

## **Constitutional Norms and Civil Law Relationships**

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### **Abstract**

This essay provides a critical account of the long-established scholarly views according to which constitutional norms have a merely programmatic nature, inapt to be directly applied in private law relationships and hence to be utilized as hermeneutical tools when interpreting statutory law. Instead, as this essay shows, courts make use of constitutional norms extensively, applying them not only indirectly – that is in the presence of statutory norms – but also directly. Thus, the Constitution is integral part of the law controlling private relationships, making them functional to the general values that mould the whole legal system. This perspective encourages the re-reading of civil law precepts in the light of the Constitution, as well as the complete fulfilment of constitutional legality.

### **I. Re-reading statutory law from a constitutional perspective: a preliminary clarification. The juridical (not political) nature of the constitutional norm and its place within the theory of the sources of law**

In the late Sixties, more openly than in the past,<sup>1</sup> legal

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<sup>1</sup> See, in general and particularly, R. Nicolò, 'Diritto civile', *Enciclopedia del diritto* (Milano: Giuffrè, 1964) XII, 907 ff; M. Giorgianni, 'Il diritto privato e i suoi attuali confini' *Rivista trimestrale di diritto e procedura civile*, 399 ff (1961) and on specific topics see, for all, U. Natoli, *Limiti costituzionali dell'autonomia privata nel rapporto di lavoro*, I, *Introduzione* (Milano: Giuffrè, 1954) 46, 85 ff; L. Campagna, *Famiglia legittima e famiglia adottiva* (Milano: Giuffrè, 1966), 3 ff; U. Majello, *Profili costituzionali della filiazione legittima e naturale* (Napoli: Morano, 1965), 10-11.

scholars<sup>2</sup> pointed to the ‘re-reading of the civil code and statutes in the light of the Republican Constitution’ as an inevitable methodology for overcoming the gap between theory and practice, with a view to adjusting old categories and concepts –vigilantly combining pedantry and creativity– to the needs of a conflictual and participatory society, which was rapidly changing. Private law doctrines began to take on different contents and meanings,<sup>3</sup> of fundamental importance not only for the reform process, but also for a more balanced application on the part of practitioners, raising a number of delicate questions of constitutional legitimacy.<sup>4</sup> This new approach, while boasting many advantages, was not supported by an adequate understanding of the all-embracing role that the Fundamental Chart played in the theory of the sources of private law, with particular regard to the effect of the Constitution’s norms and principles into private relationships.<sup>5</sup>

<sup>2</sup> P. Rescigno, ‘Per una rilettura del Codice civile’ *Giurisprudenza italiana*, IV, 224 (1968); P. Perlingieri, ‘Produzione scientifica e realtà pratica: una frattura da evitare’ *Rivista di diritto commerciale*, I, 475 (1969).

<sup>3</sup> For several examples see P. Perlingieri, ‘Scuole civilistiche e dibattito ideologico: introduzione allo studio del diritto privato in Italia’ *Rivista di diritto civile*, I, 438-439 (1978).

<sup>4</sup> Cf for example, among the most recent: Corte Costituzionale 16 April 1975 no 87, *Giurisprudenza costituzionale*, I, 807 (1975); Corte Costituzionale 30 October 1975 no 234, *ibid*, I, 2223 (1975) on the topic of family law; Corte Costituzionale 27 March 1974 no 82, *ibid*, I, 675 (1974) on the law of succession; Corte Costituzionale 15 January 1976 no 2, *ibid*, I, 12 (1976); Corte Costituzionale 7 July 1976 no 155, *ibid*, I, 1007 (1976); Corte Costituzionale 20 December 1976 no 245, *ibid*, I, 1885 (1976) for property rights and ownership in particular.

<sup>5</sup> Italian scholars are inclined to exclude the direct relevance of constitutional norms in civil law relationships and pay very little attention to this issue. See P. Rescigno, ‘La famiglia come formazione sociale’, in *Atti dell’incontro di studio su ‘Rapporti personali della famiglia’*, *Quaderni del Consiglio Superiore della magistratura* (1980); P. Rescigno, ‘Diritti civili e diritto privato’, in *VVAA, Attualità ed attuazione della Costituzione* (Bari: Laterza, 1979), 242 ff; R. Quadri, ‘Applicazione della legge in generale’, in A. Scialoja e G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1975), 260 ff; N. Irti, ‘Leggi speciali (Dal mono-sistema al poli-sistema)’ *Rivista di diritto civile*, I, 150, (1979). On the contrary, regarding such relevance, see P. Perlingieri, *La personalità umana nell’ordinamento giuridico* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1972), 131, and *passim*; see below following footnotes; P. Perlingieri, ‘Scuole civilistiche’ n 3 above, 414 ff; M. Bessone and E. Roppo, ‘Diritto soggettivo alla salute, applicabilità diretta dell’art. 32 della Costituzione ed evoluzione della giurisprudenza’ *Politica del*

It follows that the formula for re-reading statutory law through constitutional lenses needs to be clarified, taking care to avoid allowing it to take on or potentially give rise to ambiguity.

To this end, it is vital to overcome the uncertainties that still pervade many scholarly positions, pertaining to the nature (not merely political, but fundamentally juridical) of constitutional norms,<sup>6</sup> as well as to their internal relationships.<sup>7</sup> What needs to be underlined is, on the one hand, the Constitution's position of supremacy in the hierarchy of normative sources and, on the other, the hierarchical position of values in the framework of the Constitution's philosophy.

At the conclusion of a long journey, which began with the now distant in time yet courageous doctrines elaborated by the French *Conseil d'État*, some peculiar features of the Constitution, such as its

*diritto*, 767 ff (1974); P. Stanzione, *Capacità e minore età nella problematica della persona umana* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1975), 368. On the topic, among public law scholars, see G.M. Lombardi, *Potere privato e diritti fondamentali*, I, (Torino: Utet, 1970), 26 ff, and *passim*; now, very explicitly, L. Montuschi, *Rapporti etico-sociali*, in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli, 1976), 146 ff; see also, of late, the mention made by G.Volpe, *Foro italiano*, IV, 276 (1979); as regards German scholarship, very sensitive to the issue of *Drittwirkung* or of *Sozialwirkung*, see, in addition to the authors cited at n 45 below, T. Ramm, *Einführung in das Privatrecht. Allgemeiner Teil des BGB*, I, (München: C.H. Beck, 1969), 77-78 and now, particularly, H.P. Schneider, 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' *Diritto e società*, 216-217 (1979). See, moreover, A. Wolter, *Diritto civile polacco*, italian translation (Camerino-Napoli: Edizioni Scientifiche Italiane, 1976), 72 ff and P. Perlingieri, *Introduzione to A. Wolter*, *ibid*, XVIII.

<sup>6</sup> On this issue, see A. Trabucchi, 'Significato e valore del principio di legalità nel moderno diritto civile' *Rivista di diritto civile*, I, 8 ff, 15 (1975); critically, P. Perlingieri, 'Scuole civilistiche' n 3 above, 414 ff and *ibid* further bibliographical references; on the normative relevance of constitutional principles see, for all, the pages of P. Barile, *La costituzione come norma giuridica. Profilo sistematico* (Firenze: Barbera, 1951), 44-45.

<sup>7</sup> Remark also recently made by R. Quadri, 'Applicazione della legge in generale' n 5 above, 254, who wittily wonders: 'Si è poi sicuri [...] che in seno alla stessa Costituzione scritta non conflittino valori differenti e incompatibili gli uni rispetto agli altri, in modo da rendere confuso il quadro del sistema dei valori costituzionali?' (Are we sure that within the written Constitution itself different and incompatible values do not conflict one another, so as to render the framework system of constitutional values confused?).

rigidity and supremacy amongst the sources of law, allow us to acknowledge today the legally binding nature of its articles.

With respect to values, which form the basis of the legal system, they are by definition identifiable by means of an accurate historical and systematic interpretation of the Fundamental Chart, from which it may be inferred that the free development of the human person is to be deemed superior to any concurrent economic interest (eg right to private ownership and freedom of enterprise).<sup>8</sup> Even on the basis of a summary analysis, an existentialist conception that respects dignity along with the needs and civil rights of man (Art 2) ought to prevail over a productivist perspective: to illustrate, freedom of enterprise is restrained when it takes place 'in such a way as to cause damage to the human security, freedom and dignity' (Art 41, para 2).<sup>9</sup>

We will not dwell upon these aspects now, as they will be analysed in the following lectures, but suffice it to say that there is a qualitative difference between the pre-republican and contemporary political-constitutional orders, wherefrom it is indisputable that the change in the values that mould the basic tenets of the system has had a profound influence upon its institutions, even on the more technical ones, seemingly neutral with respect to the ideologies of history.

In order to understand how such an influence has arisen, it is necessary to focus in greater depth on the actual interplay between constitutional norms and statutory laws, bearing in mind the actual meaning of the pre-eminence of the former over the latter. With respect to this, two different scholarly views can be identified.

<sup>8</sup> On this specific issue, see, P. Perlingieri, *Introduzione alla problematica della proprietà* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1970), 21 ff; P. Perlingieri, *La personalità umana* n 5 above, 175, *passim*; for an application in the field of condominium, F. Ruscello, *I regolamenti del rapporto condominiale* (Camerino-Napoli: Edizioni Scientifiche Italiane, interim edition, 1979), 129 ff; now, from a critical perspective, A. Barbera, *La libertà fra diritti e istituzioni*, in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli, 1975), 68; furthermore, see A. Baldassarre, 'Recensione a P. Perlingieri, *La personalità umana nell'ordinamento giuridico*', *Diritto e società*, 1090 ff (1973).

<sup>9</sup> This particularly significant aspect has been stressed, among others, by P. Perlingieri, *La personalità umana* n 5 above, 251, 383, *passim*; P. Perlingieri, *Introduzione alla problematica della proprietà* n 8 above, 65, *passim*; G. Napolitano, 'Recensione a A. Liserre, *Tutele costituzionali dell'autonomia contrattuale*, *Rivista trimestrale di diritto e procedura civile*, 326 (1972).

## **II. Lack of generalization and ambiguities in considering constitutional norms as ‘outer limits’ to statutory laws, as if the latter were the expression of a separately definite system**

Earlier scholarship regarded constitutional norms as a ‘limit’ or ‘check’ on statutory law.<sup>10</sup> Accordingly, statutes were argued to be the expression of a wholly independent system, legitimate as long as it does not clash with a constitutionally protected interest, whilst the constitutional precepts were seen as having a residual and exceptional range of application, with no direct influence on the interpretation and implementation of statutory rules.<sup>11</sup> The very idea of constitutional norms as outer limits on statutes seems to imply that there are two separate and wholly independent systems: the constitutional and the statutory, the former placing itself outside the latter. Quite on the contrary, the unitary nature of the legal system requires that the constitutional norms, and their underlying values, be seen as general principles, relevant and binding in any context.<sup>12</sup>

Such a line of thinking – as has been observed<sup>13</sup> – was followed by the majority of scholars, especially civil lawyers, and was considered particularly suitable for preserving, not only in formal terms but also functional and foundational, the greater part of ‘private’ law.

