BEYOND CERTAINTY.
ABUSE OF RIGHTS AND BALANCING IN CONTEMPORARY JURISPRUDENCE

The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice[*].*

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I. FROM CERTAINTY TO BALANCING RIGHTS

1.1. The golden age of legal certainty was definitely that of juridical individualism: it was the age in which the jurist's main aspiration was to get over the extreme *pluralism* and *chaotic nature of sources* characterising the medieval juridical order, and reduce the complexity of law to a harmony of rigorous geometrical shapes, or to a system of logical deductions with just a few fundamental principles.

Coding of private law in the 19th century aimed mainly at guaranteeing the generality, stability, and knowledge of the rules. The bourgeois society model needed *rational, computable law* that could protect the good functioning of market economy[1].

This resulted in a drastic limit to jurisprudence's creative power. The "school of exegesis" (maximum expression of legal formalism) felt that the solution for each possible

[*] G. Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht", in *Süddeutsche Juristenzeitung* , 1946, p. 107

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[1] M. Weber, "Wirtschaft und Gesellschaft" (1972), Italian Translation "Economia e società", Milano: Edizioni di Comunità, 1978, p. 161, established the link between modern capitalism and rational-formal law, considered both an element and a product of the West's political development. Capitalism needs complete computability ("*Berechenbarkeit*") of the administrative and juridical system's operations, with the security of a purely formal guarantee ("*rein formaler*") of all stipulations by political powers.

real life case can be found "within" the Code, with no need to refer to extrapositive rules to express the rule of judgement: the judge as "mouth of the law" to quote the famous expression by Montesquieu.

In other words, for 19th century bourgeoisie the code was a great conquest, almost a final step in human progress. For them it embodied all the enlightenment ideals. It was a general law (hence egalitarian), simple and clear; the legal magma had been reduced to a coherent system. In brief, the Code was the cornerstone of the bourgeois legal system, and was its reassuring written Constitution[2].

1.2. In its modern (philosophical-political) version, legal certainty takes on a primary value, because – as Hobbes thought – it guarantees *security for the individual*, compared to that condition of the state of nature where total uncertainty over any rights reigns supreme. In this sense of the word, "certainty" found one of its most powerful narratives in the writings of Lopez De Onate and Calamandrei[3].

To those authors - in that dramatic period of history – legal certainty must have seemed the only stronghold compared to the legal conceptions then prevailing in the national-socialist and communist doctrines. These were conceptions condensed into a strongly ideologised law powered directly by the "values" of the "Nazi *Volksgeist*" or "socialist legality", thus legitimising any action (and crime).

In other words, it was a defence if not exactly against authoritarianism or totalitarianism, at least against the arbitrariness of power. It was the last defence line against what, in other times, would have been called tyranny, that is, capricious, unpredictable, casual power.

In the last twenty years, juridical positivism, especially in its more "ideological" traits, has been criticised radically for the fact that it has been considered responsible for the statolatric conceptions that inflamed the "short 20th century". Full formalisation and functionalisation of the law, as a shell with no content, "was equivalent to exalting its meaning of pure expression of strength, and even, with a conceptual conjuring trick, allowed one to talk about the Nazi Rule of law"[4].

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[2] P. Grossi, "L'Europa del diritto", Roma-Bari:Laterza, p. 149.
[3] F. López De Onate, "La certezza del diritto", Gismondi, 1942 (re-printed: Milano, Giuffré, 1968); P. Calamandrei, "Fede nel diritto", 1940 (ristampa, Roma-Bari: Laterza, 2008).
[4] G. Zagrebelsky, "La legge e la sua giustizia", Bologna. Il Mulino, 2008, p. 105.

1.3. Our times are marked by a thorough '*de-mythifying*' of legal certainty and the emerging 'discourse' of legal justice – a discussion centred on an intrinsic, necessary connection between juridical and moral experience, between positive law and its "claim to rightness"[5].

Compared to the traditional structures of natural law and legal positivism which considered certainty and justice by nature incompatible, current legal-philosophical thought tends to find compatibility between these two values[6].

Legal formalism (expression of the revolutionary ideology of enlightenment and legal positivism) has, in fact, proved itself over time to be unable to guarantee that legal certainty it promised: "And this is because it has made it impossible for the law to control material claims and the polytheism of values it was considered completely foreign to"[7].

Law, being a social phenomenon, requires that positive rules must in some way correspond to the life form they belong to. Judges' decisions themselves cannot guarantee certainty if, by simply adapting to *dura lex sed lex*, they go in directions that seem forced or foreign to the social rationality available, to the spectrum of constitutive values of the system they refer to.

