imposed to the other, without making distinctions of status; the terms are not invalid if they are approved by being specifically signed (art. 1341 para.2).

In the DCFR instead the terms are submitted to the scrutiny of "unfairness", that is "significant disadvantages" imposed on the contracting party through conduct contrary to good faith and fair dealing (II.–9:404), it does not make a difference whether the counterpart is a consumer or otherwise.

However, if the counterpart is a business, the Draft extends protection to it also and this goes beyond Community law itself which reserves this protection to the consumer only. The Draft, then, does not reflect, at least from this point of view, the tendency of the national legal systems nor the tendency of Community law; here it neither works as a restatement nor as a reflection of Community law, but accommodates the demands of certain academic opinion and certain bodies (such as the English Law Commission) which had expressed their wish for the "moralization" of the market in the drafting of terms and in their imposition through controlling the abuse of bargaining power. In the case of contracts between businesses reference is not made to disadvantages but rather to serious breach of good commercial practice, good faith and fairness ("… grossly deviates from good commercial practice, contrary to good faith and fair dealing": II.–9:405). It is not exactly a test of abuse, since commercial practice is legitimized, in so far as it is "good", but the use of good faith and fairness in drafting the contract, in the appraisal of the individual clauses and in the comparison of them with clauses applied in normal practice, is however an important step forward.

The text has a number of implications, and it would be possible to continue this analysis for pages and pages. As you can see, the Draft is truly playing a driving role in the academic world and in the legal culture of every country, and it involves those whose who practice the legal professions: it is therefore a training ground in which jurists today test themselves in order to prepare the law of tomorrow. According to the programs of the Commission, on 26 April 2010, the Commission set up an expert group on a Common Frame of Reference in the area of European contract law (Commission Decision **2010/233/EU**). On 1 July 2010 the Commission has approved a Communication (COM 2010 n. 348), a Green Book asking to the States, Governments, stakeholders to reply to some questions concerning the instrument though which a CFR should be enacted.

5. Towards a European Contract Law

5.1. Background

The title of this meeting, "Towards a European Contract Law" – besides drawing again on the topic of some European Commission's Communications (COM (2001) 398 and COM (2003) 68), some European Parliament's Resolutions and the title of the Green Paper on Policy Options (COM (2010) 348), to which hundreds of institutions and stakeholders provided analytical replies – reminds us of the title of a valuable collection of essays, published in different successive editions, devoted to a "European Civil Code". Precisely because it replaces the word "code" with "law", this formula keeps open the choice between the different solutions which can be conceived: "law" is a wider concept, which includes one of E.U. instruments – regulation, directive and recommendation,

in particular – or simply refers to "principles", "negotiating models", or "codes of conduct", if we want to include also the rules arising from the application of the principle of freedom of contract. However, if a pathway is described – and, indeed, "towards" implies a direction – to reach an aim – namely the European Contract Law – first and foremost we must identify the starting point, select the aim and finally choose the means to reach it.

We cannot set off if we do not know from where we start our journey, where we want to go and how we want to proceed. The problem lies in the fact that we must consider the opinions of counterparts who have not only different skills and professional backgrounds (academics, independent professionals, associations of consumers and entrepreneurs, other categories of stakeholders, government representatives and, obviously, politicians), but also different ideas on the future. Nevertheless, if we keep on raising the same questions, we will only make a good academic exercise without reaching fruitful practical results. We would not have reached this stage without sound cultural bases, accurate research and the extraordinary work carried out by the groups of experts and academics who, more than 30 years ago, started to work on a forward-looking project such as the "codification" of European Contract Law, the consolidation of Consumer Rights' *acquis*, the C*ommon Core of European Private Law,* the drafting of common terminology and principles, the Principles of European Tort Law, the Study of a European Civil Code, the Draft Common Frame of Reference.

Once and for all, we should overcome the objections raised by sceptics and those who think it is not necessary, or even advisable, to set out on a journey and reach a destination, since they believe we cannot go well beyond the current situation. The reasons underlying this stance are well-known to all of us and point to the diversity of cultures, models, situations, competition between legal systems, cost savings, etc. However, we also know the answers, which justify the intention not to stop the project at this juncture, but rather to implement it with courage and determination.

5.2. The starting point

Hence, I will start by taking stock of the situation so as to see which is the starting point. Precisely thanks to the success of the previously mentioned initiatives, the starting point is different from the one which prevailed thirty years ago. Over time, significant achievements have been recorded.

Firth and foremost, the "gradual convergence" approach. Instead of competing, the various legal systems have started to converge, namely to express options, guidelines and solutions which tend to smooth down differences and identify common solutions.

Secondly, the approach which tends to clarify – if not approximate and standardize – legal terminology and concepts, on the basis of a vocabulary

which is the lowest common denominator of any project relying on comparisons, but also on univocal solutions to similar problems.

Thirdly, the approach which records common principles, the expression of values which are typical of the West and are enshrined in the Charters of Rights and in similar orientations defined by national lawmakers.

Thanks to the comparison of cases, as well as conceptual paradigms, and thanks to the dissemination of judgment models, on the basis of which the most difficult cases are decided by judges who want to verify, discuss and adopt foreign models, a "dialogue between courts" has been established.

A more uniform culture has also been created, thanks to the organization of specific courses and the creation of European Private Law chairs, as well as the collection of casebooks and handbooks, the organization of workshops and conferences to delve into this matter, which have led to the expansion of the debate on this topic – that had started almost as an academic bet – to companies, consumers and institutions, also involving E.U. institutions. All classes of jurists and legal formants have cooperated in creating a new way to define, interpret and apply private law rules.

European Private Law affects and includes many sectors, one of which has developed before the others, namely consumer law. The *acquis communautaire* on the matter, which relied on wide literature and a huge number of cases emerged at national level and tackled with accurate scientific studies and research, strengthened itself by developing a *body* of rules and postulated the need to collect these rules in a systematic framework, a general Consumer Rights Directive.

Hence, the starting point is different compared to the one to which we usually refer when we talk about the meaning of "European Contract Law", since it is based on existing law, both in terms of consumer law and contract law. Dozens of directives have regulated matters such as the ways to fulfil obligations, payments (carried out also by e-means), the contract content, the assessment of the parties' behaviour, unfair terms, the contract formation (including distance contracts and off-premises contracts), the ways to unilaterally terminate a contract (such as the right to withdraw), the information provided to the parties before entering into a contract (the so-called pre-contractual duties), etc. New subjective rights have been created. Even though they are designed to protect the weaker contractual parties, namely consumers, users, non-professional investors – these rules have affected the way of conceiving the contract, the parties' choices and behaviours, as well as judges' and lawmakers' decisions. The various directives introduced over time have gradually increased the harmonization level of the rules regarding relations with consumers, thus leaving smaller leeway to national lawmakers who had diversified protection models. Therefore the need is felt to coordinate *consumer rights* within a framework to ensure the same – and highest – level of protection to all European consumers.

Directives are ever more precise, mainly consisting of mandatory rules, and have no longer the "legal irritant" effect they could have in the past.

Also the European Court of Justice's judgments have a unifying effect, obviously with all the uncertainties and ambiguities of some decisions, which have been criticized by academics and experts.

There are still two important new events which must be recalled among many others, namely the adoption of the Nice Charter (2000) and the European Parliament's recognition of its binding value (2007), as well as the adoption of the Lisbon Treaty (2007) and its entry into force on December 1, 2009. In spite of the provisions enshrined in Article 6 of the Treaty, which would seem to point to a restrictive solution, the problems regarding the direct application of fundamental rights protection to private parties' relations, including contracts, always remain and, indeed, are even more acute. This holds true also regardless of the direct application of the individual member States' constitutional provisions to private parties' relations. It is true that the Lisbon Treaty has not enlarged E.U. competence, but it is equally true that once a rule has been introduced in a system, its interpretation cannot be constrained into a fully foreseeable pathway. Far-reaching literature is being collected on the application of fundamental rights to contractual relations, and the link existing between the Charter of Fundamental Rights of the European Union and European Contract Law projects. This was inconceivable in the past and has ended up by involving also the European Convention on Human Rights.

Another new issue, the debate on which is not considered to be specifically at an initial stage, regards the political and social significance of a "code", a "model", a "box" in which contract rules can be collected. Is it a politically neutral project? What political (and not only institutional) legitimization have those who have participated in it? What involvement should or shall national Parliaments have in the continuation of the pathway designed to implement the original project, as changed over time by these events?

Certainly the project is not politically neutral: it tackles the social problems faced by consumers and weak contractual parties and it tries to reconcile companies' needs to have a simplified and standardized internal market and the need to limit the freedom of contract to safeguard the interests which deserve protection.

Hence, we must adjust the aim: the journey must not be started from scratch; the current starting point is far different from the one faced by the few courageous "pilgrims", who set out on that journey thirty years ago. We are already near to destination: therefore, we must no longer decide whether it is better to set off or stay, since we are already on that journey and we can no longer go back.

Some people have regretted the timid approach of the Commission's last Communication on European Contract Law and have seen in the Green Paper a step back rather than forward towards approximation, harmonization and standardization of contract law rules. Some others have noted that isolating contract law, by ignoring that contracts are a source of obligations, is a methodological mistake, and that only by placing contract rules side by side with

those on the other sources of obligation can we think of defining a set of rules coordinated in a systematic and not piecemeal and fragmented way. This has been exactly the positive choice made by the drafters of the Draft Common Frame of Reference.

The replies have been manifold.

It has been agreed to provide more information on the current situation and initiatives, as well as on the fact that the outstanding issues are real and relevant and the text of the Common Frame of Reference can be considered a toolbox on which to draw for drafting regulations, contracts or for other purposes. A preference has emerged for the introduction of an optional instrument (the so-called twenty-eighth model), rather than a directive or a regulation requiring member States to change their systems.

Therefore today – unlike thirty years ago – we are not faced with a *tabula rasa*, but rather a canvas – the canvas of an Impressionist painter – having many points of light which, however, reveal an overall blurred picture. For the time being, the aim we can reach is not the clear, physical and concrete image of a text not laying itself open to uncertain interpretations, a text which can be considered satisfactory since it is reasonable and shareable; nor its content, scope of application and, hence, its specific goal are defined.

5.3. The aim

Therefore many destinations appear on our map; we can identify at least four, each of which can be reached by following different pathways:

(Ai) the pathway which stops at the toolbox, by keeping alive the debate, the dissemination of information and the gradual approximation of systems;

(Aii) the pathway going forward with a view to reaching an intermediate aim, namely the drafting of a text which considers the general principles of contract law, the formation of contracts and pre-contractual obligations,the content of contract and unfair terms, contracts sales and related services, damages for non-performance, restitutions and limitation of actions;

(Aiii) the pathway designed to complete the Common Frame of Reference, on the basis of the considerations made by stakeholders and the indications emerged from the replies given to the Green Paper. Indeed, the issues raised by the Green Paper were more methodological than content-related, but many people seized that opportunity also to make comments on the merits of the choice made by the drafters with reference to the CFR structure, the sectors considered and the solutions identified;

(Aiv) the pathway which resumes the Draft analysis and adds all the chapters omitted – for the time being – in the CFR definition, thus including obligations and corresponding rights, benevolent intervention in another's

affairs, torts, unjustified enrichment, acquisition and loss of ownership of goods, proprietary security rights, trusts.

All solutions imply – at the same time – decisions on other important issues, which cannot be taken individually without having in mind the aim identified:

(Bi) the future of the draft Consumer Rights Directive;
(Bii) the CFR coordination with the Rome I Regulation, or the revision of the latter, thus enabling the parties to choose, as applicable law, also *model rules* and not only the laws in force in a specific legal system;
(Biii) the extension of the CFR scope of application to the contracts reached between parties having the same nationality;
(Biv) the CFR extension to B2B contracts.

With reference to the first issue, clearly a general Consumer Rights Directive should be coordinated with the CFR, in the sense that the parties which choose *model rules* should not be allowed to avoid the *mandatory rules* which protect consumers. However, E.U. institutions must also clarify why the scope of application of the proposal has been gradually reduced and how the Directives on off-premises sales, unfair terms and manufacturer's liability should be updated. The pragmatic solution, which is currently emerging, seems to be oriented to a policy characterized by small steps finally leading to a a body of uniform consumer rights rules for all member States. Nevertheless, the level of protection is still uncertain. However, it is advisable for any CFR text on contracts to include also consumer protection rules.

The second issue can be more easily tackled since we can correct the Rome I Regulation by including the optional model of contractual rules, or we can draft a Regulation which, by leaving the parties free to choose the optional model, provides for the possibility of derogating to the *applicable law* set of rules.

However, I wish to raise a problem that is always taken for granted and regarded as solved, namely whether it is always expedient and advisable for the stronger party to impose its own national law or for the weaker party to request the application of its own national law. For consumers the ban has been laid down to impose rules which reduce the protection ensured to them by the laws of the country of origin. For non-consumers, however, the problem remains outstanding and should be solved by the parties concerned, on a case-by-case basis, by comparing rules until their standardization is reached.

We think – wrongly – that choosing our own national law is always the best choice, since it is the law we better know; or because we must not waste resources in the comparative analysis of the most favourable law and also because the application of one single national law makes relations easier. Nevertheless, our professional activity and experience teach us that there may be cases in which, well knowing the differences between national systems, sometimes it is preferable to choose the law of the other party or of a third country.

The contractual clauses inherent in the choice of applicable law cannot be controlled with the *unfairness* criterion, since a national law cannot be considered "unfair" and we cannot derogate from the national regime if it is more favourable to consumers. Even by applying a different law, we cannot worsen consumers' situation.

With reference to the third issue, we must consider the point we have reached and take note of the hesitations expressed by the Commission in its retrogressive interventions. Hence, we cannot think of such an ambitious and futuristic project, consisting in requiring member States to replace their rules with the CFR ones (and, even more unlikely, with the Draft). Conversely, I think it is reasonable to enable also the parties having the same nationality to benefit from an additional opportunity provided by them through the choice of *model rules*.

From the systematic viewpoint, and with the aim of safeguarding freedom of contract, there is no reason to grant the right of choice to the parties only in the case of transnational contracts. In view of streamlining and simplifying the rules to be applied to contracts, it is appropriate to expand the freedom of contract so as to gradually reach uniform rules in terms of their drafting and interpretation, at least in this sector.

The fourth issue regards B2B contracts, for which the response is two-pronged. In relations with companies, small and medium-sized enterprises (SME) must be granted a protection regime. All legal systems have tried to provide this protection in various forms and in various ways, with a view to curbing large companies' economic dependence and contractual power abuse. In relations with consumers, however, SMEs would like to avoid too high a level of consumer protection. We cannot proceed by excessive simplifications, but this aspiration cannot be met because we cannot gauge and scale consumer protection according to company size and for the additional reason that, if protective measures are granted to SMEs in their relations with large companies, for the sake of consistency the same principle shall also apply to their relations with consumers.

Therefore, if preliminary issues can be thus solved, in a synthetic way, it gets easier to identify the aim. The first one (Ai) has already been reached: the toolbox is included in the Draft or in the more limited CFR text submitted to stakeholders. Those who want to "avail themselves" of these formulas, by possibly extending their choice to the Principles of European Contract Law (PECL) or the Unidroit Principles, can freely do so. The fourth aim (Aiv) has been basically ruled out both in the Green Paper and the replies received from the parties concerned.

The intermediate aim (Aii) and the final one (Aiii) still remain to be reached. They imply moderate choices, but wider consensus is likely to emerge on them than the one achieved on the other two. Having participated for many years in the Staty Group for a European Civil Code coordinated by Christian von Bar, I would have chosen the (Aiv) aim, and I would have even imposed the text –

revised, re-discussed on the merits and shared by the widest possible number of stakeholders – by means of a regulation. Nevertheless, taking in consideration also the position of the stakeholders, the position of the CCBE (Council of Bars and Law Societies of Europe) I believe that today a pragmatic choice must be made so as to try and achieve what can be reached.

With reference to the final aim, namely (Aiii), the debate on content must be resumed, rather than on the structure and goals, which I think are now clear and shareable as outlined in the Green Paper and the workshops organized by the Commission with the group of experts and stakeholders' representatives.

In relation to the intermediate aim, namely (Aii), I think that some provisions, which would make the text more significant, are unavoidable.

I only wish to make some examples.

Reference to fundamental rights. The formula used in the Draft is wide (Book I, art. 1:102) since it refers to "any applicable instruments guaranteeing human rights and fundamental freedoms and any constitutional laws". I wonder whether we could not make direct reference to the Charter of Fundamental Rights of the European Union.

Discrimination against the parties. I do not think we can omit *non-discrimination* rules but, at the same time, I think that those included in the Draft (Book II, art. 2:101) are limited only to "sex or ethnic or racial origin", whereas the Charter of Fundamental Rights extends the scope of discrimination. Hence remedies shall be envisaged, which can be clearly applied in case of infringements, namely compensation for damage, by possibly including also *specific performance.*

Contract interpretation. The Draft refers to the *common intention of the parties* (Book II, art. 8:101), which is understandable: this is the subjective interpretation, but no mention is made of the parties' behaviour and the rules on objective interpretation are reduced since the application of a very flexible criterion is preferred, namely the *reasonable person* model. Are we granting excessive power to judges?

Conversely, the inclusion of *merger clause* and *hardship* rules is appreciable.

As to *unfair clauses*, bearing in mind that control is still of judicial nature, it is appropriate to extend consumer protection also to the *terms individually negotiated*, or anyway clearly ensure the best suited forms of protection to the weaker party, considering that individual negotiations with the stronger party are always unbalanced and lopsided (Book II, artt. 9:103 and 9:402).

The list of *unfair terms* as such, envisaged by Directive 93/13, should be expanded since, in member States, judicial control has led to different results according to the various experiences. This should avoid the weaker party being granted different degrees of protection according to the national judges' ap-

proach and trends and should also ensure more effective control over the contract content. It would also be appropriate to coordinate *unfair commercial practices* rules with the rules on the formation and content of contracts. Moreover, as previously outlined, it would be advisable for the *unfair clauses* rules, as well as the principles for protecting the weaker contractual party (obviously with a differentiation compared to consumers), to be extended also to B2B contracts.

No criticism has been levelled at the inclusion of a text on sales and sales-related contract rules: it is understandable to start with somehow uniform rules on sales, not only because they are the most frequent contracts and the most important tool to regulate economic transactions on the internal market, but also because they are the regulatory model to which lawmakers usually refer when they have to define the general rules of contract. Similarly, it is useful to extend the text also to sales-related contracts. However, considering that these rules regard *specific contracts*, they should be added to the general rules of contract and not be included in them. Contracts, from the conceptual viewpoint, but also special contracts, from the contractual and commercial practice viewpoint, are based not only on exchange, but also on cooperation. General rules of contract must be read, interpreted and applied as if they were designed to regulate all types of contracts, except the special rules envisaged for each type of contract.

5.4. Which tool should be used to reach the aim? A way forward

Now we must make a step forward for contract rules to be shared by everybody. When I say everybody I refer – first and foremost – to jurists, then to stakeholders and finally to citizens.

I am not worried about stakeholders, since their position is well-known and most of them have expressed a favourable opinion on the project.

Nor am I worried about citizens, because saying that this text must be accepted by everyone – in other words, "recognized" as expression of one's own belonging to the European Union – means to identify and associate these rules with political choices. Certainly they are not "neutral" rules; they are expression of a law policy which, however – as I have previously mentioned – is not based only on an economic logic and, hence, is not only market-oriented. Nevertheless, we cannot assimilate this text to a treaty, on which citizens are called upon to express their opinions directly. Only the expression of their will through national Parliaments will be enough. On the other hand, the content of such a technical text could not be submitted to a referendum, nor discussed in Parliaments. Though different from traditional civil codes, each model of contractual rules should not be subjected to an "*ad personam*" check, as was the case with national codes. If the parties are free to adopt the text, they may adopt it "as a whole" or select some parts or individual provisions. Freedom of contract always enable the parties to include individual formulas in their texts, subject to compliance with *mandatory rules*.

Conversely, I am worried about jurists – namely those who want to protect well-acquired models; those who, owing to laziness or nationalism, want to make their own model prevail over a uniform model, as well as those who fear that standardization would make scientific and professional work opportunities fade away. However, the work linked to the interpretation and application of the text would not disappear; quite the reverse, everybody would benefit from having an additional optional model.

As I said before, our destination is in the offing and we cannot go back. By paraphrasing the reply of a famous historical figure, I could also answer:

"*non volumus, non possumus*, *non debemus*"

Chapter 3
Italian Contract Law

1. Autonomy of the Parties and Choice of Law in National Contracts

1.1. Sovereignty vs. private autonomy

Until some years ago the choice of the applicable law made by the parties having the same citizenship was not usually raised explicitly. Indeed, when raised, it was solved in a drastic way, or somehow naturally, since it seemed obvious that – even without a specific decision by the parties in this respect – the parties were bound by their (common) national law. Authoritative legal literature raised no doubt in this regard: "two Italian contracting parties entering into a contract designed to be performed in Italy (hence a contract deprived of criteria connecting it with other States) cannot decide not to apply the Italian law to the contract".[1] The *sovereignty* principle prevailed: either in case of the parties' failure to choose, or in the event of the parties making a different choice.

The preliminary issue to be solved is whether the power of choice is an expression of private autonomy or is to be considered relevant for the implementation of private international law. In the case under consideration, private international law does not apply because the parties have the same nationality, there are no criteria connecting the contract with foreign States, etc.

The criteria to be followed do not tally with the criteria chosen by "Rules of Arbitration" included in codes of civil procedure or by conventions for transnational and international contracts, and not even with the provisions enshrined in the rules of the arbitration when the parties resort to the so-called "administered arbitration", namely the arbitration entrusted to a (private) arbitration court on the basis of an arbitration agreement.[2]

Another preliminary issue is the choice of the applicable law in relation to capacity of the parties, and validity and interpretation of the contract: according to the majority's opinion it is deemed that the logical *prius* consists in using the law chosen by the parties and resort to it with a view to solving the problems of capacity, validity, etc.

Another issue is related to the validity of the clause for the choice of the applicable law: it is possible to verify if it could be an "unfair" term? The choice of a foreign law and the reference to a foreign jurisdiction should not be considered

1 Galgano, *Diritto civile e commerciale*, I, IV ed., Padua, 2004, p. 105.

2 Del Prato, RDCIV 2007, I, 93.

unfair. Indeed, the validity should be assessed in the light of the foreign law. Nevertheless, even if the national law is applied[3] the Directive no. 13 of 1993 considers valid any clause reproducing legal provisions. Before the enactment of the Directive the Italian Supreme Court of Cassation had ruled it out.[4]

The principle of sovereignty prevailed over the principle of freedom of contract –not only in Italy, but also in the countries where the freedom of contact has always been a strong and well-acquired value in the framework of the private sphere, as was and still is the case in the United States.

In that country, irrespective of the choice of the applicable law made by one of the States of the Union (always viewed as "domestic" law), they found it difficult to accept the opposite approach designed to give priority to the freedom of the parties and enable them to choose a foreign law, considering that both the Restatement (Second) of Laws Section 187 (of 1971) and the 2004 amended version of the Uniform Commercial Code Section 1-301 admit the option, though with some limits connected with the founding values of the U.S. system (*fundamental policy),* and confine the choice only to the sphere of commercial contracts.[5]

Nevertheless, taking in consideration as an example the Italian legal system, there are no provisions which, in general terms, forbid to choose a law other than the national law applicable to the contract concluded in Italy, with Italian parties, and to be performed within the national borders. With some cautions: the Italian Code of Insurance explicitly allows this choice, within the limits of mandatory rules (Art. 180 and art. 181 Legislative Decree 2005, n. 209). Hence it must be verified – on a case-by-case basis – whether and according what limits the parties are free to choose the law applicable to their contract.

First and foremost we must rule out approaches which are similar to the one under consideration, but are subject to immediate and simple responses.

The parties are allowed to include in their contract – under the form of contractual clauses – rules replicating the provisions of special foreign codes and laws or principles taken from the case law of non-codified legal systems, provided that the legal institutions referred are consistent with the domestic system. A more in-depth analysis shall be made, at a later stage, on the compatibility criteria because not all the limits and bans imposed on citizens by the

3 According to the Italian Consumer Code, replicating a rule is not a sign of unfairness, even though this provision works on the assumption that the rule belongs to the Italian legal system.

4 Cass. no. 1403 of April 30, 1969, in Foro it., 1969,I, 22223; Cass. SS.UU. (full bench) no. 4082 of November 8, 1976, ivi, 1976, I, 2756; contra Bianca, Condizioni generali di contratto, Enciclopedia giuridica, VII, Rome, 1988, 11.

5 See Baker, *Foreign law between domestic commercial parties: a party autonomy approach with particular emphasis on North Carolina Law*, in Campbell Law Review, 30, 2008, p. 436 et seq.; the traditional theory is defended by Scoles et al., *Conflict of Laws*, 4th ed., 2004, p. 947 et seq.

domestic system can be also applied to foreigners, nor all the economic transactions forbidden to citizens are forbidden when made and performed abroad, such as the agreement between the creditor and the debtor allowing the first to acquire the ownership of the thing given as a pawn.

The parties may refer to a foreign law to regulate the subject matter and aim of their contract when it envisages a legal institution unknown to the national system, as it may be case for trust, which is known in all the common law countries but not allowed or allowed with some special limits or "imported" with different terminology and concepts, like the *fiducie* in France (Loi 2007-211).

The parties having the same nationality may enter into a contract abroad by applying the law of the country where the contract has been concluded, but it can inure its effects in another country only if the form and the content are not constrained by the domestic system. In the event of the contracting party being a consumer, he/she shall be entitled to the same protection he/she enjoys in his/her own country (Art.6, EC Regulation 593/2008, Rome I).

There are also other cases which may appear to be similar to the case under consideration, while they are only slightly approaching and bordering on them.

With reference to the *lex fori,* the Italian Supreme Court of Cassation has clarified that "for the purposes of identifying the judge having jurisdiction over foreigners, in disputes relating to consumer contracts, Article 15 of Council Regulation (EC) no. 44/01 of December 22, 2000, requires – for the applicability of exclusive jurisdiction envisaged by article 16 in the disputes relating to contracts other than the sale of goods on instalment credit terms or for loans repayable by instalments, or for any other form of credit, made to finance the sale of goods – that the contract be concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State.

In this specific case, the Court has ruled out the Italian jurisdiction because the party asking for the application of the consumer jurisdiction – in relation to the non-compliance with the information obligation regarding the "*jus poenitendi*" in a loan contract – had not even alleged that the foreign banking institution directed its own activity also to Italy".[6] The ruling regards the *lex fori*, but it helps us to understand that not even when one of the parties is a consumer, for whom the Rome I Regulation envisages some privileges, he/she can decide not to apply the foreign law if the other (foreign or Italian) party requires to apply it.

Another case is the contract concluded in a country, for instance Italy by an Italian party and a foreign one: here again the ruling regards the *lex fori*, but the case and the motivation assume the implementation of the Italian law.

Considering that, pursuant to the Washington international agreement reached on October 31, 1950 (transposed in Italy with Law no. 11 of January 9, 1951), the privileges and immunities from the Italian jurisdiction are granted to

6 Cass. SS.UU. (full bench), no. 11532, ord., of May 19, 2009.

the F.A.O. top managers and to the officials and employees specifically identified by this international organization with reference to the scope of their activity linked to the F.A.O. supremacy powers and the related institutional goals, the Supreme Court of Cassation (full bench) has decided that the renting of a flat in Italy by a F.A.O. official, for living purposes or for any other direct use, supplements a fact outside the above stated F.A.O. institutional and functional activity – hence for the disputes arising from the related private law contract (in this specific case, arrears for delay in payment and non-payment of rent), the Italian judge's jurisdiction shall apply.[7]

In these cases, the substance law mingles with the *lex fori*, but the problem is similar to the one considered so far.

Another different situation is the inclusion and registration in the contract of rules coming from another legal system, thus turning the regulatory text into a contractual text.

Different problems are posed by the application of the Italian law to a contract drafted by Italian parties in a foreign language or concluded between parties of different nationality – hence a transnational or international contract – to which the Italian law is always applicable. These are the problems extensively and brilliantly described in a book on the "alien" contract which, besides drawing the attention to issues disregarded by the legal literature, has introduced the notion of the so-called "*contratto alieno*" (namely alien contract) [8] in the legal terminology.

1.2. Trust, establishment of companies

Another similar situation regards the implementation of a legal institution unknown in a legal system, but applied in a foreing system. The *trust* is a case in point. In this case the Italian parties could not make the desired economic transaction because, in the Italian system, there are no rules which can be used directly to establish a *trust,* even though the parties could use legal institutions regulated by the Italian system to produce similar effects, such as the so-called "negozio fiduciario", or establish a separate property and assets devoted to a specific goal, according to the rules of company law. Irrespective of the issue regarding the admissibility of an Italian *trust* per se, Article 6 of the Hague Convention of July 1, 1985, ratified in Italy by Law no. 364 of October 16, 1989 (Annex B of the ratification Law), lays down that "a trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case. Where the law chosen under the previous paragraph does not provide for trusts or the cate-

7 Cass. SS.UU. (full bench), no. 13024 of June 1, 2006.

8 De Nova, Il contratto alieno, 2nd ed., Turin, 2010.

gory of trusts involved, the choice shall not be effective and the law specified in Article 7 shall apply".

Moreover Article 7 lays down that "where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to:

a) the place of administration of the trust designated by the settlor;
b) the *situs* of the assets of the trust;
c) the place of residence or business of the trustee;
d) the objects of the trust and the places where they are to be fulfilled".

Furthermore, the law specified by article 6 or 7 shall govern the validity of the trust, its construction, its effects and the administration of the trust (Article 8).

There are also spheres in which any legal system provides for the rules to be applied also in contrast with the parties' will – due to reasons pertaining to public order, creditors' protection or other reasons emerging from the individual specific cases.

In this regard a case in point is the set of rules governing corporate contracts and corporate life. In this case private autonomy is subjected to significant limits.

First and foremost, with specific reference to subsidiaries located in Italy, foreign companies are subject to the (Italian) provisions which regulate the operation of the company or make it conditional upon the compliance with specific requirements (Article 2508 of the Civil Code). Furthermore, when the companies incorporated abroad are different from those regulated by the Code, they are subject to the rules governing companies, with specific reference to the obligations relating to the entering of corporate deeds into the Companies' Register and to directors' liability (Article 2509 of the Civil Code).