However, whilst it cannot be denied that some constitutional norms aim to limit the scope of statutory laws, this cannot be considered the sole function of the constitutional norm. It happens

<sup>10</sup> See, on this issue, N. Irti, ‘Leggi speciali (Dal mono-sistema al poli-sistema)’ n 5 above, 150, according to whom constitutional norms would simply set a programme (for example, the social function of private ownership) and would provide exclusively ‘the criterion for evaluating the constitutional legitimacy of statutory norms’; G. Tarello, *Sullo stato dell’organizzazione giuridica* (Bologna: Zanichelli, 1979), 5-6, 9.

<sup>11</sup> See, for all, R. Quadri, ‘Applicazione della legge in generale’ n 5 above, 261-262, for further bibliographical references.

<sup>12</sup> See, among others, P. Perlingieri, *Profili istituzionali del diritto civile* (Camerino-Napoli: Edizioni Scientifiche Italiane, 2<sup>nd</sup> ed, 1979), 81; P. Perlingieri, ‘Scuole civilistiche’ n 5 above, 414 ff (with further bibliographical references), and N. Irti, ‘Leggi speciali (Dal mono-sistema al poli-sistema)’ n 5 above, 144 ff (although reaching different conclusions).

<sup>13</sup> G. Tarello, *Sullo stato dell’organizzazione giuridica* n 10 above, 6.

quite often, indeed, through the *riserva di legge*\* mechanism, that the Constitution confers upon the legislator the task of fixing a 'maximum limit' for the statutory restriction of a right (eg Art 13, para 5), at times providing for the related guarantees (Art 15, para 2), as well as the conditions whereby rights and obligations can be exercised or performed (Art 23). It follows that the norms that establish rights are interpreted widely, while norms that impose obligations, duties and liabilities are subject to a rather restrictive approach.<sup>14</sup> Such a conception is equivocal and arbitrary since it does not adequately consider the multiplicity and heterogeneity of rights, which are hardly separable from the idea of a complex 'subjective legal situation' where, to a lesser or greater extent, some concurring deontic aspects coexist.<sup>15</sup> By assuming that constitutional norms operate as outer limits on statutory laws, the legislator becomes the principal, if not exclusive, addressee of constitutional law. The function of the Constitution is thus reduced to that of delineating the rules of the game, and is deprived of the promotional capacity that historical-political arguments and its very nature as a Basic Law seem to confer upon it as a matter of priority.

Moreover, the idea of constitutional norms as mere limits drives them outside the circle of the relevant authorities that courts are supposed to consider when resolving disputes, since statutory law, through the 'subsumption' method, would remain the only applicable source – subject of course to constitutional scrutiny, yet always under the conditions and limits provided.<sup>16</sup>

In summary, this first scholarly position may be defined as advocating separate readings of the code and of its complementary provisions, on the one hand, and of the Fundamental Chart, on the other, whereby it is only in exceptional and incidental situations that

\* Translator's note: When a given matter is governed in Italian law by the 'riserva di legge' principle, it means that any norm purporting to regulate that matter has to consist in either a Parliamentary law or an act having the same force as a law: within the hierarchy of the sources of law, it has to be a 'primary source', ie placed immediately below the supreme source, which is the Constitution.

<sup>14</sup> G. Tarello, *ibid.*

<sup>15</sup> See, for all, P. Perlingieri, *Profili istituzionali* n 12 above, 177 ff.

<sup>16</sup> See for the criticized perspective, N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 150; and now N. Irti, *Decodificazione e leggi speciali* (Milano: Giuffrè, 1979), 71, 92.

they converge: that is, when a statutory rule is struck down as unconstitutional.

### **III. The constitutional norm as an expression of general legal principles which must be adhered to when interpreting statutory law. Rejecting the potential objection based on Art 12 of the Italian Civil Code's preliminary rules, and its alleged provision for a hierarchy of hermeneutical tools. The dynamic and historical nature of the legal system: logical-systematical hermeneutics and constitutional values**

From a different perspective, the pre-eminence of the constitutional norm over statutes is acknowledged not only, and not simply, as a limiting factor, but also as expressing general legal principles, which have to be accounted for when statutes are interpreted.<sup>17</sup> Thus, the choices made at the supreme level of the sources of law are reflected in the hermeneutics, contents and meanings of statutory norms. In acknowledging the superiority of the 'starting from general principles' argument over any other hermeneutical argument,<sup>18</sup> such a tendency ends up reflecting itself in the constitutional interpretation of statutory law. This idea directly contradicts the one previously presented because, being moved by the need to fulfil constitutional legality, it is inclined to bend the hermeneutic tools to the primary goal of implementing fundamental values. Article 12 of the Italian Civil Code's preliminary rules is by no means an obstacle:<sup>19</sup> it allows for recourse to the 'general principles

<sup>17</sup> For an effective in-depth analysis G. Tarello, *Sullo stato dell'organizzazione giuridica* n 10 above, 6 ff; for German literature, even though with only reference to the so-called fundamental rights, H.P. Schneider, 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' n 5 above, 216. Contrary to the operativity of constitutional principles also at the level of interpretation is the opinion expressed by R. Quadri, 'Applicazione della legge in generale' n 5 above, 261-262.

<sup>18</sup> G. Tarello, *Sullo stato dell'organizzazione giuridica* n 10 above, 6; G. Tarello, 'Gli argomenti retorici dei giuristi nell'interpretazione del diritto' *Rivista di diritto civile*, I, 706 ff (1978).

<sup>19</sup> In marked and strong opposition, see R. Quadri, 'Applicazione della legge in generale' n 5 above, 252 ff, and *passim*; see furthermore, N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 149 ff according to whom '*le norme*

of the legal system' as a subsidiary and residual technique in respect of the application of a 'specific provision' or recourse to *analogia legis*.<sup>20</sup>

The alternative is clear: if the general principles referred to under the heading of Art 12 are those at the level of statutory law, then the resort to these principles, in a residual fashion where there are doubts as how to interpret a given rule, seems to comply with the hierarchical order of sources. If, on the other hand, the principles recalled therein include those of constitutional standing, then Art 12 would be wholly or partially unconstitutional, as it would hinder the interpretive recourse to a hierarchically superior source, thereby introducing a blatant anomaly into the system.<sup>21</sup> In fact, the former hypothesis is grounded on some historical evidence and also on the idea that it would be impossible to treat principles that are profoundly different, whether by nature or hierarchically, on an equal footing,<sup>22</sup> as this would constitute an unjustified

*attuatrici, già suscettibili di analogia legis, esprimono i principi generali utilizzabili in sede di analogia iuris non già le norme costituzionali, che esigono il tramite delle norme attuatrici*' (Implementation norms, already subject to *analogia legis*, express general principles applicable on the grounds of *analogia iuris*' unlike constitutional norms whose implementation requires statutory norms).

<sup>20</sup> See the in-depth analysis offered by R. Quadri, *ibid* 194 ff; and for a clear synthesis on the state of case law and scholarship, see V. Rizzo, 'Sub art. 12 c.c.'s preliminary rules', in *Codice civile annotato*, I, P. Perlingieri ed (Torino: Utet, 1979).

<sup>21</sup> Perplexities arise from the statement by R. Quadri, *ibid* 249, according to whom '*la norma 'suprema' sull'interpretazione si situa necessariamente al di sopra della Costituzione*' (The 'supreme' norm on interpretation is necessarily situated above the Constitution); in criticism of this concept, see C. Mortati, 'Costituzione (Dottrine generali)' *Enciclopedia del diritto* (Milano: Giuffrè, 1962) XXII, 178 ff; also L.M. Bentivoglio, 'Interpretazione (dir. intern.)' *ibid*, 314-315 (1972). On the remarks made in the text above, see P. Perlingieri, 'Intervento alla tavola rotonda di Bari su "Tecniche giuridiche e sviluppo della persona"' *Diritto e giurisprudenza*, 176 (1974); P. Perlingieri, 'Sull'eguaglianza morale e giuridica dei coniugi' *ibid* 487. It must be noted that when the fascist legislator wanted the principles of the *Carta del Lavoro* to come into play not only in the application of *analogia iuris* – that is, when *analogia legis* was not enough to resolve a case – but also in '*ogni fase del processo di interpretazione ed applicazione del diritto*' (Any step of the process of interpretation and application of law), this was set forth, in the absence of a rigid hierarchy of normative sources, in Art 1 of legge 30 January 1941, no 14; on this issue, see N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 143.

<sup>22</sup> For such a distinction cf L. Lonardo, *Meritevolezza della causa e ordine pubblico* (Camerino-Napoli: Edizioni Scientifiche Italiane, interim edition, 1978), 69 ff.

transposition.<sup>23</sup> However, the reasons (which are *inter alia* technical) for re-reading statutory law in the light of constitutional values can be inferred from the weaknesses of the basic precepts underlying the hermeneutical methodologies that, for reasons that are more expository than conceptual, distinguish literal interpretation from logical interpretation,<sup>24</sup> as if a single statutory rule could be understood in isolation without systematic knowledge.<sup>25</sup> A renewed approach in this respect makes it possible to move beyond a mere reading of the *littera legis*, to abandon the obsolete search for the *esprit de loi*, thus avoiding the attribution of subjective and discretionary meanings to statutory norms: the value judgement, which is a constant element of the activity of an interpreter of the law, will have a fixed point to hold on to in constitutional norms, hence reducing, albeit partially, the sphere of discretion.<sup>26</sup> Undoubtedly, the systematic nature of interpretation, in itself comprising the cognitive process which results in every norm being placed within a complex but unitary legal system, cannot be but inspired by constitutional norms.<sup>27</sup>

<sup>23</sup> On this issue, yet without the usual clarity, R. Quadri, 'Applicazione della legge in generale' n 5 above, 284-285; from a different perspective, tending to diminish the function and role of the constitutional norm, see N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 149 ff.

<sup>24</sup> It has been made clear that it is a nonsense to pose a problem of prevalence of the logical upon the grammatical interpretation, and also to make a distinction between two types of interpretation: literal and logical; the idea of one being separated from the other rests on the pretension of '*conoscere il fine di una norma, prima di sapere che cosa essa vuole, scambiandosi il risultato dell'interpretazione con un suo presupposto*' (Knowing the aim of a norm before understanding what it wants, thus mistaking the result of the interpretation with a prerequisite of it): R. Quadri, *ibid* 268, to whom the quoted words belong.

<sup>25</sup> On the so-called systemacity of interpretation see, for all, G. Lazzaro, *L'interpretazione sistematica* (Torino: Giappichelli, 1965), 127 ff; N. Bobbio, *Teoria dell'ordinamento giuridico* (Torino: Giappichelli, 1960).

<sup>26</sup> Diffusely, in this regard, L. Lonardo, *Meritevolezza della causa* n 22 above, 119 ff and 123 ff.