Hence there can be no effective, lasting certainty if there is ongoing dyscrasia between law and audience, between decisions and expectations. Legal reasoning must create a double congruence, both towards the legal system and towards those values concretised in positive law, if it really wants to implement that certainty it promises[8].

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A dramatic stage presentation of this debate between certainty and balance can be found in Shakespeare's famous work, *The Merchant of Venice*.

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[5] According to R. Alexy, "Begriff und Geltung des Rechts" (1992), Italian translation, "Concetto e validità del diritto", Torino: Einaudi, 1997, p. 53: "Certainty is definitely a supreme value, but is not the only one. The value of legal certainty must be pondered together with that of material justice". H. Kelsen, "Reine Rechtslehre" (1960), Italian translation, "La dottrina pura del diritto", Torino: Einaudi, 1966, p. 389-391, also acknowledges that legal certainty is, to a certain extent, a chimera, an objective that can only be achieved in part. Legal certainty, understood as the uniformity of interpretation, is, in fact, a pretence used by juridical science which, unlike juridical operators, does not produce law but just highlights a law's possible meanings.

[6] See for example: M. Gregorio Peces-Barba. "Curso de derechos fundamentals. Teoría general", Madrid: Eudema, 1991; N. Bobbio, "L'età dei diritti", Torino: Einaudi, 1990.

[7] G. Palombella, "Dopo la certezza. Il diritto in equilibrio tra giustizia e democrazia", Bari: Dedalo, 2006, p. 11

[8] G. Palombella, "Dopo la certezza. Il diritto in equilibrio tra giustizia e democrazia", *supra*, note 7, p. 12

The Merchant's demand to see written law complied with, even at the expense of his debtor's flesh, is contrasted by the Venetian Court audience which expresses the sentiment of mercy and the predominance of the value of life over that of property.

However, when the play ends, thanks to the providential intervention of a young female lawyer, written law turns against the Merchant who, in turn, becomes a victim of that legal certainty he had invoked.

This serves to remind us that, without balance, legal certainty inevitably ends up by *contradicting itself*.

1.4. Balancing and the prohibition of abuse of rights are the systematic legal techniques that most highlight the debate between *certainty* (*of rules*) and *balance (of principles)* in European jurisprudence.

Rules are the bearers of the all-or-nothing (*aut-aut*) logic: that is, they are cogent rules meaning that you either respect them completely or you violate them just as completely. Their application is subsumption[9]. On the contrary, principles such as "optimisation commands"[10] can be implemented to different degrees in comparison not only with other rules, but also with other potentially contrasting principles (*et-et*). Their application is by weighting or balancing.

"Certainty", intended as (relative) foreseeability of the legal consequences of one's actions, is guaranteed with more strength by law "by rules". In fact, Hans Kelsen wished for a constitutional law with a structure of rules, as he could see considerable risks for certainty-foreseeability as a consequence of the naturally vague content of principles.

Justice, in its basic meaning of balance between contrasting reasons, is, instead, promoted more effectively by law "by principles". Principles must "be relativized one to the other, or balanced, so they can operate jointly"[11].

[9] R. Dworking, "Taking rights seriously" Bologna: Il Mulino, 2010 (1978), p. 93.
[10] R. Alexy, "Concetto e validità del diritto", *supra,* note 5, p. 73.
[11] G. Zagrebelsky, "La legge e la sua giustizia", *supra*, note 4 p. 210.

II. THE DOGMATIC AUTONOMY OF THE PROHIBITION OF ABUSE OF RIGHTS

Efforts to limit the exercise of rights with reference to the principles of justice are, undoubtedly, a common reference point of the legal method of balancing and that of the prohibition of abuse. The former proposes to enrich positive law with instances of material justice found in a specific case. The latter stops the law sheltering behind a sterile, unilateral defence of its formal face[12].

In the current scenario of "mild law", of "reasonableness", also described as "proportionality", a significant part of European jurisprudence tends to characterize the method of prohibition of abuse of rights as a demonstration of balancing between interests: a 'magic formula' always able to identify the right solution in a specific case[13].

This is an incorrect identification. In each of the many variations of civil, constitutional, EU (and tax) laws, the method of prohibition of abuse has characteristics that guarantee full *juridical-dogmatic autonomy* compared to the balancing method[14].

First of all, there is a "structural" difference. The balancing method establishes an *"external" limit* to the exercise of the right, that is, a limit stemming from comparison with other interests, principles and competing values. However, the method of prohibition of abuse establishes an *"internal" limit* to the exercise of the right – a limit inherent in the *ratio* of regulatory acknowledgement of that same right.

