

*Routledge-Giappichelli Studies in Law*

# **INDIVIDUAL WILL AND THE CIVIL LAW TRADITION RETHINKING LEX PRIVATA**

Edited by  
Tommaso dalla Massara



G. Giappichelli Editore



This volume sets out to explore the relationship between individual will (*voluntas*) and the legal rule. What unfolds in the following pages is a wide-ranging itinerary, moving between past and present, most notably ancient Rome and the contemporary world.

The guiding question is as radical as it is enduring: in what way can *voluntas* (a psychological impulse internal to the individual) come to determine the legal rule? European private law tradition rests on the premise that legally binding acts – contract and will, to mention only two paradigmatic cases – derive their force from individual will. From the Roman sources arises, with exemplary force, the notion of *lex privata*: the idea that private will itself may generate binding legal norms.

Such a premise immediately leads to further questions. Above all, it compels reflection on the authenticity of that will: what if *voluntas* is compromised? The law of defects (*error, dolus, metus*) opens the problem of whether distorted or corrupted will can truly sustain the validity and effects of a legal rule. The reflections gathered in this book approach the European civil law tradition as a broad and unified phenomenon, one in which law is inseparably bound to the historical and cultural contexts in which it takes shape.

**Tommaso dalla Massara** is Full Professor of Law at Roma Tre University. His research has long focused on the foundations and models of the European civil law tradition; he is author of numerous monographs and essays in Roman law and private law. He also serves as editor of academic book series with leading publishers and sits on the editorial boards of several distinguished international journals.



Individual Will and the Civil Law Tradition  
Rethinking *Lex Privata*



# Individual Will and the Civil Law Tradition Rethinking Lex Privata

Edited by

Tommaso dalla Massara

Coordinated by

Marta Beghini and Carlo De Cristofaro



ROUTLEDGE

**Routledge**  
Taylor & Francis Group  
LONDON AND NEW YORK



G. Giappichelli Editore

First published 2026  
by Routledge  
4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge  
605 Third Avenue, New York, NY 10158

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

and by G. Giappichelli Editore  
Via Po 21, Torino – Italia

© 2026 selection and editorial matter, Tommaso dalla Massara; individual chapters, the contributors.

The right of Tommaso dalla Massara to be identified as the author of the editorial material, and of the authors for their individual chapters, has been asserted in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

The Open Access version of this book, available at [www.taylorfrancis.com](http://www.taylorfrancis.com), has been made available under a Creative Commons Attribution-Non Commercial-No Derivatives (CC-BY-NC-ND) 4.0 license. Any third party material in this book is not included in the OA Creative Commons license, unless indicated otherwise in a credit line to the material. Please direct any permissions enquiries to the original rights holder.

For Product Safety Concerns and Information please contact our EU representative [GPSR@taylorandfrancis.com](mailto:GPSR@taylorandfrancis.com). Taylor & Francis Verlag GmbH, Kaufingerstraße 24, 80331 München, Germany.

*Trademark notice:* Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

*British Library Cataloguing-in-Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloging-in-Publication Data*

A catalogue record for this book has been requested

ISBN: 978-10-411-3438-1 (hbk-Routledge)  
ISBN: 978-10-411-3451-0 (pbk-Routledge)  
ISBN: 978-10-036-6986-9 (ebk-Routledge)  
ISBN: 979-12-211-1602-1 (hbk-Giappichelli)

DOI: 10.4324/9781003669869

Typeset in Simoncini Garamond  
by G. Giappichelli Editore, Turin, Italy

*The title has been subjected to a peer review process prior to publication.*

*Financed by the funds of the Project of Relevant National Interest (PRIN) 2022 - 2022R739JM “The regulatory will” with contributions from the following research units: CUP F53D23003650006 - Department of Law of the Roma Tre University (funded by the European Union – NextGenerationEU, Mission 4, Component 1); CUP J53D23005830008 - Department of Law of the Cattolica University of Milan (National Recovery and Resilience Plan (PNRR), Mission 4 “Education and Research” – Component 2 “From Research to Business”, funded by the European Union – NextGenerationEU – Investment 1.1); CUP D53D23007410006 - Department of Legal Sciences of the University of Salerno (funded by the European Union – NextGenerationEU, Mission 4, Component 2 – Investment 1.1).*



Funded by the  
European Union  
NextGenerationEU



Ministero  
dell'Università  
e della Ricerca



Italiadomani  
PIANO NAZIONALE  
DI RIPRESA E RESILIENZA



Roma Tre



UNIVERSITÀ  
CATTOLICA  
del Sacro Cuore



UNIVERSITÀ DEGLI STUDI  
DI SALERNO

Printed by LegoDigit s.r.l.  
Lavis (TN) – Italy – January 2026

# CONTENTS

	<i>page</i>
<b>Contributors</b>	xv
<b>Introduction</b>	
<i>Tommaso dalla Massara</i>	xvii
1. The idea of <i>lex privata</i>	xvii
2. <i>Voluntas</i> and 'legal causality'	xviii
3. <i>Voluntas</i> and the civil trial	xviii
4. <i>Arbitrium</i> and 'legal causality'	xix
5. Structure of the book	xx
<b>Part 1: Hypothesis. Individual will as a norm</b>	
<b>1. Will and knowledge</b>	
<i>Mauro Orlandi</i>	
1. The regulatory will	3
2. The judicial knowledge	5
3. The axiological moment	6
4. The gnoseological moment	8
5. Legal order of signifiers	10
6. The sacrifice of particularity	12
7. Primacy of effect	15
8. Exegesis and dogmatics	19
9. Law as a dogmatic science	23
References	27

**2. The contract between will and norm***Fabrizio Piraino*

1.	The epiphanies of the contract and its centrality	29
2.	The normativity of contracts and general implications	31
3.	The need for a new dogmatics: The contract as a title of acquisition and assumption of obligations and as self-regulation	33
4.	And a new dogmatics also in light of long-term contracts	37
5.	The will/ <i>voluntas</i>	38
6.	Will and individual norms: The legal relevance of contracts as a prerequisite for strengthening binding force through remedies	41
	References	44

**3. *Voluntas as lex*. The ancient roots of a modern legal idea***Sara Galeotti*

1.	<i>Voluntas</i> : A long ‘intellectual’ journey	49
2.	The polysemy of the concept of will: From the Greek conception of <i>boúlesis</i> to the Latin notion of <i>voluntas</i>	51
3.	About <i>lex contractus</i>	55
4.	Private autonomy and <i>Typenzwang</i> in Roman contract law: Two examples	59
5.	Is the cyber-formalism the new mancipatory-formalism?	64
	References	66

**Part 2: Problems. Individual will and decision-making****4. The legal force of the individual will: Reflections at the intersection of political philosophy and legal theory***Mauro Grondona*

1.	The legal will, yesterday and today	73
2.	The ordering function of the individual legal will	78
3.	The new relationship between the legal system and the judiciary	79
4.	Individual legal will and sources of law	80
5.	The individual will as a driver of progressive institutional change	82
6.	The speed of legal change	83
7.	The legal force of the individual will from the perspective of the contemporary open society	85
	References	86

## 5. *Voluntas* and *lex contractus* in the interpretation of standard clauses

*Edoardo Ferrante*

1.	A legal theory on standard clauses?	89
2.	A brief chronicle of standard clauses in Europe	90
3.	Grades of consent and grades of contractual institutions	94
4.	From parties' common intention to the <i>contra proferentem</i> rule: Transparency as the new icon of standard contracts	96
5.	The objectification of transparency as a vector for the second life of the contract	100
6.	The <i>contra proferentem</i> rule in its soft or strong version	102
7.	The weak consent of the consumer-private authority and the Italian spillover effect	106
	References	109

## 6. Legal *voluntas ex machina*. The impossibility of non-performance in the age of code

*Giulia Bazzoni*

1.	The age of smart contracts: Logic, structure and execution	117
2.	The structural immutability of smart contracts	122
3.	The impossibility of non-performance: A critique of smart contract immutability	126
4.	From consent to code: Rethinking the role of the legal <i>voluntas</i>	129
5.	Between automation and adaptability, preserving the legal <i>voluntas</i> in the age of code	131
	References	133

## Part 3: Dynamics. Individual will in action

### 7. Will and rule in civil proceedings

*Augusto Chizzini*

1.	Will of the parties and judicial proceedings	141
2.	The binding nature of procedural rules: A dogma	142
3.	<i>Nemo iudex sine actore</i>	143
4.	The principle of party disposition	144
5.	Legal claim and will	146
6.	Procedural dynamics and will	148

	<i>page</i>
7. Legal claim and subjective right	149
8. Party's will and the object of the proceedings	150
9. Claim splitting	151
10. Party will and judicial adjudication	156
11. Claims for alteration of legal rights or relationships and will	159
12. Claims for alteration of legal rights or relations based on contractual grounds	161
References	162

**8. The will in the *per formulas* procedure in Roman law.  
The *actio***

*Federica Bertoldi*

1. The concept of <i>actio</i>	167
2. Literature review: Modern understandings of Roman <i>actio</i>	168
2.1. Bekker and Windscheid	168
2.2. Muther's critiques	171
2.3. Developments since Muther	172
3. The <i>per formulas</i> procedure and modern understandings	176
4. <i>Actio</i> in Roman legal sources	179
4.1. <i>Actio</i> as a protectable claim	180
4.2. The <i>editio actionis</i> : A meeting point between law and action	182
4.3. The <i>postulatio actionis</i> , <i>editio actionis</i> and <i>denegatio actionis</i>	186
5. Legacy of the Roman concept of <i>actio</i>	188
References	189

**Part 4: Pathology. Imperfect individual will**

**9. *Error* and contractual *synallagma* in Ulpian's thought**

*Sara Galeotti*

1. Mistake in Roman private law: Rethinking a 'difficult topic'	197
2. Protection of the buyer and <i>aliud pro alio</i>	198
3. <i>Error</i> , meaning, choice	203
4. <i>Error</i> and <i>conventio</i>	207
5. Misrepresentation and <i>dissensus</i>	210
6. The past speaks with its own voice	217
References	218

**10. Error and last will in Ulpian's thought***Marta Beghini*

1.	The concept of <i>voluntas</i>	223
2.	Testamentary disposition between <i>voluntas</i> and formalism: A conceptual framework	224
3.	The divergence between <i>volitum</i> and <i>non volitum</i> : A matter of testamentary interpretation	226
4.	<i>Voluntas</i> and <i>error</i> in the <i>testamentum</i> : Ulpian's reflection	227
5.	The irrelevance of <i>voluntas</i> in cases of <i>error in corpore hominis</i> and <i>error in re</i>	228
6.	<i>Error in nomine</i> : Interpretative criteria for <i>voluntas</i>	231
7.	<i>Error in quantitate</i> and the legal relevance of non-expressed testamentary intention	232
8.	Ulpian's perspective: Which boundaries for the <i>voluntas defuncti</i> ?	235
	References	237

**11. The will in the performance of the obligation: Between coercibility and spontaneity***Paola Pasquino*

1.	To will or not to will: That is the question	241
2.	Not under a duty, yet willing: The performance of a non-due obligation	243
3.	Debt without liability: <i>Sua sponte solvere</i>	246
4.	Matters of an adverb: From the Italian Civil Code of 1865 to that of 1942	249
5.	Performance of the obligation, payment of the <i>indebitum</i> , spontaneous performance	250
	References	251

**12. Omissive fraud during negotiations from the perspective of contractual liability***Silvia Romanò*

1.	Omissive fraud in negotiations and free will	255
2.	The roots of the problem in the Western legal tradition	257
3.	The uncertain relevance of malicious silence during negotiations under Italian law	259

	<i>page</i>
4. Omissive fraud and its relevance in the harmonisation of European contract law	261
5. Consumer rights and termination of contract due to breach of the duty to provide information	264
6. Looking for a conclusion	265
References	268

## **Part 5: Absence. Fragile dimensions of individual will**

### **13. *Invitus*. The unwilling between state of mind and declaration**

*Margherita Scognamiglio*

1. The legal will in the doctrinal debate between the 19 <sup>th</sup> and 20 <sup>th</sup> centuries. Introductory notes	273
2. The vices of the will: Mistake, duress, fraud and beyond	277
3. <i>Invitus</i> : From classical jurists to 19 <sup>th</sup> scholars of Roman law	281
4. The semantic eclipse of <i>invitus</i> : From Roman jurisprudence to modern dogmatics	283
5. From <i>invitus</i> to the basics of the vulnerability	285
References	286

### **14. The absent *voluntas*: Roman semantics and modern dogmatics**

*Carlo De Cristofaro*

1. Framing the question of ‘non-will’	289
2. Roman semantics: <i>Volens, invitus, nolens</i>	293
3. The conceptual eclipse: How modern law lost ‘non-will’	297
4. Lessons from Roman elasticity: Categories, language and hermeneutics	299
5. Implications for vulnerability and consent today	301
References	304

### **15. Free will and remedies against violence in Roman provinces. Cases and issues in epigraphic and papyrological sources**

*Alessio Guasco*

1. Violence and free will in the ancient world	307
2. War, violence and legal acts. The case of Diodorus Paspurus in Asia	309

3.	Violence and consent extorted in Egypt from 2 <sup>nd</sup> century BC to 2 <sup>nd</sup> century AD	311
4.	Roman legal culture and provincial practice: Dynamics between wanted and unwanted	315
5.	<i>Vis absoluta</i> and <i>vis compulsiva</i> : A distinction still meaningful or categories to be restructured?	316
	References	318

## **16. *Invitus* and legal practice. Technical language as imperative**

*Maria Vittoria Bramante*

1.	<i>Status personarum</i> of young people and women, and the capacity to <i>agere</i> in Roman legal practice	323
2.	Untrue will? The ancient technical language as limit to regulatory will of young people and women	324
	2.1. Technical language in legal practice. Women from ancient <i>Puteoli</i> and <i>Herculaneum</i>	326
	2.2. Technical language in legal practice. Boys, <i>athletae</i> and contracts from Egypt: The role of guardians	330
3.	The technical language as legal protection to will regulatory of vulnerable subjects	332
	References	333

## **Part 6: *Arbitrium* beyond individual will**

### **17. The determinative will of contractual content: The Russian roulette clauses**

*Francesco Castronovo*

1.	Introduction	339
2.	Classical and modern contract law and the protection of free will: Good faith and abuse of rights	341
3.	Construction and performance of Russian roulette clauses under US law	348
4.	Construction and performance of Russian roulette clauses in civil law systems	351
5.	Are common and civil law really poles apart on the Russian roulette clause?	353
	References	355

**18. Limits to the will of a party, between arbitrariness and potestativity: The case of the Russian roulette clause**

*Martina D'Onofrio*

1. The boundaries of arbitrariness: The case of the Russian roulette clause	359
2. Doubts with regard of the mere potestativity of the clause	361
3. Admissibility and limits of party arbitrage	362
4. The Russian roulette clause between <i>voluntas</i> and arbitrariness	368
References	369

<b>Index</b>	371
--------------	-----

## CONTRIBUTORS

**Giulia Bazzoni**, Research Fellow (University of Verona)

**Marta Beghini**, Researcher (Roma Tre University)

**Federica Bertoldi**, Associate Professor (Roma Tre University)

**Maria Vittoria Bramante**, Associate Professor (Pegaso University)

**Francesco Castronovo**, Research Fellow (Milano Cattolica University)

**Augusto Chizzini**, Full Professor (Milano Cattolica University)

**Tommaso dalla Massara**, Full Professor (Roma Tre University)

**Martina D'Onofrio**, Tenure Track Researcher (University of Milano-Bicocca)

**Carlo De Cristofaro**, Research Fellow (University of Salerno)

**Edoardo Ferrante**, Full Professor (University of Torino)

**Sara Galeotti**, Associate Professor (Roma Tre University)

**Mauro Grondona**, Full Professor (University of Genova)

**Alessio Guasco**, Associate Professor (Giustino Fortunato University)

**Mauro Orlandi**, Full Professor (LUISS Guido Carli University)

**Paola Pasquino**, Tenure Track Researcher (University of Cassino and Lazio Meridionale)

**Fabrizio Piraino**, Full Professor (University of Palermo)

**Silvia Romanò**, Research Fellow (University of Bologna)

**Margherita Scognamiglio**, Full Professor (University of Salerno)



# INTRODUCTION

Tommaso dalla Massara

SUMMARY: 1. The idea of *lex privata*. – 2. *Voluntas* and ‘legal causality’. – 3. *Voluntas* and the civil trial. – 4. *Arbitrium* and ‘legal causality’. – 5. Structure of the book.

## 1. The idea of *lex privata*

The volume traces a path through legal culture, centered on the relationship between individual will/*voluntas* and legal rule, on the background of the Civil Law tradition. It is a disclosure that begins in the past, especially in ancient Rome, and extends to the present.

The underlying question is a radical one: how does it happen that will, a psychological drive internal to the individual, comes to determine the legal rule?

Already in the writings of Roman jurists, individual will emerges as a decisive factor in various legally binding mechanisms. From those ancient sources we inherit a notion both powerful and paradigmatic: *lex privata*.

It is from this idea that the volume takes its inspiration.

The idea of *lex privata* pervades European legal culture. Alongside the *lex publica* – the rule governing the *communitas* – stands the *lex privata*, endowed with equal binding force.

European legal culture has long combined the effects of the *lex publica* with those generated by private will. For instance, citizen gives form to their private will in the *testamentum*, fixing the rules meant to govern the succession. Likewise, two or more subjects share their will in a contract, which is in fact also referred to as *lex contractus*: rules which are granted executive force, embodied in Rome by the magistrate, above all the *Praetor*.

In all such cases, private will creates a domain of sovereignty over those who are bound by its effects.

If we look to the outcomes, private will is no less binding than the public norm that governs the *civitas*. But where does this binding force draw its

legitimacy? How can such psychological determination become law? The idea that will is ‘causative’ of binding effects constitutes one of the deepest matrices of our legal culture. The answer must be sought in the transformative capacity of law. It seizes the *voluntas* and, through a profound act of transfiguration, constructs upon it the legal norm.

This transformative passage – from inner intention to binding rule – opens the way to a further and decisive question: what is the mechanism of causation that allows *voluntas* to generate legal effects?

## 2. *Voluntas* and ‘legal causality’

To grasp the force of this transformation, attention must be turned to the mechanism of ‘causation’. What does it mean to say that will produces legal effects?

Twentieth-century legal thought, most notably Hans Kelsen, offered a clear distinction: natural causality describes phenomena (the laws of physics or chemistry), whereas legal causality prescribes a behaviour. The former explains what necessarily happens; the latter dictates what ought to happen. It can be assumed that the earliest Greek thought such a distinction was blurred: legal and natural rule were conceived under the same horizon of necessity.

The long trajectory of legal culture, however, gradually highlighted the singularity of will (*boúlesis*, *voluntas*) as the centrepiece in the definition of legal rule and in the causation of binding effects. Roman legal culture, also due to the influence of Stoicism, became the laboratory where this extraordinary acquisition took place.

From here stems another decisive intuition: *voluntas* – if it is to be recognized by the law – must be authentic, not tainted by perturbing factors. Already the ancient category of *error* shows how external interferences can produce binding outcomes detached from the true psychological drive that originally animated the individual.

This opens yet another scenario: what happens when private will is distorted, when error or external interference corrupt its authenticity? Can the law still recognize it as binding, or does the very causation of effects collapse? These questions lead directly to the pathologies of *voluntas*.

## 3. *Voluntas* and the civil trial

Words themselves are never innocent: they already contain complexities.

The Latin *voluntas*, along with the Germanic root *Wil*, *Wilja* – from

which stems the German verb *wollen* – and the English *will*, all point to a shared semantic archipelago.

Their common feature is projection, tension towards what is not yet: a thrust into the future. Not by chance, in English the verb *to will* is the very marker of futurity.

The binding effects of law are rooted in this same forward-looking dynamic, as previously remarked. The transformation of private will into legal action is always a projection into the future: in Roman civil trial, the *actio* becomes the vehicle through which an individual's will unfolds within the judicial framework.

Nineteenth-century legal culture, with its focus on the civil trial, reworked this Roman heritage in depth. The trial was seen as structured into distinct functions: the ascertainment of facts, the judgment, and even the very creation of binding legal effects.

Through will, the individual could demand that the trial alter the legal sphere of another. But what does it mean that an inner drive, once transfigured into procedural form, can compel the reality of others? How far does the sovereignty of private will extend within the theatre of the trial?

#### **4. *Arbitrium* and 'legal causality'**

The exercise of private will is an expression of freedom.

To will is to act within a space of personal autonomy. And the very idea of individual freedom, it must be recalled, constitutes a fundamental value of European legal culture.

Yet freedom is never limitless. Every expression of free will risks tipping into arbitrariness. In some cases, the law tolerates it; in others, it reacts with sanctions.

Already in Roman legal culture, jurists distinguished between *arbitrium merum* – a sphere of discretion that, though arbitrary, did not breach the law – and *arbitrium boni viri*, measured by the standard of fairness and integrity. Where, then, does arbitrariness end and illegitimacy begin?

This ancient distinction continues to echo in contemporary debates.

The problem resurfaces whenever one party is given the unilateral power to affect the legal sphere of another: in contracts with potestative clauses, in mechanisms of unilateral termination or modification, in those borderline cases where discretion shades into abuse. Is such power still an expression of legitimate will, or does it amount to an abuse of law?

Here the tension between *voluntas* and legal causality reaches one of its most delicate points. For if the law has the capacity to transfigure will into legal rule, it must also decide when that will, left 'unchecked', undermines

its own legitimacy. This oscillation – between recognition and denial, sovereignty of will and its necessary limitation – has never ceased to trouble jurists, from the Roman sources to today’s reflections on contractual fairness and the abuse of rights.

Thus, the question persists: how far can private will go before the law itself must intervene to restrain it? Between sovereignty and abuse, freedom and its limits, lies one of the most enduring tensions of legal culture. It is precisely along these lines of tension that the structure of this book unfolds.

## 5. Structure of the book

This book is not a chronology, it is a trajectory.

From the inner impulse of the *voluntas* to its transfiguration into *lex privata*, from freedom and authenticity to limits and distortion. The structure unfolds in six Parts that intertwine ancient and contemporary in a non-linear way, as each section opens up to questions rather than closing them, inviting the reader to test the strength (and the fragility) of private will as a legal rule.

In *Part 1*, we begin by positing the core thesis: *voluntas* as a matrix of normativity. Orlandi interrogates ‘regulatory will’ in its epistemic, axiological and dogmatic dimensions: how does the will become knowable, sayable, enforceable? Piraino then re-centers the contract as a *locus* of the norm-creation (*lex contractus*), urging a renewed dogmatics capable of accounting for long-term relations and remedial force. Galeotti closes the section by retracing the ancient roots of a modern idea (*voluntas* as *Lex*) from Greek *boulesis* to Roman *voluntas*, up to today’s cyber-formalism. Together, these chapters stage the hypothesis: can private will generate binding effects that law must recognize as regulatory?

The focus of *Part 2* tightens on the conditions under which will can bind. Grondona asks what gives individual legal will its ordering force within an open society and a fast-moving legal and political order. Ferrante follows the path from parties’ common intention to transparency and *contra proferentem* in standard contract clauses: when consent thins, does transparency carry the second life of the contract? Bazzoni, ultimately, confronts algorithmic code: smart contracts, structural immutability and the ‘impossibility of non-performance’, in order to understand if legal *voluntas* can survive automation without adaptability and who decides (and how) when will is standardized or coded.

The theatre of *Part 3* is the civil trial. Chizzini reads the will through procedural grammar: *nemo iudex sine actore*, dispositive principle, legal claim, fragmentation of claims, investigating how far can the parties’ will can shape the object and destiny of proceedings. Thus, Bertoldi turns to Roman

sources: the concept of *actio*, the *editio actionis* as the meeting point between law and action, and the legacy of the *formula* procedure. Here the inner drive becomes institutional movement, from *actio* to effect.

In *Part 4*, the question is addressed: what if the will that binds is not authentic? Galeotti re-reads *error* and the contractual *synállagma* in Ulpian; Beghini probes testamentary *voluntas*, where mistake reshapes interpretation from *error in nomine* to *error in quantitate*. Furthermore, Pasquino asks whether performance can truly be voluntary where duty is uncertain. Eventually, Romanò examines omissive fraud in negotiation, to determine when silence does corrode free will under Italian law and European harmonization. The diagnostic point of view is clear: when distortion enters formation, does causation of effects still hold?

*Part 5* examines non-will lying beyond pathology. Scognamiglio traces *invitus* from classical jurists to modern dogmatics; on the other hand, De Cristofaro maps the semantics of *volens/invitus/nolens* and the conceptual eclipse of ‘non-will’, drawing lessons for vulnerability and consent today. Guasco reads epigraphic and papyrological cases from the provinces (*vis absoluta* and *vis compulsiva*, war and coercion) where wanting and not-wanting collide. Bramante, indeed, shows how technical language and *status* constraints (women, *iuvenes*) functioned as both limit and protection of regulatory will in practice. When the will is absent or structurally fragile what remains, then, of *lex privata*?

In *Part 6*, finally, the limit-cases are examined, returning to the opening tension of the book: sovereignty of will, or its restraint in the name of fairness and rule’s integrity? Castronovo dissects *Russian roulette clauses* across common-law and civil-law systems, to find whether unilateral power to force exit price and transfer amount to legitimate freedom or to abuse. D’Onofrio, then, presses on the boundary between arbitrariness and potestativity: where does party autonomy end and the law’s refusal begin?

The six Parts of the book mirror one another, echoing topics across time and legal culture. Questions of norm-creation find their counterpoint in discussions on limits, so that inquiries into decision-making reveal their shadows in distortion. The dynamics of *actio* eventually resonate with the silences of absence and the recurrency of the very same challenges: when, why and how does private will bind? And when it does not (or must not) what remains of justice, of markets, of persons?

The following chapters do not aim at resolving these tensions, they challenge them. They allow the reader to witness *voluntas* becoming rule and, at times, resisting *voluntas*.



Part 1

**HYPOTHESIS. INDIVIDUAL WILL  
AS A NORM**



# Chapter 1

## WILL AND KNOWLEDGE

Mauro Orlandi

ABSTRACT: *The judgement must be shown to be a theorem, susceptible to falsification; not because the judge disobeys an imperium or an individual or collective sensibility or a vague principle or – even worse – his own will; but whenever he draws from the conclusive facts and words a meaning alien to the logical and institutional domain of signification. To the legal and systematic order of signifiers.*

KEYWORDS: *Will – Knowledge – Signification – Dogmatics – Effect – Axiologics – Judgement.*

SUMMARY: 1. The regulatory will. – 2. The judicial knowledge. – 3. The axiological moment. – 4. The gnoseological moment. – 5. Legal order of signifiers. – 6. The sacrifice of particularity. – 7. Primacy of effect. – 8. Exegesis and dogmatics. – 9. Law as a dogmatic science. – References.

### 1. The regulatory will

In 1934, Hans Kelsen (Kelsen 1934, 1960) theorized an analogy between natural causality and legal causality, encapsulated in the famous formula: «If A, then (must be) B». <sup>1</sup> It is an analogy, not an identity, since the two categories appear irreducible to him: one marked by constitutive objectivity (Gazzolo 2016, 31 ff.), the other by immanent subjectivity (Gazzolo, Pietropaoli 2014).<sup>2</sup>

---

<sup>1</sup> «Natural law says: If there is A there must necessarily (*muss*) be B; legal law says: If there is A there must (*soll*) be B, without thereby saying anything about the value, *i.e.* the moral or political value, of this relationship. Thus duty continues to exist as a relatively a priori category for the understanding of empirical legal material».

«Just as natural law», Kelsen 1934, 1960 points out, «connects one fact as cause with another as effect, so law as effect connects the condition with the consequence of law (*i.e.* as the so-called consequence of tort). In the one case the form of the factual connection is causality, in the other it is imputation (*Zurechnung*) in which the pure doctrine of law recognises the structure of law [...]. The expression of this relationship designated as ‘imputation’ [...] is nothing other than the ought-to-be (*das Sollen*) with which the pure doctrine of law represents positive law; just as necessity (*das Müssen*) is the expression of the law of causation [...]» (trans. by the Author).

<sup>2</sup> This passage is worth noting (p. 529): «This is the essential point: what makes a norm a juridical norm is the way in which it links together two ‘facts’ – *i.e.* the tort and the

The former belongs to empirical becoming, where consequences unfold irrespective of our agency; the latter pertains to human will/*voluntas*, which determines itself within the unfathomable sphere of being. Natural causality is given; legal causality, willed.

The decisive point of separation between the two concepts appears to lie solely in the *will*, understood as the *locus* where independent and absolute freedom is exercised. We could not dwell here on the abysmal question of free will: that an absolutely free will can or cannot be given does not obscure this smaller and clearer distinction, which remains evident and stable. It is one thing to observe the empirical effect – such as a crystal shattering under a hammer; quite another to will a juridical effect, such as foreseeing in the code a compensatory consequence for non-fulfilment. Within this polarity, the question takes on sense and light: can the will become a legal norm? What is left of the will once it is transformed into a legal norm?

The transformation into a legal rule appears to mark the transition from the subjective to the objective, from *faciendum* to *factum*, from creative energy to *positum*. Law seems not to tolerate a primitive, full and unconditional power of the will. Law is what exists: a domain susceptible to foundation and prediction from the outside (*ab externo*). The law determines and closes, consigning every legal norm to its existence *externo* and thus instituting the limit to a freedom in which everyone can desire or will without conditions.

One might call it: wanting versus knowing. Knowledge asserts its authority by enclosing signs and names within concepts, thus rendering reality classifiable and recognisable. On one side, the unlimited independence of the legal will (*superiorem non recognoscens*); on the other, the constrained dependence of knowledge (*superiorem recognoscens*) within the boundaries of a given law. Here the subtle dialectic between will and knowledge unfolds. Legal will yields to knowledge, allowing the juridical to become the realm of conditioned – and therefore knowable – facts and acts.

---

sanction – in the form of ought-to-be. Which means that we experience a norm as a norm only insofar as in it we experience the relation between tort and sanction as a relation of imputation, according to which the tort consists in nothing other than its ought-to-be sanctioned and the sanction in its ought-to-be ‘imputed’, taken into account, referred to the tort» (trans. by the Author).

Primogeniture would seem to belong in the modern age to Zitelmann (1879, particularly 206 ff.). In the second edition of the *Reine Rechtslehre* (Kelsen 1960, 114), the author acknowledges Zitelmann’s primacy in the construction of the norm as judgement or hypothetical structure. But he reproaches him for failing to distinguish legal causality (here understood as the link between fact and effect) and natural causality with rigour. The latter, in which causal laws are drawn from experience (and thus nature *gives the laws*); the former, in which they are imposed by man. The experiential derivation of natural c. would prevent them from being unified.

## 2. The judicial knowledge

The legislator wills; the judge knows, one might say.

Legal will belongs to the realm of politics, where ends and means are chosen; knowledge to the realm of law, where the relevance of facts to established norms is determined.

While useful for understanding the essentials, this distinction – *ça va sans dire* – is not a sharp one: so that in rigid constitutionalism the very will of the legislature ends up regulated and legalised by the supreme law; just as the judge's knowledge passes through sources and techniques of cognition marked by significant flexibility.

Let's focus on the dimension of judgement. The act of judging can be ordered in three moments.

The first, which we may call *axiological* – formless and preliminary – is the moment in which the 'just' is intuited, evaluating facts according to a native individual or meta-individual feeling. This is also the realm of *mores*, in which people of all ages are immersed regardless of the foundation and institutional limitation of their respective powers.

The second, which we will call *gnoseological*, formal and institutional, in which propositions are fixed, and hypotheses are enunciated: the 'precepts' take the expressive form of utterances and the intellectual form of fact and effect. This is the domain of law, in which the power of the will is defined into its legal meaning and enclosed in legitimate authority, which can be ordered in meanings that can be rationalised and reviewed.

The third, which we will call *topical*, subsequent and evaluative, scrutinises the consequences of the precepts with respect to various and different final categories (Castronovo 2024, 71 ff.).

What allows us to say that Titius owes something to Caius? What is the criterion of justice, such that we can affirm as 'just' the duty of Titius towards Caius? In what relationship do we place the feeling of justice and the meaning of the textual source?

We could indulge here in elegant or suggestive rhetorical formulas, which showcase or hint at an immediate and immanent persuasiveness. We could state that justice is like freedom or air: you only realise it when it is missing. We could hold that common sense offers everyone a feeling of justice, more or less shared within a historically given community. Yet we cannot rigorously claim that concepts or categories derived from common sense or sentiment are legally valid.

The sense of justice may take three forms: individual, group-based (what we may call *cetual*), or social, referring to society as a whole.

The former is almost irrelevant, since in law it is not a matter of individual opinion but of legal norm foundation and application.

The second and third are often invoked in legal literature, within the varied and multiform category of the axiological.

### 3. The axiological moment

Axiology<sup>3</sup> conceives law as a practical science, in contrast to a theoretical one (Lipari 2024, 1073 ff.); a science, which ends up being the art of reasonableness and effectiveness.

Reasonableness leads to effectiveness, a kind of visionary wisdom that interrogates the individual fact of life, seeking in it the particular need and remedy. The former is effective in the sense that it is real and knowable in its concrete form; the latter must be made effective, as the legal therapy prescribed by the judge to soothe and overcome the evil of injustice.

In this light, 'effectiveness' would seem to exhibit two senses. That which *is actually*, *i.e.* is recorded in the empirical particularity of the fact; that which *must be legally*, in order for that and precisely that existential injustice to be healed by means of a binding legal effect.

Let's consider, for instance, a principle explicitly stated in the Constitution: the principle of solidarity. Like every concept, this one too requires the effort of defining and limiting it, to such an extent as to overcome its immanent vagueness. What does it mean, then, «the Republic recognises and guarantees the inviolable rights of man, both as an individual and in the social formations where his personality is developed, and requires the fulfilment of the inalienable duties of political, economic and social solidarity»?<sup>4</sup> We have to put the principle into the particularity of the relationship between Titius and Caius; as this marks the necessary transition from vagueness to the concrete specificity of legal normativity.

Called upon to implement the principle in the circumstances of a case, the judge will extract the case<sup>5</sup> from the vagueness of the case, thus being able to establish the hypothesis of conduct with which Titius is bound to comply as an expression of legal will translated into a legal rule.

Axiologists oppose the objectivity of the social to the accusation of

---

<sup>3</sup> Here in particular, we are dealing with moral or social values. Read Irti's reconstruction and critique of Betti's axiology in Irti 2020, 98 ff.

<sup>4</sup> Art. 2 It. Const. «La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale».

<sup>5</sup> See *infra*, §§ 5-7.

subjectivism: the rule would descend «neither from textual elements nor from ethereal historical-spiritual evaluations, but from the values concretely operating in social reality, which is therefore understood as foundational to our legal order» (Lipari 2024, 1092).

Crisis point. Even if we imagined for each vague principle a plebiscitary determination, calling a *referendum* on the meaning thus derived, would we have a narrow legal norm? Susceptible to subsumption? A meaning, such as to descend to the small concrete legal relationship, and justify the conviction of Titius?

The plebiscitary affirmation of a contractual solidarity, which renders the credit uncollectable due to the mere impropriety of the creditor or cuts the price due to the subjective condition of the parties or postulates nullity of a clause due to the unjust selfishness of the creditor, does not appear capable of affecting the operative normative source. The reason appears to be simple and profound: a *referendum* on the moral significance of existing texts is not constitutionally permissible.

The *opinio vulgaris* is simply irrelevant in itself, because the people do not legislate and have no universal normative power. As in any democratic system (Luciani 2024, 298),<sup>6</sup> powers are established in mutual and necessary limitation, so that the customary practice is subordinated to the rational determination imposed by language. Which does not imply the irrelevance of the one with respect to the other, but a constitutional, *i.e.* legal-institutional order between one and the other (Castronovo 2024, 46).

Nor would the judge seem to be allowed to alienate himself from the constitutional system by entering into a kind of rhabdomantic search for popular or personal moods; even as much as sentiment would irresistibly override the rational meaning of one or more provisions.

The crucial point lies in the theory of the limit: that is, in the elaboration of an objective criterion by which to measure the degree of resistance of the positive text and its systematic *rationes* against moral custom and *actual* sentiment (Castronovo 2024, 75-76).

---

<sup>6</sup>The etymon of ‘democratic’ is suggestively declined in: «the lemma *démos*, which has its root in *datéomai*, divide, expresses the differentiation that underlies the regiment of the *polis*; the lemma *populus* (which may perhaps have its root in *populare*, ravage) initially identifies ‘the primitive Roman army’ much as *laós* identifies the warrior community that is constituted following a chief». Further on, Luciani himself seems to evoke the transition from the heart of darkness to the heart of light of law, which makes democratic deferment the dividing and coordinating of powers under the same form of the constitutional state (p. 318).

#### 4. The gnoseological moment

It becomes apparent that the legal domain appears suspended within the problematic and opaque polarity between the general and the particular. The practical science of law can come out disoriented, so that between the extremes of the totally general and totally particular, there seems to be a missing lens that would focus on the fine-grained legal relationship.

Every instance of legal relevance requires a *proximate form*, in such a dimension as to make the fact recognisable and predictable. Every view of the world is classifying, so that the real never appears immediately; but – quite the opposite – only offers itself in the mediation of the type (Irti 2016, 173). We should not be misled by mere names. The lemma *factispecies* (or case, here used as synonyms) expresses, not the absolute and solitary primacy of positive law (Vettori 2020, 49), but – before and above – a gnoseological category: all knowing is a re-knowing, *i.e.* an application to the perceptual datum of an intellectual form (Vettori 2020, 50-51).

The *principle of justice* is, in itself, silent; for it does not generate by its own internal inclination the facts of the case. How to go from the vast axiological principle to the small conflict of Titius demanding from Caius the payment of the debt?

Without the moment of conceiving (Reale 2018, XXV ff.),<sup>7</sup> in the proper sense of taking shape, every declination of the indistinct principle of justice is – by logical and methodological necessity – worthless. It ends in a demonstrative leap and reveals itself as such to be scientifically false. The innate sense of justice does not resolve the issue; rather, it raises it. And it places it within the logical universal of new legal forms, capable of better protecting the individual.

A paradox seems to emerge here. Both indeterminacy and particularity prove to be insufficient. The first, as incapable of distinguishing case from case; the second, unable to raise pure particularity into a concept. The first too distant; the second too close to the facts of life.

The term *factispecies* simply denotes the intermediate measure of classification, marking out the boundaries of related concepts and rendering facts

---

<sup>7</sup>«The translation of the term ἰδέα would be ‘form’». Further on (p. XXVI), with irresistible suggestion: «The fundamental character of the idea or essence is that of unity. In fact, each Idea is a unity, and precisely as such explains the sensible things that participate in it, constituting of them a unified and therefore unified multiplicity. This is why true knowledge consists in knowing how to unify multiplicity in a synoptic vision, which groups the multiplicity of sensory things into the unity of the Idea on which it depends» (emphasis or., trans. by the Author).

intelligible and recognisable, while at the same time elevating them beyond pure, unrelated particularity.

The occurrence belongs to the formless flux of nature or history: in-form because, in its emergence into existence, it is not enclosed in a name nor cast in a mould: «It has no structure, nor does it turn towards a direction» (Irti 2020, 22): it is pure and naked matter.

Irti distinguishes here between happening and event. The happening is solitary and unrelated. It is of no interest to us. We can imagine in this moment in the world infinite events, which are absent and senseless to us, because they are far from our perception and classification. What we can and must speak of is ‘happening *for* someone’; consciousness, which finds it before it, and takes a position in relation to it. The observer sees it, names it, ascertains and registers it, welcomes or rejects it, and so on.

In this light, existence and relevance are resolved in a stance of rational consciousness, so that the material event becomes an ‘event for someone’; it enters *the sphere of meanings* attributed by man and therefore refers to a criterion of meaning and classification. Meaning is not «expressed from within, but *received from without* through its entry into the defining and typifying apparatuses arranged by man» (Irti 2020, 23).

The event happens *for someone*. In such a relationship with the subject and inserted in his ambit, the pure happening is properly converted into an event. ‘And *legal event* if the *quisque* is the bearer of normative schematism’. Hence the enlightening Leibniz’ formula, according to which *casus definitur factum in ordine ad jus*. The *factum* ‘is not in itself *casus*, it does not belong to the world of juridicality, it has no other meaning than its existential happening’.

The *quaestio facti* is resolved in ascertaining what has occurred, through evidentiary conjecture; the *quaestio juris* is resolved in bringing the ascertained fact within the pre-defined scheme of the concrete case; and therefore, in raising it to an event or legal fact or case (Hegel 2016, 385).<sup>8</sup> The radical opposition between matter and idea is mediated and overcomes in the adjudicative activity of the subject, which converts fact into *case*. Chance is not the event in and of itself considered; *nothing happens as chance*; nothing

---

<sup>8</sup> «For the jurist judge, as an organ of the law, the case must have been prepared for the possibility of subsumption, *i.e.*: the case must have been *extracted from its empirical-phenomenal characters* and *elevated to a recognised fact and universal qualification*» (emphasis added, trans. by the Author).

Understanding implies abstraction; progressing from the individual to the universal: *in unum vertere*. «Without abstraction» warns Ascoli 1928, 72 ff.: «[...] law knows nothing but norms; and facts, in order to become intelligible and surmountable, must ‘dissubjectify’ themselves, *i.e.* make themselves norms».

bears a name or meaning within (Irti 2020, 42; Croce 1958, 184).<sup>9</sup> The meaning of the event as such, before the observer's awareness of it, is exhausted in the opaque impenetrability of matter (Orlandi 2021, 26 ff.; 58 ff.).

Sometimes material case and event are confused, caught up in its own native charge of historicity and unrepeatability, and thus in the isolation of its own occurrence. In the unity of thought, the existence of the event must be reasoned not as an immediate knowing *ex nihilo*, but as a *re-knowing*, *i.e.* placing the fact within typified legal framework.

## 5. Legal order of signifiers

Where are the case facts to be found? Interpreting signifiers.

To signify is to become a sign – that is, for a thing to point beyond itself; the fact or thing takes on ‘meaning’ because it does not remain closed in itself but implies a direction outside itself. Meaning is precisely this direction, which establishes a *relationship between terms*. The logic of meaning implies the passage from the material to the immaterial. Going outside oneself is materially impossible; and it is only postulated in the spiritual world of thought. Meaning is a rational category, with which the observer reduces the empirical appearance of things into a concept.

Meaning seeks the other-from-itself and the mean (the *inter-pretium* of the etymon) between terms, thus establishing constant relations. Interpretation is the intellectual moment of abstracting, in which the pure particularity of perception is transcended into the universal of a concept, infinitely replicable and rationally knowable. This enables humans to share ideas and engage in the intersubjective practice of signification; capable of telling and pre-telling. The interpreter is the third party,<sup>10</sup> called upon to apply the law of concepts within which one is led from the perception of sign to the formation of meaning.

One can order the dynamics of signification into two phases:

- a. the pragmatic phase, aimed at the causal representation (in a broad sense) of becoming;

---

<sup>9</sup>The ‘*dissubjectivisation*’ is accomplished in ‘*abstraction*’, in drawing oneself out of particularities, in freeing oneself from the burden of what is rejected by form. Croce 1958, 184, that «without the logical element it is not possible to affirm even that the smallest, the most vulgar case, pertinent to our individual and everyday life, has *happened*» (trans. by the Author).

<sup>10</sup>Hence the triadic geometry of the juridical: one man alone in the world would be without law. But even two men, without the mediation of the third who interprets given sources, would be consigned to the violence of the will. Eccentric theme, to be developed in another study.

- b. the textual or semantic phase, aimed at the construction of codes of signification, *i.e.* a formal order of correspondence between sign and concept.

On the one hand, pragmatics, pre- and a-linguistics; on the other hand, symbolic language, as codified form. Pragmatic reasoning relies on conclusiveness; the semantic *ratio* of codification.

The sign, in its empirical manifestation, is in itself opaque and impenetrable. It is capable of arousing an idea in the percipient in two ways.

Firstly, *with the application of a linguistic code*, which allows us to de-code perceived signs and isolate their artificially pre-established meaning. For example: if I perceive (in the material sense: hear the sound or see the writing) the word 'glass' my mind turns to the concept of a thing, denoted by certain form and function. The word is here a datum (precisely, a sign) that is perceivable and recognisable, with which the concept is conventionally associated.

Secondly, through the *application of a criterion of experience*, so that the contingent position of the fact, the fact that it occurred in certain circumstances of time and space, allows some meaning to be inferred *ex post* (Irti 1996, 10 ff.; Gentili 2015, 190 ff.). I see Titius leaving a coin and taking a newspaper. The fact is reconstructed as an exchange, since I derive from the occurrence in certain circumstances of time and place a concept of meaning.

The notion of *linguistic code* emerges: it designates a convention on the meaning of (the idea associated with) signs (Simone 1992, 31).<sup>11</sup>

The code is a legal rule of correspondence or dependence, conceivable according to the logical scheme of If/Then. The linguistic community of dialogues establishes the law of the sign and thus codifies the *formal discipline of marking* (De Mauro 1972, 74).

For the jurist, it is not so much true that meanings must be extracted exclusively by symbolic means (codification-decodification); but rather that it is necessary to construct a *legal order of signifiers*, of material sources capable of restoring legal meaning.

Thus, we will have – in the simplification of these pages – on the one hand, the symbolic institutional text and the correlative plexus of expressed

---

<sup>11</sup> These phenomena are widely studied on the linguistic level. «From the semiotic point of view, languages are codes (a term equivalent to sign systems, but much more convenient in usage), *i.e.* systems of correspondences between the order of expression and the order of content, intended for the transmission of information between an issuer and a receiver, through the production and dissemination of messages». S. explains that «the operation of forming a message by a sender through the resources offered by a code is called encoding» (32). «man» S. adds, «is not only a user of codes but also a code-former (he has, we might say, unlimited semiopoiesis)» (trans. by the Author). For the jurist, the mere sign constitutes a conclusive fact, which does not express a meaning according to a linguistic code, but allows a hypothesis to be inferred according to a rule of experience.

legal meanings; on the other, the situational context (Irti 1996, 23 ff.), with the corresponding set of unexpressed meanings.

The relationship between these material sources raises precisely the problem of discipline and order of priority.

Textual and co-textual decoding and interpretation of the material source precede context and circumstances, because the generators of the source (legislator, strictly speaking; judge; parties to the contract) have entrusted the meaning to the symbolic expression.

Hence the separation of the *semantic* and *pragmatic position* of the *factispecies*. The *factispecies* is indefectible: always waiting to be demonstrated within the interpretative technique of textual or pragmatic signifiers. General clauses and principles do not affect the *an* (that is, whether a legal question arises), but the *quomodo* (that is, how it must be resolved) resorting to the conclusive determination of the circumstances. The need to prove and apply a case narrow or proximate or concrete;<sup>12</sup> the way of determining it changes.

In this light, nothing is given to man but the gnoseological syllogism, by virtue of which he subsumes in concept and predicates. Any predicative judgement – and so does axiological judgement – implies the major and minor premises from which to derive the conclusion. All that remains is the institutional grounding of signifiers, from which to derive the premises that in law are called legally relevant facts. Like any other cognitive system, law is also the order of (legal) signifiers.

The express provision, understood here as a written (semiotic) source bearing the description of the case, logically precedes any other position technique, because it is endowed with an intrinsically significant utterance. We would say more generally that any relevant utterance (and thus also the judgement bearing a ‘precedent’) appears to precede and override the stage of conclusion or native sense of justice.

Pragmatic reasoning occurs through circumstantial analysis: determining whether and how the historical circumstances of time and place align with the expressed case. ‘General clause’ is the residual space with respect to the intrinsic meanings of the utterances expressed; it will occupy all the space left open by the semantics of the legal factual cases, enunciated by the applicable linguistic sources.

## 6. The sacrifice of particularity

Reasonableness and effectiveness alternate between the spheres of politics

---

<sup>12</sup> They show themselves in this logic as synonyms.

and law. In the first moment, they propose a direction for the path towards new models of social and economic development; in the second moment, they ask the jurist to translate them into a rigorous and precise category. Here, we intend to explore the second dimension of effectiveness, understood as the concrete realization of justice in individual cases.

On the gnoseological level, the justice of the legal event manifests itself within the equalising dynamic of forms. The fundamental misunderstanding lies in conflating contingency with fact (Vettori 2020, 57) and thus obscuring the abysmal logical distance between pure particular and ideal class that illuminates it.

Law does not coincide with life and does not cover (luckily, one might say) all the richness of experience and the mystery of beauty. Law is a modest practical science, concerned with studying and articulating patterns of conduct by organising the life of *cives* within classes of legally relevant facts and acts. Making the legal effects of organised and disciplined behavior predictable. A world of forms, which do not culminate in the raw, unrepeatable singularity of events or desires, but lie in the lasting abstraction of thought, through which subjects recognise themselves and know – and can know – what the consequence of a *given* action will be (Benedetti 2015, 69).<sup>13</sup>

*Two realities* can be distinguished in this way. The first, which could be called sentimental; the second, formal. The first, which lies in the subjective will of the parties and the judge; the second, in the objectifying and classifying legal meaning and concept of the case.

The *perception of effectiveness* operates within the intuition of particularity by grasping the singularities of the accident in order to contrast them with the abstraction of the type; quite the opposite, the *form of effectiveness* expels the singularities of the accident by resolving them in equalising legal justice.

The greatness and humility of the juridical also lie in this precise moment. It constitutes criteria of judgement, iterable by abstraction and assimilation<sup>14</sup>, so as to lift the ineffable singularity of perceptions into the intellectual knowability of concepts, with which to classify becoming and diagnose the legal significance of facts and behavior. The actual justice of law is right here: in

---

<sup>13</sup> We seem to be able to resume, according to which the principle must be translated into «a general proposition also deduced by induction from experience, which can serve as the major premise of a syllogism». The problem thus rises to the link between semantic and pragmatic signifiers: and here our paths seem to diverge.

<sup>14</sup> The lemma ‘assimilation’ exhibits a precise dogmatic meaning. It takes place within the dynamics of analogy, where the interpreter is called upon to ‘assimilate’, *i.e.* to separate identity and difference by conjugating the terms in which the core of identity prevails. In this light, analogy, as a technique of *conjugating similars*, is conceivable only in the world of types or facts; whereas it fails in that of general and axiological principles. For the distinction between internal and external analogy and the study of analogical dynamics see Orlandi, 2021, 56-60.

typological gnoseology, which does not abandon itself to the native brutality of the formless or the vagueness of proclamations or the subjective will/*voluntas*, but constructs classes of facts and acts, knowable and predictable.

The science of types thus also reveals itself to be a technique of the limit. This criterion serves to establish the boundaries of each type, distinguishing one form of conduct from another. In this way, a systematics of types is constructed with painstaking and rigorous zeal, through which the applicability to Titius and the inapplicability to Caius of case X is demonstrated.

The greatness of the human lies in the power of the concept, which erects categories and filters the pure particular into classes and types. The world is populated with concepts that allow us to name regular order in a system of meaning. Practical science and theoretical science are not two irreducible worlds, but – precisely – two sciences: that is, systems of concepts and words.

No one would deny justice as the need to defend the fundamental rights of the individual. It is just that this defence does not oppose or contradict the world of concepts that we call factual. On the contrary, it applies and models them; it makes the small place of civil law, immersed in the technical relations between debtor creditor owner-contractor, and so on, predictable and sayable. It is one thing when performance becomes impossible because it risks someone's life; it is quite another when a debtor must bear the ordinary sacrifice involved in fulfilling an obligation – even if that entails a material or psychological cost – to satisfy the creditor's interest.

The primacy of the poietic principle<sup>15</sup> implies an empty landscape of forms and types; it rejects any *a priori*, so that judgement does not apply forms or patterns but performs the native social feeling.<sup>16</sup>

Yet without the *forms of sovereignty*, solemnly affirmed by art. 1 of the

---

<sup>15</sup> Of a principle in 'direct contact' with the fact, without mediation of the normative case, as most recently theorised Lipari 2024, 1079. See now the refined critique by Castronovo 2024, 40 ff.

<sup>16</sup> I am aware of the diversity of plans. And of the accusation of 'Kantianism' that can be levelled at these pages. The Max Scheler study on the Kantian *a-priori* and the concept of value is interesting. According to Scheler 2013, 124 ff., the *a priori* is thought of by Kant as a corrective to *cháos*, an organising and ordering function that intervenes in nature and man. For Scheler, on the other hand, if we tried to replace anguish over *chaos* with love for the world, we would no longer perceive the continuous need for action, organisation and domination. Essences and their relationships are *grasped intuitively and not constructed by the intellect*; nexuses originally and immediately placed in reality, not laws imposed as *a-priori*.

Only through these immediate relations between essences would it be possible, according to Scheler, to understand the *lógos* that permeates the universe, that is, the order that «gives meaning and value to the world of life; and that fills, enlivens and enriches our own experience of the world» (127). Beautiful. However, it does not seem possible to escape the alternative: either one *orders* and then the rational *a-priori* is inevitable; or one *intuits*, and then one leaves science, even legal science.

Charter, all that remains is an indistinct opacity of masses, groups, or individuals. A sort of legal populism, which creates a singular ruling at every turn, which sinks into the quicksand of raw individual sentiment.

## 7. Primacy of effect

Like any other legal situation, every figure of duty (and of power) – especially obligation – can be conceptualized within the framework of the relevant legal case: it is logically reducible to a hypothesis of conduct, against which the future conduct of a given subject will be judged (Ferrajoli 2007, 259 ff.).<sup>17</sup> The norm proves to be a *functional nexus of facts*: a possible A is posited; the occurrence of which is followed by a possible B. If a *fact* appears that is referable to the hypothetical model (if A), then effect B applies; *i.e.* case B comes into force.

Let us refer to the normative *prótesis* as the conditional premise, and the normative *apódosis* as the consequent, *i.e.*, the dependent legal outcome. In the logic of these pages, we are led to conceive every effect as reducible to a hypothesis.

Effect is a relationship between facts. It is the criterion that illuminates the juridical becoming. The case in point is not a pure singularity, isolated and immobile; it is a hypothesis, an ‘if’: which by definition waits to be verified, so that the fact described in the hypothesis proves to be recognisable within the circle of events. And what happens if the hypothesis succeeds in being verified? The question precisely puts the question of succeeding, a sequential nexus (Wildelband 1870, 27 ff.; Morrone 2011, 63 ff.)<sup>18</sup>

---

<sup>17</sup>Ferrajoli notes the fallacy of the term ‘facts’, since law only regulates human acts and never facts. All norms, even those on natural facts (he gives the example of the *insula in flumine nata*) would be converted into fragments, intended to regulate human acts. He then proposes the lemma ‘attispecie’. ‘Attispecie’ would thus resolve itself into *species of the genus* ‘fatispecie’. In the text we shall use *fatispecie* indifferently, to mean hypotheses of facts or acts.

<sup>18</sup>Wildelband establishes the opposition between law and chance (in the sense of random, accidental). The concept of law – *W. warns* – introduces us to the *principle of science*, which places its priority task precisely in the search for the laws of becoming. The accidental (in the sense of chance) is the unpredictable; that which, unlike what is under a law, cannot be foreseen. The random or accidental is the lawless (*Gesetzlose*). It is the archenemy of science; which must recognise it without allowing itself to be confused (by mistaking an accidental relationship for a law) and must progressively expel it from its treatment.

The accident takes on decisive importance in the scientific consideration of reality precisely because it consists in an effort to progressively delimit the accidental.

In this light, the regular constancy of effect is what makes law a science: it is what is taught in university lecture halls, so that prescription is not a mystery to be reconstructed *ab ovo* at each new eventuality: but a conditional If/Then statute. Causal and not casual combination of facts: such that once the first is verified, the second comes into effect. And so on. In the regular and *relentless* rhythm of the etiological. *Relatio constans*.

such that the occurrence of A is followed by B.<sup>19</sup>

This premise inevitably touches on the traditional category of subjective legal situations; which, while linguistically offering useful synthesis, seems unresolved on a logical level. Let's also use – as we will do here for expository convenience – the language of tradition (duty, obligation, right, action, exception and so on), in the vigilant awareness of its modal character: marked by the verbal modes of duty and power. Power and duty reveal themselves as linguistic syntheses, which are explained in the syllogistic and causal rhythm 'If A Then B'.

In this light, the legal becoming of facts is known by demonstrating and applying hypothetical structures, marked by the causal If/Then dynamic.

Having resolved the entire dynamic of relevance within the category of legal causality, *i.e.* in the *conditional nexus between independent and dependent cases/factispecies*, the mode of being or being able to be always and by definition constitutes a preliminary and descriptive stage. Which awaits a causal development, *i.e.* the well-founded *position* and *application* of the independent and dependent cases.<sup>20</sup>

Within the hypothetical structure, the legal case is by necessity an *efficient cause*, *i.e.* capable of implying a binding effect. We only point out that an *efficient cause* is different from an *effective cause*. That the effect applies in history, *i.e.* that the *apòdosis* (dependent case) comes into effect, is undoubtedly accidental: thus the compensatory effect may never apply, if the debtor performs and therefore the non-performance is not historically verified.

Instead, it is necessary that *the effect be intended*, *i.e.* formally associated with the independent fact. There are no isolated facts. Each case is placed in a rule; and in that structure it is either cause or effect.

In this light, the concept of a legal statute emerges: a nucleus of structural or essential effects in a nexus of dependence. The statute constitutes a coherent framework, which makes it possible to establish a constant between cases. A and the associated effects b, c, d. The statute is conditional or normative combination; a bundle of essential effects. One can say that statute is the name of a nucleus of effects (or dependent facts) referred to elliptically; verbal synthesis of discipline.

---

<sup>19</sup> The effect also introduces into law, and specifically into the logic of the legal case, the category of the intellect that we call causality. One might recall the instructive and highly notorious long-distance controversy between Immanuel Kant and David Hume on this inescapable junction of thought (for a hint, if desired, see Orlandi 2024, 263-264, and fn. 100).

<sup>20</sup> The traditional concept of legal situation thus ends up turning into tautology: a merely taxonomic and classificatory judgement. It is of interest to the law and the jurist, not to classify 'as non-performance' a certain conduct; but to demonstrate the effect associated with the non-performance.

For instance, the debt is shown to be associated with the effect of personal liability (art. 1218 of the Italian Civil Code) and the effect of property liability (art. 2740 of the Italian Civil Code). The normative statute of performance is complex, resulting in a structure with (at least) two essential legal effects. The normative combination (arbitrary and changeable, according to variously pursued purposes and interests) between types of fact and types of effect can be indicated by the technical and summary term 'legal statute'.

The statute introduces the concept of internal relevance (Irti 1984, 23)<sup>21</sup> and is resolved in the demonstration of the conditional structures obtainable from positive sources. We shall then say that the analysis of the internal relevance of facts belongs to the science of law. Along these lines, it must strictly be recognised that the science of law studies not the order of facts, but of factual patterns, *i.e.* the abstract models provided by one or more norms; similarly, it does not analyse the concrete behavior of this or that subject, but the *model of behavior* associated with a given factual *pattern*. *The science of law studies legal statutes* (Orlandi 2024, 83 ff.).<sup>22</sup>

Let's now observe the statute at the moment of external relevance, meaning its actual application to concrete facts. The observer is called upon to subsume the fact in a *normative case/fattispecie*; which is never isolated in itself, but precisely declined in the hypothetical If/Then structure.

It is worth noting that legal relevance is not merely classificatory and static, but functional and dynamic. Fact is relevant in the circuit of legal causality; precisely, as the cause of a given effect. The legal fact is considered as efficient, *i.e.* capable of producing consequences. The case is not relevant as being taxonomically subsumed in a case; but only if it is subsumed in the *normative case*, *i.e.* when it is the cause of legal effects. The legal statute takes place in the logic of dynamic relevance, *i.e.* the effects summoned by the case in question.

Let us reason about non-performance. The relevance of non-performance is dynamic and not static: it is so because of the liability of *the non-performing party*. Both liability and condemnation are applicable to non-performance; or it is not non-performance. Non-performance is not so because it can be statically classified in the case of art. 1218 of the Italian Civil Code (non-performance); but because it is a title of liability, *i.e.* the constitutive fact of the obligation to pay damages and of the corresponding sentence. Relevance is not

---

<sup>21</sup> «A twofold notion of relevance is delineated: a) relevance of data that are described by the norm and placed in the protasis and apodosis; b) relevance of data that are thought of according to normative criteria» (trans. by the Author).

<sup>22</sup> *Internal* relevance the former, which we could also say is horizontal, since it is closed within the purely intellectual or ideal circle of normative hypotheses; *external* relevance the latter. Which we might also say is vertical, since it is projected towards the empirical world of historical facts, susceptible precisely to subsumption.

merely taxonomic – labelling the conduct as non-performance – but normative, as it functions as the legal cause of a sanction. Why should a jurist be interested in calling a given act non-performance if it is not relevant as a cause of sentence? It would be a mere classification; an ordering and defining technique. That does not seek effect, but only names of facts or things; which would reduce the jurist’s work to mere taxonomy, like that of a botanist.

We note how the notion of legal statute rests on the category of causality; understood here (we repeat) as a functional relationship (existence function) between two terms (Cordero 1955, 90-91):<sup>23</sup> such that the existence of term B depends on that of term A.

Causality is demonstrated in this light as the *universal of legal knowledge* (and perhaps of all knowledge). One comes to prove the legal relevance of a fact, *i.e.* to know an event from the point of view of law, by always applying the same causal category: constant relationship between facts.

Let’s reflect in this way on the essential separation between the legal and the political, which is repeated and explained in that knowing and willing.

Knowledge is the locus of cogency, such that it constitutes and resolves itself into a ‘law of relationship’ (Stella 2023, 191):<sup>24</sup> A explains the existence of B.

The individual will<sup>25</sup> is the place of freedom, such that it escapes any compelling determination.

Here, let’s -again- make it clear, comes into the picture not the sum of the question of free will, but the more sober and measured question of causal law, such that given A, B follows as its function. Every science is the discovery of causal laws, which bind (in greater or lesser cogency) the existence of the entities studied. Science is the progressive erosion of the accident, in which the pure singularity closed in on itself stands; to gain the law of the relation, in which the occurrence of each entity depends on that of another.

The entities studied in law are facts; that is, meanings of sources.

Hence the dual development of the causal law: causality of signification; causality of subsumption.

---

<sup>23</sup> In normative, *i.e.* conditional logic, ‘obligation’ is a verbal synthesis of ‘If A Then B’.

<sup>24</sup> «The *concept of relationship* turns out to be the foundation of the scientific conception of the world» (emphasis or.), as particularly 191 f.

Here the theoretical abyss of the limit as the finitude of every empirical entity opens up, and of its dialectical overcoming; so that the intellectual category of the causal relation is explained as a moment of transcending; which claims as *supremum exitum* the removal of all deferring into the unity of the whole or absolute (*ab-solutus*: that which does not depend on anything else). For these developments, see the limpid pages of Stella 2023, 194-196.

<sup>25</sup> It is not for nothing that the etymological roots include ‘*wähl*’ (German), which evokes choosing.

The causality of signification leads to the rational demonstration of the statute. Through it one achieves the nomological structure of legal reality, *i.e.* the norm or set of norms,<sup>26</sup> in force at a certain point in history.

The causality of subsumption leads to the rational application of the effect. Through it is achieved *crinological* imputation, *i.e.* the attribution of a legal predicate to an empirical term.<sup>27</sup>

Knowing proves to be the opposite of wanting: *knowing depends; wanting does not depend*. Knowledge is self-validating; will is self-asserting.

## 8. Exegesis and dogmatics

Recent legal scholarship has frequently articulated the notion of a ‘crisis of the case’ (Irti 2016, 19 ff.; Luciani 2016, 430 ff.). This section focuses instead on the corresponding crisis concerning legal effects. It would appear to be revealed in the not-innocent shift from the category of effect to that of remedy (Benedetti 2015, 67). A central question arises: who defines legal causality – that is, the normative correlation between independent and dependent facts? Such that If A then B?

The crisis of legal effect appears to manifest as a broader crisis of legal textuality. Two foundational constraints are missing: first, the linguistic constraint, which binds the judge to the meanings embedded in the operative legal texts, which requires the interpreting judge to keep to the meanings expressed by the material sources in force; secondly, the law of causation, which requires the interpreter to apply the effects provided for by the provisions in force. On closer inspection, this is the universal law of codification.

The need to stand on facts implies the necessity of causal judgement, which applies the law of dependence of one on the other: nature of law necessitates adherence to the structure of legal causality; abandoning it implies abandoning law itself. *Case/fattispecie* A must be followed by effect B; no other, freely associated by the interpreter. Disregarding both statutory language and linguistic normativity, the interpreter risks arrogating to themselves the authority to override textual effects in favour of meta-textual constructs (Luciani 2016, 443).

It may be that two meanings appear inconsistent; *i.e.* that to the interpreter the simultaneous application of provisions providing for different effects in similar cases seems unjustified. For example: it would seem irrational

---

<sup>26</sup> This is the place of so-called internal relevance, or *nomological* relevance: we restrict ourselves to the ideal world of meanings.

<sup>27</sup> This is the place of so-called external relevance, or *crinological* relevance: we lean towards the empirical world of facts.

that a deposit with a compensatory function (art. 1385(2) and (3) of the Italian Civil Code) may not be reduced by the court, while a manifestly excessive penalty clause may be reduced (art. 1384 of the Italian Civil Code).

*Quid iuris?*

Two answers. The first, within the legal limit of utterances and words. The second, beyond that limit. In the second, the semantic prison ceases. This opens the realm of interpretive subjectivity, wherein judicial discretion supplants textual determinacy. That is, it is not given to the judge to disregard the constraint of the text, which constitutes for him as for every interpreter a prison. Strictly speaking, the constraint must be declined in two ways:

- a. a *semiotic prison*, which renders utterances unavailable as texts in force in a given time and space. It is not given *ab externo* to change the words of the text;
- b. a *semantic prison*, which renders the meanings of words unavailable, according to their systematic rationality. It is not given *ab externo* to change the codes of signification, which words obey.

At this point, one could engage the vast body of literature addressing methods of semantic extraction; from literalist theories to the hermeneutics of the interpreting community. Whatever the argumentative technique, the outcome always appears to be the same: establishing the statute as a structure that is both hypothetical and predictive.<sup>28</sup>

That the text is an inescapable passage of interpretation does not at all imply the absolute primacy of literal exegesis. Quite the opposite: the scientific demonstration of the statutes is converted into the extraction of the systematic and rational meaning (in a word: dogmatic<sup>29</sup>), which can go so far as to falsify the apparent literal meaning: the ‘extinguishes’ that we read in art. 2934 of the Italian Civil Code does not mean – on a systematic level – a nullification of the title of the right of claim; hence the effect of the statute of limitations cannot strictly speaking be said to be ‘extinguishing’.

The interpretive discovery of legal meanings culminates in the rational demonstration of applicable statutes. It belongs to the work of the jurist, not to the will of the legislator. Like all knowledge, legal knowledge is not created but found; the point of view is that not of the anthropomorphic nomothetic but of the scientist. The very concept of positivity implies an observer, not an omnipotent despot; law is precisely and only this: a passage from the

---

<sup>28</sup> See *supra*, § 7.

<sup>29</sup> See *infra*, § 9.

brutality of the will to the rationality of knowledge. The observer finds signifiers before him, from which he draws meanings according to a method and not according to a will. Combination of facts, norms are proved and not willed: law achieves positivity not through the will of the legislator, but through the observer's recognition of its normative structure.

In this light the Kelsen's distinction between *Rechtssatz* and *Rechtsnorm* seems to be clarified; between proposition and norm (Kelsen 1960, 102). The former is a dogmatic judgement of science, which extracts from the spectrum of signifiers (text; co-text; con-text) the hypothetical statute If/Then; the latter, a prescription of the legislator (Gazzolo, Pietropaoli 2024, 529).<sup>30</sup> An individual statutory provision may not, in isolation, articulate a corresponding legal effect: think of art. 1337 of the Italian Civil Code, which merely indicates a duty of good faith and nothing else.

One thing is the free will that every man knows or deludes himself into cultivating; another is the legal will, which enters each provision into the circuit of co-legislation and undergoes its systematic coherence, gaining organic meaning in relation to the other positive texts.

The political perspective of the legislator and the circumstantial investigation of his concrete will, as rendered by the party and parliamentary dialectic of an era, may satisfy cultural curiosities and historiographical or sociological or politological interests, but not strictly legal ones. The construction of legal meaning and current cases responds to systematic coherence. It may be that by inserting the formula 'bad faith' a historical legislator had in mind (we could evoke here an empirical or concrete 'intention') to preclude the validity of clauses marked by impropriety or malice; but this assumption must be verified in dogmatic line, putting into system all the texts from which to derive the organic discipline.

Once norms are established, the role of individual will ceases. When faced with given norms, one is in search not of (inherently) subjective wills but of coherent meanings.

Thus, for example, the credit (artt. 1173, 1174 of the Italian Civil Code), as a statute of personal liability (art. 1218 of the Italian Civil Code) and patrimonial liability (art. 2740 of the Italian Civil Code), have two things in common. Either it finds in the 'empirical reliance', by which is meant the de facto expectation of the debtor, who is led by the circumstances to think that the creditor's inertia will continue forever,<sup>31</sup> a cause of extinction in the

---

<sup>30</sup> «According to Kelsen, the task of legal science is then to move from the 'norm' to the 'legal proposition', that is, to *transform* the provision (e.g. 'Forbidden to steal') into a proposition expressing a must-be relation ('If you steal, then you must be punished')» (emphasis or.). Should-be in the conditional sense If / Then. See *supra*, § 7.

<sup>31</sup> Exemplary case rent incorrect: a limited liability company, consisting of members of the

technical sense; or it persists *unwillingly as debtor*. It is a question of the validity of the source: the validity of the source as signifying the statute and its coercive binding legal effects.

Could we therefore transform the moral reprehensibility of the conduct into a cause of extinction of the claim and so of the source. To all intents and purposes, it would seem that the system of current statutes implies (if anything) liability for misconduct; not extinction of the claim (Orlandi 2010, 1156 ff.; Orlandi 2021, 5, 1179 ff.).<sup>32</sup>

The discourse always goes back to the root of legal signification and the correlative concept of source. By this route it refines sharpness and precision, measuring with a systematic gaze the legal existence or non-existence of the statute we call credit. Bad faith does not serve as a criterion of normative validity, but rather operates as an evaluative predicate of conduct.

Bad faith must dogmatically be distinguished from the ‘unlawfulness’ of the object and cause, provided for in art. 1418, second paragraph, of the Italian Civil Code, which affect not the concrete manner of conduct but the meaning expressed by the contractual source. It is illegal to dispose by contract of a human organ or to undertake an obligation to commit homicide; it proves legally impossible to conceive of a source that provides for and aspires to the protection of such an interest, held by the parties as essential.

This distinction is logically substantiated at the theoretical level of signification, wherein hypotheses are evaluated abstractly for normative admissibility: the source is invalid as a nuclear or essentially illicit hypothesis, so that it is not possible in the *abstract* to distinguish a correct and an incorrect exercise. Killing is an *unlawful hypothesis* in and of itself, regardless of the manner; unlike pecuniary credit, which appears in and of itself a lawful hypothesis, even though it may imply concretely incorrect lines of exercise.

---

same family (two spouses and the son), enters into a lease agreement with one of the partners for a property, which the tenant (son) uses as a family residence. The tenant has not paid any rent since 2004. The lessor company in turn does not demand any fulfilment for a long time. The couple divorce in 2007. The landlord sends the tenant a letter of termination of the tenancy, and unexpectedly demands all the rent that has been outstanding up to that time.

Cass., 14<sup>th</sup> June 2021, No. 16743, in *Nuova giurisprudenza civile commentata*, 2021, I, 1043 ff.; and in part II, with comments by D’Amico, Macario, Scognamiglio, Orlandi.

It is noteworthy that in Order No. 11219 of 14<sup>th</sup> March 2024, the same *Terza Sezione* clearly disavowed its own precedent. It reads in § 3.1.c: «the mere delay in exercising the right, insofar as it is attributable to the holder of the right and insofar as it is such as to reasonably lead the debtor to believe that the right will no longer be exercised, cannot constitute grounds for denying judicial protection of the right, unless that delay is the factual consequence of an unequivocal tacit renunciation».

<sup>32</sup>If anything, the *additional* harm inflicted on the innocent party, who is forced to incur costs that could not have been foreseen using ordinary diligence, could be construed as an imputable detriment.

In this light, it does not seem systematically consistent to preach bad faith as a criterion for the validity of the source.<sup>33</sup> Nor could the interpreter consider it as such on the level of axiological or social reasonableness, thus substituting another discipline for the current one, incompatible with the positive system. Here too, willing yields to judging, that is, to knowing the dogmatic relevance of facts in the light of the system in force: neither jurists nor judges may will beyond the rational boundaries established by nomological and *crinological* coherence.<sup>34</sup> The dimension of the juridical is knowledge, by its very nature irreducible to any freedom of wanting or feeling.

Law presents itself to the observer as a dogmatic science, perpetually engaged in approximating and reconstructing systematic coherence.

## 9. Law as a dogmatic science

Dogmatics, now reasoned in the refined pages of Carlo Castronovo (2024, *passim*), demands a definition that frees it from the fideistic and petrifying prejudice, to which it seems reduced by the literature of free law.

Dogmatics constitutes the science of legal concepts namely, of signifiers from which the legal fact is derived and from which the applicative syllogism originates (Castronovo 2024, 111). No science exists without determined concepts, closed in their own rational and verifiable intellectual form.

Does formal rigor necessitate the tolerance of exceptional injustice? Should we sentence the debtor, who does not perform to save himself or others from a danger to his life or his health? Should we order another debtor to pay a now huge sum, accumulated due to the inertia of a silent creditor, who for years does not claim it, thus engendering a kind of reasonable reliance.

The topical dimension concerns the specific legal issue or situation that emerges as novel relative to existing norms, whereas the axiological dimension pertains to moral values as perceived within a given community (Viehweg 1962, 49; Mengoni 1996, 99 ff.; D'Amico 2025). If topical is to be understood as an evaluation of practical consequences, then the two axiological and topical moments – which we indicated above<sup>35</sup> – can be reasoned within the same scrutiny of reasonableness. For this assuming a scrutiny of the greater or lesser acceptability of the legal effect – as application of the

---

<sup>33</sup> We are speaking here of incidental intent (art. 1440 of the Italian Civil Code); not decisive intent (art. 1439 of the Italian Civil Code).

<sup>34</sup> See *supra*, § 7.

<sup>35</sup> See *supra*, §§ 2, 3.

dependent case<sup>36</sup> – with respect to external criteria of moral justice or economic efficiency or others, different from the positive systematic coherence.<sup>37</sup> The question thus becomes: how to frame the legal solution to a problem, and thus regulate the individual's behavior? Through the axiological sentiment? Or through the positive system?

Dogmatic is the science of legal systematics – of the conceptual order derived from the network of existing norms and their interrelations. That is to say, of the systematic order of concepts, drawn from the fabric of existing norms within their reciprocal connections. This is where the logic of the boundary must unfold; of the boundary of the case, which is demonstrated and delineated according to the connective order of signifiers and the dynamics of legal signification.

Is it therefore the typical case, expressed by the text in force, or the atypical case, unexpressed and derived by distillation from the principle as an exception to the express and in force case? The pivotal question becomes whether the debtor shall indeed be held liable under the systemically derived norms.<sup>38</sup>

The judgement must be shown to be a theorem, susceptible to falsification; not because the judge disobeys an *imperium* or an individual or collective sensibility or a vague principle or – even worse – his own will; but whenever he draws from the conclusive facts and words a meaning alien to the logical and institutional domain of signification. To the legal and systematic order of signifiers.

The foundational maxim that all are equal before the law reflects the legal system's function as a universalizing structure, abstracting individuals from particularities into typified roles. This is true. Law is first and foremost a position in concept, lifting the world from the irrationality of *the here-and-now*; and stretching individuals within the equalising conformation of names (Diano 2007, 37) and norms. It offers them the unifying and universal order of language. Law is not a static or insurmountable entity, but rather a dynamic structure responsive to temporal and social evolution. The guarantee of reasonableness and effectiveness is revealed precisely in the justice of the type, which orders actions within patterns: thus, precluding the irrational

---

<sup>36</sup> See *supra*, § 7.

<sup>37</sup> Just to reason about the constitutive value of 'coherence' within the circle of human knowing. Every 'si-system' is founded on the symbiosis of '*cum-haerere*': the being-with, as adhering and composing in harmony. Constitutionalism is by definition systematic, *i.e.* institutionally consistent: it claims the logic of the limit, which preserves the identity of the components in the functional unity of the whole, and implies the systematic validity of texts and meanings within the limit of 'constitutional legitimacy'. The primacy of the moral over the institutional textual is constitutionally senseless and rationally incoherent.

<sup>38</sup> This is the case of inexact rent. See *supra*, fn. 31.

violence of the accident, holding individuals in the conscious and shared sacrifice of pure particularity.

The question is a radical one: every case – and thus also the legal-political form – implies the expulsion of conjunctural connotations, which are inevitably pushed back into the darkness of motives. We cannot fail to perceive the *pathos* of homogeneity that intersubjective discipline imposes: the essence of all objectivity, including legal objectivity. Legality – understood as normality or regularity of law – lies precisely and only in the equality of the like and in the constitutive loss of the eccentric. Within the effectiveness of forms, the individuality of Titius ends up resolved in the type ‘debtor’; so that *every* debtor is (rightly) called upon to fulfil at the sacrifice of conjunctive motives; until the occurrence of standard grounds for extinguishment or reduction (Vettori 2020, 164 ff.).

Disapplication of legal norms is not guided by the subjective perception of effectiveness but by the objective impossibility – whether empirical or legal – of subsumption. It is not the singular concreteness of the fact, but the abstraction of the concept that makes the prevalence of one interest over the other judicable. The balancing act expresses nothing other than this supreme judgement of the prevalence of one concept over the other, so that – we will exemplify – the universal interest in health is shown within the system of the constitutional law to prevail over the economic interest.

Disapplying the type blurs to an extreme moment, precisely because it is close to the limit and the logic of delimiting and closing. The subjective perception of singularity is legally irrelevant; the case must instead be assessed through the rational structure of signifiers and interpretive science. Up to the supreme political-legal ruling of the constitutional courts, which goes so far as to dismiss the semantics (Femia 2008, 288)<sup>39</sup> of positive texts when it is incompatible with the architecture of the constitutive law. A superior office, not replicable *tout court* in the sober *criminological* effort of judges.<sup>40</sup>

The Constitutional Court’s institutional role embodies what may be termed the *principle of axiological relativity*. There remains to the power of the law an irrepressible space of political will, which translates into the relative expendability of interests within the dynamics of legal transactions, where the ‘reasonable’ is measured in the systematic coherence of meanings.

The judge of laws – whether centralised court or diffuse power – ascertains the radical incompatibility, *i.e.* the impossibility of interpreting the

---

<sup>39</sup> «Semantic destitution» is the felicitous formula coined by Femia 2008, particularly 288.

<sup>40</sup> The discovery of the constitutional hierarchy does not annihilate norms and texts but coordinates with and in them; and it takes place within the institutional architecture, erected precisely and precisely by the Constitution. I can only refer to the valuable entry by Luciani 2016, 399 ff.

source and applying the case without denying the constitutional law. An arduous judgement, since it is also oriented by axiological categories within the perennial approximation of systematic coherence. And precisely for this capital function, an extreme judgement: only a determination of ‘constitutional impossibility’ – an irreconcilable conflict between an ordinary norm and a constitutional provision – can warrant the disapplication of the statutory text.

It is to be reasoned how it puts an end to the logic of invalidity, breaking the signifier/meaning relationship: ‘source’ is that which *is valid as legal signifier*; until another source – which has the institutional and hierarchical force – excludes such validity, breaking the signification nexus between sign and concept. The annulment of legal signification constitutes a supreme institutional act, reserved for the highest constitutional authority, which must exercise this negative competence with systemic and constitutional prudence; not to write new texts himself, making himself the holder of a positive power (Luciani 2023, 185 ff.).<sup>41</sup> The institutional power of the Court extinguishes the *erga omnes* of normative meanings, *i.e.* the universal opposability of the text to citizens. A case-by-case construction of legal meaning is inconsistent with the systemic function of constitutional adjudication, which establishes universally binding interpretations: the judgement of constitutional compatibility performs the legalisation of every power, relativising and limiting even that of the sovereign. It is a ‘universal judgement’.<sup>42</sup>

It is thus in the rigorous constitutional systematics that the legal reveals itself to be the place of types. Here the singularities of the case are resolved and dissolved in the equal assimilation to the scheme, up to the limit of impossibility understood as a rationally intolerable sacrifice, such as to merit the judgement of constitutional illegitimacy and the dismissal of the signifiers.

The term ‘unreasonable’ can be misleading, often conflated with subjective or emotional criteria. Yet constitutional legality necessarily tolerates a degree of subjective discomfort inherent in normative generality: the sacrifice of pure particularity demands by its very nature a physiological dose of ‘subjective unreasonableness’, with inevitable acceptance of even unpleasant

---

<sup>41</sup> On the delicate question of the constitutionally oriented interpretation of silence (could the Court declare a silence constitutionally unlawful and replace the silent legislator by enunciating the text of the rule?).

<sup>42</sup> The vice of the unconstitutional norm rises from the logical plane of signification to the juridical plane of power; constitutional illegitimacy is just and only this: the excess of positive power, which proves to exceed the limit set by the supreme law and for this reason unsusceptible of implying the universal meaning of the normative text. Hence the constitutional judge’s review finds its limit in the merely negative power of dogmatic-systematic knowledge concerning constitutional compatibility. In this light, the so-called ‘particular disapplication’, *i.e.* the abrogating interpretation of the text made by the ordinary judge for the individual case in hand, must be excluded.

or painful consequences, necessarily implied within the constitutional system of every normative and objectivising power.

It subtracts the debtor from the civil necessity of type the necessary abandonment of individual particularity for the sake of legal predictability: by privileging accident over form, such deviated effectiveness ends up undermining the universal reliance erected on the predictive equality of signification.

## References

- Ascoli M. (1928), *La interpretazione delle leggi*, Roma, Athenaeum.
- Bagolini L. (1968), *Visioni della giustizia e senso comune*, Bologna, il Mulino.
- Benedetti G. (2015), “Fattispecie e altre figure di certezza”, in *Persona e mercato*, 69 ff.
- Castronovo C. (2024), *Dogmatica del diritto*, Milano, Giuffrè Lefebvre.
- Cordero F. (1955), *Le situazioni soggettive nel processo penale*, Torino, Giappichelli, 90-91.
- Croce B. (1958), *Logica come scienza del concetto puro*, Roma-Bari, Laterza.
- D’Amico G. (2025), “Il ruolo della dogmatica nella scienza giuridica. Un confronto tra Mengoni e Falzea”, in *Nuovo diritto civile*, 2.
- De Mauro T. (1972), *La forma linguistica*, Milano, Rizzoli.
- Diano C. (2007), *Il pensiero greco da Anassimandro agli stoici*, Torino, Bollati Boringhieri.
- Femia P. (2008), *Nomenclatura del contratto o istituzione del contrarre? Per una teoria giuridica della contrattazione*, in *Il terzo contratto*, Bologna, il Mulino, 265 ff.
- Ferrajoli L. (2007), *Principia Juris, Teoria del diritto e della democrazia*, Roma-Bari, Laterza.
- Gazzolo T. (2016), *Essere e dover essere. Saggio su Hans Kelsen*, Milano, FrancoAngeli.
- Gazzolo T., Pietropaoli S. (2024), *Manuale di filosofia del diritto. Teoria e storia del pensiero giuridico*, Macerata, Quodlibet.
- Gentili A. (2015), *Senso e consenso*, I, Torino, Giappichelli.
- Hegel G.W.F. (1820, 2006), *Lineamenti di filosofia del diritto*, It. tr. by V. Cicero, Milano, Bompiani.
- Irti N. (1984), “Rilevanza giuridica”, in *Jus*, 1967, 55 ff.; now in *Norme e fatti*, Milano, 23 ff.
- Irti N. (1996), *Testo e contesto*, Padova, Cedam.
- Irti N. (2016), “Il ‘pathos della distanza’ (per Giorgio De Nova)”, in *Rivista di diritto privato*, 2, 170 ff.
- Irti N. (2016), “La crisi della fattispecie”, in *Un diritto incalcolabile*, Torino, Giappichelli, 19 ff.

- Irti N. (2020), *Riconoscersi nella parola. Saggio giuridico*, Bologna, il Mulino.
- Kelsen H. (1934), *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, Wien; *Lineamenti di dottrina pura del diritto*, It. tr. by R. Treves, Torino, Einaudi, 1970<sup>2</sup>.
- Kelsen H. (1960), *Reine Rechtslehre*, Wien, It. tr. by M.G. Losano, *La dottrina pura del diritto*, Torino, Einaudi, rist. 2021.
- Leibniz von G.W. (2014), *De casibus perplexis in iure*, It. tr. by C.M. De Iulii, *I casi perplessi in diritto*, Milano, Giuffrè, with introductory essay, translation and notes.
- Lipari N. (2024), “Regole, clausole generali, principi”, in *Rivista trimestrale di diritto e procedura civile*, 4, 1073 ff.
- Luciani M. (2016), “Interpretazione conforme a costituzione”, in *Enciclopedia del diritto, Ann.*, Milano, Giuffrè, IX, 430 ff.
- Luciani M. (2023), *Ogni cosa al suo posto*, Milano, Giuffrè Lefebvre.
- Luciani M. (2024), “Il diritto della forza”, in *Lo Stato*, 23, 297 ff.
- Mengoni L. (1996), *Ermeneutica e dogmatica giuridica*, Milano, Giuffrè.
- Morrone G. (2011), “I modi del caso. Intorno al primo scritto di Wilhelm Windelband”, in *Atti dell'accademia di scienze morali e politiche*, Vol. CXXI, Napoli, 63 ff.
- Orlandi M. (2021), *Introduzione alla logica giuridica*, Bologna, il Mulino.
- Orlandi M. (2010), “Contro l'abuso del diritto”, in *Rivista di diritto civile*, II, 1156 ff.
- Orlandi M. (2021), “Ermeneutica del silenzio”, in *Nuova giurisprudenza civile commentata*, II, 1179 ff.
- Orlandi M. (2023), “L'universale della causalità”, in *Rivista internazionale di filosofia del diritto*, 2, 227 ff.
- Orlandi M. (2024), *Riduzione. Diritto senza forza*, Torino, Giappichelli.
- Reale G. (2018), “Introduzione generale”, in *Platone. Tutti gli scritti*, Milano, Bompiani.
- Scalisi V. (2018), “Lineamenti di una teoria assiologica dei rimedi giuridici”, in *Rivista di diritto civile*, 1058.
- Scheler M. (2013), *Der Formalismus in der Ethik und die materiale Wertethik*, Halle, 1916; It. tr. by R. Guccinelli, *Il formalismo nell'etica e l'etica materiale dei valori*, Milano, Bompiani.
- Simone R. (1992), *Fondamenti di linguistica<sup>2</sup>*, Bari, Laterza.
- Stella A. (2023), *Riflessioni teoretiche*, Perugia, Morlacchi Editore.
- Vettori G. (2020), *Effettività tra legge e diritto*, Milano, Giuffrè Lefebvre.
- Viehweg T. (1962), *Topica e giurisprudenza*, It. tr., Milano, Giuffrè.
- Windelband W. (1870), *Die Lehren vom Zufall*, Berlin, Berlin F. Henschel.
- Zitelmann E. (1879), *Irrtum und Rechtsgeschäft. Eine psychologisch-juristische Untersuchung*, Leipzig, Duncker & Humblot.

## Chapter 2

# THE CONTRACT BETWEEN WILL AND NORM

Fabrizio Piraino

*ABSTRACT: The essay analyses the evolution of the contract as an instrument of private regulation. The centrality of the contract as an instrument of social governance and the various manifestations of the contract require a new dogmatic, especially with regard to mass contracts and long-term contracts. The author also proposes a conception of the original normativity of the contract that suggests a new approach to the relationship between the effectiveness of the contract and its legal relevance for the State legal system.*

*KEYWORDS: Contract – Will – Individual norm – Normativity – Effectiveness – Legal relevance – Mass contracts – Unilaterally prepared contracts – Long-term contracts.*

*SUMMARY: 1. The epiphanies of the contract and its centrality. – 2. The normativity of contracts and general implications. – 3. The need for a new dogmatics: The contract as a title of acquisition and assumption of obligations and as self-regulation. – 4. And a new dogmatics also in light of long-term contracts. – 5. The will/voluntas. – 6. Will and individual norms: The legal relevance of contracts as a prerequisite for strengthening binding force through remedies. – References.*

### 1. The epiphanies of the contract and its centrality

For some years now, civil law literature has insisted on the centrality of the contract as a normative act and as a vehicle for heteronomous interventions which, precisely through the contract, pursue general interests, mostly related to market regulation. Against the backdrop of these arguments about contracts, there is uncertainty, if not outright opacity, about the current era, marked by the overcoming of past certainties but also by the difficulty of discerning a new order. Between the blurring of the distinction between public and private law, the preponderance of economics and the challenge, not yet clear in its real scope, of technological innovation, especially generative artificial intelligence systems, to which should be added the crucial issue of climate change, the conscience of the jurist is challenged, raising the question of what its role is in today's society (dalla Massara, Nervi 2024, on which see the review by Cicero 2025, 343 ff.).

European private law and the comparison with North American law have brought contracts to the fore, but many of the considerations relating to the latter and to the dialectic between will in individual autonomy, as an

expression of freedom to draw up individual rules, by means of the production of binding effects – often destined to legally affect third parties in partial mitigation of the principle of relativity of the effects of contracts or of *privity of contract* – and normativity, including heteronomous normativity, also apply to other instruments of private autonomy, to the extent that I believe the idea – strongly supported by Giovanni Ferri – of the continuing vitality of the juridical act as a category encompassing the various manifestations of private autonomy (Ferri 2004, 75 ff.) is clearly confirmed. The centrality of the contract, as mentioned above.

This centrality does not depend solely on the breadth of the areas in which contracts and, more generally, contractual instruments can be used (relations with the public administration, resolution of corporate crises or over-indebtedness, self-enforcement, agreements in view of personal separation, generational succession agreements in companies, etc.). It also depends on the direction taken by the regulation of private autonomy. Decades of special legislation, especially under the harmonising influence of the European Union, now combined with micro-sectoral regulation by independent administrative authorities (so-called regulatory private law), have changed the approach to the regulation of private autonomy.

Civil codes, including the Italian Code of 1942, are concerned with establishing legal rules to guide the exercise of private autonomy, with a view to promoting the individual interests of the parties. Even the requirements imposed on pain of nullity respond to general demands, but these are mostly concerned with establishing the conditions for the maximum expression of individual self-determination in the economic sphere, preventing one party from taking advantage of the other (through the requirements of form and suitable ‘causa’/worthiness), unilateral constraints (through the requirement of consent and by censuring purely discretionary conditions precedent), the reduction of the contract to an empty shell intended to conceal unjustified transfers of wealth (through the requirement of effective ‘causa’ and the certainty or determinability of the subject matter). Of course, the institution of nullity is not limited to imposing a certain structure on the contract capable of guaranteeing full and free self-determination in negotiations, but also serves to safeguard the external boundaries of voluntary private regulation (prohibition of succession agreements, with the recent relaxation achieved with family agreements referred to in art. 768-*bis* of the Italian Civil Code; prohibition of forfeiture clauses, etc.) and to prevent the use of contracts to achieve arrangements of interests that are contrary to the legal system. From this perspective, the establishment of rules coordinating the pursuit of individual interests through acts of autonomy and the preservation of general interests, and therefore *lato sensu* political interests, falls within the traditional scope of contract law.

However, in recent decades, the link between the regulation of private autonomy and the pursuit of general interests has intensified, along with the prevalence of ordo-liberal approaches, which, in their various forms, assign to the State – and now to the supranational European legal system – an almost exclusively regulatory role in the markets, excluding the possibility that economic activity may be guided by political objectives other than the proper functioning of the market on a competitive basis. The strategy of regulating the economy does not stop at regulating the activity that precedes or follows the act, but also extends to the act itself, assuming that this distinction really makes sense, given that the act merely offers a snapshot of the activity. In the not always thorough discourse of civil law scholars, this regulatory move is referred to as bottom-up market regulation as legal normativity. The truth is that, just as competition cannot be established solely on the basis of relations between companies, since it is necessary to assess the effect of the accumulation of market power (resulting from agreements, the acquisition of a dominant position or concentrations) by analysing the economic and regulatory conditions of the contracts entered into by the company with consumers, in the same way, it is not possible to regulate contracts without taking into account the general repercussions of specific rules and conduct.

## 2. The normativity of contracts and general implications

Perhaps the most striking feature of the most recent phase of contract law is not the consideration of general, or even public, objectives (such as combating usury in the abstract) when regulating the conditions and methods for pursuing the individual interests of the parties to a contract, but rather the sectoralisation of regulatory interventions (think of the regulation of contracts in the banking, insurance, financial and telecommunications sectors, etc.). This makes it more difficult even for contract law experts to master their subject and identify which special rules are candidates for generalisation. Such generalisation will initially take place through dogmatics, which will offer practitioners new categories capable of influencing the interpretation of existing law and pushing the boundaries of private law further; it could then be formally enshrined through the reform of general contract law.

The genuine legal normativity of the contract is rendered through the metaphor of the force of law of the contract between the parties (art. 1372 of the Italian Civil Code): the *lex contractus*. However, this normativity does not only affect the individual private sphere of the parties, but also projects itself into the public sphere with the strengthening of genuine private

powers. The accumulation of power in the hands of private companies is no longer just economic, but also socio-political (Pollicino 2023, 436 ff.), and this relaunches the general terms and conditions of contracts drawn up by these companies on an enormous, unprecedented, even global scale. This allows these companies to influence social relations and certain institutional balances. Just think of platform contracts – especially, but not only, those of *over the top* (VLOPs: *Very Large Online Platforms*), which as such are capable of acting as *gatekeepers* of the digital ecosystem<sup>1</sup> – which provide digital services not only in the e-commerce sector, but also in the field of interpersonal communication and information (Carleo, Pescatore 2025, 141 ff.). Not to mention that contracts between platforms and commercial users (the transparency and fairness of which are covered by Regulation 2019/1150) often end up influencing contracts between the latter and end buyers, who are mostly consumers. In many cases, platforms also set up the procedure and service for payment by purchasers of goods and services or provide services functional to the performance of the commercial user's service, such as booking services or procedures to enable communication between the seller of goods and the provider of services or digital content and the end purchaser (Fernández del Moral Domínguez, Tuccillo 2025, 138-139). Nor can we overlook the complaint services managed directly by the platforms in order to settle any disputes between the seller or supplier and the end buyer. Not to mention contracts for the provision of knowledge and control services for national defence, where the social impact of the contractual rule becomes even more evident and concerning.

The two examples relate to two different aspects of contemporary contract law: the first concerns the supra-individual dimension of contractual regulation when two factors come together: the significant market penetration of certain companies and the adoption, in some cases on a global basis, of standard contractual regulations. The convergence of these causes gives standard contracts of certain companies a regulatory dimension, if not general, then at least Community-wide. The second example is linked to a cyclical phenomenon: when the State entrusts private individuals with the provision of goods and services that are essential for the exercise of a public function, or for reasons of public expenditure restraint, taking into account the costs of public production, or for reasons of greater competence and professionalism on the part of private individuals, the contract governing the provision of such goods and services becomes a normative act that affects the

---

<sup>1</sup> Even the largest digital platforms have been proposed in doctrine as 'private legal systems' in order to highlight their economic, negotiating and regulatory power: Bassan 2023, 1103 ff.

public sphere, structurally conditioning the effectiveness, quality and quantity of the public function.

A small comment on this point: I am not convinced by the idea that the normative nature of the contract, its being the source of an individual right which in certain contexts – as we have seen – can instead become a general and abstract right *lato sensu*, finds expression in art. 1372 of the Italian Civil Code. I am more convinced by the idea that assigns to the metaphor of ‘force of law between the parties’ the meaning of expressing the unilateral irrefutability and immutability of the contract. The contractual rule is identified with consent, understood not as an agreement, which is the essence of the contract, but in the sense established by art. 1326 et seq. of the Italian Civil Code, *i.e.* as the sharing of a balance of interests to the point of translating it into a rule that binds its authors. It is not sufficient for this arrangement of interests to be identified by mutual agreement or prepared by one party and shared by the other; it is also necessary for this arrangement to be preserved from any second thoughts on the part of the parties or from the occurrence of events that do not reach the threshold of significance necessary to make them legally relevant in terms of reshaping the content of the contract (partial termination due to partial impossibility of performance) or the dissolution of the obligation (total termination due to impossibility or supervening excessive burden). Art. 1372 of the Italian Civil Code therefore identifies the primary, so to speak existential or ‘negotiating’ effect (*i.e.*, the constitutive legal effect?) of the contract, highlighted by Renato Scognamiglio (Scognamiglio 1969, 268) and represented by its impermeability to unilateral modifications or terminations (Roppo 2011, 499 ff.). The *lex contractus* established by consent is actualised in a dynamic phase with the main binding effects of the contract (attributive: real, obligatory or guarantee; modifying or extinguishing) which constitute the projection of the contractual rule, originated by the parties’ will (*voluntas*), onto the plane of the legal modifications that the contract brings about.

### **3. The need for a new dogmatics: The contract as a title of acquisition and assumption of obligations and as self-regulation**

These general considerations and the increasingly central role of the contract provide the premise for moving on to one of the most interesting reflections in the current debate: the loss of the past certainties and systematic and conceptual symmetries that accompanied our university education. Are we sure that the post-twentieth-century world and the related regulatory framework were less complex and difficult to decipher than today’s reality? My impression is that the most eminent and sensitive exponents of the generations of

civil law scholars who worked around the Second World War and then throughout the 20<sup>th</sup> century made a conscious choice, both in teaching and in scientific circles, to select regulatory material and to make robust simplifications and generalisations. Obviously, this methodological choice led to a sclerotisation of private law studies, due to the uncritical repetition of models already tested within the conceptual and generalising approach. In the hands of less gifted scholars, these lines of inquiry and an abstracting canon led to a detachment from the subjects regulated, downgrading dogmatics to dogmatism and conceptual and systematic discourse to variations on the theme, completely unaware of the heuristic and ordering function of lexical, categorical and systematic work.

In its original inspiration, the selection of normative material and the consequent robust simplifications and generalisations of civil law scholars were designed to enable private law to take over from Roman law the basic grammar and lexicon of law, offering other disciplines a categorical framework and a system of general rules to be used in the interpretation and systematisation of the various branches of the legal system. In recent times, private law scholars have given up on this task, following in the footsteps of scholars in private law disciplines (especially commercial law and economic law) because they clearly want to be ‘business lawyers’, even on an academic level. I do not believe that this distortion of private law studies has led to an improvement in the quality of private law research: today, private law studies can probably no longer be criticised for a formal conceptuality that is unaware of the magma of material interests expressed by society and the market, but, just as likely, the general usefulness of these studies can be questioned.

In the crucial field of private autonomy, a new contract dogmatics is struggling to take shape (this is also noted by Gentili 2015, 26 ff.), with some significant exceptions, among which I would mention in particular: the contract with contractual power asymmetry, outlined by Enzo Roppo (2020, 69 ff.) and refined by Alberto Benedetti (2012, 370 ff.); the third contract, intuited by Roberto Pardolesi and given form by various authors, including Andrea Zoppini, Gregorio Gitti and Gianroberto Villa (Various Authors 2008); and the alien contract proposed by Giorgio De Nova (2010).

The challenge is to construct a robust and shared dogmatics of standard-form contracts (mass contracts) and long-term contracts, especially if they are of a lasting nature. In conceptualising the former, Natalino Irti’s provocation, aimed at denying the contractual nature of unilaterally prepared mass contracts, conceiving them as «scambi senza accordo», *i.e.* as two unilateral acts devoid of linguisticity and, therefore, of dialogue, did not do a good service, among the many rendered to the scientific debate both before and after (Irti 1998, 347 ff.). On the contrary, these are unquestionably contracts – as many have argued,

above all Giorgio Oppo (1998, 525 ff., followed by the counter-reply by Irti 1999, 273 ff.), Massimo Bianca (2000, 43 ff., followed by a reply by Irti 2000, 601 ff. and a counter-reply by Bianca 2001, 1120 ff.), Giuseppe Benedetti (1999, 137 ff.) and Francesco Gazzoni (2006, 313 ff.) – whose characteristics must be identified at a dogmatic, *i.e.* conceptual, level, not only and not so much for the sake of definition and conceptual purity, but rather to establish a more adequate framework than the fragmented one outlined by the legislator.

In mass contracts, unilaterally prepared regulations, the use of standard contractual content and the phenomenon of heteronomy as a means of limiting the preponderance of one party's bargaining power over the other seem to deprive the contract of its character as an individual act, *i.e.* an act designed to satisfy the particular and unique interests of two parties. The need for uniformity of contractual content, especially in terms of the regulatory content of the contract, seems to trample on the specific, and perhaps unique, interests of the weaker party. This indisputable characteristic of mass bargaining leads many to believe that in these contracts the space for individual freedom of the weaker party is reduced, if not eliminated altogether. It would therefore be worthwhile to distinguish within the contract – in every contract, but especially in mass contracts – between two different dimensions. The dimension of the contract as a legal title for the acquisition of rights or the assumption of obligations; and the dimension of the contract as a regulation of the economic transaction set out in the subject matter.<sup>2</sup>

Even in contracts that are strictly unilateral, the choice to purchase a good or service in exchange for consideration or to voluntarily assume obligations towards the other party is an act of freedom. This is a complete freedom, no less rich and substantial than that expressed in negotiated contracts, in which both the subject matter and the regulation arise from a decisive – or, to use Gianfranco Palermo's expression, 'configurative' (Palermo 2015, 26 ff.) – contribution by both or all of the parties. Obviously, the subject matter of the contract does not always relate to goods and services whose characteristics are self-evident and intelligible on the basis of common culture or experience. Just think of certain financial, insurance or investment formulas, where the freedom of choice and bind depend on the counterparty's ability to make the banking or insurance service or financial instrument understandable to the other party through adequate information, which in the context of consumer-professional relations should even become a prior dialogue.

---

<sup>2</sup>This dual dimension of the contract forms the basis for the limitation of the assessment of unfairness, by art. 4(2) of Directive 93/13/EEC and art. 34(2) of the Italian Consumer Code, to the normative content alone and not to the subject matter of the contract and the adequacy of the consideration, unless these are clearly and comprehensibly identified.

The second dimension, that of regulatory content, is in fact increasingly the result of a form of sharing between the parties that is less substantial than that which characterises the classic conceptualisation of the contract, which is still relevant for negotiated contracts. Adherence is not conformity. And the degree of free determination inherent in the act of adhering to a unilaterally prepared negotiated regulation is not comparable to contributing to the preparation of the regulation. From this point of view, the concept of the contract as self-regulation, on which the refounding of the contract on objective bases had relied since the mid-twentieth century (in Italy, Betti 1960, 53 ff.; Scognamiglio 1969, 100 ff.), is no longer adequate to represent the reality of standard-form contracts. In these contracts, the regulatory aspect function is exercised unilaterally, and it is therefore difficult to conceive of the contract as an instrument of self-discipline for both parties. A more accurate representation should recognise that for the party drawing up the contract, it remains an instrument of self-regulation, and in this sense an act of voluntary standard-setting, while for the weaker party, which cannot influence the regulatory dimension, the contract is still an act of freedom in the field of property, but in terms of an act of self-determination accessing goods and services.

The regulatory dimension is undoubtedly capable of being reflected back on the subject matter, making it less economically advantageous than it appears on the basis of its intrinsic characteristics.<sup>3</sup> It is for this reason that European private law, in consumer contracts, unable and unwilling to allow review of the subject matter of the contract and the appropriateness of the negotiated arrangement, instead allows significant and effective control over the regulatory aspects of the contract. Such review and its outcome, consisting of relative ineffectiveness or, in Italy, the partial nullity of the contract for protection purposes, is not, as has been claimed for too long, especially in Italy, for reasons of fairness or – as it should perhaps more correctly be said – contractual justice, but mainly for utilitarian reasons linked to the proper functioning of the market. European legislation on so-called unfair terms prevents the immediate profit of a professional who intends to maximise their advantages by drawing up contractual terms characterised by a significant imbalance of rights and obligations within the contract from

---

<sup>3</sup>Just as the subject matter of the contract affects the assessment of the unfairness of the contractual provision, as established by art. 4(1) of Directive 93/13/EEC and art. 34(1) of the Italian Consumer Code: «The unfairness of a term shall be assessed by taking into account the goods or services which are the subject matter of the contract and by reference to the circumstances existing at the time when the contract was concluded and to the other terms of the contract or of any other contract with which it forms a set or to which it is related» (trans. by the Author).

being pursued at the expense of the medium- and long-term profit, both individual and general, represented by consumer confidence. This reliance would be undermined, if not completely destroyed, if the legal system allowed the full effectiveness of non-individually negotiated contracts that conceal the pitfall of hidden contractual imbalances.

#### 4. And a new dogmatics also in light of long-term contracts

The category of long-term contracts, and in particular those of a fixed duration (in Italy, most recently, Granieri 2007; Tuccari 2018), poses entirely different challenges. Here, the long term of the economic activity breaks into the contractual structures, which are not centred on the act and on the immediate or protracted effect for the reasonable period of time imposed by the performance of the obligation in contracts with binding effects. Even in fixed-term contracts, the issues of unilateral determination and standardisation examined above may arise (*e.g.*, a bank current account, a loan with a pre-established repayment plan, etc.), and the same applies to these characteristics. The specificity of fixed-term contracts lies in their subjection to a principle of contract stability, as opposed to remedies of termination (*arg. ex art.* 1564 of the Italian Civil Code on the termination of supply and *art.* 1596 and 1597 of the Italian Civil Code on the termination of leases and tacit renewal), which is also justified in light of the specific investments that the conclusion of such contracts usually requires. Furthermore, the extension in time is an indispensable element for the satisfaction of the parties' interests, which are, in fact, long-lasting, so much so that it can be said that the duration is inherent in the 'causa' of such contracts. The extension of time exposes these contracts to unforeseen circumstances and, where the parties do not predetermine this by including a hardship clause as the basis for voluntary renegotiation (Brunner 2008, 391 ff.; and in Italy, see, recently, Venturelli 2017, 1036 ff.), the problem arises of managing such unforeseen circumstances, selecting those that are irrelevant because they are included in the normal risk of the contract precisely because of its duration, from those that are legally relevant, even if not subject to a legislative provision. The problem of changing circumstances has already been recognised, as highlighted by James Gordley (2004, 513 ff.), by medieval canon lawyers thanks to Thomas Aquinas' rationalisation of Aristotle's theory of equity, and cannot remain confined to the dogmatic constructions of scholars and the most prudent guidelines of case law, but requires regulation in general contract law, as was the case in France with the reform of the *Code civil* in 2016 with the introduction of *art.* 1195 on *imprévision* (Deshayes, Genicon, Laithier

2018, 436 ff.; Fabre-Magnan 2021, 620 ff.) and, even earlier, in Germany with the *Schuldrechtsmodernisierung* with the introduction of § 313 BGB, entitled *Störung der Geschäftsgrundlage* (Heinrichs 2009, 472 ff.; Medicus 2006, 518; Rösler 2003, 383 ff.; Wiesner 2004, 654 ff.).