<sup>27</sup> See, for example, C. Mortati, 'Costituzione (Dottrine generali)' n 21 above, 183, according to whom '*ogni contrasto della legge rispetto ai principi impone la sua disapplicazione (o, secondo i casi, il suo annullamento), così come giustifica la pretesa dei soggetti i cui interessi riescano da esso lesi ad ottenere una pronuncia in tal senso*' [Any conflict of a statute with the principles implies its non-application (or, depending on the case, its voidability), just as it justifies the

It would be futile to attempt to dismiss the systematic criterion in the interpretation of legal provisions by suggesting that this would change the sense of those very provisions in ‘a perennial interplay of transfigurations and metamorphoses’,<sup>28</sup> as it is precisely here where the dynamics and the historicity of the legal system become manifest and can potentially impact upon reality.<sup>29</sup>

It would in fact be an illusory and vain ambition to think that a judge may have had in the past and will in the future have the mere task of ‘ascertaining whether the facts correspond to the abstract models the legislator has fixed’,<sup>30</sup> denying him the chance to balance conflicting interests and values by immersing himself in ‘the world of facts and of social, political, economic and moral evolution’.<sup>31</sup> Without dwelling upon the mere reading of a single provision – Celso would say on the *aliqua particula* – it is necessary to appraise it within the logic of the system, and this requires acumen, balance and particular sensitivity.<sup>32</sup> Even if such an approach does not guarantee the perception of the system’s ‘highest coherences’ – as has been acutely observed<sup>33</sup> – legal research should seek to acquire a systematic character, influenced by the all-encompassing nature of knowledge: these prerogatives are grounded on the very scientificity

pretension of the persons whose interests have been infringed to obtain a favourable judgment].

<sup>28</sup> R. Quadri, ‘Applicazione della legge in generale’ n 5 above, 254; the illustrious author, however, could not but write that ‘*le norme giuridiche si confermano, si arricchiscono, si evolvono, in un processo di continua storicizzazione*’ (Legal norms confirm, enrich themselves, and evolve in a process of continuous historicization), 249.

<sup>29</sup> Private law scholars have always been aware of this: see, for all, R. Nicolò, ‘Riflessioni sul tema dell’impresa e su talune esigenze di una moderna dottrina del diritto civile’ *Rivista di diritto commerciale*, I, 177 ff (1956); see, more recently, among others, P. Perlingieri, ‘Scuole civilistiche’ n 3 above, 436-437. Scholars also mention the ‘circularity of the relationship between *norm* and *fact* (from which the norm derives)’: see V. Crisafulli, *Lezioni di diritto costituzionale*, I, (Padova: Cedam, 1962), 14.

<sup>30</sup> R. Quadri, ‘Applicazione della legge in generale’ n 5 above, 255.

<sup>31</sup> R. Quadri, *ibid.*

<sup>32</sup> In this sense, see P. Perlingieri, ‘Produzione scientifica e realtà pratica’ n 2 above, 471 and bibliographical references in note 77 below.

<sup>33</sup> R. Quadri, ‘Applicazione della legge in generale’ n 5 above, 254.

of research and, with particular regard to law, constitute an effective tribute to the principle of legality.<sup>34</sup>

**IV. The constitutional norm as a justification for statutory law. The perceived risk of constitutionalization of all branches of the law and the retreat of traditional hermeneutical rules: critical remarks. Clarifying the meaning and scope of the principle of constitutional legality and its fundamental role in preserving the unitary nature of the system, as well as the hierarchical organization of the sources of law; hermeneutical rules as expressions of the structure and logic of the legal system, not of the jurist's abstract reasoning**

The fundamental norm reveals itself as a justification for the statutory norm: the latter has to harmonize itself consistently and reasonably with the former, following a sort of expansion, or development, in a way that is almost deductive, albeit historically conditioned. It has been observed that this might entail a cultural manoeuvre resulting in the 'constitutionalization' of all branches of the law, that is the 'hyper-interpretation' of the Constitution, consequently loosening the 'culturally accepted hermeneutical rules' and the 'control by social culture on the norms' meanings',<sup>35</sup> so as to produce 'a high level of instability in the legal system, as well as strong legal uncertainty'.<sup>36</sup>

It must be observed, in truth, that when swift social transformations and radical changes in life occur, they are not always surrounded by monolithic certainties. Besides, the modern state cannot refrain from expressing the full potential of the legal system

<sup>34</sup> From a comparative perspective, resorting to the *global intellection of the system* ('una intellectione globale del sistema') is deemed necessary by M. Ancel, *Utilità e metodi del diritto comparato*, italian translation (Camerino-Napoli: Edizioni Scientifiche Italiane, 1974), 46 ff; on this topic, also, P. Stanzione, *Introduzione a M. Ancel*, ibid XXII.

<sup>35</sup> G. Tarello, *Sullo stato dell'organizzazione giuridica* n 10 above, 7.

<sup>36</sup> G. Tarello, ibid 7-8; likewise, R. Quadri, 'Applicazione della legge in generale' n 5 above, 252 ff, *passim*.

in its entirety,<sup>37</sup> and not simply what is mostly desired or desired by the most. In this sense, the Constituent itself – in addition to specifying that the principle of legality has been set forth not only for the judge and for his defence (Art 101, para 2), but for all citizens without exception – stipulated that the Judiciary has ‘the duty to be loyal to the Republic and to *abide by the Constitution and its laws*’ (Art 54, para 1); a commitment which is also solemnly recalled in the promulgation formula, where it is perhaps more vigorously affirmed: ‘The Constitution shall be loyally obeyed as the *fundamental law of the Republic* by all the citizens and by the organs of the State’. It is thus misleading to single out the legislator as the exclusive addressee of Constitutional norms; likewise, there is no point in highlighting their allegedly political (non-juridical) nature. The principle of constitutional legality<sup>38</sup> is an anchor; it is a mandatory pathway to follow for the interpreter who intends to find, with a humble spirit, a unifying factor in the interpretation of laws. This can be achieved, on the one hand, by overcoming the myth of a misconceived certainty of the law which, although daily contradicted in the court rooms, continues to stand out hypocritically in defence of conservative needs and, on the other, by definitively setting aside the contrary myth of destabilizing the system by means of a classist interpretation of the law.<sup>39</sup> It is necessary to rescue the system’s uniformity swiftly, by putting the concept of constitutional legality into operation, that is by expressing the full potential inherent in the legal system, through a renewed positivistic approach which must not be identified with mere subservience to law. However, it has been ascertained that

<sup>37</sup> On the conception of a systematic legal system see, in particular among civil law scholars, Salv. Romano, *Ordinamento sistematico del diritto privato*, I, *Diritto obiettivo, diritto soggettivo* (Napoli: Morano, 2<sup>nd</sup> ed, n.d.), 15 ff, *passim*.

<sup>38</sup> Cf now L. Lonardo, *Meritevolezza della causa* n 22 above, 129 ff, 139 ff.

<sup>39</sup> Even though from a different perspective see, among others, U. Cerroni, ‘Il problema della teorizzazione dell’interpretazione di classe del diritto borghese’, in P. Barcellona ed, *L’uso alternativo del diritto*, I, *Scienza giuridica e analisi marxista* (Roma-Bari: Laterza, 1973), 3 ff; L. Ferrajoli, *Magistratura democratica e l’esercizio alternativo della funzione giudiziaria* *ibid*, 113; for a critique see, among others, P. Perlingieri, ‘Scuole civilistiche’ n 3 above, 423 ff and *ibid* further bibliographical references.

positivism can be appreciated only for its historical content and that its choice as a method remains a political and ethical one.<sup>40</sup>

Constitutionalizing the law is required not only to guarantee the unitary nature of the system and foster respect for the hierarchy of its normative sources, but also to obviate the risk of degeneration within a system entirely dependent on formal obedience to statutory law: 'the Fundamental Law in fact not only guarantees predetermined forms and procedures set forth by the State, it also comprises substantive normative elements'.<sup>41</sup> Its aim is not to destroy existing interpretive techniques, but rather to adjust them in line with primary values, rejecting the idea that only official practices (by courts, notaries or administrative bureaucracy) should be relied upon, since they too can be subjected to constitutional review.<sup>42</sup>

As regards the loosening of society's control over the meanings of culturally accepted norms and rules of interpretation, this can be easily countered by the argument that if law is culture, it is nonetheless true that official culture could not affect the actualization of the legal system's values without breaching legality itself. This would be historically objectionable, all the more so given that constitutional legality confers a higher and more qualified protection to humans and their related existential prerogatives. The hermeneutical rules in themselves must be expressions of the structure and logic of the legal system, and not of the abstract logic of the jurist.<sup>43</sup> This is confirmed

<sup>40</sup> Thus, P. Perlingieri, *ibid* 425 ff for references on this topic in the literature; see, however, the seminal pages of A. Baratta, 'Il positivismo e il neopositivismo in Italia', in R. Orecchia ed, *La filosofia del diritto in Italia nel secolo XX, Proceedings of the XI National Congress* (Napoli, Oct. 4-7 1977), II, (Milano: Giuffr , 1977), 21 ff.

<sup>41</sup> H.P. Schneider 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' n 5 above, 218.

<sup>42</sup> This was, at the time, the wishful intention expressed by P. Calamandrei, 'La funzione della giurisprudenza nel tempo presente' *Rivista trimestrale di diritto e procedura civile*, 270 (1955), who invited the courts to make use of a 'constitutional sensitivity'.

<sup>43</sup> Differently see, for all, F. Carnelutti, *Metodologia del diritto* (Padova: Cedam, 1939), 25-26; see, also, V. Crisafulli, 'I principi costituzionali dell'interpretazione ed applicazione delle leggi', in *Scritti giuridici in onore di Santi Romano*, I, *Filosofia e teoria generale del diritto. Diritto costituzionale* (Padova: Cedam, 1940), 675 ff; on this topic see also G. Tarello, 'Il 'problema dell'interpretazione': una formula ambigua' *Rivista internazionale di filosofia del diritto*, 349 ff (1966) now in G. Tarello, *Diritto, enunciati, usi* (Bologna: Il Mulino, 1974), 389 ff.

by the explanations given with respect to Art 12 of the preliminary provisions to the Italian Civil Code but also by objective historical-comparative evidence.<sup>44</sup>

**V. The issue of the direct relevance of constitutional norms to interpersonal relationships. The so-called indirect application of constitutional principles, mediated by statutory rules, results in the combined application of both. It is not just about interpreting a statutory provision: it is about determining the applicable norm**

While the re-reading of statutory law in the light of fundamental norms, within the twofold meaning referred to above (as mere interpretation driven by constitutional principles and as a functional justification of statutes) might embody a helpful and workable methodology which could be deployed constantly, it does not seem to be able to exploit the full potential of constitutional norms. Having abandoned the idea that such norms have the legislator as their only addressee and that they do not solely aim to impose normative limits or establish political programmes, it is then necessary to face the question of their direct relevance for interpersonal relationships, with specific regard to those relating to private law.