According to the case law, "in relation to the legal status of foreign companies, Article 25 of Law no. 218 of May 31, 1995 identifies, first and foremost in the law of the State in which their incorporation has been finalised, the legal system to which we must refer in order to determine, for the purposes of the Italian system, their legal nature, capacity and the liability regime for joint obligations. Hence, to all intents and purposes, a company incorporated abroad, which has in Italy neither its registered office nor its main aim, must anyway be considered a company endowed with autonomous legal personality and, in particular, a business corporation if it is regarded as such in its legal system of origin, in accordance with the laws in force in that country".[9]

9 Cass. no. 3968 of March 18, 2003.

Also recently it has been established that

> "In relation to the legal status of foreign companies, Article 25 of Law no. 218 of May 31, 1995 identifies, first and foremost in the law of the State in which their incorporation has been finalised, the legal system to which we must refer in order to determine, for the purposes of the Italian system, their legal nature, capacity and the liability regime for joint obligations. Hence, to all intents and purposes, a company incorporated abroad, which has in Italy neither its registered office nor its main aim, must anyway be considered a company endowed with autonomous legal personality and, in particular, a business corporation if it is regarded as such in its legal system of origin, in accordance with the laws in force in that country there".[10]

In case of a dispute leading to a legal action initiated by a worker employed by a foreign company, the law regulating the working relationship must be identified in relation to the express choice made by the parties pursuant to Article 3 of the Rome Convention of June 19, 1980 which may also result from the provisions of the contract where they provide reasonable indications on the matter. On the basis of this principle the Supreme Court of Cassation reaffirmed the decision of the territorial court, which had considered the German law applicable to the working relationship established between a German company and an Italian worker seconded to a subsidiary in Italy, on the basis of a series of indicators evidencing the parties' will, such as the choice of German for drafting the contract, the preparation and conclusion of the contract in Germany, the payment of that workers' wages in German marks, the opening of a social security position and the payment of contributions to the German social security institute, as well as the absence of objections by the plaintiff during the working relationship.[11]

Nor can we refer to the regulations regarding the European company, with the related regulation and Directive on working relations, because it anyway assumes the presence of two companies having different nationalities.

Likewise, there exist limits to private autonomy in the sector of banking and financial law. Nevertheless the legal theory – whose origin is based on private international law – deems that the Italian parties may refer to foreign regulations and contractual models (which are self-sufficient to prevent the legal risk) provided that the public order principles and the so called "norme di applicazione necessaria" (rules which shall be enforced mandatorily because they pursue goals which are particularly important for the State which enacted them) are always complied with. This is the case of "derivatives".[12]

The Supreme Court of Cassation (full bench) has decided along these lines by ruling no. 14560 of July 5, 2011. The foreign law provision (the English one

10 Cass. no. 23933 of November 11, 2010.

11 Cass. no. 18113 of November 27, 2003.

12 Carbone, *Dir. Comm. Int.*, 2000, 1, 3.

in this specific case), which admits the purchase of goods as a result of an agreement of forfeiture, does not run counter the international public order, pursuant to Article 16 of Law no. 218 of May 31, 1995, because the related ban does not fall within the relevant founding principles of the international public order – as results from the fact that the agreement of forfeiture is not known, nor forbidden in many E.U. member States. Nor Article 2744 of the Civil Code is a "regola di applicazione necessaria", since this type of rules are only those spatially conditioned and functionally self-limited – hence only bound to be applied mandatorily, in spite of the reference to the foreign law – such as, *inter alia*, tax, monetary, labour and environmental laws.

Furthermore, the Supreme Court of Cassation clarified that

> "There is no coincidence between the overriding rules of the Italian system designed to protect workers and the relevant public order principles as a limit to the implementation of foreign laws, pursuant to Article 31, preliminary provisions of the Civil Code (in the text preceding its repeal by Law no. 218 of May 31, 1995), because the latter cannot be inferred only on the basis of the internal regulatory system – so that the efficacy of the foreign law is confined only to the cases of more favourable treatment for Italian workers – but must be recognized in the fundamental principles enshrined by the Italian Constitution or, however, in the other rules which meet the universal need to protect the fundamental human rights or which characterize the whole legal system so that their infringement is tantamount to a distortion of its founding values. Hence the notion of public order, pursuant to the above stated Article 31, is supplemented by the fundamental principle relating to the workers' right not to be dismissed without a (subjective or objective) fair and justified reason, namely the principle requiring a justification for dismissal (Constitutional Court, decision no. 46 of 2000), which cannot be considered infringed when the foreign system has really ensured control over the employer's decision to terminate the working relations. In this specific case, the Constitutional Court reaffirmed the decision challenged, which had ruled out any infringement of public order as a result of the implementation of the U.S. law in the case of the dismissal of all the employees of the Alitalia airline in the New York airport, because the working relations had been terminated after negotiations, public bodies' mediations and meetings with trade unions, held over many years and designed to ensure the preservation of jobs or a gradual and less traumatic dismissal, also considering that the different levels of guarantees offered by the U.S. and Italian legislation on collective dismissals and social safety nets met the intrinsic differences existing between legal systems and went beyond the "minimum" protection of workers' personality and dignity."[13]

[13] Cass. 19 July 2007, n. 16017.

1.3. The integration of the contract

The examples made are useful to understand that a general rule cannot be defined whereby the Italian parties are allowed or forbidden to choose a foreign law, or more foreign laws if they want a *dépechage* of their contract.

Subject to the limits of public order and *bonne meurs*, as well as the aforesaid "norme di applicazione necessaria", which are designed to prevent the elusion of rules imposed on citizens, the parties – within the scope of their autonomy – may chose a law to be applied to the contract into which they entered.

This implies that the contract is complete, otherwise the foreign law should proceed to complete it.

In this regard the judge could not proceed to the integration of the contract according to the national law, where this opportunity is provided: i.e. in France, according to Art.1135 of the Civil Code, the contract binds the parties not only for what they have agreed but also for what is required by equity, usages and the law; the same for the Italian Civil Code (art. 1374).

Conversely if the national law requires the replacement of a clause with a legal provision (e.g. Article 1339, concerning the automatic insertion of terms) this provision would apply because, in that case, the replacement would be mandatory and the parties could not avoid it also by referring to foreign law.

Also in this case we cannot generalize. Suffice to recall the case in which the parties subject to foreign law only a clause of the whole contract. The contract is subjected to foreign law with reference to that specific clause – and that law will also regulate its validity and interpretation – and, for the rest, it shall be regulated by the domestic law. The same holds true for the cases in which the overriding rules lay down that a clause does not comply with domestic law: in that case the clause shall be interpreted according to domestic law and shall have the limited effects allowed by domestic law.

1.4. The problem in private international law

In a systematic and valuable analysis of the issue regarding the choice of applying a foreign law to the contracts concluded between the parties having the same nationality in contribution entitled *Obbligazioni (dir.int.priv.)* of the *Enciclopedia del diritto,*[14] an authoritative scholar of private international law, Rodolfo De Nova, underlined that the issue could be tackled both from the formal and the practical viewpoints.

From the formal viewpoint a distinction must be made between *domestic* contract and *international* contract, while from the practical viewpoint we must identify the "connecting" criteria which could lead the parties to choose

[14] Specific attention is paid to these issues by Galgano and Marrella, *Diritto del commercio internazionale*, III ed., Padua, 2011, 374 et seq.

a law other than the national one, by referring for example to their residence or domicile, the place in which goods or assets are located, the fact that the subject matter of the contract are goods or assets, the place where the contract must be performed, etc..

Rodolfo De Nova, however, highlighted a problem of legal logic: when the parties have the same nationality and hence enter into a "domestic" contract, does the power they exercise to conclude the contract stem from domestic law? Hence does it already assume the implementation of a positive law rule coinciding with the law applied to that contract, which is national law? The authoritative scholar replied to these questions affirmatively. Therefore the rules allowing, excluding or limiting the implementation of a law other than the national one must be sought within national law.

In this regard, in the Italian law, Article 1372 of the Civil Code reiterates the principles of the Codes preceding Italy's Unification, as well as the *Code Napoléon,* whereby the contract "is effective as law between the parties". In this case we can say that the (domestic) system gives effectiveness to the contract, as well as legal status and binding power on the parties. The parties shall abide by it and hence shall comply with the law regulating that contract.

On the basis of this reasoning, we could simply maintain that the parties cannot derogate from domestic law when they regulate the internal contract within the scope of their autonomy. Nevertheless Rodolfo De Nova himself was not so drastic in his analysis of the issue and was not even inclined to share the thesis of extreme liberalization that some French scholars of the 1960s had theorized while describing the "*contrat sans loi*".[15]

Hence the reasoning should follow another pathway, namely considering the rules from which the parties cannot derogate, by identifying the overriding rules and the so-called "norme di applicazione necessaria", as well as the rules from which the parties can derogate, or *default rules*, and only in that case enable the parties to choose another law which – instead of being replicated in the text, thus becoming letter of the contract – is only a regulatory reference on which the parties rely to complete the contract provisions.

When the contract must be implemented in Italy, clearly the Italian judge cannot enforce foreign rules which are in conflict with the overriding rules, with public order, *bonne meurs* and all the other causes which would prevent the contract from being effective in Italy's system. As to the so-called "norme di applicazione necessaria", this is a rather fading and vague area, incorporating the rules which, at a certain point in time (coinciding with the time considered

[15] For a general view see Léna Gannagé, « Le contrat sans loi en droit international privé »dans Katharina Boele-Woelki et Sjeb van Erp, dir., *Rapports généraux du XVIIe congrès de l'Académie internationale de droit comparé*, Bruxelles, Bruylant, 2007 aux pp. 275 à 3.

by the competent judge), are regarded as founding rules characterizing a legal system.[16]

A further problem is the fragmentation of the contract, with the choice of different laws according to the individual clauses.

However, there is a more "liberal" conception – if we may say so – which, by drawing inspiration from the rules on international contracts, and particularly the aforesaid Rome I Regulation (Regulation no. 593 of June 17, 2008), maintains that the parties have wider freedom than stated so far.

It is a position at the opposite of the restrictive stance defended at the time by Galgano, which also differs from the "half-way" stance defended in this essay.

The theory – maintained by Sergio M. Carbone in many essays published in relation to various types of contracts[17] – works on the assumption that the parties are free to choose the law for making their contract binding. In other words it maintains that it is not Article 1372 of the Civil Code to regulate the matter, but rather the law that the parties have chosen to regulate the whole transaction. This stance denies the existence of a *contrat sans loi* – and rightly so – because "the regulatory nature of which the contract is an expression can be legitimized and fully fulfilled only within an adequate regulatory system ", in the light of which the lawfulness, capacity and validity of the contract shall be verified. This implies that the check on the unlawfulness or illegitimacy of the contract shall be made also in the light of the legal system in which the contract shall inure its effects.[18]

If this is the case, it is important to know the position of the various legal systems in relation to the choice of applicable law to be implemented by citizens, and whether the system chosen allows to extend the liberal rule also to foreigners. Clearly in this case the *lex fori* must be combined with the *lex contractus*, because in the event of the foreign judge not being legitimized to apply his/her law to a contract entered into by citizens of another State, who have chosen the substance law similar to the *lex fori*, the law common to both contracting parties shall apply to this contract.

Not all systems, however, are (or were) liberal. The choice of opening their borders to the choice of a foreign law to be applied also to "domestic" contracts was made by Austria (in 1978), Peru (in 1985), Germany (in 1986), Switzerland (in 1988), Tunisia (in 1998) and Russia (in 2001), but a comparative analysis is

16 Galgano and Marrella, *Diritto del commercio internazionale*, 3rd ed., Padua, 2011, p. 242 et seq.

17 *Principi Unidroit quale diritto applicabile ai contratti commerciali internazionali: tra autonomia privata e ordinamenti statali,* in *Diritto del commercio internazionale*, 2012, p. 47.

18 *Lex mercatus e lex societatis tra principi di diritto internazionale privato e disciplina dei mercati finanziari*, in *Riv. dir. int. priv. e proc*., 2007, p. 27 et seq.; *Le "norme" applicabili alla responsabilità contrattuale: il ruolo dell'autonomia privata*, 2008.

lacking in literature. On the basis of the first analyses, it seems that if the Rome I Regulation were not in place, in France the negative thesis would prevail.

1.5. The Rome I Regulation (article3, paragraph 3)

The issue of the choice of applicable law is a typical *locus* of private international law, which was tackled both by the Rome Convention on the law applicable to contractual obligations, subsequently turned into the Rome I Regulation, and by other Conventions, as well as by the national lawmakers who have regulated international contractual relations.

The Hague Convention of 1964 on the international sales of goods appears to be restrictive because in Article 1 it lays down that "the mere parties' statement relating to the implementation of a law or the competence of a judge or arbitrator is not sufficient to give to the sales contract the international character inherent in the meaning of paragraph 1 of this article". Article 2 lays down that "the sales contract shall be subject to the domestic law of the country designated by the Contracting parties. This designation shall be the subject of an express clause or undoubtedly result from the contractual provisions. The "whereas clauses" relating to the parties' mutual consent on the applicable law stated shall be determined by this same law". Furthermore, Article 3 provides for that when there is no parties' statement on the applicable law, in accordance with the premise of the previous article, the sales contract shall be regulated by the domestic law of the country in which the seller has his/her habitual residence, when the order is received. When the order is received by a subsidiary of the seller, the sales contract shall be regulated by the domestic law of the country in which the subsidiary is located. Nevertheless the sales contract shall be regulated by the domestic law of the country in which the seller has his/her habitual residence or where the commercial company making the order is located, when the order has been received in that country by the seller, his/her representative, agent or salesman. In case of stocks, shares and securities trading or sales by auction, the contract shall be regulated by the law of the country in which the Stock Exchange is located or the sales by auction take place" Article 4 lays down that " in the lack of an express clause to the contrary, the domestic law of the country, in which the check of the goods and assets delivered by contact must be made, shall apply to the form and terms according to which the check and the related notices shall be made, as well as the measures to be adopted in the event of the rejection of goods and assets."

The Vienna Convention of 1980 applies to the contracts for the international sales of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or
(b) when the rules of private international law lead to the application of the law of a Contracting State.

2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention".

The regulatory pattern of sales is usually the paradigm followed to define the contractual rules in general.

The Rome Convention on the law applicable to contractual obligations provides for that its provisions apply to contractual obligations in the situations which imply a conflict of laws.

Article 3, "Freedom of choice", provides for as follows:

1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.
3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".
4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Furthermore connecting criteria are envisaged for the applicable law in the absence of choice.

The Convention appears to be fairly liberal.

The Rome I Regulation has not taken the text of the Convention literarily, as highlighted by commentators.[19] Also these rules do not seem to solve the matter definitively, nor be exhaustive.

In the *whereas clauses* we can read that "the parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations (whereas clause no. 11).

Nevertheless, this is exactly the reason why – considering that in the case under consideration there is no "conflict of law" because, working on the assumption made of an "internal" contract, the sales shall be made in Italy – by applying the Rome I Regulation *as if* the parties had a different nationality, we should solve the problem by implementing the Italian law since the characteristic performance of the contract is effected in Italy.

All the more so if we consider the *whereas clause* no. 15: "Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from any agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal".

The same holds true if we apply the *whereas clause* no. 21: "In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is mostly connected. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts".

However, while reading the Regulation text, some doubts may arise considering that (it is assumed, but) it is not said that the rules apply *only to transnational contracts*.

Indeed **Article 3** – *Freedom of choice* – reads as follows:

"1. A contract shall be governed by the law chosen by the Parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to the part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation".

Up to this point the text of the Convention and the text of the Regulation seem to coincide. But the text of the Regulation adds:

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[19] See, for example, Galgano and Marrella, *Diritto del commercio internazionale*, 3rd ed., Padua, 2011, p. 374 et seq.

"Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member State, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.
5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13."

Hence it seems that a first conclusion can be drawn. Even if we admitted that the parties could choose to apply a foreign law, they could not subject their contract to rules other than the national ones for ascertaining the *existence* and *validity* of the contract. They cannot avoid applying to the contract the so-called "norme di applicazione necessaria", that in private law we keep on defining "mandatory rules". They could subject to the foreign law only the non-mandatory rules and those which complete the contract in case of the parties' failure to act (the so called "default rules"). But what for interpretation of contract when a national law provides rules on interpretation, like the French and the Italian Civil Codes?

The Regulation also permits the *morcellement* (or *dépéchage)* of the contract, namely the freedom to subject the individual contractual clauses or groups of clauses to different laws. Is also this power granted to the parties? Do we not infringe the principle of the *unity* of the contract that case law applies also outside its interpretation pursuant to Article 1363 of the Civil Code?

1.6. The unfair nature of the clause on applicable law

The fact whether the clause envisaging the choice of applicable law can be subject to the check on its unfair nature is an issue which has emerged recently both in relation to the interpretation of the Rome I Regulation (Article 3.3) and in relation to the draft optional Regulation on sales, as well as in relation to the rules on unfair terms in consumer contracts pursuant to the Council Directive 93/13/EEC and the national laws which have transposed it.

The Rome I Regulation does not consider the choice of applicable law as unfair; quite the reverse, it deems it an additional option provided to the parties, since the provisions it enshrines regard the parties' contractual situation when the applicable law has *not* been chosen. The Regulation sets limits to the

freedom of contract from the public interest viewpoint (if we may use this wide and general expression by including in it both public order, *bonne meaurs* and the so-called "norme di applicazione necessaria"). If we think that the consumer protection rules are public interest rules, clearly the Rome I Regulation is bound to protect this interest. The contractual clauses included in a consumer contract replicating rules enshrined in the Rome I Regulation could not be considered unfair from the law politics viewpoint. Nevertheless they would be considered unfair not even from the legal-formal viewpoint because in the Consumer Code (Article 33 and following ones), the list of unfair terms does not envisage any provision including also the clause on applicable law among the clauses to be monitored (as unfair *ex se*, as unfair by presumption or as unfair by evidence).

The same holds true for the draft Regulation on Sales (CESL), which lays down nothing on the matter with reference to the applicable law.

On the other hand, it is exactly Directive no.13 of 1993 which lays down that a clause replicating a law text cannot be considered unfair – and internal rules have abided by this Directive.

From the general viewpoint, it is interesting to note that in Germany, on the contrary, the first version of the law on unfair terms (ABGB of 1976) had a provision whereby a clause including the choice of a foreign law other than the German one had to be considered unenforceable in the lack of an interested protected by law. That provision (Article 10.8) was repealed when the Rome Convention on the law applicable to contractual obligations came into force in 1986 – hence the provision did not even enter into conflict with Directive no. 13 of 1993, and not even with the Rome I Regulation, nor could it hamper the implementation of the optional Regulation on sales, once adopted.[20]

The same holds true for Italy, in which both the provisions of Articles 1341 and 1342 of the Civil Code and those of the Consumer Code (Leg.Decree 2005, n. 206) do not consider the clause including the choice of applicable material law, but only the *lex fori* clauses.

1.7. The help provided by the comparative analysis

When it is profitable for the parties concluding a domestic contract to select a foreign law, and which one?

Considering that the *morcellement* of the contract is allowed, we need to verify both parties' or either party's interest on a case-by-case basis.

This analysis does not consider the rules on the conclusion of the contract, the effects of promise, its binding nature and revocability, its knowledge by the

[20] Basedow, *The Optional Instrument of European Contract Law: Opting-in through Standard Terms – A Reply to Simon Whittaker*, in ERCL 1/2012, p. 84; Whittaker, *The Optional Instrument of European Contract Law and Freedom of Contract*, ERCL 7/2011, 388.

counterpart or offeree, etc. It is more appropriate to consider the possible various phases of negotiations and also of the conclusion of the contract which take place by means of a written procedure staggered over time.

(i) The English common law regards the withdrawal from negotiations or the behaviour contrary to good faith in a very benevolent and lenient way – hence, during negotiations the parties could agree only on the applicable law and, if they did not want to run any liability risk, they could agree to apply the English law.

(ii) As to the initial phase, when the parties do not want to undertake binding commitments, but start contacts which may lead to the conclusion of a contract, they may choose to reach a "gentlemen's agreement".

In this regard it is worth clarifying that, if we follow the common law theory, which is liberal on the matter, the agreement is not binding: in common law whatever regards family and social relations, and the gentlemen's agreements based on honour or courtesy, generally is not considered binding. Hence when the parties do not intend to bind themselves, they can declare so explicitly. Furthermore, given that the intention to create legal relations is a fundamental factor of the contractual agreement, its exclusion implies that the contract cannot be considered concluded.

Therefore in these cases it is more advisable for the parties to opt for the English or U.S. common law as applicable law because they can guard against any different interpretation of their will or from definitions of the agreement which could force it up to making it binding.

In the Italian law a distinction must be made between the honour-based agreements, the trust-based agreements and the agreements binding the parties to confidentiality, as well as the agreements including obligations other than the subject matter of the contract.

(iii) When the parties intend to bind themselves to a preliminary contract, it is advisable for them to use the Italian or the German law, otherwise if they apply the English law they will run the risk of seeing the agreement be declared null and void.

(iv) Also the contract in favour of third parties is well accepted in Italy and in Germany while, though being now admitted with a statute in England, its admissibility is always liable to be assessed with a centuries-old bias.

(v) With reference to the equivalence of contract performances, almost all systems are very careful not to affect the parties' will, but also to consider null, voidable or ineffective an agreement in which the economic disproportion between performances is evident, as well as onerous and burdensome for either contracting party. Different evaluation criteria are used and different remedies are envisaged, but both the theory of consideration and the theory of cause allow to rebalance the contract.

Obviously, according to the various legal systems, the control may be more or less effective and pervasive, but clearly it is a risk which cannot be avoided by the parties.

The same holds true for the occurrence of unforeseen circumstances: the theory of frustration has made advances not only in the German or Italian law, but also in the English common law with the rules on frustration, while the French law is less sensitive to this type of control.

(vi) The clauses of exemption from liability are subject to a very strict control in the English and German law. In the English law the control also regards the B2B relations – hence if either party wished to impose clauses of exemption from liability on the other, it would be more appropriate for it to apply the Italian law (Article 1229 of the Civil Code) rather than proposing the implementation of a foreign law which would be less lenient.

(vii) Also for penalty clauses the problem is solved in different ways according to the various legal systems. In the German law there is strict control, while in the English law the clause is null and void.

(vii) As to the interpretation, while in continental Europe there is still much room for subjective interpretation, in the English common law the objective one prevails and, more recently, the interpretation oriented to attach priority to the parties' economic interest in view of the efficient corporate activity.

(ix) In relation to dissolution of contract for non performance, in the English law the contracting party can choose between performing and not performing, at its convenience. The non-performance entails the compensation of damage, but not of unforeseeable damages that the party should compensate if the rules of the Italian Civil Code were applied in relation to the voluntary breach of contract.

(x) With reference to the compensation of the contractual damage, apart from the fundamental requirements which vary according to the legal systems – suffice to recall the controversy between the advocates of the reliance interests and those of the expectation interests in the U.S. legal literature – we should consider that the possibility of compensating the contractual non-economic damage has made its way in the Italian law.

(xi) As to the specific performance, everybody knows that this is an abhorred remedy in common law, so that a contracting party foreseeing a possible default by the other party could be facilitated by choosing to apply the Italian law rather than the English law.

(xii) Finally, as to good faith which – as is already known – is a new element for the English system, if the parties set great store by a targeted control they can rely on the Italian system in which a widespread control is carried out over the various phases of the conclusion of the contract, its interpretation and performance. The same holds true for Germany, otherwise they can choose the French or English law which are much more restrictive in this regard.

(xiii) Clearly, however, until the Italian case law legitimizes the principle of the "abuse of contractual power " relating to the choice of the type of contract, of the negotiating connection, or the economic dependence outside the cases expressly envisaged by the lawmaker, the parties that want to protect their agreement have interest in *not* applying the Italian and German law.

(xiv) Conversely, if the parties want to settle conflicts and disputes by resorting to arbitration, and prefer the so-called "arbitrato irrituale" (namely the free and voluntary arbitration procedure) to the so-called "arbitrato rituale" (namely the statutory binding arbitration procedure based on an arbitration agreement) – within the limits in which the former procedure is still permitted in the Italian system (Article 808 ter of the Code of Civil Procedure) – they will have interest in applying the Italian law rather than a foreign law that will certainly disregard it.

These are some examples which – well beyond the theory of competition between legal systems[21]– can explain us to what extent it is useful to make careful and cautious choices both when the problem of the law applicable to the contract is disregarded and when the choice is made.

2. Judicial Control of Contracts through Interpretation

2.1. Judicial Control of Contracts

There are various meanings of the expression "judicial control of contracts". Scholarly literature in Italy today uses this expression with reference to the following situations:

(i) the relationship between the independence of the parties and the limits provided by the legal system, limits that can be imposed through the intervention of the judge. In this case, the control is based on the merit of the interest sought by the parties, regarding legitimacy (or conformity with the law), lawfulness (conformity with reproachable aims) or morality (conformity with shared ethical rules) of the contract, implying therefore the control of the essential elements of the contract, thus agreement, *causa*, object and form when required, on the accidental elements that can make the contract illegal, illicit or immoral; or even on the type of the contract, therefore dividing contracts into typical or atypical, according to the result of their qualification;

(ii) the methods with which the contract is created, and therefore its formation, which can be preceded by a stage of negotiation, of exchange of information, exchange of documents; in this it must be verified if the

21 Zoppini, *La competizione tra ordinamenti giuridici,* Roma-Bari, 2004.

control is based on actions that give rise to pre-contractual responsibility, contractual responsibility or extra-contractual responsibility;
(iii) the methods with which the contract has or has not been undertaken, the causes that have impeded or constituted an obstacle to the execution;
(iv) the methods with which the contract has been modified or has been terminated (exhausting its effects, giving life to a new contract, and so forth).

In undertaking this control, judges must follow rules which limit the discretion of their valuation and operation. These rules are set out in the Italian Civil Code, and also in statutes, and in other sources of law. The rules can also arise from the application previously assigned by other judges to these rules and therefore from the previous solution of similar or comparable cases. Jurisprudence is now accredited as a *source of law*. Rodolfo Sacco includes it among the sources in his *Trattato di diritto civile*.[22] Obviously, this is an "unwritten" source, which derives from repeated application of principles of law, maxims, and rules that emerge from individual cases and, specifically due to their repeated citation, tend to form a sort of interpretive custom (of the law) which becomes part of the rule. Moreover, Riccardo Guastini, in his *Trattato sulla interpretazione della legge*[23] defines a "rule" specifically as the product of "provision + interpretation".

The accreditation of jurisprudence has passed through various stages: from legal scholarship, albeit with much discussion and obstacles, to factual or pragmatic accreditation, which has imposed itself in the facts, through appeal to precedents, undertaken by lawyers in their defence briefs and by judges in the motivation of their decisions, and finally to accreditation of rules, due to legislative intervention on the Code of Civil Procedure. This is a necessary motivation of the sentence, as well as a formulation of the principle of law which must be observed by the appellate judge, as a question of law, and as a formulation of requests in orders to highlight non-conformity of the ruling contested before the jurisprudence of the Court of Cassation, therefore asking for confirmation or in order to make obvious a change in jurisprudence, requesting its rejection.

This aggregate of rules, orders, directives and suggestions, already complex in itself, becomes even more complex if one considers that legal rules derive from the interpretation of the request by the deciding judge, the interpretation of the sentence by the appeal judge and by the commentators-glossators-classifiers, and from their consolidation which occurs also through official maxims or the maxims published in journals;. All of these operations can be subject to errors and manipulation. Thus, the judge's spaces of evaluation and operation are wide and the confines of discretion are extended even further when the provisions applied contain general clauses, general principles, "open" expressions (such as *nature* or *circumstance*) that serve to adapt the rule to the actual circumstances, tempering its rigour if considered excessive, or re-forming the

22 (Turin, 1996).

23 (Milan, 2000).

order, if considered too restrictive, and also to introduce underlying values of the legal system included good faith, correctness, solidarity, abuse, reasonableness and so forth.

The use of the expression "judicial control of contracts" is also found in cases in which the *totality* of the contract is discussed, not only when the theory of substitution of cancelled clauses occurs in accordance with Article of the 1339 Italian Civil Code or of sources of integration of the contract (undertaken according to to law, usage, equity) in accordance with Article 1374 Italian Civil Code or of partial cancellation in accordance with Article 1419 Italian Civil Code or of conservation of the contract when abusive clauses are deleted in accordance with Article 33 of the consumer code, but also when the parties refer to clauses within the contract to regulate this occurrence or when they foresee circumstances which would affect the contract, that in any event they intend to retain, or when they are obliged to review or renegotiate the content. Considered from another point of view, the problem of control can also be described in terms of incidence of the public interest on the interests cultivate by individuals or, with regard to the sources, in terms of hetero-integration, if they arise outside of the agreement, or of auto-integration, if they arise from the same contract that the parties have agreed. With this list of operations is not completed the task of the judge responsible for controlling the contract. There are other cases, including for example procedural rules, both those set out by the Italian Civil Code regarding evidence and documents (if the contract is written or based on documents which indicate the intent of the parties), and those set out by the Code of Civil Procedure, as well as procedural rules that derive from practice, such as for example the principle of self-sufficiency of the appeal to the Court of Cassation, which make it necessary to include in the appeal the reproduction of the entire text of the contractual clauses invoked. Finally, it is necessary to distinguish control of merit from control of legitimacy.

Thus, the judge has a wide range of action. This range has extended over time by legal scholarship, which distinguishes: the stage of the initial application of the Italian Civil Code, from 1942 to 1970, in which the application of the rules of the code tended to be literal and restrictive; the stage of the explosion of the general clauses (somewhat sooner in legal scholarship and later in jurisprudence) during the 1970s; the articulation of all these techniques of intervention in theories typical at the end of the 1990s. Analysis of jurisprudence prior to 1970 could also reserve a few surprises, because there could have been many operations/manipulations of the contract behind the formalism that then reigned. However, this examination has never been made in a fully comprehensive manner. Nonetheless, we observe that some notes to the sentences complain of an excess of formalism or an excess of judicial discretion. This problem is particularly evident in one sector of contract law, the sector of interpretation.

2.2. The Development of Formation of the Rules on Interpretation of the Contract

In order to understand the development of the provision of interpretation of contract, we must take into account three aspects of the law, as they are described by Sacco in his studies of comparative law: legislation (in our case, the rules contained in the code), legal scholarship and jurisprudence. In this matter, the model of the Italian Civil Code has almost slavishly followed the French model, of Napoleonic origin (1804), applied in the Kingdom of Italy in Italian translation (1806) and then replicated in the pre-unification codes (for example, the Albertine Code of 1837) and in the Civil Code of unified Italy dating from 1865. In French language legal scholarship, the theories of the Belgian François Laurent – whose treatises were translated into Italian and had great success – and the theories of Giuseppe Messina in Italy were determining factors. Italian jurisprudence took up where French jurisprudence left off, but from the beginning of the twentieth century, according to Messina's theory, it separated itself. While drawing up the new Italian Civil Code, Cesare Grassetti published a work on contractual interpretation (1937) that took this long and complex process into account, and its well-deisgned, clear, simplified modulation of the criteria of contractual hermeneutics can be found in the current Italian Civil Code, in Articles 1362-1371. Subsequent jurisprudence, and also legal scholarship with the works of Giorgio Oppo (1943) and gradually through other valuable contributions, have recreated a context of principles and rules that make this sector an authentic conceptual and practical laboratory. Thus, it is worth mentioning the most relevant events in order to summarise this intellectual episode.