## 5. The will/*voluntas*

The will/*voluntas* is the ideal-philosophical concept around which the classical doctrine of contract has been built. The implications of resorting to this concept are well known to all. On the one hand, the legal will expresses the humanism of the Enlightenment, centred on trust in the individual and his ability to dominate reality. On the other hand, the *voluntas* as the cornerstone of the contract expresses the sanctity of the principle of the intangibility of the content of the contract, the so called sanctity of contract, and, therefore, the resistance of the classical conception of the contract to hetero-integration by the law. Both of the assumptions that justified the adoption of the will, the very *abracadabra* of contract law, have ceased to exist. The criticism of the subjectivist approach to contracts and juridical acts (they are united by attributing the legal effects of the transaction to the declared intention: Karlowa 1877, 4 ff.; Zitelmann 1879, 290 ff.; Enneccerus 1888, 152 ff.) and «the secular theology based on the binding nature of the will», denounced by Siegmund Schlossmann in *Kritik des Vertragesbegriffs* (Schlossmann 1876, trans. by the Author, on which see the reflections of dalla Massara 2021, and of Pagliantini 2023, 7 ff.), is long-standing and draws on the unknowability of the will as a spiritual dimension and on the need to re-establish the contract on the objective basis of the declaration or action, on the assumption that «the will is within the action, not outside it» (Schlossmann 1876, 32, trans. by the Author). In other words, the will only acquires significance to the extent that it is expressed through a sign, which, to tell the truth, was already well understood by the ancients (dalla Massara 2021, 37). Of course, if the criticism of the theory of will is limited to the need to anchor the binding effects of the contract to an objective fact, such as a declaration (Manigk 1907, 150 ff.; Manigk 1918, 79 ff., 134 ff.) contrasting the *Willenstheorie* with the *Erklärungstheorie* (in Italy, the most in-depth discussion is offered by G.B. Ferri 2004, 31 ff.), the progress is not decisive (see, in fact, the criticism by Betti 1960, 56 ff.). Whatever the preferred conceptual framework, the question remains whether the legal effects of a contract are the prerogative of the party or parties or whether they arise from the state legal system. In this second scenario, the legal system can operate on the pre-legal preconception that the parties have of the effects of the contract or juridical act (the so-called empirical effects), modifying or supplementing them

with respect to the parties' expectations,<sup>4</sup> which, therefore, constitute only the factual prerequisite for a mechanism for producing effects that is entirely governed by the state legal system.<sup>5</sup>

If, today, the *voluntas* appears to contract scholars to be an ideologically too compromised category to still be used, and this, to be honest, is not a settled conclusion and is the subject of recent research, what the will, purified of all value implications, intends to express should not be set aside: the individual freedom to set binding rules for oneself. Only in this way can we escape Rodolfo Sacco's criticism that, since the 1960s, the rejection of will and pandectic definitions has been replaced by «equally rigid concepts, which are elusive, ambiguous and vague» (Sacco 2016, 56-57, trans. by the Author).

Firstly, the contractual rule translates into a unilateral promise (gratuitous contract) or mutual promises (bilateral contract) to provide the other party with a benefit which, precisely because it is formulated as a rule, since it is characterised by the intention to be legally binding, gives rise to a reliance on the part of the other party that must be protected.<sup>6</sup> From this point of view, it is reductive to distinguish between an empirical intention, such as the desire for practical results, and a legal intention, such as the desire for legal effects (this traditional approach is supported by Cataudella 2023, 5-6, following Santoro Passarelli 1959, 205; Scognamiglio 1958, 590). Even the intention of practical results is conceived by the parties and structured in terms of what ought to be, and therefore has, to all intents and purposes, a normative scope, albeit not exhaustive, for reasons that will be clarified below. The intention to bind oneself in an exchange of goods or services, in financing, in granting the enjoyment of one's own property, in cooperation

---

<sup>4</sup>The point is made with characteristic clarity and insight by Vassalli (1934), 8: «la volontà è il momento caratteristico del negozio giuridico, posto che nel riconoscere i negozi giuridici la legge dà riconoscimento e attuazione alla autonomia del privato, cioè al potere del privato di dettare la regola di dati suoi interessi. Ma la volontà, da un lato (A), non esaurisce tutto il *contenuto* dei n.g., poiché in ciascuno di essi possono essere richiesti altri elementi (p. es. di forma) e possono altresì da essi derivarsi degli effetti che non sono voluti dal privato, ma sono determinati dalla legge; dall'altro lato (B), gli effetti sono riconnessi non tanto alla volontà, ch'è un momento interiore, quanto all'atto esterno in cui essa trova manifestazione: sicché non in ogni negozio o in ogni caso è decisiva la volontà del soggetto».

<sup>5</sup>Falzea (1996), 41; Falzea (1997), 719 ff., in particular 78, refers to «legal manipulation» by the law of self-regulation of interests, relegated to a «pre-legal phenomenon».

<sup>6</sup>On the role of reliance as a reason for the obligation, even more than the moral imperative to respect commitments or the utilitarian incentive to receive the corresponding advantage in the exchange or the symbolic power of having performed an act of autonomy, see Sacco (2016), 55; as well as Irti (2011), 71, who emphasises trust in the binding nature of the objective meaning of words or conduct.

to carry out an act or activity, etc., constitutes the material reality, already juridical in itself, referred to by the term and concept of contract.<sup>7</sup>

The contract is, therefore, the union of autonomy and normativity: it is freedom to submit to rules, and these rules, not because they are autonomous, are not legal norms. In general theory, it is now accepted that the notion of a legal rule as a prescriptive proposition does not require the concomitant characteristics of generality and abstractness, which are not mutually implied, since a legal rule can be a precept of universal scope even in the absence of one of the two requirements. The universality of the prescription depends, in fact, on the typical nature of the matters regulated, and this connotative requirement of the legal norm exists even if the typical or universal form of the precept depends either solely on the indeterminate plurality, or class, of the subjects to whom it is addressed, or solely on the indeterminate plurality, or class, of the behaviours regulated (Ferrajoli 2007, 229 ff.). As an individual regulation of future conduct and relationships, the contract is a source of rules that are universal in nature because they are abstract but not general (Ferrajoli 2007, 231, who, in fact, defines a legal transaction as «any prescriptive act of disposition that is an exercise of private autonomy» (Ferrajoli 2007, 767, trans. by the Author), and this is sufficient to recognise private autonomy as having an original normative force in the proper sense,

---

<sup>7</sup> Therefore, we cannot agree with the opinion of Gentili (2015, 11), according to whom in the material world, the theorist could not point to anything to make it clear what he means by *contratto*, *contrat*, *contract*, *Vertrag*, etc. Of course, in order to speak of a contract in concrete terms, a fact is required: there are parties who negotiate, the text they draw up, the contractual intentions, the executive activities and those in breach. A fact that involves values: the goods and services negotiated, the fairness or unfairness of the exchange. But none of this is in itself the 'contract'. Nor is it an institutional fact. Or rather, there is certainly an institutional fact of which 'contract' is the name. But it is rather the name that constitutes the fact and not vice versa. And the fact itself, without the contribution that the name brings to it, remains a mere sociological reality and does not rise to the level of law. Deprived of the deontic values that only language (and therefore the name) introduces, exchanges are sociology, economics, not law. They exist in being, whereas 'contract' is the name of a ought to be. And the ought to be can only exist in prescriptive language. That is, here, in the name of contract. Of course, the contract does not arise out of nothing. At its origin there are facts, material and social, and values are manifested in them. The contract is not without this. But it is not this. The contract is rather the prescriptive meaning of all this: that one or the other can or must do something. The contract cannot be grasped in material or social reality. The contract cannot be grasped outside prescriptive discourse on the contract. This judgement seems excessive, because in socio-economic reality, individuals, subjects, agree in a prescriptive sense, often unaware of how the contract is regulated by the state legal system and what the prescriptive meaning of the contract is in the discourse of jurists. The judgement is, however, acceptable insofar as it detaches the concepts of the contract from the material substratum of business, emphasising that they are influenced by ideal inspirations that are also prescriptive in nature, insofar as they are the basis for justifying different and sometimes contradictory rules governing contracts.

regardless of the connotation of generality (in a different sense, see Lipari 2007, 728) but not of universality/typification, which also gives the contractual rule the syntactic structure of a legal rule and the extensional dimension of the normative meanings it expresses, distinguishing it from individual and concrete rules. The genesis of legal norms by autonomous means therefore appears to be a generalised phenomenon, which goes well beyond the hypotheses in which autonomous rules are intended to be observed by subjects other than their authors (see Pastore 2019, 49), thus linking the trait of generality to that of abstractness (*e.g.* collective bargaining, codes of ethics and good conduct, codes of self-discipline (Scotti 2019, *passim*, in part. 70 ff. etc.).

In this broader context, it is not unreasonable to argue that art. 1322 of the Italian Civil Code<sup>8</sup> represents a secondary rule of competence in the Hartian sense (Hart 2002, 118 ff.) and, more specifically, a rule of recognition that gives explicit form to a customary rule establishing the relationship between the normative power of individuals and the heteronomous normativity of the State, and now also of supranational institutions (on this point, see Barberis 2017, 122 ff.). In other words, the contract can be considered to produce rules in the strict legal sense beyond and even before recognition by the state legal system and outside any context of delegation/authorisation by the latter. The legal nature of the regulation contained in acts of autonomy exists despite their individual origin and the absence of an underlying social organisation in the sense of a private legal system distinct from the state legal system, as clarified by Widar Cesarini Sforza (Cesarini Sforza 1929, 43 ff. for whom private law is «the set of rules that non-state authorities issue to regulate certain legal relationships between the persons subject to them», trans. by the Author). Private autonomy therefore represents a genetic phenomenon of original legal rules which, however, are naturally and programmatically destined to be subject to assessment by the state legal system.

## 6. Will and individual norms: The legal relevance of contracts as a prerequisite for strengthening binding force through remedies

The premise for recognising the original normative scope of the contract can be found in the affirmation of the precedence of the social order over the

---

<sup>8</sup>The second paragraph of this provision is unique in the international landscape and provides that «1. The parties are free to determine the content of the contract within the limits imposed by law and corporate rules. 2. The parties may also conclude contracts that do not belong to types subject to specific rules, provided that they are intended to achieve interests worthy of protection under the legal system» (trans. by the Author). On this point, reference may be made to Piraino (2021a), 667 ff.

legal order and of the participation of private autonomy in both, without its inclusion within the scope of the legal system stripping it of its pre-legal autonomy, expressed through will/*voluntas*. This concept of private autonomy and its relationship with the state legal system has been advocated and extensively argued in Italy, above all by Emilio Betti (Betti 1960, 43 ff.) and Renato Scognamiglio (Scognamiglio 1969, 83 ff., in part. 98 ff.).

The contract therefore constitutes the translation into individual but abstract legal norms of the practical intent of the parties, which the legal system recognises in its intrinsic and original normativity. Therefore, both the concept that conceives the relationship between private autonomy and the state legal system in terms of prior authorisation of the former by the latter<sup>9</sup> and the concept that instead relies on the idea of subsequent recognition of legal effects (Scognamiglio 1969, 138 ff.) must be overcome. In recognising the act of autonomy in its intrinsic and original normative force, the legal system may also disapprove of it if the contract or act of autonomy goes beyond the limits set for private autonomy or if it does not comply with the structure that the legal system imposes on contracts and juridical acts, for the sole purpose of ensuring that freedom has been adequately exercised, or if the contract in some way conflicts with a balance of interests enshrined in the legal system with binding provisions. Recognition may culminate – and this is the most frequent scenario – in full approval of the contract or transaction. If they approve the contract, contemporary European legal systems subject the economic transaction carried out by the parties and the related regulation to a process of addition of normativity implemented through the integration of

---

<sup>9</sup>This is the well-known Kelsenian approach, in which, in fact, the legal transaction does not refer to private relations that arose before the formal appearance of the coercive rule established by the legal order, since no legally relevant relations arise between private individuals before the rule comes into force, but only spontaneous and informal adjustments of interests: Kelsen (1974), 58 ff., probably following Bierling (1894, 114 ff.). In Kelsen's strictly formal scheme, the legal transaction is recognised as an act producing law by virtue of authorisation by the higher-ranking norms of the state legal system: Kelsen (1980, 139): «The legal transaction is a creative act of law because it produces legal obligations and rights for the parties entering into the transaction. But at the same time, it is an act of applying the law, and therefore creates and applies the law at the same time. The parties resort to general rules that make legal transactions possible» (trans. by the Author). In Italy, this construction has attracted authoritative and influential followers: Santoro Passarelli (1983), 126; Pugliatti (1968), 668; Scalisi (1998), 549-550, according to whom, in the encounter between autonomy and the state legal system, it is inevitable that the latter will express an authorisation or concession to the former, inasmuch as the autonomy of the private individual in the field of legal transactions lives and operates within the sphere of the legal system (art. 1322 of the Italian Civil Code), as well as within the limits – more or less rigid or flexible – imposed by the system and under conditions – formal and substantive – as well as methods and procedures established by law (art. 1323 of the Italian Civil Code).

the content of the contract by ordinary law, secondary sources and regulatory acts of independent administrative authorities. The mandatory and dispositive heteronomous rules established by the legal system do not come down from above, but inevitably end up influencing the social manifestation of contractual autonomy, which does not operate in a sort of state of nature. The contracting parties, especially if they operate on the supply side and are therefore fully aware of the heteronomous rules of the contract, both supplementary and binding, make their choices and configure the economic transaction, regulating it, also in light of the applicable regulatory framework.

The real point of friction between the different theories of contract concerns judicial integration, especially that implemented through general clauses, first and foremost that of good faith and fairness. Here, the ideological clash between the liberal-libertarian view and interpretations variously inspired by equitable requirements, or in any case to reasons of commutative justice, becomes more heated, and the preservation of the normative scope of the legal will becomes a function of the preservation of the balance of interests outlined by the parties from unforeseeable revisions by the judge, dictated by the specificities of the individual case. In North American literature – and even earlier in the common thinking of Anglo-American circles – there is strong resistance to judicial integration (Schwartz, Scott 2003, 541 ff.), which has translated into a textualist theory of interpretation and then into market practices concerned with making contracts immune from judicial review, both in terms of integration (see *merger clauses* as an application of the *parol evidence rule* (Fuller, Eisenberg, Gergen 2013, 517; Murray 2003, 431 ff. In Italy, see Castronovo 2017, 59 ff.; Foglia 2015, 11 ff.)) and in the selection of the most appropriate remedy (see *sole remedy clauses*) (De Nova 2024, 228 ff.; Gabrielli 2021, 281 ff.; Cicconi 2020, 11 ff.).

However, the relationship between the inherent and original normativity of the contract and its recognition within the legal system must be clarified. To borrow a felicitous expression, it is necessary to highlight the dialectic between freedom and authority.<sup>10</sup> Recognition determines the relevance of the normativity of the contract at the level of the legal system and, therefore,

---

<sup>10</sup>Ferri (2004), 57 ff., in part. 69: «la relazione tra negozio e ordinamento statuale è, a ben vedere, espressione della relazione tra libertà (rappresentata dal negozio) e autorità (espressa dall'ordinamento statuale); cioè tra un sistema di valori (il negozio) espressione di specifici, circoscritti e personali interessi e un sistema di valori (l'ordinamento statuale), espressione di una visione generale e totalizzante la realtà sociale, in cui il negozio si inserisce come frammento minimo. I compiti che si prefiggono i due sistemi sono dunque profondamente diversi, sia da un punto di vista qualitativo, che da un punto di vista quantitativo».

this relevance is not functional to the production of legal effects, which arise directly from the contract, but rather to the strengthening of these effects through judicial or extrajudicial remedies. The recognition of legality by the state or supranational legal system is therefore not functional to making social manifestations of private autonomy binding or normative, but only to conferring on them that increase or multiplication of force guaranteed by access to jurisdiction and extrajudicial remedies (Piraino 2021b, 150 ff.). The increase in binding force depends on the possibility of resorting to the apparatus of remedies, invalidating and against non-compliance, developed by the state or supranational legal system, and on the possibility of bringing proceedings before the courts to ascertain one's rights and to obtain the condemnatory or constitutive measures to which the substantive remedies give rise. In addition, the state legal system provides for procedures for the enforcement of judgments and other enforceable titles, which are based on the proportionate and regulated use of force that the legal system reserves for itself in order to ensure the coercive power of legal rules. All this is reflected in the degree of reliance generated by the promise made by the other party: «in order to give legal subjects credibility, credit and viability, the legal rule must necessarily guarantee their promises and, in order to guarantee every promise, it must impose its fulfilment» (Sacco 2016, 56, trans. by the Author).

## References

- Barberis M. (2017), *Una filosofia del diritto per lo Stato costituzionale*, Torino, Giappichelli.
- Bassan F. (2023), “Digital Platforms and Blockchains: The Age of Participatory Regulation”, in *European Business Law Review*, 1103 ff.
- Benedetti A.M. (2012), *Contratto asimmetrico*, in *Enciclopedia del diritto*, Ann. V, Milano, Giuffrè, 370 ff.
- Benedetti G. (1999), “Diritto e linguaggio. Variazioni sul ‘diritto muto’”, in *Europa e diritto privato*, 137 ff.
- Betti E. (1960), “Teoria generale del negozio giuridico”, in *Trattato di diritto civile italiano*, ed. by F. Vassalli, 2<sup>nd</sup> ed. Torino, Utet, reprinted by G. Crifò, with an introduction by G.B. Ferri, Napoli, ESI, 2002, 53 ff.
- Bianca C.M. (2000), *Diritto Civile. III. Il contratto*, Milano, Giuffrè.
- Bianca C.M. (2001), “Acontrattualità dei contratti di massa?”, in *Vita notarile*, 1120 ff.
- Bierling E.R. (1894), *Juristische Prinzipienlehre*, I, Freiburg and Leipzig, Mohr, 114 ff.

- Brunner Ch. (2008), *Force Majeure and Hardship under General Contract Principles*, Alphen aan den Rijn, Wolters Kluwer.
- Carleo R., Pescatore V. (2025), “Le fonti. Disciplina generale e regole specifiche”, in *Le piattaforme digitali. E-Agorà*, ed. by R. Bocchini, Torino, Giappichelli, 141 ff.
- Castronovo F. (2017), *Autonomia contrattuale e disponibilità dell'integrazione. The 'merger clause' dal diritto americano a quello italiano*, Torino, Giappichelli.
- Cataudella A. (2023), *I contratti. Parte generale*<sup>6</sup>, Torino, Giappichelli.
- Cesarini Sforza W. (1929), “Il diritto dei privati”, in *Rivista italiana per le scienze giuridiche*, 1929, 43 ff.
- Cicconi E. (2020), *Disponibilità ed esclusività dei rimedi contro l'inadempimento contrattuale*, Milano, Giuffrè Lefebvre.
- Cicero C. (2025), *Recensione a “Tommaso dalla Massara, Andrea Nervi, Il contratto è politica, 2004, Milano, BookTime”*, in *Studi economico-giuridici online*, 343 ff.
- dalla Massara T. (2021), *Il consenso annichilito. La critica radicale del contratto in Siegmund Schlossmann*, Bologna, il Mulino, 2021.
- dalla Massara T., Nervi A. (2024), *Il contratto è politica. Riflessioni sul contemporaneo in una conversazione con Giuseppe Guizzi*, Milano, BookTime.
- De Nova G. (2010), *Il contratto alieno*<sup>2</sup>, Torino, Giappichelli.
- De Nova G. (2024), *The Sale and Purchase Agreement: a commented contract*<sup>5</sup>, Torino, Giappichelli.
- Deshayes O., Genicon Th., Laithier Y.M. (2018), *Réforme du droit des contrats, de régime général et de la preuve des obligations*<sup>2</sup>, Paris, LexisNexis.
- Enneccerus L. (1888), *Rechtsgeschäft. Bedingung und Anfangstermin*, I, Marburg, N.G. Elwert.
- Fabre-Magnan M. (2021), *Droit des obligations*, 1, *Contrat et engagement unilatéral*<sup>6</sup>, Paris, P.U.F.
- Falzea A. (1996), “L'atto negoziale nel sistema dei comportamenti giuridici”, in *Rivista di diritto civile*, I, 41.
- Falzea A. (1997), *Ricerche di teoria generale del diritto e di dogmatica giuridica. II. Dogmatica giuridica*, Milano, Giuffrè.
- Fernández del Moral Domínguez L., Tuccillo C. (2025), “I modelli contrattuali nell'economia delle piattaforme”, in *Le piattaforme digitali. E-Agorà*, ed. by R. Bocchini, Torino, Giappichelli, 138-139.
- Ferri G.B. (2004), *Il negozio giuridico*<sup>2</sup>, Padova, Cedam.
- Foglià M. (2015), *Il contratto autoregolato. Le 'merger clauses'*, Torino, Giappichelli.
- Fuller L.L., Eisenberg M.A., Gergen M.P. (2013), *Basic Contract Law*, Concise Edition, St. Paul, West Academic Publishing.

- Gabrielli E. (2021), “Autonomia privata ed esclusione dei rimedi contrattuali (Brevi spunti di riflessione sulla clausola di *exclusive remedy*)”, in *L'autonomia privata. Dal contratto alla crisi d'impresa*, Milano, Wolters Kluwer-Cedam, 281 ff.
- Gazzoni F. (2006), “Contatto reale e contatto fisico (ovverosia l'accordo contrattuale sui trampoli)”, in *Studi in onore di C.M. Bianca*, III, Milano, Giuffrè, 313 ff.
- Gentili A. (2015), “Il contratto dopo il Novecento”, in *Teoria e critica della regolazione sociale*, 26 ff.
- Gordley J. (2004), “Impossibility and Changed and Unforeseen Circumstances”, in *52 Am. J. Comp. L.*, 513 ff.
- Granieri M. (2007), *Il tempo e il contratto. Itinerario storico-comparatistico sui contratti di durata*, Milano, Giuffrè.
- Hart H.L.A. (1961), *The Concept of Law*, New York, Oxford University Press.
- Hart H.L.A. (2002), *Il concetto di diritto*, It. tr. ed. by M.A. Cattaneo, Torino, Einaudi.
- Heinrichs H. (2009), s.v. “§ 313”, in O. Palandt, *Bürgerliches Gesetzbuch*<sup>68</sup> (BGB), Munich, C.H. Beck, 472 ff.
- Irti N. (1998), “Scambi senza accordo”, in *Rivista trimestrale di diritto e procedura civile*, 347 ff.
- Irti N. (1999), “‘È vero ma...’ (replica a Giorgio Oppo)”, in *Rivista di diritto civile*, I, 273 ff.
- Irti N. (2000), “Lo scambio dei foulards, (replica semiseria al Prof. Bianca)”, in *Rivista trimestrale di diritto e procedura civile*, 601 ff.
- Irti N. (2011), *Destini dell'oggettività. Studi sul negozio giuridico*, Milano, Giuffrè.
- Karlowa O. (1877), *Das Rechtsgeschäft und seine Wirkung*, Berlin, Weidmann.
- Kelsen H. (1974), *Tra metodo giuridico e metodo sociologico*, (1911), It. tr., Napoli, Guida Editori.
- Kelsen H. (1980), *Teoria generale del diritto e dello Stato*, It. tr. by G. Treves, Milano, Giuffrè.
- Lipari N. (2007), “Fonti del diritto e autonomia dei privati (Spunti di riflessione)”, in *Rivista di diritto civile*, I, 728.
- Manigk A. (1907), *Willenserklärung und Willensgeschäft*, Aalen, Vahlen, 150 ff.
- Manigk A. (1918), *Irrtum und Auslegung*, Aalen, Vahlen, 79 ff., 134 ff.
- Medicus D. (2006), *sub § 313*, in *BGB Kommentar*, ed. by H. Prütting, G. Wegen-G. Weinreich, Neuwied, Luchterhand Verlag, 518.
- Murray J. (2003), *Murray on contracts*, Newark, LexisNexis.

- Oppo G. (1998), “Disumanizzazione del contratto?”, in *Rivista di diritto civile*, I, 525 ff.
- Pagliantini S. (2023), *Sul negozio giuridico: itinerari novecenteschi e della contemporaneità*, Napoli, ESI.
- Palermo G. (2015), *L'autonomia negoziale*<sup>3</sup>, Torino, Giappichelli.
- Pastore B. (2019), “Complessità del diritto e autonomia private”, in *Autonomia privata e fonti del diritto*, ed. by M. Palazzo, Milano, Giuffrè Lefebvre, 49.
- Piraino F. (2021a), “Meritevolezza degli interessi”, in *Enciclopedia del diritto – I tematici*, I-2021, *Contratto*, ed. by G. D’Amico, Milano, Giuffrè Lefebvre, 667 ff.
- Piraino F. (2021b), “Il negozio giuridico nel pensiero di Renato Scognamiglio e gli sviluppi verso una concezione normativa del negozio”, in *Rivista di diritto commerciale*, I, 150 ff.
- Pollicino O. (2023), “Potere digitale”, in *Enciclopedia del diritto – I tematici*, V-2023, *Potere e Costituzione*, ed. by M. Cartabia, M. Ruotolo, Milano, Giuffrè Lefebvre, 436 ff.
- Pugliatti S. (1968), “Finzione”, in *Enciclopedia del diritto*, XVII, Milano, Giuffrè, 668.
- Roppo V. (2011), “Il contratto”, in *Trattato di diritto privato*, ed. by G. Iudica, P. Zatti, 2<sup>nd</sup> ed., Milano, Giuffrè, 499 ff.
- Roppo V. (2020), *Il contratto del duemila*<sup>4</sup>, Torino, Giappichelli.
- Rösler H. (2003), “Die Geschäftsgrundlagestörung nach der Schuldrechtsreform”, in *Zeitschrift für das gesamte Schuldrecht*, 383 ff.
- Sacco R. (2016), in R. Sacco-G. De Nova, *Il contratto*<sup>4</sup>, Milano, Utet.
- Santoro Passarelli F. (1959), “Atto giuridico”, in *Enciclopedia del diritto*, IV, Milano, Giuffrè, 205.
- Santoro Passarelli F. (1983), *Dottrine generali del diritto*, Napoli, Jovene.
- Scalisi V. (1998), “La teoria del negozio giuridico a cento anni dal BGB”, in *Rivista di diritto civile*, I, 535 ff.
- Schlossmann S. (1876), *Der Vertrag*, Leipzig, Breitkopf und Härtel.
- Schwartz A.-Scott R.E. (2003), “Contract Theory and the Limits of Contract Law”, in *Yale Law Journal.*, 541 ff.
- Scognamiglio R. (1958), “Atto giuridico”, in *Enciclopedia forense*, I, Milano, Giuffrè, 590.
- Scognamiglio R. (1969), *Contributo alla teoria del negozio giuridico*<sup>2</sup>, Napoli, Jovene, reprinted Napoli, Jovene, 2008.
- Scotti A. (2019), *I codici di condotta tra mercato, impresa e contratto*, Milano, Giuffrè Lefebvre.
- Tuccari E. (2018), *Sopravvenienze e rimedi nei contratti di durata*, Milano, Cedam.

- Various authors (2008), *Il terzo contratto*, ed. by G. Gitti, G. Villa, Bologna, il Mulino.
- Vassalli F. (1934), *Sommario delle lezioni sulla teoria dei negozi giuridici*, Roma, Società editrice del *Foro Italiano*.
- Venturelli A. (2017), “Clausola di ‘hardship’”, in *Clausole negoziali. Profili teorici e applicativi di clausole tipiche e atipiche*, ed. by M. Confortini, Torino, Utet, 1036 ff.
- Wiesner E. (2004), “Der Anspruch auf Vertragsanpassung wegen Störung der Geschäftsgrundlage”, in *JuristenZeitung*, 654 ff.
- Zitelmann E. (1879), *Irrtum und Rechtsgeschäft. Eine psychologisch-juristische Untersuchung*, Leipzig, Duncker & Humblot.

## Chapter 3

### **VOLUNTAS AS LEX.**

# **THE ANCIENT ROOTS OF A MODERN LEGAL IDEA**

**Sara Galeotti**

*ABSTRACT: This contribution aims to investigate the significance of the expression *lex contractus* (*lex privata*) concerning the phenomenon of the normativity of will. Specifically, this study will examine the complex role of ‘private will’ – as expressed in the construction of *id quod actum est* – in shaping contractual types and contributing to their development and enrichment.*

**KEYWORDS:** *Voluntas* – *Lex contractus* – *Agreement*.

**SUMMARY:** 1. *Voluntas*: A long ‘intellectual’ journey. – 2. The polysemy of the concept of will: From the Greek conception of *boúlesis* to the Latin notion of *voluntas*. – 3. About *lex contractus*. – 4. Private autonomy and *Typenzwang* in Roman contract law: Two examples. – 5. Is the cyber-formalism the new *mancipatory-formalism*? – References.

## **1. *Voluntas*: A long ‘intellectual’ journey**

*Nil est tam in potestate voluntatis  
quam ipsa voluntas.*

August. *Retract.* 1.1.22

One of the most fruitful contributions of twentieth-century philosophical hermeneutics lies in its capacity to elucidate the intrinsic relationship between thought and language (Baghramian 1998). This perspective has served to consolidate, on the one hand, the notion of the fundamental ‘conceptuality’ of philosophy (Gadamer 1970, 137 f.); and, on the other hand, of the methodological centrality of *Begriffsgeschichte* in tracing the evolution of thought itself (Gadamer 1990, 401 ff.).<sup>1</sup> Indeed, attentiveness to linguistic

---

<sup>1</sup> «Wir hatten in der Analyse des hermeneutischen Prozesses die Gewinnung des Auslegungshorizontes als eine Horizontverschmelzung erkannt. Das wird jetzt auch von der Seite der Sprachlichkeit der Auslegung aus bestätigt. Der Text soll durch die Auslegung zum Sprechen kommen. Kein Text und kein Buch spricht aber, wenn es nicht die Sprache spricht, die den anderen erreicht. So muß die Auslegung die rechte Sprache finden, wenn sie wirklich den Text zur Sprache bringen will. Es kann daher keine richtige Auslegung

phenomena and recognizing the semantic transformations of keys – such as the Latinisation of the Greek philosophical lexicon or the translation of Latin terminology into modern idioms – enables us to grasp the complexity of linguistic choices and cultural contexts which, over time, have generated distinct intellectual traditions (Camera 2025, 232).

Much like philosophy, law is not an abstract construction founded upon conceptual invariances; rather, it is the dynamic product of a work shaped by language in forms defined and oriented by the socio-economic evolution of a given civilization (*ex multis*, Mazzotta 1992, 104 f. and Raffa 2000, 113 ff.). Consequently, the understanding of a legal institution as well as its developments demands, first and foremost, the ‘historicisation’ of the terminology that describes it, together with a diachronic reflection on the concepts thereby evoked across different moments in time.

After all, from the perspective outlined by one of the most prominent intellectual figures of the Roman Republic – Cicero, particularly in *De re publica* and *De legibus* –, *ius* is conceived as *lógos*, the rational principle underpinning the normative order of the *res publica* (Schiavone, 2005, 108). As Ulpian would observe more than two centuries later, this order would be unsustainable without the jurists, *sacerdotes iuris* and *veri philosophi*, who serve as custodians of the profound and privileged nexus between the pursuit of justice and the realization of truth (Nörr 1973; Nörr 1972 [74]; Casavola 2003; Falcone 2004; Schiavone 2005, 371; Bretone 2010; Maganzani 2020).

As a full understanding of the long intellectual journey of the *Willenstheorie*, calls for an exploration of the cultural landscape that shaped its origins, the inquiry will begin by considering the theme from the perspective of the ancient world. Indeed, starting from a preliminary, and necessarily cursory, reflection on the term *voluntas* within the Roman cultural and legal context, this contribution seeks to investigate the conceptual and functional significance of the expression *lex contractus* (*lex privata*) concerning the phenomenon of the normativity of legal will. Specifically, the chapter will offer an overview of the complex role played by will/*voluntas* – as expressed in the formula *id quod actum est* (Vlahos 2012, 844)<sup>2</sup> – in shaping contractual types and in contributing to their development and conceptual refinement.

---

>an sich< geben, gerade weil es in jeder um den Text selbst geht. In der Angewiesenheit auf immer neue Aneignung und Auslegung besteht das geschichtliche Leben der Überlieferung. Eine richtige Auslegung >an sich< wäre ein gedankenloses Ideal, das das Wesen der Überlieferung verkennt. Jede Auslegung hat sich in die hermeneutische Situation zu fügen, der sie zugehört...».

<sup>2</sup> See, e.g., Ulp. 31 *ad ed. D. 17.2.52 pr.*: *Cum duobus vicinis fundus coniunctus venalis esset, alter ex his petit ab altero, ut eum fundum emeret, ita ut ea pars, quae suo fundo iuncta esset, sibi cederetur: mox ipse eum fundum ignorante vicino emit: quaeritur, an aliquam*

## 2. The polysemy of the concept of will: From the Greek conception of *boúlesis* to the Latin notion of *voluntas*

The historical evolution of the philosophical concept of ‘will’ or ‘willing’, from classical antiquity to the advent of Christianity, has garnered considerable scholarly attention and inspired thorough debates. These inquiries juxtapose diverse paradigms that aim to delineate this notion and underscore its centrality in elucidating the Human experience (Arendt 1971, 84; Dihle 1982, 144; Kahn 1988, 255-259; Miller and Inwood 2003; King 2010, XXXI; Brann 2014, 23-37; Maso 2021a; Paulson 2022, 17). Within this rich hermeneutic framework, certain salient theoretical junctures may be discerned to demarcate the speculative scope within which the concept of *voluntas* can be critically examined (Ranouil 1980; Vetö 2003; Wijffels 2022). Philosophically, the term is inextricably linked with the phenomena of action and deliberation, situated within the broader domains of ethics, moral discourse, and anthropological self-comprehension. Private will, in its legal meaning, is frequently conceptualized as an intrinsic faculty of the agentive subject, endowed with the capacity to engender acts rooted in deliberation, whether exercised voluntarily or involuntarily, and informed by the principle of free will (Pereboom 2014; Pereboom 2017a; Pereboom 2017b).

According to a well-established interpretation, the concept of will as a causal principle of action finds its development in modernity, shaped significantly by the influence of Latin culture and its reinterpretation in Medieval doctrine (Bassano 2022; Sinisi 2022). Although an initial reflection on willing emerged in the Greek world, it is crucial to note the absence of a precise term in the Greek linguistic context equivalent to what the Romans denote as *voluntas*.

Instead, the Greek philosophical paradigm oscillates between two poles, represented by the verbs *θέλειν* and *βούλεσθαι*, though this does not amount to a strict opposition: the former signifies «being ready or disposed

---

*actionem cum eo vicinus habeat. Iulianus scripsit implicitam esse facti quaestionem: nam si hoc solum actum est, ut fundum Lucii Titii vicinus emeret et mecum communicaret, adversus me qui emi nullam actionem vicino competere: si vero id actum est, ut quasi commune negotium gereretur. Societatis iudicio tenebor, ut tibi deducta parte quam mandaveram reliquas partes praestem.* According to Ulpian, the mere fact that two or more individuals jointly perform an act or engage in a common enterprise does not, in itself, constitute a partnership. In addition to such collaborative action, there must also be a specific intention to establish a partnership relationship, expressed through the *affectio societatis*. This *affectio* is precisely what Julian seeks to identify in addressing the factual question at hand. He examines the parties’ intent to determine whether the arrangement in question represents a mere informal agreement between neighbors or a true partnership contract. Particularly illustrative in this context is the formula *si hoc solum actum est, ut – si vero id actum est, ut*, which underscores the pivotal role of intent.

toward something», while the latter refers to «aspiring to something deemed worthier of effort – a desire or plan (βουλή) directed toward a specific object» (*ex aliis*, Pohlenz 1947, 209 ff., 304 f.; Snell 1953, 182 f.; Voelke 1973, 5).<sup>3</sup>

While βούλεσθαι denotes the act of spontaneous willing, its etymological root invokes notions of reflection and deliberation. As a result, the actions it describes invariably stem from an intellectual process culminating in the effort to attain a goal deemed valid. In a philosophical framework that privileges the primacy of intellect (manifested as νοῦς or διάνοια), the will does not attain autonomy as a distinct force or an independent psychic faculty detached from the cognitive dimension, thereby hindering its conceptual independence (Vlahos 2012, 830 ff.; Paulson 2022, 18-24; Camera 2025, 234 f.).

A significant turning point in the redefinition of the theory of will lies in the assimilation of Greek thought within the framework of Latin culture. It can indeed be justly stated that the Latin concept of *voluntas* constitutes a foundational matrix for the subsequent conceptualisation of legal will as an autonomous human faculty, wherein deliberation is not exclusively dependent on rational knowledge (Maso 2021b, particularly 84).

First and foremost, language offers guidance: in Latin, *voluntas* is a polysemous term that encompasses the meanings expressed by the three Greek nouns βούλησις, ἐκών, and ὁρμή (Maso 2021b and Paulson 2022, 24). *Voluntas* thus signifies not only the manifestation of a subject's decision<sup>4</sup> but also a choice exercised in the absence of constraint, as well as an impulse that does not necessarily arise from an act of rationality. It is no coincidence that Varro, capturing this dynamic, attributes a dual origin to *volo/velle* – from *voluntas* and *volatus* – to emphasize the dynamic and immediate nature of the human spirit, capable of turning instantly to any chosen objective (Paulson 2022, 24).<sup>5</sup>

In Cicero, legal will is theorized as the motivational nucleus from which all movements of the human soul originate, encompassing both those rooted in rational deliberation and those stemming from irrational impulses (Maso 2021b, 73-84; Vlahos 2012, 832; Paulson 2022; Camera 2025, 234 f.). Seneca likewise delves into the interplay between *voluntas* and intellect within the framework of human action, challenging the Greek intellectualist tradition and attributing to the will a profound and structurally innovative significance. His celebrated *dictum, velle non discitur*,<sup>6</sup> encapsulates the notion

<sup>3</sup> See below, Galeotti, particularly 196 ff.

<sup>4</sup> See below, Galeotti, particularly 196 ff. See also Orlandi and Grondona, in this book.

<sup>5</sup> Varr. *ling. lat.* 6.6.47: *Volo a voluntate dictum et a volatu, quod animus ita est, ut puncto temporis pervolet quo volt.*

<sup>6</sup> Sen. *ep.* 81.13: *Desinant itaque infamare nos tam quam incredibilia iactantes et sciunt*

that the will does not emerge from learning or knowledge but rather manifests as a primordial force emanating from the unfathomable depths of the human psyche (Maso 2021b, 85-94 and Camera 2025, 236 f.).

In Seneca, the term *voluntas* attains substantial significance, yet does not crystallise into a formal theoretical system. Rather, the term identifies an original disposition of the soul, a tendency (*impetus, intentio*) rooted in the will to live, from which action derives independently of any necessary connection to positive action. In this framework, action resulting from *voluntas* is not exclusively bound to goodness or reason but can also strive toward what is not good, as exemplified by the characters of Medea and Phaedra in Seneca's tragedies, where reason is dramatically at odds with will (Bourbon 2021; Maso 2021b, 85-94; Cassan 2022, 105-143; Camera 2025, 237).

It is worth noting, moreover, that it is precisely the theatrical stage that provides the earliest evidence of the term's multifaceted nuances: indeed, the first recorded instance of *voluntas* appears not within a juridical framework but in the work of the pioneering Latin tragedian, Livius Andronicus.

An enigmatic line from his tragedy *Tereus*, performed in the latter half of the 3<sup>rd</sup> century BC, reads: «Believe me, never with my own consent/Did she my sister press her cheek to his – *Credito/cum illo soror mea voluntate numquam limavit caput* (trans. Warmington 1936, fr. 25 f.)». Although the context remains partly obscure, the implicit relationship between the characters appears to articulate the nexus between *voluntas* and *sponsio* in a marital context:<sup>7</sup> an individual grants their consent – presumably expressed verbally – to an action carried out under their authority (*ex aliis*, Albanese 1992, 145-148; Astolfi 1992, 262 ff.; Astolfi 1994, 9 ff.; Bartocci 2002, 25 ff.). We are not yet dealing with an interpretation of will in a subjective sense; rather, the focus is on the hierarchical status of the two parties and the relationship between βούλεσθαι and θέλειν, between command and consent (Paulson 2022, 27).

Misinterpretations of will also constitute a fundamental structural element in the dramatic architecture of the two foremost playwrights of Roman comedy, Plautus and Terentius. The term *voluntas* and its derivatives appear eight times in the twenty-one extant comedies of Plautus and six times across Terentius' six surviving plays (Paulson 2022, 27). Notably, *Pseudolus* testifies a refined awareness of the 'transactional' conception of will, deeply rooted in the Roman legal tradition. In the first act, the astute eponymous slave finds himself subjected to a mock trial orchestrated by his master and a family friend, accused of

---

*apud sapientem esse ipsa honesta, apud vulgum simulacra rerum honestarum et effigies. Nemo referre gratiam scit nisi sapiens. Stultus quoque, utcumque scit et quemadmodum potest, referat; scientia illi potius quam voluntas desit. Velle non discitur.*

<sup>7</sup> See, e.g., also Gell. 4.4.1-4.

having misappropriated a substantial sum of money. Having taken the money to assist his master's son in purchasing a slave girl, Pseudolus subverts the parody of a criminal trial into a simulation of contractual negotiation:

Would you not, of your own free will (*tua voluntate*), immediately grant me the money so that I may pay the procurer?

The friend intervenes, affirming the validity of the request (*ius bonum orat*):

Say: «I grant it». <sup>8</sup>

As in Andronicus's fragment, the character's will is not the object of inner scrutiny, but one of performative declaration. The role of *voluntas*, both on stage and within a legal framework still deeply marked by formalistic constraints, would thus appear to be that of an analytical and adjudicative instrument – operating in retrospective and dichotomous terms – rather than a constitutive force (Paulson 2022, 25).

A different image emerges when we turn our gaze to the political sphere. An inscription dating back to the late 2<sup>nd</sup> century BC in Roman Spain states:

*extarent eis red(d)idit dum populus [senatusque]  
Roomanus vellet deque ea re eos [qui aderunt--]  
eire iussit legatos Cren[--- filius]  
Arco Cantoni f(i)lius legates [---]*<sup>9</sup>

The phrase «public law is law insofar as it is what the Senate and the People of Rome have willed» underscores the self-activating and dynamic nature of the republican deliberative process, in which the very act of willing produces legal effects without the need for an abstract conceptualization of will (Paulson 2022, 25).

This transition from the original descriptive and retrospective function of *voluntas* in the private domain to a constitutive and self-activating function in the political realm reveals the stratification and complexity with which the concept was integrated into Roman legal-political culture.

In classical Roman law, the legal will of private individuals transcends mere institutional consideration, emerging as a fundamental aspect of the conceptualization of *ius* by the jurisprudential discourse of that era. Our analysis commences with the *responsum*, characterized by its typical tripartite structure: factual background, legal consequence, and *ratio decidendi*. Within this framework, *voluntas singulorum* is manifested either in the first or the third part.

<sup>8</sup> Plaut. *Pseud.* 534-538. See also Plaut. *Men.* 640-645; *Stich.* 170.

<sup>9</sup> AE 1984, 495 = AE 1986, 304 = AE 1987, 474 = AE 1991, 965.

Primarily, the will of individuals constitutes an element of the *factum*; however, it is frequently utilized as the foundation for the jurist's interpretative approach to the specific case at hand (Burdese 1993, 9-11 and Vlahos 2012, 839-846). In such instances, *voluntas* transitions from a factual component to the basis of the *ratio decidendi*, thereby playing a guiding role in the jurisconsult's determination of the legal consequences of the act under examination. Occasionally, this interpretive process extends beyond a mere application of legal norms to factual circumstances, acquiring an expansive dimension driven by the forceful nature of *voluntas singulorum*. This dynamic legitimizes significant interpretive interventions in favor of a more flexible legal framework.

The two occurrences of will – both as a factual and as a normative element – constitute the foundation of our analytical framework. Consequently, we will examine the concept of *voluntas singulorum* as interpreted by the more mature Roman legal science, which strongly emphasizes the intentional dimension underpinning the notion of will. Due to its conceptual alignment with other components of the legal system, *voluntas singulorum*, initially viewed as the origin of the act (*factum*), can also serve as a source of law (*ius*), thus forming the *ratio decidendi*. Through its dual nature, will encompasses both the *quaestio facti* and the *quaestio iuris*, a complexity that, in certain respects, is effectively encapsulated by the expressions *lex privata/lex contractus*.

### 3. About *lex contractus*

Roman legal thought of the Classical period identifies *voluntas* as a fundamental principle underpinning contractual agreements, thereby conceiving them not merely as 'transactional entities' but also as expressions of individual will deeply rooted in the philosophical tradition previously discussed (Vlahos 2012 and Giannozzi 2022). The distinguishing characteristic of *voluntas*, as recognized by law, resides in its binding nature, which engenders legal effects. What begins as a mere fact evolves into a commitment – one that obligates not only the individual but also other parties who may engage in the same legal transaction. This transformation is often governed by a specific *formula*: the will must be presented in a formal manner to yield its intended effects.<sup>10</sup> Nevertheless, preclassical and classical jurisprudence consistently emphasizes the intentional essence of any legal act executed voluntarily (Burdese 1993, 7-11 and

---

<sup>10</sup> See, e.g., Gai 2.116: *Sed ante omnia requirendum est, an institutio heredis sollemni more facta sit; nam aliter facta institutione nihil proficit familiam testatoris ita venire testesque ita adhibere et ita nuncupare testamentum, ut supra diximus. 117. Sollemnis autem institutio haec est: TITIVS HERES ESTO; sed et illa iam comprobata uidetur: TITIVM HEREDEM ESSE IVBEO; at illa non est comprobata: TITIVM HEREDEM ESSE VOLO; sed et illae a plerisque improbatæ sunt: TITIVM HEREDEM INSTITVTO, item: HEREDEM FACIO.*

Vlahos 2012, 830, 836 f.). Particularly in the legal discourse of the 2<sup>nd</sup> and 3<sup>rd</sup> centuries AD, the *voluntas singulorum* embodies the judgment of an individual aimed at fulfilling a specific objective and, being subject to the authority of the normative authority of the legal rule – which remove it from the realm of personal discretion –, it becomes a norm in itself.

It is not surprising, therefore, that legal studies on Roman terminology, conducted since the 19<sup>th</sup> century, have sought to identify private agreements with the expressions *lex contractus* and *lex privata* (Georgescu 1932).

Notwithstanding their alignment with Roman contractual models, ancient legal sources offer only scant textual evidence to substantiate this interpretation. At least regarding consensual contracts, the jurisprudential framework emphasizes the bilateral character of the interests underlying the agreement – interests that, in turn, shape its internal regulation. This projection of the *lex contractus* into a dual dimension is manifest in terms such as *lex venditionis*, *lex emptionis*, *lex locationis*, and *lex conductionis* (du Plessis 2006, 81).

In other words, what mattered was the perspective adopted by the jurist: if consulted by an *emptor*, he would frame his reasoning in terms of *lex emptionis*; conversely, if called upon to defend a seller's position, his *responsum* would refer to *lex venditionis*.

Why, therefore, should one refer to the substance of the agreement, to an individual contractual provision, or, more broadly, to the elements that constitute the foundation of an obligational relationship as *lex*?

To address this question, the etymology of the term, albeit controversial, offers little assistance (Watkins 2000, 47). Some scholars have linked it to *ligare* (to bind), emphasizing its binding nature, while others have associated it with the Greek *λέγειν* (to gather, to choose, but also to read). This latter interpretation could suggest both a reference to the written form that a *lex publica* might take and – most compellingly, given the theme of this study – the coming together of individual wills with a shared intention (Magdelain 1978, 12-22; Harrison 2010, 79-87).

A useful starting point, then, may be a well-known passage from Varro, which not only documents the adaptation of contractual formulas originally designed for cash sales to the new reality of consensual and obligatory sales (Talamanca 1991, 50), but also provides valuable insight into the terminological issue surrounding the use of the term *lex*:

*In emptionibus (ovium) iure utimur eo, quo lex praescripsit; in ea enim alii plura, alii pauciora excipiunt... De reliquo antiqua fere formula utuntur: cum emptor dixit: «tanti sunt mihi emptae?» et ille respondit: «sunt» et promisit nummos.*<sup>11</sup>

<sup>11</sup> Varr. *re. rust.* 2.2.5.

In purchasing we take advantage of the variation which the law allows, some making more and others fewer exceptions... With this exception, the ancient formula is generally employed: when the purchaser has said, «They are sold at such a price?» and the seller has replied, «Yes», and the money has passed (trans. Hooper 1934, 332-335).

The *lex*, drafted at an earlier stage, is explicitly defined here as the source of law (*iure utimur eo*), containing the prescriptions that bind the parties (*lex praescripsit*). Varro thus attributes to the word *lex* – more than any other term – the ability to express the idea of ‘that which is (legally) binding’, granting it its full meaning as the *ius* governing the contract. Moreover, as in the system described by Cato, the passage illustrates a two-step process: first, the formulation of clauses intended to regulate the relationship between the parties, and second, the subsequent conclusion of a contract that ought to conform to the regulatory shell (Magdelain 1978, 40; Carbone 2005; Carbone 2016-2017, 12, fn. 35; Carbone 2017, 69, fn. 211).

This framework has direct repercussions on the procedural level. Claims arising from *leges contractus*, which acquire legal force in stipulatory form and for which no issue of typical content emerges – since it is the *conceptio verborum* that grants them relevance, while the *voluntas contrahentium* remains latent in the background (Magdelain 1978, 43; Talamanca 1991, 50 f.; Burdese 1993, 4 f.) –, were originally protected through *satisfactiones* or *ex stipulatu* (Carbone 2017, 89 ff.). However, the *sponsio/stipulatio* could be used for achieving various objectives. In its different forms, it became a multifunctional instrument that roughly fulfilled the role of the modern principle of freedom of contract and the abstract notion of legal acts. It is extremely characteristic that precisely through the example of verbal contracts developed from the *sponsio*, especially those like *stipulatio*, the theory of the validity of declarations of will emerged in Roman law (Wołodkiewicz 1978, 295 ff.). Similarly, the advent of *iudicia bonae fidei* led jurisprudence to relate these archaic constitutive schemes and the content of obligations to the general principle of *bona fides*, progressively shaping the substantive scope of the *oportere ex fide bona*.

In the praetorian jurisdictional practice, formality thus began to be replaced by causal typicity (with a gradual rigidification of the *leges contractus*, which also defined the *finis actionis*, given that the Roman system of actions was itself typified) as the criterion for distinguishing, within contractual relations, what was legally binding from what was not. In other words, increasing value was attributed to *conventio* beyond the binding force previously conferred on agreements solely by the *verba stipulationis* (Talamanca 1991, 51).

During the classical period, the individual will enter into the picture as a central driving force behind the interpretative techniques developed by *iurisprudentia*, which not only shaped legal practice but also contributed to the

emancipation of Roman law from its formalistic constraints (Magdelain 1978, 44 and Burdese 1993, 10 f.).

In this regard, it is worth recalling a famous *dictum* by Ulpian, who wrote at a moment of full maturation of this process: *contractus accipiunt legem ex conventionione* (Cardilli 470, fn. 1 and 471 and du Plessis 2006, 82 f.). The central concern in this statement pertains to the interpretation of the term *conventio*. The Severan jurist utilizes this term predominantly to signify ‘agreement’ or, more accurately, to denote the «of the convergence of the internal assent of several individuals». <sup>12</sup> His statement should therefore be understood as: «contracts derive their *lex* from the object of *consensus*» – that is, from the *quid* on which there is a mutual *consentire* among those engaging in a contractual transaction (Falcone 2019). In other terms, the agreement established between the parties regarding the essential elements of the ongoing economic transaction engenders a form of ‘law’ that is binding.

The recognition that every contract is fundamentally anchored in a *conventio* constitutes one aspect of legal analysis; however, it is a distinct endeavour to infer, through the principle of reciprocal implication, that every *conventio* possessing a lawful cause engenders an *obligatio* and thus forms a contract. As previously noted, the Roman legal system is distinguished by a strong typicality. This principle implies that individuals are constrained by the catalogue of legal provisions provided by the system, with no opportunity to deviate from these established parameters. Nevertheless, this assertion represents only a partial truth. The growing emphasis placed on the substantive content of the *conventio*, in contrast to mere formalities and predefined contractual frameworks, occurs even within established legal structures. This phenomenon is particularly evident in procedural evaluations of the concrete and specific content of agreements (Burdese 1993, 8 f.).

Specially within the framework of contracts governed by *iudicia bonae fidei*, private autonomy is recognized as having the capacity to modify the typical effects of specific legal transactions – for instance, by expanding or restricting the scope of the parties’ liability, thereby altering the structure of obligations that would ordinarily arise from a given contract. <sup>13</sup> This principle is explicitly emphasized by Ulpian himself, who observes that the *pacta*, reached at the time of concluding a contract protected by an *iudicium bonae fidei*, constitute an integral part of the agreement (Cardilli 2008, 51 ff.). <sup>14</sup> Consequently, the judge

---

<sup>12</sup> D. 2.14.1.3.

<sup>13</sup> See, *infra*, § 4.

<sup>14</sup> Ulp. 4 *ad ed.* D. 2.14.7.5: *Quin immo interdum format ipsam actionem, ut in bonae fidei iudiciis: solemus enim dicere pacta conventa inesse bonae fidei iudiciis. sed hoc sic accipiendum est, ut si quidem ex continenti pacta subsecuta sunt, etiam ex parte actoris insint: si ex intervallo, non inerunt, nec valebunt, si agat, ne ex pacto actio nascatur.*

must take them into account as if they were inherent elements of the contractual structure itself. Furthermore, it should be noted that, through established practice, certain provisions tend to become standardized to such an extent that, even in the absence of an explicit agreement between the parties, the judge may presume their inclusion – unless proven otherwise.

These observations are crucial for weighing the *Typenzwang* of the Roman civil law system, particularly in terms of its practical impact on the contractual freedom of the parties and the normative power of their will.

#### 4. Private autonomy and *Typenzwang* in Roman contract law: Two examples

The process of refining contract types – a result of the absorption and legal formalization of certain agreements between parties – discussed above is well-documented, for example, by Papinian's distinction between *adminicula emptionis* and *substantia emptionis*, which arises from a structural reflection on contractual typology:

Pap. 10 *quaest.* D. 18.1.72 pr.: *Pacta conventa, quae postea facta detrahunt aliquid emptioni, contineri contractui videntur: quae vero adiciunt, credimus non inesse. quod locum habet in his, quae adminicula sunt emptionis, veluti ne cautio duplae praestetur aut ut cum fideiussore cautio duplae praestetur. sed quo casu agente emptore non valet pactum, idem vires habebit iure exceptionis agente venditore. an idem dici possit aucto postea vel deminuto pretio, non immerito quaesitum est, quoniam emptionis substantia constitit ex pretio.*

Special agreements made subsequent to a sale count as part of if they abate some of its terms, but not if they add a new term. This applies to all provisions subsidiary to the contract; for example, a covenant dispensing with the penalty of the double for eviction, or one requiring it and a surety as well. If the pact does not form a good ground of action at the instance of the vendee, it will receive effect as an equitable defence in favour of the vendor. It has with good reason been questioned whether this holds good when the price is subsequently increased or diminished, because the price goes to the essence of the contract (trans. Mackintosh 1892, 121-123).

There are certain aspects of the content of a sale that the jurist regarded as indispensable for the contract to be legally recognizable, and others – considered accessory – that were gradually incorporated into the original framework of the causal type. For these latter elements, it becomes necessary to assess whether a contractual derogation, autonomously established at a time

subsequent to the *conventio* constituting the *oportere ex fide bona*, may nonetheless be considered part of the *lex contractus*. Papinian distinguishes, in fact, between *pacta quae detrahunt aliquid emptioni* and *pacta quae vero adiciunt*. This distinction is entirely internal to the so-called *pacta ex intervallo*: the former are considered *contineri contractui*, whereas for the latter, Papinian leans toward a negative solution (Falcone 2019, 202).

In terms of the remedial effects associated with the *actio empti*, this means that the former can be directly invoked within an *iudicium bonae fidei*, while the latter are only enforceable *ope/iure exceptionis* in response to a potential action brought by the seller (Talamanca 2003, 89 f.). The distinction would, in any case, be confined to aspects of the contract's content that qualify as *adminicula emptionis*. Conversely, its extension to clauses affecting areas of the contract deemed non-derogable – namely, those that, according to Papinian's terminology, reflect its *substantia* – would be questionable. This applies, for instance, to subsequent stipulations aimed at increasing or decreasing the price originally stipulated by the parties at the time of the sale's conclusion. Ultimately, we are faced with a dual-track structure of the content of *emptio venditio*, which, according to Papinian, responds differently to contractual modifications introduced after its conclusion (Cardilli 2008, 44 and fn. 111).

However, it would be a mistake to ascribe absolute value to this *distinctio*, as Papinian formulates his *responsum* within a circumscribed legal setting – namely, a *pactio* made after the *lex contractus* that purports to alter its content. Accordingly, this distinction cannot be uncritically extended to the broader dialectic between *pacta conventa* and contracts adjudicated through *iudicia bonae fidei*. On the contrary, it is precisely the impossibility of subsuming such subsequent agreements under the category of *lex contractus*, given their temporal autonomy from the foundational convention that gives rise to the *oportere ex fide bona*, that necessitates an evaluation of their capacity to legally modify an already existing legal framework. This autonomy, in principle, should preclude any juridical relevance of *pacta ex intervallo* in terms of enforceability. Yet, it is precisely on this point that Papinian offers his most original contribution, identifying a category of agreements which, despite their subsequent formation, may nonetheless be incorporated into the contract, thereby effecting a substantive modification of its content.

In his analysis of *pacta ex intervallo*, the Severian jurist distinguishes between pacts that modify the accessory content of an already concluded contract – some of which are considered automatically incorporated into the contract – and those that introduce entirely new external elements. In the former case, subsequent pacts may transcend their temporal disconnection and effectively alter the contract, as they fall within the framework of the original convention. In the latter case, however, if the new elements do not

align with the content already established in the contract, these pacts cannot be automatically integrated and are not enforceable through legal action. In essence, the capacity of *pacta ex intervallo* to alter a contract, hinges on their compatibility with the original content agreed upon by the parties.

The Papinian's distinction not only reflects a precise conceptualization of the limits within which contractual modifications can operate, reaffirming the central role of the *lex contractus*, but above all illustrates the complex work undertaken by Roman juridical science in filtering and defining the rules to be included in the contractual type and transmitted through it (Cardilli 2008, 73).

An additional example of how the regulatory will (*voluntas*) of the contracting parties can influence the material determination of *oportere ex fide bona* comes from an excerpt from Ulpian's writings, which merits close and scholarly scrutiny:

Ulp. 32 *ad ed.* D. 19.2.15.6: *Item cum quidam nave amissa vecturam, quam pro mutua acceperat, repeteretur, rescriptum est ab Antonino Augusto non immerito procuratorem Caesaris ab eo vecturam repetere, cum munere vehendi functus non sit: quod in omnibus personis similiter observandum est.*

Likewise, when someone was asked, having lost the ship, to return the freight he accepted as loan, it was replied in a rescript by Antoninus Augustus that it is not without cause for the emperor's procurator to ask him the restitution of the freight, because he did not fulfil the duty to convey: a rule that should hold for all persons alike (trans. Fiori 2022, 195).

The core narrative of the passage, whose paligenetic attribution has sparked scholarly debate (Mayer-Maly 1956, 146; Longo 1965, 295; Fiori 2018, 554 f., fn. 165), offers a vivid snapshot of the bustling reality of maritime trade. It recounts the case of a *navicularius* who, having undertaken to transport certain goods by sea on behalf of the *procurator Caesaris*<sup>15</sup> and having received a sum of money upon boarding, fails to fulfil the promised

---

<sup>15</sup> See, e.g., the inscription dedicated to *Sex. Iulius Possessor* by the *schapharii Hispanenses*: CIL II.1180 = ILS 1403 = AE 1965, 237 = AE 1971, 171 = AE 1991, 993 = CIL II.23: *Sex(to) Iulio Sex(ti) filio) Quir(ina) Possessor(i) / praef(ecto) coh(ortis) III Gallor(um) praeposito nume(ri) Syror(um) sagittarior(um) item alae primae Hispanorum curatori civitatis Romulensium Malvensium tribuno mil[iti] leg(ionis) XII Fulminat[ae] / curatori coloniae Arcensium adlecto / in decurias ab Optimis Maximisque / Imperatoribus Antonino et Vero Augg(ustis) adiu(tori) Ulp(ian) Saturnini praef(ecti) Annon(ae) / ad oleum Afrum et Hispanum recen/sendum item solamina transfe/renda item vecturas navicula/ris exsolvendas procuratori) Augg(ustorum) ad / ripam Baetis Scapharii Hispanen/ses ob innocentiam iustitiam/que eius singularem.*

service due to the loss of the ship. The lessor (Fiori 2018, 548; Galeotti 2020, 111 e fn. 201; Galeotti 2023, 847. *Contra* Jakab 2000, 259 ff.; Crescenzi 2011, 75 ff.) subsequently demands the restitution of the *pecunia numerata*, encountering resistance from the carrier. The latter, likely, cites the evident facts in his defense: the failure to perform was not attributable to his fault but rather to an uncontrollable event – possibly a shipwreck.

To defend the imperial *procurator's* position, the *princeps* intervenes through a rescript, affirming that the freight received as payment for an unfulfilled (and now unfulfillable) service cannot be retained by the carrier.

The source is notable not only for the parties involved (Cimma 1981, 3 ff., 36 ff.; Sirks 1991, 30 ff.; De Salvo 1992, 210 ff.; Höbenreich 1997, 83 ff.; Galeotti 2023, 846 f.) – though its conclusion suggests a broad application of the principle it articulates – but above all in the agreements established between them regarding the methods of calculation and payment of the *vectura*. Indeed, the specific configuration of the interests agreed upon by the parties (*lex contractus*) shapes the framework for the allocation of contractual risk.

Despite the limited attention that doctrine – though with some notable exceptions (Jakab 2000; Thür 2010; Zwälve 2013; Fiori 2018, 546 ff.) – has devoted to the specification that the *vectura* was received as if it were a loan (*pro mutua*), the phrase must have held some technical significance, or the Severan jurist would not have alluded to it.<sup>16</sup> The clause, deemed by many as superfluous to the point of not warranting translation (Galeotti 2023, 849, fn. 52), could find a satisfactory explanation within the *Basilica*, specifically in Cyril's Greek paraphrase of the excerpt.<sup>17</sup>

The Latin expression *promutua* is rendered by the Byzantine jurists as *προχρεία*, a term that, in Hellenistic practice, Greco-Egyptian papyri identify as indicating the advance payment of a specific sum of money in anticipation of a future labor performance requested from the recipient (Jördens 1990, 271 ff.; Fiori 2018, 550; Fiori 2022, 195). The presentation of the document attesting to the fictitious loan – on which no interest would accrue – was intended to provide the creditor with assurance regarding the possibility of recovering the advance in the event of the debtor's non-performance. Conversely, the debtor would receive the same document as a receipt, confirming their fulfilment of the obligation for the agreed-upon service. Far from redundant, Ulpian's observation highlights a critical aspect of the contractual arrangement: the sum paid by the principal at the time of loading, retained by the carrier «as if it were

---

<sup>16</sup> The mere use of the verb *repetere* would have sufficed to indicate the prepayment of the freight charge.

<sup>17</sup> Bas. 53.1.59 (SCHELTEMA VII A, 2439-2440); Sch. ad Bas. 20.1.15 (Sch. 5 SCHELTEMA III B, 1182).

a loan», would only acquire the status of compensation for the transport upon the successful delivery of the goods at their destination port (Thür 1994; Thür 2010; Fiori 2018, 551; Fiori 2022, 195; Galeotti 2023, 849). The failure of the shipment would have consequently precluded the deduction of the *pecunia numerata* from the *naulum*. This, in turn, would have imposed upon the *nauta* an obligation of restitution, giving rise to a *dare oportere* concerning a *certum*.

A *lex contractus* establishing such parameters for the calculation and payment of freight would have prevented the *navicularius* from defending himself by claiming that he had been bound to an *obligation de moyens*:

Lab. 1 *pith. a Paulo epit.* D. 14.2.10 pr.: ... *Paulus: immo quaeritur, quid actum est, utrum ut pro his qui impositi an pro his qui deportati essent, merces daretur: quod si hoc apparere non poterit, satis erit pro nauta, si probaverit impositum esse mancipium.*

... *Paul*: But this depends on the agreement, whether freight was payable for the slaves who were loaded or for those who were carried to destination. If it is not clear what the agreement was, it will be enough for the captain to prove that a slave was put on board (trans. Fiori 2022, 188).

In light of the subject of this study, the Paulus' note on the *pithanón* of Labeo is of particular interest, as it suggests the existence of a juridical presumption in favour of the carrier: if it were impossible to prove the actual content of the agreement, Paulus states, it would be appropriate to assume that the contracting parties had agreed on the freight *pro his qui impositi* – that is, that they had arranged not for transportation, but rather for the rental of the vessel or some of its spaces.

If the sailor's obligation is typically understood as an *obligation de moyens* rather than *de résultat*, then the usefulness of the practice of fictitious lending described in D. 19.2.15.6 becomes evident. This practice, by excluding the carrier's upfront gain at embarkation – since the *pecunia numerata* was accepted as a loan (*mutuum*) rather than as *naulum* – indirectly qualifies the nautical lease between the *navicularius* and the *procurator Caesaris* as a transportation contract (thus, an *obligation de moyens*), placing on the former the contractual risk of non-delivery at the destination (*i.e.*, non-performance).

Starting from the formula – *C. Aquilius iudex esto. Quod Aulus Agerius Numerio Negidio opus faciendum locavit, qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret absolvitor* – it becomes clear how the *actio locati* could be employed, in the case contemplated in D. 19.2.15.6, *ad pecuniam (promutuum) repetendam*: the failure to fulfil the contractual purpose (*cum munere vebendi functus non sit*), which

justified the performance rendered – namely, the advance payment of freight – would have resulted in the carrier being condemned to *quidquid ob eam rem dare oportet ex fide bona, i.e.*, to pay a sum of money equivalent to what had been received (Galeotti 2025, 102).

If this reconstruction is correct, Caracalla's rescript would thus document the conventional extension of the sailor's *praestare* obligation to encompass risks intrinsically linked to the *id quod actum est* – that is, the structuring of interests formalized through the conclusion of the contract.

## 5. Is the cyber-formalism the new mancipatory-formalism?

This brief analysis of *voluntas singulorum* within the context of Roman contractual law may be synthesized along several intersecting trajectories: from philosophy to jurisprudence, from actions to their legal effects, from social practices to their normative implications, from the formal structure of the *responsum* to the broader domain of *scientia iuris*, and, ultimately, from the rigid formalism of archaic law to the interpretive flexibility of classical law. Among these, the final trajectory – encompassing and illuminating all others – offers a tangible representation of the historical development of Roman legal thought. Within this evolving framework, the notion of legal will (*voluntas*) emerges as a central, indeed decisive, element.

Positioned within a conceptual framework informed by philosophy, Roman legal science engages with legal practice by tracing it back to its foundational source: the individual *voluntas*. The legal act is understood not merely as an external behaviour but as the expression of an internal intention – an instrument oriented toward the realization of a consciously chosen binding effect. Admittedly, divergences among jurists do exist,<sup>18</sup> reflecting the inherently pluralistic nature of jurisprudential discourse. However, a comparative analysis of various *responsa* and interpretive methodologies reveals a consistent intellectual pattern: interpretation *ex voluntate* persistently aims to uncover the substantive meaning that lies beneath formal appearances.

Particularly, the textual analysis presented reveals a constant element: the extreme plasticity of the *lex contractus*, within which the form of the contractual type and the will of the parties are synthesized. The Roman contract, therefore, does not constitute a static entity, but rather a 'structure' with variable geometry, the boundaries of which must be continuously redefined through a process of selection and conceptual refinement of the legal rules to be integrated into the model. It is a complex mechanism of juridical sedimentation, that has made the contractual type a value in itself. A significant

---

<sup>18</sup> Compare D. 2.14.7.5 to D. 18.1.72 pr.

example of this process is the distinction between *pacta in continenti* and *pacta ex intervallo*, which plays a decisive role in the juridification of the agreements that enrich the typical content of the contract. Equally important is the reflection on the criteria for reconstructing the *id quod actum est*, aimed at defining the regime of *periculum* in carriage-by-sea contracts.

It is evident that Roman legal culture significantly diverged from contemporary conceptions of the interaction between private autonomy and contractual typology. On the contrary, it emphasized the central role of the dynamic process through which the regulatory will (*voluntas*) was typified, thereby shaping the ‘anatomy’ of the contract. This framework, as understood by jurisprudential doctrine, represented a privileged legal structure within which private autonomy could operate – a structure not solely defined by specific agreements but also derived from concrete patterns of interests that gradually achieved typification as judicial and interpretative practices crystallized within the broader legal paradigm.

In this sense, the typicality discussed should not be viewed as a limitation, but rather as an acknowledgment of a development: a lesson worth remembering before declaring the contract, like God, *dead* (Gilmore 1974, 3).<sup>19</sup>

In today’s world, increasingly shaped by the digitalization of legal, educational, and social practices, we are witnessing the re-emergence of rigid normative frameworks disguised as technical neutrality. Automated decision-making, algorithmic platforms, and procedural informatics seem to offer a new form of legal rationality: cyber-formalism. But is this truly something new? I believe – if anything – we must look beyond the mere appearance of things.

Unlike Gilmore, in fact, I would argue that contract theory can be ‘re-signified’ precisely by drawing inspiration from the Roman example. The reflections developed thus far demonstrate – at least to me – that even a system dominated by formalism and contractual typicality allows for the enhancement of legal will: on a substantive level, through *stipulationes* and *pacta*; on a procedural level, through *iudicia bonae fidei* or *exceptiones*.

If we imagine transposing that system into today’s reality of smart legal contracts, the contracting party’s fingertips become the bronze and the *libra* of Cato: simply put, a cyber-formality has replaced a mancipatory-formality. Thus, with a memory that looks toward the future, we must reclaim the most fertile aspect of the Roman lesson: rather than yielding to the binary opposition between ‘form’ and ‘will’, we should embrace the tension, the dynamic

---

<sup>19</sup> «We are told that Contract, like God, is dead. And so it is. Indeed the point is hardly worth arguing anymore. The leaders of the Contract is Dead movement go on to say that Contract, being dead, is no longer a fit or worthwhile subject of study. Law students should be dispensed from the accomplishment of antiquarian exercises in and about the theory of consideration».

balance, and the dialectic between these two poles, continuously integrating the former with the sedimentations of the latter.

## References

- Albanese B. (1992), “*Verbis obligatio e sponsalia in Varrone*”, in *Annali del Seminario Giuridico dell’Università di Palermo*, 63, 134-167.
- Arendt H. (1971), *The Life of the Mind*, Vol. II, New York, Harcourt Brace Jovanovich.
- Astolfi R. (1992), “Per la storia del fidanzamento arcaico (a proposito di Bernardo Albanese, Brevi studi di diritto romano, VIII. *Verbis obligatio e sponsalia in Varrone*)”, in *Studia et Documenta Historiae et Iuris*, 58, 262-280.
- Astolfi R. (1994), *Il fidanzamento nel diritto romano*, 3<sup>rd</sup> ed., Padova, Cedam.
- Baghrmian M. (1998), “Introduction”, in M. Baghrmian (ed.), *Modern Philosophy of Language*, London, J.M. Dent, XXIX-L.
- Bartocci U. (2002), «*Spondebatur pecunia aut filia*». *Funzione ed efficacia arcaica del «dicere spondeo»*, Roma, Edi. V., 2000.
- Bassano M. (2022), “*Ex voluntate*. La puissance de la volonté dans la doctrine médiévale (XIIIe-XVe siècles)”, in M. Bassano, L. Brunori, C. Ciancio, F. Garnier (eds.), *La volontà Italie-France allers-retours*, Toulouse, Presses de l’Université Toulouse Capitole, 111-125.
- Bourbon M. (2021), “La *uoluntas* sénéquienne a-t-elle sa place dans une généalogie de la volonté? *Status quaestionis*”, in *Lexis Supplementi*, 5, 139-154.
- Brann E. (2014), *Un-willing*, Philadelphia (PA), Paul Dry Books.
- Bretone M. (2010), “La «verità» di Ulpiano”, in *Materiali per una Storia della Cultura giuridica*, 40(1), 3-14.
- Burdese A. (1993), *s.v.* “Interpretazione nel diritto romano”, in *Digesto delle discipline privatistiche – Sezione civile*, Vol. X, Torino, Utet, 1-13.
- Camera F. (2025), “L’autonomia della volontà. Da *facultas* umana a «volontà di potenza»”, in *Lexis Supplementi*, 17, 231-273.
- Carbone M. (2005), “*Tanti sunt mi emptae? Sunt. Varr. de re rust. 2.2.5*”, in *Studia et Documenta Historiae et Iuris*, 71, 387-456.
- Carbone M. (2016-2017), “*Hac lege ... venire oportet*. Alcune riflessioni sui formulari di vendita di Catone”, in *Rivista di diritto romano*, 16-17 (n.s. 1-2), 1-74.
- Carbone M. (2017), *L’emersione dell’«emptio» consensuale e le «leges venditionis» di Catone*, Milano, LED.
- Cardilli R. (1995), *L’obbligazione di «praestare» e la responsabilità contrattuale in diritto romano (II secolo a.C. – II secolo d.C.)*, Milano, Giuffrè.
- Cardilli R. (2008), “Il problema della resistenza del tipo contrattuale nel diritto

- romano tra *natura contractus e forma iuris*”, in R. Fiori (ed.), *Modelli teorici e metodologici nella storia del diritto privato*, 3, Napoli, Jovene, 1-75.
- Casavola F.P. (2003), *A Genuine Philosophy*, in R. Dottori (ed.), *The Legitimacy of Truth / Die Legitimität des Wahrheit. Proceedings of the Third Meeting Italian-American Philosophy (Rome, 5<sup>th</sup>-10<sup>th</sup> June 2001)*, Münster-Hamburg-London, Lit Verlag, 327-331.
- Cassan M. (2021), “Lo spazio della *voluntas* senecana: tra filosofia e tragedia”, in *Lexis Supplementi*, 5, 117-138.
- Cassan M. (2022), *Studio sulla psicologia di Seneca*, Venezia, Edizioni Ca' Foscari.
- Cimma M.R. (1981), *Ricerche sulle società di «publicani»*, Milano, Giuffrè.
- Crescenzi V. (2011), “Varianti della subordinazione, 2. I Glossatori”, in *Initium. Revista catalana d'Historia del Dret*, 16, 73-132.
- De Salvo L. (1992), *Economia privata e pubblici servizi nell'Impero romano. I «corpora naviculariorum»*, Messina, Samperi.
- Dihle V. (1982), *The Theory of Will in Classical Antiquity*, Berkeley, University of California Press.
- du Plessis P.J. (2006), “The Roman Concept of *lex contractus*”, in *Roman Legal Tradition*, 3, 79-94.
- Falcone G. (2004), “La vera *philosophia* dei *sacerdotes iuris*. Sulla raffigurazione ulpiana dei giuristi (D.1.1.1.1)”, in *Annali del Seminario giuridico dell'Università di Palermo*, 49, 3-96.
- Falcone G. (2019), “Riflessioni sulla *conventio* in D. 2.14.1.3”, in *Annali del Seminario giuridico dell'Università di Palermo*, 62, 195-217.
- Fiori R. (2018), “L’allocazione del rischio nei contratti relativi al trasporto”, in E. Lo Cascio, D. Mantovani (eds.), *Diritto romano e economia. Due modi di pensare e organizzare il mondo (nei primi tre secoli dell'Impero)*, Pavia, Pavia University Press, 507-567.
- Fiori R. (2022), “The Allocation of Risk in Carriage-by-Sea Contracts”, in P. Candy, E. Mataix Ferrándiz (eds.), *Roman Law and Maritime Commerce*, Edinburgh, Edinburgh University Press, 187-201.
- Gadamer H.-G. (1970), “Begriffsgeschichte als Philosophie”, in *Archiv für Begriffsgeschichte*, 14, 137-151.
- Gadamer H.-G. (1990), *Hermeneutik I. Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*, 6<sup>th</sup> ed., Tübingen, Mohr Siebeck.
- Galeotti S. (2020), «*Mare monstrum*». «*Mare nostrum*». Note in tema di «*pericula maris*» e trasporto marittimo nella riflessione della giurisprudenza romana (I secolo a.C.-III secolo d.C.), Napoli, Jovene.
- Galeotti S. (2023), “Perdita del carico e diritto al nolo: considerazioni in tema di *locatio mercium vebendarum*”, in *Archivio giuridico online*, 2(2), 831-853.
- Galeotti S. (2025), “«Ceci n’est pas un mutuum... ou oui?»». Ripetibilità del nolo anticipato nella prospettiva di Ulp. D. 19.2.15.6”, in T. dalla

- Massara, M. Beghini (eds.), «*Certum dari*». *Un paradigma sostanziale e processuale*, Bologna, il Mulino, 93-107.
- Georgescu V.A. (1932), *Essai d'une théorie générale des «leges privatae»*, Paris, Rousseau.
- Giannozzi E. (2022), “La volontà à l'aune de la systématique des compilations de Justinien”, in M. Bassano, L. Brunori, C. Ciancio, F. Garnier (eds.), *La volontà Italie-France allers-retours*, Toulouse, Presses de l'Université Toulouse Capitole, 43-63.
- Gilmore G. (1974), *The Death of Contract*, Columbus, Ohio State University Press.
- Harrison R.P. (2010), *The Dominion of the Dead*, Chicago-London, The University of Chicago Press.
- Höbenreich E. (1997), *Juristische Aspekte der stadtrömischen Lebensmittelversorgung im Prinzipat*, Graz, Leykam.
- Hooper W.D., Ash H.B. (eds.) (1934), *Marcus Porcius Cato on Agriculture; Marcus Terentius Varro on Agriculture*, Cambridge, Harvard University Press.
- Jakab É. (2000), “*Vectura pro mutua*: Überlegungen zu TP 13 und Ulp. D. 19, 2, 15, 61”, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 117, 244-273.
- Jördens A. (1990), *Vertragliche Regelungen von Arbeiten im späten griechischsprachigen Ägypten, mit Editionen von Texten der Heidelberger Papyrus-Sammlung, des Istituto Papirologico «G. Vitelli», des Ägyptischen Museums zu Kairo und des British Museum, London (P. Heid. V)*, Heidelberg, Carl Winter Universitätsverlag.
- Kahn C.H. (1988), “Discovering the Will from Aristotle to Augustine”, in J.M. The Dillon, A.A. Long (eds.), *Question of «Eclecticism»: Studies in Later Greek Philosophy*, Berkeley, University of California Press, 235-260.
- King P. (2010), “Introduction”, in P. King (ed.), *Augustine: On the Free Choice of the Will, On Grace and Free Choice, and Other Writings*, Cambridge, Cambridge University Press, IX–XXXII.
- Longo G. (1965), “Osservazioni critiche sulla disciplina giustiniana della *locatio conductio*”, in *Studi in onore di B. Biondi*, Vol. II, Milano, Giuffrè, 283-309.
- Mackintosh J. (1892), *The Roman Law of Sale: With Modern Illustrations: Digest XVIII, 1 and XIX, 1: Translated with Notes and References to Cases and the Sale of Goods Bill*, Edinburgh, Clark.
- Maganzani L. (2020), “Diritto e *simulata philosophia* nelle Istituzioni di Ulpiano”, in *Erga-Logoi. Rivista di storia, letteratura, diritto e culture dell'antichità*, 8(1), 55-87.
- Magdelain A. (1978), *La Loi à Rome. Histoire d'un concept*, Paris, Les Belles Lettres.
- Maso S. (2021a), “Introduzione”, in *Lexis Supplementi*, 5, 3-7.
- Maso S. (2021b), “*Desiderium voluntas non est*”, in *Lexis Supplementi*, 5, 73-96.

- Mayer-Maly Th. (1956), «*Locatio conductio*». *Eine Untersuchung zum klassischen römischen Recht*, Wien-München, Verlag Herold.
- Mazzotta G. (1992), *Dante's Vision and the Circle of Knowledge*, Princeton, Princeton University Press.
- Miller J., Inwood B. (eds.) (2003), *Hellenistic and Early Modern Philosophy*, Cambridge, Cambridge University Press.
- Nörr D. (1973), “*Iurisperitus Sacerdos*”, in «*Xenion*». *Festschrift für Pan. J. Zepos anlässlich seines 65. Geburtstages am 1. Dezember 1973*, Vol. I, Athens-Freiburg-Berlin-Köln, Ch. Katsikalis, 555-572 = T.J. Chiusi, W. Kaiser, H.D. Spengler (eds.) (2003), «*Historiae Iuris Antiqui*». *Gesammelte Schriften*, Vol. II, Goldbach, Keip, 851-868.
- Nörr D. (1972[1974]), *Ethik v. Jurisprudenz in Sachen Schatzfund*, in *Bullettino dell'Istituto di diritto romano 'Vittorio Scialoja'*, 75, 11-40 = T.J. Chiusi, W. Kaiser, H.D. Spengler (eds.) (2003), «*Historiae Iuris Antiqui*». *Gesammelte Schriften*, Vol. II, Goldbach, Keip, 897-926.
- Paulson L. (2022), *Cicero and the People's Will: Philosophy and Power at the End of the Roman Republic*, Cambridge, Cambridge University Press.
- Pereboom D. (2014), *Free will, Agency, and Meaning in Life*, Oxford, Oxford University Press.
- Pereboom D. (2017a), “Responsibility, Regret, and Protest”, in *Oxford Studies in Agency and Responsibility*, 4, 121-140.
- Pereboom D. (2017b), “Responsibility, Agency, and the Disappearing Agent Objection”, in J.-B. Guillon (ed.), *Le libre arbitre. Perspectives contemporaines*, Paris, Collège de France, 1-18.
- Pohlenz M. (1947), *Der hellenische Mensch*, Göttingen, Vandenhoeck & Ruprecht.
- Raffa G.P. (2000), *Dante's Incarnational Poetry*, Toronto-Buffalo-London, University of Toronto Press.
- Ranouil V. (1980), *L'autonomie de la volonté: naissance et évolution d'un concept*, Paris, Presses Universitaires de France.
- Schiavone A. (2005), «*Ius*». *L'invenzione del diritto in Occidente*, Torino, Einaudi.
- Sinisi L. (2022), “Brevi riflessioni extravagantes sulla libertà della volontà e i suoi possibili limiti nell'interpretazione dottrinale fra Medioevo ed Età contemporanea”, in M. Bassano, L. Brunori, C. Ciancio, F. Garnier (eds.), *La volonté Italie-France allers-retours*, Toulouse, Presses de l'Université Toulouse Capitole, 105-110.
- Sirks A.J.B. (1991), *Food for Rome: The Legal Structure of the Transportation and Processing of Supplies for the Imperial Distributions in Rome*, Amsterdam, J.C. Gieben.
- Snell B. (1953), *The Discovery of the Mind: The Greek Origins of European Thought*, tr. by T.G. Rosenmeyer, Oxford, Blackwell.

- Talamanca M. (1991), “La tipicità nel sistema contrattuale romano”, in *Revista Da Faculdade De Direito, Universidade de São Paulo*, 86, 44-64.
- Talamanca M. (2003), “La *bona fides* nei giuristi romani: *Leerformeln* e valori dell’ordinamento”, in L. Garofalo (ed.), *Il ruolo della buona fede oggettiva nell’esperienza giuridica storica e contemporanea. Atti del Convegno internazionale di studi in onore di A. Burdese (Padova, Venezia, Treviso, 14-15-16 giugno 2001)*, Vol. IV, Padova, Cedam, 1-313.
- Thür G. (1994), “Die Aestimationsabrede im Seefrachtvertrag”, in G. Thür (ed.), *Symposion 1993. Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Graz-Andritz, 12.-16. September 1993)*, Wien-Köln-Weimar, Böhlau Verlag, 267-271.
- Thür G. (2010), “Fictitious Loans and *Novatio*: IG VII 3172, UPZ II 19 and C.Pap.Jud. I 24 Reconsidered”, in T. Gagos, A. Hyatt (eds.), *Proceedings of the 25th International Congress of Papyrology (Ann Arbor, July 29 – August 4, 2007). American Studies in Papyrology. Special Edition*, Ann Arbor, Scholarly Publishing Office, 757-762.
- Vetö M. (2003), *La naissance de la volonté*, Paris, Éditions L’Harmattan.
- Vlahos C. (2012), “La notion de *voluntas singulorum*: quelques réflexions sur un protagoniste du droit romain Classique”, in E. Chevreau, D. Kremer, A. Laquerrière-Lacroix (eds.), «*Carmina iuris*». *Mélanges en l’honneur de Michel Humbert*, Paris, De Boccard, 829-852.
- Voelke A.-J. (1973), *L’idée de volonté dans le stoïcisme*, Paris, Bibliothèque de philosophie contemporaine.
- Warmington E.H. (ed.) (1936), *Livius Andronicus, Tragoediae, in Remains of Old Latin*, Vol. II, *Livius Andronicus, Naevius, Pacuvius and Accius*, Cambridge (MA), Harvard University Press.
- Watkins C. (2000), *American Heritage Dictionary of Indo-European Roots*, 2<sup>nd</sup> ed., Boston-New York, Houghton Mifflin Harcourt.
- Wijffels A. (2022), “Métamorphoses de la volonté dans la culture juridique occidentale”, in M. Bassano, L. Brunori, C. Ciancio, F. Garnier (eds.), *La volonté Italie-France allers-retours*, Toulouse, Presses de l’Université Toulouse Capitole, 17-41.
- Wołodkiewicz W. (1978), “*Contrahere – contractum – contractus* dans le droit romain classique”, in H. Kupiszewski, W. Wołodkiewicz (eds.), *Le droit romain et sa réception en Europe. Actes du colloque organisé par la Faculté de Droit de l’Administration de l’Université de Varsovie en collaboration avec l’Académie nationale dei Lincei (8-10 octobre 1973)*, Varsovie, Éditions de l’Université, 295-308.
- Zwalve W.J. (2013), “The Case for the Lost Captain: A Discussion About D. 19,2,15,6”, in *Tijdschrift voor Rechtsgeschiedenis/Legal History Review*, 81, 621-631.

Part 2

**PROBLEMS. INDIVIDUAL WILL  
AND DECISION-MAKING**



## Chapter 4

# THE LEGAL FORCE OF THE INDIVIDUAL WILL: REFLECTIONS AT THE INTERSECTION OF POLITICAL PHILOSOPHY AND LEGAL THEORY

Mauro Grondona

*ABSTRACT: This essay explores the evolving role of individual will as a driver of legal change, situated at the intersection of political philosophy and legal theory. It examines the dialectical relationship between individual claims and the legal system, highlighting how the contemporary legal order is increasingly shaped by individual freedom expressed within a pluralistic, open society. The paper argues that individual will, through its normative and transformative force, acts as both an engine of legal change and a balancing mechanism, fostering a dynamic equilibrium between continuity and innovation in the legal system. It discusses how this transformation occurs within a cooperative framework that integrates judicial mediation and social legitimacy, emphasizing concepts such as constructive versus constructivist judiciary, remedial expansion, and the progressive adaptation of law to social needs. Ultimately, the essay underscores that legal morphology is inseparable from social morphology, advocating for a conception of law as a relational and evolving structure grounded in the interplay between individual aspirations and collective values.*

*KEYWORDS: Will – Freedom – Intention – Liberalism – Judiciary – Social norms – Legal transformation – Continuity and change – Normativity – Social legitimacy.*

*SUMMARY: 1. The legal will, yesterday and today. – 2. The ordering function of the individual legal will. – 3. The new relationship between the legal system and the judiciary. – 4. Individual legal will and sources of law. – 5. The individual will as a driver of progressive institutional change. – 6. The speed of legal change. – 7. The legal force of the individual will from the perspective of the contemporary open society. – References.*

### 1. The legal will, yesterday and today

When considering the legal force and effectiveness of individual will (*voluntas*)<sup>1</sup>

---

<sup>1</sup> See Galeotti, in this volume, particularly § 2.

– specifically, the legal effects it produces<sup>2</sup> – several key questions arise, in particular:

- (i) the relationship between individual will and general will; *i.e.*, the will intended as *ratio iuris*, as a pillar of the general purpose of the legal system (Murphy 2018);
- (ii) the selective function of the legal system;
- (iii) the role of the legal system as an axiological filter, understood as an institutional *locus* for the synthesis of social needs: hence, moreover, the democratic reach of the legal system, as opposed to its function as an axiological stabilizer; hence (in this perspective, quite consistently), an eminently enforceable function of the jurisdictional *apparatus* (at whatever level of the system).

The indicated issues have traditionally been resolved along the following unitary trajectory: the legal system is necessarily in a position above individual freedom (Dihle 1982). Therefore, for individual intention to be legally effective, it must be received by the legal system. In other words, the individual's expression of intent encounters a normative filter. Everything that passes through this filter becomes the legal will (*voluntas*) of the institutional system. The system's filtering function is politically legitimate because the institutional methods to exercise this function are based on the usual democratic procedures. Consequently, the political (and thus axiological) content of the legal system is legitimate to the extent that it conforms to the democratic procedures established to determine the institutional axiology, which therefore must be respected and indeed implemented at every stage of legal application. That is why, from this perspective, the judicial function serves to confirm the legal system's axiology. In this view, any deviation between the content of the legal order and that of judicial decisions constitutes a wound inflicted on the legal system as a democratic institution.

However, if we look today at the conceptual and operational dimensions of individual legal will, and at the relationship between the individual dimension (or, according to a legal-political phraseology that seems particularly compelling, individual claims) and the collective dimension (by which I obviously mean the legal order, especially in its axiological content, which is prescriptively relevant because it is democratically decided), we find that things are no longer exactly in these terms (Fischer et al. 2024).

Or rather. On the one hand, no doubt the idea of a legal system operating dialectically in relation to individual wills remains firm in place (otherwise, we would fall straight into the logical fallacy of confusing *ought to be* with

---

<sup>2</sup> See Beghini, in this volume, particularly § 1.

*being* – indeed worse: into the logical fallacy of considering *to be* on a par with *ought to be*). But on the other hand (and here a problem emerges, because the two aspects go together, and therefore it is necessary to find, if not a convergence, at least a way out of the difficulty that, on closer inspection, reveals a potential contradiction), it is true that the spaces of individual juridical agency are tending to open.

In other words: it is true that the social spaces in which the individual dimension evolves are expanding. Moreover, the plurality of this individual dimension should be emphasized, in the sense that it is not merely a matter of individualities – of isolated subjectivities –, but of individualities and subjectivities that converge and act collectively within the social dimension, and therefore also within the political and legal dimension (Queiroz 2018).

Put differently: individual will, the moment it becomes a socially audible voice, connotes itself as a social force, as a socially transformative force, and a power. At this point, it becomes, therefore, a force connoted by the political element of legal order: a legal power. Here, then, the individual will, taking on a juridically relevant scope, becomes one of the sources of law. And I would add that, at least under certain conditions (conditions that concern the democratic hold of the system of order, and thus of the legal system understood as the institutional *locus* of liberal democracy), it can indeed be considered the main source of law. This is because, as previously noted, the social spaces in which individual freedom (in all its forms) manifests itself progressively tend to expand in proportion to the consolidation of the rate of the liberal democracy in the legal system; or rather: they increase in proportion to the rate of social openness of liberal democracy.

From this point of view, contemporary pluralistic society is an open society (in the evidently Popperian sense), and as such capable of enhancing the dialectic, that is intrinsic to the pluralistic dimension, between individual and social aspects (Gordon 2006).

If we dwell a moment longer on the reasons that have led to the expansion of the social spaces of freedom today, some central and decisive aspects emerge, both for the purposes of our discourse and for a realistic approach regarding the legal force of individual freedom.

First, the steady expansion of human rights.

An expansion, indeed, that is not only quantitative, but also qualitative. Which carries a very precise meaning. The quantitative expansion has led to an increase in the number and name of human rights, thereby ensuring that the entire projection (both static and dynamic) of the human being has been, and is, more effectively protected.

But alongside the quantitative growth, there is also precisely the qualitative expansion, which has led to an effect clearly consistent with the former,

but not identical to it. That is to say: qualitative expansion refers to the intensity and the ways through which everything relating to the existential dimension of the human being takes on legal relevance, namely as a matter of legal protection.

In particular, there is one aspect that must be highlighted: the qualitative expansion of human rights introduces a dynamic profile. And that dynamic profile pertains to the individual and subjective perception of the space of institutional legal protection needed, for the purpose, precisely, of a protection that could be effective with respect to those who formulate such a need for protection. Thus, we are faced with a dynamism that, unlike what happens on the strictly quantitative level, does not merely lead to a nominalistic increase in personal rights, but rather fosters a substantive expansion. From such substantial extension, the step is short to be faced with an existential dimension of law, which – as the object of perception by the subject who is its owner – becomes a social vehicle of remedial expansion innovation. Hence, in a chain, the strengthening of the centrality of individual subjective situations affects the objective, systematic, and institutional dimension.

The discourse then leads directly to the theme already mentioned just above, namely, remedial expansion. In summary, remedial expansion has two meanings and affects two parallel but different domains.

First, remedial expansion means that the protection of legally relevant situations (*i.e.*, how such situations are safeguarded) is expanded and refined by expanding it.

Second, remedial expansion also implies that the remedial refinement is (or can become) a productive source of law. Given, in fact, a remedial *apparatus* that is flexible and thus quite easily adaptable to claims, the favourable outcome of such a request for protection is conceivable precisely because of the aforementioned remedial flexibility. Here, then, is that such remedial expansion, understood as a transformation of the protection technique itself, moves in parallel with the dual idea of legal effectiveness and legal argumentation. Both aspects – the effectiveness and that of argumentation of law – move in the same remedial direction (and in particular, a direction of remedial enhancement).

In other words, the contemporary right (understood both in the subjective sense and in the objective sense, as an instrument of protection) is meaningful if, and only if, it is effective: that is, if it is a rule that is not only enforced, but one that actually serves to protect a legally relevant interest. Here, the interplay between remedies, effectiveness, and argumentative dimensions emerges with particular evidence. The identification of the legal relevance of the interest protected or to be protected, today, is often the consequence of an argumentative construction of legal relevance itself – consistent

with the postulate of legal effectiveness –, coinciding with the argumentative construction of legal significance.

In this sense, then, the question of legal relevance should be considered as the outcome of a judgment, of a constructive character, formed in response to the concreteness of the specific claim (*ex post facto* judgment), and not as the outcome of a judgment, of a descriptive character, which translates into a rule of judgment (*regula iuris*) a legislative provision pre-existing the judgment itself. In this latter case, the rule of judgment itself is pre-existing, because it is contained in the legislative provision, and as such inferable from the latter by applying the usual criteria of legal hermeneutics.

The two profiles just referred to – law as effectiveness; law as argumentation, with the many consequences that can easily be derived from such parallels, again, in argumentative terms – are closely connected. Law is effective because it is sustained by the force of argumentation, and argumentation operates as an instrument for the progressive construction of a moving, or adaptive, *juridicity* (understood as the true juridical nature of legal phenomena).

In this sense, law assumes immediate social significance as an immediate social product (Sémanne 2025).

It is precisely within this framework of synthesis that it can be said that contemporary legal systems look to the individual will (*voluntas*) as a fundamental factor in the production of *juridicity*: in fact, social action and movement originate in individual action, in those individual claims oriented toward achieving the recognition of that juridical relevance that opens up the remedial dimension. Upon closer inspection, it is nonetheless a matter of an indirect, mediated, or at any rate a cooperative production of *juridicity*, and certainly not a production that takes place by reason of individual will alone. Indeed, it is obvious to observe that, if this were indeed the situation, that is, if we were faced with an individual will in itself legitimized to produce new law, this same will could take on the characteristics of arbitrariness and prevarication, with serious harm first and foremost to institutional stability, which is functional to remedial effectiveness, where institutional instability brings with it remedial instability, hence, also, possible remedial arbitrariness (Lloyd 1902).

A close reading of this picture shows that the individual will (*voluntas*) can become normative precisely because it will always, and necessarily, operate within a relational dimension. And there is no doubt that law – and therefore the legal system – is the place *par excellence* of relationality.

In this way, moreover, the radical opposition between what is individual and what is social – between individualism and collectivism, between individualism and organicism, between individualism and communitarianism (all conceptual pairs that do not coincide with each other, but all connoted by an intrinsic tension, at least *prima facie*) – is diluted, and indeed turns into

cooperation. One could say that everything that becomes social originates as individual, and what is social, such as *ex ante*, affects what *ex post* will become the new individual.

After all, this is the trajectory (today to be recovered, or at least revalued) of communitarian liberalism (Krygier 2013), and individual freedom that becomes a norm – that is, that takes a central role in the production of legal rules – is a communitarian freedom, that is, a relational freedom (Mańko 2025).

## 2. The ordering function of the individual legal will

Within an ordinal framework that is not only open, but above all progressively constructed through the cooperation between the principle of effectiveness and the principle of argumentation (law is effective insofar as it is argumentation), it is clear that the spaces for the individual legal will to perform a transformative and normative function are bound to grow.

This expansion of individual legal will bring with it four consequences: (i) the renewal of the relationship between the legal system and the judiciary; (ii) the renewal of the framework of the sources of law; (iii) a progressive and constant institutional transformation; (iv) an acceleration of the speed of legal change.

These are four fundamentally essential aspects of contemporary law.

Let us look at them individually, starting with a familiar premise.

Individual legal will today has a primary ordering function. Through individual legal will, and in particular through the constant dialectic (and often clash) between mutually different individual claims, the legal system not only changes, but progressively reaches conditions of new equilibrium, without a break in continuity, without gaps of *juridicity* and thus ‘remediality’.

In other words, the juridical force of the individual will is a powerful juridical engine (and one might add, indeed, today it may be considered the most powerful juridical engine): a force that is expressed in two different senses. On the one hand, there is transformative power (law changes, and therefore the legal system changes); on the other hand, there is balancing and rebalancing power. The juridical force of the individual will then simultaneously performs two functions (both essential): it accelerates and restrains the movement of law, straddling continuity and discontinuity (Ibbetson 2010).

Suppose we were to recall two famous theoretical models. In that case, we might think of Kuhn’s model of paradigm shift (oriented toward discontinuity) and Popper’s model of conjectures and refutations (oriented toward continuity).

If this is the starting point, let us now examine how the juridical force of the individual will is articulated around the four points mentioned above.

### 3. The new relationship between the legal system and the judiciary

Let us start with the relationship between individual legal will and judicial function, which naturally affects the relationship between ordering and jurisdiction.<sup>3</sup>

From this point of view, there is no doubt that the judicial function undergoes a decisive transformation: the judiciary is no longer a sector of the system called upon to apply pre-constituted rules; on the contrary, the judiciary enters into a dialectical relationship with the individual legal will itself. The classic moment in which this dialectical relationship occurs is obviously the trial. Here, on closer inspection, we have a double dialectic: on the one hand, the dialectic between the parties to the trial; on the other hand, the dialectic between parties and judges (Burgers et al. 2020).

In this perspective, then, it is rather evident that the rule pronounced at the outcome of the trial cannot be understood as a mere declaration by the judge of what the legal system has previously determined and which the judge merely reaffirms in declaratory terms. If this were the scenario, we would face a declarative judiciary, in fact, which, however, does no longer correspond to the current situation. It may incidentally be noted that there is a perfect parallelism between legal effectiveness, legal argumentation, and the procedural dimension of law: contemporary law revolves entirely around a constructive judiciary. With the obvious premise, of course, that we are thinking here of systems that can genuinely call themselves respectful of the *rule of law*, and therefore be liberal-democratic: it is precisely in such systems that individual liberty can fully express itself and still play a transformative role in the proper sense, that is, in the substantive sense (Daou 2025).

I am referring to ‘constructive judiciary’. It is perhaps useful to dwell briefly on its adjective to avoid ambiguity. At first glance, it might be noted that the idea of constructive judiciary is at odds with the notion of an individual will endowed with legal force, or at any rate with the idea of an individual force, and thus legitimized, in the liberal-democratic sense, to give rise to new rules (hence the overall and progressive institutional transformation).

A distinction must then be made between constructive and constructivist judiciary (*à la* Hayek, of course).

---

<sup>3</sup> See Orlandi, in this volume.

Constructive judiciary is marked by a dialectic with the individual legal will, which, as a claim asserted in court, potentially has the features and the content of a legally relevant will, that is, a normative will.

Constructivist judiciary, by contrast, does not play any dialectical role: it presupposes a specific legal order to be implemented. In this perspective, of course, the qualification of the claims asserted in the process moves in this strict logic, depowering the legal force of the individual will. Indeed, we are faced with an individual will that is always recessive, as opposed to the will of the legal order: in this sense, the will of the legal order does not arise as a dialectical synthesis of many individual wills in mutual connection and competition, but rather as a compact normative prescription, predetermined in its content. Hence ‘constructivist judiciary’: if the normative content of the rule is predetermined, we are faced with an effectively constructivist consequence, because the space for spontaneous transformation (*i.e.*, through the dialectical force of legal argumentation), if any, is minimal. However, on closer inspection, and in prescriptive terms, it must be said that such space cannot exist.

Constructivist judiciary, then, is a declaratory judiciary, operating within a legal order that pre-exists judgment.

Constructive judiciary, on the other hand, is a judiciary that dialectically progressively constructs the legal order (and, in this sense, it is a legal order that is to some extent always new, and yet, in parallel, always in equilibrium, concerning what we may call voluntarist dynamics, *i.e.*, the ensemble of purposes to which individual wills tend).

In this sense, constructive judiciary is a source of law through law, and specifically through the dialectic of judgment.

We can then say that constructive judiciary is a ‘judiciary of freedom’, perfectly suited to the current context of a liberal-democratic society, and authentically open, that is, plural. A political place where pluralism, as an axiological principle, underlies the political (and thus ordinal) legitimization of an individual will that becomes the norm, that is, capable of producing new rules.

In contrast, the constructivist judiciary is a ‘judiciary of authority’ in opposition to ordinal pluralism (Esen 2024).

#### **4. Individual legal will and sources of law**

The reasons for saying that, today, the individual legal will (*voluntas*) is *per se* a source of law, have already emerged. Indeed, the process of legal transformation depends largely on it. With an additional emphasis: the individual

legal will (or rather: the legal efficacy of the individual will) also assumes the role of a social mediator (Munger 2025).

In this sense. It is clear that not all individual claims that move and express themselves within the social context are destined (if at all, at a given historical-political moment) to flow into the dimension of legal relevance.

Consequently, the legal force attributed to the individual will is the product of a competition between claims and non-overlapping interests (both individual and collective). Therefore, it is the individual will itself that dialectically performs the role of spontaneous selector of *juridicity*. A *juridicity*, precisely, constructed from below rather than imposed from above, in accordance with the contemporary paradigm of a *juridicity* in progressive construction because it represents the reasonable and balanced (also in terms of time, see *infra*, § 6) synthesis of social dynamics.

In this sense, the legal system, and therefore law itself, becomes living, thanks to judicial mediation, which, in turn, relies on the mediation operated through that process (at the same time, competitive and cooperative) of progressive discovery and production of new *juridicity* originating from individual needs that do not remain as such, but become ‘socialized,’ that is, transformed into social force (Steuer 2025).

Even in this perspective, discovery and production are not antithetical terms.

For an easily identifiable reason: in both cases, we are faced with the production of new law in substantive terms; what changes is the mode of production (Ferrera 2025; Benassi 2025). If we think of discovery, we are obviously thinking of legal rules that are already socially, if not in force, present, and whose transformation into legal rules is desired. In these cases, therefore, there is a substantial overlap between social rules (*i.e.*, the social feeling of *juridicity* of social norms, or social feeling of normative force of social norms) and juridical rules. This is why talking about discovery in the proper sense is correct: both on the technical-legal level (the rule exists insofar as it is applied) and on the axiological level (the content of the rule represents a social value, and social value exists where behaviours and shared standards prevail, *i.e.*, where social approval outweighs disapproval to the extent that the legal system does not feel compelled to expunge the rule or, rather, to ensure that the social rule fully assumes legal *status*).

If, on the other hand, we think, in the proper sense, of the construction of the legal rule, and if, of course, we leave aside the introduction of the new legal rule by the legislature (when that is the hypothesis), we would, indeed, be faced with a legislative construction. A construction, however, based on what observed above, is in danger of entering the semantic area of

constructivism. In fact, the legislative rule is a rule, in this sense, imposed. Specifically, it is a general, abstract norm that provides a typological synthesis of the interests at stake. If the synthesis is typological, the interests being synthesized and representing the material basis of the rule can never be perfectly coincident with concrete interests. By contrast, when the material basis of the rule is concrete interests, we are faced with an effective collective construction of the legal rule. A collective construction, certainly, operated through the cooperative synthesis of socially diffuse and thus spontaneously aggregated individual interests (Ludwig 2020).

## 5. The individual will as a driver of progressive institutional change

From what has just emerged, the individual will, assuming its own (intrinsic) normative force as a consequence of the centrality of individual freedom, becomes a relevant element within the general framework of the sources of law.

After all – it bears repeating –, the connection between an individual will (*voluntas*) becoming a legal rule and the judiciary is by no means accidental; rather, quite the opposite is true. To wit: precisely because individual human action becomes social action, becomes social context, it is clear that judiciary very strongly and very clearly assumes the role of social mediator (beyond the role of parliament), precisely because the process (in the historical time of creative judiciary and political jurisdiction – a creativity and politicalness that even in the past, certainly, were connotative elements of judiciary, though in the past the criticism directed at these elements was sharper than it is today) becomes the main institutional *locus* of selection of legally relevant interests, and thus the main *locus* of attribution of legal relevance.

Contemporary *juridicity*, in fact, is characterized by a prominent transformative force of the judiciary, which is perfectly parallel to the social force of individual will. In other words, we can speak of a progressive process of ‘juridicization’ (*i.e.*, the expansion of law’s reach) that takes on significance in holistic terms and has an individual origin. Both the individual will and the process, in which, through the activity of judgment, the rule of the case is identified, express an individual dimension of reality, which can then become a social dimension.<sup>4</sup>

In this sense, between the individual moment and the social moment, there is no opposition at all, but rather relation and, indeed, cooperation.

---

<sup>4</sup> See Chizzini, in this volume.

Here, then, the individual will that becomes the norm, expresses, in the perspective of the relationship between individual will and progressive institutional transformation, the driving force of the legal order, capable of such a role precisely because, in the first place, it moves within the perimeter of individual action (and thus of individual interest).

The individual moment, in this sense, captures a need that can then become socially relevant (when that need does not turn out to be solely the projection of a need, more than strictly individual, that is not in line with the general social sensibility – that sensibility, for example, that today takes for granted that a contemporary legal system recognizes marriage not already within the male/female duality, as was the case until the recent past). Thus, it is the individual/social cooperative relationship (a biunivocal cooperation) that allows, on the one hand, the individual will to affect the social dimension, and that allows, on the other hand, the social dimension to operate as a *tertium comparationis* (i.e., a comparative standard) with respect to everything that, at the moment, is only an individual dimension.

It may be added that such a two-way relationship of a cooperative nature between the individual and the social is what legitimizes (in political and therefore legal terms) an ordinal transformation from below. From this point of view, a transformation seems to be fixed within the flexibility typical of spontaneous orders as complex orders (Mulligan 2025).

We could also speak of an ordering transformation, that is, an order that is always present and at the same time a context-dependent variable.

Everything is then strongly intertwined with the temporal factor, that is, with the time of legal change.

## 6. The speed of legal change

This is, arguably, the most delicate aspect, both in theoretical and practical terms.

While there can be no doubt about the transformative juridical force of the individual will, which in this sense becomes a juridical will, and thus becomes a norm, the temporal aspect is undoubtedly problematic. That is: when does the exact time come for introducing a particular legal change? In other words, when can the appropriate time be said to have arrived for the individual will (*voluntas*) to actually become the norm, and thus acquire a direct prescriptive value, such, precisely, as to transform the legal system?

The merely quantitative answer certainly cannot suffice (although there is no doubt that the quantitative element carries weight: i.e., an isolated will

is going to be a will, for these institutional purposes, irrelevant); a necessarily qualitative element is needed, pertaining the content of a will that has already taken on a socially relevant significance (Varga 2025).

As also specified above, such social relevance often passes, today, through the judiciary: many claims marked by a similar content are a signal, both quantitative and qualitative, of a specific social need, which has not remained expressed in the abstract, as a mere ‘will to power’, but which, on the contrary, has found a procedural concretization. From this point of view, it may be further observed that the non-acceptance of such claims is not, in itself, a signal of legal irrelevance; rather, it is a signal that assumes relevance with reference to the temporal aspect.

This, in fact, in my view, is the way forward in assigning legitimate transformative force to the individual will. With the clarification that, here, legitimate means precisely democratic: that is, consistent with a constitutional order that places individual freedom at its core, and thus the idea of a progressive and constant strengthening of that freedom – a strengthening that, of course, also means adjustment to the surrounding social context (Tepedino et al. 2024).

All this brings us back to the assertion that there is not and cannot be, a static concept of freedom.

On the contrary, what can exist is a dynamic concept of individual freedom, which, as such, is capable of gradually adjusting to the general, that is, social, idea of freedom.

The social idea of freedom (Thalos 2016), as itself a product of individual freedom, requires further clarification. We are clearly faced with the idea of communitarian freedom, and thus, at the same time, we are faced with communitarian liberalism, as already mentioned above.