According to prevailing German scholarship,<sup>45</sup> constitutional norms ought to be applied indirectly, via statutory rules, whether they are expressed by way of general clauses or through specific and

<sup>44</sup> It is useful to consider the insights on the varying conceptions of the subject-matter and contents of socialist civil law: see, for example, I. Markovits, *Il diritto civile tra socialismo e ideologia borghese nella Repubblica democratica tedesca*, Italian translation (Camerino-Napoli: Edizioni Scientifiche Italiane, 1978), 71 ff, 139 ff; on this issue, also, P. Stanzione, *Introduzione a I. Markovits*, *ibid* XXXVI, and XLIV ff. On the historical grounds of the application of law see, among others, L. Bagolini, 'La scelta del metodo nella giurisprudenza (Dialogo fra giurista e filosofo)' *Rivista tri mestratale di diritto e procedura civile*, 1063 ff (1957).

<sup>45</sup> Cf, on this subject, H.C. Nipperdey, 'Grundrechte und Privatrecht' in *Festschrift Molitor* (München-Berlin: Beck, 1962), 17 ff; G. Dürig, 'Grundrecht und Zivilrechtssprechung' in *Vom Bonner Grundgesetz zum gesamtdeutschen Verfassung*, *Festschrift Nawiasky* (München: Isar, 1956), 157 ff and, to a wider extent, W. Leisner, *Grundrechte und Privatrechte*, (München-Berlin: Beck, 1960), *passim*, and 113 ff.

detailed propositions. But this type of application, rather than being indirect, constitutes a coordinated ('combined') application of both constitutional and statutory norms, according to the logical scheme of the *combinato disposto*:<sup>46</sup> more than the expression of mere interpretation of a statutory rule, it reflects the search for the norm itself.<sup>47</sup> What emerges is the inconsistency of the mechanism based on mere 'subsumption', as it erroneously posits the logical and chronological precedence of interpretation before qualification, neglecting the fact that both are aspects of a unitary cognitive process aimed at selecting the applicable norm.<sup>48</sup> Consequently, although the

<sup>46</sup> See, for example, C. Mandrioli, *L'assorbimento dell'azione civile di nullità e l'art. 111 della Costituzione* (Milano: Giuffrè, 1967), 3 ff; and furthermore, although aimed at the constitutional evaluation of a 'body of norms', G. Chiarelli, 'Processo costituzionale e teoria dell'interpretazione', in *Studi in memoria di T. Ascarelli*, V, (Milano: Giuffrè, 1969), 2856; this orientation belongs to that line of jurisprudence interpreting statutory norms in the light of the Constitution. Particularly significant, for example, is the statement of reasons by the Tribunale Superiore delle acque, 3 May 1965 no 9, *Tribunale Superiore delle acque pubbliche*, II, 232 ff (1966) which, picking up the teachings of the Corte costituzionale itself (8 April 1958 no 6, and also 26 January 1957 no 24), points out that '*non deve darsi carico della eccezione di illegittimità costituzionale se non dopo aver proceduto all'analisi della disposizione, essendo noto che il dubbio che la norma non sia conforme alla Costituzione può prospettarsi solo dopo che si è chiarita la portata della disposizione in contestazione e si è accertato che l'eventuale contrasto con i precetti costituzionali è conseguenza necessaria dell'applicazione della norma, la quale non è suscettibile di altra applicazione, di per sé aderente alla Costituzione*' (A question of constitutionality must be raised only after having analyzed the statutory provision, as it is well known that the doubt about a provision not complying with the Constitution can arise only after having cleared up its scope and having ascertained that the possible conflict with the constitutional precepts is a inevitable consequence of the application of the norm, which is not subject to any other interpretation, in itself adherent to the Constitution).

<sup>47</sup> On interpretation as 'definition of the normative case' R. Quadri, 'L'interpretazione dei negozi giuridici nel diritto internazionale privato', in *Studi critici di diritto internazionale*, I, *Diritto internazionale privato* (Milano: Giuffrè, 1958), 242-243, and now in R. Quadri, 'Applicazione della legge in generale' n 5 above, 230, 239, 247 ff, examining the issue of how to identify the applicable norm; also L.M. Bentivoglio, 'Interpretazione del diritto e diritto internazionale' (Università degli Studi di Pavia, 1953) XXXIII, 230; L.M. Bentivoglio, 'Interpretazione (dir. intern.)' n 21 above, 314 ff.

<sup>48</sup> Recently, on this issue, P. Perlingieri, 'Interpretazione e qualificazione: profili dell'individuazione normativa' *Diritto e giurisprudenza*, 826 ff (1975), now in P. Perlingieri, *Profili istituzionali* n 12 above, 199 ff; more in-depth V. Rizzo,

constitutional norm seems to be employed here as a hermeneutical tool aimed at making sense of a statutory rule, it actually becomes an essential part of the final norm regulating the concrete relationship.

It is important not to be misled by the expression ‘re-reading’, used in this context; it does not express merely a subsidiary way of interpreting statutes, nor does it exhaust itself in a constitutionally sound reading of black-letter law.<sup>49</sup> Even though scholars are generally inclined to consider resorting to the constitutional norm only in doubtful cases, ie as a matter of last resort, the Fundamental Law – which lays down principles of general relevance – qualifies as substantive law, and not simply as an interpretive tool. Recourse to the Constitution is hence justified, just like any other legally binding norm, as it expresses a normative value which cannot be ignored.

## **VI. Compatibility of this assumption with the exclusive role attributed to the Constitutional Court in monitoring the legitimacy of all legislative acts having the force of law, with a view to their possible ‘elimination’. The constitutional norm in the judges ‘and other interpreters’ discretionary evaluations: different levels, mirroring different functions**

The most serious objection against the idea that the constitutional

*Sull’interpretazione dei contratti* (Camerino-Napoli: Edizioni Scientifiche Italiane, interim edition, 1976), 56 ff and *ibid* further bibliographical references.

<sup>49</sup> This is connected to the long standing issue of the subject-matter of interpretation – norm or article –, which is particularly relevant in the field of constitutional interpretation: see, for all, T. Ascarelli, ‘Giurisprudenza costituzionale e teoria dell’interpretazione’ *Rivista di diritto processuale*, 351 ff (1957); G. Chiarelli, ‘Processo costituzionale’ n 46 above, 2854 ff; V. Crisafulli, ‘Le sentenze interpretative della Corte Costituzionale’, in *Studi in memoria di T. Ascarelli* n 46 above, 2886 ff, and, in a wider perspective, now R. Quadri, ‘Applicazione della legge in generale’ n 5 above, 216, underlines that the ‘*norma agendi non può essere identificata con il ‘testo’ e cioè con un complesso di segni linguistici, dalla cui interpretazione si ottiene il significato*’ (*Norma agendi* cannot be identified with the text, that is with an group of linguistic signs, from the interpretation of which we derive a meaning); see, furthermore, G. Tarello, ‘Il ‘problema dell’interpretazione’ n 43 above, 353 f; N. Lipari, ‘Il problema dell’interpretazione giuridica’, in N. Lipari ed, *Diritto privato. Una ricerca per l’insegnamento* (Bari: Laterza, 1974), 78 ff.

norms may have a direct effect on private law relationships continues to be the exclusive nature of the role entrusted to the Constitutional Court in reviewing the constitutionality of laws (Art 134 Constitution).<sup>50</sup> The special status of such review and the related proceedings is grounded on the general interest in ‘eliminating’, once and for all and *erga omnes*, any law that is found to be unconstitutional (Art 136, para 1, Constitution; Legge 11 March 1953 no 87, Art 30).<sup>51</sup>

However, the task of ascertaining whether a constitutionality complaint is not *prima facie* groundless rests with the common interpreter. Unquestionably, when a judge is faced with a legal provision that appears unlikely to comport with the Constitution and its application is crucial for the resolution of the case at issue, he is expected to suspend the ongoing proceedings and refer the matter to the Constitutional Court for *certiorari*; conversely, in the presence of a provision that does not stand out as manifestly illegitimate, or that is irrelevant for the case under examination (Legge 11 March 1953 no 87, Art 24), the judge is not under any obligation to refer it to the Court. In either case, the judge clearly exercises a broad discretionary power. It is up to the judge to decide whether the incompatibility of a statutory rule with one or more constitutional precepts is absolute and impossible to be amended: in such a case, the inconsistency and/or contradiction is of such a degree and is so intense that, were the illegitimate statutory rule to be applied, the corresponding constitutional precepts would inescapably be disregarded. However, it is always for the judge to decide the converse, where, for example, a statutory rule is not absolutely and irremediably incompatible with one or more constitutional norms, but is simply ‘non-conform’, due for instance to defective coordination, entailing a merely functional shortfall which may be resolved by way of interpretation.

With respect to the first hypothesis, it is still unclear whether the question concerning the illegitimacy of a statutory rule which entered into force before the Constitution was adopted ought to be referred to the Constitutional Court or could instead be resolved, more simply, by applying the long-standing hermeneutical norms regulating

<sup>50</sup> On this topic, see R. Quadri, ‘Applicazione della legge in generale’ n 5 above, 260 ff.

<sup>51</sup> See C. Mortati, *Istituzioni di diritto pubblico*, II, (Padova: Cedam, 9<sup>th</sup> ed., 1976), 1415 ff.

conflict of laws over time (Art 15 of the Italian Civil Code's preliminary provisions), hence reaching the conclusion that the conflicting statutory rule ought to be regarded as having been implicitly abrogated.<sup>52</sup> At any rate, in cases involving a statutory norm, the judge has to decide whether and to what extent it is compatible with the Constitution. The two terms of comparison are not fixed and immutable, but depend on the interpretation provided. The functional inadequacies of statutory rules, having regard to the specific facts of the case, may always be superseded within the framework of the legal system as a whole, from which the interpreter is expected to draw the applicable norm, without having to refer the issue to the competent Court. Indeed, the basic legal institutions laid down and regulated by statutory law are normally qualified in accordance with the constitutional principles and values:<sup>53</sup> suffice it to mention private ownership, freedom of enterprise and contracts.<sup>54</sup>

Despite the existence of a control mechanism such as that

<sup>52</sup> See, however, Corte Costituzionale 14 June 1956 no 1, *Giurisprudenza costituzionale*, 7 (1956); Corte Costituzionale 27 January 1959 no 1, *Foro italiano*, I, 186 ff (1959); Corte Costituzionale 27 January 1959 no 4, *ibid* 177 ff. On this subject cf R. Quadri, 'Applicazione della legge in generale' n 5 above, 346-347; C. Esposito, 'Illegittimità costituzionale e abrogazione' *Giurisprudenza costituzionale*, 829 ff. (1958); V. Crisafulli, 'Incostituzionalità o abrogazione?' *ibid* 271 ff (1957); S. Pugliatti, 'Abrogazione', *Enciclopedia del diritto* (Milano: Giuffrè, 1958), 151 ff; E.T. Liebman, 'Invalidità e abrogazione delle leggi anteriori alla Costituzione' *Rivista di diritto processuale civile*, II, 161 ff (1956); VVAA, 'Dibattito sulla competenza della Corte costituzionale in ordine alle norme anteriori alla Costituzione' *Giurisprudenza costituzionale*, 261 ff (1956). See also E. Ondeì, 'Può il giudice ordinario dichiarare abrogata una norma di legge per effetto della Costituzione?' *Giurisprudenza italiana*, IV, 49 ff (1970); G. Marzano, 'Sul preteso potere del giudice ordinario di dichiarare abrogata una norma di legge per contrasto con la Costituzione', *ibid* 92 ff (1972).