2.3. The French Model

French legal scholarship has undoubtedly been fortunate in the subjective theory of contractual interpretation. Only recently do we encounter the first exceptions to the theory that locates the search for the meaning of the agreement in the objective intent of the parties. Indeed, there are very few arguments which place other criteria of objective criteria next to the criteria of subjective interpretation, seeking no so much intent as determination of content (in itself) of the act. Isolated exceptions can be found under the influence of section 133 of the German Civil Code or Article 18 of the Swiss *Code des Obligations*,[24] but these are rare. If we were to prepare a complete bibliography of the authors defending subjective interpretation, we would require pages and pages and this would be a useless effort because, as Carbonnier notes in his valuable compendium, "the subjective method (based on the intention of the parties....) is

[24] For example Bosshart, *L'interprétation des contrats* (Thèse Geneva, 1939).

traditional in France".[25] Thus, jurisprudence is aligned to the subjective theory without doubt or perplexity, without exceptions, without review. The only opinion that has attempted mediation between the due opposite trends stopped at the application of the subjective criteria of identification of the status of the contracting parties. Subjective interpretation is for contracts between private individuals, whereas objective interpretation is for contracts between merchants.[26] This distinction is not difficult in a legal system that has maintained duplication of the codes, and continues to confer great emphasis on business agreements between "professionals".

Recently, the objective theory – another exception, according to current manuals – was supported by Boris Starck.[27] Of all the pages written by this original and acute legal scholar, who died prematurely, those dedicated to interpretation are not actually the most convincing. This is a sign of the scarce attention paid by tired and repetitive legal scholarship to this matter. There is also a certain superficiality, which can be blamed squarely on French contractual legal scholarship, which is far too erudite and based on elaborate concepts, if compared with that in Italy during this century. In two brief paragraphs, Starck issues his diatribe. It is worth re-reading, in order to be convinced of this. Section 1158 states: "la *thèse subjective,* qui prend appui sur l' Article *1156, se* rattache à l' idée d'autonomie de la volonté et au libéralisme juridique, économique et social. Certes, reconnait-elle, il existe des lois impératives qui restreignent ce libéralisme. Mais il faut bien se garder d'ajouter à l'imperium du législateur un pouvoir d'immixtion du juge dans le sphère contractuelle, ce qui permettrait à ce dernier de modifier le contrat, sous couleur d'interprétation, en créant ou en suppriment des obligations, contrairement à ce qui a été réellement voulu par les parties". Thus, in the following paragraph, Starck describes the objective theory,: "la *thése objective,* qui invoque à son appui l' Article 1135*,* ne tient pas compte des ces objections. Pour elle, le contrat n'est pas a simple instrument d'échange de biens ou de services entre les deux parties, il doit, aussi, servir la collectivité, ne pas etre contraire au "bien commun", à l' équité et à la bonne foi. A cet effet, on doit faire confiance au juge: "pourquoi lui permettre d'interpréter le loi et non le contrat lorsque ce dernier n'est pas, par lui-meme, suffisamment explicite? "

It is far too easy to observe that Starck (and with him contemporary legal scholarship) does not distinguish between interpretation and integration (laws, usage, equity)[28] nor does he take the responsibility to construct the integrative interpretation[29] or distinguish rules of interpretation of the law and rules of

[25] Carbonnier, *Droit civil, Obligations* 220 (vol. IV Paris, 1964).

[26] Bonnecase, *Précis de pratique judiciaire et extra-judiciaire* 258 (Paris 1927).

[27] Starck, *Droit civil Obligations* 371-372 (Paris, 1972).

[28] Regarding contractual integration, in its historical and systematic aspects, see Rodotà, *Le fonti di integrazione del contratto* 21 (Milan, 1967).

[29] Grassetti already discussed integrative inteprettaion in our legal system in *L'inter-*

contractual interpretation[30] almost as if the judge were making use of the same hermeneutic operation in both cases. However, this can be the object of observations on another occasion.[31] This introduction only served here to introduce the page of Laurent that I intend to illustrate.

We have briefly mentioned the attitude of contemporary French legal scholarship and jurisprudence, after Laurent. However, previously there are no such questions. Everyone is aligned with the subjective theory, despite the fact that the Italian Civil Code did not make explicit reference to this and did not clearly explain that this was the *mens legis.* If we read the rules expressed by Articles 1156-1164, we can indeed infer that the first rule is the only one which makes reference to the common intention of the parties. All the others concern the interpretation of what has *objectively* emerged from the document or from the verbal agreement. Moreover, when we note the "common intention" of the parties, this is not necessarily a referenceto the research for their virtual or probable intent but rather the coincidence of the two different intents of the contracting parties. This coincidence results from more or less intentional juxtaposition and therefore is *objective,* certainly not subjective.

Previously, I have tried to demonstrate that this line, which we can call objective, was that indicated by Pothier[32] and that, commenting on the individual rules that were then translated into the Italian Civil Code*,* Pothier *always* provides examples which concern objective interpretation, or in any event objective criteria of interpretation. This is understood not so much as referring to what the individual party effectively intended to say or write, or that which both contracting parties wanted to negotiate, but rather to determine that, on the basis of the text or of the declaration, a third party could understand by applying the rules of logic and of good sense, or of experience, and assign a meaning to the contract or its individual clause. However, if we read the passage by Laurent dedicated to interpretation, none of this emerges. Indeed, Laurent argues the opposite theory, and *therefore* this is taken as the meaning of the rules according to the intention of the lawmaker. This page can be considered a clear example of manipulation of the sources and the Code in order to reach a conclusion which satisfies its interpreter.[33]

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pretazione del negozio giuridico with particolare riguardo ai contratti 189 ff (Padua, 1937, reprinted, 1983).

30 Moreover, this distinciton was only recently made in Italian contractual law. See Sacco, *Il contratto* 769 ff (Turin, 1975).

31 Following on from Bessone's analysis in *Adempimento e rischio contrattuale* 349ff (Milan, 1969 reprinted 1975).

32 Pothier, *Traité des obligations, Oeuvres complètes* 9 (Paris, 1835). And my own *Alle origini della teoria moderna dell'interpretazione del contratto* 2 *Rivista critica del diritto privato* 127 (1983).

33 Laurent, *Principi di diritto civile* (vol. XVI, Naples, Rome, Milan, 1881), n. 500 ff.

2.4. Laurent's Theories

Let us consider the Italian translation of Laurent's treatise edited by Alessio di Majo.[34] In section 500, Laurent presents the rules of interpretation (1156 to 1164 which correspond to Articles 1131 to 1139 of the Italian Civil Code, 1865) as "borrowed by Pothier". These are clear rules, which allow the judge relative freedom of interpretation. Laurent warns that "these rules are not at all doubtful; the difficulty lies in applying them well. Now application is necessarily abandoned to the prudence and intelligence of the judges". The principle of jurisprudence states that Articles 1156-1139 and following do not have an imperative character. Thus, according to the Court of Cassation, they constitute some of the advice for interpretation of conventions given to the judge by the lawmakers.

These matters are followed by an example taken from agricultural life: the sale of a parcel of land for which the criteria of measurement is the number of days necessary for it to be ploughed by a pair of oxen. On the basis of this criterion, one party sells and the other buys, but the measure is not applied uniformly, so that a dispute arises over the price to be paid. Today, this would be considered an error of quantity, that instead Laurent (quoting jurisprudence) categorises as contractual interpretation. In any event, having illustrated the example, Laurent goes on to describe the meaning of the first rule, Articles 1156-1131, as follows: "In conventions, one must investigate the common intention of the contracting parties, rather than following the literal meaning of the words". Laurent maintains that this rule, "created by Pothier", is "poorly formulated", and explains that it gives the impression that the interpreter should not trust the contractual tet but should rather seek its meaning according to the common intention of the parties.

Truthfully, this rule, reproduced also in Italy's 1942 code (Article 1362 of the Italian Civil Code), is perfectly formulated and clear in its intention. Knowing full well that the parties are not always (indeed, almost never) experienced jurists, and may therefore write the agreement with terms dictated by colloquial language rather than the specific technical language of the jurist, the lawmaker has always considered the text with suspicion, preferring to consider the "spirit" of the agreement, so to speak. In this regard, Pothier expressed himself as follows, setting out the first of his twelve rules of interpretation: "On doit, dans les conventions, rechercher quelle a été la commune intention des parties contractantes, plus que le sens grammatical des termes. *In conventionibus contrahentium voluntatem potius quam verba spectari placuit;* I, 219, ff. *de verbor, signif.*"

However, Laurent does not agree and appeals to the authority of Domat. "Domat formulates this fundamental first rule of interpretation better: "If the words of a contract seem contrary to the intention of the contracting parties, *then it is obvious that* it is necessary to follow this intention rather that the words". He goes on to explain that first of all the text of the agreement must

[34] *Ibid*, n. 502.

be considered. One can only appeal to common intention when the text is unclear. Therefore, when a rule is clearly intelligible, there is no need to propose an interpretation *(in claris non fit interpretatio*[35]*)*. Thus, there is a principle of hierarchy between the rules, in which literal interpretation takes first place. Laurent continues:

> … the reason is that the intent of the parties is expressed with the words of which they make use. Therefore, if the words are clear, the intention, in itself, is certain. In this case, if one were to seek the intention of the parties, one would find an intention clearly expressed by the parties themselves. The intention is established by the interpreter, more or less through conjecture, which means that certain intention is preferable to uncertain intention. This occurs for conventions as for the laws. Contractual interpretations must be applied to this very wise rule that the authors of the original draft of the Italian Civil Code formulated in the preliminary title: "For a law to be clear, it is not necessary to evade the text under the pretext of penetrating its spirit".

Once again, in order to give strength to his arguments, Laurent mentions the "thought" of the lawmaker. However, this is a dangerous weapon. Furthermore, if one wanted to access his theory and believe that this "thought" exists, we can see how it is expressed in the debate resulting from the preparatory works.[36] From Fenet's text (Laurent may have used other texts, but I don't believe that this can have been interpolated, also because he mentions the discussion held on the 11th day of Brumaire of the year XII, thus the 3 November 1803), we note that the rules on the interpretation are those which least gave rise to discussions. Rather, they passed without significant alterations or modifications. The only point examined is if it is appropriate to maintain the text of Article 52 (corresponding to Articles 1156-1131) in its original formulation, and thus that the "grammatical expressions" of the words are to be preferred over the intention of the parties, or that it is appropriate to prefer the expression "grammatical meaning". In other words, there is specific discussion of the issue opened by Laurent, and closed (by Laurent) in favour of the prevalence of the literal interpretation.

In order to refute these objections in the discussion, Cambacérès emphasizes that the rule is copied directly by Pothier and Tronchet observes that "cet Article ne peut jamais devenir a moyen de dénaturer l'intention des parties; car ce ne sera pas sur de simples allégations qu'on s'écartera des terms de l'acte; ce sera d'après le plus claire qu'il n'exprime point la volonté des contractans". Final-

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35 The falsity of this maxim has already been argued by Grassetti, *L'interpretazione*, ibid, p. 96 (and n. 7). In any event, the Court of Cassation continues to apply it; see the review edited by C. Cossu, *In claris non fit interpretatio*, in G. Alpa (ed), *L'interpretazione del contratto – I. Orientamenti e tecniche della giurisprudenza* 164 (Milan, 1983).

36 Fenet, *Recueil complet des travaux préparatoires de Code civil* 237 (XIII, 1827, reprinted Osnabrück, 1968), Articles 1156 ff.

ly, he accepts Defermon's proposal and the original text is modified, replacing "grammatical expressions" with the more specific "grammatical meaning" of the words. The subsequent Articles are adopted without discussion although there is insistency on the need to give prevalence to the "spirit" rather than the "letter" of the text. Given the rule, inverting the order of the criteria expressed clearly by the Code, Laurent worries about explaining that the judge can move away from the text, confiding in his power of correction" as he does for the interpretation of the law. Unlike the case of Wills, where the intent of the testator is sacred and the deed must be respected because it is "solemn", this power is more extensive. However, it must be exercised within the limits of the discipline of the evidence: "written documents prevail over the evidence". As we can see, we return to the point of departure after a long journey: the text prevails above all.

Seeking to understand why Laurent manipulates the sources and reading the Code in the opposite manner to its clear diction is not a job for a civil law expert, but rather for philosophers and historians. However, without a doubt these pages give rise to a very serious fear that judges could mis-use their powers to make the contract say what the parties did not at all intend. Such a fear is perfectly comprehensible in a legal system in which it has always been claimed that the rules of the Code regarding contractual interpretation are not legal rules, but simply maxims, advice, suggestions offered to the interpreter, who is then much freer to appreciate the meaning of the text. Even in recent theoretical discussions, maxims have granted statutory value to the first rule (Article 1156) whereas it is agreed that the others are not statutory. One not must forget that, specifically with considerations on the power of the judge, Laurent proposed his theories for the attention of the reader. Is this a very successful manipulation dictated by his fondness for the theory of intent or a reading made necessary by the poor operation of the judge?

2.5. Jurisprudence under the Abrogated Code

If we review the jurisprudence in matter of contractual interpretation we can note situations of continuity and discontinuity of the court rulings due either to changes in the text of rules or changes in hermeneutical direction. The rules for the interpretation of the Italian Civil Code of 1865 (Articles 1131-1139) in part coincide with those for the current code (Articles 1362-1371), at times placed in a different provision, can be superimposed on the new ones in most cases. Making a control looking back, we note that the problems on which jurisprudence has laboured in the first half of the twentieth century in Italy are essentially: the nature of the rules of contractual interpretation, the confines of the control of legality by the old Courts of Cassation unified in 1923 in a Supreme Court, and "contractual mis-interpretation".

For many years it has been considered – with an orientation that one could define as rock solid – that "the provisions of the code in matter of contractual

interpretations do not constitute rigorous and imperative rules but are rather advice and suggestions to provide guidance to the judge".[37] In other words, it is maintained that "in Articles 1131 and following, the law gives direction criteria to the judge without binding his freedom of using again any further means of evidence that, according to the cases, can be requested from the parties or ordered officially to better clarify the facts, the principled intelligence of the agreements, the intention of the contracting parties".[38] The judge is not required "to provide a detailed explanation, as it might occur that due to the obscurity or ambiguity of the words of a contract, the probable intention of the declarants could change more through intuition and impression than rigorous reasoning".[39] The rules are subject to the prudent decision of the trial judge and cannot form the object of censure in cassation.[40] Only a minority orientation had considered that the sentences could be censured in case of violation of the law.[41]

From these rulings we can infer two points: the first is that, under the previous code, the trial judge had a greater freedom of action, its discretion meeting only extreme limits, such as the open disavowal of the *suggestions*, the application of erroneous judicial criteria leading to incorrect consequences.[42] Moreover, it is obvious that, if the provisions to be applied do not have the nature of rules strictly speaking, their binding nature was rather unstable. The secondo is that the control of legitimacy is affected, and is rather circumscribed. Thus we have the elaboration of canons which must be followed by the judge of Cassation which slightly extend the sphere of the control of legitimacy and circumscribe the sphere of discretion of the trial judge. Is subject to control of legality the process of qualification (or of definition) of the contract[43] as long as it does not imply a revision of the fact which has already been ascertained by the trial judge.[44]

Thus, we can identify some canons for qualification: the apparent intention of the parties, the previous relations between them, the principles concerning the contracts, the rules regarding contracts with which the contract being disputed has "greater alignment".[45] However, this more cautionary orientation of the parties in respect of the discretion of the judge is also contradicted by a ruling that instead maintains that the Cassation judge is not responsible for the process of qualification which is considered expression of a valuation of

37 See for example Court of Cassation Florence, 24.2.1912, *Ragg.giur.*, (1912), p. 221.

38 Court of Cassation Florence, cit.

39 Court of Cassation, Rome, 20.4.1912, in Court of Cassation un.civ., (1912), p. 338.

40 For example, Court of Cassation, Turin, 27.11.1911, in *Giur.tor.*, (1912), p. 200.

41 For example Court of Cassation, Palermo, 12.8.1897, in *Foro sic.*, (1897), p. 695.

42 Court of Cassation Naples, 13.9.1913, in *Sentenza*, (1913), p. 598.

43 Court of Cassation Palermo, 23.11.1895, in *Foro sic.*, (1896), p. 18.

44 Court of Cassation Florence, 27.3.1893, in *Temi ven.*, (1893), p. 312.

45 Court of Cassation Turin, 24.3.1881, in *Ann.* (1881), p. 401.

the facts by the trial judge and not debatable by the appeal judge.[46] It is equally understandable that the judge seeks the *literal tenor* of the words, despite Article 1131 of the previous code, likewise 1362 of the current code is based on the *common intention* of the parties (thus the *spirit* rather that the *text* of the contract). This implies the application of the maxim *in claris not fit interpretatio*: the judge cannot replace with his own intent that of the contracting parties (principle that recalls the *sanctity of contract* of the related tradition of the common law, both English and American). In other terms, interpretation is not required when the expressions used by the contracting parties are "clear and precise".[47]

It is necessary, however, to indicate two other aspects that make more certain the confines of the judicial intervention. The first, so to speak, more liberal, which places the hermeneutical canons in the context of the *aequitas*, despite always a foundation of the law, and Thus "allows the judge to equally balance the mute reasons of the parties in the interpretation of obscure, ambiguous or incomplete agreements".[48] The debate on equity, associated with the debate on general principles, which took hold in the early part of the twentieth century, had an effect on the jurisprudence, leading to a less rigorous and automatic appreciation of the agreements reached by the parties. The judge takes into account not only the maxims of experience but also the need to give obscure text a proportionate and reasonable meaning. The second point concerns the question of the *misinterpretation* of the intent of the parties. There are many sentences classified under this expression, still today reflected in French jurisprudence as *dénaturation du contrat*. This direction could appear to limit the judge's discretion, but it can also be understood as the extreme limit to which the judge can push discretional appreciation.

How can we qualify the *misinterpretation*? Various rulings are expressed with different criteria, but in any event, this example is verified when "it appears obvious that the judge has replaced his own intent for that which appeared clearly in the document",[49] making the contract say what it doesn't say,[50] when "a pretext of interpretation of the intent of the parties, attributes to them an intention denied by the explicit, clear and certain tone of the contract",[51] or when there is a misunderstanding of the individual cause.[52] However, it cannot be considered misinterpretation when there is doubt "as slight as regarding the extension of a contractual agreement".[53] The misinterpretation or the *distor-*

46 For example, see Court of Cassation Florence, 30.12.1878, *Annali,* (1879), p. 164; Court of Cassation Naples, 11.5.1906, *Dir. e Giur.* XXI, p. 977.

47 Court of Cassation Rome, 19.2.1907, *Ann*., (1907), p. 243.

48 Pret.Barletta, 28.6.1911, in *Foro Puglie*, (1911), p. 893.

49 Court of Cassation Naples, 30.12.1911, *Dir. e giur.* (1912), p. 169.

50 Court of Cassation Turin, 17.6.1884, *Massimario*, (1885), p. 947.

51 Court of Cassation Turin, 4.5.1879, *Giur.tor*., (1889), p. 341.

52 Court of Cassation Naples, 16.9-1874, in *Giur.it*., (1874), I,1, p. 921.

53 Court of Cassation Turin, 20.4.1888, in *Massimario*, (1888), p. 512.

tion must be certain so that "the document can be interpreted in a manifestly contrary manner to its true and natural meaning, which cannot be censured".[54] In other terms, the meaning given by the judge "must not distort the presumed intent of the parties",[55] and cannot be "grammatically and literally" different from the meaning given by the expressions used by the parties.[56] Reading the sentences, we notice formulas and expressions that are then used again by the lawmakers in 1942, or by the Italian Minister of Justice's Report and by legal scholarship which, close to the new codification, tries to align the rigid interpretation of the presumed intent of the parties to the exegetical work of the trial judge and its control at the Court of Cassation.

2.6. Messina's Theories

The essay by Giuseppe Messina on interpretation, published in 1906, has not been completed: it comprises an introduction, dedicated to "the objective data in the interpretation of contracts" and a first chapter on the "laws of interpretation" comprising eight sections. The author's clear objective is to demonstrate that the rules on the interpretation of contracts are "rules" strictly speaking, rules that do not differ from the others which comprise the legal system and that therefore establish rights and obligations. The eighth section, interrupted in its logical development, looks at potestative rights, a theme dear to Messina, on which he has made many reflections, on several occasions (see in the collection of *Scritti giuridici* the two essays on potestative rights and optional rights). The introduction sets out the open problem of the provisions contained in the Napoleonic Code and derived from this in the pre-unification codes and in the Italian Civil Code of the period of the Kingdom of Italy (Articles 1131 ff.). Thus whether these are rules or advice, suggestions, orders or good sense, the application of which should be such as to orient the hermeneutical activity of the judge or if their violation implies an infraction of the law and therefore could be susceptible to a judgement of legitimacy.

Thus the research takes its focus, taking into account the historical data, because (at least at that time) the interpreters refer to this to support their theory, attempting to legitimise and give nobility to the solutions put forward with the prestige and the authority of the culture which has solidly stratified over the past centuries. The author's first concern is to indicate that rules in matter of interpretation are found in all modern codes, from the Napoleonic and Austrian to those which have been taken from the European continent to Latin America. These rules find their initial origin in the *Digest* – n. 16 and 17 of L.50. However, the reference serves only to clarify that these are ambiguous orders,

54 Court of Cassation Rome, 18.5.1876, *Legge*, (1876), II, p. 276.

55 Court of Cassation Turin, 6.9.1892, *Massimario*, (1892), p. 968.

56 Court of Cassation Palermo, 25.6.1896, in *Foro sic*., (1906), p. 441.

whose divergent interpretation has accompanied their application not only in the Roman period, but also in the Middle Ages. Was unclear both the area of application of these orders and their origin (to say that they were present in the *natura rerum* is nonsense) or in the Middle Ages from what authority they obtained their binding force. The origin of the provisions of the Italian Civil Code have been recovered from the text of the *Traité des Obligations* by Pothier. In the problems raised by French jurists not only in the nineteenth century but in the early twentieth century (and in particular in the realistic and anti-dogmatic writing of Gény), specifically the confirmation that the main question is not the historical origin, Messina can see the manner in which the formulas are created, the fact that the Napoleonic provisions can all be re-connected to Roman documents. Yet what is their essence … are they part of the character of the coactivity or not?

This is how the reasoning develops, expressing Messina's intellectual vigour of in all its force. He begins by observing that the lawmaker has made a choice between the hermeneutical rules assigned by tradition and therefore those provided in the text of the code (or the texts of the codes gradually elaborated throughout the nineteenth century) they have a character which distinguishes them from the others, of which they have shared the origin up to the crystallisation in the text of rules, thus their formal presentation. The others are only rules of experience. This first conclusion allows the author to move away from the theory, arising from the German area, which distinguishes the hermeneutical rules in laws of nature, psychological principles and theory of experience according to traffic and custom. The second conclusion is that the interpretative rules act to determine the content of the contract: indeed it is up to the investigation of the intent of the parties which must however be entrusted to objective criteria: "no one must attribute to the parties an intent that the circumstances do not demonstrate that they had" (p.168).

Although the Napoleonic Code and the unitary code did not include the clause of good faith among the rules of the interpretation (as would be done by the lawmakers of 1942 with Article 1366) Messina maintains that Article 1124, referring to the execution of the contract, can be extended to the sources of integration, as the law, usages and equity. Article 1124 is considered one of the cornerstones of interpretation. If this is so, no one can speak of advice given to the judge, as these are rather rules strictly speaking, thus binding legal rules: if they are considered equal to the law, usage and equity they could not have a different nature. Thus we move on to another issue: how the rules mentioned that contain vague expressions such as equity or good faith constitute the manner for the judge to express actual opinions, thus the rules of interpretation allow the judge to reach concrete judgements of fact without however becoming arbitrary.

The sentence handed down by the judge is debatable also if expressed in the merit insofar as it has been formed on the basis of legal rules, a criticism which cannot be avoided simply by declaring that there is no need to apply them under the circumstances. In other terms, the principle *in claris not fit in-*

terpretatio is not admissible because it constitutes an expedient to remove from the result of hermeneutical process every criticism of legitimacy. At this point, the discussion could be considered closed, but here emerges the theoretical finesse of Messina. It is not sufficient to indicate that the interpretive rules have been included in a text of law to highlight their coactive nature. This is demonstrated by the fact that the text of code contains classifications, definitions and other formulas without coactivity because they are not the rule of law strictly speaking. This is why the *regulae juris* are not rules strictly speaking, but rather formulas which express a "narrative judgement".

The rules on interpretation of contracts cannot be compared to interpretative legal rules, in particular the rules on authentic interpretation. They do not imply how the latter, neither *ius novum* nor the concrete conclusion of a logical opinion, but rather express the intent of the judge. All the rest of the discourse centres on a digression regarding the imperative nature of the legal rule. How were these ideas collected regarding interpretation from the legal scholarship of the time and later? In other terms, did the imperative theory, today no longer discussed, have many proponents on its side at the beginning of the twentieth century? It is sufficient to consider the manuals produced during the life of the sage of Messina and later in order to realise that his original and acute ideas did not immediately penetrate judicial culture. However, in the end they were accepted with great favour decades later, as they are stringent and persuasive.

Here are some examples:
G.P. Chironi,[57] in *Elementi di dritto civile* (Milan, Turin, Rome) published in 1914 recalls the Article of the Italian Civil Code with regard to the interpretation of the legal act but describes these rules as directed to clarify the real intent of the contracting parties, according to a literal and logical interpretation. Simoncelli makes a simple exegesis of the text of code attributing however the rules to the legal act (p.489). Barassi, in his *Istituzioni* distinguishes the rules of interpretation of the egizio from those of the contract, but doesn't pose the problem of the binding nature, and specifies that in defining the content of the contract we must take into account good faith. However, Venzi is explicit in his *Manuale di diritto civile italiano*[58] where he clarifies that the rules on the contractual interpretation are binding for the judge, also if the contractual interpretation is an opinion of fact which cannot be censured at the Court of Cassation. And thus – albeit laconically – De Ruggiero in his *Istituzioni*[59].

With a great deal of finesse, without moreover going into detail on the theory of the binding nature, Nicola Coviello discusses the objectives of interpretation in his *Manuale di diritto civile italiano.*[60] Coviello insists on the need

57 In *Elementi di diritto civile* (Milan, Turin, Rome, 1914).

58 (Turin 1933, p. 399).

59 Vols. VII and III (Milan, 1935) p. 295-296.

60 V ed., Milan, 1929, p. 410.

to clarify the intent of the parties and establishes a parallel between rules of interpretation of the law and rules of interpretation of the legal act (believing moreover that they are equal, with the exception obviously of the differences due to the different nature of the documents examined). He seeks to establish that "the judge can [not] re-make the contract according to a personal ideal of justice and of equity, against that which the parties actually wanted". He adds that the incorrect interpretation of the negotiation does not give rise to the appeal at the Court of Cassation unless the sentence "does not apply, applies wrongly, or interprets falsely the legal rules of interpretation". In this case, the sentence can be contested "as in every other case of laws violated".

The theory is challenged with rigorous arguments by Pacchioni in his *Trattato di diritto civile italiano* (part II, vol. II) regarding the contracts in general published in 1936. Pacchioni links the theory of the binding nature of the hermeneutical rules to Danz,[61] a work held in consideration by Messina, that he quotes together with the theory of Carnelutti,[62] of Calamandrei,[63] and the article by Grassetti in the *Nuovo Digesto Italiano* (Grassetti then takes up the theory again in his book on the contractual interpretation published in 1937). Pacchioni maintains that the traditional theory is preferable because the object of the interpretation is the intent of the contracting parties every rule on interpretation would have unusually resulted in the substitution of the intent of the judge to replace that of the contracting parties. And he uses another practical line of argument: if the judge were to be persuaded that the intent of the parties is different from his own, it must be demonstrated that the interpretive criterion dictated by law is not applicable to the case in point.

On the basis of Messina's arguments, it is easy to overcome the convictions of Pacchioni: the intent of the parties will always be that which the judge declares it to be, because only the intent highlighted in the sentence is the intent recognisable as such. Otherwise, one would misunderstand intent, without construction and without limits to imagination. However, one can set a limit to the judge's discretion, specifically because the rules are binding even if expressed with rather general formulas. That then the judge attributes to the parties the specific conception of common intent is not only an understandable legal conclusion, it is also a necessary consequence of the fact that only by taking the conflict between the parties to judgement is it possible to ascertain the procedural truth. It is only possible to support the hermeneutical process by identifying the violation of criteria set by the law.

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61 *Die Auslegung des Rechtsgeshaefte* (Jena, 1897).

62 *Le interpretazioni contrattualki e l'appello in Cassazione*, I *Riv.dir.comm.* 140 (1922).

63 *La Cassazione civile*, II, 369 (Turin, 1920), n.3.

2.7. The Legal Rules in the Application of Articles 1362–1371 of the Current Italian Civil Code

The rules of interpretation codified in 1942 present aspects that legal scholarship prefers to deal with in a more theoretical than practical framework: there are scarce references to the work of the jurisprudence, scares annotations dedicated to sentences in this sector. There is a tendency to credit the interpretive simplicity of the rules, almost as if, with their formulation at times ambiguous, at times imprecise, they are orders that do not require particular attention from the jurist. Perhaps this attitude is due to repetition of the maxims and the servile confirmation of the principles elaborated by traditional theory. However, if one examines the sentences, one can open various questions, not always straightforward. If the interpretation of the rules of contractual hermeneutics were uniform, in the forty years following 1942; if the reference to Articles 1362 and following of the Italian Civil Code were merely formal, or actually useful for the identification of the contractual meaning; if exceptions are described, or minority perspectives. Finally, what importance could be given to an "objective" interpretation, if it must be reserved a marginal, supplementary role, in conformity with the traditional theory?

By analysing the objective data, the circumstances which arise from time to time, and then the arguments of the judges, we note with clarity that often the judge "makes the contract for the parties". Not stopping at formal, literal analysis, but reconstructing the "real intent" inevitably modifies the rules, also if it does not operate in an arbitrary manner. Thus we become aware that, behind the outward formality, the manipulation of the text is an objective and irrepressible fact, made necessary to safeguard the effects and to arrive at a plausible meaning.