A freedom that is socially affirmed, and which, therefore, socializes; and, in becoming socialized, it diffuses and thus generalizes, and thereby becomes – precisely, in democratic terms – a criterion of reference and judgment for selecting, even in chronological terms, what we might call the ‘democratic timeliness of individual freedom’.

From this point of view, freedom becomes the norm because and in light of the judgment – that is, thanks to the procedure – which, in this perspective, evolves into a measure for determining the time of freedom and the selector of the contents of freedom, because of the historical time in which these contents are enforced.

This, after all, is a mechanism of competition and social selection perfectly suited to the progressive development of freedom that characterizes a contemporary open society. In this sense, the question of the will (*voluntas*) becoming norm, and thus the question of the relationship between will,

order, and justice, is also a communicative question (Stone, Tarello 1960), and in particular a question of relationships between values, needs, expectations, and the social expressions of these relationships (on the assumption that every relationship is a measure of value, a sign of value).

The legal, and particularly normative, solution is thus a social product; it is, in other words, the measure, content, and time of social relations.

In this sense, every legal problem (and thus also the problem of the individual will/*voluntas* becoming a norm) is a problem of social relations, and hence a problem of understanding the social relevance of those relations.

## **7. The legal force of the individual will from the perspective of the contemporary open society**

The conclusion of this brief overview, which has mainly aimed at highlighting some problems (to some extent still open, and which in any case are in search of a satisfactory general-theoretical framework) related to the legal force of individual freedom, is that there is no legal morphology that is not also a social morphology.

Coherently with this assumption, this piece attempts to indicate some viable paths for the theoretical consolidation of the transformative force of freedom. To this extent, it can be emphasized the following aspect, which crosses the political and the legal fields: the systematic dimension of law – and therefore the institutional dimension of the law – is a relational dimension, based on relationships between interests, in a perspective of constant movement (political-social, and therefore cultural), on which the legal morphology of a society depends.

If this is the premise of the discourse, the conclusion can only be the following: the contemporary open society is a complex social system and, as such, requires a parallel complex conception of freedom – after all, every cultural system is a complex system (Camps et al. 2025).

Hence, the constant dialectic arises (a communicative relationship between different interests and claims) between what is individual and what is social (Choi 2025). A dialectic that, thanks to the persuasive force of argumentation (and here the communicative aspect returns, impacting the axiology of the legal system and thus its prescriptive content) expresses, simultaneously, both that axiological balance and that chronological balance necessary for the legal system to perform, always and to the full, its role as a social stabilizer, without being overwhelmed either by an excess (quantitative and temporal) of individual claims, or by a pernicious social immobilism with

respect to the developments potentially inherent within an individual will that can become the norm.

The path to individual freedom, therefore, is always open before us, but it is a path that is always illuminated by the social context: by that collective dimension of individual freedom that is in constant dialectical relation with its individual dimension.

## References

- Benassi C. (2025), “Explaining institutional change through ideas”, in *Stato e mercato*, 1, 89-95, <https://www.rivisteweb.it/doi/10.1425/117157>.
- Burgers L., van Duin J., Mak C. (2020), “Judges in Utopia. The Transformative Role of the Judiciary in European Private Law”, in *European Review of Private Law*, 28(4), 865-883, <https://dare.uva.nl/search?identifier=683ae6-ff89-4414-8b40-50303f69d0ab>.
- Camps J.B., Randon-Furling J., Godreau U. (2025), *On the transmission of texts: written cultures as complex systems*, 1-30, arXiv:2505.19246 [physics.soc-ph].
- Choi H.S. (2025), “Individualism–collectivism and intergroup bias”, in *Asian Journal of Social Psychology*, 28, e70010, 1-15, <https://doi.org/10.1111/ajsp.70010>.
- Daou M. (2025), “Jacques Rueff: an Ordoliberal? Between Commonalities and Divergences”, in *Constitutional Political Economy*, 1-31, <https://doi.org/10.1007/s10602-025-09469-0>.
- Dihle A. (1982), *The Theory of Will in Classical Antiquity*, Berkeley-Los Angeles, University of California Press.
- Esen B. (2024), “Judicial transformation in a competitive authoritarian regime: Evidence from the Turkish case”, in *Law & Policy*, 47(1): e12250, 1-22, <https://doi.org/10.1111/lapo.12250>.
- Ferrera M. (2025), “Ideas and institutional change. Insights from the analysis of political ideologies”, in *Stato e mercato*, 1, 71-87, <https://rivisteweb.it/doi/10.1425/117155>.
- Fischer J.M., Kane R., Pereboom D., Vargas M. (2024), *Four Views on Free Will*, 2<sup>nd</sup> ed., Hoboken (N.J., USA), Wiley Blackwell.
- Gorton W.A. (2006), *Karl Popper and the Social Sciences*, Albany (N.Y.), State University of New York Press.
- Ibbetson D.J. (2010), *Legal Change and Legal Continuity*, in Id., *A Historical Introduction to the Law of Obligations*, online ed., Oxford Academic, 1<sup>st</sup> January 2010, <https://doi.org/10.1093/acprof:oso/9780198764113.001.0001>.

- Krygier M. (2013), “Communitarian Liberalism”, in Id., *Philip Selznick: Ideals in the World*, online ed., Stanford Scholarship Online, 20<sup>th</sup> June, 248-274, <https://doi.org/10.11126/stanford/9780804744751.003.0012>.
- Lloyd A.H. (1902), “The Social Will”, in *The American Journal of Sociology*, 8(3), 336-59, <http://www.jstor.org/stable/2762063>.
- Ludwig K. (2020), “The Social Construction of Legal Norms”, in M. Garcia-Godinez, R. Mellin, R. Tuomela (eds.), *Social Ontology, Normativity and Law*, Berlin, De Gruyter, 179-208, <https://ssrn.com/abstract=3873477>.
- Mańko R. (2025), *Towards an Ideological History of Private Law or What Legal History Can Gain from Critical Legal Theory*, <https://ssrn.com/abstract=5084065>, or <http://dx.doi.org/10.2139/ssrn.5084065>.
- Mulligan R. (2025), “Hayekian Systems: Scientific Inquiry as a Spontaneous Order”, in *Cosmos + Taxis*, Vol. 13, issue 5 + 6, 42-58, <https://cosmosandtaxis.org/ct-1356/>.
- Munger M. (2025), “Book Review: John Hasnas, Common Law Liberalism: A New Theory of the Libertarian Society”, New York: Oxford University Press, 2024, in *The Journal of Value Inquiry*, <https://doi.org/10.1007/s10790-025-10038-9>.
- Murphy L.B. (2018), “The Normative Force of Law: Individuals and States”, in *Oxford Studies in Philosophy of Law*, 3, 87-122, NYU School of Law, Public Law Research Paper No. 19-05, <https://ssrn.com/abstract=3300968>.
- Queiroz R. (2018), “Individual liberty and the importance of the concept of the people”, in *Palgrave Commun* 4, 99, <https://doi.org/10.1057/s41599-018-0151-3>.
- Sémanne A. (2025), “Toward an Austro-Libertarian Sociology”, in *The American Journal of Economics and Sociology*, 1-16, <https://doi.org/10.1111/ajes.12630>.
- Steuer M. (2025), “The ‘will of the People’ as means for pressuring the rule of law?”, in *Zeitschrift für Vergleichende Politikwissenschaft*, <https://doi.org/10.1007/s12286-024-00620-z>.
- Stone J., Tarello G. (1960), “Justice, Language and Communication”, in *Vanderbilt Law Review*, 14(1), 331-382, <https://scholarship.law.vanderbilt.edu/vlr/vol14/iss1/16>.
- Tepedino G., do Rêgo Monteiro Filho C.E., Konder C.N., Sampaio da Cruz Guedes G., Donato Oliva M. (2024), “History, fundamentals and perspectives of Civil-constitutional Law methodology”, in G. Sampaio da Cruz Guedes, G. Silveira Siqueira (eds.), *Graduate Program UERJ Law School fields and research*, Londrina (Brasil), Engenho das Letras, 17-51, [https://www.researchgate.net/publication/392693366\\_History\\_fundamentals\\_and\\_perspectives\\_of\\_Civil-constitutional\\_Law\\_methodology](https://www.researchgate.net/publication/392693366_History_fundamentals_and_perspectives_of_Civil-constitutional_Law_methodology).

Thalos M. (2016), *A Social Theory of Freedom*, New York, Routledge.

Varga C. (2025), “Change of Law: Backgrounds and Limits, Expectations and Realizations”, in F. Gárdos-Orosz (ed.), *The Resilience of the Hungarian Legal System since 2010. A Failed Resilience?*, Cham, Springer, 195-208, [https://doi.org/10.1007/978-3-031-70451-2\\_12](https://doi.org/10.1007/978-3-031-70451-2_12).

## Chapter 5

# **VOLUNTAS AND LEX CONTRACTUS IN THE INTERPRETATION OF STANDARD CLAUSES**

**Edoardo Ferrante**

*ABSTRACT: In contract law, there is no general theory for standard terms. Yet, general terms and conditions create an autonomous contractual paradigm where the will of the parties (voluntas) is in reality the will of only one party, followed by the other's acceptance. The result is an agreement with unequal or unbalanced consent. This paradigm, especially in Europe, began to gain traction with the advancement of consumer law, which brought the issues of control and transparency to the fore. But beyond that, the paradigm requires a re-examination of the general part of the civil codes: the interpretation of standard terms, for example, cannot be the same as that of an individually negotiated agreement. Hence the emergence, even in EU case law, of new tools (that are not really new), such as the updated and re-evaluated contra proferentem-rule employed as a remedial device. However, this is a rapidly changing landscape whose future is still unpredictable.*

*KEYWORDS: Will (voluntas) – Parties' common intention – Standard clauses – Lex contractus – Transparency – Contra proferentem rule – Spillover effect.*

*SUMMARY: 1. A legal theory on standard clauses? – 2. A brief chronicle of standard clauses in Europe. – 3. Grades of consent and grades of contractual institutions. – 4. From parties' common intention to the contra proferentem rule: Transparency as the new icon of standard contracts. – 5. The objectification of transparency as a vector for the second life of the contract. – 6. The contra proferentem rule in its soft or strong version. – 7. The weak consent of the consumer-private authority and the Italian spillover effect. – References.*

### **1. A legal theory on standard clauses?**

It is obvious that in private law, legal intention (*voluntas*) is the root of binding force. Although in decline, the foundation of the binding effect on the *voluntas*, but also the political legitimacy of that effect on what the *cives* has intentionally pursued, corresponds to the tradition of private law (De Almeida Ribeiro 2019, 101 ff.). It is even superfluous to recall the epic history of the juridical act (*negotium*): not only contracts, but also last wills have legal force because they are intended; *lex contractus* and *lex successionis* disseminate the power of the intention as a legal rule (dalla Massara 2022).

Much less obvious is the relationship between legal intention and binding effect when the contract is unilaterally prepared. What transformative force can be attributed to an asymmetrical agreement, stipulated under standard terms or through forms and templates? More generally, what sense does a *lex contractus* designed and imposed by one party have when the other simply said ‘yes’ and nothing more? (Raiser 1935; Kessler 1943, 629 ff., 640 ff.). It may not be an exchange without agreement, but, since the agreement is unequal, basing its binding nature on it becomes in turn an asymmetry: there are those who truly wanted, and those who only said ‘yes’ (Irti 1998, 347 ff.; Irti 1999, 273 ff.; Irti 2000a, 601 ff.; Oppo 1998, 525 ff.; Bianca 2001, 1120 ff.).

Now, the ‘quick hand’ transactions have gone through many seasons, in different historical periods and under different legal systems. Moreover, it is not even easy to reduce it to a single entity, because the common matrix of unilateral predisposition corresponds to numerous variations that differ significantly. As is well known, the area of non-negotiation ranges from fixed clauses drawn up on a one-off basis to those designed to last, from forms to be filled at self-service machines to sets of conditions displayed on company premises or digital platforms.

However, while the general theory of negotiated contracts is rich, that of standard clauses remains underdeveloped, despite their importance and widespread use application. It is not even certain that the area of non-negotiation lends itself to a single general theory, given the many and varied options available. Nevertheless, a theoretical framework is necessary. It is certainly not the aim or ambition of this paper to bridge this gap: the dogmatic disadvantage is such that an entire generation of scholars would not suffice to fill it.

## 2. A brief chronicle of standard clauses in Europe

In many European countries, the recent history of standard contracts has a ‘before’ and an ‘after’ marked by EC Directive 13/93 on unfair terms in consumer contracts. Only in Germany was the situation substantially different (Schulze, Zoll 2021, 243 ff.).

In Italy, where legislation has been unchanged since 1942 – the «Progetto italo-francese di Codice delle obbligazioni e dei contratti» («Italian-French Draft Code of Obligations and Contracts») of 1927 did not contain any reference to general terms and conditions (Degni 1929, 145 ff.) – scholarly dissatisfaction began to grow in the 1960s (Alpa 2014, 627 ff.). The contract of adhesion brought the issue of judicial controls to the fore, perhaps for the first time, but the idea that such arrangements did not differ from the basic contractual concept prevailed. The drafter did rise to a position of authority: in law, he was – and is – merely a party, exactly like the adhering party (Bianca 1977, 62 ff.).

This is a normalising approach, in the sense that the peculiarities, requirements and distortions of standard terms began to gain ground, giving rise to elaborate and, in some ways, unsurpassed constructions, but the dogma of *voluntas* was not questioned (Mazzoni 1975, 9 ff.; Barcellona 1965, 580 ff.; Di Majo 1970, 192 ff.; Rodotà 1972, 239 ff.). In mercantile logic, the consent of the weaker party actually constitutes the greatest form of legitimation of the stronger party's excessive power. In both B2B and B2C contracts, economic asymmetry is obscured by the formally equal structure of the agreement («perversione della funzione legittimante del consenso»: Femia 2016, 36 ff.; Femia 2013, 151 ff.). Moreover, in the spirit of capitalism, the external equality inherent in the contract morally justifies the pursuit of profit, since it is obtained not «against» but «according to» the intention of all market participants, both producers and consumers (Navarretta 2016, 1262 ff.). A universal but formal harmony is recreated, in which substantial disharmonies struggle to find expression (Gierke 1889, 28 ff.). The consensual strategy fulfils the thankless task of making a system of equalities that has no substance appear credible to the mind of the jurist (Mazzoni 1975, 7 ff.). Elsewhere, the debate was more advanced and has been translated into law. While Italian scholars, with modest echoes in case law, discussed the *de facto* authority of the drafter and possible controls on his activity as a master of private legislation (Femia 2016, 43), in Germany, the long history of § 242 BGB in the case law ended with the fundamental AGB-*Gesetz* of 1976-77. Here, the parallel with the German experience shows different speeds and trends: the Italian Civil Code of 1942 postdates the ancient German case law on AGB-*Recht*, but greatly precedes the German statute of 1976-77; the latter anticipates and almost takes the Italian debate of the early 1970s by surprise, but struggles to gain ground, both in Germany and even more so in Italy, at least until the 1990s (Ferrante, Koch 2011, 695 ff.).

The matter then entered into a period of suspension until at least 1993, when EC Directive 13/93 was issued (Ferrante 2017, 541 ff.).<sup>1</sup> The European rules sparked a revival of the scholarly interest throughout Europe.

In Germany, however, the change was more superficial than substantial, given that the so-called *Klauselrichtlinie* was largely inspired by the German AGB-*Gesetz* (Zaccaria 2016, 159 ff.; Micklitz 2014, 125; Rochfeld, Houtcieff 2003, 49-84). Consequently, the initial transposition did not require any particular changes to the existing legislation, other than the addition of § 12 BGB and § 24a AGB-*Gesetz*, which later became, with a few minor

---

<sup>1</sup> Council Directive 93/13/EEC of 5<sup>th</sup> April 1993 on unfair terms in consumer contracts [1993] OJ L 95, amended by Directive 2011/83/EU of the European Parliament and of the Council of 25<sup>th</sup> October 2011 on consumer rights (...), in OJ L 304 of 22<sup>nd</sup> November 2011 (corrected, as regards the Italian version, by the “Corrigendum to Directive 93/13/EEC [...]”, in OJ L 137 of 4<sup>th</sup> June 2015).

amendments, the new § 310(3) BGB. Nor did the recodification carried out in 2001 with the *Schuld-rechtsreform*, which incorporated the *AGB-Gesetz* into the German Civil Code with the new §§ 305-310 BGB, require any particular intervention (Ulmer 2001b, 215 ff.; Pfeiffer 2001, 481 ff.; Pfeiffer, Schinkels 2001, 133 ff.; Roth 2001, 475 ff.; Graf v. Westphalen 2002, 12 ff.).

In conclusion, after re-evaluating everything some twenty-five years later, the systematic impact of the German implementation and recodification does not appear particularly robust (Zimmermann 2001, 179 ff.; Roth 2001, 484; Schmidt, Rantsch 2001, 169; Dörner 2001, 177; Pfeiffer, Schinkels 2001, 189; Ulmer 2001a, 491). The consumer protection schemes are general in nature and the legislation is contained in its entirety in the BGB, ensuring that European law is fully integrated into the system (Schlechtriem 2001, 335; Möllers 2002, 121-126). Nevertheless, this gap between objectives and areas of intervention – the directive ‘originated’ in Germany but is restricted to consumers, while the legal system that produced it maintains broader legislation – has given rise to some doubts regarding its application (Zoll 2016, 68 ff.). The German legislation derived from it was subsequently found to be *über-obligatorisch*, but the judgments of the EU Court of Justice can only apply to consumer contracts, even when the referring court belongs to a legal system that has introduced or maintained broader rules intended to apply to all contracts (Jäger 2006, 96 ff.). Therefore, in Germany, any new development from the EU Court of Justice is bound to cause difficulties: decisions on consumer matters must be related to a system that extends the scope of implementing rules to all contracts, whether consumer contracts or not. And if a German court is bound by a European judgment within its strict scope of application, *i.e.* those of B2C contracts, it will be difficult to disregard it elsewhere, when called upon to apply the same rules to B2B or C2C contracts. What use can be made of a European precedent outside its proper scope? There is discussion of a ‘spillover effect’ (Wagner 2016, 99-100). However, from a foreign observer’s perspective, the issue is not so different from others that have always troubled judges when they must navigate the ambiguities and distortions of persuasive precedent.

In Italy, the European directive marks a deep break, first with art. 1469-*bis* et seq. of the Italian Civil Code, and then with art. 33 et seq. of the Italian Consumer Code. The problem of judicial review has finally been addressed, albeit not conclusively, and even the idea of the *de facto* or atypical authority of the drafter is beginning to falter (Ferri 2011, 3). Nevertheless, on the one hand, in the absence of any expansive or enhanced implementation of EC Directive 13/93, the judgments of the EU Court do not raise particular doubts as to enforcement, but on the other hand, the picture remains divided between an autonomous status for consumer contracts, confined to the

sectoral code, and the general part of the contract, which – precisely in the face of European developments – seems to be losing its centrality (Alpa 1997, 237 ff.; Mengoni 1998, 546; Roppo 2020, 95 ff.).

A seemingly innocuous European provision illustrates this paradigm shift well. Pursuant to art. 34(5) of the Italian Consumer Code, taken from art. 3(2), 3<sup>rd</sup> sentence, EC Directive 13/93, if the contract provides for the consumer's acceptance of a standard form, it is presumed that there has been no negotiation and therefore that the entire set of rules protecting the consumer applies, notwithstanding art. 34(4) of the Italian Consumer Code (Zachariasiewicz 2017, 95 ff.). In other words, negotiation on the clause (even if prepared *ex uno latere*) removes it from the review of substantive unfairness, but proof of negotiation must be provided by the professional, confirming that the law – and no longer just the market, the economy, or society – elevates the drafter to official holder of private power.<sup>2</sup> The drafter is an authority by law, therefore a 'legal' authority. It is difficult to say whether the European innovations, which have become part of the domestic legal system, have made paths already in place visible or have set new ones (Wilhelmsson 2011, 571 ff.; Maggiolo 1996, 193 ff.).

Then, as is well known, there was a long series of special statutes, some of European origin, others of domestic origin. These statutes brought the idea of the asymmetric contract to the fore: legislative and, in part, case law developments, together with the intensification of academic debate, gradually led to a reversal of the situation. At present, the model of the unbalanced contract seems to dominate in theory and practice, transcending consumer protection in the strict sense to embrace every hypothesis of asymmetry: from the consumer to the weak party in general, from the weak entrepreneur to the «customer». And the stronger party, the one who imposes the rules of the game, is legally certified as private authority (Garro 2001, 310 ff.; Azzarri 2023, 364 ff.).

In this context, when the discussion turns to the general part, there seems to be an aura of antiquity, a feeling of outdated schemes. The asymmetric contract is indeed dominant, the authority of the drafter is certainly legal, but the general part remains based on another, recessive paradigm (Sirena 2004, 787 ff.). There is therefore an incomplete transition, because the asymmetrical model prevails in the applicable law, but outside the general part; it monopolises the attention of scholars, but remains on the margins of theory; it fails to build a system and, indeed, continues to appear as a disruptive factor at the centre of the legal order, an appendage that subverts rather than builds new unity.

---

<sup>2</sup> Recently, ECJ 30<sup>th</sup> May 2024, case C-176/23, *UG v. SC Raiffeisen Bank SA*; and ECJ 13<sup>th</sup> July 2023, case C-265/22, *ZR & PI v. Banco Santander SA*, para. 62.

More than thirty years after EC Directive 13/93, the standard contract paradigm remains largely unexplored. With the exception of the BGB, which provided the model-rule for the directive itself, the codes of continental Europe are sparse on general terms and conditions; and even after the directive, with its multifaceted implementation, large parts of the paradigm remain in the shadows. Yet, while the directive has revitalised the debate on consumer issues, it has, by contrast, increased the obscurity of the business variant, where not only the drafter but also the adherent exercises a professional activity.

### 3. Grades of consent and grades of contractual institutions

Yet, it must be said that the transition will not be short and may never be complete. On closer inspection, the contractual strategies to be observed appear to be much more numerous and complex than what emerges from the dry opposition between negotiated contracts and pre-drafted ones. It is necessary to break down and grade the single concept of consent, to break once again the *Willensdogma* dear to Pandectism (Betti 1920; Scalisi 2011, 738 ff.; Herresthal 2016, 105). At the two poles are the «pure and simple» act of consumerism and the clause-by-clause negotiated agreement, but between the two poles there is a space for mediation, weighing up and balancing.

First pole. The average consumer or «the man without qualities» is the end point of the production and distribution chain. Driven by natural and artificial needs, managed or induced by the consumer society (*Konsumgesellschaft*) or the ‘throw-away society’ (*Wegwerfgesellschaft*), before «accepting» he acquiesces to offers entirely prepared by others. His consent is reduced to stating *when* and *how much*, but on the assumption that sooner or later he will need that good or service and the quantity cannot fall below a certain threshold (Genovese 1961, 804). Not only is he precluded from any negotiation, but the very terms of the contract are inflexibly predetermined (*e.g.* in online bargaining, through sequences of tick boxes, where the absence of a tick blocks the procedure, or in automated self-service contracts, through mandatory material arrangements, such as inserting money into a machine; Roppo 1975, 25 ff.; Maggiolo 1996, 63 ff. and 193 ff.; Scognamiglio 2002, 160). Rather than consent, there is tacit submission to the other party’s business plan.

Nevertheless, in the logic of mature capitalism, fully incorporated into EU law, freedom of exchange must be accompanied by verification tools that serve, if nothing else, to ensure fair competition between companies. The protection of the weaker party is not a goal in itself: by safeguarding the final link in the chain, a fair playing field is guaranteed for companies wishing to

compete for that share of the market, with positive repercussions on the competitiveness of the market itself (Weatherill 2017, 27 ff.).<sup>3</sup>

Therefore, consumer protection in EU law is instrumental in regulating and rationalising the market, which is a vehicle for greater competition; and the competitiveness of the single market is a predominant objective of European policies. In this light, it becomes clearer why a law with few provisions dedicated to the private sphere, such as primary EU law, entrusts consumer protection to two supreme provisions, namely art. 169 of the Treaty on the Functioning of the European Union (TFEU) and art. 38 of the EU Charter (Pagliantini 2016, 103; Franzen 1999, 103, 358 ff. and 405 ff.).<sup>4</sup>

Similarly, in the North American world, especially from the viewpoint of the economic debate, people usually talk about ‘consumer sovereignty’ (Hutt 1940, 66 ff.). Obviously, such expression must not be mistaken for the saying ‘the customer is always right’; it rather means that consumer is the king of demand, and therefore of competition, a sort of sovereign regulator of the market. Given that the reins of the market are held by consumer protection, the market itself does (or should) provide it. For this reason, North American scholars often say «We do have consumer protection ... the market!».

A different matter is to understand whether the idea of consumer sovereignty is truly a good one and whether its implementation within the so-called *ordo-liberal* EU-policies represents a real development and growth factor. However, consumer protection enjoys constitutional cover and relevance, and it is from such a perspective that connected secondary legislation should be read (or re-read).

At the other pole is the fully negotiated contract, which is rarer but not unknown in practice. Consider perfectly balanced business relationships or, to give another example, real estate negotiations between private individuals, where a substantially equal arrangement can unfold. Here, consent is full, rather than a mere simulacrum of itself. The general part of contract law finds its natural *habitat* here (but how many contracts are concluded in this way?).

---

<sup>3</sup> Among others ECJ 13<sup>th</sup> May 1997, case C-233/94, *Germany v. Council* [1997] ECR I-2405 para. 48.

<sup>4</sup> Art. 169 TFEU (*ex art.* 153 TEC): «1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and (...) to organise themselves in order to safeguard their interests. (...). 4. Measures adopted (...) shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them» (Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01). Art. 38 EU-Charter: «Consumer protection. Union policies shall ensure a high level of consumer protection» (Charter of Fundamental Rights of the European Union [2012] OJ C 326/02).

Between the two poles there are intermediate constellations, which express a mix of tacit submission and negotiated consent. The terms laid down cover a significant part of the contractual «building», but the adhering party is not so weak as to be unable to wring out a few concessions. Even areas that were once among the most impersonal, such as banking and insurance contracts, are now experiencing a new flexibility in response to the demands of private and professional customers. This leads to a gradation of consent within the same transaction, whose uniform contractual regulation no longer hides that mix of subjugation and genuine acceptance.

It follows that contractual instruments, and particularly those of a general nature, must in turn be graded and fragmented. This may be the best strategy: without changing the wording, re-reading the rules on contracts in order to discern what pertains to one pole, *e.g.* that of authentic negotiation, from what can be extended to contracts by adhesion or asymmetric agreements; and in intermediate cases, skillfully balance rules that are valid across the board with rules of more limited scope. In particular, the limited consensual nature of the standard clauses leads to a reformulation of the traditional answers to problems of interpretation. However, it must be assumed that numerous doctrines, despite their apparent universality, have very little to do with the ‘quick hand’-transactions of the average person (Gorla 1963, 114), simply because they are foreign to the full contractual consent that inspires the general part (Roppo 1975, 164 ff., 219 ff.).

Therefore, the judge is called upon not to endorse the drift of the legal system, but to attempt, as far as possible, to reconcile and adapt it. The construction of new paradigms has never been the prerogative of the legislator or the judiciary; it is up to legal scholars to gather the inputs that come from outside in order to create a new unity. The asymmetrical contract, generally by adhesion, must push on the general part so that the latter, with all its permeability, returns a clearer and more complete image. This is an exercise that the spread of asymmetric contracts makes necessary if the ambition is to revitalise the general part by enabling it to fulfil its systematic function.

However, this exercise is too large for the present contribution, which will now devote some attention to one of the most urgent issues, namely the interpretation of standard contracts.

#### **4. From parties’ common intention to the *contra proferentem* rule: Transparency as the new icon of standard contracts**

There is reason to believe that, when the contract has been concluded through general terms and conditions, the interpretation criteria established

by the general part of contract law must be reviewed; and, above all, that their normal hierarchy must be revisited. It is immediately apparent that the asymmetrical structure of the contract requires equally asymmetrical procedures in terms of interpretation. If, for example, there is no «common intention of the parties» – as stated in art. 1362(1) of the Italian Civil Code (Pennisilico 2004, 145) – but the sole intention of the drafter, who drafts and imposes almost all the rules, what is the point of investigating a «common intention» (as described in § 133 BGB)? And is the «overall conduct even after conclusion» – as stated in art. 1362(2) of the Italian Civil Code (Alpa 1999, 97 ff., 106 ff.) – referred to both parties or only to one of them? And in the latter case, which of the two?

The examples could be many. Rules designed for ‘contract No. 0’, the contract without qualities, are ill-suited to the genetic and functional characteristics of the contract of adhesion and require numerous adjustments (Chiodi 2017, 165). Among the interpretative criteria, it is necessary to replace the common intention of the parties – which cannot be found as such, nor interpreted – with the rule of interpretation against the draftsman (*contra proferentem*), which tends to occupy the top of the hierarchy. Provided for by EC Directive 13/93, but already found in many European legal systems, the *contra proferentem* rule applies to consumer contracts and to all pre-drafted contracts when the fixed terms are unclear or ambiguous. art. 1370 of the Italian Civil Code corresponds almost literally to art. 35(2) of the Italian Consumer Code, which, in turn, stems from EC Directive 13/93.

These rules restore the most striking feature of the post-modern standard contract, namely transparency, with the long-standing problem of remedies, to which the EU Court of Justice continues to pay so much attention. As will be seen, transparency and *interpretatio contra proferentem* now constitute fundamental «blocks» for the weaker party. However, it is necessary to proceed gradually (McCunn 2019; Berner 2024).

Directive 93/13 basically provides two protection tools and raises a big problem: 1) the judicial check on contractual terms, leading to a rejection of the unfair ones under art. 3, para. 1, Directive 13/93, § 307, para. 1, 1<sup>st</sup> sentence, BGB and art. 33, para. 1, Italian Consumer Code; this tool regulates the normative or legal balance in consumer contracts; 2) the principle of transparency *ex* art. 5, 1<sup>st</sup> and 2<sup>nd</sup> sentences, Directive 93/13, § 307, para. 1, 2<sup>nd</sup> sentence, BGB and art. 35, paras. 1-2, Italian Consumer Code; this tool regulates the informative balance in consumer contracts (Gottschalk 2006, 555; Lorenz, Riehm 2002, 56 ff.; Huber, Faust 2002, 463 ff.; Kreienbaum 1998; Schäfer 1992); 3) the assessment of economic balance, which is generally excluded but might be reintroduced in case of non-transparency, as provided by art. 4, para. 2, Directive 93/13 and art. 34, para. 2, Italian Consumer Code (a question of

contractual justice?) (Hesselink 2015, 185; Gordley 2015, 197; Eidenmüller 2015, 220; Piraino 2015, 233 ff.; Collins 1998, 988 ff.; Mengoni 1998, 546).

For a long time in the field of consumer protection the substantive check review on contractual terms, the German *Inhaltskontrolle*, has prevailed, and almost left no room for the principle of transparency. Yet, the two parallel and partly competing subsystems of consumer protection make inroads into private autonomy, and more specifically the contractual freedom of the professional. In fact, both control over content, which leads to oppressive clauses being held to be ineffective, and the principle of contractual transparency, which gives rise to remedies like damages or voidability for fraud, constitute instruments of legal pressure on the stronger party (Gallo 2024, 73 ff.).

In any event, in order to prevent the pressure from becoming unbearable and leading to paradoxical outcomes, such as judicial disregard for arts. 5 and 4, para. 2, Dir. 93/13, it is essential that each violation should be matched with an appropriate remedy. Accordingly, the sanction for lack of transparency should be disengaged from the assessment of oppressive content, granting arts. 3, para. 1, and 5 Dir. 13/93 distinct and competing spheres of application.

Furthermore, if one wants an interpretation which facilitates the furtherance of community goals, one must exclude *a priori* judicial interference with agreements on purely economic grounds. If this leads to lack of transparency, the only effective – and judicially possible – sanction is the application of domestic remedies for contractual fraud.

Otherwise, one would be demanding from the judge an intrusion into the field of economic justice. This would lead on the one hand to excessive restrictions of contractual freedom autonomy, and on the other to strong reluctance on the part of courts to abandon their long-standing practice of self-restraint. Such polarized approaches would lead to substantial inertia, while more balanced interpretations could, by contrast, give rise to more productive applications, which are more respectful of private autonomy and, in fact, more protective of the consumer.

In the Italian Consumer Code transparency was already valued as a fundamental right: pursuant to art. 2, para. 2, lett. 'e)', «*ai consumatori ed agli utenti sono riconosciuti come fondamentali i diritti (...) alla correttezza, alla trasparenza ed all'equità nei rapporti contrattuali*» (Salvi 2015, 206 ff.). However, what consequences may the fundamentalisation of transparency lead to?

At first glance, the upgrading at stake is just an acknowledgement, by a synthetic formula, of values already deemed worthy of protection elsewhere in the Italian legal system. art. 2, para. 2, lett. e), of the Italian Consumer Code, would say nothing more than what is already written in the whole consumer code; perhaps, it is the same idea as the one which has been in the air for decades about good faith.

Yet, the ECJ, in some recent decisions seems to consider transparency much more than we could expect from a simple restatement. It fairly looks like a new interpretative *élan* towards «plainness and intelligibility». In *van Hove v. CNP Assurances*,<sup>5</sup> for instance, we can read that «as the system of protection introduced by EC Directive 13/93 is based on the idea that the consumer is in a weak position *vis-à-vis* the seller or supplier, as regards, in particular, his level of knowledge, that requirement of transparency is to be interpreted broadly».<sup>6</sup>

Transparency carries in itself a revolutionary power: in standard terms it replaces what good faith is to pre-contractual dealings. Without those dealings, there is no need for fairness, but a new one arises instead, *i.e.* the demand for plainness and intelligibility of unilaterally drafted terms. Despite some dissenting opinions, nothing more than a remote link exists between good faith during the negotiations and transparency in standard contracts (Wilhelmsson 1996, 385; Micklitz 2014, 143). But where can that missed link be found?

Above all in continental European legal systems – think of Germany and Italy – pre-contractual good faith means the duty to play fair during the negotiations; it is a source of positive obligations. True, these obligations have very flexible content, but that is just because they originate from a general clause. They are indeed obligations, after all (Loos 2015, 179 ff.; Grigoleit H.C. 2003, 201 ff.). By contrast, transparency of standard terms does not play any role in consumers' decisions, as in serial contracts negotiations are omitted (and the dialogue between the parties is reduced to only what is strictly necessary). In fact, the parties reach an agreement on the mobile or unfixed terms, which do require a mirror consent; whereas fixed terms are automatically embedded in the contract as they are, without any chance for consumers to pre-emptively scrutinise them.

It is as if in standard contracts the agreement consisted of two levels. On the one hand, consent on mobile or unfixed terms – which are considerably few – follows the one required in individual negotiations and is characterised by a certain simplicity; parties briefly discuss the quality and amount of goods. On the other hand, consent on fixed terms downgrades to a mere acknowledgement; the consumer is subject to the other party's conditions as an automatic consequence of the conclusion of the contract and he neither can nor wants to negotiate their content (Raiser 1936, 59 ff., 109 ff., 237 ff., 281 ff., 324 ff. and 502 ff.; Raiser 1958, 1 ff.). We cannot exclude that a smart

---

<sup>5</sup> ECJ 2<sup>nd</sup> April 2015, case C-96/14, *van Hove v. CNP Assurances SA*, para. 40.

<sup>6</sup> In the same direction ECJ 10<sup>th</sup> May 2001, case C-144/99, *Commission v. Netherlands*, paras. 19-20; ECJ 21<sup>st</sup> March 2013, case C-92/11, *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen e.V.*

and conscious consumer refuses to enter into the contract because he is not satisfied with the other party's terms or is convinced he can find some of a better quality elsewhere, but this is not so frequent in practice. However, in similar homogeneous product markets, professionals tend to standardise contractual templates as to form and content, with the aim of reducing competition and eliminating whatever could (even marginally) influence individual consumer choices (Micklitz 2014, 144 ff.).<sup>7</sup>

Accordingly, transparency of standard contracts, unlike good faith *in contrahendo*, plays a post-contractual rather than a pre-contractual role: it is not there to protect the consumer's freedom of contract, but to make him downstream aware of mutual rights and duties according to the contractual design of the professional seller or supplier. For these reasons, also the link between transparency and disclosure is not one-sided: it is true that plain and intelligible clauses convey relevant information on the contractual program and therefore, in this sense, gain an informative significance; nevertheless, both from a logical and a chronological viewpoint, such information is post-contractual.<sup>8</sup> It means that it does neither affect the *an* nor the *quomodo* of the contract, but it affects instead *ex post* knowledge of the terms by the consumer. If necessary, the consumer will go over what is already incorporated into the contract to 'discover' his rights and duties, certainly not to find an answer to his doubt whether to enter into the contract and under what conditions (Ayres, Schwartz 2014, 545 ff.; Wolf 2001, 319 ff.; Eisenberg 1995, 211; Rakoff 1983, 1173 ff.; Leff 1976, 144).

## 5. The objectification of transparency as a vector for the second life of the contract

On the other side, it seems unacceptable to argue that the common ground between good faith *in contrahendo* and transparency is the power of the first one to make the stronger party comply with the second one (Campagna 2015, 1036, 1057-1058, 1060). On the contrary, transparency is a new requirement as to the form/content of the contract and, in particular, as to the unilateral drafting of terms by the stronger party. It is therefore an antecedent requirement, rather than a supervening defect; one conveying a rule on validity, and certainly not a rule on conduct. It does not belong to pre-contractual duties, but to the contract as a legal act. In case it entails the drafter's

---

<sup>7</sup> In a different direction *RWE Vertrieb AG* (n. 6) paras. 49-59.

<sup>8</sup> Despite ECJ 4<sup>th</sup> March 2004, case C-264/02, *Cofinoga Mèrignac SA v. Sylvain Sachithanathan*.

liability, this will not, at least not directly and uncritically, deal with *mala fides* in negotiations, since such negotiations did not take place at all.

The reasons for the (somehow justifiable) misunderstanding are that, unlike the traditional validity requirements, plainness and intelligibility must be fulfilled, achieved and made available to the contracting party who wants to invoke them. This way, the normal bilateral nature of the requirement fades. But such peculiarity depends upon another one: the set of fixed terms enters into the contractual relationship by the drafter's unilateral will, and not by a proper agreement (Paissant 1995, 107).

Some aspects seem to confirm this main idea: first of all, non-transparency is indeed an antecedent defect which does not affect only one particular contract, but affects terms intended to apply to a series of contractual relationships (be they many, few or even just one); secondly, the drafter's state of mind cannot be taken into account: non-transparency has legal relevance *per se*, regardless of whatever malice or fault on his side; finally, the plainness and intelligibility test must go beyond a case-by-case approach and reach up for a standard-consumer-bound benchmark (where standard consumer does not stand for average consumer, but, more properly, for 'average consumer in relation to that specific type of contract') (Loos 2015, 188; Reich, Micklitz 2014, 45 ff.).

On reading art. 5 of the EC Directive 13/93, one immediately realizes that, in this context, transparency is not entirely neutral. The requirement of good faith (or *Treu und Glauben*) does not have a broad and definite application. It is not a bilateral criterion, which might be expected to pervade the behaviour of both contracting parties, whatever their status, all by itself. Instead, it is a right of the consumer and a duty of the professional (something similar can be read in art. 4:107, para. 3 [a] of the Principles of European Contract Law, so-called Lando-Principles or PECL). Transparency in contracting, at least in the system designed by this directive, means a right to information for the consumer and a duty to supply information for the professional (Collins 1998, 978). Accordingly, it is an instrument of struggle, even of class struggle, even if here the class is not «social», but «occasional», in the sense that the status of consumer is situation-based.

The parties are not given any real opportunity to personalize the content of the contract and to bring their communication horizons closer together. In *Kásler & Káslerné Rábai* the ECJ promoted the benchmark of the «average consumer, who is reasonably well informed and reasonably observant and circumspect».<sup>9</sup>

In the analysis of the symmetrical or asymmetrical fallouts of objectification

---

<sup>9</sup> ECJ 30<sup>th</sup> April 2014, case C-26/13, *Kásler & Káslerné Rábai v. OTP Jelzálogbank Zrt*, para. 74.

there is one last point worth outlining: the reconstruction of a suitable contract-type-based standard for transparency assessment implies that consumers with cognitive skills lower than the average are not granted protection, but it also implies that such protection cannot be turned into a privilege for extraordinarily clever consumers (Zimmermann 2004, 174 ff.).

Here the outcome favours the drafter: should he wish to provide a set of uniform rules, he will not need to decrease indefinitely their qualitative level, as this might not prevent him from being accused of non-transparency (by people allegedly incapable of understanding this or that term). But there are some advantages also for the consumer: in the event of a non-transparency related to the cognitive status of a standard consumer, he will not need to prove that he has been concretely deceived, but just that he meets the standard.

Therefore, it looks crystal-clear that the objectification of transparency is a vector of definiteness and predictability for the future (or second) life of the contract and contributes, as such, to a more balanced relationship.

## 6. The *contra proferentem* rule in its soft or strong version

It would be almost useless to put a rule, if the sanction for its violation could not be clearly identified. Yet, both art. 5 Directive 93/13 and the national legislations implementing it do not answer the question directly (Wilhelmsen 2003, 245 ff.). *Quid juris* if fixed terms are not transparent?

In a perfectly competitive and informed market the sanction would be commercial exclusion of the non-transparent seller or supplier (Reich 1994, 23); but it is illusory to think that transparency of fixed terms becomes a player in the game of competition among companies and has any meaningful impact on families' consumer choices (McCunn 2019).

The second statement of art. 5 Directive 93/13 provides that: «*Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail*»; whereas former § 5 AGB-Gesetz, and 'new' § 305c, para. 2, BGB reads: «*Zweifel bei der Auslegung Allgemeiner Geschäftsbedingungen gehen zu Lasten des Verwenders*» (Medicus 2002, 163 ff.; Huber, Faust 2002, 464).<sup>10</sup>

---

<sup>10</sup>The *contra proferentem* rule is widespread also in *soft law* instruments. Art. 4.6 Unidroit-Principles (PICC) states: «If contract terms supplied by one party are unclear, an interpretation against that party is preferred» (Vogenauer 2015, 604); whereas, according with art. 5:103 PECL, «Where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred»; the same provision appears in art. II. – 8:103(1) DCFR: «Where there is doubt about the meaning of a term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred» (see Bar, Clive, Schulte-Nölke 2009, 217).

It is not worth dwelling on the *ratio* and the meaning of the rule, whose role as a protective interpretation is well-known also from a historic-comparative viewpoint (Irti, 2000b, 624 ff.; Gentili 2015, 601; Kosche 2011). Such provision does not shut the door to other, more penetrating remedies. It is just a pre-emptive solution: before assessing the grounds for whatever claim made by the consumer against the professional, the judge must establish whether it is possible to neutralise the opaque term through a consumer-friendly interpretation.

Yet, the (logical and literal) preliminary character of *interpretatio contra proferentem* means more than just consumer protection; it is also a tool for market regulation. In this light, such characteristic has a further deep-seated *ratio*: the preservation of the contract. A consumer-friendly construction of ambiguous terms discourages the adoption of measures to terminate the contract. In fact, the preservation of the latter, as far as possible, benefits consumers as well. They are generally interested in performance, even though it comes too late or needs adjustments, while termination would be useless (Berner 2024, 172 ff.).

However, the *contra proferentem* rule, in its traditional version and up to now, has shown signs of weakness, being incapable of remedying the structural imbalances between the stronger and the weaker party (Grassetti 1938, 204 ff.; Oppo 1943, 102; Ferrante 2005, 121 ff.).

First of all, because such an interpretation requires a «doubt about the meaning of a term». The rule can apply only if a term carries at least two possible and equally acceptable meanings; if it is not so, if non-transparency does not make the clause ambiguous but simply obscure, the rule is excluded (Rizzo 1983, 368 ff.). It would be ruled out anyway whenever the other subjective and objective rules of interpretation succeed in reducing the possible meanings to one. In other words, the rule is subsidiary (Gentili 2015, 603-604; Martuccelli 2000, 58, 139). Among the possible constructions, the rule imposes to prefer the one «more favourable to the consumer», which does not always mean the most protective one.<sup>11</sup>

Furthermore, the ambiguity of a term could lead to two constructions equally possible and reasonable, but dramatically divergent as to their effects: one spares the clause from a verdict of material abusiveness; the other commits it to ineffectiveness (*rectius* voidness), under art. 6, para. 1, Directive 93/13. Then what would the more consumer-friendly interpretation be? Is it the one more detrimental to the consumer but capable of making the single term void, or the one less detrimental but sufficient to save this latter and keep it effective for the consumer?

---

<sup>11</sup> Cass., 27<sup>th</sup> May 2005, No. 11278, in *Contratti*, 2006, 221 ff.; Cass., 13<sup>th</sup> May 1998, No. 4815, in *Corriere giuridico*, 1999, 469 ff.

Such weakness is the legacy of the traditional conception of *contra proferentem* and its boundaries, as they had been drawn by our codes far before the rule caught the European legislator's attention (Andr. Genovese 2008, 208; Azzaro 2000, 269 ff.). Yet, the ECJ, through a series of recent judgments, tends to remedy such shortcomings by a strong or casual use of the *contra proferentem* (Stempel 2017, 106 ff.).

First, the rule seems to be deemed applicable whenever and however, as soon as a breach of the transparency principle emerges; according to the ECJ's recent approach, the rise of a polysemy in the drafting is no longer required.

The first issue discussed in *Matei* is a term reserving to the professional lender the right to increase unilaterally the interest rate applied to the borrower consumer. What is on trial are «the conditions and criteria enabling the lender to make that alteration, in particular on the ground alleging 'significant changes in the money market'»,<sup>12</sup> drafting that the ECJ finds «*prima facie* not transparent». <sup>13</sup> Then, discussion moves to terms which «require the consumer to pay commission of a substantial amount which aims to ensure the repayment of the loan, even though it is argued that that risk is already guaranteed by a mortgage and that, in exchange for that charge, the bank does not provide a real service to the consumer solely in the consumer's interests». <sup>14</sup> The ECJ, in referring the case back to the national judge, questions that «the loan agreement concerned sets out transparently the reasons justifying the remuneration corresponding to that charge (...)». <sup>15</sup> Regardless of their unfairness – consider that, according to the ECJ, the terms are out of the scope of art. 4, para. 2, Dir. 93/13 and can therefore undergo a substantive check –, «the fact remains that those terms must, in any event, be subject to an assessment of their unfairness if it was found, which is also for the referring court to verify, that they are not drafted in clear and intelligible language». <sup>16</sup>

But, according to what the judgment wording seems to suggest, expressions like 'significant changes in the money market' or 'risk charge' are not polysemous at all. They simply leave the partial quantification of the due

---

<sup>12</sup> ECJ 26<sup>th</sup> February 2015, case C-143/13, *Matei & Matei v. SC Volksbank România SA*, para. 63; ECJ 26<sup>th</sup> April 2012, case C-472/10, *NFH v. Invitel*.

<sup>13</sup> *Matei* (fn. 12), para. 76.

<sup>14</sup> *Matei* (fn. 12), para. 71.

<sup>15</sup> *Matei* (fn. 12), para. 77.

<sup>16</sup> *Matei* (fn. 12), para. 72; *van Hove* (fn. 5), para. 45: « (...) the doubts as to the lack of clarity of the term at issue in the main proceedings are reinforced by the extremely broad and vague nature of the expression 'activity, paid or otherwise' used in that term. Indeed, the word 'activity', as the Commission states, can encompass any human operation or activity carried out to achieve a specific purpose».

performance to the stronger party's discretion. No matter if such quantification is defined as an increase in the interest rate or as an additional risk charge.

Even more radically, *van Hove* concludes «(...) under Article 5 of that directive, if the wording of a contractual term is not clear, the interpretation most favourable to the consumer shall prevail». <sup>17</sup>

Thus, as well as pre-contractual good faith differs from transparency of standard contracts, the continental 'interpretative good faith' differs from the *interpretatio contra proferentem*. Even in the context of unilaterally drafted terms, interpretative good faith is above all a synonym for *honeste intelligere*: between two (or among more) possible meanings of such terms the one must prevail which the consumer could understand and should have understood according to the *id quod plerumque accidit*. Therefore, it is a relational, symmetrical, balanced judgment (what could and should the average consumer have understood?). On the contrary, the *contra proferentem* rule assures the prevalence of the meaning more favourable to the consumer, even when the other meaning (less favourable) was the one which the consumer could understand and should have understood according to the drafter's intent. In the end, it nearly seems that an antithesis exists between the two interpretative criteria: it sounds a little more than just two sides of the same coin. <sup>18</sup>

Moreover, given that the rule is directly inferable from the principle of transparency, no subsidiarity in respect of the other interpretative rules applies. *Interpretatio contra proferentem* cannot but prevail on the common intention of contracting parties and the other subjective criteria, as well as on the objective ones. Therefore, the more favourable interpretation must be preferred even when, by chance, an exhaustive reconstruction of the parties common will is possible.

It is true that «the requirement of transparency of contractual terms laid down by artt. 4(2) and 5 of Directive 93/13 (...) cannot be reduced merely to their being formally and grammatically intelligible»; <sup>19</sup> but if the consumer, facing a non-ambiguous term, has perfectly understood it – and therefore 'accepted' it – *interpretatio contra proferentem* ends up prevailing even on the parties' *lato sensu* common intention (Calderai 2008, 82 ff.).

So the aim of the rule under exam might soon change from imposing

<sup>17</sup>*Van Hove* (fn. 5), para. 49.

<sup>18</sup>ECJ 18<sup>th</sup> November 2021, case C-212/20, *M.P. & B.P. v. «A.» prowadzacy działalność za pośrednictwem «A.» SA*, paras. 67 ff.; *ZR & PI v. Banco Santander* (n. 2), paras. 51 ff.

<sup>19</sup>*Kásler* (fn. 9), para. 71; *Matei* (fn. 11), para. 73; *van Hove* (fn. 5), para. 40; ECJ 20<sup>th</sup> September 2017, case C-186/16, *Ru. Pa. An. v. Banca Românească SA*, paras. 44 ff.; ECJ 10<sup>th</sup> June 2021, case C-609/19, *BNP Paribas Personal Finance SA v. VE*, paras. 42 ff.; *M.P. & B.P.* (n. 18), paras. 41 ff.; ECJ 20<sup>th</sup> April 2023, case C-263/22, *Ocidental v. LP*, paras. 26 ff.; ECJ 16<sup>th</sup> March 2023, case C-565/21, *CaixaBank SA v. X*, paras. 30 ff.

the choice of the more favourable interpretation to requiring a reconstruction *a posteriori* of the most favourable meaning, regardless of whatever other criterion: «It is of fundamental importance, for the purpose of complying with the requirement of transparency, to determine whether the loan agreement sets out transparently the reasons for and the particularities of the mechanism for altering the interest rate and the relationship between that mechanism and the other terms relating to the lender's remuneration, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it».

The trend to drop the comparative parameter might make it easier to answer the question 'Is it better to adopt a detrimental construction leading to the elimination of the term or a favourable one leading to its preservation?'. Even though the ECJ has not ruled on the matter yet – at least not directly –, the 'more consumer-friendly' interpretation, free from comparative judgments based on a merely contingent convenience, will be the one which favours consumers and at the same time spares the term.<sup>20</sup> Instead, it will be out of the question to consider, from a comparative point of view, the one which is good for consumers only because it impairs the term.

Contractual hermeneutics, strengthened as it has been, is not a weak sanction any longer. Moreover, the *contra proferentem* is upgraded to a remedy and perhaps loses, at least partially, its merely interpretative value. Instead of interpreting the 'grey' term – where 'grey' here only means unfavourable – they replace it with a plain and intelligible one; ultimately, a more favourable one.

## 7. The weak consent of the consumer-private authority and the Italian spillover effect

We should ask ourselves whether, thus strengthened, the *interpretatio contra proferentem* might gradually become not the supreme rule, but the exclusive one, not the principal remedy, but the only one available. If the remedy appears adequate and proportionate, *i.e.* if it appears to be the «right» one, why not consider it an exclusive tool? The link in EC Directive 13/93 between *interpretatio* and comprehensibility tends to supplant any other combined provisions (*contra* Gentili 2015, 606), and it is not difficult to imagine that a well-oiled interpretative machine, which exploits the opacity of the

---

<sup>20</sup> According to *M.P. & B.P.* (fn. 18), paras. 67 ff., the judge cannot uphold an unfair term simply because it can be interpreted in accordance with the common intention of the parties. In fact, what can save the term from being unfair is the interpretation most favourable to the consumer, not the one closest to both parties' common will.

text to create interpretations defending the consumer, will soon end up monopolising the practical use of transparency.

The example of the '*interpretatio*'-remedy shows how the new contract law is sensitive to degrees of consent. Perhaps because it is detached from traditional archetypes or perhaps because it is crude, Italian-European law pre-establishes protections for the weaker contracting party that overlook and render irrelevant, so to speak, the fact that the latter has consented. In adhesion contracts, with their variants unified by the prevalence of the 'editorial' over the 'voluntary', the *voluntas* (at most) covers the 'if', but does not include the regulation. It then becomes artificial to interpret that regulation as authentically intended. It is as if the *lex contractus* were emancipated from the *voluntas*: the *lex* belongs to both parties, the *voluntas* (almost entirely) to the drafter.

The consumer-adherent is set up as the controller of market rationality, the guarantor of free and fair competition between companies. So consumer protection is a means rather than a goal.

But the example of the strong *interpretatio contra proferentem* is congenial to both the instrumental function and the finalistic purpose: it induces the company to draw up clear forms because, if it fails to do so, the consumer will always be protected, regardless of what he has understood or what he would never have understood, even in the face of very clear terms.<sup>21</sup> The result will be the construction of a rule that is unconditionally beneficial to the weaker party.

Perhaps in these new scenarios, influenced by European law and the case law of the EU Court of Justice, a 'reverse' private authority is emerging, whether in fact or in law, namely the consumer. In their ordo-liberal design, European law and judges mark its role as the sovereign organiser of the market, thanks to the objective use of the *interpretatio*.

But this strong *interpretatio* is the result of European legislation and case law, competent in consumer matters. Now that the EU Court has sent signals of strengthening the *interpretatio*, it is no longer possible – if it ever was – to reduce art. 35(2) of the Italian Consumer Code to a norm that simply repeats, in the Italian Consumer Code, what is established in art. 1370 of the Italian Civil Code. The rules are equivalent, but they are part of different areas with respect to the choices made: in the general part, the contract is between neutral parties ('n. 0'), while in the sectoral code, the contract is a B2C relationship, not only prepared but also imposed on a party needing special protection.

This European approach therefore reveals a sort of «Italian spillover». Since the Italian legislator usually transposes EU law literally, making room for it among existing provisions without systematic improvements or connections,

---

<sup>21</sup> ECJ 30<sup>th</sup> April 2025, case C-699/23, *FG v. Caja Rural de Navarra SCC*.

the *sedes materiae* are quite diverse; and with the creation of the Italian Consumer Code, it is also ‘geographically’ clear what concerns the consumer and what pertains the general part instead. EC Directive 13/93 – just to deal with this one – was first included in the Italian Civil Code, using the technique of *bis, ter* and *quater*, and then extracted and transplanted into art. 33 et seq. of the Italian Consumer Code. Now more than ever, it is quite clear what concerns consumer contracts and what concerns contracts in general.

Years ago, this passivity of the domestic legislator was much criticised, and it is still often criticised today. In the best of all possible worlds, it would be taken for granted that we would have well-coordinated, concise and clear law provisions: a few rules that fit together quite well, giving rise to a few well-considered judgments that are equipped to set precedents. However, since this is not the best of all possible worlds, but rather the legal order has become disorderly – the order as a target rather than a given (Pistor 2019) – all that remains is to aim for the lesser of two evils. In the kaleidoscope of competing and multi-level sources, a normative approach that appears to be a kind of political disengagement, almost laziness, proves to be efficient. Given that the governance of sources is no longer possible – too many legislators, too many courts, too many authorities – it is wise to give up and entrust the task to the interpreter. It will not be an easy one, but at least they will be able to piece together the thousand threads of the legal system step by step, without haste.

Academics, instead of exhausting their energies to support or fluidify a recodification of private law, should spend their time holding together the code with the other, more vital, sources of the legal system. They should try to mediate between principles and rules, but above all, they should aim at revitalising, with the use of good dogmatism, the systematic method, that is ordering the law into a system (after all, isn’t this precisely what the codes have done?).

If this thinking were to take hold – and there are no signs to the contrary – we would end up, on the one hand, with a «mummified» Italian Civil Code and, on the other hand, with an Italian Consumer Code in perpetual flux, as turbulent as the numerous directives to be implemented, a mass of special statutes and sectoral codes which embody the real life of contemporary private law.

It may be not so bad: instead of lamenting, perhaps we should start applauding. First in Germany and then in France, legislators aimed to reform the national codes, but with questionable results that were, in any event, disproportionate to the effort involved: grammatical reforms, albeit appreciable, but on the whole ineffective in terms of application, truly law in the books.

Perhaps the «Italian spillover» is preferable: at the centre of the system remains the general Civil Code, with its eternal love-hate relationship with the Constitution, and on the outskirts the sectoral codes and other special statutes.

The former is almost ‘hibernated’ but fundamental, useful for the architecture of the legal system as well as for teaching; the latter, such as the Italian Consumer Code, are constantly evolving because they gather European inputs, but are disorganised and almost centrifugal. It is the interpreter who has to do the job, far more difficult and therefore far more valuable than in the past.

To return to the point, the interpreter is faced with two almost identical provisions, art. 1370 of the Italian Civil Code and art. 35(2) of the Italian Consumer Code, but one is general, whereas the other is contained in the sectoral code; one conveys the old-style *interpretatio contra proferentem*, *i.e.* the weak version; the other expresses a new deal, the strong one. There is reason to assert that the strong *interpretatio* applies only to consumers, due to art. 35(2) of the Italian Consumer Code, while the weak version, closer to our history and tradition, continues to apply to all contracts as per art. 1370 of the Italian Civil Code.

It is not impossible to imagine that one day the two variants may be reduced to a single version. Indeed, this is to be hoped for. However, the time is not yet ripe and there is no reason to rush.

## References

- Alpa G. (1997), “L’incidenza della nuova disciplina delle clausole vessatorie nei contratti dei consumatori sul diritto comune”, in *Rivista trimestrale di diritto e procedura civile*, 237 ff.
- Alpa G. (1999), “La prassi”, in G. Alpa, A. Guarneri, P.G. Monateri, G. Pascuzzi, R. Sacco (eds.), *Le fonti del diritto italiano*, 2, *Le fonti non scritte e l’interpretazione (Trattato di diritto civile Sacco)*, Torino, Utet, 97 ff.
- Alpa G. (2014), “Il contratto in generale”, I, *Fonti, teorie, Metodi*, in *Tratt. Cicu-Messineo-Mengoni-Schlesinger*, Milano, Giuffrè.
- Ayres I., Schwartz A. (2014), “The no-reading problem in consumer contract law”, in *Stanford Law Review*, 545 ff.
- Azzaro A.M. (2000), *I contratti non negoziati*, Napoli, ESI.
- Azzari F. (2023), “Condizioni generali di contratto nei rapporti B2C e B2B: novità e ipotesi di riforma nel diritto tedesco”, in C. Granelli, S. Patti, P. Sirena (eds.), *Il diritto privato tedesco vent’anni dopo la Schuldrechtsmodernisierung: un modello per i giuristi europei?*, Torino, Giappichelli, 349 ff.
- Bar C., Clive E., Schulte-Nölke H. (eds.) (2009), “*Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition*”, Munich, De Gruyter Brill.
- Barcellona P. (1965), “Sui controlli della libertà contrattuale”, in *Rivista di diritto civile*, II, 580 ff.

- Berner F. (2024), “Die Auslegung von Willenserklärungen zwischen Normativem und Faktischem – eine rechtsvergleichende Annäherung am Beispiel von Auslegungsregeln”, in *Archiv für die civilistische Praxis*, 153 ff.
- Betti E. (1920), *Il concetto della obbligazione costruito dal punto di vista dell'azione*, Pavia, Tipografia cooperativa.
- Bianca C.M. (1977), *Le autorità private*, Napoli, Jovene.
- Bianca C.M. (2001), “Acontrattualità dei contratti di massa”, in *Vita notarile*, 1120 ff.
- Calderai V. (2008), *Interpretazione dei contratti e argomentazione giuridica*, Torino, Giappichelli.
- Campagna F. (2015), “Note sulla trasparenza del contratto”, in *Contratto e impresa*, 1036 ff.
- Chiodi G. (2017), “La funzione sociale del contratto: riflessioni di uno storico del diritto”, in F. Macario, M.N. Miletta (eds.), *La funzione sociale nel diritto privato tra XX e XXI secolo*, Roma, Roma TrE-Press, 165 ff.
- Collins H. (1998), “Transnational private law regulation of markets”, in *Europa e diritto privato*, 988 ff.
- dalla Massara T. (2022), *Il consenso annichilito*, Bologna, il Mulino.
- De Almeida Ribeiro G. (2019), *The Decline of Private Law*, Oxford, Hart.
- Degni F. (1929), “La solidarietà umana nella rinnovazione del diritto civile (a proposito del «Progetto italo-francese di Codice delle obbligazioni e dei contratti»)”, in *Rivista del diritto commerciale*, I, 145 ff.
- Di Majo A. (1970), “Il controllo giudiziale delle condizioni generali di contratto”, in *Rivista di diritto commerciale*, I, 192 ff.
- Dörner H. (2001), “Die Integration des Verbraucherrechts in das BGB”, in R. Schulze, H. Schulte-Nölke (eds.), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts*, Tübingen, Mohr Siebeck, 177 ff.
- Eidenmüller H. (2015), “Justifying Fair Price Rules in Contract Law”, in *European Review of Contract Law*, 220 ff.
- Eisenberg M.A. (1995), “The limits of cognition and the limits of contract”, in *Stanford Law Review*, 211 ff.
- Femia P. (2013), “Desire for Text: Bridling the Divisional Strategy of Contract”, in *Law and Contemporary Problems*, 151 ff.
- Femia P. (2016), “Autonomia e autolegislazione”, in S. Mazzamuto, L. Nivarra (eds.), *Giurisprudenza per principi e autonomia private*, Torino, Giappichelli, 36 ff.
- Ferrante E. (2017), “Alcune considerazioni «malgrado» o «contro» la buona fede dopo la rettifica della dir. Ce 13/93”, in *Rivista trimestrale di diritto e procedura civile*, 541 ff.
- Ferrante (2005), “Contractual Disclosure and Remedies under the Unfair Contract Terms Directive”, in G. Howells, A., Janssen, R. Schulze (eds.), *Information Rights and Obligations*, Aldershot, Ashgate, 115 ff.

- Ferrante E., Koch R. (2011), “Le condizioni generali di contratto: collocazione e limiti del controllo di vessatorietà nella prospettiva italo-tedesca”, in *Contratto e impresa Europa*, 695 ff.
- Ferri G.B. (2011), “Riflessioni sul diritto privato europeo”, in *Europa e diritto privato*, 3 ff.
- Franzen M. (1999), *Privatrechtsangleichung durch die Europäische Gemeinschaft*, Berlin, De Gruyter Brill.
- Gallo P. (2024), “Contratti d’adesione e asimmetrie informative”, in *Archivio di diritto civile*, 73 ff.
- Garro A.M. (2001), “Rule-Setting by Private Organisations, Standardisation of Contracts and the Harmonisation of International Sales Law”, in I. Fletcher, L. Mistelis, M. Cremona (eds.), *Foundations and Perspectives of International Trade Law*, London, Sweet & Maxwell, 310 ff.
- Genovese Andr. (2008), *L’interpretazione del contratto standard*, Milano, Giuffrè.
- Genovese Ant. (1961), *s.v.* “Condizioni generali di contratto”, in *Enciclopedia del diritto*, VIII, Milano, Giuffrè, 804 ff.
- Gentili A. (2015), *Senso e consenso*, II, Torino, Giappichelli.
- Gierke v. O. (1889), *Die soziale Aufgabe des Privatrechts*, Berlin, Springer.
- Gordley J. (2015), “The Just Price: The Aristotelian Tradition and John Rawls”, in *European Review of Contract Law*, 197 ff.
- Gorla G. (1963), “Condizioni generali di contratto e contratti conclusi mediante formulari nel diritto italiano”, in *Rivista di diritto commerciale*, I, 114 ff.
- Gottschalk E. (2006), “Das Transparenzgebot und allgemeine Geschäftsbedingungen”, in *Archiv für die civilistische Praxis*, 555 ff.
- Graf v. Westphalen F. (2002), “AGB-Recht ins BGB – Eine erste Bestandsaufnahme”, in *Neue juristische Wochenschrift*, 12 ff.
- Grassetti C. (1938), *L’interpretazione del negozio giuridico con particolare riguardo ai contratti*, Padova, Cedam.
- Grigoleit H.C. (2003), “Irrtum, Täuschung und Informationspflichten in den European Principles und in den Unidroit-Principles”, in R. Schulze, M. Ebers, H.C. Grigoleit (eds.), *Informationspflichten und Vertragsschluss im Acquis Communautaire*, Tübingen, Mohr Siebeck, 201 ff.
- Herresthal C. (2016), “Offer and Acceptance – Other Forms of Manifestation of Consent under the German Civil Code”, in R. Schulze, M. Perales Viscasillas (eds.), *The Formation of Contract*, Baden-Baden, Nomos, 105 ff.
- Hesselink M.W. (2015), “Could a fair price rule (or its absence) be unjust”, in *European Review of Contract Law*, 185 ff.
- Huber P., Faust F. (2002), *Schuldrechtsmodernisierung*, München, Beck.

- Hutt W.H. (1940), “The Concept of Consumers’ Sovereignty”, in *The Economic Journal*, 66 ff.
- Irti N. (1998), “Scambi senza accordo”, in *Rivista trimestrale di diritto e procedura civile*, 347 ff.
- Irti N. (1999), “È vero, ma...” (replica a Giorgio Oppo), in *Rivista di diritto civile*, I, 273 ff.
- Irti N. (2000a), “Lo scambio dei foulards (replica semiseria al prof. Bianca)”, in *Rivista trimestrale di diritto e procedura civile*, 601 ff.
- Irti N. (2000b), “Principi e problemi di interpretazione contrattuale”, in Id. (ed.), *L’interpretazione del contratto nella dottrina italiana*, Padova, Cedam, 624 ff.
- Jäger T. (2006), *Überschießende Richtlinienumsetzung im Privatrecht*, Baden-Baden, Nomos.
- Kessler F. (1943), “Contracts of adhesion – Some Thoughts About Freedom of Contract”, in *Columbia Law Review*, 629 ff.
- Kosche K. (2011), *Contra proferentem und das Transparenzgebot im Common Law und Civil Law*, Tübingen, Mohr Siebeck.
- Kreienbaum B. (1998), *Transparenz und AGB-Gesetz*, Berlin, Duncker & Humblot.
- Leff A.A. (1976), “Contract as thing”, in *American University Law Review*, 144 ff.
- Loos M. (2015), “Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law”, in *European Review of Private Law*, 179 ff.
- Lorenz S., Riehm T. (2002), *Lehrbuch zum neuen Schuldrecht*, München, Beck.
- Maggiolo M. (1996), *Il contratto predisposto*, Padova, Cedam.
- Martuccelli S. (2000), *L’interpretazione dei contratti del consumatore*, Milano, Giuffrè.
- Mazzoni C.M. (1975), *Contratti di massa e controlli nel diritto private*, Napoli, Jovene.
- McCunn J. (2019), “The Contra Proferentem Rule: Contract Law’s Great Survivor”, in *Oxford Journal of Legal Studies*, 483 ff.
- Medicus D. (2002), *Allgemeiner Teil des BGB*, Heidelberg, De Gruyter.
- Mengoni L. (1998), “Problemi di integrazione della disciplina dei ‘contratti del consumatore’ nel sistema del codice civile”, in *Studi in onore di P. Rescigno*, III, *Diritto Privato*, 2, *Obbligazioni e contratti*, Milano, Giuffrè, 546 ff.
- Micklitz H.W. (2014), “Unfair Terms in Consumer Contracts”, in N. Reich, H.W. Micklitz, P. Rott, K. Tonner (eds.), *European Consumer Law*, Cambridge, Intersentia, 125 ff.

- Möllers M. (2002), “Europäische Richtlinien zum Bürgerlichen Recht”, in *Juristen Zeitung*, 121 ff.
- Navarretta E. (2016), “Il contratto «democratico» e la giustizia contrattuale”, in *Rivista di diritto civile*, 1262 ff.
- Oppo G. (1943), *Profili dell'interpretazione oggettiva del negozio giuridico*, Bologna, Zanichelli.
- Oppo G. (1998), “Disumanizzazione del contratto”, in *Rivista di diritto civile*, I, 525 ff.
- Pagliantini S. (2016), “Principio di effettività e clausole generali: il canone “armonizzante” della Corte di Giustizia”, in S. Mazzamuto, L. Nivarra (eds.), *Giurisprudenza per principi e autonomia private*, Torino, Giappichelli, 103 ff.
- Paissant G. (1995), “Les clauses abusives et la présentation des contrats dans la loi n. 95-96 du 1<sup>er</sup> février 1995”, in *Dalloz*, 107 ff.
- Pennasilico M. (2004), “L'interpretazione dei contratti del consumatore”, in P. Perlingieri, E. Caterini (eds.), *Il diritto dei consumi*, I, Napoli, ESI, 145 ff.
- Pfeiffer T. (2001), “Die Integration von ‚Nebengesetzen‘ in das BGB”, in W. Ernst, R. Zimmermann (eds.), *Zivilrechtswissenschaft und Schuldrechtsreform*, Tübingen, Mohr Siebeck, 481 ff.
- Pfeiffer T., Schinkels B. (2001), “Schuldrechtsmodernisierung und AGB-Gesetz”, in H.W. Micklitz, T. Pfeiffer, K. Tonner, A. Willingmann (eds.), *Schuldrechtsreform und Verbraucherschutz*, Baden-Baden, Nomos, 133 ff.
- Piraino F. (2015), “Il diritto europeo e la ‘giustizia contrattuale’”, in *Europa e diritto privato*, 233 ff.
- Pistor K. (2019), *The Code of Capital: How the Law Creates Wealth and Inequality*, Princeton, PUP.
- Raiser L. (1936), *Das Recht der allgemeinen Geschäftsbedingungen*, Bad Homburg, Gentner.
- Raiser L. (1958), “Vertragsfreiheit heute”, in *Juristen Zeitung*, 1 ff.
- Rakoff T.D. (1983), “Contracts of adhesion: an essay in reconstruction”, in *Harvard Law Review*, 1173 ff.
- Reich N. (1994), “L'information du consommateur”, in Y. Serra, J. Calais-Auloy (eds.), *Concurrence et Consommation*, Paris, Dalloz-Sirey, 23 ff.
- Reich N., Micklitz H.W. (2014), “Economic Law, Consumer Interests, and EU Integration”, in N. Reich, H.W. Micklitz, P. Rott, K. Tonner (eds.), *European Consumer Law*, Cambridge, Intersentia, 45 ff.
- Rizzo V. (1983), *Condizioni generali del contratto e predisposizione normativa*, Napoli, ESI.
- Rochfeld J., Houtcieff D. (2003), “Perspectives de développement du droit communautaire en matière de la consommation”, in R. Schulze, M.

- Ebers, H.C. Grigoleit (eds.), *Informationspflichten und Vertragsschluss im Acquis Communautaire*, Tübingen, Mohr Siebeck, 49 ff.
- Rodotà S. (1972), “Il controllo sulle condizioni generali di contratto”, in G. Amato, S. Cassese, S. Rodotà (eds.), *Il controllo sociale delle attività private*, Bologna, il Mulino, 239 ff.
- Roppo E. (1975), *Contratti standard*, Milano, Giuffrè.
- Roppo V. (2020), *Il contratto del duemila*, Torino, Giappichelli.
- Roth W.H. (2001), “Europäischer Verbraucherschutz und BGB”, in *Juristen Zeitung*, 475 ff.
- Salvi C. (2015), *Capitalismo e diritto civile*, il Mulino, Bologna.
- Scalisi V. (2011), “Autonomia privata e regole di validità: le nullità conformative”, in *Rivista di diritto civile*, I, 738 ff.
- Schäfer J. (1992), *Das Transparenzgebot im Recht der AGB*, Frankfurt, Lang.
- Schlechtriem P. (2001), “Die Anpassung des deutschen Rechts an die Klausel-Richtlinie und den Richtlinienvorschlag zum Verbraucherkaufrecht”, in *Zeitschrift für schweizerisches Recht*, 335 ff.
- Schmidt-Räntsch J. (2001), “Reintegration der Verbraucherschutzgesetze durch den Entwurf eines Schuldrechtsmodernisierungsgesetzes”, in R. Schulze, H. Schulte-Nölke (eds.), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts*, Tübingen, Mohr Siebeck, 169 ff.
- Schulze R., Zoll F. (2021), *Europäisches Vertragsrecht*, Baden-Baden, Nomos.
- Scognamiglio C. (2002), “L’adempimento dell’operazione economica telematica tra «realtà virtuale» ed «interessi dei contraenti»”, in V. Ricciuto, N. Zorzi (eds.), *Il contratto telematico*, Padova, Cedam.
- Sirena P. (2004), “L’integrazione del diritto dei consumatori nella disciplina generale del contratto”, in *Rivista di diritto civile*, I, 787 ff.
- Stempel C. (2017), “Der lange Weg zur Teilvereinheitlichung der AGB-Kontrolle in Europa – Die Rechtsprechung des EuGH zur Richtlinie 93/13”, in *Zeitschrift für Europäisches Privatrecht*, 106 ff.
- Ulmer P. (2001a), “Das AGB-Gesetz: ein eigenständiges Kodifikationswerk”, in *Juristen Zeitung*, 491 ff.
- Ulmer P. (2001b), “Integration des AGB-Gesetzes in das BGB?”, in R. Schulze, H. Schulte-Nölke (eds.), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts*, Tübingen, Mohr Siebeck, 215 ff.
- Vogenauer S. (2015), “Article 4.6”, in Id (ed.), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*, Oxford, OUP.
- Wagner G. (2016), “Der Verbrauchsgüterkauf in den Händen des EuGH: Überzogener Verbraucherschutz oder ökonomische Rationalität?”, in *Zeitschrift für Europäisches Privatrecht*, 99 ff.

- Weatherill S. (2017), *The Internal Market as a Legal Concept*, Oxford, OUP.
- Wilhelmsson T. (2011), “Standard Form Conditions”, in A.S. Hartkamp, M.W. Hesselink, E. Hondius, C. Mak, E. du Perron (eds.), *Towards a European Civil Code*, Alphen aan den Rijn, Kluwer, 571 ff.
- Wilhelmsson T. (2003), “Private Law Remedies against the Breach of Information Requirements of EC Law”, in R. Schulze, M. Ebers, H.C. Grigoleit (eds.), *Informationspflichten und Vertragsschluss im Acquis Communautaire*, Tübingen, Mohr Siebeck, 245 ff.
- Wilhelmsson T. (1996), “Public Interest Litigation on Unfair Terms”, in H.W. Micklitz, N. Reich (eds.), *Public Interest Litigation before European Courts*, Baden-Baden, Nomos, 385 ff.
- Wolf M. (2001), “Party Autonomy and Information in the Unfair Contract Terms Directive”, in S. Grundmann, W. Kerber, S. Weatherill (eds.), *Party Autonomy and the Role of Information in the Internal Market*, Berlin-New York, De Gruyter, 319 ff.
- Zaccaria A. (2016), “Anmerkungen zur Umsetzung der Richtlinie 93/13/EWG über missbräuchliche Klauseln in Verbraucherverträgen in Europa”, in *Zeitschrift für Europäisches Privatrecht*, 159 ff.
- Zachariasiewicz M. (2017), “Inclusion of Standard Terms in Electronic Form under the CISG”, in I. Schwenzer, L. Spagnolo (eds.), *The Electronic CISG*, The Hague, Eleven International, 95 ff.
- Zimmermann R. (2004), *Roman Law, Contemporary Law, European Law*, Oxford, OUP.
- Zimmermann R. (2001), “Schuldrechtsmodernisierung?”, in *Juristen Zeitung*, 179 ff.
- Zoll F. (2016), “The problems associated with the implementation of directives into national legal systems – a few examples from the codified legal traditions”, in C. Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham, Edward Elgar, 68 ff.



## Chapter 6

# LEGAL VOLUNTAS EX MACHINA. THE IMPOSSIBILITY OF NON-PERFORMANCE IN THE AGE OF CODE

Giulia Bazzoni

*ABSTRACT: This essay investigates the implications of smart contracts for the traditional concept of contractual non-performance. Smart contracts – self-executing agreements encoded on blockchain platforms – automate the fulfilment of obligations once predefined conditions are met. While they offer advantages in terms of efficiency, transparency, and decentralization, they also raise complex legal questions. Most notably, once a smart contract is deployed and the triggering conditions are satisfied, the execution becomes technically irreversible. This technological determinism paradoxically deprives the parties of their traditional contractual faculty to suspend, negotiate, or even breach performance. In this sense, smart contracts challenge the very notion of legal voluntas as the sovereign expression of private autonomy, replacing it with the preprogrammed logic of code.*

*KEYWORDS: Smart contract – Code – Non-performance – Legal voluntas – Automation – Execution.*

*SUMMARY: 1. The age of smart contracts: Logic, structure and execution. – 2. The structural immutability of smart contracts. – 3. The impossibility of non-performance: A critique of smart contract immutability. – 4. From consent to code: Rethinking the role of the legal voluntas. – 5. Between automation and adaptability, preserving the legal voluntas in the age of code. – References.*

### 1. The age of smart contracts: Logic, structure and execution

It has been aptly observed that the history of contract cannot be separated from the history of the technologies through which exchange relations are shaped (Irti 1998, 364 ff.).

From this perspective, one might speak of a Darwinian adaptability inherent in contract law, a legal domain that has demonstrated remarkable resilience in the face of technological advancement.

Far from being static, contract law reveals itself as a dynamic construct, continuously reshaping its structure, mechanisms, and theoretical foundations to accommodate successive waves of innovation. Yet, the current frontier marks not a mere stage in this evolutionary continuum, but a profound

rupture (Hildebrandt 2016). What is unfolding is no longer a mere process of legal adaptation to technological innovation; rather, technology itself assumes the role of the contract (see Benedetti 2021, 411 ff.; Pardolesi, Davola 2019, 195 ff.).

Building upon this premise, smart contracts emerge as a paradigmatic expression of such a transition. They are frequently regarded as a new form of machinic private autonomy, situated at the confluence of artificial intelligence, digital automation, and classical contract doctrine. Far from simply operating within the boundaries, smart contracts tend to reconfigure the role of legal *voluntas* in contract law.

In this sense, it is worth recalling that smart contracts were first theorised by computer science and cryptographer Nick Szabo in the 1990s who defined a smart contract as «a computerized transaction protocol that executes the terms of a contract» (Szabo 1994; Szabo 1996; Szabo 1997).<sup>1</sup>

As of today, there is no universally accepted definition of a smart contract. It is variously described as «a computer code that programmatically executes transactions in accordance with predefined terms» (Chamber of Digital Commerce 2018) or as «an agreement encoded in computer code and deployed within a decentralized virtual infrastructure» (Eenmaa Dimitreva and Schmidt-Kessen 2019, 71). Nonetheless, there appears to be broad consensus regarding the core components that characterize a smart contract: namely, computational language, disintermediation, automation, and immutability.

In essence, conceived as self-executing digital protocols, smart contracts rely on conditional algorithmic logic – typically framed in *if this – then that* structures – to automate the enforcement of obligations arising from an agreement between parties (Böhm, Jacopini 1966, 336 ff.). More precisely, the *if this – then that* function provides that,<sup>2</sup> upon the occurrence of certain conditions (if ...) established by the programmer and verifiable through inputs received from so-called ‘oracles’, the smart contract is triggered and gives rise to the execution of the contract (*ex multis*, Tommasi 2022, 840; Cuccuru 2017, 107 ff.; Doria, Bassan, Rabitti, Sciarrone Alibrandi, Malvagna 2024, 21 ff.).

The underlying ambition was clear: to make contractual performance not merely predictable, but compulsory by design, thereby eliminating the need

---

<sup>1</sup>The first definition that Szabo provided dates to 1994, in the aptly titled essay *Smart Contract*. The very first example of a smart contract used by Szabo was the vending machine: an automated machine that provides various items, such as chocolate, drinks, or snacks, in exchange for money. This represents an automated transaction that does not require the involvement of a third party and occurs automatically. He returned to the topic in the following years, further exploring certain aspects.

<sup>2</sup>See Orlandi, in this volume, 3 ff., who reflects on the *if-then* construct – albeit in a different context – drawing on the thought of Hans Kelsen.

for external enforcement mechanisms or judicial intervention. Instead of having a judge interpret and enforce the statements (and the subsequently emerging *lex contractus*), it is possible to delegate these tasks to the machine (Raskin 2017, 314).

Whilst Szabo's original conception did not rely on blockchain, the prevailing contemporary understandings almost invariably place smart contracts within distributed ledger technology (DLT) ecosystems (Kalbantner, Markantonakis, Hurley Smith, Sheperd 2021; Iansiti, Lakhani 2017). Indeed, smart contracts have gained widespread popularity only in recent years, as technological advances – most notably the emergence of blockchains – have made their practical application feasible (Durovic 2022, 123).

Accordingly, some authors place particular emphasis on the specific technology that enables the existence of smart contracts, defining them as «a piece of code which is stored on an Blockchain, triggered by Blockchain transactions, and which reads and writes data in that Blockchain's database». (Greenspan 2019).<sup>3</sup>

This definition places emphasis on the Blockchain technology as one of the core features of smart contracts. In other words, without this technology, the smart contract system could not exist; it represents its logical precondition.<sup>4</sup>

These infrastructures confer defining attributes: immutability, decentralisation, and radical transparency (Guadamuz 2019, 1 ff. focuses on the structure and highlights its critical aspects).<sup>5</sup> Indeed, data are redundantly stored across a decentralised network of nodes, each maintaining an identical copy

---

<sup>3</sup> Similarly, Savelyev 2017, 120 f. considers Blockchain as a paradigm, shifter in the sphere of contracting: it allows automation of the process of contractual performance of both parties.

<sup>4</sup> This technological determinism is taken even further by Savelyev 2017, 120 who provocatively observes that «if there is no difference in principle between vending machines and smart contracts, then we will have to admit that smart contracts are almost as old as Roman law itself».

<sup>5</sup> Blockchain cannot be changed; it is tamper-proof, and whatever is written into it cannot be altered or censored. This means that any smart contract recorded on this ledger will also be immutable, making it difficult – if not impossible – to modify the code. To better understand this, one must look at how blockchain immutability works from a technical perspective. Smart contracts are considered immutable due to something called a hash. In simple terms, a hash function is a mathematical operation that generates a unique output based on a given input: you can take a piece of text, convert it into numbers, and then apply a formula (the hash function) that produces a unique number (the hash value). If you alter the original text, the resulting number will no longer match the original hash value. Blockchains are composed of blocks of transactions that are linked together by including the hash of the previous block in the next one. This chaining of hashes makes it virtually impossible to alter past transactions without breaking the entire chain, thus ensuring the system is tamper-proof.

of the ledger. Any alteration is subject to strict consensus mechanisms, thereby ensuring resilience against manipulation and preserving the integrity of recorded transactions.

Such features generate substantial systemic efficiencies: reduced transaction costs, expedited performance, enhanced reliability in cross-border exchanges, and streamlined certification and authentication processes (Mik 2017, 269 ff.).

Therefore, smart contracts are far from being mere technological tools; rather, they mark a significant conceptual shift. The architecture of the agreement is not merely supported by code: it is constituted by it (Drummer, Neumann 2020, 337 ff.).

More specifically, the lifecycle of a smart contract typically unfolds across four distinct stages: (i) design, wherein the substantive content of the agreement is articulated in the form of executable code; (ii) deployment, which entails the inscription of that code onto a blockchain and its digital signing by the parties, typically via asymmetric cryptographic keys; (iii) execution, automatically triggered upon the occurrence of predefined conditions as encoded by the drafting party or parties; and (iv) termination, the point at which the contract, having fulfilled its programmed purpose, ceases to produce legal effects, much like a traditional contract that has been fully performed by both parties (Carrato 2020, 370 ff.; Sillaber, Watl 2017, 498 f.; Durovic, Janssen 2019, 61 ff.).

At the first stage, the coding process represents a fundamental break with conventional normativity (for a more extensive reference, see Maugeri 2021, who questions whether codified rules are capable of governing emerging phenomena such as smart contracts). Legal meaning is no longer generated through interpretative reasoning or linguistic nuance, but through the binary clarity of computational syntax.

The legal form is transformed into a set of machine-readable instructions, operating with technical certainty and deterministic precision (Savelyev 2017, 124 ff.; Dale 2010). In short, one of the key elements that fundamentally distinguishes smart contracts from traditional ones is that smart contracts are written in a programming language and encoded in a format readable by machines, whereas traditional legal contracts are drafted in natural languages (Durovic 2022, 125, where she highlights the differences between digital and traditional contracts). This inevitably entails not only a disruption of legal language, but also – and more importantly – a shift in the underlying logic of contracts themselves, including the interpretation of party intent, *i.e.* their *voluntas*.

Upon the parties' cryptographic consent to the encoded terms, the contract is deemed concluded and immediately immutable. The execution stage

then follows automatically, governed not by deliberation or human volition but by pre-scripted triggers. Once the programmed condition materialises, the contract executes without pause or possibility of reconsideration.

In this model, the machine is no longer a neutral intermediary; it becomes the operative will (*voluntas*). Indeed, «the basic idea behind a computable contracts term is to create a series of actionable, computer-processable instructions that approximate what is that the parties are intending to do in their contractual arrangement» (see Surden 2012, 658).

In such a scenario, human parties effectively abdicate discretion, transferring execution to a surrogate legal *voluntas*, that of the system itself.

This delegation is not purely functional; it is juridical. Consent is no longer a continuous force shaping the contractual relationship, but becomes a singular moment, crystallised and irrevocable. Thus, contractual autonomy is displaced from the human subject and relocated within the structural logic of the technological artefact (Lemme 2019, 129 ff.).

What emerges is a model of hetero-directed private autonomy, in which the parties' will is not sovereign, but conditioned by the embedded design of the code. This reality places significant strain on the classical conception of contract as a meeting of minds, a convergence of freely formed and evolving intentions, resulting in the so-called *lex contractus*.

In the smart contract paradigm, that convergence is mediated – and ultimately overridden – by a third individual will: that of the machine.<sup>6</sup> Once entrusted with execution, the machine admits of no renegotiation, no pause, no retreat and, above all, structural preclusion of non-performance. The contract becomes a closed system, immune to relational dynamics, contextual shifts, or equitable recalibration.

In this sense, it is as if there were a displacement of will within the *lex contractus*: on the one hand, the law (of the contract), which belongs to the parties; on the other, the will, which instead belongs to the machine that drafts the contract.<sup>7</sup>

---

<sup>6</sup> See Grondona, in this book, 73 ff., particularly on the role of individual will as a source of juridical normativity.

<sup>7</sup> See Ferrante, in this volume, 89 ff., who, focusing on the issue of terms and conditions, identifies the emergence of a new paradigm in which the will of the parties (*voluntas*) is the will of only one party, with the other merely adhering to it. In a similar vein, see also Piraino, in this volume, 29 ff., who shows how such contractual frameworks increasingly undermine the very structural core of contract theory, including the foundational principle of party autonomy and the role of genuine will formation (legal *voluntas*) in the contractual process.

## 2. The structural immutability of smart contracts

What distinguishes smart contracts from traditional agreements is not simply their capacity to facilitate performance, but rather their underlying ambition: namely, to render execution mechanical – indeed, machinic – and therefore inexorably automatic.<sup>8</sup> In essence, the fundamental difference lies in their function: whereas legal contracts define the normative relationship between the parties, smart contracts define the automated execution of pre-established conditions between them (Durovic 2022, 125).

The algorithm represents the transposition, in computational terms, of the will of the parties, to who are tasked with defining the normative framework that governs the contractual relationship.

The advantage inherent in the adoption of a smart contract resides in its capacity to incorporate an indefinite – potentially infinite – number of contingencies, each modelled, in accordance with computational logic, as so many *if-then* conditionals (Kasprzyk 2018, 101 ff.).

Accordingly, it becomes feasible to delineate an endless series of clauses capable of determining, in a given moment and in light of specific and concrete circumstances (*if*), the precise content of the respective obligations of the parties (*then*) (Di Sabato 2024, 366).

In this light, it may be persuasively argued that the true adversary targeted by the techno-economic rationale of smart contracts is not inefficiency, but legal indeterminacy itself (Benedetti 2021, 412). This is precisely why objectification, the progressive erosion of classical voluntarist doctrines, and the automation of legal obligations constitute the stylistic core of this emerging contractual paradigm.

On these grounds, it has been observed – ironically, yet incisively – that smart contracts are neither ‘smart’ nor ‘contracts’.<sup>9</sup>

Starting from the adjective smart, the term implies a degree of intelligence; understood as the capacity for contextual adaptation, purposive flexibility, and autonomous decision-making.<sup>10</sup>

---

<sup>8</sup>The evocative expression *machine will* recalls the title of the two recent volumes *La Volontà macchinica* presented by dalla Massara and Al Mureden (2024 and 2025).

<sup>9</sup>In this respect, some Authors do not consider the smart contract as falling within the conventional definition of a contract. See, Sirena 2019; Gabrielli 2019, 299 ff.; Di Ciommo 2018, 291 ff. But also, Durovic 2022, 122 who shows that «the name ‘smart contracts’ itself is confusing and inadequate as the notion of the smart contract is a misnomer. As an initial observation, it is important to emphasize that smart contracts are neither smart nor contracts in the legal sense, so the terminology used to explain this form of new technology is wrong and has led to confusion».

<sup>10</sup>According to certain scholars, the smart contract may be characterised as a set of

However, smart contracts, though undeniably situated within the broader ecosystem of emerging technologies, remain deterministic protocols. Rather, such contracts «are not smart because the current stage of technological development does not allow the use of smart contract in more complex commercial transactions» (Durovic 2022). They are not intelligent in any meaningful legal or technical sense: they simply execute predefined instructions and lack any inherent adaptability or capability to accommodate unforeseen circumstances (Karamanlioğlu 2018, 29 ff.).

From this perspective, it is accurate to speak of automation, but certainly not of autonomy. A smart contract is capable of self-executing a given task – more precisely, the performance of an obligation – without leaving any margin for default, discretion, or inefficiency (Maugeri 2020, 375 ff.). Accordingly, within this framework, the very notions of breach or non-fulfilment become conceptually obsolete.

Execution unfolds mechanically, in rigid adherence to the *if this-then that* logic embedded in its code. Once the stipulated condition is met, the operation is carried out automatically: the machine takes charge of the exchange and therefore performance is imposed, not deliberated.

The human will – at least for now – remains in the background: it writes the code, chooses to deploy it, and elects to transact under its terms. Yet a critical issue remains unresolved: what happens when circumstances arise that were not, and could not have been, anticipated at the time of programming? In other words, what becomes of the agreement when the factual matrix diverges from the predefined logical architecture and escapes the rigid dichotomy of the *if-then* construct?

To be sure, the future emergence of smart contracts endowed with artificial intelligence or adaptive capacities – systems capable of autonomously responding to unforeseen external stimuli – cannot be excluded (Di Sabato 2017, 391 ff.). In such a scenario, no longer as implausible as it once appeared, a serious question arises as to whether the resulting arrangement would still qualify as a contractual relationship between human parties mediated by technological tools, or whether it would instead require a fundamental redefinition of the legal nature of the smart contract itself.

Closely connected to this is the juridical notion of the contract itself,

---

promises, albeit in digital form, including the protocols within which the parties automatically perform such promises. See, in this regard, George 2018, 404; Chen Wishart 2018, 71; Blum 2007, 2, who contends that the smart contract does not fall within the definition of a promise or agreement recognized by the law, nor of an exchange relationship created by oral or written agreement between two or more persons, containing at least one promise, and recognized in law as enforceable. Others, by contrast, consider the smart contract to be a form of automated legal document. See Surden 2012, 629; Werbach, Cornell 2017, 338.

which appears to be, at the very least, in a state of relative crisis. Indeed, smart contracts seem to share only a tenuous affinity with the traditional definition enshrined in articles 1321 and 1322 of the Italian Civil Code (Cerrato 2020, 378).

In classical legal theory, a contract is understood as the meeting (or concurrence) of individual wills, expressed through mutual consent, with the purpose of producing legally binding effects. By contrast, smart contracts are not legal contracts in this sense. As noted in the literature, smart contracts are «rather computer codes stored and replicated on the system and supervised by the network of computers that run the blockchain» (Durovic 2022, 122). They are essentially a technological tool used to execute obligations previously established through a legal contract.

In many respects, smart contracts constitute a fundamentally different legal object. So radically distinct are they, in fact, that – were the term not already in use – they might aptly be described as *alien* (the reference to the adjective is a clear allusion to De Nova 2010), or at the very least, *extraneous* to the traditional legal understanding of contractual obligations. Indeed, to borrow from Lessig's formulation, they are «like contracts [...], but like is not» (Lessig 1999b, 530): a resemblance in structure, perhaps, but not in legal essence.

Smart contracts do not pertain to the formation of contractual relationships but operate almost exclusively at the level of execution. They function in the post-consensual phase, after the agreement has been reached and formalised.

What thereby emerges is a renewed conceptual bifurcation between the negotiation and conclusion of the agreement, on the one hand, and its automated implementation, on the other. Rather than constituting an agreement by which the parties regulate their mutual patrimonial obligations, the smart contract should be more accurately described as a technical infrastructure, a tool for automating the execution of obligations previously agreed upon.

Nevertheless, art. 8-ter, paragraph 2 of Italian Law No. 12 of 11<sup>th</sup> February 2019 appears to presuppose the existence of a valid underlying agreement, implicitly reaffirming that a smart contract cannot stand alone as an autonomous legal act (see on this point Benedetti 2021, 414 f.). In this regard, the language adopted by the legislator seems, on one hand, to underscore the technological nature of the instrument, defining it as a computer programme functioning exclusively on distributed ledger technologies, to the exclusion of alternative systems. On the other hand, the deliberate inclusion of terminology traditionally associated with contractual relations – such as *execution*, *binding force*, *parties*, and *effects* – unequivocally points to the necessity of anchoring the smart contract within the framework of a pre-existing and legally recognised agreement (Tommasi 2022, 838).

Thus, the legislative text reveals a dual nature: technical in form, yet

inherently contractual in function. In this light, the expression *smart contract* ought not to be interpreted as denoting a contract in the strict legal sense, but rather as a symbolic construct – a rhetorical expression – functionally referring to the existence of a transaction between parties.

The term *contract* evokes, therefore, the operational and relational framework within which automated performance takes place. In this light, the smart contract is, above all, an informatic protocol – more precisely, a software programme – designed to autonomously govern certain events affecting a pre-existing legal relationship, based on instructions predefined by the parties.

From this, a tentative working definition may be proposed: the smart contract is not, properly speaking, a contract or a set of contracts. Rather, it constitutes a technological progression: a system for managing all or part of the contractual life cycle through complete automation of its operative phase, based on code predefined or selected by the parties, who thereby subject themselves to its effects (Benedetti 2021, 414 f.).

Support for this interpretation lies in the observation that none of the four essential features typically associated with the phenomenon, namely, computational language, disintermediation, automation, and immutability, concerns the substantive content of the agreement.

They pertain exclusively to its formal infrastructure and operational dynamics within the broader contractual framework.

Accordingly, the term *smart contract* may be more accurately understood as denoting a contractual architecture, wherein the defining characteristic lies not in the substance of the agreement, but in the form through which it operates, both as legal act and as functional relationship.

In other words, the outcome of such technological techniques is, ultimately, still a contract. The adoption of a smart contract does not replace the legal agreement but presupposes it: the very decision to employ a smart contract is itself the result of a prior configurative contractual agreement between the parties. It is this agreement that represents the real *lex contractus* – the normative framework to which the parties deliberately subject themselves.

What is particularly noteworthy is that such contractual forms introduce hitherto unexplored scenarios for contract law, which now finds itself undergoing a formidable stress test; a test that is as cultural and epistemological as it is juridical.

This challenge arises from a technology that promises to disintermediate commercial transactions, eliminate the risk of non-performance, and liberate the parties from the burden of reciprocal trust, ironically, by means of a system of distributed chains (blockchain), composed of countless interdependent nodes that certify transactions and render them immutable (Mik 2022, 100 ff.).

Such developments compel a reconsideration of the foundational

assumptions of contract law. The very notion that obligations are enforced externally through institutions based on interpretation, discretion, and equity is replaced by a logic of *ex ante* determinism, wherein performance is not merely expected; it is engineered, *i.e.*, technically preordained.

The result is a profound reversal in the traditional trajectory of legal reasoning: from *ex post* adjudication to pre-coded execution; from interpretation to activation; from trust to architecture; and from legal will to automation.

### 3. The impossibility of non-performance: A critique of smart contract immutability

In this context, one is confronted with a novel form of normativity encapsulated in the concept of *lex informatica*: a system of algorithmic, protocol-based rules that increasingly supplant traditional legal sources within digital environments (Reidenberg 1998, 553 ff.).

The shift introduced by smart contracts does not merely alter the form in which contractual obligations are expressed; it reconfigures the very logic of contract and *lex contractus* itself. Code is not designed to accommodate the theoretical possibility of non-performance; rather, it is architected to ensure performance with inexorable technical necessity (Mik 2025).

The smart contract, like any computer program, operates by processing available information and linking specific effects to such data, in accordance with a rigid and inexorable logic (*if-then*). The reaction to an input is inevitable – provided the input exists – but entirely absent if it does not.

This operational rigidity constitutes both the defining feature and the intrinsic limitation of the smart contract. Once set in motion, the functioning of the code is immutable. Should a contracting party wish to refrain from performance, to delay execution, or to fulfil the obligation partially or under revised terms, such discretion is precluded by design. Conversely, no margin remains for tolerance towards hypothetical or potential hardship or impracticability on the part of the counterparty (Di Sabato 2024, 368 f.).

From this perspective, the now well-known expression *code is law* aptly captures the operative structure of smart contracts, wherein automation assumes the normative function of law itself (The direct reference is clearly to the writings of Lessig 1999a; Lessig 2006). Blockchain technology becomes the passport to a deeper cultural transformation: the total disintermediation of contractual relations and the progressive elimination of trust as a legal and economic variable, replaced by cryptographic consensus mechanisms. Thus, amid the ongoing blockchain revolution, «the grand challenge will be to identify the legal boundaries of blockchain-based smart contracts» (Möslein 2020, 313 ff.).

Indeed, blockchain promises immutability and decentralised trust, a kind

of technological *veritas*, namely, a form of truth defined not by legal interpretation or factual investigation, but by the immutable logic of the code itself. In this framework, neither the code nor its data sources can be altered once deployed (Gambino 2019, 1169 ff.). This ensures strict and automatic adherence to the rules it embodies (Mik 2025).

Within the blockchain framework, what is declared is also intended, and it is precisely this coincidence between expression and legal will (*voluntas*) that produces binding effects between the parties, while simultaneously generating trust within the wider community. This, perhaps more than any other feature, constitutes the defining element of the phenomenon.

Thus, the distance from traditional models of electronic contracting is immediately apparent: in those systems, technology acts purely as a medium through which a traditional agreement is concluded or performed. By contrast, blockchain-based smart contracts project the agreement into a dimension that neutralises human interference: execution does not require human intervention, and – crucially – cannot be obstructed, altered or even blocked by it. The very possibility of breach is eliminated, not by legal sanction, but by structural design.

Hence the claim that smart contracts eliminate the risk of non-performance and eradicate the transactional cost of mistrust; costs that, in classical contracting, necessitate guarantees, safeguards, or monitoring mechanisms. Execution is ineluctably assured, surpassing even the most stringent of guarantees, which, for all their efficacy, remain ultimately contingent upon the reliability and good faith of the guarantor called upon to remedy the debtor's default (Savelyev 2017, 126; Karamanlioğlu 2018, 35; Werbach- Cornell 2017, 334).

Smart contracts are, by design, programmed not to fail. They require no legal rules to address breach, nor do they rely on liability frameworks for default. Their defining features – non-retractability, immutability, and irreversibility – operate with an absolute and impersonal finality that profoundly impacts the concept of will in contract law (Cerrato 2020, 382).

In this model, the smart contract abolishes, from the outset, even the abstract possibility of *post hoc* amendment. The execution phase becomes hermetically sealed: once the contractual conditions are encoded and triggered, performance follows inexorably. The result is a system in which, once concluded, the agreement becomes inescapably binding, not as a matter of legal coercion, but of technological design. In this sense, judicial protection becomes, if not altogether obsolete, then radically marginalised.

Execution is no longer a matter of renewed intention or mutual assent, but the result of automated determinism. Indeed, by eliminating the changeability of contractual intention, smart contracts impose a rigid operational logic that resists adaptation to unforeseen contingencies. As a result, legal will – long

regarded as both a source of risk and a reservoir of flexibility within contractual relations – is systematically diminished, if not displaced. In its place, a regime of algorithmic certainty emerges, one that prioritises predictability of cost-efficiency and return over adaptability or relational nuance.

The contract is no longer tailored to the particularities of the individual or the contingency of circumstance but moulded by the logic of the provider and calibrated to serve the economy, the market, and consumption itself. And yet, such rigidity, while enabling the predefinition of risk and performance parameters, undermines one of the foundational principles of contract law: the capacity of the parties to adapt, to renegotiate, or even to suspend their obligations, considering unforeseen or supervening events.

Once the smart contract is concluded, performance no longer depends on human *voluntas*. The parties are neither notified nor consulted; they are confronted with the irreversible consequences of code that has already begun to operate, autonomously and inexorably (Battelli, Incutti 2019, 928 f.; Pasquino 2017, 245; Werbach, Cornell 2017, 332). What is thereby lost is not only flexibility, but also the right not to perform; a freedom that, in certain contexts, may be both lawful and economically rational (Scalise 2007, 721 ff.).

The rigid automation of performance precludes the debtor from exercising self-help remedies in the event of counterparty breach, from seeking judicial adjustment to restore contractual equilibrium, or from engaging in efficient breach, where non-performance paired with compensation would yield a superior outcome for all involved. Paradoxically, the very attributes that are celebrated as guarantees of certainty – non-retractability, immutability, and irreversibility – may, under some conditions, become the very source of systemic inefficiency (Cerrato 2020, 382 ff.).

In circumstances where deviation from performance would be more equitable or efficient, such deviation is no longer available; not because it is prohibited by law, but because it is technically foreclosed. A will that may evolve over the life of a contract is, admittedly, a source of uncertainty and potential conflict. Yet it also enables responsiveness to the unforeseen and constitutes the juridical expression of human agency within the contractual relationship.

The architecture of the smart contract, by contrast, constrains this dynamic capacity, crystallising the will at the moment of coding and precluding any subsequent recalibration (Battelli, Incutti 2019, 928 f.). The parties' intent becomes temporally fixed in advance and is expressed outside of the code itself (Finocchiaro 2018, 441 ff.). In this light, it has been aptly observed that «the intention to be legally bound is manifested by means of a computer. In this sense, smart contracts represent the intentions of the transacting parties, who chose to express their obligations in code and automate certain aspects of contractual performance» (Mik 2017, 271).

This technological determinism, however efficient it may appear, poses serious normative challenges. By automating performance and reducing the scope for human intervention, smart contracts risk undermining fundamental principles of contract law, including party autonomy, interpretative flexibility, and judicial oversight. In particular, they may erode the very foundations of contractual theory, which rests on the centrality of *voluntas* as the juridical expression of personal autonomy. The rigid, self-executing nature of code contrasts with the inherently contextual and relational dimension of legal obligations, thereby raising complex issues concerning enforceability, the availability of remedies, and the protection of weaker parties.

Within this framework, performance no longer derives from the binding force of mutual promises, nor from the coercive authority of legal sanction in the event of breach. Rather, it depends entirely upon the internal consistency of the technical infrastructure in which the smart contract operates. The effectiveness of execution is secured not by the parties' willingness to perform, but by the structural integrity of the system itself. In this schema, contract law ceases to govern a relationship between subjects and instead comes to regulate the execution of a machine.

#### 4. From consent to code: Rethinking the role of the legal *voluntas*

As seen, smart contracts are self-executing instruments that dispense with intermediaries, human discretion, and – crucially – post-contractual intent. Yet this frequently celebrated efficiency conceals a more radical transformation: the progressive reconfiguration of the relationship between legal intention (*voluntas*) and performance.

Contrary to the classical conception of contract as a meeting of minds – *contractus* as both rule and will – smart contracts draw attention to a structural divergence. The contract, in this paradigm, is not primarily an expression of human intention but functional tool governed by code, and so digital logic.

While traditional doctrine often identifies the contract with the will that animates it, in practice the contract is a normative structure for which the will is merely the most common matrix (Gentili 2022, 701 ff.). Nonetheless, the human element cannot be entirely disregarded. At the very least, some manifestation of intention must be located at the upstream stage, whether in the choice to employ a smart contract, in the drafting of its code, or in the configuration of its operational parameters (Benedetti 2021, 420). However, such intention is difficult to trace. Algorithmic language is by nature formal, opaque, and lacking in expressive force (Garapon, Lassegue 2021). What was once *lógos* – reasoned articulation – becomes *a-lógos*: silent, inarticulate computation (Perlingieri 2020, 181 ff.).

Smart contracts, therefore, raise profound questions about the continuing role of legal *voluntas* in contract law.

Classical theory presupposes a central role for human will, interpretative reasoning, and, not least, the freedom to diverge and dissent. By contrast, the smart contract paradigm reduces these faculties to a set of executable, pre-determined instructions, thereby transforming the open texture of contractual relations into the closed logic of code. Once deployed on a blockchain, the contract becomes autonomously operative, foreclosing the possibility of any discretionary intervention.

This feature must be understood in its dual dimension. On the one hand, it entails a significant reduction in party autonomy – specifically, the capacity to breach or delay performance – which may indeed produce desirable externalities in terms of transactional certainty and economic efficiency. This is precisely what makes them very desirable to the businesses: the issue of certainty, parties can be reassured that to the established promises will eventually be executed and that nothing can stop that (Durovic 2022, 123). On the other hand, it marks a profound displacement of trust: transferred from person to systems, no longer invested in the reliability or good faith of the counterparty, but in the technical infrastructure that guarantees immutability and tamper-resistance (Eenmaa Dimitrieva, Schmidt-Kessen 2019, 69 ff.; Battelli, Incutti 2019, 928 f.).

Within this rigid architecture, the very notion of contractual will risks not only being obscured but rendered irrelevant. Legal *voluntas* ceases to operate as a dynamic force accompanying the contractual relationship over time; it is instead reduced to a static expression, crystallised at the moment of formation. Smart contracts thus embody a radical *ex ante* fossilisation of intent: once the code is executed, the autonomy of the parties is effectively exhausted. No space remains for deliberation, adjustment, or contextual responsiveness.

To this, a further complication must be added. In many instances, the contract is no longer merely executed by the machine; it is determined and interpreted by it. Through the elaboration of pre-set conditions, data inputs, and algorithmic logic, the smart contract may autonomously select variables – such as pricing mechanisms or responses to supervening events – which in traditional law would fall within the discretionary domain of the parties or the judiciary (Morace Pinelli 2020, 677 ff.).

Responsibility for these outcomes is no longer attributable to human volition but to the machine executing them, with ‘absolute fidelity’ to the underlying code. Consequently, the capacity of the parties to control the unfolding of the agreement – to reconsider, suspend, or withhold performance in response to evolving circumstances – is effectively extinguished.

The contract is frozen, both temporally and contextually, immune to

variation, relational contingency, or equitable adjustment. What is lost is not merely the ability to default or renegotiate, but the legal recognition of contractual will as a fluid and evolving force; one that continues to shape the agreement beyond the moment of its inception.

The interpretative mechanisms and judicial remedies that traditionally accompanied the life of a contract become, in this model, largely superfluous. The legal system is no longer called upon to intervene *ex post*; it is replaced by a technological framework that promises – and indeed imposes – a renewed form of legal certainty and calculability.

