GUIDO ALPA

FORM AND SUBSTANCE IN ITALIAN PRIVATE LAW
IV

COMPETITION OF LEGAL SYSTEMS AND HARMONIZATION OF EUROPEAN PRIVATE LAW

ANTEZZA

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Preface

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

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

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

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

Rome, 18 July 2013 *Guido Alpa*

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Fundamental Rights

1. Fundamental Rights and the Role of Lawyers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This results in two consequences:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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