2.7.1 Literal Interpretation

a) The Language of the Parties

There are many problems raised by Article 1362, paragraph 1, on the basis of which the contractual interpretation must concern not only the literal meaning of the expressions used but also the common intention of the contracting parties. Indeed, the problem of the literal meaning of the text. Obviously, the parties use expressions that are specific to their language which are often imprecise, not technical, created by the individual cultural heritage from the atmosphere, practice, and so forth. Understood as a complex communication design, the language of the parties must be investigated first in its expressive formulation, and then in its objective relevance, with the warning that the language used by one party can be considered present and relevant, in so far as it is connected with the possibility of attributing meaning from the counterparty. Indeed, atten-

tion must be paid not to the subjective isolated individual intention; rather the *common* intention must be investigated. Therefore, it is necessary to consider how counterparty has understood, or could have or should have understood the linguistic sign (giving emphasis to its *entrustment).* Thus dialect expressions must be understood not so much as reconstructing the internal intent of those using them, but rather with reference to the type of operation and the surrounding atmosphere, and the commercial usage of the site.[64]

b) Tacit Intent and Express Intent

The judge must then take into account the integration expressed by the contracting parties, rather than what is not expressed, not taken externally. As long as this does not give rise to contractual presuppositions,[65] the internal intent has no relevance at all. This aphorism is followed at the moment of interpreting a contractual clause for insurance against damages, and clarifies if the damages incurred for driving an industrial vehicle could be included in the insurance risk circumscribed to the driving of cars.[66]

c) Intent and Declaration

In matter of contractual interpretations, legal scholarship reproduces the contraposition that derives from the trend to conceive the legal act either as an act essentially of intent reducing to this measure the problems of its treatment or, alternatively, to identify it with mere external declaration. Thus if the object of the interpretation is definitively the meeting of the minds, the activity of the interpreter must be directed principally to look for this internal desire based on verification with all the means allowed, of the psychic fact or the psychological process of formation of intent.[67] However, if one maintains that the interpretation must be based prevalently on exterior behaviour as evidenced in the textual data and in every relevant external manifestation, the interpretive activity will tend to be revealed in a judgement from the objective exterior point of view of the meaning of the act,[68] in view of the expectation that can arise. Thus, the part of the legal scholarship that adheres to the subjective theory of the legal act maintains attribution to Article 1362 of the Italian Civil Code. Article 1362 states that, for a correct contractual interpretation one must not be limited by the literal meaning of the words, but it is necessary to investigate what has been the common intent of the contracting parties, the value of a convergence of the information of rules with intent in the interpretation. These rules would

64 Court of Cassation, 22 June 1972, n. 2055.

65 Bessone, *Adempimento e richio contrattuale* (Milan, 1975).

66 App. Florence, 26 November 1973.

67 Stolfi, *Teoria del negozio giuridico* 223 (Milan, 1947).

68 Betti, *Teoria del negozio giuridico* 355 (Turin, 1955).

result from the contrast between intent and declaration that one must expect, in order to determine the meaning of the contract, to the investigation of the real intention of the contracting parties.[69] However, as has been indicated in legal scholarship[70] and is effectively emphasized again by the sentence reported, the investigation regarding the internal intent certainly cannot exhaust the task of the contractual interpretation, which constitutes the fruit of the agreement of at least two parties and two intents. Thus, indeed, the reference that the lawmaker makes to the common intention of the parties, and not, for example, to the single declarant specifically indicates that the interpreter, rather than being based on the point of view or on the expectation of one or the other contracting parties, must investigate the real content of the agreement.

We see this also in the jurisprudence of the Supreme Court, according to which, "if it is true that the judge is required ad investigate what was the common intent of the contracting parties, it is equally true that a further interpretation is inadmissible as it would cause the judge to replace with his own subjective opinion the actual intents of the contracting parties, if the literal meaning of the agreement reveals such an intent for the expressions used and there is no reason for divergence between letter and spirit of the agreement".[71] Likewise, according to Court of Cassation n. 3456, dated 24 November 1959, the judge, in ascertaining a rule regarding Article 1362 and the effective intent of the parties, must start initially from the literal meaning of the words used and, when this meaning appears clear, according to the rules of current language. He can step away from them only if he considers and indicates the reasons for which the authors of the act have in actual expressed a different intent, although they may have expressed themselves in a certain manner. The divergence between intent and declaration gives rise to a stumbling block. In one of the first cases decided by the Supreme Court after the implementation of the new Italian Civil Code, we note that the new discipline cancels the contract[72] with reference to a text from which this contrast emerged.

d) Written Intent and contrasting verbal evidence

The intention of the parties must be clarified with regard to what emerges from the contractual or testamentary document. It is not possible to allow a different intent to prevail over what is written, documented with verbal evidence in order to reconstruct the original intent, if the written Will is in itself clear. In the case in point, it was a matter of interpreting an expression jointly agreed in a preliminary contract, in which a third party promised to "guarantee" the

69 G. Stolfi, ibid., pp. 105 e 225; Cariota Ferrara, *Il negozio giuridico nel diritto privato italiano* 179 (Naples, 1948).

70 Scognamiglio, *Teoria del negozio giuridico* 177 (Naples 1961).

71 Court of Cassation, 14 February 1956, n. 419.

72 Court of Cassation, 15 February 1943.

contract (thus, guarantee must be understood as the definitive conclusion or guarantee of the fulfilment of the definitive contract once it is completed).[73]

e) Multiple Intent, Interpretive Arguments

In distinguishing the criteria of interpretation of the law from those of contractual interpretation legal scholarship specifies that all the criteria which can be used for the interpretation of the law are applicable also to the contract, insofar as they are compatible with the hermeneutical process seeking to clarify the common intention of the parties; between them, then, is excluded the criterion of analogical interpretation, whereas authentic interpretation, logical-formal interpretation, and so forth, are allowed. It is discussed if it is possible to make use of indirect or absurd arguments in the case of expressions with multiple meanings. In the case in point, this was the interpretation of a Will in which the testatrix wanted to make her daughter beneficiary and treat the other children in an equitable manner.[74]

With regard to "logical interpretation", it is possible to identify at least two acceptances of the term: that relative to the internal logic of the declaration (non-contradictory) and that relative to the compatibility between the declaration and the meaning of the matter agreed, if necessary correlated with similar business at that time and place; how one sees the literal hermeneutical criterion is interwoven with the other objective interpretation. It becomes impossible (if not presumptuous) to separate the subjective criteria from the objective criteria. This aphorism is applied in a case dealing with the construction of a detached house, where the party wanted to build a "terrace-veranda". Was then necessary to create an actual liveable room or was it sufficient to cover the roof of an open terrace? The Court has made use of the criterion of the *price* to identify the parties' economic plan.[75]

f) The Principle of Hierarchy of Criteria and the Subsidiarity of the Criteria of "Objective Interpretation"

The establishment of a relationship of hierarchy between the interpretive principles, in which prevalence is given to the subjective interpretation and is affirmed the subsidiarity of the objective interpretation: that is a constant line of the orientation of the jurisprudence. The Supreme Court has re-affirmed the "principle of hierarchy" between the hermeneutical criteria, claiming the lawfulness of the appeal to the "objective" criteria only if the previous application of the subjective criteria of interpretation is insufficient. The Court's position is clear.[76]

73 Court of Cassation, 12 July 1980, n. 4480.

74 Court of Cassation, 2 October 1974, n. 2560.

75 Court of Cassation, 27 July 1973, n. 2210.

76 Court of Cassation, 15 September 1970, n 1483.

It maintains that the interpreter must investigate the common intention of the parties referring "first to the literal meaning of the expressions used by them, and only where this hermeneutical criterion is clearly inadequate due to the generic, ambiguous or incomplete nature of the expressions used can it appeal to the valuation of the overall behaviour of the parties and to other subsidiary criteria set out in subsequent provisions ".[77]

Current legal scholarship agrees with the jurisprudence in admitting the "principle of hierarchy" between the rules of interpretation, which is presented as a logical consequence of the theory that connects the problem of interpretation to that of the verification of the subjective intent of the parties, in order to exclude the intervention of the judge in the contract, consider4ed dangerous for the certainty of the law, and damaging to the independence of the contracting parties. This hierarchical vision of the criteria of interpretation was already accepted under the code which has been repealed, as claimed literally by Grassetti (1941), and is thus followed by the majority of the legal scholarship. Thus for Messineo (1961) the interpretation "is a logical operation, for purposes of explanation or clarification (reconstruction of a thought or of a situation)". Likewise Stolfi (1947), who, regarding application of the "worrisome" Article 1371, and thus of the final instrument allowed to the judge to interpret the contract, does not hide the fear that the formula adopted "can lead the judge to feel authorised to re-write the contract according to his own ideal of equity and of justice, thereby neglecting what the parties wanted". In particular for a negation (always motivated by the fear of the intervention of the judge in the regulation of the contractual discipline, in observance of the principle of contractual independence) of the general effectiveness of the criterion of "equal parity of interests" contained in Article 1371 of the Italian Civil Code, recently expressed by Messineo (1961). In a diverse prospective instead on this point we find Bessone, for whom this Article is to be understood within the context of a series of rules seeking to affirm this principle. In any event, there are several authors that have criticised the traditional theory and the preconceived notions from this conception arises, on the basis of which the object of the interpretation would not be the declaration or the behaviour of the parties, but directly their intent. The discussion is conducted within the wider panorama of criticism of the dogma of the intent, from which derives the vision of the interpretive activity as an operation seeking the "true" intent of the contracting parties, almost as if it were a mere psychological factor to be ascertained, without any reference to the social fact of its objective recognition.

Thus, although accepting the distinction of both subjective and objective hermeneutical criteria, some have also clarified that the latter must seek the common intention of the parties "genetically reconstructed in its objective

[77] Likewise see also, among others, Court of Cassation, 3 January 1970, n. 7; Court of Cassation, 17 April 1970, n. 1098; Court of Cassation, 7 April 1970, n. 957; Court of Cassation, 3 February 1971, n. 248.

recognisability".[78] Always in the perspective of a "reduction of meaning of the activity of the contracting parties for the purposes of the construction of the contractual regulation" has been emphasized by a valuable contribution on this point[79] the need for research to investigate if "beyond the fragile shield of the text of Article 1374, other rules fulfil the same function as the instruments indicated in this Article",[80] indicating the insufficiency of the perspective tending to resolve the problem of the integration of the contract in the scholastic design of the distinction between interpretation and integration. In much the same way has recently been supported the need for the judge to proceed with "interpreting the clauses of the contract each through the others, thereby identifying the object of the act beyond the general expressions used, to understand every individual agreement or pronouncement in the manner most favourable to the nature of the contract and, basically, to use all the hermeneutical criteria offered by Articles 1362-1371".[81] This is in contrast with the theory that connects the problems of interpretation to the verification of the subjective intent of the parties. A brief analysis of the techniques of contractual interpretation employed by the judges reveals the operation of the various rules in a similar manner, almost as if the criteria indicated by the code were to be applied all at the same time, even if the principle of hierarchy were to continue to be observed.

2.8. Creativity at Work

If we briefly review the last twenty years of jurisprudence in the matter of contractual interpretation, we will note that the maxims are repetitive and that there are very few changes of orientation at the Court of Cassation. One can say that a series of principles and rules taken from the provisions of the Italian Civil Code are now consolidated in this matter and that their compact nature is difficult to remove. Opening new hermeneutical horizons appears rather tricky from the point of view of legal scholarship, and even more, from the professional point of view. The repetition can obviously be justified by the conviction that a satisfactory state of elaboration has been reached and therefore it is not necessary to make modifications to the many shared observations or from the conviction that it is fulfilling to follow the traditional route rather that opening new methods. In both cases, the valuations are different according to whether they are undertaken by the trial judge or the appeal judge. The first, moving away from the consolidated orientation, would be exposed to the risk of a reform of his decision, and could fear the negative effects; the second, not holding

78 Betti, (1950), pp. 329 ff.

79 Rodotà, *Le fonti di integrazione del contratto* 13 (Milan, 1969).

80 Rodotà, *ibid*, p. 10.

81 Bessone, *Adempimento*, *ibid,* pp. 322-323.

a higher level, could also dare, but to change a direction is always costly in terms of time and of effort.

There is then the issue (better, the problem) of *nomophilachia*, that today the same lawmakers have sought to reinforce, reforming first the provision of Article 360 bis of the Code of Civil Procedure, then the provision of Article 360 of the Code of Civil Procedure, sought to reinforce, concerned more for the number of the appeals and delays than guaranteeing the correct consideration of that principle, seeking uniform application of the law, in order to make decisions predictable and ensure greater legal certainty. Years ago, following research on the contractual interpretation, we had reached some results: stable points documented by the decisions examined, which, however have not produced specific innovations.[82]

Procedural Rules

Let us begin with the rules of a procedural nature which govern the questioning of a decision based on the contractual interpretation. It is *ius receptum* that in this matter there can be two reasons for questioning: the violation of rules of law (therefore, Articles 1362 to 1371 of the Italian Civil Code) and the lack or insufficiency of the motivation (Article 360 paragraph 1, n. 3 and 5). However, the two reasons are not independent. It is not sufficient to report the violation of law, because it is also necessary to explain the reason why the trial judge, having violated the law, has issued an illogical or insufficient sentence. Again, it is necessary to move from the interpretation undertaken by the judge and not to propose *ex novo* a different interpretation of the rules of the contract that would lead to it having a different meaning, because this solution would lead to a judgement on merit and not on legitimacy. A decision of the labour section clarifies this orientation:[83]

The interpretation of a contract is a typical verification actually reserved to the trial judge, which cannot be censured regarding legitimacy, except in the case of violation of the legal canons of contractual hermeneutics, as set out in Articles 1362 and following of the Italian Civil Code, or of motivation inadequate, or even not appropriate to allow the reconstruction of the logic used to reach the decision. Thus, where impose a violation under the first aspect, it is necessary not only to make specific reference to the legal rules of interpretation, through specific indication of the canons allegedly violated and the principles contained therein, but it is also necessary to specify how and with which considerations the trial judge has moved away, with the further consequence of the inadmissibility of the reason for the appeal that is based on the alleged violation of the hermeneutical regulations or the error of motivation. This is

82 Alpa, Fonsi, Resta, *L'interpretazione del contratto* (Milan, 2002).

83 Court of Cassation 30.4.2010, n. 10554.

resolved, in actual fact, in the proposal for a different interpretation. Specifically, the Supreme Court has declared inadmissible the censure of the appellants, containing an interpretation of the agreement provision for participation of the former non-managerial staff Stet spa to FAIS – Fund for Supplementary Health Assistance fir the non-managerial staff of Stet in liquidation – and of the nature of the payments made on their behalf by the company, different from than contained in the sentence contested, that had excluded the existence of a reciprocal relationship between the services rendered by FAIS for the pensioners and the labour services previously provided by the same, resulting in the negation of the existence of rights acquired by the pensioners, as such intangible *in peius* through the collective agreements modified by the agreements that those services had governed.

In any event, if the reasons are different, and each of them can be sufficient grounds for appeal, why in matter of interpretation would not be sufficient each of them? It is easy to understand that a motivation is contradictory, if it does not respond to logical criteria, if the reasoning is not sequential, if one were to open one of those passages which make the argument persuasive. It is equally easy to understand if the canons of interpretation have been violated – therefore if there has been a violation of law – when the motivation is based on canons different from those expressly accepted in the provisions of the code or make reference to documents and facts extraneous to the contract that one must interpret. There is also the canon of self-sufficiency of the appeal:

With regard to contractual interpretation, where impose the violation of the legal canons of hermeneutics and the error of motivation in the investigation on the common intent of the parties, the appellant for cassation – for the principle of specificity and self-sufficiency of the appeal – must include the full text of the agreed regulation of the relationship in its original formulation, or of the disputed part, specify which hermeneutical rules have been concretely not observed and specify in what way and with what considerations the trial judge has moved away. As a result, for the purpose of the admissibility of the appeal, is not appropriate the mere transcriptions of specific legal maxims without a specific description and a full demonstration of the reasons why the trial judge, in reaching the conclusions set out in the sentence contested, has acted against the principles established in the maxims themselves.[84]

The interpretation of the intent of the parties in relation to the content of a contract or of any contractual clause involves investigations and valuations actually entrusted to the discretional power of the trial judge, which cannot be criticised in appeal if there has not been any violation of the regulatory canons

[84] Court of Cassation 1 April 2003, n. 4905 and n. 4948; 5 September 2003, n.13012; 7 December 2004, n. 22979; 21 April 2005, n. 8296; 28 July 2005, n.15798; 2 August 2005, n. 16132, *Giust.civ.,* (2006), I, 2083 with a note by F. Montaldo regarding the self-sufficiency of the appeal, also with regard to the recent reform; Court of Cassation, 18 November 2005, n. 24461.

of contractual hermeneutics and there are no errors in the activity undertaken by the trial judge, so as to influence the logic, congruence and entirety of the motivation. Moreover, when the appellant to the Court of Cassation censures the erroneous interpretation of contractual clauses by the trial judge, for the principle of self-sufficiency of the appeal, it is necessary to transcribe them fully because the appeal judge is not allowed to examine the documentation concerning the previsions proceedings in order to verify the relevance and the basis in fact of the censure.[85]

However, this is precisely where the problems begin.

Interpretative Canons not Set out in the Code but Added by Case Law

There are ten provisions on the contractual interpretation (1362-1371), and fifteen canons indicated, three contained in Article 1362 of the Italian Civil Code (common intention, behaviour, literal meaning of the words), two contained in Article 1368 (general matters, location of the firm), two more contained in the final rules set out in Article 1371, with regard to unilateral and bilateral agreements. The other rules contain one canon each (overall interpretation, general expressions, simplified expressions, interpretation of good faith, conservation, expressions with more than one meaning, *interpretatio contra proferentem).* To these canons it is necessary however to add those that jurisprudence has created over the years, as a true and specific source of production of rules, to be applied not only in individual cases, because the repetition of the maxims has consolidated an interpretive practice to be applied to most cases, like the *lex posita.*

One additional canon concerns the distinction between *essential* or *principal* interpretative rules and additional or subsidiary interpretative rules: the former are found in the criteria set out in Articles 1362-1365, the latter in the criteria set out by Articles 1366-1371. This canon is formulated also making use of different terminologies. It is said that the interpretative rules must be applied *gradually*, thus starting from the first ones, and gradually moving on to the subsequent ones, or that there is a *hierarchy* between the rules, so that if the former prevail the latter should not be applied, or again that there is a *logical priority* between these criteria:[86]

With regard to contractual interpretations, the rules contained in Articles 1362 and following of the Italian Civil Code as well as being distinguished into essential or principal interpretative rules (Article 1362-1365 Italian Civil Code) and in integrative or subsidiary interpretative rules (Article 1366-1371 Italian Civil Code) also can be categorised hierarchically, both in the sense that the first group of rules precede and prevails on the second, both in the sense that,

[85] Court of Cassation 18 November 2005, n. 24461, *Contratti* (2006), p. 867, with note by Toschi Vespasiani; 6 February 2007, n. 2560; 22 February 2007, n. 4178.

[86] See for example Court of Cassation *civ.sez.trib.*, 26.9.2008, n. 24209.

within the context of the principal interpretative rules, that on the function, prevail on the others and, in particular, on those structural linguistic, such as the rules relative to the literal meaning of the words and the rule on the entire declaration, because the rules on the declarative structure are instrumental in respect of the objective that the parties intend to achieve, so that the rules on the intention of the parties have a logical priority, which is also confirmed by their precedence in the text of the Italian Civil Code.

Another additional canon to those of law is understood from the maxim *in claris not fit interpretatio*. Regarding this many jurists including myself have contested the logic, even before utility, but uselessly. It is obvious that a clause is described as "clear", if it has already been interpreted, it has already appealed to criteria (not expressed) to identify the meaning and the judge thus has refused to explain because, as the clause is "clear", the judge has not proceeded to not launch the hermeneutical process. This maxim continues to have a hold over the jurisprudence of the Supreme Court:[87]

> … with regard to contractual interpretation the Article 1362 sets out the principle not of the literal interpretation but rather of the reconstruction of the intent of the parties, with regard to which the traditional and not codified principle *in claris not fit interpretatio* implies that the textual formulation is so clear as to preclude search for a different intent, which constitutes more specifically the *thema demonstrandum*, and not the actual introduction to the argument ... Fortunately change is afoot, and now we find sentences in which the maxim is mentioned *en passant*, or is openly criticised. In other terms, although it is recognised, it is not considered an imperative.

The principle *in claris not fit interpretatio*, even if it cannot be understood in its literal meaning because the trial judge always has the obligation to exactly identify the intent of the parties, is basically operative when the meaning of the words used in the contract is such as to render, in itself, evident the effective intent of the contracting parties, in which case the activity of the judge can – and must – be limited to verifying the clarity and precision of the literal tenor of the document in order to note the said intent and becomes inadmissible any further interpretive activity that would allow the judge to replace the intent of the contracting parties with their own subjective opinion.[88]

In other sentences, it is met head on in order to be overcome:

The principles of hermeneutics do not include *ubi verba sunt clara not debet admitt voluntatis quaestio*. The judge must not be limited by the literal meaning of the words, but must seek the intent with which they sought to express. They are strictly associated with the teleological criterion, which requires that the

87 See for example Court of Cassation, 13.7.2004, n. 12957.

88 Court of Cassation, 15 May 1987, n. 4472; 29 November 1988, n. 6445.

intention of the author of the act and the concrete breadth of the same can be identified according to the practical objective that he seeks to reach.[89]

In the contractual interpretation, the textual data, albeit assuming a fundamental aspect, cannot be considered decisive for the purpose of the reconstruction of the content of the agreement, as the meaning of the act declarations can be held to have been acquired only at the end of the interpretive process, which cannot stop with the literal tenor of the words, but must be extended to the consideration of all the further elements, textual and extra-textual, indicated by the lawmaker, also when the expressions appear in themselves "clear" and not requiring further interpretation, as the expression *prima facie* clearly can no longer appear as such, if associated with other expressions contained in the same declaration or placed in relation to the overall behaviour of the parties" (Cass. 10 October 2003, n. 15150).

The sentences of merit that invoke the maxim *in claris* should all be reformed because they constitute a clear intent of the judge not to proceed with the application of the interpretive canons, even if this has been requested by the parties. It appears rather unusual (what a shame, a lost occasion!) the sentence in which the maxim is justified with comparative argumentation, believing that this can be compared to the English hermeneutical rule the *parol evidence rule* that is different from the *construction*. In actual fact, the first is closer to the literal interpretation and the second to the integrative interpretation. Thus states the maxim:

The literal interpretation also exists in English law – in which a distinction is made between *interpretation* understood as exegesis of the intent expressed and *construction* seeking to reconstruct the intent according to objective criteria– at least according to principle the same breadth and the same role set out in the Italian legal system, corresponding to the *parol evidence rule* the maxim *in claris not fit intepretatio*, which prohibits the judge from making use of further hermeneutical instruments when, at the end of an interpretive process, he believes that from the terms used by the parties their common intention emerges with clarity and precision.[90]

A canon added years ago, and now being modified, concerns the distinction between *subjective* and *objective* interpretation: that both have been modified can be inferred from the fact that these descriptive terms are no longer as frequent as they once were. As we know, they were introduced by Cesare Grassetti in his book on the contractual interpretation in the 1937 and then migrate in the handbooks and in the *Report to the King* concerning the innovations of the new civil code (n. 622 ff.). The subjective interpretation is preferable to objective interpretation because it seeks to reconstruct the intent of the parties and therefore more closely adheres to the contractual freedom, whereas objec-

89 Court of Cassation, 26 January 1962, n. 142, *Sett. Court of Cassation,* (1962), p. 130; 5 April 1963, n. 870.

90 Court of Cassation, 2 November 1995 n. 11392, in *Giur.it.* (1997), I, 1, p. 384.

tive interpretation (and even more that according to good faith) would imply the intervention of the judge because it would give rise to an interpretation that overcomes the intent of the contracting parties and is based on objective criteria. In actual fact, the distinction has appeared doubtful right away and must demonstrated[91] because the rules of subjective interpretation also include objective canons. Moreover, the *Report*, in those passages quoted particularly efficient, explains with ideological arguments (which today could be converted into logical arguments) how to ascertain the subjective intent of the parties to the application of the principles of entrustment, solidarity and certainty of the relationships. Such principles are still valid today, and that find their foundation in the Constitution (Articles 2, 3, 41) rather that in the fascist ideology. Additional canons include those which concern unilateral acts, for which no forecast is given, with the exception of that which makes compatible the provisions on the contract in general with the nature of the unilateral deed (Article 1324, Italian Civil Code). This category can include those canons relative to testamentary interpretation.

Legal Contrasts

There remain the legal contrasts on the application of the individual canons of law. Thus if one must first ascertain the *literal meaning* of the words, or seek the *common intention* of the parties (which is how I believe one should proceed). Here are some examples of contrast:

In the contractual interpretation clauses, if the expressions used by the parties allow to emerge in an immediate manner the common intent of the same, the trial judge must stop at the literal meaning of the words and cannot make appeal to further hermeneutical criteria, the appeal to which, outside of the theory of ambiguity of the clause, presupposes the rigorous demonstration of the insufficiency of the mere literal data to highlight in a satisfactory manner the contractual intent.[92]

> And again:
> … Article 1362, which prescribes that the interpreter should not be limited by the literal meaning of the words, far from devaluing the literal element, intends to emphasize the fundamental and priority nature that it assumes in looking for

[91] Oppo, *L'interpretazione del contratto* (Padua, 1944).

[92] Court of Cassation, 28 September 1994, n. 7895; 15 February 1994, n. 1487, *Foro it.,* (1995), I, p. 2554, in an example in which the Supreme Court has held that the expression "voting will be made by secret ballot" indicates that voting for election to company management roles must be made by secret ballot and not blank voting cards; Court of Cassation, 20 March 1996, n. 2372; 29 November 1999, n. 13351; 30 May 2000, n. 7142; 1 August 2001, n. 10493; 2 August 2002, n. 11609; 8 January 2003, n. 83; 5 February 2004, n. 2153.

> the common intention of the parties, in the sense that only if the literal expressions are not clear, precise and accurate, is it allowed to make use of hermeneutical rules of a subsidiary nature.[93]

The perspective that focuses on the behaviour of the parties and therefore on of an objective criterion of interpretation seems however to be reaching consolidation:

With regard to the interpretation of the intent of the parties (with reference, specifically, to a transaction concerning, as well as the payments for severance indemnity and redundancy incentives, also the methods of payment of the same and their relative term), when the trial judge has identified the context of the agreement on the basis of the pretexts discussed in judgement and has reconstructed the common intention of the parties on the basis of the text signed, which can be understood moreover also from the subsequent behaviour of the same (specifically the disclaimer signed by the worker at the moment of collection), the interpretation is not debatable in legitimacy, remaining irrelevant the object of the transaction as long as the revocations made by the worker do not fall under the provisions of Article 2113, but rather those of Article 19654.[94]

There is a contrast of perspectives in the case of a clause contrary to the law. It is discussed thus if the clause should be interpreted *secundum legem*, or if its cancellation should be verified:

Article 1362 does not allow attribution to the parties of an intention that occurs only from the abstract and prior configuration of an order of law to be observed. Any non-observance of the law may result in the cancellation of the contract, but cannot cause the claim, against the letter of the agreement, that the parties have necessarily wanted to fulfil the legal vote[95].

> And again:
> Without any indication to the contrary, the intent of the parties must be interpreted in the sense that they have intended to make reference to the rules and the legitimacy of the activity that forms the object of the contract rather than to an activity contrary to provisions of law.[96]

As the cancelled clause implies the application of the discipline of the partial cancellation or, in case of cancellation of the entire contract, the application of the institution of the conversion should be undertaken not on the basis of a process of interpretation, but on the basis of an independent process. Basically,

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93 Court of Cassation 3 January 1970 n. 7; 2 July 1981 n. 4294; 26 January 1982 n. 508; 8 July 1983 n. 4626; 25 June 1985 n. 3823; 28 June 1986 n. 4309; 25 March 1992 n. 3693; 20 February 2001 n. 2468; 27 July 2001 n. 10290.

94 Court of Cassation, 19 August 2003, n. 12147.

95 Court of Cassation, 13 January 1971, n. 43; 22 January 1988, n. 502.

96 Court of Cassation, 17 June 1974, n. 1758.

conversion is not automatic, it is only *possible* but based on the question if one should ascertain the effective intent of the parties to have a sentence converted through contract or if this intent has no bearing. If one were to follow a line coherent with the provisions of code, one would arrive at a response favourable to the verification of the intent of the parties, as the code sets out a rule on the *conservation* of the contract (Article 1367 of the Italian Civil Code), always however dictated by interpretive objectives: among the possible meanings one chooses the one which makes the contract effective (*not* the one that makes the contract valid because it is interpreted *secundum legem).* The conversion can however be officially issued by the judge. Thus, it is up to the judge, by applying Article 1424, to demonstrate that the converted contract reflects what the parties wanted.

Typological Interpretation

It is maintained that when the contract does not pose interpretive problems with regard to the determination of the obligations deriving from the parties it is not necessary to proceed with its qualification.[97] However authoritative its source, the sentence appears curious, as only through the qualification of the contract can one identify its cause. Of course, this can be atypical, but it has its own intrinsic value.[98] And therefore only the qualification can allow its identification. The qualification of the contract implies other problems that we do not need to examine in depth in this instance.

Good Faith Interpretation

There is now an extensive, boundless literature dealing with interpretation according to good faith, in particular since rediscovery of the general clauses. To the use of the general clauses by the judge have been dedicated very detailed and admirable studies.[99] An accurate report was prepared by the Office of the Massimario in the 2010 (Rel. n. 116). Particularly significant is the perspective on the basis of which:

… the principles of correctness and good faith in the execution and contractual interpretations, set out in Articles 1175, 1366 and 1375 of the Italian Civil Code, indicate both on the level of the identification of the contractual

97 Court of Cassation united sections, 28.1.1971, n. 208, in *Giust.civ.,* (1971), I, p. 1682.

98 As long as one believes in its value: Alpa, *Interpretazione*, ibid.

99 Roselli, *Il controllo della Cassazione civile sull'uso delle clausole generali* (Naples, 1983). Recently, there has been greater interest for the general clauses, which in truth has never dwindled: in particular see Fabiani, *Clausole generali e sindacato della Cassazione* (Turin, 2003).

obligations and on that of the balancing of the contrasting interests of the parties. Under the first aspect, they oblige the parties to fulfil obligations also not expressly set out by the contract or by the law, where this is necessary to preserve the interests of the counterparty; under the second aspect, they allow the judge to intervene also to modify or add to the content of the contract, if this is necessary to ensure the fair balancing of the interests of the parties and prevent or repress the abuse of the law.[100]

For an example of this perspective, let us consider the case in which the Supreme Court accepted the appeal of the sentence, in virtue of which it was not interpreted according to the aforementioned canon of the objective good faith the clause of a contract of mediation, with which it was established that no compensation was due to the mediator "whose term expired due to missed sale" despite the fact that the preliminary had been stipulated for the effective and appropriate intervention of the mediator and the definitive contract of sale had not been completed due to reasons entirely associated with the parties. The principle expressed is that the obligation of objective good faith or correctness constitutes an independent legal duty, the expression of a general principle of social solidarity, which, in the contractual context, implies an obligation of reciprocal loyalty of conduct that must preside over the execution of the contract and its formation and interpretation, accompanying it, definitively, at every stage.[101] The discretion of the judge is however represented not as the implementation of an order containing a general clause but rather as the obligatory process of adaptation of the contract to the law on the basis of integration and not interpretation.