Ascertaining an abuse of rights is, so to speak, *'upstream'* of the balancing of interests involved. This latter profile represents a possible subsequent phase of the abuse, a relapse compared to its core, essential moment, constituted by the evaluation of conformity of the interest concretely pursued with that acknowledged by law[15].

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12 G. Palombella, "Dopo la certezza. Il diritto in equilibrio tra giustizia e democrazia", p. 19.

13 This overlapping between different methods is, for example, evident in sentence no. 100/1981 of the Italian Constitutional Court in which it is stated that: the balance of the protected interests does not compress the right to express one's own opinions but avoids its anomalous exercise, that is the abuse that emerges when the values of impartiality and independence are damaged". Even the ambiguous wording contained in article 54 of the Charter of fundamental rights of the European Union (listed as "prohibition of abuse of rights") seems to be asking the interpreter for a balancing of fundamental freedoms ratified in the Charter.

14 See, if you will, F. Losurdo, "Il divieto dell'abuso del diritto nell'ordinamento europeo. Storia e giurisprudenza", Torino: Giappichelli, 2011.

15 See, as a example, C. Restivo, "Contributo ad una teoria dell'abuso del diritto", Milano: Giuffré, 2007.

Secondly, both methods depart from legal certainty, of course, but in a decidedly different way. In fact, the prohibition of abuse method corrects the normal exercise of a right, being based on a *principle of justice intrinsic* to the logic of that right; that is, the concrete exercise of the law is 'parametrized' to the purpose, the function for which the positive system recognises and protects it.

On the other hand, the balancing method compares the content of a right with a *principle of justice extrinsic* to the logic of that right. This principle is often considered outside the reference system itself and filled with "cosmopolitical and universal" content, for which the last word "lies with judges"[16].

Thirdly, the overall result given by the two methods is different. The balancing method seems to tend towards *multiplication of rights*. It allows the judge to ceaselessly balance principles-values to satisfy new rights, produced by umpteen different social needs and desires, which tend to reject limitations for the sake of corresponding duties.

On the contrary, the prohibition of abuse method seems to tend towards a greater '*equilibrium' between rights and duties*. Amongst all the possible cases of exercise of the right, it excludes some abusive ones, restricting the justified area to which the rule can be extended, by virtue of an intrinsic and implicit duty.

III. BALANCING AND "INSATIABLE" RIGHTS.

3.1. According to its supporters, the main virtue of the balancing method is that it guarantees *peaceful co-existence* of the different principles involved, identifying the fairest, most reasonable, 'humane' solution of specific cases[17]. The symbol itself used – scales – refers to an activity designed to produce harmony between conflicting principles, since it relates to an action of weighing in order to identify a solution that can satisfy a principle as far as possible, and at the same time sacrifice, as little as possible, the principle that, in the specific case, appears as a competing one[18].

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16 G. Zagrebelski, "La legge e la sua giustizia", p. 406.

17 A. Spadaro, "Dall'indisponibilità (tirannia) alla ragionevolezza (bilanciamento) dei diritti fondamentali. Lo sbocco obbligato: l'individuazione di doveri altrettanto fondamentali", in *Politica del diritto,*p. 167 ss.

18 R. Alexy, "Concetto e validità del diritto", *supra,* note 5, p. 74.

It is legitimate to doubt this peaceful coexistence. Balancing between principles always brings us back to the balancing of underlying values. The principle 'embodies' a value to be implemented in the best way possible (it is, as has been said, a "optimisation command"). Nevertheless values – placed before principles - tend to be antagonists and claim full, exclusive implementation[19].

On that point, one must not forget the denunciation by Schmitt of the potential *"tyranny of values"*. The intrinsic logic of a value is deformed when it leaves its economic terrain and "valorizes assets, interests, purposes and ideals other than economic ones"[20]. Judicial (immediate) implementation of a value – without legal mediation – becomes potentially destructive of other values (to be implemented the value requires that everything posing as an obstacle be suppressed).

3.2. One has exemplary evidence of this risk with the comparison between collective social rights and fundamental economic freedoms within the European legal system. EU case-law introduced by the Viking-Laval cases[21] promoted a model of balancing social rights with economic freedoms based on the prevalence of the value of the "open market economy" compared to every other competing value[22].

This Court of Justice orientation is not just the result of "fake", "faded", "incomprehensible" balancing (to repeat what most commentators have said). It was the opportunity that clearly revealed some *logical aporias* of the judicial method of balancing.

Faced with a specific case, values tend to retire and the material interests at play emerge; these tend to take on greater weight and also "invisibly" orient the judge's hand[23].