In short, through technology, the aim is to restore the degree of certainty and calculability in the governance of legal relationships that the market demands, but which the law is no longer able to adequately guarantee (Irti 2016, 100 ff.; Lipari 2017, 157 ff.). As a result, the role of the judge is marginalized: contractual performance is ensured, and textual interpretation becomes unnecessary. Yet in doing so, the contract is redefined: no longer as a negotiated space of human cooperation and evolving mutual intention (*lex contractus*), but as a pre-determined sequence of technologically activated commands.

It is a mechanism that, by design, does not permit non-performance.

The result is paradoxical. In their pursuit of certainty and efficiency, the parties relinquish the very freedom that contract law is historically designed to protect: the freedom – under certain conditions and at their own risk – not to perform. Within the regime of *lex informatica*, such freedom is no longer legally sanctioned; it is technically foreclosed.

At the moment of execution, the code supplants the legal *voluntas* of the parties. Autonomy, in its classical juridical sense, is thus reconfigured: no longer the ongoing capacity to act or refrain from acting in accordance with one's will, but a single act of delegation, an irreversible submission of that will to a rigid and unalterable mechanism.

## **5. Between automation and adaptability, preserving the legal *voluntas* in the age of code**

The paradigm of the smart contract heralds a technological vision of law in which certainty, immutability and irreversibility are not merely technical features but are elevated to normative ideals. By replacing deliberation with execution, discretion with code, and interpretation with architecture, smart contracts present a radical reconfiguration of contractual engagement: one in which performance is no longer chosen but pre-scripted.

Nevertheless, the pursuit of mechanised certainty is not without its institutional and normative. This is not to suggest that such instruments are inherently detrimental; on the contrary, in certain contractual relations,

automated execution offers undeniable advantages in terms of efficiency, predictability, and enforcement. What this analysis seeks to illuminate, rather, is that machinic will – however efficient by design – is not invariably synonymous with perfection.

Its inherent rigidity, encapsulated in the binary logic of *if-then*, may at times yield outcomes that are paradoxically contrary to the economic interests of the parties involved (Sklaroff 2017, 265 ff. spec. 291 ff). In this respect, the human will, precisely in its innate malleability and capacity for contextual discernment, may prove better suited to accommodate unforeseen contingencies. Indeed, the opposition between rigidity and flexibility in the law – particularly in the realm of contract – mirrors the age-old contrast between what is just and what is unjust, as Sophocles' *Antigone* so powerfully witnesses.<sup>11</sup>

This tension is further heightened by the law's enduring need to adapt to evolving social and economic conditions, a dynamic especially evident in contract law, even more so when contracts are automated (Faraci, Lonardo 2022, 155 ff.).

The true challenge, then, lies in striking a judicious balance between these two models of volition: one mechanical, precise, and unyielding; the other adaptive, interpretative, and imbued with juridical sensitivity.

While automation may indeed yield compelling efficiencies in contexts defined by standardised, low-trust transactions, it simultaneously precludes the adaptive capacities that lie at the core of private autonomy.

What is lost is not merely the risk of breach, but the entire juridical architecture that renders breach meaningful: negotiation, suspension, revision, and not least, the strategic and equitable dimensions of non-performance.

Paradoxically, in their pursuit of perfect efficiency through technical rigidity, smart contracts may create systemic inefficiencies within the legal framework, notably by introducing counterproductive institutional inflexibilities that hinder adaptability, dispute resolution, and the exercise of equitable discretion. In scenarios where non-performance would be economically rational, socially desirable, or legally justified – such as hardship, force majeure, or efficient breach – the inexorability of code renders deviation not simply impermissible, but technically infeasible.

The capacity to recalibrate, to rebalance, or to respond to changed intentions and unforeseen circumstances is not merely constrained; it is nullified. By contrast, the classical conception of contract law, however imperfect, acknowledges that human will is dynamic: it evolves, it hesitates, it adjusts. It accommodates the possibility of negotiation, modification, and even rupture, thereby preserving the contract as a living instrument rather than a frozen script.

---

<sup>11</sup> In similar terms: Aristotle, *Ars Rhetorica*.

This volatility, far from being a deficiency, often enables relational resilience, commercial pragmatism, and substantive fairness. It allows the law to function not solely as a structure of enforcement, but as a forum for deliberation, adaptation, and equity. The challenge posed by smart contracts is thus not exclusively technical, but profoundly philosophical.

Efficiency cannot be conflated with automation, nor can legal certainty be achieved through the suppression of freedom. A contract devoid of the potential for divergence is not a stronger contract; it is a fundamentally different legal construct, one that may compromise, rather than uphold, the normative values that contract law is designed to safeguard.

In the age of code, what makes a legal system truly effective is not its ability to prevent every deviation, but its capacity to recognise the right moment – and the right reason – to let the rules bend. For in the end, the value of a contract lies not in its rigidity, but in its resilience – in its capacity to serve human intent even when the code falls short. What truly makes a contract just is not only the logic it encodes, but the will to interpret it wisely, with conscious regard for context, purpose, and fairness.

## References

- Battelli E., Incutti E.M. (2019), “Gli *smart contracts* nel diritto bancario tra esigenze di tutela e innovativi profili di applicazione”, in *Contratto e impresa*, 2019, 925 ff.
- Benedetti A.M. (2021), “Contratto, algoritmi e diritto civile transnazionale: cinque questioni e due scenari”, in *Rivista di diritto civile*, 411 ff.
- Blum B.A. (2007), *Contracts: examples & explanations*, New York, Aspen.
- Böhm C., Jacopini G. (1966), “Flow Diagrams, Turing Machines, and Languages with Only Two Formation Rules”, in *Communications of the ACM*, 336 ff.
- Campagna M.F. (2019), “Gli scambi attraverso algoritmi e il problema del linguaggio. Appunti minimi”, in *Analisi giuridica dell’economia*, 153 ff.
- Carrato S.A. (2020), “Appunti su *smart contract* e diritto dei contratti”, in *Banca borsa e titoli di credito*, I, 370 ff.
- Casey A.J., Niblett A. (2017), “Self-Driving Contracts”, in *The Journal of Corporation Law*, 100 ff.
- Chamber of Digital Commerce (2018), *Smart Contracts, Legal Primer. Why Smart Contracts Are Valid Under Existing Law and Do Not Require Additional Authorization to Be Enforceable*, 1 f.
- Chen Wishart M. (2018), *Contract Law*, Oxford, Oxford University Press.
- Cuccuru P. (2017), “*Blockchain* ed automazione contrattuale. Riflessioni sugli *smart contract*”, in *Nuova giurisprudenza civile commentata*, II, 107 ff.

- Dale R. (2010), “Classical Approaches to Natural Language Processing”, in N. Indurkha, F.J. Damerau (eds.), *Handbook of Natural Language Processing*, 2<sup>nd</sup> ed., New York, Taylor & Francis.
- dalla Massara T., Al Mureden E. (eds.) (2024), *La volontà macchinica*, Bologna, il Mulino.
- dalla Massara T., Al Mureden E. (eds.) (2025), *La volontà macchinica. Realtà e soggettività*, Bologna, il Mulino.
- De Nova (2010), *Il contratto alieno*, Milano, Giappichelli.
- Di Ciommo F. (2018), “Smart contract e (non-) diritto. Il caso dei mercati finanziari”, in *Nuovo diritto civile*, 257 ff.
- Di Sabato D. (2017), “Gli smart contracts: robot che gestiscono il rischio contrattuale”, in *Contratto e impresa*, 378 ff.
- Di Sabato D. (2024), “Tecnologia algoritmica e attività negoziale smart”, in *Contratto e impresa*, 360 ff.
- Doria M., Bassan F., Rabitti M., Sciarrone Alibrandi A., Malvagna U. (2024), “Caratteristiche degli smart contracts”, in *Questioni di economia e finanza, Banca d'Italia*.
- Drummer D., Neumann D. (2020), “Is Code Law? Current Legal and Technical Adoption Issues and Remedies for Blockchain-enabled Smart Contracts”, in *Journal of Information Technology*, 337 ff.
- Durovic M. (2022), “What are Smart Contracts?”, in Z. Slakoper, I. Tot (eds.), *Digital Technologies and the law of obligations*, London, Routledge, 121 ff.
- Durovic M., Janssen A. (2019), “Formation of Smart Contracts under Contract Law”, in L.A. Di Matteo, M. Cannarsa, C. Poncibò (eds.), *Contract law and smart contract*, Oxford, Oxford University Press, 61 ff.
- Eenmaa Dimitreva H., Schmidt-Kessen M.J. (2019), “Creating Markets in No-Trusts Environments: The Law and Economics of Smart Contracts”, in *Computer Law & Security Review*, 69 ff.
- Faraci A., Lonardo L. (2022), “Addressing Contemporary Challenges in Contract Law through Millenary Concepts”, in Z. Slakoper, I. Tot (eds.), *Digital Technologies and the Law of Obligations*, London, Routledge, 166 ff.
- Finocchiaro G. (2018), “Il contratto nell’era dell’intelligenza artificiale”, in *Rivista trimestrale di diritto e procedura civile*, 441 ff.
- Gabrielli E. (2019), “La nozione di contratto e la sua funzione. Appunti sulla prospettiva di una nuova definizione di contratto”, in *Giustizia civile*, 2019, 299 ff.
- Gambino A.M. (2019), “Vizi e virtù del diritto computazionale”, in *Diritto dell’informazione e dell’informatica*, 1169 ff.
- Garapon G., Lassegue A. (2021), *La giustizia digitale. Determinismo tecnologico e libertà*, Bologna, il Mulino.
- Gentili A. (2022), “La volontà nel contesto digitale: interessi del mercato e

- diritti delle persone”, in *Rivista trimestrale di diritto e procedura civile*, 701 ff.
- George S. (2018), “Smart Contracts: Tools for Transactional Lawyers”, in *Texas Journal of Business Law*, 404 ff.
- Gliha D., Marković S. (2022), “Smart contracts and the Evolution of a Legal Perspective on the Protection of Human Rights”, in Z. Slakoper, I. Tot (eds.), *Digital Technologies and the Law of Obligations*, London, Routledge, 166 ff.
- Greenspan G. (2016), “Beware of the Impossible Smart Contract”, in *Blockchain News*.
- Guadamuz A. (2019), “All Watched Over by Machines of Loving Grace: A Critical Look at Smart Contracts”, in *Computer Law & Security Review*, 1 ff.
- Hildebrandt M. (2016), *Smart Technologies and the End(s) of Law*, Cheltenham, Edward Elgar Publishing.
- Iansiti M., Lakhani K.R. (2017), “The Truth about Blockchain”, in *Harvard business review*, 118 ff.
- Irti N. (1998), “Scambi senza accordo”, in *Rivista trimestrale di diritto e procedura civile*, 364 ff.
- Irti N. (2016), *Un diritto incalcolabile*, Torino, Giappichelli.
- Kalbantner J., Markantonakis K., Hurley Smith D., Sheperd C. (2021), “A DLT-based Smart Contract Architecture for Atomic and Scalable Trading”, in *Advance online publication*, 1 ff.
- Karamanlioğlu A. (2018), “Concept of Smart Contract. A Legal Perspective”, in *Kocaeli Üniversitesi Sosyal Bilimler Dergisi*, 29 ff.
- Kasprzyk K. (2018), “The Concept Of Smart Contract From The Legal Perspective”, in *Review of Comparative Law*, 101 ff.
- Lemme G. (2019), “Gli *smart contracts* e le tre leggi della robotica”, in *Analisi Giuridica dell’Economia*, 129 ff.
- Lessig L. (1999a), *Code and other Laws of Cyberspace*, New York, Basic Books.
- Lessig L. (1999b), “The Law of the Horse: What Cyberlaw Might Teach”, in *Harvard Law Review*, 506 ff.
- Lessig L. (2006), *Code: And Other Laws of Cyberspace, Version 2.0: And Other Laws of Cyberspace, Version 2.0*, New York, Basic Books.
- Lipari N. (2017), “I civilisti e la certezza del diritto”, in N. Lipari, *Il diritto civile tra legge e giudizio*, Milano, Giuffrè, 157 ff.
- Maugeri M. (2020), “*Smart contracts* e disciplina in tema di contratto”, in *Osservatorio del diritto civile commerciale*, 375 ff.
- Maugeri M. (2021), “*Smart contract*” e disciplina dei contratti, Bologna, il Mulino.

- Mik E. (2017), “Smart Contract: Terminology, Technical Limitations and Real World Complexity”, in *Law, Innovation and Technology*, 269 ff.
- Mik E. (2022), “Smart Contract: Tales of Trust and Certainty”, in *Technology and Regulation*, 100 ff.
- Mik E. (2025, forthcoming), “Smart Contracts and the Oracle Problem in the Context of InsurTech”, in C. Poncibò, P. Tereszkiewicz (eds.), *European Insurance Contract Law: The Promises and Perils of Digitalization*, Berlin, Springer, in open access: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4390271](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4390271).
- Morace Pinelli E. (2020), “Il contratto giusto”, in *Rivista di diritto civile*, 643 ff.
- Möslein F. (2020), “Legal Boundaries of Blockchain Technologies: Smart Contracts as Self-Help?”, in A. De Franceschi, R. Schulze, M. Graziadei, O. Pollicino, F. Riente, S. Sica, P. Sirena (eds.), *Digital Revolution – New challenges for Law*, Baden-Baden, C.H. Beck-Nomos, 313 ff.
- Pardolesi R., Davola A. (2019), “What is Wrong in the Debate about Smart Contract”, in *Il Foro italiano*, 195 ff.
- Pasquino V. (2017), “Smart contracts: caratteristiche, vantaggi e problematiche”, in *Rivista diritto e processo, Annuale giuridico Università di Perugia*, 240 ff.
- Perlingieri P. (2020), “Sul trattamento algoritmico dei dati”, in *Tecnologie e diritto*, 181 ff.
- Raskin M. (2017), “The Law and Legality of Smart Contract”, in *Georgetown Law Technological Review*, 312 ff.
- Reidenberg J.R. (1998), “Lex Informatica: the Formulation of Information Policy Rules through Technology”, in *Texas Law Review*, 553 ff.
- Savelyev A. (2017), “Contract law 2.0: Smart Contracts as the Beginning of the End of Classic Contract Law”, in *Information & Communications Technology Law*, 116 ff.
- Scalise R.J. (2007), “Why No Efficient Breach in the Civil Law? A Comparative Assessment of the Doctrine of Efficient Breach”, in *American Journal of Comparative Law*, 721 ff.
- Sillaber C., Waltl B. (2017), “Life Cycle of Smart Contracts in Blockchain Ecosystems”, in *Datenschutz und Datensicherheit*, 498 ff.
- Sirena P. (2019), “Le questioni degli smart contracts con riguardo alla struttura ed alla patologia del contratto. Intervento al Convegno Il robot tra diritto e processo”, Roma 21 febbraio 2019.
- Sklaroff, J.M. (2017), “Smart Contracts and the Cost of Inflexibility”, in *University of Pennsylvania Law Review*, 263 ff.
- Surden H. (2012), “Computable Contracts”, in *UC Davis Law Review*, 629 ff.

- Szabo N. (1994), “Smart Contracts”, in open access: [www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html](http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html).
- Szabo N. (1996), “Smart Contracts: Building Blocks for Digital Markets”, in *Extropy: The Journal of Transhumanist Thought*, 16 ff.
- Szabo N. (1997), “The Idea of Smart Contracts”, in *Nick Szabo’s Papers and Concise Tutorials*, 6, 199.
- Tommasi M.F. (2022), *Lo smart contract e il diritto dei contratti*, in *Jus Civile*, 838 ff.
- Werbach K., Cornell N. (2017), “Contracts *Ex Machina*”, in *Duke Law Journal*, 338 ff.



Part 3

**DYNAMICS. INDIVIDUAL WILL IN ACTION**



## Chapter 7

# WILL AND RULE IN CIVIL PROCEEDINGS\*

Augusto Chizzini

*ABSTRACT: In civil proceedings, the parties' will is expressed through the legal claim, which initiates the proceedings, defines its object, and limits the judge's power. Even in constitutive protection, the party's will to effect change is particularly effective, although it must be implemented through a judicial decision.*

*KEYWORDS: Civil proceedings – Parties' will – Legal claim – Judge's power – Constitutive protection.*

*SUMMARY: 1. Will of the parties and judicial proceedings. – 2. The binding nature of procedural rules: A dogma. – 3. Nemo iudex sine actore. – 4. The principle of party disposition. – 5. Legal claim and will. – 6. Procedural dynamics and will. – 7. Legal claim and subjective right. – 8. Party's will and the object of the proceedings. – 9. Claim splitting. – 10. Party will and judicial adjudication. – 11. Claims for alteration of legal rights or relationships and will. – 12. Claims for alteration of legal rights or relations based on contractual grounds. – References.*

### 1. Will of the parties and judicial proceedings

What role does the will of the parties, as *voluntas*, plays in judicial proceedings? According to some, perhaps too many, Italian scholars of civil procedure, judicial proceedings are an expression of State power and governed by mandatory rules of procedure that leave little or no room to the will of the parties, and even to the will of the judge, to shape the proceedings: everything must happen according to the rules.

We do not accept this view. The will of all players of judicial proceedings, that is to say the concept of *voluntas*, plays a decisive role: this includes not only the will of the judge, but also, and above all, the will of the parties. We claim that the will of the parties is the guiding rule of judicial proceedings, and we aim at providing justifications to our claim in the following pages.

As mentioned, in theory the issue arises with regard to both the judge and the parties; however, our discussion will focus on the position of the parties only, for one reason: according to Italian civil procedure scholarship, the judge's decision is a sort of mechanical act with a specific content (Attardi

---

\* I would like to thank my colleagues prof. Nicolò Trocker (University of Florence) and prof. Giacomo Pailli (University of Palermo) for their valuable advice in the preparation and translation of this paper.

1958, 41), which is to apply the law to the facts as found (by the judges themselves) during the proceedings. Thus, according to this dogmatic view, the judge's will channels the 'will' of the legal system itself. Moreover, Italian judges must apply the law, including procedural law, without room for discretion, unless the law expressly allows them to make use of their equitable powers (e.g., art. 133 of the Italian Code of Civil Procedure).

We hold that the Italian legal system already recognises areas of autonomy for the parties in the context of judicial proceedings, so that the parties' will becomes the "rule" that shapes the unfolding of the proceedings. We draw this from the general principle that is laid in the context of substantive contract law by art. 1322, paragraph 2, of the Italian Civil Code, which states: «The parties may [...] enter into [all kinds of] contracts ... provided that they are aimed at achieving interests recognised as worthy of protection under the [Italian] legal system». The rule of art. 1322 sets a general recognition of party autonomy that, we believe, does not *a priori* conflict with procedural law (Chizzini 2022, 45 ff.). This idea is not commonly accepted by Italian scholars, and therefore deserves further clarification.

Indeed, the view that procedural law is purely public law and thus entirely non-negotiable and immune to party autonomy, a view that we criticise, is based on a methodological inversion: it fails to consider that the goal of judicial proceedings is always to protect the right of the parties involved, giving effect to the fundamental guarantee laid by art. 24 of the Italian Constitution.<sup>1</sup> Under this perspective, judicial proceedings and procedural law itself appear to stay functionally on the same level, *auf gleicher Stufe* (Wagner 1998, 60), as the substantive provisions regulating contractual matters, all having the goal of ensuring the effective implementation of the will of the parties.

## 2. The binding nature of procedural rules: A dogma

Even the most classical Italian legal scholarship has emphasised that procedural rules concern the parties, who are directly interested in the unfolding and in the outcome of judicial proceedings in their specific case, as they seek to obtain something concrete (*bene della vita*) through an application of the law. It follows that the law often considers the will of the parties and it is often neither mandatory nor absolute (Chiovenda 1936, 62, although he held that in doubt, procedural rules must be understood as binding).

---

<sup>1</sup> Art. 24 of the Italian Constitution states, in its first two paragraphs: «All persons may take legal action to protect their individual rights and legitimate interests. The right to defense shall be inviolable at every stage and instance of legal proceedings».

This is confirmed, on a general theoretical level, by the observation that proceedings may be regulated by legal sources of any hierarchical level – provided that constitutional safeguards and the principle of legality are respected, as required by art. 111, paragraph 2, of the Italian Constitution – including contractual agreements, where the underlying substantive legal positions relate to *diritti disponibili* (i.e., rights that are not subject to mandatory rule and may be freely negotiated, waived and settled by the parties) (Tavormina 2013, 73). For these reasons, the fact that civil proceedings are primarily governed by public law does not imply that procedural norms must necessarily be of a mandatory nature, nor that agreements with procedural content are inherently inadmissible (Wagner 1998, 59).

This leads to a preliminary conclusion: the protection of substantive rights guaranteed by art. 24 of the Italian Constitution is made effective through a convergence of a public function performed by the State and by party autonomy. No *a priori* or normative barrier should prevent a productive interplay between these two different instruments, all serving the same goal. There is no valid reason to exclude the possibility that the will of the parties may become normative, regulating the unfolding of the judicial proceedings.

Within this systematic framework one can seek a suitable space for the *Konventionalprozess* (a procedure open to private ordering) (Chizzini 2018, 321 ff.).

*In dubio pro libertate* – embracing the insightful reconstructive framework developed by Peter Schlosser (Schlosser, 1968, 9 s. See Wagner 1998, 11 ff.): liberty is to be understood here as the expression of party autonomy that coordinates with the heteronomous rules of civil procedure, to more effectively ensure that procedural law is instrumental to substantive law, and not the other way round. Let us now examine how the will of the parties may become a rule within judicial proceedings.

### 3. *Nemo iudex sine actore*

We turn now to examine how, within the judicial proceedings, the powers of the parties and those of the judge mutually influence one another, beginning with the act that initiates the proceedings – namely, the legal claim (*domanda giudiziale, Klage*).

An ancient legal maxim, *nemo iudex sine actore*, expresses a principle accepted by all legal systems – namely, the so-called ‘principle of the claim’ – according to which civil jurisdiction is generally exercised only upon the initiative of a party, that is, through an act of will by the interested party.

Within this framework arises the issue of the relationship between the substantive legal relationship invoked in the claim and the procedural mechanism through which it is pursued (Sauer 1951, 6, shows how the theory of *Rechtsschutzanspruch* starts from the assumption of the pre-existence of subjective situations at the trial, so that the party acts to protect its own claim). On this point, notable fluctuations can be observed (Wach 1896, 52-53): there are periods in which the public-law conception of civil proceedings prevails, displacing all alternative views on the relationship between judge and parties. These are characterised by a pronounced emphasis on judicial intervention, recognising in the judge a broad – if not absolute – control over the conduct of the proceedings. It has even been claimed that substantive law is reduced to a set of behavioural guidelines for the judge at the time of the decision.

These periods alternate with phases in which a different view regains prominence – one that seeks to limit judicial interference and to reaffirm the fundamentally dispositive nature of civil proceedings. This illustrates a ‘technical’ dimension of those transformations – often nonlinear – that have shaped civil procedure in the modern era and have marked its evolution over the past two centuries (Chizzini 2014, 166 s. See Carnacini 1951, 695 ff.; Damaška 1991, 97 ff.).

The causes of these transformations are manifold, but they may be traced to social developments, political dynamics, and events that profoundly affect civil procedural law – a field which some would describe as detached from social conflict, purely technical, and entirely apolitical (Satta 1941, 4. See also Proto Pisani 2011, 1154-1155). And yet it seems that formalism is often employed to mask the deeply political choices that lie behind seemingly technical provisions. It must be clearly stated that, regardless of the analytical perspective adopted and the structure of the system reconstructed, the outcome must always be the same: a balanced distribution of powers between the private parties and between the parties and the judge. Such equilibrium is now mandated by the constitutional framework as a whole, which requires that the exercise of one’s own powers must always safeguard the exercise of the powers of others. In other words, the right of action (art. 24 It. Const.) must take shape within a ‘fair trial governed by law’ (art. 111 It. Const.), a due process of law (Fabbrini 1989, 409. See Costantino 2011, 351 ff.).

#### 4. The principle of party disposition

It is appropriate, as a preliminary matter, to dispel certain recurring misconceptions (Chizzini 2014, 164 ff.). First and foremost, it must be made clear that the theoretical position – advanced by the most rigorous proponents of

the principle of party disposition in civil proceedings – that the State is wholly indifferent to the concrete resolution of the dispute, thereby justifying the parties' full control over the proceedings, is entirely unacceptable (Wach 1896, 53-62; Chiovenda 1993, 385). This view must be rejected, regardless of the premise one adopts regarding the relationship between substantive law and procedural law. The legal system is concerned with both the resolution of the dispute and the content of the decision – *ne cives ad arma ruant* – for otherwise the judicial function would not be part of the essential functions of modern States. The real issue lies elsewhere: how this central interest of the legal system is to be realised in practice, and what is the most appropriate path to reach an outcome that is broadly shared within society. Within this perspective, the decisive role of the parties' will – their normative will, as power to shape the concrete application of the law to their right in the specific case – clearly emerges.

Indeed, if one adopts the view (shared both by classical Italian and German civil procedure scholarship) that, prior to and outside of judicial proceedings, substantive rights do not exist, and that only the right of action exists – since legal norms would regulate not the conduct of private individuals but solely that of the legal institutions charged with the task of exercising jurisdiction – then it becomes clear that when the legal system assigns a specific content to the general and abstract norm that the judge must apply to the concrete case, it cannot be said that the way in which the judge shapes the rule governing the individual case, or how other institutional actors carry out its implementation, is of no relevance (Fazzalari 1957, 28 ff.). Surely, if the State were indifferent to the concrete application of general legal rules in judicial proceedings, this would give rise to an irreconcilable contradiction between the affirmation of a general legal rule and its practical implementation by a judge who is, under art. 101, paragraph 2, of the Italian Constitution, required to 'apply the law' (Attardi 1961, 15 ff.).

*A fortiori*, the State cannot be indifferent to the outcome of the decision if one accepts the traditional (and preferable) theoretical position according to which legal rules regulate not only the conduct of State authorities but also, concurrently, that of private individuals. Private individuals, in this view, are not merely the objects to which legal rules apply, but legal subjects of the rules in its fullest sense. Thus, substantive rights (*posidiritti soggettivi*, *Rechte*, *Droits*) exist prior to and independently of judicial proceedings; within the proceedings, they seek protection either for their practical implementation or their judicial declaration (Attardi 1955, spec. 65 ff.).

Otherwise, it would make no sense that legal systems that regulate the conduct of private individuals and create substantive rights with a specific content, would also be indifferent as to how such rights are shaped before

the judicial body, *i.e.*, that body which, in exercising its institutional authority, is bound to apply the law. It would be absurd to state that the judge could decide the dispute without regard to the standard set by the general and abstract rules. Declaring that the practical outcome of the dispute is irrelevant for the legal system would amount to declaring the irrelevance of the legal system itself at the very moment it lays down the practical rules of conduct for the members of the community. In this regard, the insights of Jhering are fundamental (Jhering 1872).

From these simple considerations, it follows that while the State cannot be indifferent to the practical outcome of the dispute and to the content of the judicial decision, it is equally true that this institutional interest must not override that of the parties involved. Judicial proceeding qualifies as ‘judicial’ precisely because they are not merely ‘proceedings’, *i.e.*, a stream of procedural formalities. Judicial proceedings are such because, on one side, those who ultimately bear the consequences of the decision are actively involved in the process, and on the other side also because judicial proceedings pursue a substantive interest that does not belong to the author of the decision (*i.e.*, the judge), but to its recipients (*i.e.*, the parties) (Benvenuti 1952, 134 ff.). Their will, expressed within the dynamics of the proceedings, thus plays a decisive role, albeit not an exclusive one.

Hence, one must conclude that any excessive emphasis on the inquisitorial model or on the judge’s powers, and any attempt to exclude the significance of the will of the parties would effectively degrade the ‘judicial proceedings’ into mere ‘proceedings’. What would remain is a hollow simulacrum of justice, a procedure dominated by the unilateral authority of a ‘despotic judge’, and the judicial function would be reduced structurally to that of an administrative proceeding – resulting in numerous constitutional violations, given the constitutional requirement of a ‘due process of law’ (art. 111 It. Const.), consistent with the fundamental charters that guarantees individual rights. Such an approach would also result in a clear violation of art. 24 of the Italian Constitution and a radical departure from the principle of party’s claim (*principio della domanda, Dispositionsmaxime*) enshrined in art. 2907 of the Italian Civil Code.

## 5. Legal claim and will

In this context, one may clearly grasp the underlying rationale of the principle of the party’s claim within the current constitutional framework, grounded in artt. 24 and 111 It. Const. – a principle according to which it is the party’s will that initiates the judicial proceedings (Pekelis 1958, 29 ff.).

Indeed, in assessing the systematic position of the principle of the party's claim as an expression of the plaintiff's will, it is important to note that the principle operates from a dual perspective: that of the right of action on the one hand, and that of the procedural relationship that is created between plaintiff, defendant and judge, on the other.

This duality shows itself both in the necessary assertion of a right through a party's claim and in the formation of the procedural relationship, which derives directly from the constitutional provision safeguarding the right of action (art. 24 It. Const.). As such, the constitutional rule itself limits the possibility of exercising judicial power in the absence of a request by rightsholders, in a way that would override their individual will. Only exceptionally, and following a careful balancing of multiple constitutionally relevant values, public powers or other bodies may be entitled to claim individual's right on behalf of the holder, as recognised under art. 24 It. Const.

Furthermore, it must be recognised that the principle of the party's claim – as an expression of the will of the party – governs the activation of judicial protection in all its manifestations and therefore it extends beyond ordinary adjudicatory proceedings.

In enforcement proceedings (*processo esecutivo, Vollstreckungsverfahren, exécution forcée*), the will of the party is embodied in the request for judicial enforcement of the substantive right contained in the enforceable title (or, in some cases, inferred from the mere assertion thereof) (Andolina 1962, 418 ff). Hence, the concept of the party's claim – in its most substantive sense as an articulated demand – retains relevance even in such proceedings and materialises in the request for the forced enforcement of the 'violated' right (Salotti 1992, 11 ff).

In precautionary proceedings (*processo cautelare, vorläufiges Verfahren, procédure de référé or conservatoire*), the application – motivated by the need for interim protection – does not require full assertion of the underlying right; rather, that right serves only as a basis for the judge's incidental assessment in deciding whether to grant the measure (Consolo 1998, 136 ff.). In all cases, the prevailing interest is always to ensure the judge's impartiality.

Thus, even in this context, a balancing of the two perspectives is always required: with respect to the right of action, the claim is connected to the asserted substantive right and its protection – whether in its enforcement phase or in its conservatory or anticipatory phase; with respect to the procedural relationship, or the conduct of the proceedings, the claim is linked to the need to guarantee the absolute impartiality of the judge – a principle that underpins the very legitimacy of the *res judicata* (Liebman 1962, 9 ff.).

## 6. Procedural dynamics and will

Precisely because the legal system recognises the will of the parties as a normative source when filing a claim, there is no room for the notion – advanced by certain confused strands of case law – that the exercise of jurisdiction on the merits may be made contingent upon a discretionary judicial assessment of the ‘worthiness’ (*meritevolezza*) of the protection sought.

Indeed, no limitation should be placed on what constitutes an essential achievement of the continental procedural tradition: the claim of a party establishes the duty of the judge to decide on that party’s claim (right). The judge has no discretion to assess whether the remedy sought by the party is worth or desirable. Otherwise, the proceedings would be reduced to mere interest management, akin to voluntary jurisdiction (*giurisdizione volontaria, Freiwillige Gerichtsbarkeit, Jurisdiction gracieuse*). This seems to be the most serious risk that correlates with the positions taken by certain case law and shared by some careful doctrine (Ghirga, 2004, 89 ff.; for a critique see Tedoldi 2017, 954).

Nor may the conceptual tool of the ‘interest to sue’ (*interesse ad agire, Rechtsschutzbedürfnis, intérêt légitime*) be employed for this purpose (Attardi 1955, 173 s.). This notion cannot be used to justify any judicial review of the actual usefulness or appropriateness of the protection sought, let alone of the economic value of the claim (Marinelli 2005, 81 ff. See Panzarella 2016, 251, in comments on Cass., 3 March 2015, n. 4228). Doing so would arbitrarily restrict – or even entirely nullify – the fundamental principle of the right of parties to bring an action, as protected by the Italian Constitution and German *Grundgesetz* (Schumann 1988, 439 ff.).

It is important to clarify that the principle of the party’s claim pertains exclusively to the initiating act of the proceedings and to the assertion of rights before the court. It does not extend to acts carried out during the course of the proceedings (Allorio 1942, 219 ff.), since the internal dynamics of the proceedings are governed by a distinct principle: the principle of party disposition (*principio dispositivo, Verhandlungsmaxime, Principe dispositif* – similar to that found in adversary systems). That principle recognises the predominant role of the parties – deriving always from their will – in shaping the course of the proceedings in accordance with the rules of civil procedure, which regulate the prerequisites and conduct of intermediate procedural stages (Carnacini 1951, 714 ff.).

Within the internal dynamics of the judicial proceedings, when the legal conditions for a decision on the merits – as laid down by procedural law – are met, the judge has a duty to issue a decision on the merits. Conversely, when those conditions are not satisfied, the action should result in a

procedural dismissal. Even in issuing such a procedural decision, however, the judge is exercising judicial authority, although the court does not reach a determination on the merits (Consolo 1985, 175 ff.).

It is for the judge, on the basis of the powers conferred by procedural law, to verify whether the requisite procedural conditions are met – conditions which the law demands for a ruling on the substantive validity of the claim.

## 7. Legal claim and subjective right

Art. 2907 of the Italian Civil Code provides that judicial protection of rights is granted upon party's claim. Therefore, within the general framework in which judicial proceedings serve to protect substantive rights, the relationship between proceedings and substantive law raises the question of whether the object of judicial proceedings – the asserted need for protection – can, through an exercise of the will of the parties, be defined with boundaries that are different from those defined by substantive legal norms. In other words, the issue arises whether the subjective legal situation mentioned by art. 2907 of the Italian Civil Code, as well as by art. 24 of the Italian Constitution, must be asserted in the proceedings in the exact form in which it is shaped by substantive law, or whether it may be modified in accordance with the plaintiff's will. But the idea that private parties cannot go beyond the (presumed) unitary object of the lawsuit would be ideologically unsupportable and contrary to positive law, since the application is an exercise of the action, not of substantive law, so that a consummation of the same could only take place with the legal modification produced by the judgment (Bove 2015, 1394). The remark is not decisive and is resolved in a play on words: the action is an instrument for the protection of rights, which is why the legal system recognises it (Cerino Canova 1985, 129 ff.).

Scholarly commentary has already noted that two distinct profiles must not be conflated: the first concerns the principle of the party's claim and the parties' power to assert in court the subjective legal situation recognised by the legal system; the second concerns the definition of the object of the proceedings – *Streitgegenstand*, *objet du litige*. The fact that parties may freely dispose of the substantive legal situation they assert (*diritti disponibili*, *droits disponibles*) does not mean that they are likewise entitled to determine the object of the proceedings (Menchini, Motto 2016, 47).

Indeed, how the *res in iudicium deducta* is defined within the legal system must be derived from procedural law, and such definition is entirely independent of the parties' will. Within the scope of the party disposition powers

lies only the decision by the plaintiff regarding which dispute to bring before the court. However, this does not confer to the plaintiff also the power to define the concept of the object of the proceedings, which must instead be determined in the abstract, according to the principles of procedural law (Henckel 1961, 273, which, moreover, makes it clear that the object of the lawsuit cannot be a generic assertion of an effect, but rather of a specific substantive right).

Regardless of the extent to which procedural rules are of a mandatory nature – *ius cogens* – (Chiovenda 1936, 62), recognising a certain space for the so-called *Konventionalprozess* does not conflict in any way with the principle that the substantive right must be asserted in court in the terms in which it is shaped by substantive law and cannot be split arbitrarily in different legal claims.

This issue has a particularly significant, albeit specific, practical relevance in relation to the well-known and much-debated question of the possibility for a plaintiff to split a unitary claim into multiple, partial, claims (Allorio 1958, I, 1, 399 ff.; Attardi 1987, I, 1, 537 ff.; Menchini, Proto Pisani 1989, 2954 ff.; Asprella 2015, 22 ff.; Ghirga 2004, 181 ff.; dalla Massara 2008, 345 ff.; Fornaciari 2015, 829 ff.). However, it also has broader theoretical importance. The underlying question is whether what appears to be a unitary legal effect in substantive terms may give rise to multiple actions at the procedural level (Menchini 1987, 276. Indeed, *res judicata* is informed by what the court actually ruled and not by what the court should have ruled on the basis of the proposed application: Attardi 1987, 540; Blomeyer 1985, 448). Such a limitation must necessarily be assessed in relation to the will of the parties.

## 8. Party's will and the object of the proceedings

Despite some notable scholarly opinions (Nikisch 1935, 153 ff.; Schwab 1954, 154 ff.), it must be excluded that procedural rules allow for a restriction of the object of the proceedings compared to the structure of the underlying substantive right; and certainly this restriction is not mandated by the procedural rules on subject-matter jurisdiction.

Essentially, the issue is whether such provisions – not only requiring the plaintiff to identify their claim by reference to one of the legal relationships envisaged by the specific rule on jurisdiction – also limit the scope of the court's adjudication to the legal grounds identified by the plaintiff.<sup>2</sup> A

---

<sup>2</sup> Thus, if before the labour court the plaintiff asserts a right arising out of one of the relationships referred to in art. 409 of the It. Code of Civil Procedure, the question arises as to whether the court can accede to the application in respect of a different

similar issue may arise with regard to rules that determine the procedural track to be followed for adjudicating the dispute.

The question, then, is whether a limitation on the object of the proceedings may arise from the exercise of the parties' powers – particularly through an express manifestation of the plaintiff's will. This amounts to asking whether the party initiating the action can, in pursuit of their own specific interest, shape the object of the proceedings by splitting a unitary substantive legal right into multiple procedurally autonomous claims. The German legal doctrine refers to this as *Ausschaltungsbefugnis* (power of exclusion) (Roth 2008, Rndr. 66 s.; Braun 2014, 80 ff. and 439 ff. Tending to be negative, Consolo 1991, 244-245; Motto 2012, 557, footnote 499).

## 9. Claim splitting

The issue breaks down into two distinct profiles: on the one hand, it concerns the determination of the substantive right for which protection is sought – such as whether a claimant, in relation to a single monetary obligation, may request only part of the amount due, reserving the remainder for future proceedings. This may be done for various reasons, not always fraudulent (such as to save on litigation costs) (Nikisch 1952, 163); on the other hand, it involves the possibility of limiting the scope of the judge's adjudication to certain aspects of the dispute, while expressly excluding others – for instance, whether the claimant may request a ruling based on a specific ground of acquiring a right, expressly precluding the court from basing its decision on alternative legal grounds. *E.g.*, whether the court may be asked to decide on ownership by reference only to the purchase title given by a specific purchase contract, to the exclusion of other competing titles (*e.g.*, usucapion), as so *agere ex expressa causa* in the Roman trial; or whether it is possible to claim damages in respect of only some of the items of damage (Menchini 1987, 276 ff.).

With regard to the first issue, the conclusion must be clearly negative. As is well known, some case law – at times superseded, but sometimes resurfacing<sup>3</sup> – and certain scholarly opinions have recognised the claimant's power

---

legal profile, *e.g.* unjust enrichment, which does not fall within the relationships falling in its jurisdiction: Menchini 1987, 287-288.

<sup>3</sup>The jurisprudence is oscillating: while for a time the thesis excluding splitting was prevalent (Ghirga 2015, 445 ff.; Bove 2010, 99 ff.) Recently, the Supreme Court seems to have limited the previous direction to some extent, again driven by the specific requirements related to labour relations: Cass., Sezioni Unite, 16<sup>th</sup> February 2017, n. 4090. It should be recalled that the court of legitimacy has admitted that one and the same claim

to split the same legal right into multiple proceedings, at least when the plaintiff explicitly states in the legal claim that the request is limited to the quantification of only part of the claim, and a reservation is made for a subsequent action regarding the remaining portion. Case law has accepted the fractionability, by reason of the plaintiff's power of disposition (as Allorio 1958, 399 ff.; Consolo 1991, 236), while in more recent times, based on considerations of abuse of process, it has come to negative, albeit oscillating position (Asprella 2015, 26 ff. See Menchini 1987, 283, footnote 159 ff.; Attardi 1987, 537 ff.; Verde 1989, 573 ff.). However, other decisions and doctrinal approaches, more permissive, have admitted the possibility of bringing later a new action even where no express reservation was made in the first proceedings (Asprella 2015, 37 ff.; Menchini 1987, 284, footnote 159).

We should address a few arguments first that appear irrelevant. First, it must be noted that the lawfulness of such claim-splitting cannot be inferred *a contrario* from the creditor's right to refuse partial performance under art. 1181 of the Italian Civil Code (Verde 1991, 723 ff.). Such reasoning mixes two distinct levels: one concerns the creditor's interest in accepting partial performance, which is a purely substantive matter based on discretionary evaluations by the creditor (Fondrieschi 2012, 296 ff.); the other concerns procedural matters – namely, the possibility of bringing a legal action (including enforcement) to recover only part of the full substantive claim. There is a clear logical leap between acknowledging that a creditor may accept partial payment and asserting that the creditor holds a 'partial right of action'. Different is a debtor who offers partial performance (and a creditor who accepts such an offer) from a creditor who acts for part of its own right and forces the debtor to defend itself on the point, with the risk of re-trial. It should not be forgotten that the debtor's interest in being released from the obligation is also protected, as confirmed by the rules on the creditor's default (Falzea 1947, 38 ff.).

Second, no positive conclusion can be drawn from a generic reference to the principle of party disposition, understood as the principle of party's initiative (Verde 1989, 577 ff.; Allorio 1958, 401 ff., who bases his thesis on the assertion that in modern trials there would be 'neither the mythical unity of the action, nor its consummation'. Which means very little, since the options of positive law are always decisive, even in a system characterised by the atypical nature of the action, as it ineluctably confirms, *a contrariis*, the fact

---

may be pursued in different procedural forms, *i.e.*, for the part of the claim for which the party can provide documentary evidence, in the form of a monitor, while, for any residual part, in the form of summary proceedings: Cass., 7<sup>th</sup> November 2016, n. 22574, in *Foro it.*, 2017, I, 201 ff., with a comment by Brunialti. Lastly, on the same subject Cass., Sezioni Unite, 19<sup>th</sup> March 2025, n. 7299.

that acting for part of the claim was also much discussed in Roman law: dalla Massara 2005, 61 ff.).

A party claiming to be the holder of a right has the power to access the judicial system for protection of that right – but only within the limits and constraints set by procedural norms. Therefore, it is the possible power conferred by law upon the claimant that will determine the object of the proceedings and that shapes the scope of the principle of party disposition – not the other way around. Conversely, it could equally be argued that judicial proceedings are an instrument of public law, established to provide both parties with a final and comprehensive remedy on the whole matter – so that the public interest itself requires the full adjudication of the legal relationship (Menchini 1987, 283-284). Admittedly, this kind of reasoning in purely abstract terms does not seem very convincing.

In any case, initiating legal proceedings cannot be considered an act by which rightsholders “disposes of” their right (*i.e.*, make use of the right from a substantive point of view), at least not in the technical and proper sense of the term (Mengoni-Realmonte 1964, 192, note 12; Gorla 1937, 3 ff.),<sup>4</sup> since the party acts to obtain judicial recognition of a (claimed) substantive legal right, and such judicial recognition is structurally tied to the factual and legal situation on which the court bases its decision (Chizzini 1996, 344 ff.). More generally, on the power of disposition and its otherness from the power to seek judicial protection (Mengoni-Realmonte 1964 189 ff., especially 191, footnote 7): even compulsory execution cannot technically be considered an act of disposition of the right. Moreover, if the act of disposition is a non-causal act, thus abstract (Gorla 1937, 5), its cause must be found elsewhere and certainly not in the process itself.

Certainly, the party initiating proceedings is generally the rightsholder from a substantive point of view; but that does not mean that such party is engaging in a substantive dispositive act (Gorla 1937, 7).

This issue is closely tied to the choices made by positive law, and the procedural law of a given legal system may expressly regulate the matter – as evidenced by comparative references to the German concept of *Teilklage*.<sup>5</sup>

---

<sup>4</sup> According to the opinion of Mengoni, Realmonte 1964, 192, footnote 12, the term ‘disposition’ is used in a very broad sense, referring to assets in general, without any real reconstructive scope. See Gorla 1937, 3 ff.

<sup>5</sup> Art. 86 of the Swiss ZPO states that: “*Ist ein Anspruch teilbar, so kann auch ein Teil eingeklagt werden*” and the doctrine links this choice to the very general option in favour of the dispositive principle in art. 58 of the sZPO (see Gehri, Jent Sørensen Sarbach 2015, Art. 86, n. 1), even if in practice the admissibility of partial action is limited by the principle of the prohibition of abuse (*schikanöse Teilklage*). As well known, the debate on the admissibility of the *Teilklage* in Germany and Austria, both as an *offene Teilklage* and as

Where no express rule exists and the matter must be resolved through interpretation, it becomes necessary to define a rule of conduct: for the parties, concerning their action; for the judge, concerning the adjudication.

After these clarifications, we must conclude that the notion that plaintiffs may have the power to shape the objective limits of their claim to satisfy their own specific interest is unacceptable (Jauernig 1993, § 24, III; Rosenberg, Schwab, Gottwald 2009, § 156, III). In the absence of a specific provision regulating the issue, the matter must be resolved according to general principles – and in particular, by reference to the function of judicial proceedings and their relationship with substantive law.

From this perspective, it may therefore be emphasised that, under positive law – consider art. 24 It. Const., art. 99 of the Italian Code of Civil Procedure, and, clearly, art. 2907 of the Italian Civil Code – the right of action is always coordinated with the assertion of a substantive right having autonomous relevance under substantive law. Since the law grants the power to bring an action for the protection of that substantive legal right, the individual may not elude the correlative duty to frame the claim in terms consistent with the substantive right as defined by law. The legal system does not appear to confer upon the claimant any power to redefine the notion or scope of the *res in iudicium deducta* (Menchini 1987, 280).

That the parties may dispose of the object of the proceedings at the substantive level does not mean, in any way, that they may define the concept of the *Streitgegenstand* (object of judicial proceedings), which must instead be determined on the basis of procedural law – rules that are beyond party autonomy (Henckel 1961, 273. See Menchini 1987, 280-281, footnote 153).

Moreover, there is no procedural rule – either directly or indirectly – that suggests that the substantive legal situation can be disaggregated at the procedural level, or that a split can be made between the substantive right as defined by substantive law and the one asserted in court.

This role cannot be assigned to the provision allowing for judgments limited to the existence of a right and reserving the quantification of damages (so called *condanna generica*, allowed by art. 278 of the Italian Code of Civil Procedure), nor can it be derived from the admissibility of a declaratory action limited to the *an* (existence of the right), as there is a fundamental distinction between allowing what might be described as horizontal segmentation and permitting vertical splitting (Consolo 1991, 244). There is no functional proximity justifying the assimilation of such cases. art. 278 is justified, at the very least, by the need to allow a creditor to obtain a title for registering

---

a *verdeckte Teilklage*, is extensive (see Habscheid 1962, 352 ff.; Lindacher 1963, 451 ff. See Braun 2014, 473 ff.; D’Alessandro 2016, 137 ff.).

a judicial mortgage, in cases where delays in calculating damages might prejudice their position. This scenario is entirely unrelated to the creditor's voluntary decision to seek enforcement of only part of the claim.

The 'right' (*il bene della vita*, by Chiovenda) for which judicial protection is sought must be identified in accordance with the substantive rules that define the content and boundaries of the legal relationship – both in its objective and subjective dimensions. These dimensions are often shaped by party autonomy (though not always), but judicial proceedings receive them as predetermined and they cannot be modified unilaterally by the plaintiff when claiming the right before the court.

Furthermore, the defendant must be guaranteed protection equivalent to that which the claimant would obtain through a favorable judgment, in line with the principle of equality of arms: if, in the event of success, the claimant cannot be disturbed in the enjoyment of the right as recognised by the judgment – due to the binding effect of *res judicata* – then the defendant likewise has the right to obtain a definitive determination of the unfoundedness of the claim asserted against them. The possible power of the plaintiff to reduce its claim to some of the constituent allegations, and to reserve the deduction of the others for a separate trial, exposes the defendant to several actions for the same good of life (Menchini 1987, 282).

It follows that the substantive legal right is transferred into the judicial proceedings in its structural unity, as defined by substantive law. Correspondingly, it does not fall within the parties' dispositive power either to split a single claim for monetary performance into multiple partial actions with respect to the *petitum*, or to limit the scope of *res judicata* to a particular legal aspect or specific way of acquiring a right (Menchini 1987, 283-284).

This issue is of practical relevance above all in relation to claims for damages: judicial proceedings, therefore, may not revolve around isolated components, specific heads of damage, or selected aspects of the asserted right, but must concern the right in its entirety, since it is unitary at the substantive level (Cerino Canova 1992, 129-130, footnote 32). The adjudication of subjective rights must relate to their content and identity as defined by substantive law, and is not confined to merely resolving the dispute based on the economically quantifiable *petitum* advanced in the particular proceeding (Merlin 1994, 31-32).

In this regard, it must be emphasised that the legal system possesses its own internal coherence, which would be undermined if a different solution from the one outlined above were adopted.

Consider, for instance, the correlation between the object of the proceedings and the binding effect of the judgment (*res judicata*). Clearly, if parties are permitted to define, according to their own will, the boundaries of the

subjective legal situation asserted in proceedings – differently from how that situation is structured by substantive law – this would lead to consequences that are difficult to manage, particularly in relation to the scope of judicial determination.

Take, for example, a highly debated case: the seller of real property obtains a final judgment against the buyer for the payment of the first instalment of the purchase price, which was agreed to be paid in multiple tranches. The seller then transfers possession of the property and later brings an action to recover the outstanding portion of the price. Can the buyer, in the second action, raise a defense asserting that the contract is null or void, and thus request that the claim for the remaining price be dismissed? And if the buyer succeeds, must the property be returned, even though there is now a final judgment concerning the first instalment of the price? (Zeuner 1959, 89-90).

This question proves to be virtually unresolvable – without generating serious systemic inconsistencies – under the principles governing the objective limits of *res judicata*, as provided in § 322 of the German Rules of Civil Procedure (ZPO), and, arguably, in art. 34 of the Italian Code of Civil Procedure (see § 322 ZPO: Zeuner 1959, 90. About art. 34 of the Italian Code of Civil Procedure see Attardi 1973, 18 ff.).

What can be said? The problem appears to be fundamentally misframed; or rather, it stems from a flawed conception of the object of the first proceeding. Since the performance owed is unitary, so too is the underlying right, and the adjudication of the claim for the purchase price must be unitary as well. As a result, a *Teilklage* (partial action) concerning only the portion of the right alleged to be due may not be permitted. The adjudication must be comprehensive. If the right to payment of the price is unitary, even though, by the parties' will, divided into several instalments, pursuant to art. 1181 of the It. Civil Code, the entire right will be ascertained unitarily, the order will be for the part that is overdue, while in the subsequent proceedings action will be taken for the constitution of the enforcement title for the part that is subsequently overdue.

Therefore, the procedural rule that judicial protection of rights is to be obtained through the assertion in court of the right itself necessarily entails that the substantive right must be asserted in the judicial proceedings as it is defined by substantive law – and that the proceedings must receive and protect it in such form.

## 10. Party will and judicial adjudication

A different question is whether, and to what extent, the plaintiff may, by an act of will, limit the scope of the judge's adjudication to certain aspects of

the dispute – for instance, by requesting the court to decide based on a specific legal ground. In Germany, a positive answer has been proposed, although the prevailing view tends toward a negative conclusion (see Braun 2014, 80; see Habscheid 1956, 167 ff. For the prevailing thesis, Wach 1896, 29-29. See also Böhm 1986, 103).

One element appears to be certain and may serve as the foundation for further analysis: even if such a delimiting power were to be admitted for the plaintiff, in the event of the claim being dismissed, the binding effect of the judgment (*res judicata*) would in no way be altered by the limitation imposed on the court's adjudication. Accordingly, the losing plaintiff would not be allowed to bring a new action asserting a new ground previously excluded, as the principle applies that *res judicata* covers what has been asserted and what could have been asserted (*dedotto e deducibile*) (Chizzini 1994, 68 ff.). Similarly, while proceedings are pending, such excluded grounds could not be brought in different proceedings, as they would be precluded by the doctrine of *lis pendence* (*Streitanhängigkeit*: Braun 2014, 82-83).

A similar issue arose in Roman law with respect to *actiones in rem* and the interpretation of the well-known passage by Paulus, D. 44, 2, 14, 2, according to which *res amplius quam semel mea esse non potest, saepius deberi potest* – that is, concerning the possibility of acting *causa expressa vel adiecta*, thereby limiting the action to a specific title without prejudice to another in rem action based on a different title. In fact, such a possibility was to be denied, since limiting the preclusive effect of the *intentio* conflicted with the classical principle of typicity – though it may have become more admissible under Justinian law, where typicity appears somewhat attenuated (Betti 1935, 643, espec. footnote 3). Perhaps it was already possible in the process to formulate *agere ex expressa causa* and this, through Justinian law, then passed into common law (Wach 1896, 27-28).

That said, German jurisprudence has accepted that, in limited cases, the claimant may impose a specific limitation on the cause of action. These are exceptional cases – most frequently encountered in matrimonial proceedings, where the claimant may have a specific interest in limiting the judge's cognition to certain aspects while excluding others (*e.g.*, to avoid criminal implications) (Braun 2014, 83; Schwab 1954, 98 ff.). Similar situations may arise in contractual matters as well. Let it be the case that the plaintiff seeks the annulment of the contract on the ground of mistake, thus wanting to exclude – for reasons of personal relations – that the court decides, again on the basis of the pleadings, to annul on the ground of fraud or violence (Braun 2014, 82).

Moreover, there appears to be no conflicting interest on the defendant's side. On the contrary, given that the protection afforded to the defendant by

the dismissal of the claim is not diminished, the preclusive effect of *res judicata* remains fully operative. In this sense (and within these limits), both the legal scholarship supporting such exclusionary powers and prevailing jurisprudence confirm that the 1877 German Code of civil procedure (*Zivilprozessordnung*) leaves ample room for party autonomy – reflecting the distinctly liberal orientation of the system, an orientation that has been preserved, at its core, to the present day.

It follows that, provided the objective limits of *res judicata* – which are strictly tied to the *Streitgegenstand* – are not affected, one must coherently conclude that such a limitation on the cause of action operates merely as an expression of the dispositive principle in the strict sense. In other words, it serves as a limitation on the factual assertions and evidentiary powers of the court.

Turning to the Italian legal system, in the absence of unambiguous guidance, the issue must be reconstructed at the systematic level.

In this regard, first of all, it must be excluded that the parties' will can serve as a legal basis for limiting, either directly or indirectly, the powers granted to the judge by law. For instance, in matters of contract law, one cannot prevent the court from raising the issue of nullity *ex officio*. Case law clearly reflects this position: the now-superseded limitations on the court's power to raise the nullity of a contract (when not acting for its enforcement) were previously linked to the parties' dispositive power in managing the case material. Recent jurisprudence, though, no longer appears to support such an approach (Consolo, Godio 2014, 141 ff.; Proto Pisani 2014; 233 ff.; Pagni 2022, 63 ff.).

Second, reference to art. 101, paragraph 2, of the Italian Code of Civil Procedure does not provide decisive support for denying the claimant a power of exclusion. While that provision requires respect for the adversarial principle, it indirectly suggests that the judge may raise any issue – fact or law – regardless of the parties' limitations. However, it could be argued that the provision functions merely as a *default rule* – applying in the absence of a specific limitation imposed by the parties on the procedural dynamics – and therefore it does not in itself preclude the possibility of such exclusions. In short, that legal reference is not decisive.

Lastly, a generic reference to the internal principle of party disposition governing the conduct of proceedings and the exercise of party's powers is insufficient. That principle can hardly be interpreted as authorising the parties to extend their control beyond the traditional ability to include or exclude specific facts from the factual material upon which the decision will be based, within the *thema decidendum* as outlined in the claim (Consolo, 1985, 477).

Rather, the phase following factual allegations – including the order in which to examine, hear, and decide the various issues – should fall within the scope of the principle of procedural economy, which is concretely realised in the established rule of deciding – *ceteris paribus* – on the basis of the most straightforward issue (*questione più liquida*) (Consolo 1985, espec. 473-478).

In this context, the decisive consideration appears to lie in the fact that, if the parties have the power to allege the facts of the case – first and foremost, the claimant through the statement of claim – there is, indirectly, a limitation or exclusion of the judge’s power to take into account a different constitutive fact, provided that the defendant does not express a different will and no agreement between the parties emerges.

Insofar as one holds that the *iura novit curia* principle applies within the Italian legal system, nothing prevents the judge from classifying the facts established by the parties under a different legal category, as long as this requalification does not affect the legal effect sought in the claim. One may therefore conclude that the power of exclusion – *Ausschaltungsbefugnis* – operates only indirectly, with reference to the parties’ responsibility for pleading the facts, which serves as a safeguard of the judge’s impartiality. But with one clarification: the problem of conditional cumulation is different (Consolo 1985, 478).

A final clarification: it follows naturally that any limitation (to the extent that it is permitted) does not affect the scope of *res judicata*, nor does it alter the definition of the object of the proceedings, let alone the powers conferred on the judge by law.

## 11. Claims for alteration of legal rights or relationships and will

A particular manifestation of the principle whereby the will of the parties becomes ‘normative’ within the proceedings is found in so-called *azioni costitutive* (*Gestaltungsklagen*): *i.e.* legal actions in which parties seek a judicial decision to create, modify or terminate a legal relationship. The legal effect sought by the party is directly realised through the judicial proceedings and the judgment of the court, without the need for enforcement proceedings.

As well known, art. 2908 of the Italian Civil Code provides for the *tutela costitutiva*: the legal system allows judicial decisions through which judges may create new legal relationships, with the corresponding rights and obligations, or modify or terminate existing relationships as of the moment the claim is brought (Ferri 1970, espec. 3 ss.; Pagni 1998, 1 ss.). The provision embodies Chiovenda’s doctrinal approach, which in turn builds upon the dogmatic elaboration of German legal scholarship, beginning with the

contributions of Hellwig and Kisch (Hellwig 1910, 443 ff.; Kisch 1903, 47 ff.; Schlosser 1966, espec. 20 ff.; Roth 2008, Rndr. 88 ff. See Hattenhauer 2011, espec. 197 ff.). Similar ideas have long been present in the French legal tradition.<sup>6</sup>

The specific nature of this *tutela costitutiva* lies essentially in those situations where the legal right at stake is expressed as a ‘potestative right’ (*Recht des rechtlichen Könnens*): that is, a power to effect a legal modification which, though existing at the substantive level (Tavormina 1990, 10 ff.; Fornaciari 1999, 6 ff. See also Carpino 1977, 69 ff.), cannot be realised through the holder’s will alone, but it requires a judicial decision – either due to lack of the other party’s consent or because the law expressly demands it. According to the opinion of Zitelmann (1898, 45 ff.), it was irrelevant whether, according to the relevant rule, the constitutive effect could only be obtained by judicial process or also by negotiation (see Carpino 1977, 72).

From a functional perspective, a judgment in such actions directly realises the underlying substantive interest, without the need for subsequent enforcement proceedings, unlike judgments for performance. Accordingly, from a functional standpoint, judgments in an *azione costitutiva* are often referred to as *self-executing* (di Majo 2003, 363). Germans refer to the ruling as *Vollstreckungsakt* (Hellwig, 1910 480).

The power granted by law to the judge to issue decisions that directly affect substantive legal relationships – by creating or modifying them – always derives from the exercise of a right of action, which in turn conditions the exercise of judicial power. In this context, a distinction is drawn between the ‘right to alter a legal relationship’ (*Gestaltungsrechte*) and the ‘actions for modifications of rights’ (*Gestaltungsklagerechte*). The former are numerous and well-established in German substantive law; the latter are more characteristic of the French legal tradition – a tradition marked by a significant limitation on self-help remedies, ever since the principle was established that ‘*en France, nul ne peut se faire justice à soi-même*’ reflecting the strong centralisation of judicial power in the French state, far more so than in the German context (Helmreich 1967, espec. 48 ff.; Hattenhauer 2011, 205 ff. See Menchini 1987, 140, note 3; Consolo 1991, 249).

Indeed, situations where substantive law grants a party a dominant legal position – or a potestative right – by virtue of which a unilateral declaration

---

<sup>6</sup>So Sraffa 1901, I, 29, pointed out that the French doctrine (recalling a work by Poucet in 1880) and the Italian doctrine itself (see Bolchini, *I diritti facoltativi e la prescrizione*, Torino, 1989) had been talking about optional rights for some time, to the category of which hypotheses undoubtedly qualified by the doctrine as potestative rights (think of the power to request the forced communion of a wall or division) can be traced.

of will is enough to create or modify a legal relationship (*e.g.*, artt. 1373, 1456, 1454, 2285, 2286 of the Italian Civil Code), do not result in the need for an *azione costitutiva*. In such cases, any dispute over the effects of that declaration will be resolved through a declaratory judgment, or at most, a judgment ordering performance.<sup>7</sup>

## 12. Claims for alteration of legal rights or relations based on contractual grounds

Within this framework, the prevailing view of Italian legal scholarship derives from art. 2908 of the Italian Civil Code the principle that private autonomy cannot serve as the source of a potestative right to obtain a legal creation, modification or termination of a legal relationship through a judgment, nor of the corresponding right of action (Ferri 1970, 4 ff.)<sup>8</sup> – though some scholars have suggested the possibility of *tutela costitutiva*, and judgments creating/modifying/terminating a legal relationship, being grounded in contractual agreements (Grunewald 1988, 153 ff.).

To be honest, opponents of this latter view rely more on the mandatory nature of statutory provisions than on any presumed conceptual incompatibility between contractual grounds and the jurisdiction of the State (Tavormina 2003, 42. See Ferri 1970, 4 ff.). Yet this reasoning is not convincing. The possibility of requesting a judicial decision creating/modifying/terminating a legal relationship does not appear in conflict with any principle of procedural economy; on the contrary, it complements a system designed for the efficient protection of rights through the activity of the judiciary. Moreover, the principle of party autonomy is not impaired, as the action would still be based on their independent will.

Indeed, it is important to distinguish between different situations. When substantive law recognises a right to alter a legal relationship (*Gestaltungsrecht*) – exercised outside the courtroom – party autonomy cannot undermine the efficiency of the system by requiring judicial intervention to produce an effect that could already be realised by the unilateral will of the interested party.

By contrast, a different situation arises where the parties, through the exercise of their contractual autonomy, establish an action for modifications of

---

<sup>7</sup>Think of: unilateral withdrawal under art. 1373 of the It. Civil Code; the express termination clause under art. 1456 of the It. Civil Code; or the notice to perform under art. 1454 of the It. Civil Code; the unilateral withdrawal of the shareholder under art. 2285 of the It. Civil Code; or his exclusion under art. 2286 of the It. Civil Code.

<sup>8</sup>Ferri 1970, 4 ff.

rights (*Gestaltungsklagerecht*) not expressly provided by law, with the aim of strengthening substantive protection.

For example, there appear to be no valid objections to allowing a corporate statute to provide – parallel to art. 2259, paragraph three, of the Italian Civil Code – for a constitutive action seeking the judicial removal of managing directors from office under art. 2476 of the Italian Civil Code (this has been ruled out, on the dogma of taxability, by Trib. Napoli, 20<sup>th</sup> October 2005, *Soc.* 6, 625, with a comment by Di Bitonto). Likewise, in the context of a subcontracting relationship, nothing seems to prevent the inclusion of a specific contractual clause enabling the parties to go beyond merely injunctive relief and obtain a judicial decision that establishes a legal relationship outside the cases expressly provided by law, such as those under art. 2597 of the Italian Civil Code (*contra* Trib. Bari, 11<sup>th</sup> October 2004, *Resp. civ. prev.*, 2005, 605, with a comment by Toschi Vespasiani).

In such instances, the will of the parties outlines a form of judicial protection that is more effective and better suited to safeguarding substantive rights.

## References

- Allorio E. (1942), *Diritto processuale tributario*, 1<sup>st</sup> ed., Milano, Giuffrè.
- Allorio E. (1952), “Giudicato su domanda parziale”, in *Giurisprudenza italiana*, I, 1, 399 ff.
- Andolina I. (1962), *Profili dogmatici della esecuzione forzata espropriativa*, Milano, Giuffrè.
- Asprella C. (2015), *Il frazionamento del credito nel processo*, Bari, Cacucci.
- Attardi A. (1955), *L'interesse ad agire*, Padova, Cedam.
- Attardi A. (1959), *La revocazione*, Padova, Cedam.
- Attardi A. (1961), “La cosa giudicata”, in *Jus*, 1 ff.
- Attardi A. (1973), “In tema di questioni pregiudiziali e giudicato”, in *Studi in memoria di E. Guicciardi*, Padova, Cedam, 18 ff.
- Attardi A. (1987), “Frazionamento della domanda di danni e estensione del giudicato”, in *Giurisprudenza italiana*, I, 1, 537 ff.
- Benvenuti F. (1952), “Funzione amministrativa, procedimento, processo”, in *Rivista trimestrale di diritto pubblico*, 134 ff.
- Betti E. (1935), *Diritto romano*, I, Padova, Cedam.
- Blomeyer A. (1985), *Zivilprozessrecht. Erkenntnisverfahren*, 2<sup>nd</sup> ed., Berlin, Duncker & Humblot.
- Böhm P. (1986), “Die Ausrichtung des Streitgegenstandes am Rechtsschutzziel”, in *Festschrift Kralik*, Wien, Manz, 83 ff.

- Bove M. (2010), *Il principio della ragionevole durata del processo nella giurisprudenza della Corte di Cassazione*, Napoli, ESI.
- Bove M. (2015), “Rilievo d’ufficio della questione di nullità e oggetto del processo nelle impugnative negoziali”, in *Giurisprudenza italiana*, 1394 ff.
- Braun J. (2014), *Lehrbuch des Zivilprozessrechts*, Tübingen, Mohr Siebeck.
- Carnacini T. (1951), “Tutela giurisdizionale e tecnica del processo”, in *Studi in onore di E. Redenti*, II, Milano, Giuffrè, 695 ff.
- Carpino B. (1977), *L’acquisto coattivo*, Napoli, Jovene.
- Cerino-Canova A. (1992), “Unicità del diritto e processo di risarcimento”, in Id., *Studi di diritto processuale civile*, Padova, Cedam, 119 ff.
- Chiovenda G. (1936), *Istituzioni di diritto processuale civile*, I, Napoli, Jovene.
- Chiovenda G. (1993), *Saggi di diritto processuale civile*, I, rist., Milano, Giuffrè.
- Chizzini A. (1996), “Privato e pubblico nella ripartizione dei ruoli processuali: i poteri dell’interveniente adesivo”, in *Rivista di diritto civile*, I, 344 ff.
- Chizzini A. (2014), *Pensiero e azione nella storia del processo civile*, 2<sup>nd</sup> ed., Torino, Utet.
- Chizzini A. (2018), *La tutela dei diritti*, Milano, Giuffrè.
- Chizzini A. (2022), “Meritevolezza e processo civile”, in *Storia, metodo e cultura*, 45 ff.
- Consolo C. (1985), *Il cumulo condizionale di domande*, I, Padova, Cedam.
- Consolo C. (1991), “Oggetto del giudicato e principio dispositivo. I. Dei limiti oggettivi e del giudicato costitutivo”, in *Rivista trimestrale di diritto e procedura civile*, 215 ff.
- Consolo C. (1998), *Il nuovo processo cautelare. Problemi e casi*, Torino, Giappichelli.
- Consolo C., Godio F. (2014), “Patologia del contratto e (modi dell’) accertamento processuale”, in *Studi senesi*, CXXVI, *Supplemento*, Siena, Università degli Studi di Siena-Dipartimento di Giurisprudenza, 141 ff.
- Costantino G. (2011), “Il nuovo articolo 111 della Costituzione e il “giusto processo civile””, in G. Costantino, *Riflessioni sulla giustizia (in)civile (1995-2010)*, Torino, Giappichelli, 351 ff.
- D’Alessandro D. (2016), *L’oggetto del giudizio di cognizione tra crisi delle categorie del diritto civile ed evoluzioni del diritto processuale*, Torino, Giappichelli.
- dalla Massara T. (2005), *La domanda parziale nel processo civile romano*, Padova, Cedam.
- dalla Massara T. (2008), “La domanda frazionata e il suo contrasto coi principi di buona fede e correttezza: il ripensamento delle Sezioni Unite”, in *Rivista di diritto civile*, II, 345 ff.

- Damaška M.R. (1991), *I volti della giustizia civile. Analisi comparatistica del processo*, Bologna, il Mulino.
- di Majo A. (2003), *La tutela civile dei diritti*, III, Milano, Giuffrè.
- Fabbrini G. (1989), “Poteri del giudice”, in *Scritti giuridici*, I, Milano, Giuffrè.
- Falzea A. (1947), *L’offerta reale*, Milano, Giuffrè.
- Fazzalari E. (1957), *Note in tema di diritto e processo*, Milano, Giuffrè.
- Ferri C. (1970), *Profili dell’accertamento costitutivo*, Padova, Cedam.
- Fornaciari M. (1999), *Situazioni potestative, tutela costitutiva, giudicato*, Torino, Giappichelli.
- Fornaciari M. (2015), “Oggetto del processo e diritto sostanziale”, in *Rivista trimestrale di diritto e procedura civile*, 829 ff.
- Gehri M., Jent Sørensen I., Sarbach M. (2015), “ZPO. Kommentar”, 2<sup>nd</sup> ed., Zürich, Schulthess Verlag.
- Ghirga M.F. (2004), *Meritevolezza della tutela richiesta. Contributo allo studio sull’abuso dell’azione giudiziale*, Milano, Giuffrè.
- Ghirga M.F. (2015), “Recenti sviluppi giurisprudenziali e normativi in tema di abuso del processo”, in *Rivista di diritto processuale*, 445 ff.
- Gorla G. (1937), “L’atto di disposizione dei diritti”, in *Studi in memoria di Edoardo Tommasone*, Padova, Cedam.
- Grunewald B. (1988), “Numerus clausus der Gestaltungsklagen, und Vertragsfreiheit”, in *ZZP*, 153 ff.
- Habscheid W.J. (1956), “Der Streitgegenstand im Zivilprozeß und im Streitverfahren der freiwilligen Gerichtsbarkeit”, Bielefeld, Deutscher Heimat.
- Habscheid W.J. (1962), “Probleme der Teilklage”, in *FamRZ*, 352 ff.
- Hattenhauer C. (2011), *Einseitige private Rechtsgestaltung*, Tübingen, Mohr Siebeck.
- Hellwig K. (1905), *Klagrecht und Klagmöglichkeit*, Leipzig, A. Deichert’sche Verlagsbuchhandlung Nachf. (Georg Böhme).
- Hellwig K. (1924), *Anspruch und Klagerecht. Beiträge zum bürgerlichen und zum Prozeßrecht*, Photo. Druck, Leipzig, Deichert’sche Verlagsbuchhandlung D. Werner Scholl.
- Helmreich H. (1967), *Das Selbsthilfeverbot des französischen Rechts und sein Einfluss auf Gestaltungs- und Gestaltungsklagerecht*, Berlin, Duncker & Humblot.
- Henckel W. (1961), *Parteilehre und Streitgegenstand*, Heidelberg, Winter.
- Jauernig O. (1993), *ZPR*, 24 Auf., München, C.H. Beck.
- Jhering R. (1989), *La lotta per il diritto*, trad. it., Milano, Giuffrè.
- Kaufmann E. (1914), *Amministrazione e diritto amministrativo*, trad. Napoli, Editoriale Scientifica, 2013.
- Kisch W. (1903), *Beiträge zur Urteilslehre*, Leipzig, Hirschfeld.

- Liebman E.T. (1962), “Fondamento del principio dispositivo”, in Id., *Problemi del processo civile*, Napoli, Morano, 3 ff.
- Lindacher W. (1963), “Individualisierte und nicht individualisierte Teilklagen”, in *ZZP*, 451 ff.
- Marinelli M. (2005), *La clausola generale dell'art. 100 c.p.c.: origini, metamorfosi e nuovi ruoli*, Trento, Dipartimento di Scienze giuridiche Università di Trento.
- Menchini S. (1987), *I limiti oggettivi del giudicato*, Milano, Giuffrè.
- Menchini S., Motto A. (2016), “Art. 2909”, in *Commentario del codice civile*, directed by E. Gabrielli, *Della tutela dei diritti*, ed. by G. Bonilini, A. Chizzini, Torino, Utet, 21 ff.
- Menchini S., Proto Pisani A. (1989), “Oggetto del processo e limiti oggettivi del giudicato in materia di crediti pecuniari”, in *Foro it.*, I, 2954 ff.
- Mengoni L., Realmonte F. (1964), s.v. “Disposizione (atto di)”, in *Enciclopedia del diritto*, XIII, Milano, Giuffrè, 189 ff.
- Merlin E. (1994) *Compensazione e processo*, II, *Il giudicato e l'oggetto del giudizio*, Milano, Giuffrè.
- Motto A. (2012), *Poteri sostanziali e tutela giurisdizionale*, Torino, Giappichelli.
- Murray P.L., Stürner R. (2014), *German Civil Justice*, Durham (NC), Carolina Academic Press.
- Nikisch A. (1935), *Der Streitgegenstand im Zivilprozess*, Tübingen, Mohr Siebeck.
- Nikisch A. (1952), *Zivilprozeßrecht*, 2<sup>nd</sup> ed., Tübingen, Mohr Siebeck.
- Pagni I. (1998), *Le azioni d'impugnativa negoziale. Contributo allo studio della tutela costitutiva*, Milano, Giuffrè.
- Pagni I. (2022), *Il contratto nel processo*, Milano, Giuffrè.
- Panzarola A. (2016), “Davvero il diritto d'azione (art. 24, comma I, Cost.) dipende dal valore economico della pretesa?”, in *Corriere giuridico*, 251 ff.
- Pekelis A. (1958), s.v. “Azione”, *Novissimo digesto italiano*, II, Torino, Utet, 29 ff.
- Proto Pisani A. (2011), “Pubblico e privato nel processo civile”, in *Il giusto proc. civ.*, 1153 ff.
- Proto Pisani A. (2014), “Una decisione storica delle Sezioni Unite”, in *Studi senesi*, CXXVI, *Supplemento*, 233 ff.
- Rosenberg L.-Schwab K.H.-Gottwald P. (2010), *Zivilprozessrecht*, 17<sup>th</sup> ed., München, C.H. Beck.
- Roth H. (2008), “vor § 253”, in F. Stein, M. Jonas, *Kommentar zur Zivilprozessordnung*, XXII Auf., Band 4, Tübingen, Mohr Siebeck.
- Saletti A. (1992), *Processo esecutivo e prescrizione*, Milano, Giuffrè.
- Satta S. (1941), *Guida pratica per il nuovo processo civile*, Padova, Cedam.

- Sauer W. (1951), *Allgemeine Prozeßrechtslehre. Zugleich eine systematische Schulung der zivilistischen und der kriminalistischen Praxis*, Berlin-Detmold-Köln-München, Heymanns Verlag.
- Schlosser P. (1968), *Einverständliches Parteihandeln im Zivilprozeß*, Tübingen, Mohr Siebeck.
- Schlosser (1966), *Gestaltungsklagen und Gestaltungsurteile*, Bielefeld, Gieseking.
- Schumann E. (1988), “Kein Bedürfnis für das Rechtsschutzbedürfnis”, in *Fest. f. Fasching*, Wien, 439 ff.
- Schwab K.H. (1954), *Der Streitgegenstand im Zivilprozess*, München-Berlin.
- Sraffa A. (1901), “Nota a Cass. 21 settembre 1900”, in *Foro it.*, I, 29 ff.
- Tavormina V. (1990), *Contributo alla teoria dei mezzi di impugnazione delle sentenze*, Milano, Vita e pensiero.
- Tavormina V. (2003), *Il processo come esecuzione forzata*, Napoli, ESI.
- Tavormina V. (2013), “Diritto e processo rivisitati”, in *Jus*, 45 ff.
- Tedoldi A. (2017), “Interesse ad agire, leggi elettorali e pregiudizialità costituzionale”, in *Rivista di diritto processuale*, 954 ff.
- Verde G. (1989), “Sulla «minima unità strutturale» azionabile nel processo (a proposito di giudicato e di emergenti dottrine)”, in *Rivista di diritto processuale*, 573 ff.
- Wach A. (1896), *Vorträge über die Reichs-Civilprozessordnung*, Bonn, Adolf Marcus.
- Wagner G. (1998), *Prozeßverträge: Privatautonomie im Verfahrensrecht*, Tübingen, Mohr Siebeck.
- Zeuner A. (1959), *Die objektiven Grenzen der Rechtskraft im Rahmen rechtlicher Sinnzusammenhänge. Zur Lehre über das Verhältnis von Rechtskraft und Entscheidungsgründen im Zivilprozeß*, Tübingen, Mohr-Siebeck.
- Zitelmann E. (1912), *Internationales Privatrecht*, II, München-Leipzig, Dunckler & Humblot.

## Chapter 8

# THE WILL IN THE *PER FORMULAS* PROCEDURE IN ROMAN LAW. THE *ACTIO*

Federica Bertoldi

*ABSTRACT:* In the Roman legal system, the *actio* was portrayed as a claim that was protectable by the praetor and which would entail the existence of the asserted legal situation as enunciated by the plaintiff through the *postulatio actionis* and the connected *editio actionis*. Through these passages, the plaintiff's will/voluntas became the norm through the granting of a formula, which would lead to the *litis contestatio* and the judgment that closed the trial.

**KEYWORDS:** Voluntas – Actio – Anspruch – Editio actionis.

**SUMMARY:** 1. The concept of *actio*. – 2. Literature review: Modern understandings of Roman *actio*. – 2.1. Bekker and Windscheid. – 2.2. Muther's critiques. – 2.3. Developments since Muther. – 3. The *per formulas* procedure and modern understandings. – 4. *Actio* in Roman legal sources. – 4.1. *Actio* as a protectable claim. – 4.2. The *editio actionis*: A meeting point between law and action. – 4.3. The *postulatio actionis*, *editio actionis* and *denegatio actionis*. – 5. Legacy of the Roman concept of *actio*. – References.

### 1. The concept of *actio*

The Roman concept of *actio* remains elusive, as evidenced by the persistent debates between scholars of Roman law and proceduralists since the nineteenth century. To complicate matters, the *actio* enucleated in the formular process was lost in Justinian law. This led to this classical concept being fragmented by the operations carried out by Justinian compilers. There is, however, an element commonly believed to be inherent in the concept: the consistent idea that *actio* was intended to protect a right.

Modern dogmatics have not clarified the notion of *actio*, since it has not always been emphasised that this concept – and its relations to subjective right – responds to an original (if not unique) conception by Roman jurists that is largely absent in modern legal systems (Biondi 1931, 132). Modern continental jurists tend to favour more abstract conceptualisations, whereas Roman jurists adhered to concrete reality. Moreover, the method by which they elaborated the law was casuistic, based primarily on concrete cases, deduction and analogy (Biondi 1931, 133).

While Justinian's *Institutiones* have only one title on the *actiones*, the

Digest reserves a considerable space for this subject. Based on quantity, it could even be said that the last term of the tripartition *personae, res, actiones*, was the most significant (Brugi 1896, 758). Two corollaries follow from this: firstly, that the *actio* was, for Roman jurists, the most technically engaging element of the procedural relationship. Secondly, that the thought of Roman jurists was dominated by the concept of *actiones*. In practice, jurists sought the prerequisites of an *actio* and determined the contents and consequences that flowed from it. In this regard, it seems useful to research the content of the *actio*, in order to clarify (as far as possible) the concept as understood by Roman jurists.

One cannot assume that Romans made a clear distinction between substantive and procedural law, since *actio* was at the origin of numerous legal figures (e.g., contracts). Sometimes (perhaps unconsciously), there is no clear distinction between the formular procedure and the *cognitio extra ordinem*, meaning that, when confronted with passages in the *Digesta*, it is not always evident which of the two procedures the jurist (or interpolator) was referring to.

Furthermore, there is a lack of a complete treatment of the civil process of the intermediate period, which has led many civil procedure scholars to detach themselves from historical research, neglecting the Romanist roots of debates on *actio*/action or how much of the Roman *actio* has passed into contemporary European law.

The present study will therefore demonstrate that, in the Roman formular process, the actor's will/*voluntas* was transformed into legal normativity through the granting of the *formula*. This gave rise to the *litis contestatio*, the sentencing that concluded the process, and the incontrovertible presupposition that constituted the binding procedural *status* between the parties.

## 2. Literature review: Modern understandings of Roman *actio*

### 2.1. Bekker and Windscheid

The first scholar to deal with the problem of the Roman *actio* was Ernst Immanuel Bekker, who posed the question of whether there was an identification between Roman *actio* and subjective right, and between *actio* and judicially protected claim (*Klage, Klagerecht*). Given that a claim, as the subject of an action, could be qualified in Roman legal language as *res*, no *res* is *per se* judicially actionable. *Res* can only be judicially protected when an *actio de hac re* is used. When the equity guided praetor crafted a *formula in factum* for a *res* not already covered by the edict, he thus recognised the possibility that a *res* without *actio* was judicially protectable. If what happened in Rome as an exception had become the rule, modern principles would have recognised

that a legal claim does not require any action existing outside of it, but has an inherent judicial enforceability. Actionability would thus be a quality of a claim. Consequently, according to Bekker, the *actio* arises immediately upon the conclusion of a contract or at the performance of a legal act and is enforceable regardless of whether there is a reason (*Anspruch*) to bring it. Bekker therefore held that the *actio* was a public prerogative of the magistrate – to issue a *formula* and appoint a judge – as well as a private right of the defendant to the assumption of the cross-examination (Bekker 1870, 366-371; 1871, 4-17; 1894, 169-188, 199-203).

Some doubts surrounding this issue were dispelled by Bernhard Windscheid in 1856. His monograph is the continued basis of a debate that still has not concluded, since the modern problematic of both *actio* and action can be said to have its birthplace in Windscheid's works (Windscheid 1856; 1857). He went so far as to affirm that the Roman concept of *actio* was entirely foreign to modern German law and did not coincide with that of action (*Klagerecht*) (Pugliese 1954, XVII). This had repercussions in both Romanist and procedural-civilist doctrine. As noted, Windscheid stood at the boundary of purely historical studies of Roman law (that is, those not dealing with contemporary legal debates) and studies of modern dogmatics (both civil and procedural) beyond the direct influence of Roman sources (Pugliese 1954, XVI-XVII). Naturally, his theories had repercussions in both fields.

In Windscheid's view, the Roman *actio* does not presuppose a violation of law, nor is it implicit that *actio* is a means of enforcing a right. Therefore, *actio* is not something that lies behind law, nor is it derived from law; rather, it is an expression of law. In Roman legal language, when someone has an action or is entitled to an action, it means what for moderns is the attribution to a subject of a legal right or claim. Here, Windscheid's *Anspruch* theory is central: the *actio* stood in place of the claim (*i.e.* the right to demand a certain conduct from another). The use of this concept by both German and Italian scholarship thus started from Windscheid, who saw the claim as the modern equivalent of the *actio* as a substantive legal situation that was clearly distinct from both action in the procedural sense and from subjective right. Windscheid later refined this notion, which eventually found its legislative formulation in § 194 BGB.<sup>1</sup>

According to Windscheid, the Roman legal system did not delineate individual prerogatives in terms of subjective rights, but of *actiones*. It did not note

---

<sup>1</sup>The concept of a claim was included in the BGB in § 194: «Das Recht, von einem anderen ein Tun oder Unterlassen zu verlangen (Anspruch), unterliegt der Verjährung ...». Literally, this means the 'Right to demand an act or omission from a third party'. However, it should be understood as the 'Right to demand in court an act or omission from a third party'.

when one's will became law for others (*i.e.*, having a certain right), but that in certain relationships an individual could judicially enforce their will before other individuals (*i.e.*, having a certain *actio*). Therefore, the Roman legal system was not a system of subjective rights, but one of judicially enforceable claims (*Ansprüche*). Legal protection created rights; the right existed insofar as it was granted procedural protection. The *actio* is not derivative, but an original and autonomous construct. It exists through the activity of the judicial and jurispudent magistrates, who can or may also deny it (Windscheid 1856, 3). This clear-cut theory was later confined to the *actiones quae ex praetoria iurisdictione pendet* (Bruns 1882, 23-37; Windscheid 1906, 189-192).

*Actio* indicates, for Windscheid, what one can demand from another; in other words, it is the term that stands in place of claim (Windscheid 1856, 5-6). He chose 'legal claim' to designate the personal direction of law, by virtue of which something is demanded of a particular individual. *Actio* in this sense is explained by the circumstance that Roman citizens did not possess what the law now attributes to moderns, but what the *forum* ascribed. This theory found its basis in the independence of the praetor in relation to the *ius civile*, which enabled him to deny protection to a right based on the *ius civile* and to grant it even when the latter did not recognise it.

One might imagine the repercussions this doctrine had on Romanist studies. First, the *actio* would be considered the foundational element from which the law itself derived. Second, the *actio* would stand in place of the law, and would come to be equivalent not to the modern concept of action, but rather to that of claim. To possess an *actio*, for a Roman, meant to possess a legally enforceable claim. Therefore, a Roman was faced with the question of whether they could act to protect that claim. Consequently, according to Windscheid, for modern jurists the right is the *prius* and the action is the *posterius*. For Romans, by contrast, the *prius* was the *actio* and the *posterius* was the right.

While modern legal language employs the vocabulary of rights, Roman legal language used that of actions. *Actio* was the power vested in the subject before the trial. Therefore, the Roman citizen was interested in what the relevant edict, the source of law, said. When an individual brought a lawsuit, they were asserting a right to which they were already entitled thanks to edictal concession. The action, inserted in the edict clause, created the right. Windscheid thus saw the *actio* as simultaneously standing in place of the right, expressing the right, and being the *Anspruch* (claim) (Guarino 1953, 406).

In the formulary procedure, the praetor would have rendered justice without being strictly bound by law. He could recognise a claim that could not be justified by law by disallowing another that was formally grounded in the law.

The legal order thus emerges as a regulation of judicially enforceable claims (Windscheid 1857).

## 2.2. Muther's critiques

A year after Windscheid's first paper, Theodor Muther published a systematic critique (Muther 1857). While researching the meaning of *actio*, Muther discovered that originally *agere* meant to appear (*i.e.*, to act before the praetor), whereas *actio* would have denoted the bilateral act by which the trial began. Accordingly, formulating an *actio* thus became the *formula* for initiating a litigation, through which the terms *praetor actionem dat, tribuit, denegat*, and so on, should be understood. For Muther, *actio* is the right to obtain the *formula*, or more broadly, the right to judicial protection.

Within this framework, the most important moment was the *editio actionis*, in which the plaintiff asked the praetor for the *formula* of the action (*postulare actionem*). Since a *formula* was established for certain cases in the edict, it could be said that the plaintiff had a claim to this grant even before it was granted, provided all the conditions to which the *actio* was promised were fulfilled. Muther thus admitted a claim to have the *actio* even before it was granted. Furthermore, in the event of arbitrary *denegatio* by the praetor, there were grounds for provoking the *intercessio*.

The claim to the *formula* precedes the *litis contestatio*; thus, when Roman jurists stated '*actio ei competit*' in reference to the plaintiff, they were referring to that prior entitlement. When debating whether someone was entitled to a claim in an individual case, the focus was on whether the factual or legal prerequisites of that specific *formula* had been met. According to this view, Roman jurists admitted a right to state protection without the need to presuppose a dispute: their legal system was thus a system of rights, in that only rights in the subjective sense could be asserted in court.

Therefore, the most frequent sense of the word *actio* was, in Muther's view, that of a claim to the granting of a *formula*. Within the framework of formulary law, the praetor is obliged to grant it as a representative of the state. The right to the granting of the *formula* would have arisen alongside the introduction of the formulary procedure. Nevertheless, the thought behind this claim would not have disappeared (*i.e.*, that the right to invoke the protection of the state would arise from the offence to a right).

Eventually, with the disappearance of the formulary procedure, the *formula* was replaced by the *libellus conventionis*, which would be presented to the magistrate to determine whether the litigation should be allowed to proceed. Although the structure of the process changed, the right of the offended party remained identical. This fact was recognised by the compilers when they

collected the passages of the classical jurists, in which *actio* was understood as ‘right to act’. Thus, for Muther, there existed no essential divergence between the ‘right to act’ in the Roman sense and that of the law of his own time.

### 2.3. Developments since Muther

Muther’s criticism was followed by a heated reply from Windscheid, who reiterated his positions (Windscheid 1857). Later, Windscheid’s ideas would be taken up by various authors, such as August Sigismund Schultze, who held that in the flower of praetorian legal production, *i.e.* during the formula procedure, there was only one actual right, which was granted by the magistrate either by *decretum* or *per formulam*, thus denying any normative value to general or abstract precepts (Schultze 1883, 384). The praetor was entrusted with the composition of the formula and thus the interpretation of *ius civile*. Because he could deny the action, the principles of *ius civile* were only effective if the praetor accepted them in a concrete case. Although Windscheid had found a concept originally distinct from both substantive right and *actio* in *Anspruch*, subsequent doctrine reworked the category to the point of affirming its coincidence with *actio* and *actio* with subjective right (Falcone 2013, 341).

Windscheid’s thesis, which attributed substantial legal significance to *actio*, was subsequently developed by other authors, including Heinrich Degenkolb, for whom the action was a simple legal faculty, and Moritz Wlassak, who identified *actio in personam* with the right of credit, or the *actio* with the claim (Degenkolb 1877, 9-15; Wlassak 1893, 303-323). This thesis was reiterated by Leopold Wenger, Gino Segrè and Benedikt Frese.<sup>2</sup>

Equally noteworthy are the contributions of other scholars. Alois Brinz believed that subjective right coincides with action, or rather that *actio* and subjective right overlap, since the *actio* exhausts the content of the right (Brinz 1884, 144-150). Ernst Levy highlighted the distinction between *actio* and the active side of *obligatio* (Levy 1918, 63-73, 82-97). James Goldschmidt declared that equating *actio* with a claim is erroneous (Goldschmidt 1925, 58-59, 153-157). Finally, Julius Binder assigned primacy to action over subjective right (Binder 1927).

Fundamental here is Emilio Betti’s opinion, which evolved and became

---

<sup>2</sup>Wenger embraces the idea of the *Rechtsschutzanspruch* in Roman law, or a claim to legal protection directed against the magistrate. According to Segrè, the *actio romana* is not the *ius agendi* (*i.e.*, the faculty to enforce a right), but the secured expectation of the creditor resulting from an obligatory bond. According to Frese, *actio* is not *Zwang*, but entitles *Zwang* and is comparable to the modern claim. Wenger 1925, 10-13; 1926, 11-13; Segrè 1930, 517-524; Frese 1935, 229-249.

increasingly nuanced over time (Betti 1920, 5-53; 1932, 205-237; 1935, 205-237). He considered it appropriate to erase the discriminating line between *actio* and subjective right. At an early stage, Betti adhered to the traditional notion of the ‘concrete right of action’ (Betti 1920, 5-25). This was followed by a further elaboration of a concept of action as a right of a specifically procedural nature only with respect to an asserted reason, regardless of its justification (Betti 1932, 205-222).

According to Betti, the reason (*res* or *actio*) in litigation is the assertion of a legal relationship of determined parameters by the person who takes the initiative in the proceedings. During the trial, this assertion, which may be identified with the claim, tends to represent what in the concrete case is substantive right. Thus, the action is directed at asserting a reason against an adversary. As a procedural power (*potestas agendi*), the action itself is the power to assert a given reason in court, and thus to promote the forced implementation of the legal relationship.<sup>3</sup> As *potestas*, the action has the nature of the potestative right to which corresponds, or a legal subjection in the adversary. This right is at once power and burden, in a means to an end in the legal relationship to which it applies. In other words, it is an instrumental power that, according to its purpose, must serve to enforce a concretely founded ‘reason’.

In essence, ‘reason’ mediates between right and action. When sources describe a private individual having an *actio* against another private individual, they mean that individual could assert a ‘reason’ in court that represented a relationship of substantive right towards him. At the heart of Betti’s approach is the ‘reason’ as an assertion intended to justify the measure being sought, subject to the demonstration of its factual basis.

Betti’s thought, after an evident evolution, eventually arrived at sustaining that the action is not only incumbent on the holder of the right, but also on those who are not (dalla Massara 2022, 61-83; Stolfi 2022, 171-195). In this understanding, the plaintiff’s aspiration to be right, *i.e.* to obtain a favourable decision, is brought to the forefront (Betti 1935, 443-444; 1936, 70-74). Regardless, through the term *actio*, Roman jurists usually designated both what moderns mean by ‘action’ and what they mean by ‘reason’. Here, ‘reason’ is intended to represent the relationship of substantive law or the legal case on which the dispute is based. Meanwhile, the action is the instrument that initiates the trial and opens the way to judicial protection, which happens insofar as one of the ‘reasons’ envisaged is asserted with that action.<sup>4</sup>

---

<sup>3</sup> Gai 4.123.

<sup>4</sup> See Cels. 3 *dig.* D. 44.7.51.

Finally, Betti would go on to maintain that substantive right is indissolubly linked to the trial and enforcement (Betti 1955, p. v.). This connection would have gone much deeper in Roman law than in modern law.

Equally interesting at this point is Biondo Biondi's view that the *actio* was not law, but simply legal activity, which has a determined beginning and development that leads to a specific outcome (Biondi 1931, 131-139, 156; 1933, 31-32; 1935, 443). Therefore, the action creates the right and is the fulcrum of the entire legal system, since law is always affirmed and develops as a function of the action (Biondi 1931, 141). While having a right or having an action are entirely equivalent concepts under current legal systems, this was not the case for Roman jurists, for whom the right was a situation created by agreement (Biondi 1931, 154).

Also significant in the twentieth century was the contribution made by Alessandro Pekelis, who, with a slant closer to the theory of law, revived Binder's thesis (Pekelis 1937, 94-95). Pekelis argued that in an evolved legal system, the position of advantage in which private holders of an interest find themselves is reduced (from a legal point of view) to the power to trigger state intervention (*i.e.*, to action). He thus concluded that the relationship to subjective right is the common denominator of all theories of action.

Some of Pekelis' reflections were taken up by Giovanni Pugliese in his well-known work, '*Actio e diritto subiettivo*'. Criticising the then-dominant Windscheid thesis, Pugliese believed that studies dealing with the relationship between subjective right and action had been characterised by the acceptance of an overly 'elastic' notion of action (Pugliese 1939, 5). He showed that the difficulty in defining the notion of action stems from the ambiguity of its meaning in Roman sources (Pugliese 1939, 5-6). According to him, *actio* places the holder in a position of legal dominance over another subject, who will consequently find themselves in a position of legal subjection (Pugliese 1939, 20). Therefore, someone who is in a state of subjection cannot prevent the holder from taking legal action and especially cannot materially escape the consequences of such action.

According to Pugliese the *actio* is nothing other than the power of *agere*, meaning 'to assert a right'; *actio* was thus the extrusion of a legal power (Pugliese 1939, 21, 33). *Actio* is the power to pursue in court what one is entitled to and therefore cannot be identified with the substantive right being asserted. The *actio* was understood by Roman jurists as the power to act in the trial and seek a certain result consisting in the protection of a pre-existing substantive situation (*i.e.*, the sanction for it). Thus, *actio* refers to the initiation of the sanction mechanism, which unfolds as ascertainment, condemnation and enforcement (Pugliese 1939, 173). The *actio* places the

holder in a position of dominance over another subject who is in a position of subjection (Pugliese 1939, 19).

Pugliese contends that *actio* presupposes the validity of the legal ‘reason’ being asserted: only those who can demonstrate the truth of their claim possess *actio* (Pugliese 1939, 150). There is no *actio* if the content of the *intentio* of the *formula* does not correspond to reality (Pugliese 1939, 152). Hence, *actio* postulates the soundness of the reason and is based on the favourable judicial pronouncement (Pugliese 1939, 157). In this way, Pugliese challenged the concept of a private right through the lens of procedural dynamics.

In this regard, Antonio Guarino’s input is also worth considering (Guarino 1953, 389-406). He upholds the thesis that action and subjective right coincide, reducing every subjective right to a specific claim against a single, determined, passive subject. Meanwhile, Orestano affirms the ‘unreality of action’ and the impossibility of arriving at a single solution to the problem if one approaches the concept of *agere* in the abstract and independently of its setting in concrete practice (Orestano 1959, 816-817). The only reality in the problem of action is thus the behaviour of legal science. The problem of action, like that of subjective right, is thus resolved in its history.

Carlo Gioffredi here asserts that only two basic meanings can be found in the term *actio*: that of a procedural act and that of a legal institution of a procedural nature (Gioffredi 1980, 218). The former is more concrete and focused on ‘procedure’, whereas the latter is more abstract, ideal and focused on ‘right of action’. Nevertheless, there is some overlap between the two meanings, which is constituted by the fact that in both aspects the *actio* aims at a single purpose consisting of the protection of the right. All the other meanings sought in the sources can be traced back to these two basic significations.

Carlo Augusto Cannata further emphasised the distinction between modern interpreters and classical Roman jurists (Cannata 1980, 8; 2001, 98-99). The former recognises an instrumental subjective right in the *actio* in that it functions as a means for the realization of a substantive right. However, this right is one that exists in and of itself, regardless of the merits of the claim. For Roman jurists of the classical period, on the other hand, ‘having action’ was equivalent to having well-founded reasons for winning a case against someone. Action therefore was a procedural subjective right that was instrumental to a substantive subjective right and accrued to the subject only if the substantive subjective right existed. Only the one whose claim was founded in a subjective right had the right to go to trial to pursue that claim. Otherwise, the trial would be futile; a judgment unfavourable to the plaintiff meant the plaintiff exercised an action they did not have.

According to Giuseppe Provera, *actio* was *ius* and therefore power to

which one was subject (Provera 1983, 341). This power was no different from the power conferred on a given subject for the protection of their interest, which was *ius* only by virtue of this protection. Conversely, Talamanca stated that Roman jurists, even if they saw law as a process, did not ignore the substantive dimension (Talamanca 1990, 279). Not only was the *actio* category itself understood in a substantial sense, but where judicial protection was provided, a substantial subjective situation was also identified.

To conclude this overview and consider more recent scholarship, it is worth mentioning Riccardo Cardilli's assertion that the *actio* is neither an element of the subjective right functional to its defence, nor an element instrumental to the right in an objective sense, but a structure of *ius*: the *ius* as action (Cardilli 2010, 99-100; 2023, 100-101). From a different angle, Stefania Romeo argues that the edict represents the first 'regulatory' framework of the claims of the parties: whoever wants to bring an action must fundamentally verify that the claim being asserted falls within the parameters of that edict (Romeo 2020, 62, fn. 80). In this regard, the edict 'codifies' a fabric of actions and represents a particularly reliable precedent on which to build the action. Thus, according to Romeo, the action protects the right but does not imply ownership of it. The *actio* is a *ius* that is clearly distinguished from both the objective right and the subjective right, the protection of which it is preordained (Romeo 2020, 64).

### 3. The *per formulas* procedure and modern understandings

Having analysed the most important doctrinal approaches to Roman *actio*, it seems useful to place it more clearly within the formular procedure to explore its more concrete importance. The formulary procedure is pivotal, as it constitutes the procedural paradigm that most significantly shaped the notion of *actio* as elaborated in the literature discussed above.

The conduct of the trial first required the initiative of the plaintiff, who was the interested party complaining about a violation suffered or the failure to meet a specific expectation. The one who initiated the process therefore had to bring 'legitimacy' to it (*i.e.*, a 'justification' for the process itself) (Pugliese 1963, 259). The plaintiff's initiation materialised their *agere* (*i.e.*, the concrete exercise of the *actio*) (Pugliese 1963, 260).

The term *actio*, in its procedural sense, originally denoted the ensemble of verbal acts on which the first Roman trial, that of *legis actiones*, hinged (Pugliese 1958, 24). In the later formular trial, its meaning is believed to refer both to the concrete activity of the plaintiff during the trial (a procedural activity to enforce a given interest) but also as an abstract model of

procedural activity prepared by the praetor and made available by hypothetical plaintiffs at the beginning of the judicial year (Pugliese 1963, 261).

Thus, in the subsequent formular process, each *actio* corresponded to a *formula*, which was the enunciation of the task to be entrusted to the adjudicating body. An *actio* could be deemed to exist only if a suitable *formula* scheme was found in the praetor's edict. This *formula* was, however, malleable by the parties and the praetor, since clauses (such as *exceptio* and *praescriptio*) could be added. In fact, both the concrete activity of the plaintiff and the abstract scheme of that activity were specified in the relevant *formula*, to determine a distinct *actio* each time. Thus, the semantic scope of *actio* encompassed the 'activity of the plaintiff in the process', both in concrete terms and as an abstract scheme or model (Pugliese 1963, 261).

Each plaintiff's claim was therefore linked to a particular *formula*, which was either provided for in the edict or granted individually by the praetor. As seen above, the dominant scholarly view holds that, for Roman jurists, only plaintiffs who *were* right and *had* a right were entitled to an action.<sup>5</sup> In this context, a very well-known text by Celsus is illuminating: '*Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi*'.<sup>6</sup> This was echoed in the Institutes, which reports the only testimony preserved in legal sources of a Roman jurist's reflection on the content of the *actio*:<sup>7</sup> '*... actio autem nihil aliud est quam ius persequendi iudicio quod sibi debetur*'.<sup>8</sup> To paraphrase these texts, action is the right to pursue what is due in court.

Biondi and Michail Andréev have cast doubt on the authenticity of the text, but its tenor is not such as to authorise suspicion (Biondi 1931, 176-180; Andréev 1965, 73). On the contrary, this 'lapidary' statement is very relevant and seems to underlie the distinction between action and subjective right and the relationship between these two concepts.

This very passage constituted the basis of the gap discussed above between what Romans understood by *actio* and what moderns understood as action (*Klagerecht*) (Pugliese 1954, XII-XIV). The interpretative challenges posed by this definition appear to lie at the root of scholars' inability to enunciate an unambiguous concept of action (Brugi 1896, 758-761; Pekelis 1937, 92-93; Fazzalari 1988, 30-31).

---

<sup>5</sup> It is not clear from the literature whether the problem of the plaintiff's interest in bringing proceedings also emerged in the context of the formative process. More precisely, it does not indicate whether the plaintiff had to have an interest in bringing proceedings.

<sup>6</sup> Cels. 3 dig. D. 44.7.51.

<sup>7</sup> See: Pugliese 1939, 179; 1979, 792-793; Orestano 1959, 792-793.

<sup>8</sup> I. 4.6 pr.

For Windscheid, for example, *actio* indicated what one party may demand from another; that is, *actio* indicated a claim capable of judicial enforcement (Windscheid 1856, 5-6). It stands in place of law, being an expression of subjective right, and is what qualifies as *Anspruch*, or pretence. This idea has had decisive consequences for Romanist studies. Firstly, the *actio* would be the primary element from which law would be derived; secondly, the *actio* would take the place of law and would come to be equivalent not to modern action, but to claim. To have an *actio* for a Roman meant, as noted above, to hold a legal claim.

It was only with Francesco Carnelutti that the idea that the claim could be an intermediate element between action and subjective right was buried in modern procedural law (Carnelutti 1927, 280-292). An expectation was derived from the obligation to behave in a certain manner, based on the rule prescribing that conduct. This expectation is what a part of Italian doctrine conceives as the set of attributions conferred by the legal system on a subject for the satisfaction of their 'interest'.<sup>9</sup>

This modern construction of claim, however, departs significantly from the idea Windscheid and his followers had. Windscheid's formulation that *actio* was the equivalent of what we call a claim came to mean that *actio* was the equivalent of right (as argued by Wlassak and Wenger) and can be recovered through a thorough analysis of Celsus.<sup>10</sup>

Celsus, in stating that the *actio* is the '*ius quod tibi debeatur iudicio persequendi*', highlights both the procedural and the substantive aspect of the action, the latter of which can be called a claim. That is, it is the right to pursue in court what is due is a judicially enforceable claim. In essence, it constitutes a claim activated by the plaintiff through the *postulatio actionis*, which, once subjected to the magistrate's control of admissibility, becomes prosecutable by means of the granting of the formula.

---

<sup>9</sup> Betti 1920, 26-34; Pugliese 1954, XXXIII; Calamandrei 1947, 8. According to Betti, the will of the obligor may not bend to perform. In this case, the legal power inherent in the subjective right is no longer sufficient to realise the expectation. The attitude of pretension that it assumes as soon as the expectation remains unsatisfied is a weapon directed at the obligor's reluctant will. To overcome the resistance of the latter, a further legal power (action) is indispensable, either as condemnatory or executive action. Where the subjective right is not honoured, the right of action takes over: this has a subsidiary and eventual function, subordinate to the ineffectiveness of the latter. In short, the two powers stand in a relation of subordinate alternation and subsequent competition. In the person who is passively legitimised to act, the power of action is correlated with pure juridical subjection, which never takes the form of an obligation of conduct, even negative content. This power primarily corresponds to an interest and arises immediately with the interest in implementation of legal protection.

<sup>10</sup> Wlassak 1893, 306; Wenger 1926, 12. See also Jolowicz 1952, 475.

In this light, the subjective right became an action through the exercise of the plaintiff's will. This will/*voluntas*, once recognised, became normalised, in the sense that the exercise of the *actio* led to a judgement (*i.e.*, an ascertainment of the claim asserted), which would be followed by the judge's command to the parties to do what the ascertainment itself required (Marrone 1955, 5-6). The judgement, as the judge's *dictum*, also became the norm, entailing the parties' obligation to uphold it (Marrone 1965, 14). Therefore, the traditional doctrine holds that the judgement, from the moment it recognised or disavowed the reason asserted, had a nature of ascertainment that was endowed with its own normative efficacy (*i.e.*, it is *res iudicata*, or shareable) (Betti 1968, 216). It can therefore be concluded that Roman jurists had already attributed normative effects to the judgement, not only in the formal process, but in any kind of process (Pugliese 1960, 227-228; 1965, 492).

#### 4. *Actio* in Roman legal sources

To avoid excessively dogmatic approach and to adopt a more empirical angle and take a different approach to the problem at hand, it seems useful to study the position of this subject within the Roman legal system itself, especially in relation to its procedural means (Gioffredi 1980, 216). In this framework, the concept of *actio* seems to have had a pre-eminent value over subjective right, or to have determined 'a fusion between claim and action' (Gioffredi 1980, 217).

The *actio* is, in essence, the procedural articulation of the verb *agere* (Brugi 1896, 760). This is demonstrated in certain passages of the Digest like Paul. 2 *ad ed. aed. cur.* D. 21.1.44.1, but especially in Ulp. 14 *ad ed.* D. 4.9.3.1, where the *actio in factum* is the *actio honoraria* as opposed to the *civilis*. As Gioffredi has pointed out, there is a reference to the origin of the action, to the normative source that confers judicial protection (Gioffredi 1980, 220).

In the sources, the locution *formulam, iudicium dare* or *denegare*, is often preferred to *actionem dare* or *denegare*. This indicates that the praetor, with the progress of legal conceptions, is conceived not so much as someone who gives (or denies) a *formula*, but rather as one who admits (or refuses) legal action, grants (or denies) the power to defend a right being claimed (*i.e.*, the *actio*). This also applies to other expressions such as *agere, petere, experiri actionem* (Gioffredi 1980, 219).

Even phrases in the sources like '*aliquis actio competit*', '*alicui actio est*' or '*habere actionem*' refer to a more pregnant form of *actio* with a 'subjective' connotation. In other words, *actio* in these phrases is a right and therefore a claim involving a power to act according to a procedural scheme (the

*formula*) established by the legal order (Pugliese 1963, 262). Therefore, only if the action were grounded from the point of view of substantive law, would the claim (*i.e.*, the right and power to act in respect of that particular dispute) have arisen.<sup>11</sup> Other sources also use *actio* in this sense.<sup>12</sup> In a passage from Julian, for example, it is said that if a person gave 10 coins to Titius so that he would manumit Sticus by the kalends, if Sticus was not manumitted, the *actio* could only be available after the kalends.

Therefore, one should also ask how *actio* is to be understood when it is followed by its particular specification and name (*e.g.*, *actio depositi*, *actio mandati*, *actio empti*, *actio ex stipulatu*, *actio doli*, *actio iniuriarum*, *actio furti*) (Gioffredi 1980, 220). A particular *actio* corresponds to a particular legal relationship which it is designed to protect. There are multiple cases in which it is said that the plaintiff is entitled to a certain action and not another. What is of interest ultimately at stake is the substantive legal case; the *actio* is invoked not as a *formula*, but as a procedural means that is suited to that case and expressly stated.