<sup>53</sup> The most accurate line of scholarship is aware of this: see, among others, U. Majello, *Profili costituzionali della filiazione legittima e natural* n 1 above, 11, and note 12, who specifies that 'la ricostruzione sistematica della legge ordinaria, sulla base dei principi costituzionali, rappresenta un'operazione preliminare e necessaria, idonea ad esprimere un giudizio di incostituzionalità per tutte quelle norme che restano fuori dal sistema' (The systematic reconstruction of statutory legislation, based on constitutional principles, represents a preliminary and necessary operation, suitable to express a judgment of unconstitutionality for all those norms which place themselves outside the system).

<sup>54</sup> See text and footnotes in the following paragraph.

entrusted to the Constitutional Court, interpreters are enabled to apply constitutional norms directly, with the sole limit – due to the general interest in repealing the illegitimate provision from the body of laws – that if, upon thorough examination, the unconstitutionality of a statutory provision is patent, the question must be referred to the Constitutional Court. The existence of different judicial levels mirrors the co-existence of diverse functions which, far from conflicting with one another, join together to form a productive connection which of course renders the common judge subject to the principle of constitutional legality, but also makes him responsible for its interpretation.<sup>55</sup>

This view is also endorsed in the Constitutional Court's jurisprudence. Urged on by the need to avoid dangerous gaps in the system, out of the many possible interpretations of a statutory provision, the Court picks the one that, in its opinion, best adheres to the Constitution. But this does not have a binding effect upon anyone and, according to numerous commentators,<sup>56</sup> does not even bind the judge who referred the constitutionality question to the Constitutional Court. The same approach has been followed by the Supreme Court of Cassation when examining the alleged violation or false incorrect application of constitutional norms by common judges, even in cases in which this is the sole ground of appeal.<sup>57</sup> Therefore, the peculiar mechanism of constitutional review, which aims to expunge

<sup>55</sup> For an analysis of the judge's concurrent exercise of control over the conformity of legislative options with the Constitution and over an effective application thereof, see L. Lonardo, *Meritevolezza della causa* n 22 above, 139.

<sup>56</sup> Thus, V. Crisafulli, 'Le sentenze interpretative' n 49 above, 2877 ff, wherein further bibliography. On this issue, recently, see N. Picardi, 'Sentenze integrative della Corte costituzionale e vincolo del giudice' *Giustizia civile*, I, 1110 ff (1979) and *ibid* further bibliographical references, in addition to those contained in P. Perlingieri, 'Scuole civilistiche' n 3 above, 434, especially note 133; see also G. Zagrebelsky, *La giustizia costituzionale* (Bologna: Il Mulino, 1977), 188 ff. Even in the different German constitutional system, in the presence of a question of constitutionality (*Verfassungsbeschwerde*) raised in the hypothesis of violation of fundamental rights, the German Constitutional Court has tried to remit to the court of first instance the interpretation of mere law also with reference to its implications on the ground of fundamental rights: see H.P. Schneider, 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' n 5 above, 215 f.

<sup>57</sup> As to Art 37, para 3, Constitution, see Corte di Cassazione 14 June 1976 no 2188, *Giustizia civile*, I, 1210 (1976).

illegitimate provisions from the system, is no obstacle to the direct application of constitutional norms in relations between private parties, irrespective of the co-existence of specific statutory rules.

**VII. Confirmations from relevant case law and scholarship. References to employment and penal law, as well as to civil and criminal procedure. Private law examples of constitutional norms being applied either in the presence or in the absence of specific statutory rules**

Such a perspective is confirmed by a significant body of case law and literature. Whilst employment law – which is among the liveliest and most dynamic sectors of the legal system – is supported by a wide array of modern statutory provisions (for the most part inspired by the driving force of collective bargaining), it has made ample use of constitutional norms and in particular of Arts 4,<sup>58</sup> 19,<sup>59</sup> 21,<sup>60</sup> 36,<sup>61</sup> 37,<sup>62</sup>

<sup>58</sup> This was rightly observed by G.M. Lombardi, *Potere privato e diritti fondamentali* n 5 above, 31, referring to precedents.

<sup>59</sup> For a direct application of Art 19, although in connection with Arts 2 and 3, para 1, and Art 3, para 1, and 36, para 3, of the Constitution itself see respectively Pretura di Napoli, 9 December 1976, *Diritto e giurisprudenza*, 594 (1977) and Pretura di Roma, 27 May 1975, *Diritto ecclesiastico*, II, 185 (1976).

<sup>60</sup> Meaningful are a number of decisions delivered before the passage of Legge 20 May 1970, no 300 (so-called ‘Statute of workers’): see, for example, Tribunale di Ferrara, 8 June 1968, *Rivista giuridica del lavoro*, II, 270 (1968) and also 13 August 1969, *ibid* 747 (1969).

<sup>61</sup> Cf M.L. De Cristofaro, *La giusta retribuzione* (Bologna: Il Mulino, 1971) for a thorough analysis of case law and scholarship. On the judge’s power to supplement salaries, see Corte di Cassazione 8 July 1972 no 2299, *Massimario del Foro italiano*, 701 (1972) and on the *iuris tantum* presumption that minimum contractual wages fulfill the provisions set forth in Art 36, see for example, Corte di Cassazione 7 October 1970 no 1849, *ibid* 585 (1970). Courts furthermore apply Art 36 Constitution to any type of employment relationship: to collective employment [Corte di Cassazione 6 April 1973 no 949, *ibid* 275-276 (1973)], to part-time work [Corte di Cassazione 29 January 1970 no 189, *Foro italiano*, I, 760 (1970)]; where the employer is a public body [for a public law perspective: Tribunale amministrativo regionale del Lazio, 28 July 1975 no 549, *Repertorio del Foro italiano*, v. Giustizia amministrativa, 1223, no 847 (1975); under civil law, see Corte di Cassazione 5 November 1973 no 2875, *Massimario del Foro italiano*, 808 (1973), or is not bound by collective agreements due to its not being associated to any bargaining unions [Tribunale di Ravenna 14 July 1975, *Foro italiano*,

40,<sup>63</sup> etc. The same result has been achieved in the most varied sectors: thus, for example, the right to an appeal, with respect to a number of court decisions not expressly mentioned as being eligible for appeal to the Supreme Court of Cassation, was eventually acknowledged through direct application of Art 111 Constitution;<sup>64</sup> it

I, 233 (1976)]. Article 36 Constitution is also used as grounds for the principle of equal treatment in an employment relationship: accordingly, Pretura di Milano, 13 March 1975, *Orientamenti della giurisprudenza del lavoro*, 365 (1975). On this issue, indeed very controversial, see L. Angiello, *La parità di trattamento nei rapporti di lavoro* (Milano: Giuffrè, 1979), 57 ff. Ultimately, the same norm has been utilized with reference to the nature and the amount of seniority indemnity: Tribunale amministrativo regionale del Lazio, 14 July 1975 no 295, *Repertorio del Foro italiano*, v. Impiegato dello Stato e pubblico in genere, 1462, no 963 (1975).

<sup>62</sup> Article 37 Constitution, in both its first and third paragraph expresses a precept of equal legal treatment of women and minors, for equal amounts of work, compared to that established for the male-adult-workers. On the first hypothesis see Corte di Cassazione 11 September 1972 no 2731, *Massimario del Foro italiano*, 834 (1972); on the second one, see Corte di Cassazione 14 June 1976 no 2188, *Giustizia civile*, I, 1210 ff (1976), according to which the word ‘*garantisce*’ (guarantees) in the third paragraph of the article under consideration clearly outlines ‘the extent and limits of a ‘perfect’ subjective legal situation. No additional provision is, indeed, necessary in order to grant the minor the same remuneration as the full aged person, if the former performs the same work as the latter’ (*l’estensione e i limiti di una posizione soggettiva perfetta. Nessuna disposizione integrativa è, infatti, necessaria per riconoscere al minore la stessa retribuzione del maggiorenne, se di costui svolge pari lavoro*). And this holds ‘even if, hypothetically, productivity is lower’ (*anche se, in ipotesi, sia inferiore il rendimento*). See, among others, G.M. Lombardi, *Potere privato e diritti fondamentali* n 5 above, 30 ff.

<sup>63</sup> On the different types of strike (articulated, ‘work to rule’ or ‘white’, chessboard-style, etc) Courts make assessments of legitimacy or illegitimacy in relation to Art 40 Constitution, which is explicitly or implicitly considered to be ‘*precettivo e di immediata attuazione*’ (preceptive and immediately enforceable): see, for example, Corte di Appello Milano, 20 November 1964, *Foro italiano*, I, 1315 ff (1965); Corte di Cassazione, 3 May 1967 no 512, *ibid* 958 ff (1967); Corte di Cassazione 10 February 1971 no 357, *Massimario del Foro italiano*, 115 ff (1971); Pretura di Recanati, decreto-ordinanza 12 August 1971, *Foro italiano*, I, 247 (1972); Corte di Appello Venezia, 29 April 1972, *ibid* 2319 (1972); for further references, see P. Perlingieri, ‘*Scuole civilistiche*’ n 3 above, 411 and note 21.

<sup>64</sup> Among others, the following court decisions have been deemed appealable to the Court of Cassation under Art 111 Constitution: the decree-order rejecting the petition by the general partner in a limited partnership to be admitted to take part in the pre-bankruptcy agreement with creditors [Corte di Cassazione 15 December 1970 no 2681, *Foro italiano*, I, 43 ff (1971)]; the decree-order of admission to the aforesaid pre-bankruptcy agreement [Corte di Cassazione 7 February 1975, no 462,

has been highlighted that the right to due process is one which the judge has the power and the duty to guarantee whilst exercising his judicial powers pursuant to Art 24 Constitution;<sup>65</sup> moreover, Art 97 Constitution has been considered to express 'behavioural rules for the public administration'.<sup>66</sup> Not to mention the in-depth constitutional studies carried out by criminal law scholars and also by procedural specialists who, starting from Art 3, para 2, and Arts 24, 25, 26, 27 and 112, paved the way for a sweeping critical review of existing statutes and their interpretation.<sup>67</sup>

ibid 216 ff (1976)]; the decision cancelling the bankruptcy agreement [Corte di Cassazione 18 July 1973 no 2103, *Massimario del Foro italiano*, 607-608 (1973)]; the bankruptcy court's decree which, on the premise that the precautionary sequestration, issued by the delegated judge (Art 146/3 bankruptcy law), cannot be validated according to the provisions of the code of civil procedure, but is subject to the claim laid down in Art 26 of the bankruptcy law, rejected the claim filed against the precautionary measure [Corte di Cassazione 9 August 1973 no 2300, *Giustizia civile*, I, 1848 ff (1973)]; the bankruptcy court's ruling on the claim filed against the order of the delegated judge which sets the plan of partial distribution of the assets, rendering it enforceable [Corte di Cassazione 25 May 1973 no 1554, ibid 1716 ff (1973)]; the decision (unappealable) of the bankruptcy court on grounds of opposition to the statement of liabilities in a dispute not exceeding the competence of the *pretore ex* Art 99, paragraph 6, bankruptcy law [Corte di Cassazione 25 October 1973 no 2737, *Massimario del Foro italiano*, 768 (1973)]; decisions of the Corte dei Conti based on reasons only concerning jurisdiction [Corte di Cassazione-Sezioni unite 12 February 1973 no 408, ibid 111 (1973)]; decisions of the Tribunale Superiore delle acque pubbliche, issued both at first instance and on appeal, either based on the reasons listed in Art 200 Testo Unico no 1775 of 1933, and on any other breach of law [Corte di Cassazione-Sezioni unite 2 February 1973 no 311, *Giustizia civile*, I, 560 ff (1973)]. Among legal scholars, see, for all, C. Mandrioli, *L'assorbimento dell'azione civile di nullità e l'art. 111 della Costituzione* n 46 above, 20 ff.