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19 G. Bongiovanni, "Principi come valori o come norme: interpretazione, bilanciamento e giurisdizione costituzionale in Alexy e Habermas" in *Ars Interpretandi*, n. 10, p. 177 ff. A., Cantaro, "Introduzione" in Id. (Ed.), "Giustizia e diritto nella scienza giuridica contemporanea", Torino: Giappichelli, ,, 2011, p. 5 ff.

20 C. Schmitt, "Die Tyrannei der Werte" (1967), Italian Translation: "La tirannia dei valori. Riflessioni di un giurista sulla filosofia dei valori", Milano: Adelphi, 2008, p. 34.

21 Court of justice of EU, sentences: 11 December 2007, C-438/05, *Viking Line*; 18 December 2007, C-341/05, *Laval un Partneri Ltd*. Also reflected in the sentences: 3 April 2008, C-346/06, *Dirk Rüffert*; 15 July 2010, C-271/08, *Commission versus Germany*.

22 Further emblematic proof is the fact that the Court of Justice – demolishing a real, true taboo of national constitutional case-law – delegated individual judges to judge the very *purposes of the collective action*: its legitimacy, suitability and necessity based on proportionality standards of judgement.

23 M. Luciani, "L'interprete della Costituzione di fronte al rapporto fatto-valore. Il testo costituzionale nella sua dimensione diacronica", in *Diritto e società*, p. 1 ff.

The judge, called on institutionally to weaken conflicts and favour compromise, can be induced to protect the stronger social interests[24].

3.3. What the judge is called on to do when balancing the different rights at stake, when contributing to pacification of the different ethical conceptions present in society, has been compared to the mythological 'labours' of Hercules. It is a 'superhuman' task, if we think of the fact that in modern, multi-form, pluralistic societies, principles (values) often tend to be counterposed one against the other: freedom of procreation for women against freedom of conscience for doctors; dignity of life, in and for itself, against the dignity of the sick person, and so on.

The qualification of "rights" itself is often inaccurate when it refers to juridical positions summing up several desires and needs, which do not deserve that juridical protection traditionally reserved for subjective rights.

This result was aided by the dominant narration of the European juridical arena as a place in which to celebrate, above all, the triumph of the individual. European society seems to be dominated by an anthropology which only, or almost only, speaks the language of rights; by an ideology that makes citizens the 'insatiable' devourers of claims against others to whom, it is believed, nothing is owed.

A paradigmatic example of this trend is claiming to enforce a "right to a child", and a "healthy" one as well, with the danger of turning the latter into a simple object of other people's subjective juridical situations. The Italian Constitutional Court itself – in the sentence with which it stated that the prohibition on artificial insemination by donor was not constitutional (contained in article 4 of Law no. 40/2004) – declared that: "The freedom and intentional nature of the deed enabling people to become parents and create a family does not imply that the freedom in question can be *without limits*"[25]

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[24] G. Scaccia, Valori e diritto giurisprudenziale, available at the website www.associazionedeicostituzionalisti.it.

[25] Italian Constitutional Court, Sentence no. 162/2014, which continues: "However, these limits, even if inspired by considerations and convictions of an ethical nature, though deserving attention in such a delicate area, cannot consist in an absolute prohibition" (point 6). On this topic, the European Court for Human Rights expressed itself in the sentence 28 August 2012 (no. 54270/10, *Costa and Pavan versus Italy*) and ratified that prohibiting a pre-implant diagnosis (contained in article 13 of Law 40) is a violation of article 8 of the ECHR.

IV. ABUSE AND DUTIES OF SOLIDARITY.

Could renewed dogmatics of the prohibition of abuse of rights perhaps help to 'compensate' this limited consideration of the size of duties?

In its original field of application the prohibition of abuse aimed to correct a rigidly individualistic structure of the right of property with a more supportive vision, that could valorise its functional limits. As in the field of contractual autonomy the need to protect the weak contracting party (the worker, and nowadays also the consumer) against abuse by the strong contracting party has given rise to social legislation centred on the rights and duties of both contracting parties.

The dogmatic of prohibition of abuse of rights has also been amply acknowledged in the European juridical arena: on one hand in the legal system of the European Convention on Human Rights (ECHR) of 1950, and on the other in that of the European Union[26].

In the ECHR, the prohibition of the abuse of fundamental rights (specifically coded in article 17), following the German "protected democracy" model (article 18 *Grundgesetz*), places an 'internal' limit to fundamental freedoms (in particular freedom of speech), if exercised in contrast to the "spirit" of the Convention (adopting the motto: "no freedom for the enemies of freedom").