#### 4.1. *Actio* as a protectable claim

It is here useful to consider the concept of a claim, or *Anspruch* (which itself indicates the power to claim or demand). This concept has been developed by German doctrine and carries with it various shades of meaning.

According to Bekker *Anspruch* indicates a legal relationship involving three parties – plaintiff, defendant and judge – resulting in two distinct rights: the right for the relations of the active party with the passive party to be recognised by the judge (with the possible pronouncement of a pecuniary sentence) and a right against the defendant to the performance of a specific obligation (Bekker 1871, 15). As we have already seen, for Windscheid, *Anspruch* is a legal

---

<sup>11</sup> Falcone 2013, 341. According to Fabiana Falcone, these phrases hint at the shaping of an idea of *actio* perceived as *ius*.

<sup>12</sup> Gai 3.181: *Unde fit, ut si legitimo iudicio debitum petiero, postea de eo ipso iure agere non possim, quia inutiliter intendo DARI MIHI OPORTERE, quia litis contestatione dari oportere desiit, aliter atque si imperio continenti iudicio egerim; tunc enim nibilo minus obligatio durat, et ideo ipso iure postea agere possum, sed debeo per exceptionem rei iudicatae vel in iudicium deductae summoverti. quae autem legitima <sint> iudicia et quae imperio contineantur (?), sequenti commentario referemus; Iul. 10 dig. D. 12.1.19: *Veluti si Titio decem dedero, ut Stichum intra calendas manumitteret, ante kalendas nullam actionem habeo, post kalendas ita demum agere potero, si manumissus non fuerit; Paul. 21 ad ed. D. 6.1.23 pr.: In rem actio competit ei, qui aut iure gentium aut iure civili dominium adquisiit. 1. Loca sacra, item religiosa, quasi nostra in rem actione peti non possunt; Pomp. 22 ad Sab. D. 45.1.27.1: Si stipulatus hoc modo fuero: 'si intra biennium Capitolium non ascenderit, dari?', non nisi praeterito biennio recte petam.**

concept in its own right, distinct from both the subjective right and the *actio*; it is conceived as a right to demand the elimination of a violation of a primary right (Windscheid 1856, 3). For Wlassak, this notion was subsumed under the right of claim (Wlassak 1893, 303-323). For Mitteis, *Anspruch* is an actual *Verlangendürfen*, a permissible demand directed against a specific adversary (Mitteis 1908, 91-92). Betti argues the claim is not to be confused with the subjective right, but neither is it to be confused with the *actio*, because several claims may arise from a single subjective right, just as a single *actio* may serve to assert multiple claims. (Betti 1920, 5-53). Finally, for Georges Cornil, the claim represented the active side of the debt and expressed the creditor's due (Cornil 1950, 39-48). The claim would have nothing in common with the *actio*, but neither would it be confused with the subjective right. It thus fell between the right and the *actio*.

Beyond this much debated category, however, it is crucial to reiterate that Roman jurists spoke the language of *actiones*, not that of modern subjective rights. Whoever acted improperly, acted *non recte* (i.e., they did not have the *actio*).<sup>13</sup> If this was evident in the *in iure* phase, the praetor could deny the *actio*, or, in the case of granting an illegitimate *actio*, sanctions were provided for (Pugliese 1958, 28). Thus, in the phrase *actio competit*, the *actio* is seen as the reflection of the claim. Meanwhile, in the phrase *habere actionem*, the *actio* is something that is due because it is provided for by the legal order and allows one to act, or assert a right against the other party. It is the will/*voluntas* of the plaintiff that becomes the norm (Pugliese 1939, 173-179).

There are some texts in the Digest that seem to confirm that Roman jurists employed the term *actio* as a synonym for claim, if not right. Regarding real rights, Celsus, seeking to define property (itself a difficult task), states that it is what is defended by *rei vindicatio*.<sup>14</sup> On the other hand, with respect to obligations, Modestinus clearly refers to the possibility of taking judicial action against the debtor.<sup>15</sup>

Here, Gioffredi's assertion is convincing: in a legal system lacking codification, it was difficult to think of the precept or the institution that formed the basis of a relationship (Gioffredi 1980, 234). Instead, it was much easier to refer to the *actio* that afforded protection; and the praetorian edict, with its catalogue of *actiones*, suggests it. The real difficulty for a Roman, therefore, was not the typicality of the actions, but rather making a pre-existing

---

<sup>13</sup> See Gai 4.178, 186; Ulp. 28 *ad ed.* D. 13.7.9.5; Call. 2 *ad ed. mon.* D. 6.1.50 pr.; Quint. *inst. orat.* 3.6.73. In this passage, Quintilian qualifies action as a right.

<sup>14</sup> Cels. 18 *dig.* D. 6.1.49.1: *Eum est, quod ex re mea superest, cuius vindicandi ius habeo.* See Gioffredi 1980, 230.

<sup>15</sup> Mod. 4 *pand.* D. 50.16.108: *'Debitor' intellegitur is, a quo invito exigi pecunia potest.* See Gioffredi 1980, 231.

right under dispute fit into the procedural scheme. The risk was that the praetor (and, later, the *iudex*) would not agree on the link between the case and the procedural scheme (Brugi 1896, 763).

A plaintiff asserting an unfounded claim was not barred from performing procedural acts, subject to the possibility of the praetor denying the action and the judge acquitting the defendant. This does not detract from the fact that the Roman *actio* theoretically entailed the power to enforce a single substantive right that was incumbent on the plaintiff. In some cases, the plaintiff could choose between several possible courses of action for a legal situation that presented multiple possibilities for protection. The plaintiff's will/*voluntas* in the choice of action was thus important.

In this regard, Quintilian's input is pertinent: '... *habeo ius actionis: non habes*'.<sup>16</sup> Discussing *ius actionis*, he qualifies action as a right. The *ius actionis* is thus the right allowing one to act (*i.e.*, the prerogative) and the claim granted by the legal order to be able to take legal action. We are thus faced with a locution that encapsulated an abstract concept, but which inherently carries the potential for the plaintiff's will/*voluntas* to become concretely normative.

#### 4.2. The *editio actionis*: A meeting point between law and action

Acts of impetus, by which the plaintiff advanced the process towards its final goal, constituted the plaintiff's *agere* (Pugliese 1963, 260). As previously observed, each claim by the plaintiff corresponded to a particular *formula*, whether it was already provided for by the edict or granted individually by the praetor. The *actio* is, therefore, the procedural expression of the *agere*. It is in this sense that the expressions *praetor actionem dat, tribuit* or *denegat* must be understood.<sup>17</sup>

The most crucial moment for the plaintiff was not only that of the *litis contestatio*, where everything is practically accomplished, but that of the *editio actionis*, in which he asks the praetor for the *formula* of the action (*postulare actionem*). In most instances, this would lead to the praetor's granting of the *formula*, thus allowing the plaintiff's will/*voluntas* to acquire normative

<sup>16</sup> Quint. *inst. orat.* 3.6.73.

<sup>17</sup> Cic. *de part. orat.* 99: *Atque etiam ante iudicium de constituendo ipso iudicio solet esse contentio, cum aut sitne actio illi qui agit aut iamne sit aut num iam esse desierit aut illane lege, hisne verbis sit actio quaeritur. Quae etiamsi ante quam res in iudicium venit aut concertata aut diiudicata aut confecta non sunt, tamen in ipsis iudiciis permagnum saepe habent pondus, cum ita dicitur: plus petisti; sero petisti; non fuit tua petitio; non a me, non hac lege, non his verbis, non hoc iudicio.*

force. As has been rightly observed, because a *formula* was established for certain cases in the edict, the plaintiff could be said to have a claim to this concession even before it was granted, provided all the conditions necessary for the *actio* were met (Brugi 1896, 760). The claim to the *formula* thus preceded the *litis contestatio*. When Roman jurists said ‘*actio ei competit*’ in reference to the plaintiff, they were thinking of the claim to the concession of the *formula*.

The *editio actionis*, however, constituted a procedural stage within the formulary process that has not yet been thoroughly studied.<sup>18</sup> The defendant being sued had to know what action was being brought against them and why to decide how to most effectively prepare their defence (Cannata 1982, 139-140). Symmetrically, the plaintiff had to choose the most suitable action to protect their claim. This choice would inevitably shape the entire development of the subsequent trial, unless *denegatio actionis* by the magistrate. Regardless, the plaintiff had to indicate the action being brought. The following text from Ulpianus rules out the possibility that ‘*edere actionem*’ could simply consist of informing the defendant of the name of the action the plaintiff intended to request from the praetor:

Ulp. 4 *ad ed.* D. 2.13.1 pr.: *Qua quisque actione agere volet, eam edere debet: nam aequissimum videtur eum qui acturus est edere actionem, ut proinde sciat reus, utrum cedere an contendere ultra debeat, et, si contendendum putat, veniat instructus ad agendum cognita actione qua conveniatur. 1. Edere est etiam copiam describendi facere: vel in libello complecti et dare: vel dictare. eum quoque edere Labeo ait, qui producat adversarium suum ad album et demonstret quod dictaturus est vel id dicendo, quo uti velit.*

Where anyone wishes to bring an action, he should give notice; for it seems most fair that one who is about to bring an action should give notice so that the defendant accordingly may know whether he ought to admit the claim or contest it further and so that if he thinks it should be contested, he may come prepared for the suit, knowing the action by he is sued. 1. To give notice includes providing a means for taking a copy, the drawing up and furnishing of a written statement or dictation. Labeo says that a person also gives notice if he brings his adversary to the tablets proclaiming the

---

<sup>18</sup> See: Lenel 1894, 385-392; Schott 1903, 35-45; 1904, 28-43; Wlassak 1904, 169, fn. 1; Wenger 1905, 1960-1967; Pugliese 1963, 353-361; Fernández Barreiro 1969, 32-43; 1975, 125-144; Lemosse 1975, 45-54; Guarino 1980, 74 fn. 48; Cannata 1982, 139-142; Buti 1984, 189-220; Gómez-Iglesias Casal 1984, 26-28; Murga Gener 1989, 249-252; Fernández Barreiro 1990, 78; Lemosse 1991, 298-304; Kaser, Hackl 1996, 220-221; Bürge 1995, 1-50; Varvaro 2023, 89-91.

edict and points out the action which he is about to dictate or declares the one which he intends to use (trans. Watson 1985, 58-59).

For Ulpianus, the *editio actionis* is a ‘condition of the *actio*’s proceedability’ and responds first and foremost to a requirement of fairness (Romeo 2020, 61, fn. 80). Any legal action intended to be exercised had to be explicitly stated, and the defendant had to know the action being brought against them so they could justifiably decide whether to resist. If he decided to proceed with the litigation, he had to be able to defend themselves. Consequentially, according to Wenger, ‘*edere actionem*’ means the formal communication to the defendant of the claim that the plaintiff wants to assert in proceedings (*i.e.*, the substantive subjective right they intend to exercise (Wenger 1905, 1962-1963).

‘*Edere actionem*’ in formal proceedings meant to indicate the *formula* by which to ‘procedurally channel’ the action the plaintiff wanted to use to enforce a claim (Fernández Barreiro 1969, 45). As Pugliese observes, the indication of the procedural *formula* indirectly reveals the plaintiff’s claim, rendering the latter a reflex manifestation of the former (Pugliese 1963, 360, fn. 64). ‘*Edere*’ also consists in giving the opportunity to transcribe or to draw up a written document and deliver it, or to have it drawn up under dictation. On a residual basis, Labeo states that whoever brings an opponent before the bar and shows what they intend to dictate or use for the formulation of a claim also indicates the action.<sup>19</sup>

Accordingly, the praetor established the plaintiff’s obligation to *edere actionem* (*i.e.*, to make the action explicit). Only upon completion of the *postulatio actionis* could the praetor, if the action was successful, follow up with a *decretum* of *datio actionis*, with which the magistrate adhered to the scheme proposed by the plaintiff (Sciortino 2015, 200-201). According to some scholars, this procedural phase took place extrajudicially, while others hold it was the first moment of the *in iure* phase before the magistrate.<sup>20</sup>

In my opinion, this phase seems to mirror the *postulatio exceptionis*, which is why I consider it to have formally been part of the process. According to Pugliese, the magistrate, when confronted with the *postulatio actionis*, enjoyed discretionary power in his response (Pugliese 1939, 349). He was not obliged to *dare actionem*, despite what the *ius civile* established, but he was obliged to *ius dicere* (*i.e.*, to pronounce on the *formula* proposed by the plaintiff), authorising the relative *litis contestatio*, or opposing it. At the time

<sup>19</sup> Ulp. 4 *ad ed.* D. 2.13.1.1.

<sup>20</sup> For the former, see Lenel 1894, 385; Pugliese 1963, 353-361; Fernández Barreiro 1969, 32-33; Kaser, Hackl 1996, 220. For the latter, see Schott 1903, 35-36; Wlassak 1904, 169, fn. 1.

of the *postulatio actionis*, the plaintiff was required to identify the intended *formula* in at least one of two ways: orally, by enunciating it so that the defendant could write it down, or by providing them with notes for transcription.

What is of interest here, however, are the effects of this *editio*, which are made very clear from an *incipit* of a constitution of Severus and Caracalla, the continuation of which could be interpolated: '*Edita actio speciem futurae litis demonstrat, quam emendari vel mutari licet, prout edicti perpetui monet auctoritas vel ius reddentis decernit aequitas*'.<sup>21</sup>

The *actio edita* reflected the species of future litigation, in which action can be changed or corrected, as the perpetual edict allowed or as was decreed by equity. Consequently, it predisposed the course of the litigation that led to the judgement. It is evident, however, that the magistrate had the discretionary power to grant, modify or even deny the *actio* chosen by the plaintiff. The will of the plaintiff was therefore conditional. However, in the presence of certain conditions, it could lead to the granting of the *formula* and a judgment based on the same *formula*. As mentioned above, the plaintiff's will/*voluntas* therefore established the status of the parties and became the rule. While the passage of the constitution was certainly reworked, the substance indicates that the choices made by the plaintiff from the earliest steps conditioned the dispute, despite any adjustments made by the praetor or requests from the defendant.

According to Max Kaser and Karl Hackl, the primary function of the *editio* was to inform the defendant, enabling them to prepare an appropriate defence strategy. It therefore did not bind the editor, as the trial could also take place using an improved *formula* or even a different action from the one announced (Kaser, Hackl 1996, 220-221). This aspect had led previous scholarship, starting with Otto Lenel, to hold that there were two phases of *editio*: one extrajudicial and one taking place *in iure*.<sup>22</sup> According to this model, the plaintiff first had to notify the adversary (first in a freer form, and then in a legally 'more armoured' form) of the action with which they intended to pursue a claim. In the sources, however, direct evidence of this dichotomy is lacking (Burge 1995, 43). Rather, it was structural considerations based on logical arguments that prompted Lenel to make this distinction. He believed he could thus resolve certain apparent contradictions in contemporary doctrine. This made it possible to explain why the title *de edendo* in the *Album* preceded the title *de in ius vocando*, even though the *editio* was supposed to be an integral part of the *litis contestatio*.

Nonetheless, the fact that the terms *editio* and *edere* were used by Roman

---

<sup>21</sup> C. 2.1.3 (a. 202).

<sup>22</sup> Lenel 1894, 374-392. See also Wlassak 1924, 8, 72-85.

jurists without any indication of a double meaning (despite their clear opposition) has caused problems in the literature, as it begs the question of how the terms were used in everyday practice despite the lack of semantic differentiation. In fact, as Alfons Bürge has shown, the sources on the *editio actionis* demonstrate how the parties' interaction in the phase preceding the *litis contestatio* was characterised by a compulsion to engage in a legal qualification of the claim.<sup>23</sup> In fact, the sources show that the parties could negotiate the formulation of the object of the lawsuit. Roman jurists indicated this procedure when they mentioned, for example, that a plaintiff had prepared for multiple courses of action before finalising the decision at a later stage.

This range of possible strategies is also reflected in the latitude accorded to the *procurator* or *cognitor*. If we dispense with the assumption that there was a division of the *editio*, which is not indicated in the sources, it becomes clearer how the subject matter of the trial was gradually finalised in the interaction between the parties (Bürge 1995, 43).

According to Bürge, whether more importance was given to the will/*voluntas* of the parties (based on private autonomy) or more attention was paid to the actions of the magistrate (which conclude the preliminary proceedings) is in fact irrelevant (Bürge 1995, 43-44). It remains clear is that the praetor had the coercive power to deny an action in the event of a defective *editio* or unwillingness to undertake an *exceptio*, which determined the behaviour and strategies of the defendant (Bürge 1995, 44). The Roman trial's requirement of legal qualification and the obligation to make evidence public before the final determination of the object of the trial through *litis contestatio* indicates two ancient procedural peculiarities that are profoundly alien to modern models of civil procedure.

### 4.3. The *postulatio actionis*, *editio actionis* and *denegatio actionis*

From the above, it is possible to clarify what was meant by *editio actionis*: a means of formally announcing a claim and therefore notifying others of the *formula* with which the plaintiff would proceed (Wenger 1905, 1961). This was not the concrete formula that would be the subject of the *litis contestatio*, since it did not yet contain the possible exceptions of the defendant, which implies that it referred primarily to the abstract scheme contained in an edict. This is confirmed by Cicero, who illustrates how the *editio actionis* took place and which indicates that it was the first formal act of the trial (and therefore not an extrajudicial step):

---

<sup>23</sup> TPSulp. 2; TPSulp. 3. See Wolf 1985, 781, fn. 34; Camodeca 1992, 59-60; 1999, 56-57; Wolf 2012, 34-35. See also Bürge 1995, 43.

Cic. *p. Caec.* 7.19: *Atque illis paucis diebus, postea quam videt nihil se ab A. Caecina posse litium terrore abradere, homini Romae in foro denuntiat fundum illum de quo ante dixi, cuius istum emptorem demonstravi fuisse mandatu Caesenniae, suum esse seseque sibi emisse...*

In the course of the next few days, realizing that nothing could be squeezed out of Caecina by the threat of a lawsuit, Aebutius formally notified him in the Forum at Rome that the estate of which I have already spoken and which I showed that the defendant purchased on the instructions of Caesennia, was his own, bought by him for himself... (trans. Grose Hodge 1979, 115).

Ebutius, recognising that he could not get anything out of Caecina, notified him in the Forum of his desire to take legal action to claim his property rights to the Fulcianus estate through a *rei vindicatio*. This text demonstrates how the will/*voluntas* of the plaintiff was relevant not only in shaping the procedural dispute, but also in the specific choice of action, which would be the basis of the *formula* elaborated by the magistrate in the *in iure* phase once the respective claims of the parties had been collected. I believe this choice was binding, as the term '*denuntiat*' suggests. Whoever proposed the action therefore had the power to determine the subject matter of the trial in a way that was in part binding on the praetor and the judge. It was thus a central choice, reflected by the fact that there is no title in the Digest that does not discuss what action was involved (Brugi 1896, 763). A trace of this posture remained in the *Basiliká*, where translating the title D. 2.13, *De edendo*, it says that the *libellus* must indicate the action of the traditional list.<sup>24</sup>

At this point, however, it seems useful to highlight the relationship between *editio actionis* and *litis contestatio*. A constitution from the Severan age is very interesting in this regard.<sup>25</sup> The *res* is not intended to be deduced in the action when only a simple *postulatio* is made, or the defendant has been made aware of the nature of the action before the trial. Thus, there exists a substantial difference between *litis contestatio* and *editio actionis*. Both are equally mandatory, but have little in common.

During the *postulatio actionis*, the plaintiff determined the most appropriate legal action; at this stage, the plaintiff had a claim against the defendant. After the grant of the action by the praetor, the situation changed: the

<sup>24</sup> Bas. 7.18.1.

<sup>25</sup> Impp. Severus et Antoninus AA. Valenti C. 3.9.1 (a. 202): *Res in iudicium deducta non videtur, si tantum postulatio simplex celebrata sit vel actionis species ante iudicium reo cognita. inter litem enim contestatam et editam actionem permultum interest. lis enim tunc videtur contestata, cum iudex per narrationem negotii causam audire coeperit*, D. k. Sept. Severo III et Antonino AA. cons.

plaintiff's claim was transformed into a real *actio*. It thus became protectable from that moment on and could therefore be made the subject of *litis contestatio* by the parties. In essence, the magistrate's approval of the *formula* was commonly considered a '*dare actionem*', meaning that the initial claim became an *actio* legally protected by the magistrate and his edict (Goldschmidt 1925, 44, 56-59).

It is here important to investigate the role of the praetor in the event of *denegatio actionis*. Because the plaintiff's choice had its own relevance, it is logical to think that the power to *denegare* was limited by *aequitas*. Thus, there were limits to the praetor's discretion, since he could not 'oppose the *postulatio actionis* out of pure malevolence towards the plaintiff or for no appreciable reason' (Pugliese 1939, 350).

It therefore seems accurate to speak of an obligation to *dare actionem* within the boundaries of *aequitas*. More precisely, this duty was framed by the body of praetorian norms codified in the edicts. In fact, the praetor was bound by his own edict and therefore could not deny an *actio* promised in the edict, unless it was due to a lack of meeting the stated requirements or the intrinsic groundlessness of the reason formulated by the plaintiff with the *postulatio actionis* (Pugliese 1939, 350).

## 5. Legacy of the Roman concept of *actio*

The above discussion illustrates how the divergent constructions of the concept of action in modern law stem from a contested conception of the Roman notion of *actio*. In contemporary law, there is a veritable literature on the concept of action. Of the various disputes, all of which have been listed by Pekelis, those of interest here concerned the foundational questions of civil procedural science that may also concern Roman law (Pekelis 1937, 92-93). The two fundamental questions here have been whether *actio* can be understood as a subjective right or whether it constitutes a procedural prerogative reserved exclusively to those who are substantively entitled to enforce a legal situation.

As I have shown, in the Roman legal system, *actio* was considered a claim that was protectable by the praetor and entailed the existence of the asserted legal situation enunciated by the plaintiff through the *postulatio actionis* and the related *editio actionis*. The above passages indicate that the plaintiff's will/*voluntas* acquired normative effect through the granting of the *formula*, which led to the *litis contestatio*, the judgement that closed the trial and an incontrovertible presupposition that implied the authority of the judgement.<sup>26</sup>

---

<sup>26</sup> Ulp. 2 *ad ed.* D. 44.2.1; Pugliese 1969, 743-744. Macer. 2 *de appell.* D. 42.1.63: *Saepe constitutum est res inter alios iudicatas aliis non praeiudicare. quod tamen quandam distinctionem habet ...* See also Pugliese 1962, 732, 766-767.

Only the praetor could grant the *actio* within the scope of his discretion. This implied not only the discretion to withhold protection for situations grounded in the *ius civile*, but also the faculty to extend protection to novel configurations of interests under the *ius honorarium*. Outside exceptional cases, the praetor was anchored to his edict, which was a reference and guarantee handbook for any Roman citizen. Since there was no legal codification, the edict, published at the beginning of each praetor's term in office, allowed citizens to know the *formulae* that would be used by the magistrate during the year.

Modern proceduralists, in constructing the various concepts of action, cannot detach themselves from its historical Roman genealogical matrix, which provided the foundation for both *ius commune* and *ius canonicum* (Pekelis 1937, 92). Contemporary legal thought thus requires historical study to understand this concept if it is to move beyond the nineteenth century debate on the notion of Roman *actio*.<sup>27</sup>

## References

- Andréev M. (1965), "L'object du procès civil dans le droit romain classique", in *Studia classica*, 7, 67-75.
- Bekker E.I. (1870), "Ueber das Verhältnis von *Actio* zu *Obligatio*", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 9, 366-407.
- Bekker E.I. (1871), *Die Actionen des römischen Privatrechts*, I, Berlin, Verlag von Franz Vahlen.
- Bekker E.I. (1894), "Ueberschau des geschichtlichen Entwicklungsganges der Römischen Actionen; Aufkommen, Wesen; Abkommen, Nachwirkungen", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 28, 145-209.
- Betti E. (1920), *Il concetto dell'obbligazione costruito dal punto di vista dell'azione*, Pavia, Tipografia cooperativa.
- Betti E. (1932), "Ragione e azione", in *Rivista di diritto processuale civile*, 9, 205-237.
- Betti E. (1935), *Diritto romano*, I, *Parte generale*, Padova, Cedam.
- Betti E. (1936), *Diritto processuale civile italiano*, 2<sup>nd</sup> ed., Roma, Società editrice del Foro Italiano.

---

<sup>27</sup> Brugi 1896, 759; Orestano 1959, 787. In this regard, Orestano has suggested recognizing not only the historicity of the various constructions of action, but also the problem of action itself.

- Betti E. (1955), *La struttura dell'obbligazione romana e il problema della sua genesi*, 2<sup>nd</sup> ed., Milano, Giuffrè.
- Betti E. (1968), s.v. "Regiudicata", in *Novissimo digesto italiano*, XV, Torino, Utet, 216-218.
- Binder J. (1927), *Prozess und Recht*, Leipzig, A. Deicherstchen Verlagsbuchhandlung.
- Biondi B. (1931), "Diritto e processo nella legislazione giustiniana", in *Conferenze per il XIV centenario delle Pandette*, Milano, Vita e pensiero, 131-182.
- Biondi B. (1933), *Prospettive romanistiche*, Milano, Vita e pensiero.
- Biondi B. (1935), *Diritto romano*, I, *Parte generale*, Padova, Cedam.
- Biondi B. (1936), *Diritto processuale civile italiano*, 3<sup>rd</sup> ed., Roma, Foro Italiano.
- Brinz A. (1884), *Lehrbuch der Pandekten*, I, 3<sup>rd</sup> ed., Erlangen, Andreas Deichert Verlag.
- Brinz A. (1886), "Obligation und Haftung", in *Archiv für civilistische Praxis*, 70, 371-408.
- Brugi B. (1896), s.v. "Azione", in *Digesto italiano*, IV.2, Torino, Utet, 758-770.
- Bruns C.G. (1882), "Zur Geschichte der Cession", in *Kleinere Schrift*, II, Weimar, Hermann Böhlau, 1-37.
- Bürge A. (1995), "Zum Edikt *De edendo*", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 112, 1-50.
- Buti I. (1984), *Il praetor le formalità introduttive del processo formulare*, Napoli, Jovene.
- Calamandrei P. (1947), "La relatività del concetto di azione", in *Studi sul processo civile*, V, Padova, Cedam, 1-26.
- Camodeca G. (1992), *L'archivio Puteolano dei Sulpicii*, Napoli, Jovene.
- Camodeca G. (1999), *Tabulae Pompeianae Sulpiciorum (TPSulp.)*, Roma, Quasar.
- Cannata C.A. (1980), *Profilo istituzionale del processo privato*, I, *Le legis actiones*, Torino, Giappichelli.
- Cannata C.A. (1982), *Profilo istituzionale del processo privato*, II, *Il processo formulare*, Torino, Giappichelli.
- Cannata C.A. (2001), *Corso di istituzioni di diritto romano*, I, Torino, Giappichelli.
- Cardilli R. (2010), "Brevi riflessioni critiche dell'azione come difesa del diritto attraverso il Diritto romano", in *Revista Chilena de Historia del Derecho*, 21, 95-102.
- Cardilli R. (2023), *Fondamento romano dei diritti odierni*, 2<sup>nd</sup> ed., Torino, Giappichelli.

- Carnelutti F. (1927), “Diritto e processo nella teoria delle obbligazioni”, in *Studi di diritto processuale in onore di G. Chiovenda*, Padova, Casa Editrice Milani, 225-341.
- Cornil G. (1950), “Une conjecture sur l’origine de la maxime *bis de eadem re ne sit actio*”, in *Studi in onore di P. Bonfante*, III, Milano, Fratelli Treves editori, 39-58.
- dalla Massara T. (2022), “Emilio Betti, l’obbligazione, il processo”, in A. Carratta, L. Loschiavo, M.U. Sperandio (eds.), *Emilio Betti e il processo civile*, Roma, Roma Tre Press, 61-83.
- Degenkolb H. (1877), *Einlassungszwang und Urtheilsnorm*, Leipzig, Verlag von Breitkopf & Härtel.
- Falcone F. (2013), “*Actio* e *ius*: l’evoluzione del concetto di azione nell’ordinamento canonico tra il Codice del 1917 e il Codice del 1983”, in *Ius Ecclesiae*, 25, 339-361.
- Fazzalari E. (1988), *s.v.* “Azione civile (teoria generale e diritto processuale)”, in *Digesto delle discipline privatistiche - Sezione civile*, II, Torino, Utet, 30-42.
- Fernández Barreiro A. (1969), *La previa información del adversario en el proceso privado romano*, Pamplona, Universidad de Navarra.
- Fernández Barreiro A. (1975), “Los principios ‘dispositivo’ e ‘inquisitivo’ en el proceso romano”, in *Studia et documenta Historiae et Iuris*, 41, 125-158.
- Fernández Barreiro A. (1990), “Etica de las relaciones procesales romanas: recursos sancionadores del ilícito procesal”, in *Seminarios Complutenses de derecho romano*, I, Madrid, Artes Gráficas Benzal, 73-92.
- Frese B. (1935), “Der obrigkeitliche und der prozessuale Zwang im römischen Recht”, in *Atti del Congresso internazionale di diritto romano*, II, Pavia, Tipografia Fratelli Fusi, 227-265.
- Gioffredi C. (1980), “*Ius* e *actio*”, in *Nuovi studi di diritto greco e romano*, Roma, Pontificia Università Lateranense, 213-239.
- Goldschmidt J. (1925), *Der Prozess als Rechtslage*, Berlin, Springer Verlag.
- Gómez-Iglesias Casal A. (1984), *Citación y comparencia en el procedimiento formulario romano*, Santiago de Compostela, Imprenta de Aldecoa.
- Grose Hodge H. (eds.) (1979), *Pro lege Manlia; Pro Caecina; Pro Cluentio, Pro Rabirio perduellionis*, Cambridge (MA), Harvard University Press.
- Guarino A. (1953), “Il diritto e l’azione nell’esperienza romana”, in *Studi in onore di V. Arangio-Ruiz*, I, Napoli, Jovene, 389-406.
- Guarino A. (1980), “La formazione dell’editto perpetuo”, in *Aufstieg und Niedergang der Römischen Welt*, Vol. II.13, Berlin, New York, Walter de Gruyter, 61-102.
- Jolowicz H.F. (1952), “*Obligatio* and *actio*”, in *The Law Quarterly Review*, 68, 469-480.

- Kaser M., Hackl K. (1996), *Das römische Zivilprozessrecht*, 2<sup>nd</sup> ed., München, C.H. Beck.
- Lemosse M. (1975), “*Editio actionis* et procédure formulaire” in *Labeo*, 21, 45-54.
- Lemosse M. (1991), “Les deux régimes de l’instance *in iure*”, in *Labeo*, 37, 297-304.
- Lenel O. (1894), “Die Form der Litiscontestation im Formularprozess”, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 15, 374-392.
- Levy E. (1918), *Die Konkurrenz der Aktionen und Personen im klassischen römischen Recht*, I, Berlin, Verlags Franz Vahlen GmbH.
- Marrone M. (1955), “L’efficacia pregiudiziale della sentenza nel processo civile romano”, in *Annali del Seminario giuridico dell’Università di Palermo*, 24.
- Marrone M. (1965), *L’effetto normativo della sentenza*, 2<sup>nd</sup> ed., Palermo, Manfredi editore.
- Mitteis L. (1908), *Römische Privatrecht bis auf die Zeit Diokletians*, I, Leipzig, Duncker & Humblot.
- Murga Gener J.L. (1989), *Derecho romano clasico*, II, *El proceso*, 3<sup>rd</sup> ed., Saragoza, Universidad de Saragoza.
- Muther Th. (1857), *Zur Lehre von der Römischen Actio, dem heutigen Klagrecht, der Litiscontestation und der Singularsuccession in Obligationen*, Erlangen, Verlag A. Diechert.
- Orestano R. (1959), s.v. “Azione in generale”, in *Enciclopedia del diritto*, Vol. IV, Milano, Giuffrè, 785-830.
- Pekelis A. (1937), “Azione”, in *Nuovo Digesto italiano*, Vol. XVI, Torino, Utet, 91-108.
- Provera G. (1983), “Diritto e azione nell’esperienza giuridica romana”, in *Studi in onore di A. Biscardi*, IV, Milano, La Goliardica, 325-348.
- Pugliese G. (1939), *Actio e diritto subiettivo*, Milano, Giuffrè.
- Pugliese G. (1954), *Introduzione*, in *Polemica intorno all’actio di Windscheid e Muther*, Firenze, Sansoni.
- Pugliese G. (1958), s.v. “Azione”, in *Novissimo Digesto italiano*, II, Torino, Utet, 24-29.
- Pugliese G. (1960), “Cosa giudicata e sentenza ingiusta nel diritto romano”, in *Conferenze romanistiche*, Milano, Giuffrè, 223-246.
- Pugliese G. (1962), “Note sull’ingiustizia della sentenza in diritto romano”, in *Studi E. Betti*, III, Milano, Giuffrè, 725-781.
- Pugliese G. (1963), *Il processo civile romano*, Vol. II, Milano, Giuffrè.
- Pugliese G., (1965), “Due testi in materia di *res iudicata*”, in *Studi in memoria di G. Zanobini*, Milano, Giuffrè, 489-511.

- Pugliese G. (1969), *s.v.* “Giudicato civile (Storia)”, in *Enciclopedia del diritto*, Vol. XVIII, Milano, Giuffrè, 727-785.
- Pugliese G. (1979), “L’*actio* e la *litis contestatio* nella storia del processo romano”, in *Studi in onore di E. T. Liebman*, Milano, Giuffrè, 409-432.
- Romeo S. (2020), “Dal procedimento al processo. I percorsi della *iurisdictio* tra azione e diritto”, in *Teoria e storia del diritto privato*, 13, 1-82.
- Schott R. (1903), *Das Gewähren des Rechtsschutzes im Römischen Zivilprozess*, Jena, Gustav Fischer Verlag.
- Schott R. (1904), *Römischer Zivilprozess und moderne Prozesswissenschaft*, München, Beck, 1904.
- Schultze A.S (1883), *Privatrecht und Process in ihrer Wechselbeziehung*, Freiburg im B. Tübingen, J.C.B. Mohr.
- Sciortino S. (2015), “*Denegare iudicium* e *denegare actionem*”, in *Annali del Semi-nario giuridico dell’Università di Palermo*, 58, 199-238.
- Segrè G. (1930), “*Obligatio, obligare, obligari* nei testi della giurisprudenza classica e del tempo di Diocleziano”, in *Studi in onore di P. Bonfante*, Vol. III, Milano, Fratelli Treves Editori, 501-617.
- Stolfi E. (2022), “Attorno al concetto di azione in Betti”, in A. Carratta, L. Loschiavo, M.U. Sperandio (eds.), *Emilio Betti e il processo civile*, Roma, Roma Tre Press, 171-195.
- Talamanca M. (1990), *Istituzioni di diritto romano*, Milano, Giuffrè.
- Varvaro M. (2023), *Lineamenti di procedura civile romana*, Napoli, Editoriale Scientifica, 2023.
- Watson A. (eds.) (1985), *The Digest of Justinian*, Philadelphia, Pennsylvania, University of Pennsylvania Press.
- Wenger L. (1905), *s.v.* “*Editio*”, in *RE*, V.2, Stuttgart, Metzlerscher Verlag, 1960-1967.
- Wenger L. (1925), *Institutionen des römischen Zivilprozessrechts*, München, Verlag der Hochschulbuchhandlung Max Hueber.
- Wenger L. (1926), *Praetor und Formel*, München, Bayerischen Akademie der Wissenschaften.
- Windscheid B. (1856), *Die Actio des römischen Civilrechts vom Standpunkte des heutigen Rechts*, Düsseldorf, Buddeus.
- Windscheid B. (1857), *Die Actio. Abwehr gegen Dr. Theodor Muther*, Düsseldorf, Verlag J. Buddeus, 1857.
- Windscheid B. (1906), *Lehrbuch des Pandektenrechts*, 9<sup>th</sup> ed., Frankfurt, Literarische Anstalt Rütten & Loening.
- Wlassak M. (1893), *s.v.* “*Actio*”, in *RE*, I,1 Stuttgart, Metzlerscher Verlag, 303-323.
- Wlassak M. (1904), “Der Gerichtsmagistrat im gesetzlichen Spruchverfahren”,

in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 38, 81-188.

Wlassak M. (1924), *Die klassische Prozeßformel. Mit Beiträgen zur Kenntnis des Juristenberufes in der klassischen Zeit*, Vol. I, Wien-Leipzig, Hölder-Pichler-Tempsky.

Wolf J.G. (1985), "Aus dem neuen Pompejanischen Urkundenfund: die Streitbeilegung zwischen *L. Faenius Eumenes* und *C. Sulpicius Faustus*", in *Studi in onore di C. Sanfilippo*, VI, Milano, Giuffrè, 771-778.

Wolf J.G. (2012), *Neue Rechtsurkunden aus Pompeji. «Tabulae Pompeianae novae»*. Lateinisch und deutsch, 2<sup>nd</sup> ed., Darmstadt, De Gruyter Brill.

Part 4

**PATHOLOGY. IMPERFECT  
INDIVIDUAL WILL**



## Chapter 9

# **ERROR AND CONTRACTUAL SYNÁLLAGMA IN ULPIAN'S THOUGHT**

**Sara Galeotti**

*ABSTRACT: This research examines the tension between the subjective intention of contracting parties and its objective expression, focusing on the legal remedies designed to reconcile the mistaken party's will with the legitimate expectations of third parties who rely on the external declaration. Special attention is given to cases of dissent (dissensus) concerning the res in contracts of sale (Ulp. D. 18.1.9 pr.; D. 18.1.9.2; D. 18.1.14), and to various forms of error related to the appearance of the merx – including error in corpore, error in materia, and error in qualitate.*

**KEYWORDS:** Error – Lex contractus – Mistake – Contract of sale.

**SUMMARY:** 1. Mistake in Roman private law: Rethinking a 'difficult topic'. – 2. Protection of the buyer and *aliud pro alio*. – 3. Error, meaning, choice. – 4. Error and *conventio*. – 5. Misrepresentation and *dissensus*. – 6. The past speaks with its own voice. – References.

### **1. Mistake in Roman private law: Rethinking a 'difficult topic'**

*While in the very act no one is conscious of the  
greatness of his sin, but later on he sees.*  
Menandr. fr. 448 K.

Long described as a 'difficult topic' by Peter Birks in the notes to one of his lectures on sale (Birks 2014, 76), the issue of mistake in classical Roman law has occupied the centre of Romanist discourse for more than a century (Lawson 1936; Voci 1937; Flume 1951; Wolf 1961; Wieacker 1963; Diesselhorst 1970; Schermaier 1992, 115 ff.; Apathy 1994; Harke 2005; Cardilli 2020, 135).

The theme, moreover, transcends the traditional confines of the discipline, acquiring centrality in 20<sup>th</sup> century legal theory. Drawing from the Pandektistik and its notion of *Rechtsgeschäft*, modern jurisprudence has adopted a markedly voluntaristic conception of the «juridically acting subject», (Voci 1937, 10) assigning to the concept of *Irrtum* an autonomous normative regime within the broader framework of contractual invalidity (Miquel 1963, 79 ff.; Cardilli 2020, 135, 139 f.).

The axiological shift that accompanied the rise of the conceptual

framework grounded in Winscheid's dichotomy between *Motivirrtum* and *Erklärungsirrtum* (Winscheid 1891, 194 ff.) has left a lasting imprint on scholars of Roman law (Voci 1937, 8; Miquel 1963, 98; Zimmermann 1992, 585 f.; Cardilli 2020, 135 ff.). Even today, much of the literature continues to grapple with the legacy of a nomenclatural system whose appeal remains undeniable, yet whose analytical effectiveness in capturing the empirical and case-based methodology characteristic of the *scientia iuris* of the Romans remains markedly inadequate.

The *reductio ad unitatem* undertaken in the wake of Savigny – deeply influenced by a voluntaristic paradigm – tends to flatten the rich and stratified landscape revealed by the sources. Far from pointing to a uniform treatment of *error*, these texts bear witness to a differentiated, context-sensitive treatment of the phenomenon, one that evolved significantly over time.

Rethinking the problem of mistake in Roman private law (Cardilli 2020, 135) thus entails moving beyond the reified taxonomies that have long dominated scholarly interpretations of juristic solutions. It demands a renewed focus on elements such as the safeguarding of underlying structure of interests shaped by the parties within a legal framework governed by *Typenzwang* – elements that are inevitably sidelined when the analysis remains confined to a paradigm centred exclusively on individual *voluntas* (Cardilli 2020, 137 f.).

That said, my aim here is not to engage with the complex and multifaceted body of theory surrounding *Irrtum und Rechtsgeschäft* (Zitelmann 1879) or *Irrtum bei Vertragsschluss* (Diesselhorst 1970; Schermaier 2014), nor to survey the various positions advanced by leading scholarship on the subject (Harke 2005, 17 ff.). Such an undertaking would far exceed the scope and methodological economy of the present inquiry.

What I propose to do, with more modest ambition, is to analyse the complex relationship between *consensus* and *error* in Ulpian's reflections concerning the contract of sale (*emptio venditio*) – specifically, the *tópoi* through which he appears to draw a distinction between *substantia/materia* and *qualitas* when, perhaps responding to a disappointed buyer, he reflects on the characteristics of the contractual object that prove decisive for identification of the *causa negotii*.

## 2. Protection of the buyer and *aliud pro alio*

In contracts governed by *iudicia bonae fidei* – particularly in the contract of sale – the synallagmatic nature of the structure of the obligational nexus, which is crucial to both the teleological profile of the agreement and the configuration of interests from which it originates, finds expression in the

procedural mechanisms employed to ensure that the *causa* of the contract is effectively realized for both parties (Vacca 1994[97], 32; Vacca 1995, 2 f., 18 ff.; Vacca 1998, 146 f., 150; Vacca 1999, 71 ff. and fnn. 15 and 17). This reciprocity also informs the assessment of the legal relevance of a 'false' or inaccurate or misaligned representation of factual reality – captured by the *prudentes* through verbal formulations that are never unequivocal (e.g., *aliud pro alio venisse videtur, de alio sentiam, tu de alio, de alio sensero, tu de alio*)<sup>1</sup> – from which arises the interest in preserving the typical profile of the economic transaction (Frier 1983, 270 and fn. 48).

The procedural and substantive function of good faith (*bona fides*) underlies the solutions crafted to rationally safeguard the *synállagma* of the contract. Defined concretely by legal science through the assessment of the interdependence of reciprocal obligations (Stolfi 2004; Schermaier 2005, 44 ff.), good faith acts as the technical-legal mechanism by which socio-economic values are transposed into the contractual domain. Within the judicial decision-making, it performs a mediating role, bridging abstract legal norms and the concrete realities of everyday life.

To examine the conceptual role of mistake in Ulpian's elaboration of *consentire* (lit. to feel/to perceive jointly) in the context of sale, it is necessary to begin with a well-known passage. There, the Severan jurist, while illustrating the remedy available to a dissatisfied buyer, underscores the nuanced complexity of the obligation placed upon the seller. This complexity is embodied in the idea of *rem praestare*, understood as the «guarantee of conformity with respect to any impediment to the peaceful enjoyment of the sold item in accordance with its economic purpose». This passage marks the culmination of a layered interpretive trajectory, most likely grounded in the jurisprudential debates of the 1<sup>st</sup> century AD (Voci 1937, 250 ff.; Medicus 1962, 131 and 154 f.; Apathy 1994, 101 ff.; Vacca 1995, 2 f., 19 f. and fn. 35; Schermaier 1998, 241 ff.; Vacca 1998, 145):<sup>2</sup>

---

<sup>1</sup> See, besides Ulpian in D. 18.1.9.2, Paul. 72 *ad ed.* D. 45.1.83.1: *Si Stichum stipulatus de alio sentiam, tu de alio, nihil actum erit*, and Ven. 1 *ad ed.* D. 45.1.137.1: *Si hominem stipulatus sim et ego de alio sensero, tu de alio, nihil acti erit: nam stipulatio ex utriusque consensu perficitur*.

<sup>2</sup> See, e.g., Ulp 1 *ad ed. aed. cur.* D. 21.1.1.9: *Apud Vivianum quaeritur, si servus inter fanaticos non semper caput iactaret et aliqua profatus esset, an nibilo minus sanus videretur. et ait Vivianus nibilo minus hunc sanum esse: neque enim nos, inquit, minus animi vitii aliquos sanos esse intellegere debere: alioquin, inquit, futurum, ut in infinito hac ratione multos sanos esse negaremus ut puta levem superstitiosum iracundum contumacem et si qua similia sunt animi vitia: magis enim de corporis sanitate, quam de animi vitiiis promitti. interdum tamen, inquit, vitium corporale usque ad animum pervenire et eum vitiare: veluti contingeret phrenitikó, quia id ei ex febribus acciderit. Quid ergo est? Si quid sit animi vitium tale, ut id a venditore excipi oporteret neque id venditor cum sciret pronuntiasset, ex*

Ulp. 32 *ad Sab.* D. 19.1.11.1: *Et in primis sciendum est in hoc iudicio id demum deduci, quod praestari convenit: cum enim sit bonae fidei iudicium, nihil magis bonae fidei congruit quam id praestari, quod inter contrahentes actum est. Quod si nihil convenit, tunc ea praestabuntur, quae naturaliter insunt huius iudicii potestate.*

It is important to note that this action extends to everything for which the parties have agreed to be responsible; for it is an equitable action, and what can be more agreeable to equity than to give effect to the intentions of the contracting parties? In the absence of any agreement, the measure of their responsibility will be the obligations that naturally fall within the scope of this action (trans. Mackintosh 1892, 157).

At the opening of his commentary on the *actio ex empto*, Ulpian sheds light – through a stratified hermeneutic lens – on the influence exerted by the parties’ regulatory will in shaping the specific profile of the obligations incumbent upon the seller. In keeping with the Roman legal perspective, this reconstruction takes as its starting point what emerges in the context of the *iudicium empti*: the initial premise emphasizes the centrality of the agreements concluded at the moment of contract constitution (*quod praestari convenit*), followed by a pointed invocation of the *bonae fidei* character of the *actio empti*, which requires the judge to assess the debtor’s duty of performance according to substantive standards of fairness and loyalty (Stolfi 2004, 86 ff.; dalla Massara 2007, 281 f., 297 ff.; Cardilli 2008, 39 f.).

The regulatory dimension of what was intended,<sup>3</sup> filtered through the interpretive canon of good faith (*bona fides*) – which ensures its full implementation – thus determines both the operative content and the normative extent of the binding effects.

Particularly significant, within the framework of this analysis, is Ulpian’s concluding statement: in the absence of specific agreements by the parties

---

*empto eum teneri. 10. Idem Vivianus ait, quamvis aliquando quis circa fana bacchatus sit et responsa reddiderit, tamen, si nunc hoc non faciat, nullum vitium esse: neque eo nomine, quod aliquando id fecit, actio est, sicuti si aliquando febrem habuit: ceterum si nihilo minus permaneret in eo vitio, ut circa fana bacchari soleret et quasi demens responsa daret, etiamsi per luxuriam id factum est, vitium tamen esse, sed vitium animi, non corporis, ideoque redhiberi non posse, quoniam aediles de corporalibus vitiis loquuntur: attamen ex empto actionem admittit; Pomp. 9 ad Sab. D. 19.1.6.4: Si vas aliquod mihi vendideris et dixeris certam mensuram capere vel certum pondus habere, ex empto tecum agam, si minus praestes. Sed si vas mihi vendidieris ita, ut adfirmares integrum, si id integrum non sit, etiam id, quod eo nomine perdiderim, praestabis mihi: si vero non id actum sit, ut integrum praestes, dolum malum dumtaxat praestare te debere. Labeo contra putat et illud solum observandum, ut, nisi in contrarium id actum sit, omnimodo integrum praestari debeat: et est verum. Quod et in locatis doliis praestandum Sabinum respondisse Minicius refert.*

<sup>3</sup> See above, Galeotti, particularly 55 ff.

intended to fill, in a supplementary fashion, the gaps ungoverned by the original *conventio*, one may assert in court any obligation that *naturaliter* falls within the operative scope of the *actio ex empto*. In other words, the Roman seller could be summoned to court whenever a circumstance arises that objectively undermines the functional reciprocity inherent the *synállagma*, understood as the functional interdependence of the contractual performances (du Plessis 2006).

Can a 'false' representation of the characteristics of the object sold be regarded as a circumstance that impedes the realization of the natural content of the economic transaction? Should the seller be held liable for it? And if so, under what conditions?

In reconstructing the evolution of the dogmatic parameters underpinning concrete legal solutions, citing the *formula* of the *actio ex empto* (Lenel 1927, 299) proves particularly useful in tracing the stages of a doctrinal evolution that begins with an initial understanding of *aliud pro alio* as an instance of objective non-performance, and culminates, in Ulpian, in arguments that that progressively elevate to the volitional core of the agreement (*id quod actum est*):

*Quod Aulus Agerius de Numerio Negidio hominem quo de agitur emit, qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato; si non paret absolvito.*

Whereas Aulus Agerius bought the man who is the subject of the action from Numerius Negidius, which matter is the subject of the action, whatever on account of that matter Numerius Negidius ought to give to or do for Aulus Agerius in good faith, for the value of that let the judge condemn Numerius Negidius to Aulus Agerius; if it does not appear, let him absolve (trans. Birks 2014, 66).

The *demonstratio* – since A.A. purchased the *res* from N.N. – compels the interpreter to assess scenarios in which the buyer has received a good that does not conform to their expectations. This inquiry is shaped by at least two fundamental questions: under which conditions can it be affirmed that the sale was validly concluded? And what must the plaintiff establish in order to succeed in their claim?

Regarding the first question, it must be assumed that the *res* (which must be susceptible of economic circulation) is clearly identified and exists in the material world – either at the time of the contract's conclusion or at a future moment – since the socio-economic function of the contract, which justifies and sustains the interdependence of reciprocal performances, presupposes

as a typical effect that the seller transfers to the buyer peaceful enjoyment of the *merx* that forms the object of the *conventio*.

The rule *nulla venditio sine re quae veneat* – «There is no sale without the thing that is sold» (Pomp. 9 *ad Sab.* D. 18.1.8 pr.) –, which likely originated in a period when sales occurred solely for ready money, and which persists in the consensual contract due to its initial proximity to the act of real conveyance, exerted – as will be demonstrated – considerable influence on juristic reflections regarding mistake in contracts of sale (Miquel 1963, 79; Apathy 1994, 108 ff.). Indeed, the *scientia iuris* is called upon to determine in which cases a misrepresentation of the object – especially its material constitution – may be deemed functionally equivalent to the non-existence or indeterminacy of the contractual item (*res*), thereby resulting in the nullity of the transaction (Lawson 1936, 80 f.; Apathy 1994, 98 ff.; Birks 2014, 77).

Addressing the second question demands an analysis that goes beyond the content of the *demonstratio* in the formula, focusing instead on the *intentio* (i.e., the claim's substantive foundation): where a valid *conventio* exists, the buyer must ground their claim either in the terms originally negotiated and formalised (*id quod actum est*) or in consolidated mercantile usage. These elements delineate the scope of the *oportere ex fide bona* obligation resting upon the seller.

Faced with the practical problem of identifying situations in which the contractual action could be effectively pursued, Roman legal doctrine initially seems to have relied on the procedural elasticity of the *iudicium empti* to address the problem of *aliud pro alio* not as a *Konsensproblem* but rather as a case of non-performance (the good does not exist) or at variance with the agreed *id quod actum est* (the good lacks the promised qualities). The focus – so it seems to me – was on the performance of the seller's obligation viewed through the lens of contractual fairness rather than formal legal intention (Apathy 1994; Vacca 1999, 72 f.; Schermaier 2014, 850 f.).

According to this original approach, the seller should answer under *ex empto* for the buyer's dissatisfaction due to discrepancies between the delivered good (*merx tradita*) and what was originally agreed, provided that the sale was *cum re*. If the *merx*, even in the smallest part, did not exist in nature, the contract – being void *ab initio* – could lack the capacity to ground a transfer of ownership, and restitution of the price paid (*pretium*) would be pursued via an action of strict law (*condictio*), no differently from the case in which a *datio ob rem* was not followed by the agreed counter-performance.

### 3. Error, meaning, choice

Since the half of the 2<sup>nd</sup> century AD, cases of *aliud pro alio* began to be examined through a lens which, while not entirely disregarding procedural implications, appears to transcend a merely procedural framework. A notable indication of this shift is found in an excerpt from Pomponius (D. 44.7.57),<sup>4</sup> not without suspicion of interpolation (Lotmar 2019, 31 and fn. 61; Schiavone 2005, 195), where the Antonine jurist highlights *error* as a form of unconscious dissent.

What kind of legal transaction could be conceived – Pomponius suggests, or even Quintus Mucius (Stolfi 2018), albeit confined to *societas* – if beneath the façade of an apparent convergence (*Konvergenzprozess*) there exists a reciprocal *aliud sentire* arising from a distorted cognitive perception of reality, which permeates the genesis of the legal transaction? The *sentire de alio* of one party, contrary to the veritable will of the other, would predictably yield *nihil actum*.

The verb *sentire*, which concretely evokes the perceptual realm, when transposed to an intellectual plane (do opinions not ultimately derive from sensations?), conveys the notion that no agreement arises unless the parties' respective legal intentions (*voluntates*) converge upon a shared object. A deviation from the agreed terms, a *falsa existimatio*, thus becomes juridically relevant even prior to the moment of contractual execution, reaching back to the foundational moment of the contract itself. The problem of *aliud pro alio* would therefore originate from the tension between the subjective representation and the objective content of the obligation.

This new hermeneutic perspective evidently rests on a conceptual reassessment of *consensus*, which, moving beyond its role as an organizing category in the Gaius-based systematics, becomes an element capable of integrating the *contrahere* with the expression of an intentional and binding *voluntas* (MacMillan 2010, 14 f.).

The good-faith interpretation of *id quod actum est*, which delimits the scope of the *oportere* obligation, thus requires the jurist to look beyond the mere words (*verba*) that embody the parties' commitment in order to access the (shared) intention that should underpin the genesis of the contractual bond – in short, to define the *quid* upon which the wills have effectively converged and that therefore affects the substance of the relationship (du Plessis 2006).

Of course, this does not mean that Julian, Marcellus, or Ulpian – among

---

<sup>4</sup>Pomp. 36 ad *Quint. Muc.* D. 44.7.57: *In omnibus negotiis contrahendis, sive bona fide sint sive non sint, si error aliquis intervenit, ut aliud sentiat puta qui emit aut qui conducit, aliud qui cum his contrahit, nihil valet quod acti sit. Et idem in societate quoque coeunda respondendum est, ut, si dissentiant aliud alio existimante, nihil valet ea societas, quae in consensu consistit.*

the jurists who paid particular attention to the issue of *error* in relation to consent – anchored their *responsa* in speculative psychology. The primary reference point remains the contractual action, and the investigation into the parties' will serves the purpose of establishing the existence of a shared content capable of producing binding effects (*lex contractus*), which governs the transaction protected as typical.

This progressive refinement in the analysis of *quid actum sit*, directed toward unveiling the actual meeting of wills, and this rational mode of interpretation that leads the interpreter beyond the contractual text to focus on the consensual element, likely originates from a very specific cultural *humus* (Schermaier 2014, 852 f.). More precisely, I refer to the reflection inaugurated by Socratic intellectualism and further developed in Platonic and, above all, Aristotelian thought on the psychology of human action, particularly concerning the relationship between will (*voluntas*), knowledge/comprehension, and rational choice.<sup>5</sup>

It is useful, in this regard, to recall what is stated at the beginning of the third book of the *Nicomachean Ethics*, where Aristotle examines precisely the concepts of voluntary and involuntary action:

Since that which is done by force or by reason of ignorance is involuntary, the voluntary would seem to be that of which the moving principle is in the agent himself, he being aware of the particular circumstances of the action (...). At any rate choice involves reason and thought. Even the name (προαίρεσις) seems to suggest that it is what is chosen before other things (trans. Ross 2009).<sup>6</sup>

In Aristotle's thought, a voluntary action is characterised by a rational choice concerning the means employed to achieve a specific end, emanating from an agent who is autonomous in will and fully aware of the concrete circumstances surrounding the action. While there exists a close connection between will/*voluntas* and choice, these notions are not synonymous. Choice is subsequent to deliberation – a process that refines the simple conscious inclination toward an object (βούλησις) by subjecting it to the scrutiny of reasoned judgment (βουλή), entailing a careful assessment of the advantages and disadvantages of a given desire (ὄρεξις). Only at the conclusion of this process can that act of trust in the reliance on the rational self-determination of the subject occur, which we call 'choice' and which leads us to translate an intellectual movement into physical action. Ultimately, it is in προαίρεσις – the hinge between volition and cognition – that the full juridical and moral appropriation

---

<sup>5</sup> See above, Galeotti, particularly 51 ff.

<sup>6</sup> Arist. *EN* III.1 1111a (20-23)-2 1112a (15-18).

of action by the subject is realised: where the intellect, in other words, becomes action.

We deliberate not about ends but about means. For a doctor does not deliberate whether he shall heal, nor an orator whether he shall convince, nor a statesman whether he shall produce law and order (...). Having set the end, they consider how and by what means it is to be attained (trans. Ross 2009).<sup>7</sup>

Aristotle's argument is clear and systematic: will is understood as rationally structured desire, insofar as it identifies and is directed toward an end, whereas *προαίρεσις* entails a calculated deliberation focused on the means appropriate to achieving the identified objective. Given that the ultimate goal of human life is happiness, there exists an intermediate level at which the specific aims of each practical discipline are situated – for instance, the healing of the patient in medicine, persuasion in rhetoric, and the governance of citizens in politics – these ends are realised through the rational selection of appropriate means. To choose poorly, that is, to fail to adequately weigh the foreseeable consequences of one's actions, is to move away from the attainment of the goal and, if harm is caused to others, to incur legal and moral liability. It is important, however, to distinguish between two cases: one in which *error* derives from the agent's negligent failure to account for all relevant circumstances; and another in which such circumstances remain unknown to the agent with no culpable omission. In this latter scenario, the event caused cannot be said to express the agent's true will (Manthe 1996, 5 f.).

Building on these premises, Aristotle's theoretical framework articulates a conception of justice (*δικαιοσύνη*) that is both distributive and corrective (Manthe 1996, 3 f.) – an understanding that profoundly influenced Roman legal thought and is epitomized in the well-known maxim, attributed notably to Ulpian among others,<sup>8</sup> *suum cuique tribuere* (Manthe 1996, 1 ff.; Santucci 2018, 63 ff.; Santucci 2024, 75 f.).<sup>9</sup> The essence of justice lies in rendering to each individual what is due according to law and equity, whether honors or burdens, rewards or punishments (d'Ors 1953, 284 f.; Villey 1956, 364 f.; Falcone 2007, 136 ff. and fn. 7; Santucci 2024, 75). In this context, sanctioning voluntary actions that cause harm to another member of the community

<sup>7</sup> Arist. *EN* III.3 1112b (10-16).

<sup>8</sup> Ulp. 1 *reg.* D. 1.1.10 pr.: *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*. 1. *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*; Triph. 9 *disput.* D. 16.3.31.1: ... *Et probo hanc esse iustitiam, quae suum cuique ita tribuit, ut non distrahat ab ullius personae iustiore repetitione*.

<sup>9</sup> See above, Galeotti, particularly 51 f., 61 ff.

serves to rectify a disturbance which, if left unchecked, would threaten social harmony.

As Aristotle further elaborates in the *Nicomachean Ethics*:

But in associations for exchange this sort of justice does hold men together – reciprocity in accordance with a proportion and not on the basis of precisely equal return. For it is by proportionate requital that the city holds together. Men seek to return either evil for evil (...) or good for good – and if they cannot do so there is no exchange, but it is by exchange that they hold together (trans. Ross 2009).<sup>10</sup>

In Aristotle's ethical framework, justice governs a relational syntax in which the structure of human agency is central, characterized by the interplay between principles and the circumstances surrounding the act. Will/*voluntas*, whose role in the determination of conduct is subordinated to rational cognition in the governance of conduct, does not constitute a psychic function independent from cognition: as Aristotle suggests, one cannot *velle* without knowing. Consequently, one who is ignorant – provided such ignorance is not self-imposed – cannot be regarded as having 'truly' willed.

When Pomponius declares the *voluntas errantis* to be null,<sup>11</sup> or when Julian, in addressing the modifiability of jurisdictional competence, identifies *error* as a limit to the binding effects of the parties' agreement,<sup>12</sup> are they not, in effect, appealing to the Aristotelian understanding of ἀμαρτία as παραλογισμός – a cognitive process that, by deviating παρά τὸν λόγον, fails to culminate in an act of true understanding (γνώσις)?

This possibility cannot be excluded. Nevertheless, the weight of philosophical influence – at most a resource, not a normative methodology, for the learned jurist – must not be misunderstood. The shift from an *interpretatio* of contractual acts based strictly on verbal expression to one centered on *mens et voluntas*, though certainly nurtured by the intellectual *humus* outlined above, ultimately unfolds within the heuristic and discursive strategies internal to the *scientia iuris*. That is to say, it unfolds through processes of juridical typification that convert raw events into legal categories, abstracting

<sup>10</sup> Arist. *EN* V.5 1132b (31-36)-1133a (1).

<sup>11</sup> Pomp. 34 *ad Sab.* 39.3.20: *Sed hoc ita, si non per errorem aut imperitiam deceptus fuerit: nulla enim voluntas errantis est.*

<sup>12</sup> Ulp. 2 *omn. trib.* D. 2.1.15: *Nec enim ferendus est qui dicat consensisse eos in praesidem, cum, ut Iulianus scribit, non consentiant qui errent: quid enim tam contrarium consensui est quam error, qui imperitiam detegit?; Ulp. 3 ad ed. D. 5.1.2 pr.: ... error enim litigatorum, ut Iulianus quoque libro primo digestorum scribit, non habet consensum.* See also Plat. *Rep.* I 330a-332c; Cic. *de inv.* 2.160, and *Reth. ad Her.* 3.2.3.

them from their empirical contingency. In its development as a scientific discourse, the juridical culture of the first two centuries of the Common Era could not ignore the vitality of contemporary philosophical debate surrounding what we might call a *Willenstheorie*, and thus inevitably engaged with its themes and questions (Schermaier 2014, 848 f., 852 f.).

The identification of the origin of a given conceptual nucleus – such as the notion of conscious volition as the foundation of individual responsibility, in both juridical and ethical dimensions – constitutes only the starting point of the inquiry. Once its provenance has been established, what becomes crucial is the reconstruction of the function and semantic density that such an element acquires within the theoretical horizon and argumentative structure of the discourse in which it is employed.

To paraphrase Plutarch, it is not enough to appropriate Peripatetic categories and logical frameworks to be a philosopher;<sup>13</sup> yet that very terminology and those frameworks can be integrated into juridical reasoning, contributing to the development of novel conceptual paradigms (Schiavone 2005, 162 f.). One such example, as will be examined, is found in Ulpian's reflection on *error* in the context of *emptio venditio*.

#### 4. Error and *conventio*

In Ulpian's conception of *contrahere*, shaped on the one hand by the consensualism of Pedius and on the other by the causalism of Aristo (Schiavone 2005, 359), *error* becomes relevant insofar as it concerns an essential component of the contractual structure the parties intended to establish. If one or both parties hold a mistaken understanding of reality that prevents the realization of the contract's typical purpose, the agreement is incapable of producing valid binding effects.

Given that the defining *causa* of *emptio venditio* lies in the reciprocal exchange of a *res* for a price, it is essential that the parties reach agreement on both the object and the price. As Ulpian aptly observes, however, such agreement presupposes a preliminary intellectual operation – *consentire*, that cognitive process by which the will is brought into harmony with understanding:

Ulp. 4 *ad ed.* D. 2.14.1.3: *Conventionis verbum generale est ad omnia pertinens, de quibus negotii contrahendi transigendique causa consentiunt qui inter se agunt: nam sicuti convenire dicuntur qui ex diversis locis in*

---

<sup>13</sup> Gell. 9.2.4: "Video," inquit Herodes, "barbam et pallium, philosophum nondum video..."; Plut. *Quaes. Conv.* 7.6.3 (709b).

*unum locum colliguntur et veniunt, ita et qui ex diversis animi motibus in unum consentiunt, id est in unam sententiam decurrunt.*

*Conventio* (literally, ‘coming together’) is a general word covering all things agreed to by those who deal with one another in order to contract and transact affairs. People who are gathered and come from different places to one place are said to ‘come together’ (*convenire*), and they resemble those who from different mental impulses agree on one thing, *i.e.*, come to one way of thinking (trans. Frier 2021, 7).

The term *conventio*, defined as «that upon which those who undertake acts between themselves in order to contract or settle agree», denotes precisely the product of an inner convergence of juridical consent among multiple parties – a meeting of minds. Ulpian’s metaphor emphasizes the tangible, almost muscular concreteness of this movement: individuals *conveniunt*, he writes, when they move from diverging intentionalities toward a shared judgment, much like travellers coming from different places who ultimately arrive at the same point (Frier 2021, 7; Falcone 2019, 203).

More precisely, Ulpian’s emphasis on the *unum* as the objective outcome of *consentire* reveals a distinctive focus not so much on *consensus* as an ordering category to be contrasted with other structural elements of the contract – such as the *res*, the *verba*, or the *litterae* – but rather on the internal *substantia* of the consensual act itself. This act is conceived as a perfect alignment between the parties’ perception and volition, a moment in which intention (*voluntas*) and understanding fully coincide in a moment of juridical unity/unification (Falcone 2019, 211).

As previously noted through the citation of Julian’s *dictum*, it is especially from the 2<sup>nd</sup> century AD onward that *scientia iuris* begins to articulate the phenomenon of *error* in terms of an opposition between *consensus/consentire* (shared intention) and *dissentire* (disjunction of wills) – that is, based on the presence or absence of an actual uniformity, or more precisely, a unity of will and perception between the contracting parties. This dichotomy is developed, among others, by Ulpian with respect to any element of the contractual content, including – at a preliminary level – the very recognition of the contractual *typus in fieri*.

On this point, a particularly significant textual reference can be found in:

Ulp. 28 *ad Sab.* D. 18.1.9 pr.: *In venditionibus et emptionibus consensum debere intercedere palam est: ceterum sive in ipsa emptione dissentient sive in pretio sive in quo alio, emptio imperfecta est. Si igitur ego me fundum emere putarem Cornelianum, tu mihi te vendere Sempronianum putasti, quia in corpore dissensimus, emptio nulla est. Idem est, si ego me Stichum, tu*

*Pamphilum absentem vendere putasti: nam cum in corpore dissentiatur, apparet nullam esse emptionem.*

In sales and purchases it is obvious that agreement (*consensus*) must occur. But the sale is incomplete if they disagree on (the fact of) the purchase itself, or on the price, or on something else. Therefore, if I thought that I bought the Cornelian farm and you thought that you sold the Sempronian, there is no sale because we disagreed on the object of sale (*in corpore*). Likewise, if I thought (I purchased) Stichus, and you that you sold the absent (slave) Pamphilus; for since there is disagreement on the object of sale, there is clearly no sale (trans. Frier 2021, 205).

Ulpian develops the problem of the divergence between the parties' wills through a refined semantics of *sentire* – articulated in terms of *consensus* and *dissentire* – offering an interpretive key that reaches to the very core of contractual dynamics (Flume 1951, 248 ff.; Frier 1983, 259 ff.; Zimmermann 1992, 587 ff.). As the outcome of an intellectual process, *convenire* always entails a *reductio ad unitatem* of individual intentions. If the wills of the parties deviate independently – that is, if they err, in the strict sense – there can be no *idem sentire* that may constitute a valid *lex contractus*, whether this pertains to the identification of the contractual type or to a particular element of the broader configuration of interests expressed therein (Zimmermann 1992, 588; Schanbacher 2011, 532. *Contra* Wolf 1961, 23 ff., 99 f., 135 f.).

What, then, occurs when there is disagreement regarding the determination of the object of sale – when the subjective presupposition of *conventio* is absent, namely the formation of a shared perception and intentional alignment (*consensus*) between the parties concerning the item to be exchanged for a price?

In the case discussed by Ulpian, the buyer intends to acquire a specific tract of land (or a particular slave), while the seller intends to alienate a different one; since there is no convergence on the same *res*, their *sentire* is incapable of generating any binding effect under legal order, as the discord directly affects the *causa* of the contract itself (Frier 1983, 261 f.). One might say that neither party truly manifests a legally relevant *voluntas* toward the transaction as structured, since neither can derive any utility from it. In other words, the issue arises upstream of the identification of the object to be transferred – a necessary condition for the synallagmatic contract to possess the economic and social content that the legal order protects – and instead involves how the parties perceive and engage with the material reality (Zimmermann 1992, 589).

It will not escape the reader's attention that the scenarios addressed by Ulpian presuppose, albeit implicitly, the material absence of the object of the

transaction (Harke 2005, 27; MacMillan 2010, 19 f.). What rendered the archaic cash sale – rooted in a demand for physical immediacy – ultimately unworkable resurfaces in the context of the consensual contract: although the actual presence of the object is no longer requisite, the absence of a shared intellectual framework renders genuine agreement equally unattainable (Wolf 1961, 47 f.; Frier 1983, 262 f.). At that point, it matters little whether the misunderstanding stems from excessively vague declarations (Pringsheim 1935, 363; Flume 1951, 246 ff.) or whether the *error* is unilateral: expressions such as *putare emere* or *putare vendere* describe intentions that, if they fail to converge on the same object, cannot generate any contractual bond capable of producing binding legal consequences (Wolf 1961, 44 ff.; Wieacker 1963, 389 ff.; Wunner 1964, 163 ff.; Frier 1983, 261 f.; Zimmermann 1992, 589 f.).

The shift in the hermeneutic paradigm, which now places greater emphasis on the volitional and cognitive dimension encapsulated in the concept of *conventio*, nonetheless remains embedded – let it be duly noted – within a private law system governed by the *Typenzwang*.<sup>14</sup> Moreover, the transition from *mancipatio* to *emptio venditio* does not alter the fundamental economic rationale of the contractual scheme, which remains the exchange of a specified thing for a price.

## 5. Misrepresentation and *dissensus*

There are instances in which the precise identification of the *res* proves insufficient to secure the fulfilment of the interest structure embedded in the contract. This occurs when specific qualities of the purchased good – regarded as essential for the constitution of the contractual *causa* and presumed by one or both parties to be present – are in fact absent (Zimmermann 1992, 592 f.).

Notably, when the mistake is predominantly unilateral – as is frequently the case with the buyer – it raises the question of how to reconcile the protection of the *emptor* (who fails to derive the intended benefit from the transaction due to the absence of expected qualities) with the imperative of preserving the structural integrity of the contractual relationship.

An important precedent for what will later become Ulpian's reflection on this matter can be found in Julianus:

Iul. 3 *ad Urs. Fer. D.* 18.1.41.1: *Mensam argento coopertam mihi*

---

<sup>14</sup> With regard to testamentary provisions, see Beghini, in this book.

*ignoranti pro solida vendidisti imprudens: nulla est emptio pecuniaque eo nomine data condicetur.*

You unknowingly sold me, also unaware, a silver-plated table as a solid one: there is no sale and money paid on this account can be recovered by a *condictio* (trans. Frier 2021, 211).

The jurist describes a scenario in which both parties are mistaken as to the material composition of the *merx*: the buyer intends to acquire a solid silver plate; the seller, due to his own negligence (Galeotti 2025), believes he has provided such an item, which is later revealed to be merely silver-plated. Julianus concludes that the *emptio* must be considered null and void, and that the buyer is entitled to an action at strict law to recover the price paid.

According to the jurist's reading, a shared error concerning the characteristics of the object of sale (*res*) would appear to produce the same effects as a *venditio sine re*: although the parties' wills do formally converge, the transaction is devoid of causal efficacy, since the contract – concluded over something that does not exist (the solid silver plate) – is incapable of producing the typical effects of the transaction. The *error*, one might say, undermines the causal *consensus*, turning it into an illusory *consensus* (Schanbacher 2011, 524 ff.; Schermaier 2014, 855).

In my view, however, Julianus' – or perhaps rather Urseius' (Guarino 1946, 48 ff.; Paricio Serrano 2023, 60; Galeotti 2025) – *opinio* should not be understood as a general treatment of *error in materia* or *substantia*, but rather as a more nuanced reflection on the objective dimension of the *causa* underpinning the synallagmatic structure of the contract. Specifically, it concerns the ability of the *iudicium empti* (more precisely, the shaping of the *condemnatio ex fide bona*) to uphold the contractual equilibrium in accordance with the criteria of *bonum et aequum*. Should the contractual remedy be available even in the absence of *dolus in contrahendo*, where the deception arises solely from the item's appearance and results in the delivery of a materially different or inferior good from what the buyer had anticipated?

There is, undoubtedly, no single definitive answer: only a constellation of factual elements that the interpreter must examine in order to construct a solution consistent with the *corpus* of responses previously developed in analogous cases.

The assessment is therefore guided by a series of diagnostic questions aimed at capturing the context: Did the *merx* present misleading attributes? Could a reasonably attentive buyer or seller have perceived its actual composition? Was the essence of the item detectable through the exercise of reasonable care?

In the case at hand, we are dealing with a plate which, at first glance,

appears to be made of solid silver. As Julianus characterizes the *emptor* as *ignorans*, we may infer that the *error* was not reasonably avoidable. Conversely, the seller's mistake seems attributable to culpable behaviour (*imprudencia*): perhaps he possessed the means to ascertain the actual composition of the *res*, yet behaved carelessly; perhaps he could have consulted an expert, but failed to do so. What is certain is that he preferred to rely on appearances, without verifying the substantial composition of the item (Galeotti 2025).

The position in which the *venditor* of the plate finds himself is thus different both from that of a fraudulent seller (*qui sciens vendidit...*), and from that of the innocent seller of a defective item (*qui ignorans vendidit...*):<sup>15</sup> in the latter case, after all, the buyer's failure to obtain the expected benefit from the transaction could not be traced to the vendor's conduct (Flume 1934, 329; Medicus 1962, 130; Vacca 1999, 91 ff.).

The Roman jurist's perspective is best appreciated by transitioning from substantive to procedural analysis.

Suppose the sale (*emptio*) was considered valid, and that the *imprudens* merchant of D. 18.1.41 was sued under the *actio ex empto* for having failed to correctly identify the material composition of the plate: if his 'lightness' (*i.e.*, negligence) were deemed *dolus in contrahendo*,<sup>16</sup> he could face a *condemnatio* for the amount of the *id quod interest emptoris non decipi* (Talamanca 1993, 440 ff.). He would thus have been required to pay the buyer a sum greater than the price he had received, while, since the validity of the transfer remained unaffected, the *merx* would have remained with the purchaser.

No matter how reprehensible the merchant's conduct appear from the standpoint of *virtus* or *fides* (Schulz 1934, 151 ff.), even the strictest Stoic would have acknowledged that the result fell short of the principles of *bonum*

---

<sup>15</sup> Ulp. 32 *ad ed.* D. 19.1.13 pr.: *Iulianus libro quinto decimo inter eum, qui sciens quid aut ignorans vendidit, differentiam facit in condemnatione ex empto: ait enim, qui pecus morbosum aut tignum vitiosum vendidit, si quidem ignorans fecit, id tantum ex empto actione praestaturum, quanto minoris essem empturus, si id ita esse scissem: si vero sciens reticuit et emptorem decepit, omnia detrimenta, quae ex ea emptione emptor traxerit, praestaturum ei: sive igitur aedes vitio tigni corruerunt, aedium aestimationem, sive pecora contagione morborum perierunt, quod interfuit idonea venisse erit praestandum.*

<sup>16</sup> See Pomp. 9 *ad Sab.* D. 19.1.6.4: *Si vas aliquod mihi vendideris et dixeris certam mensuram capere vel certum pondus habere, ex empto tecum agam, si minus praestes. Sed si vas mihi vendidieris ita, ut adfirmares integrum, si id integrum non sit, etiam id, quod eo nomine perdiderim, praestabis mihi: si vero non id actum sit, ut integrum praestes, dolum malum dumtaxat praestare te debere. Labeo contra putat et illud solum observandum, ut, nisi in contrarium id actum sit, omnimodo integrum praestari debeat: et est verum. Quod et in locatis doliis praestandum Sabinum respondisse Minicius refert.*

et *aequum*, given that the seller endured a financial detriment wholly disproportionate to his actual actions.

Nor, for that matter, would requalifying the seller's *imprudentia* as mere *ignorantia* yield a fairer result. If the plate – despite its lesser intrinsic value – had been deemed fit for ordinary use, and no express warranty had been given by the merchant (Talamanca 1993, 414 f. and fn. 1155, 442, fn. 1443 e 1445; Schermaier 2005, 42 f.; Vacca 2007, 171 f.; Frier 2021, 298), the buyer could not claim breach of the seller's duty to ensure full availability and usability of the item sold (*habere licere*).

Even assuming the buyer were granted the *actio empti* on grounds of the good's «lack of integrity» (Talamanca 1993, 445 and fn. 1467; Vacca 1999, 93 f., fn. 56, 101 ff.; Vacca 2007, 169 ff.), the vendor's liability would be limited to compensating the difference between the *pretium* paid and the amount that would have been paid had the defect been known. This would result in a reduced profit margin for the seller, reflecting the buyer's diminished interest in the transaction. Nevertheless, the negligent seller would still retain a certain – albeit modest – gain from the deal.

Conversely, the *emptor*, having overpaid for an inferior good, would not only suffer a financial loss, but would incur both an economic loss and a qualitative disappointment (Galeotti 2025).

The fact that the imbalance arising from the failure of reciprocal performance could not be rectified through a good faith interpretation of the contract – specifically, by leveraging the flexibility inherent in the *condemnatio* under the *actio empti* – would hardly have escaped Julian's notice. In reflecting on the *causa* of the synallagmatic exchange and the remedial options available, the jurist may well have deemed nullity a preferable course to preserving the economic transaction (Frier 1983, 265, 267).

It should be noted, however, that the outcome would likely have been different had the discrepancy between the market value of the good and the price paid worked to the buyer's advantage – for example, if a plate sold as silver-plated had turned out to be solid silver. In such a case, the issue previously discussed – namely, the imputation of the consequences of one party's *imprudentia* to the non-negligent counterpart – would not have arisen: in accordance with the principle of *suum cuique tribuere* (Betti 1942[47], 144 and fn. 15; Betti 1962, 270, 333, 338, 384; Santucci 2024, 70 ff.), the merchant – having set the *pretium* himself – would have had no one to blame but his own carelessness (Frier 2021, 195 f.).

If correct, this reconstruction would demonstrate how the reflection on the issue of common *error* (*in materia/substantia*) followed a substantially coherent development from Julian to Ulpian (Galeotti 2025, 378 ff.):

Ulp. 28 *ad Sab. D.* 18.1.14: *Quid tamen dicemus, si in materia et qualitate ambo errarent? Ut puta si et ego me vendere aurum putarem et tu emere, cum aes esset? Ut puta coheredes viriolam, quae aurea dicebatur, pretio exquisito uni heredi vendidissent eaque inventa esset magna ex parte aenea? Venditionem esse constat ideo, quia auri aliquid habuit. Nam si inauratum aliquid sit, licet ego aureum putem, valet venditio: si autem aes pro auro veneat, non valet.*

But what will we hold if both parties are mistaken on the material and a characteristic (*materia et qualitas*)? For example, if I thought that I sold, and you that you bought, gold, when it was (in fact) bronze? For instance, co-heirs sold to one heir, for a substantial price, a bracelet said to be of gold, and it was (subsequently) found to be mostly bronze? It is settled that there is a sale because it had some gold. For, if something is gilded, the sale is valid even if I thought it (solid) gold; but if bronze is sold as gold, it is not valid (trans. Frier 2021, 211).

In my humble assessment, the case of the gold-plated bracelet – believed to be, and sold as, gold – only apparently constitutes a sort of overruling (Cornioley 1968, 280 ff.; Zimmermann 1992, 595; Frier 2021, 211) of Julian's *opinio*; nor is it necessary to invoke «abstract philosophical considerations» (Talamanca 1993, 327 f.) to explain its rationale – at least not as a guiding principle (Schanbacher 2011, 528 ff.).

In the case examined by Ulpian, both seller and buyer appear to have been unaware of the actual material composition of the *merx*, whose accurate classification in light of its typical economic function within market exchange, plausibly as personal ornamentation – would not have been compromised by the presence of a lesser amount of precious metal than the parties had anticipated. The lower intrinsic value of the *viriole* (gold-plated rather than solid gold) would, however, have implied a market price substantially below that which was agreed upon.

The subsequent discovery of this discrepancy, while not retroactively undermining the contractual *causa*, nonetheless raised the issue of the objective imbalance between the correlative performances arising from the contract of sale (*emptio venditio*).

Building on what had already been suggested by the jurisprudence of the Hadrianic age (Vacca 2007, 170 ff.), it is therefore plausible to assume that the *actio empti* would, where appropriate, have been granted to allow the disappointed buyer to recover part of the price paid (Zimmermann 1992, 589): should the defect in the good prove such as to diminish its market value, it would have been contrary to the standards of *aequitas* embedded within the legal order for the seller – even if without fault – to be unjustly

enriched. At the same time, it would have appeared equally unfair to nullify the effects of the contract altogether, thereby depriving the good-faith seller of even a minimal profit.

If, however, the bracelet contained no gold whatsoever – and given that the precious nature of the item represented a decisive factor in the structure of interests the *emptor* sought to realise through the contract of sale – the alternatives offered by the *condemnatio* in the *iudicium bonae fidei* would not have sufficed to resolve the matter equitably: the buyer would have received too much (in the event of a *condemnatio* for the *id quod interest* against the merchant), or too little (if the seller were ordered to pay only the difference in market value).

«There is no contract without a shared content – that is, without an object upon which the parties have reached an *idem sentire*», states Ulpian. It follows that an agreement concerning a *merx* unfit to realise the typical *causa* of sale (the exchange of a thing for a price) because it is *falsa* – in the logical and ontological sense of ‘not being’ – would likewise be incapable of generating obligations (Schermaier 1992, 130). To bind the parties to their mutual misapprehension would entail an irreconcilable conflict both with the principle that ties the validity of the *emptio venditio* to the existence and marketability of the *res* (Flume 1951, 249 ff.), and with the notion of *iustitia* immanent in the positive legal order – a standard plausibly grounded in an ethical-epistemological model that excludes liability for unintentional deception.

Why, then, invoke Aristotle at this point – especially when, as I believe has been demonstrated, the solution offered by Ulpian arises entirely from internal legal reasoning?

For now, I might respond that, insofar as the *iudicium ex empto* permits the development of a «logic of equity and plausibility», it should not be surprising if arguments that resonate with shared meanings – precisely because they are rooted in a *zeitgebundene Weltsicht* – also underpin Ulpian's interpretation of the contract of sale (Schermaier 1992; Schermaier 2014, 857).

The analysis of another fragment, in which the Tyrian jurist engages with the problem of *error* concerning the material composition of the *merx*, should help to clarify more precisely what I mean.

The idea that the intrinsic qualities of the good being sold must be correctly represented by the parties – on pain of nullifying the economic transaction, insofar as such qualities affect the causal determination of the contractual *synállagma* – forms the core of:

Ulp. 28 *ad Sab.* D. 18.1.9.2: *Inde quaeritur, si in ipso corpore non erratur, sed in substantia error sit, ut puta si acetum pro vino veneat, aes pro auro vel plumbum pro argento vel quid aliud argento simile, an emptio et*

*venditio sit. Marcellus scripsit libro sexto digestorum emptionem esse et venditionem, quia in corpus consensum est, etsi in materia sit erratum. Ego in vino quidem consentio, quia eadem prope οὐσία est, si modo vinum acuit: ceterum si vinum non acuit, sed ab initio acetum fuit, ut émbamma, aliud pro alio venisse videtur. In ceteris autem nullam esse venditionem puto, quotiens in materia erratur.*

If there is no *error* as to the thing itself but rather a mistake as to *substantia*, is there *emptio-venditio* or not? As where vinegar is sold for wine, bronze for gold or lead, or something else similar to silver, for silver. Marcellus in book 6 of his *Digesta* says the sale holds good, because there is *consensus* as to the thing itself though *error* as to the *materia*. I myself agree as to the wine since the essence is the same, at least if the vinegar was indeed soured wine. Yet if it was not sound wine but vinegar *ab initio*, one thing would seem to have been sold for another. For the rest I think the sale is void as often as there is a mistake as to material (trans. Birks 2014, 77 f.).

The fragment presents, among other scenarios, the case of someone who purchased the liquid contained in certain vessels believing it to be wine, only to later discover it was vinegar. According to Marcellus, there would be no reason to question the validity of the sale once agreement had been reached regarding the *merx* – namely, the wine jars. By invoking a term that, on a concrete level, most closely evokes the notion of tangible substance,<sup>17</sup> the Antonine jurist appears to privilege the *quid actum* over the *effectum*: in his view, the fact that the contents of the vessels (the *corpus* subject to the sale) turned out to be of inferior quality than presumed would not undermine the ‘causal *consensus*’.

Ulpian, following a line of thought that originates with Aristo and draws from the Aristotelian model a notion of *synállagma* not confined to the objective structure of the contract but rather centred on its rebalancing function (Schiavone 2005, 359), appears – at least to my reading – to privilege the configuration of interests embodied in the *conventio*. He thereby conditions the validity of the sale on the attainment of an outcome aligned with the economic function of the contract. Ulpian thus introduces a significant distinction: it is one thing for the vinegar to result from the natural fermentation of the original product (Frier 1983, 268 ff.; Zimmermann 1992, 592; Apathy 1994, 147 f.); quite another for it to be the condiment known as *émbamma*,

---

<sup>17</sup> See Lucr. 1.304: *tangere enim et tangi, nisi corpus, nulla potest res*; Sen. ep. 106.4: *Bonum facit; prodest enim; quod facit corpus est. Bonum agitat animum et quodam modo format et continet, quae [ergo] propria sunt corporis. Quae corporis bona sunt corpora sunt; ergo et quae animi sunt; nam et hoc corpus est.*

an entirely artificial substance. In the former case, Marcellus' *responsum* would be correct – there would be a correspondence between the *merx* delivered, though of inferior quality, and the one agreed upon (Schermaier 2014, 855). In the latter, however – resembling the situations addressed in D. 18.1.9 pr. or D. 18.1.14 (the bronze bracelet sold as a *viriola aurea*) – the proposed solution would not lead to an equitably satisfactory outcome.

## 6. The past speaks with its own voice

As clearly shown by the foregoing analysis, Ulpian assigns equal importance to the agreement on the material composition of the object as to its mere identification, recognizing that the *substantia* of the *merx* can fundamentally alter its socio-economic function and, in doing so, bear significant consequences for the synallagmatic *causa*. Consequently, it becomes imperative to establish clear evaluative criteria that go beyond mere contingency, providing the interpreter with concrete reference points for determining the 'reality' of a *res*. This determination, in turn, is pivotal in shaping the legal effects of *error* within the contractual framework.

Ultimately, addressing the philosophical inquiry into «what makes a thing that thing?» becomes a necessary precondition for any coherent juridical assessment.

Especially in D. 18.1.9.2, although the topical nature of the argument is beyond doubt, the terminology employed by Ulpian reveals a clear connection with the dialectic between essence and accidents, which lies at the core of Aristotelian metaphysics (Wolf 1961, 139 ff.; Nicholas 1962, 178; Schermaier 1992, 153; MacMillan 2010, 20; Schermaier 2014, 856. *Contra* Schanbacher 2011, 536 ff.). The importance attributed by the jurist to *error in substantia* (or *materia*), at least, emerges subtly from his recourse to the term οὐσία, arguably more appropriate than its Latin equivalent to express the ontological dimension of the proposed solution. As the first of Aristotle's categories, οὐσία designates the '*quidditas*' the primary nature of a thing considered 'in itself' (καθ'αυτό). From this perspective, the vocabulary employed by Ulpian is not merely a description of material data but a valorisation of the intellectual process accompanying the identification of the object of negotiation through the abstraction of the «constants of its being». As demonstrated, in the absence of an *idem sentire* regarding the *res*, the object of the sale may be said to be legally non-existent; the same conclusion, however, does not necessarily follow in cases of dissent concerning the *qualitas*, which merely predicates or specifies contingent attributes of the underlying substance.

These cursory references to the Peripatetic tradition are not intended –

as previously emphasized – to suggest that philosophy provides a diagnostic tool for the *prudens iuris* (Harke 2005, 49). Rather, what Ulpian seems to pursue is the conceptual form, articulated in Aristotelian thought and situated beyond the strict boundaries of legal dogmatics: a cognitive construct capable of expressing an immutable and unambiguous «state of being», whose heuristic utility sustains the development of a distinctly juridical reasoning (Miquel 1963, 94 ff., 99).

Striking a balance between opposing demands through the concrete determination of the criteria of *bonum* and *aequum* would not be possible without a skilful and consistent recourse to shared premises. As an interpreter of the *Zeitgeist* in terms of selecting the tools to exercise his directive action, the jurist both shapes and is shaped by the sociocultural context within which he operates.

«To explain Ulpian by Ulpian (and Aristotle)»,<sup>18</sup> in conclusion, appears to me the only viable path for reconstructing the jurist's reflection on *error* in consensual sale without distortion. Only in this way can one grasp the *ratio decidendi* of his *responsa*, in which the emphasis placed on the volitional dimension of contractual agreement consistently serves to safeguard the synallagmatic structure of the contract – both at the stage of formation and in the realization of its underlying function.

## References

- Apathy P. (1994), “Sachgerechtigkeit und Systemdenken am Beispiel der Entwicklung von Sachmängelhaftung und Irrtum beim Kauf im klassischen römischen Recht”, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 111, 95-154.
- Betti E. (1942[1947]), *Istituzioni di diritto romano*, I, 2<sup>nd</sup> ed., Padova, Cedam.
- Betti E. (1962), *Istituzioni di diritto romano*, Vol. II, Padova, Cedam.
- Birks P., Descheemaeker E. (eds.) (2014), *The Roman Law of Obligations*, Oxford, Oxford University Press.
- Cardilli R. (2008), “Il problema della resistenza del tipo contrattuale nel diritto romano tra *natura contractus* e *forma iuris*”, in R. Fiori (ed.), *Modelli teorici e metodologici nella storia del diritto privato*, Napoli, Jovene, 1-75.
- Cardilli R. (2020), “Philipp Lotmar e la dottrina dell'errore”, in *Tesserae iuris*, 1(1), 135-151.

---

<sup>18</sup> The exegetical statement of Porphyry. *quaest. Hom.* 297.16 Schrader, “Ὅμηρον ἔξ Ὀμήρου σαφηνίζειν (‘to make clear/interpret Homer from Homer’), is a probable Aristarchian maxim.

- Cornioley P. (1968), "Error in substantia, in materia, in qualitate", in *Studi in onore di G. Grosso*, Vol. II, Torino, Giappichelli, 251-295.
- d'Ors Á. (1953), "Aspectos objetivos y subjetivos del concepto de *ius*", in G. Lavaggi (ed.), *Studi in memoria di E. Albertario*, Vol. II, Milano, Giuffrè, 279-299.
- dalla Massara T. (2007), "Garanzia per evizione e interdipendenza delle obbligazioni nella compravendita romana", in L. Garofalo, *La compravendita e l'interdipendenza delle obbligazioni nel diritto romano*, Vol. II, Padova, Cedam, 277-310.
- Diesselhorst M. (1970), "Zum Irrtum bei Vertragsschluß", in D. Liebs (ed.), *Symptica Franz Wieacker sexagenario Sasbachwaldeni a suis libata*, Göttingen, Vandenhoeck & Ruprecht, 180-211.
- du Plessis P.J. (2006), "The Roman Concept of *lex contractus*", in *Roman Legal Tradition*, 3, 79-94.
- Falcone G. (2007), "*Ius suum cuique tribuere*", in *Annali del Seminario giuridico dell'Università di Palermo*, 52, 133-176.
- Falcone G. (2019), "Riflessioni sulla *conventio* in D. 2.14.1.3", in *Annali del Seminario giuridico dell'Università di Palermo*, 62, 195-217.
- Flume W. (1951), "Irrtum und Rechtsgeschäft im römischen Recht", in *Festschrift für F. Schulz*, Vol. I, Weimar, Hermann Böhlau Nachfolger, 209-252.
- Flume W. (1934), "Zum römischen Kaufrecht", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 54, 328-335.
- Frier B.W. (1983), "Roman Law and the Wine Trade: The Problem of «Vinegar Sold as Wine»", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 100, 257-295.
- Frier B.W. (2021), *A Casebook on the Roman Law of Contracts*, Oxford, Oxford University Press.
- Galeotti S. (2025), "L'apparenza delle cose. Errore e *synállagma* contrattuale nella riflessione di Ulpiano", in *Seminarios Complutenses de derecho romano*, 38, 347-389.
- Guarino A. (1946), *Salvius Iulianus. Profilo bibliografico*, Catania, Crisafulli.
- Harke J.D. (2005), «*Si error aliquis intervenit*». *Irrtum im klassischen römischen Vertragsrecht*, Berlin, Duncker & Humblot.
- Lawson F.H. (1936), "Error in Substantia", in *Law Quarterly Review*, 52(1), 79-105.
- Lenel O. (1927), *Das «Edictum Perpetuum»*. Ein Versuch Zu Seiner Wiederherstellung, 3<sup>rd</sup> ed., Leipzig, Bernhard Tauchnitz.
- Lotmar P. (aut.), Fagnoli I. (ed.) (2019), *Das römische Recht vom Error*, Vol. I, Frankfurt am Main, Vittorio Klostermann.

- Mackintosh J. (1892), *The Roman Law of Sale: With Modern Illustrations: Digest XVIII, 1 and XIX, 1: Trans. with Notes and References to Cases and the Sale of Goods Bill*, Edinburgh, Clark.
- MacMillan C. (2010), *Mistakes in Contract Law*, Oxford-Portland, Hart Publishing.
- Manthe U. (1996), “Beiträge zur Entwicklung des antiken Gerechtigkeitsbegriffes, I: Die Mathematisierung durch Pythagoras und Aristoteles”, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 113, 1-31.
- Medicus D. (1962), «*Id quod interest*». *Studien zum römischen Recht des Schadensersatzes*, Köln, Böhlau.
- Miquel J. (1963), “Una aportación al estudio del *error in substantia* en la compraventa”, in *Anuario de Derecho Civil*, 16(1), 79-99.
- Nicholas B. (1962), *An Introduction to Roman Law*, Oxford, Clarendon Press.
- Paricio Serrano F.J. (2023), *Salvio Juliano. Vida del jurista y político*, Madrid, Marcial Pons.
- Pringsheim F. (1935), “The Inner Relationship between English and Roman Law”, in *Cambridge Law Journal*, 5(3), 347-365.
- Ross W.D. (trans.), Brown L. (ed.) (2009), *Aristotle. The Nicomachean Ethics*, Oxford, Oxford University Press.
- Santucci G. (2018), *Il sistema aperto del diritto romano. Antologia di testi*, Torino, Giappichelli.
- Santucci G. (2024), *Chi è causa del suo mal pianga se stesso. Emilio Betti e «quel senso di autoreponsabilità, che i romani mostrano così vivo»*, Bologna, il Mulino.
- Schanbacher D. (2011), “Ulpian’s Lehre vom *error in substantia* und die stoische Ontologie”, in K. Muscheler (ed.), *Römische Jurisprudenz. Dogmatik, Überlieferung, Rezeption. Festschrift für D. Liebs zum 75. Geburtstag*, Berlin, Duncker & Humblot, 521-542.
- Schermaier M.J. (1992), «*Materia*». *Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht*, Wien-Köln-Weimar, Böhlau.
- Schermaier M.J. (1998), “Auslegung und Konsensbestimmung. Sachmängelhaftung, Irrtum und anfängliche Unmöglichkeit nach römischem Kaufrecht”, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 115, 234-288.
- Schermaier M.J. (2005), “Mistake, Misrepresentation and Precontractual Duties to Inform: The Civil Law Tradition”, in R. Sefton-Green (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law*, Cambridge, Cambridge University Press, 39-64.
- Schermaier M.J. (2014), “*Philosophari necesse est, sed paucis*: Juristisches und

- philosophisches zum Irrtum bei Vertragsschluss”, in *Fundamina*, 20(2), 847-857.
- Schiavone A. (2005), «*Ius*». *L'invenzione del diritto in Occidente*, Torino, Einaudi.
- Schulz F. (1934), *Prinzipien des römischen Rechts*, Berlin, Duncker & Humblot.
- Stolfi E. (2004), «*Bonae fidei interpretatio*». *Ricerche sull'interpretazione di buona fede tra esperienza romana e tradizione romanistica*, Napoli, Jovene.
- Stolfi E. (2018), “Commento ai testi. F. 73 – D. 44.7.57”, in J.-L. Ferrary, A. Schiavone, E. Stolfi (eds.), *Quintus Mucius Scaevola. Opera*, Roma, «L'Erma» di Bretschneider, 333-334.
- Talamanca M. (1993), *s.v.* “Vendita (dir. rom.)”, in *Enciclopedia del diritto*, Vol. XLVI, Milano, Giuffrè, 303-475.
- Vacca L. (1994[1997]), “Ancora sull'estensione dell'ambito di applicazione dell'*actio empti* in età classica”, in *Iura*, 45, 35-73, reprinted in L. Vacca (aut.) and B. Cortese (ed.) (2015), *Garanzia e responsabilità. Concetti romani e dogmatiche attuali*, new ed. rev. – from which I have quoted, Torino, Giappichelli, 29-65.
- Vacca L. (1995), “Sulla responsabilità *ex empto* del venditore nel caso di evizione secondo la giurisprudenza tardo-classica”, in *Seminarios Complutenses de derecho romano*, 7, 297-326, reprinted in L. Vacca (aut.) and B. Cortese (ed.) (2015), *Garanzia e responsabilità. Concetti romani e dogmatiche attuali*, new ed. rev. – from which I have quoted, Torino, Giappichelli, 1-27.
- Vacca L. (1998), “Profili della ‘risoluzione’ nella *emptio venditio* e nella *locatio conductio rei*”, in A. Dufour, B. Winiger (eds.) *Pacte, convention, contrat. Mélanges en l'honneur du P.B. Schmidlin*, Bâle-Frankfurt am Main, Helbing & Lichtenhahn, 121-145, reprinted in L. Vacca (aut.) and B. Cortese (ed.) (2015), *Garanzia e responsabilità. Concetti romani e dogmatiche attuali*, new ed. rev. – from which I have quoted, Torino, Giappichelli, 125-151.
- Vacca L. (1999), “Risoluzione e *synállagma* contrattuale nella giurisprudenza romana dell'età classica”, in L. Vacca (ed.), *Il contratto inadempnuto. Realtà e tradizione del diritto contrattuale europeo. Atti del III Congresso internazionale Aristec (Ginevra, 24-27 settembre 1997)*, Torino, Giappichelli, 23-59, reprinted in L. Vacca (aut.) and B. Cortese (ed.) (2015), *Garanzia e responsabilità. Concetti romani e dogmatiche attuali*, new ed. rev. – from which I have quoted, Torino, Giappichelli, 67-106.
- Vacca L. (2007), “Sul rischio del locatore nella *locatio conductio rei*”, in E. Nicosia (ed.), *Studi per Giovanni Nicosia*, Vol. VIII, Milano, Giuffrè, 305-332, reprinted in L. Vacca (aut.) and B. Cortese (ed.) (2015), *Garanzia e*

- responsabilità. Concetti romani e dogmatiche attuali*, new ed. rev. – from which I have quoted, Torino, Giappichelli, 153-175.
- Villey M. (1956), “*Suum jus cuique tribuens*”, in E. Volterra (ed.), *Studi in onore di P. de Francisci*, Vol. I, Milano, Giuffrè, 361-371.
- Voci P. (1937), *L'errore nel diritto romano*, Milano, Giuffrè.
- Wieacker F. (1963), “Irrtum, Dissens, oder gegenstandslose Leistungsbestimmung”, in *Mélanges Ph. Meylan*, Vol. I. *Droit romain*, Lausanne, Imprimerie Centrale de Lausanne, 383-408.
- Windscheid B. (1891), *Lehrbuch des Pandektenrechts*, Vol. I, 7<sup>th</sup> ed., Frankfurt am Main, Rütten & Loening.
- Wolf J.G. (1961), *Error im römischen Vertragsrecht*, Köln-Graz, Böhlau.
- Wunner S.E. (1964), «*Contractus*». *Sein Wortgebrauch und Willensgehalt im klassischen römischen Recht*, Köln, Böhlau.
- Zimmermann R. (1992), *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Cape Town, Juta (München, Beck).
- Zitelmann E. (1879), *Irrtum und Rechtsgeschäft. Ein psychologisch-juristische Untersuchung*, Leipzig, Duncker & Humblot.

## Chapter 10

# **ERROR AND LAST WILL IN ULPIAN'S THOUGHT**

**Marta Beghini**

*ABSTRACT: This research investigates the scope of juridical reflection on the role of error in testamentary dispositions. It focuses, in particular, on the degree to which the notion of a private voluntas attaining normative significance emerges in relation to the institution of heirs and legacies. The analysis is framed through the lens of testamentary pathology as constituted by error, through which Ulpian's exegesis of Sabinus provides a coherent and conceptually autonomous framework for evaluating the juridical consequences of error in dispositions effective upon death.*

*KEYWORDS: Testamentary dispositions – Normative will – Error – Ulpian.*

*SUMMARY: 1. The concept of voluntas. – 2. Testamentary disposition between voluntas and formalism: A conceptual framework. – 3. The divergence between volitum and non volitum: A matter of testamentary interpretation. – 4. Voluntas and error in the testamentum: Ulpian's reflection. – 5. The irrelevance of voluntas in cases of error in corpore hominis and error in re. – 6. Error in nomine: Interpretative criteria for voluntas. – 7. Error in quantitate and the legal relevance of non-expressed testamentary intention. – 8. Ulpian's perspective: Which boundaries for the voluntas defuncti? – References.*

### **1. The concept of voluntas**

The emphasis on the author's will/*voluntas* in the construction of a juridical act is deeply rooted in the long-standing tradition of Western thought, crossing – in various forms – the domains of political theory, philosophy and law.

This focus is closely connected to the notion of the subject's autonomy, understood as the capacity to act in accordance with rational principles freely chosen. From this perspective, the will (*voluntas*) is not a mere expression of individual desire or inclination, but rather the exercise of a normative faculty, capable of conferring both meaning and validity upon private action.<sup>1</sup>

Philosophically, such a conception – most fully articulated in the Kantian framework – posits the *voluntas* as the very foundation of morality and duty, as well as the transcendental condition for the possibility of any form of

---

<sup>1</sup> See Grondona and De Cristofaro, in this volume.

normativity, including legal normativity (Meneghelli 1993; Schürmann 2022; dalla Massara, Rametta 2024).

The centrality of volition permeates the history of legal thought – both ancient and modern – prompting scholars and jurists alike to investigate the normative productivity of the *voluntas*, in both *inter vivos* relations and those *mortis causa*.

Nonetheless, it is well known that the prominence attributed to the will does not exhaust the complexity of the legal act, which necessarily involves a delicate balance between subjective intentionality and objective elements, as well as the relational and formal structures of the act (Cardilli, Formichella, Marini, Sangermano 2024).

Within this conceptual framework, the present inquiry – adopting a historical-juridical perspective grounded in Roman legal experience – intends to explore the centrality of volition in the testamentary act, a domain wherein the preeminence of the *voluntas* emerges with particular clarity. The analysis will focus specifically on the typical components of the *testamentum* – namely, the institution of the heir and the *legatum* – with a view to examining the legal object (*res*) at the core of the patrimonial transfer (Manfredini 1991; Stern 2022).

## 2. Testamentary disposition between *voluntas* and formalism: A conceptual framework

Qualsiasi esposizione della successione testamentaria romana deve procedere dalla considerazione che [...] il testamento nella coscienza sociale ha la massima importanza; secondo Cicerone anzi è l'atto più grave della vita del *civis*, come la *lex* nell'orbita pubblica. Tanta importanza [...] trovava radici profonde nella tradizionale impostazione individualistica del diritto e della società romana, per cui la certezza di far valere la propria *voluntas ultra mortem* si considera *solacium mortis*.

[...]

Il testatore intende sopravvivere imponendo in forma autoritaria la propria volontà, e la legge cerca di dare ad essa piena attuazione.

[...]

L'importanza sociale del testamento [...] nell'orbita del diritto si manifesta non solo nella impostazione pubblicistica del regime testamentario, da cui deriva la sua inderogabilità, ma soprattutto in quel *favor testamenti*, che è l'orientamento più generale e caratteristico a cui si ispira la giurisprudenza e la legislazione romana.

[...]

Si cerca di salvare il testamento non per il vano scopo di tenere in piedi un atto giuridico, ma perché il testamento racchiude la estrema volontà

del defunto, la quale in ogni tempo rappresenta qualche cosa di sacro (Biondi 1955, 1 ff.).

To substantiate such claims, one need only consider the principal definitions of *testamentum* found in ancient legal sources (Amelotti 1992).

Foremost among these is the celebrated definition offered by Modestinus in the *Digesta*: *Testamentum est voluntatis nostrae iusta sententia de eo, quod quis post mortem suam fieri velit* (Mod. 2 *pand.* D. 28.1.1). Here, the jurist asserts that a *testamentum* is nothing other than a legally valid expression of one's will, concerning what one wishes to be effected after death.

This formulation is firmly situated within an explanatory paradigm of private autonomy, wherein the individual retains full dominion over their patrimony, with the capacity to amend the testamentary act until the very final breath of life. This principle is exemplified in the renowned passage from Ulpian: *ambulatoria enim est voluntas defuncti usque ad vitae supremum exitum* (Ulp. 33 *ad Sab.* D. 34.4.4), affirming the mutable nature of the testator's will up to the moment of death (Lo Iacono 2019, 201 ff.; Lambertini 2020, 164).

A nearly identical definition appears in the *Tituli ex corpore Ulpiani*: *Testamentum est mentis nostrae iusta contestatio in id sollemniter facta, ut post mortem nostram valeat* (Tit. Ulp. 20.1), wherein the *testamentum* is described as a solemn attestation of our lawful intention, meant to take effect *post mortem*.

Likewise, Justinian's Institutes provide a definition in I. 2.10 pr.: *Testamentum ex eo appellatur, quod testatio mentis est*. Here, the *testamentum* is portrayed as the attestation of one's mental intention, inherently linked to the concept of *hereditas*, that is, the transfer of patrimonial goods upon death.

In this context, the sources use a variety of interchangeably terms – *mens testatoris*, *voluntas*, *quaestio voluntatis*, *verba*, *scriptum*, *exprimere*, *declarare* – thereby revealing an apparent synonymy among such notions as thought, expression, manifestation, will, and declaration.<sup>2</sup>

It is well established that, in the context of succession, the analysis of the various forms of invalidity assumes a distinct significance, owing both to the peculiar nature of the *mortis causa* dispositions and to the terminology that reflects the absence of a systematic conceptual framework and, correspondingly, a marked tendency toward case-by-case adjudication (Gai 2.146: ... *commodius erat singulas causas singulis appellationibus distingui*).

---

<sup>2</sup> See Voci 1963, 825, according to which «lo scambio si spiega. Una disposizione è l'atto di un uomo: ma è un'azione che incide sulla realtà esteriore per il suo valore di proposizione. Al testatore si richiede solo che parli o scriva: la sua volontà di costituire una nuova situazione non ha che da esprimersi».

From these brief references, it is already possible to assert that, within the temporal-spatial boundaries of Roman legal experience – particularly during the classical period – testamentary disposition entails a complex constellation of legal constructs. These include the relationship between the *voluntas defuncti* and both the formal structure and interpretive criteria of the juridical act, all of which serve as key elements in understanding the phenomenon (Maschi 1938; Watson 1971, 85 ff.; Ernst 2012, 91 ff.).

What thus emerges is a nuanced interplay of normative frameworks, whose internal tensions and refinements may ultimately challenge the very definition of *successio mortis causa* in patrimonial relationships (Voci 1967, 143 ff.).