<sup>65</sup> Concerning the pre-bankruptcy agreement procedure, see, for example, Corte di Cassazione, 24 March 1976 no 1042, *Giustizia civile*, I, 864 (1976) on the interpretation of Art 24 Constitutional given by the Constitutional Court, firstly in the decision of 2 July 1970 no 141 and then in that of 20 June 1972 no 110.

<sup>66</sup> See, for example, Consiglio di Stato, 14 April 1970 no 278, *Consiglio di Stato*, I, 591 ff (1970); but see S. Cassese, 'Imparzialità amministrativa e sindacato giurisdizionale' *Rivista italiana di scienze giuridiche*, 47 ff (1968); on the preceptive nature of the norm laid down under Art 97 Constitutional see A.M. Sandulli, 'Nuovo regime dei suoli e costituzione' *Rivista di diritto civile*, I, 294 ff (1978), who, however, regards it as one of the most neglected within the Constitutional Chart.

<sup>67</sup> See, for all, M. Chiavario, *Processo e garanzie della persona* (Milano: Giuffrè, 1976), 5 ff, *passim*; and for some examples, G. Conso, *Costituzione e processo penale*

Now, focusing on sectors traditionally considered to be the privileged domain of private law scholars, it can be stressed that the application of constitutional norms, including Art 2 in particular, has produced a number of widely innovative effects, especially in the contexts of parenting and adoption, and fostering arrangements intended to protect the best interests of children.<sup>68</sup> The same can be argued with respect to family law disputes, especially when balancing the interests of the family against those of its members. There, the fundamental provisions of Arts 2, 3, 29 ff Constitution show that a merely economic approach is insufficient and hence – facilitated by a renewed regulatory framework, but not only by that – priority is given to the existential needs of the person. To illustrate, these articles were applied to identify the notion of marital fault in separation

(Milano: Giuffrè, 1969), 388-389; R. Provinciali, *Norme di diritto processuale nella Costituzione* (Milano: Giuffrè, 1959), 151 ff.

<sup>68</sup> Particularly significant to this orientation are the decisions by the Tribunale dei minori di Bologna, 26 October 1973, *Giurisprudenza italiana*, I, 2, 546 ff (1974) which, concerning the application of Arts 330 and 333 of the Civil Code, grounds on Art 2 Constitution the necessity to ‘*educare non in termini precettivi ma per fare l'uomo capace di opzioni libere e coscienti, per conquistare, nella cultura, il mezzo della libertà*’ (‘educate not in preceptive terms but aiming at rendering the person capable of free and conscious choices, in order to achieve freedom by means of culture’); Tribunale dei minori di Bari 9 September 1975, *Diritto di famiglia e delle persone*, 147 ff, 149 (1976), affirming on the basis of the same article its own competence when dealing with the primary interest of protection of the minor and when preventing the latter from any prejudices; Tribunale dei minori dell’Emilia-Romagna, decreto 23 January 1978, *ibid* 900 ff (1978) deeming reviewable, in the interest of the minor, the opposition (made by the parent who recognized a natural child) to the integration of the child in the ‘legitimate family’ of the other parent, judging unconstitutional the opposite interpretation of Art 252 Civil Code [whereas other courts have only raised a question of constitutionality: Tribunale dei minori di Firenze ordinanza 22 April 1977, *ibid* 502 ff (1977); Corte di Cassazione 8 November 1974 no 3420, *Giurisprudenza italiana*, I, 1, 826 ff, 832-833 (1976), with a note by M.E. Poggi, ‘Criteri e finalità dell’affidamento nell’adozione speciale’, who affirms that all measures concerning adoption must aim at guaranteeing the protection of dignity, autonomy and free development of the person, based on Arts 2, 29 and 30 Constitution; and, in the end, of Corte di Cassazione 17 January 1978 no 203, *Foro italiano* I, (1978) on the issue of adoptions]. For further references on this topic cf G. Battistacci, ‘Affidamenti ed adozioni’, in *Atti dell’incontro di studio sui Rapporti personali della famiglia* n 5 above, and A. Germanò, *Potestà dei genitori e diritti fondamentali dei minori*, *ibid*.

proceedings,<sup>69</sup> and also to classify the duties of parents responsible for the upbringing, maintenance and instruction of adult children.<sup>70</sup>

Such an approach is destined to produce even more remarkable results, not to speak of its use in rectifying many questionable overlaps between financial interests and existential values that have characterized numerous private law institutions. For example, interdiction has been historically explained on the grounds of incapacity to 'provide for one's own interests' (Art 414 Civil Code), meaning economic interests (see also Art 415, para 2, on incapacitation). Despite the clearly economic nature of the interests accounted for by these rules, the code has arbitrarily impaired the interdicted person's legal capacity also in connection with non-economic choices, by prohibiting, for example, to enter into a valid contract of marriage (Art 119 Civil Code)<sup>71</sup> or recognize a natural child (Art 266 Civil Code), etc.<sup>72</sup>

Within this framework, many attempts of a similar kind have followed: given the absence of a specific statutory rule, instead of resorting to the 'general principles' which may be inferred from the civil code or its complementary provisions, it has been argued that constitutional norms should be directly applied. Particularly illustrative,

<sup>69</sup> See V. Carbone, 'Separazione e divorzio: profili sostanziali e processuali', in *Atti dell'incontro di studio sui Rapporti personali della famiglia* n 5 above, and *ibid* references to precedents; with regard to the equality principle contained in Art 29, para 2, Constitution, see Corte di Cassazione 19 May 1978 no 2470, *Giustizia civile*, I, 1401 (1978).

<sup>70</sup> In relation to Art 30 Constitution see Corte di Cassazione 9 January 1976 no 38, *Diritto di famiglia e delle persone*, 95 ff (1976).

<sup>71</sup> On this issue, see B. Pannain, 'Interdizione e capacità al matrimonio', *Diritto e giurisprudenza*, 509 ff (1978).

<sup>72</sup> In this sense the prevailing scholarship: cf, for all, A. Cicu, 'La filiazione', in F. Vassalli ed, *Trattato di diritto civile* (Torino: Utet, 1969), III, 2, 171, 198, and U. Majello, 'Della filiazione', in *Commentario al Codice Civile* A. Scialoja and G. Branca eds (Bologna-Roma: Zanichelli, 1969), 145 and there for further bibliography. The possibility of extending the hypothesis *ex* Art 266 to the hypotheses of mental impairment is controversial. For the affirmative thesis, among others: M. Stella Richter and V. Sgroi, 'Delle persone e della famiglia', in *Commentario al Codice Civile* (Torino: Utet, 1977), 2, 191; F.D. Busnelli, 'L'incapacità di intendere e di volere nel riconoscimento dei figli naturali' *Foro padano*, I, 946 ff (1962); *contra*, Tribunale di Napoli 25 February 1964, *Giurisprudenza italiana*, I, 269 (1966), with well known critique by M. Bessone, 'L'incapacità di intendere e di volere nel regime dei mezzi di impugnazione del riconoscimento dei figli naturali'; Corte di Cassazione 8 October 1970 no 1869, *Repertorio del Foro italiano*, v. Filiazione, 865, no 15 (1970).

in this regard, is the overcoming of the debate on the alleged *numerus clausus* of personality rights, such as the right to a name, to one's image, to physical integrity (Art 5 ff Civil Code),<sup>73</sup> which tended to leave out any other existential manifestation of the person, in particular the so-called fundamental rights, which are undoubtedly relevant for private-law relationships.<sup>74</sup> The fact that the Constitution contains numerous provisions concerning civil rights (to health, to education, to a free and decorous existence, etc), civil liberties,<sup>75</sup> along with an open clause providing protection for the full development of the human person (Art 2),<sup>76</sup> means that the idea of a *numerus clausus* of personality rights must be rejected and the very

<sup>73</sup> See, however, A. De Cupis, *I diritti della personalità*, I (Milano: Giuffrè, 1973), 25-26 who speaks about '*parziale costituzionalizzazione dei diritti della personalità*' (partial constitutionalization of personality rights).

<sup>74</sup> On this topic P. Perlingieri, *La personalità umana* n 5 above, 174 ff, 368 ff. Article 1 of the Bonn Constitution guarantees the fundamental rights '*come immediatamente applicabili*' (as directly applicable) so that, as duly stressed by the Constitutional Court itself since from the *Lüth* case (Bundesverfassungsgericht 15 January 1951, *Entscheidungen des Bundesverfassungsgerichts*, Bd. 7, 198 ff, 203 ff) and by scholarship (H.P. Schneider, 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' n 5 above, 221), each judge when interpreting and applying civil law norms must pay attention to their possible 'modifications' resulting from their connection with the 'body of norms on fundamental rights', which is 'constitutional objective law'.

<sup>75</sup> In this regard, see Tribunale di Bari, 26 November 1964, *Foro italiano*, I, 140 (1965) interestingly applying Art 13, paras 1 and 2, Constitution to specify the sphere of operativity of the right to a name.

<sup>76</sup> See, recently, T.A. Auletta, *Riservatezza e tutela della personalità* (Milano: Giuffrè, 1978), 39 ff, and moreover C.M. Bianca, *Diritto civile*, I, *La norma giuridica, I soggetti* (Milano: Giuffrè, 1978), 157 ff; G. Criscuoli, 'L'opposizione del marito all'aborto voluto dalla moglie: dai casi 'Paton' e 'Danforth' all'art. 5 della legge n. 194 del 22 maggio 1978' *Diritto di famiglia e delle persone*, 242 ff (1979). German scholars have talked of an extensive interpretation of the right to free development of personality (Art 2 Abs 1 GG) so as to create 'a system of values and rights without gaps': G. Dürig, 'Sub Art 1 Abs', in Th. Maunz, G. Dürig and R. Herzog eds, *Grundgesets Kommentar*, Bd. I (München: Beck, 1971) I, 8; for a critical account of the constitutional case law which substantially endorsed this view (lately, Bundesverfassungsgericht 1 March 1978, *Entscheidungen des Bundesverfassungsgerichts*, Bd. 47, 327 ff, especially 369; previously, the said Court 2 May 1967, *ibid* Bd. 21, 362 ff, especially 372) see H.P. Schneider, 'Carattere e funzione dei diritti fondamentali nello Stato costituzionale democratico' n 5 above, 209; K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Karlsruhe: Heidelberg, 9<sup>th</sup> ed., 1976), 127.

role of the human person in the system should be reconsidered from a qualitatively different perspective, by extending not only the scope of available protection but also its objective relevance.<sup>77</sup> The different existential needs of the human person such as, for example, information and access to its sources,<sup>78</sup> privacy,<sup>79</sup> change of sex,<sup>80</sup> mental other than physical integrity,<sup>81</sup> find a reliable normative

<sup>77</sup> See paragraph 1 above and related footnotes.