In the legal system of the European Union, the prohibition of abuse of rights represents an 'internal' limit to the exercising of fundamental economic freedoms, according to an ethic aiming to stop the "choice of applicable law" – one of the main prerogatives of the EU citizen – becoming "abusive", being exercised with the sole purpose of evading imperative national laws[27].

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[26] See for details F. Losurdo, "Il divieto dell'abuso del diritto nell'ordinamento europeo. Storia e giurisprudenza", *supra*, note 14, p. 107 ff.

[27] In most cases decided by the Court of Justice, one is faced by a situation that leads back to the following typical situation: a citizen or an enterprise exercises fundamental circulation rights and, more generally, EU prerogatives, for the sole (hence absorbing) purpose of eluding the internal laws of a member State. The criterion of ascertaining an abuse is based mainly (if not exclusively) on an objective and teleologic criterion, although in some cases – because of the particular aspects of the case in question - ascertaining the intention (the will) to obtain a benefit from exploiting EU law has also been considered. The many sentences include: 3 December 1974, C-33/74, *Van Binsbergen;*10 January 1985, C-229/83*, Leclerc e a.;* 2 May 1996, C-206/94, *Paletta II*; 12 May 1998, C-367/96, *Kefalas e a.*; 14 December 2000, C-110/99 *Emsland-Staerke.*

It is no coincidence that one of the most significant EU applications of the category in question concerns taxes, where the moral need to limit the most uncontrolled commercial and financial practices aimed only at tax evasion[28] is felt strongly, notwithstanding the general principle of legal certainty.

This is a demand that has become more and more pressing in the Italian legal system too, on which the Court of Cassation has noted the existence of a general principle of the prohibition of abuse; its source is to be found not only in EU case-law, but more directly in the Italian Constitution; markedly in article 53, which affirms the ability-to-pay (Clause 1) and progressive taxation principles (Clause 2)[29].

V. FOR AN EQUILIBRIUM OF RIGHTS AND DUTIES IN EUROPEAN SOCIETY.

The different cases that have emerged in positive Italian and European law (referred to briefly here) seem to confirm the juridical-dogmatic virtues of the prohibition of abuse of rights method and in particular, its capacity to favour a greater *'equilibrium' between the dimension of the rights and that of the duties* in the European juridical arena.

Indeed, European Union law has been fairly generous over guaranteeing rights to citizens and consumers, maintaining the original liberal structure of the founding Treaties. On the contrary, EU law tends to put citizen and consumer duties in second place, despite the specific reference contained in article 20 of the TFEU.

Could a theory on prohibition of abuse of rights compensate for this "gap" in the European system? That is, could it contribute to a renewed theory of a citizen's duties? Could it represent a judicial method for equilibrium between the (economic) rights sphere with that of (social) duties?[30]

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[28] A considerable amount of case-law has been developed on the matter starting from Court of Justice 21 February 2006, C-255/02, *Halifax*. More recent sentences include that of 20 June 2013, C-653/11, *Newey*; 13 march 2014, C-155/13, SICES.

[29] Italian Court of Cassation (Joint Sections): sentence nos. 30055, 30056 and 30057 of 23 December 2008.

[30] This is what N. Reich ("Il consumatore come cittadino – il cittadino come consumatore: riflessioni sull'attuale stato della teoria del diritto dei consumatori nell'Unione europea", in *Nuova giurisprudenza civile commentata*, II, p. 345 ss.) asks himself. According to him "EU law, which is very close to the everyday rights of citizens, needs an approach that converges more with the *abus de droit* theory, still waiting to be developed" (p. 358).

The *Viking-Laval* case-law (mentioned briefly) induces one to give a positive answer to the above questions. It exposed the presumed neutrality of the balancing method, whose results depend on the pre-constituted hierarchies of values, where the scales of the Court of Justice lean naturally in favour of fundamental economic freedoms (in compliance with the fundamental political decision of the EU system).

A different result would perhaps have been possible, and desirable, if the Court of Justice had seriously considered the existence not of a *use*, but of an *ab-use of economic freedoms* by the companies involved.

The purpose of recognising fundamental economic freedoms is certainly to permit choice of the legal system considered to be most advantageous. But that choice must not become the pure and simple evasion of imperative national laws with the sole purpose of making a profit from "social dumping", as in the paradigmatic case of merely faking a change of flag (*Viking*), or transferring workers to a member State other than that where the company has its registered office (*Laval*).

In these cases the Court of Justice could have ratified the existence of an abuse of fundamental economic freedoms by the companies; to *prevent 'upstream'* the 'foreseeable' result of a balancing with collective social rights.