### 3. The divergence between *volitum* and *non volitum*: A matter of testamentary interpretation

In general terms, the notion of ‘normative volition’ in legal thought gained prominence through the German Pandectist tradition and its subsequent doctrinal developments. This framework – which places great emphasis on the autonomous sphere of the individual – contributed significantly to the crystallisation of the so-called ‘will dogma’ (*Willensdogma*), as first articulated by Savigny. This dogma, as is well known, constitutes one of the cornerstones of the *Usus Modernus Pandectarum* and underpins the very conceptualisation of the juridical act itself (Riccobono 1934; Schiavone 1977; Brutti 1980).

With specific regard to the testamentary act, one may trace a scholarly trajectory beginning with Gradenwitz (1887, 170 ff.) who, in his early attempt to historicise the issue, posited that the emphasis on the testator’s intent derives primarily from Justinianic sources, rather than from classical Roman law.

In contrast, subsequent studies by Maschi (1938), Biondi (1955, 582 ff.), Voci (1963; 1967; 1972), Watson (1971, 85 ff.) and Talamanca (1985, 77 ff.) sought to move beyond this limited perspective, exploring the interpretative complexities of *mortis causa* dispositions through a plurality of approaches.

Accordingly, any inquiry into the boundaries and implications of *voluntas* in testamentary law – understood as the final and autonomous expression of an individual’s *voluntas* – must address the so-called defects of will. These concern the various degrees of pathology that may affect volition when confronted with the dialectic between intent and non-intent.<sup>3</sup>

---

<sup>3</sup> See Scognamiglio, in this volume, particularly 273 ff.

Within this context, the issue of *error* arises as a central topic, one to which this contribution will now turn its attention.

#### 4. *Voluntas* and *error* in the *testamentum*: Ulpian's reflection

The relationship between will (*voluntas*) and *error* in testamentary dispositions must be analysed against a broader theoretical backdrop (Betti 1960; Voci 1966).

At its core, the problem of *error* begins where interpretation reaches its limits. As long as the testator's will can be reconstrued through hermeneutic methods in a way that remains faithful to their actual intent, the legal act retains its validity, regardless of any underlying misconception. Conversely, when interpretative efforts fail to reconcile the declaration with the testator's true intention – due to a misapprehension of the meaning of their own words – a legally relevant *error* arises. Where such *error* is deemed substantial, it may vitiate the act, rendering it void for lack of genuine volition (Pugliese 1991, 260).

Emilio Betti addresses the systematic implications of *error* in testamentary dispositions in the opening chapter of his seminal work *Esercitazioni romanistiche su casi pratici*. Therein, he examines «the interpretative efficacy to be accorded to the testator's individual idiom», in other words, the *voluntas* as expressed in the *mortis causa* act. For Betti, the *nexus* between will and *error* provides a privileged standpoint from which to attain a precise understanding of foundational legal concepts and to develop «a concrete intuition of the efficacy of legal principles» through close engagement with Roman jurisprudence (Betti 1930, 1).

As already noted, Savigny's theory (1891) constitutes the traditional point of departure for modern treatments of *error*. His framework embeds *error* within a general theory of the juridical act.

This contribution does not intend to retrace the entire evolution of the *Irrtum-Rechtsgeschäft* dynamic, which – in Roman law – often reveals the absence rather than the elaboration of a fully-fledged conceptual theory of *error* (Betti 1960; Cappellini 1995; Guarino 1997, 369 ff.).

Rather, we aim to investigate specific instances of *error* within the testamentary context, in order to assess the ways in which voluntaristic elements interact with the validity of the legal act in the presence of *error facti*.<sup>4</sup>

To this end, we shall turn our attention to several excerpts from Ulpian's commentary *ad Sabinum* (Schulz 1968, 378 ff.), which, in our view, provide

---

<sup>4</sup> See Scognamiglio, in this volume, particularly 277 ff.

a particularly fertile ground for probing the conceptual boundaries of a *voluntas* that, though compromised, may nonetheless retain a measure of normative effectiveness.

## 5. The irrelevance of *voluntas* in cases of *error in corpore hominis* and *error in re*

In the Roman sources, the point of departure for analysing the relationship between *error* and *voluntas* in the context of *mortis causa* legal relations is a celebrated passage from Ulpian's commentary *ad Sabinum*, namely D. 28.5.9 pr.:

Ulp. 5 *ad Sab.* D. 28.5.9 pr.: *Quotiens volens alium heredem scribere alium scripserit in corpore hominis errans, veluti "frater meus" scribere volens scripserit "patronus meus."*

Whenever [a testator], intending to appoint one person as heir, has appointed someone else due to a mistake in identifying the person, such as when intending to write "my brother" he has written "my patron", it is held that neither the person who was named becomes heir, because the *voluntas* is lacking, nor the one who was intended, since he was not written down (trans. by the Author).

This passage – typically treated by scholars as a case of *error in persona*, although explicitly designated here as *error in corpore hominis* – concerns a scenario of *heredis institutio*, wherein the testator seeks to identify the heir not by name, but by descriptive qualification (Betti 1930, 21-22; Voci 1937, 125 s.; Voci 1963, 828; Pontoriero 2020, 32 f.).

It appears from Ulpian's formulation that in cases where the testator is *in corpore hominis errans* – that is, mistaken in physical identification of the intended heir – the dispositive provision is rendered null and void (*placet*).

Put differently, when the *de cuius* fails to correctly designate the heir – even in cases where the intended beneficiary could be inferred with reasonable certainty – the *heredis institutio* is deemed ineffective (Quadrato 1983; Talamanca 1998-1999).

In the reflection of the Severan jurist – likely transmitting Sabinus' opinion –, the legal outcome is unambiguous: neither the person named in the written instrument, nor the one the testator actually intended, may validly succeed. This fragment is of particular significance, as it articulates an explicit rationale for nullity: according to Ulpian the dispositive provision fails, on the one hand, because the formal declaration lacks the requisite *voluntas*

*testandi*; and on the other, because the name of the intended heir is absent from the dispositive text.

In sum, when confronted with the divergence between *volitum* and *non volitum*, caused by the testator's misidentification of the heir, Ulpian affirms that the appropriate sanction is nullity. In his view, a defective or 'inauthentic' will, arising from an essential *error*, leaves no room for any form of 'normative will' capable of sustaining such disposition.

A further illustration of the interplay between *error* and *voluntas defuncti* – this time in the form of a *legatum* – is found in the subsequent portion of the same Ulpian's text. Here, the *res* forming the object of the legal relationship does not correspond to that intended by the testator. Specifically, the testator intends to bequeath a dish (*lanx*), but instead designates a garment (*vestis*):

Ulp. 5 *ad Sab.* D. 28.5.9.1: *Et si in re quis erraverit, ut puta dum vult lancem relinquere, vestem leget, neutrum debebitur, sive ipse scripsit sive scribendum dictaverit.*

And if someone has made a mistake in the thing, if, say, when intending to bequeath a dish he makes a legacy of a garment, neither will be due, whether he wrote [the provision] himself or dictated it to be written [by someone else] (trans. by the Author).

This passage exemplifies *error in re*, that is, a mistake pertaining to the identity of the *res* itself. As with the previous testimony, the disposition is ineffective; and it matters little whether the mistake is attributable to the testator or to the scribe (Betti 1930, 21 f.; Voci 1937, 109 f.; Voci 1963, 828; Pontoriero 2020, 34 f.).

In both scenarios, the *error* undermines the efficacy of the testator's *voluntas*, effectively extinguishing its normative weight.

In line with the foregoing, another Ulpian's fragment, also from the *ad Sabinum* commentary, addresses a similar case of *error in corpore*. As is known, this category of *error* may arise either in the designation or identification of the object of the disposition, or where there is a mismatch between the conceptual designation employed by the testator (*voluntas*) and the actual identification of the item through a particular description (*demonstratio*) (Voci 1963, 822 ff.).

This is a foundational text for understanding – in parallel to dissent concerning object determination in contracts of sale<sup>5</sup> – the legal consequences triggered by a divergence between *volitum* and *non volitum*, that is, between

<sup>5</sup> See Galeotti, in this volume, particularly 204 ff.

the *mens testatoris* and the wording of the disposition, resulting from a misapprehension of a factual circumstance.

Ulp. 5 *ad Sab.* D. 30.1.4 pr.: *Si quis in fundi vocabulo erravit et Cornelianum pro Semproniano nominavit, debebitur Sempronianus: sed si in corpore erravit, non debebitur. Quod si quis, cum vellet vestem legare, suppellectilem adscripsit, dum putat suppellectilis appellatione vestem contineri, Pomponius scripsit vestem non deberi, quemadmodum si quis putet auri appellatione electrum vel aurichalcum contineri vel, quod est stultius, vestis appellatione etiam argentum contineri. Rerum enim vocabula immutabilia sunt, hominum mutabilia.*

If someone has made a mistake in the name of a farm and has named the Cornelian instead of the Sempronian, then the Sempronian will be due; but if he has made a mistake with respect to the tangible object, it will not be due. In the case of someone who, wishing to bequeath clothing, has written ‘household goods’, thinking that clothing is included under that term, *Pomponius* writes that clothing is not due, just as if someone were to think that electrum or brass is included under the term gold, or more foolishly still, that silver is included under the term clothing. For the names of things are immutable, whereas those of persons are mutable (trans. by the Author).

In this case presented by Ulpian, the testator assigns to the object of his bequest a term that does not correspond to the item actually intended.

Specifically, he wishes to bequeath the ‘Sempronian’ estate but erroneously writes ‘Cornelian’. Ulpian, representing the Severan jurisprudential tradition, holds that such a disposition lacks any legal efficiency.

The same conclusion applies to the second example in the passage, wherein the testator, intending to bequeath a garment, instead writes *suppellectilis* under the mistaken belief that the latter (indicating the ‘household goods’) encompasses the former. Once again, the juridical consequence is nullity.

Where there is no correspondence between the *voluntas testatoris* (the intended) and the *verba of testamentum* (the declared), *i.e.*, when the terminology used in the instrument fails to reflect the testator’s actual intention due to an erroneous belief about the meaning of words, the jurist considers the disposition to be ineffective (Voci 1937, 103 ff.).

This legal framework is confirmed by *Pomponius*, who elucidates the rationale behind the solution: private will acquires juridical force only where the content of the bequest is adequately expressed. Conversely, when there is a disjunction between what was intended and what was declared – and

where the *res* is not clearly and correctly identified in accordance with the *mens testatoris* – the patrimonial attribution is void.

## 6. Error in nomine: Interpretative criteria for voluntas

On the basis of the foregoing analysis, the *mens testatoris* appears to carry limited normative significance, becoming legally relevant only when expressed in an adequately precise manner within the testamentary instrument. Nonetheless, there exist scenarios in which the boundaries of the so-called 'normative will' (*voluntas*) are extended; notably, in cases of *error in nomine*, where an erroneous designation is made.

These are cases in which the mistake is not regarded as essential, inasmuch as – despite an incorrect indication of a subject or object – no ambiguity remains concerning the substantive content of the patrimonial disposition intended by the testator.

A paradigmatic instance is found in a passage from Ulpian, once again from his commentary *ad Sabinum*, wherein the Severan jurist confronts the question of whether, and to what extent, the content of the will may be interpreted *post factum* in order to uncover the deeper meaning of the private *voluntas* embedded in testamentary provisions:

Ulp. 2 *ad Sab.* D. 28.1.21.1: *Si quid post factum testamentum mutari placuit, omnia ex integro facienda sunt. quod vero quis obscurius in testamento vel nuncupat vel scribit, an post sollemnia explanare possit, quaeritur: ut puta Stichum legaverat, cum plures haberet, nec declaravit de quo sentiret. Titio legavit, cum multos Titios amicos haberet: erraverat in nomine vel praenomine vel cognomine, cum in corpore non errasset: poteritne postea declarare, de quo senserit? et puto posse: nihil enim nunc dat, sed datum significat. sed et si notam postea adiecerit legato vel sua voce vel litteris vel summam vel nomen legatarii quod non scripserat vel nummorum qualitatem, an recte fecerit? et puto etiam qualitatem nummorum posse postea addi: nam etsi adiecta non fuisset, utique placeret coniectionem fieri eius quod reliquit vel ex vicinis scripturis vel ex consuetudine patris familiae vel regionis.*

If it has been decided that something should be changed after the will has been executed, everything must be redone from the beginning. But if someone has expressed himself obscurely in the will, either orally or in writing, it is asked whether he may clarify it after the formalities have been completed, for instance, if he made a legacy of Stichus when he had several slaves so named, and did not specify which he intended; or if he left a legacy to Titius, having many friends with that name; or if he made

a mistake in the nomen, praenomen, or cognomen, without erring as to the person: can he later declare whom he meant? I think he can, for he is not now making a gift, but explaining one already made. Similarly, if he later adds a note to a legacy, either orally or in writing, such as the amount or the name of the legatee, which he had omitted, or the quality of the coins, has he acted properly? I believe so, for even had these not been added, it would still be proper to infer what he intended, from related writings or from the custom of the household or the region (trans. by the Author).

Ulpian begins by recalling a principle – presumably derived from Sabinus – according to which, should the testator wish to amend any provision, a new *testamentum* must be executed in its entirety (*omnia ex integro facienda sunt*): nothing may be added to a *testamentum* once the *testamentum* has been formally concluded (Voci 1963, 810).

Secondly, Ulpian directly confronts a crucial point: a *quaestio voluntatis* concerning the interpretation of individual bequests, with the aim of aligning the juridical effect of the *testamentum* with the author's actual intention.

Thus, if the testator possessed multiple slaves named *Stichus* and bequeathed to 'Stichus' without specification, he may subsequently clarify which individual he intended. Likewise, if he had many friends named Titius and failed to indicate which was the intended legatee, he may later explain to whom he referred. Similarly, if the testator bequeathed a quantity of coins without indicating the type, he may later specify the denomination intended.

These examples illustrate a regime of hermeneutic tolerance: the error, being non-substantive, does not compromise the 'normative coefficient' of the expressed *voluntas*. The underlying rationale is evident: where there exists uncertainty in the testamentary disposition that does not amount to legal indeterminacy, interpretative recourse is permitted to give effect to the testator's presumed intention.

Where ambiguity can be resolved – particularly *ex vicinis scripturis*, *ex consuetudine patris familias*, or *ex consuetudine regionis* – the indeterminacy of the bequest, resulting from the testator's *error*, does not invalidate the disposition.

## 7. Error in *quantitate* and the legal relevance of non-expressed testamentary intention

Another context in which the interaction between *error* and *voluntas* becomes operative is that of *error in quantitate*, where the testator indicates a share or quantity that diverges from what was truly intended.

This scenario is addressed in the following passage from Ulpian's *ad Sabinum*:

Ulp. 5 *ad Sab.* D. 28.5.9.2-4: *Sed si non in corpore erravit, sed in parte, puta si, cum dictasset ex semisse aliquem scribi, ex quadrante sit scriptus, Celsus libro duodecimo quaestionum, digestorum undecimo posse defendi ait ex semisse heredem fore, quasi plus nuncupatum sit, minus scriptum: quae sententia rescriptis adiuvatur generalibus. idemque est et si ipse testator minus scribat, cum plus vellet adscribere. 3. Sed si maiorem adscripserit testamentarius vel (quod difficilius est probatione) ipse testator, ut pro quadrante semissem, Proculus putat ex quadrante fore heredem, quoniam inest quadrans in semisse: quam sententiam et Celsus probat. 4. Sed et si quis pro centum ducenta per notam scripsisset, idem iuris est: nam et ibi utrumque scriptum est et quod voluit et quod adiectum est: quae sententia non est sine ratione.*

But if the mistake was not in respect of the object but of the share – say, if the testator dictated that someone be appointed heir for one-half, but one-quarter was written – Celsus, in the twelfth book of his *Quaestiones* and the eleventh of his *Digest*, states that it may be defended that the heir is entitled to one-half, since more was declared but less was written. This opinion is supported by general rescripts. The same applies where the testator himself writes less than what he intended to assign. On the other hand, if a larger share was written – whether by the scribe or (more difficult to prove) by the testator himself – such as one-half instead of one-quarter, Proculus believes the heir takes only one-quarter, since the quarter is contained within the half; and Celsus concurs. The same reasoning applies where someone writes two hundred instead of one hundred, by means of a symbol: here too, both are written, the intended and the additional sum; and this opinion is not without justification (trans. by the Author).

Upon closer analysis, Ulpian's fragment – though ostensibly centred on the so-called *error in corpore*, which, as previously discussed, concerns the identification of the object of the juridical transaction – actually addresses an instance of *error in parte*, specifically regarding the quantification of the hereditary share (*pars bonorum*).

In the first case, the testator intended to institute Titius as heir for one-half (*ex semisse*) but – whether through dictation or in writing – recorded a one-quarter share (*ex quadrante*). Whereas earlier doctrine might have limited the validity of the institution to the lesser share, Celsus adopts a more intent-based approach. Within a broader *quaestio voluntatis*, he argues that the heir should receive the greater share, invoking the interpretative principle *plus nuncupatum, minus scriptum*, more was declared, less was written.

As Ulpian observes, this opinion is further endorsed by general imperial re-scripts (Voci 1963, 829 f.).

The second case reverses the *error*: here, the larger share is recorded, although the testator intended a smaller one. In this case, Proculus (followed by Celsus and Ulpian) holds that the heir receives only the smaller share, since the smaller fraction is logically contained within the larger one. The dispositive intent is preserved only to the extent of the true *voluntas*.

Finally, Ulpian affirms that the same approach applies to *legatum*: if the testator writes two hundred instead of one hundred, the bequest remains valid to the extent of the lesser amount, because *utrumque scriptum est et quod voluit et quod adiectum est*: both the intended and the added quantity appear in the text. The legacy is thus enforceable within the limits of the true *mens testatoris*.

These passages collectively reveal that, even beyond explicit declarations, an *implicit will* may acquire legal relevance, provided there is no conflicting intent. The principle *plus nuncupatum, minus scriptum* reflects the latent normativity of *unexpressed voluntas* (Dulckeit 1953, 179 ff.).<sup>6</sup>

What scope, then, may be accorded to such tacit *voluntas*?

It appears that the interpreter may continue the search for the *mens testatoris* as long as no evidence emerges to contradict it, in accordance with the canon of interpretative reasonableness. That is, inductive normative will may be inferred and deemed operative in the absence of contrary indicators (Voci, 1963, 907 ff.).

This approach recalls the celebrated *causa Curiana*, a foundational precedent in recognising the legal relevance of non-expressed testamentary intention (Talamanca 1990, 734; Negri 2009; Cortese 2019).

Indeed, as already acknowledged by the *veteres* – and even more so in the post-classical and Justinianic periods – the literal wording of the will could be overridden by the true, though implicit, intention of the testator.

---

<sup>6</sup>This is a principle rarely applied in the sources, originally developed in connection with the *testamentum per aes et libram*, in which, as is well known, the *nuncupatio* refers back to the written instrument. In this regard, Voci 1964, 908: «La finzione giuridica è che il testamento sia interamente orale; da questo punto di vista, al documento può essere attribuita la qualifica di processo verbale che testimonia quanto è stato detto, senza alcuna efficacia costitutiva. Ne segue che allo scritto può essere negata la funzione di atto, da cui dipenda la validità di una disposizione. Quando in esso si riscontra un vizio, non è detto che lo stesso vizio si trovi nella pronuncia orale; in dati casi si presume anzi il contrario, e cioè che la pronuncia sia esatta o conforme alla volontà del testatore, ma il documento non la renda perfettamente. Così una finzione ne genera un'altra: dalla finzione di pronuncia integrale si passa a quella di pronuncia esatta. Questo significa *plus nuncupatum, minus scriptum videtur*; ed è probabile che la massima risalga almeno a Sabino. Sabino l'applicava in materia di difetti formali; è Celso che l'estende all'ipotesi dell'*error in partes*».

The issue, then, is not whether *voluntas* may override declaration (*verba tout court*), but rather to what extent the *mens testatoris*, when impaired by factual *error*, may be reconstructed in order to uphold the dispositive effect of the testamentary act.

## 8. Ulpian's perspective: Which boundaries for the *voluntas defuncti*?

The foregoing analysis underscores how a renewed engagement with the so-called *theoria erroris* in Roman private law offers particularly fertile ground for re-examining the normative force of individual will, especially as shaped – and potentially compromised – by formative defects.

The *commentarii* of Ulpian *ad Sabinum* emerge as a particularly illuminating locus for such inquiry. They provide, from the standpoint of a Severan-era jurist, a sophisticated framework within which the boundaries of the *normativitas voluntatis defuncti* may be explored and conceptually reconstructed.

In navigating the dialectic between *voluntas* and formalism, Ulpian's jurisprudential voice is marked by both analytical precision and systemic coherence. His approach reflects a deep sensitivity to the structural tensions underlying testamentary disposition: between subjective intention and normative form, between the inner will of the *de cuius* and the juridical configuration that translates it into binding legal effects.

His treatment of *error*, in particular, reveals a jurist not merely engaged in exegetical commentary, but one who constructs a hermeneutic architecture capable of accommodating imperfection within the legal expression of will.

It is in Ulpian's measured recognition – often implicit – of the legal order's capacity to attribute binding force to a will that is partial, defective, or formally non-conforming, that the conceptual depth of his thought becomes fully apparent. He operates not merely as a transmitter of received doctrine, but as a juristic innovator, whose interpretative strategies anticipate and actively shape the doctrinal evolution of Roman private law.

Domitius Ulpian, a native of Tyre, served as *assessor* to Papinian, sat in the *consilium* of Emperor Alexander Severus, and likely held the office of *praefectus praetorio* from AD 222 onwards (Vacca 2012, 91 ff.; Schiavone 2021, 53 ff.). His intellectual profile is thus that of a jurist fully integrated into the institutional and political machinery of the Empire, whose legal reasoning transcends mere commentary to engage with the foundational structures of legal normativity.

Se Giuliano fu l'esempio più luminoso di giurista consigliere del Principe, Ulpiano lo fu ancora più del giurista ministro dell'Impero. La sua vastissima opera, concentrata tutta nel giro di pochi anni – probabilmente fra il 212-213 e il 218-219 – attende ancora di essere indagata a fondo, con criteri storiografici davvero attendibili.<sup>7</sup>

[...]

Sarebbe perciò sbagliato immaginare Ulpiano solo come un giurista fra i giuristi. Egli fu anche il costruttore di una dimensione nuova per il mondo giuridico romano, l'inventore di una testualità che sceglieva di porsi al di fuori della lunga vicenda che l'aveva preceduta, avendo raggiunto un punto di vista sentito come più alto, dal quale si potevano abbracciare e ordinare secoli di pensiero, e riproporli entro il canone di una compostezza definitiva, pronta a essere usata all'interno della nascente incompiuta statualità tardo antica, che non aveva più bisogno di un diritto giurisprudenziale, ma cercava di non perdere il rapporto con un passato straordinario. La sua è dunque un'autentica scrittura della sistemazione, destinata ad un enorme successo.<sup>8</sup> (Schiavone 2024, 433).

In Ulpian's treatment of interpretative dilemmas arising from the divergence between what was intended and what was not, one may discern the following guiding principle: «if a clear meaning can be obtained by taking the expressions as they are used in ordinary language, this meaning must be accepted, even if it does not in any way correspond to the intention of the person who used those expressions» (Schulz 1968, 148). Conversely, where a fundamental *error* undermines the authenticity of the dispositive will, the provision must be held invalid.

More precisely, Ulpian appears to articulate a graduated notion of *error* whose impact upon the testamentary act is graduated or 'scalar': the will is either upheld or nullified depending on the nature of the *res* – that is, the objective referent – to which the dispositive intention relates.

---

<sup>7</sup> If Julianus was the paradigmatic example of a jurist as imperial counsellor, then Ulpian stands as the paradigmatic jurist-minister of Empire. His vast corpus, composed within a few brief years – probably between AD 212-213 and 218-219 – has yet to be explored with fully credible historiographical tools (trans. by the Author).

<sup>8</sup> It would be mistaken, therefore, to view Ulpian merely as one jurist among others. He was, rather, the architect of a new dimension of Roman juridical culture: the inventor of a textuality that chose to situate itself beyond the *longue durée* of the tradition, having attained a vantage point conceived as higher, from which centuries of legal reflection could be comprehended, ordered, and rearticulated within the canon of a definitive composition – one destined to be received and deployed within the emergent, though unfinished, late antique statehood, a canon which no longer required a living jurisprudence, yet refused to relinquish its link to a past of extraordinary refinement. His is therefore a genuine writing of settlement, destined for enormous success (trans. by the Author).

This suggests, in other terms, a variable metric through which the *voluntas* may be assessed. A private will – like the *lex contractus* in the context of *inter vivos* juridical relations<sup>9</sup> – does not invariably attain binding legal force.

The *res* itself, therefore – together with the formal structure of the act – operates as a determinant of the legal relevance of individual intent. Where a factual *error* affects the *voluntas testatoris*, the *res*, understood not merely as material object but as legal construct, may shape the juridical regime of the patrimonial allocation in question. As previously argued, this leads to the delineation of fluid and context-sensitive boundaries for the *normativity* of a private intention that is, in some sense, ‘inauthentic’.

## References

- Aa.Vv. (2024), *Aspetti e problemi dell'autonomia negoziale tra continuità terminologica e discontinuità concettuale. Atti del Dialogo interdisciplinare (Univ. Roma Tor Vergata, 23-24 novembre 2023)*, ed. by R. Cardilli, L. Formichella, R. Marini, F. Sangermano, Torino, Giappichelli.
- Amelotti M. (1992), *s.v.* “Testamento (dir. rom.)”, in *Enciclopedia del diritto*, Vol. XLIV, Milano, Giuffrè, 459-470.
- Betti E. (1930), *Esercitazioni romanistiche su casi pratici*, I, *Anormalità del negozio giuridico*, Padova, Cedam.
- Betti E. (1953), “Declarare *voluntatem* nella dogmatica bizantina”, in *Studi in memoria di Emilio Albertario*, II, Milano, Giuffrè, 419-461.
- Betti E. (1955), *Teoria generale del negozio giuridico. Seconda ristampa corretta della seconda edizione*, Torino, Unione Tipografico-Editrice Torinese.
- Betti E. (1960), *s.v.* “Errore (dir. rom.)”, in *Novissimo Digesto italiano*, Vol. VI, Torino, Editrice Torinese, 660-665.
- Biondi B. (1955), *Successione testamentaria e donazioni<sup>2</sup>*, Milano, Giuffrè, *passim*.
- Brutti M. (1980), “La sovranità del volere nel sistema di Savigny”, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 9, 265-300.
- Cappellini P. (1995), *s.v.* “Negozio giuridico (storia)”, in *Digesto delle discipline privatistiche – Sezione civile*, Vol. XII, Torino, Utet, 95-123.
- Cortese B. (2019), “Tra *aequitas* e *ius* nella causa Curiana”, in *IVRA*, 67, 49-77.
- dalla Massara T. (2021), *Il consenso annichilito. La critica radicale del contratto in Siegmund Schlossmann*, Bologna, il Mulino.

---

<sup>9</sup> See Galeotti, in this volume, particularly 197 ff.

- Dulckeit G. (1953), “*Plus nuncupatum minus scriptum*. Ein Beitrag zur Entwicklung des römischen Testamentsrechts”, in *Zeitschrift der Savigny-Stiftung. Romanistische Abteilung*, 70, 179-213.
- Erdelkamp A. (2025), *Nemo pro parte testatus pro parte intestatus decedere potest*, Berlin, Duncker & Humblot.
- Evangelisti M. (2018), *Profili di rilevanza dell'errore nel diritto ereditario romano*, Pisa, Pacini.
- Fercia R. (2023), “L’*exceptio in factum ad impugnandam actionem* a favore dell’*error lapsus*”, in S. Di Maria, G. Santucci (eds.), *Ignorantia vel facti vel iuris est. L'errore fra passato e presente (Atti del convegno di Trento 16-17 maggio 2022)*, Napoli, Jovene, 21-44.
- Flume W. (1951), “Irrtum und Rechtsgeschäft im römischen Recht”, in *Festschrift für F. Schulz*, Vol. I, Weimar, Hermann Böhlau Nachfolger, 209-252.
- Gandolfi G. (1966), *Sull'interpretazione degli atti negoziali in diritto romano*, Milano, Giuffrè.
- Gradenwitz O. (1887), *Interpolationen in den Pandekten. Kritische Studien*, Berlin, Weidmannsche Buchhandlung.
- Grosso G. (1936), “In tema di divergenza tra volontà e dichiarazione nel testamento”, in *Studi in onore di Salvatore Riccobono nel XL anno del suo insegnamento*, Vol. III, Palermo, Giuseppe Castiglia, 163-174.
- Harke J.D. (2022), *Libri ad edictum, libri ad Sabinum Zu den sogenannten Kommentaren des Domitius Ulpianus*, Berlin, De Gruyter.
- Herrler S. (2012), s.v. “Wills”, in J. Basedow, K.J. Hopt, R. Zimmermann, A. Stier (eds.), *The Max Planck Encyclopedia of European Private Law*, Oxford, Oxford University Press, 1-10.
- Lambertini R. (2020), “L’intangibile mutevolezza della *voluntas defuncti*”, in *Tesseræ iuris*, I.1, 153-185.
- Lo Iacono S. (2019), *Ambulatoria est voluntas defuncti? Ricerche sui “patti successori” istitutivi*, Milano, Giuffrè, 2019.
- Lotmar P. (2019), “Das römische Recht vom Error”, ed. and Introduction by I. Fargnoli, in *Studien zur Europäischen Rechtsgeschichte*, 316. B.1-2, Frankfurt a.M., Vittorio Klostermann, 645-1123.
- Manfredini A. (1991), *La volontà oltre la morte. Profili di diritto ereditario*, Torino, Giappichelli.
- Marotta V. (2021), *Ulpiano la biografia. Tra Tiro e Roma*, in J.L. Ferrary, V. Marotta, A. Schiavone (eds.), *CNAEVS DOMITIVS VLPPIANVS INSTITVTIONES DE CENSIBVS*, V. Roma-Bristol, «L’ERMA» di BRET-SCHNEIDER, 3-50.
- Maschi C.A. (1938), *Studio sull'interpretazione dei legati. Verba e voluntas*, Milano, Vita e pensiero.

- Meneghelli R. (1993), *s.v.* "Volontà (fil. dir.)", in *Enciclopedia del diritto*, Vol. XLVI, Milano, Giuffrè, 1032-1043.
- Negri G. (2009), "Cicerone come fonte di cognizione del diritto privato romano. L'esempio della *causa Curiana*: appunti per una ricerca", in *Ciceroniana On Line. A Journal of Roman Thought (Atti del XIII Colloquium Tullianum (Milano, 27-29 marzo 2008))*, 13, 165-183.
- Pietrobon V. (1963), *L'errore nella teoria del negozio giuridico*, Padova, Cedam.
- Pietrobon V. (1990), *Errore, volontà e affidamento nel negozio giuridico*, Padova, Cedam.
- Pontoriero I. (2020), *I vizi del consenso nella tradizione romanistica*, Giappichelli, Torino.
- Quadrato R. (1983), *Sulle tracce dell'annullabilità. 'Quasi nullus' nella giurisprudenza romana*, Napoli, Jovene, 1983.
- Riccobono S. (1951), "La *voluntas* nella prassi giudiziaria guidata dai pontefici", in *Festschrift für F. Schulz*, I, 1951, Weimar, Hermann Bohlaus Nachfolger, 302 ff.
- Riccobono S. (1934), "Origine e sviluppo del domma della volontà nel diritto", in *Atti del Congresso Internazionale di Diritto romano (Roma, 22-29 aprile 1933)*, I, Pavia, Tipografia Successori Fratelli Fusi, 177 ff.
- Savigny F.C (1891), *Sistema del diritto romano attuale*, It. tr. by V. Scialoja, Vol. III, Torino, Utet, 431 ff.
- Schermaier M. (1998), "Auslegung und Konsensbestimmung. Sachmängelhaftung, Irrtum und anfängliche Unmöglichkeit nach römischem Kaufrecht", in *Zeitschrift der Savigny Stiftung. Romanistische Abteilung*, 115, 234-288.
- Schermaier M. (2007), "L'errore nella storia del diritto", in *Roma e America. Diritto romano comune*, 24, 185-255.
- Schiavone A. (1977), *s.v.* "Negozio giuridico (dir. rom.)", in *Enciclopedia del diritto*, Vol. XXVII, Milano, Giuffrè, 906-921.
- Schiavone A. (2005), «*Ius*». *L'invenzione del diritto in Occidente*, Torino, Einaudi.
- Schulz F. (1968), *Storia della giurisprudenza romana*, It. tr., Firenze, Biblioteca Sansoni.
- Schürmann R. (2022), *Modern Philosophies of the Will*, Zurich, Diaphanes.
- Talamanca M. (1985), "Trebazio Testa fra retorica e diritto", in G. Archi (ed.), *Questioni di giurisprudenza tardo-repubblicana (Atti di un Seminario - Firenze 27-28 maggio 1983)*, Milano, Giuffrè, 29-204.
- Talamanca M. (1990), *Istituzioni di diritto romano*, Milano, Giuffrè.
- Talamanca M. (1998-1999), "Inesistenza, nullità ed inefficacia dei negozi

- giuridici nell'esperienza romana", in *Bullettino dell'Istituto di diritto romano* 'Vittorio Scialoja', 101-102, (ed. 2005), 1 ff.
- Voci P. (1937), *L'errore nel diritto romano*, Milano, Giuffrè.
- Voci P. (1963), *Diritto ereditario romano. Parte speciale. Successione ab intestato, successione testamentaria*<sup>2</sup>, Vol. 2, Milano, Giuffrè.
- Voci P. (1966), s.v. "Errore (dir. rom.)", in *Enciclopedia del diritto*, Vol. XV, Milano, Giuffrè, 229-235.
- Voci P. (1967), *Diritto ereditario romano. Introduzione. Parte generale*<sup>2</sup>, Vol. 1, Milano, Giuffrè.
- Voci P. (1972), s.v. "Interpretazione del negozio giuridico", in *Enciclopedia del diritto*, Vol. XXII, Milano, Giuffrè, 252-277.
- Watson A. (1971), *The Law of Successions in the Later Roman Republic*, Oxford, Clarendon Press.
- Wolfgang E. (2012), s.v. "Mistake", in J. Basedow, K.J. Hopt, R. Zimmermann, A. Stier (eds.), *The Max Planck Encyclopedia of European Private Law*, Oxford, Oxford University Press, 1-7.
- Zilletti U. (1961), *La dottrina dell'errore nella storia del diritto romano*, Milano, Giuffrè.
- Zimmermann R. (1992), *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Cape Town, Juta (München, Beck).

## Chapter 11

# THE WILL IN THE PERFORMANCE OF THE OBLIGATION: BETWEEN COERCIBILITY AND SPONTANEITY

Paola Pasquino

**ABSTRACT:** *Starting from the well-known definition of debtor contained in Mod. 4 pand. D. 50.16.108, according to which the debtor is the one from whom performance can be demanded even against his will (invito), this contribution aims to examine the reflections of classical Roman jurisprudence on the theme of the non-coercibility of the obligatory bond. In particular, it focuses on the voluntas of the solvens (and the potential relevance of its defects, especially error) in cases of undue payment and in the case of a payment made sua sponte by the debtor. This analysis provides a foundation for evaluating the changes introduced in the transition from the 1865 Italian Civil Code to the 1942 Italian Civil Code on the subject of natural obligations, where the adverb 'voluntarily' was replaced, thus more faithfully recovering the Roman legal tradition, by the adverb 'spontaneously'.*

**KEYWORDS:** *Coercibility of the obligatory bond – Soluti retentio – Spontaneous performance.*

**SUMMARY:** 1. To will or not to will: That is the question. – 2. Not under a duty, yet willing: The performance of a non-due obligation. – 3. Debt without liability: *Sua sponte solvere*. – 4. Matters of an adverb: From the Italian Civil Code of 1865 to that of 1942. – 5. Performance of the obligation, payment of the *indebitum*, spontaneous performance. – References.

### 1. To will or not to will: That is the question

Will (*voluntas*) necessarily implies the possibility of not willing, a concept that in Latin finds an excellent expression in the term *invitus*, employed in many literary and legal sources. Among the latter, a text by Modestinus assumes particular relevance, taken from his *Pandectae* and, not by chance, included by the Justinianic compilers in the title of the *Digesta* dedicated to the meaning of words (50.16). In this text, the *debitor* is defined as one who can be compelled to perform 'even against his will' (*invito*),<sup>1</sup> as he opposes it:<sup>2</sup>

---

<sup>1</sup> Brutti 2011, 449 f., on the connection between performance and payment of *pecunia*, as an implication of the purely pecuniary judgment in the formulary procedure.

<sup>2</sup> On the ambivalence of *invitus*, see Scognamiglio and De Cristofaro, in this volume, in part. 281 ff. and 293 ff.

Mod. 4 *pand.* D. 50.16.108: ‘Debitor’ *intellegitur is, a quo invito exigi pecunia potest.*

The genesis of the relationship could therefore be connected, or not, to an act of *voluntas*; and such *voluntas* was deemed present – even though remedies were available to restore balance between the parties – also where the process of formation of the legal will had been altered by external interference: it is well known the adage found in a text by Paulus (Paul. 11 *ad ed.* D. 4.2.21.5) concerning inheritance, but regarded as valid for virtually any act throughout Roman legal experience: *tamen coactus, voluit*.<sup>3</sup> However, once the legal bond had arisen, the individual defined as the passive subject of the relationship was in the position of having to perform a given obligation irrespective of his actual intention.

Thus, if the argument is framed in such simple terms, the correlation between the ‘moment of the right’ (and correspondingly, of the duty) and that of the action in its protection (with the consequent subjection) appears linear in its physiological structure. Drawing from German legal doctrine categories, it is possible to retrospectively identify in Modestinus’ text – with the awareness of the history of legal thought from the perspective of a modern jurist – on one hand, the *Schuld*, the debt, consisting in the duty to perform a specific obligation, and on the other hand, the *Haftung*, the liability that arises where the debt is not fulfilled, consisting in the personal or patrimonial consequences borne by a determined individual (D’Angelo 2018, 136).

From the perspective adopted here, the following question emerges: granted that a debtor unwilling to perform can be compelled to do so, must such performance, in order to be valid, always be supported by an appropriate legal will to solve (*solvere*)? The answer depends on the nature attributed to performance. Those who, adhering to the *Willensdogma*, opt for a transactional nature obviously believe that, for performance to qualify as such, an *animus solvendi* – freely formed – is essential (and, for some, even accompanied by express acceptance by the creditor). Those who instead conceive performance as a due act (and, in the Italian scholarly debate, they constitute the majority: Rescigno 2000, 501 ff., 508 ff.; Trabucchi 2024, 1046 ff.) stress that the will to satisfy an obligation exists at the time the obligation is undertaken; but if that will is lacking at the time of performance, this does not preclude that performance from being itself valid.

We consider this latter approach to be the most correct and that it can already be inferred from the text of Modestinus from which we began. Extending its meaning slightly beyond the letter, in fact, it seems that the jurist highlights

---

<sup>3</sup> On the subject, see Guasco, in this volume, in part. 316 ff.

the irrelevance of the debtor's will in performing the obligation: since even if he did not want to perform (even if he was, indeed, *invitus*), he could nonetheless be compelled to perform.

## 2. Not under a duty, yet willing: The performance of a non-due obligation

The recourse to the bipolar construction of the *obligatio*, which distinguishes and separates the two aspects of debt (*Schuld*) and liability (*Haftung*), allowed for the disruption of the traditional correlation between the 'moment of the right' and the action protecting it. This development broadened the very category of *obligatio*, making room for cases of debt without liability, and vice versa.

For our discussion, at least two essential questions arise: when the interdependence between 'the duty to receive' and 'the duty to perform' is severed, does the debtor's performance always produce the effect of *soluti retentio* (i.e., the creditor's right to retain what he has received)? In such a case, what is the required psychological attitude of the debtor? That is, how relevant is his *voluntas*?

Of particular interest are cases where the obligatory bond is non-coercible, leaving performance entirely to the debtor's initiative.

If we reason strictly in terms of a rigid 'due/not due' dichotomy – attaching to it, positively or negatively, the character of enforceability – then the recipient of the performance would be entitled to retain it whenever it qualifies as such by virtue of the existence of an *obligatio*; conversely, they would be obliged to return it in the case of an *indebitum*: indeed, in this latter scenario it is the *accipiens* who finds themselves in the position of *obligatus*, against whom an action can be brought if they refuse to restore what was received.

It is hardly necessary to recall the extraordinary conceptual construction found in Gaius, who highlighted the divergence between the decision-making process and the legal effects:

Gai 3.91: ... *is, qui solvendi animo dat, magis distrabere vult negotium quam contrahere.*

... a party who gives with the intention of paying a debt, rather desires to discharge an obligation than to incur one (trans. by the Author).

The difficulties, as is well known, arise when questioning the circumstances in which the *animus solvendi* is formed and the possible relevance of those circumstances, especially the importance attributed, already in the

classical period, to error (Lotmar 2019, with commentary by Cardilli 2023), and the distinction between factual and legal error (Galeotti 2020, 111 ff.).

Yet, what remains constant is that the *voluntas* of the *tradens* (Gaius explicitly refers to a *dare* performance [Wegmann Stockebrand 2018, 111 ff.]) was directed at affecting legal relations in the opposite sense to what is actually produced in terms of legal effects.

What has been received *indebite* must therefore be returned, according to a rule that protects the party who suffers a patrimonial loss without valid cause, either because the *obligatio* does not exist at all, or because there is a misalignment between the parties involved (the giver and the receiver) and the roles of debtor and creditor.<sup>4</sup>

However, the action (*condictio indebiti*) granted to the *solvens* encounters limits under certain conditions, which preclude the right to *repetitio*, thereby consolidating the payment in the hands of the *accipiens*, who is thus entitled to retain it. Sometimes these conditions are objective in nature and affect the very existence of the ‘non-due’ *status*; in other cases, it is the psychological condition under which the act was performed that eliminates the possibility of recovering what was transferred.

A paradigmatic example, in this latter sense, is found in Ulpian at the very beginning of title 12.6 of the *Digesta*, precisely dedicated to the *condictio indebiti*:

Ulp. 26 *ad ed.* D. 12.6.1.1: *Et quidem si quis indebitum ignorans solvit, per hanc actionem condicere potest: sed si sciens se non debere solvit, cessat repetitio.*

Indeed, if someone pays a non-due obligation in ignorance, they may recover through this action; but if they pay knowing they do not owe, repetition is excluded (trans. by the Author).

In this juxtaposition (where *solvens ignorans* triggers the right to restitution, validated by the *condictio*, whereas *solvens sciens* of the absence of debt excludes *repetitio*, thereby recognising the right of *soluti retentio*), emerges a perspective of conserving the effects produced by the parties’ will: even where no debt exists, if one person performs in favour of another, and that act is sustained by a free and conscious *voluntas*, this *voluntas* itself becomes a

---

<sup>4</sup> It is well known that a distinction is drawn between objective *indebitum* and subjective *indebitum*: Paul. 17 *ad Plaut.* D. 12.6.65.9: *Indebitum est non tantum, quod omnino non debetur, sed et quod alii debetur, si alii solvatur, aut si id quod alius debebat alius quasi ipse debeat solvat.* See Pellecchi 1998, 79 ff.; Giomaro - Biccari 2022, in part. 485, 503 ff. See also Pomp. 22 *ad Sab.* D. 12.6.19.1.

juridical rule, and the legal system must, so to say, step back. Only where there is an alteration in the formation of the internal *voluntas* – sufficient to affect the awareness of the acting party – does intervention occur to restore balance: the legal effect takes place nonetheless, but the subject is given the possibility to undo it, to go back, to cancel what was done through a contrary act of will.

Pomponius appears crystal clear on this point, also with his perspicuous reference to the *tantundem*, in

Pomp. 9 *ad Sab.*<sup>5</sup> D. 12.6.7: *Quod indebitum per errorem solvitur, aut ipsum aut tantundem repetitur.*

If a non-due obligation is paid in error, the very thing or its equivalent may be recovered (trans. by the Author).

When the *solvens* realises that their transfer to another arose from a misunderstanding, a mistaken belief, a mere mental projection, we can discern a flaw in their *voluntas* that allows the emergence of the *indebitum* and casts an inequitable light upon the enrichment achieved at another's expense, as affirmed by Papinian, in a statement that was subsequently extended by the Justinianic compilers and included in the same title 12.6:

Pomp. 21 *ad Sab.* D. 12.6.14: *Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiozem.*

For it is naturally equitable that no one should be enriched at the expense of another (trans. by the Author).

This is perfectly complemented by the incipit of Paulus' text immediately following in the *Digesta*:

Paul. 10 *ad Sab.* D. 12.6.15 pr.: *Indebiti soluti condictio naturalis est et ideo etiam quod rei solutae accessit, venit in conductionem, ut puta partus qui ex ancilla natus sit vel alluvione accessit: immo et fructus, quos is cui solutum est bona fide percepit, in conductionem venient.*

The action for restitution of undue payment is of natural essence, and therefore includes in its scope anything acceding to the thing paid, such as offspring born from a slave-girl or alluvial accretion; moreover, even the fruits which the recipient in good faith has collected will be subject to the action (trans. by the Author).

---

<sup>5</sup> Fagnoli 2001, 139 and fn. 202.

However, *detrimendum* here constitutes merely a patrimonial diminution, without negative connotations, reflecting an *aequitas* applicable across various legal frameworks: where *voluntas* is consciously directed towards the enrichment of the other, an intertwining with *causa* arises, precluding the recovery of what was transferred and establishing the recipient's right to *soluti retentio*.

All this is closely linked to another thorny issue: that of *iusta causa traditionis*. If *traditio* must be grounded in a cause that justifies its transfer effect, then the absence of an *obligatio* should undermine the *causa solutionis* to the point of preventing that effect. Without retracing in detail the paths followed, since the era of the *Glossa*, to overcome this impasse (as outlined by Cortese 2013, 100 ff.), we may simply note that in the sources – starting from Gaius, who foregrounded the *animus solvendi* – there appear to be several hooks supporting the idea that the shared intention of the parties to achieve a patrimonial attribution from one to the other acquires such a significant normative value as to sustain the act even in the absence of an underlying legal transaction. In other words, it is a *voluntas* endowed with strong normative force, even compensating for an objective missing requirement.

But such a will must be pure, freely formed, and susceptible to unambiguous interpretation: where the crack of a defect appears, especially *error* in the representation of reality, whether on one side or the other, the entire structure trembles, and collapses entirely when the transferor, no longer willing, exercises the *condictio indebiti* to protect himself.

### 3. Debt without liability: *Sua sponte solvere*

As observed above, the *condictio indebiti* has no rationale in certain other scenarios. Here, assuming a rigid conception of legal enforceability, the *vinculum iuris* becomes tenuous, sometimes almost imperceptible, and the *debitor* drifts away from the definition we read in Modestinus, since in these cases he cannot be compelled to perform, if he doesn't want (*invitus*).

And yet, a relationship persists between the two individuals, such that payment made by one party to the other is not perceived as unjust and the recipient may retain what has become theirs. In other words, the 'non-due' character arises only within the world of *strictum ius*.

Title 12.6 of the Digest preserves several texts where the impossibility of restitution is linked to such situations. Among them, an absolutely paradigmatic passage is:

Paul. 32 *ad ed.* D. 12.6.28: *Iudex si male absolvit et absolutus sua sponte solverit, repetere non potest.*

If the judge wrongly acquitted, and the acquitted person spontaneously pays, he may not recover (trans. by the Author).

The literal meaning is clear: the judge mistakenly acquits the defendant; nevertheless, the latter proceeds to perform *sua sponte*, and Paulus categorically excludes any action for recovery.

We shall return later to the adverbial phrase *sua sponte*, which is central to the diachronic reconstruction of certain rules in Italian law. For now, let us focus on the other adverb used in the text and seek the rationale for this notable decision of Paulus.<sup>6</sup>

In that adverb (*male*) we can encapsulate what we would now describe as a gap between substantive truth and procedural truth: the judge, by wrongly acquitting the defendant, disregards the well-founded claims of the plaintiff. This implies, by logical consequence, the existence of a bond between the two subjects, by virtue of which the debtor, *invitus*, was summoned to court with a view to being compelled to perform.

But the exercise of the action and, above all, the framing of the controversy itself<sup>7</sup> impact the bond, transforming it. According to one line of thought,<sup>8</sup> this transformation consists in the transposition of liability into a procedural context, while the primary debt remains unchanged.<sup>9</sup> However, following the acquittal (which extinguishes liability), what remains is a ‘pure’ debt, that is, one no longer enforceable.

The conclusion of this reasoning is that Paulus was subsuming this case under the category of *obligationes naturales*; and that he understood *solvere sua sponte* to mean that there was no action to compel payment from the acquitted defendant *invitus*. The original debt, though disconnected from liability, continued to exist: the wrongful *absolutio* generated this discrepancy, leaving it to the debtor – now free from any liability – to decide whether to perform or not. If he chose not to perform, an inequity arose

---

<sup>6</sup>We shall leave aside, as entirely irrelevant for the purposes of the present analysis, the issue of the liability of the *iudex privatus* who has made an error in adjudication: on this issue, see Scevola 2004, 349 f.; Fercia 2015, 17 ff.

<sup>7</sup>The procedural context of reference is likely that of the formulary procedure, so one must consider the effects of the *litis contestatio* (see Pugliese 1962; Scevola 2004; Fercia 2015); however, the generic wording allows for an easy extension also to the *cognitio* procedure.

<sup>8</sup>We concur on this point with the reconstruction proposed by Fercia 2015, 17 ff.

<sup>9</sup>On the effects of the *litis contestatio*, in light of the fundamental passage from Gai 3.180, as well as the differing views of the Sabinians and Proculians, see Salomone 2007, 207 ff. The reasoning followed in the text, however, encounters some difficulty where one accepts the idea that the *litis contestatio* entirely extinguishes the principal obligation (the so-called ‘judicial novation’).

for which the mistaken judge could ultimately be held responsible (Scevola 2004; Fercia 2015); whereas if he chose to perform, the legal system, recognising that a (pure, *i.e.*, without liability) debt indeed existed, would deny the *condictio* and protect the creditor's interest, ensuring their *soluti retentio*.

Yet such satisfaction is possible only because the acquitted defendant transforms his initial 'unwillingness' to perform into a *solvere sua sponte*; an affirmation of individual decision-making that generates effects capable of correcting distortions produced at the systemic level (Albers 2024, 41).

At this point it becomes essential to understand the meaning to be attributed to the expression *sua sponte*. Its literal translation indeed leaves ample room for interpretation (Oxford Latin Dictionary 1968, 1809 f.). What we feel compelled to exclude, in light of the foregoing analysis, is that the phrase should be understood as marking the relevance of the debtor's subjective awareness: in other words, in our view, *sua sponte* does not equate to *sciens* in Ulpian's text. It is true that the debtor knew he had been acquitted;<sup>10</sup> but it is equally true that a *vinculum* persisted upon him, albeit stripped of enforceability.

And this is the key point: the impossibility of coercing payment qualifies such payment as 'spontaneous', left entirely to the individual's free determination, a behaviour that no one could have compelled him to undertake. Paulus therefore inserts *sua sponte* precisely to emphasize the debtor's intervention, necessary to redress an erroneous judicial decision that had distorted the alignment of interests between the parties. In our view, this reflects a broadening by the jurist aimed at achieving justice in the concrete case: for Paulus' solution preserves the effectiveness of the payment even where no specific *animus solvendi* accompanied by an awareness of being able to avoid performance can be identified.

One important observation: this expression appears, within the title on *condictio indebiti*, only in this passage; far more frequent is the reference to possible error undermining the *solvens'* decision-making process, rendering

---

<sup>10</sup> Thus, Pugliese 1962, 47. We believe we can discern here the case mentioned in Ulp. 26 *ad ed.* D. 12.6.26.3: Indeed, by undue payment we mean not only when something is absolutely not owed, but also when it could not have been judicially claimed because of some perpetual exception always available; therefore, that too may be recovered, unless payment was made with knowledge of being protected by such an exception. The *exceptio perpetua* mentioned in the text could be understood as an instrument for extinguishing the claim at the substantive level (*e.g.*, by invoking a *pactum de non petendo*); in that case, there would be an *indebitum*, as affirmed in the initial part of the passage. If, however, the exception is interpreted in a procedural sense (*e.g.*, the *exceptio rei in iudicium deductae*), then a conceptual construction different from the one we have followed would be required. See also Fargnoli 2001, 51 ff.

repeatable a transfer performed under the mistaken belief that a debt existed.<sup>11</sup>

By contrast, no doubt appears to arise concerning the psychological attitude of the parties in other cases contemplated within this portion of the *Digesta*,<sup>12</sup> cases which can be explicitly grouped under the macro-category of *obligationes naturales* (Di Cintio 2009; Grondona 2023; Longo 2023): with respect to these, the jurists firmly affirm the impossibility of bringing a *condictio*, precisely because – as has become a widely held opinion in modern scholarship – there is no true *indebitum*, since the performance is perceived as due, albeit not protected by an action.

#### 4. Matters of an adverb: From the Italian Civil Code of 1865 to that of 1942

*Obligationes naturales* in fact represent the ideal ground for reflecting, in diachronic terms, on the problem of the debtor's *voluntas* in the performance of an obligation: on the opposite side of coercibility, where a debtor *invitus* resists performance, stands the spontaneity of a subject who, though not constrained by a *vinculum iuris* in the strict sense, nonetheless chooses to engage in conduct expected of him, but neither demanded nor demandable (Fercia 2010, 206 ff.; Mazzariol 2023, 1187 ff.).

In the Italian legal system, the connection with the Roman legal tradition is expressly stated in the explanatory report (*Relazione*) of Minister of Justice Grandi to the 1942 Italian Civil Code,<sup>13</sup> where, commenting on art. 1933, paragraph two,<sup>14</sup> it is affirmed that to make the meaning of that provision clearer – ‘supported by the Roman tradition’<sup>15</sup> – the adverb *volontariamente*

---

<sup>11</sup> Or, in other words, in the absence of *scientia* regarding the existence of the *indebitum*; but such *scientia* must, at most, be demonstrated by the defendant in the *condictio indebiti* to preclude recovery: Galeotti 2020, 112 f.

<sup>12</sup> By way of example only, see Paul. 10 *ad Sab.* D. 12.6.13; Pomp. 22 *ad Sab.* D. 12.6.19 pr.; Afr. 9 *quaest.* D. 12.6.38.2.

<sup>13</sup> See page 171.

<sup>14</sup> Art. 1933 of the Italian Civil Code, *Lack of action*: No action lies for the payment of a gaming or betting debt, even if the game or bet is not prohibited. II. The succumbing party, however, may not recover what they have spontaneously paid following the outcome of a game or bet in which there was no fraud. Recovery is permitted in any case if the loser is legally incapacitated (trans. in English by the Author).

<sup>15</sup> The Roman tradition must be identified – as will become clearer later in the text – in the manner of execution of the payment; for in relation to games of chance, in ancient Rome not only was no action available to the winner, but the loser could also recover what had been paid: Di Marzo 1960, 313 f.; Ziliotto 2018, 104 ff. On gambling in ancient Rome more generally, see Fasolino-Palma 2018.

(voluntarily), which appeared in art. 1804 of the repealed code, was replaced with the adverb *spontaneamente* (spontaneously). Immediately before, the report clarifies the meaning of ‘spontaneous payment’ as ‘payment made in a situation of psychological freedom in decision-making’, without requiring ‘awareness of the lack of enforceability’. The same concept is reiterated further on,<sup>16</sup> when discussing payment of the *indebitum* (art. 2033 of the Italian Civil Code, headed *Objective indebitum*), and when referring to *obligationes naturales* (art. 2034 of the Italian Civil Code) as a limit to the operation of recovery actions, emphasizing that the prerequisite for *soluti retentio* is the spontaneity of the performance.

Accordingly, a consistent substitution of the adverb occurs here as well (art. 1237 of the Italian Civil Code 1865, art. 2034 of the Italian Civil Code 1942): from *volontariamente* to *spontaneamente*, as – according to an astute observation by Di Marzo (1960, 330) – is suggested precisely by D. 12.6.28. This text, as noted above, by breaking the consequential link between *scientia* and non-recoverability (and thus *soluti retentio*), represents a *unicum* in Justinianic treatment of the *condictio indebiti*, where, as we have seen, frequent reference is otherwise made to error as the prerequisite for bringing a *condictio*.

In other words, the replacement of the adverb aimed at eliminating the ambiguity connected to interpretation of the first (*volontariamente*), which could bear multiple meanings: among others, it could be understood either as a mere absence of violence or fraud (*i.e.*, freely), or as requiring awareness of not being legally bound (*i.e.*, knowingly). The difference is far from trivial: only in the latter case would error have significance, such that performance made under the erroneous belief of being obliged would have been subject to recovery.

The perspective of the 1942 Italian legislator, by contrast, is not that of a conscious will but rather of a *voluntas* free from any psychological coercion; error, therefore, is irrelevant, provided that a genuine moral duty objectively exists (Clarizia 2024, 579 ff.).

## 5. Performance of the obligation, payment of the *indebitum*, spontaneous performance

In the physiological structure of an obligatory relationship, *voluntas* is evident both at the moment of genesis and at the moment of concrete realisation of the intended allocation of interests. Yet with respect to the performance

---

<sup>16</sup> See page 178 of the cited document.

of the obligation, resistance may arise: the negative side of ‘not willing’ may surface, against which the legal system asserts itself with its full coercive force: the debtor, as such, whether willing or unwilling, must perform; if he fails to do so, he can be compelled.

At the opposite extreme of this construction, for the purposes of this discussion, two broad alternatives can be identified. Their common denominator is that a performance is carried out voluntarily.

In the first scenario, the performance is entirely detached from the existence of a debt: no obligatory bond exists between the two parties (we are thus in the presence of an *indebitum*). What relevance does *voluntas* then possess? If the decision-making process was flawed – if it was based on *error* – the effects produced can be nullified by an act of contrary will (the exercise of the action for restitution, the *condictio indebiti*). If, on the other hand, that will is free and conscious, it normatively realises a configuration of interests and the patrimonial attribution becomes final.

In the second scenario, while the element of *Haftung* (and thus enforceability) is absent, so that the performance is left to the free initiative of the individual, it is nonetheless possible to identify the *Schuld*, potentially rooted in a normative system distinct from *strictum ius*.

Here, *voluntas* – even if affected by a mistaken perception of reality (provided it is not psychologically coerced) – exercises its full normative power, producing a legal transformation that is deemed, under ordinary conditions, entirely irreversible.

## References

- Albers G. (2024), “Quali requisiti per la volontà? Per una riflessione italo-tedesca sullo scopo pratico perseguito dalle parti e l’effetto giuridico dell’atto”, in T. dalla Massara, G. Rametta (eds.), *Il volere che si fa norma. Quaderno primo. Dialoghi tra giuristi e filosofi*, Bologna, il Mulino, 33-43.
- Brutti M. (2011), *Il diritto privato nell’antica Roma*, 2<sup>nd</sup> ed., Torino, Giappichelli.
- Cardilli R. (2023), “*Error* e *Irrtum* tra fondamento romano e discontinuità concettuale nell’opera di Philipp Lotmar”, in S. Di Maria, G. Santucci (eds.), *Ignorantia vel facti vel iuris est. L’errore fra passato e presente*, Napoli, Jovene, 191-212.
- Clarizia O. (2024), “Obbligazione naturale e adempimento «spontaneo»”, in P. Perlingieri, F. Maisto (eds.), *Mario Allara*, Napoli, ESI, 559-585.
- Cortese B. (2013), *Indebiti solutio ed arricchimento ingiustificato. Modelli storici, tradizione romanistica e problemi attuali*, 2<sup>nd</sup> ed., Napoli, Jovene.

- D'Angelo A. (2018), "Note storiche sulla dottrina generale delle obbligazioni", in A. Somma, A. Fusaro, G. Conte, V. Zeno-Zencovich, *Dialoghi con Guido Alpa. Un volume offerto in occasione del suo LXXI compleanno*, Roma, Roma Tre Press, 117-154.
- Di Cintio L. (2009), *Natura debere. Sull'elaborazione giurisprudenziale romana in tema di obbligazione naturale*, Soveria Mannelli, Rubbettino.
- Di Marzo S. (1960), *Le basi romanistiche del Codice Civile*, Torino, Utet.
- Fargnoli I. (2001), '*Alius solvit alius repetit*'. Studi in tema di *indebitum condicere*, Milano, Giuffrè.
- Fasolino F., Palma A. (eds.) (2018), *Il gioco nell'antica Roma. Profili storico-giuridici*, 2<sup>nd</sup> ed., Torino, Giappichelli.
- Fercia R. (2010), "Le obbligazioni naturali", in L. Garofalo (dir.), *Trattato delle obbligazioni, I. La struttura e l'adempimento, III. Obbligazioni senza prestazione e obbligazioni naturali*, Padova, Cedam, 165-720.
- Fercia R. (2015), "*Litem suam facere* da Adriano ai Severi", in *Diritto@Storia*, 10, 1-30.
- Galeotti S. (2020), "«*Solutio per errorem*». The Significance of the Solvens' Mistake in the Context of the *Condictio Indebiti*", in *Roma Tre Law Review*, 1, 105-125.
- Giomaro A.M., Biccari M.L. (2022), *Sulle regulae iuris fra I e III secolo: Paolo commenta Plautio*, Palermo, Unipa-Press.
- Grondona M. (2023), "L'obbligazione naturale tra fatto e diritto: premesse per una discussione", in P. Lambrini (ed.), *Le obbligazioni naturali tra dogmi antichi e nuovi interrogativi. Palazzo del Bo – Padova 3 dicembre 2021*, Napoli, ESI, 109-146.
- Longo S. (2023), "Il *naturale debitum* classico e le *obligationes naturales* giustiniane: un confronto inevitabile", in P. Lambrini (ed.), *Le obbligazioni naturali tra dogmi antichi e nuovi interrogativi. Palazzo del Bo – Padova 3 dicembre 2021*, Napoli, ESI, 9-35.
- Lotmar Ph. (2019), *Das römische Recht vom Error*, with an Introduction by I. Fargnoli (ed.), Frankfurt a.M., Vittorio Klostermann.
- Mazzariol R. (2023), "Il dibattito sulle obbligazioni naturali in Vittorio Polacco e Giovanni Brunetti", in P. Perlingieri (ed.), *Rileggere i «classici» del diritto civile italiano (1900-1920)*, I, Napoli, ESI, 1187-1216.
- Oxford Latin Dictionary (1968), s.v. "*Spons*", Oxford, Clarendon Press, 1809-1810.
- Pellecchi L. (1998), "L'azione di ripetizione e le qualificazioni del '*dare*' in Paul. 17 *ad Plaut.* D. 12.6.65. Contributo allo studio della '*condictio*'", in *Studia et Documenta Historiae et Iuris*, 64, 69-160.
- Pugliese G. (1962), "Note sull'ingiustizia della sentenza nel diritto romano", in *Studi in onore di E. Betti*, III, Milano, Giuffrè, 727-781.

- Rescigno P. (2000), *Manuale di diritto privato*, in G.P. Cirillo (ed.), Milano-fiori-Assago, Kluwer IPSOA.
- Salomone A. (2007), *'Iudicati velut obligatio'*. *Storia di un dovere giuridico*, Napoli, Satura.
- Scevola R. (2004), *La responsabilità del iudex privatus*, Milano, Giuffrè.
- Trabucchi A. (2024), *Istituzioni di diritto civile*, G. Trabucchi, S. Delle Monache, S. Troiano, M. Tesaro (eds.), Padova, Cedam.
- Wegmann Stockebrand A. (2018), “Sobre el así llamado contrato real en las Instituciones de Gayo”, in *Revista de estudios histórico-jurídicos*, 40, 97-122.
- Ziliotto P. (2018), “Disciplina privatistica classica del gioco d’azzardo vietato”, in F. Fasolino, A. Palma (eds.), *Il gioco nell’antica Roma. Profili storico-giuridici*, 2<sup>nd</sup> ed., Torino, Giappichelli, 95-116.



## Chapter 12

# OMISSIVE FRAUD DURING NEGOTIATIONS FROM THE PERSPECTIVE OF CONTRACTUAL LIABILITY

Silvia Romanò

*ABSTRACT: The essay analyses the problem of malicious silence during pre-contractual negotiations, the consequences it can have on the contract concluded, and the remedies available to the deceived party. After briefly reconstructing the problem in Western legal tradition and Italian law, the research focuses on projects for the harmonization of European contract law to find a solution aimed at protecting the victim of deception.*

*KEYWORDS: Will – Contractual negotiations – Omissive fraud – Silence – Good faith – Remedy.*

*SUMMARY: 1. Omissive fraud in negotiations and free will. – 2. The roots of the problem in the Western legal tradition. – 3. The uncertain relevance of malicious silence during negotiations under Italian law. – 4. Omissive fraud and its relevance in the harmonisation of European contract law. – 5. Consumer rights and termination of contract due to breach of the duty to provide information. – 6. Looking for a conclusion. – References.*

### 1. Omissive fraud in negotiations and free will

The idea that the will of private individuals can shape reality to suit their interests is now going through a major crisis (Bianca 2019, 17), but it represented a powerful expression of individual sovereignty for much of the 19<sup>th</sup> and 20<sup>th</sup> centuries. This idea was developed in a European continent dominated by bourgeois-liberal ideologies, which found its ideal, and sometimes ideological, foundation in Roman legal culture.

Will (*voluntas*) expresses its power most distinctly in contract law.

The idea that the will is the foundation of the contract was already central at the end of the 18<sup>th</sup> century, when scholars found various reasons why will could be defective, concluding that anything that prevents free will also undermines the validity of the contract (Glück 1796, 108).

*Voluntas* creates the contract, but only if it is free.

It is necessary to question whether we can really speak of free will if, during pre-contractual negotiations, one party voluntarily conceals information that would have influenced the consent of the other party.

This raises the issue of omissive fraud in negotiations: when such conduct is legally relevant and what remedies may be available.

The problem is difficult to frame.

Italian law – but, as will be seen, also the projects for the harmonisation of contract law and, in general, the main continental codes – imposes a general duty to act in good faith and fair dealing during negotiations.

Good faith, like most general principles, does not indicate specific rules, which could raise difficulties in cases of omissions that fall into a grey area, where it may be unclear whether the party acted wilfully or not.

If the law expressly requires that specific information be disclosed to the other party (*e.g.* § 491a BGB; art. 1497 of the Italian Civil Code; art. 1892 of the Italian Civil Code; various provisions of consumer law), its omission is legally relevant. The matter is more difficult when one can only rely on the general clause of good faith.

No doubt that if one party tells a lie to mislead the other, good faith is broken. But consider, for example, cases where one party gives incomplete information, even if it is formally sufficient. Or where one party realises during negotiations that the other is mistaken and does nothing to correct it, choosing to remain silent. Or imagine a situation in which one party decides not to share important information unless expressly requested by the other party (who may not have extensive knowledge of the subject matter of the contract and therefore may not ask the appropriate questions).

These issues arise most frequently in contracts preceded by a lengthy information-gathering phase (*e.g.* insurance contracts or contracts for the sale of financial products), in contexts where there is a significant information asymmetry between the parties (*e.g.* consumer or employment contracts), and in those negotiated at a distance, where the lack of simultaneous presence of the parties may constitute an obstacle to obtaining all relevant information.

A further problem is that many legal systems require that the false representation of reality caused by the other party's fraud must be carried out through particularly insidious conduct, usually active rather than omissive (Kötz, Patti 2017, 309). In Italian law, fraud is achieved through «raggiri» (art. 1439 of the Civil Code), in Spanish law through «maquinaciones insidiosas» (art. 1269 of the Civil Code), in French law through «manœuvres ou ... mensonges» (art. 1173 of the French Civil Code), and in German law «arglistige Täuschung» (§ 123 BGB).

Given the uncertain relevance of wilful omission during negotiations, some legal systems explicitly provide that fraud may also consist in intentionally failing to disclose relevant information to the other party.

The recent reform of French contract law (Fauvarque-Cosson, Wicker

2019) amended art. 1137 (2) of the French Civil Code, specifying that [it] «constitue également un dol la dissimulation intentionnelle par l'un des contractants d'une information dont il sait le caractère déterminant pour l'autre partie». <sup>1</sup> This provision is to be read with art. 1111-2, which obliges «Celle des parties qui connaît une information dont l'importance est déterminante pour le consentement de l'autre doit l'en informer dès lors que, légitimement, cette dernière ignore cette information ou fait confiance à son cocontractant». <sup>2</sup> Otherwise, «le manquement à ce devoir d'information peut entraîner l'annulation du contrat».

Also, under art. 3:44(3) of the Dutch Civil code – *Defective will for performing a juridical act* –, fraud is legally present when someone induces another person to perform a juridical act also by deliberately concealing a fact that ought to have been revealed.

The paper aims, firstly, to clarify under which conditions the deliberate omission of information may be legally relevant. Not every omission, even those of a minimal nature, can be considered relevant and allow the party to seek redress.

Secondly, it intends to analyse which remedies are available to a contracting party induced to enter a contract due to the other party's wilful omission, and, in particular, whether redress is limited to compensation for damages or also includes annulment of the contract.

As briefly seen, these problems are not limited to Italian law. The issue is of broader comparative relevance.

To investigate the issues outlined from a European perspective, also in a cultural meaning, it is necessary to start from the origins of the problem of omissive fraud, which has its roots in the Western legal tradition.

## 2. The roots of the problem in the Western legal tradition

The modern concept of pre-contractual liability was shaped by the work of Rudolph von Jhering in his well-known essay on *culpa in contrahendo* (von Jhering 1861).

Jhering's reflection begins where Savigny ended the construction of the *Willenstheorie*.

Savigny affirms the relevance of mistake induced by the immoral influence, *i.e.* fraud (*Betrug*), of the other party (von Savigny 1840, 115), generally produced through active misrepresentation, but which may also take place

---

<sup>1</sup> LOI n°2018-287 du 20 avril 2018 - art. 5.

<sup>2</sup> Création Ordonnance n°2016-131 du 10 février 2016 - art. 2.

through passive conduct, *i.e.* by knowingly and tacitly tolerating the error of the other party. Omission is considered relevant only where there is a contractual relationship in which the other party has the right to expect openness (*Offenheit*) (von Savigny 1840, 119). The deceived party receives contractual protection through action, defence, or restitution, depending on the circumstances (von Savigny 1840, 115).

Such was Savigny's influence that Jhering began his analysis by highlighting the absence of uncertainty regarding the mistake induced by the other party's fraud during negotiations, whereas the topic of *culpa in contrahendo*, which was the subject of Jhering's study, was entirely novel.

Jhering's doctrine established a form of liability unknown to Roman jurists, namely, liability arising from the negotiation phase.

Wilful concealment of information during negotiations is a problem well known to Roman jurists (*dolus in contrahendo*), particularly in law of sale (Vacca 2011, 203 ff.; Solidoro 2008, 1 ff.; Procchi 2007, 196 ff.; Vacca 1997, 65 ff.; Talamanca 1993, 440). Various sources from the classical period demonstrate how contractual protection is granted to a buyer who, for instance, purchased a piece of land because the seller had deliberately concealed the presence of a troublesome neighbour: a fact which, if disclosed, would have prevented the buyer from concluding the contract (*quem emptor si audisset, empturus non esset*).<sup>3</sup> The same applies to the deliberate omission of burdens associated with the ownership of the goods sold,<sup>4</sup> or to the intentional failure to declare that a slave girl was no longer a virgin, despite knowing that the buyer expressly sought a *virgo* and not a *mulier*.<sup>5</sup>

The sources consistently emphasise the seller's actual knowledge (*celaverit; celavit; cum sciret deberi; sciens*), thereby excluding that the silence of an *ignorans* seller could constitute *dolus in contrahendo*.<sup>6</sup>

Omissive fraud during negotiations would thus have resulted in contractual liability, and the deceived party could bring an *actio ex empto* aimed at obtaining compensatory relief corresponding to the *id quod interest*.

The action explains its scope within the framework of the *iudicia bonae fidei*. Fraud is the antithetical to *bona fides*, such that the use of any artifice or deception, whether active or passive, entitles to contractual remedies. Classical sources attest to the extension of the seller's liability not only following defective performance, but also to where bad faith manifested during negotiations (Kaser 1971, 557).

<sup>3</sup> Gai. 10 *ad ed. prov.* D. 18.1.35.8.

<sup>4</sup> Pap. 3 *resp.* D. 19.1.41.

<sup>5</sup> Ulp. 32 *ad ed.* D. 19.1.11.5.

<sup>6</sup> Ulp. 32 *ad ed.* D. 19.1.11.15-16.

In general, where the contract has produced its intended effects – namely, the transfer of possession and payment of the price – the protection afforded to the deceived party is limited to compensation, provided that the error did not render the transaction invalid (Talamanca 1993, 438).

Only in the case of the woman sold as a virgin, do the jurists grant not *redhibitio*, but an *actio ex empto ad resolvendam emptionem*, thereby obliging the seller to return the price and the buyer to return the slave. The rationale why this remedy was granted, as opposed to compensation, remains debated. According to one theory, since the fraud concerned a quality essential for the buyer, an *actio ex empto ad resolvendam emptionem* would probably have seemed more effective in protecting the buyer's interest (Vacca 2011, 203 ff.); another hypothesis justifies the remedy by reference to the qualitative nature of the deception, which made it nearly impossible to quantify in monetary terms the buyer's interest in acquiring a *virgo* rather than a *mulier* (Procchi 2007, 205, ff.).

In addition to the granting of contractual remedies, another key element that needs to be clarified to provide a concise overview of the model of omissive fraud in classical Roman law concerns the equivalence of malicious silence to active fraud, which emerges from the identity of judicial protection. This equivalence can also be explained in the light of the *iudicia bonae fidei*: since good faith (*bona fides*) is the opposite of the *dolus malus*, it is irrelevant whether the deception took place through silence or artifice.

### 3. The uncertain relevance of malicious silence during negotiations under Italian law

Art. 1337 of the Italian Civil Code obliges the parties to behave with fairness and good faith during negotiations.

Fraud, according to art. 1439 of the Italian Civil Code, constitutes a ground for annulment of the contract only when the deception employed by one of the parties was such that, absent such deception, the other party would not have entered into the agreement (*dolus causam dans*). Otherwise, pursuant to art. 1440 of the Italian Civil Code, if the fraudulent conduct did not determine consent, but nonetheless influenced the terms of the agreement, the contract remains valid, albeit without it would have been concluded on different terms, and the party acting in bad faith is liable for damages (*dolus incidens*; on the topic dalla Massara 2011, 611 ff.).

The standard of good faith imposed by art. 1337 of the Italian Civil Code, although a cornerstone in Italian contract law, remains difficult to translate into concrete rules, and this is particularly evident in the case of omissions.

Does good faith require a party to correct the other's mistake when it becomes apparent during negotiations? Is it a violation of good faith to provide incomplete or selectively curated information, or to withhold relevant facts unless specifically requested?

First, it is difficult to identify the cases in which silence becomes legally relevant.

According to some scholars, silence is relevant when it concerns information to which the other party could not have had access, deliberately in breach of a «duty to speak» (Sacco 2011, 358). This occurs both when silence violates the general duty to act in good faith during negotiations (Visintini 1972, 101 ff.), and when it contravenes a specific duty to disclose.

Part of Italian doctrine derives from art. 1337 of the Civil Code a general duty to provide information during negotiations. Therefore, fraud can be seen in the contractor's decision to withhold information of particular relevance to the counterparty's decision to negotiate (Visintini 1972, 101 ff.; Sacco 2011; Gallo 1999, 461 ff.).

Other scholars, on the other hand, reject the idea that silence can be relevant, unless it is accompanied by explicit misrepresentations or deceptive conduct (Trabucchi 1937, 528; Pietrobon 1990, 101; De Poli 2004, 921).

Others consider silence only when there is a specific duty to provide information imposed by law (Albanese 2023, 67).

The difficulties to frame omissive fraud are reflected in the remedy.

Pre-contractual liability has been interpreted by the Italian Court of Cassation since 2016 as a form of contractual liability (on Cass., 12<sup>th</sup> July 2016, No. 14188, see Scognamiglio 2016, 1515 ff.; Di Majo 2016, 2568 ff.; Piraino 2017, 35 ff.).

However, this reading has not entirely displaced the alternative interpretation, which continues to view pre-contractual liability as a species of tortious liability (Cass., 25<sup>th</sup> September 2023, No. 27262; Bianca 2019, 140).

When omissive fraud is invoked within the framework of art. 1337, and thus as a case of pre-contractual breach, the burden is on the claimant to prove: (i) the existence of a rule – either general or specific – obliging disclosure; (ii) that the silence materially affected the formation of the agreement; and (iii) that measurable harm ensued, typically in the form of negative interest. If the aim is not merely compensation but annulment of the contract, a more stringent standard applies (Granelli 2018, 1206). The claimant is required to prove that the omission, while not sufficient *per se*, is part of a complex scheme designate do induce contractual consent.

According to recent jurisprudence, mere silence, even in situations of interest to the other party, and concealment do not constitute grounds for invalidating the contract since they do not alter the representation of reality

but only refrain from contradicting the perception of reality reached by the counterparty (Cass., 11<sup>th</sup> April 2022, No. 11605).

#### 4. Omissive fraud and its relevance in the harmonisation of European contract law

The comparison with the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR), the UNIDROIT Principles and (at least in ideal terms since it is no longer in force) the Common European Sales Law (CESL) proves useful not only because they may be chosen as the applicable law by the parties, but also because they represent a synthesis of the values of European legal culture (Alpa 2007, 21), as well as a tool for dialogue aimed at adopting uniform rules from which guidelines for national laws may emerge (Kadner Graziano 2019, 52). With reference to the PECL, they have been attributed the character of «scientific law» (Sirena 2019, 608 ff.; Zimmermann 2012, 21 ff.; Lando 1992, 573 ff.).

Leaving aside the United Nations Convention on Contracts for the International Sale of Goods (CISG), which does not address pre-contractual liability or fraud, the main harmonisation projects establish as general principles of contract law – including the negotiation phase – the duty to act in good faith and fair dealing (art. 1.7 Unidroit Principles, art. 1:201 PECL, art. II. – 3:301 DCFR).

With regard to negotiations contrary to good faith and fair dealing, art. 2.1.15 of the Unidroit Principles, art. 2:301 PECL and art. II. – 3:301 DCFR specify that a party is free to negotiate and is not liable for failure to reach an agreement. However, it may incur liability if it initiates, continues, or terminates negotiations in bad faith. According to those provisions, it is bad faith, in particular, for a party to enter or continue negotiations when intending not to reach an agreement with the other party.

These provisions focus primarily on the unjustified breakdown of negotiations, without explicitly addressing any duty to disclose information. The aggrieved party may recover the expenses incurred in the negotiations and may also be compensated for the loss of opportunity to conclude an alternative contract (so-called reliance damages or negative interest).

Unlike Italian law, which classifies (not without difficulties) the intentional concealment of information under art. 1337 of the Civil Code and, only under certain conditions, as fraud under artt. 1439-1440 of the Civil Code, the main drafts for the harmonisation of contract law classify the intentional breach of the duty to disclose information as a vice of consent, classifiable as fraud, capable of leading to the avoidance of the contract.

Among these, the DCFR – the instrument that devotes the greatest attention to information duties – provides, in general, that before the conclusion of a contract for the supply of goods, other assets or services by a business to another person, a business has a duty to disclose to the other person such information concerning the goods, other assets or services to be supplied as the other person can reasonably expect (II. – 3:101).

The duty to provide information becomes more significant if the party is a consumer. When a business markets with a consumer, it has a duty not to provide misleading information. Information is considered misleading if it misrepresents or omits material facts that the average consumer would expect to receive to make an informed decision about whether to take steps to enter a contract (II. – 3:102). The information must contain all the relevant details necessary to decide whether to conclude a contract. In the case of transactions that place the consumer at a significant informational disadvantage due to the technical means used to conclude the contract, additional disclosure obligations apply (II. – 3:103). When a business initiates real-time distance communication with a consumer, it is required to provide clear and explicit information about its name and the commercial purpose of the contact (II. – 3:104).

Unlike in art. II. – 3:103, the consequence for violating the duty to inform laid down in art. II. – 3:104 is not only damages, but also a right to withdraw from the contract. The latter provision states that, if a business has failed to comply with the information duties set out in II. – 3:104 (1) and a contract has been concluded because of the miscommunication, the other party has a right to withdraw from the contract by giving notice to the business within a certain period of time.

The duty to inform under Chapter II of the DRFC is not fulfilled unless it meets specific requirements (such as clarity, precision, intelligibility of the language, II. – 3:106) and includes the provision of information concerning the price (II. – 3:107) and the identity of the business (II. – 3:108). Under the DRFC, it is possible to terminate a contract for which the consumer has not been given all the relevant information in a precise and transparent manner, as his or her will (*voluntas*) is deemed to have been incorrectly formed.

In addition to a detailed duty to disclose information, the DCFR considers as fraud the deliberate concealment of information that a party should have disclosed during negotiations, granting the deceived party the right to avoid the contract concluded due to the other party's fraud.

Art. II. – 7:205 provides that a party may avoid a contract when the other party has induced the conclusion of the contract by fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose. Non-disclosure is fraudulent if it is intended to induce the person to make a mistake. In

determining whether good faith and fair dealing required a party to disclose information, art. II. – 7:205, unlike many provisions on fraud, which are usually more general in tone, contains specific criteria. Regard should be had to all the circumstances, including: (i) whether the party had special expertise; (ii) the cost to the party of acquiring the relevant information; (iii) whether the other party could reasonably acquire the information by other means; and (iv) the apparent importance of the information to the other party.

Also, the Proposal for a Common European Sales Law (CESL) provides for detailed duties to disclose information, differentiated according to whether the trader deals with a consumer (artt. 13-22) or a trader (art. 23), with additional duties to provide information in distance contracts concluded by electronic means (art. 24) and special requirements in distance contracts concluded by electronic means (art. 25). The party has also a specific duty to ensure that information supplied is correct (art. 28).

As for legal protection, in addition to compensation for damages (art. 29), in cases of fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose, a party may avoid the contract (art. 49), having regard to all the circumstances, including: (i) whether the party had special expertise; (ii) the cost to the party of acquiring the relevant information; (iii) the ease with which the other party could have acquired the information by other means; (iv) the nature of the information; (v) the apparent importance of the information to the other party; and (vi) in contracts between traders, good commercial practice in the relevant context. The test for establishing the existence of a fraudulent breach of the duty of provide information is substantially aligned with that adopted in the DCFR.

Unlike the DCFR and CESL, the PECL does not expressly recognise a duty to provide information. However, it does include within the notion of fraud cases in which the contract has been concluded by fraudulent non-disclosure of any information which, in accordance with good faith and fair dealing, should have been disclosed (art. 4:107: Fraud). Similarly to CESL and DCFR, in determining whether good faith and fair dealing required the disclosure of particular information, reference must be made to all relevant circumstances, including: (i) whether the party had special expertise; (ii) the cost to it of acquiring the relevant information; (iii) whether the other party could reasonably acquire the information for itself; and (iv) the apparent importance of the information to the other party. Thus, also under the PECL, a contract may be avoided on the ground of omissive fraud.

The UNIDROIT Principles are the harmonisation project that, among all others, devotes the least attention to the obligation to disclose information and the fraudulent concealment of relevant facts. Nevertheless, art. 3.2.5

provides that a party may avoid the contract when it has been led to conclude the agreement by fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the other party should have disclosed.

From the European harmonisation projects on contract law, it seems possible to conclude, in general, that they converge in treating fraudulent concealment not as a matter of pre-contractual liability – even though the omission occurs during the negotiation phase – but rather as a ground for avoidance, falling squarely within the scope of fraud.

## 5. Consumer rights and termination of contract due to breach of the duty to provide information

The duty to provide information during negotiations and the consequences of its breach are particularly relevant in consumer law due to the structural information asymmetry between consumers and professionals.

The European Union has addressed this issue, *inter alia*, in Directive 1997/7/EC on the protection of consumers in respect of distance contracts (especially art. 4), Directive 1997/55/EC amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, and Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (notably, regarding the guarantee). More recently, the professional's duty to provide information has been confirmed and specified by the Directive 2011/83/EU on consumer rights, Directive 2019/770/UE, on contracts for the supply of digital content and digital services, and Directive 2019/771/UE, which has replaced Directive 1999/44/EC.

Consequently, the Italian Consumer Code expressly recognises, in art. 2(2)(c), the right of consumers and users to adequate information and fair advertising.

Not only does the European legislator impose a duty on professionals to inform consumers in a particularly incisive manner – and thereby recognises the consumer's right to receive accurate and comprehensive information – but it also monitors its enforcement through rules on unfair commercial practices.

Art. 7 of Directive 2005/29/EC, entitled «Misleading omissions», considers a commercial practice misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it fails to disclose material information that the average consumer needs, according to the context, to make an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. It shall also

be regarded as a misleading omission when a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information.

There is no doubt that an omission is misleading when it is made deliberately, as indicated by the use of terms such as «ambiguous» or the verb «to hide». However, the terminology adopted by the legislation is broader than that directly attributable to fraud and may cover situations that fall into a grey area, where it is unclear whether the trader has intentionally concealed the required information.

The validity of a contract concluded as a result of a misleading practice has recently been clarified by Directive 2019/2161/EU. Art. 11a states that consumers harmed by unfair commercial practices shall have access to proportionate and effective remedies, including compensation for damage and, where relevant, a price reduction or the termination of the contract.

In Italy, the new art. 27, co. 15-*bis*, Cons. Cod., modified by Legislative Decree No. 26/2023 to adopt Directive 2019/2161/EU, affirms the jurisdiction of the civil court to grant consumers harmed by unfair commercial practices proportionate and effective remedies, including compensation for damage suffered and, where applicable, a price reduction or the termination of the contract, without prejudice to further remedies.

This raises a question: can a professional's failure to provide relevant information to the consumer be considered a breach of contract that justifies termination?

## 6. Looking for a conclusion

In light of the above, the following key points can be identified:

- (i) the principle of good faith during negotiation requires the parties to maintain a transparent and cooperative attitude throughout the negotiation;
- (ii) good faith requires each party to disclose relevant information, especially information that is of interest to the other party for the contract that it has expressed its intention to conclude;
- (iii) a deliberate omission of relevant information is incompatible with the principle of good faith;
- (iv) as it derives from a general clause, omission of information in breach of the duty to inform is not legally relevant only in the cases expressly provided for by law;
- (v) in order to determine when, in the absence of a specific legal provision, a duty to inform can be inferred, it is possible to refer to the conditions

- set out in the DCFR and the PECL, namely: (a) whether the party had special expertise; (b) the cost to the party of acquiring the relevant information; (c) whether the other party could reasonably acquire the information by other means; and (d) the apparent importance of the information to the other party;
- (vi) in order to determine the existence of a duty to disclose information in the absence of a specific legal provision, analogy may be used. For example, regardless of whether the contracting party is a consumer, if there is a significant information asymmetry between the parties, it can be assumed that the party possessing the information is under a duty to disclose it. Or, if cryptocurrencies were to be legally recognised as currency in the future and could be used in loans, it can be assumed that banks would have to provide information similar to that which they are required to provide in loans in euros or dollars;
  - (vii) a duty to inform must not be interpreted as exonerating the party from acquiring all useful and necessary information (at least that to which it has access) for the conclusion of the contract.

As for remedial protection, classifying the breach of the duty to inform as pre-contractual liability usually results in compensation for the negative interest, while fraud can lead to the contract being avoided. The latter solution is also supported by the main projects for the harmonisation of contract law, as well as by some European legal systems.

It can be assumed that someone who has entered a contract due to the omissive fraud of the other party may find the preservation of the contract inadequate.

However, everything related to intent is subject to evidentiary difficulties. The plaintiff must establish what information was due and, even more difficult, that the omission of this information was deliberately intended to deceive the other party.

An alternative solution could be imagined by invoking liability for breach of an obligation.

Getting to the heart of the concept of obligation, if «today the technical term ‘obligation’ is widely used to refer to a two-ended relationship which appears from the one end as a personal right to claim and from the other as a duty to render performance» (Zimmermann 1996, 1), the duty to inform can be seen as an obligation in the technical sense.

This is certainly true when the obligation to inform is imposed by a rule of law. One party is required by law to disclose specific information, and the other party can claim the right to receive that information.

If the data subject to the obligation to inform is not provided, for whatever reason, but for a reason attributable to the obligated party, the obligation is

not fulfilled, and its non-fulfilment is relevant in itself. The aggrieved party may obtain compensation for the damage to its positive interest simply by alleging that it did not receive the information to which it was entitled.

In Italian law, which adopts the classification of the sources of obligation established in the *Res Cottidianae* by the Roman jurist Gaius, pursuant to art. 1173 of the Italian Civil Code, obligations arise from contracts, torts or any other act or fact capable of producing them in accordance with the legal system.

The obligation to provide information to the other party may arise, at least in cases where it is provided for by a rule of law, from the law itself. Contractual liability derives from the non-performance of an obligation. Pursuant to artt. 1218 and 1223 of the Italian Civil Code, non-performance obliges the liable party to compensate the positive contractual interest. In the event of intentional breach, Italian law also allows compensation for damages that were unforeseeable at the time the obligation arose (art. 1225 of the Italian Civil Code).

To obtain termination of the contract for breach of the obligation to provide information, one more step must be taken.

It is a difficult step to imagine, but not impossible.

The starting point is that, in some cases, the obligation to inform does not end at the negotiation stage but is part of the contract as it continues after the contract has been concluded. Consider, for example, the obligation on the financial intermediary to provide updates, which continues even after the contract has been concluded. Or consider contracts for the supply of digital content and digital services, in respect of which Directive 2019/770/EU imposes specific information obligations on the trader (after the conclusion of the contract) to inform the consumer about the availability of updates that are necessary to keep the digital content or digital service in conformity and the consequences of the consumer's failure to install them.

In these cases, the obligation to inform forms part of the contract and, therefore, its non-fulfilment, unless it is of minor importance or excusable, may justify termination of the contract.

A further step forward would be to recognise that even when the obligation to provide information does not continue for the conclusion of the contract, nevertheless the information provided beforehand may nonetheless determine the subject matter of the agreement (*lex contractus*) and, in this way, enters into the contract; this is at least the case where there is a rule imposing a specific information obligation.

In this respect, part of Italian legal scholars includes in contractual liability, specifically under art. 1497 of the Italian Civil Code,<sup>7</sup> the intentional

---

<sup>7</sup> According to art. 1497, when the item sold does not have the promised qualities or

conduct of a party who, by false certification, has made the goods appear to be of a higher quality than they actually are (Bianca 2019, 624).

Further support for this theory can be found in the Western legal tradition, particularly the Roman juridical culture, which considers the breach of the duty to provide information prior to the conclusion of the contract to fall within contractual liability, since fraud, regardless of when it occurs during the contractual or pre-contractual phase, and whether through silence or active deception, is contrary to good faith.

On the other hand, the fact that the obligation to provide information prior to the conclusion of the contract enters into the agreement is recognised by Recital 42 of Directive 2019/770/EU, in the part in which it provides that «the requirements of the contract should include those resulting from the pre-contractual information which, in accordance with Directive 2011/83/EU, forms an integral part of the contract». Those requirements could also be set out in a service level agreement, where, under the applicable national law, such type of agreement forms part of the contractual relationship between the consumer and the trade». <sup>8</sup>

## References

- Albanese A. (2023), “Errore e reticenza tra regole di validità e regole di responsabilità”, in *Europa e diritto privato*, 57 ff.
- Alpa G. (2007), *Introduction to European Contract Law*, Roma-Bari.
- Bianca C.M. (2019), *Diritto civile*, III, *Il contratto*, 3<sup>rd</sup> ed., Milano.
- dalla Massara T. (2011), “Tra regole di validità e regole di correttezza: la sanzione processuale del dolo incidente”, in L. Garofalo (ed.), *Actio in rem e actio in personam. In ricordo di Mario Talamanca*, II, Padova, Cedam, 611 ff.
- De Poli M. (2004), “Servono ancora i «raggiri» per annullare il contratto per dolo? Note critiche sul concetto di reticenza invalidante”, in *Rivista di diritto civile*, II, 911 ff.
- Di Majo A. (2016), “La culpa in contrahendo tra contratto e torto”, in *Giurisprudenza italiana*, 2016, 2568 ff.
- Fauvarque-Cosson B., Wicker G. (2019), *La réforme du droit français des contracts*, Paris, Société de législation comparée.
- Gallo P. (1999), “I vizi del consenso”, in *Trattato dei contratti*, dir. by P.

---

those essential for its intended use, the buyer has the right to terminate the contract, if the quality defect exceeds the limits of tolerance established by customary practice.

<sup>8</sup>Our emphasis.

- Rescigno, *I contratti in generale*, ed. by E. Gabrielli, II, Torino, Giappichelli, 461 ff.
- Graneli C. (2018), “Gli obblighi informativi nella formazione dell’accordo contrattuale”, in *Nuova giurisprudenza civile commentata*, II, 1200 ff.
- Glück C.F. (1796), *Ausführliche Erläuterung der Pandekten*, IV.1, Erlangen.
- Kadner Graziano T. (2019), *Comparative contract law. Cases, Materials and exercise*, 4<sup>th</sup> ed., Cheltenham-Northampton.
- Kaser M. (1971), *Das römische Privatrecht*, I, 2<sup>nd</sup> ed., München, C.H. Beck.
- Kötz H., Patti S. (2017), *Diritto europeo dei contratti*, 2<sup>nd</sup> ed., Milano, Giuffrè.
- Lando O. (1992), “Principles of European Contract Law: An Alternative to or a Precursor of European Legislation”, in *American Journal of Comparative Law*, 40, 573 ff.
- Pietrobon V. (1990), *Errore, volontà e affidamento nel negozio giuridico*, Padova, Cedam.
- Piraino F. (2017), “La natura contrattuale della responsabilità precontrattuale (ipotesi sull’immunità)”, in *I Contratti*, 35 ff.
- Procchi F. (2007), “*Dolus e culpa in contrahendo* nella compravendita. Considerazioni in tema di sinallagma genetico”, in L. Garofalo (ed.), *La compravendita e l’interdipendenza delle obbligazioni nel diritto romano*, I, Padova, Cedam, 196 ff.
- Sacco R. (2011), *s.v.* “Dolo omissivo e obblighi informativi”, in *Digesto delle discipline privatistiche – Sezione civile*, Agg. VI, Torino, Utet, 356 ff.
- Scognamiglio C. (2016), “Verso il definitivo accreditamento della tesi della natura contrattuale della responsabilità precontrattuale”, in *Nuova giurisprudenza civile commentata*, II, 1515 ff.
- Sirena P. (2019), “La scelta dei *Principles of European Contract Law* (PECL) come legge applicabile al contratto”, in *Rivista di diritto civile*, 608 ff.
- Solidoro L. (2008), “Sulle origini storiche della responsabilità precontrattuale”, in *Teoria e storia del diritto privato*, I, 1 ff.
- Talamanca M. (1993), *s.v.* “Vendita in generale (dir. rom.)”, in *Enciclopedia del diritto*, 46, Milano, Giuffrè, 438 ff.
- Trabucchi A. (1937), *Il dolo nella teoria dei vizi del volere*, Padova, Cedam.
- Vacca L. (2011), “Garanzia e responsabilità nella vendita. Tradizione romanistica e problemi dommatici attuali”, in L. Garofalo (ed.), *Questioni vecchie e nuove in tema di responsabilità*, Napoli, Jovene, 203 ff.
- Vacca L. (1997), “Ancora sull’estensione dell’ambito di applicazione dell’*actio empti* in età classica”, in *Iura*, XLV, 65 ff.
- Visintini G. (1972), *La reticenza nella formazione dei contratti*, Padova, Cedam.
- von Jhering R. (1861), “*Culpa in contrahendo* oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen”, in *Jahrbücher für*

*die Dogmatik des heutigen römischen und deutschen Privatrechts*, IV, Jena, Friedrich Mauke.

von Savigny F.C. (1840), *System des heutigen römischen Rechts*, III, Berlin, Veit.

Zimmermann R., (2012), “Wissenschaftliches Recht” am Beispiel (vor allem) des europäischen Vertragsrechts”, in C. Bumke, A. Röthel (eds.), *Privates Recht*, Tübingen, Mohr Siebeck.

Zimmermann R. (1996), *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford, Oxford University Press.

Part 5

**ABSENCE. FRAGILE DIMENSIONS  
OF INDIVIDUAL WILL**



## Chapter 13

# **INVITUS. THE UNWILLING BETWEEN STATE OF MIND AND DECLARATION**

**Margherita Scognamiglio**

*ABSTRACT: In Roman legal and literary sources, the adjective invitus occurs in disparate contexts and with meanings and values that are often ambiguous. Starting from the doctrinal debate of the nineteenth and twentieth centuries on the legal will, this essay will be dedicated to investigating both the link between will, non-will and vices of the will, in the light of the possible interpretations of the Latin term invitus, and the possibility of using the ideas from the Roman sources relating to the invitus to reason on the category that has recently spread in the jurisprudence and doctrine of vulnerability.*

**KEYWORDS:** *Will – Unwill – Vices of will – Invitus – Vulnerability.*

**SUMMARY:** 1. The legal will in the doctrinal debate between the 19<sup>th</sup> and 20<sup>th</sup> centuries. Introductory notes. – 2. The vices of the will: Mistake, duress, fraud and beyond. – 3. *Invitus*: From classical jurists to 19<sup>th</sup> scholars of Roman law. – 4. The semantic eclipse of *invitus*: From Roman jurisprudence to modern dogmatics. – 5. From *invitus* to the basics of the vulnerability. – References.

### **1. The legal will in the doctrinal debate between the 19<sup>th</sup> and 20<sup>th</sup> centuries. Introductory notes**

The issue of the normative force of the legal will (*voluntas*) is closely linked to that of the relationship between inner (psychological) will, legal will and declaration of will. This connection and the different weight that can be attributed to each of these elements within the dynamics of contractual negotiation, constitute two of the main nodes of the theories developed, especially from the reconstructions advanced by the Pandectist doctrine, on the subject of the validity and effectiveness of the legal transaction.

Such normativity is inextricably intertwined with the responsibility connected with the contractual obligations undertaken. This form of responsibility may, therefore, be conditioned in its effectiveness by external elements that affect the psychological prerequisites of the contractual act, distorting the natural and regular process of their formation. This idea is well clarified by Alberto Trabucchi, at the beginning of his book about *Il dolo negoziale nella teoria dei vizi del volere* (Trabucchi 1937, 9 f.):

Di quanto si estende l'efficacia dell'agire umano nella varietà delle conseguenze giuridicamente rilevanti, di altrettanto si estende la considerazione che la legge fa dell'errore, della forza maggiore, della violenza, cioè delle cause che agiscono sui presupposti psicologici o morali dell'atto.

E poiché gli atti dell'uomo si distinguono dagli altri fatti giuridici, non per la materialità della loro provenienza, ma in quanto sono espressione dell'agire cosciente e volontario dei soggetti, si spiega la cura che pone la scienza del diritto, sì civile che penale, sostanziale o processuale, nel fissare i principi che permettono di attribuire ad una persona le conseguenze del suo agire. Questa ricerca del nesso intimo che lega l'uomo con le sue azioni è problema fondamentale in ogni campo della vita morale: è il problema della responsabilità.

[...]

*Responsabilità* significa prima di tutto solidarietà della persona umana con i suoi atti. E il fatto che essa sia di regola richiesta come condizione pregiudiziale perché l'uomo risulti giuridicamente obbligato per il suo agire, è stato ed è uno dei segni più sicuri del progresso giuridico di tutti i popoli civili.

At the beginning of the nineteenth century, in France, the process of abstraction that had led to the creation of the legal category of contract came to a halt with the entry into force of the Code Napoléon. In Germany, by contrast, the doctrinal elaboration of Pandectistics extended beyond the contractual domain, so that, pushing abstraction further and in the absence of a civil code, Pandectist scholarship came to construct the new category of the *legal act*. It is well known that in Germany, between the nineteenth and twentieth centuries, two opposing doctrinal orientations emerged regarding the binding force of the *voluntas* towards counterparties and third parties. The *Willenstheorie* (von Savigny 1840, §104; Windscheid 1887, §69),<sup>1</sup> rooted in the voluntarist tradition of Jusnaturalism, was based on a subjective conception of the legal act, whereby every legal act (*Rechtsgeschäft*) originates from the creative will of the subject, who is naturally endowed with the capacity to effect change through his will. However, the will had to be outwardly manifested through a declaration (*Willenserklärung*).

The problematic junction of this theory lay precisely in the articulation of the relationship between inner will and external manifestation: proponents of the *Willenstheorie* interpreted such relationship in favour of the *voluntas*, so that, in the event of a discrepancy between the two, an interpretation consistent with the inner will had to prevail.

---

<sup>1</sup> Compared to Savigny, Windscheid adopts a somewhat different perspective, which – while remaining faithful to *Willenstheorie* – combines the centrality of the individual will with the objectivity of law.

In Savigny's theory of will, centered on the idea of individual freedom, there are three relevant moments: the will, its declaration and the concordance between the two. The traditional vices of the will (duress, mistake, and fraud) in Savigny's perspective do not invalidate the declaration or the concordance between will and declaration. Duress does not produce legal consequences, since the person subject to it, being able to choose not to issue the declaration, still chooses (and is therefore free) to make it. Mistake and fraud (which itself gives rise to mistake) likewise do not invalidate the declaration. Thus, the legal act remains valid, but, in continuity with Roman law precedents, it may give rise to exceptions, special actions, or *restitutio in integrum* (Brutti 1980, 283-288).

The limitations of such a radical stance were soon recognized, and corrective measures were identified, among which the best known is perhaps the theory of *culpa in contrahendo* (von Jhering 1860-1861, 1-112). According to this theory, legal significance may be accorded even to unrecognized mistake, albeit within the limits of compensation for negative interest. But the remedies theorized to soften the rigidity of the system founded on the strict logic of the *Willenstheorie* (so much so that one can speak of a *Willensdogma*) still presupposed the primacy of the will over its declaration.

Quite different, instead, was the objectivist approach of scholars, who around the second half of the nineteenth century, began to develop theories aimed at attributing to the declaration of will a role no longer subsidiary or physiologically subordinate to the will, but autonomous and, indeed, prevailing over the other constitutive elements of the legal act (*Erklärungstheorie*). According to this scientific orientation, the subject's inner will was deemed irrelevant, as intrinsically elusive and unascertainable, while the declaration alone was vested with constitutive legal force (Bähr 1875, 393-427; Bekker 1889, 54 ff.). The theory of declaration clearly emerged as a reaction to the *Willenstheorie*, whose critical shortcomings lay in the disregard for the legitimate reliance of third parties and the lack of effective safeguards for commercial traffic. Yet, even the *Erklärungstheorie*, displayed theoretical and practical limitations, leading several scholars to temper its rigidity by formulating variants collectively referred to as the theory of reliance. These approaches were characterized by the protection of the addressee of the declaration, provided that the discrepancy between inner will and external statement was neither known nor knowable by the recipient.

*Willenstheorie* and *Erklärungstheorie*, with their respective corrective mechanisms, constitute doctrinal elaborations – subsequently incorporated, in varying degrees, into European codifications – theoretical roots of which are consistently traced back to the internal structure and elements of the legal act. Distinct from these, and intended to radicalize the objectivist

perspective, is the so-called preceptive theory, which identifies the essence of the legal act in the legal system's recognition of a given economic or social function carried out through private autonomy.<sup>2</sup> It is quite clear that such a reconstruction of the legal act tends to privilege, among the constitutive elements of the legal act, the *causa*, a requirement often marginalized and debated in its definition, but generally understood as the objectively appreciable economic-social function, recognized by the legal system and pursued by the parties.

This brief theoretical serves as a functional introduction to the theme of the so-called vices of the will. This is because the weight attributed to the will in competing theories of the legal act clearly influences whether legal consequences are to be recognized in circumstances that affect the subject, condition the volitional process, and distort the proper formation of the *voluntas*. In this regard, however, a clarification is necessary. A vice of will does not entail a discrepancy between will and declaration, as it acts exclusively upon the process of formation of the will itself, which nonetheless exists and is externally manifested in a coherent and formally correct manner. This principle is aptly captured, in the case of legal acts affected by duress, by the famous Latin maxim *coacta voluntas tamen voluntas est*.<sup>3</sup>

Hence, the problems relating to the relevance of vitiated consent operate on a different analytical level than the tension between will and declaration, an issue resolved with diametrically opposed solutions by the proponents of the *Willenstheorie* and of the *Erklärungstheorie*. As has been observed, it would probably be more accurate to frame this matter in terms of a discrepancy between the actual will (that is, a real but defectively formed will, consistently expressed to the outside) and the hypothetical will, namely the will that the party would have held in the absence of the vitiating element.

Nonetheless, the two themes – the vices of the will and the theoretical opposition between the two theories just mentioned (with their respective correctives) – intersect and influence one another, particularly in the phase of assigning evidently different weights to the will and to its external manifestation (Trabucchi 1937, 58 f.). Where, for instance, one embraces the

---

<sup>2</sup>The most effective exposition of the theory of precepts in Germany is due to Larenz 1930, 34 ff., according to which the declaration of intent is a declaration of validity. It should also be remembered, in the Italian doctrine, the construction of Betti 2002, 55 f., who based the principle of self-responsibility on the conception of the transaction as binding self-regulation.

<sup>3</sup>Latin maxim derived from Paul. 11 *ad ed.* 4.2.5.21: *Si metu coactus adii hereditatem, puto me heredem effici, quia quamvis si liberum esset noluissem, tamen coactus volui: sed per praetorem restituendus sum, ut abstinendi mihi potestas tribuatur.*

*Willensdogma* and attributes paramount value to the inner will, one would be naturally inclined to recognize far-reaching consequences to its defects.

Therefore, three distinct analytical levels may be identified: (i) the discrepancy between a correctly formed will and its corresponding declaration; (ii) the absence of will altogether in relation to a declaration nonetheless made; and (iii) the divergence between a real yet vitiated will, externally expressed in coherent form, and the *hypothetical* will, as it would have manifested absent the vitiating factor.

On the basis of these premises, it is appropriate to turn to the analysis of the vices of the will and to the historical path that led from their dispersed and pragmatic emergence in Roman legal practice to their systematic dogmatic classification in the rigid conceptual framework of Pandectist legal thought, through the creation of a dedicated category. The objective is to assess in what terms and within what limits one can speak of the normativity of the *voluntas*.

## 2. The vices of the will: Mistake, duress, fraud and beyond

I. 4.13.1: *Verbi gratia si metu coactus aut dolo inductus aut errore lapsus stipulanti Titio promisisti quod non debueras promittere, palam est, iure civili te obligatum esse, et actio qua intenditur dare te oportere, efficax est: sed iniquum est te condemnari, ideoque datur tibi exceptio metus causa aut doli mali aut in factum composita ad impugnandam actionem.*

For example, if you, coerced by duress or induced by fraud or mistake, promised to the stipulating Titius something you should not have promised, it is clear that under the *ius civile* you are bound, and the action by which you are required to perform is effective; but it would be unjust for you to be condemned, and therefore you are granted the *exceptio* on the grounds of duress, malicious fraud, or a fact-based exception to oppose the claim (trans. by the Author).

This passage from Justinian's *Institutiones*, partially derived from Gaius' *Institutiones* (4.115-117),<sup>4</sup> is one of the very few sources in which the

---

<sup>4</sup>Gai 4.115-117: 115. *Sequitur, ut de exceptionibus dispiciamus.* 116. *Comparatae sunt autem exceptiones defendendorum eorum gratia, cum quibus agitur. saepe enim accidit, ut quis iure civili teneatur, sed iniquum sit eum iudicio condemnari. uelut si stipulatus sim a te pecuniam tamquam credendi causa numeraturus nec numerauerim. nam eam pecuniam a te peti posse certum est. dare enim te oportet, cum ex stipulatu tenearis; sed quia iniquum est te eo nomine condemnari, placet per exceptionem doli mali te defendi debere. item si pactus fuero tecum, ne id, quod mihi debeas, a te petam, nibilo minus id ipsum a te petere possum dari mihi oportere, quia obligatio pacto conueno non tollitur; sed placet debere me*

traditional vices of the will – fraud, duress and mistake – appear together. It reflects, however, a highly specific perspective, representative of sixth-century legal thought, focused on identifying the procedural mechanisms available to block the enforcement of an action.