In the current legal system, the activity of contractual interpretations is legally guided, in the sense that it is in conformity with the law not already when it reconstructs carefully the intent of the parties, but when it becomes adapted to the legal rules which, in general, are not rules which integrate, the content of the contract, but, rather, they constitute the instrument of reconstruction of the common intent of the parties at the moment of the stipulation of the contract and, thus, of the substance of the agreement. Thus, the emerging intent from the consensus of the parties in the aforementioned moment cannot be integrated with elements which are extraneous to it, even when is invoked good faith as a factor of contractual interpretation, which must be understood as a factor of integration of the contract not already on the level of the interpretation of this, but on the different determination of the respective obligations, as established by Article 1375 of the Italian Civil Code (Specifically, the Supreme Court, following the principle stated, has confirmed the sentence contested and rejected the appeal, with which it was deduced that, with regard to the controversy relative to the termination of a commercial leasing contract for alleged non-fulfilment by the lessor due to the fact that the building was not used for retail sales, the

[100] Court of Cassation, section III, 18 September 2009, n. 20106.

[101] Court of Cassation, section III, 5 March 2009, n. 5348.

lessor did not intend to attribute to the content of the contract one meaning in the place of another, but rather to integrate the content itself in the sense that its object was not the generic lease of a property for non-residential use, but the lease of a building with the said usage).[102]

Many operations can be undertaken by making an appeal to good faith. On this point, there has been discussion of hetero-integration of the contract and of the corrective power of the judge, of contractual justice, and even of legislative "paternalism". The orientations of legal scholarship are highly contrasted, even if prevalent is the perspective which seeks to facilitate the application of this general clause. The perspectives which emerge both from European contractual law, thus from directives in matter of contracts, and from the uniform contractual law, thus from the *Draft Common Frame of Reference* and above all from the projected European regulation on sales are [all] in favour of a wide application of the clause of good faith also in the matter of contractual interpretation.

3. Compensation in Contract*

3.1. Introduction

The European Commission has shown a renewed interest in putting together a systematic framework of the fundamental principles of private law, primarily in the fields of contracts and sales. The Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses,[103] constitutes a further invitation to examine not only the text of the Draft Common Frame of Reference of European Private Law, or DCFR,[104] but also the works that preceded, accompanied and followed its publication, first as a draft edition, then as an Outline Edition and also as a text with commentary. An interesting and wide-ranging literature is now available on the subject: I shall refer in particular to the Commentary on the Draft Common Frame of Reference, in several volumes, edited by the Study Group on a Eu-

[102] Court of Cassation, 12 April 2006, n. 8619.

* This text has been translated from Italian into English by dr. Anne Thompson and discussed and revised by prof. Mads Andenas and dr. Nello Pasquini. I am very grateful to all of them for their great help.

[103] COM (2010) 348 final, Brussels, 1.7.2010. Available on http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF. See also Commission Communication on *European Contract Law and the revision of the aquis: the way forward* – COM(2004) 651, 11.10.2004.

[104] von Bar, Clive, Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (Munich, 2009). Available on http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

ropean Civil Code,[105] to the exploration of the terminology and principles of European private law,[106] to the articles and essays that have been appearing in several journals, and to lectures to conferences.[107] One of the most important matters dealt with in these texts is that of the recovery of damages for breach or non-performance of a contract. This is a central theme in the theory of *contractual liability* and *loss and damage,* to give these concepts their names according to the categories used by continental European legal doctrine and case law. In the English system it is preferred to place these problems in the context of *remedies*,[108] rather than in the context of the general theories and institutions of private law and the law of obligations.

The drawing up of a text of principles, to be used for the purpose of regulating the recovery of damages for breach or non-performance of contracts, satisfies not only the need one is referring to when one tries to justify the usefulness of introducing an optional instrument – or, as someone has said somewhere – the 28th judicial model of the European Union – but also satisfies a further, additional, need that is by no means negligible: that of identifying (i) within each national model, sufficient means of harmonisation to make it intelligible to its own legal theorists, and then, separately from these, (ii) a set of rules in which commonly acknowledged principles can be placed in combination or, failing that, new principles that will be acceptable to all the stakeholders.

The topic is introduced, as will be clear, with caution. The reason is simple: the subject of damages for breach and non-performance of contract is generally regarded as particularly complex and has a noble and complicated history. Starting with classical Roman law, through the millennia, theories, solutions and tendencies have alternated, and found expression, both in the texts of the European civil codes and English case law, and in an elaborate and wide-ranging body of legal doctrine and judgments.

History is always useful, but in this field it is absolutely essential. It explains to us the origins of the terms and principles in current use in the various legal systems and the firmness with which convictions, prejudices and differences persist and prevent us from identifying common approaches, similar solutions and legal models that can be agreed upon by all.

If the argument were to be embellished by a full bibliographical apparatus and a proper survey of cases, it would have to extend to many volumes, rather

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105 Munich, 2009-2010

106 *European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (Munich, 2008).

107 A detailed account of this literature is offered by Alpa and Andenas, *Fondamenti del diritto privato europeo*, Milan, 2005 with a revised edition in *Grundlagen des Europäischen Privatrechts*, Heidelberg, 2009).

108 And this is also reflected in teaching where the topics may be taken not only as part of a general obligations course but also as a remedies course, see the text book by Andrew Burrows *Remedies for Torts and Breach of Contract* (4th ed, Oxford 2004).

than to the few pages of elementary summary represented by the present work. But even if we examine it in elementary terms, the theme does not lose its particular fascination, because it forms part of the more general question, which is by what criteria should we assess contractual liability, relief, the consequences of breach or non-performance, i.e. damages, restitution and so on. It directly affects the transactions carried out by means of contracts, whether between private individuals (C2C), between businesses (B2B and B2b) or between parties with different status (B2C, where some would include B2b).

In order to start the discussion, several more general remarks are in order to set out the background and provide a focus.

In the civil codes the subject is usually dealt with in rules of a general nature; the provisions are not detailed, and they incorporate terms that can aptly be described as general, and very elastic. This gives rise to two important consequences. First, the judge construing them really has to actively use or manipulate them, precisely because the directives given to him to follow are rather vague; secondly, he is given wide powers to evaluate loss and damage on equitable grounds. Thus the ambit of his discretion is very wide. These powers are at the same time limited by the evidence, but reinforced by presumptions. To offer a quick example, we may recall two provisions of the Italian Civil Code, enacted in 1942 and still in force. Article 1223 states: 'The measure of damages arising from non-performance or delay shall include the loss sustained by the creditor and the lost profits insofar as they are a direct and immediate consequence of the non-performance or delay.' Article 1126 says: 'if damages cannot be proved in their exact amount, they are equitably liquidated by the court.'

There are aspects that pertain to national legal systems and which seem difficult to reconcile with the peculiar characteristics of the competing (European or international) models with which they ought to coincide to form a 'common frame of reference'. Here are some examples. In most legal systems, no punitive (or exemplary) damages will be allowed; but in some of them, the same concept is hidden behind a variety of names and forms; and in yet other systems it is openly allowed. In almost all the systems, it is lawful to specify an amount of liquidated damages in a penalty clause; but in some systems the penalty clause is distinguished from other types of clauses, and it is necessary to engage in complex efforts of exegesis in order to distinguish those clauses that are lawful from those that must be treated as void. In some systems 'moral damages' (for pain and suffering) are allowed also in cases of breach of contract; and in others the idea of compensating damage which does not pertain to the economic sphere is considered outrageous. Finally, in the common law systems, the non-performing party is free to choose whether to comply with the contract or to breach it and pay damages to the other,[109] whereas in the

[109] An extension of this is found in the efficient breach theory associated with Richard Posner and the Law and Economics school of thought in US law, see Posner's majority opinion in *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284 (7th Cir. 1985).

continental systems the non-performing party in wilful breach is liable even for unforeseeable damages.

These differences (among the many that could be listed) have not discouraged the compilers of the UNIDROIT principles, the Principles of European Contract Law and the Draft Common Frame of Reference. They have succeeded in agreeing proposals, for the most part uniform, for the rules to apply to contracts and thus to contractual loss and damage.

In order to demonstrate the difficulties encountered by the lawyers belonging to the various working groups, and by the legal theorists who have ventured upon this hard task, it is necessary to reconstruct the history of this problem, as if it were a thin red line connecting the past to the present time, and to summarise its successive phases.

3.2. The tradition of Roman law

The study of Roman law and the medieval tradition is fraught with difficulties. Among others, the illustrious legal academics Jhering, Mommsen and Kaser have dedicated themselves to this study. The debtor was obliged to pay, and if he did not pay, judgment against him became inevitable. But Roman law had various types of judgment, according to the formula of application. The most common, in actions *ex stipulatu* and in those *ex testamento certi* was '*quanti ea res est*' (how much the thing is worth), which corresponded to the mere value of the thing that must be given; in judgments *bonae fidei iudicia* the interests of the creditor were paramount '*id quod interest*' (that which constitutes his interests) and judgment against the debtor consisted in' *quidquid … dare facere oportet*' (whatever he ought to give or to do). The *interests* even at that time, were of two types: the *positive interest*, represented by the economic advantage that the creditor would have obtained from fulfilment of the contract, and the *negative interest*, represented by the situation the creditor was in *before* entering into the contract. Vincenzo Arangio Ruiz explains that judgments in decided cases oscillated between these two approaches, just as it was uncertain whether to include in the award of damages, that is in the *id quod interest*, both the *lucrum cessans* (loss of the economic advantage the creditor would have obtained) and the *damnum emergens* (economic loss caused by the breach of contract); the loss and damage, however, had to be direct and must not exceed (according to Justinian) twice the value of the thing.[110] In any case the *id quod interest* included the *positive interest;* and an award was made in respect of the *negative interest*, only when the aggrieved party claimed that the other was liable in *dolus in contraendo* (deception or fraud in contracting).[111]

[110] Ruiz, *Istituzioni di diritto romano*, Naples, 1943, pages 389 following.

[111] Talamanca, *Istituzioni di diritto romano,* Milan, 1990, page 658.

Another great scholar of Roman law, Silvio Perozzi, clarifies in an exemplary manner the questions that beset Roman lawyers concerning the obligation imposed upon the author of the loss and damage, to pay for it.[112] He says: '(…) Here we must sound a fundamental note of caution. The present-day legal systems confirm the general principle that whoever has by his own fault caused loss and damage must pay for it. The rights of the creditor are included in the range of entitlement to damages. It is because of this that the theory of damage recovery has assumed such extraordinary importance in the perception of the rights of the creditor. Roman law does not recognise either the one or the other principle. No Roman judgment uses the word *condemnatio* to express the idea that the court must condemn the defendant to pay for loss and damage. The formulae *quod aequius melius erit, quanti ea res est,* and *quid quid N.N.A.A. dare facere praestare oportet* which are the widest do not signify: an order 'condemning' the defendant to pay damages. It was case law that determined that in certain circumstances the judge must order payment of damages, on the basis of these formulae.' The outcome of the action was different: restitution, recovery of the market price of the asset, or recovery of the value of the thing as determined by the parties. To continue the quotation: '(…)Thus the theory of compensation for loss and damage is of modern origin and nature. But there are facts and ideas associated with it, in addition to that of loss and damage (…): (such as) the causal relation between the act and the loss and damage, liability for unlawful or tortious acts (*culpa*) and the award of damages (*damnum*), which deserve to be considered together'.

Thus, the modern rules for the recovery of loss and damage are the result of a re-working of the rules of Roman law.

Meanwhile, it is important to recognise that, at the end of the eighteenth century, legal doctrine found itself faced with a choice, whether to apply the rules of Roman law (according to Justinian) directly, or whether to take account of the law applied in Middle Ages that had formed since the fall of the Roman Empire. The latter is full of problems, since it rests on the plurality of legal systems continuing Roman Law, customs, Law Merchant, statutory law etc.) In addition to the local laws, which governed legal relations between individuals by means of statutes, one must take account of the rules imposed by foreign conquerors and of Canon law, which has also affected the development of civil law. Furthermore, over the space of almost fifteen centuries, the tradition of Roman law had gradually remodelled itself on the interpretations of the glossers, the commentators and the lawyers called *culti*, in the opposition between *mos italicus* and *mos gallicus* (the Italian and the Gallic different interpretation of the law). In other words, it was not easy for the legal theorists of the seventeenth and eighteenth centuries, or indeed those of the nineteenth century, to identify unequivocal rules of law, based on the Roman sources.

[112] Silvio Perozzi, *Istituzioni di diritto romano*, Rome, 1928, II ed., page 158 ff.

According to one reconstruction[113] in the Middle Ages, three different interpretations had been proposed for the formula *id quod interest*: (i) the value of the asset or service as agreed between the parties, (ii) the market value of the asset or service, (iii) the value ascribed to the asset or service by the creditor. One of the most famous legal theorists, Azone, identified the *id quod interest* with the actual fact of the loss and damage caused to the creditor by the unlawful act of the defendant or a third party. Jacques de Révigny criticised this conception of loss and damage, considering, on the contrary, that the *id quod interest* was not a *fact* (that is, the objective detriment to his material assets suffered by the creditor) but the assessment or *quantification* of the loss and damage caused by the breach or non-performance, viewed in the context of safeguarding the interests of the creditor (the so-called individual's (*singulare*) interests). On this construction, the loss and damage did not coincide with the market price, or even with the price agreed between the parties, but took on subjective connotations, that is, it corresponded to the value of the performance as assessed by the creditor. By this means, even the differences in calculation of value according to the different types of contract were overcome, since the rule was of universal application.

This theory did not find favour. It was not accepted even by Révigny's pupil Belleperche. He preferred to return to the tripartite division of the cause of action. In any case, since the obligation to perform is not the same as the obligation to pay, it was not possible to apply the same solution to all cases.

Despite the best efforts of the glossers and their successors in defining the boundaries of contractual loss and damage, and despite the fact that statute law had assimilated and amended the Justinian rules, as they were interpreted by the legal theorists in Middle Ages centuries, the original rules had the last word:' Roman law triumphed in the end', as Schupfer remarked in his book *Il diritto delle obbligazioni in Italia nell'età del Risorgimento*.[114]

3.3. The Napoleonic model

Really recapturing the sources of Roman law, which in their decisive way they have called *la loi*, the French *jurists* have long been using the formula *dommages-intérêts*.[115]

Since contemporary French legal academics are questioning the meaning of this hendiadys, and wondering whether damages should be separated from

[113] Volante, *Il sistema contrattuale del diritto comune classico* (Classical common contract law) Milan, 2001, page 441 ff.

[114] Schupfer *Il diritto delle obbligazioni in Italia nell'età del Risorgimento* (Volume I, Turin, 1911) page 266.

[115] Girard, *Manuale elementare di diritto romano,* (An Elementary Manual of Roman law) Italian translation, Milan, Rome, Naples, 1909, page 658 following.

interest, it may be useful to explain that the term '*interest*' used by the Romans did not apply to the *interest* on a sum of money, but, as has been shown, to the *interests*, or cause of action, of the creditor. The formula has given rise to many misunderstandings, partly due to the fact that the breach of an obligation to pay a sum of money – which gives rise to interest – is quite different from non-performance of an obligation to do something. The two give rise to different kinds of indebtedness. And interest can be divided into several categories, as mentioned below.

To trace the origins of the Napoleonic codification it is necessary to refer to the pages of Domat and Pothier, whose sentences the compilers have often lifted wholesale into the provisions of the *Code civil.*

Domat in *Les loix civiles dans leur ordre naturel* states clearly and simply that whoever does not comply with the terms of a contract is bound to pay *damages and interest* to the other party 'in accordance with the nature of the agreement, the nature of the non-compliance and all the circumstances of the case'.[116] In another Section (the sixth) of this Part, Domat adds that termination of the contract with retroactive effect (*résolution*) for non-performance of a service involves restitution (of benefits obtained under the contract) and the payment of damages and interest.[117]

Pothier, in his *Traité des obligations selon les règles tant du for de la conscience, que du for extérieur*[118] explains that *dommages & intérêts* represent 'the loss that someone has suffered and the profit he has not been able to make', as Roman law teaches (us), at L.13 ff. Rat. rem hab.: *Quantum mea interfuit; id est, quantum mihi abest, quantum lucrari potui* (How much it affected my assets: that is, how much I have lost, how much I could have gained).' '*Dommages & intérêts*' thus denotes both the *damnum emergens* (economic loss) and the *lucrum cessans* (loss of profits). It becomes almost natural to pair off economic loss (*damnum emergens*) with '*dommages*' and loss of profits *(lucrum cessans)* with'*intérêts*'. Even Pothier then refers to the various types of obligation, and calls for 'moderation' in the assessment of the damages to be awarded against the debtor. There is a causal connection between breach or non-performance and loss and damage; it is necessary to assess the extent of wrongful conduct on the part of the debtor, the absence of *force majeure* and whether the loss and damage were foreseeable. Unforeseeable loss and damage can be recovered only in the event of *dolus* (fraud or deception) on the part of the debtor.

It was from these simple formulae that the rules were formed upon which the entirety of continental law still rests.

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116 Domat, *Les loix civiles dans leur ordre naturel,* 1689 (The natural order of the civil law) (Italian translation), Naples, 1796, I, page 241, Part I, Book I, Title I, Section III.

117 Page 279.

118 *Traité des obligations selon les règles tant du for de la conscience, que du for extérieur* (Treatise on obligations according to the rules of the court of conscience as well as the external court) 1761 (Paris, Orléans, 1768, I, pages 176 following.

The words of Domat and Pothier were transposed into the text with the force of law and were placed in Book III of the *Code civil*, On contracts and contractual obligations, after the rules on the obligation to pay or give up possession of, to deliver, to perform or not to perform, in Section IV of Book III, entitled '*dommages et intérêts* resulting from non-compliance with an obligation'. Article 1147 of the *Code civil* recites therefore:'the debtor is ordered (*condamné*), if appropriate, to pay damages *and* interest', both in the case of failure to pay or perform and in the case of delay; Article 1149 specifies that 'the *dommages et intérêts* due to the creditor are, in general, for the loss he has made and the gain of which he has been deprived'.

'*Dommages* ***et*** *intérêts*' was thus the magic formula that included both the loss arising from non-performance of a service to be performed or not performed; and the non-performance of an obligation to pay. Even for the obligation to pay, the Code does not speak only of interest, but of **damages and** interest. Article 1153 is clear on this point: 'for obligations limited to the payment of a certain sum of money, damages and interest arising from delay in payment never amount to more than judgment for interest as fixed by law; save for the special rules applying to commerce and to contracts of guarantee'.

Obviously the provisions of the *Code civil* had to be subjected to interpretation and the simple formulae became complex over time.

Actually, discussion of them in the Tribunate was almost non-existent, and the *motifs* explaining the meaning and drafting of the text emphasise that the subject is an extremely difficult one to deal with.[119] The vagueness of the terms, which encompass a very wide field, the diversity of the circumstances that can arise, enable those interpreting the law to give free play to their imagination and their powers of exegesis.

Not many years after the enactment of the *Code civil*, we find the author of *La Clef des Lois Romaines ou Dictionnaire analytique et raisonné de toutes les matières contenues dans le Corps de Droit*[120] warning us that the range of possible cases is infinite. In his view the difficulty of assessing damages and interest lies not in the law but in the facts, and (he says)'the court, not always seeing clearly what the *dommages-intérêts* should be that one party can justly claim against the other, tends to reduce them as much as it can'. The Roman sources continue to be the keystone of the subject, and the exponents of the School of Exegesis turn to them to interpret the text of the Code.

Here are two significant examples.

Toullier, in his *Droit civil français*, cites the passage of Paulus, (second century A.D.) from whom the formula of '*domages-intérêts*' has been drawn, and

119 *Code civil des Français*, Volume. V, Paris, Year XII,1804, Volume V, page 115.

120 *La Clef des Lois Romaines ou Dictionnaire analytique et raisonné de toutes les matières contenues dans le Corps de Droit,* (The key to Roman law, or An analytical and reasoned dictionary of all matters contained in the Body of Law), Metz, 1809.

explains that *domages-intérêts*, in the case of non-performance of pecuniary obligations, consist of 'interest established by law', save for the special rules on commerce.[121] He dwells on the application of the Code in decided cases. Baudry-Lacantinerie and Barde state that loss and damage must include the loss suffered (*damnum emergens*) and the loss of profit (*lucrum cessans*); and add: 'these two elements, according to most authors, are represented in the very expression, 'recovery of *domages-intérêts*' (*domages*: *damnum*, *lucrum*), which thus would almost contain a definition of the remedy.[122] But it is highly probable that the word *lucrum*, added to the word *damnum*, is merely otiose, as is often found in the style of ancient notaries'. Then they draw a distinction between compensatory damages, for non-performance of a service; and damages for delay, for the delay in paying a sum of money.

3.4. The origins of the Italian models (1837, 1865, 1942)

These Napoleonic formulae passed into the Italian pre-Unification Codes, in particular the Albertine Code (Articles1237 and 1240) of 1837; and then into the Italian Civil Code (Article 1227) of 1865. In the text of the Italian Civil Code, the hendiadys *danni e interessi* no longer appears; it speaks only of damages (*danni*), while interest (*interessi*) is mentioned in connection with those obligations pertaining to a sum of money. Legal doctrine and judgments in decided cases continued however to use both the expression '*danni e interessi*' and the French expression '*danni-interessi*'. The Code provides that interest for delay in paying a sum of money is due at the legal rate (Article 1231) save as otherwise agreed between the parties. Interest is due without the creditor having to give any justification. In any case, the loss and damage (*danno*) to be remedied arises from a *positive interest*.

The treatment in the Austrian Civil Code of 1811 (translated into Italian and enacted in 1816 in the Italian provinces) is altogether different. It specifies, at §912 that 'sometimes the creditor may, in addition to (payment of) the principal debt, claim further payment or performance from his debtor. This consists in (delivery of) accretions to and derivations from the principal asset; in interest, whether contractual, or due because of delay on the part of the debtor; in damages in respect of the loss and damage caused, or the consequential loss to the creditor caused by the obligation not having been duly discharged; and finally in the sum that one of the parties has stipulated should be payable in those circumstances'. At § 1293, on the subject of non-contractual loss and damage, a distinction is drawn between loss and damage and the loss of profit (*lucrum cessans*) that in the ordinary course would have been anticipated; and between in-

121 Toullier, *Droit civil français*, Brussels, 1837, volume III, page 530.

122 Baudry-Lacantinerie and Barde, *Trattato di diritto civile. Delle obbligazioni*, (Treatise on civil law. Obligations.) Italian translation, Volume I, Milan, s.d., pages 496 following.

demnification (the remedy for the *damnun emergens)* and full satisfaction (the remedy including also the *lucrum cessans*). The two heads of damage are however not indissolubly united; in fact §1324 provides for recovery of the *lucrum cessans* only in the event of fraud or deception (*dolus*) or obvious negligence.

The German Civil Code is even more detailed and precise, at §§ (paragraphs) 241 and following. § 249 provides that the person liable in damages must re-establish the state of affairs that would have pertained if the facts leading to that liability had not occurred; § 252 provides that loss and damage also includes the *lucrum cessans*, and that this means the profits that would reasonably have been expected in the usual course or in the particular circumstances, specifically in line with the measures and precautions taken; § 253 provides that damage that is not pecuniary loss has a remedy only in the cases specified by law. The subject is placed in the category of legal relationships of indebtedness. There are special rules for the remedy in damages deriving from an unlawful act against the person, for loss and damage extending to prejudice to the earnings or well-being of the victim (§ 842) and in the case of injury to the person or to health, or deprivation of liberty, the offended party has the right to compensation in money even for non-pecuniary loss and damage (§ 847).

The text of the BGB (*Bürgerliches Gesetzbuch*) simply reproduces the conclusions that German legal doctrine had reached in the years in which it was drawn up. Dernburg in his *Pandette* explains that in the case of breach or non-performance of the obligations, there are two heads of loss and damage, namely the *damnum emergens* and the *lucrum cessans*; the first is easily quantified, the second must be determined in a sum that is more or less problematical. He says: 'certainty cannot be required, and usually cannot be achieved, but the mere illusions of a (prospective) profit must not be taken into account. The law does not take account of fantasy'.[123] In other words, the creditor must show that he has taken particular steps that offered a reasonable hope of his obtaining the profit that he believes he has lost.

Faced with this varied picture, Italian legal doctrine, from the middle of the nineteenth century, began to elaborate its own legal categories, taking account of Roman law, of French law and of the re-working of Roman law in German legal doctrine. The French legal prototype is interpreted using the categories worked out in the *Pandette* school. Thus, in the 1930's, when in Italy the need to renew the Civil Code was most strongly felt, the cultural climate was favourable not so much to proposing a combination of the Roman, French and German traditions, as to renewing the rules, setting them out more clearly and placing them in the text in systematic order.

But not all the problems were resolved. The years preceding the new Codification of 1942 had seen the opening of a debate about the recoverability of moral, or non-economic contractual loss and damage.

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[123] Dernburg *Pandette* (Volume II, *Diritto delle obbligazioni* (The law of obligations), Italian translation, Milan, 1903, pages 178-179.

The idea was dismissed in the then prevailing legal doctrine, both on the grounds that breach or non-performance of a contract should not be treated as requiring punishment, and on the grounds that the Code of 1865 was silent on the question and that therefore its inclusion as a ground of loss and damage would have placed an excessive burden on the non-performing party.

But the Italian legal theorists nevertheless tended to adapt the formulae of Roman law to the needs of modern life in their own way. Shortly before the new Codification, Nicola Stolfi, the author of a weighty and successful treatise on civil law, had reason to report that the evolution of Roman law had led to the 'affirmation of the principle that the debtor who defaults on an obligation must pay to the creditor such sum as is equivalent to the advantage that would have enured to (the creditor) from the *precise, effective and punctual compliance* with that obligation. And this sum in compensation (*indennità*) specifically constitutes *domages-intérêts*'.[124] Giovanni Pacchioni explained that 'the *damnum emergens* consists in every diminution of the creditor's assets by reason of the breach or non-performance; *lucrum cessans* is all the value that the owner of the assets would have been able to realise by means of his own business activity, if his debtor had complied with his contractual obligations: all that profit that he could have made, as an exclusive or principal consequence of the increase to his assets that compliance with the contract, which had not been forthcoming, would have caused'. To support this theory, he refers to the Roman tradition, which was reluctant to allow recovery of the *lucrum cessans* and allowed it only on the basis of a specific claim, which was referred to the court's discretion: this (he says) must therefore be the rule for Italian law as currently in force.[125]

3.5. The present-day Italian model

The decision made by the drafters when the Civil Code and the Commercial Code were unified was to place the rules on this question among those governing obligations (Articles 1223 ff.) and to assign special additional rules to non-contractual loss and damage (Articles 2056-2059). Relief for moral damage, in the strict sense, was recognised only in cases of non-contractual unlawful or tortious acts.

The Italian Civil Code devotes seven provisions to compensation for contractual loss and damage. It starts with the general principle that loss and damage consist in two factors, the loss (already) suffered by the creditor and his (future) loss of profits (Article 1223). Loss and damage (*il danno*), to be recoverable, must be direct and immediate; for pecuniary obligations, there is

[124] Nicola Stolfi, *Diritto civile*, Turin, 1932, Volume III, page 308.

[125] *Diritto civile italiano. P.II Diritto delle obbligazioni. Volume.II Dei contratti in generale,* (Italian Civil Law, part II The law of obligations, Volume II, Contracts. Padua, 1936, page 217.

provision for an award of interest at the legal rate as from the day they became payable, and further loss and damage (*il danno maggiore*) is recoverable, if the creditor provides proof of it (Article 1224); the loss and damage must also have been foreseeable at the time the contract was entered into (Article 1225); in the event that it cannot be proved in an exact amount, the court is authorised to assess it equitably (Article 1226); if the creditor's negligence has contributed to cause the damage, the compensation is reduced according to the seriousness of the negligence and the extent of the consequences arising from it. The debtor is also liable for the dishonest, tortious or unlawful acts of his servants or agents (Article 1228); and contract terms excluding liability for intentional wrong or gross negligence are void (Article 1229).

As can be seen, there are two distinct heads of loss and damage, just as interest for non-performance of pecuniary obligations is separately treated. In the Report of the Minister for Justice (*Relazione del Ministro Guardasigilli*) (no. 572, 1942) the two heads are re-assigned to *damnum emergens* and *lucrum cessans*, and the Report insists on the causal connection between the breach or non-performance and the loss and damage, that is, on the fact that to be recoverable, the loss and damage must be an immediate and direct consequence of the breach or non-performance, and must have been foreseeable at the moment the obligation arose. The discretion of the court is wider in evaluation of *lucrum cessans*. Moral damages are not recoverable in contract.

Italian doctrine and case law have defined in some detail the wide formulae that tradition has handed down to us: the creditor must be put in the same financial situation in which he would have found himself if the wrongful act had not taken place; damages must be liquidated in a sum equal to the actual value of the lost profits, the *lucrum cessans* is defined as the extent to which the assets of the creditor have not grown, and the creditor must provide adequate evidence as to the use of them that he specifically planned and actually prepared, and which he has not been able to achieve (Court of Cassation 7.7.1981 no. 4455). A well-founded and reasonable expectation is adequate, without absolute certainty that the profit would have been made (Court of Cassation 20.1.1987 no. 4280). The loss and damage, for which an award is made on the basis of the wrongful act or omission, must be direct and immediate as well as foreseeable, save in the case of deliberate breach or non-performance, which leads to liability also for unforeseen loss and damage. For loss and damage suffered as a consequence of breach of pecuniary obligations, interest at the legal rate is the remedy, save where further loss and damage (*il maggior danno*) is proved.

Interest is divided into the categories '*moratori*' for delay in payment of a sum of money; '*corrispettivi*' to remedy the creditor's loss of use of the sum of money; and '*compensativi*', due to the creditor independently of the interest for delay in payment, in order to re-establish the economic balance between the contracting parties (Court of Cassation 19.8.1998, no. 8196).

For debts in the Italian currency, there is no addition to interest at the legal rate for currency revaluation; in order to obtain more than interest at the

legal rate, the creditor must show that he has suffered a greater loss (*maggior danno*). The accumulation is however applicable to debts in money's worth, because the revaluation is intended to restore the assets to the value they had before the breach, whereas the interest is of a compensatory nature (*compensativi*) (Court of Cassation 18.8.1998, no. 8165). Judgments in decided cases have developed various presumptions, dividing creditors into socio-economic categories (businesses, professions and consumers) and thus graduating the amount of the greater loss (*maggior danno*); this was in view of inflation, which has now been partly overcome by Italy's adopting the Euro (Court of Cassation 19.10.1995, no. 10844).

It is now possible to recover moral damages (*danno morale*) in contract, for ruined holidays, bullying, stalking, or damage to one's image. Moral damages are recoverable in particular – in the category of so called 'existential damages' – in the case of medical malpractice, since judgments have found that there is a 'contractual' (the so-called 'social contact') relationship between doctor and patient, even if the doctor is employed by the health service (Court of Cassation 4.1.2010, no. 13)

Punitive damages are not recoverable, even in the context of extra-contractual liability. On this point the Court of Cassation has observed that 'in the current legislation, the fundamental function of restoring the asset base of the person who has suffered the injury (*lesione*) is a matter of civil liability, which operates to award to the injured party a sum of money intended to eliminate the consequences of the injury he has suffered, whereas the concept of punishment or penalty for civil liability is not germane to the system and the assessment of the debtor's conduct is for that purpose irrelevant. The principle of punitive damages is therefore incompatible with the Italian legal system; nor does it apply to the recovery of non-pecuniary or moral damages. Such recovery is always dependent on an assessment of the suffering or injury caused by the unlawful or tortious act or omission, and cannot be treated as proved '*in re ipsa*'. In addition there is no possibility of arriving at an assessment of damages on the basis of a consideration of the poverty of the injured party or the wealth of the person liable (Court of Cassation 19.1.2007, no. 1183).

