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MULTISENSORY LAW AND ITALO CALVINO'S "LEZIONI AMERICANE"

– ELEMENTS FOR AN IMPURE THEORY OF LAW –

MARCILIO T. FRANCA-FILHO[1]

On June 6th, 1984, Italo Calvino – one of the most important Italian writers of the 20th century – was invited by University of Harvard (USA) to give the traditional and respected Charles Eliot Norton Poetry Lectures for the 1985/1986 academic year. Set in 1925 to pay homage to one of the first professors of art and literature in Harvard, the Charles Eliot Norton Poetry Lectures are a set of six conferences given by a great name in the field of arts, literature, painting, music or architecture on a topic of his/her choice in the course of one academic year. In the previous years, names such as Leonard Bernstein, Octavio Paz, Jorge Luis Borges, Meyer Schapiro, Igor Stravinsky e T. S. Eliot had accepted University of Harvard's invitation. Calvino was the first Italian ever invited. Overcoming the excessive liberty he was given – "believing as he did in the importance of constraints" over the literary work – Italo Calvino set the theme of his six conferences: he would cover some of the literary values that deserved to be preserved in the course of the new millennium which was to start some years later. Lightness, quickness, exactitude, visibility, multiplicity and consistency would be the themes and titles of each of his lessons. He wrote five of them before getting to Harvard and he intended to write the last one (consistency) after his arrival in the city of Cambridge, in the US state of Massachusetts, where the renowned university is located. However, Calvino passed away on September 19th, 1985, shortly before setting off to the United States, thus before the conferences and before preparing the last of his six lessons. Posthumously, the five conferences written so far were collected in one volume entitled Lezioni Americane: Sei Proposte per il Prossimo Millennio, ("Six Memos for the Next Millennium").

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> *"I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon, and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject."*
>
> *Judge Learned Hand, 1930*

I. INTRODUCTION

The insufficiency of the legal positivism for understanding and interpreting the juridical phenomenon has been an obvious and frequent finding in contemporary theories of law. In search of new epistemological and methodological models for the Law, legal scholars have sought to approach more and more other languages in pursuit of a cross-cultural dialogue. And so, since the 1990s, the emergence of various hues of the "Law and ..." movement - such as the Law & Society, Law & Literature and the Law & Humanities - sparked a wide-spread wave of aesthetic and cultural studies on the legal phenomenon. Since then, it has not been uncommon to find in law schools events, disciplines and bibliographies on themes hitherto unfamiliar to the legal doctrine, as art, opera, theater, cinema, jazz and poetry. It is for no other reason but this familiarity with the domains of Themis, goddess of justice, and those of Calliope, the Muse of Epic Poetry – who starts and leads the choir of all Muses, according to Hesiod – that this writing seeks to bring some arguments, narratives and wisdom originally

conceived in the womb of literature into the field of Law (domestic and international Law), of State and of Political Ideas.

On June 6th, 1984, Italo Calvino – one of the most important Italian writers of the 20th century – was invited by University of Harvard (USA) to give the traditional and respected Charles Eliot Norton Poetry Lectures for the 1985/1986 academic year. Set in 1925 to pay homage to one of the first professors of art and literature in Harvard, the Charles Eliot Norton Poetry Lectures are a set of six conferences given by a great name in the field of arts, literature, painting, music or architecture on a topic of his/her choice in the course of one academic year. In the previous years, names such as Leonard Bernstein, Octavio Paz, Jorge Luis Borges, Meyer Schapiro, Igor Stravinsky e T. S. Eliot had accepted University of Harvard's invitation. Calvino was the first Italian ever invited.

Overcoming the excessive liberty he was given – "believing as he did in the importance of constraints" over the literary work[2] – Italo Calvino set the theme of his six conferences: he would cover some of the literary values that deserved to be preserved in the course of the new millennium which was to start some years later. Lightness, quickness, exactitude, visibility, multiplicity and consistency would be the themes and titles of each of his lessons. He wrote five of them before getting to Harvard and he intended to write the last one (consistency) after his arrival in the city of Cambridge, in the US state of Massachusetts, where the renowned university is located. However, Calvino passed away on September 19th, 1985, shortly before setting off to the United States, thus before the conferences and before preparing the last of his six lessons. Posthumously, the five conferences written so far were collected in one volume entitled Lezioni Americane: Sei Proposte per il Prossimo Millennio, whose English version is entitled "Six Memos for the Next Millennium".

Although it was conceived as an aesthetic-literary discussion, Italo Calvino's book had great impact in arts in general, including design. This text will care to

[2] Introductory note by Esther Calvino to CALVINO, 1996, p. I.

examine if and how those five literary values described by Italo Calvino – lightness, quickness, exactitude, visibility and multiplicity – have echoed in the legal world of the present millennium. In other words, our intention is to find out what Calliope could say to Themis years after those conferences were written.

II. LIGHTNESS

Italo Calvino starts his lesson on lightness by remembering that "to cut off Medusa's head without being turned to stone, Perseus supports himself on the very lightest of things, the winds and the clouds (...)."[3] Likewise, it is supported on the very lightest of juridicity – legal principles and soft law – that the contemporary State has found its best strategies to fight the current Medusas of transboundary air pollution, transnational organized crime, international monopolies, ubiquitous economic instability, global degradation of labor conditions or even contemporary terrorism, which ignores geographical limits. The more complex the social system has become, the lighter the juridical structure becomes in order to reach the necessary conceptual-interpretative flexibility to embrace the fractal infinite of situations each time more far-reaching and complex in society.

In a more interdependent economy, which for this reason becomes more susceptible to the risks produced by global economic actors, the contemporary State, both alone and as part of great constellations or post-national networks, has come to frequently take up a more effective function of market's regulatory agent, in order to guarantee economic stability, competition, free trade or minimum standards of healthcare, security, environment, human rights, labor rights and consumer protection. This way, in the last years, the impoverished and weakened State has become mainly and fundamentally a market's regulatory entity, so as to better face – alone or as a group –, present-day's huge transboundary challenges. It is in this context that the contemporary State lets go of the monopolized provision of public services, with highly centralized norms, by becoming the market's supervisor (or co-supervisor).

[3] CALVINO, 1996, p. 4.

This phenomenon is particularly evident in Latin America, where massive privatization of public services in the last twenty years has determined the end of the State-Actor or State-Producer/Provider of goods and services and the beginning of a new era in which the State is, basically, regulatory. This new State profile as a regulatory entity in the global scenario leads to the appreciation of the lightness, flexibility and subtlety of the juridical post-positivist forms: generality, abstraction and polymorphism of the legal principles and soft-law are more worthy that the density, casuistry and temporality of the detailed, rigid and fixed legal rule, unable to operate in the vastness of regional integration or to establish a dialogue in the ever- more frequent geographies of transboundary normative cooperation.

Apart from that, as global public goods[4] cross-national borders, collective responses to the same extent start to be required. In these "network actions", the weight, thickness, stiffness and concretion of the traditional positive juridical rule give way to flexibility, openness, lightness and flexibility peculiar of juridical principles and soft law – without foregoing effectiveness, for sure. The prestige that the principle-based argumentation has reached in the last decades in several national and international courts; the growing number of informal intergovernmental networks between national regulatory entities (such as the horizontal cooperation founded by the Basel Committee on Banking Supervision or the coordination organized by the International Competition Network); the growing presence of distributed administration, in which national authorities set rules and policies subject to international regulation (such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and several directives issued by the European Union and the MERCOSUR); the public-private regulatory partnerships (such as the Internet Corporation for Assigned Names and Numbers, ICANN); the importance of

[4] By definition, public or collective goods cannot be provided by a private party (individuals or corporations). In an even wider dimension, "global" public goods, such as security, healthful environment or free trade, must now be supplied in an even larger scale of global collective action, involving public and private, local and international actors (POSNER, 2008, p. 1).

essentially private organs in charge of developing standardization and certification mechanisms (such as the International Standardization Organization, ISO, or the Society for Worldwide Interbank Financial Telecommunication, SWIFT, and the World Anti-Doping Agency or the Court of Arbitration for Sport); all this shows traits of "radical changes in the understanding of positivity" of which Gomes Canotilho[5] has long been talking.

Leaving the mere reductionist Manichaeism behind, Italo Calvino himself warns that none of the values he chose as a theme of his five conferences excludes its opposite value at all.[6] Likewise, this encomium to the lightness of the juridical forms does not neutralize the acknowledgment that the jus-political weight of the State and its positive rules still enjoy the centrality in juridical rationale. However, this centrality is more and more shared by new "centers of normativity": interjusfundamentalism, multilevel constitutionalism, transconstitutionality, interjusfundamentality, internormativity, interconstitutionality, as Gomes Canotilho has been emphasizing in his latest writings.[7]

According to Roman Tschäppeler and Mikael Krogerus, the more complex is the world, the greater is the need for simplicity, adaptability, malleability and ductility. The current world is light.[8] The figure below reflects this desire for simplicity, adaptability, malleability and ductility:[9]

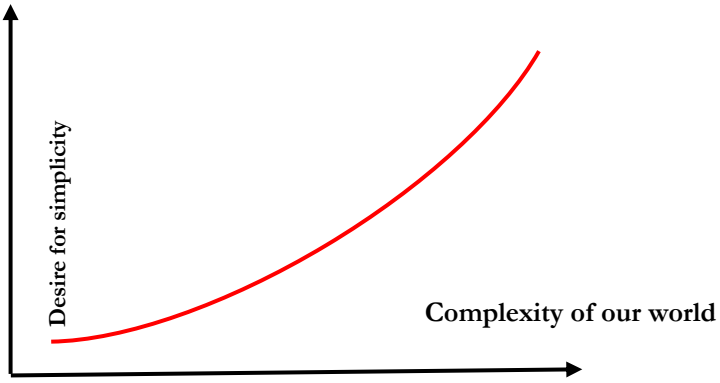
[5] CANOTILHO, 2001, p. 707.

[6] CALVINO, 2010, p. 59.

[7] Speaking in "new centers of normativity" has a certain "rhizomatic" flavor. GILLES DELEUZE and FÉLIX GUATTARI use the terms "rhizome" and "rhizomatic" to describe epistemological models in which the organization of the elements does not follow a line of hierarchical subordination but where any element can affect or influence any other. In their book "A Thousand Plateaus" (1987), they oppose "rhizome" and "rhizomatic" to an "arborescent" conception of knowledge, which derives from a common stem or trunk and works with dualist categories and binary choices.

[8] CUNHA, 2013, p. 332.

[9] TSCHÄPPELER and KROGERUS, 2013, p. 3.



In order to guarantee more and more simplicity, adaptability, malleability and ductility, the new "centers of normativity" shall also include, of course, new modalities of legal discourse, as mentioned by Colette R. Brunschwig[10], i. e., "multimodal or multisensory systems"; "visual, auditory, kinaesthetic, and so forth". This shows how right Italo Calvino is as he indicated, in 1984, lightness as one of the values that would go on guiding the aesthetics of the third millennium – in literature but also in the paths of Law.

III. QUICKNESS

In his second conference, Quickness, Italo Calvino makes an "apology for quickness" without, however, denying the "pleasures of delay".[11] And he explains his apparent paradox by stating that:

"From my youth on, my personal motto has been the old Latin tag, Festina lente, hurry slowly. Perhaps what attracted me, even more than the words and the idea, was the suggestiveness of its emblems. You may recall that the great Venetian humanist publisher, Aldus Manutius, on all his title pages symbolized the motto Festina Lente by a dolphin in a sinuous curve around an anchor. The intensity and

[10] BRUNSCHWIG, 2013, passim.

[11] CALVINO, 2010, p. 59. In another – undoubtedly more hedonistic – context, the same pleasure of delay can be found in Zino Davidoff's work: *Il y a dans les gestes lents, dignes et mesurés du fumeur de cigare une cérémonie qui permet de retrouver des rythmes oubliés et de rétablir une communication avec soi-même* (1967, p. 28). Also: SANSOT, Pierre. *Du Bon Usage de la Lenteur*. Paris: Payot/Rivage, 2004.

constancy of intellectual work are represented in that elegant graphic trademark, which Erasmus of Rotterdam commented on in some memorable pages. But both dolphin and anchor belong to the same world of marine emblems, and l have always preferred emblems that throw together incongruous and enigmatic figures, as in a rebus. Such are the butterfly and crab that illustrate Festina lente in the sixteenth-century collection of emblems by Paolo Giovio. Butterfly and crab are both bizarre, both symmetrical in shape, and between them establish an unexpected kind of harmony." [12]

It is not new that much before being global, informational or post-industrial, the contemporary world is, above all, a world of paradoxes. The paradoxical nature of current society is, without a doubt, one of the most vehement signs of the complexity that emerges from current daily life. In the recent years, for example, fewer wars did not result necessarily in more peace nor did a bigger production of richness lead to a reduction in poverty. In this period, the bigger and deeper the development of science and techniques has been, the smaller the number of unquestionable certainties in society has become. The quest for hurry slow can be seen as one more of the several paradoxes produced in the bosom of current society. In the path of juridicity, the search for such paradoxical harmony between quickness and slowness has also been a constant goal of the contemporary juridical systems: how can we combine, the best way possible, decision quickness and due process of law? How can we coadunate the necessary quick, efficient and legitimate legislative response without ending up in perverse and insecure legislative inflation?

As Gomes Canotilho discussed the relations between Time and Law, he once again sagaciously pondered:

"(...) In a work suggestively entitled Law and Time (Recht und Zeit, 1955), [Gehrard Husserl] identified the legislator as 'man of the future', the agent of administration as 'man of the present' and the judge as 'man of the past'. Today, these formulas must be object of urgent critical review. Anyway, one would say that various

[12] CALVINO, 1996, p. 48.

'instances of temporality' shall be summoned in a theory of the temporally-adequate Constitution." [13]

The abysmal discrepancy between the time of Law (anchor) and the time of economy and technology (dolphin) has long been known, in such a way that the quest for more celerity has been continuously attempted in legal cases. Legislative renovations, creation of instruments and quicker rules of procedure, administrative control over legal deadlines, the appreciation of more agile forms of conflict settlement (conciliation, mediation and arbitration), as well as the fast digitalization and virtualization of the state jurisdiction, in combination with the jusfundamental view of "right to a reasonable duration of the trial", all these examples are clear signs of the need to approximate the rhythm of juridical relations to the beat of economical and technological relations.

However, as the Latin motto Festina lente itself claims, the speed of Law cannot neglect the slow and mature legislative development, which might generate a legislative inflation that would cause much insecurity. The phenomenon of legislative inflation does not translate itself into a proportional rise in legal certainty for the citizen; much the contrary, many times it generates normative systems in the form of a web, whose traits are multiplicity, conflict, mistake in the prognosis and temporality of its normative structures.[14] Additionally, many laws are highly individualizing and discriminatory and thus, once again the parsimonious care with nomogenesis emerges.

In search of more efficient (and faster[15]) ways to understand and spread the juridicity, many legal scholars have been studying, in the last years, non-textual forms of communication, which obviously have its pros and cons. As noted by Tschäppeler and Krogerus[16] or Wahlgren[17], the diverse forms of communication

[13] CANOTILHO, 2006, p. 26.

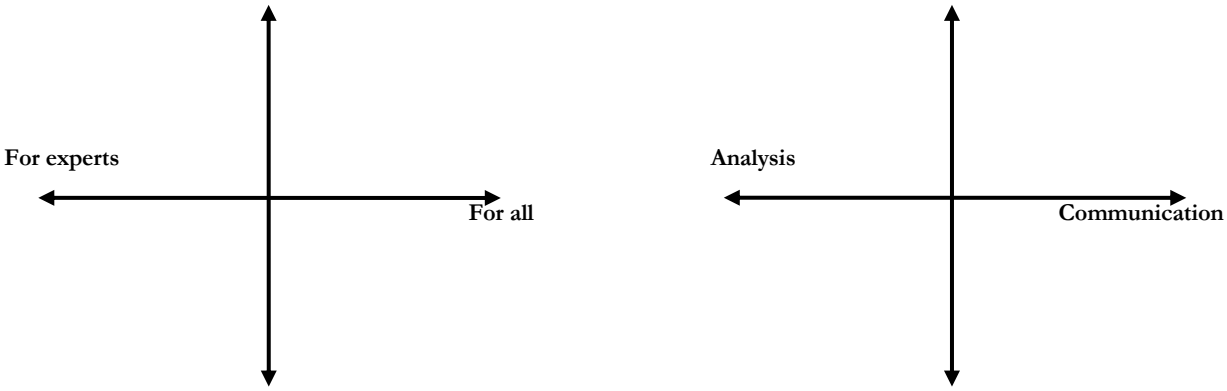
[14] HESPANHA, 2007, p. 322 and following.

[15] *"Bilder werden deutlich schneller als Wörter vom Gehirn aufgenommen"*- says BOEHME-NEßLER (2010, p. 64).

[16] TSCHÄPPELER and KROGERUS, 2013, p. 5.

[17] WAHLGREN, Peter. *Visualization of the Law*. In: MODEER AND SUNNQVIST, 2012, p. 24.

(models, signs, schemes, trees, semantic nets, mind maps, matrices, etc.) can navigate in territories of diagrams as follow:



For all these reasons, the contemporaneity and adequacy of Calvino's literary thinking in the ways of legal thought lie unquestionable a second time.

IV. EXACTITUDE

Italo Calvino begins his conference on exactitude remembering Maat, Egyptian goddess of justice whose iconography always depicted a set of scales, and goes about his topic in the following way:

"To my mind exactitude means three things above all: 1) a well-defined and well-calculated plan for the work in question; 2) an evocation of clear, incisive, memorable visual images (...); 3) a language as precise as possible both in choice of words and in expression of the subtleties of thought and imagination." [18]

In the project of juridicity that rises in Modern times, definition, calculation, sharpness, exactitude, precision and certainty also constitute values that belong to Law, so much that the scale – a precision tool par excellence – remains firmly incorporated to the contemporary iconography of Lady Justice. However, this scientific, logical and rational exigency that Law move itself in the field of exactitude

[18] CALVINO, 1996, p. 55-56.

and prognosis is, day by day, put to test when confronted with the ubiquity of scientific uncertainty and the inherent risk in contemporary society – risk always connected to the idea of insecurity.

In a place where science becomes critical of itself, it is evident that there are no more risk-free activities. In this scenario, Law cannot vainly assume to sail a sea of definition, calculation, sharpness, exactitude, precision, predictability and certainty. Central themes in contemporary security and international trade, such as genetically modified organisms, global warming, biosecurity, climate changes or biotechnology require more and more an approximation between jurists and scientists in order to clarify concepts, definitions, terms, consequences, hypotheses and, above all, risks.

Law alone is unable to produce the truth; only with constant, honest, open and profound dialogue with science (and not only science but also the Arts[19]) can it mitigate – never eliminate – risk and chase exactitude.

Although the incapacity of the State and Law in this third millennium to eliminate all risk is known, there is growing demand in the international organizations (such as the World Trade Organization, European Union and the UN, for example) for the State and Law to embrace firm policies of "risk assessment" and to work on the threshold of exactitude, as proposed by Calvino, as: 1) a well-defined and well-calculated plan; 2) an evocation of clear, incisive, memorable visual images; and 3) a language as precise as possible. This international scenario is not much different in the domestic perspective: national courts have

[19] CAPES (Coordenação de Aperfeiçoamento de Pessoal de Nível Superior) is the Brazilian agency responsible for assessing the quality of master's and PhD programs in all public and private academic institutions. In the results of its latest triennial review, a fact particularly caught my attention: among 73 master's and PhD programs (in Law) evaluated, 20 of them had some sort of artistic or cultural production of its faculty. In other words, in addition to books, chapters and articles on legal themes, the Professors of these master's and doctorates in law also produced pieces of Performing Arts, Music and Visual Arts - demonstrating, once again, the necessary dialogue between the arts and the Law. Altogether, those 20 post-graduate programs in law produced 64 artistic or cultural works (for details, consult http://www.avaliacaotrienal2013.capes.gov.br/). In this scenario, Law's new academic partners could be, also, media and cultural studies, art history, music theory, network theory, cognitive psychology, psychoanalysis or neurosciences (SHERWIN, 2011, p. 3).

recurred more and more to the collaboration of scientists to try to convey justice.[20] Thus, for the third time, another one of Calvino's memos for this millennium shows to be adequate and modern in the world of Law.

V. VISIBILITY

In 1984, some "primacy of the visual image" over "verbal expression" was highlighted by Italo Calvino[21], who explained his method of creation like this:
"In devising a story the first thing that comes to my mind is an image that for some reason strikes me as charged with meaning, even if I cannot formulate this meaning in discursive or conceptual terms. As soon as the image has become sufficiently clear in my mind, I set about developing it into a story; or better yet, it is the images themselves that develop their own implicit potentialities, the story they carry within them. Around each image others come into being, forming a field of analogies, symmetries, confrontations."[22]

As a matter of fact, social sciences and humanities have relied on images to understand and explain the world around, and Law is not immune to this tendency. Nowadays, because of the great visual appeal in our culture, in special, of the juridical information itself, Law is becoming more permeable to argumentation incited by the visual, aesthetic or artistic field, and is also using visual resources to make itself understood. Strongly influenced by information technologies, legal informatics and the multimedia character of contemporary culture, a brand new juridical discipline has originated in Austria, Switzerland and Germany since the early 21st century: "Rechtsvisualisierung" or "legal visuality" (or "BilderRecht" or even "Visuelle Rechtskommunikation"). This multisensory discipline takes upon studying the design of juridical information and the multiple modalities of

[20] In Brazil, in two recent and important cases, the dialogue between law and science was much explored: the Supreme Court's examination on embryonic stem cells and abortion in cases of brainless fetus (Arguição de Descumprimento de Preceito Fundamental ADPF 54 e Ação Direta de Inconstitucionalidade ADIN 3510).

[21] CALVINO, 2010, p. 102.

[22] CALVINO, 1996, p. 88-89.

communication of the juridical phenomenon – from richly-illustrated medieval manuscripts to the tridimensional digital information layouts of today.[23]

For long, Law was understood as an exclusively textual science (Textwissenschaft) whose essence would reside in the purest interpretation of legal texts, with no room for images – jurists seemed to suffer from imagophobia, the phobia about images. The numerous academic discussion forums (institutions, projects and publications) that deal with these themes nowadays and the growing presence in courtrooms of graphic aid of sophisticated technology, closed circuit images and GPS maps, magnetic resonance imaging or CAT scan and even 3D scale model (as means of evidence and argumentation tools), all this signals the presence of one "iconic turn" or "pictorial turn" in our contemporary mediatic legal system.[24]

Social sciences and the Humanities' iconophilia is due, overall, to three factors: 1) the easy access to antique images, based on technological improvement for the conservation, digitalization, storing and research in large image banks; 2) the easy production and dissemination of new images, also based on new technologies of production and publishing (among which are YouTube and Flickr); and, finally, 3) the huge quantity of images continually produced, consumed and discarded in the most traditional media channels, such as cable television, newspapers, magazines, websites, blogs, mobile phones, etc., which has led men to an essentially visual way of thinking nowadays. To these three factors, we must add that communication through images is always faster than text and speed is undoubtedly a central concern these days – as seen in paragraph 3 above.

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[23] FRANCA FILHO, 2011, *passim*. BRUNSCHWIG, 2009, *passim*. Also Peter Wahlgren states that *"it must nevertheless be mentioned that also text is a form of visualization. It should likewise be underlined that text is, and for the foreseeable future will remain, the most important tool in this respect. (…) Looking beyond representations utilizing text elements, and approaching what more easily can be understood as visualizations, it is indisputable that pictures, films, animations, symbols, and icons can be employed in order to depict different aspects of law"* – P. WAHLGREN, *Visualization of the Law*. In: MODEER AND SUNNQVIST, 2012, p. 20-21.

[24] FRANCA-FILHO, 2011, *passim*. In the foreground of constitutional-juridical methodism and methodology, Gomes Canotilho included visual elements in his writings long ago. See, for instance, the numerous informational charts, designs and models found in his *Constitutional Law and Theory of Constitution (Direito Constitucional e Teoria da Constituição)* or his *Studies on Fundamental Rights (Estudos de Direitos Fundamentais)*.

This iconophilic tendency spread in contemporary social sciences and the humanities is recognized by the 2009 METRIS Report of the European Union as one of the vectors of contemporary production of knowledge:

"Visualization and visual tools have always played an important role in the sciences. Anatomical atlas makers, illustrators of herbaria, and physicists have made ample use of images when presenting, representing, illustrating, and explaining natural phenomena. Yet, the history and the use of visualization as a field of specialized study have gained prominence only recently. This 'iconic turn' has become a major paradigm in the SSH [Social Sciences and Humanities]. Several dimensions of this turn can be identified, including the new role of images and of the visual in sciences as well as in contemporary societies in general. The recent study of images, as a more general category than works of art, is underpinned by important studies published in the past two decades. (…) Studying the historically distinct use of images in different eras, fields and disciplines, provides an opportunity to explore methodological and epistemological issues in new ways. The iconic turn in the sciences is a special aspect of a more general trend in contemporary societies. In fact, the private and public spheres in European and Non-European societies alike are characterized, if not dominated, by an increasing flood of images. Television, digital photography, the Internet and the print media have led to new forms of interaction and intertwining or fusion between the private and the public. Information has become more and more 'iconic'." [25]

In this scenario of excessive visualization of contemporary culture, it is paradoxical that one of the most frequent attributes of iconography on Lady Justice today still is the blindfold over the eyes, a sign of the absence of sight. All this considered, for the fourth time, Italo Calvino's writings deal with a tendency that Law in the third millennium totally welcomed.

VI. MULTIPLICITY

[25] EUROPEAN COMMISSION, 2009, p. 112-113.

The theme of the last conference written by Italo Calvino for his stay in Harvard, dedicated to multiplicity, deals with the contemporary romance "above all as a network of connections between the events, the people, and the things of the world...".[26] One "system of systems"[27] or one "hyper-romance".[28] In one previous conference (on Quickness), Calvino had already made clear his idea of literature as a multiplicity of connections in the following way:

"Since in each of my lectures I have set myself the task of recommending to the next millennium a particular value close to my heart, the value I want to recommend today is precisely this: In an age when other fantastically speedy, widespread media are triumphing, and running the risk of flattening all communication onto a single, homogeneous surface, the function of literature is communication between things that are different simply because they are different, not blunting but even sharpening the differences between them, following the true bent of written language."[29]

With a similar tone to "connections between the events, the people, and the things of the world…." or a "system of systems", the legal doctrine of this third millennium has also frequently sought the construction of a "network of constitutionality"[30] under the shelter of definitions such as global constitutionalism, multilevel constitutionalism, interconstitutionalism or transconstitutionalism. Apart from the specificity of each of these concepts, the conducting idea of them all is the network juxtaposition and the dialogue (or polylogue, as Gomes Canotilho [31] proposes) among several constitutions and many powers that constitute in the same global political space a dialogue that is, as a matter of fact, far from being always convergent and harmonious, sometimes being divergent, concurrent and conflicting.

[26] CALVINO, 2010, p. 121.
[27] CALVINO, 2010, p. 121.
[28] CALVINO, 2010, p. 134.
[29] CALVINO, 1996, p. 45.
[30] CANOTILHO, 2006, p. 261.
[31] CANOTILHO, 2008, p. 117.

It is important to see that the origins of the idea of "constitutional network" were not born in the international arena, but in the grammar of the domestic law itself. In 2000, Prof. Lawrence Tribe, from Harvard University, for example, underlined that Constitutional Law was in fact a hypertext, a network of networks.

The Constitution is (or has become) a hypertext – as a text and a gloss – not unlike a medieval manuscript. Most of us at some level sense that an adequate embodiment of constitutional meaning would have to be multidimensional; would have to make possible the display and observation of numerous links and feedback loops; would have to be viewable from more than a single angle; would benefit from exploration through various crossectional transparencies; would be coded so one could tell at a glance when each part of the whole was proposed and when ratified; would include some means of indicating which provisions had been superseded or rendered inoperative by subsequent amendments (as a matter of logic even if not by express repeal); would employ links permitting one to see in an instant where else in the text a given word or phrase appears and what the possibly analogous phrases or words were in the Articles of Confederation and other arguably relevant surrounding texts such as the Declaration of Independence; would come equipped with suitable annotations so that one could tell what lines of institutional practice and what lines of decisional authority had given each provision or constellation of related provisions a specific substantive gloss; and would contain a further set of annotations pointing to features of the national ethos and identity helping to orient and give direction to various combinations of constitutional clauses and provisions.[32]

Obviously, the legal polylogue (as mentioned by Gomes Canotilho[33]) implies an intercultural polylogue: "the theory of inter-constitutionality is not merely a problem of inter-organization. It is also a theory of constitutional interculturality."[34]. This generates the fifth and last adequacy of Calvino's propositions to the structures of juridical discourse – must Law be open to

[32] TRIBE, 2000, p. 40.

[33] CANOTILHO, 2008, p. 117.

[34] CANOTILHO, 2006, p. 271.

multiplicity in the third millennium! In this sense, multiplicity in Law does not signify the mere openness to multiples jurisdictions or multiples branches of law. The many contemporary Laws (jurisdictions and legal systems) are not enough in themselves and, much more than building walls or dykes, these Laws (jurisdictions) need new bridges, windows and passages - among themselves and with other forms of knowledge. In this framework, unlike Theseus (who tried to kill the hybrid Minotaur), contemporary Law must value positively symbiosis and polymorphy.

In this context, the literary genre "essay" gains today particular relevance as a form of legal writing, since - as an encyclopedia and never as a dictionary – an essay is capable of opening multiple references and links to elements not strictly legal or juridical.[35]

VII. CONCLUSIONS

Rather than being an inventory (incomplete and fragmented as it is) of legal news, this outline aimed at reaffirming the proximity of Law and literature (and the arts in general) based on the adequacy and legitimacy of certain literary arguments (originally developed by Italo Calvino) in the field of Law. This writing attempted to show that not only jurists, professors, scholars, lawyers or judges talk about Law. Many others can do so with propriety: poets, painters, architects, playwrights, movie makers, novel writers, tragedy writers, musicians etc. Their authority lies in their non-dogmatism, their dynamic complexity, their refined comprehension of the world, their openness and their creativity.