<sup>78</sup> See, in a general perspective, A.M. Sandulli, 'Libertà d'informazione e mass-media nell'odierna realtà italiana' *Diritto e società*, 71 ff (1978) but more amply, A.M. Sandulli, 'La libertà d'informazione' *Il Diritto delle radiodiffusioni e delle telecomunicazioni*, 477 ff (1977); N. Lipari, 'La libertà di informare o diritto ad essere informati?', *ibid* 1 ff (1978); C. Chiola, 'Azionabilità dell'interesse all'obiettività dell'informazione', *ibid* 581 ff (1978); C. Chiola, 'Libertà d'informazione e disciplina della radio e della telediffusione' *Annali della Facoltà di giurisprudenza dell'Università di Genova*, 217 ff (1977). With regard to the lively debate which has recently arisen on the issue of access to radio and television programmes (regulated by Legge 14 April 1975 no 103 about 'New norms on radio and television broadcasting') see, for all, A. Reposo, 'La natura giuridica della Commissione parlamentare per i servizi radiotelevisivi' *Diritto delle radiodiffusioni e delle telecomunicazioni*, 553 ff (1978) and C. Chiola, 'L'accesso dei gruppi alle trasmissioni radiotelevisive', *ibid* 212 ff (1976). Further, on this subject, see Corte Costituzionale 6 December 1977 no 139, *Giurisprudenza costituzionale*, I, 1441 (1977) with a commentary by C. Chiola, 'Sentenza d'irrelevanza per accesso a Tribuna politica', *ibid* 1553 ff.

<sup>79</sup> See, for example, Corte di Cassazione 20 April 1963 no 990, *Foro italiano*, I, 877 ff (1964) and, of recent and more explicitly, Corte di Appello Milano 17 July 1971, *Giurisprudenza italiana*, I, 2, 202 ff, especially 205 ff (1972); Corte di Cassazione 27 May 1975 no 2129, *Giustizia civile*, I, 1686 ff, especially 1693 ff (1975); now, on this issue, T.A. Auletta, *Riservatezza e tutela della personalità* n 76 above, 39 ff, 45, and a hint in P. Perlingieri, *La personalità umana* n 5 above, 382; more diffusely, G. Piazza, 'Sul diritto alla riservatezza', in *Considerazioni su casi pratici di diritto privato* (Napoli: Jovene, 1971), 125 ff.

<sup>80</sup> Cf P. Perlingieri, 'Note introduttive ai problemi giuridici del mutamento di sesso' *Diritto e giurisprudenza*, 833 ff (1970); and now P. D'Addino, 'Mutamento volontario di sesso ed azione di rettificazione' *Rassegna di diritto civile*, 220 ff (1980), and there for references to the most recent court rulings. In this sense also the German Constitutional Court, Bundesverfassungsgericht 11 October 1978, *Foro italiano*, IV, 272 ff (1979); differently, Italian Constitutional Court, 1 August 1979 no 98.

<sup>81</sup> Cf P. Perlingieri, 'La tutela giuridica della 'integrità psichica' (A proposito delle psicoterapie)' *Rivista trimestrale di diritto e procedura civile*, 763 ff (1972); L. Brusciuglia, *Infermità mentale e capacità di agire. Note critiche e sistematiche in relazione alla legge 18 marzo 1968, n. 431* (Milano: Giuffrè, 1971), 57-58; F.D. Busnelli and U. Breccia, 'Premessa', in VVAA, *Tutela della salute e diritto private* (Milano: Giuffrè, 1978), 4-5.

foundation in the constitutional provision purporting to protect the human person as such, with the consequence that such needs are regarded as actionable and enforceable rights directly affecting interpersonal relationships.

Analogous reasoning can be proposed with respect to certain *de facto* relationships, such as unmarried families. Thanks to Art 2 Constitution, a serious and stable *more uxorio* cohabitation – which is already relevant in itself for certain specific purposes (eg Art 317 *bis* Civil Code was introduced in 1975 in order to regulate the exercise of parental authority by cohabiting partners) – has taken on a far-reaching legal relevance, as a social formation capable of furthering the personal development of its members.<sup>82</sup> Obviously, there exists a hierarchy even among social formations: unmarried families are protected in a manner ‘compatible’ with the needs of families founded on marriage and, in particular, of legitimate filiation (Art 29 ff Constitution).<sup>83</sup>

Examples of the direct application of constitutional norms may be detected, also, in the theory of obligations, wherein judgements based on values are undoubtedly less common than in other branches of civil law. The assumption that the law of obligations, as a demanding sector for its intense technicality and depth of speculation, is also ahistorical and value-free must be rebutted.<sup>84</sup> Even a superficial historical-comparative survey would enable us to highlight how, despite the formal preservation of the classical doctrines of the law of obligations, these have radically altered their original function, due to a structural change in both basic economic relationships and the legal system’s

<sup>82</sup> On this issue, see F. Prospero, *La famiglia non fondata sul matrimonio* (Camerino-Napoli: Edizioni Scientifiche Italiane, interim edition, 1978), 77 ff, and *passim*, to refer to for further bibliographical references; see, furthermore, P. Perlingieri, ‘Sui rapporti personali nella famiglia’ *Diritto di famiglia e delle persone*, 1253 (1979).

<sup>83</sup> See, among others, F. Prospero, *ibid* 84 ff; P. Perlingieri, *ibid*; see, however, S. Puleo, ‘Concetto di famiglia e rilevanza della famiglia naturale’ *Rivista di diritto civile*, I, 385 ff (1979).

<sup>84</sup> See, indeed, P. Perlingieri, ‘Recenti prospettive nel diritto delle obbligazioni’ *Vita notarile*, 1027 ff (1976); P. Perlingieri, *Il fenomeno dell’estinzione nelle obbligazioni* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1971), 48-49; accordingly, P. Stanzone, *Introduzione a I. Markovits* n 44 above, XXXIII, and S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffrè, 1964), 2-3, and there ample bibliographical references.

ideology.<sup>85</sup> This may be easily noticed, also within our system, in respect of the so-called ‘filling up’ of general clauses, such as diligence, good faith, fairness, public policy, exonerating cause, etc. Consider, for example, the requirement of diligence applicable to performance under an employment relationship, as clarified by Art 2014 Civil Code; similarly, the ‘measures’ which – according to Art 2087 Civil Code – the entrepreneur is obliged to take in order to ‘protect the physical integrity and moral personality of employees’ must not be interpreted in a production-focused or efficiency-oriented sense, but from the perspective of constitutional solidarity,<sup>86</sup> and must hence be more sensitive to motivations of a humanitarian kind and respectful of personal needs.<sup>87</sup> Moreover, the notion of non-imputable (exonerating) cause, which the legislator resorts to with respect to the doctrine of the supervening impossibility of performance of an obligation (Art 1256 Civil Code), must be construed broadly so as also to take into account the exercise of constitutional rights and duties. This has a significant influence – as already pointed out elsewhere<sup>88</sup> – on the critical issue of labour strikes being the cause of the non-fulfilment of an obligation taken on by the entrepreneur towards third parties.

Besides, in order to define the notions of ‘unjust damage’,<sup>89</sup> civil wrong,<sup>90</sup> liable persons,<sup>91</sup> and for the purposes of controlling not only

<sup>85</sup> See, n 44 above.

<sup>86</sup> Sharp remarks are in the pages by R. Cicala, ‘Produttività solidarietà e autonomia privata’ *Rivista di diritto civile*, II, 287 ff (1972); see, also, P. Perlingieri, *Introduzione alla problematica della proprietà*, n 8 above, 21 ff, 25-26, 65 ff.

<sup>87</sup> In this perspective, concerning Art 2087, see P. Perlingieri, ‘La tutela giuridica della ‘integrità psichica’ (A proposito delle psicoterapie)’ n 81 above, 769; and also N. Lipari et al, ‘Il problema dell’uomo nell’ambiente’, in N. Lipari ed, *Tecniche giuridiche e sviluppo della persona* (Roma-Bari: Laterza, 1974), 19 ff; A. Cataudella and M. Dell’Olio, ‘Il lavoro e la produzione’ *ibid* 225 ff; concerning Art 2104 see P. Perlingieri, ‘Intervento alla tavola rotonda di Bari’ su *Tecniche giuridiche e sviluppo della persona*’ n 21 above, 177-178.

<sup>88</sup> P. Perlingieri, ‘Sciopero e situazioni soggettive dell’imprenditore verso i terzi’ *Rivista di diritto civile*, I, 663 ff (1976); P. Perlingieri, *Dei modi di estinzione delle obbligazioni diversi dall’adempimento* (Bologna: Roma, Zanichelli, 1975), 466 ff.

<sup>89</sup> See, on this issue, Corte di Cassazione 26 June 1973 no 1829, *Giurisprudenza italiana*, I, 1, 1412 (1973).

<sup>90</sup> See, for example, Corte di Cassazione 21 December 1967 no 3003, *Foro italiano*, I, 644 (1968), grounding on Art 21 Constitution the right of any person to resort to the press in order to criticize situations, acts and behaviours; Corte di

the formal legality (*liceità*) of a contract clause (or of the overall contractual setting) but also its eligibility for legal protection (*meritevolezza*), courts are inclined to consider constitutional norms as privileged parameters. For example, it has been asserted that Art 41 is a ‘norm regulating inter-personal relationships’, thus constituting a legal basis for entrepreneurs to enter the market and resist any form of boycott;<sup>92</sup> that the XII transitional provision of the Constitution – as a logical consequence of applying the fundamental principles of democracy, sovereignty of the people and full development of the human person – excludes from the controls of *liceità* and *meritevolezza* those associations that, regardless of their nature and name – are in truth fascist organizations;<sup>93</sup> that according to Art 37, para 3, any collective labour agreement or individual employment contract that makes provision for lower pay for children compared to adults in relation to the same work is null and void.<sup>94</sup>

The constitutional system may finally make sense of several tendencies within case law which are grounded essentially on common sense and opportunity, rather than on thorough and balanced reasoning. It has correctly been held with regard to alimentary obligations that the right to receive alimony is justified only where the claimant is in a state of necessity and is unable ‘to secure his own proper nurturing’ (Art 438, para 1, Civil Code) or to produce sufficient income through his work, and certainly not when, despite having the capability and the possibility to earn a living, he just prefers to receive maintenance.<sup>95</sup> This conclusion can clearly be

Appello di Milano, 9 September 1975, *Diritto d'autore*, 57 (1976), conceding that freedom of information and critique does not encounter limitations but for those founded on other constitutional precepts, in particular on the duty to refrain from offending one’s honour, reputation and dignity; similarly Corte di Cassazione 16 October 1972, *Giustizia penale*, II, 344 (1973).