But on the question of recovery of damages for non-performance of pecuniary obligations, the Court of Cassation has not yet shown a united trend in its judgments.

There is one trend that propounds the principle that in pecuniary obligations 'the phenomenon of inflation does not give rise to an automatic adjustment of the amount of the debt, nor does it constitute a head of damage in itself, but may involve, pursuant to Article 1224 of the Civil Code only an award to the creditor, in addition to interest, of whatever greater loss (*maggior danno*) has flowed from his being unable to use that sum during the period preceding payment, if and only if the creditor himself pleads and proves that prompt payment would have enabled him to avert the impoverishing economic effects that inflation has on all owners of money: because the interest on delayed payment

awarded to the creditor pursuant to the first part of Article 1224 of the Civil Code has a restorative function, since it represents the replacement, in a lump sum, of the loss of availability of the amount of the debt.' (Court of Cassation 10.11.2009, no. 23744).

Another trend holds on the contrary that when the creditor is a business and there is delay in payment, there is no need (for the creditor) to prove the greater loss (*il maggior danno*) equivalent to monetary devaluation, because there is a presumption 'on the basis of the '*id quod plerumque accidit*' (as is usually the case), that if the payment had been made promptly, the sum owing would have been put to anti-inflationary uses' (Court of Cassation 31.5.2010, no. 13228).

Pietro Trimarchi, one of the most authoritative Italian jurists, has in a recent book revisited the problems of contractual loss and damage, having recourse not only to logical and pragmatic, but also to economic considerations. His starting point, in the context of a wider analysis of the remedies available to the creditor in the Italian legal system, in the case of non-payment by the debtor is that to resolve the problems of the award of damages 'it is necessary to analyse the function of contractual liability, that is, in the context of a contract, which is necessarily concerned with economic transactions' it is necessary to ascertain how 'the rules on liability may influence the motivation of the operators so as to achieve efficient results'.[126]

The functions of contractual liability are many: to establish a relationship of trust between the parties, to provide an incentive for the debtor, to achieve the aims of the creditor. From this point of view the theory appears preferable that gives precedence to the remedy for the *interesse positivo*, (economic advantage expected by the creditor) since it is difficult in almost all circumstances, to prove the *interesse negativo* (situation the creditor would have been in had the contract never been formed). According to Professor Trimarchi, 'breach or non-performance must not be discouraged when it gives the non-paying debtor a greater advantage than the loss to the other party (efficient non-payment), so the damages must not be less, nor must they be greater than the positive interest'. This conclusion leads Professor Trimarchi to consider that the rule that deliberate breach or non-performance gives rise to liability even for unforeseeable loss and damage, should be applied with caution and restrictively.[127] This solution thus brings the Italian model close to the English one.

Professor Trimarchi wonders whether in Italian law the *interesse negativo* is recoverable as an alternative to the *interesse positivo*. If, that is, the creditor, rather than claiming the price of the thing or the service that he has not obtained, and the *lucrum cessans*, could claim instead restitution of the price and payment of the expenses he incurred in preparing to carry out his own side of the bargain. His answer is in the negative, because the payment of damages is

[126] Pietro Trimarchi, *Il contratto: inadempimento e rimedi* (*Contracts: breach or non-performance and remedies*) Milan, 2010, pages 83 ff.

[127] Page 180.

a consequence of the breach or non-performance, and thus there is a question of causation; 'it is only the recovery of expenses reasonably incurred in vain that is economically justified and appropriate, when the loss and damage is not quantifiable, or not easily quantifiable, in money'. In this way the distinction between *interesse positivo* and *interesse negativo* is blurred, since Article 1226 of the Civil Code permits the courts to assess the loss and damage claimed by the creditor on an equitable basis, that is, taking the circumstances into account.

The distinction between an estimation of the thing or facts (*aestimatio rei*) and an estimation of the effect on assets (*id quod interest*) appears to Professor Trimarchi to be too schematic. The latter is better suited than the former to the Italian legal system, because it includes the *lucrum cessans*, and is based on objective and therefore easily verifiable criteria, whereas the former is dependent on subjective criteria. If, however, the creditor engages in a substitute transaction at a time close to that of the breach of the contract, 'it is reasonable to treat the price actually agreed as representing (…) a market price' which is not easily ascertainable.[128] The creditor may obtain the damages he hopes for (damages representing the profit he expected) only if he succeeds in proving that he could otherwise have obtained a superior advantage. To this extent, he regards the rules laid down by the UNIDROIT principles, the PECL (Principles of European Contract Law) and the DCFR as being in line with Italian law.

And yet, Professor Trimarchi wonders whether, when performance of the contract has been incomplete or defective, the damages should supplement the lesser market value of that performance, or reimburse the cost of completing it or of eliminating its defects. He considers that, except in cases where the results of these two approaches would be the same, the principle must be followed, of producing a result that is in accordance with the particular type of contract. In the case of a contract of works, the debtor must pay the cost of proper performance, if the works are not completed; if the works are completed but defective, it is necessary to balance the opposing interests, without burdening the debtor excessively; and the same applies to a contract of sale. But it is necessary to distinguish between types of sale, and in particular to consider the remedies available to the purchaser if he has the status of consumer.

On the question of loss of opportunity, legal and case law are uncertain whether to ascribe it to *damnum emergens* or *lucrum cessans*. Professor Trimarchi argues that the question is otiose, since opportunity can from time to time be assigned to one or the other category of loss and damage; loss of opportunity is only problematical in terms of causal connection and burden of proof.[129]

Recovery of damages in the case of non-compliance with pecuniary obligations – on which interest at the legal rate is owing from the day that payment should have been made – should not be confused (he says) with the greater damages (*maggior danno*) for delay. The rate of legal interest varies according to

[128] Page 116.

[129] Page 150 ff.

whether Article 1284 of the Civil Code is applied, or Legislative Decree no. 231 of 2002 (Article5), which brings into force EC Directive on delayed payments (EC Directive no. 35/2000). There is a considerable difference, and the courts will be required to reduce that difference, by evaluating the evidence put in by the creditor[130]. Article 1283 of the Civil Code exempts the debtor from liability for payment of interest upon delayed interest; according to Professor Trimarchi this rule is justified because otherwise the debtor would be exposed to too great a burden; but it must be applied reasonably; for example interest upon delayed interest is due if the creditor has voluntarily paid such interest, so that the rule does not apply in the case of recovery of damages for the loss actually caused by the delay or for the actual loss as liquidated in a judgment.

According to case law, in the assessment of unliquidated damages, 'monetary revaluation and interest constitute elements in the obligation to make good the loss, and can be awarded by the court even of its own motion, or on appeal, and even if not specifically claimed, since they must be treated as having been included in the originating formulation ('*petitum*') of the claim in damages, wherever they have not been expressly excluded' (Court of Cassation 30.9.2009, no. 20943). In cases of unlawful or tortious non-contractual acts' compensatory (*compensativi*) interest owing for the loss caused by delay in paying, cannot be calculated from the date of the unlawful or tortious act on the sum that has been liquidated as to capital and (then) revalued up to the moment of the judgment but must, on the contrary, be calculated either with reference to the single moments at which the sum equivalent to the lost asset nominally increases, by reason of the previously chosen average indexes of monetary revaluation, or, likewise on the basis of an average index, bearing in mind that damages for delay fall within the scheme of liquidated (damages) pursuant to Article 2056 of the Civil Code, which includes the equitable valuation of the loss and damage itself pursuant to Article 1226 of the Civil Code' (Court of Cassation 9.3.2010 no. 5671).

In the case of breach, or delay in discharge, of an obligation to pay a sum of money (pecuniary obligations)– which is subject, as such, to the provisions of Article 1277 of the Civil Code –'damages may be awarded in respect of monetary revaluation of the debt, only on condition that the creditor alleges and proves, pursuant to Article 1224, second sentence, of the Civil Code, that there is a greater loss (*maggior danno*), flowing from the non-availability of the sum during the period of delay, which is not compensated by the payment of legal interest at the rate predetermined by Article 1224, first sentence, of the Civil Code; however there is in any event no possibility of compounding monetary revaluation and compensatory interest' (Court of Cassation 3.6.2009, no. 12828).

The Courts, however, calculate the revaluation with reference to the ISTAT consumer prices index, compounding it with the interest, and thus revaluing the sum initially obtained, from year to year. This solution, according to Profes-

[130] Page 154.

sor Trimarchi, was justifiable, years ago, when those engaging in commercial transactions were exposed to a very high rate of inflation. Now, however, the situation has changed and these rules are no longer justified. Thus, for the debt in money's worth, the pecuniary equivalent 'must be determined with reference to the moment at which the entitlement to the asset or service is replaced by an entitlement to liquidated damages, or to the moment at which substitution of the asset or service became possible and has not been forthcoming. Interest can only be considered, during the subsequent period in which the liquidated sum is not forthcoming, but not for the period in which the asset or service was not forthcoming; these are life values which do not produce interest; for the preceding period account should be taken of the non-acquisition of the money and thus automatic revaluation is justified'.[131]

3.6. The English model

The fundamental rule in the matter of *damages* in the English *common law* is that the loss and damage must be the measure of the damages and therefore the function of the latter is purely one of satisfaction *(damages are compensatory)*. Therefore *punitive damages,* which would tend, on the contrary, to punish the party at fault, are not allowed: the loss and damage to be dealt with is the loss suffered by the claimant, not the gain of the defendant. The *loss* includes any diminution in his assets caused by the breach or non-performance, either to the person or the assets of the creditor, including loss of profits on business transactions not brought to a satisfactory conclusion: it is only exceptionally that *damages for non-pecuniary loss* are awarded, in particular for damages for '*injury to feelings*', as in the case of tourism services which turned out to be disastrous *(Jarvis v. Swans Tours Ltd.,* [1973] 2 Q.B. 233). Finally in cases in which there has been no *loss,* for example because the party has succeeded in finding on the market, at the same price, goods equivalent to those which the non-performing party has not delivered, English law awards only '*nominal damages*'.

The body of rules on contractual damages has to a large extent been formed since the middle of the nineteenth century and appears to have been profoundly influenced by continental law (particularly the French) following the translation into English of Pothier's Treatise (1806). The most important case is that of *Hadley v. Baxendale*[132] in which the court held that: 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered *either* arising naturally, i.e., according to the usual course of things, from such breach of contract itself, *or* such as may

[131] Page 169.

[132] [1854] 9 Exch. 341.

reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it'.

According to learned legal writing there are three types of recoverable damages: *expectation damages, reliance damages* and *restitution damages.*

Expectation damages consist of recovery for *loss of bargain,* which is equivalent to the *lucrum cessans*. The aim here is to put the aggrieved party in the position in which he would have found himself if the contract had been properly performed. The *loss of bargain* has two aspects, one consisting in the immediate loss suffered because of the non-performance of an expected service (for example the non-delivery of a car that has already been paid for), the other consisting in the consequential loss directly resulting from the non-performance (for example the loss suffered by not having been able to use the machine that has been purchased, to carry out works and produce profits). The assessment of *expectation damages,* in the former case, is usually made, as necessary, on the basis of the *difference in value* (that is, the difference in value between the goods or services received and those that the aggrieved party should have received), or on the basis of the *'cost of cure'* (that is, the costs incurred in remedying the breach, for example by repairing defective goods).

Reliance damages represent the expenses and losses incurred by the aggrieved party in reliance upon the contract, whether in the course of its performance or in the period before it was made, which correspond to the *damnum emergens*. The function of these damages is to restore the aggrieved party to the position he would have been in if the contract had not been made.

Restitution damages, finally, represent the 'benefit' that has enured to the non-performing party by reason of the aggrieved party's reliance upon the contract. In the event of a *breach* so serious as to give rise to *total failure of consideration,* this benefit must be restored in kind or to an equivalent value in money, to the party that conferred it. The function of these damages is to put the aggrieved party in the position in which he would have found himself if the contract had not been made. They are distinguished from *reliance damages* by the fact that they are based not on the loss suffered by the aggrieved party but on the unjust enrichment received by the non-performing party.

The aggrieved party maintaining an *action for damages,* must prove the existence of the contract, the breach and the loss and damage resulting from the breach. The claimant can choose the type of damages to claim in the action and can also claim for more than one type, provided that the amount of recovery is not greater than the loss and damage itself. There are limits however: the claimant cannot claim *expectation damages* if he fails to prove *loss of bargain,* or the value of his expectation, nor can he claim *reliance damages* if the expenses he has incurred have been greater than those reasonably foreseeable and the reimbursement of them would put him in a better position than that in which he would have found himself if the contract had been complied with. Finally the claimant cannot claim *restitution damages* if the breach by the other party is not so serious as to amount to a *'total failure of consideration'*. Moreover, it is pos-

sible that *termination* of the contract with payment of *restitution damages* may mean that the claimant finds himself in a better position than that in which he would have found himself if the contract had been complied with: for example, if a contract of sale of a car turns out to be a *bad bargain,* because the agreed price was 10,000 pounds sterling, whereas its real value was 7,500 pounds sterling, in the case of non-delivery of the car by the vendor, the purchaser claiming *termination for breach of contract* and *restitution damages* can obtain restitution of the 10,000 pounds sterling he has paid, rather than a car of lower value.

In English law it is the case of *Hadley v. Baxendale* that gives directions on this point: the defendant carrier who did not deliver a mill shaft in time for the mill to be repaired, caused a stoppage at the mill; however the defendant did not know and could not have known the serious economic consequences of the delay.

It follows from the rule in *Hadley v. Baxendale*, that to be recoverable, loss and damage must correspond to that which would normally occur in similar circumstances; the award of damages can be increased if the defendant had knowledge of specific circumstances; and loss and damage that have no causal connection with the breach cannot be recovered. Loss and damage suffered as a consequence of the claimant's failure to discharge his *duty to mitigate* cannot be recovered. The claimant in fact has a duty to do everything possible to mitigate the loss and damage, taking reasonable steps to limit or prevent it increasing; if he does not do so he is liable for the further loss and damage caused.

Damages can be limited if the loss and damage has been contributed to by the *default of the victim*. This principle, which corresponds to that of *contributory negligence* in the law of *tort,* applies in English law only when the wrongful conduct of the victim amounts to an unlawful act, whether contractual or non-contractual, as can happen in a contract of transport or in contracts for professional services but not when the unlawful act is merely a breach of contract.[133]

In conclusion, it should be stated that if the facts support them, *reliance* and *restitution damages* can be claimed in an *action for damages* or an *action for restitution,* even when the contract has not yet been entered into, or when it is void, or has been avoided, or when it has been dissolved subsequently for *frustration,* or for *total failure of consideration. Expectation damages* on the other hand can be claimed only in contract, when the contract has been entered into but not been properly performed.

3.7. A comparative reading of PICC, PECL and DCFR

On the basis of the foregoing review of the reference material, we now turn to the PICC, the PECL and the DCFR. I omit the CISG, even though it inspired these other texts, which have followed one other in a short space of time, be-

133 *Forsikringsaktieselskapet Vesta v. Butcher* (1989) AC 852.

cause it relates to contracts of sale, whereas the others relate to the recovery of damages for breach or non-performance of contract in general. The formulae are a little more precise, but still very general and allusive.

The three texts have a *common core* and some variants.

The general principle is that damages should constitute full satisfaction of the loss and damage caused by breach or non-performance of a contract (in the PICC and the PECL) or of an obligation (in the DCFR), as appears respectively at their Articles 7.4.2.; 9.502; and III.–3.701. That is, the aggrieved party must be placed in the same situation in which he would have found himself if the contract or obligation had been complied with.

The loss and damage (*danno*) is referred to as *harm* in the PICC and as *loss* in the other two models; and the award of *damages* represents both the *damnum emergens* and the *lucrum cessans*. In contrast to the provisions of many of the national legal systems, moral injury (non-pecuniary loss) is recoverable: the PICC specify, for example, that it includes 'physical suffering or emotional distress' (7.4.2); the DCFR describes this type of loss and damage as 'pain and suffering and impairment of the quality of life' (III.–3.701.(3)); the PECL do not offer further particulars.

All these models provide that the loss and damage must have been reasonably foreseeable (7.4.4.; 9.503; III.–3.703), but whereas the PICC do not provide that damages should be recoverable for voluntary breach or non-performance (following the CISG), both the PECL and the DCFR include unforeseeable loss and damage as recoverable, if the *non-performance* was 'intentional or grossly negligent' (PECL) or 'intentional, reckless or grossly negligent' (DCFR).

The PICC also include a provision as to 'certainty of *harm*' and the possibility of recovering damages for the *loss of a chance* (7.4.3).

In line with the provisions of the Italian Civil Code, the three models take account of circumstances in which the creditor reasonably mitigated the loss and damage (7.4.8; 9.505; III.–3.705), in which case he has the right to be reimbursed for his expenses incurred in obtaining this advantage. They provide also for the possibility of contributory negligence on the part of the creditor and for a consequential reduction in the damages awarded against the debtor (7.4.7; 9.504; III.–3.704), just as provided in the Italian Civil Code (Article 1227 c.1).

The three models provide for the possibility of making up the difference in damages, where the creditor has reasonably made a '*replacement transaction*' with third parties (7.4.5.; 9.506; III.3.706); in the Italian system this possibility is not provided for.

In contrast to the Italian model, which is silent on the point, the three models refer to the *current price* (7.4.6; 9.507; III.–3.707), and provide that in the event that the aggrieved party has not entered into a replacement transaction he can recover the difference between the contract price and the current price at the time of termination of the contract, in addition to damages for all further loss and damage suffered. This provision is useful in any case; in Italian law it would be possible to achieve the same result with recourse to *lucrum cessans*, if

the aggrieved party can prove that he could have used or enjoyed possession of the subject matter of the contract to make a profit.

In the event of failure to discharge a pecuniary obligation, the three models – in contrast to the Italian Civil Code, which refers to interest at the legal rate, except in case of greater loss and damage (*il maggior danno*) – all follow the same formula, that is, payment of interest calculated 'at the average commercial bank short- term lending rate to prime borrowers' (DCFR III.–3.708; PICC, 7.4.9; PECL, 9.508). In all three models the possibility is provided, of obtaining further damages if further loss and damage is proved. On this point it seems a little surprising that the PECL and the DCFR agreed with the choice of the PICC, since their rules are not intended to regulate only business-to-business contracts, as those of the PICC are.

The questions of penalty clauses, and payment in a particular currency, involve principles that go beyond the general rules on contractual damages and therefore the examination of them must be postponed to another occasion.

In conclusion one has to take account of the differences between the various models currently in the national legal systems, of which some examples have been given above. All in all the rules in the DCFR are reasonable. The solutions offered in the DCFR to the problems mentioned above constitute a step forward in the definition of common EU-wide principles. They may not only facilitate trans-national economic operations but also make for greater clarity in the national legal systems.

Chapter 4
The Legal Profession in Italy

1. The Admittance of Women to the Legal Profession

1.1. The first woman graduate in utroque iure (both Civil and Canon law) and the Symbols of Justice

(…) Tu gisti colà, Vergin preclara
Ove di molle pié l' orma è più rara

With these words, taken from the ode *La laurea* (1777), Giuseppe Parini crowned, with his poetic wreath, Maria Pellegrina Amoretti who earned the laurel wreath for her degree in utroque iure obtained from the University of Pavia on the 25th of January 1777 with a thesis on the "dowry". A double merit, not only because she was one of the first woman to receive a degree, but, above all, because the degree with which she was graduating was somewhat singular:: the study and practice of law was, in fact, reserved to men, for reasons that tradition, social organization, the government of politics had rooted to such a point that this type of exclusive right was considered to be totally natural, unquestionable, indefectible.

And yet, in many ways, women were not extraneous to the universe of law. They were, in fact, an integral part of it, so much so as to be its symbol: Themis, the wife of Zeus was a symbol of order and law; her daughter Dike, the roman *Iustitia,* symbolized justice, the fundamental principle at the base of civil society, the engine of its development. At the origins of Western culture, in the Greek tragedy but also in poetry and in Greek philosophy, the theme of justice is the uninterrupted thread that collects around itself all the problems of humanity, from the relationship with the Absolute to the relationship among people, from the distribution of power and goods to the future of humanity. Justice is prosperity, therefore fertility: only the image of a woman, her body, connected to the natural gift of procreation, are found in the representations of justice. The icons on justice in the collection of Cesare Ripa are beautiful, but the painting that impressed me the most is the one found in a hall in Palazzo Ducale in Genoa which, at one time, was the home of the courts of law and detention. Here Giovanni Andrea De Ferrari represents justice in the manner of a young florid woman with a sword and scales, but without a blindfold, and with a horn of plenty in her arms, with the meaning that justice, even though it may be severe, is the advocate of prosperity.

Was it just simple mythology, a simple oleographic representation, or did the presence of a woman within the creation of the idea of justice go beyond that of a myth and aesthetics? It is not by chance that one of the most complex and courageous characters of Greek tragedy is a woman, Antigone. Antigone challenges the law, the law of the State, in virtue of an ethical law, compassion for the father and the peace of the dead; she expresses the drama of the conflict between the official side of the law and justice as an innate value, and can do so solely in as much as she is a woman, because a woman then did not belong to the legislative body, which was reserved to men. Men could criticize the legal text at the time in which it had to be approved, but once approved they had to observe it. The law is severe but it is the law; Dura lex sed lex …

The woman is given the higher and more difficult task, that of identifying the borders between law and justice, and, therefore, to define the borders of *just law.* In Greek thought, alongside Antigone, we find, however, Diotima, clairvoyant and priestess, Socrates' tutor in the philosophy of Eros and the protagonist of Plato's Symposium. These two components – and it is not a hazard to underline – accompany the admittance of women into the world of law and the juridical profession. And it is not by chance that in Parini's ode he insists so much on the loveliness of the woman who is a graduate of law, and acknowledges the difficulties of acceptance of this unusual presence on the part of the male world of jurists.

"Oh amabil sesso, che su l'alme regni / con così possente incanto /
qual'alma generosa è che si sdegni / del novello tuo vanto?"

Male generosity, as far as the admittance to women into the world of law, has always been extremely rare: women became sui iuris (in their own right) only upon abolition of marital protection, in Italy in 1919, and with a very limited application of the new rules. This is the difference between the juridical status of a woman as a person, as a member of the family, as a component of society, and of the woman as one who exercises the legal profession. For the other professions, Notaries and the Judiciary, as for political representation, it will take decades, not only because admittance into the world of law was still surrounded by hostility, opposition, a cultural lag and petty limitations, but also because the exercise of the notary or judiciary function meant carrying out a role of a public nature, and the charges that involved a public function or the performance of a public service befit only men.

1.2. The Liberation of Women: the Debate in the Middle of the 1800s

The discrimination of women surmounts the great historical events, goes beyond the period of the Enlightenment, the French Revolution and the Decla-

ration of the Rights of Man and the Citizen, it is further consolidated in the Napoleonic Civil Code and it is not even touched by the Italian Civil Code in 1865 even though Anna Maria Mozzoni, one of the great icons of the battle for the equality of rights, wrote, in a persuasive and elegant style, an essay with the eloquent title, *The Liberation of Women*. This essay, written in 1864, contains precious observations regarding the civil code bill which was being drafted at that time. It is worthwhile pausing on these pages, because they clearly demonstrate that the professional status of women had to overcome not one but two obstacles: the equality of women and how they were treated within the realm of individual rights and family, and equality in the world of labour. These two dimensions are indissolubly integrated, so that without one the other could not proceed and neither could it disassociate itself. And that is how it went: the turning point, in 1919 implies an irreversible change – even though, as historians have documented, gained with great difficulty and observed with great caution – both in the juridical position of women as such and in the juridical position as someone performing a profession that did not involve assuming a public function.

On this long journey, professional historians are of help to the jurists: all you have to do is consider the history of historiography,[1] western political and social history,[2] the history of professions.[3] But the jurists add a quid pluris to these narrations: on the one hand, their contribution to the creation of juridical rules and their interpretation, so as to make discrimination a binding factor – I highlighted this in research published with the title *Status and ability. The juridical construction of individual differences*[4] – on the other hand their subtle intelligence aimed at the argumentation of the reasons that justify discrimination. So that the history of women's admittance into the legal profession is not only a political and social story, it is a story that insinuates itself, it "materializes" so to speak, within the mentality and culture of the jurists, in tradition, it is found in legal texts, in sentences, in manuals, in specialized literature.

It is to this perspective that I would like to dedicate greater attention in these pages, considering the fact that it is not oportune to repeat, summarizing them and therefore debasing them, the beautiful pages of Francesca Tacchi *Eva togata.(Eva Robed) Women and juridical professions in Italy from Unification till today,* just now published by Utet.[5]

As I said, at the threshold of the new civil code, Anna Maria Mozzoni tries, by means of a thorough analysis of the position of women within public opinion, religion, family, society and in science, to build the bases towards a reform

1 Palazzi, The History of women and the history of gender in Italy, Gender and masculinity. A historical view, Rome 2000.

2 Duby e Perrot, History of Women in the Western world, Rome-Bari, 2003.

3 Malatesta (cur.), *Historical Atlas of professions,* Bologna, 2009.

4 Rome-Bari, 1994.

5 Turin, 2009.

of the rules of private law which can improve their position and guarantee their emancipation:

> "G. G. Rousseau considered women in nature; Balzac from the point of view of manly interests; La Bruyère subjected women to a fine analysis without any consideration for deriving any reform in or around them; Madame Neker only saw women from the local institutions' point of view, often fighting with the true nature of beings and things. Nobody, among many, purposely studied the influence of the institutions on women's character and conditions"

> "Since a woman has, as does a man, special aptitudes, she also has the right to develop them; this teaches us the principle of innate right. She has the right because, having the right to work, only within herself lies the choice regarding her work; she has the right because practically and actually she works and produces; in industry and in commerce, in the arts and in teaching she can already be found on a large scale, and displays, at this time, aptitudes, that one might have truly wished to deny her . Finally she has the right because society, in turn, has the right that the function be carried out by who can do it best; and however, if among many contenders, a woman shows greater ability, she, among all, has the right to it. A woman was, and always is, considered as being outside of the law with the help of citing her weakness that is exaggerated to the point of being ridiculous, and with the opportune exhibition of her claimed incapability, which is disproved, in vain, by splendid facts that arise everywhere."

Anna Maria Mozzoni's discourse takes place in two phases. First it examines the woman "in the face of law", and, moving from the principle on the basis of which the purpose of law can only be that of guaranteeing each individual the development and exercise of his/her faculty and not impose further limits than that of the rights of others, it declines all classifications and prejudices that have kept this principle of natural law to be fully shared and applied. It is a discourse that goes well beyond the equality of sexes and the claim to rights by women: the questions that Mozzoni asks herself and the reader – unfortunately I must say that they could also be asked of today's reader – are extremely refined.

> "(..)in our times – she writes – (I am speaking of civilized and progressive countries) what does the ostracism of the Jews mean, in the face of the philosophical principle of law? And what about the barriers elevated to the free association of the differences of beliefs? The disinheritance of a son that has left his father's religion? The phrase common to many codes, *tolerance of cults?* The slavery of coloured races? The suppression of female intelligence and activity?"

Hence, the prejudices that are rooted regarding paternity, and therefore guardianship, which excludes the rights of the mother regarding her children, which lists the duties of the wife and the rights of the husband, that submerges the

wife in the shadow of her husband, that penalizes the wife in crimes in which the husband is treated more lightly, that reduces the wife to being at the mercy of the power of her husband.

In the pages then addressed to the Lord Chancellor who had, if possible, worsened the position of women in the family and in society, Anna Maria Mozzoni explains how necessary it is to overcome the obstacle of public offices not only allowing women to have greater prominence in family relationships, but also to open the doors to work, private and public employment, professions and teaching. And more. The law, informed to the "old caryatid of roman law, that, by now, the centuries should have worn away" appears to be incompatible with the new Italy and with the new generations. The juridical argument goes side by side with the political one: and advances a crucial question. If the civil code must reflect the needs of society, why introduce rules that are no longer in step with the times and indeed are now surmounted by the same convictions that are by now widespread in society? Why is the legislator more backward and the jurists more conservative than models which have, by now, been overcome by the times and by the same social evolution?

Animated by the principles that advocated socialism in the middle of the 1800s, Anna Maria Mozzoni, with subtle acumen, in just a few lines, depicts the juridical condition of women articulated in the various situations of the social scale, and discovers that – curiously – the condition of women coming from humble extraction is more egalitarian than that of women coming from noble or bourgeois extraction: the former are condemned to boredom, the others condemned to living in the professional light of their husband.

Her criticism of "Mr. Gabba" is ferocious: the balance between the sexes advocated by the jurist "is a true imbalance for anyone that has the best sense of justice and understands how facts strangle the egotistical theorems, everywhere, as soon as they are born". Gabba himself, professor of the University of Pisa, had written on the juridical condition of women, justifying its *deminutio (diminishment),* and will insist on the theme, both in his work against the introduction of divorce, both in that on *Women who are not Attorneys*[6] and then in the III National Juridical Council, held in Florence.[7]

1.3. Women in Society, that is in Civil Codification

Taken as an inspirational model, the Napoleonic Code leaves deep traces in the Italian unitary Code of 1865. In family law some innovations are found, even though, in substance, the "authoritarian" line does not change. On the one hand, in implementing the Cavourian principle "free Church in free State", the institution of civil marriage is introduced (but after a long debate in Parliament the

6 *Pisa, 1884.*

7 *Atti*, Florence, 1891.

institution of divorce is excluded); the separation of spouses is maintained, in the case in which their cohabitation has become impossible; but the husband is assured a privileged position (art. 150, 2° c.: "the action of separation because of adultery by the husband is not admitted, unless he keeps the concubine at home or notoriously in another place, or there are circumstances that the fact constitutes a serious insult to the wife"); the husband is considered the head of the "family" in any case and the wife "follows his civil condition, takes on his surname and is obliged to accompany him wherever he considers it opportune to establish his residence" (art. 131); the husband conserves the administration of the family (art. 152: "the husband has the duty to protect his wife, to keep her with him and to administer to her all that is necessary towards life's needs in proportion with his substances") even though the wife is asked to contribute to the maintenance of the husband "if he does not have sufficient means" (art. 132,2° c.), and marital power (even though attenuated), that is explicated even in the "authorization" to which the activity of sales and purchases made by the wife is subordinated (art. 134: "the wife cannot donate, sell or mortgage real estate, devolve or collect capital, establish a company, nor negotiate or be involved in legal proceedings related to such acts, without the authorization of her husband"; authorization is not required if her husband is a minor, absent, proscribed, condemned during the expiation of a punishment; separated for his own fault; when the wife exercises a trade). The power that the father can exercise on his children are instead less intense (artt. 220 ss.); in the most serious cases, the father can place his son in an educational or correctional institute but certainly not in prison.