[35] In a positive (but sometimes critic) point of view regarding the essays, GAUDREAULT-DESBIENS (2010, p. 138) says: *"Les limites du genre étant admises, l'essai juridique offer néanmoins des possibles. D'une part, il admet d'emblée la dimension esthétique du droit, si souvent occultée mais pourtant si présente dans la structure mytho-logique et symbolique de toute tradition juridique. D'autre part, en raison de sa fonction interrogative et de son caractère spéculatif, l'essai recèle un important potentiel libérateur. Il peut notamment servir à établir des passerelles entre le droit envisagé sous l'angle positiviste et d'autres mondes. Aussi, comme j'espère l'avoir démontré dans les libres propos qui ont précédé, il mérite de se voir reconnaître une certaine légitimité dans une culture juridique encore profondément marquée par le formalisme, mais qui a déjà entrepris de s'en libérer."*

Thinking is becoming more and more relative, complex, relational, entangled and transdisciplinary, and Literature and Law cannot refuse their mutual comprehension. As cultural phenomena that they are – and phenomena whose raw material is language and whose object is the "narrative of life", Literature and Law set a fertile path for symbolic exchanges. For didactic effects, it is common to hear that such symbolic exchanges between art and Law can be currently separated in four fields of profound interaction:

1) Law as object of art, that is, all those episodes in which justice and Law have been the theme of masterpieces by great artists in the fields of painting, literature, cinema, theater, etc.; [36]

2) Art as object of Law, that it, the numerous cases in which Law itself sought to regulate, discipline, protect, limit or mold the themes, works, liberties or the rights of artists;

3) Art as a right[37], where the many discussions on the right to culture take place, as well as the right to the protection of the artistic heritage and the exercise of freedom in artistic expression[38]; and

4) Law as art, which arouses the classic definition of Law as "the art of good and just" ("ius est ars boni et aequo" according to Celsius) and its occasional implications in the grammars of law as science and as technology.

Such relations, as one can notice, operate in an extrinsic perspective of the dialogue between Themis, goddess of justice, and Calliope, the Muse of Epic Poetry, more directed to the thematic contents of Law and literature. This quadripartite classification, however, ignores that novels, essays, poems, plays, tragedies, paintings, engravings, sculptures, movies, music, perfumes and architecture can always create innovative legal arguments and contents, simply by

[36] In this field, the pioneer works of jurists E. FERRI (*I Delinquenti Nell'Arte*, de 1896) and B. ALIMENA (*Il Delitto Nell' Arte*, de 1899) stand out.

[37] It is important to note that in Portuguese we can use the same word "Direito" to express both Law and right. Thus, in Portuguese, there is a "direito à arte" (i.e. the "right to art") and a "Direito da Arte" (Art Law).

[38] In this field, it is impossible not to mention the important essay by Antônio Cândido, one of the principal names in literary theory and critique in Brazil, on "The Right to Literature" (in A. CÄNDIDO, *The Right to Literature and Other Essays*. Coimbra: Angelus Novus, 2005).

putting convictions in disorder, by halting certainties, by freeing possibilities, by anticipating the future, even if they did not indicate Law as their primal object of reflection.

There is, then, a fifth plan of interaction between art and Law: the art that speaks to Law even if it does not talk of Law. In the case of Italo Calvino's Lezioni Americane, it is clear that those five literary values that he developed – lightness, quickness, exactitude, visibility and multiplicity – also have great repercussion in the plot of the legal text (domestic and international) of this third millennium and not only in novels or literary essays. Then, even if inadvertently, Italo Calvino accentuates and reinforces the indispensable dialogue between Calliope and Themis – one dialogue that, with no trace of doubt, makes both Law and literature richer.

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NEW MODELS OF CONSTITUTIONAL REVIEW

FRANCESCO DURANTI[1]

Recently, in Commonwealth countries such as Canada, UK, New Zealand and Australia (at state level), is emerging a new, distinctive, model of constitutional review, in which courts have broad authority to interpret Bill of Rights provisions, but national legislatures can override courts' interpretations of rights by ordinary majority vote. In the UK, New Zealand and Australia (at state level), where it is not possible for a court to read and give effect to legislation in a way which is compatible with a bill of rights norms, a court may make a formal «declaration of incompatibility». Such a declaration, however, does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and is not binding on the parties to the proceedings in which it is made, following the traditional principle of sovereignty of Parliament. The net effect is that the legislature has powers to suspend the effect of courts' interpretation of particular rights, simply by the use of sufficiently clear language. In Canada – in a different constitutional setting – the key provision that ensures this is sect. 33 of the Canadian Charter, or the so-called «notwithstanding clause», with the consequential overriding power conferred on federal Parliament and to the legislature of a province. Also in the Nordic countries (especially in Finland and Sweden), various type of well-established ex ante parliamentary preview and restrained ex post judicial review clearly fit with weak-form model of judicial review of legislation. This essay considers how this new model functions, in constitutional theory and practice of the chosen countries.

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I. INTRODUCTION

After the end of the 20th century – significantly defined as the century of constitutional justice[2] – at the dawn of the 21st century new perspectives open up for the protection of fundamental rights and for a different balance of powers within the constitutional State, in the framework of which unknown forms of

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[2] G. ZAGREBELSKY, V. MARCENÒ, *Giustizia costituzionale*, Il Mulino, Bologna, 2012, 545.

constitutional review are being implemented in the various contemporary legal systems[3].

The traditional models of judicial review (the American one and the European) both, in fact, appear to be related to a single macro-model of judicial review – adequately defined as *strong-form judicial review*[4] – which is characterized by the ultimate primacy of the interpretation of the Constitution carried out by the judicial bodies entrusted with the exercise of the constitutional review of legislation (*judicial supremacy*), provided that the Parliament, in order to override a judicial interpretation of the Constitution issuing the annulment or the disapplication of the reviewed statute, can only resort to the complex procedure of constitutional amendment.

In order to reconcile the traditional institutional principle of parliamentary sovereignty with the need to provide effective guarantee of the fundamental rights, the new model implemented in several legal systems based on Anglo-Saxon matrix[5] identifies, instead, a different form of balance featuring a sort of "dialogue" between the Courts and the Parliament, according to which the Bill of Rights is laid down in a primary legal source which does not, therefore, enable the judges to set aside any statutory norm deemed to be conflicting with the Bill itself, but compels them to always adopt that interpretation of the legislation which might be the most consistent with the rights in question.

[3] F. FERNÁNDEZ SEGADO, *La evolución de la justicia constitucional*, Dykinson, Madrid, 2013; L. PEGORARO, A. RINELLA, *Diritto costituzionale comparato. Aspetti metodologici*, Cedam, Padova, 2013; M. DE VISSER, *Constitutional Review in Europe. A Comparative Analysis*, Hart publishing, Oxford, 2013; A. STONE SWEET, *Constitutional Courts*, in M. ROSENFELD, A. SAJÒ (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, OUP, Oxford, 2012, 816.

[4] M. TUSHNET, *The Relation Between Political Constitutionalism and Weak-form Judicial Review*, in *German Law Journal*, (2013), vol. 14, no. 12, 2249; M. TUSHNET, *The Rise of Weak-Form Judicial Review*, in T. GINSBURG, R. DIXON (Eds.), *Comparative Constitutional Law*, Edward Elgar publishing, Cheltenham, 2011, 321.

[5] S. GARDBAUM, *The New Commonwealth Model of Constitutionalism. Theory and Practice*, CUP, Cambridge, 2013; F. DURANTI, *Ordinamenti costituzionali di matrice anglosassone. Circolazione dei modelli costituzionali e comparazione tra le esperienze di Australia, Canada, Nuova Zelanda e Regno Unito*, Aracne, Roma, 2012.

This is something similar to the need for an «interpretation consistent with the Constitution», often advocated also by the Italian Constitutional Court[6].

In case of unresolvable conflict between the statute and the rights, the model features – subsequent to the assessment of the Courts of all the possible interpretations of the provision under scrutiny – the ultimate primacy of the legislative intent, while the Courts are exclusively empowered to adopt specific «declarations of incompatibility» through which they warn the Parliament of the existing conflict and of the need to amend the incompatible provisions: the amendment may, however, be discretionally issued only by the legislator, who holds the unaltered constitutional prerogative to having the right to the "last word" on this topic.

In the legal systems of Nordic countries likewise (particularly in Sweden and Finland) a new model of judicial review is being developed.

This is grounded on a dynamic connection between the *ex-ante* constitutional control entrusted to the Parliament and the diffuse control conferred to the Courts, although the latter – due also to a consolidated constitutional customary law – are bound to hold in due consideration the interpretation of the Constitution adopted by the Parliament, before they might possibly rule invalid any statutory provision[7].

Either the variant of legal systems based on Anglo-Saxon matrix and Nordic countries ultimately appear to be both likewise related to a single new judicial review classificatory type, which can be adequately defined as – in line with the mentioned US literature – *weak-form judicial review*, and which, due to its peculiar characteristics, deserves an adequate in-depth comparative analysis.

II. THE CHARACTERISTICS OF THE NEW MODEL

As known, the global expansion of constitutional review, particularly after the second world war, has been followed by the proliferation of the models of judicial

[6] See, recently, Italian Constitutional Court, decision no. 1/2014.

[7] R. HIRSCHL, *The Nordic Counternarrative: Democracy, Human Development, and Judicial Review*, in *Int'l. Journ. Const. L. (ICON)*, 2011, 451; F. DURANTI, *Gli ordinamenti costituzionali nordici. Profili di diritto pubblico comparato*, Giappichelli, Torino, 2009, 149.

review, and by their mutual hybridization, so as to induce many scholars to constantly discover new classificatory schemes and new categories, which have not proven to be flexible enough in order to include the newly emerged experiences[8].

This is due to the fact that the topic of constitutional justice proves to be one the most controversial, for the very reason that the increase in role has caused its unusual expansion and transpositions hardly ever a-critical, yet always related to the requirements of the different legal systems.

When faced with such phenomena, the comparative literature has the task of putting in order the experiences of the various legal systems, not only identifying the elements of novelty as they show up but also suggesting more effective methodologies of investigation and classification.

As for the national scholars, they cannot read their own legal systems only through hindsight, but by putting them in classificatory frameworks adequate to the evolution of the subject matter and to the legislative and practice innovations, concerning the changes in the single legal systems and in the concrete models of judicial review[9].

In this perspective, as it has already been remarked in the past, the traditional bipartition of the models of judicial review in the American model and the European/Kelsenian seems to be outdated, due to the process of their progressive and uninterrupted convergence, which has rendered obsolete the traditional bipolarism, making it necessary to identify a new typology which might offer a higher analitical capability of the judicial review systems[10].

Along this line, having ascertained the convergence of the two traditional models, when approaching the study of the judicial review systems, it seems more

[8] L. MEZZETTI, *Introduzione*, in L. MEZZETTI (cur.), *Sistemi e modelli di giustizia costituzionale*, vol. II, Cedam, Padova, 2012, 8.

[9] L. PEGORARO, *Elementi determinanti ed elementi fungibili nella costruzione di modelli di giustizia costituzionale*, in R. BALDUZZI, M. CAVINO, J. LUTHER (cur.), *La Corte costituzionale vent'anni dopo la svolta*, Giappichelli, Torino, 2011, 291.

[10] F. FERNÁNDEZ SEGADO, *La giustizia costituzionale nel XXI secolo. Il progressivo avvicinamento dei sistemi americano ed europeo-kelseniano*, Bonomo, Bologna, 2003, 11. Cfr. anche R. SCARCIGLIA, *La giustizia costituzionale oltre i "modelli storici". Ipotesi di un approccio cognitivo*, in L. ANTONIOLLI, G.A. BENACCHIO, R. TONIATTI (cur.), *Le nuove frontiere della comparazione*, UniTn Press, Trento, 2012, 107.

appropriate to adopt a unitary reference framework, within characterized by the exercise of functions for the protection of the Constitution, whereof the nature and aiming are mainly objective and of functions for the protection of the Constitution, whereof the nature and aiming are mainly subjective.

A rejection of the traditional dichotomy, then, and a reversal in the method of analysis: start not with the United States and Austria, in order to match with them the various experiences (possibly shaping mixed or hybrid classes), but start with the extraordinary variety of the positive law wherefrom to possibly re-construct the classes[11].

Within this framework, it is thus possible to observe an interesting form of evolution, on this topic, featuring the British legal system and legal systems based on Anglo-Saxon matrix, more closely pertaining to this constitutional tradition (e.g.: Australia, Canada and New Zealand): in these it is evidencing a progressive – and relentless – manner to the override of the traditional principle of absolute supremacy of the Parliament, which has for very long inhibited any form of constitutional review of the statutes[12].

The diffusion of the models among the legal systems based on Anglo-Saxon matrix, in fact, determines, along with the enactment of the new Bills of Rights, also the introduction of original interpretative and declaratory tools in favour of the Courts.

A new role – which was precluded in the past – is conferred upon them.

This responsibility entails a deeper control over the legislator, who traditionally stands in a position of unassailable institutional primacy within the legal system, due to the traditional (and for long times unquestioned) principle of British derivation of the *sovereignty of Parliament*[13].

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[11] See also L. PEGORARO, cit., 283.

[12] P. LEYLAND, *The Constitution of the United Kingdom. A Contextual Analysis*, Hart Publishing, Oxford, IInd Ed., 2012; H. P. GLENN, *Legal Traditions of the World. Sustainable Diversity in Law*, OUP, Oxford, IVth Ed., 2010, 450; T. GROPPI, *La genesi della giustizia costituzionale negli ordinamenti di matrice britannica*, in R. ORRÙ, F. BONINI, A. CIAMMARICONI (Eds.), *Le origini della giustizia costituzionale in prospettiva storica: matrici, esperienze, modelli*, ESI, Napoli, 2012, 47.

[13] J. GOLDSWORTY, *Parliamentary Sovereignty. Contemporary Debates*, CUP, Cambridge, 2010; A. L. YOUNG, *Parliamentary Sovereignty and the Human Rights Act*, Hart, Oxford, 2009.

These new tools now available to the Courts are being implemented thanks to specific legal provisions (United Kingdom[14]; Australia[15]), and via judicial practice (New Zealand[16]).

They substantially aim at enabling the Courts, to experiment new interpretation techniques concerning the subject matter of the protection of rights.

And, furthermore, at enabling the Courts to have the power to issue, in case of ascertained antinomy between the Bill of Rights and the parliamentary legislation, specific «declarations of incompatibility»: these, however, do not have the effect to set aside or declare void the provisions conflicting with the rights, but have the purpose to render the Parliament aware of the existence of the aforesaid conflict and, as a consequence, to suggest their repeal through express abrogation (or amendment), which can be carried out only by the Parliament itself.

What ensues is the creation of a new model of constitutional protection of rights and of judicial review, which differs from the traditional ones and develops in original directions – with comparable contexts also in the experiences of several Nordic legal systems – worthy of thorough comparative analysis[17].

Following to the application of the methodological proposal aimed at the selection of the «determinant elements»[18] in order to identify the models of judicial review, the new classification is grounded, thence, on the joint analysis of two distinct features to be held «determinant», that is the mechanisms for the protection of the constitutional rights, which are offered by the legal system and, conversely, how the relationship among the powers of the State – particularly between the legislative and the judiciary – is structured.

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[14] *Human Rights Act 1998*, section 4.

[15] *Australian Capital Territory's Human Rights Act 2004*, section 32; *Victorian Charter of Human Rights and Responsibilities 2006*, section 36.

[16] New Zealand Court of Appeal, *Moonen v. Film and Literature Board of Review* (2000) 2 NZLR 9 (CA).

[17] «Par l'action conjointe des juges et du législateur [...] ces pays sont passés de la souveraineté parlementaire à une nouvelle forme de garantie des droits qui ne copient pas le les modèles des justice constitutionnelle existante»: M. C. PONTHOREAU, *Droit(s) constitutionnel(s) comparé(s)*, Economica, Paris, 2010, 375.

[18] J. L. CONSTANTINESCO, *Einfhürung in die Rechtsvergleichung, Band I: Rechtsvergleichung*, Carl Heymanns-Verlag, Khöln, 1971.

The use of these distinction criteria thus allows to identify three different typologies of constitutional review systems:

a) the *strong-form* (or *judicial supremacy*) model, wherein the protection of the fundamental rights is entrusted to the Courts (ordinary or constitutional), which are empowered to set aside or declare void the statute conflicting with the constitutional rights, consequently conferring to the same Courts the ultimate primacy with regard to the interpretation of the Constitution, which the legislator can possibly override – if deemed unacceptable – only by applying the complex procedure of constitutional amendment;

b) the traditional model of *sovereignty of Parliament* (or *legislative supremacy)*, wherein the protection of the fundamental rights essentially falls within the competence of the Parliament, so that the Courts are not enabled to carry out any control over the constitutional legitimacy of the statutes;

c) the new model, termed *weak-form judicial review*, that is intermediate and is characterized by an *ex-ante* political control concerning the compatibility of statutes with the fundamental rights, followed by an *ex-post* judicial review concerning the conformity of the statutes to these rights.

In the variant of legal systems based on Anglo-Saxon matrix, the Courts are not empowered to set aside or rule invalid any statute conflicting with them; they are only enabled to issue specific «declarations of incompatibility», through which they may warn to the Parliament the existence of the aforesaid conflict. The final decision concerning the possible amendment (or abrogation) of the statute declared incompatible is, thus, only up to the Parliament.

In the Nordic variant, conversely, the Courts, although empowered with the judicial review of legislation, can exercise it only in cases of manifest unconstitutionality or, more often, when it was not possible to exercise the *ex-ante* parliamentary control.

III. The Variant of Legal Systems based on Anglo-Saxon Matrix

In recent years, within the experience of some of the major Commonwealth countries (e.g., Australia, Canada and New Zealand), it is possible to observe an intense constitutional "work-in-progress", which is gradually building a new model of constitutionalism, different from the US and Europe, particularly with regard to the constitutional relations between the legislative and the judiciary.

This model consequently has a deep influence, in this discipline, on the institutional structure of the former mother country[19].

The diffusion of the models among the legal systems based on Anglo-Saxon matrix has developed steadily, in particular, since the end of the last century, whence, beginning with the *Canadian Charter of Rights and Freedoms* laid down in the new Canadian Constitution in 1982, has featured an intense phenomenon of "constitutional migration"[20].

This has favoured the introduction of new and authentic Bill of Rights in the legal systems of New Zealand, United Kingdom and – only at the sub-federal level – Australia[21].

Therefore more effective forms of protection of the fundamental rights can be experimented through these means.

Along with the new Bill of Rights, furthermore Courts are, as aforesaid, now granted new interpretative and declaratory mandates in the domain of fundamental rights, consequently giving rise to the new model of judicial review under scrutiny.

As Gardbaum has finely summarized, in fact, «the new Commonwealth model of constitutionalism consists in the combination of two novel techniques for protecting rights; these are mandatory pre-enactment political rights review and weak-form judicial review. The first technique requires both of the elective branches of government to engage in rights review of a proposed statute before

[19] S. Gardbaum, *The New Commonwealth Model of Constitutionalism*, in *Am. Journ. Comp. Law*, 2001, 707.

[20] S. Choudhry (Ed.), *The Migration of Constitutional Ideas*, CUP, Cambridge, 2006.

[21] S. Stephenson, *Constitutional reengineering: Dialogue's migration from Canada to Australia*, in *Int'l. Journ. Const. L. (ICON)*, 2013, 870.

and during the bill's legislative process. […] The second techniques of rights protection that is constitutive of the new model is weak-form judicial review. It is this technique that decouples judicial review from judicial supremacy, meaning that although courts have powers of constitutional review, they do not necessarily or automatically have final authority on what the law of the land is. This is because one of the defining features of the technique (and so of the new model) is that it grants the legal power – but not the duty – of the final word to the legislature»[22].

In practice, then, the *ex-ante* control of conformity to the rights is conferred to a political authority, that is to the Minister of Justice (in Canada[23]), the Attorney-General (in New Zealand[24] and the two Australian states[25]) or to the Minister alternatively responsible (in the United Kingdom[26]), who has the duty to make a formal preventive statement to the Parliament concerning the specific compatibility of the new legislation with the Bill of Rights, thus resulting in the accomplishment of a higher overall awareness of the Government and the Parliament on the question of respect of fundamental rights[27].

Courts are, instead, empowered to exercise an *ex-post* control on the conformity to the rights in question, that cannot however go so far as – Canada excluded – to set aside the statute conflicting with the provisions of the Bill of Rights.

Although it enables the same Courts to adopt specific «declarations of incompatibility», that do not imply *per se* the invalidity of the statute concerned, as rather having the purpose of "notifying" to the Parliament the existence of the aforesaid conflict[28].

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[22] S. GARDBAUM, *The New Commonwealth Model of Constitutionalism. Theory and Practice*, cit., 26-27.

[23] *Department of Justice Act* 1985, section 4.1.

[24] *New Zealand Bill of Rights Act* 1990, section 7.

[25] *Australian Capital Territory's Human Rights Act 2004*, section 37; *Victorian Charter of Human Rights and Responsibilities 2006*, section 28.

[26] *Human Rights Act 1998*, section 19.

[27] J. HIEBERT, *Constitutional Experimentation: Rethinking How a Bill of Rights Function*, in in T. GINSBURG, R. DIXON (Eds.), *Comparative Constitutional Law*, cit., 298.

[28] R. WEILL, *The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making*, in *Am. Jour. Comp. Law*, 2014, 127.

Consequently it stays with the Parliament alone to decide the possible measures to be adopted. However, practice has so far evidenced a scrupulous respect on the part of the Parliament towards the judicial indications, this almost always resulting in the amendment by the legislator of the provisions declared incompatible by the Courts.

In this sense, the Canadian experience appears to differ in part since, from the patriation of the Constitution onwards, the Courts can, as known, exercise the traditional diffuse control of constitutionality, enabling them to set aside the legal provisions deemed to be in contrast with the Constitution.

However, also the Canadian experience is worth being put on the same level as the other legal systems based on Anglo-Saxon matrix herein analysed, as also within this legal system it is being experienced an original, totally specific, institutional structure in the relationship between the legislative and the judiciary within the domain of the protection of rights, due to a notorious provision of the Charter, better known as «notwithstanding clause» (sect. 33)[29].

Consequently this allows to include also Canada in the framework of the new model of judicial review currently being developed in the legal systems under scrutiny[30].

IV. The Variant of Nordic Legal Systems

On comparative grounds, the legal systems of Nordic countries have likewise featured a progressive evolution in the traditional constitutional principle of the supremacy of the Parliament, that has inhibited the true implementation of any, albeit fledgling, form of judicial review for quite a long time.

[29] J. B. Kelly, M. A. Hennigar, *The Canadian Charter of Rights and the Minister of Justice: Weak-Form Review within a Constitutional Charter of Rights*, in *Int'l. Journ. Const. L. (ICON)*, 2012, 35.

[30] «The strongest of the weak-form mechanisms gives the Courts power to suspend the legal effect of a statute pending a legislative response through ordinary legislation rather than constitutional amendment. Canada's so called 'notwithstanding clause', section 33 of the Charter of Rights, is the primary example of such a mechanism»: M. Tushnet, *The Rise of Weak-Form Judicial Review*, cit., 325.

This led to the consolidation of the present institutional structure, which is experimenting forms – though "cautious" – of diffused constitutional review of the statutes carried out by the Courts.

From this point of view and in line with the scopes of this essay, the constitutional legal systems of Sweden and Finland are a case point.

In these countries, in fact, more than in any others belonging to the same Nordic legal-cultural tradition, it is possible to observe, an interesting dynamic coordination between the *ex-ante* and the *ex-post* constitutional control in the domain of fundamental rights.

In Sweden, the diffuse constitutional review was, as known, introduced only following to the constitutional amendment of 1979, which has empowered the Courts to set aside the statutes conflicting with the Constitution although in the only case of «manifest» contrast (chapter XI, article 14, Const.).

This, however, coexists with an *ex-ante* control of conformity to the Constitution of the statutes under discussion in Parliament, conferred to a specific body (*Lagrådet*, Council on Legislation).

This organ is composed of judges (also retired) from the Supreme Court and Supreme Administrative Court and is called on to give opinions on proposed statutes, when these are requested by the Government or by a Parliamentary Committee.

In the range of possible hypotheses, such pronouncements are always required if the proposed statutes pertain to the domain of fundamental rights (chapter VIII, article 21, Const.).

Constitutional practice has so far evidenced a substantial respect on the part of the Government and Parliament towards the opinions expressed *ex-ante* by the Council on Legislation.

It has likewise evidenced that, when the Council on Legislation has not raised any objections to the constitutionality of statutes, hardly unlikely have the Courts, during the *ex-post* control, set aside the same statutes due to unconstitutionality[31].

[31] T. BULL, *Judges without a Court – Judicial Preview in Sweden*, in T. CAMPBELL, K. D. EWING, A. TOMKINS (Eds.), *The Legal Protection of Human Rights: Sceptical Essays*, OUP, Oxford, 2011, 392.

In Finland, the diffuse constitutional control exercised by the Courts was, instead, totally precluded until 2000[32].

Subsequent to the enforcement of the new Constitution, it has been expressly stipulated that the Courts are empowered to set aside the statutes on grounds of unconstitutionality in the only case of «manifest» contrast with the Constitution (art. 106), as in the case of Sweden.

However, also for this legal system a preeminent role of the *ex-ante* constitutional control is emphasized.

In this instance, the latter is conferred to the Parliamentary Constitutional Law Committee (*Perustuslakivaliokunta*).

Although this is composed of only members of the Parliament, in case of review of constitutionality it is used to hearing the opinion of distinguished constitutional law scholars (e.g., mainly academics/university professors), due to a consolidated constitutional practice.

These opinions are almost always faithfully observed by the Committee in question.

As a consequence – also confirmed by the *travaux préparatoires* of the Constitution – the *ex-post* constitutional review conferred to the Courts cannot, in practice, go as far as to declare any «manifest» conflict with the Constitution, if the Constitutional Law Committee has not *ex-ante* ascertained the existence of the aforesaid conflict[33].

The Swedish and Finnish legal systems confirm, thence, the existence of the new model of judicial review.

In fact, in these experiences it is likewise possible to observe new techniques for the protection of the fundamental rights. These innovative techniques are based on an increased awareness and involvement of the Government and the Parliament.

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[32] J. HUSA, *The Constitution of Finland. A Contextual Analysis*, Hart Publishing, Oxford, 2011.

[33] J. LAVAPURO, T. OJANEN, M. SCHEININ, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, in *Int'l. Journ. Const. L. (ICON)*, 2011, 505; K. TUORI, *Judicial Constitutional Review as a Last Resort*, in T. CAMPBELL, K. D. EWING, A. TOMKINS (Eds.), *The Legal Protection of Human Rights: Sceptical Essays*, cit., 365.

When drafting and subsequently approving the statutes, these are thus supported by the significant role played by the *ex-ante* control, which further determines major effects on the *ex-post* constitutional control exercised by the judiciary.

The Courts show, in fact, a deep deference towards Parliament and thence confine the cases of declaration of unconstitutionality to rare hypothesis, limited to the only instances when the *ex-ante* control has not been exercised[34].

The last Swedish constitutional amendment, in force as of January 2011, in any case deleted the requirement of the «manifest» contrast versus the Constitution for the purpose of the diffuse control conferred to the Courts (chapter XI, article 14, new text): we shall see how it works in the future constitutional practice.

V. CONCLUSION

The most recent developments in constitutionalism and the «migration» of ideas, precedents[35] and institutes in the domain of judicial review, offer, at last, the opportunity for a significant re-consideration of the by now traditional models implemented over time within diverse comparative experiences.

This occurs also in legal systems of consolidated democracy, with institutional structures traditionally considered to be stable.

[34] «The criterion of an evident conflict with the Constitution as a presupposition of the courts' power to set aside a parliamentary law fulfils even other important functions than just establishing the primacy of the ex ante review exercised by the Constitutional Law Committee. Thus, with this criterion explicitly spelled out, the Finnish and Swedish Constitutions have, as it were, positivised the plea for judicial restraint. Related to the general requirement of judicial restraint, the criterion of an evident conflict entails the primacy of interpretive means for avoiding contradictions with the Constitution. Accordingly, the *travaux préparatoires* to the Bill of Rights of the 1995 and the new Constitution of 2000 stressed the courts' obligation to construe statutes consistently with the Constitution. This obligation connects the Finnish model to such examples of the New Commonwealth Model of Constitutionalism, as the New Zealand Bill of Rights and the UK Human Rights Act 1998, which also are premised on the primacy of interpretive tools»: K. TUORI, *Combining abstract* ex ante *and concrete* ex post *review: the Finnish model*, in European Commission for Democracy Through Law (Venice Commission), CDL-JU(2010)-011.

[35] T. GROPPI, M. C. PONTHOREAU (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013.

The legal systems based on Anglo-Saxon matrix and the Nordic ones feature, as a matter of facts, new interesting elements concerning the tools for the protection of the fundamental rights.

In order to avoid what Kelsen had traditionally indicated as the danger of the «transfer of power»[36] – that is the possibility that the constitutional control, by introducing constitutional legal contents not ascribable to the Constitution, might discretionally expand, jeopardizing the prerogatives of the legislator and menacing democracy – in these legal systems new forms of judicial review are being experimented.

They are premised on the attempt to implement a more harmonious correlation between the Courts and the Parliament with regard to the effective protection of the fundamental rights.

This is subsequent to the changeover from an institutional structure, which conferred this guarantee exclusively upon the legislator (in compliance with the classic principle of *sovereignty of Parliament*), to another, whereof the constitutional core idea is to ensure an *ex-ante* control on the compatibility of every proposed statute to the fundamental rights, carried out in Parliament and through bodies in any case referring to the Parliament.

And furthermore to entrust the Courts with the task of ruling over the possible conflicts between the statute and those rights, through the application of new interpretative and declaratory tools.

In the Anglo-Saxon variant of this model, the Courts are only empowered to make formal «declarations of incompatibility», subsequent to the assessment of all the possible interpretations consistent with the rights in question.

These do not have the effect of declare void or setting aside the contrasting statute, but only of warning the Parliament of the existence of this conflict, thus enabling it to amend through legislation.

[36] H. KELSEN, *La garantie juridictionnelle de la Constitution (la justice constitutionnelle)*, Paris, 1928.