The conceptualization of the vices of the will as a systematic category was, in fact, the result of the conceptual reorganization introduced from Jusnaturalism onwards, whereas Roman jurists, by contrast, occasionally grouped such figures together, primarily with reference to the procedural remedies applicable to them. For this reason, a significant dogmatic gap emerges between the approach adopted by Roman jurisprudence and that of the doctrinal constructions developed between the late nineteenth and early twentieth centuries – constructions which, relying on the texts of the Justinianic compilation, nonetheless partly betray the spirit of the original sources.

While the centuries-long tradition of Romanist scholarship, dating back to the Glossators and continuing without interruption, has produced ever more refined theories of fraud, duress, and mistake (we can think, just to give a well-known example, of the enucleation of the notions of *dolus causam dans* and *dolus incidens*) (Wacke 1977, 184-246; Gordley 2000, 93-117), a decisive turning point in the doctrinal elaboration of the intention to be legally bound, its vices, and its normative role in private law may be identified in the rationalist conception of the *legal/juridical subject*. The subject is no longer the one who is subject to the *ius*; *subiectum*, or *subiectum iuris*, is now conceived as the holder of rights (Stolfi 2019, 59 ff.). This semantic shift expresses a profound transformation in legal theory, one which also impacts the theory of the legal act, now regarded as the highest expression of the individual's *voluntas*. The vices of the will, destined to become a distinct legal category, increasingly gain prominence as they are seen to affect the formation of will and thus undermine what had come to be regarded as a fundamental value: the freedom of the individual in shaping his *voluntas*.

By limiting the category of vices of will to the three traditional figures of fraud, duress and mistake, the rationalist legal system excluded other circumstances that had historically influenced the process of will formation, or the reliance of third parties – for example, *laesio enormis* or, from the perspective of the third party, simulation. In modern European legal systems, thus, the reasoning has been based on the concepts of nullity, voidability or

---

*petentem per exceptionem pacti conuenti repelli. 117. In his quoque actionibus, quae non in personam sunt, exceptiones locum habent. uelut si metu me coegeris aut dolo induxeris, ut tibi rem aliquam mancipio dem, tua est; sin eam rem a me petas, datur mihi exceptio, per quam, si metus causa te fecisse uel dolo malo arguero, repelleris. item si fundum litigiosum sciens a non possidente emeris eumque a possidente petas, opponitur tibi exceptio, per quam omni modo summoueris.*

rescissibility (with significant divergences among different codes) to address flawed legal acts (Pontoriero 2020, 139-238), referring these exclusively to the modern vices of will and assigning other phenomena to distinct legal disciplines.

From this point of view, the rigid conceptual framework into which the Roman tradition has been retroactively forced represents a marked discontinuity from the empirical legal experience reflected in the Roman sources.

The philosophical foundation of the distinction between willing and unwilling is to be found in Aristotle, who in the *Nicomachean Ethics* differentiates between the generic concept of volition (*boúlesis*) and *deliberate voluntary act* (*probáiresis*).<sup>5</sup> The latter denotes rational decision-making, which may not coincide with mere will: one may will what one cannot rationally choose (Gazzolo 2023, 864).

In the *Nicomachean Ethics*, Aristotle also clearly distinguishes between voluntary and involuntary actions, introducing a third category of so-called *mixed actions*.<sup>6</sup> This is the case of those performed under fear of a greater harm.<sup>7</sup> While absolute coercion renders an action involuntary (*e.g.* a man blown by the wind), relative constraint – which modern theory would classify as a disturbance of the will-formation process – preserves the voluntary character of the act. Those who act under threat still choose to act (D’Atri 2018, 227-236).<sup>8</sup> Aristotle’s analysis also reveals how the distinction between voluntary and involuntary actions bears directly on legal responsibility and imputability (D’Atri 2018, 232; Gazzolo 865).

In Roman law, a particularly significant perspective concerns the use, both in the Republican era and in the Imperial age, of a term whose legal meaning is central to the question of normative (*i.e.*, regulatory) will: *invitus*.<sup>9</sup>

The term *invitus* designates both the person who actively opposes an act, expressing dissent, and the person whose consent is not proven. The sources clearly attest to the semantic ambivalence of the term:

Ulp. 8 *ad ed.* D. 3.3.8.1: *Invitus procurator non solet dari. invitum accipere debemus non eum tantum qui contradicit, verum eum quoque qui consensisse non probatur.*

<sup>5</sup> Arist. Et. Nic. III, 1111b.

<sup>6</sup> Arist. Et. Nic. III, 1110a, 11-14

<sup>7</sup> Arist. Et. Nic. III, 1110a, 4-5.

<sup>8</sup> It is possible to glimpse in these reasonings of Aristotle the logical presuppositions of Savigny’s theory on the will and on the vices of the will.

<sup>9</sup> See De Cristofaro, in this volume, particularly 293 ff.

A *procurator* is not normally appointed against one's will. We must interpret '*invitus*' as referring not only to the one who expressly objects, but also to the one whose consent has not been established (trans. by the Author).

Ulp. 17 *ad ed.* D. 8.2.5: *Invitum autem in servitutibus accipere debemus non eum qui contra dicit, sed eum qui non consentit. ideo Pomponius libro quadragensimo et infantem et furiosum invitos recte dici ait: non enim ad factum, sed ad ius servitutis haec verba referuntur.*

In the matter of servitudes, we must consider as '*invitus*' not as referring to one who voices opposition, but to one who does not consent. Accordingly, Pomponius, in the fortieth book, rightly states that both an infant and a person of unsound mind are to be regarded as *invitus*: these terms relate not to the fact, but to the right of servitude (trans. by the Author).

Ulp. 3 *ad l. Iul. et Pap.* D. 23.2.45.5: *Deinde ait lex 'invito patrono': invitum accipere debemus eum, qui non consentit ad divortium: idcirco nec a furioso divertendo solvit se huius legis necessitate nec si ab ignorante divorterit: rectius enim hic invitus dicitur quam qui dissensit.*

The law then states: '*invito patrono*': we must interpret as *invitus* the one who does not consent to the divorce. Therefore, the woman is not released from the legal obligation if she separates from an insane man or divorces without the latter's knowledge: for in this context, '*invitus*' is more properly said of the one who has not consented, rather than of the one who has dissented (trans. by the Author).

From these sources, two key conclusions can be drawn. First, as already highlighted, the term *invitus* admits at least two distinct technical-legal meanings: *is, qui contradicit* (he who dissents) and *is, qui non consentit* (he who does not consent). Second, the sources clearly affirm that individuals who are unable to validly express consent, such as the *infans* or the *furiosus*, or those lacking the material possibility of consenting (*e.g.*, the *ignorans*) must, in all cases, be considered *inviti*.

This clarification brings us back to the conceptual gap that separates Roman legal thought from modern and contemporary systems regarding the categories of legal will, its absence, and its vitiation.

The rigid dogmatism that characterizes the continental legal systems has forced the various institutions into well-defined frameworks. With regard to the legal act – even in jurisdictions, such as Italy, where this construct is not explicitly codified – the tendency towards formalism has produced a

system of finely fragmented categories, under which nullity, voidability, or rescissibility are attributed according to whether the will is absent, defective, or otherwise impaired. Aside from the physiological role of judicial interpretation, modern systems are thus relatively inflexible – and therefore slow to adapt – to the evolving needs of legal practice.

Roman law (especially in the classical period), stood in stark contrast to this schematic rigidity. In assessing the will of the acting party, the Romans essentially relied on the binary opposition *volens/invitus*; and it was through the nuanced application of this adjective, *invitus*, that they captured a wide array of situations, all referable to cases in which the will was either not fully formed or not correctly formed.

It is precisely in this perspective that the distance between Roman legal experience and modern dogmatic vision regarding the evaluation of the binding nature of the negotiating will becomes more apparent. Despite having laid the foundations for distinguishing between *absence of will* and *viti-ated will*, and despite the Roman jurists' meticulous attention to a wide range of disabling conditions, they nonetheless continued to rely primarily on the much broader and more inclusive dichotomy *volens/invitus*.

### 3. *Invitus*: From classical jurists to 19<sup>th</sup> scholars of Roman law

*Invitus* occurs in a wide variety of contexts, consistently conveying the idea of someone who does not wish or dissents, sometimes also referring to someone who, despite formally expressing consent, does so as a result of circumstances that have compromised the proper formation of their will to contract.<sup>10</sup> The use of *invitus* in the texts of Roman jurists is the subject of another study in this volume and to which I refer.<sup>11</sup> For our purposes, it will suffice to examine a few particularly significant texts that are relevant to the historical and historiographical reconstruction of the category of *non-will*.

A noteworthy perspective on the relationship between *invitus* and *dolus*, albeit in a context unrelated to contractual relations and from a reversed angle (that of the *volens/dolus malus* opposition), may be drawn from the sources concerning the *interdictum de homine libero exhibendo*.

Ulp. 71 *ad ed.* D. 43.29.3.5: *Si quis volentem retineat, non videtur dolo malo ritenere. Sed quid si volentem quidem retineat, non tamen sine*

---

<sup>10</sup> S.v. *Invitus*, in Kübler 1937, 917-920.

<sup>11</sup> See De Cristofaro, in this volume, particularly 293 ff.

*calliditate circumventum vel seductum vel sollicitatum, neque bona vel probabili ratione hoc facit? Recte dicitur dolo malo retinere.*

If someone detains a consenting person, it is not considered that he does so with fraudulent intent. But what if the person, although formally consenting, has been cunningly deceived, seduced, or incited, and the detention lacks a good or plausible justification? In that case, it will be correctly said that the detention is fraudulent (trans. by the author).

This raises the question whether one must also consider as *invitus*, that is, *non-volens*, the individual who gives consent as a result of deception and is therefore a victim of *dolus malus* (Lambertini 1980, 21). By analogy, a person who accepts an inheritance under coercion may likewise be deemed *invitus*. In such a case, fear (*metus*) alters the proper formation of the *voluntas*:

Pap. 30 *quaest.* D. 29.2.85: *Si metus causa adeat aliquis hereditatem, fiet ut, quia invitus heres existat, detur abstinendi facultas.*

If someone accepts an inheritance under the influence of fear, he will be deemed an unwilling heir (*invitus heres*), and will therefore be granted the right of abstention (trans. by the Author).

On the basis of these sources, it seems possible to draw some general indications regarding the importance attributed, especially in classical Roman law, to the legal will (*voluntas*) and to the circumstances that could affect its actual existence and proper formation.

First, a clear conceptual distinction was made between *volens* and *invitus*.

Second, although from a strictly logical standpoint, the individual who acts under fraud or duress should still be considered *volens* (e.g., *tamen coactus volui*), Roman jurists nonetheless recognized that fraud or duress disrupted the process of volitional formation to such an extent that the agent could legitimately be classified as *invitus*.<sup>12</sup> Third, and most crucially, the qualification of an agent as *invitus* provided the basis for access to specific remedies under the *ius honorarium*, aimed at procedurally neutralizing the effects of juridical acts tainted by a defective will.

With regard to the legal *voluntas*, Roman jurists (despite the asymmetrical development of the *ius civile* and the *ius honorarium* in relation to what modern legal theory would classify as absence or defect of will)

---

<sup>12</sup>Partly different considerations apply to the error, given the difficult legal recognition of the error in its various configurations. See Galeotti, in this volume, particularly 197 ff.

nonetheless resorted to the dichotomy *volens/invitus* as a broad conceptual framework for encompassing all cases of impaired volition, without attempting to rigidly circumscribe the category.

A similar interpretative flexibility of the meaning surrounding *invitus* has, however, been lost in the course of the development of the so-called Roman legal tradition. The intensive effort aimed at the dogmatic organization of the legal institutions, initiated with Jusnaturalism and culminated in the constructions of the Pandectists, while undoubtedly contributing to the advancement of modern legal theory, came at the cost of impoverishing the interpretative richness of Roman jurisprudence. The semantic trajectory of *invitus* is emblematic of this phenomenon.

#### 4. The semantic eclipse of *invitus*: From Roman jurisprudence to modern dogmatics

The legal will (*voluntas*) becomes the object of meticulous investigation in order to identify indicators of validity, proper formation, and coherent external expression. The theories just presented (in particular the *Willenstheorie* and the *Erklärungstheorie*) are built precisely on the normative weight attributed to those indicators. What is notably lost in this transition, and particularly relevant here, is the broader and more fluid notion of non-will (*invitus*) as elaborated by Roman jurists. This notion gradually disappears, supplanted by scholarly efforts to isolate and define specific instances of absent or flawed *voluntas*.

It is only with the advent of Jusnaturalism that the unitary category of vices of the will begins to emerge as an autonomous subject of inquiry. In the works of Grotius (1625, b. 2, chap. 17, par. 17) and Pufendorf (1672, b. 3, chap. 6, par. 8), fraud, duress and mistake are increasingly grouped as circumstances that affect the freedom of the will. From the standpoint of legal theory, this connection between freedom and the internal process of will formation marks a decisive moment in the conceptual transition from the Roman dichotomy of *volens/invitus* to the modern distinction between absence and vitiation of will.

The primacy of free will also characterizes French legal Rationalism, a school of thought derived from Jusnaturalist foundations. The works of Domat (1689, part 1, b. 1, tit. 18)<sup>13</sup> and Pothier (1761, 24 ff.), based on an interpretation of numerous texts of the Digests conditioned by the Roman tradition that has overlapped with the original thought of the Roman jurists,

---

<sup>13</sup> Vices of the conventions.

address the vices of will as a cohesive doctrinal category. This is the approach that is also institutionalized in the Code Napoléon, whose art. 1109 provides a canonical definition of valid consent:

*Il n'y a point de consentement valable, si le consentement n'a été donné que par erreur, ou s'il a été extorqué par violence ou surpris par dol.*

There is no valid consent if consent has been given only by mistake, or if it has been extorted by duress or obtained through fraud (trans. by the Author).

The German BGB also reflects the influence of Junsnaturalist thought, particularly in its elevation of the will as the foundation of legal validity. Under this model, defects of the will render a legal act voidable per se, to the point that the distinction articulated by Savigny (1840, 440-447) between proper mistake (defective will) and improper mistake (absent will) is functionally obliterated: in both cases, the legal act may be voided, regardless of whether the mistake was excusable or recognizable.<sup>14</sup>

Modern and contemporary codes, in general and with some natural deviations, alternately reproduce the paradigms of the French or German codes.

From a theoretical perspective, however, what is definitively lost in the nineteenth- and twentieth-century legal literature on contractual *voluntas* is the semantic richness that Roman jurists had attributed to the notion of *invitus*. Only scattered references remain, including those contained in a debate that saw mainly two eminent scholars of Roman law as protagonists, around the early 1900s: Fadda and Perozzi.

The dispute centered on the comparison between the rules of Roman law on the subject of co-ownership (*communio*) and those relating to collegial magistracies. It was undisputed that, in collegial magistracies, each magistrate could exercise his powers unless and until a colleague intervened with

---

<sup>14</sup> § 119 (*Anfechtbarkeit wegen Irrtums*): (1) Wer bei der Abgabe einer Willenserklärung über deren Inhalt im Irrtum war oder eine Erklärung dieses Inhalts überhaupt nicht abgeben wollte, kann die Erklärung anfechten, wenn anzunehmen ist, dass er sie bei Kenntnis der Sachlage und bei verständiger Würdigung des Falles nicht abgeben haben würde. (2) Als Irrtum über den Inhalt der Erklärung gilt auch der Irrtum über solche Eigenschaften der Person oder der Sache, die im Verkehr als wesentlich angesehen werden. § 123 (*Anfechtbarkeit wegen Täuschung oder Drohung*): (1) Wer zur Abgabe einer Willenserklärung durch arglistige Täuschung oder widerrechtlich durch Drohung bestimmt worden ist, kann die Erklärung anfechten. (2) Hat ein Dritter die Täuschung verübt, so ist eine Erklärung, die einem anderen gegenüber abzugeben war, nur dann anfechtbar, wenn dieser die Täuschung kannte oder kennen musste. Soweit ein anderer als derjenige, welchem gegenüber die Erklärung abzugeben war, aus der Erklärung unmittelbar ein Recht erworben hat, ist die Erklärung ihm gegenüber anfechtbar, wenn er die Täuschung kannte oder kennen musste.

an *intercessio*. Whether the same principle applied to co-owners, however, was open to question, and the answer hinged on the proper interpretation of *invitus*.

According to Perozzi (1906, 475 and fn. 1; 1912, 355-386), co-owners, or more generally the co-holders of a right, could not validly act without the consent of the others. In his reading of the sources,<sup>15</sup> the *ius prohibendi* was triggered even in the mere absence of consent: expressions such *invito altero* and *invitis ceteris* referred to a state of mind, not necessarily to a material act of opposition. Thus, *invitus* should be understood as both *without consent* and *against consent*. For Fadda (1910, 139-150), however, *invitus* cannot always be understood in the sense of one whose consent cannot be proved. It is precisely the sources invoked by Perozzi in which *invitus* is placed alongside the *ius prohibendi* that would suggest, according to Fadda, that *invitus* should be understood as *against consent* and that therefore the proof of unwillingness must necessarily be traced to a material act of prohibition. By analogy, the rules applicable to collegial magistracies should apply also to co-ownership.

As can be easily observed from the contrast of opinions between Fadda and Perozzi and transferring these reasonings to the legal act, the semantic breadth of *invitus* and its ability to encompass various nuances of *non-will* is absolutely evident. As is evident from this exchange, the conceptual breadth of *invitus* and its capacity to capture multiple shades of non-will emerges with striking clarity when transposed to the context of the legal act. While the classical jurists employed the term as a flexible legal marker to encompass diverse impairments of volition, modern dogmatic systems have progressively reduced its semantic field, transforming a once-fluid category into a series of rigid taxonomies.

## 5. From *invitus* to the basics of the vulnerability

Returning, then, to the problem of willingness and unwillingness, and drawing upon both the philosophical heritage of Aristotle's theory of mixed actions and the semantic elasticity of *invitus* in Roman legal sources, one may uncover a conceptual space that escapes the constraints of modern dogmatic logic. This space allows for the juridical recognition of a broader spectrum of circumstances, codified or not, that may affect the formation and authenticity of the legal will (*voluntas*).

Within this broader framework, particular attention must be paid to

---

<sup>15</sup>Pap. 7 *quaest.* D. 10.3.28; Marcell. 6 *dig.* D. 8.5.11.

conditions of vulnerability: situations in which a subject may appear to give consent, but in fact does so from a position of physical or psychological subjection, whether natural or externally induced. In such cases, the subject may will what they would not otherwise have willed, had they not been placed in a state of constraint or dependency. This is the field, for example, in which the European legislator is moving, with the special consumer discipline,<sup>16</sup> where asymmetries of information, power, and competence are recognized as factors capable of compromising free and informed volition. Here, vulnerability is not merely a sociological notion, but a juridically relevant condition, one that compels the law to re-evaluate the assumptions of autonomy, consent, and accountability underlying private transactions.

## References

- Bähr O. (1875), “Über Irrungen im Kontrahieren”, in *Jherings Jahrbücher*, 393-427 = *Gesammelte Aufsätze*, Vol. I, Leipzig, F.W. Grunow, 1895, 1-51.
- Bekker E.I. (1889), *System des heutigen Pandektenrechts*, Vol. II, Weimar, Böhlau.
- Betti E. (2002), *Teoria generale del negozio giuridico*, 2<sup>nd</sup> ed., Napoli, ESI.
- Brutti M. (1980), “La sovranità del volere nel sistema di Savigny”, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 9, 265-300.
- Domat J. (1689), *Les loix civiles dans leur ordre naturel*, Vol. I, Paris, Chez Jean Baptiste Coignard.
- Gordley J. (2000), “Good faith in contract law in the medieval *ius commune*, in Good Faith in European Contract Law”, in R. Zimmermann, S. Whittaker (eds.), *Good Faith in Europea Contract Law*, Cambridge, Cambridge University Press, 93-117.
- Grotius H. (1625), *De iure belli ac pacis libri tres, in quibus ius naturæ et gentium item iuris publici præcipua explicantur*, Parisiis, Apud Nicolaum Buon, in via Jacobæa, sub signis S. Claudij, et Hominis Silvestris.
- Kübler B. (ed.) (1937), *Vocabularium Iurisprudentiæ Romanæ 1/3 inaedificio – ipse*, Berlin-Boston, De Gruyter.
- Lambertini R. (1980), *Plagium*, Milano, Giuffrè.
- Larenz K. (1930), *Die Methode der Auslegung des Rechtsgeschäfts. Zugleich ein Beitrag zur Theorie der Willenserklärung*, Leipzig, Deichert.

---

<sup>16</sup>But to give an example relating to a very recently drafted Code, we can refer to the Chinese Code, which in art. art. 151 provides for the possibility of annulling a legal act if one party exploits, among other possible events, a serious situation in which the other party finds himself or his lack of capacity to judge to conclude a manifestly unjust legal act.

- Perozzi S. (1906), *Istituzioni di diritto romano*, Vol. I, Firenze, Barbera.
- Perozzi S. (1912), “Un paragone in materia di comproprietà”, in *Mélanges P.F. Girard*, Vol. II, Paris, Librairie Arthur Rousseau, 355-386.
- Pontoriero I. (2020), *I vizi del consenso nella tradizione romanistica*, Torino, Giappichelli.
- Pothier R.-J. (1761), *Traité des obligations*, Vol. I, Paris, Debure.
- Pufendorf S. (1672), *De Jure Naturae Et Gentium Libri Octo*, Londini Scannorum, Sumtibus Adami Junghans imprimebat Vitus Haberegger.
- Stolfi E. (2019), “Per una genealogia della soggettività giuridica: tra pensiero romano ed elaborazioni moderne”, in P. Bonin, N. Hakim, F. Nasti, A. Schiavone (eds.), *Pensiero giuridico occidentale e giuristi romani. Eredità e genealogie*, Torino, Giappichelli, 59-88.
- Trabucchi A. (1937), *Il dolo nella teoria dei vizi del volere*, Padova, Cedam.
- von Jhering R. (1860-1861), “*Culpa in contrahendo* oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen”, in *Jherings Jahrbücher*, 1-112.
- von Savigny F.C. (1840), *System des heutigen Römischen Rechts*, Vol. III, Berlin, Veit.
- Wacke A. (1977), “*Circumscribere*, gerechter Preis und die Arten der List (*Dolus bonus und dolus malus, dolus causam dans und dolus incidens*) unter Berücksichtigung der §§ 138 Abs. II und 123 BGB”, in *ZSS* 94, 184-246.
- Windscheid B. (1887), *Lehrbuch des Pandektenrechts*, Vol. I, 6<sup>th</sup> ed., Frankfurt a.M., Rütten & Loening.



## Chapter 14

# THE ABSENT *VOLUNTAS*: ROMAN SEMANTICS AND MODERN DOGMATICS

Carlo De Cristofaro

*ABSTRACT: This contribution explores the conceptual absence of a juridical category of ‘non-will’ in both Roman and modern legal thought. It reconstructs the Roman semantic field of volens, invitus and nolens as a model of interpretive elasticity, contrasting it with the rigid dichotomies of modern dogmatics, where voluntas is reduced to an abstract, binary construct. The chapter argues that Roman jurisprudence tolerated and operationalised imperfect voluntas, offering a hermeneutical sensitivity to constrained agency that modern legal categories fail to capture. It concludes by suggesting that a recovery of this Roman elasticity can enrich contemporary debates on consent, vulnerability and juridical agency.*

*KEYWORDS: Voluntas – Invitus – Ancient and contemporary legal thought.*

*SUMMARY: 1. Framing the question of ‘non-will’. – 2. Roman semantics: Volens, invitus, nolens. – 3. The conceptual eclipse: How modern law lost ‘non-will’. – 4. Lessons from Roman elasticity: Categories, language and hermeneutics. – 5. Implications for vulnerability and consent today. – References.*

### 1. Framing the question of ‘non-will’

It has been incisively observed by Aldo Schiavone – through an expression now canonical, which serves as the conceptual point of departure for this inquiry – that law (*ius*) is an ‘invention’ (Schiavone 2005, 1 ff.). By this, Schiavone underscores that law, as an autonomous, self-referential and technical form of knowledge (a discipline capable of structuring social life according to principles of rationality and coherence) constitutes a singular creation of Roman civilisation. Other societies undoubtedly knew normative orders, but only in Rome did this phenomenon crystallise into *ius* in its proper sense, detaching itself from morality, religion and politics, and thereby founding a professionalised juridical discourse governed by its own linguistic, epistemological and methodological protocols. This discourse became a foundational matrix of Western legal and cultural identity, providing a shared grammar of legal science that unified disparate political and cultural spaces (Finazzi 2017, 2 ff.).

The ‘invention’ of law as an autonomous discipline necessarily entailed,

over time, the construction of a dogmatic architecture: a conceptual edifice composed of general categories (such as *persona*, *obligatio*, *dominium*), formalised institutions (like *emptio venditio*, *stipulatio*), interpretive principles, and a refined technical vocabulary, all bearing the hallmark of a rational and self-contained, internally coherent system. However, it is crucial to recognise that this architecture never assumed the form of a systematic dogmatics in the modern sense. Indeed, Roman law remained, throughout its development, a fundamentally casuistic and pragmatic jurisprudence, even when it was systematised by the Tribonian commission in the Justinianic compilation. This pragmatism, traces of which are preserved in the *Corpus Iuris* itself and in numerous other extant legal sources,<sup>1</sup> was not symptomatic of conceptual poverty; rather, it reflected a semantic richness wherein *voluntas* was perceived as encompassing both rational intention and desire, in contrast to the rigid Aristotelian and Stoic distinctions (Maso 2021, 74 ff.).

The dogmatism retrospectively attributed to Roman law crystallised only later: it is precisely the modern jurist who, looking backwards, extracted from the Roman casuistry the foundational categories around which contemporary legal dogmatics is organised. This historical curve marks the transition from casuistic and rhetorical method to the creation of abstract dogmatic categories within Italian legal science, emblematic of a broader European transformation (Nardoza 2021, 75 ff.) Even the very concept of ‘will/*voluntas*’ (and its modern centrality) emerges from a complex philosophical sedimentation absent in classical frameworks, retrojected onto antiquity by post-scholastic elaborations (Brann 2014, 11 f.). Recent scholarship has reinforced this insight, emphasising that Roman legal culture constituted an autonomous epistemology, distinct from philosophy and rhetoric, forging an independent legal technicity whose professional and hermeneutic autonomy is itself a Roman ‘invention’ (Mantovani 2018a, 17 ff.; Mantovani 2018b; Peppe 2019, 39 ff.).

The legacy of this Roman innovation endures: modern legal dogmatics, including codified civil law, is nothing but the historical continuation of that inaugural gesture through which law was constituted as an independent normative science. The nineteenth-century Pandectist system represents, in this sense, the apex of this genealogy, which originates in Rome and understands juridical analysis itself as a matter of conceptual precision and taxonomic ordering. Indeed, the persisting tension between casuistic pragmatism and systematic dogmatism can itself be traced to the Roman experience, where juridical forms and institutional practices were transfigured into conceptual

---

<sup>1</sup> Including the documents of legal practice, on which see Guasco and Bramante, in this volume, respectively 307 ff. and 323 ff.

structures with lasting influence across the Western tradition (Miceli 2023, XX f.; Cerami, Miceli 2023, 1 ff.)

Within this dogmatic panorama, the juridical category of *voluntas* emerges as a foundational axis: it is through *voluntas* that modern legal systems have sought to articulate not merely consent but the very architecture of legal obligation and responsibility.<sup>2</sup>

Contemporary doctrinal discourse<sup>3</sup> exemplifies this trajectory. The elaboration of *voluntas* as a central juridical concept reflects a systematic abstraction culminating in the nineteenth-century German *Willenstheorie*, where the legal act (*Rechtsgeschäft*) is conceived as an emanation of the autonomous creative will of the subject. The problematic tension between inner will and its external manifestation – resolved in favour of the former by voluntarist doctrine and in favour of the latter by *Erklärungstheorie* – generated a dogmatic landscape in which *voluntas* becomes not merely a premise but the principal analytical criterion for assessing validity, effectiveness, and responsibility.

This historical development is far from contingent: it constitutes the precise juncture at which modern dogmatics ‘decided’, within its conceptual grammar, that *voluntas* would serve as the privileged interpretive key to juridical normativity. Such a ‘decision’, framed as neutral dogmatic elaboration, reflected a broader cultural orientation, reproducing the modern image of the juridical subject as autonomous, self-transparent, and fully capable of mastering its declarations and intentions.<sup>4</sup>

This inquiry focuses precisely on this aspect. While acknowledging this tradition, this study seeks instead to shift the perspective, moving from an analysis of *voluntas* as a juridical category to the question of why a corresponding category of *non-will* is absent. That is, a conceptual space capable of capturing complex conditions of constraint, ambivalence, relational domination and normative heteronomy, in which juridical acts frequently unfold.

At the heart of juridical reflection lies a fundamental tension between

---

<sup>2</sup>For instance, in this volume see Piraino, particularly, 29 ff., who offers a detailed account of how contract has become a *locus* of normativity, wherein *voluntas* functions both as a principle of individual autonomy and as a site of heteronomous regulatory intervention. Galeotti (see in this volume, 49 ff.) similarly shows that this architectural function of *voluntas* was already discernible in Roman juristic constructions of *lex contractus* as an internal rule emerging from the reciprocal convergence of individual wills.

<sup>3</sup>See Scognamiglio, in this volume, particularly 273 ff., whose analysis provides an essential premise for the present inquiry (and from whose principal concepts this contribution will necessarily draw).

<sup>4</sup>These tracks are critically examined in contemporary civil law discourse: see, in this volume, Castronovo, 339 ff.; see also Grondona, 73 ff., who highlights the dynamic interplay between individual claims and systemic transformation.

*voluntas* as the (internal) subjective source of juridical effects and the normative architectures that capture, translate and at times suppress that will. This chapter does not presume to offer an exhaustive excavation of this tension – a task that would far exceed the scope of this contribution – but rather seeks to offer at least a preliminary exposure of a dimension that, while present in Roman juridical language, has remained conceptually underarticulated in both Roman<sup>5</sup> and modern legal dogmatics.

Indeed, Roman legal culture deployed a sophisticated vocabulary around *volens*, *nolens* and *invitus*, acknowledging that *voluntas* could encompass both rational decision and irrational impulse, a nuance carefully articulated by Cicero and Seneca through distinctions such as ‘*recta voluntas*’ (Maso 2021, 73 ff., 85 ff.; Cassan 2021, 116 ff.). However, as Roman legal semantics yielded to the architectural certainties of modern legal dogmatics – a transition well captured in the intellectual trajectories of conceptual jurisprudence (*Begriffsjurisprudenz*) – the elasticity of Roman *voluntas* was progressively eroded, supplanted by rigid bifurcations: valid versus invalid will, defective versus perfected consent, autonomy versus heteronomy.

This erosion is more than a chapter in intellectual history; it reflects a rigidity that continues to influence current doctrines of consent, vulnerability, and *voluntas* as a legal rule (*lex contractus*).<sup>6</sup>

Yet this crisis cannot be properly understood without interrogating the disappearance of the category of *non-will* from the matrix of legal classifications; a disappearance paradoxically consolidated within late nineteenth-century *Willenstheorie*, even as it sought to ground legal obligation in individual *voluntas* (Gordley 2025, 11 ff.). Roman legal culture, by contrast, tolerated and even theorised gradations of will that resist the binary logic of modern validity doctrines. The notion of *invitus* – not simply unwillingness, but a relational condition of constrained unwillingness under normative or factual pressure – testifies to this semantic sophistication.

---

<sup>5</sup> In the case of Roman sources, it must be acknowledged that this assumption itself reflects a hypothesis conditioned by the hermeneutic biases with which modern interpreters approach those materials; the silence of Roman legal texts on a fully elaborated category of *non-will* may thus be more a product of retrospective projection than historical fact.

<sup>6</sup> On *lex contractus*, see Galeotti, in this volume, particularly 55 ff. Moreover, as Ferrante incisively notes, for *voluntas* and *arbitrium* to become norm, they must undergo a continuous process of repositioning and rebalancing (Ferrante 2025, 7, but see also ff.). A similar preoccupation animates recent critical scholarship concerned with the fragmentation of the legal person (see Micklitz and Vettori 2025, 1 f.), where traditional conceptions of the autonomous juridical subject yield under the pressures of globalisation, digitalisation and epistemic shifts towards post-personalism.

The ambition of this chapter is therefore twofold: first, to reconstruct briefly the semantic framework within which Roman legal culture negotiated *volens*, *nolens*, and *invitus*, offering not an antiquarian catalogue of sources but a theoretical account of the interpretive elasticity of Roman *voluntas*; second, to trace the conceptual eclipse of *non-will* in the transition from Roman semantics to modern doctrinal structures, suggesting that this eclipse has impoverished not only the historical imagination of jurists but also their capacity to respond to contemporary phenomena of vulnerability, manipulation and soft coercion, phenomena that demand categories beyond the reductive alternatives of ‘will’ or ‘vitiating will’.

In doing so, this chapter situates itself as a general and metadogmatic contribution, distinct from the more philologically oriented analyses offered elsewhere in this volume.<sup>7</sup> Its purpose is to furnish a theoretical propaedeutic for the study of *voluntas* as a legal norm, rehabilitating the absent category of *non-will* as an indispensable element of juridical hermeneutics and normative construction.

## 2. Roman semantics: *Volens, invitus, nolens*

This chapter does not aim to provide an exhaustive inventory of the Roman sources in which *invitus* appears – as such a task would exceed the bounds of this contribution and require a dedicated monographic treatment –, since the richness and dispersion of the material (ranging across procedural, contractual, and status-related contexts) have been thoroughly explored in other analyses contained elsewhere in this volume.<sup>8</sup>

This methodological *caveat* must also reckon with the very structure of the *Corpus Iuris Civilis*, which today constitutes our main archive of Roman legal knowledge. It is well known that our understanding of Roman law relies on fragments editorially selected and reshaped, rather than on integral works reflecting juristic thought in its original form (Johnston 2015, 4). As Stagl cogently argues (Stagl 2023, 5 f., 11 ff., 43 ff., but also Stagl 2016), the *Corpus* – and, in particular, the Digest – does not faithfully reflect the juristic thought of the classical period, but is rather the product of a late-antique editorial and didactic project, shaped under the political and ideological imperatives of Justinian’s reign. The architecture we encounter today, often interpreted as an index of classical dogmatic rationality, is in fact the outcome of a compilation process that selected, excerpted, and rearranged juristic material according

---

<sup>7</sup> See, in this volume, the contributions by Pasquino, 241 ff., Guasco, 307 ff., Brantante, 323 ff., and partially Scognamiglio, 281 ff.

<sup>8</sup> See previous footnote.

to the priorities of sixth-century Constantinople, rather than embodying any putative systematic vision internal to the classical jurists themselves. The ‘dogmatic order’ of the Digest thus reflects an imperial ambition to codify and rationalise legal knowledge for a new normative and pedagogical context, and must therefore be approached critically by modern scholarship as an artefact of compilation rather than as a transparent window onto classical legal thought.

A further methodological qualification is necessary: the *corpus* of Roman law that constitutes our principal source today is not a transparent repository of the original volitional categories as conceived by Roman legal culture itself. Rather, as Ibbetson notes, it represents a legal tradition whose sources and evidences were progressively shaped by (the requirements of) evolving procedural frameworks, intellectual expectations, and imperial authority, implying that any reconstruction of Roman legal thought is necessarily mediated (Ibbetson 2015, 25 f.). As highlighted in contemporary scholarship (see Brutti 2018, 49 ff.), this layered formation prevents any unmediated reconstruction of ‘what the Roman jurists really thought’. The Digest, in particular, embodies a curated memory of Roman jurisprudence shaped by specific late-imperial contexts, which may obscure, rather than illuminate, the nuances of *volens*, *invitus*, and *nolens* as originally deployed. This awareness reinforces the focus of this chapter on paradigmatic examples rather than an exhaustive inventory.

Nevertheless, a selective reference to key *exempla* suffices to illustrate the semantic and normative elasticity embedded in the Roman treatment of *voluntas*. Roman legal culture did not conceive of *voluntas* as a discrete, atomic datum, extractable from context and reduced to a juridical event isolated from relational dynamics. As Donini incisively argues (Donini 2019, 45 ff.), the distinction between *ius* and *lex* is not merely historical or terminological but epistemic and structural: there can be no law (*lex*) without the mediating rationality of *ius*, which integrates, contextualizes, and transforms legislative prescriptions into operative normative structures. The interpretive and hermeneutic dimension (*ius*) thus constitutes not an adjunct, but the very condition of juridical meaning. This insight reinforces the view that Roman *voluntas*, far from being an isolated psychological fact – and also far from the Greek categories such as *boulesis* and *probairesis*, on which see Brann 2014, 29 f.; Galeotti, in this volume, 49 ff. –, is embedded in a relational and interpretive network, where normative effects emerge only through this sophisticated hermeneutic filter.

Instead, the semantic field traversed by words such as *volens*, *invitus*, and *nolens* evinces a subtle hermeneutic sensitivity to gradations of consent,

dissent, submission, and normative tension. This richness, irreducible to post-Enlightenment binaries of voluntariness and involuntariness, reveals a sophisticated legal epistemology in which *voluntas* emerges as inherently relational, contextual, and performative. This epistemology, for instance, anticipates a view of *voluntas* as structurally fragile and susceptible to conditions of vulnerability or dependence, long before its rigid dogmatic fixation in the categories of *error*, *dolus* and *metus*, as later systematised by the Pandectists. It aligns with a dynamic and interactive perspective in which consent-assent is understood not as mere adhesion but as ‘a will directed toward the will of another,’ and consent-agreement as ‘wills converging upon the same object’ (Cascione 2003, 1 ff., 16 ff.).<sup>9</sup>

At the core of this epistemology lies *invitus*, a term that defies facile translation as mere ‘unwillingness’ and also resonates (though in contrast) with Seneca’s notion of *voluntas* as an original disposition preceding rational assent (Maso 2021, 85 ff.). Rather, *invitus* signals the juridical recognition of a volitional state characterised by constraint, coercion, or extrinsic normative imposition (Forcellini 1864-1926a, 930), distinguishing itself from  *nolens*, which denotes the pure negative mirror of *volens* (Forcellini 1864-1926b, 381 ff.). The semantic distinction between  *nolens* and  *invitus* confirms that  *voluntas* was not conceptualized, in Roman legal culture, in purely internal or psychological terms but rather as situated within normative and procedural relations.

Illustrative examples abound. In the domain of obligations, the  *solutio pro invito debitore* provides a paradigmatic case:<sup>10</sup> as attested in  *Institutiones* 3.29 pr. and Digest 3.5.38, an obligation could be extinguished by a third party’s performance even  *invito debitore*, that is, even if the debtor opposed the payment. This principle, deeply rooted in Roman conceptions of legal utility and procedural economy, reveals that the effectiveness of juridical acts did not invariably depend on unambiguous or autonomous will. Indeed, the

---

<sup>9</sup>This relational understanding is particularly visible in the testamentary domain, where, as Beghini (in this volume, 223 ff.) demonstrates, Roman jurists calibrated their interpretations to accommodate both  *error* and the presumed intention of the  *testator*. A similar interplay shaped the contractual sphere, where, as Galeotti (see in this volume, 49 ff.) reconstructs, the  *id quod actum est* served as the interpretive hinge between the parties’  *voluntas* and the  *lex* governing their agreement (the so called  *lex contractus*). Comparable patterns appear in legal practice concerning women and minors, whose  *voluntas* was institutionally constructed as incomplete or dependent, as Bramante – see in this volume, 323 ff. – has shown in her analysis of legal acts from Campania and Egypt. Provincial legal practice likewise reveals, as Guasco – see in this volume, 307 ff. – demonstrates, that  *voluntas* was juridically constructed through documentary evidence, without strict conceptual separations between physical and moral violence.

<sup>10</sup>On the subject, see Pasquino, in this book.

debtor's volition, or its lack, could be treated as juridically irrelevant when the outcome benefited the debtor.

Further distinction is introduced by the well-known jurisprudential contrast (*ius controversum*) between Labeo and Paulus in Lab. 6 *pith. a Paul. epit.* D. 46.3.91: Labeo holds that a debtor who is present and explicitly refuses to be discharged cannot have the debt extinguished against his will (*non potest invitus a te solvi*), whereas Paulus provides a technical solution by which the creditor may achieve discharge through *novatio*, even in the debtor's presence and despite his explicit opposition. This episode not only illustrates the elasticity of Roman doctrine, but also signals a juridical imagination capable of accommodating imperfect or constrained *voluntas* as fully operative within the normative structure of obligations.

*Invitus* also figures prominently in domains as diverse as family law – where, for instance, the Digest denies the possibility of restoring natural children to *patria potestas inviti* (Mod. 1 *pand.* D. 1.6.11) – and property law, where it mediates tensions between individual autonomy and collective interest, as in the tolerance of burial in common *sepulchres etiam invitis ceteris* (Marc. 3 *inst.* D. 1.8.6.4), or the acquisition of servitudes *etiam invito fructuario* (Ulp. 18 *ad Sab.* D. 7.1.15.7). In each instance, *invitus* does not serve as a signal of nullity or juridical failure, but rather as an operative category through which Roman law registers and processes relational constraint within its normative architecture.

What emerges from this landscape is a fundamental elasticity in Roman semantics of *voluntas*, whereby law accommodates gradients of acceptance and resistance without collapsing into dichotomies of validity and invalidity. The juridical deployment of *invitus* thus foregrounds a contextual hermeneutics of will, attuned to the interplay between individual disposition – including its relation to the passions –, <sup>11</sup> normative structures, and social utility. Such a hermeneutic sensitivity, also extended to issues of interpretative obscurity (*obscuritas*) and ambiguity (*ambiguitas*), <sup>12</sup> is notably absent from the schematic constructions of post-classical dogmatics.

This semantic flexibility enabled Roman jurists to articulate doctrines responsive to phenomena that modern legal systems tend to scatter across disparate categories (duress, undue influence, procedural inequality, and

---

<sup>11</sup>For example, this is the case of *ira* (anger) and *impetus*, on which see Silla 2018, who shows that Roman jurisprudence sometimes treated anger as an ethically and socially tolerable (even legitimate) impulse, influencing both judgments on criminal responsibility and the moderation of penalties. The juridical significance of *ira* and *impetus* confirms the existence of a legal culture attentive not only to the factual condition of constraint (*invitus*), but also to the relational and moral quality of the passions shaping the will.

<sup>12</sup>See Burdese 1993; Masuelli 2015.

coercion). The ‘category’ of *invitus* did not require the sharp modern distinction between voidness and annullability; nor did it demand that juridical effects attach only to a pure, uncontaminated will. Rather, it acknowledged that juridical consequence and imperfect *voluntas* could coexist within the same normative space, provided that the equilibrium of interests and utility was preserved.

In short, the Roman semantics of *volens/invitus/nolens* reveals a landscape of interpretive nuance and pragmatic reasoning that modern dogmatics, in its pursuit of conceptual purity, has largely overlooked. The reflections offered in this chapter aim precisely to reclaim this lost elasticity, suggesting that the Roman conception of *voluntas* – and crucially, of non-*voluntas* – may still provide resources for a contemporary theory of juridical agency attentive to constraint, relationality, and imperfection.

### 3. The conceptual eclipse: How modern law lost ‘non-will’

The semantic sophistication of the Roman legal tradition, with its capacious understanding of *invitus* as an intermediate juridical condition between assent and dissent, did not survive the epistemic transformation inaugurated by modern conceptual jurisprudence. Contemporary dogmatics, indeed, inherited not only the texts of the Digest but also its compilatory architecture, which, as Stagl observes, was itself a late-antique construction shaped by pedagogical and imperial logics (Stagl 2023, 43). The very arrangement that nineteenth-century dogmatics adopted as a template for systematicity was, in fact, a compilatory artefact rather than an organic system.

The reconfiguration of legal science in the nineteenth century – particularly within the frameworks of the *Willenstheorie* (which led to the elaboration of *Willensdogma*, setting the juridical standard of «volition as a myth», on which expression see Brann 2014, 327 f.) and *Begriffsjurisprudenz* (see Solidoro 2010, 151 ff.)<sup>13</sup> – entailed not merely a new architecture of dogmatic categories, but a profound reduction of *voluntas* to an abstract, decontextualised manifestation of intention.

This reduction is evident in the intellectual projects of German Scholars such as Savigny, Puchta and Windscheid. In their hands, the juridical act (*Rechtsgeschäft*) was defined axiomatically as a ‘manifestation of will’

---

<sup>13</sup> Such a posture also resonates with earlier transformations already visible in the classical foundations of modern civil law (see Addis 2022, 13 ff., who notes that in Domat’s *Traité des lois* emerges a value-based hierarchical organization of norms, aimed at transcending the casuistic complexities of Roman legal semantics, in order to establish a rationalized, indeed ‘absolutist’, legal order).

(*Willenserklärung*), with *voluntas* posited as the exclusive source of normative effect.<sup>14</sup> Savigny's insistence that will (*voluntas*) is an independent event – and it alone is decisive for the formation of legal relations – exemplifies this disjunction: the relational and hermeneutic nuances embedded in the Roman semantics of *volens/invitus/nolens* were rendered irrelevant, subordinated to an abstract formalism unconcerned with purpose, circumstance, or relational constraint.<sup>15</sup>

As Gordley has acutely observed, this development did not merely represent an evolution in technical vocabulary but embodied a philosophical rupture: «[t]he very attempt to explain the law conceptually led to a will theory of contract» (Gordley 2025, 12), where the will was understood narrowly as the intention to produce a legal effect, abstracted from any inquiry into purposes or relational contexts. The conceptualisation of *voluntas* as a binary phenomenon – either present and therefore generative of obligation, or absent and therefore nullifying – effected what may properly be called a conceptual eclipse of the category of *non-will*.<sup>16</sup>

In this new dogmatic schema, categories such as coercion (*vis*), fear (*metus*), and error (*error*) were no longer integrated as instances of a broader grammar of constrained or imperfect will; they were reconfigured as external 'vices' affecting an otherwise pristine and autonomous *voluntas*. The legal imagination ceased to acknowledge conditions of normative ambivalence or relational constraint as analytically distinct; instead, the conceptual edifice demanded a clear separation between the will as pure intention and all that might 'impair' it.

The consequences of this eclipse are profound and enduring. Where Roman jurists had tolerated (indeed, theorised) a conceptual space where imperfect, constrained, or ambiguous will could nonetheless produce juridical effect, modern dogmatics ossified into a rigid taxonomy: nullity, annulment, validity; a scheme from which all intermediate or ambivalent categories were excised. This development apparently entailed the loss of a fluid conceptuality whereby *voluntas* could still be understood as related to *adpetitio* and

---

<sup>14</sup> See Scognamiglio, in this volume, particularly 274 f.

<sup>15</sup> As for modern scenarios, see Orlandi, in this volume, 3 ff., who seems to suggest that this epistemic reduction collapsed the nuanced interplay between will and juridical knowledge into rigid binarism.

<sup>16</sup> This eclipse also obscured the nuanced treatment of error in classical jurisprudence, where, as Galeotti (see in this volume, 197 ff.) has shown, jurists like Ulpian grounded contractual validity not simply in declarations but in the coherence of consensual structures and their capacity to realise the contractual *synállagma*. For contemporary times, see Chizzini, in this volume, particularly 141 ff., who notes that this eclipse is inseparable from the historical passage from *voluntas* to rule as the *locus* of juridical normativity.

impulse, as Roman authors allowed for a *voluntas* stemming from irrational tension (Maso 2021, 85).

Even as late nineteenth-century theorists such as Windscheid struggled with doctrinal difficulties, the dogmatic form persisted, resistant to any semantic elasticity. The eclipse of *invitus* as a juridically meaningful state thus exemplifies the broader foreclosure of interpretive nuance that characterises the triumph of formalist legal thought. On the other hand, the modern eclipse of *non-will* is thus intertwined with what Donini identifies as the impoverishment of legal consciousness itself: a transition from the nuanced interplay of *ius* and *lex* to a rigid legal positivism in which *lex* becomes sovereign and *ius* is reduced to mere exegesis (Donini 2019, 55 ff.).

It is this foreclosure that contemporary legal theory must now confront, for it continues to shape the categories through which modern law grapples with phenomena such as vulnerability, coercion, informational asymmetry, and soft constraint. The loss of *non-will* as a juridical category has deprived jurists not only of a precise language, but also of conceptual resources.

#### 4. Lessons from Roman elasticity: Categories, language and hermeneutics

The Roman legal tradition exemplified an interpretive approach distinct from later systematic dogmatism: marked by semantic flexibility, pragmatic adaptation, and an awareness of the relational context of *voluntas*, an attitude that endures today.<sup>17</sup> Roman legal culture did not subordinate legal language to axiomatic coherence, but pursued a fluid hermeneutics (*prudentia*) attentive to social practice and normative context.

At the core of this interpretive *ethos* lies the recognition that *voluntas* was not a unitary psychological state but a performative phenomenon, always articulated within a web of institutional roles and relational asymmetries. The Roman juristic approach was animated not by a quest for axiomatic coherence or rigid dogmatic purity, but by a pragmatic hermeneutics of case resolution, deeply embedded in rhetorical traditions. As Honsell reminds us (Honsell 2004), the celebrated *verba-voluntas* opposition was not the expression of an abstract theoretical antinomy, but a flexible argumentative repertoire, a toolkit available to jurists and advocates alike for justifying alternative interpretive outcomes.

Recovering this rhetorical-dialectical posture is key to rethinking modern

---

<sup>17</sup> See, for example, D'Onofrio in this volume, 359 ff., on the role of *arbitrium* as an interpretive hinge between *voluntas* and normative determination.

dogmatics' false conceptual dichotomies. The juridical vocabulary of *volens/invitus/nolens* was thus not simply descriptive, but operative: it structured the conditions under which juridical effects could be produced even in the absence of 'pure' (*i.e.*, unconditioned) consent. This operativity extended to procedural contexts as well: for example, the very notion of *actio* reflected a dialogic interplay between the plaintiff's *voluntas* and the formal framework of procedural norms.<sup>18</sup>

The elasticity of this semantic framework is more than an antiquarian interest: it provides a valuable hermeneutic model capable of addressing complexity and avoiding reductive binaries.<sup>19</sup> The Roman tolerance for intermediate categories such as *invitus* apparently allowed law to register forms of constrained agency without necessarily invalidating juridical transactions or collapsing into moralistic paternalism. This hermeneutic flexibility permitted a contextual calibration between private autonomy and social utility, between individual disposition and collective needs.<sup>20</sup>

In contrast, the conceptual architecture erected by modern legal dogmatics, as Micklitz and Vettori have aptly observed, has reified the abstract subject of will as an autonomous monad, thereby obscuring the inherently relational and fragile character of juridical agency (Micklitz, Vettori 2025, 3). The normative ideal of the *homo volens* (the sovereign chooser, the disembodied subject of intention) has supplanted the Roman awareness that *voluntas* is always situated, conditioned, and mediated by social structures and power asymmetries. Nonetheless, as Stagl has underscored, much of modern Romanist scholarship has privileged a genealogical and reconstructive

---

<sup>18</sup> See Bertoldi, in this volume, particularly 182 ff.

<sup>19</sup> This hermeneutic stance is exemplified by Roman doctrines on error in testamentary dispositions, as analysed by Beghini, in this volume, particularly 226 ff., where Ulpian's reasoning reveals an attentiveness to factual error that anticipates a modern sensitivity to relational contexts and imperfect *voluntas*; or even in the treatment of women's juridical agency, showing how technical language and formal schemes operated as both limitations and protective devices for subjects deemed vulnerable (see Bramante, in this volume, 326 ff.).

<sup>20</sup> Such a calibration is vividly exemplified in doctrines regulating funerary practices (Ulp. 68 *ad ed.* D. 11.8.1 pr.; Marc. 3 *inst.* D. 1.8.6.4), proprietary dispositions (Pomp. 9 *ad. Sab.* D. 2.14.61), or fiduciary relations (Fur. 1 *ad ed.* D. 2.14.62). The elasticity of this approach also emerges in Roman solutions to contractual mistake, where, as Galeotti (see in this volume, 210 ff.) shows, the jurists' pragmatic sensitivity allowed them to distinguish between substantive and accidental errors without collapsing into rigid dogmatic templates.

On the other hand, Scognamiglio – see in this volume, 281 ff. – further illustrates this hermeneutic flexibility by showing how Roman legal culture treated *invitus* not as a fixed psychological condition but as a juridical marker encompassing dissent, lack of consent, and incapacity alike.

approach – seeking to recover the supposed original fragments of classical juristic thought – while neglecting the morphological and hermeneutic character of the text as it was compiled and transmitted (Stagl 2023, particularly 10 f.). A recovery of Roman interpretive elasticity requires precisely an inversion of this methodological priority.

Recovering the hermeneutic lessons of Roman flexibility is not about nostalgically reviving Roman categories – through a self-projecting process –, but about critically adopting their interpretive approach. It means recognising juridical categories as normative tools rather than mere descriptive labels, and acknowledging that language shapes both the framing of legal problems and the scope of their solutions. In this sense, *invitus* exemplifies a legal vocabulary capable of capturing gradations and relational ambiguities without falling into incoherence.

In an era in which contemporary law grapples with contractual asymmetries, algorithmic governance, and pervasive informational inequalities, the lesson of Roman elasticity is urgent and salient: juridical language must resist the allure of false clarity and preserve a space for semantic nuance and normative calibration. Only thus can law avoid the ‘pitfalls’ (see Piraino, in this volume, particularly 36) of both reductive formalism and indiscriminate interventionism, and recover an interpretive horizon adequate to the realities of constrained and imperfect agency.

## 5. Implications for vulnerability and consent today

The eclipse of *non-will* as a juridical category is not simply a historiographical episode: it constitutes a latent epistemic *deficit* that continues to distort contemporary discourse on vulnerability, consent, and juridical subjectivity. The conceptual narrowing caused by the rigidification of *voluntas* into a binary construct – either present and generative of obligation, or absent and void – has left modern legal systems ill-equipped to engage with the subtleties of constrained, fragmented, or mediated agency.<sup>21</sup> This fixation reflects what Pekelis, in a study now regarded as a ‘classic’ on the subject, identified as the assimilation of juridical normativity to scientific causality, in which every juridical determination is treated as conditional necessity, a model that proves inadequate for capturing the layered nature of modern agency (Pekelis 1931, 14).

This inadequacy is particularly evident in contemporary regimes of

---

<sup>21</sup> As also exemplified by Romanò – see in this volume, 255 ff. – analysing how doctrines of fraud and omission reflect the limits of *voluntas* as a reliable dogmatic *fulcrum*.

contract law, where doctrines of duress, undue influence, and informational asymmetry still operate within a paradigm fundamentally hostile to gradations of will. The pervasive assumption remains that, once vitiating circumstances are removed, a purified, autonomous consent will emerge, sufficient to ground binding effects. Yet as contemporary scholarship on vulnerability suggests, this image of the juridical subject is anachronistic and analytically inadequate (see Micklitz, Vettori 2025, 1 ff.). The juridical subject is no longer, if it ever was, an atomic chooser freely consenting in conditions of perfect information and symmetric power.

The Roman category of *invitus* offers a paradigmatic contrast to this ‘disadvantaged’ conceptual scheme: rather than seeking to sanitize the will of its relational entanglements, it recognised and incorporated them, framing constrained agency as a legally intelligible and operational condition.<sup>22</sup> The elasticity of *invitus* allowed Roman law to articulate a nuanced jurisprudence of constraint, acknowledging the existence of juridical agency under conditions of pressure, necessity, or relational dominance without mechanically annulling juridical effects.

This ancient hermeneutic insight bears directly upon modern legal challenges. In an economy marked by algorithmic personalisation, behavioural nudging, and informational asymmetry, the notion of a ‘free and informed consent’ appears increasingly implausible as a foundation for juridical obligation.<sup>23</sup> This diagnosis aligns with broader reflections on how artificial intelligence reshapes the legal landscape, situating the crisis of consent within the algorithmic transformation of juridical agency itself, and interrogating whether contemporary legal categories remain adequate in the face of machinic decision-making processes designed to anticipate, condition, and displace human *voluntas* (on the subject, see De Cristofaro 2025).

The conceptual resources of contemporary legal dogmatics, locked into binary structures inherited from nineteenth-century formalism, prove incapable of addressing this complexity except by multiplying ‘exceptions’, which invariably depend on the very paradigm they seek to critique.<sup>24</sup>

---

<sup>22</sup>For instance, Guasco, in this volume, 307 ff., highlights this dimension precisely in provincial documentation, where Roman magistrates confronted fragile agency with remedies that figured contemporary concerns over vulnerability and coercion.

<sup>23</sup>See Bazzoni, in this volume, 117 ff., highlighting how smart contracts epitomise the inadequacy of modern dogmatic structures when confronted with algorithmically predetermined transactional patterns that bypass genuine *voluntas*; also Ferrante – in this volume, 89 ff. –, who emphasizes the imperative of recalibrating *voluntas* and arbitrium to reflect contemporary conditions of relational vulnerability.

<sup>24</sup>For example, as observed elsewhere in this volume, the Roman device of *soluti re-tentio*, as analysed by Pasquino, (see in this volume, 243 ff.) offers a striking precedent

A recovery of the semantic flexibility embedded in Roman jurisprudence offers a theoretical alternative: rather than persisting in the futile search for an untainted consent, modern law might develop a ‘grammar of *non-will*’, capable of recognising gradations and structures of constrained agency. Such a grammar, on the one hand, entails acknowledging *voluntas* as a multifocal notion, already shaped in Roman legal discourse<sup>25</sup> as encompassing a range of motives from rational assent to irrational desire (Maso 2021, 74); on the other hand, it would not abandon the principle of personal autonomy but would recalibrate it, situating it within an epistemology of vulnerability and relational entanglement.<sup>26</sup>

This would entail a conceptual reorientation with profound implications. It would allow juridical discourse to distinguish between degrees of constraint without forcing them into the rigid ‘alternatives’ of nullity or full validity. It would permit an acknowledgment that consent can be partial, ambivalent, or relationally inflected, and yet remain juridically relevant. And it would enable courts and legislators to articulate protective regimes that respect agency while recognising its fragility, avoiding both paternalistic overreach and the fiction of autonomous choice.

In sum, the Roman semantics of *invitus* – and, more broadly, the Roman tolerance for juridically operative imperfection in will – provides a hermeneutic key for addressing contemporary crises in the theory of consent. It illuminates the possibility of a legal vocabulary capable of registering vulnerability not as an exceptional ‘pathology’ of otherwise perfect agency, but as a constitutive condition of juridical subjectivity itself. Such a recovery of a grammar of *non-will* would thus enable contemporary legal systems not only

---

for contemporary debates on voluntariness: Roman law accepted that, even absent a juridical obligation, a spontaneous act of giving (*sua sponte*) could consolidate patrimonial effects, provided that the actor’s volition was free from psychological coercion, a nuance that modern binary doctrines of consent fail to capture. On the matter, also consider that in contrast to such schemes, Roman legal culture also distinguished between *voluntas* and *propositum* (purposeful intent), denying responsibility for further illicit consequences of an act (like theft) when there was no *propositum*, even if the act was voluntary (see Silla 2018, 9 f., 18 f.).

<sup>25</sup> These features of multifocality and elasticity, as Saccoccio has noted (2019, particularly 164 ff., 171 ff.; see also the contributions in Santucci, Ferretti, Di Maria 2019), help to explain why Roman law continues to serve as an intellectual resource for contemporary jurists confronting an increasingly fragmented and globalised legal landscape.

<sup>26</sup> For instance, Roman testamentary practice, as elucidated by Beghini (see in this volume, 226 ff.), suggests precisely such a recalibration, wherein imperfect, erroneous or ambiguous expressions of will could nonetheless be interpreted in light of relational circumstances and the broader normative framework. This epistemology resonates with Scognamiglio’s (see in this volume, 281 ff.) insight that the Roman treatment of *invitus* prefigures contemporary legal efforts to articulate vulnerability as a condition where formal consent may mask substantive coercion or incapacity.

to diagnose the limits of formalist categories, but to better accommodate the relational, vulnerable, and imperfect conditions in which juridical agency actually operates today.

## References

- Addis F. (2022), “Diritto romano e giuspositivismo nel *Trattato delle Leggi di Jean Domat*”, in *Roma e America. Diritto romano comune*, 43, 2022, 13-33.
- Brann E. (2014), *Un-Willing. An Inquiry into the Rise of Will's Power and an Attempt to Undo It*, Philadelphia, Paul Dry Books.
- Brutti M. (2018), “Sulla convergenza tra studio storico e comparazione giuridica”, in M. Brutti, A. Somma (eds.) *Diritto: storia e comparazione. Nuovi propositi per un binomio antico*, Frankfurt a.M., Max Planck Institute for European Legal History, 49-79.
- Burdese A. (1993), *s.v.* “Interpretazione nel diritto romano”, in *Digesto delle discipline privatistiche – Sezione civile*, X, Torino, Utet, 1-13.
- Cascione C. (2003), *Consensus. Problemi di origine, tutela processuale, prospettive sistematiche*, Napoli, Editoriale Scientifica.
- Cassan M. (2021), “Lo spazio della *uoluntas* senecana: tra filosofia e tragedia”, in E. Cattanei, S. Maso (eds.), *Paradeigmata voluntatis. All'origine della concezione moderna di volontà*, Venezia, Edizioni Ca' Foscari, 116-138.
- Cerami P., Miceli M. (2023), *Strutture costituzionali, fonti e codici nell'esperienza giuridica romana. Storicità del diritto. Prospettive antiche e moderne*, Torino, Giappichelli.
- De Cristofaro C. (2025), *Diritto romano e intelligenza artificiale. Itinerari di comparazione storico-giuridica*, Torino, Giappichelli Editore.
- Donini M. (2019), “*Iura et leges*. Perché la legge non esiste senza il diritto”, in *Il Pensiero. Rivista di filosofia*, 58.2, 2019, 45-77.
- Ferrante E. (2025), “Premessa”, in E. Ferrante (ed.), *Il volere che si fa norma. Quaderno secondo. Volontà e arbitrio*, Bologna, il Mulino, 7-9.
- Finazzi G. (2017), “Identità nazionali e identità europea alla luce del diritto romano e della tradizione romanistica”, in *Italian Review of Legal History*, 3, 2017, 1-68.
- Forcellini A. (1864-1926a), *s.v.* “*Invitus*”, in *Lexicon totius Latinitatis*, II, curante Francisco Corradini, 1965 reprint, *Arnaldus forni excudebat Bononiae Gregoriana edente Patavii*.
- Forcellini A. (1864-1926b), *s.v.* “*Nolo*”, in *Lexicon totius Latinitatis*, III, curante Francisco Corradini, 1965 reprint, *Arnaldus forni excudebat Bononiae Gregoriana edente Patavii*.

- Gordley J. (2025), “Will theory and conceptual jurisprudence”, in E. Ferrante (ed.), *Il volere che si fa norma. Quaderno secondo. Volontà e arbitrio*, Bologna, il Mulino, 11-32.
- Honsell H. (2004), “Willentheorie oder Erklärungstheorie?”, in P. Forstmoser, H. Honsell, W. Wiegand (eds.), *Richterliche Rechtsfortbildung in Theorie und Praxis. Methodenlehre und Privatrecht, Zivilprozess- und Wettbewerbsrecht. Festschrift für Hans Peter Walter*, Bern, Stämpfli Verlag AG Bern, 335-350.
- Ibbetson D. (2015), “Sources of Law from the Republic to the Dominate”, in D. Johnston (ed.), *The Cambridge Companion to Roman Law*, Cambridge, Cambridge University Press, 25-44.
- Johnston D. (2015), “Introduction”, in D. Johnston (ed.), *The Cambridge Companion to Roman Law*, Cambridge, Cambridge University Press, 3-8.
- Mantovani D. (2018a), *Les juristes écrivains de la Rome antique. Les œuvres des juristes comme littérature*, Paris, Collège de France – Les Belles Lettres.
- Mantovani D. (2018b), “Les juristes romains comme écrivains. Perspectives de recherche sur la pensée juridique à travers l’écriture”, in *Clio@Thémis*, 14, 2018, 1-17.
- Maso S. (2021), “*Desiderium voluntas non est*”, in E. Cattanei, S. Maso (eds.), *Paradeigmata voluntatis. All’origine della concezione moderna di volontà*, Venezia, Edizioni Ca’ Foscari, 73-96.
- Masuelli S. (2015), “Regole per l’interpretazione nel diritto romano e nella tradizione romanistica”, in *Rivista di diritto romano*, 15, 2015, 1-15.
- Miceli M. (2023), “Presentazione”, in P. Cerami, M. Miceli, *Strutture costituzionali, fonti e codici nell’esperienza giuridica romana. Storicità del diritto. Prospettive antiche e moderne*, Torino, Giappichelli, XIX-XXI.
- Micklitz H.-W., Vettori G. (2025), “Introduction”, in H.-W. Micklitz, G. Vettori (eds.) *The Future of the Person*, Oxford, Hart Publishing, 1-5.
- Nardoza M. (2021), “Radici e tradizioni della scienza giuridica italiana: alcune prospettive”, in *Jura Gentium*, 18, 2021, 74-107.
- Pekelis A. (1931), *Il diritto come volontà costante. «Iustitia est constans voluntas»*, Padova, Cedam.
- Peppe L. (2019), “Sulla «letteratura giuridica romana». A proposito di *Les juristes écrivains de la Rome antique* di Dario Mantovani”, in *Rivista di diritto romano*, 19, 2019, 1-48.
- Saccoccio A. (2019), “Diritto romano, fondamenti e fondamentali”, in G. Santucci, P. Ferretti, S. Di Maria (eds.), *Fondamenti del diritto europeo. Esperienze e prospettive*, Trieste, EUT Edizioni Università di Trieste, 157-187.
- Santucci G., Ferretti P., Di Maria S. (eds.) (2019), *Fondamenti del diritto*

- europo. Esperienze e prospettive*, Trieste, EUT Edizioni Università di Trieste.
- Schiavone A. (2005), «Ius». *L'invenzione del diritto in Occidente*, Torino, Giulio Einaudi editore.
- Silla F.M. (2018), “La dimensione «etica» del «dolo»”, in *Rivista di diritto romano*, 18, 2018, 1-22.
- Solidoro Maruotti L. (2010), *La tradizione romanistica nel diritto europeo*, II. *Dalla crisi dello «ius commune» alle codificazioni moderne. Lezioni<sup>2</sup>*, Torino, Giappichelli.
- Stagl J.F. (2016), *s.v.* “law, Roman, institutional scheme of,” in *Oxford Classical Dictionary*<sup>4</sup>, Oxford, Oxford University Press, online.
- Stagl J.F. (2023), *Der Tempel der Gerechtigkeit. Zur Morphologie und Hermeneutik der Pandekten*, Paderborn, Brill – Schöningh.

## Chapter 15

# FREE WILL AND REMEDIES AGAINST VIOLENCE IN ROMAN PROVINCES. CASES AND ISSUES IN EPIGRAPHIC AND PAPHYROLOGICAL SOURCES

Alessio Guasco

*ABSTRACT: The contribution deals with the analysis of cases of violence affecting the free formation of the contractual will, as attested by epigraphs and papyri for the Eastern provinces between the Republican age and the Principate. In particular, the normative and procedural remedies adopted for the individual cases examined and aimed at invalidating contracts extorted with violence will be examined. From the investigation of the sources, both concerning the province of Asia and Egypt, no importance seems to be given to the distinction between physical violence and moral violence, which appear to be equal also regarding the consequences on the contract submitted to the attention of the judicial authority. The examination of these sources, also in the light of the praetorian remedies and the Roman jurisprudential reflection, can contribute to a re-examination of the Roman tradition's roots that have led over the centuries to the consolidation of the traditional distinction between vis absoluta and vis compulsiva, the boundaries of which could be overcome under the aspect of remediality in the perspective of the broader protection of the contracting party in conditions of fragility.*

**KEYWORDS:** Βία – Defects of the will – Roman provinces – Vis absoluta – Vis compulsiva – Will.

**SUMMARY:** 1. Violence and free will in the ancient world. – 2. War, violence and legal acts. The case of Diodorus Paspurus in Asia. – 3. Violence and consent extorted in Egypt from 2<sup>nd</sup> century BC to 2<sup>nd</sup> century AD. – 4. Roman legal culture and provincial practice: Dynamics between wanted and unwanted. – 5. *Vis absoluta* and *vis compulsiva*: A distinction still meaningful or categories to be restructured? – References.

### 1. Violence and free will in the ancient world

The traditional research approach on the impact of violence (Lintott 1968; Labruna 1991; Solidoro 1993) on the free formation of contractual consent (*voluntas*), from a diachronic perspective, generally starts from the assumption, fully calibrated on Roman legal experience, of a substantial irrelevance

of coercion of any sort until the 1<sup>st</sup> century BC (Balzarini 1993, 831) in the formation of contractual acts.

A first reaction of the Roman legal system is attributable, in fact, to the intervention of the praetor Octavius, who, in a climate marked by social and political unrest, introduced for the first time a legal mechanism to address violence affecting the free formation of consent through the identification of a specific *formula* in the edict, the so-called *formula Octaviana*.

Precisely from the citation of a syntagma of the *formula Octaviana*, which Cicero textually refers to in the second oration against Verres, it can be inferred that the reasons for a praetorian intervention responded to the widespread use of *vis aut metum* in coercing contractual will determining the contractual norm, in that particularly tumultuous historical period. The words of the edict referred to by Cicero are precisely *quod per vim aut metum abstulisset* (Verr. II, 3, 65, 152). From Cicero's testimony, scholarly debate has arisen regarding the normative scope of the expression *vim aut metum*.

For part of the literature, the simple hendiadys would have indicated a praetorian remedy limited to justified fear, regardless of the form how it had been induced. A different interpretation traces back to an original common factual matrix of both cases – violence, indicated by the term *vis*, or fear, indicated by the term *metus* –, namely, a single act of coercion (about literature according to Balzarini 1993, 834 ff.). Only a few years later, with the introduction of the *actio de damno vi hominibus armatis coactisve* by the praetor Lucullus (Vacca 1992; Balzarini 1993; Galeotti 2016-2017, 1 ff.), *vis* would have been sanctioned by a specific action. While the action aimed at sanctioning the contract concluded with *metus* would have continued to be regulated by the *formula Octaviana*, probably later superseded by an action indicated as *actio quod metus causa* (Calore 2008; Pulitanò 2011; Gaulhofer 2019; Pontoriero 2020, 64 ff.), as well as by additional praetorian remedies such as the *exceptio* and the *in integrum restitutio* (Kaser 1977, 101 ff.).

All these remedies were systematically reorganized in the Justinian compilation under D. 4.2, titled *Quod metus causa gestum erit*, and C. 2.19(20) titled *De his quae vi metusve gesta sunt*, these latter sources laid the groundwork for the bipartition in the European legal tradition between *vis absoluta* (physical coercion, rendering the contract void) and *vis compulsiva* (moral coercion, resulting in voidability) which in the Italian Civil Code is translated into the single term *violenza* and does not give rise to immediate invalidity of the contract, but to annulment through courts' intervention.

However, both to contribute to a reassessment of praetorian remedies to violence in the free formation of will in Roman legal experience (d'Ors 1981, 223 ff.), and critically revisit the traditional categories of defects of consent, it is essential to analyse the documentary legal practice emerging from the

diverse Mediterranean areas later incorporated as Roman provinces. And, in the opinion of the literature, the vast epigraphic and papyrological documentation of the provinces provide a complete understanding of Roman legal experience, through contracts and procedural acts.

Unlike the normative and literary sources traditionally employed in the study of Roman law, the reading of epigraphic and papyrological evidence allows us to perceive everyday law, made up of contracts, procedural acts that clearly, simply, and linearly reflect not only the events and facts underlying a given legal issue, but also allow us to identify the normative or jurisdictional solutions adopted for the restoration of legal balance between the parties (Taubenschlag 1955). The reading of documentary legal practice allows us to perceive how the will (*voluntas*) became a contractual norm between the parties (*lex contractus*), and the pathologies afflicting different regulatory configurations. More precisely, from the perspective of normative will, the testimonies of contractual arrangements, sometimes far from essential, demonstrate how attention to contractual discipline, and related procedural remedies in the event of non-performance, constituted a network of *ius gentium* among the different Mediterranean civilizations of the ancient world (Frezza 1949; Kaser 1993; Masi Doria 2012; Di Salvo 2014; Fiori 2016). Such practices were subsequently received into the Roman legal system through the normative activity of praetorship, following a cultural attitude of openness to foreign legal experiences. From these external models, the Romans acquired contractual and procedural tools that led to the development of new types and a new procedural system: I think in the first case of contracts *iuris gentium*, or institutions previously unknown to Roman legal culture such as *antichresis* (Guasco 2024), or the adoption of *cognitiones extra ordinem*, until the overcoming at the beginning of the Late Antiquity of the now outdated formulary trial. Thus, to provide a meaning contribution that fits into a debate on the sustainability of traditional categories of physical violence and moral violence/coercion, it is essential to consider the testimonies of epigraphic and papyrological legal sources related to violence as pathologies of contractual *voluntas*, which allow, based on stories narrated in the same documents or examined acts, to reconstruct the dynamics between ‘wanted’ and ‘unwanted’ (Tarwacka 2014, 707 ff.).

## 2. War, violence and legal acts. The case of Diodorus Pasparrus in Asia

The province of Asia, corresponding to part of present-day Anatolia, was established following the hereditary disposition of King Attalus III of

Pergamon (Meyer-Zwiffelhofer 2010) who named the Roman people as his universal heir in order to avoid providing a pretext for Roman military intervention. However, the foundation of the province and the subsequent entry of the Roman administration and army into those territories proved quite problematic and triggered the uprising led by Aristonicus in 131 BC (Carrata Thomes 1968, 1 ff.; Merola 2001, 15 ff.), a conflict which demanded significant resources from Roman Republic to suppress.

A stele found in the Gymnasion of the altar of Pergamon textually refers to the events of some contracts concluded during that period, when the city found itself in severely difficult conditions. This inscription, published in the *Inscriptiones Graecae ad res romanas pertinentes* (IGR. IV.292), mentions an honorary decree dedicated to Diodorus Pasparus, a distinguished citizen of Pergamon, who, acting as an envoy to Rome, succeeded in securing a series of privileges for his fellow citizens. There is still a lively debate in the literature concerning the precise dating of the events and the honorary decree, with interpretations ranging between immediate aftermath of the province's establishment and more recent times, such as the Mithridatic Wars. Be that as it may, what matters for the evaluation of the events is the legal treatment reserved for contracts stipulated under threats and extortions duress in wartime conditions. Diodorus Pasparus, sent to Rome in his capacity as ambassador, obtained from the Republic for his city exemption from conscription duties and winter military quarters, the reduction of interest rates on loans, and the annulment of contracts entered into under oppressive conditions during the years of the city's occupation by Aristonicus' rebels. Some lines of the epigraphic text report the content of the measure (IGR. IV.292 ll.7-14) not well identified, but it was probably a *senatus consultum*. What is interesting, and clearly emerges from the source, is that the term βίους (violence) is used univocally in the text, without further distinctions between physical violence and moral violence, unlike what Cicero reported regarding the subsequent *formula Octaviana*, which seems to distinguish between *vis* and *metus*.

The inscription underscores the protective measures by Roman authority in favour of the newly subjected community within the province of Asia. However, in the absence of further textual references, one may infer that a subsequent petition to the competent jurisdictional authority would still be necessary to obtain, in accordance with the current regulations, a declaration of nullity of the *syngraphae* mentioned in line 11 of the text (τῶν κενῶν συγγραφῶν καὶ μετὰ βίας καὶ ἀν[άγκης]...); the term τῶν κενῶν indicates a form of empty (Taubenschlag 1955, 312), caused by the fact that these private writings (συγγραφῶν) were extorted by the rebels with threats of violence in situation of need (καὶ μετὰ βίας καὶ ἀν[άγκης]) and therefore lacked normative will.

This epigraphic source, therefore, although concise and less detailed compared to the subsequent ones analysed for the area of Egypt, offers a clue to the Roman legislator's attention to protecting fragile positions in the transaction, already in a period preceding the *formula Octaviana*, due to the psychological and economic coercion resulting from threats during the months of instability in the territories.

### 3. Violence and consent extorted in Egypt from 2<sup>nd</sup> century BC to 2<sup>nd</sup> century AD

After examining a case of normative intervention aimed at restoring contractual balances between the parties, in the testimonies analysed below concern jurisdictional remedies – such as petitions, requests, and appeals –, seeking the ablation of normative expressions of will vitiated by violence. The area on which the investigation will extend is Egypt, a territory from which we receive the richest number of testimonies concerning procedural and contractual practices in places other than Rome. Temporally, the span appears quite extensive, ranging from the 2<sup>nd</sup> century BC to the 2<sup>nd</sup> century AD, that is, through a period that begins in the middle of the Ptolemaic kingdom in Egypt and ends in the full age of the Roman Principate, a time when the region had long become a province. This broad chronological scope, moreover, makes it possible to observe how certain strands of the Hellenistic legal tradition, particularly of Doric and Macedonian origin, were transplanted in Egypt following the conquest by Alexander the Great in the 4<sup>th</sup> century BC and continued under the rule of the Ptolemaic dynasty. This methodological lens thus allows us to highlight the tradition of Hellenistic legal culture and its interactions with Roman legal rationality in the wake of the province's establishment, after the victory of Actium in 31 BC.

Therefore, we can begin with the analysis of a first procedural case preserved in a papyrus. The first case under examination dates precisely to the 2<sup>nd</sup> century BC, more precisely to 141 BC according to its editors (Reinach, Spiegelberg and De Ricci 1905, 54) at the time of the Ptolemaic kingdom, before the Roman conquest (P. Rein. 7). The papyrus contains an appeal, characterized by the solemn tones of a supplication addressed to the sovereign (ἐντευξις) requesting the declaration of nullity of a writing drawn up in double original (συγγραφή). From the reading of the text, the facts grounding the request for invalidation emerge quite clearly: a certain Kephalos invoked, in fact, the procedural protection by the local authority as he was coerced to sign under threat a writing of acknowledgment of a fictitious debt of ten talents in favour of a rather powerful person, Lysicrates, commander of the local cavalry.

Kephalos, son of Dionysius, mercenary soldier in service in the Hermopolite district of Upper Egypt, stationed in Akoris (a village on the eastern bank of the Nile), had purchased from Lysicrates, commander of the local cavalry and a very powerful and authoritative person, about three hundred jars of wine for the price of twenty-four talents of copper. Kephalos himself had delivered to his creditor Lysicrates a writing with which he undertook to deposit the agreed sum with a trusted person within a specified term. Kephalos, however, recounts having partially fulfilled his obligation, having deposited only thirteen talents of copper. Subsequently, he continues in the story, he would have paid the balance of eleven talents of copper into the hands of Lysicrates, in good faith and without obtaining a receipt, but rather a simple oral promise of restitution of the acknowledgment of debt of twenty-four talents with indication of the agreed place of fulfilment, once the payment was completed. The receipt, on the basis of an oral promise that the original acknowledgment of debt, would be returned upon full payment. Such restitution of the debt instrument was perceived as extinctive of the obligation.

However, some time later, Kephalos recounts being accused by Lysicrates before the district's *stratēgós*, claiming that the eleven talents had not been paid, being threatened to be dragged to court with the consequent risk of loss of personal liberty. Following the threats, psychological pressure, and for the purpose of extortion, Lysicrates managed to have Kephalos sign an additional document, committing to pay within three years the sum of ten talents of copper, one less than the original debt, yet now guaranteed by surety from Kephalos' brothers and mother. The writings were immediately transferred by Lysicrates to a certain Petchon, a resident of Akoris, with the strict instruction not to return them to Kephalos before full payment. In this way, Lysicrates sought to obtain double payment, invoking both the original and the subsequent document, with the added possibility of enforcing the obligation against Kephalos' relatives.

From a structural point of view, the appeal was submitted by the applicant to the competent magistrate, the commander of the local cavalry, through his chancellor, but formally addressed to the sovereigns of the time, Ptolemy VII and Cleopatra II (Montevocchi 1998, 113). The introductory act consisted of a petition to the judicial authority (*hypómnema*), which was then notified to the defendant either by judicial officers or directly by the petitioner, who would ensure certification of the notification through written attestations (*testationes privatae*), in a complex form of summon to court indicated by the sources as *parangelía* (Boyé 1922, 41 ff.; Foti Talamanca 1979, 1 ff.; Guasco 2017, 79 ff.).

The appeal was formally addressed to the two sovereigns Ptolemy and Cleopatra, contained a request for examination by Apollodoros, magistrate

and commander of the cavalry, described as a friend of the sovereigns, along with an application for the judicial summoning of Lysicrates.

Following the factual narrative, the text presents two distinct legal questions raised by the applicant. The first one of verification of the payment of the debt, first, in the nature of an *actio negatoria*, sought the ascertainment of the extinguishment of the debt. The second, more explicit, aimed at the declaration of invalidity of the acknowledgment of debt for ten talents, which had been extorted under threat and thus also imperilled the property of the petitioner's relatives. We have no testimony of the decision taken by the official invested with the matter, but the detailed narrative and the specific questions formulated by the applicant (*editio actionis*) – possibly drafted with the assistance of a local legal scribe – underscore the presence of a coherent legal reasoning on the part of the applicant.

In particular, the distinction between a contract grounded in genuine *voluntas*, formed absent any external constraint (as in the case of the original debt acknowledgment), and a contractual declaration extorted through coercion – that is, induced by the threat of serious and unjust harm affecting the decision-making process – emerges as fully conceptualized. Such coercion renders the transaction affected by the pathology of moral violence, and consequently, vitiated will.

Even in the age following the Roman conquest, sources related to petitions to the judicial authority aimed at declaring the nullity of contracts extorted with violence seem to emerge, although sometimes the sources appear much more fragmentary.

P. Amh. II.78, dated by editors to 184 AD (Grenfell-Hunt 1901, 97), records a petition by Stotoetis of Soknopaiou Nesos, a village near the Fayum Oasis, addressed to centurion Aurelius Antoninus. Stotoetis accused his relative Hekusis of defrauding him of shared property and compelling him under threat of death to issue a written guarantee. The text, though lacunose – in fact, it does not give us an expressed *pretium* –, suggests that the petitioner sought a declaratory remedy recognizing the invalidity of the guarantee on the grounds that it was vitiated by violence.

Another testimony of the Roman age concerning violence in the context of contractual negotiation for the province of Egypt is offered in P. Lond. II.358, dated around 150 AD (Kenyon 1898, 172). The document consists of the appeal of Stotoetis, son of Stotoetis, a resident of Soknopaiou Nesos. Compared to the previous text, one might wonder whether this is the same Stotoetis mentioned in P. Amh. II.78, or whether it is a case of homonymy: the latter hypothesis cannot be excluded, given the frequent recurrence of proper names in various archival sources from the Ancient Mediterranean East. The petition is addressed to the prefect Munatius Felix and concerns

two individuals, Sota and Ammonius. The narrative context is admittedly complex and partially obscure, due to both the elliptical style of the composition and to numerous syntactic and grammatical errors in the document. It appears that Sota and Ammonius had compelled the petitioner, through violence, to deliver to a daughter of Sota a written instrument of promise of sale and loan of the sister, originally provided in his favour, for a total value of four hundred drachmas. Although the precise juridical meaning of this act remains elusive, it is worth noting the reference to the use of the desert (ὄς ἐν ἐρημίᾳ), presumably as an instance of *mos regionis*, connected to the performance and delivery of such promises. The remedy requested by the applicant to the prefect seems to have been the issuance of a summons order, so that the defendants would appear before the court at the next judicial session. Even in this story, although there is no mention in the papyrus of the requested provision, it appears evident from the concise *editio actionis* that the goal was to obtain a judicial declaratory provision of the invalidity of the extorted transfer.

The final case examined here derives from the document BGU. II.378, dating back to 147 AD (Mitteis and Wilcken 1963, 11). The papyrus, written in Greek, comes from Arsinoe, in the Fayum Oasis, where it was originally discovered. This document preserves a petition presented by Gaius Julius Agrippinus to Calpurnianus, *iuridicus* (in the Hellenistic procedural terminology it is the *dikaiódotes*), against Julius Saturninus, cousin of Agrippinus. Both parties were presumably Roman citizens residing in Egypt.

In his petition, Agrippinus complains about the initiation of an executive procedure on his properties, accompanied by a request for forced possession, aimed at securing payment of a loan of eight minas of gold, which according to Agrippinus had been violently extorted by his cousin Saturninus. Additionally, Agrippinus claimed that at the time the loan was concluded he was a minor, and, for this reason, he invoked the protection of the *lex Laetoria de circumscriptione adulescentium* (Di Salvo 1979, Erdödy 2022, 99 ff.). The reference to the *lex Laetoria* seems to reveal the intention to submit an opposition to the execution, also aimed at obtaining the declaration of invalidity of the coerced loan, through a request to the magistrate for the granting of a *restitutio in integrum*, that is, the restoration of the *status quo ante* (Di Salvo 1979).

Across all the cases analysed so far, it becomes apparent that access to judicial jurisdiction is essential in order to obtain a provision abrogating contractual effects produced under coercion. Such relief may assume either declaratory or constitutive form, as in the *restitutio in integrum* granted in favour of a minor. In all instances, however, the primary legal remedy remains the declaration of invalidity of a contractual act vitiated in its *voluntas* by violence.

#### 4. Roman legal culture and provincial practice: Dynamics between wanted and unwanted

The analysis of epigraphic and papyrological sources containing acts and documents of legal practice in the provinces makes it possible to revisit Roman sources concerning the reconstruction of the origins of procedural protection against instances of moral violence. What immediately becomes apparent from reading the texts is an approach to the notion of violence devoid of rigid categorizations. The term βίη (violence), employed in the sources to designate violence, is not indicative simply of physical violence or moral constraint; in fact, no terminological distinction is drawn between these two cases, nor is any alternative wording employed that might suggest the existence of a Hellenistic classification, one that would carry different implications in terms of legal remedy.

At this point, the Mediterranean dimension of the concept of violence could have played a significant role in shaping the earliest procedural remedies within Roman legal experience. Let us return briefly to Cicero's reference to the Octavian formula, in light of what emerges from the provincial sources, and in particular to the syntagma *quod per vim aut metum abstulisset* (Cic. Verr. II, 3, 65, 152), that is, the expression *auferre per vim aut metum*. It cannot be excluded that the praetor Octavius, who first established this form of action, already had a global vision of Hellenistic legal experiences that in the 1<sup>st</sup> century BC had certainly already long influenced the Romans culturally, including aspects of procedural practice, and therefore the activity of magistrates endowed with *iurisdictio*, both under the profile of scientific elaborations of the jurisprudence of the time.

Roman sensitivity towards a comprehensive conception of violence, for the purpose of identifying the dimension of the unwanted, could perhaps weigh in favour of the thesis that the hendiadys *per vim aut metum* encapsulates two aspects of the single notion of coercion: the first, corresponding to the active manifestation of the phenomenon (such as the act of violence, physical or threat), while the second, *metus*, the passive dimension of violence, affecting the perception of risk by the vulnerable party, and thus distorting the decision-making process of the one whose *voluntas* was compromised. And evidently, this passive aspect had been the subject of valorisation over time, which had determined a more intense attention by the praetors towards the psychological function of violence. It is likely that this development gave rise to an action, such as the *actio quod metus causa*, which, as attested by the sources, was conceived precisely in the perspective of a *reductio ad unum* of the effect of the violent act, regardless of its specific form.

Significantly, Ulpian, in a well-known passage of the eleventh book *ad edictum*, preserved in D. 4.2.1,<sup>1</sup> refers to the historical evolution of the problem of continuity between an action aimed at declaring invalid any act, which had been executed, carried out for violence or fear, from which the mention of vis had then been eliminated, precisely because whatever had been done due to atrocious violence was considered done for fear (Cervenca 1965, 312 ff.; Ebert 1969, 403 ff.). Moreover, this was an *actio in rem scripta* that could see as a passive legitimized not only the author of the violence, but also the one who had derived some advantage from it. Clearly, the valorisation of the legal concept of *metus* did not exclude the same phenomenon of *vis* in a cause-effect relationship that appears included in the more general concept of βία (violence) emerging from the sources for provincial documentary practice.

Nonetheless, it must be stressed that the emergence of the *formula Octaviana* and the specific *actio quod metus causa*, regardless of the historical dynamics of emergence, are framed in a well-defined legal-historical context, one that fits neatly in the middle of the temporal period considered for provincial sources, that is, between the 2<sup>nd</sup> century BC and the 2<sup>nd</sup> century AD. This could be an indication of the probable interaction between contemporary and nearby legal cultures, such as the Roman and Hellenistic ones.

### 5. *Vis absoluta* and *vis compulsiva*: A distinction still meaningful or categories to be restructured?

Considering a revisitation of the Hellenistic conception of violence, it becomes possible to reassess the validity of a longstanding dogma of the civil law tradition, namely the distinction between *vis absoluta* and *vis compulsiva* (Longo 1934, 68 ff.). These testimonies, which seem not to differentiate physical coercion from moral constraint, emphasise the need for legal protection in conditions of fragility, irrespective of the specific type of violence. Although they constitute only a fragment of a broader mosaic concerning private law constructions on the subject, from Roman jurisprudential elaborations to their modern doctrinal legacies (Zimmermann 1996, 651 ff.; Kupisch 1998, 463 ff.; Gianola 2008, 147 ff.; Pontoriero 2020, 64 ff.; Lambri 2023, 1 ff.) they prompt a reflection on the protection of fragility and the effectiveness of traditional categories.

---

<sup>1</sup>Ulp. 11 *ad ed.* D. 4.2.1: *Ait praetor: 'Quod metus causa gestum erit, ratum non habeo'. Olim ita edicebatur 'quod vi metusve causa': vis enim fiebat mentio propter necessitatem impositam contrariam voluntati: metus instantis vel futuri periculi causa mentis trepidatio. Sed postea detracta est vis mentio ideo, quia quodcumque vi atroci fit, id metu quoque fieri videtur.*

Pandectistics, in fact, held that the term *Zwang* (Windscheid 1887, 379), indicative of coercion broadly assimilated to *metus*, could not be encompassing of every type of violence: physical violence constituted a hypothesis of true absence of contractual will (*voluntas*), whereas the psychological condition in which the *coactus* found themselves after receiving threats of unjust and significant harm was qualified as *metus* by the Romans, although Ulpian had clarified that the edict (D. 4.2.1) once contained the mention *vis metusve*. Within this framework, *vis absoluta* entails structural nullity, characterised by imprescriptibility, non-curability, and judicial cognoscibility *ex officio*, thereby overriding the general principle of party autonomy. In such cases, in fact, the formation of will is traditionally excluded: the contract is null due to the lack of one of the requirements provided by law. Different is the case of *vis compulsiva*, a concept derived from the principle *coactus tamen volui*, expressed by the jurist Paulus (11 *ad ed.* D. 4.2.21.5),<sup>2</sup> according to which, despite a flawed formation process, the contractual will would still be present. Thus, whereas the first scenario results in radical nullity, the second gives rise merely to annullability. This classical distinction evaluates the condition of the party subjected to *metus* as inferior to that of one subjected to physical force, and consequently deems the related contract voidable, not void.

In the Italian Civil Code, therefore, based on this approach, only the case of moral violence is regulated under the heading ‘violence’, fully incorporating the Pandectistic concept of *Zwang* (Windscheid 1887, 379 f.; about *metus* in Pandectistic’s perspective, see Pulitanò 2011, 665 ff.). Moreover, this traditional distinction also persists in the reading of more recent Italian jurisprudence. The Italian Supreme Court (Cass., 14<sup>th</sup> December 2010, No. 25222), in fact, confirmed the traditional and codified regulatory framework, excluding the nullity of the contract for violation of imperative norms, when a different anomaly is provided, such as annullability, or when the law ensures the effectiveness of the imperative norm by providing different remedies. In the specific case, the request for a declaration of nullity of the contract for the sale of a property, in which the applicant claimed to have been forced by the buyer through threat and usurious pressure, was rejected. The Italian Supreme Court, confirming the rejection sentence of the merit judges, deemed art. 1418<sup>3</sup> of the It. Civil Code inapplicable and indicated as

---

<sup>2</sup> Paul. 11 *ad ed.* D. 4.2.21.5: *Si metu coactus adii hereditatem, puto me heredem effici, quia quamvis si liberum esset noluissem, tamen coactus volui: sed per praetorem restituentus sum, ut abstinendi mihi potestas tribuatur.*

<sup>3</sup> Art. 1418: «Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente. Producono nullità del contratto la mancanza di uno dei requisiti indicati dall’art. 1325, l’illiceità della causa, l’illiceità dei motivi nel caso indicato

normative reference parameters Artt. 1434<sup>4</sup> and 1435<sup>5</sup> of the same Code, noting that the related action had not been proposed within the five-year prescription period.

Does this distinction between forms of violence, physical and moral, still make conceptual and normative sense? Probably from a purely categorical perspective, the classic distinction between physical violence, as a hypothesis of lack of a contractual requirement, and moral violence as a pathological defect in the formation of consent, can still be considered valid. What may warrant critical reconsideration, however, is the different evaluation by the traditional approach and jurisprudence of remedies against these forms of violence, which both lead to a deviation from the physiological elaboration of contractual elements and create a situation of non-will. After all, those who suffer psychological pressure, such as to induce them to conclude a contract that they would not have wanted to conclude under normal conditions, do not want such a contract. It is a matter of overcoming the Pauline ‘dogma’ of *coactus tamen volui* towards a hypothetical *coactus non volui*, with the application of remedies against the null contract, to those that today are simply annulable contracts, that is, contracts, as textually referred to by Andrea Torrente (Torrente 2017, 686) affected by an anomaly of lesser gravity in comparison to nullity. In a contemporary context where the doctrine of so-called ‘nullity to protect’ is invoked to sanction unfair commercial practices, those threatened with unjust and serious harm must, by inveterate tradition, be granted protection, however solid, less intense than that relating to null.

## References

- Balzarini M. (1993), *s.v.* “Violenza (diritto romano)”, in *Enciclopedia del diritto*, Vol. XLVI, Milano, Giuffrè, 830-843.
- Boyé A.-J. (1922), *La denuntiatio introductive d’instance sous le Principat*, Bordeaux, Imprimerie de l’Université Y. Cadoret.
- Calore E. (2008), *Actio quod metus causa. Tutela della vittima e azione in rem scripta*, Milano, Giuffrè.

---

dall’art. 1345 e la mancanza nell’oggetto dei requisiti stabiliti dall’art. 1346. Il contratto è altresì nullo negli altri casi stabiliti dalla legge».

<sup>4</sup> Art. 1434: «La violenza è causa di annullamento del contratto, anche se esercitata da un terzo».

<sup>5</sup> Art. 1435: «La violenza deve essere di tal natura da fare impressione sopra una persona sensata e da farle temere di esporre sé o i suoi beni a un male ingiusto e notevole. Si ha riguardo, in questa materia, all’età, al sesso e alla condizione delle persone».

- Carrata Thomes F. (1968), *La rivolta d'Aristonico e le origini della provincia romana d'Asia*, Torino, Giappichelli.
- Cervenca G. (1965), "Per la storia dell'editto 'quod metus causa' (a proposito di D. 4, 2, 1 e 3)", in *Studia et Documenta Historiae et Iuris*, 31, 312-318.
- D'Ors A. (1981), "El Comentario de Ulpiano a los Edictos del 'metus'", in *Anuario De Historia Del Derecho Español*, 51, 223-290.
- Di Salvo S. (1979), *Lex Laetoria. Minore età e crisi sociale tra il III e il II a.C.*, Napoli, Jovene.
- Di Salvo S. (2014), "Ius gentium e lex mercatoria", in *Studia et Documenta Historiae et Iuris*, 80, 351-357.
- Ebert U. (1969), "Vi metusve causa", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 86, 403-415.
- Erdődy J. (2022), "Protected by *Lex Laetoria*: Two Papyri of Roman Egypt and their Effect on Roman Law", in *Journal on European History of Law*, 13/2, 99-106.
- Fiori R. (2016), "La nozione di *ius gentium* nelle fonti dell'età repubblicana", in I. Piro (ed.), *Scritti per Alessandro Corbino*, Vol. 3, Tricase, Libellula, 109-129.
- Foti Talamanca G. (1979), *Ricerche sul processo nell'Egitto greco-romano. L'introduzione del giudizio*, Vol. 2/1, Milano, Giuffrè.
- Frezza P. (1949), "Jus gentium", in *Revue internationale des droits de l'antiquité*, 1(2), 259-308.
- Galeotti S. (2016-2017), "L'editto di Lucullo e il processo a C. Antonius Hybrida. Osservazioni in tema di «*edictum de vi hominibus armatis coactisve*»", in *Rivista di diritto romano*, 17 (n.s. 1-2), 1-20.
- Gaulhofer, J. (2019), *Metus. Der prätorische Rechtsschutz bei Furcht, Zwang und Gewalt*, Wien-Köln-Weimar, Böhlau Verlag.
- Gianola A. (2008), *L'integrità del consenso dai diritti nazionali al diritto europeo. Immaginando i vizi del XXI secolo*, Milano, Giuffrè.
- Grenfell B.P., Hunt A.S. (1901), *The Amberst Papyri. Being an account of the Greek Papyri*, Vol. II, London, Oxford University Press.
- Guasco A. (2017), *Gli atti introduttivi del processo civile nelle cognitiones extra ordinem*, Torino, Giappichelli.
- Guasco A. (2024), *Ἀντίχρησις est species pignoris ...? Itinerari dell'antiresi dai diritti dell'antichità alle codificazioni moderne*, Napoli, Satura editrice.
- Kaser M. (1977), "Zur *in integrum restitutio*, besonders wegen 'metus' und 'dolus'", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 94, 101-183.
- Kaser M. (1993), *Ius gentium*, Köln-Weimar-Wien, Böhlau.
- Kenyon F.G. (ed.) (1898), *Greek Papyri in the British Museum (P. Lond)*. Vol. II, London, Oxford University Press.

- Kupisch B. (1998), “*Quod metus causa gestum erit, ratum non habebit* (Dig. 4,2,1). Restitution des biens à la suite des persécutions subies par un groupe dans l’antiquité romaine et à l’époque actuelle”, in A. Dufour, I. Rens, R. Meyer-Pritzl, B. Winiger (eds.), *Pacte, convention, contrat. Mélanges en l’honneur du Professeur Bruno Schmidlin*, Bâle et Francfort-sur-le-Main, Helbing&Lichtenhan, 463-479.
- Labruna L. (1991), “Alle radici dell’ideologia repressiva della violenza nella storia del diritto romano”, in *Adminicula*, 2<sup>nd</sup> ed., Napoli, Jovene.
- Lambrini P. (2023), “I rimedi contro la violenza morale tra ordinamenti moderni e diritto romano”, in *Annali della Facoltà Giuridica dell’Università di Camerino – Studi*, 12, 1-12.
- Lintott A. (1968), *Violence in Republican Rome*, Oxford, University Press.
- Longo C. (1934), “Note critiche in tema di violenza morale”, in *Bullettino dell’Istituto di diritto romano ‘Vittorio Scaloja’*, 42, 68-128.
- Masi Doria C. (2012), *Modelli giuridici, prassi di scambio e medium linguistico. Un itinerario dell’espansionismo romano*, Napoli, Editoriale Scientifica.
- Merola G.D. (2001), *Autonomia locale, governo imperiale. Fiscalità e amministrazione nelle province asiatiche*, Bari, Edipuglia.
- Meyer-Zwiffelhofer E. (2010), *Storia delle province romane*, trad. it. B. Maj, Bologna, il Mulino.
- Mitteis L., Wilcken U. (1963), *Grundzüge und Chrestomathie der Papyruskunde*, Vol. II(2), Hildesheim, Georg Olms Verlag.
- Montevocchi O. (1998), *La papirologia. Ristampa riveduta e corretta con addenda*, Milano, Vita e Pensiero.
- Pontoriero I. (2020), *I vizi del consenso nella tradizione romanistica*, Torino, Giappichelli.
- Pulitanò F. (2011), “La violenza nella contrattazione: tutela processuale e legittimazione passiva”, in L. Garofalo (ed.), ‘*Actio in rem*’ e ‘*in personam*’. In ricordo di Mario Talamanca, Padova, Cedam.
- Reinach Th., Spiegelberg W., De Ricci S. (1905), *Papyrus grecs et démotiques*, Paris, E. Leroux, rist. anast. Milano 1972, Cisalpino-Goliardica.
- Solidoro L. (1993), *La repressione della violenza nel diritto romano. Appunti dalle lezioni*, Napoli, Jovene.
- Tarwacka A. (2014), “*Nil in consensu tam contrarium est quam vis atque metus*. The Origin of Provisions against Duress in Roman Law”, in F. Reinoso-Barbero (ed.), *Principios Generales del Derecho. Antecedentes históricos y horizonte actual*, Madrid, Thomson Reuters Aranzadi, 707-716.
- Taubenschlag R. (1955), *The Law of Greco-Roman Egypt in the Light of the Papyri: 332 B.C.-640 A.D.*, 2<sup>nd</sup> ed., Warszawa, Państwowe Wydawnictwo Naukowe.

- Torrente A., Schlesinger P. (2017), *Manuale di diritto privato*, ed. by F. Anelli, C. Granelli, 23<sup>th</sup> ed., Milano, Giuffrè.
- Vacca L. (1992), “L’editto di Lucullo”, in F. Milazzo (ed.), *Illecito e pena privata in età repubblicana*, Atti del Convegno internazionale di diritto romano. Copanello 4-7 giugno 1990, Napoli, Jovene.
- Venturini C. (1994), “*Metus*”, in F.J. Paricio Serrano (ed.), *Derecho romano de obligaciones: homenaje al profesor José Luis Murga Gener*, Madrid, Editorial Universitaria Ramón Areces, 921-944.
- Windscheid B. (1887), *Lehrbuch des Pandektenrechts*, Vol. I, Frankfurt a.M., Rütten&Loening.
- Zani G. (1927), “L’evoluzione storico-dogmatica dell’odierno sistema dei vizi del volere e delle relative azioni di annullamento”, in *Rivista italiana per le scienze giuridiche*, 2, 335-350.
- Zimmermann R. (1996), *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford, University Press.



## Chapter 16

# **INVITUS AND LEGAL PRACTICE. TECHNICAL LANGUAGE AS IMPERATIVE**

**Maria Vittoria Bramante**

*ABSTRACT: In ancient societies, young people and women are considered incapable, due to their age and sex, of knowingly taking care of their affairs. The legal system reflects this situation and adopts specific legal instruments to protect their position, which is considered weak and fragile. Epigraphs, wax tablets from Pompeii and Herculaneum and papyri attest that they were required to be assisted by a male.*

*KEYWORDS: Young people and women' status personarum – Agere – Technical language – Limit to will regulatory – Protection – Tabulae ceratae – Papyri – Puteoli – Herculaneum – Egypt – Vulnerable subjects – Loans – Lease – Agreement – Contract to lose a wrestling match.*

*SUMMARY: 1. Status personarum of young people and women, and the capacity to agere in Roman legal practice. – 2. Untrue will? The ancient technical language as limit to regulatory will of young people and women. – 2.1. Technical language in legal practice. Women from ancient Puteoli and Herculaneum. – 2.2. Technical language in legal practice. Boys, athletae and contracts from Egypt: The role of guardians. – 3. The technical language as legal protection to will regulatory of vulnerable subjects. – References.*

### **1. Status personarum of young people and women, and the capacity to agere in Roman legal practice**

Law is a dynamic construct, shaped by language within forms that are defined and oriented by the socio-economic evolution of a civilization. It is not an abstract architecture founded upon immutable conceptual invariances.

Within Roman legal culture, the legal subject (*persona*) was conceived as a free citizen, not under the authority of another (*sui iuris*), who had the capacity to understand and to will. The male sex and pubertal age were important. For minors and women, protection institutions known as curatorship (*cura*) and guardianship (*tutela*) were instituted (Arangio-Ruiz 1930, 46 ff.; La Pira 1930, 53 ff.; Frezza 1930-1931, 363 ff.).

The normative will (*voluntas*) of young people and women was not considered full for reasons related to age and belonging to the female gender.

The law considered incomplete or deficient, owing to their age or gender.

Law regarded these individuals as fragile legal subjects, incapable of managing their affairs with full awareness, and therefore subject to special safeguards: they were deemed ‘limited’ legal persons (Guarino 2001, 133 ff.).

Their normative will was therefore ‘incomplete’ and was insufficient to support the autonomous conclusion of legal transactions without the assistance or intervention of a guardian or curator. In fact, in Roman legal culture, guardianship and curatorship (namely, *tutela* and *cura*) were institutional mechanisms designed to protect those deemed incapable of self-management, primarily because of age, sex, or mental incapacity. These institutions focused on the integration or supplementation of the individual’s will, with the goal of safeguarding the interests of the agnatic family group.

The normative will of women and minors – it can be said – is a ‘minor’ or ‘imperfect’ normative will, one that in certain cases was deemed non-existent unless validated or supplemented by a legally competent person. In this respect, the capacity of women and minors to act legally was conditional: their *voluntas* acquired normative efficacy only through the cooperation of an authorised guardian, whose intervention was necessary for the act to be valid and binding (Cantarella 2010, 203; Gardner 1990, 233 ff.). This paper addresses the *formulae* as a means of protecting a person unable to manage their relationships with others, enter into legal acts, or administer their own property. In such contexts, these individuals lacked a fully formed *voluntas*, and their juridical agency was fundamentally dependent upon the legal mediation of others.

## 2. Untrue will? The ancient technical language as limit to regulatory will of young people and women

The Roman legal system is known to us from manuscript sources and legal practice particularly from the Roman *Campania* (which included *Venafrum*, *Allifae*, *Suessa*, *Teanum*, *Compulteria*, *Forum Popilii*, *Cales*, *Trebula*, *Caiata*, *Capua*, *Sinuessa*, *Volturnum*, *Suessula*, *Atella*, *Abella*, *Acerrae*, *Liternum*, *Cumae*, *Misenum*, *Puteoli*, *Herculaneum*, *Nuceria*, *Pompeii*, *Surrentum*, *Salernum*).

Roman legal practice is notably attested by wax tablets.

As is well known, in addition to the use of wood for items such as *dipinti*, wooden tablets were employed throughout the Mediterranean for legal and personal writing from a very early date. From the Roman period, we have numerous surviving examples of such writing-tablets.

These include tablets from London (Tomlin 2016, 32 ff.; Bramante 2016, 149) and Vindolanda (Bowman, Thomas 1983, 33 ff.; Bowman 2003, 16 ff.) and Dacia (IDR 1975), Egypt, Switzerland and North Africa (Courtois, Leschi, Perrat, Saumagne 1952).

Particularly significant are the Campanian tablets, which predate the eruption of Vesuvius in 79 AD. These were surprisingly found in Pompeii and *Herculaneum*, and – unlike the tablets from Britain and Dacia – constitute an extraordinary body of first-hand evidence in many fields of ancient life during the period between *Tiberius* and *Vespasian* (Camodeca 1999, 537 ff.)

The following are preserved from Pompeii:

1. the tables from the archive of *Lucius Caecilius Jucundus* (CIL. IV 3340, Tab. 1-153) discovered in 1875 in the house of the *argentarius* (banker) and consist in 153 documents dating from 27 to January 62 AD, shortly before the great earthquake of 5 February;
2. two triptychs found in 1887 in the *praefurnium* of the *Palestra* of Pompeii of *Poppea Notae*; 3. from Moregine, the archive of freedmen bankers active in *Puteoli*, the *Caii Sulpicii* (*Faustus*, *Cinnamus*, *Onirus*), who moved to the slopes of *Vesuvius*, and discovered in 1959 during highway construction; these documents date from 26 and 61 A.D. (Camodeca 1999; K. Verboven 2000, 161 ff.; K. Verboven 2008, 280).

From *Herculaneum*, tablets were found in eight different houses during excavations from 1930 to 1940, ranging from 8 BC to 75 AD.

These silver fir wood tablets – the diptych and the triptych – were intended to hold documents regarding the legal affairs of private individuals (state certifications; contracts of various kinds: mortgage, lease, guarantee, land or slave sales, partnerships; procedural agreements).

As required in Roman legal culture, such tablets provided evidence between parties and against third parties and their evidentiary value remained valid even before a court, unless their content lacked binding force.

Their importance was such that a *Senatus consultum Neronianum* (61 AD) established specific rules for sealing and inscribing the inner text, written by the author or the scribe of the *testatio*, to preserve content and prevent forgery.

We can therefore understand the extraordinary documentary and legal value of these texts, considered cultural assets in Italian law (pursuant to art. 13 Legislative Decree No. 42/2004).