<sup>91</sup> Tribunale di Napoli, 19 November 1977, *Giustizia civile*, 1901 (1978), which on the grounds of Art 28 Constitution deems the executive power directly liable for the illegitimate fact by the officer who is personally liable.

<sup>92</sup> Corte di Cassazione 26 June 1973 no 1829, *Giurisprudenza italiana*, I, 1, 1417 (1973).

<sup>93</sup> Tribunale di Roma, 16 June 1973, *Giustizia penale*, I, 291 ff. (1973).

<sup>94</sup> Corte di Cassazione 14 June 1976 no 2188, *Giustizia civile*, I, 1210 (1976).

<sup>95</sup> According to an already consolidated orientation the state of necessity of a person claiming for alimony ‘*si concreta non soltanto nell’attuale mancanza di mezzi di sostentamento, ma anche e soprattutto nell’impossibilità per l’alimentando*

derived from the Constitution, where it is solemnly stated that the Republic is founded on labour (Art 1); in addition to establishing a right (Art 4), this is also an expression of social solidarity, which is a primary duty of each citizen (Art 2).

### **VIII. Concluding comments, useful to overcome the traditional juxtaposition of public law and private law, favouring the foundation of a ‘constitutional civil law’**

Therefore, within the framework of both the so-called indirect application – in cases involving specific statutory provisions, general clauses or express principles – and the so-called direct application – thus defined due to the absence of any intermediary statutory norm

*di poterseli procacciare col proprio lavoro, nei limiti consentiti dall'età, dal sesso, dalle condizioni di salute, dalla posizione sociale, etc., si da far sorgere una sua incolpevole carenza lavorativa* (Consists not only in an actual lack of means of support, but also and above all in the impossibility to earn them with a job's proceeds, within the restraints due to age, sex, health conditions, social position, etc which give rise to a situation of blameless unemployment): Corte di Appello di Firenze 3 July 1958, *Giurisprudenza toscana*, 56 (1959); see, moreover, Corte di Appello di Napoli, 18 October 1969 no 3119, *Diritto e giurisprudenza*, 727 ff (1970) and in editor's note, see more precedents; Corte di Cassazione 23 March 1968 no 923, *Repertorio del Foro italiano*, v. Separazione dei coniugi, 2440, no 38 (1968); Corte di Cassazione 22 June 1976, no 1487, *ibid* 2319, no 26 (1967); more recently Corte di Appello di Bari, 12 July 1973, *ibid* 2109, no 46 (1974); Corte di Cassazione 24 March 1976 no 1045, *Foro italiano*, I, 1218 ff (1976), according to which *‘il coniuge legalmente separato ha diritto agli alimenti solo se non è in grado di adempiere l'obbligo di trovarsi un lavoro o si trovi in situazione d'invalidità, intesa come impossibilità di trovarsi un'occupazione confacente’* (The legally separated spouse is entitled to alimony only if unable to perform the duty to find a job or if on disability, meant as impossibility to find a suitable job); on the ability to work see, also, Corte di Cassazione 17 April 1972 no 1210, *Repertorio del Foro italiano*, v. Separazione dei coniugi, 2620, no 37 (1972). It is significant that in legal scholarship, those who analyzed the state of necessity under different perspectives, suggesting an ample interpretation of it, have referred to Art 4, para 2, Constitution and not to Arts 1 and 2: see G. Provera, ‘Degli alimenti’, in A. Scialoja e G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1972), 77, text and note 8. To be pointed out, also, G. Provera, himself, *ibid* 74, note 1, who resorts to Art 38, para 4, Constitution to describe the state of necessity. Cf D. Vincenzi Amato, *Gli alimenti. Struttura giuridica e funzione sociale* (Milano: Giuffré, 1973), 220 ff, who highlights the defects in such a perspective, insisting on the connection with social security.

– constitutional norms end up being applied in any case. It is not so much a matter of direct or indirect application, the different premises of which are not always easy to identify, but rather, with or without sufficient statutory authority, a question of the effectiveness of constitutional norms on personal and socio-economic relationships. The constitutional norm becomes the primary justifying reason – though not the only one – for the legal relevance of the aforementioned relationships, constituting an integral part of the normative environment within which, in a functional perspective, they develop. Thus, it is not always and not only a mere hermeneutical rule, but a norm of conduct, capable of affecting the very content of subjective legal situations and their interplay, rendering them functional to the new values.

Ample and thorough studies – especially on (real) property rights and private enterprise – have confirmed the fertility of this perspective. However, it is necessary to raise awareness about it, in order to overcome the residual conceptual resistances and atavistic prejudices that are rooted in generic hesitations and potential misunderstandings imputable to a type of legal culture and education that, instead of looking for logical-normative justifications and drawing them from the system in force, proves to be too code-oriented, and is accustomed to reduce legality to mere compliance with codes, ascribing them a constitutional nature and function,<sup>96</sup> and exalting the logical mechanism of ‘subsuming’ the concrete fact into a normatively-framed abstract case.<sup>97</sup> In view of the above, the direct relationship between the interpreter and the constitutional norm must be construed in such a manner as to ensure that the latter is not understood in isolation from the rest of the legal system, and also to avoid any unjustified duplication aimed at isolating the constitutional norm, thus substantially reaffirming the unitary nature of the legal system while overcoming the traditional juxtaposition

<sup>96</sup> Regarding the overcoming of this attitude see, among others, M. Giorgianni, ‘Il diritto privato e i suoi attuali confini’ n 1 above, 399 ff and in a consequent hyper-evaluation of ‘special’ legislation N. Irti, ‘L’età della decodificazione’ *Diritto e società*, 613 ff (1978); N. Irti, ‘Leggi speciali (Dal mono-sistema al poli-sistema)’ n 5 above, 141 ff.

<sup>97</sup> See, indeed, B. Grasso, *Appunti di teoria dell’interpretazione* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1974), 11, and 19 ff.

between public and private.<sup>98</sup> Accordingly, it would be an arbitrary limitation to acknowledge the direct relevance of constitutional norms for interpersonal relationships – or, as German scholarship puts it, a constitutionally-oriented interpretation<sup>99</sup> – mostly or exclusively with reference to fundamental rights, on the one hand, or public law statutes, on the other.<sup>100</sup>

The research programme before private law scholars is composite and suggestive, and aims to achieve conspicuous objectives – only a minimal part of which have already been met – requiring a commitment over more than one generation. This means that the private law system has to be more receptive to the fundamental principles and to the existential needs of the person<sup>101</sup> by: re-defining the basic tenets and scope of legal doctrines, with special regard to those specifically crafted in the private law environment, by re-designing their functional profiles in an attempt to revitalize the aforementioned control based more on legal worthiness (*meritevolezza*)<sup>102</sup> than on formal legality (*liceità*); testing and adapting traditional techniques

<sup>98</sup> On this topic, see P. Perlingieri, *Profili istituzionali* n 12 above, 28, 32 ff; P. Perlingieri, 'Scuole civilistiche' n 5 above, 414 ff and there at note 41, the most significant bibliographical references. In relation to the 'autonomia collettiva' (power to make collective labour agreements), always floating between public law and private law, G. Napolitano, *Contrattazione collettiva e interpretazione* (Camerino-Napoli: Edizioni Scientifiche Italiane, interim edition, 1977), 29 ff.

<sup>99</sup> S. Haak, *Normenkontrolle und Verfassungskonforme Gesetzesauslegung des Richters. Eine rechtsvergleichende Untersuchung*, (Bonn: Röhrscheid, 1963), 1, cited by R. Quadri, 'Applicazione della legge in generale' n 5 above, 261, note 20.

<sup>100</sup> R. Quadri, *ibid* 261.

<sup>101</sup> See the attempts in Eastern Germany in the period starting from the Conference of Babelsberg in 1958: in this regard, see, diffusely, I. Markovits, *Il diritto civile tra socialismo e ideologia borghese* n 44 above, 75 ff, and especially 192 ff, with essential bibliographic references. Generally, see M. Giorgianni, 'Il diritto privato e i suoi attuali confini' n 1 above, 402, suggested that the '*modificazione della struttura del sistema*' (change in the structure of the system) implied '*una valutazione, non più soggettiva, ma oggettiva o meglio 'contenutistica' del diritto privato*' (an evaluation, no longer subjective, but objective or rather 'content-based' of private law).

<sup>102</sup> For some hints see, for example, A. Lener, 'Ecologia, persona, solidarietà: un nuovo ruolo del diritto civile', in N. Lipari ed, *Tecniche giuridiche e sviluppo della persona* n 87 above, 333 ff; P. Perlingieri, '*Intervento alla tavola rotonda di Bari su "Tecniche giuridiche e sviluppo della persona"*' n 21 above, 177-178, and with reference to newer types of activity P. Perlingieri, '*Relazioni pubbliche e persona umana*' *Diritto di famiglia e delle persone*, 825 ff (1972).

and notions (from the subjective legal situation to the legal relationship, from capacity to standing, etc),<sup>103</sup> in an effort to modernize the theory of interpretation and its tools.<sup>104</sup> Many of the studies carried out along these lines note that the path is flourishing with interesting results, which are destined to give private law a new face, thus contributing – in the meaning specified above – to the foundation of constitutional civil law.<sup>105</sup> Moreover, this is the path that ought to be followed in order to counteract the fragmentation of legal knowledge, and the insidious, excessive subdivision of the law into a multitude of branches and specializations<sup>106</sup> which, should they predominate, would inevitably turn the jurist, locked within his microcosm, into an over-specialized yet uncritical professional, endowed with sophisticated technical skills but insensitive to society's overall mission, especially when the latter, expressed in the Supreme Law of the State, is clearly in contrast with pressure groups and power structures.

<sup>103</sup> On subjective legal situations and especially on the interplay thereof, see P. Perlingieri, *Profili istituzionali* n 12 above respectively 166 ff, 220 ff, 262 ff and P. Perlingieri, *Dei modi di estinzione delle obbligazioni* n 88 above, 29-30, 40 ff; now, also for a practical application, F. Ruscello, *I regolamenti del rapporto condominiale* n 8 above, 75 ff, 86 ff; on the role of capacity, see P. Stanzione, *Capacità e minore età nella problematica della persona umana* n 5 above, 137 ff; and, particularly on the issue of unborn babies, the thick essay by G. Criscuoli, 'L'opposizione del marito all'aborto voluto dalla moglie' n 76 above, 184 ff, 225 ff and there for further bibliographical hints.

<sup>104</sup> See L. Lonardo, *Meritevolezza della causa* n 22 above, Chapter II.

<sup>105</sup> For the use and the meaning of this expression, see P. Perlingieri, 'Scuole civilistiche' n 5 above, 414 ff.

<sup>106</sup> For a different (and resigned) vision, N. Irti, 'Leggi speciali (Dal mono-sistema al poli-sistema)' n 5 above, 151-152. The excessive fragmentation in legal studies was already pointed out by the author of the present article in the opening lecture held in Camerino: P. Perlingieri, 'Produzione scientifica e realtà pratica: una frattura da evitare' n 2 above, 469-470.