The practice so far carried out evidences, altogether, a scrupulous respect on the part of the Parliament towards the aforesaid pronouncements: the Parliament has consequently amended through legislation the inconsistent provisions.

In the Nordic variant, conversely, the Courts – although empowered with the diffuse constitutional control – can set aside the unconstitutional provision in the only cases of manifest contrast with the Constitution.

It is thus stipulated in the Constitution the judicial restraint in the domain of judicial review, since the disapplication of statutes is limited to very few hypotheses and, in any case, when it was not possible to exercise the *ex-ante* control.

The new model discussed here has, therefore, the merit of implementing an innovative and original model concerning the relationship between the legislative and the judiciary in the domain of constitutional review[37].

It thus ensures a balance of powers and an effective protection of the constitutional rights, as such resulting from the institutional cooperation – otherwise defined as "dialogue"[38] – between the Parliament and the Courts, aimed at preventing the institutional predominance of one power over the other (*judicial supremacy* vs. *legislative supremacy*).

As a consequence «its mechanism for reducing the tension between parliamentary supremacy and constitutional limitations on that supremacy provides the ground for serious reflection on fundamental features of constitutional design in modern democracies»[39].

[37] R. HIRSCHL, *How Consequential is the Commonwealth Constitutional Model?*, in *Int'l. Journ. Const. L. (ICON)*, 2013, 1092.

[38] P. HOGG, A. BUSHELL, *The Charter Dialogue Between Court and Legislatures (Or Perhaps The Charter of Rights Isn't Such A Bad Thing After All*), in *Osgoode Hall L. Jour.*, 1997, 75.

[39] M. TUSHNET, *The Rise of Weak-Form Judicial Review*, cit., 331.

LAW, BEAUTY AND WRINKLES. FIRM POINTS AND OPEN ISSUES AFTER THE EU COSMETICS REGULATION

VINCENZO ZENO ZENCOVICH[1]

The full entry into force in July 2013 of Regulation 2009/1223 on cosmetic products (henceforth Cosmetics Regulation, CR) brings with it a host of problems only partly solved by the said Regulation which opens – or leaves open – a series of issues deserving the attention of legal scholars.
This paper intends to examine the following topics: 1. The Regulation as basis of a comprehensive regulation of the cosmetics sector; 2. Standardization of products and selection of market players; 3. Distribution and competition; 4. Animal testing between bio-ethics and trade barriers; 5. New models of products liability; 6. Consumers and cosmetics: pre-sale and post-sale protection.

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I. THE REGULATION AS BASIS OF A COMPREHENSIVE REGULATION OF THE COSMETICS SECTOR

A few data are necessary: in 2011 the cosmetic industry in Europe was worth over 70 billion Euros. It employed directly around 150.000 persons, to whom one should add the many hundreds of thousands engaged in the distribution and sales

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process. Germany and France have the largest national industries, each producing goods worth approximately 15 billion Euros (although France exports 4.4 billion compared to Germany's 2.4 billion). Italy and the UK also have a large share, ranging between 10.5 and 11 billion Euros. Among the top five operators in the world, two are European (L'Oreal, no. 1 and Unilever, no.3); two are from the US (Procter & Gamble, no.2 and Estée Lauder, no.4) and one is Japanese (Shisheido). The presence of extremely big companies, however, does not seem to influence the number of SMEs: 700 in both France and Italy, 300 in Germany. Per capita spending in the EU is around € 90 (but in Germany, France, Italy, the UK and Spain it is over € 150)[2].

We are therefore facing a strong and dynamic sector which has a vast basis in household goods (soaps, toothpastes, bath foams, generally qualifying as toiletries) but presents itself mostly as a luxury good, where image, branding, packaging and marketing are perceived as essential. The cosmetic industry sells something that is entirely non-material and subjective: beauty and, especially in the case of perfumes, seduction.

The CR is not a novelty. Actually, it is the consolidated version of a very long history of regulation which started way back in the mid-seventies with Directive 76/768, and has grown incrementally to the point –clearly marked by policy decisions – of being turned into a Regulation, and therefore a harmonized system of binding rules for all member States[3].

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[2] The data is drawn from the following sources: Statista. The Statistics Portal available at http://www.statista.com/statistics/271773/per-capita-expenditure-on-cosmetic-products/ ; Cosmetic Industry Statistics in Europe, available at http://www.reportlinker.com/d014793271/Cosmetic-Industry-Statistics-in-Europe.html; Global Insight, A Study of the European Cosmetics Industry (prepared of the European Commission), available at http://edz.bib.uni-mannheim.de/daten/edz-h/gdb/07/study_eu_cosmetics_industry.pdf ; For data on the Italian market see the data provided by Ermeneia (Ed.), *Beauty Report 2013. Quarto Rapporto sul valore dell'industria cosmetica in Italia*, F. ANGELI, 2013.

[3] Preamble 4: "This Regulation comprehensively harmonises the rules in the Community in order to achieve an internal market for cosmetic products while ensuring a high level of protection of human health." See the paper presented at the Rome Conference "Il diritto dei cosmetici: Regolazione, responsabilità, bio-etica" (Jan.28, 2014) by G. BENACCHIO**,** *Il diritto europeo dei cosmetici: dall'armonizzazione all'uniformazione delle regole.*

This transformation has been relatively smooth, without the usual complex and sometimes noisy confrontation between the Commission and industry with trade unions and consumers playing their part and other vocal stakeholders taking sides, that characterizes the development of regulation in other sectors. Regulation in the cosmetics sector has been mostly industry-driven and although obvious concessions have had to be made, compliance can be expected to be high, inasmuch as the rules reflect what is generally common practice among operators. This policy assessment clearly is not without consequences on the interpretation of the picture which emerges from Regulation 1223 and its connections with the rest of the legal system.

A further preliminary remark is necessary. When analysing the CR one is struck by the lack of academic writings on the topic. What can be found are general descriptions of its content and some articles related to its impact in this or that member state[4]. The most commonly considered topic is selective distribution, a competition issue that was born in the cosmetics sector. One could assume that cosmetics do not deserve scholarly attention. Notwithstanding the importance of the descriptive approach, this article will endeavour to highlight a number of issues

[4] In the classical POUCHER's *Perfumes, Cosmetics and Soaps* (10th Ed., H. Butler Ed.) (Kluwer 2000) there is a chapter of about 40 pages (pp. 625-645) by P. D. WILKES, *Legislation and safety regulations for cosmetics in the United States, the European Union and Japan*. Its content is mostly descriptive, and is directed to a public of industry professionals. In France, which one would imagine to be more sensitive to the issue, the only handbook on the topic, C. ROQUILLY, *Le droit des produits cosmétiques*, Economica, dates back to 1991. More recently, a brief outlook by V. DEPADT-SEBAG, *Le droit et la beauté* (Ière et IIème parties), *Petites Affiches* 2000, nn. 95 and 96. In Italy, previously the only general articles to be found on the topic were by M. V. DE GIORGI, *Produzione dei cosmetici e tutela della salute*, in *Giurisprudenza commerciale* 1978, 839; and by G. PONZANELLI, *Appunti civilistici in merito alla l. 11 ottobre 1986, n. 713, sulla produzione e la vendita dei cosmetici*, in *Le nuove leggi civili commentate* 1987, 79. Only very recently see M. C. PAGLIETTI, *Cosmetics law e tutela del consumatore. La disciplina dei cosmetici tra persona e mercato, soluzioni contrattuali e aquiliane*, in 3 *Quaderni di Diritto, Mercato, Tecnologia* (2012), [available on-line athttp://www.dimt.it/wp-content/uploads/2013/12/MariCecilia-Paglietti-Anno-III-%E2%80%93-Numero-1-%E2%80%93-Novembre-2012Marzo-2013-trascinato.pdf] where there are ample citations of both EU case law and literature from various legal systems.

that appear to deserve more attention, especially for their impact on the rest of the regulatory system.

In fact the CR draws a fairly complete outline of the rules which govern the sector[5]: 71 preambles, 40 articles and 10 annexes may not necessarily be considered very ample (in the food sector regulations can be much longer). What is important is that it is quite a comprehensive text and although there are obvious cross-references to other pieces of EU legislation, a civil law *aficionado* might easily rename the CR the Cosmetics Code[6].

One should compare the CR to similar regulatory frameworks. The first thing one notes is that the definition is relatively loose:

«"Cosmetic product" means any substance or mixture intended to be placed in contact with the *external parts* of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to *cleaning* them, *perfuming* them, *changing their appearance*, *protecting* them, keeping them in *good condition* or *correcting body odours*». [italics added][7]

This functional definition obviously leaves a certain degree of uncertainty as to where the boundary lies between cosmetics and other products, typically pharmaceutical products or hybrid products which may have similar functions but are of internal use[8].

However it is worth pointing out that it is up to the producer what sector he wishes to operate in and therefore whether his product falls within the CR. Once this choice has been made the rest of the regulations ensue. There may be areas of uncertainty, but they appear to be marginal, especially if one considers that the

[5] See the paper presented at the Rome Conference "Il diritto dei cosmetici: Regolazione, responsabilità, bio-etica" (Jan.28, 2014) by S. AMOROSINO**,** *La disciplina dei cosmetici: un caso di studio per il diritto dell'economia.*

[6] One should note, however, that the CR does not set out penalties, but simply states (as most EU legislation), that they "should be effective, proportionate and dissuasive" (Preamble 66).

[7] Preamble 7 contains an even longer list.

[8] Preamble 6: "This Regulation relates only to cosmetic products and not to medicinal products, medical devices or biocidal products. The delimitation follows in particular from the detailed definition of cosmetic products, which refers both to their areas of application and to the purposes of their use."

companies in the cosmetics sector often operate, though parent companies, in neighbouring sectors, and presumably make their decisions well before putting the product on the factory line.

The system therefore is built around prior industrial decisions – does one want to produce a cosmetic or some other product? – following which the whole CR applies (or does not apply).

Presumably the blurred border is between cosmetics and on the one side, health foods and beverages (which are of internal use and therefore do not fall within the definition) and on the other side, over-the-counter pharmaceuticals whose main functions are curative and are usually advertised[9]. Again one should compare this objective regulation, which depends on the nature of the product and determines the whole structure of the enterprise and its productive system, with other forms of sectorial regulation such as financial markets, electronic communications and transport, where the starting point is subjective: a firm requires an authorization or a licence; from that qualification stems the nature of the services it can render, and how it should render them.

One generally considers the financial markets, etc. as regulated markets but if one wants to avoid indulging in nominalism, one can quite properly state that the market for cosmetics also falls within the notion. This should be considered especially when tackling competition issues: the market, and the field where firms compete has, by and large, been drawn by regulatory decisions.

II. STANDARDIZATION OF PRODUCTS AND SELECTION OF MARKET PLAYERS

The last comment suggests a reading of the CR for its competitive (pro, or anti) effects. Theoretically the production of cosmetics is an open market, where any new business may enter. Market concentration is not so high as to favour

[9] See, for an attempt to distinguish the two in French law ROQUILLY, cited at fn 2, p. 154 ff. (concluding that the law is uncertain).

exclusionary practices. There are certainly some large enterprises that compete among themselves and through subsidiaries and parent companies they also compete in other fields but at the same time there are hundreds of SMEs. Undoubtedly, the CR introduces a regulatory barrier to entry into the market: conformity to CR prescriptions has a standardizing effect which restricts innovation – one of the key elements, and goals, of competition[10]. This standardization clearly has strong policy reasons (consumer health and safety concerns; animal bio-ethics). But this means that competition moves from the product to its marketing and advertising practices, where moneys will have to be spent, and which represent – when extremely high in proportion to the cost – a typical entry barrier. This does not mean to advocate lowering standards of quality and safety and circumventing the provision of article 169 TFUE, which requires a "high level of consumer protection"[11], in order to ensure a more competitive market; rather to point out that –at least in the EU – there is always a mix of interests between competition and regulation, which from a legal-realistic point of view are used quite indifferently and in varying quantities, with the intent of reaching public goals.

This is a further element to be considered when applying competition principles to this market.

One should also consider the important regulatory role of the Scientific Committee for Consumer Safety (SCCS), especially in the fast-developing field of nano-materials[12] which requires a great amount of research and will in the near future make the difference between the European industries and those of other

[10] The complex French regulation before the CR (but compliant with the previous EC legislation) is presented by ROQUILLY, cited at fn. 2, p. 16 ff.

[11] According to Preamble 9 "a risk-benefit reasoning should not justify a risk to human health".

[12] Although there are some doubts about what exactly is meant by "nano-materials": "it is necessary to develop a uniform definition for nano-materials at international level" (Preamble 29). And article 2, para. 3, is even more explicit: "In view of the various definitions of nano-materials published by different bodies and the constant technical and scientific developments in the field of nanotechnologies, the Commission shall adjust and adapt point (k) of paragraph 1 to technical and scientific progress and to definitions subsequently agreed at international level." For an example of these differences see J. MOORE, *New Zealand's Regulation of Cosmetic Products Containing Nano-materials*, 9 *Bioethical Enquiry* 185 (2012).

regions (typically the US). The CR expressly states that the use of nano-materials (as well as of other materials) should be governed by the principle of precaution[13]. The notion is widely challenged for its fuzzy theoretical grounds and in its practical applications[14]. It appears to be an inescapable levy in favour of vocal anti-scientific movements. At any rate, the provisions substantially equate those industries most subject to the precaution principle: pharmaceuticals, cosmetics and food. However, one can detect the reason behind this apparently stringent regulation – vividly represented by the 1328 forbidden substances listed in Annex II, and the 256 partially forbidden substances listed in Annex III[15] – which primarily standardizes production in the EU; it creates a protective barrier against external competition that does not comply with the same standards. And this is strengthened by the protection of intellectual property rights, both trademarks and patents[16]. The issue deserves to be analysed – but not in this limited article – from the perspective of global trade and the possibility for European cosmetic companies to conquer new market shares without giving up their share at home and being challenged under WTO rules[17].

III. DISTRIBUTION AND COMPETITION

[13] See article 16 CR

[14] The obvious reference is to C. R. SUNSTEIN, *Laws of Fear: Beyond the Precautionary Principle*, Cambridge U.P., 2005 (especially Ch. 3).

[15] See, already before the CR A. REINHART, *Process of Harmonisation of the Laws relating to Cosmetic Products Goes On – Positive List of Hair Dye Substances*, in *Eur. Food & Feed L. Rev.* 362 (2006)

[16] Preamble 15: "The European cosmetics sector is one of the industrial activities affected by counterfeiting, which may increase risks to human health. … In-market controls represent a powerful means of identifying products that do not comply with the requirements of this Regulation." On the protection of trademarks in the cosmetics sector see G. GUGLIELMETTI, *Cosmetici e marchio ingannevole*, in *Rivista diritto industriale* 1988, I, 424; and Roquilly, cit. at fn. 2, p. 55 ff. On the patentability of perfumes see the classical work by J. P. PAMOUKDJIAN, *Le droit du parfum,* LGDJ 1982; and of cosmetics ROQUILLY, cit. at fn. 2, p. 41 ff. The ECJ in the *l'Oréal, Lancôme, Garnier v. eBay* case (C-324/09) decided in 2011 has protected the cosmetic producers against the on-line auction site on the basis of trademark law.

[17] It is interesting to note that the ASEAN Cosmetic Directive at its Article 4 states that "Member States shall adopt the Cosmetic Ingredient Listings of the EU Cosmetic Directive 76/768/EEC including the latest amendments". It is not yet clear if this provision will now refer to the 2009 CR. The ASEAN Directive is part of the *Globalization of Cosmetic Regulations* (J. WINTER BLASCHKE, in 60 *Food Drug L. Rev*. 413 (2005).

From a commercial point of view one of the reasons for the success of the cosmetic industry in Europe has been the special distribution rules which it has been able to obtain as an exception to general competition principles clearly set out in (now) articles 101 and 102 TFEU.

The main reason behind the "selective distribution" (a legal euphemism for refusal to sell) in the *Givenchy*[18]and *Yves Saint-Laurent*[19] cases decided by the ECJ was that the cosmetic industry was engaged in selling "luxury goods" requiring specialized channels of distribution that would not dilute the aura surrounding those products. Surprisingly (or maybe not) the CR does not mention, even in its lengthy preambles, the word "competition", and more specifically does not intervene directly in the distribution process[20].

However this silence – which appears to apply the Latin maxim *quieta non movere* (*i.e.* leave things, and case law, how they are) – suggests a more complex scenario. In the CR the distributor of the product is given the unprecedented role of controller and guarantor. In particular the distributor must ensure that all safety regulations have been complied with, and must act appropriately even if it has (only) "reason to believe" that conformity is lacking.

Considering the structure of the market and the fact that distributors are in the front line in deciding strategies to penetrate or strengthen a position in the market, one can imagine that this increased responsibility is a trade-off for maintaining competition exceptions in line with the selective distribution procedure.

The CR expressly establishes that the distributor "covers" both wholesalers and retailers[21]. It is therefore understandable that it must be able(through contract) to choose and control them[22]This would be extremely difficult to do if it were

[18] See Case No IV/33.542 *Parfum Givenchy*; subsequently see the *Kruidvat BVBA* case (C-70/97 P), in which the Commission was sided by Givenchy.

[19] Case T-19/92 *Leclerc* v *Commission*

[20] See the paper presented at the Rome Conference "Il diritto dei cosmetici: Regolazione, responsabilità, bio-etica" (Jan.28, 2014) by C. CAMARDI, *La distribuzione "vigilata" dei cosmetici nel mercato unico. Aspetti contrattuali.*

[21] Preamble 14

[22] see ROQUILLY, cited at fn. 2, p. 113 ff. (distribution in perfume stores) and p. 153 ff. (distribution in pharmacies).

compelled to sell to any wholesaler, especially bearing in mind the role that e-commerce plays in the field of cosmetics and the difficulty of guaranteeing compliance by much bigger business entities, often established in non-EU countries[23].

From a marketing point of view, producers have made of their websites a powerful tool to increase not only sales but also brand recognition[24]. One could object that this prevents consumers from buying – on-line – from the same vendor different products by different producers, somehow promoting tying contracts. But the reply could be that consumers can freely choose among a variety of producers who sell on-line, and if they do not want to bear extra delivery costs they can easily and freely choose at their nearest retailer. Once again one is confronted with the possible incompatibility of "pure" competition rules in a highly regulated market.

IV. ANIMAL TESTING BETWEEN BIO-ETHICS AND TRADE BARRIERS

An important part of the CR[25] is devoted to (the prohibition of) animal testing and indicates a preference for alternative methods of testing.

The normative *portmanteau* is the Protocol on protection and welfare of animals annexed to the Amsterdam Treaty in 1997, in which animals are qualified as "sentient beings"[26]. If one reads the few lines of the Protocol one easily detects considerable compromise in the wording: member States are to "*pay full regard to the*

[23] The producers do not appear to be altogether satisfied by the ECJ *Pierre Fabre* decision (case C-439/09). See CH. VILMART, *Les nouveaux risques pour la distribution sélective des produits cosmétiques*, 2011 *Semaine Juridique*, *E/A*, n. 3, 1028; Eadem, *Distribution sélective des produits cosmétiques Pierre Fabre et Internet. La CJUE fait une réponse tautologique*, in 2011 *Semaine Juridique*, *E/A*, n. 47, 1833; M. MALAURIE-VIGNAL, *L'interdiction de la revente en ligne de produits dermo-cosmétiques ne peut être contractuellement stipulée*, 2013 *Contrats, Concurrence, Consommation*, n. 4, comm.76.

[24] see the doubts expressed by ROQUILLY, cited at fn. 2, p. 247 ff. on the possibility of extending the rules for luxury cosmetics to toiletry

[25] Article 18.

[26] See the paper presented at the Rome Conference "Il diritto dei cosmetici: Regolazione, responsabilità, bio-etica" (Jan.28, 2014) by F. RESCIGNO*, Esseri animali: res o soggetti. L'animal testing quale possibile ostacolo verso la soggettività animale*.

welfare requirements of animals, while respecting the legislative or administrative provisions and customs of Member States relating in particular to religious rites, cultural traditions and regional heritage". The same words have been inserted into article 13 of the 2007 Lisbon Treaty.

The CR's position against animal testing is a significant departure from the 2010/63 Directive on the protection of animals used for scientific purposes, which instead allows, albeit with significant limits and procedures, animal testing, especially in the pharmaceutical sector.

The result is surely a success for the animal-care pressure groups. There are however some unanswered questions.

In the first place, one could ask whether human testing might become the alternative to animal testing. In the second place, alternative methods of testing might incur considerably increased costs in the production process, which would then be passed on to consumers. Thirdly, if cosmetics must abide by the precaution principle this would suggest extensive testing in order to ensure their complete safety. Finally one should consider that the prohibition might encourage marketing solutions that in some cases would bring the product under a pharmaceutical label: a cosmetic developed through animal testing is qualified as a drug, stressing its curative, rather than aesthetic, function.

This does not in any way imply that animal testing should be re-introduced for cosmetic products, but it does point out some issues that do not appear to receive sufficient attention in the preambles of the CR and its *travaux préparatoires*.

However the ban on animal testing has considerable market implications. On the one side it has a protectionist effect, inasmuch as foreign products – and we have seen that three of the top-five cosmetic and toiletry producers are non-European – would not be allowed to enter the EU if they had been tested on animals. But on the other side the CR already anticipates that animal testing might become a dangerous tool in international commerce, especially if other countries (the obvious reference would be to the FDA procedures in the USA) were to deny

marketability precisely because European cosmetic products had not been sufficiently tested[27].

V. NEW MODELS OF PRODUCTS LIABILITY

The CR does not apparently contain specific provisions concerning liability for cosmetics that may have damaged health or property. It would therefore seem that the legal regime in these cases should be that set by the earliest, and best-studied, EU consumer legislation, Directive 85/374 on liability for defective products. The systematic interpretation being suggested in this article is that the CR widely supersedes the defective products directive and establishes, as *lex specialis*, a different, and more stringent, regime of liability[28].

In the first place there is a significant increase in the number of persons or entities that may be held liable. The CR imposes the designation of a "responsible person" burdened with a number of obligations, the violation of which one can reasonably expect (at least in continental legal systems) to be a source of liability[29].

One must include, always from a subjective point of view, the role played by the distributor, who must ensure, together with the obligations already imposed on the responsible persons, conformity of labelling, expiry data and relevant information, and safe storage and transport conditions[30]. Both responsible persons and distributor must also provide, if requested, all necessary information

[27] See Preamble 45: "The Commission should also endeavour, within the framework of European Community cooperation agreements, to obtain recognition of the results of safety tests carried out in the Community using alternative methods so as to ensure that the export of cosmetic products for which such methods have been used is not hindered and to prevent or avoid third countries requiring the repetition of such tests using animals."

[28] See the papers presented at the Rome Conference "Il diritto dei cosmetici: Regolazione, responsabilità, bio-etica" (Jan.28, 2014) by S. WHITTAKER, *Product liability, 'putting the product into circulation' and corporate structure*; and by F. CAFAGGI, *"Supply chains" e distribuzione della responsabilità nel regolamento 1223/2009*.

[29] See article 5 of the CR.

[30] See article 6 of the CR.

concerning the supply chain[31]. They are also compelled to notify any serious undesirable effects and take appropriate measures to prevent them from repeating themselves.

From an objective point of view, considering that the general principle of precaution and the listing of thousands of prohibited, or partially prohibited, substances in the various Annexes to the CR are meant to protect the health of consumers, one can reasonably suppose that non-compliance with that principle and the use or misuse of listed substances is, *prima facie*, in continental legal systems, ground for liability, putting the burden of the proof on the producer, the responsible person, the distributor.

One can therefore expect that, in case of damage to consumers, the CR will be invoked as *lex specialis* in respect of the *lex generalis* represented by the defective products directive. This poses a further question, *de iure condendo*. Is Directive 85/374 still adequate nearly 30 years after its enactment? When it was passed it was clearly a ground-breaking piece of legislation but now, after dozens of directives and regulations in the field of consumer protection and scores of decisions by the ECJ, it appears at best a rusty tool, no longer in line with the goal set by article 169 of the TFEU ("a high level of consumer protection"). The contrast appears to be not only in comparing directive 85/374 with subsequent legislation and case-law in the field of extra-contractual obligations, but also in relation to the quasi-strict liability regime one finds in most consumer contract directives and regulations.

Clearly the CR is a sectorial regulation, but if one starts adding the various "exceptions" (financial markets, pharmaceutical products, transport, electronic communications) one can detect a trend which ends up by swallowing the rule.

VI. CONSUMERS AND COSMETICS: PRE-SALE AND POST-SALE PROTECTION.

[31] Article 7 sets a 3 years period of traceability. The rule is set not only for safety reasons, but also for economic reasons: "Ensuring traceability of a cosmetic product throughout the whole supply chain helps to make market surveillance simpler and more efficient" (Preamble 12).

Another aspect not present in the CR that is equally important is the relevance of the general regulation of consumer contracts.

While it is rare for serious accidents to occur that impair the health of the user and for which the extra-contractual liability will apply, the most common case will be consumers who, dissatisfied with a product, invoke a misleading advertisement or information concerning that product and therefore, its non-conformity.

This aspect is relevant especially if one considers that many cosmetics are advertised promising certain results (white teeth, slimmer body, elimination or reduction of wrinkles, etc.).

This specific feature of cosmetics marketing should be read in the context of Directive 1999/44 (the consumer sales directive). In particular article 2, para. 2, letter d) states that conformity should be established "taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling".

Therefore, quite independently of eventual (and unlikely) express guarantees (disciplined by article 6 of the Directive) the line followed is that which was opened by the package tours Directive (1999/314), in which advertising statements in favour of the consumer prevail over the written contract.

Considering that the sale of cosmetics is a typical over-the-counter transaction, and imagining that the leaflets which accompany the product will be fraught with warnings, the problem will be the interpretation of the possible contrast between advertising statements and information contained in the leaflet.

However one should take into account that advertising (and packaging) come before the purchase and are meant to promote it. Only after the sale can the consumer actually read the leaflet. It would therefore appear reasonable for the producer to be bound by his public statement, while the instructions and warnings contained in the leaflet should be relied upon in the case of misuse of the products, but surely not to render illusory the results promised in the advertisements. Other

relevant information, e.g. on maximum durability after the product has been opened, is also generally contained on the leaflet or on the label.

From this point of view one can see the other aspect of public statements in as much as they violate the preeminent public interest to fair dealings. As a matter of fact it appears more likely that the protection of consumers will be borne by the unfair commercial practices Directive (2005/29) and the misleading advertising Directive (1984/450) and by the heavy fines which have been introduced. One notices here a typical issue of consumer contracts when their economic value is relatively low. It is extremely difficult for the consumer to prove significant damages arising from the ineffective cosmetic product, and therefore it is reasonable to expect that his/her only claim will be for the cost of the product. But if the reimbursement is not spontaneous, it is unlikely that the consumer will engage in expensive and time-consuming litigation. And even the eventual ADR procedures do not appear to be particularly appealing from a cost/benefit analysis.

VII. CONCLUSIVE REMARKS

For lawyers the most interesting aspect of the CR is seeing how an existing, developed and highly sophisticated market can be defined and governed through regulation.

On the longitudinal axis the CR sets the boundaries of the market by providing a definition of what is meant by "cosmetic product". This allows us, to a certain extent, to distinguish the cosmetics market from that of other products, typically pharmaceuticals and food & beverages.

This area is relevant for regulatory purposes, although it is reasonable to consider that it may (and will) be subdivided for competition purposes on the basis of the traditional criteria of substitutability and interchangeability. However the fact that cosmetics fall under a specific regulation makes it unlikely that any will be included in a relevant market with non-cosmetic products.

On the vertical axis we can observe that the regulated market includes a variety of enterprises, from producers to importers, to distributors, to wholesalers, to retailers and, obviously, consumers. Some advocates of animal rights might even

include animals, in as much as they are entitled to be excluded from experimentation and testing.

This vertical perspective – typical of all EU sectorial regulations – establishes a legal relationship between the various actors in the market, setting out their respective duties and creating a framework within which private law governance may operate, mostly through very detailed and complex contracts .From this point of view the CR enhances the increasing hybridization of public law constraints and private law autonomy.

It also defines the legal status of each actor, giving certainty to where they stand vis-à-vis public authorities. Although the CR does not introduce independent regulatory agencies, the role of the SCCS and of its decisions will inevitably increase, so the role of the Commission will become central because it must receive all the relevant information concerning the product before it is placed on the market

What should be considered – mostly for imported cosmetic products – is the phenomenon of "member State shopping" in order to take advantage of the principles of free movement of goods and of mutual recognition.

Finally, the formalization of the cosmetics market and of its actors allows a more precise and effective application of the extensive EU consumer legislation. Inasmuch as the European cosmetics industry appears to be quite united in its aims one can expect that increased exposure to consumer expectations will encourage the formation of best practices in order to avoid or solve controversies with consumers.

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These notes are meant to provide a general overview of a topic which is acquiring, through the CR, increasing legal importance; their intention is to promote a wider and more profound analysis able to clarify the many aspects that have not – for reasons of conciseness – been examined here.

FUNCTIONALISM, CO-OPERATION, GOOD FAITH, AND THE MAKING OF THE "DAILY-PREVENTIVE JUSTICE" IN CONTRACT LAW THEORY AND PRACTICE.

– A CONTRIBUTION TO A RATIONAL UNDERSTANDING OF GOOD FAITH AND TO ITS FUTURE REASONABLE DEVELOPMENTS. EVALUATIONS FROM THE SOUTH AFRICAN PERSPECTIVE –

LUCA SILIQUINI CINELLI[1]

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"Justice delayed is justice denied"
William E. Gladstone
[addressing Parliament as Queen Victoria's Prime Minister, 1868]

"Legal reasoning is an exercise in constrictive interpretation,
that our law consists in the best justification of our legal practices as a whole,
that it consists in the narrative story that makes of these practices the best they can be."
Ronald Dworkin

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[Law's Empire, 1998, VII]

I. INTRODUCTION

The thoughts and observations contained in this paper were first presented in a preliminary form at the *Staff Seminar* that I gave at the University of Cape Town (UCT) - Department of Private Law, on Tuesday May 8 2012. The organizers generously offered me a free choice of subject. Such an offer always poses a problem to imaginative people like myself. I finally chose as my subject the role of good faith in contract law theory and practice and then entitled the *Seminar* "*Good Faith & Contracts - Brothers in Arms*".