It allows the acquisition of an extraordinary result: «The daily application of law in Roman Italy was consistent with the teaching of Roman jurisprudence, with consequences that are not insignificant, clearly, for our understanding of Roman private law in that period and for assessing the effective operation of law in Roman legal culture» (Camodeca 1999, 133 ff., trans. by the Author).

In particular, the comparison between the legal texts and the tablets shows that in these tablets the legal form and the language are consistent

with the jurisprudential texts of slightly earlier (*Alfenus Varus*) and slightly later (*Javolenus Priscus*).

Significantly, in the wax tablets no acts by minors under guardianship or under curatorship are attested; however, women assisted by a guardian do appear. It follows that the contractual text preserved in the tablets reflects Roman rules on the normative will of women when they are parties to the contract.

The normative will of subjects is not, in fact, freely expressed in an autonomous way: they could not will on their own. It remains unknown whether the women wished to perform the transaction, would have preferred different terms, or acted entirely contrary to their true will.

Nonetheless, compliance with the formulary scheme was mandatory: the formalism of the contractual formulas made the transaction valid *sub specie iuris* in itself, even where the inner will was absent. Moreover, women could not author or seal a legal document where the transaction concerned them personally.

From this perspective, Roman legal culture limits the normative will of young people and women, and legal forms and technical language function as constraints on such will.

The *voluntas* had to be moulded into, and expressed through, the formats made available by the legal order or already recognised by it.

It can thus be deduced that the appearance of the legality, in its external formalism, may or may not coincide with the normative will of the contracting party.

### **2.1. Technical language in legal practice. Women from ancient *Puteoli* and *Herculaneum***

In the Roman legal culture, a woman did not possess the capacity to autonomously regulate her own legal affairs: she lacked an autonomous normative will

As is evident from the sources, a woman was required to act under the assistance of a guardian. A *lex Iulia et Papia* granted women full freedom of negotiation and legally relevant volition only after bearing three children if the mulier was *ingenua* or four if she was a freedwoman, *i.e.* a former slave (La Pira 1930; Arangio-Ruiz 1930, 46; Frezza 1930, 363 ff.).

The incapacity of women to act autonomously in legal matters was so pronounced, as the Campanian tablets attest, that they were required to be assisted by a male even if he was a slave. In the *Sulpicii*'s archive we have twelve women appear as parties to legal acts.

TPSulp. 58 preserves a *chirographum* written and sealed by *Pyramus*, a slave of *Priscilla Caesia*: the *domina* had received a loan of 20,000 sesterces and subsequently a further 4,000 (*mutuum cum stipulatione*).

It is the slave who draws up the deed. Scholars believe that the *servus* is an extension of the figure of the guardian, and therefore, since (*res Mancipi et persona*) he is endowed with minimal capacity to act, he is preferred over the woman as *signator*.

Let us now consider other documents in which the normative will of the woman is valid due to the presence of a guardian (Höbenreich, Rizzelli 2003, 170 ff.).

TPSulp. 60, dated 20 March 43, preserves a triptych, containing a *nomen arcarium*, frequently employed in Campanian practice to extend credit to women, for the obvious reason that they could not draw up the chirograph, typically used in such transactions (TPSulp. 51-58), as it consisted of a rigorous *testatio* taken from the *codex accepti et expensi* of the creditor. *Titinia Antracidis* was (with high probability) a freedwoman, now *sui iuris*, lacking a guardian, who appears as *creditor ex mutuo* granted by another woman, a Greek named *Euplia*, from Milo, who is mentioned in this document together with her guardian and guarantor, the Athenian *Epichares*, son of *Aprhodisius*.

The document clearly shows the use of Roman law and Greek law (in Greece the married woman's *Kyrios*, unlike in Rome, could be her husband or pubescent son), and further illustrates that foreigners were always identified with their patronymic and *origo* (Camodeca 1999, 152-154).

These tablets demonstrate the guardian's role in interposing *auctoritas* in legal acts performed by women.

Upon childbirth of a certain number of children, women acquired full ability to negotiate and therefore their will becomes normative, and completely autonomous. *Titinia Antracidis* was one of them; and we can present other examples.

In a triptych from *Herculaneum* (from the archive of *L. Cominius Primus*) there is a *nomen arcarium* for *Herennia Pallas* (TH<sup>2</sup> A8) evidently a freedwoman for her *cognomen* who *petiit et numeratos accepit*, that is, who requested and received in cash, *domo ex arca*, directly from the creditor's coffer. *Herennia Tertia* of TH. 63 purchases a venalicious business without the assistance of a guardian.

In TH. 59, datable before 63 AD, a woman, *Vibidia Procula*, purchases an adult slave for 1,900 sesterces from *Claudia Musa*, who acts, as the legal form requires, through the *auctoritas* of the guardian, who must be expressly identified, *M. Antonius Philetus*, while her slave *Hamillus* acts for the buyer (Camodeca 2000, 53 ff., 63 ff.).

We can still recall the case preserved in another loan document, TPSulp. 63, in which a naive woman, *Magia Pulchra*, appears, without assistance, who has borrowed a sum of money from *C. Sulpicius Cinnamus*.

The *mulier* is *sui iuris* and acts without the support of a guardian.

The creditor, in order to secure repayment, makes her promise to pay a penalty in the event of delay or default, and imposes an oath by *Iovis et numen divi Augusti*.

This form makes us understand how, in daily life, a woman's normative will was perceived as questionable and was not so trustworthy, despite having acquired full subjectivity as a result of childbirth and her will was no longer legally impaired by her gender.

The documents demonstrate that women's normative will was limited by legal formalism and requirement to operate through pre-established forms. It becomes clear that jurists created these forms for male subjects, and then, depending on the case, they were adapted for women's participation in legal transactions.

Some Pompeian graffiti confirm this picture, and demonstrate that women not only possessed legal knowledge and familiarity with Roman legal culture, sources, and jurisprudential practice, but also engaged in granting loans, usually secured by pledges. In everyday life, outside formal and strictly legal contexts, in minor commercial environments, women's ability to understand and intend legal acts was fully recognised, and the issue of their normative will did not arise.

In these contexts, women possessed autonomy and their will was regulatory (Gardner 1999, 11 ff.).

From the *Officina* of Granio Romano (ins. I 8.13) the activity of lending at interest by a woman, a certain *Faustilla*, is attested.

In CIL. IV 8203 – *Idibus Iulis/ inares postas ad Faustill(am) pro denariis II usura(m) deduxit aeris a(sses) Ex su(mma) XXX* –, we read «On the Ides of July, earrings were delivered to *Faustilla* for two *denarii*. For these, she deducted one as per month as interest from the sum given» (trans. by the Author).

From the valuation of the earrings equal to two *denarii*, or 32 asses, *Faustilla* retained for herself as a premium one as, corresponding to one-thirtieth of the total sum, effectively delivering 31 asses to the debtor. The monthly interest rate for the pledge thus amounted to 3.3%.

In a similar graffiti, found in the same room, CIL. IV 8204 - *IV Non(as) Iul(ias)/paenulam, palliolum/ [posita ad Fau]stilla(m)/Pr[o HS] L usur[is]/ [deduxit] XIIS s(emisses) / [aeri]s a(sses) VIII* – we read: «Four days before the Nones of July, a traveller's cloak and a small cloak were delivered to *Faustilla*. For fifty *denarii* she deducted thirteen and a half asses monthly, as

interest» (trans. by the Author). This too attests to the valuation of the pledge and the monthly deduction of interest.

From a formulaic point of view, there is no indication of the debtor, who in the contemporary loan documents was unailing.

From these graffiti on the wall, used as a real register, of debit-credit entries and pledges, *sub specie iuris*, a distance emerges between the Roman legal culture formalised by jurists (science), documentary practice, and the day-to-day handling of small-scale agreements, we might say.

First of all, for what we are saying on the subject of regulatory will, the credit is extended by a woman, with clear awareness of the legal mechanisms, and then because the loan witnessed by the aforementioned graffiti is not gratuitous.

As is well known, the credit phenomenon, traditionally rooted in the *datio mutui*, was characterized by gratuity, which, except for limited cases, excluded the agreement of interest, and remained so formally until Justinian.

And this was precisely because of its genesis in a friendly context, as noted by the grammarian *Nonius Marcellus* (*Unde honestius mutuuum quod sub amico affectu fiat meum tuum usu temporis necessarii*, ed. Lindsay, 707), suggesting that the very idea of repaying more than one received undermined the authenticity of the relationship, its solidarity and familiarity.

There is, in fact, no rational justification that supports an increase in assets if the delivery occurs to support the indigence and difficulty of others.

It is no coincidence that *Aulus Gellius* takes this ethical stance when he refers to the loan as *subsidium hoc inopiae temporariae quo communis omnium vita indiget* (*Noctes Atticae* 20.1.41: «A remedy for temporary want, which the life of all people has need of», trans. by the Author).

Women were considered limited legal subjects *ratione sexus* (*propter sexus infermitatem et ignorantiam rerum forensium*, Tit. Ulp. 2.1). However, as the *tabulae ceratae* show, they engaged in contractual acts, with the assistance of the guardian and through their own slaves, if they did not have the capacity under the *ius trium liberorum*.

The graffiti, compared to the wax tablets that document the *agere muliebre*, economic initiative and entrepreneurial activity, are distinguished by their informality, and above all by the absence of the precautions that the drafting of a chirograph or a *testatio* required for the validity of the act, as they were more easily modifiable without altering the diplomatic nature of the document.

From this point of view, a grey area emerges, a daily routine of relationships and transactions, grounded in dynamics unacknowledged by the legal system, and likely entirely indifferent to performance, timing, legitimacy of usury agreements, or the legal mechanisms of release.

I believe that *Faustilla's* graffiti constitute a clear instance of the use of legal instruments parallel to those of full legal subjects, testifying to the circulation of legal knowledge, in its essential elements and formulaic expressions, even in non-elite environments. Judicial protection, however, appears fundamentally difficult to conceive and invoke in the event of non-repayment or pledge retention, except perhaps by resorting to strategic framing, reinterpreting the relationship to bring it within the formal structure prescribed by legal culture.

## 2.2. Technical language in legal practice. Boys, *athletae* and contracts from Egypt: The role of guardians

In the Egyptian practice of the Roman era, some papyri preserve contractual agreements in which the normative will of the contracting parties appears to be entirely absent (Taubenschlag 1938, 122 ff.).

An emblematic example is P.Oxy. LXXIX 5209 – dated February 23, 267, when *Gallienus* was emperor – recording an agreement between young wrestlers competing in the first class of the *paidēs* category, to alter the course and the outcome of a match, P.Oxy. LXXIX 5209, a «contract to lose a wrestling match» (Maltomimi, Rathbone 2014, 163 ff.; Papakonstantinou 2016, 13 ff.; Hoogendijk 2016, 98; Maduli 2018, 73; Marshall 2018, 94 ff.; Decker 2019, 32 ff.).

In the margin of the admissibility and validity of what was established, the agreement drawn up in duplicate, so that each of the parties could retain one copy (ll. 21-22, δισση γραφεῖσα ἀντίτυπος ἥς ἔσχον μοναχὸν/ καὶ ὑμεῖς μοναχὸν).

The agreement concerns the progress of the wrestling competition, and describes the technical maneuvers to be performed during the match so that victory would be awarded to *Nicantinous*. In other words, *Demetrius* effectively sells his own defeat, thereby renouncing fame, triumph and, clearly, the prize. It is established, in particular, that *Demetrius* would fall three times and surrender after the third fall.

If *Demetrius* complied with the plan but the referee failed to award the crown, the agreement provided that he would not have to return the 3,800 drachmas (ll. 11, δι' ὑμῶν), a sum apparently already paid.

Should *Demetrius* fail to lose, whether by refusing to surrender or otherwise breaching the agreement, a penalty would be due immediately, without delay or legal dispute (ll. 19-20, ἀνευ τινὸς ὑπερθέσεως καὶ εὐρησιλογίας).

Clearly the penalty was paid by his guarantors, one of whom is to be considered the guardian. The clause ἡ ὁμολογία κυρία (ll. 21-22) was commonly

known from contracts of pure Greco-Egyptian origin in Roman times to attribute full validity and probative force to the document.

Precisely, I believe that due to the unlawful content and the difficulty of enforcing such an agreement the standard clause «καθάπερ ἐκ δίκης» is absent, which would have allowed for a more expedited execution in the event of breach.

And yet a formula is inserted of assumption of the commitment to respect the agreement according to the legal concept of guarantee, since the parties had entered into the agreement on these conditions) (ll. 20-21, κατὰ τὸ τῆς ἐγγύης δίκαιον διὰ | τὸ ἐπὶ τούτοις ἡμᾶς τὰς συνθήκας πεποιηκέναι).

In line 23 appears the well-known clause «ἐπερωτηθεὶς ὁμολόγησα» which consists of an adaptation in the Greek legal practice of the institution of Roman *stipulatio*, so as to render the agreement compatible with Roman juridical forms, solemnizing the terms as a formal promise.

The fulfillment of this promise consisted in the execution of choreographed athletic movements typical of the discipline of wrestling, which abstractly appeared completely voluntary to spectators. In fact, they were staged performances, in breach of the rules of fair competition, since the contest's outcome had been pre-arranged. Victory, therefore, was awarded *ope arbitris*, not through genuine combat.

P.Oxy. LXXIX 5209 thus contains a contract in fraud of the 'law' in the sports field.

Was there coercion? Physical or moral violence exerted against the boys? We cannot know. Yet, the illegality of the agreement is beyond question: from the papyrus emerges a very vivid portrayal of the corruption that penetrated the world of athletics, which seems to respond in perspective to a logical division of prizes and rewards driven by connivance and purely economic purposes.

This stands in stark contrast to the ideal of *facere hoc gloriae causa et virtutis gratia* that characterizes the competitive spirit of athletes in the opinion of Ulpian (XVIII *ad ed.* D. 9.2.7.4).

In accordance with Roman legal culture, the purchase and sale of the competition's outcome was concluded by the athletes themselves, with the assistance of those holding authority, in the appropriate legal form.

The written contract reveals the parties' true intent to instrumentalize legal forms for ulterior purposes. The contract was drawn up in two copies, each with the value of original: a party in breach could later be denounced by the other, who could present the document as evidence of coercion or manipulation, arguing they had been compelled by force to enter into the agreement.

### 3. The technical language as legal protection to will regulatory of vulnerable subjects

In the thousand years between the Law of the Twelve Tables and Justinian's massive Codification, the Romans developed the most sophisticated and comprehensive secular legal system of Antiquity. Roman legal culture was deeply intertwined with its societal structure and gradually transforming norms, from customary practices into a sophisticated system that influenced legal thought for centuries (Stein 1999, 129 ff.).

The Roman legal culture remains at the heart of the civil law tradition of Europe (Zimmermann 2007, 134 ff.; Zimmermann 2011) and much of the Americas, Asia, and Africa (Domingo 2018).

Roman jurists created new legal concepts, institutions and procedural devices that continue to resonate today.

Legal practice shows the use of formal patterns which operated independently from the actual volition of the contracting parties. In Roman legal culture, *voluntas* is understood as the exercise of a specific normative power; indeed, agreement (*consensus*) is the primary tool for the implementation of private autonomy.

The structure of legal acts was based on standardized schemes: the will – whether existing or not – of the individual contractors (*voluntas singulorum*) had to conform to these predetermined patterns.

The rigidity of the negotiation scheme was useful to express an agreement, regardless of the underlying legally relevant intention. Roman legal thought of the Classical period identifies *voluntas* as a fundamental principle, as expressions of individual will deeply, of normative freedom (Vlahos 2012, 829).

Any agreement relies on mutual consent. However, there are some cases in which exterior will does not coincide with the internal readiness or the will of the parties – caused by various exterior factors and their influence proper. Therefore, this is a vivid illustration of 'insufficient will'.

In the same way, legal form constitutes a scheme that protects vulnerable subjects, because it contains all the legal elements required for the validity of the transaction. From this perspective, formulaic language may be seen as a means of safeguarding the rights of weaker parties.

Clearly the Campanian legal tablets and graffiti demonstrate that there was a tension between the everyday application of law, especially by women, and the formal structures developed by jurists and enshrined in *responsa* and imperial constitutions.

The contract from Roman Egypt likewise demonstrates that formal legal schemes were often employed/used by actors unable to will autonomously or with the intent to pursue unlawful objectives.

It cannot be denied, however, that legal formulas are elaborated by jurists for reasons of certainty and prudence, and that their proper use could benefit weaker categories.

In conclusion, it is worth underscoring that even today, both contractual and procedural forms are often constructed by jurists with the express purpose of supporting legally vulnerable categories.

Thus, technical legal language continues to function as a protective mechanism for the regulatory will of those who may otherwise lack full juridical capacity.

## References

- Arangio-Ruiz V. (1930), *Persone e famiglia nel diritto dei papiri*, Milano, Vita e Pensiero.
- Bowman A.K., Thomas D. (1983), *Vindolanda: the Latin writing tablets*, London, Society for the Promotion of Roman Studies.
- Bowman A.K. (2003), *Life and Letters on the Roman Frontier. Vindolanda and its People*, London, Routledge.
- Bramante M.V. (2017), “A proposito delle «Roman London’s first voices» ovvero sulla necessità di una riedizione delle «tabulae» da «Londinium»”, in *Index. International Survey of Roman Law – Quaderni Camerti di studi romanistici*, 45, 147 ff.
- Cantarella E. (2010), *L’ambiguo malanno*, Milano, Feltrinelli.
- Camodeca G. (1999), “Nuovi dati dalla riedizione delle tabulae ceratae della Campania”, in *Atti dell’XI Congresso Internazionale di Epigrafia greca e latina*, Roma 1997, I, Roma, Quasar Editore, 537 ff.
- Camodeca G. (1999), *Tabulae Pompeianae Sulpiciorum, (TPSulp.)*. Edizione critica dell’archivio puteolano dei Sulpici, Vol. I-II, Roma, Quasar Editore.
- Camodeca G. (2000), “*Tabulae Herculenses*: riedizione delle *emptiones* di schiavi (TH 59-62)”, in U. Manthe, Ch. Krampe (eds.), *Quaestiones Iuris. Festschrift für J.G. Wolf zum 70. Geburtstag*, Berlin, Dunker & Humblot, 53 ff.
- Courtois C., Leschi L., Perrat C., Saumagne C. (1952), *Les Tablettes Albertini. Actes privés de l’époque Vandale (fin du V<sup>e</sup> siècle)*, Vol. I-II, Paris, Arts et Métiers Graphiques.
- Decker W. (2019), “A Prearranged Affair. Towards Papyrus Oxyrhynchus 5209”, in *Diagoras: International Academic Journal on Olympic Studies*, 3, 32 ff., online Journal.
- Domigo Osle R. (2018), *Roman Law: An introduction*, London-New York, Routledge.

- Frezza P. (1930), "La capacità delle donne all'esercizio della tutela nel diritto romano classico e nei papiri greco-egizi", in *Aegyptus. Rivista italiana di Egittologia e di Papirologia*, 11, 363 ff.
- Gardner J.F. (1990), *Women in Roman Law and Society*, London, Bloomington, Indiana University Press Collection.
- Gardner J.F. (1999), "Women in Business Life: Some Evidence from Puteoli", in P. Setälä, L. Savunen (eds.), *Female Networks and the Public Sphere in Roman Society*, Institutum Romanum Finlandiae, Rome, Quasar, 11 ff.
- Guarino A. (2001), *Diritto privato romano*, Napoli, Jovene.
- Höbenreich E., Rizzelli G. (2003), *Scylla. Fragmente einer juristischen Geschichte der Frauen im antiken Rom*, Wien-Köln-Weimar, Böhlau.
- Hoogendijk F. (2016), "Match fixing in Romeins Egypte", in *Hermeneus. Tijdschrift voor het Nederlands Klassiek Verbond*, 88.3, 98 ff.
- IDR (1975), *Inscriptiile Daciae Romanae (Inscriptiones Daciae Romanae)*, Vol. I, Dacia Superior, Bucharest, Editura Academiei Republicii Socialiste România.
- La Pira G. (1930), "Riflessi provinciali nel diritto tutelare classico romano", in *Bullettino dell'Istituto di diritto romano 'Vittorio Scialoja'*, 38, 53 ff.
- Maduli B. (2018), "Un caso di frode sportiva: P. Oxy. LXXIX, 5209", in *Rivista di diritto ellenico*, 8, 73-127.
- Maltomimi F., Rathbone D.W. (2014), "Contract to lose a wrestling match. N. 5209", in W.B. Henry, P.J. Parsons et alii (eds.), *Oxyrhynchus Papyri, LXXIX*, Graeco-Roman Memoirs, 100, London, The Egypt Exploration Society, 163-167.
- Marshall C.W. (2018), "Golden Boys (POxy. 79.5209)", in *Bulletin of the Institute of Classical Studies (BICS)*, 61.1, 94 ff.
- Papakonstantinou Z. (2016), "Match fixing and victory in greek sport", in *Rheinisches Museum für Jurisprudenz, Philologie, Geschichte und griechische Philosophie*, 159.1, 13 ff.
- Pudsey A., Vuolanto V. (2021), "Children's Urban Environments in an Ancient City: Social and Physical Realities", in *Childhood in the Past An International Journal*, 14.2, Abingdon, Oxfordshire, Routledge, 161-176.
- Simonett C. (1947), *Führer durch das Vindonissa-Museum in Brugg*, Brugg, Effingerhof.
- Stein P. (1999), *Roman law in European History*, Cambridge, University of Cambridge Press.
- Taubenschlag R. (1938), "The Ancient-Greek-City Laws in Ptolemaic Egypt", in Id., *Opera minora*, Vol. I, Warszawa 1959, 601, Paç stwowe Wydawn.
- Tomlin R.O.S. (2016), *Roman London's first voices: writing tablets from the Bloomberg excavations, 2010-14*, London, Museum of London Archaeology.

- Verboven K. (2000), “L’organisation des affaires dans les archives des C. Sulpicii de Pouzzoles (Tabulae Pompeianae Sulpiciorum)”, in *Cahiers Glotz*, 11, 161 ff.
- Verboven K. (2008), “*Faeneratores, Negotiatores* and Financial Intermediation in the Roman World (Late Republic and Early Empire)”, in K. Verboven, K. Vandorpe, V. Chankowski (eds.), *Pistoi dia tèn technèn. Bankers, Loans and Archives in the Ancient World. Studies in Honour of Raymond Bogaert*, *Studia Hellenistica* 44, Leuven, Peeters, 280 ff.
- Vlahos C. (2012), “La notion de *voluntas singulorum*: quelques réflexions sur un protagoniste du droit romain classique”, in E. Chevreau, D. Kremer, A. Laquerrière-Lacroix (eds.), «*Carmina iuris*». *Mélanges en l’honneur de Michel Humbert*, Paris, De Boccard, 829-852.
- Zimmermann R. (2007), “Roman Law and European Culture”, in *New Zealand Law Review*, 42.2, 63 ff.
- Zimmermann R. (2011), “Roman Law and the Harmonization of Private Law in Europe”, in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C.E. Du Perron, J.B.M. Vranken (eds.), *Towards a European Civil Code*<sup>3</sup>, Alphen aan den Rijn, Kluwer Law International, 27 ff.



Part 6

***ARBITRIUM* BEYOND INDIVIDUAL WILL**



## Chapter 17

# THE DETERMINATIVE WILL OF CONTRACTUAL CONTENT: THE RUSSIAN ROULETTE CLAUSES

Francesco Castronovo

*ABSTRACT: Taking a comparative approach, this essay explores the construction and performance of Russian Roulette clauses in common and civil law systems, from the perspective of the limits to the intention of the parties that we can retrieve in each system.*

*KEYWORDS: Russian Roulette clauses – Will of the parties – Contract law – Interpretation*

*SUMMARY: 1. Introduction. – 2. Classical and modern contract law and the protection of free will: Good faith and abuse of rights. – 3. Construction and performance of Russian roulette clauses under US law. – 4. Construction and performance of Russian roulette clauses in civil law systems. – 5. Are common and civil law really poles apart on the Russian roulette clause? – References.*

### 1. Introduction

Under the expression ‘Russian-roulette clause’, or similar terminology (*Delaney v. Georgia-Pacific Corp.*),<sup>1</sup> we find a number of contractual provisions (usually contained in shareholder agreements, in by-laws or operating agreements of many business ventures) in anticipation of deadlock situations. They take different forms (Tannenbaum 1999, 65),<sup>2</sup> that vary according to the needs of the parties, but their common aim is to prevent or break deadlocks over major decisions facing the business, in the hope of avoiding the need of judicial intervention (Tannenbaum 1999, 63).<sup>3</sup> From

---

<sup>1</sup> 601 P.2d 475 (Or. Ct. App. 1979); this decision provides an example of the use of the Russian roulette terminology. These provisions are also called “Shotgun clauses” (*Damerow Ford Co. v. Bradshaw* 876 P.2d 788 (Or. Ct. App. 1994)); Texas Shootouts (*RDO Foods Co. v. U.S. Int’l, Inc.*, 194 F. Supp. 2d 962 (D.N.D. 2002)); buy-sell mechanisms (*Universal Studios Inc. v. Viacom Inc.*, 705 A.2d. 579 (Del. Ch. 1997)).

<sup>2</sup> Offering a list of possible anti-deadlock clauses.

<sup>3</sup> «BSAs are far preferable to resolving deadlocks than courts, which may, among other things, remove directors to eliminate a tie, appoint provisional directors to break a tie, appoint a custodian for the business, or simply cause the corporation to be dissolved».

another perspective, such clauses are essentially share transfer provisions and restrictions that work as elements of governance, in particular in non-listed companies where shareholders depend heavily on each other's actions. Indeed, the resolution of business deadlock generally involves the exit of one of the joint owners through the buyout of their share by the other shareholders (*D'Angelo v. Leone*),<sup>4</sup> and the procedure for such exit is ruled by the clause.

The formal validity of Russian roulette clauses, in their various forms, is generally recognized by legal systems worldwide; the problems and doubts surrounding these clauses lie in their operation and enforcement in practice. Indeed, given the formal validity of the clauses, their operation may leave room for behaviors that may be considered as (too) opportunistic and, therefore, unlawful (Muris 1981, 521).<sup>5</sup> Put briefly, in seeking to enforce such clauses the strongest party may take advantage of a particular situation – for instance leveraging its greater financial resources and the weakness of the counterparty, or exploiting information asymmetries – to get benefits and returns that may be considered as unfair and undue. The issue of whether such behaviors will be considered lawful or not does not hinge on the formal validity of such clauses (which, as already mentioned, is generally not in question), but on the approach to contractual interpretation and on how we interpret two fundamental doctrines: good faith and abuse of rights. Even if good faith and abuse of rights are doctrines recognized by legal systems worldwide, across different legal traditions, and are considered (depending on the circumstances) as important principles relevant to contractual performance, they are interpreted and applied in many different ways.

Therefore, each legal system distinguishes between lawful and unlawful behavior in operating the clauses depending on its vision and approach to contract and on how the duty of good faith and the prohibition of abuse of rights are interpreted and applied. This is because each legal system has its own approach to contract law, and attaches different weight to the protection of the will of the parties when entering into a contract and when implementing it.

It follows that moving from one legal system to another raises relevant

---

<sup>4</sup> No. 2005/09815, 2007 BL 241725, at \*7 (N.Y. Sup. Ct. Feb. 13, 2007), defining this kind of clauses as «buy-sell agreement of the “shoot-out” variety».

<sup>5</sup> «Besides addressing these fundamental questions of formation, interpretation, and remedy, courts often police an array of business actions undertaken in performance of the contract. A major problem occurs when a performing party behaves contrary to the other party's understanding of their contract, but not necessarily contrary to the agreement's explicit terms, leading to a transfer of wealth from the other party to the performer—a phenomenon that has come to be known as opportunistic behavior».

differences in the application of Russian roulette clauses, and these differences are particularly significant when comparing common law systems to civil law systems, also due to their different conception of *voluntas*, and of the role of private autonomy.

## 2. Classical and modern contract law and the protection of free will: Good faith and abuse of rights

Russian roulette clauses were exported from the US system to civil law systems following what can be described as «the Americanization of contract law» (Shapiro 1998, 284-285)<sup>6</sup> phenomenon, that caused legal tools and clauses originating in the US to be transposed into civil law systems, in the context of the worldwide spread of the use of an American-style contract as a universal model of business contracts. More generally, since the middle of the last century, American practitioners have been exporting to Europe new forms of contract, so that «step by step, after World War II, these procedures have established themselves outside the U.S. as an integral part of the process of Americanization and, today, they are in use virtually worldwide» (Wiegand 1991, 229). As a result, in civil law countries almost all contracts between professional parties are drafted in an American style (Shapiro 1998, 284-285).<sup>7</sup> This means that Russian roulette clauses are alien to European legal practice and, therefore, their construction and performance can be difficult once transposed into a civil law system, mainly because common law and civil law contracts belong to different legal cultures, and the concept of contract itself differs from one to the other. In short, the change of context can significantly affect the functioning of these clauses (Overby 2002, 605).<sup>8</sup>

Moreover, the interpretation, performance, and enforcement<sup>9</sup> of Russian roulette clauses can also vary greatly within the US legal system, depending on the approach of each US state; this is due to the unfinished evolution in

---

<sup>6</sup> «A certain American style of contracting arose and then spread to Europe and the rest of the world as American companies doing business abroad insisted on contracting that business in the style to which they had become accustomed». Farnsworth 2001, 21, arguing about the «*mundialization*» of American law; Castronovo 2017, 617.

<sup>7</sup> Observing the «globalization of the long, extremely complex and detailed “American” form of business contracting».

<sup>8</sup> «[A] great deal of American contract law and scholarship now seems to proceed from a perspective of universalism. American universalism assumes, often tacitly, that domestic theories in contemporary American debate are valid not only across the world, but throughout time. In other words, the assumption is made that such theories are valid transculturally and objectively true».

<sup>9</sup> On the difference between performance and enforcement, Andersen 1988, 301.

the US from classical to modern contract law, *i.e.* from a textual to a more contextual approach.

Classical contract law (Teveen 1990, 179)<sup>10</sup> envisages a formalistic, textual approach to contractual interpretation, giving primacy to the intention of the parties as objectively expressed in the language of the contract, without inquiring into the parties' subjective intent. Even if the contract is theoretically seen as the final outcome of the "meeting of the minds", courts give prevalence to the plain meaning of the agreement (Friedman 2005, 203),<sup>11</sup> disregarding the context surrounding the agreement. From this perspective, the classical position hinges on the «will of the parties» (Swain 2015, 201),<sup>12</sup> and on its protection (Kennedy 1976, 1730),<sup>13</sup> as solely expressed in the document, barring courts from «making the contract for the parties» (*Henrietta Mills, Inc. v. Commissioner*)<sup>14</sup> to preserve the freedom and sanctity of contract (Friedman 2005, 404).<sup>15</sup> Under classical contract law parties to contract are held rigidly to their final agreement because they are assumed to be

---

<sup>10</sup> «The first three quarters of the nineteenth century are seen as the 'years of contract' or the classical period both because the idea of freedom of agreement was the organizing principle for the period's dynamic burst of growth and because the details of contract law were filled out as known today».

<sup>11</sup> «This phrase, "meeting of the minds", should not be taken too literally. The law emphasized the document itself, if there was one, and the plain meaning of its words... For example, a rule, which came to be called the parol evidence rule, shut off any evidence that might contradict the terms of a written document».

<sup>12</sup> «The so-called classical law of contract was developed using the Will Theory».

<sup>13</sup> «For example, the contract law of 1825 was full of protective doctrines, such as the incapacity of married women, infants, lunatics and seamen ... During the latter part of the century, some of these doctrines were cut back, and others expanded somewhat. But all of the doctrines were recast as implications of the fundamental idea that private law rules protect individual free will. The basis of restrictions on capacity is that infants and those like them lack free will; duress is the overbearing of the will, undue influence its subversion; fraud leads to a consent that is only apparent; mistake meant that the wills of the parties had miscarried; the measure of damages was defined by the will of the parties with respect to the extent of liability».

<sup>14</sup> 52 F.2d 931, 934 (4th Cir. 1931): «The courts will not write contracts for the parties to them nor construe them other than in accordance with the plain and literal meaning of the language used»; «The courts were "responsible for seeing that agreements were kept". They were not to "interfere" in private bargains, unless they had an awfully good reason» (Friedman 2005, 204). Farnsworth 1968, 862.

<sup>15</sup> «In the late nineteenth century, liberty of contract became another constitutional slogan... the boundaries of this right, to be sure, were vague. But the principle — that contract deserved this kind of privilege — was significant nonetheless». Dazell 1942, 239: «We have been proud of our "freedom of contract", confident that the maximum of social progress will result from encouragement of each man's initiative and ambition by giving him the right to use his economic powers to the full».

rational actors (Levy 1954, 158),<sup>16</sup> capable of looking out for their own interests (Atiyah 1985, 405)<sup>17</sup> and, therefore, responsible for all the consequences of their contractual will. In sum, «one of the principal characteristics of classical contract theory was the tendency to attribute all the consequences of a contract to the will of those who made it» (Atiyah 1985, 408). As a result, the possible final imbalance or inequality of the contract is completely irrelevant in the eye of the judge, who will not intervene to rebalance the agreement or to «subvert the legitimacy of the market process as a neutral and apolitical arbiter of the just distribution of wealth» (Horowitz 1992, 194). Indeed, in a broader sense, this protection of contractual free will is also seen as a way to protect the free market, so that we can say that, from this perspective, the classical contract theory is a market-based law of contract (Atiyah 1985, 436),<sup>18</sup> where each party, in carrying on its business, is expected to protect itself *ex ante*, rather than seeking the court's protection *ex post* (Teveen 1990, 207; Beatson and Friedman 1995, 7).<sup>19</sup>

This rigid and in some ways extremely formalistic vision of the contract has never been completely superseded in the US system: even if, starting from the beginning of the 20<sup>th</sup> century, the theory of contract began to evolve towards a less formalistic, more contextual approach (which is generally called “modern contract law”), in many US jurisdictions the textual, classical approach still prevails. It is self-evident that textual and contextual theories reflect not just different approaches to contract (Fuller, Eisenberg and Gergen 2013, 499; Scott 2013, 312),<sup>20</sup> but also different visions of the market economy (*Rowe v. Great Atlantic & Pacific Tea Co.*).<sup>21</sup> This (unfinished)

---

<sup>16</sup> «To the common law, indifferently neutral ... the parties were theoretically interchangeable personalities to be dealt with on equal terms and with scant regard for others». Scheiber 1998, 149.

<sup>17</sup> «The autonomy of the free choice of private parties to make their own contracts on their own terms was the central feature of classical contract law. Its influence is to be found in every corner of contract law».

<sup>18</sup> «The nineteenth-century rules were made in the context of a market-based law of contract. In the market, economic pressures are commonplace, and a market-based law of contract cannot treat them as vitiating ground. Only a pressure of a different character, personal pressures, could be available as a defence».

<sup>19</sup> «This body of law has been said to have been shaped by the conditions created in the wake of the industrial revolution and the prevalent social and economic outlook. These were seen as fostering freedom of contract founded upon the centrality of the individual, the creed in the creative power of his will and a restricted role for either the court or the state».

<sup>20</sup> On the contrast between textualist and contextualist theories in the approach to contract interpretation.

<sup>21</sup> New York Court of Appeals, 1978 (385 N.E.2d 566 (N.Y. 1978): «There exists an

evolution of US contract law means that today in the US legal system we see both the classical textual theory and a modern contextual theory (the latter being closer to the civil law approach), but also between these two extremes we can see many different positions, depending on the standpoint, the tradition, and the culture of each court, with the effect that the approach to contract greatly varies according to the jurisdiction. Over the years, many courts changed their approach to contract, shifting from a textual to a contextual approach, or vice versa. As a result, the US legal system has not been able to find consistency in the approach to contract and, in general, there is not a sharp and solid core of principles that, when it comes to contractual interpretation and integration, can be identified, neither for the judges, nor for the parties.

Against this backdrop, it is easy to see how choosing one of these approaches over the other can give rise to very different results when it comes to Russian roulette clauses: indeed, textualist theories look principally to the written agreement as the only element to be taken into consideration in determining the construction and operation of the clause, with the effect that elements not encompassed in the text are irrelevant and should therefore be ignored by the judge. On the contrary, the contextual approach requires that a judge looks beyond the writing: pre- and post-contractual elements are to be taken into account in the interpretation and implementation of the clause. As we will see, this lack of a clear choice in the approach to contract gives rise to relevant differences in the operation of Russian roulette clauses in different jurisdictions.

Moving on to abuse of rights and good faith, the inconsistency among different approaches to contractual interpretation in different jurisdictions clearly affects the scope and shape of those two doctrines.

The full analysis of good faith and abuse of rights in common law is beyond the scope of this paper, but it is worth trying to describe in broad strokes their evolution and implementation in the US system, to try to understand how they affect the operation of Russian roulette clauses.

Importantly, good faith was not included in the first Restatement of the Law of Contracts, which was published in 1932, but in 1933, good faith made its first appearance (Burton 1980, 379) in *Kirke La Shelle Co. v. Paul Armstrong Co.*,<sup>22</sup> a case decided by the New York Court of Appeals, that held that «in every contract there is an implied covenant that neither party shall do anything

---

unavoidable tension between the concept of freedom to contract, which has long been basic to our socioeconomic system, and the equally fundamental belief that an enlightened society must to some extent protect its members from the potentially harsh effects of an unchecked free market system».

<sup>22</sup> 263 N.Y. 79, 188 N.E. 163 (1933).

which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing». A few decades later, as a result of the influence of German law (Beatson and Friedman 1995, 5; Litvinoff 1997, 1656; Whitman 1987, 156), the good faith duty was enshrined in the Uniform Commercial Code,<sup>23</sup> that «extends the “obligation of good faith” to every contract within the scope of the statute» (Patterson 1964, 858; Farnsworth 1963, 666)<sup>24</sup> and then embraced by the second edition of the Restatement of the Law of Contracts,<sup>25</sup> in the context of the (partial) detachment from contractual formalism discussed above (Buckley 1999, 9).<sup>26</sup>

However, notwithstanding the inclusion of good faith in the UCC and Restatement, consensus had not formed on a final definition of such a duty, and its roots are not particularly deep (or at least not as deep as in the civil law culture), such that as recently as 1970, one commentator said that «the question whether there is [a general duty of good faith imposed upon the parties to a contract] under our system of law has been almost entirely neglected in the legal literature» (Kessler and Gilmore 1970, 912).

This is essentially because of the peculiar nature of the Restatement and

---

<sup>23</sup> § 1-203 reads: «Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement»; § 1-201(19) defines good faith as «honesty in fact in the conduct or transaction concerned» and, «in the case of a merchant», § 2-103(1)(b) provides that good faith means «honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade».

<sup>24</sup> Observing that «The Code uses the term “good faith” in two fundamentally different senses ... One group of Code sections, involves what may be loosely described as “good faith purchase”. Here “good faith” is used to describe a state of mind ... In a second and smaller group of Code provisions, “good faith” is used to describe performance or enforcement rather than purchase. In this sense, “good faith” has nothing to do with a state of mind-with innocence, suspicion, or notice. Here the inquiry goes to decency, fairness or reasonableness in performance or enforcement», and concluding that «this is a modest achievement, extending not to the entire Code and not to all parties, but only to contracts of sale and then only to contracts of sale by merchants».

<sup>25</sup> § 205 provides that «Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement». See also § 176(1)(d), that defines a threat as improper if «the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient».

On the impact of such new provision, see, for instance, Summers 1981-82, 810, observing that, in his opinion, «This new section reflects one of the truly major advances in American contract law during the past fifty years»; Andersen 1988, 299.

<sup>26</sup> «The decline of formalism has plausibly weakened ... the security of exchange in contract law — the expectation that promises made in a contractual setting will be enforced. The excuses which promisors may invoke to excuse performance, such as unconscionability, misrepresentation, duress, mistake, and breaches of promisee duties of good faith, are much broader in scope today than they were in the nineteenth century».

the UCC, that are not comparable to the European civil codes,<sup>27</sup> and, more generally, as a result of the inconsistent, continuing evolution from classical to modern contract law within the peculiar structure of the US law system discussed above. It follows that, in general, we can say that «every contract contains an implied covenant of good faith and fair dealing» (*Denn v. Anderson*),<sup>28</sup> so that «the office of the doctrine of good faith is to forbid the kinds of opportunistic behaviour that a mutually dependent, cooperative relationship might enable in the absence of rule»;<sup>29</sup> on one view, «the good faith performance doctrine thus may be used to protect a ‘weaker’ party from a ‘stronger’ party» (Burton 1980, 383; Patterson 1964, 858).<sup>30</sup> Nonetheless, as the Supreme Court recently acknowledged, «while most States [but not all] recognize some form of the good faith and fair dealing doctrine, it does not appear that there is any uniform understanding of the doctrine’s precise meaning» (*Northwest Inc. v. Ginsberg*),<sup>31</sup> so much so that we can say that, in the US system, «the term [has no] settled meaning in law generally; it is a chameleon». <sup>32</sup> When it comes to Russian roulette clauses, this means that, firstly, such clauses will not be interpreted and implemented in every

---

<sup>27</sup> It is worth remembering that the Restatement does not have the force of legislation, and it is not binding authority, with the result that we can find cases making reference to the first Restatement of contract even decades after the publication of the second Restatement: see for instance *In re E. Airport Dev., LLC* (443 B.R. 823, 829 (B.A.P. Ninth Cir. 2011)); *FilmLife, Inc. v. Mal “Z” ENA, Inc.* (598 A.2d 1234, 1236 (N.J. Super. Ct. App. Div. 1991)).

<sup>28</sup> 99 Wash. App. 1031 (2000); *State v. Trask*, 91 Wn. App. 253, 272-73, 957 P.2d 781 (1998); Muris 1981, 552, observing that «although the decisions vary from one jurisdiction to another, common law courts have deemed good faith relevant at every stage of the contracting process, from negotiation through remedy»; Burton 1980, 369: «A majority [but not all] of American jurisdictions, the Restatement (Second) of Contracts, and the Uniform Commercial Code (U.C.C.) now recognize the duty to perform a contract in good faith as a general principle of contract law»; Farnsworth 1995, 259: «The parties to a contract are, however, regarded as bound by a duty of good faith and fair dealing»; Fuller, Eisenberg and Gergen 2013, chapter 19: «The modern doctrine [of good faith and fair dealing] has old roots».

<sup>29</sup> Justice Posner’s opinion from the decision *Market St. Assoc. v. Frey*, 941 F.2d. 588, 595 (7TH CIR. 1991).

<sup>30</sup> «The concept of ‘good faith’ may be invoked to justify constructions of the contract favorable to the weaker bargainer».

<sup>31</sup> 134 S.Ct. 1422 (2014), 1431. More precisely, the Supreme Court observes that «while some States are said to use the doctrine ‘to effectuate the intentions of parties or to protect their reasonable expectations’, other States clearly employ the doctrine to ensure that a party does not ‘violate community standards of decency, fairness, or reasonableness».

<sup>32</sup> As observed by Judge Posner in *Empire Gas Corp. v. American Bakeries, Inc.*, 840 F.2d 1333, 1339 (7th Cir. 1988).

American jurisdiction in accordance with a duty of good faith. And secondly, in any case, there is no consensus on how such a duty defines the boundaries of how the parties should perform such clauses; it is therefore not clear where, under the good faith principle, the line between lawful and unlawful behavior should be drawn.

The doctrine of abuse of rights is not completely alien to American law. Although in 1933 one commentator still said that «theory of the abuse of rights is one which has been rejected by our law, with the result that the ancient brocard ‘dura lex sed lex’ finds its most vivid illustration in the present-day decisions of the Anglo-American Courts» (Gutteridge 1933, 22), the United States has more recently tried to develop and implement its own doctrine through the «recognition of a concept [of a doctrine of abuse of rights] that can be constructed from cases, doctrines, and statutes indigenous to the United States» (Perillo 1995, 96) (even if abuse of rights is generally considered as imported from civil law systems and rooted in such tradition,<sup>33</sup> so much so that it is not mentioned in the Restatements, nor in the UCC). In broad strokes, and bearing in mind once again that the content of this doctrine inevitably varies among jurisdictions, abuse of rights is applicable when «the right is exercised for a purpose other than that for which it exists» (Perillo 2014, 440). Thus, this definition makes clear that abuse of rights is a ubiquitous concept (Perillo 1995)<sup>34</sup> and underlies many contractual doctrines. Elements of abuse of rights can be properly seen in good faith, unconscionability, and duress (Perillo 1995, 40 and 52) (although overlaps between these doctrines are inevitably frequent in practice). From the perspective of interpreting and construing contract rights, we can say that abuse of rights translates into the refusal to give literal application to contractual language where such literal exercise of the right created by contract would allow for a malevolent action (Perillo 1995, 52), and allows, in certain specific cases, the court to «[override] the express terms of the [contract]» (Perillo 2014, 440), *i.e.* the will of the parties as expressed in the terms of the agreement.

However, even if the idea that the unreasonable exercise of a contractual right can constitute an abuse is generally well established in the US legal

---

<sup>33</sup> In one of the first US cases dealing at large with the abuse of rights doctrine, a case dealing with the erection of a spite fence, the court likely considered as persuasive authority civil law precedents and/or statutes, stating that «[t]he [civil] law furnishes redress, because the injury is malicious and unjustifiable», and we can find «civil law» quoted throughout the decision (*Burke v. Smith*, 37 N.W. 838 (Mich. 1888)). Anderson 2006, 250, observing that «It is hardly surprising that abuse of right is not a concept widely acknowledged in the common law»; Perillo 1995, 39.

<sup>34</sup> Defining abuse of rights «a pervasive legal concept».

systems, the theoretical and systematic boundaries of this doctrine seem to be even more uncertain than those of good faith, and its implementation depends on the specific case and, therefore, on the approach of the court.

Returning to Russian roulette clauses, we can then say that the doctrines of abuse of rights and good faith, may be seen as limits to the binding force of contract (*lex contractus*) softening the original rigidity of classical contract law, and supporting a contextual approach to contract (Andersen 1988, 301),<sup>35</sup> may support some courts in providing an interpretation and enforcement of such clauses aimed at preventing opportunistic behaviors in the performance of the clause, prohibiting a party from taking advantage of the particular circumstances of the specific case.

### 3. Construction and performance of Russian roulette clauses under US law

In the light of the discussion in the previous paragraph, it is easy to understand how the inconsistencies and vagaries in the approach to contract and, more specifically, in the application of the doctrines of good faith and abuse of rights, inevitably affect the operation of Russian roulette clauses in the US system. It is therefore not surprising that decisions pertaining to such clauses significantly vary from one jurisdiction to another: we can see cases in which the court rigidly sticks to the letter of the agreement, adopting the classical approach to contractual interpretation, and cases in which the court implemented an approach very similar to civil law, for instance relying on good faith.

An illustrative case of the first approach is *D'Angelo v. Leone*,<sup>36</sup> where the defendant formally declared a deadlock, offered to buy plaintiff's 50% share under a Russian roulette clause contained in a shareholder agreement, and sought summary judgment enforcing such deadlock provision after rejection of the offer and defendant's rejection of plaintiff's counteroffer to buy defendant's share: the claimant asked the court to find that the exercise of the Russian roulette clause was invalid on the basis that it was used to exploit the relative financial weakness of the plaintiff. However, the court held that this was irrelevant to the interpretation and operation of the clause, and sticking to the strict letter of the contract – *i.e.*, to the formal expression

---

<sup>35</sup> «The purpose of this good faith doctrine is to accommodate properly the competing interests of the parties when a contract is enforced ... The doctrine accounts for many cases in which courts have, or should have, declined to enforce an express contractual condition».

<sup>36</sup> No. 2005/09815, 2007 BL 241725, at \*7 (N.Y. Sup. Ct. Feb. 13, 2007).

of the parties' will (*voluntas*) –, decided that «the parties did not negotiate terms to protect the less wealthy shareholder, and the court cannot now supply them»: the buy-sell deadlock provision was upheld, despite wealth differences.

A similar result was reached in *Denn v. Anderson*, where the court carefully circumscribed the application of the duty of good faith in contract performance. Denn and Anderson were partners in a printing franchise and Denn was leasing a building to Anderson. After some years the business relationship between the two deteriorated to the point where they could no longer agree on major business decisions. Denn invoked the Russian roulette clause contained in their shareholder agreement and, at the same time, insisted on raising the rent. Anderson brought litigation and argued that he could not afford both the increase in rent and reacting to the use of the Russian roulette clause, and that Denn was taking advantage of this situation in order to prevail in the buy-sell mechanism. The court found for Denn, refusing to assess the behavior of Denn under a general duty of good faith; instead, the court held that each contract – the lease agreement and the shareholder agreement – had been lawfully enforced by Denn, that he was allowed to rise the rent for his own financial benefit, and that he was not required to treat Anderson as a favored tenant. In short, the court considered the two contracts to be separate and the duty of good faith not to be seen as a general duty extensively applicable to the entire business relationship, but as specifically pertaining to each agreement separately: «the law does not allow a court to find a duty [of good faith] arising from 'the totality of circumstances'. The law requires a court to point out the specific contractual obligation that gave rise to the supposed duty of good faith».

Taking a step back from specific cases, it is worth noting that this approach is justified not only by the literal interpretation of the agreement pursuant to the classical approach to contractual interpretation, but also by the fact that, when it comes to the performance of a contract, one of the main pillars of traditional contract law, still critical in the US law system, is the bargaining principle. This principle entails that «in the absence of a traditional defense relating to the quality of consent, bargain promises should be enforced to their full extent» (Eisenberg 1982, 741), with the effect that «our courts are not concerned with the equivalence of the consideration given for a promise» (Dazell 1942, 244). And this is particularly true when it comes to sophisticated, professional parties who, in the eyes of the court, are expected to be capable of looking out for their own interests and to bear the consequences of their volitional and conscious choices when negotiating and agreeing to a Russian roulette clause.

Different results were reached by courts adopting a less formalistic, more

contextual approach, more similar to civil law, where good faith and abuse of rights play a more prominent role. Applying such approach to contract and such doctrines, some courts showed more flexibility in interpreting and determining the legal effects of the Russian roulette clauses.

In *Johnson v. Buck*,<sup>37</sup> the court held that partners in a partnership business are bound by a mutual duty of good faith, from which stems «an absolute duty of full disclosure of all material facts and information to the buying partner [that] is imposed upon the selling partner». Therefore, in enforcing a buy-sell provision, the subsequent sale «will be sustained only when it is made in good faith, for a fair consideration and on a full and complete disclosure of all information as to value».

Similarly, in *Larken Minnesota, Inc. v. Wray*,<sup>38</sup> the court discards the literal interpretation of an anti-deadlock provision contained in a partnership agreement, opting for a less rigid, wider construction. Indeed, in the eyes of the court, the literal interpretation (suggested by the defendant) would allow a party who sought to evade its obligations under the partnership agreement to «completely thwart» the bidding process envisaged in the provision, substantially undermining and frustrating its purpose. And the court explains this choice in the light of the fact that the wider interpretation is not a «judicial rewriting of the partnership agreements» as argued by the defendant, but a necessity to prevent the possibility of abuse by the strongest party.

We can say that the modern contract law approach adopted in *Johnson* and *Larken* is the application of good faith as a general rule requiring «the cooperation of one party where it was necessary in order that the other might secure the expected benefits of the contract» (Farnsworth 1963, 672); from this perspective, like in civil law systems, good faith is seen as a principle that sets an objective standard of fairness and reasonableness in interpreting and performing the contract, allowing the judge to go beyond the literal meaning of the language of the clause, in order to properly respond to opportunistic behavior (Muris 1981, 553).<sup>39</sup> This vision of contractual interpretation under good faith leads to the prohibition of abuse of rights that, in performing the contract, translates into the refusal to give literal application to contractual language where such literal application would allow for a malicious action.

This short survey of cases confirms that, in the US legal system, the formal validity of Russian roulette clauses, in their various forms, is not in question, but their interpretation, construction and enforcement greatly vary depending

---

<sup>37</sup> 540 S.W.2d 393 (Tex. Civ. App. 1976)

<sup>38</sup> 881 F. Supp. 1413 (D.Minn. 1995), *affd*, 89 F.3d 841 (8th Cir. 1996).

<sup>39</sup> «Reliance on good faith is a common response to opportunistic behavior, thus infusing the good faith concept with more unity than has commonly been acknowledged».

on the approach to contractual interpretation chosen by the court, *i.e.* on how the court applies the doctrines of good faith and of prohibition of abuse of rights. Therefore, it is the application of such doctrines that draws the line between lawful and unlawful behaviors but, these being doctrines of uncertain definition, where that line will be drawn is often unpredictable.

#### 4. Construction and performance of Russian roulette clauses in civil law systems

Just as in the US legal system, Russian roulette clauses are generally considered valid in European civil law systems, where they are largely treated as presumptively fair. Over the years, courts throughout Europe have held as lawful and valid contractual provisions in anticipation of deadlock situations drafted in different forms: under Austrian law (Vienna Court of Appeal, 20<sup>th</sup> April 2009),<sup>40</sup> the Court of appeal of Vienna approved the inclusion of a «deadlock clause» in the articles of association of a close corporation and the entry of these articles into the commercial register. In Italy the *Corte di Cassazione* recently considered the Russian roulette clause as a lawful manifestation of freedom of contract and of parties' autonomy in negotiating a partnership agreement (Cass., 25<sup>th</sup> July 2023, No. 22375). Likewise, in France (where exit provisions are called *clause d'offre alternative* or *clause de sortie alternative*), Russian roulette clauses are seen as an exit procedure voluntarily agreed to by the contracting parties and therefore perfectly valid (Court of appeal of Paris, 15<sup>th</sup> December 2006; Cass. Com., 28<sup>th</sup> April 2009, No. 08-13.044; Cass. Com., 20<sup>th</sup> September 2011, No. 10-27.186), and in Spain the *cláusulas de duelo* are seen as an application of art. 28 of the *Ley de Sociedades the Capital*, under which the deed of incorporation and by-laws of a company may also include any agreements or terms that the founding partners or shareholders deem suitable, provided that they are neither unlawful nor breach the principles applicable to the type of company involved (Del Pozo 2017, 205).

In Germany, traditionally Russian roulette clauses were considered invalid because they were contrary to public policy. However, in 2013, the *Oberlandesgericht Nürnberg* (Nürnberg Higher Regional Court) held that these clauses are not invalid *per se*, and shall be considered valid when justified by an objective need of breaking up possible deadlock situations, such as where there are two shareholders with a 50:50 shareholding in the company (*Oberlandesgericht Nürnberg*, Case No. 12U 49/13, 20<sup>th</sup> December 2013).

---

<sup>40</sup> GesRZ 2009, 376: OLG Wien 20.4.2009, 28 R 53/09h.

This last case is particularly interesting because it is representative of the approach widely adopted by European courts when dealing with anti-deadlock provisions. Since the clause serves the legitimate interest of resolving deadlocks situations among shareholders with the same level of interest, the intervention of the judge is justified only in case of abuse: when the strongest shareholder, leveraging its greater financial resources, uses the clause as a tool to exclude the less wealthy shareholder that is not able to make a counteroffer. This means that the German court sets the boundaries of the interpretation and enforcement of the clause by applying the doctrine of prohibition of abuse of rights.

Indeed, unlike in the US legal system, in Europe the abuse of rights doctrine is, together with the good faith principle, well established and often used as an adjustment mechanism for preventing and correcting behaviors that are not necessarily contrary to the agreement's explicit terms, but constitute opportunistic actions. In other words, from the contractual interpretation perspective, these two doctrines allow courts to go beyond the strict meaning of the clause – and of the *lex contractus per se* –, sanctioning opportunistic behaviors that otherwise would be legal under a literal interpretation of the clause.

Certainly, the good faith principle is widely used in all civil law countries, so that most civil codes have one or more general good faith provisions. For instance, in Germany, Switzerland, Turkey, France, Italy, Spain and the Netherlands, and in most of the Civil Codes in continental Europe, good faith is explicitly required in contractual performance. This is carried through into the Principles of European Contract Law as well as into the Draft Common Frame of Reference, which are ultimately intended to apply as general rules of contract law on the Continent. Moreover, at the international level, we can say that the civil law approach to good faith has found its way into the United Nations Convention on Contracts for the International Sale of Goods (the so-called Vienna Convention) and into the Unidroit Principles.

Similarly, the neighboring principle of prohibition of abuse of rights is an enduring element of the civil law. It is a principle that exists in a large number of civil law legal systems, and in many of them is not just left to case law but is codified (in Switzerland, Germany, Italy, Austria, Spain, Greece, Luxembourg, Netherlands) and generally has a wide reach (Byers 2002, 391).

It is then easy to see how, in Europe, the interpretation and enforcement of Russian roulette clauses is deeply affected by this backdrop. The full analysis of good faith and abuse of rights in Europe is beyond the scope of this paper. Indeed, such analysis may be of limited utility considering that the scope, shape and content of these doctrines varies among states. (Even

within the same state, courts interpret and enforce good faith and abuse of rights with different shades and nuances, making it difficult to identify a final, coherent definition of these two doctrines (in the legal literature, their content is usually defined by means of concepts of equal generality). However, notwithstanding this variety of approaches, it is clear that when considering continental Europe in general, courts are generally more willing than US courts to interpret Russian roulette clauses through the lens of the doctrines of good faith and prohibition of abuse of rights which, despite their own nuances, are generally considered as solid, well-established doctrines. Indeed, even if the definitions and the boundaries of these two doctrines are not universal and are, to some extent, nebulous, the general principle according to which these two doctrines empower the judge to limit opportunistic behaviors is well established.

Thus, we can say that these doctrines work as a kind of “safety valve” to which judges may turn to correct the possible opportunistic behaviors of the parties in performing the clause, prohibiting those conducts that formally do not collide with the language of the clause but substantially consist in one party taking advantage of the particular circumstances of the specific case. If on the one hand the open-ended nature of good faith and abuse of rights prevents us from having a clear definition of these two doctrines, on the other hand their flexible nature is their strength, since opportunism may take many different forms and new ones may be invented continually by abusive parties. A legal system needs an open-ended arsenal of responses to it, because it is impossible to develop specific rules for every situation where rights are exercised abusively and/or in bad faith.

This means that in Europe, despite the differences among states, there is a generally shared idea of good faith and prohibition of abuse of rights that supports the well-established principle that the judge shall intervene to prevent opportunistic behavior in performing Russian roulette clauses. Conversely, in the US, these two doctrines are not understood the same way in every jurisdiction and by every court, with the result that courts are more cautious and, in some jurisdictions, refuse to intervene in the performance of the clause, preferring to stick to its literal meaning.

## **5. Are common and civil law really poles apart on the Russian roulette clause?**

We have seen how the difference between the common and civil law approach to Russian roulette clauses does not lie in the clause per se, but in the judge’s ability to intervene in the interpretation and performance of the

clause depending on the vision of good faith and prohibition of abuse of right adopted in each jurisdiction. More specifically, the different results in enforcing the clause that we see in the US and in Europe depends on the power of the judge to limit the behaviors of the parties, and this power turns on how good faith and prohibition of abuse of rights are considered in each legal system and are used to draw the line that marks the boundary of opportunism and unlawfulness.

It would appear that the good faith and abuse of rights doctrines in civil law systems permit the judge to interfere with or even overrule the parties' autonomy (as expressed in the plain language of the contract, the so called *lex contractus*), allowing the court to interpret and enforce the clause beyond its language and its literal meaning, constituting an important caveat to the freedom of contract. From the common law perspective, this approach might be viewed as a judicial rewriting of the agreements, in circumstances where the US traditional approach apparently seems more respectful of the will of the parties (*voluntas*) as expressed in the clause.

However, this is likely to be an oversimplification. Indeed, in invoking a Russian roulette clause, as case law shows, is unfortunately largely an illusion at best the opinion that «the possibility that the person naming the price can be forced either to buy or sell keeps the first mover honest» (*Shilkoff inc. v Third Ave. Corp*):<sup>41</sup> certainly, this is true only in a world where there are no information asymmetries or disparities in resources. And this is recognized also in common law, so much so that notions of good faith and abuse of rights have not been confined to civil law countries: as we have seen, albeit to varying degrees, out of willingness to correct the possible opportunistic behaviors of the parties in performing the clause, these doctrines have also been acknowledged in common law jurisdictions, where they are often invoked by parties involved in disputes, and sometimes recognized by the courts, depending on the jurisdiction.

In the light of this, insofar as the intervention of the courts aims simply at curbing overreaching and opportunistic behaviors by a party that enjoys disproportionate power, leveraging its greater financial resources or exploiting information asymmetries, such intervention is not an overruling of parties' contractual autonomy, but rather enables that autonomy, allowing the Russian roulette clause to properly function and accomplishing its aim: the quick, cost-effective, resolution of business deadlock scenarios and the exit of one of the joint owners in a simple, balanced, and fair manner, curbing the opportunism that would thwart this objective and, therefore, the original intent of the parties. After all, the concept of the duty of good faith is nothing

---

<sup>41</sup> 299 A.D. 2d 253 (2002).

more than «a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute». <sup>42</sup>

In other words, if we assume that the *voluntas* of the parties in drafting a Russian roulette clause is the resolution of business deadlock scenarios in a fair, non-opportunistic and cost-efficient manner, then the use of good faith and abuse of rights to correct behaviors that are against such intent is not overriding the intention of the parties, but is protecting and achieving this intention and, ultimately, preventing market failure. Indeed, from a law and economics perspective, we can say that bad faith and opportunistic behavior increase transaction costs, reduce the net gain from the contract and allow one party to achieve unfair advantages, whereas precluding the wrongful exploitation of business exigencies to obtain disproportionate gains bolsters the freedom to contract and the proper functioning of the system.

In the end, the problem of the interpretation and implementation of the Russian roulette clause is just a specific variation of «the first great problem of contract law», that is «what kinds of promises the law should enforce. This problem, however, is tightly linked with another: the extent to which a certain kind of promise should be enforced. Indeed, on a deep level the two problems are virtually inseparable. The proposition that promises made as part of a bargain ought to be enforced is relatively straightforward; the real question is to what extent» (Eisenberg 1982, 798).

## References

- Andersen E. (1988), “Good Faith in the Enforcement of Contracts”, in 73 *Iowa Law Review*, 299.
- Anderson D. (2006), “Abuse of Rights”, in 11 *Judicial Review*, 348.
- Atiyah P. (1985), *The rise and fall of the freedom of contract*, Oxford, Oxford University Press.
- Beatson J., Friedman D. (1995), “Introduction: from ‘Classical’ to Modern Contract law”, in J. Beatson, D. Friedman (eds.), *Good Faith and Fault in Contract Law*, Oxford, Oxford University Press.
- Buckley F.H. (1999), “Introduction”, in F.H. Buckley (ed.), *The fall and rise of the freedom of contract*, Durham, Duke University Press.
- Burton S. (1980), “Breach of Contract and the Common Law Duty to Perform in Good Faith”, in 94 *Harvard Law Review*, 369.

---

<sup>42</sup> Justice Posner’s opinion from the decision *Market Street Associates Limited Partnership v. Frey*, 941 F.2d 588, 595.

- Byers M. (2002), "Abuse of Rights: An Old Principle, A New Age", in 47 *McGill Law Journal*, 389.
- Castronovo F. (2017), "The Americanization of contract law: the merger clause in the European perspective", in *Annuario di diritto comparato e di studi legislativi*, 617, and in 11 *Revista de Direito da Cidade*, 503.
- Dazell J. (1942), "Duress by Economic Pressure", in 20 *North Carolina Law Review*, 237.
- Del Pozo L. (2017), "Las llamadas 'cláusulas de duelo' (*shoot-out clauses*) y las de subasta como mecanismos estatutarios para remediar las situaciones de bloqueo societario", in *Revista de Derecho Mercantil*, 205.
- Eisenberg M. (1982), "The bargain principle and its limits", in 95 *Harvard Law Review*, 741.
- Farnsworth E.A. (1963), "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code", in 30 *University of Chicago Law Review*, 666.
- Farnsworth E.A. (1968), "Disputes over omission in contracts", in 68 *Columbia Law Review*, 860.
- Farnsworth E.A. (1995), *Contract*, St. Paul, West Publishing Co.
- Farnsworth E.A. (2001), "L'américanisation du droit – Mythes ou réalités", in 45 *Arch. phil. Droit*, 21.
- Friedman L. (2005), *A history of American law*, New York, Simon & Schuster.
- Fuller L., Eisenberg M., Gergen M. (2013), *Basic contract law - Concise edition*, St. Paul, West Academic Publishing.
- Gutteridge H.C. (1933), "Abuse of Rights", in 5 *Cambridge Law Journal*, 22.
- Horowitz M. (1992), *The transformation of American law, 1870-1960*, New York, Oxford University Press.
- Kennedy D. (1976), "Form and substance in private law adjudication", in 89 *Harvard Law Review*, 1685.
- Kessler F., Gilmor G. (1970), *Contracts – Cases and materials*, New York, Foundation Press.
- Levy L. (1954), *The Law of the Commonwealth and Chief Justice Shaw*, Cambridge, Harvard University Press.
- Litvinoff S. (1997), "Good Faith", in 71 *Tulsa Law Review*, 1645.
- Muris T. (1981), "Opportunistic Behavior and the Law of Contracts", in 65 *Minn. L. Rev.*, 521.
- Overby B. (2002), "Contract in the age of sustainable consumption", in *The Journal of Corporation law*.
- Patterson E. (1964), "The Interpretation and Construction of Contracts", in 64 *Columbia Law Review*, 833.
- Perillo J. (1995), "Abuse of Rights: A Pervasive Legal Concept", in 27 *Pacific Law Journal*, 37.

- Perillo J. (2014), *Contracts*, St. Paul, West Academic Publishing.
- Scheiber H. (1998), “Economic liberty and the modern state”, in H. Scheiber (ed.), *The state and freedom of contract*, Stanford, Stanford University Press.
- Scott R. (2013), “Text versus context – The failure of the unitary law of contract interpretation”, in F.H. Buckley (ed.), *The American Illness*, New Haven, Yale University Press.
- Shapiro M. (1998), “Globalization of the freedom of contract”, in “The state and freedom of contract”, Stanford, 1998.
- Summers R. (1981-1982), “General Duty of Good Faith - Its Recognition and Conceptualization”, in 67 *Cornell Law Review*, 810.
- Swain W. (2015), *The law of contract 1670-1870*, Cambridge, Cambridge University Press.
- Tannenbaum F. (1999), “What Every Business Lawyer and Business Owner Should Know About Buy-Sell Agreements”, 145 *The Practical Lawyer*, 55.
- Teveen K. (1990), *A history of the Anglo-American common law of contract*, New York, Greenwood Press.
- Whitman J. (1987), “Commercial law and the American Volk: A note on Llewellyn’s German sources for the Uniform Commercial Code”, in 97 *Yale law Journal*, 156.
- Wiegand W. (1991), “The reception of American law in Europe”, in 39 *The American Journal of Comparative Law*, 229.



## Chapter 18

# LIMITS TO THE WILL OF A PARTY, BETWEEN ARBITRARINESS AND POTESTATIVITY: THE CASE OF THE RUSSIAN ROULETTE CLAUSE

**Martina D'Onofrio**

*ABSTRACT: This essay explores the limits of parties' will in contractual integration when one party is granted the power to determine an essential term of the agreement. While Italian law regulates third-party determinations, it does not expressly address cases where such power is conferred on a contracting party. The analysis is prompted by the Italian Supreme Court's recent ruling on the Russian roulette clause, which allows one shareholder to set a price for shares, leaving the other to accept or reverse the transaction. The decision upheld the clause's validity, highlighting its structural reciprocity. The paper considers broader legal principles and comparative insights, particularly from German law, to define the boundaries of party's discretion in contract integration.*

*KEYWORDS: Will – Discretion – Potestative Condition – Arbitration – Contractual integration.*

*SUMMARY: 1. The boundaries of arbitrariness: The case of the Russian roulette clause. – 2. Doubts with regard to the mere potestativity of the clause. – 3. Admissibility and limits of party arbitrage. – 4. The Russian roulette clause between *voluntas* and arbitrariness. – References.*

### **1. The boundaries of arbitrariness: The case of the Russian roulette clause**

Within Italian legal system there are several cases in which one of the elements of the contract is left to the will of only one party.

In such cases, the need felt by the Italian lawmaker is to delineate the boundaries within which such will has room to express itself: this need is indeed underlying, for example, the regulation of the merely potestative condition, as well as arbitrability. Some doubts, however, creep in between the meshes of the normative dictate, and it is worth reflecting on them in these pages.

In order to address these issues, it seems very useful to start from a concrete case that originates from a corporate law matter, but brings to the

interpreter's attention a large number of private law problems (on the interpenetration that characterises civil and commercial law, Delle Monache 2012, 489 ff.; Mazzamuto 2019, 1205 ff.).

In July 2023, the Court of Cassation was called upon to assess the legitimacy of the so-called Russian roulette clause, *i.e.*, a clause – widespread mostly in Anglo-Saxon countries<sup>1</sup> – intended to resolve deadlock situations in which companies composed of only two partners with equal shareholdings might find themselves (Cass., 25<sup>th</sup> July 2023, No. 22375, in *Società*, 2023, 1207 ff.). According to the Russian roulette clause, upon the occurrence of a situation of impossibility to take decisions because of the irreconcilable disagreement between the two partners, the continuation of which would potentially lead to the dissolution of the company due to the impossibility of achieving the purpose, one of the two has the right to make an option to the other to purchase his share at a price determined by him, while the offeree has the option either to accept the proposal and thus sell his shareholding, or to reverse the situation and decide to purchase, at the same price, the other's share.

In this way, the partner who buys the other's shares will remain the sole head of the company, ensuring its continuation, while the one who sells the shares will leave the company (Cotillo 2023, 309 ff.; de Luca 2022, 863 ff.; Schneider, Fleischer 2010, 2713 ff.).

Over time, such an agreement has become so widespread that nowadays it has also entered into practice in Italian legal system. As noted by the Supreme Judges, common is in fact the phenomenon known in doctrine by the expression *contratto alieno* (alien contract), which is found when the agreement is drafted on the basis of models containing clauses deriving from other legal systems, mostly common law, whose compatibility with the principles of Italian legal system must generally be verified (De Nova 2008).

The essential features of the structure of this clause are represented by the full discretion in determining the sale or purchase price on the part of the partner activating the mechanism (unless, as a precautionary measure, the parties crystallise in the contract parameters for determining the price of the shareholding), and by the counterparty's entitlement to the right to choose whether to purchase the shares of the other, or – under the same conditions – to sell to the latter its own (about potestative rights, see Messina 1906). As mentioned above, according to its decision, one party will cease to be a partner, while the other will remain a sole partner.

This mechanism has given rise to a number of doubts as to its compatibility with various continental legal experiences: indeed, German, Austrian and French courts have already pronounced on this point, and have

---

<sup>1</sup> See Castronovo, in this volume, particularly 339 ff.

established the legitimacy of the clause, at least under ordinary conditions, but admitting that it can, in situations of economic imbalance, lead to abuse.

## 2. Doubts with regard of the mere potestativity of the clause

In light of the broad space that the Russian roulette clause leaves to the arbitrariness of a party, doubts have been raised as to its compatibility with Italian legal system with reference to the nullity sanctioned by art. 1355 of the Italian Civil Code: it could be hypothesised that the clause incurs a violation of that provision to the extent that it leaves to the free and unquestionable will of a party the power to determine a purchase or sale price of the share.

In this regard, however, there is no unambiguous criterion for determining the cases in which potestativity results in mere (and not allowed) potestativity.

In case law the notion of mere potestativity was always interpreted in a very restrictive manner, limiting itself to providing for nullity only when the condition consists in a voluntary act, the performance or omission of which does not depend on serious and appreciable motives, but rather on the arbitrariness of the party, unconstrained by any rational assessment of convenience (Cass. 18<sup>th</sup> May 2020, No. 9047).

Another opinion links the distinction between potestativity and mere potestativity to the presence or absence of criteria controllable by the other party on the basis of which the party must make the assessment on which the fulfilment of the condition depends (Maiorca 1998, 281 ff.).

Nevertheless, whatever benchmark is used to draw the borders of mere potestativity, this case does not appear to fall within the perimeter of that notion.

The existence of a willingness to bind on the part of the shareholder who has the power to trigger the clause and fix the price is certainly not questionable. Nor could it be held that no appreciable interests are involved in the determination of the price.

As to the presence of verifiable criteria, the matter becomes more complicated: in the case of the Russian roulette clause, very often the determination is not made on the basis of objective, pre-established criteria. Mere potestativity may, however, be denied insofar as the decision taken by the offeror is closely linked to rational and economic evaluations, which must take into account the fact that the choice whether to buy or sell the shareholding falls to the other shareholder, so that it is the offeree who decrees the final outcome of the procedure initiated by the exercise of the clause, whereas the role of the person who initiated it is limited to setting the price.

Criticisms are, however, also raised on this last point, insofar as the legitimacy of the choice to give one of the parties to the contract the power to determine the purchase or sale price in the absence of pre-established criteria is not accepted. But on this point it seems worthwhile to devote an in-depth examination to the issue of party arbitration (relates the discipline of the merely potestative condition and the arbitration provisions Marchetti 2022, 153 ff.).

### 3. Admissibility and limits of party arbitration

As can be deduced from the above reconstruction of the legal structure of the Russian roulette clause, it delegates to one of the partners the determination of the price of the shares to be sold or purchased: this is clearly a case of arbitration by one party (Ascarelli 1952, 205 ff.; Zuddas 1992; Gabrielli 2001, 291 ff.; Barenghi 2005; Gallo 2019, 1 ff.).

Arbitration is expressly regulated by art. 1349 of the Italian Civil Code only with respect to the cases in which the integration of the contract is entrusted to a third party. In such cases, the Italian Civil Code distinguishes between *arbitrium boni viri* and *arbitrium merum*: in the former, the arbitrator is called upon to act in accordance with equitable discretion, whereas the latter case occurs when the parties expressly leave the determination of the subject matter of the contract to the mere will of the third party. The two cases also differ in terms of remedies, since in the latter situation the arbitrator's decision may be challenged only in case of bad faith, whereas if the arbitration is based on equitable discretion, the judge's evaluation extends to cases of manifestly unfair or erroneous determination.

However, the legislature does not provide for the admissibility of the case that one of the parties acts as arbitrator and thus determines the subject matter of the performance under the contract.

The silence of the law in this regard should not, however, lead to the conclusion that such a possibility should be excluded: the fact that the Italian Civil Code only regulates the delegation of the determination of the subject matter of the contract to a third party does not seem to preclude the validity of various mechanisms for supplementing the elements of the contract when the parties themselves agree to that effect (Barenghi 2005, 156).

Although party arbitration represents a case that interpreters have always viewed with suspicion, since it is a case in which the choice made is by definition partial, oriented towards the interest of the party making it and therefore potentially detrimental to the other party, doctrine and jurisprudence have long paved the way for the admissibility of this hypothesis, however not

without limits (Roppo 2011, 337). Indeed, it is held that to be valid the clause providing for arbitration by one party must outline the objective criteria it should follow in determining the price, so as to safeguard the other party from the danger of abuse. In essence, the majority of interpreters accepts arbitration subject to equitable discretion, while they censure the submission to mere arbitrariness (Gallo 2019, 7).

The tendency to allow party arbitration, albeit within certain limits, is also found more generally at the level of European private law, so much so that some States have codified this rule: sometimes the boundaries within which arbitrariness finds room are fixed *ex ante*, while in other cases the rule simply imposes the criterion of reasonableness, but gives the judge a more penetrating subsequent control.

Examples of provisions that establish only the necessary preponderance of the criterion of reasonableness, while leaving the subsequent control to the judge, are to be found in art. II. 9:105 of the Draft common frame of reference, which provides for the substitution of the party's determination when it is «grossly unreasonable», or in § 315 of German Civil Code (BGB), which leaves the judge to make a fairness judgment on the same (Dalbosco 1987, 321 ff.).

In order to understand whether the Russian roulette clause is admissible in Italian legal system, it therefore seems necessary to ask whether it represents *arbitrium boni viri* or mere arbitrariness, since, in the latter case, it would be necessary to address the doubts raised by interpreters concerning party arbitration in order to affirm the validity of the clause.

As mentioned above, an element that characterises this clause is precisely the possible absence of the provision of a minimum value that the shareholding must have, or of other parameters on which the party deciding to make use of the clause should rely in order to determine the purchase or sale price.

Nonetheless, the basis for the admissibility of this agreement has been traced by case law to the mechanism provided for by the structure of the clause itself, since the party that is subject to the determination of the price is in any event vested with the potestative right to choose between the purchase and sale of the shares. Thus, the other shareholder – at the time of the formulation of the proposal – is in a situation of uncertainty with respect to the other party's decision whether to buy or sell. It would be precisely the necessary ignorance as to the counterparty's future choice that would act as an 'antidote' against making disproportionate determinations and ensure that the price set more or less reflects the market price, or, if not, allow the counterparty to profit from the off-market price decided by the offeror.

Consider, moreover, that in other jurisdictions, too, it was precisely the

provision of 'checks & balances' that led to rulings on the legitimacy of the clause (e.g. OLG Nürnberg 20<sup>th</sup> December 2013, No. 12 U 49/13).

In fact, the circumstance that the party called upon to fix the price to be proposed must take into account multiple factors in its determination does not detract from the fact that he or she is free to follow non-objective criteria as well: it is not obvious that he or she will base himself exclusively on the market value; on the contrary, purely subjective reasoning could come into play, such as the interest in continuing the business activity, or the opposite interest in disposing of one's share to leave the reins to the other partner. On the basis of such considerations, the party exercising the clause is free to determine a price that deviates even significantly from the market value.

On the one hand, it could therefore be argued that its arbitrariness is not necessarily based on equitable discretion, but, on the other hand, it does not appear to be possible to consider that the choice is left to mere capriciousness either: the arbitrator's arbitrariness comes into play, since he or she is free not to rely on objective and controllable criteria; nevertheless, in the determination, he or she is called upon to weigh the amount to be indicated according to his or her own subjective assessment, in the knowledge that his or hers choice will influence the other party's behaviour. And, as already emphasised, it is precisely the potestative right that the clause attributes to the latter that acts as a counterbalance with respect to the remittance of the determination of the price to the free will of the offeror.

The Court's decision to admit Russian roulette, even though it does not provide that objective criteria constrain the party's arbitrariness, can be better understood if, instead of providing a binary reading of the opposition between *arbitrium boni viri* and *arbitrium merum*, it distinguishes between three different degrees of freedom of arbitrariness, which can be more clearly understood by recalling the reflections just made with regard to the mere potestativity of the condition.

Indeed, the set of arbitrage hypotheses free from objective criteria appears to be broader than the circle of cases that would be null and void if the parameter used to identify the mere potestativity of the condition were to be used with respect to party arbitrage.

In the latter case, as already anticipated, a restrictive interpretation of the case law prevails, so that the cases of nullity are limited to cases in which the fulfilment of the condition is left to the mere and irrational capriciousness of one of the parties, in the absence of other values or interests worthy of protection to be taken into consideration.

There are, however, a number of situations in which the arbitrating party's decision is not subject to pre-established objective criteria, but neither is it unconstrained by any criterion nor left to its mere capriciousness:

these are hypotheses in which the party's will is nevertheless guided by the logic of the economic transaction entered into.

The three levels of arbitrariness could thus be classified according to the narrowness of the criteria by which the will is bound: equitable discretion, where in the determination the arbitrator is subject to compliance with objective parameters; free discretion, where the arbitrator is also authorised to rely on subjective criteria for the decision, which take into account his own interest, but this arbitrariness is nevertheless limited by other elements in the economy of the operation; and, finally, the mere arbitrariness, unconstrained by any constraint, which – in accordance with the prevailing orientation on the subject of merely potestative conditions – comes into play when the determination is left entirely to the capriciousness of the person in charge.

In this regard, a reading of the above-mentioned § 315 BGB suggests further thoughts: there, the German legislator provides that, if nothing is specified, the determination of the party is to be understood as being left to the equitable discretion (*Bestimmung nach billigem Ermessen*), thereby implicitly admitting that – provided this is expressly stated – also the submission to the mere will of the party is permitted (Medicus, Lorenz 2015, 90).

It is precisely in German doctrine that a categorisation is widespread that mirrors the one we have just attempted to outline. German interpreters distinguish between *billiges Ermessen*, which corresponds to our equitable discretion, *freies Ermessen*, i.e. sole discretion and, finally, *freies Belieben*, which literally should translate as mere arbitrariness, but whose contours would not correspond in full with those of the notion of mere arbitrariness under art. 1349 of the Italian Civil Code, enclosing instead a narrower circle of cases, in which there is a total absence of parameters guiding the determination, left entirely to the mere will of one party (Lieder, Meyer 2023, 9 ff.).

The possibility of configuring these three degrees of arbitrariness also in our legal system emerges from a reading of art. 1349 of the Italian Civil Code on the subject of arbitrage that is in continuity with the precept in art. 1355 of the Italian Civil Code on the merely potestative condition.

In fact, the rationale of the two rules, which are also close in terms of their location in the Code, seems to be homogeneous: what is to be avoided is that one party holds the entire contractual balance in its hands and is thus given the power to determine the fate of the bond on the basis of its own will, in the absence of any criteria aimed at guiding the choices of the party (Marchetti 2022, 153 ff.; Barenghi 2005, 146).

In the above context, the aforementioned doctrinal and jurisprudential elaboration, which reads the prohibition in art. 1355 of the Civil Code in a very restrictive manner, seems to allow the identification of a sub-category of cases in which mere arbitrariness – in principle permitted under art. 1349

of the Civil Code – results in mere caprice, in mere potestativity, thus falling, when the arbitrator is one of the parties, within the spectrum of nullity imposed by art. 1355. Thus, when the arbitrator is one of the parties, it falls within the scope of the nullity imposed by art. 1355 of the Italian Civil Code.

Arbitrage by the party, as well as arbitrage by the third party, would therefore seem to be admissible, even if left to mere arbitrariness. However, since in the case of party arbitrage additional factors come into play with respect to the case where it is an outsider who must supplement the contractual content, the limit of mere arbitrability, governed by the law on conditions and narrowly interpreted by case law, applies.

Naturally, if the determination is entrusted to the mere arbitrariness of one of the parties, the *ex post* judicial review provided for by art. 1349 of the Italian Civil Code remains possible, which allows the arbitrator's decision to be censured if the latter's wilfulness emerges.

Accepting the reconstruction just proposed, it therefore appears that Russian roulette clause, as also affirmed by the Court of Cassation in the decision from which it took its cue, overcomes any objection of legitimacy, at least in ordinary situations.

The ascertainment of legitimacy of the clause in ordinary cases does not exclude the possibility that there may be cases in which the exercise of the clause actually results in an abuse of right (about abuse of right in the Italian legal system, see above all Rescigno 1965, 205 ff.).

Moreover, the very notion of abuse of rights presupposes the exercise of a right that would be *per se* lawful, but in a manner that is misleading with respect to the purposes for which it was intended.

In the present case, if the Russian roulette clause is to be considered worthy of protection insofar as it is useful to avoid the dissolution of the company in deadlock situations that cannot otherwise be resolved, in practice there may be cases in which the clause is used to force the other partner to resign from the company with unfavourable terms.

Consider, for example, the case where a large imbalance of economic strength arises between the two partners during the life of the company, such that one of them is in such difficulty that he is totally unable to purchase the other's shares, and the financially stronger partner wilfully creates an impasse by not cooperating with the other party and avoiding any compromise with respect to decisions concerning the management of the company. The 'strong' partner could at this point activate the Russian roulette clause and propose the purchase of the other's shares at a price well below their value, knowing that the latter would not in fact have the economic possibility of reversing the proposal and purchasing the other's shares.

In such a case, it is clear that the mechanism envisaged by the clause,

which makes it worthy of protection, would be altered: in effect, the ‘weak’ shareholder would only be the holder on paper of a potestative right to choose between the purchase and sale of the shares, but in reality, he would find himself in a position of mere subjection to the conditions dictated by the other shareholder.

It seems appropriate to consider that in such cases the economically disadvantaged shareholder should be provided with remedies to address the described abuse.

An effective means would appear to be the granting of the *exceptio doli generalis*, which – if raised by the weaker partner, who is in a position of subjection – would make it possible to paralyse the exercise of the clause by the prevaricating partner (with regard to *exceptio doli generalis* see Portale 2007, 155 ff.; Ranieri 1991, 311 ff.; dalla Massara 2023, 2917 ff.).

However, someone in the doctrine limits the use of this instrument only to cases in which not only is there an exploitation of an unbalanced situation of the other partner, but it is also found that the intention to harm the latter is the only purpose that prompted the offeror to activate the clause.

On closer inspection, this limitation seems to excessively reduce the range of action of this remedy, which has instead become widespread in its application in case law (as well as in doctrinal elaboration) regardless of an investigation verifying the exclusivity of the so-called *animus nocendi*; what has instead been given greater emphasis is the violation of the obligations of fairness and good faith, which are also found in the mere exploitation of the detrimental position of the other party (about violation of good faith, see Piraino 2015, 431 ff.).

In addition to the *exceptio doli generalis*, one could hypothesise the invalidity of the negative resolution giving rise to the deadlock situation. This remedy is in fact recognised by jurisprudence in cases where the decision of the shareholders’ meeting – although formally legitimate – conflicts with the obligation of good faith and has led to a deviation from the pursuit of the company’s interest.

Jurisprudence has addressed this issue in company law, in particular with regard to the species of abuse of rights represented by the vice of abuse of majority, which has been taken into consideration for the annulment of resolutions on several occasions: when the decision voted by the majority shareholders finds no justification in the company’s interest, or when it has the sole fraudulent purpose of damaging the interests of the other shareholders, or is preordained to unjustifiably benefit the majority shareholders to the detriment of the minority shareholders (the judgment that paved the way for the abuse of majority is Cass., 26<sup>th</sup> October 1995, No. 11151).

The possible configurability of abuse of rights in pathological cases of use

of the Russian roulette clause is also recognised by German jurisprudence in a judgment of the Nuremberg Court of Appeal, which nevertheless reaffirms the legitimacy of the clause in ordinary cases. On this point, the German courts consider it more appropriate to carry out a subsequent check on the possible abusive exercise of the clause, rather than considering it null and void at all, since under ordinary conditions it does not appear to conflict with mandatory rules (OLG Nürnberg 20<sup>th</sup> December 2013, No. 12 U 49/13. In the German legal literature, see also Valdini, Koch 2016, 179 ff.; Schroeder, Welpot 2014, 615).

#### 4. The Russian roulette clause between *voluntas* and arbitrariness

As a result of the foregoing, the subject of the Russian roulette clause has proven to be fertile ground for wide-ranging reflections on a number of topics such as the mere potestativity of the condition and the different degrees of arbitrariness to which the determination of the subject matter of the contract may be referred.

In particular, a conjoint reading of the rules on purely potestative conditions and arbitrability has made it possible to identify a range of cases in which the will of the party called upon to determine a contractual element is not bound by objective parameters, but neither is it unbound by any criterion. It is precisely in this space, which in German law is qualified as the sphere of *freies Ermessen*, that the agreement under consideration appears to be located.

Indeed, the peculiar mechanism envisaged by the clause, which, as a counterbalance to the right of a party to determine the price, attributes to the counterparty the potestative right to choose whether to sell or to purchase at that price, allows the Russian roulette clause to be placed within the set of cases that attribute to a party a level of arbitrariness that is intermediate between equitable discretion and mere arbitrariness: a free discretion, which allows the party charged with making the determination to avail itself not only of objective parameters, but also of its own subjective interests, while not leaving the choice to the mere capriciousness of the party, since an essential element of the economic transaction acts as a corrective and limit to the arbitrariness: the counterparty's potestative right.

This configuration also makes it possible to exclude the mere potestativity of the offeror's right to determine the price. Indeed, in his evaluations, the latter is not disengaged from any criteria. In fact, his judgment is necessarily guided by the characteristics of the economic transaction: the balancing of the weights and counterweights in the rights of the two parties provided for by the

Russian roulette clause guarantees the balance between the parties involved, at least under physiological conditions.

At the end of the day, therefore, the argumentative path of the Supreme Court seems worthy of support, which removes any doubts as to the admissibility of the agreement, thus granting this ‘alien’ clause full citizenship in Italian legal system, thus placing itself in line with the previous decisions of several courts in other European states, including Germany, Austria and France.

## References

- Ascarelli T. (1952), “Arbitri ed arbitratori”, in *Studi in tema di contratti*, 205 ff.
- Barengi A. (2005), *Determinabilità e determinazione unilaterale del contratto*, Napoli, Jovene.
- Cotillo G. (2023), “Russian roulette clause e arbitraggio della parte: profili di validità e suo (lecito) esercizio”, in *Contratto e impresa*, 309 ff.
- Dalbosco M.C. (1987), “L’arbitraggio di parte nel sistema tedesco del BGB”, in *Rivista di diritto civile*, II, 321 ff.
- dalla Massara T. (2023), “Arglistenrede (*exceptio doli*)”, in U. Babusiaux, C. Baldus, W. Ernst, F.-S. Meissel, J. Platschek, T. Rübner (eds.), *Handbuch des römischen Privatrechts*, II, Tübingen, 2917 ff.
- De Luca N. (2022), “Una rivoltella puntata alla tempia (a proposito di clausole della roulette russa)”, in *Rivista di diritto civile*, 863 ff.
- Delle Monache S. (2012), “Commercializzazione del diritto civile (e viceversa)”, in *Rivista di diritto civile*, I, 489 ff.
- Gabrielli E. (2001), “Contratto completo e clausola di arbitraggio”, in *Rivista di diritto civile*, II, 291 ff.
- Gallo P. (2019), “Arbitrio del terzo e arbitraggio di parte”, in *Digesto delle discipline privatistiche – Sezione civile*, Aggiornamento, XII, Milano, 1 ff.
- Lieder J., Meyer S. (2023), “Ermessen im Privatrecht”, in *Zeitschrift für Wohnungseigentumsrecht*, 9 ff.
- Maiorca S. (1998), s.v. “Condizione”, in *Digesto delle discipline privatistiche – Sezione civile*, III, Torino, 281 ff.
- Marchetti G. (2022), *Potestatività condizionale e scioglimento del contratto*, Milano, Giuffrè Lefebvre.
- Mazzamuto S. (2019), “Clausole di ‘roulette russa’”, in M. Confortini (ed.) *Clausole negoziali. Profili teorici e applicativi di clausole negoziali tipiche e atipiche*, II, Assago, 1205 ff.
- Medicus D., Lorenz S. (2015), *Schuldrecht I. Allgemeiner Teil. Ein Studienbuch*, München, Beck.

- Messina G. (1906), "Sui cosiddetti 'diritti potestativi'", in *Studi giuridici in onore di C. Fadda*, Napoli, Luigi Pierro, 279 ff.
- Piraino F. (2015), *La buona fede in senso oggettivo*, Torino, Giappichelli.
- Portale G.B. (2007), *Lezioni di diritto privato comparato*, Torino, Giappichelli.
- Ranieri F. (1991), s.v. "Eccezione di dolo generale", in *Digesto delle discipline privatistiche – Sezione civile*, VII, Torino, Utet, 311 ff.
- Rescigno P. (1965), "L'abuso del diritto", in *Rivista di diritto civile*, I, 205 ff.
- Roppo V. (2011), *Il contratto*, Milano, Giuffrè.
- Schneider S., Fleischer H. (2010), "Zulässigkeit und Grenzen von Shoot-Out-Klauseln im Personengesellschafts- und GmbH-Recht", in *Der Betrieb*, 2713 ff.
- Schroeder H.-P., Welpot E.C. (2014), "High noon in Nürnberg. Neues zum Texan Shoot-out, zum Russian Roulette und zu anderen Klauseln der alternativen Streitbeilegung im Gesellschaftsrecht", in *Neue Zeitschrift für Gesellschaftsrecht*, 609 ff.
- Valdini D., Koch M. (2016), "Die missbräuchliche Verwendung von Russian-Roulette-Klauseln", in *Gesellschafts- und Wirtschaftsrecht*, 179 ff.
- Zuddas G. (1992), *L'arbitraggio. Rinvio al terzo e fonti determinative esterne al negozio*, Napoli, Jovene.

# INDEX

## A

- abuse of rights, xx, 339 ff., 366 f.
  - and good faith, 341 ff.
  - and arbitrariness of a party, 359 ff.
- actio* (Roman concept), xix, xxi, 58, 60, 63, 167 ff., 187 ff., 191 ff., 200 f., 212 ff., 221, 258 f., 268, 277, 300, 308, 313, 315 f., 318, 320
  - modern understandings of Roman concept, 168 ff.
  - in Roman legal sources, 179 ff.
  - legacy of the Roman concept, 188 ff.
  - as protectable claim, 180 ff. (see *Anspruch*)
- agency, 4, 69, 75, 128, 206, 297, 300 ff., 324
  - human, 128, 206
  - constrained, 52, 279, 286, 291 ff., 313, 316, 365 (see *non-Will*)
  - juridical, 289, 297, 300, 302, 304, 324
  - and vulnerability in Roman legal science, 293 ff.
  - in contemporary dogmatics, 297 ff.
  - in Roman legal practice, 324 ff.
  - and procedural dynamics, 148 ff., 175
- agentive subject, 51 (see *subject*)
- agreement, 22, 30 f., 33, 45, 51, 55 ff., 62 f., 65, 90 f., 94, 96, 98 f., 101, 106, 118, 120, 122 ff., 127, 130 f., 143, 159, 161, 174, 198, 200 f., 203, 206 f., 209 f., 215 ff., 259 ff., 264, 267 f., 295, 323, 329, 330 ff., 340, 342, 344, 347 ff., 359 f., 363, 368 f.
  - asymmetrical, 90 f.
  - binding effect, xviii ff., 16, 30, 33, 37 f., 89 f., 124, 127, 200, 204, 206 f., 302
  - interpretation (standard contracts), 96 ff.
  - self-executing, 117 ff.
  - shareholder', 161, 339, 348 f., 352, 359, 361, 363 ff.
- algorithm, 122 (see *technology*)
- alien contract, 34, 360 (see *contract*)
- americanization of contract law, 341 ff., 356
- ancient technical language, 323 ff.
- animus solvendi*, 242 f., 246, 248
- annullability, 297, 317
- Anspruch*, 48, 144, 153, 164, 167 ff.
  - in Roman Law, 180 ff.
- arbitrium*, xix, xxi, 77, 292, 299, 302, 337, 359 ff.
- automation, xx, 117 ff.
- autonomy, xix, xxi, 29 f., 34, 40 ff., 52, 58 ff., 65, 98, 115, 118, 121, 123, 129 ff., 142 f., 155, 158, 161, 186, 223, 225, 276, 286, 290 ff., 296, 300, 303, 317, 328, 332, 341, 343, 351, 354
- awareness, 10, 16, 53, 242, 245, 248, 250, 294, 299 f., 324, 329
  - cognitive, 8 ff.
  - in Roman legal science and practice, 197 ff., 203 ff., 244 ff., 249 f., 324 ff.
- axiologics, 3 ff., 12 f., 23 ff., 74, 80 f., 85, 197

## B

*bīa*, 309 ff, 314 ff.  
buy-sell provision, 339 f., 349 ff.

## C

causal determination, 215 (see causality)  
causality, xviii ff., 3 f., 16 ff., 301  
change: legal/institutional, 77 ff., 83 ff.  
choice, 34 f., 43, 50, 52, 68, 100, 102, 106 f., 129, 144, 153, 182 f., 185, 187 f., 203 f., 303, 343 f., 349 f., 361 ff., 368  
– of action (Roman law), 182 ff.  
claim, xx, 5, 18, 20, 22 ff., 57, 74, 76 ff., 80 f., 84 f., 103, 127, 141, 143 f., 146 ff., 161, 168 ff., 175 ff., 201 f., 213, 225, 247 f., 266, 277, 291, (see *actio*)  
clauses, xix ff., 7, 12, 20 f., 30, 37, 43, 45, 57, 60, 62, 89 ff., 93 ff., 103, 105, 107, 109, 111, 113, 115, 122, 161 f., 170, 177, 256, 265, 330 f., 339 ff., 343 ff., 359 ff., 366 ff.  
– deadlock, 339 ff., 360, 366 f.  
– standard, 89 ff.  
– in ancient legal practice, 326 ff.  
*coacta voluntas*, 276 (see coercion)  
code, xx, 4, 11, 17, 20 ff., 30 f., 33, 35 ff., 41 f., 90 ff., 97 f., 104, 107 ff., 111, 113, 115, 117 ff., 123 ff., 137, 142, 146, 149 f., 152, 154, 156, 158 f., 161 f., 249 f., 256 f., 259 ff., 264, 267, 274, 279, 284, 286, 308, 317 f., 345 f., 352, 356 f., 361 ff., 365 f.  
– linguistic, 11 ff.  
– *vs* consent 117 ff., 122 ff., 129 ff.  
coercibility, xi, 241, 243, 245, 247, 249, 251, 253 (see coercion)  
coercion, xxi, 127, 250, 279, 282, 293, 295, 297 ff., 302 f., 308 f., 311, 314 ff., 331

*cognitio extra ordinem*, 168  
common law, 87, 112, 157, 341, 343 ff., 354 ff., 357, 360  
– comparative analysis with civil law, 340 ff., 348 ff., 353 f., 357, 360  
communitarian liberalism, 78, 87  
comparative contract law, 90 ff., 351 ff.  
*condictio indebiti*, 244, 246, 248 ff.  
*consensus*, 58, 118, 120, 126, 198 f., 203, 208 f., 211, 216, 304, 332, 345, 347  
consent, xx f., 30, 33, 53, 91, 94 ff., 99, 106 f., 111, 120 f., 124, 129, 160, 204, 208, 255, 259 ff., 276, 279 ff., 284 ff., 291 f., 294 f., 300 ff., 307 f., 311, 318, 332, 342, 349 (see *consensus*)  
constitutive judgment, 159 ff.  
constraint, 19 f., 30, 52, 58, 153, 279, 285 f., 291, 295 ff., 302, 313, 316, 326, 365  
consumer law, 89 ff., 112 f., 256, 264  
continuity, 73, 78, 86, 275, 316, 365  
*contra proferentem* rule, 89 ff.  
contract, xvii, xix f., 12, 29 ff., 51, 56 ff., 63 ff., 67 f., 89 ff., 99 ff., 105, 107 ff., 117 ff., 142, 151, 156 ff., 168 f., 198 ff., 207 ff., 214 ff., 218 ff., 229, 255 ff., 274, 281, 286, 291, 298, 302, 308 ff., 313, 317 f., 325 f., 330 ff., 334, 340 ff., 354 ff., 359 f., 362  
– and *conventio*, 57 f., 60, 67, 197, 201 f., 207 ff., 216, 219  
– and *synállagma*, xxi, 197 ff., 201 ff., 209, 211, 213, 215 f., 217, 298  
– in Roman legal practice, 277, 323 ff.  
contract law, 30 ff., 37 f., 45, 47, 49, 59, 89, 95, 97, 101, 107, 109 ff., 115, 117 f., 125 ff., 129 ff., 136, 140, 156, 220, 255 f., 259, 261, 264, 266, 268 f., 286, 302, 339 ff., 348 ff., 352, 355 f.  
– Typenzwang in Roman 49, 59.  
– and standard clauses, 89, 90, 96  
– and protection of free will, 341  
– smart, xx, 117 ff.

contractual autonomy, 43, 121, 161, 354 (see autonomy)  
 contractual clauses, 162 (see clauses)  
 contractual will, 130, 307 f., 317, 343  
*conventio*, 57 f., 60, 67, 197, 201 f., 207 ff., 216 f., 219

## D

debt, 8, 17, 181, 241 ff., 246 ff., 251, 296, 311 ff.  
 decision-making process, 248, 251, 313, 315  
 defects of the will, 284, 307  
 deliberation, 51 f., 121, 130 f., 204 f.  
*denegatio actionis*, 167, 183, 186, 188  
 digital platforms, 32, 44, 90  
*dissensus*, 197, 210  
*dolus malus*, 259, 281 f., 287 (see fraud)  
 duress, 273, 275 ff., 282 ff., 296, 302, 310, 320, 342, 345, 347, 356  
 duty to provide information, 255, 260, 262 ff., 268

## E

*editio actionis*, xxi, 167, 182 ff., 186 ff., 192, 313 f.  
 effectiveness, 6, 12 f., 24 f., 27, 29, 33, 36 f., 73, 76 f., 79, 129, 198, 228, 248, 273, 291, 295, 316 f.  
 Erklärungstheorie, 38, 275 f., 283, 291, 305  
 error, xviii, xxi, 197 f., 203 ff., 209 ff., 213, 215 ff., 223, 225, 227 ff., 236 ff., 241, 244 ff., 248, 250 ff., 258 f., 282, 295, 298, 300, 314  
 – and contractual *synállagma*, xxi, 197  
 – and last will, 223  
 – and *indebiti solutio*, 251  
*exceptio doli*, 367, 369  
 execution, 117 f., 120 ff., 123 f., 126 f., 129, 131 f., 147, 153, 203, 249, 314, 331

## F

*formula Octaviana*, 308, 310 f.  
 fraud, xxi, 98, 151, 157, 220, 249 f., 255 ff., 261, 263 ff., 273, 275, 277 f., 282 ff., 301, 331, 342  
 free will, xix, xxi, 4, 18, 21, 51, 54, 69, 86, 255, 283, 307, 309, 311, 313, 315, 317, 319, 321, 339, 341 ff., 364  
 freedom of contract, 57, 100, 112, 342 f., 351, 354 f., 357

## G

good faith, 21, 43, 98 ff., 101, 105, 127, 130, 199 ff., 203, 213, 215, 245, 255 f., 259 ff., 262 f., 265, 268, 286, 312, 339 ff., 345 ff., 348 ff., 351 ff., 354 ff., 357, 367  
 grades of consent, 89, 94

## H

*heredis institutio*, 228  
 hermeneutics, 20, 49, 77, 106, 289, 293, 299  
 heteronomy, 35, 291 f.  
 human rights, 75 f., 135  
 hypothesis, xx, 1, 6, 11, 15, 22, 81, 93, 259, 292, 313, 317 f., 362

## I

ignorance, 204, 244, 363  
 intention, xviii, xx, 21, 39 f., 56, 64, 74, 89 ff., 96 f., 105 f., 121, 127 ff., 131, 200, 203, 208 ff., 225, 227, 230, 232, 234 ff., 242 f., 246, 256, 265, 278, 290 f., 295, 297 f., 300, 314, 332, 342, 346, 355, 367  
*invitus*, xxi, 241, 243, 246 f., 249, 273, 275, 279 ff., 282 f., 285, 289, 292 ff., 295 ff., 298 ff., 302 ff., 323, 325, 327, 329, 331, 333, 335

– in Roman legal practice, 277, 323

## L

legacies, 223, 316

legal effects, xviii f., 13, 17, 19, 22, 38 f., 42, 44, 54 f., 64, 74, 120, 217, 235, 243 f., 350 (see legal force)

legal force, 57, 73 ff., 80 f., 85, 89, 237, 275

legal practice 57, 64, 277, 281, 290, 295, 308 f., 315, 323 ff., 326 ff., 330 ff., 341

*lex contractus*, xvii, xx, 31, 33, 49 f., 55 f., 60 f., 63 f., 67, 89 f., 107, 119, 121, 125 f., 131, 204, 209, 219, 237, 267, 291 f., 295, 309, 348, 352, 354

## M

meeting of minds, 121, 129, 208 (see agreement)

*mens testatoris*, 121, 129, 208, 225, 230 f., 234 f.

*metus*, 277 ff., 282, 295, 298, 308, 310, 316 ff., 319 ff. (see duress)

misrepresentation, 202, 210, 220, 257, 260, 345

mistake, xxi, 60, 157, 197 ff., 202, 210, 212, 216, 220, 228 ff., 231 ff., 240, 252, 257 f., 260, 262, 273, 275, 277 f., 284, 300, 342, 345 (see *error*)

## N

non-will, xxi, 273, 281, 283, 285, 289, 291 ff., 297 ff., 301, 303, 318

nullity, 7, 30, 36, 158, 202, 213, 228 ff., 278, 281, 296, 298, 303, 310 f., 313, 317 f., 361, 364, 366

## O

objectification, 89, 100 ff.

obligation, 14 ff., 18, 22, 33, 37, 39, 42, 45, 57 f., 62 ff., 86, 90, 99, 110, 118, 122 ff., 126, 128 f., 134 f., 152, 159, 178 ff., 184, 186, 188, 190, 199 ff., 215, 218, 222, 241 ff., 245, 247, 249 ff., 263, 266 ff., 270, 273, 280, 287, 291 f., 295 f., 298, 301, 303, 312, 321, 345, 350, 367

– natural, xviii, 14 ff., 18, 22, 33, 35 ff., 39, 42, 45, 57 f., 62 ff., 86, 90, 99, 110, 118, 122 ff., 126, 128 f., 134 f., 152, 159, 178 ff., 184, 186, 188, 190, 199 ff., 215, 218, 222, 240 ff., 247, 249 ff., 253, 263, 266 ff., 270, 273, 280, 287, 291 f., 295 f., 298, 301, 303, 312, 321, 345, 350, 367

– non-due, 14 ff., 18, 22, 33, 35 ff., 39, 42, 45, 57 f., 62 ff., 86, 90, 99, 110, 118, 122 ff., 126, 128 f., 134 f., 152, 159, 178 ff., 184, 186, 188, 190, 199 ff., 215, 218, 222, 240 ff., 247, 249 ff., 253, 263, 266 ff., 270, 273, 280, 287, 291 f., 295 f., 298, 301, 303, 312, 321, 345, 350, 367

omissive fraud, xxi, 255 ff., 259 ff., 263, 265 ff., 269 (see fraud)

opportunistic behaviour, 346

## P

papyri, 62, 307, 319 f., 323, 330, 334

party arbitration, 359, 362 ff., 366 (see *arbitrium*)

play fair, 99 (see good faith)

*postulatio actionis*, 178, 184 ff.

*postulatio exceptionis*, 184

## Q

*quaestio facti*, 9, 55

*quaestio iuris*, 55

## R

repetition, 34, 244

right of action, 144 f., 147, 152, 154, 160 f., 173, 175, 178

### S

shared intention, 56, 203, 208, 246 (see intention)

signification, 3, 10, 19 f., 22, 24, 26 f.

silence, xxi, 26, 255, 258 ff., 268, 292, 362

*soluti retentio*, 241, 244, 246, 248, 250

spillover effect, 89, 92, 106

subject, – matter of the judgment, xvii, 9, 13, 15, 17, 30 f., 34 ff., 39 ff., 44, 51 f., 56, 63, 65, 76, 99, 104, 120 f., 125, 129, 143, 145, 150, 152, 168 f., 170, 173 ff., 176, 178 f., 182, 186 ff., 197 f., 201, 204 f., 216, 223, 231, 241 f., 245, 249 f., 256, 258, 266 f., 273 ff., 278, 281, 283 f., 286, 291 f., 295, 300 ff., 315 f., 323 f., 328 ff., 332, 362 ff., 368

### T

testamentary dispositions, 223, 227, 232, 235, 300

theoretical framework, 85, 90, 205

throw-away society, 94

transformative force, 75, 85, 90

transparency, xx, 32, 96 ff., 112, 117, 119

### V

vices of will, 278 f., 284 (see defects of the will)

violence, 10, 25, 157, 250, 284, 295, 307 ff., 313 ff., 320, 331 (see *bía*)

*voluntas*, xvii ff., 4, 29, 33, 38 f., 42, 49 ff., 59, 61, 63 ff., 67 ff., 73 f., 77, 80, 82 ff., 89, 91, 107, 117, 119, 120 f., 127 ff., 141, 167 f., 179, 181 f., 185 ff., 198, 204 ff., 223 ff., 230 ff., 241 ff., 249 ff., 255, 262, 273 f., 276 f., 281 ff., 289 ff., 305, 307, 309, 314 f., 317, 323 f., 326, 332, 335, 341, 349, 354 f., 359, 368

– and *lex contractus*, 89, 126

– *ultra mortem*, 224

– *ex machina*, 117, 137

vulnerability, xxi, 273, 285 f., 289, 292 f., 295, 299, 301 ff.

### W

Willensdogma, 94, 226, 242, 275, 277, 297

Willenstheorie, 38, 207, 257, 274 ff., 291 f., 297, 305

### Z

Zwang, 172, 191, 317, 319 (see also duress)



Printed by LegoDigit s.r.l.  
Lavis (TN) – Italy  
January 2026