The road to emancipation for women, and the "family" on the whole, is, however, extremely slow. From the introduction of the Code in 1865 many years must pass before new legislation modifies the situation of women in the family and in society. The law that allows women to testify in public proceedings goes back to 1877; in 1893 and 1907 some provisions are passed that attenuate marital power (excluding the authorization to the benefit of a separated woman and a working woman). The parliamentary Commission established by Lord Chancellor Nicolò Gallo in 1908 for the purpose of reviewing the first book of the Civil Code is not successful in terminating the work, even though he is aware of the serious condition that is reserved to women in civil legislation: "in family law, the Lord Chancellor observes, it will be necessary to see what form of different valuation can be given to the condition of a woman within the institutions that are related to her. It is worthwhile examining whether every element of subjective inability in a woman should disappear". Even though the abolition of marital protection in 1919 should mark the final turn around, the situation does not change with the arrival of Fascism.

In truth, a new model of family is favoured: the family seen as an institution, subjugated to the State, and hierarchically dependent on it, and as a body that transcends the single members. The interests of the family, therefore, appear distinct from the interests of the single components: in this way there is the

will, in the rhetorical affirmations found in the declarations of the regime, to destroy the liberal-bourgeois model of the family, so as to replace it with that inspired by corporative solidarity. The family is, however, protected according to state interests: considered a site of production, it needs laws that protect the working mother; considered a cell of society, it is protected by excessive charges (and, on the one hand, a tax on celibacy is established, on the other, exemptions are admitted on the taxes on numerous families); considered as a social formation within which the primary education of minors is carried out, the family is the object of the principles of the corporative state, which is a true and proper program of "fascist education" (and helps the family by means of family assistance and scholastic assistance organizations) Women continue to maintain their vicarious role, in society as in the family. And the conception of the social conscience is reflected in the words of the Duce: "A woman must obey. My opinion of her role in the State is in opposition with any form of feminism. Of course, she must not be a slave, but if I conceded to her the right to vote, I would be laughed at. In our State, women must not count." In her relationship with man, therefore, the position remains one of subjection, at least in fact, that is then transformed into subjection by law in the family community ("the father-husband must be a little Duce", and the woman "exemplary wife and mother").

On the basis of these directives, women continue to be excluded from any political activity, since they are denied the right to vote. And the opening that is delineated in 1924, the year in which women are admitted to the elections of this type, is abolished, for all citizens, in the following year.

Even the policies regarding the protection of women in the world of labour, on which many insist in order to claim, in the '20s and '30s, the first forms of social legislation in favour of women, must be examined carefully. It does reveal a favourable position towards working mothers, for which some guarantees are introduced (the institution of the National Opera of Maternity and Infancy, which offers assistance to unwed mothers, working women, abandoned minors, in 1938, is included in this project), but the primary purpose of this legislation does not deal as much with protecting the "weak" part as, instead, in pursuing programs with which to increase demographics.

If, then, a review is made of the legislative provisions in the matter of female labour, instead, you have persuasive proof of a policy of exclusion of women from the world of labour, because, they are necessarily destined to a model of family life. Loffredo's theory of"family policy" places itself in a perspective that relegates the woman to a position of subordination, so to speak, dictated by nature (women are, in fact, seen as "ignorant mammals" to whom any intellectual abilities are to be denied). And, in fact, on January 20th 1927, women's salaries are reduced to half of the corresponding male salaries by the unions.

The family is also the object of a massive number of penal norms, which intends to protect its most important aspects, in order to assure the purity of race and the increase in demographics. As a result, we have the configuration of a newly conceived series of crimes, such as crimes against the integrity and

health of progeny, crimes against matrimony, against family morals, against the state of the family, against family assistance.

The purity of race is also ensured by the legislation of 1938, aimed at impeding the marriage of male and female Italians with those belonging to "hamitic, semitic and other races which are not arian". Even though they are introduced with great pomp and rhetoric, these laws (that owe their existence to the aberrant scheme pursued in those years to approach the national-socialist model) take scarce hold on the social conscience, and do not lead to those forms of racial discrimination that had such serious consequences under the Third *Reich*.

1.4. The Debate on the Admittance of Women to the Legal Profession at the end of the 1800s

We are approaching the definition of the rules regarding the practice of the legal profession. The Acts of the Ist Italian Juridical Congress, held in Rome between the 26th November and the 8th December 1872, lay the foundation for the founding principles of the Bar., both under the juridical the ethical profile.[8] The V thesis, illustrated by the attorney Cesare Norsa, regarded the practice of the profession of attorney and prosecutor and the need for a representation of the same. The treatise reconstructs in great detail, in terms of data and references, the development of the legal profession over the centuries, justifies the distribution of the two categories of professionals, places the ministry of the profession within the realm of the defence of rights and within the framework of procedural rules, carries out a comparative and sociological analysis, retracing State by State in pre-unified Italy, the means of representation of the class, the purpose of which is to protect "dignity, decorum and the interest of the class".[9] In particular,

> "the principle of freedom that must be respected in order to keep resistance integral and favour the well-being of the class, the autonomy that must be the absolute characteristic of its representation, established on the basis of free elections, the mission which is naturally attributed to it and that is of conserving the dignity and the decorum of the class, demand, by logical consequence, that the aptitude and the capability of those who want to be admitted to the class of officials practicing law, be recognized by the representatives of the same class: who otherwise might, by the influence and the will of others, find who perchance is not respected as being deserving and is imposed on the college, disregarding the dignity of the class and the representation of the same."

8 Rist. by G. Alpa, Bologna, 2006.

9 Op. cit., p. 457.

It also deals at length with the fees and the means of compensation of the attorney and the prosecutor, but is silent when it comes to the controversy, already an issue then, on the admittance of women to the Legal Profession.

The first unitary law regarding the legal profession, in 1874, is also silent on this theme. And this silence will be used as an argumentative weapon by those who will oppose the admittance of women to the legal registers.

The problem of the admittance to women to the legal profession was so heightened at the end of the 1800s that, in an encyclopaedic entry (Attorneys and prosecutors) aimed at reconstructing the juridical, economic and social aspects of the legal profession, written by a magistrate, Camillo Cavagnari (scholar of labour law), and of an attorney, Emilio Caldara (who subsequently became the first socialist mayor of Milan, follower of Turati and collaborator of Matteotti) for *The Italian Digest*[10] the question of the admittance of women to the Legal profession occupies a central position in the way it is treated.

Cavagnari e Caldara write at the end of the 1800s, just at the moment in which the debate is heated, the controversies underway, the solutions uncertain, the prevalent guidelines of attorneys and judges which were totally unfavourable. In this case, too, one can notice that in the debate the formal interpretations rather than those of a political and social nature prevailed. The two authors do not leave the scope of formalism, but, being sensitive, for cultural and political beliefs, towards the socio-economic implications of the juridical rules, they do not censor themselves. In any case, they worry, first of all, about defeating the theses against the admittance of women to the Legal Profession on their same terrain.

It was, in fact, a question of pure additive interpretation in one way, restrictive in the other way, of a legal text, the one having the first provisions on the legal profession introduced by the unitary legislator, that made no mention to that regard. Among the prerequisites necessary to be enrolled in the register of attorneys, art. 8 of 1. 8.6.1874, n. 1938 required that there be no reports of convictions to punishments greater than confinement or detention up to five years, nor important convictions banning the practice of the profession, that one was awarded the degree in Law, that one attended legal practice for at least two years, and that one passed the theoretical-practical exam towards qualifying for the profession. No mention, therefore, of the sex of the person, as a prerequisite for enrolment or exclusion. The same, as far as the requisites for enrolment in the register of prosecutors, in which the attainment of a degree was not even foreseen (art. 36 1. cit.). For both professions it wasn't even required that the candidate possess Italian citizenship.

The interpretation in the additive sense (that the rules regarded only "male attorneys") and in the restrictive sense (that women were excluded) therefore, had to be motivated, taking into consideration the rules of interpretation of the law established by the first articles of the Civil Code in 1865 (similar to those

10 Torino, 1893-1899, pp. 656 ss.

prepended by the albertino Civil Code in 1837 and not too far from the preliminary provisions prepended to the Civil Code of 1942). In short, it was necessary to use the literal interpretation, the systematic one, the analogical one in order to be able to justify the exclusion. The interpretative techniques had to be at the service of the current mentality, that reflected the social state of women, bearer of *imbecillitas sexus* and therefore of an inadequacy (deriving, as was thought then, from the same "state of nature") that the law had to take charge of.

The theme had already been debated in publications. One of the interventions that went back furthest was that of Calenda de' Tavani on the "Rivista di Giurisprudenza", published in Trani in 1855 (p. 742). But the question came into the limelight in the news regarding the event that had involved Lidia Poët, the first woman to be enrolled in a register of attorneys in1883, even though, because of the opposition of a public prosecutor, the enrolment was annulled by the Court of Appeals of Turin.

Long excerpts from the sentence are reported by Cavagnari and Caldara in their entry on page 136, and one can therefore follow the reasoning of the judges to obtain the desired results.

They go from a supposition that is not shared by many, and therefore quite uncertain, already at the moment in which the professional law had been approved, and that is that the legal profession had to be qualified a *public office*. This reasoning is corroborated by some corollaries: the use of literal wording, because the professional law never spoke of women attorneys; the use of historical tradition, from the moment that even in Roman law, women could not practice law, and the use of the argument *ex adverso*, in the sense that the admittance of women to offices was explicitly established by law, and therefore, there where the law was silent, the admittance to office could not be considered implicit.

The rules on the interpretation offer the judges further argumentation: there where the solution is uncertain because "there is no precise provision of law" reference must be made to common law; and, in fact, from common law an excerpt from Ulpiano is extrapolated in which the edict of the Roman Magistrate is recalled prohibiting the practice of law to women (Li, § 1, *De postul.)*. From the formal terrain the judges pass, however, to other levels. It almost seems as if, having done their duty as interpreters of the texts, they now feel free to express their opinion. They make recourse to common sense, which appeals to *pudicitia sexui,* to how inopportune it is that the "gentle sex" take part in the "din of public judgements" in which arguments that could embarrass honest women are discussed. Then they pass on to more frivolous arguments, as the use of the toga on "strange and bizarre" female clothing, or arguments that are petty, to say the least, such as preventing suspicion that judges might tip the scales in favour of a "graceful woman attorney" (where it emerges that the only doubt that this might happen – expressed by colleagues – did not show great trust in the independence and correctness of the judiciary …). There is also a punch line, as succulent as it is amusing: women must not expect to become

equal to men "instead [prefer to remain their] companion, since fate has chosen this as their destiny".[11]

The High Court of Turin confirms the appeals pronouncement, sheltering itself in the social function of the Bar, and therefore, utilizing the first argumentation of the Turin judges.[12]

Cavagnari and Caldara relate, with obstinate precision, the debate that had been initiated *after* the initial decision in Turin, annotating among the jurists favourable to admittance, Vidari, Giuriati, Landolfi and Mariani; among the judges who are unfavourable we have Gabba, Marghieri e Bianchi. And, retracing the reasoning of the judges, they demonstrate the flaws. First of all, looking to the historical interpretation, since the parliamentary Report, with which the text of the bill of law related to the legal profession was presented, had already excluded the fact that an attorney carried out public office, and that the same conclusion was reached for the prosecutor. This conclusion was also endorsed by the High Court of Rome.[13] They also criticize the sentence of the High Court of Turin which had denied the application of art 24 of the Statute, concerning the principle of equality, and art. 3 of the Civil Code regarding the ownership of the civil rights, stubbornly asserting the absolute inequality of women compared with men. The judges had also made recourse to the legislation regarding the university of 1859, then confirmed by that of 1876, so as to exclude that from these provisions, arguments could be derived in favour of women's enrolment in the register.

Even though they explicitly admitted women to the study of jurisprudence, the law – according to them – did not imply the freedom to practice law for the women graduates.

One of the most tenacious objectors was Bianchi, who, as the specialist in civil law that he was, had established his reasoning on the minority status of women in private law, in particular, making reference to the institution of marital authorization, systematic argumentation on the basis of which he extrapolated the impossibility of women to receive mandates without the authorization of their husband, an indispensable condition for whoever wanted to be a defender of justice. However, Vidari had replied to him stating that the discipline of marital authorization could not be considered the obstacle to the practice of law, it having a totally different purpose.

But the connection with marital authorization had a sense to it, at least in terms of legal policy. And it is not by chance that the obstacle to the admission to practice the legal profession came about *together* with the abolition of marital authorization.

The conclusion to this discussion by Cavagnari e Caldara is caustic. Since the judges in Turin had appealed to the law of nature and the will of Providence,

11 App. Turin, 11.11.1883, in *Giur. it.,* 1884, II, 9.

12 Cass Turin, 18 4 1884, ivi, 1884, 1, 1, 295.

13 With its sentence of 10 2 1890, ivi, 1890, I, 2, 197.

they ask themselves "if nature or Providence take care of distributing the functions in society, why worry about distributing them with sentences?"

These were hard times, and just a few sporadic cases quoted by two Authors in Germany and in Sweden could not be of great help. Moreover, the event had had its counterpart in France in the case of Giovanna Chauvin, she too a graduate in Law but not admitted to practicing the profession. And France, at that time, was the model most followed in its style and mentality.

In the debate on the admittance of women into the legal profession there is also that of the admittance of women to teaching in High Schools, public offices, and in the active and passive electorate. This time it is Teresa Labriola, a graduate in law, daughter of one of the founders of Italian socialism, Antonio Labriola, to hold high the torch of freedom and the battle again discrimination.

In 1901 she had obtained her university teacher's qualification in Philosophy of Law; in 1903 she becomes responsible for the juridical division of the National Council of Italian Women, collects some of her essays and interventions in the compilation *La questione femminile* of 1910; after the admission of women to the profession, in 1919, she approaches fascism and continues, within this political view too, to defend women in the world of labour.

The case of Teresa Labriola also makes jurisprudence and therefore history. In her case too, as for Poët, the Roman Bar had accepted her; in her case too, it is the General Prosecutor of the Court of Appeals that goes to the judge to have her excluded. In her case too, the judges say she is wrong. Pietro Cogliolo, professor of civil rights in Genoa, illuminated conservative, takes her defence; and publishes her defence in September of 1912.[14] Distinguishing the juridical side from the social one, he reconstructs the juridical aspects of the legal profession, reproaches the argumentation of Mortara, that I will shortly mention, recalls the albertino Statute and the defence of civil rights of every citizen, counters, step by step, the High Court of Turin that had denied the right to Poët.

> "Thus, it is worthless to say that an attorney is a mandatary and the married woman cannot accept a mandate without the authorization of her husband (art. 1743 civil code). It is easy to respond with one of these three things: the first is that it can be disputed whether the attorney is, except in the high court, a mandatary; the second is that not all women are married; the third is that the authorization of the husband is necessary, but that does not imply a general inability: even to become a tradesperson, a married woman must be authorized (article 13 commercial code) and nobody has ever said that commerce is forbidden to women."

At the end, however, one can read:

> "And I conclude by saying that since the professional law of attorneys does not

[14] Now in *Scritti vari di diritto privato,* II, Milan, 1917.

contain any form of interdiction, women can be attorneys. That it be good that they take on this profession is something else: it is not up to us, the jurists, to occupy ourselves with the matter."

And with this temperament, based on a question of whether it is *opportune,* the defender himself shows caution in his defence …

Quite different is the attitude of those who really believed in the equality of sexes: the Genoese marquis (and attorney) Edoardo Ollandini writes a passionate book on women and the legal profession, *Le donne e l'avvocatura,* (1913), and others will follow with firm convictions.[15]

1.5. The Long Coveted Admittance

The tormented path had woven itself with the juridical position of the woman quite simply: a courageous decision made by Lodovico Mortara that, in the quality of President of the Court of Appeals of Ancona, had accepted the appeal of some teachers in Senigallia who wanted to be registered in the provincial electoral lists, had been reformed by the High Court of Rome. The Legal Profession, had already, in the course of the VII national juridical Congress held in Rome in 1911, expressed itself, by means of Vittorio Scialoja, in favour of the abolition of marital authorization, but only the law 17.7.1919 n. 1776 abolished the detestable interpretation of the professional law, together with the humiliating institution of marital authorization.

It is interesting to re-read the argumentations adopted by the Senate Commission on the bill of law approved by the House of Representatives on 9.3.1919 regarding the juridical and professional abilities of women, not only because of the authoritativeness of the president and relator, in addition to the components of the Commission (respectively Mortara, Bensa, Scialoja, Filomusi, Del Giudice), but also to understand the difficulties in which the jurists struggled at that time (Mortara himself had many perplexities, dictated by economic reasons, worrying about the work of the veterans and the number of attorneys that were already considered exorbitant) having to deal with a widespread mentality and inveterate prejudices. The reproduction of the text, in appendix to the volume, is essential towards understanding the spirit, in addition to the wording of the Report.

The Report prompts argumentations related to the opportunities of suppressing marital authorization, considered illogical (juridically) even before being politically useless, but it dwells, above all, on the practice of the professional activity of women, and this innovation is considered an objective, "a truly enormous step in the juridical emancipation of women" (page 205). Art. 7 of the bill of law exempted the functions that involve political or jurisdictional

15 Citations in Tacchi, *Eva togata,* cit., p. 29 ss.

powers, on which the commissioners do not express themselves, knowing that the same egalitarian instance never reached the point of encouraging women-soldiers or women-judges or prefects, but, instead, admitted women arbitrators. They did not withdraw in the face of an inveterate tradition, and realistically underline how, by now, as far as qualifications are concerned, there are no more obstacles to the access of women, and therefore, all doors to all the liberal professions should be open to them, even those that are organized in associations and could pose greater obstacles to admittance. The rule – the commissioners unanimously find, specifying that everyone was of the same opinion – must be turned around.

To the formal argumentations, the commissioners add considerations of a social character: the courageous role absolved by women during the World War earned them "the license of capability"; the discrimination against their access to professions would resolve itself in an act of social injustice; the naturalistic consideration on female inferiority is overcome by many cases of intellectual superiority compared with men; the "holy domestic mission" will not be impeded by the practice of the profession to those who do not have this family vocation; the possible genetic transformation into a "third sex" of those who will have to measure themselves with the men in that profession is easily surmountable because "the creature who is adorned with these endowments will not lose anything because of her greater social elevation".

The Report also takes upon itself the concerns of its president, who would have preferred to allow admittance to women in the legal profession only after the conclusion of the process regarding the professional reform, that he hoped could elevate the moral and technological level of those enrolled in the registers. But this concern, which, moreover, does not preclude the unanimity of the appreciation of the text, is not considered an impediment. To the contrary, the Commissioners are confident that the "admittance of women to the class of attorneys, in itself so noble, is also a way of refining the legal custom".

Finally, the long battle was concluded with a victory for women. And to avoid interpretative refinements or retrograde affectations, art. 7 of the law explicitly proclaimed the admittance – having title as do men – of women to practice "all professions and to cover all public offices with the exception of only, unless expressly admitted by law, those that involve public jurisdictional powers or the practice of political rights and powers, or that pertain to military defence of the State according to the specification that will be made by means of a specific regulation."

During the fascist period the situation does not change greatly. We see the first women attorneys; above all women are included in labour offices-corporatism, in this sense, becomes a springboard for emancipation – we find the first university teachers, above all in corporate law. But the fascist conception of women, "angel of the hearth", the greater part of practicing attorneys (Calamandrei in 1921 had stigmatized the category as being excessively affluent), the

misadventures of the war are some of the factors that discourage the admittance into the profession or, after admittance, the continuation of the profession.

1.6. Women Notaries and Women Magistrates

Even for the women who wanted to set out in the profession of Notary, the same hardships, as those for attorneys, existed. The first request for enrolment, on the part of a woman, for admittance to the Notarial practice is registered in the first decade of the 1900s. In this case too, the professional organisms responded positively, but the Court of Appeals of Rome, with the sentence of 8th of April 1914 pronounced the cancellation. The judges appealed to the dictate "of the special and common law" which impeded access to women to any office that implied "functions related to judiciary action."

We had the first woman Notary in Italy in the 1930s, when Dr. Adelina Pontecorvo, who intended to dedicate herself to a career as a Magistrate, wound up rethinking her aspirations and affirming herself in this profession.

For the woman Magistrate the path is even more complicated.

That is because, for some offices, women were admitted alongside men to carry out their function. For example, in 1893 they were admitted to judging in the Collegi dei Probiviri (College of Arbitrators), in the matter of labour. But for the entire decade of the 1930s the discussion – on public offices, but also on the opportunity of including women amongst the personnel of the judiciary – had a negative outcome.

In addition to the usual prejudices, the salacious aspects that certain trials could present were used to justify their not being suitable to the female nature, and, worse, in a culture that was still imbibed with Lombrosiani prejudices, that is, that criminality is determined by physiological traits, the particular nature of the female mind and complexion that would not have ensured the necessary balance towards a correct practice of the judging function.

Francesca Tacchi expertly renders the debate at the constituent Assembly, in which the interpretations on art.3 and the norms on the matter of family are intertwined with those of the public Administration and the role of the Judiciary. The political parties held contrasting positions, but a certain amount of transversality aggregating those that had a more traditional mentality and that were able to gauge the solutions, allowing the law (equality assured) to carry out specifications and limitations. In the same period, the law on the Judiciary was also being discussed. Despite the presence of women of notable prestige and great worth in the Assembly, the compromising formula was approved, which Tacchi considers almost a defeat. We had to wait until the law in 1963 to accomplish access, and subsequently, the first exams to have women recognized as having the right to belong to the Judiciary.

1.7. The Role of the National Legal Council and the Equal Opportunities Commission

Since, as all agree, the acquisition of equal opportunities for women within the realm of the legal professions is, first of all, a cultural fact, the National Legal Council established, within the course of the third from the last Council meeting, an ad hoc Commission to study the problem and take the most adequate initiatives. Over the course of time, the programs and the possibilities of coordination with the institutions increased, so as to give greater impulse to the activities of the Council and of the Commission. In the relations read during the opening ceremony of the judicial year, I had the opportunity to give three brief accounts of the activities performed, that the Equal Opportunities Commission then articulated in a more analytic way in its own annual report

As regards the historical analysis, the National Legal Council published the volume *Donne e diritti*, to which I have made reference, and other volumes of the history of the Legal Profession in which chapters or pages dedicated to the theme that we are dealing with are contained.

But the cultural promotion constitutes only the initial start up of the necessary initiatives. The extremely useful analysis of the social and economic situation promoted, through Cencis, the socio- economic research institute, by means of two research projects, one dedicated to the image of the Legal Profession and the other to the role of women in the Legal Profession. Both studies confirmed what had already been perceived for a long time: the access to the University, in particular to Law School, presently sees a majority of women enrolled compared with men; and the same is true for those enrolled in legal practice, and those enrolled in the professional register in the youngest age groups.

The income of women attorneys instead is inferior to that of male attorneys; the specialized matters practiced are still in a certain way biased by the prejudice of minor technical preparation or greater sensitivity regarding themes considered of a feminine nature: in other words, few women attorneys practice the profession in Company or financial matters, many are those that dedicate themselves to litigation regarding family relationships or on minors. Even under the profile of representativeness, the difficulty of women attorneys to accede to the positions in the orders and in the category associations is significantly perceived.

All these themes were amply discussed during the opening day of the V Congress of legal adjournments, held in Rome on the 11th of March 2010, but have also been the object of motions in the latest National Congresses. The fact that there is discussion, sometimes animated, and, in any case, always with the prospective of having to continue to cultivate this theme, to multiply initiatives, and to sustain the reasons of the position of women in the Legal Profession, is an indication of the fact that equality has still not been reached. Truthfully, this conclusion is not shared by all, in particular by authoritative exponents of the associative world (such as Michelina Grillo who, in her role as president of the

OUA, in the report made at an important conference on the matter, sustained a more cautious thesis on present day female discrimination.)

The results of the conference organized in Rome on the 22 May 2007 by the Superior Council of the Judiciary on *Il diritto alle pari opportunità fra attuazione e negazione* together with the Department for the rights and equal opportunity of the Presidency of the Council of Ministers, the National Committee of Equality of the Ministry of Labour and Social Security, seem to be closer to my conviction.

1.8. Equal Opportunities within the Context of Women's Rights

As I tried to highlight in the various passages of this work, the realization of equal opportunities is strictly linked with the accomplished realization of the rights of women in the social and economic realm. It is a connection that may seem almost evident, and, said for the women that militate in the legal professions, it could appear to be superfluous, from the moment that they are the first to be aware of their own rights – as the first woman graduate in Law, discussing a thesis on dowry, had already made understood – and they are the first to claim them both with the means assigned to the law (the activity of Anna Maria Mozzoni) and with the other opportunities offered by the cultural and union associations, by the political arena, by the role carried out within the institutions.

This is a theme that has an extremely wide perimeter, but the National Legal Council is following it both in the predisposition of themes to be studied at the CCBE, the European representation of attorneys, and in the relations with exponents of the professions and institution of the Mediterranean area. The most significant publication on this matter, now being printed, deals with the problem of *I diritti delle donne nell'area del Mediterraneo. Civiltà a confronto, pari opportunità, identità e tutela delle differenze (The rights of women in the Mediterranean area.) A comparison of Civilizations, equal opportunities, identities and the protection of differences.*[16]

Here we discuss women as a subject of rights in Western culture, but also the defence of women from their defenders (in the contribution by Ettore Randazzo, who historically traces the witch trials), the violence on women and interfaith dialogue; for each of the Muslim Countries the most thorny issues are analysed. Finally, the objectives of an omni-comprehensive cultural project are indicated which includes the technological and communicational challenges.

16 E.S.I., by di S. Andò, G. Alpa and B. Grimaldi.

1.9. Historical Literature on Women in the Legal Professions

The literature on the history of the admittance of women to the legal professions includes various literary typologies: those referring, so to speak, to factual history, which is typical of the professional historians, and is reflected commendably by the writings of Francesca Tacchi,[17] and by Antonella Meniconi.[18] There is then research on regional and local situations: in this vein there are the medallions of some famous attorneys, like Elisa Colmani, of the Forum of Ancona;[19] and the interesting book, now being published, by Elio Di Rella, on the Ligurian legal profession – in particular Genoan- that has an entire paragraph on women attorneys, commemorating the first Genoese women attorneys that received the gold medal for 50 years in their profession. Lastly, there are the writings of aspiring women attorneys – but excluded from the profession until 1919 – and those of women attorneys who have distinguished themselves for their culture and their high level of professionalism[20].

2. The legal professions in the age of global economic crisis

"Justice requires (…) that access to any profession be open, without privileges and exceptions, to all those who prove to be capable of practicing it. It also requires that, precisely due to the technical ability shown, everyone can contribute to define the rules governing their respective profession, thus contributing to protect the common interests of those who devote themselves to it, subject to the laws safeguarding the general interest (professional justice)"

Giorgio Del Vecchio, *Speech delivered on November 19, 1922 for the inauguration of the academic year, University of Rome La Sapienza* (Annuario 1922-1923)

2.1. Foreward

This analysis reflects the fact that currently the intellectual professions, and the legal profession in particular, are floundering in an emergency situation. The world in which we already lived with difficulty has changed completely, thus adding risks and negative factors to the previous difficult situation. Moreover,

17 *Gli avvocati italiani dall' Unità alla Repubblica,Bologna*, Bologna, 2002; *Eva togata, cit.*

18 *La "maschia avvocatura". Istituzioni e professione in epoca fascista (1922-1943).*

19 Tacchi, "*una Silfide vaporosa dagli occhi color mare e dalla chioma d'oro. Elisa Colmani del foro di ancona,* in *Donne e diritti. Dalla sentenza Mortara del 1906 alla prima avvocata italiana, by* N.Sbano, Bologna, 2004,p. 153 ss.

20 I am referring, in particular to Angiola Sbaiz, Pagine sparse sull'avvocatura, *edited by* G.Berti Arnoaldi Veli (Bologna, 2009).

further changes are expected to take place in Italy as a result of the adoption of the bill for the legal profession reform being discussed in the House of Deputies (AC 1390) and the implementation of the regulation on professions prepared by the Ministry of Justice, currently submitted to the Council of State opinion (draft Ministerial Decree on professions).

Both reforms are closely interwoven and, considering that the legal profession is one of the pillars of the Rule of Law and a profession which has the right and duty to assist citizens in gaining access to justice, it would be illogical and even politically wrong to effect changes in justice administration without the legal profession cooperation, as well as changing the lawyers' status without appreciating the role they play within the judicial system. Nevertheless, in spite of Hegelian theories, we do not live in a *rational* world and we are experiencing a phase in which we tend to ignore the problems besetting the legal profession and the measures which could support it in the valuable and painstaking activity that lawyers take upon themselves to perform their mission and stand in for the judiciary in their tasks.

Unfortunately, in the analyses made over the last few years on the occasion of official ceremonies, workshops and conferences, but also in the presentation of books which provide useful suggestions to improve the current situation, not to mention the studies, papers and reports drafted by the relevant institutions, no reference is made to this activity performed by the legal profession, as if the thousands of judges of peace, honorary judges and lawyers who are members of the judiciary councils were a mere decorative element of the system rather than a means to make it work.

Likewise, while assessing the best choices to regulate the legal profession, the institutions have seldom recognized or praised the role played by those who practice a unique profession, which cannot be assimilated to the mere provision of a service, or entrusted to the usual mechanisms and principles of entrepreneurial and business activities. In the citizens and weak stakeholders' interest, this profession needs strength, independence and autonomy to be able to fulfil its mission: if these values are lost and the specificities of this profession are straitjacketed in uniform rules for all professions, we end up by undermining it and the whole "justice system".

The particular economic situation has imposed new interpretation keys and new prospects for analysing the machinery of justice, which now are the guiding light for any measure taken in this field – a sort of primary and exclusive evaluation imposed on the legislator, the government and all those who operate inside the judicial system and those who resort to it. The problem lies in the fact that these interpretations keys and new prospects cannot be considered in isolation as if it were possible to overgeneralize a phenomenon which, on the contrary, encompasses century-old moral and social values which cannot be passed over without distorting, misrepresenting and even sap it.

2.2. The economic dimension

On many occasions the Italian Bar Council has promoted a debate on this one-way prospect: in particular, this matter was discussed during the conference organized at the House of Deputies on July 15, 2011.[21]

With a view to underlining that the one-way analysis based on economic principles cannot be accepted, irrespective of the situation in which we are forced to live, the Italian Bar Council and the other members of the legal profession who organized the 30th National Bar Congress gave an emphatic, but significant, title to it – "*Rights are not commodities*"–[22] thus reaffirming the primacy of law over the other social sciences, as well the primacy of the legal organization over the other societal forms of expression.