The aim of the talk was to briefly describe what I see behind the doctrine of good faith (and, more broadly, behind the general course of the parties' behavior before and after the conclusion of an agreement), to then explain the need of its protection and future reasonable developments by challenging the limitations of both traditional and current legal approaches to contract law theory and practice. By adopting a comparative *modus investigandi*, it emerged that especially in the area of contract law a new law-finding process is emerging in the European continent and it is leading to re-conceive the meta-national legislative interventions by challenging the limits of Hobbes's Leviathan.[2]

[2] I refer particularly to the *Principles of European Contract Law* (PECL), the *Draft Common Frame of Reference* (DCFR), and the *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions. A Common European Sales Law to Facilitate Cross-border Transaction in the Single Market* (CESL). Cf., respectively, O. LANDO – H. BEALE (Eds.). *Principles of European Contract Law*, *Parts I and II*. The Hague: Kluwer Law International, 2000; O. LANDO – E. CLIVE – A. PRÜM – R. ZIMMERMANN (Eds.). *Principles of European Contract Law*, *Part III*. The Hague: Kluwer Law International, 2003; C. VON BAR – E. CLIVE – H. SCHULTE-NÖLKE, et al. (Eds.). *Principles, Definition and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR*), *Outline Edition*. Munich: Sellier, 2009. Also, see J. W. RUTGERS, *The DCFR, Public Policy, Mandatory Rules, and the Welfare State*, in A. SOMMA (Ed.). *The Politics of the Draft Common Frame of Reference*, Alphen aan den Rijn: Kluwer Law International, 2009: 123-128. Regarding the possible creation of a DCFR for Public law, see J. H. Jans, "Towards a Draft Common Frame of Reference for Public Law?", in L. W. GORMLEY – N. Nic Shuibhne (Eds.). *From Singe Market to Economic Union. Essays in Memory of John A Usher*, Oxford: Oxford Univ. Press, 2012: 356-374. COM (2011) 636 final. Also, cf. *Single Market Act II. Together for New Growth,* COM (2012) 573 final.

As asserted, we ought to not take this process for granted because although there are many forms of social organization, contract is the most pervasive and the law of contract still is the most important vehicle to support and supplement private arrangements. However, the point of departure for theorizing about private law is based on experience. Consequently, despite the growing emphasis on the convergence of national legal systems in Europe, conducting research on private law theory and practice requires that imagination and creativity be matched with prudence. Proficiency has to be aligned with what we have learned from history.

The choice of the topic warrants further comment. As will be discussed, the principle of good faith does not play an exact role in South African law. More precisely, even though it has played a crucial role in the development of the Roman law in South Africa, nowadays it has an uncertain role and there is an absence of legislation –except for what concerns the field of labor law– that generally requires adherence to it or to any other similar norm. This is why today it is generally argued that in South African law good faith is just an underlying principle or (according to some legal scholar) an abstract concept and not a rule of law. It cannot be applied by a court as the basis on which to set a contract aside or to refuse its full performance.

As it was for the Seminar, this paper calls for a "hard" approach to good faith as a rule of law and not as an underlying principle. In order to justify the above aim and properly discuss the real essence of a contract, different disciplines and approaches will be used. In particular, the analysis will develop through three different fields: (i) the nature of contract; (ii) the morality of contract; (iii) economics & contract (Microeconomics & Economic Efficiency Theory). In addition, Philosophy of Law and Ontology will both play a pivotal role. The suggested roadmap will also be pursued to explain how to feasibly promote, what during the Seminar, I defined as the "socially efficient formulae of normative thinking".

Finally, a general clarification has to be made. The different approaches I used in my contribution to explain my point of view are linked to the usual view of every legal scholar, that is: one understands law through its purposes –a notion that we

may call functionalism, and that is well entrenched in American legal scholarship from the jurisprudence of Oliver Wendell Holmes Jr. to the realist revolt against Christopher Columbus Langdell's suggestions about the role of public policy and social interests. The functional approach to private Law has an understandable appeal, because, by following directly from the seemingly axiomatic proposition that "the object of law is to serve human needs", it specifies aspects of human welfare that should be promoted.

II. THE SOUTH AFRICAN LANDSCAPE

Whilst conducting my doctoral studies I described that the rule connected to the favored "reliance theory" in South African law flows directly from the principle of good faith which has been significant in the development of the Roman law in South Africa.[3] Yet the "good faith galaxy" has an uncertain role in South African law of contract and there is an absence of legislation that generally requires adherence to it or to any other similar norm.[4]

Although the Supreme Court of Appeal has stated that the South African legal system is an equitable one and that contracts are *iudicia bonae fidei*, it has also denied that the *exceptio doli generalis* had ever formed a part of modern South African law,[5] and then opted for an indirect application of good faith, as an abstract principle inextricably linked to the role of public policy.[6] This is why today it is generally asserted that in South African law good faith is an abstract concept and

[3] L. SILIQUINI CINELLI, "Beyond National Paradigms for Understanding Law. The Role of the South African Contract Law in the Europeanization of Contract Law: The Case of the Formation of Contract", *The Cardozo Electronic Law Bulletin,* (2012): Vol. 18.1, Spring Summer Issue, 1-72.

[4] Subject to the exception as provided for in the field of Labour law. *Sasfin (Pty) Ltd v. Beukes* 1989 (1) SA 1 (A).

[5] *Bank of Lisbon & South Africa Ltd v. De Ornelas* 1988 (3) SA 580 (A). The doctrine of *laesio enormis* has been abolished in 1952 by statute.

[6] *Eerste Nasionale Bank van Suidelike Africa Bpk v. Saayman* 1997 (4) SA 302 (HHA). Cf. also *Sasfin (Pty) Ltd v. Beukes* 1989 (1) SA 1 (A).

not a rule of law and hence it cannot be applied by a court as the basis on which to set a contract aside or to refuse its full performance.[7]

It is similarly improbable that South African courts will recognize or develop a precise duty *in contrahendo* to negotiate or to continue negotiating in good faith because the main principle that is applied is simply that the agreement must not offend public policy or the public interest(s).[8]

As Ngcobo CJ stated whilst delivering the judgment of the South African Constitutional Court's majority in a very interesting case,[9] public policy represents just the legal conviction or general sense of justice of the community, the *boni mores* and the values held by the South African community. A notion, he maintained, that also implies to take into account the necessity to do simple justice between individuals in accordance to the concept of *Ubuntu.*[10] A recent judgment delivered

[7] *Nedcor Bank Ltd v. SDR Investiment Holding Co. (Pty) Ltd* 2008 (3) SA 544 (SCA).

[8] In South Africa, private law includes the law of persons (*personereg*), family law (*familiereg*), the law of property (*sakereg*), succession (*erfreg*), delict (*deliktereg*), trusts, estoppel, product liability (*produkte-aanspreeklikheid*) and consumer protection (*verbruikersbeskerming*). Contracts do not have to fall into any particular category in order to be formally and validly recognized. However, certain terms (*i.e.*, *naturalia* terms) are included in any contract belonging to one of the classes of specific contracts recognized by law. More details in Sir J. W. WESSELS, *The Law of Contract in South Africa*, Vol. I, 2nd Ed., Durban: Buttherworths, 1951; R. WARDEN LEE – T. HONORÉ – E. NEWMAN – D. J. MCQUOID-MASON (Eds.). *The South African Law of Obligations*, Durban: Butterworths, 1978; D. J. JOUBERT, *General Principles of the Law of Contract*, Cape Town: Juta & Co, 1987; R. H. CHRISTIE, *The Law of Contract in South Africa*, Durban: Butterworths, 1991. G. F. LUBBE – C. MURRAY, *Farlam & Hathaway, Contract. Cases, Materials, Commentary*, 3rd Ed., Cape Town: Juta & Co, 2009; W. J. SCHALK VAN DER MERWE – L. F. VAN HUYSSTEEN – M. F. B. REINECKE – G. F. LUBBE, *Contract: General Principle*, 4rd Ed., Cape Town: Juta & Co, 2012; D. HUTCHISON – C.-J. PRETORIUS (Eds.). *The Law of Contract in South Africa*, Cape Town: Oxford Univ. Press Southern Africa, 2010; L. F. VAN HUYSSTEEN – W. J. SCHALK VAN DER MERWE – C. J. MAXWELL, *Contract Law in South Africa*, Alphen aan den Rijn: Kluwer Law International, 2010; A. HUTCHISON, "Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith?", *SALJ* (2011): 273-293.

[9] *Barkhuizen v. Napier* 2007 (5) SA 323 (CC). The Constitutional Court is the highest court in South Africa. It has the final say on all matters relating to the Constitution and its decisions are binding on all other courts. However, the intention of the South African Government is to review decisions that are germane to the executive and its exercise of power in terms of national and other legislation that has been the subject of its ruling.

[10] On the role of fairness in the law of contract see LUBBE, GERARD F. "Taking Fundamental Rights Seriously: the Bill of Rights and its Implications for the Development of Contract Law", *SALJ* (2004): 395; D. HUTCHISON, *Good faith in the South African law of contract*, in R. BROWNSWORD – N. J. HIRD – G. G. HOWELLS (Eds.) *Good Faith in Contract: Concept and Context*, Dartmouth: Ashgate, 1999; F. B. J. BRAND, "The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution", *SALJ* (2009): 71; D. BHANA – M. PIETERSE, "Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited", *SALJ* (2005): 865.

by the Kwa-Zulu Natal High Court –and which was confirmed by the Supreme Court of Appeal and then by the Constitutional Court– has made this approach even clearer.[11]

To sum-up, due to the nature of the offer and other factors, such as the primacy given to private autonomy and the absence of a clear concept of *bona fide*, no general theory of pre-contractual liability has developed in South Africa and consequently the general principles of delict have been applied directly or indirectly as a common guideline.[12]

The landscape is so particular, that South African legal scholars generally assert that whether or not reliance damages are available is a question of fact which necessitates "*the establishment of a legitimate expectation on the part of the innocent party that a contract would eventuate*" and that "*there must be fault present in conduct of the recalcitrant party in the making of pre-contractual representation*". Secondly, they maintain that even though "*the view that a party may negotiate a contract with impunity, secure in the knowledge that should no binding agreement result, he or she would be free from any liability, is outdated* […] *when establishing liability based on a negligent representation the legitimacy of the plaintiff's expectations of a contract will have to be carefully interrogated to avoid an opening of the floodgates of litigation* […] *the reliance interest should thus be claimable by a disappointed party to contractual negotiations which are ultimately unsuccessful and in South Africa the most appropriate cause of action toward this end is the law of delict*".[13]

The landscape just described should not surprise anyone. In a legal system in which consensus is the basis to make agreements as long as it is the central concept in the creation of contractual liability, pre-contractual negotiations in itself do not

[11] Judges literally stated that according to South African law, an option to renew a lease on terms to be agreed upon, is unenforceable even if there had been an agreement to negotiate in good faith. Cf. *Everfresh Market Virginia (Pty) Ltd v. Shoprite Cjeckers (Pty) Ltd* 2012 (1) SA 256 (CC).

[12] It is quite common to find in a mixed legal system a particular solution to the problem of wasted pre-contractual. See M. HOGG, *Promises and Contract Law. Comparative Perspectives,* Cambridge: Cambridge Univ. Press, 2011: 197.

[13] A. HUTCHISON, "Liability for breaking off contractual negotiations?", *SALJ* (2012): 130-131.

attract any direct contractual liability –unless the negotiations have reached such a stage that all the requirements for the formation of a contract have been met.

However, the time seems ripe to argue that this approach is insufficient and needs to be critically re-considered. As any comparative investigation may easily demonstrate, in both Civil and Common law jurisdictions, co-operation is considered a significant tool in contract law theory and practice. The formation of a contract is often preceded by lengthy negotiations and most legal systems nowadays accept a general duty of pre-contractual good faith.[14] Even those legal jurisdictions –like Common law systems[15]– where there is not a general duty of pre-contractual *bona fides* the ruler uses other "strategies" (*i.e.*, fraud) to protect a party's interests and rights linked to co-operation.

True, on the other hand, the South African approach has also positive elements that deserve praise. First of all, the application of the Constitution may limit the freedom of withdrawal and good faith, being an underlying "rule", may very well influence the content of public policy.[16] Secondly, the *South African Law Commission* submitted to government draft legislation on the introduction of fairness and reasonableness as general principles in the law of contract.[17] Finally, as in other legal systems, South African law recognizes the concept of "subjective good faith" as reflected by the doctrine of notice and according to which, for

[14] In 1861 and 1906 RUDOLF VON JHERING and GABRIELE FAGELLA demonstrated the importance of having a strong approach to *bona fides* and *culpa in contrahendo*. In particular, Fagella showed the importance of distinguishing three different periods of good faith (the period before any offer has been drafted; the period during which an offer is drafted; the period when the offer has been made). See *Culpa in Contrahendo der Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen, Jahrbücher für die Dogmatik des heutigen röminschen und deutschen Privatrechts*, IV.1; *Dei Periodi Precontrattuali e della loro vera ed esatta costruzione scientifica, in Studi Giuridici in Onore di Carlo Fadda*, III, 271. The value of Fagella's theory was recognized by R. SALEILLES in "De la responsabilité précontractuelle; à propos d'une etude nouvelle sur la matière", *RTD civ.* (1907): 697. The Italian Civil Code of 1942 was the first in Europe to contain a specific provision on pre-contractual good faith (cf. Art. 1337). For a comparative glance on good faith see H. BEALE – B. FAUVARQUE-COSSON – J. RUTGERS – D. TALLON – S. VOGENAUER, *Cases, Materials and Text on Contract Law*, Oxford-Portland: Hart Publishing, 2010.

[15] Where, by way of an example, there has been some doubt about the enforceability of exclusive negotiation clauses when conducting parallel negotiations. Cf. *Walford v. Miles*, [1992] 2 AC 1998; *Pitt v. PHH Asset Management Ltd* [1994] 1 WLR 327.

[16] *Olitzki Property Holdings v. State Tender Board* 2001 (3) SA at 1247 (SCA); *Transnet Ltd v. Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA).

[17] Cf. *Project 47: Unfair Contract terms and the Rectification of Contracts*.

instance, an acquirer of property who knows that the property is the subject matter of a prior sale is obliged to re-transfer the property upon a claim by the prior purchaser.[18]

III. The Nature of Contract

This part of my analysis will consider and evaluate why *bona fides* plays an essential role in both contract law theory and practice according to contracts' intrinsic essence.

In *The Concept of Law*, HLA Hart argued, I think successfully, that all "legal norms" are not necessarily "laws".[19] Only legal norms that are capable of being applied to a succession of fact-institutions may, therefore, be considered as laws (Kelsen would partly agree with this). By way of an example, § 1295 of the Austrian Civil code states that "(1) *Every person is entitled to claim compensation from the wrongdoer for the damage the latter has culpably inflicted upon him; the damage may have been caused by the breach of a contractual duty or independently of any contact.* (2) *A person who intentionally inflicts damages in a manner contrary to public morals is also liable; however, if the damage was inflicted in the exercise of a right, he is liable only if the exercise of the right evidently had the object of harming the other*". This is an example of law. But "*given § 1295 of the Austrian Civil code, Luca is liable to pay Matthew Euro 50 in reparative damages for having* […]", is a legal norm.

This definition may be associated with John Gardner's distinction between law and *the* law, which is a distinction, it should be noted, that brings the dangers of the pluralist-setting of governance out of the shadows. While exposing the fallacy in Dworkin's theory, Gardner suggested that the abstract noun 'law' may be used to refer to a practice as well as genre of artefacts. [20] He then noted that the abstract nouns "poetry" and "sculpture" have the same ambiguity, although things are a bit

[18] L. F. van Huyssteen – W. J. Schalk van der Merwe – C. J. Maxwell, *supra*, note 11: 58. Also, cf. *Brisley v. Drotskly* 2002 (4) SA I (HHA); *Afrox Healthcare Bpk v. Strydom* 2002 (6) SA 21 (HHA); *Napier v. Barhuizen* 2006 (4) SA 1 (SCA).

[19] 2nd Ed., Oxford: Oxford Univ. Press, 1994.

[20] *Law as a Leap of Faith*, Oxford: Oxford Univ. Press, 2012: 185.

more complicated with law. Sculpture is the practice of producing sculpture but law is not (only) the practice of producing legal norms (law-making). It is the practice, Gardner says, of using legal norms (law-applying), yet its central and most distinctive activity is a combination of the two: the production of legal norms by using legal norms (law-making by law-applying).

But why does law become *the* law? Law is nothing more than an invisible and intangible entity (sublime) that lives in an ideal ontological dimension. It is, in other words, an "ideal object". And, as every ideal object (like dreams and numbers), it lives out of space and time because of us. Furthermore, law is something that needs to be continuously represented for practical purposes. And when we represent it, or when, as Burke would say, we try to "capture" it, we create *the* law. In other words, law is the genre to which legal systems and legal norms belong, while *the* law what lawyers and legal officials (*i.e.*, judges) do.

That said, the law is a necessity (*ubi societas, ibi ius*). In its modern sense, as spread by the French Revolution, according to the deliberative essence of constructivist rationalism, the law is an act of will usually identified as a set of rules that evolves artificially with the aim of preventing the emergence of disputes or settling them or, in general, organizing the various forms of social life with its "authority"[21] and "normativity". In the broadest sense, *the* law organizes the various dimensions of the process of societal interactions and people are expected to respect it. This is why *the* law has two types of content: 'descriptive' and 'prescriptive'. Lastly, *the* law is also a social science because it has to provide for the changing needs of a developing community and is inseparably connected to it. This is the reason why the "modern"[22] paradigm of law perceives it as a balancing act. True, the complex and multifaceted character of *the* law allows for a wide variety of topics whose aim is to usefully describe law's nature and structure, especially in legal

[21] As A. WATSON remembers, Yahweh directly gave the Ten Commandments to Moses on Mount Sinai, Apollo, through the Oracle of Delphi, provided Lycurgus with the laws of Sparta, Zeus gave the Cretans their laws, and Hermes did the same with the Egyptians through Mneves. In his words, "[t]*he significance* […] *of these traditions is that the fiction of the gift of god heightens the laws' authority and makes their acceptance and maintenance easier*". See, *Comparative Law: Law, Reality and Society*, Lake Mary: Vandeplas Publishing, 2010: 41.

[22] That is, since Jhering.

philosophy. However, if this is taken further it may result in general disagreement dictated by the predilections of each particular jurist.

In contrast to the difficulty in defining law, the view of the majority of legal scholars has always been the same: one understands *the* law through its purposes. The notion of "functionalism" is related to the provision what I called "efficient *formulae* of normative thinking" (law in context). Within this perspective, it is usually maintained that the law of contract plays a decisive role because of the contract's function of providing a legal framework within which people do business by exchanging resources. Contracts are intimately involved in the achievement of society's values and their special virtues lie in their capacity to increase human satisfaction through exchange.

Yet, as John Rawls aptly put it, the idea *of* co-operation includes the idea of each participant's rational advantage or good, and the idea of rational advantage specifies what it is that those engaged in co-operation are seeking to advance from the standpoint of their own good. The fact is that all the parties involved in agreements clearly recognize that they cannot achieve what they would like too without the other party's co-operation.[23] Thus, while analyzing and discussing contract law's essence, aims, limitations, and future challenges, we should avoid abstract approaches and instead provide an effective description of contracts as systematic realities.

The foregoing should be investigated (and eventually criticized) by also remembering that every contract has an "impersonal" and a "personal" dimension. There is a correlative relationship between each party's position in a contract and this is namely its "impersonal" dimension (a seller, a buyer). Nonetheless, at the same time every contract is shaped by a "personal" dimension because human

[23]Rawls sees "justice" as a synonymous of "equality". This line of thinking is rooted in the suggestions of Hobbes, Locke, Rousseau, and Kant who were the creators of the so-called "contractarian approach" to socio-legal theory. This view has greatly influenced political philosophy since the making of Rawls' 1958 paper ("*Justice as Fairness*") and which preceded his definitive statement in his "*A Theory of Justice"*. For a compelling introduction on this topic, see A. SEN. *The Idea of Justice*, Cambridge (MA): Harvard Univ. Press, 2011.

personality describes a party's capacity to pursue his own interests and so provides elements about each party's view. Finally, for present purposes, it is worth noticing that both in South Africa and the EU[24] the law of contract is strongly connected to a critical attitude which exposes it to social, cultural, political, economic, and other impetuous influences.

Contracts' double dimension should make it clear that: (*i*) the notion "good faith" implies that a party has to take into account the other party's interests and rights;[25] (*ii*) even within contract law's framework, "justice", as will be discussed below, is a much wider conception than "law" and may therefore apply wherever there is a "code" of rules, legal or non-legal. As a consequence, conducting research on the so-called "access to justice" in contract law theory and practice should start by arguing that as lawyers it is our duty to improve the methods by which the contractants can obtain, what during the *Seminar*, I labeled "daily-preventive justice" (DPJ). A type of justice whose notion implies that the contractants may see their rights and interests effectively protected by the contract itself on the one hand, and its correct execution on the other hand, and hence without bringing proceedings before a court.

Yet this last observation warrants further comments. Dennis Lloyd started his analysis on "*the idea of law*" remembering that "*In the pantheon Mesopotamia two deities were singled out for special reverences. These where Anu, the god of the sky, and Enlil, the god of the storm* […] *the sky god issued decrees which commanded obedience by the very fact of having emanated from the supreme divinity*" but "*the power of the storm was invoked, the power*

[24] Which, on the one hand, are two realities that share important elements (*e.g.*, legal pluralism, financial crisis, future common challenges, *etc.*), whereas, on the other hand, the former has an extremely progressive Constitution – a result that the EU has been unable to formally achieve (even though the European Commission says that the EU's Constitution are its Treaties).

[25] M. C. BIANCA, *Il Contratto*, Milan: Giuffré Editore, 1987. Which is the reason why even though in France and Germany the starting point was that there was no duty to disclose facts that the other party did not know, it is now clearly established that keeping silent (non-disclosure) about certain matters, circumstances, and/or facts of which a party knows that the other one is ignorant, may in some cases amount to fraud (which requires an intention to deceive the other party). In Italy, similar provisions are provided in Articles 1337, 1338, 1439 and 1440 Civil code). Contrarily, in English law only the (positive) making of a false representation of fact amounts to fraud. More details in H. BEALE – B. FAUVARQUE-COSSON – J. RUTGERS – D. TALLON – S. VOGENAUER. *Cases, Materials and Text on Contract Law*, Oxford-Portland: Hart Publishing, 2010: 434.

of compulsion, the god of coercion, who executes the sentences of gods and leads them in war".[26] Literally, he points out that the myths of Anu and Enlil reveal the deep human need for order and the concomitant belief that such order demands the combination of two essential elements: authority and coercion. As Lord Bingham recently asserted whilst giving his explanation of "the rule of law"– only "*in Utopia* […] *civil disputes would never arise: the citizens would live together in amity, and harmonization would reign. But we live in a sub-utopian world, in which differences do arise, and it would be false to suppose that they only arise when there is dishonesty, sharp practice, malice, greed or obstinacy on one side or the other*".[27] In other words, all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefits of laws publicly made, taking effect in the future and publicly administered in the courts –that is one of the multiple meanings of the "rule of law". This is basically the reason why people can also rely on alternative dispute resolution mechanisms (*i.e.,* mediation, conciliation, and arbitration).

Nonetheless, I perceive the need to go beyond this approach by also calling for a major update of high-level normative arrangements and theories on this topic. In particular, my suggestion is that private law legal scholars should ask themselves whether, and if so how, is it possible to feasibly achieve the DPJ stage within contract law's framework. We will see that b*ona fides* (and the general course of the parties' behavior before and after the conclusion of an agreement) is a fundamental part of the answer. But before going any further, it is necessary to describe the evolution of the notion of the term "justice" from Plato to date, in order to understand how and why we have come to associate it with "equality" only under the influence of democratic-fraternal theories.

Some commentators may conceive such an enquiry to be unnecessary. Their claim would be fascinating given that much literature is dedicated to the meaning

[26] *The Idea of Law*, London: Penguin Books, 1964: 26.

[27] *The Rule of Law*, London: Penguin Law, 2010: 85. Bingham's utopic dimension was partly anticipated by B. MANDEVILLE's *The Fable of The Bees: or, Private Vices, Public Benefits* London: Penguin Classic, 1989 (1705).

of this timeworn term. Yet this is not surprising for many reasons: (*i*) *in medias res*, concepts that appear to us as the most common are always the most difficult to describe; (*ii*) the concept of "justice" and our perception of it evolves; while we have come to associate it with "equality" under the direct influence of Jeremy Bentham and Jean-Jacques Rousseau, for millennia it held a different meaning; (*iii*) any analysis as to what is "just" and "unjust" demands a clear articulation and reasoned scrutiny; (*iv*) as Matthew H. Kramer persuasively suggested, "[a]*nyone seeking to gain a clear understanding of the relationships between law, justice, and morality must attend to numerous distinction with each of those phenomena*,"[28] with this distinction being an uneasy task; (*v*) there is a clear difference between procedural justice and justice *tout court*.

Nonetheless, given that the point of departure for theorizing about private law is based on experience, any discourse on good faith should also be focused on the implications of the current meaning of the term justice as well as its achievement. As John Gardner writes, "*It is essential to the nature of law that all legal systems/orders have law-applying officials who make legal rulings*."[29] Consequently, access to justice and the enforceability of private law rules are central issues in the promotion or denial of good faith as a "rule of law". Thy is the reason why, as lawyers, we are called upon to investigate whether the theoretical concept and practical application of "justice" is better promoted and protected with the a "hard" or "soft" approach to good faith. Indeed, contractual rights are not self-applicable; they are acquired politically in the form of laws that guarantee them. The discourse on contractual rights is thus a legal discourse.

To truly understand the meaning of the term justice, it is necessary to bear in mind that justice is a much broader concept than law. Its wider scope is due to the unavoidable circumstance that socio-legal scholars face when answering the question, "*How are we to decide whether the actual rules are themselves just?*". Ronald Dworkin summarizes this effectively when he claims that "[l]*aw is also different from justice. Justice is a matter of the correct or best theory of moral and political rights, and anyone's*

[28] *In Defense of Legal Positivism. Law Without Trimmings*, Oxford: Oxford Univ. Press, 2007: 21.
[29] *Supra*, note 23: 74.

conception of justice is his theory, imposed by his own personal conviction, of what these rights actually are. Law is a matter of which supposed rights supply a justification for using or withholding the collective force of the state because they are included in or implied by actual political decisions of the past."

Difficulties thus emerge as we attempt to conduct such an investigation. These arise because, a priori, it is hard to deny that our positions and predicaments can affect our general attitude and political beliefs about social differences and asymmetries. Long ago, Aristotle understood that for those who sit in judgment, "*love, hate or persona interest is often involved, so that they are no longer capable of discerning the truth adequately, their judgment being obscured by their own pleasure or pain.*" [30] In Shakespeare's play King John, Philip the Bastard observes this truth quite clearly when saying, "*Well, whiles I am a beggar / I will rail / And say there is no sin but to be rich / And being rich, my virtue then shall be / To say there is no vice but beggary*."[31] In the same vein, we find the economist Amartya Sen, who moved away from classical utilitarianism after many years, though without completely rejecting it. He aptly recognized that "*if we take self-scrutiny very seriously, it is possible that we may be hard-minded enough to seek more consistency in our general evaluative judgments*."[32] As Thomas Scanlon rightly pointed out, "*Thinking about right and wrong is, at the most basic level, thinking about what could be justified to others on grounds that they, if appropriately motivated, could not reasonably reject.*" [33] In other words, life's experiences, as Albie Sachs Justice suggested, affect legal reasoning in unexpected ways. This is the reason why, according to Judge Richard L Nygaard, any judicial decision must not be "ghost-written" by the counsel and must show that the judge "*actively wrestled with* [the parties'] *claims and arguments and made a scholarly decision based on his or her own reason and*

[30] *The Art of Rhetoric*, Book 1, (John Henry Freese tr.), Cambridge, (MA): Harvard Univ. Press, 1975: 1.7.

[31] Written around 1590 and published in 1623. Cf. 2.1.592.

[32] *The Idea of Justice,* Cambridge (MA): Harvard Univ. Press, 2011: 196.

[33] *What We Owe to Each Other*, Cambridge (MA): Belknap Press of Harvard Univ. Press, 1998: 5.

logic".[34] Yet these unavoidable circumstances are extremely dangerous because they may lead to a shift from the rule of law to the so-called "rule of men." Tamanaha recognized this when saying "[i]*f judges only consult their own subjective view to fill in the content of the rights, the system would be no longer the rule of law, but the rule of the men or women who happen to be the judges*."[35]

To summarize, we may say that in modern times the term "justice" mainly denotes the notion of equality. However, justice is little more than the idea of rational order and coherence, and therefore it operates also as a principle of procedure and not only of substance. The values that we choose to affirm are a matter of choice, and sometimes this choice is an inevitable and logical necessity, or in other words, one decides to follow the necessity felt within. Therefore, we cannot say whether our choice is entirely free. Considering as Hume suggested that it is not reason but passion that imposes our moral criteria, even if the scale of social values cannot be logically demonstrated, explained, and "justified," we sometimes have to accept it because we cannot do otherwise. Among legal scholars, there is a general consensus that there should be rules outlining how people should be treated in given cases. These rules should be general in character, that is, by providing that all individuals who fall within the scope of the given rule should automatically be governed by it. Finally, there is a need for an impartial application of these rules.

The exposed theses are evidently related to the significant role that "equality" plays within justice discourse at the moment of writing, and in particular to the circumstance that, as a historical fact, we have come to associate "justice" to "equality" only because of Jeremy Bentham's and Jean-Jacques Rousseau's accounts. For millennia it has had a completely different meaning. In this sense, it is quite interesting to note that above the entrance to the Supreme Court of the United Sates four words are caved: "*Equal justice under law*".[36]

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[34] Cf. *Bright vs. Westmoreland County* 380 F 3rd 729 (2004) – US Court of Appeals, Third Circuit.

[35] *On the Rule of Law. History, Politics, Theory*. Cambridge Univ. Press, 2004: 105.

[36] The US is not alone in the list of the legal systems according to which the modern meaning of 'justice' involves 'equality'. Several governments around the world spend more effort

Although many examples could be made of the way the spirit of equity was invoked by Roman law to enable the law to be developed in a more just and humane manner than was permissible within its strict letter, it is generally argued that it was Jeremy Bentham (who is widely regarded as the greatest and most influential figure in Anglo-American jurisprudence and leader of the *Philosophical Radicals*) that specifically interpreted "justice" as "equality" in the modern sense. According to Bentham, "formal justice" requires equality of treatment in accordance with the classifications laid down by the rules – even if it tells us nothing about how people should or should not be classified and then treated.

helping members of certain racial or ethnic groups realize their ambitions than they do others. In doing so, they take certain factors (including race, color, religion, sex, national origin) into consideration in order to benefit an under-represented group in areas of employment, education, and business. In some countries, the policy only applies to areas under direct state control, such as public-works contracts or admission into public universities and public sector jobs. In others, like South Africa, it also applies within the private sector: private firms are obliged to take account of the race of their employees, and contractors. Although equality and diversity should always be protected and promoted as the two most significant expressions of human dignity, it is time for a thoroughgoing investigation into the 'affirmative action' theory. A deeper look at affirmative action policies reveals three flaws: First, (*i*) in the short term, they imply the sacrifice of important elements that any system of government and governance should take into account (*i.e.*, quality); (*ii*) in the long term, it runs the risk of creating an upside-down situation (as with South Africa's so-called 'anti-apartheid'); (*iii*) given that some inequality is needed to propel growth while inequality is closely linked to low growth, mass redistribution may, under certain conditions, affect economic growth. The second flaw lies at the core of Schuette v. Coalition to Defend Affirmative Actions, a case heard by the US Supreme Court on 15 October 2013. The case was about racial preferences and whether state constitutional amendments banning affirmative actions (which are in eight state constitutions) violated the federal constitutional right to the quale protection of the laws (as the federal appellate court of Michigan ruled). Finally, too often racial-empowerment schemes are used to benefit political party-linked people, not redress previous injustices. This is why justice and equality lie at the center of some of the most heated controversies in contemporary society (recent debates about the American health care system are just the tip of the iceberg). In this sense, it would be pertinent to rediscover the significance of Hayek's three notions of 'social legislation' in his *Law, Legislation and Liberty*, London: Routledge, [1973, 1976, 1979] 2013: 133-35. regarding the last flaw, see *The Economist*'s editorial 'Inequality v growth. Up to a point, redistributing income to fight inequality can lift growth' (italics in original), 1 March 2014. Finally, it is worth noting that the doctrine aimed at creating the 'a-spatial', unlimited, and unbounded global order based on a scheme of intelligibility (as opposed to that of the modern nation-state) has instrumentally manipulated both the political and juridical meanings of 'equality' of the community of the people of a given territory (today we would call them 'citizens') and of their collective differentiation from other groups in Schmittian terms.

Bentham was a committed observer of society[37] and is seen as the first modern legal positivist – even though the word 'positivism', in its modern dimension, was first used by Auguste Comte. According to Bentham, when two men's interests clash, the best resolution is that which produces the greatest total happiness – regardless of which man enjoys it or how it is shared by them. Bentham (along with all *The Utilitarians*) – who rejected natural law – believed that the behavior of mankind is dominated by the influence of pain and pleasure and that, by increasing the latter and diminishing the former, human happiness increased. Utility is no more than what serves to increase human happiness and satisfaction, the sum of which is to be assessed by calculating the stock of pleasure and pain which results from a particular course of action. The test of utility was conducted mathematically by assuming that each man's happiness was equal in value of that of the next man. Bentham was writing at a time of tremendous progress, so it is understandable why his ideas in favor of utility were based mainly on the conviction that human reason could find no other rational justification for preferring one course of action over another, other than pursuing "utility".

In addition, Bentham had clear views on the role of law regarding the subordinate ends of government and based his whole philosophy on two principles: (*i*) the association principle; and (*ii*) the greatest-happiness principle. He believed that determinism is important in psychology and maintained that what is good is pleasure or happiness, and what is bad is pain. This line of thinking had been advocated by Francis Hutcheson as early as 1725, and then by James Mill. Bentham's merit consists of making a vigorous application of it while trying to solve practical problems. He claimed that criminal law is a method of making the interests of the individual coincide with those of the community, whereas civil law has four aims: substance, abundance, security, and equality. It is no surprise that Bentham did not mention "liberty", because his ideal was "security", not "liberty", like that of Epicurus. He then moved to Radicalism and his refusal to believe without rational grounds finally led him to reject religion, including belief in God.

[37]He elaborated on the Panopticon theory (1791) two centuries before George Orwell's Big Brother in *1984* (published in 1949).

John Stuart Mill, who became an important figure in liberal political philosophy, continued to promote an impressive rational concept of utility. Such a tendency, as Hayek notes, led him to overlap the concept of 'social justice' with 'distributive justice' and earned him criticism on both sides of the Atlantic.[38] A century later, Chester Irving Barnard, who was an American business executive, public administrator, and author of pioneering works in management theory and organizational studies, clarified this approach by suggesting that "[…] *exchange is the distributive factor; coordination is the creative factor. We are now giving attention to the distributive factor. If we for the moment limit ourselves to industrial organizations, in all of them the rule must be that you give, so far as possible, what is less valuable to you but more valuable to the receiver; and you receive what is more valuable to you and less valuable to the giver*". Barnard was referring particularly to the development of the US public sector. Nonetheless, his studies show their real value only when applied to the private sector (as with Sun Tzu's teachings, which were intended as powerful weapons to defeat the enemy, but today are used more in business schools than military academies).

[38]In particular, Hayek writes that Mill's notion of social justice '*leads straight to full-fledged socialism*', which is a doctrine that Hayek disliked given that it is, in his words, 'the most influential and respectable form of constructivism to stand for all its various forms'. Indeed, Hayek maintains, in Mill's statement '*the demand for "social justice" is addressed not to the individual but to society – yet society* […] *is incapable of acting for a specific purpose, and the demand for "social justice" therefore becomes a demand that the members of society should organize themselves in a manner which makes it possible to assign particular shares of the product of society to the different individuals or groups'. It should not be forgotten that Hayek did not believe in the modern dimension of the doctrine of social justice. In his words, 'the prevailing belief in "social justice" is at present probably the gravest threat to most other values of a free society.* […] *It seems to be widely believed that "social justice" is just a new moral value which we must add to those that were recognized in the past, and that it can be fitted within the existing framework of moral rules. What is not sufficiently recognized is that in order to give this phrase meaning a complete change of the whole character of the social order will have to be effected, and that some of the values which are used to govern it will have to be sacrificed* […] *I believe that "social justice" will ultimately be recognized as a will-o'-the-wisp which has lured men to abandon many of the values which in the past have inspired the development of civilization.* […] *Unfortunately, this vague desire […] not only is bound to be disappointed this would be sad enough. But, like most attempts to pursue an unattainable goal, the striving for it will also produce highly undesirable consequences* […]'. *Law, Legislation and Liberty*, supra, note 39, respectively 228, 217and 229-31.

According to Russell, Mill '[…] *offers an argument which is so fallacious that it is hard to understand how he can have thought it valid. He says: Pleasure is the only thing desired; therefore pleasure is the only thing desirable. He argues that the only things visible are things seen, the only things audible are things heard, and similarly the only things desirable are things desired. He does not notice that a thing is "visible" if it can be seen, but "desirable" if it ought to be desired. Thus "desirable" is a word presupposing an ethical theory; we cannot infer what is desirable from what is desired*'**.** *History of Western Philosophy*, London: Routledge, [1946] 2004: 702.

All these doctrines have precise limits. In particular, they automatically involve two questions: "Does each man constantly pursue his own happiness?" and "Is general happiness the right goal of human action?". Answering these questions would inevitably imply an analysis on the ethical part of the utilitarian approach and the doctrines that used it as a starting point. Also, as demonstrated by Hayek, "[t]*he trouble with the whole utilitarian approach is that, as a theory professing to account for a phenomenon which consists of a body of rules, it completely eliminates the factor which makes rules necessary, namely our ignorance*".[39] Such a fallacy, is also present in the constructivist rationalism, which is rooted into anthropomorphic modes of thinking and received the most complete expression with Descartes (which was spread throughout the Western legal tradition by the French Revolution and the modern, "intentional" dimension of the Civil legal tradition it created).

Unfortunately, the purview of our inquiry does not allow for such an investigation. It suffices to say that this kind of ethic is usually aimed at claiming that our desires and actions are good if they promote general happiness. Hence, it is possible to assert, this ethic is not only democratic and anti-romantic (thus Democrats are likely to accept it), but it is completely different from the ethic of Nietzsche, who said that only a minority of the human race have ethical importance.

Notwithstanding these doctrines' limitations, they all had an impact on the development of microeconomics and continue to draw interest. Daniel McFadden, for instance, wryly termed *homo economicus* "a rare species" while arguing for a "new science of pleasure".[40] In this sense, he first pointed out that economics should draw much more heavily on such fields as psychology, neuroscience, and anthropology, and then asked economists to accept that evidence from other disciplines does not just explain those bits of behavior that do not fit the standard models. Rather, economists consider anomalous to be the norm.

Greek philosophers (including Plato and Aristotle) had a different concept of justice. They thought that each thing or person had its or his proper sphere, and to overstep this was unjust. Some men, by virtue of their character or aptitudes,

[39] *Law, Legislation and Liberty*, *supra*, note 39: 187.
[40] 'The New Science of Pleasure', 2 *NBER*, Working Paper No. 18687/13

have a wider sphere and there is no injustice in this. In a way, this line of reasoning was anticipated by Anaximander, who was one of the philosophers of the Milesian School with Thales and Anaximenes, who believed there was a certain proportion of fire, earth, and water in the world. He argued that each element perpetually attempts to enlarge its empire but an unknown kind of 'natural law' perpetually redresses the balance.

In the *Republic*,[41] justice, where it is almost synonymous with "law", is concerned mainly with property rights, which have nothing to do with equality. Thrasymachus[42] tells us that justice is 'nothing else than the interest of the stronger'. Yet it seems that this definition is soon abandoned as inadequate, and that Plato's ultimate definition of justice consists of every man doing his job (*i.e.*, the debtor has to pay his debts). This is how the political order may be protected within society's boundaries. As a consequence, Plato maintains that it is absolutely possible (and essential) to have inequalities of power and privilege in a just society.

The perspective should be interpreted by remembering that Plato's utopia was the most significant philosophical thought until it was replaced by Aristotle's metaphysics in the medieval Church, whereas during and after the Renaissance,[43] he reverted to being identified as a "key philosopher". At that time, people began to value political freedom and it was to Plutarch that they turned above all others. The substitution of Plato for the scholastic of Aristotle was mostly hastened by contact with Byzantine scholarship and the fact that both Cosimo and Lorenzo de' Medici were inspired by him. Besides, Plutarch's *Life of Lycurgus* played a large part in framing the doctrines of Rousseau, Nietzsche, and National Socialism. Even this aspect might be interpreted as evidence of Plato's influence. It is also indubitable that Plato influenced the English and French liberals of the eighteenth century, as well as the founders of the US and the romantic movement in Germany. After that,

[41]Plato's most important dialogue, written in around 380 BC, it is worth noting that Plato's philosophy was influenced by the Spartan culture.

[42]Who, like almost all the characters in Plato's dialogues, was a real person.

[43]Which was not a period of great achievement in philosophy even though it broke down the rigid scholastic system.

Plato's influence began to play a less important role, even though Locke's theory of knowledge is based on his perspective.

Two clarifications should be made at this stage. Firstly, from Locke's liberal perspective, liberty depends upon the necessity of pursuing true happiness and upon the government of passion. His theory was mainly based on the opinion that, in the long run, private and public interests are identical, so where there is no property, there is no justice. Secondly, it is clear that Epicurus[44] also profoundly influenced Locke's view. Indeed, his account was primarily shaped to secure tranquility because, for him, justice primarily consists of acting so as to never have cause to fear other men's resentment.

Given the above discussion, it should be now clear that the first step that is required in order to give an accurate and useful answer to the question posed above about contracts' nature is to understand that co-operation –and hence good faith– is (*i*) the key-source of an effective DPJ, and that (*ii*) it is directly linked to the soul of every contract.

As said, a contract has the function to provide a legal framework within which people do business by exchanging resources. Hence, a contract is nothing more than a "neutral field" or a "truce" between two "litigants" in competition: everyday people need each other to make exchanges because of the scarcity of the resources and services: a contract is an agreement (*pacta*) for reaching these purposes.[45] In doing so, contracts are intimately involved in the achievement of society's values and their special virtues lie precisely in their capacity to increase human satisfaction through exchange by also pursuing private and public interests at the same time. This is basically the reason why: (*i*) the contractants are legally required to agree on all what is written in the contract; (*ii*) as a consequence, by signing the contract, the parties give birth to a "common intention" (which is, figuratively, the neutral field on which the contract is adjusted); (*iii*) the agreement collapses precisely when the parties no longer rely on the common will expressed

[44]Who was the founder of one of the two great new schools of the Hellenistic period (the other was Stoicism, founded by Zeno).

[45] P. G. MONATERI (Ed.). *Manuale del Nuovo Contratto*, Bologne: Zanichelli, 2008.

in the contract (a situation which occurs before or whilst executing the contract);[46] (*iv*) the primary rule in contracts' interpretation is that, even in cases of ambiguous wording, legal effect must be given to it (a principle which is generally called "conservation of the contract"; cf. Art. 1367 Italian Civil code and Art. 5:106 PECL).

To sum-up, given the current meaning of the term "justice", this paper suggests that a feasible achievement of the DPJ within contract law theory and practice requires, first, to understand how and why the soul of every contract is co-operation and, second, that the soul of co-operating is *bona fides*. [47]

IV. THE MORALITY OF CONTRACT

Having described the nature of contract, it would be prudent to now analyze its morality. Some may argue that morality and law should not be overlapped. Austin, for instance, explained why such a connection should not be made. According to him,[48] *the* law has nothing to do with justice or morality because it is a command of political superiors ultimately backed up by the threat of a "sanction" in case of disobedience. In every society, Austin continued, there is one body or person whose sovereignty is unique. This body or (person), habitually obeys no-one, and is obeyed by the bulk of the population.[49]

[46] All legal systems rely on a number of long established and widely accepted interpretative precepts if the wording of a contractual clause is ambiguous. Among them, it is widely agreed that priority should be given to the relevant circumstances or the aforementioned common intention of the parties. As R. J. POTHIER claimed, "*one should, in contracts, seek what was the common intention of the parties, rather than the grammatical sense of the terms*", in *Traité de Obligations*, in *Oeuvres de Pothier*, 1861: 91. Cf. Art. 1156 French Civil Code; Art. 1362 Italian Civil Code; Art. 1382 Spanish Civil Code; BGB § 133; PECL Art. 5:101, 5:102, 5:105, and DCFR Art. II-8:101-2.

[47] Art. 1321 of the Italian Civil Code offers a definition of what is a contract, which could help the reader in understanding my arguments. It states that a contract is an agreement ("*accordo*") between two or more parties for the purpose of creating, providing for or extinguishing amongst themselves a legal patrimonial relation.

[48] Austin was a follower of Bentham, and developed a doctrine that persisted through ages probably because it was diametrically opposed to the school of thought which derives from Plato and Aristotle for present purposes, it is important to remember that he borrowed several suggestions from Bodin's account, which ultimately derives from the imperial Rome.

[49] *The Province of Jurisprudence Determined*, Nabu Press, [1832] 2010.

Neil MacCormick has led this doctrine to a new level of analysis. Whilst providing his "institutional theory of law" aimed to detach "law" conceptually from "state", he focuses his efforts on two important questions: (*i*) what is special about the law that is state-law; (*ii*) how is it possible that states as political entities can be effectively confined within (*the*?) law. MacCormick's basic idea is that norms belong within normative orders, of which some are, and some are not, institutional in character. More precisely, he writes that law is a principal example of institutional normative order, whereas morality is a non-institutional order, and politics is an institutional but not normative order.

Hence, it may be concluded, that we should not associate "law" to "morality" and talk of a substantive "morality of contracts". Yet, what is correctly asserted by MacCormick allows us to argue that a link between "law" and "morality" exists. In particular, it is possible to suggest that we call "law" what our morality suggests and that the only difference between the two of them is that the former has been provided with an institutional character to be formally legitimized. A difference which does not prohibit us from discussing and investigating the substantive "morality of *the* law" –whatever it may be. This is the reason why Hart's attempt to keep law and morality apart has been criticized by many American lawyers. What was argued by Judge Benavides at the US Court of Appeals, whilst referring to Calvin Burdine's case, and by Chief Justice of Alabama Roy Moore is just an example.[50]

That said, the investigation I am hereby proposing further requires an explanation as to why Charles Fried's account on contract law deserves criticism. In his "*Contract as Promise*" he argues that it is possible to locate the underlying essence of contracts in the morality of promising. He then repudiates the idea that "*contractual standards are ineluctably collective in origin and thus readily turned to collective ends*".

[50] Whilst referring to Calvin Burdine's lawyer, who had been found asleep during the process in which his client received the death penalty, Judge Benavides said that "*it shocks the conscience that a defendant could be sentenced to death under those circumstance*". Cf. *Burdine v. Johnson* 231 F 3d 950 (2000), US Court of Appeals, Fifth Circuit. Roy Moore based his campaign on a commitment "*to restore the moral foundation of law*".

[51] By using these words, Fried basically stands up against the reduction of contract law to social policies such as wealth maximization and economic efficiency –a theory that I will instead use in the next part of my analysis. In other words, he basically relies on Kant's assumption and claims that the idea of contract, as promise, expresses the liberal notion of the substantive right –with an evident aversion to the pursuing of collective interests and to economic analysis in general.

Although compelling, and in some aspect fascinating, Fried's account fails to make contract law intelligible and predictable in its own terms. [52] This is the reason why, for present purposes, it is more useful to refer to Jeremy Bentham's clear views on the role of law in respect of the subordinates ends of government, and on the role of *the* law of contract as a magnificent tool to support and supplement private arrangements. He generally opposed compulsory redistribution of wealth because this leads to disappointed expectations and specified that the law of contract is a particular tool to use in order to protect particular social values linked to the increase of human satisfaction through exchange.[53]

What I see behind these words is that every contract represents not only a matter of balancing opposite private interests, but also a matter of balancing private and public interests together. In other words, through contracts we have to provide a *useful and efficient legal system of exchange and justice*. This is the morality of contract. Consequently, it follows that *the* law of contract is extremely important for at least three reasons: (*i*) it is the law relating to the formation, performance and discharge of contractual obligations; (*ii*) it is the core area of private Law; (*iii*) it is the one closest to the market. Its role is to enhance the institution of contract by making it more stable and reliable whilst increasing its pervasiveness and its efficiency. This is the reason why contract law's evolution must be seen in light of the expansion and internationalization of trade and economics by also analyzing the emergence

[51] Cambridge (MA): Harvard Univ. Press., 1981: 5.

[52] In the same vein, see P. BENSONS' "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory", *10 Cardozo Law Review*, (1989).

[53] *Works*, 1859, I: 331.

of new categories of contracts –such as consumer contracts– together with the setting of new standards of social justice in the private sector.[54]

These suggestions were first made by John Locke and by Oliver Wendell Holmes Jr. What may be added is that two requirements have to be at least respected and promoted to promote an effective system of exchange:

1) the recognition (and protection) of property rights (already Plato and Locke wrote about that);

2) the recognition (and protection) of the right to make these rights circulate (because "rights" on things circulate, not "things" themselves).

Yet talking of property rights requires a few words on the impact of the *numerus clausus* theory on the making and developing of the Western Legal Tradition.[55] Unfortunately, the scope of this contribution does not allow sufficient space to address this crucial issue thoroughly. It will therefore suffice to highlight that, as Francesco Mezzanotte remarked, the *numerous clausus* theory may indeed *be regarded as one of the fundamental hinges of the "classic" Law of Property, limiting contractual autonomy in the definition of the relevant and admissible classes of property schemes.* […] *while contract law allows individuals to freely shape legally enforceable promises according to their needs, property law is confined in a closed set of defined forms, providing property-type protection only for those interests explicitly recognized and disciplined by the Legislator'*.[56]

Furthermore, the above mentioned p. 2 should be stressed from an ontological perspective as well. According to *Ontology*, as lawyers we mainly work with the so-called "social objects". Objects that exist in our society only because we think they do so and that have shapes and functions we want to give them (*e.g.*,

[54] In the area of contract law, transformations have been occurring for decades, leading to the phenomenon that codified law is highly divergent from the reality of contemporary contract practice after the codification stage. Nowadays, in the globalization era, the functions of contract law have been subjected to an irreversible paradigm shift and there are several factors to which the internationalization process in the field of contract law is connected, such as the growth of trade and the rising of the so-called "mass-contracts".

[55] The creation and development of which is well described by H. J. BERMAN, *Law and Revolution I*, Cambridge (MA): Harvard Univ. Press, 1983; *Law and Revolution II*, Cambridge (MA): Harvard Univ. Press, 2003.

[56] "The Interrelation Between Intellectual Property License and the Doctrine of Numerus Clausus. A Comparative Legal and Economic Analysis", *Comparative Law Review*, (2012): Vol. 3, n. 2, Fall Issue. The Author was particularly referring to intellectual property rights.

a pen, a knife, a country, Wall Street, an obligation, a contract, *etc.*).[57] Even though some socio-legal scholars do not believe in the extra value of this line of reasoning, I strongly believe in its relevance and utility because it makes it possible to write down proper norms in accordance with our society's needs. We should start to conceive that every single norm and every single rule in contracts, in legislation and in judgments is a *social object* that can have the precise shapes and functions that we want to give to it.

As a next step, let me consider another line of legal reasoning that takes the precise and technical form of saying that as a comparatist who works with different legal jurisdictions, I started asking some years ago myself whether or not it is possible to find an unanimous definition of "justice" that is suitable for all the legal systems and businesses randomly involved. It is hard to deny that such a question might be defined as "utopic" because of what was previously argued about how our personal positions and predicaments affect our general attitude and socio-political beliefs. This is why, whilst trying to answer it, socio-legal scholars face considerable difficulties.

Starting from this awareness, whilst striving for an answer, I found an illuminating suggestion in what has been argued by Epicurus, whose main idea was that justice consists in acting so as not to have occasion to fear other men's resentment (it is reasonable to assume that Savigny would not agree with that, as he argued that law should not be extended to human sentiment).[58] In other words,

[57] I described the utility of having an ontological approach to law during the aforementioned *Workshop on The Use of Comparative Law in Postgraduate Research* hosted by the *British Association of Comparative Law* at the University of Nottingham in July 2011. More details in M. FERRRI, *Documentalità. Perché È Necessario Lasciare Tracce*, Rome-Bari: Laterza, 2009; J. A. LANGSHAW. *How We Do Things With Words*, 2nd Ed., Cambridge (MA): Harvard Univ. Press, 1975; W. VAN ORMAN QUINE, *Word and Object*, 1st Ed., Cambridge (MA): MIT Press, 1964.

[58] Which is the reason why the German BGB does not provide for liability for so-called moral or non-patrimonial damages. Fortunately, case law has subsequently recognized a right to privacy and other personal/moral rights. In France, Epicurus' doctrine instead represents the origins of the theory of the "abuse of rights" (Cf. Articles 1382-1383 French Civil Code), which may be easily found in well-established case law on the abuse of freedom in France ("*abus des libertés*") which is itself inspired by the *Declaration of the rights of Man and the Citizen 1789*. By stating that "[f]*reedom means to be able to do all that does not harm other*", its Art. 4 provides a negative definition of a freedom which has allowed the French Court of Cassation to limit not only fundamental

justice depends on the capacity to make men neither to harm others nor be harmed by them (obviously this concept must be linked to what concerns the contents and operation of a contract).[59] Within contract law theory and practice, such a type of DPJ is achieved when a party does not need to bring proceedings before a court in order to benefit from the effective protection of his/her rights and interests. A result which is only achievable when *the* law expressed in the contract offers a fruitful and ontologically tangible protection of them.

Once this view has been accepted, it becomes possible to assert that, given the business of the legislator to produce harmony between private and public interests, the making of the DPJ is nothing more than a matter of using scarce resources and services in a legal and efficient way in order to let private and public interests meet when possible. This is the *socially efficient* formulae *of normative thinking* which I elaborated during the *Seminar*. A *formulae*, it may be added, according to which any analysis of law should be linked to the analysis of the social situation to which it applies (law in context). [60]

As mentioned, these observations were partly made by Locke, who claimed that private and public interests are identical in the long run[61], and by Oliver Wendell Holmes Jr**.**, who argued that "*whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions*".[62] Fifteen years later he continued along this path by saying that "*All rights* […] *are limited by the neighborhood of principles of policy, which are other than those on which the particular right is founded*".[63] Both these suggestions should be taken into account while drafting contract law rules

liberties, but also the exercise of subjective rights. The same approach is followed in Italy (cf. Art. 833 Italian Civil code).

[59] *Letter to Menoeceus, Principal Doctrines*. This perspective shows its utility with a case-by-case approach only.

[60] D. N. SCHIFF, "Socio-legal Theroy: Social Structure and Law", *The Modern Law Review* (1976) 39.3: 287-310. The concept of a constitutional balancing activity between private law's internal conflicts was "invented" by J. ESSER, a follower and critic of Phillip Heck. See *Principles and Norms in Judicial Law Making*, 1956; Id. *Pre-understanding and Choice of Method in Legal Interpretation: Principles of Rationality in the Judicial Decision*, 1970.

[61] *Essay Concerning Human Understanding* and *Treatises on Government*, both published in 1690.

[62] "Privilege, Malice and Intent". *Harvard Law Rev*., (1894) 8: 1.

[63] Cf. *Hudson Country Water vs. McCarter* 209 US 349 (1909) 305. However, it is well-known that in its history the US Supreme Court has never actually tried to balance private and public interests.

and terms. Legal scholars should also critically analyze how legislators provide a balance between private interests and then of private and public interests together by describing what are the social, moral and economic effects of legal rules and of their interpretation. As lawyers our job is to observe, to analyze and to inform (also future) legislators. According to the *functional approach*, the task for legal scholars is indeed *"to specify the goals relevant to the incidents regulated by a particular branch of private law, to indicate how different goals are to be balanced, to assess the success of current legal doctrine in achieving the specified goals and to recommend changes that might improve that success*".[64]

In keeping with these delicate duties, this paper argues that within contract law theory and practice the protection and the improvement of business on the one hand, and of public interests on the other hand, is primarily bound to the development of four legal principles (which should be analyzed along with the protection of "weaker party"):

1) legality (a principle which is linked to consensus, "*pactum*" and formalities);
2) certainty;
3) possibility;
4) *bona fides* (pre and post-contractual).

True, the making of the DPJ requires more than just the development of these four legal principles. For example, it also requires the improvement of the ability to conceive and then writing down proper and efficient rules in contracts. A result which may be achieved only if contract law's rules are *a priori* stated in a clear way. Law's content, as Anthony Murray Gleeson CJ of Australia claimed, must be accessible and so far as possible, intelligible, clear, and predictable. [65] Why must it? The reason is self-evident: if we would like to claim the rights which the civil law gives us, or to perform the obligations which it imposes on us, it is important to know what our rights and obligations are. The successful conduct of trade, investment, and business needs such an achievement. Practically speaking, as Lord

[64] H. J. WEINRIB, *supra*, note 3: 40.
[65] *Courts and the Rule of Law*, Melbourne: Melbourne Univ. Publishing, November 2001.

Mansfield CJ aptly put it, "*the daily negotiations and property of merchants ought not to depend on subtleties and niceties, but upon rules easily learned and easily retained because they are dictates of common sense drawn from the truth of the case*".[66]

So, the question arises: how well is this rule observed today? In continental Europe (*e.g.*, Italy, Germany, France, and the Netherlands) much of *the* law is found on (most of the time) carefully drafted "codes", whereas in many common law countries considerable efforts have been made in order to make clear, succinct and intelligible legislation. In the United Kingdom, the answer varies according to the source of the particular law under discussion: statute law, common law made by judges (that can be overridden by statute) and European law.

Unfortunately, legal "rules" in legislation, judgments, and contracts are written in an inappropriate legal style and unsatisfactory language most of the time. As lawyers, we can solve this problem by: (*i*) thinking more critically; (*ii*) improving our sensibility and experience with an interdisciplinary approach. And we have to do this because an improvement of our legal sensibility would lead to more legal rules being easy to interpret and make. [67]

Regarding the essence of private law, it is important to note that the majority of private law scholars assert that it has *internal intelligibility* and that the standpoint for identifying its terms, references, and aims is internal to its galaxy. It is commonly argued that private law is a "self-understanding enterprise"[68] that has an internal coherence. The idea of coherence suggests a further aspect of internal intelligibility. Personally, I do not completely agree with this view. It is correct to say that a system of legal rules must be coherent. Coherence is a fundamental aspect of the justificatory process of every science and discipline, and an incoherent private law would be extremely useless and, more importantly, dangerous. The notion of "coherence" implies a certain degree of integration between the elements of a unified structure/system. This is basically the reason why the whole has greater

[66] *Hamilton v. Mendes* (1761) 2 Burr 1198, 1214. Lord Mansfield generally regarded as the father of English Commercial law.

[67] A circumstance that, in the long run, will also help the sovereign to achieve public interests.

[68] E. J. WEINRIB, *supra*, note 3: 14.

significance than the sum of its parts. Nonetheless, I also think that this approach shows its intrinsic limits while underestimating that the notion of "coherence" inevitably implies a mode of intelligibility that is completely and inescapably internal that has no external referents. Contrarily, being a legal humanist means being capable of thinking critically by improving the sensibility and experience with an inter-disciplinary approach to law.

Furthermore, the fragmentation of substantive and procedural rules that characterizes LP has increased our perception of the fragmentation of private law sources. As a result, the idea and perception of private law as a coherent and unitary system has been significantly disturbed and challenged. Private law has become a building ground where there are several architects, located at the intra-/trans-/supra-/super- national level.

The *teleological* interpretation [69] process, aimed to interpret legislative provisions in the light of the purposes and socio-legal values that they are intended to achieve and promote, represents a clear proof of what I am hereby arguing.[70] Yet the promoters of this *modus interpretandi* seem to forget that (the) law is a *science*, not an *art*. Like every science (*e.g.*, mathematics, physics, chemistry, philosophy, theology, politics, *etc.*) (the) law is conceived, shaped, and expressed in a determined and accurate language formed by precise terms, locutions, and sentences. An artificial, symbolic, and formalistic language that must be first understood, and then respected.