Not even the most extreme *liberals* – obviously I am not speaking about free traders or the advocates of social market economy – had gone so far to preach the all-pervasiveness of economic rules and their self-sufficiency. The historical studies made for celebrating the 150th anniversary of Italy's Unity corroborate this assumption: a case in point is the collection of letters between Benedetto Croce and Luigi Einaudi recalled by Natalino Irti in his recent book.[23]

Lawyers – the defenders of rights in a democratic State – recall that economic globalization cannot run people's rights roughshod, particularly where they can boast a long-standing tradition and are the most significant feature of the Western political and historical model. Not even the severe crisis, which has hit the whole world and Italy, can justify the relinquishment of that model. Quite the reverse. Whenever we wished to depart from that model by giving priority to economic values and principles we headed for disaster: the law shortcomings, allowed by a free trade market approach fully uninterested in people's human and financial rights, have led to the tragic situation in which we are obliged to

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21 The topic was also tackled during the legal refresher course organized last March. In particular, the issue was raised by Prof. Francesco Capriglione, who examined the causes and impact of the economic crisis and Prof. Vincenzo Cerulli Irelli, who analysed the limits to private autonomy imposed by the State to face the crisis.

The topic was also specifically discussed in the presentation of two important analyses: the former made by the Vice-President of the Higher Council of the Judiciary, Hon. Michele Vietti, entitled *La fatica dei giusti* (Milan, 2011), which does not regard only judges, but describes the activity performed by those who contribute to the functioning and operation of the judicial system; the latter made by the President of the Class of Moral, Historical and Philological Sciences and Vice-President of the *Accademia Nazionale dei Lincei*, Prof. Alberto Quadrio Curzio, who wrote a book entitled *Economia oltre la crisi* (Brescia,2011), in which professionals and lawyers are given credit for contributing not only to the GDP creation, but also to the solution of citizens', companies', Public Administration's and institutions' problems.

22 Milan, March 23-24, 2012.

23 *Dialogo sul liberalismo*, Bologna, 2012.

live – a sort of revolution not dictated by policy or social claims, but imposed by those who pull the strings of financial markets. This economic and financial matrix, resulting from the mistakes made by economists and the establishment, determined not to prevent the credit crunch and now uncertain on the remedies to take, had other precedents in human history which we could overcome by recovering the values of a sound, shared and participatory democracy based on law and rights.

Hence, *rights are not commodities* since they cannot be equated with goods, services and capital. People are the primary values that a modern State must consider and the drastic and irreversible retrenchment of the Welfare State cannot be pursued without concerted discussion and large consensus.

The "Europe of Rights" does not impose rampant liberalizations, and those who maintain that measures other than those needed to reduce public debt and relaunch the economy are dictated by Europe make an ideological use of Community law. Rights are not commodities because they are not a bargaining chip and cannot be constrained into compressed trial formula as if they had to be shut up in a bottle . Rights are not commodities because they cannot be debased, hampered by high costs to have access to justice or entrusted to compulsory conciliation or alternative dispute resolution procedures mostly managed by incompetent people. Rights are not commodities because they cannot be defended by lawyers slave to partners. Rights are not commodities because they cannot be transferred from territorial judicial units to regional or provincial sorting centres.

This is the reason why the whole legal profession in Italy has launched a cry of alarm towards institutions, members of Parliament and citizens: the justice system and the legal profession cannot be reformed without involving lawyers.

Justice is an insuppressible task of the State and the system to administer it cannot be dismantled or emptied out as if it were a storehouse of damaged goods. Giorgio Del Vecchio' solemn words I have quoted at the beginning of my report, delivered just few days before the Fascist March on Rome, sound as a warning on which everybody should ponder.

The legal profession must remain independent and autonomous to fulfil its institutional tasks. Those who hit the defenders of rights hit rights and, hence, reduce democracy.

Moreover, it can be easily noted that competition in the legal profession has long been a reality. Going beyond means taking measures contrary to the proportionality and subsidiarity principles. Going beyond means hitting intermediate communities, the Bar rolls and associations with which the legal profession is self-regulated by virtue of its autonomy. Going beyond means commodifying any relationship, giving preference to the stronger party over the weaker, to the richer party over the poorer – in other words jeopardizing the values enshrined by the Constitution and the Nice Charter, the values of

free societies. Conversely, our task is "globalize rights", as hoped for by Noam Chomsky, Vandana Shiva and Joseph E. Stiglitz.[24]

2.3. The professions and professionals' partnerships

The economic crisis has not been the main cause of this debasement of the legal profession: this process of deterioration of the role played by lawyers in civil society started when we began to implement – in a fully dull and flat way – the free competition principles and when we wished to assimilate the professional activity to the business one. It started when we decided to undermine the systems based on professional rolls and associations and to abolish the criteria for setting professional fees parameterized on the basis of social needs. This was done in spite of the pivotal role played by the professions to the community's benefit. It is by no mere coincidence that their role is recognized and enshrined in the Italian Constitution and the Charter of Fundamental Rights of the European Union. Considering that the professions are essential for societies – as noted one year ago by Francesco Galgano in his essay published in *Contratto e impresa*[25]– they should be better protected by Parliaments and governments.

The rules which are currently discussed in relation to economic measures involving also the professions, are influenced by an entrepreneurial and business logic. Clearly the economic dimension – which is today favoured by the severe crisis in which we are floundering – plays a central role in every decision taken, instead of being one of the evaluation criteria to be considered, on an equal footing with other equally important criteria, such as the political and legal ones.

The reasoning which is most frequently used is based on an irrefutable assumption, namely that the rules governing the professions must be "liberalized" because the current system is supposed to reduce the GDP by 1-1.5 %. This assumption taken from a Report by the Governor of the Bank of Italy dates back to 2008. We have never known how it was calculated nor on the basis of which criteria. If, by chance, it depended on companies' legal costs (which means that it was based on CEPEJ statistics) it would date back to 2006 – hence before the decree which abolished statutory fixed and minimum attorney fees. If it were true that this abolition has led to huge economic benefits for companies, that figure would be fully unreliable since outdated and technically incomplete. On the contrary, if it were a recent, complete and reliable figure, it would demonstrate that, over a period of six years, the elimination of statutory fixed and minimum attorney fees has not led to any useful result.

On their own, the professions produced a 11 % share of GDP: on the basis of the economic data currently available, we cannot know whether this posi-

24 *La debolezza del più forte.Globalizzazione e diritti umani,* Milan, 2004.

25 2011, p. 287 seq.

tive impact on the Italian economy is confirmed or whether the crisis has led to a reduction of the benefits that the professions provide to the economy (as we may suspect). I am speaking of *benefits* because in this demonization of professions, which is disseminated by all media, we tend to speak only about fees, castes, privileges and vested interests as if the professions were serving *only their own interests* and were a useless burden, a heavy chain of which we must get rid at any price.

If we look to the benefits provided by all the economic measures taken starting from August 2011, no improvement has been recorded in the field of professions. All the concessions, help and support measures have been focused on companies. How can this economic trend be interpreted? Is it an invitation to relinquish the distinction between these two sectors? Is it the sign of the creeping change passing through the professional service market to reach market *tout court*? If this were the case, the experts and scholars who warn institutions and citizens against the creation of a new "material constitution" achieved by means of urgent decreeing would be right.[26]

If "liberalizing" means respecting autonomies, we cannot understand why the various packages of measures, starting from the first one, treated the professions cruelly by imposing any type of limits and constraints on them, thus inaugurating a *State-controlled and planned* approach, which seems to express a policy line fully opposed to the one publicized. Attorney fees were hit, and the maximum tariffs in particular, without understanding that by abolishing them we ended up by running counter the allegedly-pursued goal, namely savings for companies and advantages for all citizens; the set of measures taken to face the economic and financial crisis even tackled the issue of disciplinary measures and proceedings. If values play a significant role in the definition of government plans, how burdens were distributed and how interests were reconciled? It is hard to answer this question, since this spate of measures was taken without a consistent and systematic plan and without targeted and *well-weighed* measures.

This is an idea which is currently used in an excessively sparing way. *Reasonableness and proportionality* are mainstays of Community law. The legal framework which is being shaped in Italy with reference to professions is peculiar, because it is unique in Europe and runs counter to E.U. directives and the Court of Justice case-law. This was noted by the CCBE – the organization representing lawyers at European level, which voices the needs of all European countries including common law and Northern European countries – in a letter sent to the institutions, which passed over in silence since it was not disseminated by media. Depressing the professions with rules which standardize, rather than distinguish, the individual specificities by means of the diversifications of knowledge and practical experience, relegating them to a matter for regulatory streamlining and simplification, subduing them to the use of corporate forms typical of business activity, delegitimizing the representative bodies, which en-

26 Rodotà, *Diritti e libertà nella storia d'Italia. Conquista e conflitti 1861-2011,* Rome, 2011.

sure compliance with ethics rules and, hence, are an outpost to protect citizens' fundamental right and interests, means implementing a set of rules which is not only not "required by Europe", but even in contrast with Community law principles.

Nevertheless, there is another reasoning that I wish to follow to justify the criticism levelled at the lawmakers and governments that tackled the issue of professions and the legal one, in particular: the reasoning based on the relationship between *authority* and *freedom,* which can be inferred from the intensity of the intervention (be it legislative or regulatory) in this sector. In spite of the freedom values invoked, the lawmaker has transferred competence from the Italian Bar Council (which is the highest expression of the autonomy and self-jurisdiction principles) to the executive power, has reshaped the attorney-client relationship, has affected the codes of ethics by defining their boundaries by subject matter and *modus operandi*, has changed the access rules by taking away their control from professional rolls and associations, has abolished some of their competence, particularly the one designed to assess the appropriateness of fees. This excess of measures has reduced guarantees for citizens. The legislative measures, which have limited the professions' freedom of organization, have stricken a blow against the system based on professional rolls and associations, which is currently far different from the one conceived in the Middle Ages or during the Fascist period with the establishment of professional guilds, the so-called "*corporazioni*". History, which is the master of life, reminds us of the dissolution of professional rolls and associations imposed during the dictatorship: their organization was a shield against the government's totalitarian plans and their activity was sap and nourishment for the freedoms the government wanted to stifle. As Prof. Vincenzo Cerulli Irelli recalled us in his opening remarks on the occasion of the 7th refresher course for the legal profession held last March – it is precisely in this perspective that we must assess the impact of the rules imposed *ab externo* and authoritatively on the self-regulation and self-governing freedom which should be recognized and guaranteed to the intellectual professions, and the legal profession in particular.

This freedom has been ignored in the 2012 stability law regarding stock companies and partnerships in the organization of professional activities. In its first version the bill enabled mere stock partners to enter professionals' partnerships without any limit. Only thanks to the attention paid by Parliament to this matter was it possible – few months later – to revise at least the most inappropriate and unsuitable provisions, pending the Ministerial implementing Decree which would be issued in the short term. The draft regulation does not impose any limit to the managerial powers of non-professional partners or third parties; it does not envisage explicitly that professionals' partnerships must not be subjected to bankruptcy procedures or that they may have access to the procedure designed to solve the problems caused by over-indebtedness. The draft regulation is also lacking from the tax viewpoint: it would have been appropriate to clarify that the income produced by professionals' partnerships

are to be considered self-employment income. Furthermore it is not clarified whether the stock partner shall be an individual or also a legal person. All the inadequate and inconsistent aspects that the Italian Bar Council has reported *voluntarily* to the relevant institutions and which shall be considered in the final drafting of the regulation. In relation to another problem also raised by the Italian Bar Council, namely the registration of multi-disciplinary professional partnerships with the Bar, the draft regulation makes reference to the "prevailing activity", while no provision is envisaged with reference to the consistency between the various professional activities performed concretely by the multi-disciplinary partnership.

With reference to the ethics aspects, professionals' partnerships shall comply with the rules of the professional roll or association with which they are registered. Furthermore, "if the infringement of ethics rules perpetrated by the individual professional partner can be referred to guidelines given by the partnership, the partner's disciplinary liability adds to the partnership's". It is worth noting that it would have been appropriate to envisage also a fine for the professional partnership proportionate to the severity of the disciplinary offence perpetrated, as proposed by the Italian Bar Council.

2.4. Parliamentary hearings and the geography of areas of jurisdictions

The Italian Bar Council pays specific attention to the relations with the institutions: in particular, while fulfilling the tasks, institutionally falling upon it, of providing consultancy on the measures regarding the legal profession and justice (article 14, Legislative Decree no. 382/1944), the Italian Bar Council participates regularly in hearings within Parliamentary Committees related to measures of interest to it, upon the invitation of the relevant institutions and sometimes by asking expressly to be consulted.

During the period under consideration (January 2011/July 2012), the Italian Bar Council took part in 11 hearings before the Parliamentary Committees on Constitutional Affairs, Justice, Education and Productive Activities through its President, Secretary Councillor or other duly authorized Councillors. In most cases, besides the report of its President, the Italian Bar Council also submitted in-depth analyses (also levelling criticism, where appropriate) of the individual bills, prepared by the Research Office.

The particularly significant topics on which the Italian Bar Council was heard obviously included the bill AC 3900 on the legal profession reform, as well as:

– the judges' civil liability, in the framework of the fact-finding survey of the Senate Committee on Judicial Affairs, in view of the adoption of article 25 of the 2011 Community law;

- the reform of the rules to remedy and compensate the damage caused by the excessive length of trials;
- the liberalization of professional rolls and associations and the additional measures for fostering growth regarding justice administration (first and foremost, the creation of the Court for companies) included in Decree-Law no. 1/12 designed to boost growth (the so called Decreto "Cresci Italia").

We could equally recall, however, consultations regarding the reform of honorary judges, shared parenting and joint custody, the streamlining and simplification of civil trial proceedings.

We hope that next hearings will tackle the thorny issue of the overhauling of the geography of areas of jurisdictions. Unfortunately, also on this matter, the lawmaker is proceeding without appropriately consulting lawyers. On May 10, 2012, the Italian Bar Council and the National Association of Italian Municipalities (ANCI) signed the Protocol of Agreement with which they expressed great concern for the possible reduction of areas of jurisdictions carried out in the lack of a detailed analysis of the total costs really borne for justice administration and in the lack of planning criteria with which expenses are calculated.

The Italian Bar Council and ANCI criticize the method followed by the government in revising the areas of jurisdictions; they maintain that also for the justice sector we must abide by the model indicated in Article 9 of Decree-Law no. 98 of July 6, 2011, namely the criterion for overcoming the historical spending and the criterion of public spending rationalization through the identification of standard costs and requirements.

The survey carried out by the Italian Bar Council on the real situation of areas of jurisdiction in Italy was submitted to the government, the Justice Minister and the relevant Parliamentary Committees.

Moreover, the Italian Bar Council and ANCI submitted a request for a joint hearing before the Parliamentary Committees on Judicial Affairs.

2.5. Lawyers in the European Parliament's Resolution (2006)

However, the limits of the counsels' rights and duties, defined by primary sources of law and codes of ethics, are based on irrenounceable autonomy and independence principles not only of individual lawyers, but also of the representative bodies which defend their powers and check their behaviours, by imposing the necessary penalties for their activity to be performed properly. Over time these principles have been turned into legal rules corroborated by ethics rules.

These principles are so widespread that they were the subject of various European Parliament's Resolutions dating back to some years ago, motivated by the fact that the E.U. Commission – filled with enthusiasm for the implementation of the competition principle with a view to stepping up the creation of the single market – could end up by mistaking the role played by counsels, and

hence the services provided by lawyers, for mere provision of *services* which can be assimilated to business activities .

Among these legislative instruments, it is particularly worth recalling the European Parliament's Resolution of May 23, 2006 which highlights the counsel's role, in particular. It is worth quoting some excerpts to explain the E.U. model of justice and lawyers' role which, currently in Italy, seems to be forgotten as a result of the measures taken following the economic crisis and as a result of the prevailing economicist approach, which ends up by weakening constitutionally guaranteed rights.

First and foremost, the European Parliament reaffirmed the principles defined by the Court of Justice case-law, which are at the core of the code of ethics currently in force in our legal system, namely:

- 'independence, absence of conflicts of interest and professional secrecy/confidentiality are core values of the legal profession that qualify as public-interest considerations;
- regulations to protect core values are necessary for the proper practice of the legal profession, despite the inherent restrictive effects on competition that may result from this;
- the purpose of the principle of freedom to provide services as applied to the legal professions is to promote the opening up of national markets through the possibility offered to service providers and their clients to benefit fully from the Community's internal market".
- The Resolution has reaffirmed that "any reform of the legal professions has far-reaching consequences going beyond competition law into the field of freedom, security and justice and, more broadly, into the protection of the rule of law in the European Union" and also that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons should have effective access to legal services provided by an independent legal profession".

This premise is in line with our constitutional system, but it is endangered by the current rules introduced with the various stability packages of measures designed to curb the effects of the economic crisis, as if rights could be equated with goods on the "justice market.

The Resolution also insisted on:

- "the duties of legal professionals to maintain independence, to avoid conflicts of interest and to respect client confidentiality [that] are particularly endangered when they are authorised to exercise their profession in an organisation which allows non-legal professionals to exercise or share control over the affairs of the organisations by means of capital investment or otherwise, or in the case of multidisciplinary partnerships with professionals who are not bound by equivalent professional obligations".

Also this principle has been betrayed by the recent rules authorizing the entry of mere stock partners into professionals' partnerships and even enabling stock partners to belong to many professionals' partnerships.

The Resolution also tackled the issue of the counsels' appropriate remuneration "whereas unregulated price competition between legal professionals, which leads to a reduction in the quality of the service provided, operates to the detriment of consumers". Also this principle has been infringed by internal rules and regulations, at first with the elimination of minimum rates and fees, subsequently with the elimination of maximum tariffs and finally with the elimination of any fee parameter. This is in contempt of the principles established by the European Court of Justice which, in many judgements, had legitimised the Italian system to set counsels' fees.

Furthermore, considering the social and public relevance of the tasks performed by lawyers, the Resolution focused on the adoption and implementation of codes of ethics, namely rules of ethics by which all lawyers practicing the legal profession must abide. The Italian code in force is very strict from two viewpoints since it obliges lawyers to defend (and never betray) their clients' interests; not to accept the assignment or forgo it when they realize they have a conflict of interest with their clients; not to accept assignments they would not be able to fulfil with diligence and care; not to increase the number of trials; to discourage their clients from initiating futile or fully groundless legal actions; to explain and draw their clients' attention to the profiles of lawfulness, fairness, appropriateness and expediency in the defensive strategy, evidence collection, etc. so as to preserve fair relations with their clients, though also claiming an independence-based relationship with them – a thesis which hence radically denies the peculiar conception by Francesco Carnelutti that –as already said – wished to assimilate the counsel to the client's *nuncius*.

In particular, the Resolution:

- "recognizes fully the crucial role played by the legal professions in a democratic society to guarantee respect for fundamental rights, the rule of law and security in the application of law, both when lawyers represent and defend clients in court and when they are giving their clients legal advice;
- reaffirms the importance of rules which are necessary to ensure the independence, competence, integrity and responsibility of members of the legal professions so as to guarantee the quality of their services, to the benefit of their clients and society in general, and in order to safeguard the public interest;
- reminds the Commission that the aims of the rules governing legal services are the protection of the general public, the guaranteeing of the right of defence and access to justice, and security in the application of the law, and that for these reasons they cannot be tailored to the degree of sophistication of the client".

The Bar code of ethics devotes a full chapter, namely the third one, to the attorney-client relationship. Nevertheless, before focusing on the specific rules governing this relationship, it is worth recalling the codification of the duty of loyalty (article 7), diligence (professional diligence: article 8), professional secrecy and confidentiality (article 9), independence (article 10); the duty of defence when required by law (article 11); the ban of conflict of interest (article 12); the duty of truth which prevents lawyers from lying in courts and fiddle with evidence (article 14); there are also other minor duties (of information, etc.), but the previously mentioned trust-based relationship, the ban of conflict of interest and the non-fulfilment and breach of contract are specifically envisaged.

These principles defined in 1997 by the Italian Bar Council have been gradually adjusted to the needs emerging from the practice, namely in the framework of the jurisdictional activity carried out by the Italian Bar Council, and also considering the national lawmaker's impositions, particularly in accordance with Decree-Law no. 223/2006, inspired by anti-competition rules and regulations. The limits imposed on lawyers to the competition benefit do not always seem to be in line with the above stated Resolution and the Court of Justice case-law.

The persistent reference to this Resolution is due to the fact that the principles it enshrines are shared by the whole European legal profession and are a guarantee of protection for citizens.

Nevertheless, the issue does not only lie in citizens' rights, but also in assessing how they can be protected concretely and be turned from solemn declarations of principles enshrined in constitutional or Community instruments into rights experienced in the court daily practice. Citizens' rights are protected if the rights of lawyers, who must have the power to defend citizens before any judge or court, are safeguarded. This is exactly the Protocol of Agreement of all European legal professions, entitled "*Avocats dans le monde*" and signed in Paris some years ago, which wished to support the cause of fundamental rights before judges all over the world, precisely by virtue of the privilege connected with the practice of the legal profession.

Hence, it is significant to combine the principles ensuring access to justice and "fair" trials with the principles ensuring judges' and the legal profession's independence and autonomy. These principles are limited by any legislative or regulatory measure entrusting to external bodies (such as the Justice Ministry) the drafting of rules to organize the legal profession (which, being an "intermediate community" has the right to freely organize itself, outside any legislative intervention), or even interfere with the ethics principles or trial rules, the implementation of which is entrusted to local rolls and associations and the Italian Bar Council. Currently the Ministerial plans to reform the legal profession tend to disregard the fact that the ethics principles set by the Italian Bar Council are recognized as primary rules by the Supreme Court of Cassation and that the Constitutional Court's decisions recognizes to the Italian Bar Council the status of special judge on an equal footing with the other judges of higher instance courts.

In conclusion, the counsels' roles and functions are steadily evolving and we cannot say that this evolutionary process is always designed to a better application of the fundamental principles recognized and guaranteed by the Constitution and the European Charter of Fundamental Rights of the European Union. It is up to lawyers *in primis*, to doctrine and judges to enable lawyers, who are the most authoritative and useful aides of judges in the performance of the jurisdictional tasks, to keep on carrying out their *functions* with the competence, fairness, autonomy and independence which are essential to ensure counsels' rights and for lawyers to abide by the law and follow their conscience – as Pietro Calamandrei used to say – without caring about anything else. This means with the courage that the legal profession requires and the Bar provides to them and also with the protection of the institutions and associations representing the legal profession such as the Italian Bar Council.

3. The New Reform of the legal profession in Italy

With the entry into force, on 2 February, of the new legal system (Law No. 247/2012), the legal profession can count on legal rules of primary law, as befits a profession coessential to jurisdiction, as the judiciary. Rules which guarantee the lawyer's professional freedom, as required by Art. 15 of the European Charter of Fundamental Rights of the European Union.

On the other hand, the European Union itself recognizes the specific nature of the legal profession in relation to other professions, and to verify this it would be sufficient to read the numerous European Parliament resolutions and directives of the European Commission.

Therefore, the reform restores, to a context which is more respectful of the Constitution, the defence activities of lawyers, who are the guardians of the rights of citizens against the State and other powers, after a frantic season in which, with an exclusively mercantilist spirit, the much-needed modernization of the profession were confused with unjustified purposes of wild liberalization.

On closer inspection, these liberalization measures have mortified in all aspects the defence activity, its necessary autonomy and independence, and threatened to undermine the service of justice which must be based on the independence of both judges and lawyers.

The new legal system fully meets the needs of modernization of the profession for what concerns the up-skilling of lawyers, adequate payment for legal training, entry to the profession of the most deserving young people who can count on a more guaranteed initial vocational training with a appropriately paid training, transparent professional fees freely agreed with the client, the disciplinary control of the lawyers' fairness, compulsory insurance to cover any damage caused to clients, companies of lawyers, moreover with enhanced responsibility. And it does so in a comprehensive framework that touches every aspect of the

professional and institutional life of the legal profession, as required by rules which have waited at least 70 years to be updated.

The new rules also restore a more free, autonomous and competent legal profession to the country.

The main objectives of the reform, that the new rules are designed to achieve can be synthetically mentioned in the strengthening of the preparation and quality of professional services provided by lawyers during the course of the profession (from access onwards – continuing professional development – specialization – regular practice of the profession); in a transparent professional contract (fees freely negotiated; informative advertising); in the protection of the citizens' legitimate expectations through the obligation of the lawyer to obtain compulsory insurance; in the strengthening of disciplinary control; in allowing more modern forms of practice of the profession (multi-disciplinary partnerships and corporations of capital without members, which would not have guaranteed professional independence and freedom); in facilitating the entry of deserving young people (qualified access and remuneration to the trainee; the training will be compatible with a work commitment); in enhancing the protection of public interest by the Bar Associations, called to establish not only the Conciliation and Arbitration Chambers to solve disputes but also the citizen's helpdesk, to provide information and guidance; in ensuring balanced gender representation in the election of the legal bodies and with the establishment of equal opportunities committees at the Bars: the legal profession is, at present, the only one governing by law these achievements; in updating the profession in accordance with Community rules and the needs of the opening of a professional market; in contributing to the analysis of the situation of the jurisdiction with the establishment of a permanent observatory by the CNF.

The law also strengthens professional secrecy, provides an opportunity for lawyers to specialize in specific branches of law and confers an important delegation to the Government to more fully regulate the defence, which is also characterized by transparency and qualification.

For the legal profession, this reform is not the point of arrival but the starting point of a renewal dedicated to quality and at the service of the country to offer an efficient and supportive service in the administration of justice.

We are aware that there are many novelties and the commitment required by lawyers in order to comply with the new rules is significant. However, we believe that this commitment will be rewarded with the recovery of the dignity of the profession that the last regulatory measures had dangerously tarnished.

The new legal profession recognizes the principle of reservation in extrajudicial advice; the option of technical defence in binding arbitration has been introduced; a legislation on parameters more respectful of the competence of legal institutions has been introduced, which will contribute to recover the unjustified cuts to fees perpetrated with the Ministerial Decree No. 140/2012 – for which the CNF has also appealed before the regional administrative court of

law of Lazio for abuse of power. Also in the absence of an agreement between client and lawyer it will be possible to refer to the parameters.

We hope that all these provisions, which acknowledge the specific competences of lawyers in the legal field and a recovery of dignity also concerning fees, will create a fairer professional market, sheltered **from non-qualified competition**, therefore, it is hoped, more satisfying for everybody.

Young people will look to the profession with more confidence

There are also rules on social security which however will take charge of the more delicate situation of young lawyers and female lawyers.

The CNF is already working to fully implement the reform, to identify lines of interpretation ensuring a smooth transition between the old and new system.

At the time of writing, Circular C-1-2013, bearing the Dossier 1/2013 of the Research department of the CNF, explanatory of the reform (the Dossier, including easy to read FAQ, can be found on the institutional website), has just been sent to the Bars Associations.

With this handbook, the National Bar Council aimed to provide the Bars and members with a brief commentary (accompanied by cards) for better cognizance and interpretation of the new rules, especially with regard to the issues that will arise with the first implementation of the measures. This, as will be seen, contains numerous references to implementing regulations, partly within the jurisdiction of the National Bar Council and the National Welfare and Assistance Fund for Lawyers, partly within the jurisdiction of the local Bars and, for the most part, entrusted to the Ministry of Justice.

This legislation provides for transitional arrangements which will allow to manage the transition from the former legislative system to that defined by the reform. It is clear that, over the next few months, doubts and questions may arise at the Bar councils, in the exercise of their functions, which are now not detectable, as it is easy to imagine that the Bar councils will received many requests for opinions and questions from colleagues or also ordinary citizens. The Bar Council will be able to answer the questions as usual, also with the help of the hermeneutic supports provided by the National Bar Council, and may submit to the National Bar Council further issues: dialogue is necessary in order for the National Bar Council to be informed of application issues and contribute in creating an uniform application procedure throughout the country, in the interest of citizens who request the assistance of lawyers and in the interest of the members in our registries.

The transition between the old and the new system will take place without going through the more general reform of the professions (Law Decree No. 138/2011, converted into Law No. 148/2011 and then implemented with the Presidential Decree No. 137/2012). The first and most significant effect of the reform is in fact to remove the legal profession from the deregulation of specific areas as in Art. 3, paragraph 5, of Legislative Decree Salva-Italia, leading to a "re-regulation" of the regulatory rules of the legal profession.

The approval of the new legal system, therefore, makes the reform of the professions inapplicable to the legal profession. This, so much in view of the chronological criterion (*lex posterior derogat legi priori*) as the criterion of specificity (*lex specialis derogat legi generali*) and hierarchical (with specific reference to the fate of the provisions of the Presidential Decree No. 137/2012).

It was intended to provide otherwise for Parameters Decree No. 140/2012, although challenged by the CNF for the clear shortcomings and penalties to the detriment of lawyers.

To avoid any legal vacuum, such as the one that occurred after the approval of the Decree Salva-Italia which, by abolishing the tariff, had made the determination of costs or expenses by the courts impossible, the Dossier considers applicable, in cases provided by law, the Ministerial Decree No. 140/2012 until the adoption of the new decree specifically dedicated to the legal parameters.

With regard to social security, we would like to emphasize some very positive innovations.

Starting from the obligation to enrol both in the National Welfare and Assistance Fund for Lawyers and in the bar registry. This will not only allow to reorder the entries in the registry, but it will give more financial relief to the National Welfare and Assistance Fund for Lawyers which, as we know, is very busy, with success, in ensuring financial stability between social security contributions and benefits. This provision will be managed with attention to critical situations: the law provides that the National Welfare and Assistance Fund for Lawyers shall determine with its rules the minimum contributions due in the case of subjects entered in the registry who do not fall within the income parameters, of any temporary conditions of exemption or reduction of contributions for subjects in special conditions and the possible application of the contributor scheme.

The solidarity that has always characterized the legal profession is a value that has guided the preparation of these standards. And this is the reason why even the rule of the proof of the continuity of the profession as a condition for maintaining enrollment, which must never be measured against income, will not be required for female lawyers on maternity leave and in the first two years of a child's life or, in the case of adoption, in the two years following the adoption. The exemption applies to lawyers who are widowed or separated with sole custody of the children; lawyers who prove to be suffering or have been suffering from an illness that has greatly reduced the possibility to work; lawyers who carry out proven activity of ongoing support of close relatives or spouse suffering from an illness, if it has been proven that this causes the total lack of self-sufficiency.

The age-old issue of defining the income between companies of lawyers, qualified as self-employment income for social security purposes, is also solved.

The reform are also in charge of governance, providing for legal institutions the most innovative rules in terms of transparency, change, equal opportunities, absence of conflicts of interest.

Along this line are ascribed the provisions establishing the board of auditors at the Bar councils; which set the limit of mandates; which define the incompatibility between elective offices (that between the office of Bar councillor and member of the board of directors or of the Committee of delegates of the National Welfare and Assistance Fund for Lawyers is immediately operational); those requiring the respect of gender balance and establish the equal opportunities committee at every Bar council.

The new legal system, therefore, looks to the future, but it is well-founded in the values of the legal profession; those values of autonomy, independence and its own jurisdiction that the most difficult circumstances can not and must not bend because they too protect democracy.

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