[69] The term "interpretation" indicates the process by which the meanings of a legal source are determined. Hence the purpose of interpretation of a legal rule (wherever it lies) is to ascertain the intention of the sovereign who drafted it and, consequently, the purpose of interpretation of a contract is to ascertain the common intention of the contractans.

[70] Shakespeare's *The Merchant of Venice* (written between 1596 and 1598, during a time of religious controversy in England, and against the dark background of the Spanish Inquisition) represents a very appropriate example of, on the one hand, how important it is to have well written legal rules (or contractual clauses) by also showing, on the other hand, the difference which exists between a *teleological* and a *literal* or *authentic* interpretation of them. The whole play persuasively shows the importance of interpretation and hence of drafting clear legal rules in any contract: if Antonio pays back the money on time, he then wins the merry sport and Shylock will act like a Christian by taking no interest on the loan; but if Antonio fails to pay it back on time, Antonio himself will be made to act like a Jew and this would be a transformation of Antonio into Shylock's double.

These observations show their utility especially in the legislation-drafting process. Indeed, it is better for those who draft legislation to define exactly what they mean by the terms they use, so as to avoid any possibility of misunderstanding or judicial misrepresentation. This point would appear even clearer and more understandable if we bear in mind the inescapable link between legal rules and principles. Credit for focusing on this connection is generally given to Matthias E. Storme, according to whom "*identifying principles is an important task for legal scholars because rules do not apply absolutely but under certain conditions* […] *they spell out the conditions under which a principle prevails over another*". [71] As a consequence, the need for interpretation of contracts usually arises where the language or symbols used by parties to express their agreement are vague. This basically means that, given every judge's legal duty under the laws of his/her state (or any other geo and socio-political, legal, ontological, and economic "sovereign" entity in the stateless era) to apply them mainly according to their letter, the courts' job would everyday become more difficult and slower if judges only work with imprecise and nebulous norms.[72] Cicero and the Romans noticed this whilst asserting that: "*obscura explanare interpretando*" and "*in claris non fit interpretatio*".[73] Centuries later Blaise Pascal rightly added that "*words differently arranged have a different meaning, and meanings differently arranged have different effects*",[74] and then Ludwig Wittgenstein asserted that "[…] *what can be said at all can be said clearly; and whereof one cannot speak thereof one must be silent*".[75]

[71] "The foundations of Private law in a Multi-level Structure: Balancing, Distribution of Lawmaking Power and Other Constitutional Issues", in R. BROWNSWORD – H.-W. MICKLITZ – L. NIGLIA – S. WEATHERILL (Eds.). *The Foundations of European Private Law*, Oxford-Portland: Hart Publishing, 2011: 382.

[72] Roman law's perspective on this point should not be taken for granted. Roman law was the most innovative and the most copied system in the West and its law of contract was the most original part of it. Cf. also the Latin principles: (*i*) "*pacta sunt servanda*" –which holds that agreements freely and seriously entered into must be honoured and enforced (rights and duties); (*ii*) "*juris novit curia*" and "*da mihi factum, dabo tibi ius"* –which briefly mean that clear agreements and facts help judges in doing their job; (*iii*) *"ad poenitendum properat cito qui iudicat"* –which implies that every judge has to consider what he or she thinks justice requires, and then has to decide accordingly (otherwise he or she will regret his or her approach). With regard to this last principle, in 1790 Lord Mansfield CJ advised a Colonial Governor by saying "*Consider what you think justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong.*"

[73] *Brutus*, 152.

[74] *Pensées*, 22, 1670 (W.F. Trotter, trans. 2011).

[75] *Tractatus Logico-philosophicus*, preface, in Schriften, Vol. I, Frankfurt, 1960 (1921).

Four suggestions that, unfortunately, in contract law theory and practice, do not have the value they would instead deserve.

To conclude, the lesson is that, on the one hand, the nature of contracts reveals why *bona fides* should be conceived as a "rule of law", and not as an underlying soft principle. Their morality instead explains why, as lawyers, it is also our duty to provide the sovereign with clear and useful insights concerning the aims of *bona fides* in order to avoid chaos and confusion within contract law theory and practice. As a consequence of the foregoing, we are also required to incentivize both private and public actors to promote the using of a clear wording in legislation and in contracts of good faith dispositions. Otherwise, they will inevitably waste their resources by considering secondary or tertiary principles or precepts to understand the contractants' intention.

V. Economics & Contract: Microeconomics & Economic Efficiency Theory

The significance of the last section of this study is given by the circumstance that the most prominent contemporary manifestation of *functionalism* is the economic approach, which has so far produced complex and sophisticated analyses of the private law theory and practice.

I already mentioned that, as John Rawls puts it, the *idea of co-operation* implies the idea of each participant's rational advantage, and the idea of rational advantage specifies what it is that those engaged in co-operation are seeking to advance from the standpoint of their own good. As outlined, in the law of contract this implies that the parties are perfectly aware that they cannot achieve what they would like too without the co-operation of others. And this is true also from an economic point of view.

Starting from this awareness, during the *Seminar*, I divided the third and final step of my analysis into two secondary fields by using: (*i*) *Microeconomics*; and (*ii*) *Economic Efficiency Theory*. The former has been useful to investigate how to pursue

private interests within contract law theory and practice, whereas the latter has been dedicated to the pursuing of public interests. Yet it might be suggested that other economic indicators that are commonly used for judging the health of an economic system would have been probably important for my analysis, such as: (*i*) the gross domestic product (GDP) per head;[76] (*ii*) the rate of inflation; (*iii*) "elasticity", which measures the responsiveness of one variable to changes in another. [77] Unfortunately, there was not enough time to describe them properly. Furthermore such statistics are often subject to huge revisions in the months after they are first published cause embarrassing difficulties for the economic policymakers who constantly rely on them. Thus, by keeping in mind the moral consequences of economic growth,[78] I preferred to concentrate my efforts on the two economic fields mentioned above.

Microeconomics –"*μικρό*" (small) plus "*οικονομία*" (economics)– is a discipline which studies the behavior of individual market players. In other words, *Microeconomics* analyzes the individual pieces (as actors and elements) that together make an economy. In contrast with *Macroeconomics*,[79] this discipline considers issues as to how households reach their decisions or whether privatization improves efficiency, whether a particular market has enough completion in it. *Microeconomics* makes certain simplifying assumptions, for instance that individuals respond to incentives and make rational choices given all the available information at a given time. This allows a comparison of costs and benefits.

[76] The GDP measures the total value of output in an economic territory. Although since its creation during America's Depression, several improvements have been adopted, the GDP is still far from perfect. In this sense, to understand why the US has changed the way to measure it, and why in the short term the 'new GDP' makes international comparison more difficult, see *The Economist*'s editorial "Boundary Problems. America has changed the way it measures GDP", 3 August 2013.

[77] There are two main types of elasticity: (*i*) "*price elasticity*", which measures the quantity of supply of a good, or demand for it and that changes if its price changes: if the percentage change in quantity is more than the percentage change in price, the good is price elastic; (*ii*) "*income elasticity*" of demand, which is aimed to measure how the quantity demanded changes when income increases.

[78] B. M. FRIEDMAN, *The Moral Consequences of Economic Growth*, New York: (NY) Vintage Books, 2005.

[79] That is the study of economy-wide phenomena like "growth", "inflation" and "unemployment".

Despite its evident limitations, *Economic Analysis of Law* (EAL) has become one of the most influential scholarly methodologies in American socio-legal thought. As it is known, Jeremy Bentham, John Stuart Mill, and all *The Utilitarians* had an impetuous impact in the development of *Microeconomics*. They used the concept of "utility" to argue that human reason could find no other rational justification for preferring one course to another.[80] Yet the origins of the modern economic approach to law can be traced back to Ronal Coase's studies, and to Gary Backer, Guido Calabresi, and Richard Posner's subsequent developments.[81]

EAL develops the perspective that contractual parties engage in mutually beneficially exchanges that are per se inefficient in nature. Contracts, within this perspective, provide the ontological framework needed for such a transfer. This evidently implies the idea of co-operation to which this paper refers too. As a consequence, it is possible that at some point the social benefits provided by the contract do not justify the costs of performance. This situation may lead, according to EAL, to the possibility of optimal breach (*e.g.*, specific performance, damages, *etc.*).

The relevance of this discipline for present purposes is given by the fact that perceptions do not always keep up with reality and sometimes people lack an accurate basis for comparing their incomes or living standards to what others have. If one would like to shape Bentham's account within the modern EAL's framework,[82] he/she might then suggest that having the other's party collaboration

[80] Also, R. POUND's sociological account would be useful for our analysis. By working on von Jhering's suggestions, Pound has become a leading proponent of sociological approaches to the study of law. He explained that every man's social and economic life is nothing more than a form of "social engineering", and then argued that every society has a pattern of culture which determines its various ideologies. More precisely, he interpreted the "legal process" as a form of social control whereby all the conflicting interests in society are scrutinized, compared and finally accepted or rejected. He also criticized the new generation of "*social Utilitarians*" by arguing that it has underestimated the difficulty of the task. See *An Introduction to the Philosophy of Law*, New Haven (CT): Yale Univ. Press; Revised Ed., 1959; D. LLOYD, *supra*, note 29: 211.

[81] Respectively, "The Problem of Social Cost", (1960) 3 *Journal of Law and Economics*: 1; "Crime and Punishment: AN Economic Approach", (1968) 76 *Journal of Political Economy*: 169; *The Costs of Accidents*, New Haven (CT): Yale Univ. Press, 1970; *Economic Analysis of Law*, London Little Brown, 2007.

[82] M. KOVAČ, *Comparative Contract Law and Economics*, Cheltenham: Edward Elgar Pub., 2011.

is the best way by which a party may pursue his/her interests by also optimizing his/her resources.[83]

The foregoing should be investigated together with another important circumstance, that is, the protection of the "consumer" as contract law's weaker party. A protection which implies that the sovereign must also: (*i*) establish mandatory rules which impose "constitutional" values like non-discrimination; (*ii*) guarantee a free –or at least an easy– access to justice for those who cannot afford it (poor and/or uneducated persons).

The achievement of these results is clearly linked to an effective and reasonable prevention from the prevarication of the richest/strongest party over the weakest one. Hence, it is inevitably related to the impact that "Standard Forms Contracts" (SFCs) has had in contract law theory and practice, and to their role in the promotion of the so-called "distributive justice". [84] The creation and implementation of SFCs indeed represent a new phase in trade.

SFCs may be defined as contracts already drafted for a number of transactions concerning particular products or services and accepted by the other party in whole without conducting any kind of negotiation.[85] Their aim is to provide a given framework of the parties' rights and duties by including clauses that govern non-payment, exclusion and limitation of liability, penalty clauses,[86] clause on governing law and arbitration as alternative dispute resolution mechanisms, [87] *etc.* Their

[83] It is reasonable to assume that certain legal scholars will not agree with this perspective on the basis that, sometime, disclosure of information prior to contract formation may be more "expansive" than pre-contractual liability in the context of the breach efficient theory.

[84] It is beyond the scope of this contribution to address the 'consumer-galaxy' properly, and hence to explain why Consumer law is witnessing worldwide a shift from the original conception of the consumer as the 'weaker party' to a new conception of him/her as the 'stronger pary'.

[85] G. ŠULIJA, *Standard Contract Terms in Cross-Border Business Transactions. A Comparative Study from the Perspective of European Union Law, Peter Lang GmbH, Frankfurt am Main: Internationaler Verlag der Wissenschaften, 2011: 25-69; S. LEIBLE, Fundamental Freedoms and European Contract Law*, in S. GRUNDMANN, (Ed.). *Constitutional Values and European Contract Law*, Alphen aan den Rijn: Kluwer Law International, 2008: 63-84.

[86] For the South African landscape, cf. the *Conventional Penalties Act* 15 of 1962 which is usually interpreted narrowly by the courts. When a party makes a claim for the enforcement of a penalty clause resulting from a breach of contract, the court may reduce it insofar as it is out of proportion to the prejudice suffered by the claimant as a result of the breach of contract (by also considering non-proprietary interests).

[87] In South Africa the law of arbitration is now regulated by the *Arbitration Act 42* of 1965 which, however, does not apply to common law agreements. It should be remembered that this

intrinsic complicated essence requires an explanation of the evolution of modern contract law theory. Economists of the 18th and 19th centuries[88] argued that the freedom to bargain (whose principle is considered as a product of the school of natural law) is indispensable to further economic development. In the same vein, sociologists as Max Weber [89] and Émile Durkheim thought of contracts as voluntary and self-reliant relationships between individuals which are strongly supported by their discretion to shape contractual (and hence fraternal) relations independently.

These ideas were an evident rejection of constraints established in feudal times and were based on the (partly wrong) assumptions that: (*i*) individuals know best what is good for them; (*ii*) there is not a "weaker" party; (*iii*) there is no reason to support any form of "distributive justice"; (*iv*) the influence of public authorities is minimized so as merely to sustain the stability and enforceability of contractual relations.

The general sentiment changed at the beginning of the 20th century. At that time, legal scholars started to realize that only under conditions of perfect competition and without asymmetric information individuals would not exert undue influence over others –which is not the case of the real world. contract law became thus linked to the idea of the aforementioned "distributive justice" as well as to the efficient allocation of resources and, thus, the principle of freedom of contract was profoundly revised. Under the influence of this doctrine, scholars of different social sciences argued that the law of contract should deal not only with ideal situations, but also (and mostly) with situations, where a party is not economically independent, or where he/she is under pressure or simply does not

type of clauses are quite similar to the so-called "valuation clauses", according to which a third person has to fix the value of a "thing" of a "performance" linked to the contract without any evidence given by the parties. As introduction, see W. A. JOUBERT (Ed.), *The Law of South Africa*, I, 2nd Ed., Durban: Butterworths, 2003.

[88] As Adam Smith, David Ricardo, Jeremy Bentham, and John Stuart Mill.

[89] Max Weber conducted a profound analysis into the ways in which authority establishes itself in human society by explaining that authority (*rectius*, the legitimate domination) may take one of three different forms: charismatic, traditional of legal.

have the necessary information that he/she needs to be sufficiently aware while negotiating and concluding a contract. Within this perspective, contract law lost its prominent role and became a vehicle to achieve moral and social objectives.

This new wind made it possible that the judiciary discovered a new role by starting a complete new epoch of contract law theory defined by some legal scholars as one of the most important and innovative.[90] It is not surprising that the atmosphere where this perspective began to develop was the same which gave support, at the end of the World War II, to the notion of Welfare State.

At the moment of writing, however, the scenario is again changed and the development of contract practice has arrived at an important step: the SCFs. Many types of contracts (*e.g.*, e-commerce, banking, sale, lease, deposit, parking, dry-cleaning) are concluded the world over, without any kind of negotiation and the (weaker) party who signs them has just to accept the terms already established by the other party (in the majority of the cases by quickly clicking an online "accept the terms" button and thus without even reading them through). This phenomenon has been well described by the French doctrine of the so-called "*contract d'ahesion*" which is usually uses to define form contracts where terms are not intended to be amended by the other party.

If there are precise reasons to show some criticism about these contracts (*i.e.*, the party's evident limitation of the freedom to negotiate and hence express his/her will), on the other hand it has been noted that they can speed-up and simplify a growing number of business dealings in the light promoted by the so-called "rationalization of business" –which, according to some socio-legal surveys, already in the 1970s was covering more than the 99% of all contracts made in the US.[91] Furthermore, the same scholarship is used to remark that by (non)contracting, both parties can save money and time because standard terms usually do not require any

[90] By way of an example, case studies from Scandinavian countries show that parties re-negotiate and adjust unfair contract terms during judicial proceedings in court. In doing so, instead of invalidating contracts by following law prescriptions, judges only adjust them by literally entering into the agreement. This approach is quite dangerous because it may lead to arbitrary judicial decisions and hence undermine the stability of contractual relations.

[91] W. D. SLAWSON, "Standard Forms Contracts and Democratic Control of Lawmaking Power", *Harv. L. Rev.*, (1971) 84: 529.

additional legal cost. Finally, some commentators have also claimed that SFCs contribute in improving legal reasoning –broadly understood.

However, although these doctrines may have some appeal, it is my suggestion that especially the European paradigm[92] demonstrates that their benefits should not be overestimated. The financial crisis started in 2008 and the subsequent *Great Recession* demolished many beliefs concerning SFCs' advantages.[93] Only in Utopia, it may be suggested, under conditions of perfect competition and without asymmetric information, individuals would not exert undue influence over other. This is the reason why at the moment of writing significant credit is given to *Behavioral Economics*, whose aim is to study the nature(s) of economic decisions people make in practice by using decision-making models borrowed from psychology.[94]

Thus, especially in the insulated, soft-networked post-national framework, the law of contract should be performative instrument used to find a balance between a (*i*) *homo oeconomicus*, which is a rational and narrowly self-interested actor who has the ability to make judgments toward his subjectively defined ends by pursuing selfish interests;[95] and a (*ii*) *homo reciprocans*, the doctrine of which states that human

[92] Cf. Directive 93/13/ECC [1993] OJ L95/29; *Office of Fair Trading v. Abbey Nation et al* [2009] UKSC 6; BGH VII ZR 178/08, NJW, 2010, 2789; Case C-341/05 Laval *un Partneri Ltd v. Svenka Byggnadsarbetareförbundet* [2007] ECR I-I, 11767; Case C-438/05 *The International Transport Workers' Federation (ITF) & The Finnish Seamen's Union (FSU) v. Viking Line APB & Oü Viking Line Eesti* [2007] ECR I-107779 OJ C60/16; Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociatión de Usurarios de servicio bancarios (Ausbanc)* [2010] ECR I.

[93] The theory aimed to demonstrate that financial markets are rational is called *Efficient Markets Theory*. It is composed by two different parts: the first one claims that unless the investor has some inside information not available to other investors, he cannot tell if stock prices are too low, too high, or just right; the second one focuses on the circumstance that market imbalances cannot persist for more than a very short time, because as soon as they are discovered, they will be arbitraged away. See J. FOX, *The Myth of the Rational Market: A History of Risk, Reward, Delusion on Wall Street*, New York (NY): Harper Business, 2011.

[94] D. MCFADDEN, *supra*, note 43.

[95] This kind of "*homo*" has always been posed at the heart of economy theory. In traditional classic economics and in neo-classical economics it was argued that people act in their own self-interest. Adam Smith assumed that society was made better off by everybody pursuing their selfish interest by using the so-called "invisible hand". In recent years economists have tried to include a broader range of human motivations in their models and so there have been attempts to model altruism and charity. Recently, *Behavioral Economics* and *Neuroeconomics* have drown the studies of human psychology to explain economic phenomena. See H. WOLFF, *Der "homo oeconomicus": eine*

beings are primarily motivated by the desire to be cooperative and improve their environment [96]

As a logical progression, a pertinent question at this stage should be why the approach I am proposing may also be beneficial for the public sector. The answer is likely to be found by using the so-called *Economic Efficiency Theory* (EET), which studies the use of public resources and services so as to maximize the production and the use of goods and services. In other words, EET (mainly) investigates the impact of laws and regulations on the behavior of private and public actors in terms of their decision and implications for social welfare and its efficiency.

Seeing that the term "efficiency" is meant to measure how a private or public actor is capable to get the most out of the resources involved in a given activity, this contribution suggests that if we try to unite the utilitarian approach described above whilst investigating the nature and morality of contracts, with the standpoint of the legislator, the "justice-making process" refers more to the aggregate of the welfare of the community rather than to the egoistic self-interest. In this sense, the adoption of a *functional modus investigandi* should make it clear that having the other party's collaboration whilst negotiating and executing (post-contractual *bona fides*) a contract, is also useful for the sovereign because it avoids a waste of public resources in justice management to achieve the results that the parties, by co-operating, have already achieved.

To conclude, a successful modern liberal democracy combines three elements: (*i*) the state; (*ii*) the rule of law; (*iii*) an accountable government. The fact that there are countries capable of achieving this delicate balance is the miracle of modern politics. When this balance is not efficiently achieved, politics loses its challenges, and protests start to take place. In this sense, even though the doctrine of "rule of law" also implies that: (*i*) all persons and authorities within the state, whether public and private, should be bound by and entitled to the benefits of laws

National-okonomische Fiktion, Berlin: Paetel, 1926; M. MUNDELBAUM, *History, Man, Reason. A Study on XIX Cent. Thought*, Baltimore, 1971; A. HEALTH, "The Rational Model of Man", *European Journal of Sociology* (1974): 15.2.

[96] T. DOHMEN – A. FALK – D. HUFFMANN – U. SUNDE, "Homo reciprocans: survey evidence on prevalence, behavior and success", *IZA Discussion Paper* (2006), n. 2205.

publicly made, taking effect in the future and publicly administered in the courts; and that (*ii*) there should be an effective and affordable access to courts based on an efficient model of resolving disputes, without prohibitive cost or inordinate delay, I think that –especially during the West's worst economic crisis since the World War II– there is an existential need to go beyond this approach.

A need that is evidently linked to the fact that in trying to meet these requirements most legal systems face two potent and enduring obstacles: expense and delay. This also means that they fail to achieve any of the three aims of civil litigation, that is, in Henry Denis Litton Justice's words, the '*just, expeditious and economical*' disposal of any matter. [97]

VI. CONCLUSION

The thoughts and observations contained in this paper were first presented in a preliminary form at the *Staff Seminar* that I delivered at UCT's Department of Private Law, on Tuesday May 8 2012. As mentioned, the aim of the talk was to briefly describe what I see behind the doctrine of good faith (and, more broadly, behind the general course of the parties' behavior before and after the conclusion of an agreement), to then explain the need of its protection and future reasonable developments by facing the limitations of traditional legal approaches to contract law theory and practice.

The choice of the topic warrants further comment. The principle of good faith does not play an exact role in South African law. More precisely, even though it has been very influential in the development of the Roman law in South Africa, nowadays it has an uncertain role and there is an absence of legislation –except for what concerns the field of labor law– that generally requires adherence to it or to any other similar norm.

[97] T. BIGHAM, *supra*, note 30: 89.

As pointed out during the *Seminar*, the point of departure for theorizing about private law is based on experience. This means that proficiency has to be aligned with what we have learned from history. Hence, conducting research on contract law theory and practice requires that imagination and creativity are matched with prudence. By using a "functionalist approach", this paper has called for a "hard" approach to good faith as a rule of law and not as an underlying principle. In order to justify the above aim and properly discuss the real essence of a contract, four different disciplines and approaches have been used. In particular, the analysis developed through three different fields: (*i*) the nature of contract; (*ii*) the morality of contract; (*iii*) economics & contract (*Microeconomics* & *Economic Efficiency Theory*). In addition, *Philosophy of Law* and *Ontology* both played a pivotal role.

The suggested roadmap has been pursued to explain how to feasibly achieve, what during the *Seminar*, I called the "*socially efficient* formulae *of normative thinking*". In doing so, the South African approach to good faith was analyzed and it was explained why it is crucial that the contractants negotiating and executing (post-contractual *bona fides*) a contract can assume themselves that trust should exist between them. Also, it has been also clarified why there is an imperative and inescapable need to completely understand that co-operation is directly linked to the soul of every contract and hence of good faith, a term which implies that a party has to take the other party's interests and rights into account. As suggested, the nature of contracts reveals why good faith should be conceived as a "rule of law" and not as an underlying soft principle. Whereas their morality explains why, as lawyers, it is also our duty to help (also future) legislators to promote clear legal provisions concerning *bona fides* in order to avoid chaos and confusion within contract law theory and practice. A "hard" approach to good faith should therefore be plainly intended to become highly influential in both the legislation and contractual drafting process.

Furthermore, this paper explained why whilst analyzing and interpreting contracts we should avoid abstract and nebulous approaches and instead provide an effective description of them as systematic realities.

Finally, it has been discussed why every contract has an "impersonal" and a "personal" dimension. The main argument has been that there is a correlative relationship between each party's position into a contract and this is namely its "impersonal" dimension (*i.e.*, a seller and a buyer). At the same time, every contract is shaped by a "personal" dimension because human personality describes a party's capacity to his/her own interests and so provides elements about each party's view. The notion of good faith is profoundly linked to both of these parallel dimensions.

RE-READING THE COLLECTIVE PROPERTY ISSUE. A GENEALOGY OF "THE SOCIAL".

FABIANA BETTINI[1] [2]

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I. PRELIMINARY REMARKS

This paper offers some preliminary suggestions for critically rethinking the issue of collective property. These suggestions are part of a broader investigation into the legal debate which took place among German and French jurists in the period from the mid-nineteenth century to the first two decades of the twentieth century, and whose echo spread, to a certain extent, among Italian jurists at the beginning of the twentieth century. Part of this legal debate has significantly focused on the rediscovery of a specific legal institution, *Gesammte Hand.*

Gesammte Hand is a form of collective property that began to reemerge from the Germanic customary law in the middle of the nineteenth century, thanks to the

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[2] This paper is an extended version of the work I presented at the IV Bi-annual Colloquium of Younger Comparative Scholars, May 30th - 31st, Rome, Italy. I wish to thank Prof. Duncan Kennedy for months of conversation at the Harvard Law School and for his invaluable help in framing this topic. I also wish to thank Prof. Giovanni Marini for intellectual support and supervision. Errors are mine alone.

works of some German jurists particularly interested in the social and collective dimension of the legal phenomenon. In the last decades of the nineteenth century Otto Von Gierke's works revived *Gesammte Hand* with more persistence than anybody else before, in order to bring it back to the centre of the German legal debate and with the ultimate goal of adding a greater emphasis on the social dimension of law in the nascent German Civil Code. The thought underlying my project is that, at the threshold of the twentieth century, some French jurists were influenced by the Germanist side of the Historical School which, sensitive to social issues, first reacted against the notion of individual property and, particularly through Gierke's ideas, focused on the customs of ancient Germanic people in claiming that the true Germanic model of property was collective property.

Although the "initial innovators" of Social Legal Thought were German, the main representatives of the Social were French.[3] According to a new belief in law as a social science evolving in response to changing social needs, French Social jurists recognized a new tendency in French legal discourse towards the emergence of the so-called *propriété en main commune*. This model of collective property is different both from the *indivision* and the *personnalité morale* because it is no longer managed according to the mechanisms of the individualistic model of property, but rather through collective mechanisms. The analysis of this legal institution, along with an inquiry into the reasons for its revival in the Germanic legal debate and its utilization by French jurists at the beginning of the twentieth century, allows us to highlight the key points of what I shall call the 'Social Rebellion' against the individualistic conceptualization of private property.

As a final preliminary thought, my interest in studying collective property has been reinforced by the contemporary debate around the 'commons' and the belief that focusing attention on a specific stage of the legal debate about collective property could contribute to a better understanding of the concepts of 'common' and 'collective'. The idea is to face the issue by adopting a historical and

[3] These insights are from D. KENNEDY, "Three Globalizations of Law and Legal Thought: 1850-2000", *The New Law and Economic Development. A critical appraisal*, David Trubek, Alvaro Santos (Eds.), Cambridge, 2006, 37.

comparative perspective, which could help to treat the problem of the 'commons' not only as a purely political issue but as embracing instead a more complex perspective, in order to examine the way in which the problem of collective property, usually presented as something pertaining to the past rather than contemporary, is discussed today within the intellectual framework.

II. A PREMISE ON METHODOLOGY

This project addresses the issue of collective property by adopting the methodological approach of 'genealogy'. Genealogy does not refer to the search for the origins of an idea, and has nothing to do with going back in time and tracing the origins of an idea to the present in order to follow its evolution. Genealogy is instead a method which allows us to understand that a modern idea is "constituted by the confluence of a variety of earlier ideas, each of which was transformed at its moment of combination with another idea".[4]

The impulse for carrying out an analysis of the collective property debate using the genealogical method has been found in Nietzsche's polemical writing, "The Genealogy of Morals",[5] as studied in detail by Michel Foucault in his essay "Nietzsche, Genealogy, History".[6] Nietzsche is very critical towards his contemporaries and their technique of carrying out research into the origins of an idea or an institution in order to find a purpose which could justify the concept and therefore to place it at the origin of the problem. According to Nietzsche, this technique of identifying the purpose of an institution with its origin is totally wrong. Every purpose that can be referred to an institution is simply a demonstration of the fact that, over time, this institution has been reinterpreted and manipulated by more powerful entities, so that its previous meaning and purpose have been overshadowed or completely replaced. Purposes can tell us nothing about the origin

[4] For the idea of legal genealogy used as a methodological tool see D. KENNEDY, "Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought", 56 *Am. J. Comp. L.* 811, 831-832 (2010).

[5] F. NIETZSCHE, "Genealogia della morale. Uno scritto polemico", Milano, 2013.

[6] M. FOUCAULT, "Nietzsche, Genealogy, History", *Language, Counter-memory, Practice: Selected Essays and Interviews*, Donald F. Bouchard (Ed.), Ithaca, 1977.

of a particular idea or institution other than the fact that its history is an unbroken chain of signs that reveals a succession of interpretations, resistances, metamorphosis and counter-actions.[7]

Starting to investigate Nietzsche's understanding of genealogy, Foucault asserts that genealogy is in strong opposition to the search for origins and he clarifies more carefully the relationship between origins and purposes, stating that genealogy "rejects the meta-historical deployment of ideal significations and indefinite teleologies"; on the contrary, genealogy is all about

"record[ing] the singularity of events outside of any monotonous finality; it must seek them in the most unpromising places, in what we tend to feel is without history- in sentiments, love, conscience, instincts; it must be sensitive to their recurrence, not in order to trace the gradual curve of their evolution, but to isolate the different scenes where they engaged in different roles. Finally, genealogy must define even those instances when they are absent, the moment when they remained unrealized".[8]

Although it seems that Foucault places the method of genealogical research beyond history, almost professing the futility of resorting to it, history is intended as a repository of knowledge. So, if the genealogist listens to history, he finds that "there is something altogether different behind things: not a timeless and essential secret, but the secret that they have no essence or that their essence was fabricated piecemeal fashion from alien forms".[9]

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[7] F. NIETZSCHE, *Ibidem*, at 66-67.

[8] M. FOUCAULT, *Ibidem*, at 76.

[9] M. FOUCAULT, *Ibidem*, at 78. At this point, Foucault raises the question of what is the true subject of genealogy. The answer is found through a survey on the meaning of the words *Herkunft* and *Ursprung*, both used by Nietzsche in his texts and which are usually translated with the word 'origin'. If we try to consider these words in their deepest meaning, Foucault argues, we realize that the *Herkunft* is able to record the object of the genealogical method much better than *Ursprung*: *Herkunft* means stock or 'descent', the ancient affiliation to a group, sustained by the bonds of blood, tradition, or social class. Yet, instead of highlighting the common traits of a category, the investigation into 'descent' permits "the discovery, under the unique aspect of a trait or concept, of the myriad events through which - thanks to which, against which- they were formed". Foucault again clarifies that the task of the genealogical method is not to go back in time to restore the unbroken continuity of a series of events or to show that the past is still alive in the present; following the descent, on the contrary, "is to maintain passing events in their dispersion; it is to identify the accidents, the minute deviations – or conversely, the complete reversals- the errors,

The use of the genealogical method, defined in the manner of Nietzsche and Foucault, leads us to understand that a modern idea is always the result of the confluence of a plurality of overlapping ideas, each one transformed by its contact with the others: "what is found at the historical beginning of things is not the inviolable identity of their origin; it is the dissension of other things. It is disparity".[10] 'Disparity' implies that, within a given historical period, there is always more than what the prevailing reconstruction can prove; the predominance of an idea is always contingent, never necessitated, it is always the result of a phenomenon of contamination with ideas which, even if at some points in time have remained underground, have been always present.

III. THE GERMAN SIDE OF THE 'SOCIAL REBELLION': *GESAMMTE HAND* IN OTTO VON GIERKE'S SOCIAL LEGAL THOUGHT

Gesammte Hand begins to reemerge in the mid-nineteenth century German legal debate directly from the medieval customary law of the Germanic people, thanks to the work of some jurists belonging to the Germanist side of the Historical School.

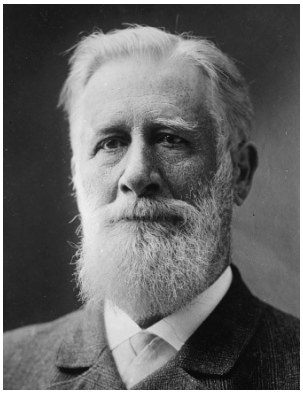
This legal institution was conceived of as a primitive form of collective property whose origins were authentically and purely Germanic. In very general terms, *Gesammte Hand* is an asset belonging in common to all the members of the group. This basic definition, however, does not help to understand what its inner structure and its functioning mechanisms are. *Gesammte Hand* does not permit any distinction in ideal shares which exclusively belong to each member of the group and, likewise, there is no place for any fiction to allow the property to refer to a new abstract entity, different from the individuals composing the group. *Gesammte Hand* refuses both the ideal distinction in shares and the idea of the solidarity of everyone towards the whole. It follows that while individuals do not lose their

the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us".

[10] M. FOUCAULT, *Ibidem*, at 79.

individuality by taking part in the group, at the same time they are the owners of the thing only if they are considered as a group.

The origin of this institution can be found in the need to regulate the use of property within restricted households, consisting of a limited number of subjects. At its origins, collective property was closely linked to the pre-existence of a group of persons, and the expression '*Gesammte Hand*' clearly recalls these origins. The expression, which is usually translated in French with *propriété en main commune*, symbolized the handshake between the members of the family, representing the visible and solemn sign of the principle of jointed action. In order to exercise their property rights, household's members had to form a single body by holding their hands together, thereby acting *communi manu*, *mit gesammter Hand*. Later, this symbol disappeared from the practice but its meaning remained, and with it the name *Gesammte Hand*. If it is true that the original impetus for the rediscovery of *Gesammte Hand* can be found in the controversy between Romanists and Germanists within the Historical School, Otto von Gierke was the first to devote full attention to the study of this institution some decades later. Otto Von Gierke (1841-1921) was a Prussian-born jurist who studied in Berlin and taught there from 1887 onwards as a historian and a legal theorist, with an ever-growing reputation.[11] Historians describe Gierke as a complex figure, whose complexity stems in part from his living in Germany between the nineteenth and twentieth centuries, in an age that was both late-romantic and social-realist. It is probably for this reason that Gierke, the first German jurist who overtly recognized the social role of law and strongly opposed the Romanistic Pandectism, never gave



[11] O. VON GIERKE'S most important works are: "Das Deutsches Genossenschatsrecht" (The German Law of Fellowship), written in four volumes between 1868 and 1913, and "Handbuch des deutschen Privatrechts" (German Private Law), written in three volumes between 1895 and 1917. Important speeches delivered in universities are: "Die Soziale Aufgabe des Privatrechts" (The Role of Private Law in Society), Berlin, 1889, and "Das Wesen der menschlichen Verbände" (The nature of Human Groupings), Berlin, 1902.

up with the romanticism and the "defensive nationalism" inherited from Georg Beseler and the other Germanists.[12]

Gierke's work summarizes the most important results of the efforts of nineteenth-century German thought towards "the idea of social law".[13] Gierke's basic theme was the reality of the group personality as a social and legal entity, independent of state recognition and concession.[14] In Gierke's theory, the fundamental distinction was between *Sozialrecht* and *Individualrecht*. The latter, which is concerned with the claims of individuals, was stressed at the exclusive expense of the former in the Romanistic tradition, which was prevalent in Germany and predominant in the first draft of the new German Civil Code. As a proof of this negative trend, Gierke brought the example of the old Germanic conception of *Gesammte Hand*, which pervaded the old Germanic community – the *Genossenschaft* - before the reception of Roman law overgrew it.[15] The collapse of the original unity of associations gave rise, in Gierke's view, to two evils: the total power of the modern state, foreshadowed by the absolutist state and actualized in the French Revolution, and individualism, foreshadowed by the Enlightenment and actualized in the bourgeois society of the Industrial Revolution.[16] Gierke's formula to fight both these evils was to recognize the 'organicism' of human associations which, in his opinion, permeated the entire life of society.

My reflection focuses on Gierke's social and 'organicistic' ideas as applied to the field of collective property and, more particularly, on the analysis of *Gesammte Hand*. Gierke was the first to advocate more decisively in favor of collective property. According to him, *Gesammte Hand* was a primitive model of joint property, dating back to the ancient German customary law, which was initially applied only in small families but soon went beyond its boundaries to become the true model of German collective property. So conceived, *Gesammte Hand* could refer to any group

[12] F. WIEACKER, "A History of Private Law in Europe (with particular reference to Germany)", Oxford, 1995, at 358.

[13] G. GURVITCH, "L'idée du droit social. Notion et système du Droit Social. Histoire doctrinale depuis le XVIIe siècle jusqu'à la fin du XIXe siècle", Paris, 1932, 535 onwards.

[14] These insights are from W. FRIEDMANN, "Legal Theory", New York, 1967, at 236.

[15] W. FRIEDMANN, *Ibidem*, at 236.

[16] F. WIEACKER, *Ibidem*, at 359.

of individuals acting collectively. In other words, Gierke was supporting the idea that *Gesammte Hand* was the one and only possible form of German property; consequently, he used it as a tool to launch his attack against Pandectism and influence the drafting of the German Civil Code so as to orient it in a more social direction.

The analysis of *Gesammte Hand* could cast new light on Gierke's social legal thought and stimulate a critical insight: *Gesammte Hand*, while presented as a breakthrough from the Pandectists' formalistic and dogmatic approach, seems to be *ad hoc* restored from a sort of mythical past made only of collectivism and still overloaded with doctrinal formulas. Here the thought is that Gierke, while rejecting the Pandectists' substantively individualistic approach in relation to private property, did however adopt a systematic and dogmatic method that was very similar to the one he was severely criticizing.

IV. The French Side of the 'Social Rebellion': Collective Property in French Social Jurists' Legal Thought

On the basis of such considerations, the project now focuses on how the echo of ideas pertaining to the German collective property debate spread into France at the beginning of the twentieth century, and the extent to which French jurists were influenced by the writings of German jurists who were more sensitive to social issues and, more particularly, by Otto Von Gierke's rediscovery of *Gesammte Hand*.

In France, the period beginning with the French Revolution of 1789 saw the rising centrality of property law, which manifestly appeared at the core of the entire systematizing project at the moment of the pivotal enactment of the French Civil Code in 1804. The French Revolution and the enactment of the French Civil Code marked the transition from feudalism – *la féodalité*- to absolute property – *la propriété pleine ou parfaite*, so giving rise to what historians have called the modern "age of

property".[17] In other words, the French Revolution seemed to be essentially "a transformation of property",[18] which was described in the Napoleonic Code as "le droit de jouir et de disposer des choses de la manière la plus absolue", [19] the largest and most comprehensive *maîtrise* that an individual could exert on a thing, with exclusion of all the other individuals.

The notion of individual and absolute ownership became the key to understanding the whole system of property rights. Private property, the symbol of the bourgeoisie, was perceived as a guarantee for the exercising of citizens' autonomy in every other sphere, the paradigm of every situations involving property. As an evidence of this, 'collective property' was relegated to a very marginal place in the Civil Code. On the one hand, the *indivision* was still modeled on the individualistic property paradigm and considered as an exceptional hypothesis clearly disfavored by the legal system[20]; on the other hand, only article 542 dealt (and deals) with *les biens communaux* providing that "les biens communaux sont ceux à la propriété ou au produit desquels les habitants d'une ou plusieurs communes ont un droit acquis".[21] Though the French legal system was anchored to the idea of property as jouissance, exclusion, disposition as consecrated in the Civil Code, some legal scholars have been more sensitive to social needs and encouraged the legal debate to refocus the attention on collective property.

[17] These insights are from D. R. KELLEY, and B. G. SMTH, "What was Property? Legal Dimension of the Social Question in France (1789-1848)", 128 *Proceedings of the American Philosophical Society* 200, 203 (1984).

[18] Using the words of Taine, "Whatever the grand words adorning the revolution, it was essentially a transformation of property; in that lay its internal support, its primary force and its historical meaning": H. TAINE, "Les origines de la France contemporaine", Paris, 1878.

[19] See the French Civil Code, art. 544: "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations".

[20] Art. 815 of the French Civil Code provides that "No one may be compelled to remain in undivided ownership and a partition may always be induced, unless it was delayed by judgment or agreement".

[21] French Civil Code, art. 542: "Common property is that to whose ownership or revenue the inhabitants or one or several communes have a vested right".

Permeated with a new belief in law as a social science evolving in response to changing social needs, the works of French jurists, such as Saleilles and Josserand, recognized a new tendency in the French legal system towards the emergence of the so-called *propriété en main commune*. Raymond Saleilles (1855-1912) was a French

jurist, who taught civil law and comparative law in Paris from 1898 onwards. Co-founder of the *Société d'études legislatives*, Saleilles organized the celebration of the first centenary of the French Civil Code in 1904, at the same time serving as a member of the Civil Code Reform Commission. A fervent Catholic and in favor of legislative reforms regarding women and workers, Saleilles resembled both the French Republican laymen and the Catholic Socialists.[22] Inspired by Jhering's position towards Roman law, Saleilles most-known formula is "au-delà du Code Civil mais par le Code Civil", which literally means "beyond the Civil Code but through the Civil Code". The formula reveals that, while recognizing the importance of the Civil Code as an instrument of legal development (instead of an instrument of inertia and immobility), Saleilles advocated for a central role of legal scholars and legislation. In his view, legal doctrine had to be the avant-garde for the interpretation of the social phenomena, a sort of repository of the collective conscience, but it was the exclusive task of the legislator to implement the necessary legislative reforms.[23]

Gesammte Hand was first studied by Raymond Saleilles in his work on the *sociétés en commandite*, in which he argued that such *sociétés* should be understood according to the *propriété en main commune* scheme,[24] and some years later he deepened the study of this legal institution in his twenty-five lessons on legal

[22] J.-L. HALPERIN, "Raymond Saleilles", *Dictionnarie historique des juristes français. XIIe-XXe siècle*, P. Arabeyre, J.-L. Halpérin, J. Krynen (Eds.), Paris, 2007, at 694-696.

[23] R. SALEILLES, "Introduction à l'étude du droit civil allemande", Paris, 1904.

[24] R. SALEILLES, "Étude sur l'histoire de société en commandite", *Annales de droit commercial*, vol. X, 1895, at 10-26, vol. XI, 1897, at 29-49.

personality.[25] Saleilles's intuition later inspired the work of Louis Verdelot[26] and Pierre Masse.[27] Other doctoral dissertations, like those of François Guisan[28] and Joseph Ricol,[29] focused on the same subject. More than all the others, however, Josserand dealt with the problem of collective property in France, more directly following the path chosen by Otto von Gierke and the other Germanists.

Louis-Étienne Josserand (1868-1941) was a French jurist who took the chair of *droit civil* in 1898 at the law faculty of Lyon, where he became Dean in 1913. Josserand's personality is characterized by the constant search for a balance between innovation and tradition, between collective and individual interests. In spite of his moderate position, Josserand was convinced that law was the social science *par excellence*: "le droit, science sociale, ne saurait échapper, en aucune de ses parties, à la loi suprême de l'évolution; seule les législations mortes se reposent dans l'immobilité" [30] . Rejecting both materialism and the abstract metaphysical conceptualization of law, Josserand believed that the law should evolve in accordance with social morality, that it should change in response to the changing image of society.[31]

It was in particular through Josserand's article in the book celebrating the centenary of the French Civil Code, which is probably the less known of Josserand's works, that the notion of *Gesammte Hand* was for the first time studied in comparison with the *indivision* and the *personnalité morale*, the only two forms in which 'collective ownership' had ever been conceived until that time.[32] The idea of

[25] R. SALEILLES, "De la personnalité juridique. Histoire et théories", Paris, 1922.

[26] P. VERDELOT, "Du bien de famille en Allemagne et de la possibilité de son institution en France", Paris, 1899.

[27] L. MASSE, "Du caractère juridique de la communauté entre époux dans ses précédents historiques : thèse pour le doctorat", Paris, 1902.

[28] F. GUISAN, "La notion de Gesammte Hand ou de Conjonction appliquée à la société en nom collectif", Lausanne, 1905.

[29] J. RICOL, *La copropriété en main commune (Gesammte Hand) et son application possible au droit français*, Toulouse, 1907.

[30] C. FILLON, "Louis-Étienne Josserand", *Dictionnarie historique des juristes français. XIIe-XXe siècle*, P. Arabeyre, J.-L. Halpérin, J. Krynen (Eds.), Paris, 2007, 429-431.

[31] C. FILLON, *Ibidem*, at 430; Chazal, Jean-Pascal, "« Relire Josserand », oui mais… sans le trahir!", *Recueil Dalloz*, 2003, 1777 onwards.

[32] L. JOSSERAND, "Essai sur la propriété collective", *Le Code civil, 1804-1904. Livre du centenaire*, Société d'Etudes Législatives (Ed.), vol. 1, Paris, 1904.

discovering the social dimension of the law of property was then re-addressed by Josserand, one year before his death, in a study published in the *Mélanges Sugiyama*, where he claimed that the process of transformation, which inevitably involved all legal institutions at the threshold of the twentieth century, was particularly evident in the context of property, which was "one of the most important pillars of the social temple".[33]

Josserand's critique was directed toward the Roman conception of *dominium*, which in his opinion was one of the most burdensome legacies left by Roman law to modern jurists. This conception was justifiable in the Roman period, due to the poverty of legal instruments and to the embryonic stage of development of collective property. The individualistic property régime understandably survived the turmoil caused by the French Revolution, which represented the triumph of individualism and was hostile to the recognition of any corporatist tendency within the legal system. At the threshold of the twentieth century, however, given that in every legal institution the jurists were rediscovering a social dimension, the application of the individualistic paradigm to private property became a complete non-sense[34].

Josserand did not preach the advent of a 'new legal order'; on the contrary, he recognized that a new trend was already taking place in the French legal system in order to correct the exaggerated individualism of property law, namely the emergence of forms of *propriété en main commune*. In order to describe it as a collective phenomenon, Josserand drew its external boundaries: the *propriété en main commune* lies in the middle between the *indivision* and the *personnalité morale*, but needs to be distinguished by both of them. On the one hand, the *indivision* is described as an individualistic and chaotic form of property, in which each share has full autonomy with regard to the others. Once acquired, the share becomes part of the asset of

[33] L. JOSSERAND, "Configuration du droit de propriété dans l'ordre juridique nouveau", *Mélanges Juridiques dédiés à M. Le Professeur Sugiyama*, Association Japonaise des juristes de langue française (Ed.), Tokio, 1940.

[34] See L. JOSSERAND, "Essai sur la propriété collective", *Le Code civil, 1804-1904. Livre du centenaire*, Société d'Etudes Législatives (Ed.), vol. 1, Paris, 1904, at 379.

the owner, like any other rights, and thus he can alienate it, create new property rights on it and ask for partition at any moment, without the other members' consent. Due to its internal rules and in spite of the plurality of (joint) owners, this form of property is still managed in accordance with the individualistic scheme of *dominium*, very far from representing the interests of the group. On the other hand, in the *personnalité morale* the moral body is regarded as the synthesis of the members' wishes; in this way, the plurality is drastically reduced through a *fictio,* thanks to which the new born entity becomes the sole owner of the thing. Once again, the individualistic scheme persists.

In Josserand's view, this binary and very simplistic systematization has led to the denial of genuine forms of collective property. In addition to these two mechanisms of management of 'common ownership', in fact, a third form of property should be recognized, a form of property *sans indivision et sans personnification*, which is the *propriété en main commune*. According to the collective property idea, the thing is not even ideally divided into parts; the different owners, if considered in isolation, have no rights over the thing nor could they, by means of disjointed acts, alienate or create new property rights on their individual share. The thing is held in common by the group, as it is a whole separate asset with a collective purpose; the one and only owner of the thing is the community itself.

Despite French jurists occupying different legal and political positions within 'the Social' and consequently pursuing different projects, they all admitted that these forms of collective property, decidedly present in the customs of the ancient Germanic people but deliberately ignored by the French Civil Code, were in reality not historically unknown in France. Although collective property became a real issue in France mainly thanks to the renewed German interest in *Gesammte Hand*, French jurists strove to present it as an indigenous French institution - whose origins could be rediscovered in the ancient French customs and specifically in the *communautés taisibles*[35] - and they were always very careful not to make the entire operation look like a legal transplant.

[35] *Les communautés taisibles*, or implied communities, have medieval origins. Their peculiar social structure is based on the exploitation of land by a community, more often a family. They

The critical remark I formulated above with respect to the position of Gierke in Germany is also applicable to French Social jurists. Like their German counterparts, they sought to pursue their ideological agenda in the field of property law. Taking advantage of the rediscovery of *Gesammte Hand*, they supported the notion of collective property in order to replace the "cold individualism" typical of Roman law – and taken ideologically from the Civil Code as a declamation- with another set of values, more consistent with the needs of society.

V. Concluding Remarks. Some Suggestions for a New Critical Reading of the Collective Property Issue

The outlined framework suggests that the description of 'the Social' should not be simplified. It only makes sense to speak in terms of a 'Social Rebellion' if we are aware that in Germany and France 'the Social' has manifested itself in different ways, in accordance with the great diversity of the socio-political and legal context.[36] Even within each of these countries 'the Social', far from being a monolithic phenomenon, must be regarded in its complexity. In France, for example, although both Saleilles and Josserand were interested in the *Gesammte Hand*, and Saleilles' work was the first to give impetus to many other works on the subject, Saleilles' social thought is more interested in the aspects of legal personality and associations, while that of Josserand one more directly follows the path opened by Gierke and the other Germanists.

are generally presented as being outside the scrutiny of the law, in the absence of any written agreement, and based on the community of goods, works and life. They are perpetuated through rules of inheritance that prevent the dissolution of the group. This short description is taken from I. Hartig, "La dissolution de communautés taisibles de la région thiernoise et le Code Civil", *Annales Historiques de la Révolution française*, n. 240, avril-juin 1980, 205-215.

[36] Probably one of the most important differences in the legal context concerns the impact of codification on the legal system: while the French faced the process of enactment and interpretation of the *Code Civil* at the beginning of the nineteenth century, in Germany the debate around codification started with the Savigny vs. Thibaut polemical controversy and reached its peak in the last decades of nineteenth century with the drafting of the German Civil Code and its enactment in 1900.

Moreover, in this project I have taken for granted the description of Classical Legal Thought given by Social jurists, assuming that it has been mostly their own projection. In fact, the exasperated description of nineteenth-century legal classicism, depicted as a period dominated by formalism and dogmatism, in terms of its method, and individualism in terms of its substance, was ideal for proving that the Social jurists' critique had deep roots in a past which had to be rejected, because it was no longer moving with the changing social needs. I am aware that this description is nothing more than a narrative and it functioned as an instrument for legitimizing their deconstruction of the legal system and its reconstruction on different grounds.

Keeping in mind these two caveats, some tentative conclusions can be formulated. First, as to the methodological dimension of the Social jurists' projects, the critique led by Social jurists in France and Germany seems to be characterized not only by a tendency toward deconstruction. If some Social jurists, such as Jhering and Geny, more clearly criticized the systematizing and formalistic approach adopted and favored by Classical legal thinkers throughout the nineteenth century, [37] jurists such as Gierke and Josserand, equally considered as representatives of 'the Social', have not always been able to distance themselves from a formalistic and dogmatic approach. In fact, although these jurists disclaimed the idea of a quasi-ontological dimension of the system, like those created by the *École de l'exégèse* and Pandectism, and they urged to break its rigidity, their criticism never stretched beyond the legal system. Jurists must be able to read the transformation of their social reality, which is in continuous evolution, in order to let 'drops of social oil' penetrating the mechanisms of the law. The critique of formalism and dogmatism of the classical method is more theoretical than practical, and it should be read within the dialectic legislator-courts-scholars. In an effort to update a system that until then had been blind to changing social realities, Social jurists constantly tried to rebuild the system from within, with the ultimate goal of

[37] R. VON JHERING, "Law as a Means to an End" (trans. Isaac Husik, The Lawbook Echange), New Jersey, 1999; Geny, François, "Méthode d'interprétation et sources en droit prive positif", Paris, 1899.

restoring the role of legal scholars as the avant-garde of any social change of law. The Social jurists' debate over collective property perfectly demonstrates the point: their critique of the individualistic and absolute conceptualization of private property did not aim at the complete *bouleversement* of the existing legal order; instead their critique was directed towards the recognition, within the legal system, of the collective dimension of property law.

Secondly, as regards the substantive dimension of the Social Jurists' projects, their critical efforts seem to be permeated with the desire to pursue an ideological agenda. As noted above, a crucial element of their projects was that, in choosing property law as one of the ideal battlefields for fighting against Classical Legal Thought, Social jurists used *Gesammte Hand* as an ideological tool in order to challenge the dogma of absolute and individual property, and to promote social and collective values as a valid substitute. The 'Social Rebellion', considered in its substantive dimension, has led to nothing more than the mere replacement of one ideology (the individualistic conceptualization of property) with another (the collective property idea). Thirdly, even if Social jurists presented their system as being more modern because it was more inclined to take account of the needs of social change, at least in France, the aim of this entirely new systematization was not redistribution; rather, the collective property discourse was useful for understanding and justifying new modes of wealth accumulation, mostly through associations and corporations. The collective property ideology permeating 'the Social', far from being at the foundations of a new legal order without private property, was put at the service of capitalist purposes. Finally, this conflict between the methodological and substantive dimension of the Social jurists' projects, rather than being understood as a contradiction internal to Social Legal Thought could and should be better described as a dialectical stage within the framework of a process of gradual transformation from the Classical mode of legal thought to the Social one.

Along with a more thorough investigation on how this 'Social Rebellion' took place differently in Germany and in France, the project will address two other

aspects of the debate on collective property. The first of these concerns how and to what extent the ideas pertaining to the 'collective property debate' spread from Germany and France into Italy at the beginning of the twentieth century. Probably in Italy there was not a real 'Social rebellion' against the individualistic conceptualization of private property, a break strong enough to push jurists to abandon their traditional methodological categories and place themselves outside the systematization of the Civil Code.[38] In spite of this, some jurists have made an effort to recognize the presence of 'traces' of Germanic law in our legal system and expressed interest in using the scheme of *Gesammte Hand* for a number of different purposes.[39] The second aspect puts forward a tentative explanation as to why jurists all over Europe have gradually abandoned the collective property idea, thus formulated, starting from the period between the two world wars, and analyzes which legal solutions they have turned towards in order to give relevance to the collective dimension of property law.

[38] For a brilliant analysis of the 'social critiques toward the Civil Codes' at the end of the nineteenth century, see G. CAZZETTA, "Critiche sociali al Codice e crisi del modello ottocentesco di unità del diritto", *Codici. Una riflessione di fine millennio*, Atti dell'incontro di studio, Firenze, 26-28 ottobre 2000, P. Cappellini, B. Sordi (Eds.), Milano, at 309-348.

[39] Among others, F. FERRARA, "Tracce della comunione di diritto germanico nel diritto italiano", *Riv. Dir. Civ.*, n. I, 1909; G. VENEZIAN, "Reliquie della proprietà collettiva", *Opere giuridiche,* vol. II, Roma, 1919.

THE COMMON BACKGROUND OF CITIZENSHIP AS THE "CORE" OF EUROPEAN FEDERALIZING PROCESS. A COMPARISON WITH THE AMERICAN EXPERIENCE.

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I. INTRODUCTION

The purpose of the following notes is to make some brief remarks on the main cultural and philosophical elements that differentiate European and American background on citizenship. Neither European citizenship as a legal structure, nor the current great cultural debate on European Citizenship: I just want to point out some historical and cultural circumstances that, in my view, make different citizenship in USA in comparison with the citizenships of the Old Continent.

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Since the first three European Communities were created, European public opinion has been accustomed to thinking that our Union represented nothing but an economic and commercial agreement, quite far from embodying a political shared identity.

And this was due to several reasonable causes such as different languages, traditions and historical paths.

Conversely, the uniform convergence of economic interests could represent – this was the dominant idea - the unique field (as well as the more effective) of a shared future for European people.

Today I think this issue should be updated.

There are no more questions, indeed, about the fact that over the last five years (at least) several conflicting national interests have been emerging in the "economic Europe". Monetary policies, in particular, are today the "pivotal" issues on which European "northern" countries and "southern" ones are facing each other.

Even more, overwhelming differences in European countries economic fundamentals make the gap apparently unbridgeable.

So, what we should wonder is whether there is something more than just economy, on which we can lay the foundations of a common shared understanding of ourselves as Europeans.

In other words, my question is whether or not there is something capable to reverse the point of view: along this way, on the economic profile, actually, we need to make the effort to fill remarkable gaps; but maybe, other aspects make our European countries more homogeneous than they appear.

I think the debate should be focused beginning from citizenship. Citizenship must be meant not only as a juridical figure but, mainly, as a cultural concept. Citizenship as a historical path, as an issue of common identity.

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II. WHAT ARE THE COMMON DENOMINATORS OF EUROPEAN CITIZENSHIP EXPERIENCES? DIFFERENCES WITH THE AMERICAN MODEL.

In Europe citizenship means, predominantly, *rights*. *Social guarantees and participation* are the basis of the typical European structure of citizenship[1].

[1] This end, historically pursued by each European single State, is today transfused into the values of the Union itself. In this regard, I agree with the opinion of P. MENGOZZI, *Cittadinanza comune e identità nazionali e culturali*, in L. LEUZZI – C. MIRABELLI (Eds.), *Verso una nuova Costituzione europea*, Lungro di Cosenza, 2003, 481, according to which next to the values identified by art. 6

Sophisticated models of social intervention in Italy as in Britain, in Germany as in France, describe an homogeneous frame with regard to a delicate balance: the one that measures the weight of individual spaces and public sphere.

In Europe, solidarity seems to be the main aspiration towards which relationships between people and States are oriented [2]. This *social dimension of citizenship* in Europe - in an attempt to reconnect the *ancient* to the *modern* liberties[3] - shows an approach in some ways more sophisticated, and even more problematic, than the overseas experience.

The American idea of citizenship is undoubtedly more inclined to favor the border of *individual freedom*: citizenship is not guaranteed *into* the State but, instead, "against" the State. Historically and culturally American citizenship has strong bases on its "contractual" origin[4]. From this starting point, it has been developing itself throughout the desire of freedom from communitarian bonds. Those bonds that, in other periods, pushed many peoples to flee from Europe.

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of the Treaty on European Union, there is a value that results from the entire system and that is also the inspiring element of European policy as a whole. This value, which certainly gives to European society a different identity from the one of another society of the West, the American one, is the idea of "welfare state", meant as a legal-political organization oriented by social relations and subsidiarity.

[2] At least, this one seems the historical frame experienced after the second world war. Today, it seems to re-emerge a kind of national economic interests making more "uncomfortable" relations between European member States.

[3] It is not necessary to recall that the reference is to the famous political essay of HENRI-B. C. DE REBECQUE (1767-1830), delivered at the Royal University of Paris in 1819, and entitled *De la liberté des Anciens comparee cells à des Modernes*. In ancient societies the concept of freedom essentially coincided with *political* freedom and have been manifested through the active participation in the life of the *polis*. The "liberty of the moderns" would be aimed, instead, to delineate a sphere of individual autonomy around the individual, in which the same the enjoyment and exercise of civil liberties should be ensured.

[4] However, different opinions are available in American doctrine. For example, R. C. SINOPOLI, *The Foundations of American Citizenship: Liberalism, the Constitution, and Civic virtue*, New York, 1992, p. 4 observes that «it can no longer to be taken for granted, however, than the American constitutional founder – even the Authors of The Federalis – can be described as Lockean liberals. A body of interpretation has emerged that places civic concerns at the forefront of founders' understanding of politics. "Republican-revisionist" readings of the founding have focused on the founders' debt to classical republican political thought, which stresses the importance of promoting "civic virtue" among citizens who deliberate on political issues based on their conceptions of the common good. The fullest realization of the self, in the classical republican tradition beginning with Aristotle, results form actively participating as a member of a political community, taking part in ruling and being ruled».

To flee, in other words, from those Countries in which, for centuries, the individual has been crushed by corporations, feudal and theocratic subjections, absolutist powers and religious hatreds[5].

Then, citizenship is not realized *having the State as the only or main "counter-party"*. American Citizenship seems, nowadays, to find more channels of practice through the active contribution directly offered, for instance, to *trade unions*, *sporting or cultural associations*, *social action organizations*, *religious communities*, etc.

Thus, different historical paths have marked - even in apparently homogeneous societies - very different models of identity. Even more, it is possible to observe that - despite a common, "transatlantic" constitutional culture[6] – citizenship emphasizes the notable differences of a deeper background.

U.S. citizenship seems bent on affirming a *civil* ideal significantly different from the call of *civic* citizenship[7].

The common root of the words just used – 'civil' and 'civic' - lies on the idea of the individual *as part of society*. But the deeper meaning of the bifurcation appears clearer recalling the Marxian reconstruction – on which bears all the weight of the Aristotel-Hegelian tradition – of civil society distinct from

[5] Anyway, in the context of civic engagement, several forms of partecipation are recovered in the American society through the inclusion of the individual in the vast and pluralistic panorama of intermediate associations widely spread in the United States. The "good citizen", the "virtuous citizen" (recalling, not coincidentally, a vocabulary typical of classical antiquity and, later, of the French Revolution) is the one who devotes most of his time to the community and to various social branches.

[6] American and European constitutionalism share a "common birth". As it was noted by H. DREIER, *Lo Stato costituzionale moderno*, Napoli, 2011, p. 19, American Revolution – other then through "personal bonds" like those between Jefferson and Lafayette - has been influenting all the events of the French Revolution. Revealing of this link, among others, is the strong affinity that appears between the French Déclaration des droits de l'Homme et du Citoyen of 1789 and the Virgina Bill of Rights of 1776.

[7] As noted by M. SILVERMANN,*The Revenge of Civil Society. State, Nation and Society in France*, in D. CESARANI – M. FULBROOK, *Citizenship, Nationality and Migration in Europe*, New York, 1996, p. 147, «one major aspect of the construction of a uniform national culture and the accompanying abstract construction of the 'citizen' was the conflation of two contradictory principles: the civil and the civic. The first of these, the civil, refers to the private individual and is underscored by the principles of liberalism, the market and the inegalitarianism, the secon of these, the civic, refers to the individual who is part of a community of rights and is underscored by the principles of intervention, egalitarianism and solidarity». See also, P. BIRNBAUM – J. LECA, Sur l'individualisme, Paris, 1991, p. 324 ss.

the political one[8].

In this regard, the writings of Norberto Bobbio are helpful. «'Civil society' means the set of relationships among individuals who are outside of (or before the) State, and give the sense of a sphere distinct and separate from the State, the sphere that writers of natural rights, and partly early economists beginning with the Physiocrats, called 'state of nature' or 'natural society'».[9]

On a historical perspective, civil powers of individual would arise thanks to the rise of *bourgeois society* and, also, to the emancipation won by bourgeoisie against political authority[10].

On a philosophical basis, civil rights of individual would find theoretical affirmation through the conception of natural rights, as well as in the Enlightenment's rationalism.

Given this overall background, civilian dimension of the individual seems to evolve in opposition to the State. Even more, the "civilian" sphere of the individual tends to confine the State within specific limits and to assign to the State essentially the task of protecting individual freedom.

So, the civil sphere comes to "reverse" the order of relations between State and individual. Civil liberties of individual, no more crushed by State, end up for indentifying their proper purpose[11].

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[8] The present use of the expression 'civil society' is derived from Marx and it ultimately replace the term 'natural society'. The specific feature of the marxian civil society coincides with the specific nature of the Hobbesian state of nature that is, as is well known, the "war of all against all", N. BOBBIO, *Stato, governo, società. Frammenti di un dizionario politico*, Torino, 1995, 27-28.

[9] N. BOBBIO, *Stato, governo, società. Frammenti di un dizionario politico*, Torino, 1995, 28.

[10] Recalling the writings of Karl Marx, political emancipation was, at the same time, the emancipation of civil society from politics, from having even the semblance of a universal content. Feudal society was resolved into its basic element – man, but man as he really formed its basis – egoistic man. Se K. MARX, *On the Jewish Question* (1844).

[11] Protection of rights and interests of individuals as the fundamental purpose of the State is the characteristic of contractarian liberalism of John Locke, «the great and main end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting» J. LOCKE, *Second Treatise of Government*, ed. 1998, Milan, 228. Doesn't need to recall that for the British philosopher property doesn't derive from the simple consent of men (as in Grotius and Pufendorf): property identifies a natural right arising from the fact that everybody own itself, individual freedom represents therefore a precondition.

The ideology of natural law - in its 'contractualist' reconstruction – represents, then, the theoretical ground of an idea of citizenship born to protect a sphere of rights and freedoms that citizens can enforce against the State itself[12].

This is the "core" concept, in my view, from which cames out the well-known option for a citizenship as a *relationship*, rather than as a *status*[13].

As a "relational category", citizenship defines - in liberal traditions - not the status of the person *into* the State - and so assuming that the individual "belongs" to the State -, but the relation between the person, as independent individual, and State, as the second part of that relation[14].

On a philosophical perspective, this theory shows a sort of reversal of Aristotelian constructions - recalled in recent times, among others, by Hannah Arendt[15] - structured on a "participatory" dimension of the individual to the realm of politics. In this last view, only politics represents indeed the chance of authentic autonomy for human beings.

In the latter perspective, the "civic" dimension of the individual

[12] As noted by F. CERRONE, *La cittadinanza e i diritti*, in R. Nania - P. Ridola (Ed.), *I diritti costituzionali*, Torino, 2001, 239, American society recognizes a decisive role to constituent power, a power to which is assigned definition of institutional mechanisms through political power can enforce the disciplines designed to preserve social bond and the identification of the rights and guarantees that citizens will claim against that power itself.

[13] The option between citizenship as a "status" and citizenship as a "relationship" has become traditional in legal doctrine. The idea that citizenship is a "status" is typical of the "organicistic" reconstruction of State. In this context, the contribution of nineteenth century public law studies was crucial and, particularly, among the greatest exponents of German Staatslehre, of Georg Jellinek. In the reconstruction offered by the Author last mentioned (see G. Jellinek, *System der subyektiven öffentlichen Rechte*, 1892, 57), the individual loses autonomy being absorbed into the state: the individual belongs to the State, becomes the "body" of the state and the status of citizenship serves public functions exercised in the interest of the State. Conversely, in the liberal tradition, the Constitution has been created precisely to describe the limits that the State met in relations with the citizen. In this sense, as noted by F. CERRONE, *La cittadinanza e i diritti*, in R. Nania - P. Ridola (Ed.), *I diritti costituzionali*, Torino, 2001, 239, American constitutionalism gave new impetus to the theory of constituent power, giving to Constitution the role to set the limits of all manifestations of political power, including the legislative. The citizen thus lives "outside" of the state and citizenship develops a relational horizon: it describes precisely the order of relations between state and citizen and between citizen and citizen.

[14] On theoretical approach, prevailing in Italian legal doctrine, about the option between citizenship as a status or citizenship as a relationship, see S. STAIANO, *Migrazioni e paradigmi della cittadinanza: alcune questioni di metodo*, in *www.federalismi.it*, 5.11.2008

[15] The political life, as a dimension that distinguishes man from animal, and that identifies the only possible framework of action, contains visible elements of Aristotel's ethics and anthropology. See H. ARENDT, *The Human Condition*, Chicago, 1958, 18.

identifies all the socio-political relations that live in a public organization. Even more, the civic element of citizenship suggests the idea of commitments and responsibilities that individual takes within an organized community. In particular, within a community made by rights and duties, and characterized by the principles of egalitarianism and solidarity.

We could say that the civic duty calls the citizen to responsibilities that he has assumed in the framework of a social ethic; on the contrary, civil liberty protects the citizen in his own sphere of individual morality.

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III. Another Comparison with the American Experience

The impression that one draws from the history of American society and constitutional law is, in short, that the *individual* seems to prevail over the *person*.

Also the word 'individualism' identified - at the time when Tocqueville wrote about American democracy[16] - a "new" concept in many ways far from European political traditions.

The colonial history, the revolution, the Constitution and the American society itself were forging a concept that in Europe, even though shared through the Enlightenment, has later suffered the harsh reaction of the eighteenth century's romanticism.

The "contractual statement" contained in the Preamble of the American Constitution[17] - as well as offering a "historically proven" example of

[16] «Individualism is a novel expression, to which a novel idea gave birth. Our fathers were only acquainted with egoism (selfishness). Selfishness is a passionate and exaggerated love of self (…). Individualism is a mature and calm feeling, which disposes each member of a community to sever himself from the mass of his fellows and to draw apart with his family and his friends, so that he has thus formed a little circle of his own, he willingly leaves society at large to itself», A. De Tocqueville, *Democracy in America*, London, 1998, 205 (or. tit. *La démocratie en Amérique*, 1835).

[17] «We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish

authentic social contract[18] -, in a few lines summarizes the liberal thought and jusnaturalistic ideals that characterized the genesis of American society and law and accompanied their growth

In that Preamble there is all the strength of the Anglo-Scottish Enlightenment tradition of the Seventeenth and Eighteenth Centuries. The purpose of legal system is to protect safety and personal freedom. And the origins of legal system are no longer identified by metaphysical and irrational sources, but they seem to be the product of an agreement between men.

Therefore, a society born from the landing of overseas refugees, settlers and victims of political and religious persecution, unchained thanks to a revolution and, moreover, shaped around a Constitution created to protect individuals and territories, could offer nothing but an original version of the very idea of citizenship[19].

But there is more.

Further historical reasons seem to have promoted the development in U.S. of a deeply different approach to citizenship from the idea which was preeminent in Europe.

The "bifurcation" between American and European history has been fostered not only during the period of the greatest civil conquests favored in Europe by the empiricism and Anglo-French Enlightenment, but also in the era immediately "behind" the Industrial Revolution.

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this Constitution for the United States of America».

[18] About the Locke's idea of a social contract David Hume wrote «a philosophical fiction which never had and never could have any reality» and one «of the most mysterious and incomprehensible operation that can possibly be imagined», D. HUME, *Treasy of Human Nature* (1739-1740), Book III, Part II, sec. 2, New York, 1978.

[19] The attention that the American constitutional tradition spends to protect the sphere of individual liberty is highlighted, in particular, by the IV° Amendment to the Constitution, «the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated». Extremely significant in the context of a theoretical effort towards the melting of citizenship with the sphere of individual freedom are also the provisions contained in Amendment XIV°, «all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws».

As it's well known, there have been hard social tensions in Europe since the Eighteenth Century and over the entire course of the Nineteenth. These tensions - accompanied by the birth of the working class called 'proletariat' and the growth of new social interests - created the preconditions of socialism, the subsequent spread of Marxism and, later, of social-democratic trends.

Then, social and political struggles of the time did represent in Europe the "natural habitat" in which the seeds of *social rights*, richly sprouted, have favored the process of birth and development of the so called *Welfare State*[20].

Overseas, the isolationism of the early decades of the Federal Government, the absence of tensions similar to those experienced by the European proletariat – partly due to the wide availability (until the end of the Nineteenth Century) of slave labor[21] - and overall, the race of everybody (not only figuratively)

[20] See M. FERRARA, *Verso una cittadinanza sociale "aperta". I nuovi confini del welfare nell'Unione Europea*, Working Papers of Department of Social and Political Studies, University of Milan, n. 8, 2004, available in *www.sociol.unimi.it/ricerca_pubblicazioni.php*, who observes that since the last decades of the nineteenth century, social rights have played a major role in the genesis of European Nation-States. These rights gave birth to "redistributive society", while strengthening cultural identities, loyalty of citizens to public institutions, willingness to use common resources to increase social and political cohesion. The European Nation-State is a typical welfare state, oriented to ensure his citizens' welfare and to draw from this much of its legitimacy. The social components of citizenship have the same importance of civil and political ones, the right to decide on the forms and substance of social citizenship has been traditionally regarded as peculiar of national sovereignty. In this respect, there were significant theoretical contributions about the problem of citizenship in relation to the model of participation and social guarantees. In his famous essay of 1964, *Citizenship and Social Class*, the English sociologist T. H. MARSHALL - postulating the historical evolution of citizenship, along the last three centuries, through stages within which the relationship between individual and community have shown in the first place the affirmation of civil rights, then the social and finally the political - called the Citizenship as a status "which is granted to those who are full members of a community" and shifted its attention from the identitarian problem of citizenship to the *social one*. Marshall's contribution, which is largely credited with having provided the theoretical and political reconstruction in the framework of which has gradually evolved both in the UK and in Europe the system of Welfare State, was intended to enhance the egalitarian profiles of citizenship, as a vehicle to create the essential preconditions by which the individual realizes his full participation in the community.

[21] Compared to the argument put forward is anything but irrelevant the fact that slavery have been abolished in Europe almost a century earlier than the United States. The slow American abolitionist process began with a legislation of 1794, entitled «An Act to Prohibit the Carrying on the Slave Trade from the United States to any Foreign Place or Country», aimed to introduce restrictions to slave trade. Then, on 2 March 1807 had been approved a new legislation (*http://avalon.law.yale.edu/subject_menus/slmenu.asp*) even more restrictive that banned the further

to acquire its "own piece of land" contributed, already at the beginning, to the spread of a completely different mood.

While in Europe people raced towards the achievement of social rights, American citizens ambitions were those to mark a "boundary" on the ground: a boundary, *physical and ideal*, in which they would be free and masters[22]. The boundary of an ideal "sphere of liberty" protected by law and enforceable against anyone else, and within which even the State wouldn't be allowed to interfere.

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This is the historical and cultural climate that contributed to a different approach to citizenship in U.S. and Europe.

Even more, while today in Europe 'citizenship' stands for 'rights', overseas this word continues to evoke mainly the idea of 'freedom'.

Opposite to the deeply rooted traditions that the Welfare State has

importation of slaves in the USA, «from and after the first day of January 1808, shall it not be lawful to import or bring into the United States or the Territories thereof from any foreign kingdom, place, or country, any negro, mulatto, or person of color, with intent to hold, sell, or dispose of Such negro, mulatto, or person of color, as a slave, or to be held to service or labor». After the Civil War slavery continued to be allowed only in the states of Delaware, Kentucky, Maryland, Missouri and New Jersey. Slavery was finally and completely abolished with the adoption in 1865 of the thirteenth Amendment to the Constitution which provides that «neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction». In France, the first legal provision to prohibit slavery occurred in 1794 by decree of the National Convention. The first judicial decision to prohibit slavery on British soil dates back to June 22, 1772, when it was affirmed that «as soon as any slave set His foot on English ground, he Becomes free», see C. STUART, *A memoir of Granville Sharp, to which is added Sharp's Law of passive obedience, and an extract from his Law of retribution*, New York, 1836, 20.

[22] On regards the idea of a private "boundary" we can recall that, even today, in United States, it is not uncommon to see, near traditional wooden houses with private garden, signs with the warning «if you get into my property I can shoot you». It is also worth recalling that the II° Amendment to the U.S. Constitution establishes the principle according to which «a well-regulated militia is necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed». The Supreme Court of the United States, in the recent decision of June 26, 2008 with reference to the case "District of Columbia vs. Heller" (available in www.law.cornell.edu/supct/html/07-290.ZS.html), reaffirmed the principle according to which «the Second Amendment Protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home»

developed in the main European models - listing for the citizen a large number of social rights, as well as duties of civic solidarity and political participation – the United States historically came out with a pure liberal doctrine of *State-citizen* relations.

Moreover, it is quite revealing that the US – rather than the *political* and *participatory* dimension of European citizenship – are experiencing a perpetual dialectic between the *Government* - not only conceived as the expression of political sovereignty of the people but also, quite often, as a mere "provider of services" - and *Taxpayers*, as an expression, this one, that seems to have almost completely replaced the word 'Citizens' also in current use[23].

In any case, while the legacy left by the melting of two categories, the State and the citizen, continues to bear on European citizenship, even in the era known as 'post-national'[24], American citizenship is definitively much closer to

[23] Not only in everyday language, but - just scroll through the pages of the Congressional Records (available on the website of the Federal Government *www.gpoaccess.gov/crecord/index.html*) to get an idea - even in the political lexicon the term 'taxpayer' seems to have almost entirely replaced the word 'citizen'. The circumstances under which the American political agenda concerns are now addressed primarily to the needs of taxpayers would seem to suggest the idea of a kind restoration of a "census" democracy, where the citizen is actually not represented as himself, but rather, and mainly, he is the one who contributes to the public expenditure.

See also, *Heim v. McCall,* 239 U.S. Supreme Court, 365 (1971), «the basic principle of the decision of the Court of Appeals was that the State is a recognized unit and those who are not citizens of it are not members of it. Thus recognized it is a body corporate and, like any other body corporate, it may enter into contracts and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the State, or spending the State's moneys, are trustees for the people of the State. (...) And it has hence decided that in the control of such agencies and the expenditures of such moneys it could prefer its own citizens to aliens without incurring the condemnation of the National or the state constitution». See also, *Graham v. Richardson,* 403 U.S. Supreme Court, 367 «agree with the three-judge court in the Pennsylvania case that the justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces...aliens may live within a state for many years, work in the state and contribute to the economic growth of the state.... There can be no "special public interest" in tax revenues to which aliens have contributed on an equal basis with the residents of the state.... Accordingly, we hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause».

[24] The concept coincides with the idea of a gradual denationalization of States, partly thanks to integration of individuals and communities of different cultures and traditions. The exceeding of the state dimension, deprivation of national states power and their loss of control and competences, as well as the desire for a cosmopolitan democracy, are the focus of three essays

identify the terms of a relationship, fragile and sometimes conflicting, between the *Administration* and *Taxpayers*[25].

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This theoretical effort seems to give, conclusively, a clear distinction between the "civic" concept of citizenship in Europe and the "civil" one of the United States.

Social rights, political participation, welfare state: these, as noted, are the "strings" that tighten the contents of European citizenship. *Civil liberties, limits to the Government's powers* and *participation agreement* (mainly conceived as the citizen's checks on the Government), define U.S. Citizenship.

By this way, we can emphasize how historical, sociological and political factors mark a common path followed by the peoples of Europe leading to the genesis of what can however be defined as an *identity* based on a "common heritage"[26] and additional to other local and national identities.

This last aspect would deserve a deep analysis: there is no doubt, in fact, that the main views expressed in the legal debate about European citizenship, as on the Union's political role, reflect deeper believes motivated by different

collected in J. HABERMAS, *The Postnational Constellation*, ed. 1999, Milan.

[25] The relationship between citizen and State seems to be replaced by the one between taxpayer and administration. In this regard, is useful to point out that in U.S. the use of the word 'administration' to define the government isn't only a mere "everyday language". Indeed, the word reflects the liberal view in which U.S. Constitution was born, and with reference to which the State is primarily responsible for aggregating and pursue the fellow citizens interests. So, in U.S., the "State" is mainly *administration*: as observed by E. H. HANKS – M. E. HERZ – S. S. NEMERSON, *Elements of Law*, Cincinnati, 1994, 385-386, «the United States Constitution Creates the posts of President, Vice President, Member of Congress, and Supreme Court of Justice», the rest of the structures related to the Government is *administration*. Those same figures that in Europe hold constitutional and political functions of Minister, in United States simply identify «principal executive officers in each of the executive departments» (see U.S. Constitution, Art. 2, sect. II, n. 1) and are also part of the *administration*: «executive agencies are squarely within the executive branch, headed by a single political appointee who serves at the President's pleasure, these include the cabinet departments (State, Defense, Health, Human services, etc.) "(E. H. HANKS – M. E. HERZ – S. S. NEMERSON, 386). See also B. A. GARNER, *Black's Law Dictionary*, St. Paul, 2006, 17, *«Administration»*, «in public law, (is) the practical management and direction of the executive department and its agencies».

[26] See art. 151 Treaty of European Union, «the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore».

philosophical and cultural options[27]. But about this debate I'll take another chance to dedicate specific investigation.

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[27] The reconstruction of a synthetic picture of the cultural polarities from which the debate on European Union citizenship took life can find an effective reference in the positions expressed by Jürgen Habermas and Ernst-Wolfgang Böckenförde. The hegelian and organicist derivation of the thought expressed by Böckenförde reflects a position of unconcealed distrust and skepticism about the very idea of an european 'status civitatis'. The essence of the concept of people - that Böckenförde tracks in the elements of cultural homogeneity among citizens - can't be found in the melting pot of languages, traditions, cultures and ways of being of different European nations. Moreover, the democratic structure of States' bodies assumes, according to Böckenförde's thought, essential role with respect to the concept of citizenship. Democracy and citizenship are in fact categories that feed each other in a centuries-old dialogue: there is citizenship only where there is democracy and, at the same time, the political rights of citizenship represent the logical precondition of the democratic mechanism. In the light of the above considerations, the "democratic gap" shown by the European institutions, as well as the difficulties to find a substantive nature related to the different coexisting identities, end up to relegate to a residual role the very idea of a European citizenship. The thought of the German jurist seems to embrace the idea that on the European level is not possible to conceive a true citizenship. Moreover, to the European citizenship, rather than a substantive content, should be attributed the descriptive role of a more or less long "list of rights." Prudence but also a high degree of awareness about the complexity of reasoning on European citizenship are effectively synthesized by Böckenförde when the jurist observed that «*even if the European Parliament's powers have been increased, this Parliament can not represent what is not still there, a European people, or reflect what is not there, a public sphere and European politics, which is formed on the issues of decision-making of European policy, beyond the borders of individual countries. Therefore, the European community, to be a form of democracy, necessarily must set out on this road and contain, in the construction of his decision-making will, a very different federal structure*», E. W. BÖCKENFÖRDE, *Stato, costituzione, democrazia. Studi di teoria della Costituzione e di diritto costituzionale*, Milano, 2006, p. 125. The Republican-Liberal approach of Habermas shows a different belief, even before to legal tool, to the very ideal of European citizenship. The idea indeed - not entirely free of problems and contradictions - that on the european level has historically been stratified a common tissue of values and principles able to fill the gap between people identities, seems to animate the whole key of reasoning put forward by Habermas. Democratic pluralism, built to be a fundamental rule of public debate in the EU countries, represents the necessary choice of method to permit the development, on the European level, of true public and "civic" debate. European Citizenship in Habermas represents nothing more than what it is already represented by the ideal of national citizenships. Indeed, the EU citizenship is a concept that, even better than the national ones, is able to support the "kantian" aspirations that pervades the philosopher's thought. Constitutional patriotism, that on the State's level still looks too pale to bypass the dominant type of cultural identity, on the European level, by contrast, plays the role of the only true key for the access to the community. Constitutional patriotism - that in the view of Habermas is also needed to reinforce a nationality, the German one, that is uncomfortable even in pronouncing the word 'volk' - becomes a necessity at European level, because of the absence of further "substantial" references, and also identifies the idea of a common, democratic and pluralistic path. EU Citizenship achieves the assigned tasks, therefore, fully, and precisely because of its plural nature.

IV. EUROPEAN FEDERALIZING PROCESS AND EVOLUTIONARY TRENDS OF CITIZENSHIP

Compared with the debate put forward, the regulation of European Union Citizenship – even though "complementary" to national regulations[28] - plays a symbolic and political role, as well as technical and legal, of very deep importance.

The establishment of a European citizenship endorses the need to strengthen European democratic legitimacy no longer on the inter-governmental level but also, increasingly, on the supranational one.

Moreover, by the introduction of European citizenship, the Union has ceased to be the mere result of a "contractual" decision between Member States: the "leading actors" of the Union are no longer just the States, as in traditional dynamics of international law. A new, powerful entity is added to the States: *the citizen*.

In some ways it seems almost possible to affirm that the very path

[28]The establishment of EU citizenship dates back to the regulations contained in the Maastricht Treaty of 1992. Article 17 of the EU Treaty (now transferred into article n. 20 of TFUE) states that «every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship». This principle clearly shows a complementary and "derived" nature of EU citizenship. The acquisition of EU citizenship represents, in other words, the automatic consequence of the fact that the individual already holds the status of citizen of a Member State. The European codification does not, therefore, interfere with national regulation on how to acquire citizen status: these arrangements continue to be governed according to the peculiarities variously provided by each national system. Similarly, the events related to any loss of national citizenship entail, in parallel, the loss of European citizenship too. From the description above, it seems possible to share the idea that - given the renunciation made at European level to define specific rules on access to EU citizenship – European Union citizenship has ended up becoming as an "ancillary" status in relation with the Citizenships of Member States. On the other hand - if we share the idea that goals related to the establishment of European citizenship were primarily attributable to the need to encourage a process of political integration between States and peoples of Europe - it is clear that the EU citizenship should have been nothing but a common denominator between different legal and cultural experiences. And this seems to be, actually, what happened. In fact, EU citizenship is not a legal status based on its own peculiar conditions, but a common condition "automatically" granted to every citizens of the Member States characterized by a wide range of diverse legal positions. About European Citizenship, see P. HABERLE, *La cittadinanza come tema di una dottrina europea della costituzione*, in *Riv. dir. costituz.*, Turin, 1997; V. LIPPOLIS, *Cittadinanza dell'Unione europea*, in *Dizionario di diritto pubblico diretto da S. Cassese*, Milano, 2006, p. 927; L. MARINI, *La cittadinanza europea*, in G. Dalla Torre – F. D'Agostino, *La cittadinanza, Problemi e dinamiche in una società pluralistica*, Torino, 2000, p. 43; C. PINELLI, *Cittadinanza europea*, in *Enc. dir.*, annali, Milano, 2007, p. 181;

towards a real European Constitution - understood as a unified political body – has already began with the establishment of EU citizenship.

Sabino Cassese supports the idea that today it is even possible to talk about Constitution in a global way. The existence of public powers gradually developed within the international legal order, as well as a large set of fundamental principles, tend to define the substance of a body of constitutional rules. This should now lead to talk, even with the absence of a written document (as, indeed, it is the case for some national constitutions such as the one in the United Kingdom), about the "international constitutionalism" as a process going ahead by evolution[29].

Comparing with remarks such as those briefly mentioned, it is possible to observe how European integration process, EU Treaties, declaration of a table of basic principles, the establishment of constitutional bodies (among all, the *Parliament*) and, last but not least, the transfer of shares of sovereignty from nation-States to the Union push EU - even more than it might have been for international legal order – toward the idea of *an essentially constitutionalized political body*. And this conclusion even though with the absence of a single document entitled 'European Constitution'[30].

It is still evident that the lack of a full democratic legitimacy of EU bodies constitutes a critical urgency[31]. And it is also evident that, if possible, to

[29] S. CASSESE, *Oltre lo Stato*, Roma – Bari, 2006.

[30] The debate about citizenship assumes the peculiarities of a "constitutional path". It seems to emerge, as its title suggests, from the perspectives offered by P. HABERLE, *La cittadinanza come tema di una dottrina europea della costituzione*, in *Riv. dir. costituz.*, Turin, 1997, 19.

[31] The issue of a "democratic gap" in the European Union is a traditional arena for the legal doctrine. This democratic deficit would manifest in the fact that «considerable administrative and regulatory powers are exercised by the EU bodies that are not directly elected by European citizens», so R. BIN – G. PITRUZZELLA, *Diritto pubblico*, Turin, 2007, p. 81; it should be noted, however, that «the most recent treaties have increased the participation of the EU Parliament to the Council's powers, thus trying to bridge the so-called "Democratic deficit" due to the Community institutions», A. CERRI, *Istituzioni di Diritto pubblico*, Milan, 2009, p. 73. It was also noted that «to fill this democratic gap the European Parliament is seeking a general co-decision procedure in all those matters of European legislation which, in the Council of Minister, are decided with qualified majority. It is also seeking a general "avis conforme" in all decisions taken with unanimity», S. S. ANDERSEN – K. A. ELISASSEN, *The European Union: How Democratic Is It?*, London, 1996, p. 222. There are those who argued that the democratic deficit in Europe reflects a deeper

talking about European constitutionalism, can only be done outside the traditional reconstructions about the relationship between *constitutional order* and *constituent power*.

Therefore, similarly to the above mentioned international legal order, European constitutionalism cannot be imagined as the product of a "single" founding act, but rather as an overall evolutionary process whose original substance is identified in a *Union of Constitutions*.

So, we can talk about a *citizenship denationalized*, both political and cultural, not only based on European "constitutional" bodies but also on a common historical background.

A new citizenship, probably, a very significant part of its potential is still waiting to be unleashed.

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The above brief notes require some conclusive remarks on the current "state of the (European) Union".

As it's well known, the Old Continent is today facing high difficulties caused by the chronic accumulation of public debt and the crash of tax revenue. In recent months, unfortunately, we have alarm signals about possible States' default in the heart of Europe, specifically related to difficulties of governments in refunding their sovereign debt.

Those emergency conditions are being faced, mainly, through the use of "draconian" measures in public spending cut. But what seems more probable is that the system as a whole, *and in particular the relationship between State and citizen*, should move towards a period of rethinking in order to update itself to the new

problem that can be identified by the absence in Europe of a widespread sense of belonging. In this regard, reference should be supported by E. W. BÖCKENFÖRDE, *Diritto e secolarizzazione. Dallo Stato moderno all'Europa unita*, Bari, 2007, p. 194. See also, L. WEISCHER, *Solving the EU's democratic deficit through direct democratic veto rights? A critical assessment of Heindrun Abromeit's concept*, Berlin, 2004, p. 6; L. DOOR, *The Democratic Deficit Debate in the European Union*, 2008, p. 10; W. JOSEPH – U. HALTERN – F. MAYER, *European Democracy and its Critique*, in Jack Hayward (Ed.) *The Crisis of Representation in Europe*, London, 1995; G. MAJONE, *Europe's "Democratic Deficit": The Question of Standards*, *European Law Journal*, vol. 4, No.1, March 1998, pp.5-28.

global economic and political conditions.

The time when social rights will turn to be considered, mainly, as rights - or even "expectations" - "financially influenced" seems to be near. And this could mean a historical phase of corresponding limitation of social rights. This trend, of course, will cause concrete repercussions on the concept of *social citizenship* built, over the years, by European systems. Also in this sense, in the coming years, the need to enhance new theoretical horizons in the development of citizenship in the Old Continent will eventually triumph.

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